

Ex. 328, p. 72.

d. Retention of Counsel

182. Brown & Schwaninger became Mr. Sobel's FCC attorneys in the early-to-mid 1990s. WTB Ex. 328, p. 109. Kay introduced Mr. Sobel to that firm, which also represented Kay. WTB Ex. 328, p. 109, WTB Ex. 329, pp. 370-371. Brown & Schwaninger represented both parties when they were preparing the management agreement. WTB Ex. 328, pp. 109-110. Robert Keller, who represents Kay in this hearing, is currently Mr. Sobel's FCC counsel. WTB Ex. 328, p. 110. Mr. Sobel asked Kay whom he could use instead of Brown & Schwaninger, and Kay directed him to Mr. Keller. *Id.* Kay has paid all of Mr. Sobel's legal fees with respect to the Management Agreement stations, including the legal fees in connection with the Sobel hearing. WTB Ex. 328, p. 109, 112.

6. Control Over Personnel

183. Mr. Sobel has no employees. WTB Ex. 328, p. 130. Mr. Sobel is not sure if he has ever hired a contractor to do work relating to the Management Agreement stations. *Id.* The employees of Kay who perform work relating to the Management Agreement stations are hired, fired, and supervised by Kay. *Id.*

184. As noted above, Kay's salespeople sell time on the Management Agreement stations as well as other stations Kay owns or manages. WTB Ex. 329, pp. 344-345. The employees of Kay described below perform their duties with respect to the Management Agreement stations as well as other stations Kay owns or manages. WTB Ex. 329, pp. 340, 342-343. Ms. Ashauer performs the billing, the receivables, and runs the accounting department, and

sometimes serves as Kay's secretary. WTB Ex. 329, p. 339. Ophelia Nunez works on accounts receivable, posts monies, prepares bills, prepares bank deposits, works on legal matters, and prepares summons and complaints. WTB Ex. 329, pp. 340-341. Damon Crowley, Sr. performs secretarial work, sorts files, performs accounts receivable and collections work, and works on legals. WTB Ex. 329, p. 341. Ken Schultz, who until recently was the acting general manager or service manager for Southland, is now a lead technician who repairs radios. *Id.* Randy French is a technician. WTB Ex. 329, p. 342. The technicians also check and test repeaters that may have failed. WTB Ex. 329, p. 343.

#### 7. Payment of Operating Expenses

185. Under Paragraph IV of the Management Agreement, Kay is responsible for paying all expenses relating to the construction of the Management Agreement stations. WTB Ex. 340, p. 3. Similarly, under paragraph XIII of the agreement, Kay is responsible for paying all expenses associated with the operation of the stations. WTB Ex. 340, p. 6, WTB Ex. 328, p. 131. Other than a possible instance where Mr. Sobel obtained a part for a Management Agreement station and then missed billing Kay for that part, Kay has in fact paid all the operating expenses relating to the Management Agreement stations. WTB Ex. 328, p. 131.

186. Kay estimates that his investment in equipment for the Management Agreement stations is about \$6,500 in each of fifteen stations for a total investment in equipment of about \$97,500. WTB Ex. 329, p. 354. Kay cannot accurately estimate how much he has paid in operating expenses for the Management Agreement stations because he does not break out his expenses based upon who holds the underlying licenses. WTB Ex. 329, pp. 351-352. For

example, Kay pays one check for rent on Mount Lukens, and pays one electric bill for equipment used by stations licensed to him, Mr. Sobel, or other stations he manages. WTB Ex. 329, p. 352.

Kay explained that one reason he functions efficiently is that he cuts down "on a lot of extraneous and unnecessary bookkeeping to keep it simple." WTB Ex. 329, p. 355.

#### 8. Receipt of Monies and Profits

187. The revenues from the operation of the Management Agreement stations are deposited into Kay's bank account, which is the same bank account that the revenues from the operation of Kay's owned stations are deposited. WTB Ex. 329, p. 348. Pursuant to the management agreement, if any station's monthly revenue exceeds \$600 a month, Mr. Sobel is entitled to fifty percent of the excess revenue. WTB Ex. 340, p. 4. The revenue from four of the fifteen Management Agreement stations has each exceeded \$600 a month. WTB Ex. 328, p. 132. However, because of the manner in which Kay and Mr. Sobel have opted to implement the agreement, Kay has retained all the money and will continue to do so until the total revenue from all the stations exceeds \$9,000 a month (i.e., \$600 x 15 stations). *Id.* When Mr. Sobel checked the stations' monthly revenues a few months before the Sobel hearing, the total from the Management Agreement stations was between \$6,000 and \$7,000. *Id.* Except for the hourly fees Mr. Sobel has received from working for Kay on the Management Agreement stations, and the money he received in connection with the sale of two stations, Mr. Sobel has not received any money from the Management Agreement stations. WTB Ex. 328, pp. 131-132.

#### 9. The Amended Management Agreement

188. In January 1999, Kay and Mr. Sobel asked Mr. Keller to prepare a new

agreement. Tr. 2370-2371, 2373. According to Kay, the new agreement was prepared:

Because while we believed the initial agreement was perfectly legal in 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. Mr. Sobel's licenses were designated for hearing on February 12, 1997. The *Initial Decision* in the Sobel proceeding was released on November 28, 1997. (12 FCC Rcd 3298, Official Notice Requested).

#### **F. Kay Misrepresentation/Lack of Candor Issue**

189. WTB Ex. 343 is a "Motion to Enlarge, Change or Delete Issues" filed in this proceeding by Kay on January 25, 1995. The pleading contains the following statements concerning the relationship between Kay and Mr. Sobel:

Attached to the HDO was an Appendix A, listing 164 call signs of Private Land Mobile Radio Services stations. For the following reasons, Kay respectfully requests that the presiding officer change or dismiss the HDO to delete all references to the licenses numbered 154 through 164.

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. As shown by the affidavit of Marc Sobel attached as Exhibit II hereto, 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 a party to the instant proceeding, the presiding officer should either change the HDO to delete the reference to the stations identified as stations 154 through Appendix A, or should dismiss the HDO with respect to those stations.

WTB Ex. 343, pp. 4-5 (emphasis added). Kay declared under penalty of perjury that the motion

was true and correct. WTB Ex. 343, p. 23.

190. Kay submitted an affidavit signed by Marc Sobel to the Commission as evidence in support of his Motion to Enlarge, Change or Delete Issues. WTB Ex. 343. Mr. Sobel's affidavit, which is dated January 24, 1995, reads as follows:

I, Marc Sobel, am an individual, entirely separate and apart in existence and identity from James A. Kay, Jr. Mr. Kay does not do business in my name and I do not do business in his name. Mr. Kay has no interest in any **radio station or license** of which I am the licensee. I have no interest in any radio station or license of which Mr. Kay is the licensee. I am not an employer or employee of Mr. Kay, am not a partner with Mr. Kay in any enterprise, and am not a shareholder in any corporation in which Mr. Kay also holds an interest. I am not related to Mr. Kay in any way by birth or marriage.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on Jan 24, 1995.

WTB Ex. 343, p. 22 (emphasis added).

191. Kay had previously been asked by the Commission for information concerning stations he managed. In the Commission's pre-designation letter of inquiry, Kay was directed to provide the following information:

List alphabetically the call signs and licensee names of all facilities owned or operated by you or by any companies under which you do business. Annotate those facilities which are located on U.S. Forest Service land.

WTB Ex. 1, p. 1. In response, Kay declared under penalty of perjury "that he does not operate any station of which either he or [Buddy Corp. and Oat Trunking Group, Inc.] the two above named corporations is not the licensee." WTB Ex. 11, p. 1.

192. In the fall of 1994, Kay received a draft copy of the hearing designation order in this proceeding through the Freedom of Information Act. Tr. 1751-1752, Kay Ex. 5. In that

draft hearing designation order (as well as the designation order actually released in this proceeding), that information request is described as follows: "In order to assess compliance with our construction and operation requirement [sic], the staff requested that Kay identify the stations for which he holds FCC licenses **as well as those he manages.**" Kay Ex. 5, p. 2 (emphasis added).

193. On January 9 or 10, 1995, Kay received an unsigned version of the motion (including the Sobel affidavit) from Brown & Schwaninger. WTB Ex. 329, pp. 370-71. Kay read the package, talked to Brown & Schwaninger, called Mr. Sobel, and told him "that there was an affidavit that my attorneys wanted him [Sobel] to read. And, if correct, execute it." WTB Ex. 329, p. 371. Kay and Mr. Sobel then had a face-to-face meeting, and Kay asked Mr. Sobel if he would sign the document. WTB Ex. 328, p. 140, 371, Tr. 1302.

194. Nothing in the affidavits or the pleadings, WTB Exs. 41-44, provides any description of the actual relationship between Mr. Sobel and Kay with respect to the Management Agreement stations. The affidavits and the pleadings fail to disclose the following acts to the Commission and the Presiding Judge: (1) Kay manages Mr. Sobel's 800 MHz stations pursuant to a Management Agreement (WTB Ex. 328, p. 103-104, 108-109); (2) Kay was responsible for finding the frequencies and preparing the applications for the Management Agreement stations (WTB Ex. 328, p. 73-75); (3) Kay provided all the money and the equipment needed to build the Management Agreement stations (WTB Ex. 328, p. 144); (4) when Mr. Sobel worked on the stations, he did so as a contractor selected and paid by Kay (WTB Ex. 328, p. 106-108); (5) Kay made the arrangements to acquire and dispose of these licenses (WTB Ex. 328, p.

101, 126-128, 366); (6) Kay's employees were involved in virtually every aspect of the stations' daily operations (WTB Ex. 329, p. 339-347); (7) Kay paid all the expenses of the Management Agreement stations, including Mr. Sobel's legal fees (WTB Ex. 328, p. 109, 131); (8) the revenues from the Management Agreement stations were deposited in Kay's bank account, and Mr. Sobel has not received any of the operating revenues of the stations (WTB Ex. 328, p. 144, 348); and (9) Kay may purchase the Management Agreement stations at any time for the nominal sum of \$500 each (WTB Ex. 328, p. 125).

195. Kay was "surprised" that some of Marc Sobel's licenses were included in the hearing designation order. Tr. 1300. Kay read Marc Sobel's affidavit. Tr. 1301. Kay did not inform the Commission until March or April 1995 that he was managing Mr. Sobel's stations. Tr. 1324. The management agreement was not attached to the Motion to Enlarge, Change or Delete Issues. Tr. 1325.

196. Kay owned the equipment that was used to construct the Management Agreement stations. Tr. 1302. He knew it was his customers that were being placed on the stations. *Id.* He knew that all the revenues from the operation of that station were going into his bank account. WTB Ex. 329, p. 348, Tr. 1302-1303. He knew that he had an option to purchase Mr. Sobel's stations for \$500 each. Tr. 1303.

197. Kay claims that he interpreted the word "station" as being interchangeable with the "license" in the motion. Tr. 1314. In fact, the written management agreement defined the term "Stations" as "800 MHz band **radio facilities** in and about the Los Angeles Metropolitan Area, **licensed by the FCC** under call signs . . ." WTB Ex. 340, p. 1 (emphasis added). In other

words, the management agreement defines the term "Stations" as meaning the "800 MHz band radio facilities", *i.e.*, the equipment (physical facilities). With respect to Mr. Sobel's claim in the affidavit (and on the witness stand) that Kay has no interest in the station, the management agreement provides that Kay has an **exclusive** interest in the equipment. WTB Ex. 340, p. 3.

Paragraph IV A. of the management agreement provides:

During the term of this agreement all equipment provided by Agent [*i.e.*, Kay] and leased by Licensee [*i.e.*, Sobel] shall remain the sole and exclusive property of **Agent**. Nothing contained herein shall be interpreted to provide to Licensee any title, interest, or control over said equipment, except such use of the equipment as is specifically described herein.

WTB Ex. 340, p. 3 (emphasis added).

198. Kay recalls that when he and Sobel met to discuss the affidavit, Sobel asked him about the meaning of the word "interest." WTB Ex. 329, p. 371. Kay told him that to the best of his knowledge, as it had been explained to him:

[The term "interest"] referred to ownership as in a partnership or ownership of stock, **as having a direct financial stake in something**. Being an owner or a stockholder or direct party to something.

*Id.* (emphasis added). Sobel testified that Kay has a direct financial stake in the Management Agreement stations. WTB Ex. 328, p. 150. Kay denied having a financial stake in the licenses, but he admitted that he has a stake in the stations because he owned the equipment and that he obtains revenues from the stations. WTB Ex. 329, p. 372.

199. Mr. Sobel has done extensive work for Kay with respect to both the stations licensed to Kay, as well as the Management Agreement stations. *See generally* WTB Ex. 338.

Kay pays Mr. Sobel an hourly fee for that work. WTB Ex. 328, p. 106. Mr. Sobel believes that despite the extensive work he has done for Kay, he has never been an employee of Kay. WTB Ex. 329, p. 246.

200. Mr. Sobel periodically contacts customers or potential customers on Kay's behalf. WTB Ex. 328, p. 72, 327-328. Mr. Sobel performs this work as part of his contracting business. WTB Ex. 328, p. 72. The Management Agreement stations, which are licensed to Mr. Sobel, are marketed in Kay's name or names under which Kay conducts business. WTB Ex. 328, pp. 152-153. Kay signs all the customer contracts, performs the billing, and receives all the revenues from customers using the Management Agreement stations. WTB Ex. 328, pp. 119-120, 132.

### **III. PROPOSED CONCLUSIONS OF LAW**

#### **A. Introduction**

201. The evidence adduced at hearing amply demonstrates that Kay engaged in a pervasive pattern of violating the Communications Act and the Commission's Rules, abused the Commission's processes, misrepresented material facts to the Commission, acquired control of stations without Commission consent, and flagrantly disregarded fundamental responsibilities as a Commission licensee. For these reasons, Kay is patently unfit to remain a Commission licensee, and the Presiding Judge should issue an order revoking Kay's licenses.

#### **B. 308(b) Issue**

202. In the Show Cause Order at ¶ 10(a), the Commission first specified the following

issue:

To 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.

This issue was designated as the result of Kay's repeated refusal over a period of many months to provide basic loading information, the call signs and names on the licenses of all stations he operated, the date each station was constructed, and forest service permits for stations on forest service land in response to multiple Commission inquiry letters directed to Kay pursuant to § 308(b) of the Act and § 1.17 of the Commission's Rules. It was unquestionably within the Commission's authority to request this basic information from Kay. It was also unquestionably Kay's responsibility as a licensee to accurately respond to the Commission's request for information without engaging the Commission staff in nothing more than a deliberate and protracted game of "cat and mouse." The Communications Act provides the Commission with the authority to gather the facts that it needs to license applicants and enforce its rules in Section 308(b) of the Act. This subsection states:

The Commission, at any time after the filing of such original application and during the term of any such 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 application and/or 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).

203. The Commission implemented this statutory provision in Section 1.17 of the

Commission's Rules. This rule explicitly provides that when the Commission sends a letter of inquiry, it is a violation of the rules to make any false statement or to make a material omission in the response. Section 1.17 of the Commission's Rules states:

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. Thus, a licensee's failure to fully respond to a Commission letter of inquiry is both a violation of the Communications Act and a violation of the Commission's rules.

204. As succinctly explained by the Presiding Judge in *Trinity Broadcasting of Florida, Inc*, 10 FCC Rcd 12020, 12062 (ALJ 1995), *affirmed in pertinent part*, FCC 98-313, (released April 15, 1999), in order to perform the Commission's statutory functions, the Commission relies on licensees to provide the information that it needs to regulate in the public interest.

The Commission's "scheme of regulation rests on the assumption that applicants will supply the Commission with accurate information." Character Policy Statement, 102 FCC 2d 1179, 1210 (1986). The "trait of truthfulness" is one of the two key elements of character necessary to operate a broadcast station in the public interest." The other is reliability in complying with the Communications Act and Commission requirements. *Id.*, p. 1209-1210. Intentional deceptions of the Commission by providing either false information (misrepresentation) or incomplete and misleading information (lack of candor) are viewed as "serious breaches of trust." *Id.* at 1211. Where inaccurate information results from an intention to deceive, as in this case, total disqualification is warranted. *Standard Broadcasting, Inc.*, 7 FCC Rcd 8571 (Rev., Bd. 1992); *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982); *Sea Island Broadcasting Corp. of S.C. v. FCC*, 627 F.2d 240 (D.C. Cir. 1980); *Chaconas v.*

*FCC*, 486 F.2d 1314 (D.C. Cir., 1973); *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946).

While this discussion in the Presiding Judge's opinion in *Trinity* relates to broadcast licensees, the principles are equally applicable in the wireless radio services.

205. In the wireless services, licensees have the privilege of operating communications services on scarce spectrum. The Commission must regulate hundreds of thousands of licensees and must be able to rely on the truthfulness and completeness of their responses. The Court of Appeals for the District Of Columbia Circuit held in *RKO General, Inc. v FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981) *cert. denied* 456 U.S. 927, 457 U.S. 119 (1982):

The FCC has an affirmative obligation to license more than 10,000 radio and television stations in the public interest... As a result, the Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate. This duty of candor is basic, and well known.

206. The Supreme Court, in *FCC v WOKO, Inc.*, 329 U.S. 223, 227 (1946) recognized that candor is among the highest concerns of the Commission and discussed that a licensee that provides false information is as untrustworthy as a licensee who refuses to answer questions.

The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones. We do not think it is an answer to say that the deception was unnecessary and served no purpose. If the applicant had forthrightly refused to supply the information on the ground that it was not material, we should expect the Commission would have rejected the application and would have been sustained in so doing. If we would hold it not unlawful, arbitrary or capricious to require the information before granting a renewal, it seems difficult to say that it is unlawful, arbitrary or capricious to refuse a renewal where true information is withheld and false information is substituted.

207. Kay repeatedly refused to answer questions and made material omissions in his

responses to the Commission inquiry letter. Either of these actions would raise very serious concerns about his fitness to be a Commission licensee.

208. In a seminal case involving a Section 308(b) violation, *Carol Music, Inc.*, 37 FCC 379, 383-84 (1964), the Commission stated:

The Commission is entitled to request and receive information relevant and material to the determination of whether grant or denial of a license is consistent with the public interest. [citations omitted] The Commission has continuing authority during the license term under sec. 308(b) of the Communications Act of 1934, as amended, to request information necessary to determine whether a station is being operated in the public interest. While information which is self-incriminatory may be withheld, the licensee, in doing so, frustrates the Commission in the performance of its duty. In such event, denial or revocation of a license may be warranted on this ground alone, since it is the licensee who deprives the Commission of information necessary to determine its compliance with the public interest standard.

Indeed, the Commission has held, in other revocation proceedings, that a licensee's failure to produce certain information upon request may result in serious consequences. *See Warren L. Percival*, 8 FCC 2d 333, 333-334 (1967).<sup>12</sup>

209. Finally, in *Tidewater Radio Show, Inc.*, 75 FCC 2d 670, 677-678 (1980), the Commission held that the staff has wide discretion in how it conducts investigations:

We also find unpersuasive the petitioners' claims of improper conduct by certain Commission staff members during the course of this proceeding. The first of these allegations, that it was improper for Commission personnel to launch an

---

<sup>12</sup> In *Percival*, the Commission held:

Under Section 308(b) of the Act, the Commission is entitled to request and receive from a licensee information relevant and material to a determination whether or not a license should be revoked. "While information which is self incriminatory may be withheld, the licensee in doing so, frustrates the Commission in the performance of its duty. In such event, denial or revocation of a license where information is not furnished may be warranted on this ground alone, since it is the licensee who deprives the Commission of information necessary to determine its compliance with the public interest standard." *Carol Music, Inc.*, 37 FCC 379 (1964); cf. *Blumenthal v FCC*, 318 F.2d 276 (D.C. Cir. 1963); *Borrow v. FCC*, 285 F.2d 666 (D.C. Cir. 1960).

investigation into petitioners' broadcast operations on the basis of information supplied by arguably interested parties, can be dismissed forthwith. Under Section 403 of the Communications Act, as amended, 47 U.S.C. § 403, full authority and power are given to the Commission to institute an inquiry on its own motion, with or without complaint, as to any matter falling within its jurisdiction. *See Stahlman v. FCC*, 126 F.2d 124 (D.C. Cir. 1942). As we recently stated in *PTL of Heritage Village Church and Missionary Fellowship, Inc.*, 71 FCC 2d 324 (1979), that power is frequently exercised by members of our staff, acting under delegated authority. The decision to investigate, moreover, is not purely discretionary. As the *PTL* decision also held, 'where, as in the instant case, the Commission has reason to believe a licensee may be violating the Act or its policies, rules, or regulations. . . it has a responsibility to inquire and determine whether, in fact, such activity is occurring.' 71 FCC 2d 324, 327. By virtue of this mandate and the provisions of Section 403, it is therefore irrelevant if (as is frequently the case) the party providing initial information to the Commission which leads to the investigation may be interested in its outcome. The decision to launch an inquiry, even in such a circumstance, is fully authorized by the Act and in fact required when a sufficient showing has been made.

210. In this case, none of Kay's claimed reasons for refusing to provide the required information provide a colorable excuse for his actions. The denial of Kay's request for immunity from criminal prosecution and the imposition of administrative sanctions, WTB Ex. 348, clearly did not provide any rational justification for withholding the information from the Commission. Similarly, Kay's claim of the fifth amendment protection against self-incrimination did not excuse production of the requested material. The Commission decisions in *Carol Music* and *Warren Percival* clearly hold that a licensee that refuses to provide information relevant to his or her licenses on the basis of the fifth amendment, risks losing his or her license when he or she does so. Similarly, there is no entitlement to any sort of immunity from prosecution and/or forfeiture prior to disclosure of requested information. The Commission is entitled to request and receive the information it requires, and if it does not, the licensee may be found unqualified to be a Commission licensee. While the licensee can claim the privilege against self-

incrimination, it forfeits the right to retain the license in those circumstances.

211. Furthermore, Kay's alleged concerns about confidentiality do not provide a valid basis for his refusal to provide the required information. While Kay did have a legitimate interest in assuring that his proprietary customer information remained confidential, the Commission's Rules provide a procedure for requesting confidential treatment of information when the information is submitted. Section 0.459 of the Commission's Rules establishes a procedure for requesting confidential treatment of material submitted to the Commission. If the staff denies such a request, the party seeking the information has the right to file an immediate application for review of that ruling. *See* Section 0.459(g) of the Commission's Rules. When the submission of materials is required, however, there is absolutely no authority that allows a licensee to simply refuse to provide required information. Neither Kay nor his lawyers have cited any precedent that would allow a licensee to unilaterally decide that he could refuse to provide information he was required to provide.

212. Moreover, the Commission repeatedly gave every possible assurance to Kay that his proprietary information would be kept confidential. In the May 27, 1994 letter, the Commission specifically told Kay, "we have no intention of disclosing Mr. Kay's proprietary business information, such as customer lists, except to the extent we would be required by law to do so." In the June 10, 1994, the Commission explicitly stated with respect to the customer data that "information submitted will be kept confidential by the Commission . . . ." The Commission did everything legally possible to meet Kay's concerns about confidentiality. Under those circumstances, Kay's continuing refusal to provide the required information was wholly

unreasonable and without basis in fact or law.

213. Finally, Kay's alleged concerns about damage from the Northridge earthquake do not justify his wholesale refusal to provide the information. While Kay's office did suffer damage, the record does not support his claims that it was impossible for him to produce the required information. A fundamental problem with Kay's testimony is that he never told the Commission back in 1994 that he was unable to provide information because of the earthquake. The Commission, in *Trinity Broadcasting of Florida, Inc, supra*, at ¶117, emphasized its demand for absolute candor when it said, "We expect licensees to represent truthfully to the Commission their intentions and the reasons for their actions." If the earthquake rendered Kay unable to provide the information, he had the duty to file a motion with the Commission fully describing the problems involved and his reasons why additional time was needed. Instead, he argued relevancy and claimed the privilege against self-incrimination. Kay's failure to properly raise the issue of earthquake damage in 1994 casts doubt on the credibility of his current claims.

214. Moreover, it is now apparent that, at least by May 1994, Kay was able to comply with the Commission's directive had he been so inclined. Kay could have printed reports containing the necessary customer information. Indeed, the underlying customer information could have been copied on to floppy disks and transmitted to the Commission. Along with some minimal explanation by Kay, such a transmittal would have provided the information the Commission required. While Kay did not keep records by call sign, the reports he could have printed of current customer configuration, together with the "day or two" of work he performed researching and listing call signs, was hardly an onerous task. Moreover, Kay had the ability to

bill his customers and file applications with the Commission during this time period. In the final analysis, Kay did not provide the requested information to the Commission because he could not do so; rather, Kay “thumbed his nose” at the Commission and engaged in stalling tactics designed to wear the staff down. The Commission should not have to grovel for information from the entities it regulates. Kay, of course, had a motive for refusing to provide the requested information, as discussed below.

215. With respect to loading information, the Commission utilizes a “trust and verify” methodology. This compliance methodology is in keeping with the Supreme Court's discussion in *WOKO* and the Commission's discussion in *RKO*. With so many licensees to regulate, the Commission resources are best utilized to check compliance when potential problems arise. The instant enforcement action, in which issues have been raised about Kay's loading, is *precisely* among the situations contemplated by the Commission when it stated that it is important to request *and receive* information as to the identity of end users and their mobile unit counts. In this regard, the Commission determined:

Information regarding eligibility of end-users and confirmation of whether a system is really serving those end users or is "paper loading" are important parts of our spectrum management responsibilities. These issues, however, generally arise in the context of a compliance action and, in such instances, we obtain information directly from the licensee, pursuant to Section 307(b) [sic] of the Communications Act. Getting this information directly from licensees on an as-needed basis would not only help to ensure its accuracy, but would also be less burdensome than an across-the-board annual reporting requirement for all licensees.

*Amendment of Part 90 of the Commission's Rules Pertaining to End User and Mobile Licensing Information*, 7 FCC Rcd 6344, 6345 n.21 (1992). The Bureau's authority to require Kay to

provide the identity of end users and their mobile unit count, mentioned above, is conferred by Section 308(b) of the Act.

216. When a licensee's loading (that is, the number of end user mobile units attributable to a particular channel) reaches a specified critical number,<sup>13</sup> the licensee is entitled, under the Commission's Rules, to obtain exclusive use of the channel, rather than being required to share the channel with other licensees.<sup>14</sup> See 47 C.F.R. §§ 90.313 and 90.633 of the Commission's Rules. Loading criteria is also important with respect to assessing a licensee's eligibility for additional channels in the area. See e.g. 47 C.F.R. § 90.623. Thus, an accurate accounting of a licensee's loading is critical to the Commission's task of determining whether exclusive use is warranted, and whether additional channels may be authorized to a licensee in the area. See 47 C.F.R. §§ 90.135(a)(5), 90.313 and 90.633 of the Commission's Rules; *Amendment of Part 90 of the Commission's Rules to Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems*, 7 FCC Rcd 5558, 5562 (1992) (¶ 24). The evidence in this case indicates that Kay did not have a means of accurately counting his loading to determine his eligibility and that he avoided scrutiny of his loading by filing applications in the name of surrogates, and wholly owned corporations.

217. The Commission rules do not specify what type of records must be kept of loading for stations in the 470-512 MHz band. Kay, however, kept records in his computer of

---

<sup>13</sup> For example, a conventional SMR channel is considered fully loaded when a licensee demonstrates that it has customers with 70 mobile units in operation. In the Business Radio Service, a fully loaded channel is one with 90 mobile units in operation.

<sup>14</sup> Exclusive use of a particular channel is more desirable than shared-use. Licensees using shared channels are required to cooperate with each other. Customers using non-exclusive conventional single channels are required to monitor the channel before transmitting to prevent overriding communications that are already in progress.

which customers were operating on which frequencies (para. 37, *supra*), and he was able to provide the required information. Nonetheless, he refused to produce these records in response to the Commission inquiry letter.

218. Kay is also the licensee of SMR stations operating in the trunked mode. Trunked operation uses groups of channels and employs hardware connected to the repeater to select available channels for use by each user.<sup>15</sup> The Commission uses loading criteria in determining, among other things, whether to authorize the addition of channels to existing trunked systems and whether to authorize the conversion of conventional SMR channels to trunked use. *See* 47 C.F.R. §§ 90.615, 90.627. Thus, an accurate accounting of a licensee's loading is critical to an assessment of the licensee's compliance with the Commission's Rules applicable to trunked SMR systems. *See* 47 C.F.R. § 90.631.

219. Section 90.658 of the Commission's Rules requires that licensees of trunked SMR stations calculate their loading from business records for a six-month period prior to any application relating to a trunked SMR system. Kay refused to produce any business records relating to his trunked SMR end users in response to the Commission inquiry letter.

220. The Commission's decision to use a "trust but verify" methodology to enforce its channel sharing requirements makes it absolutely essential that licensees provide that information when directed by the Commission. Indeed, the Commission's spectrum management responsibilities would be severely jeopardized if licensees were not severely sanctioned when they flatly refused to provide loading information upon request. Kay's refusal

---

<sup>15</sup> This eliminates the need to monitor the channel for communications that are already in progress. *See* n. 4, above.

to provide this information is particularly egregious in that he continuously deleted and wrote over the requested information in his computer during the period between February, 1994, and the spring of 1995, although he knew that the Commission had directed him to provide that information. *See* para. 12 *supra*. By so doing, Kay has forever denied the Commission the opportunity to review his loading records for 1994 and early 1995.

221. None of Kay's reasons for not responding to the request for loading information are applicable to Kay refusal to provide a list of the call signs of stations he owned and operated. This refusal was in blatant violation of the Commission's requirements for Part 90 licensees. Rule Section 90.437 requires Part 90 licensees to have current copies of all stations in operation at the licensee's place of business as part of the station records. Section 90.439 of the Commission's Rules requires Part 90 licensees to produce these station records at any time when the stations are in operation for inspection upon reasonable demand of a representative of the Commission.

222. Kay not only refused to provide the requested list, but his response also included misleading information regarding his interest in Buddy Corp. and Oat Trunking Group, Inc. and blatantly omitted any reference to the stations he manages. The Commission inquiry letter sought a list of call signs licensed to him as well as other facilities he operated. Kay misled the Commission when he told the Commission that he held an interest in Buddy Corp. and Oat Trunking, but that this interest does not effect his eligibility to hold any other licenses. The Commission's requirement of complete candor required Kay to reveal at that time that he was the sole owner of Buddy Corp. and Oat Trunking. Further, the Commission inquiry letter requested

a list of call signs for facilities he operated. Kay omitted any mention of the repeaters he operated for Marc Sobel, Vincent Cordaro, and Jerry Gales.

223. Kay's refusal to provide United States Forest Service permits applicable to his stations was wholly unreasonable. Such permits authorize persons to erect and operate stations on U.S.F.S. lands. They are thus comparable to a lease on a private site. They constitute corroborating evidence of the construction of stations. Kay's claim that such permits were irrelevant to the Commission is therefore frivolous. If the Commission is investigating whether stations located on Forest Service property were built, Forest Service permits are very relevant evidence of construction. In fact, Kay has entered a number of permits into evidence to demonstrate that his stations were timely constructed. Given that Kay maintained a file of USFS permits in his office, his refusal to provide the permits in response to the Commission's request was wholly unjustified.

224. As discussed in paras. 107-110, *supra*, more than sixty of Kay's repeaters were not constructed in 1995. The Commission was entitled to know in 1994, in response to the Commission inquiry letter which of his stations were constructed and when they were constructed. As explained by the Court of Appeals in *RKO*, the Commission does not have to designate the matter for hearing to obtain this information.

225. The Presiding Judge is thus faced with a licensee who consciously and contemptuously refused to provide information in response to a legitimate Commission inquiry. Kay pulled out all the stops to avoid providing the requested information to the Commission because he was concerned about the negative consequences of disclosing his failure to load his

stations, to construct his stations, to maintain proper supporting information about his stations, and his control of stations licensed to others.

226. Kay's claimed excuses for not providing the requested information were smokescreens to keep the staff at bay. Nevertheless, when Kay raised objections to the Commission's request, the Commission made every reasonable attempt to accommodate Kay's concerns by narrowing the scope of its requests, by assuring Kay that his proprietary customer information would be kept confidential, and by affording Kay ever more time to respond. Notwithstanding the Commission's multiple attempts to accommodate Kay, Kay contemptuously told the Commission that "there was no date that was convenient" for him to produce that information. When the Commission finally obtained information through discovery, the information demonstrated that Kay indeed had violated the Commission's rules in countless instances. Moreover, Kay's current excuses for not providing the information are not credible. Kay's patent violation of Section 308(b) of the Act was reprehensible. Such stonewalling manifestly warrants a finding that Kay is unqualified to be or remain a Commission licensee. This issue must be resolved adversely to Kay.

### **C. Construction and Operation Requirements**

#### **1. Loading Issue**

227. In the *Show Cause Order*, the Commission designated at subparagraph 10(c) the following issue:

To 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;

The operation requirements in Section 90.313 and 90.633 relate to channel loading; these sections, as discussed below, require licensees in the 470-512 MHz band and licensees of 800 MHz conventional stations, respectively, to share channels unless they are loaded to the applicable loading standard.

228. The Commission has considered various measures of channel use and has determined that it is appropriate to use the "units-in-use" or mobile loading criterion to allocate channels. Regarding the appropriate measure of channel use, the Commission has stated:

The issue of how the Commission should measure and assure that licensees are making efficient and effective use of the radio frequencies for which they have been authorized is one of the most difficult and recurring questions we have faced throughout this proceeding. No one disputes that there should be some established measure of efficient and effective spectrum use. There is little or no unanimity, however, on what constitutes such use. As a general proposition, public safety users maintain that a channel is being efficiently and effectively used when it is immediately available on a clear channel basis when an emergency arises. Others maintain that a channel is efficiently and effectively used when it is occupied by a signal a large percentage of the time. Still others contend not only that the channel must be occupied, but that it must be occupied by a technology which maximizes the number of mobile stations which can operate on the channel. A variety of other tests and refinements have also been considered. In 1974, we adopted as the test [for trunked systems at 800 MHz] the number of mobile transmitters which are authorized on a channel. We then required that applicants who sought channels on an exclusive basis would have to load their channels with a specified number of mobile transmitters in a specified period of time or they would forfeit channels.<sup>16</sup>

Thus, the Commission concluded early on that it would use mobile loading (units in use) as the criterion to measure channel use and to allocate channels.

---

<sup>16</sup> *Amendment of Part 90 of the Commission's Rules to Release Spectrum in the 806-821/851-866 MHz bands and to adopt rules and regulations, which govern their use*, 95 FCC 2d 477 (1983).

229. Mobile loading is an objective criterion which allows licensees to predict how the frequency coordinators and the Commission will make channel allocation decisions, and allows them to choose channels that will best suit their needs. The Commission explained the advantages of using mobile loading (the "units-in-use" criterion) when it adopted the loading standard applicable to Kay's 470-512 MHz stations in 1971 in *Amendment of Parts 21, 89, 91 and 93 of the Rules to Reflect the Availability of Land Mobile Channels in the 470-512 MHz Band in the 10 Largest Urbanized Areas of the United States*, 30 FCC 2d 221 (1971). The Commission adopted its proposal to apply loading standards of 50 units per channel in the Public Safety Pool, 90 units per channel in the Business and Taxicab Pool, and 70 units per channel in other pools. *Id.* at 223-27. The Commission decided that objective loading criteria would best serve the public interest:

**The 50/70/90 'Units-in-Use' Standard.** The opposition to our loading proposal centered about what the parties considered to be the 'inflexibility' of the criteria in determining whether an additional channel was to be assigned. According to them... 'more' should be involved in decisions of this nature, with consideration given to such factors as 'the number and size of systems' sharing a given frequency pair; the type of 'traffic' to be handled over the desired facilities; the 'nature' of the 'activity' of the licensee for which radio would be used, that is, whether a police or fire department, or utility, contrasted in this respect to a business or commercial enterprise.... They ask, rather, that any criteria adopted be used as a 'guideline' only and that any final determination as to whether a 'second' or a 'third' or any additional pair is to be assigned in any given situation be based on the circumstances presented in that case, with the frequency coordinator deciding when 'local conditions' warrant assignments exceeding those called for by the proposed criteria. However, the circumstances under which local coordinators would make those decisions were not spelled out.... If the described course were followed, it would, as a practical consequence, eliminate use of the loading criteria on any consistent basis, and, in effect, substitute for them case-by-case determinations as to whether a second, a third, or any additional channels are to be assigned, and, also, the 'degree' of occupancy to be required.

This approach defeats the underlying objectives of the criteria. It prevents establishment of objective levels of occupancy for the 470-512 MHz band frequencies and, just as importantly, denies to potential users a measure by which they can determine whether a frequency is available and what to expect in terms of the degree of which sharing will be required.

*Id.* at 226-27.

Thus, the Commission adopted the "units-in-use" criterion as the official measure for assessing channel use and its availability for sharing. *Id.* at 227. The standard is now codified in Section 90.313 of the Commission's Rules for 470-512 MHz stations, and in Section 90.633 of the Commission's Rules for 800 MHz conventional stations.

230. Section 90.313(c) states in pertinent part, "Until a channel is loaded to capacity it will be available for assignment to others in the same area." Section 90.633(b) similarly states, "Where a licensee does not load a channel to 70 mobiles the channel will be available for assignment to other licensees." Both rules require licensees who do not have sufficient units-in-use to have earned exclusivity to share their channels. Loading is the number of units in use on a particular frequency -- it is not the number of radios in a company's sales inventory or rental inventory.

231. Two other rule sections impact these requirements that channels be shared. Section 90.127(c) requires that applicants limit their requests for authorization to those mobiles that will be put into operation within eight months of the grant of the authorization:

Each application shall limit its request for authorized mobile transmitters and paging receivers to:

Mobile transmitters and paging receivers that will be installed and operated immediately after the authorization issuance.

Mobile transmitters and paging receivers for which purchase orders have already been signed and which **will be in use within eight months** of the authorization date.

(emphasis added). Section 90.135 also impacts upon the channel sharing requirement by requiring licensees subject to channel sharing to modify their authorizations to reflect the number of mobiles actually operating on the channel:

The following changes in authorized stations require an application for modification of license: Change in the authorized location or number of base stations . . . and for systems operating on non-exclusive assignments in the 470-512 MHz, 800 MHz or 900 MHz bands, a change in the number of mobile transmitters . . . .

Section 90.135 requires licensees without earned exclusivity to promptly modify their authorization when the number of mobile units operating on a channel changes.

232. The Commission has recognized the importance of current loading data where the channels are subject to possible sharing. While the Commission has relaxed reporting requirements for other licensees, where there is a possibility that the channel should be shared, the reporting requirement is a rigorous one. For conventional SMR channels, the Commission has held that it is "necessary to know how many mobiles are operating on a channel before authorizing additional mobiles on the same channel."<sup>17</sup> The Commission therefore indicated that conventional SMR systems should continue to be subject to the rigorous requirement of filing modification applications in Section 90.135(a)(5) whenever their loading changes. *Id.* Similarly, the Commission in a companion item regarding certain 470-512 MHz stations the Commission relaxed the application of Section 90.135(a) (5) to licensees who were operating sufficient

---

<sup>17</sup> *Amendment of Part 90 of the Commission's Rules to Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems, supra*, 7 FCC Rcd at 5562.

mobiles to have exclusivity. With respect to stations with fewer mobiles than the number required to obtain exclusivity, the Commission stated in a footnote that, "In order to maintain the integrity of our licensing records, we will continue, as indicated in the Notice, to require licensees of systems operating in the 470-512 MHz band and on conventional channels above 800 MHz to modify their licenses in accordance with the current rule as long as the number of mobiles operating on the channel is below the number needed to obtain channel exclusivity."<sup>18</sup> This limitation was codified in Section 90.135(a) of the Commission's Rules.

233. The Commission has reminded licensees that it would take very seriously the failure of licensees to accurately report their loading data. The Commission has recognized that determining whether a licensee is paper loading is part of the Commission's spectrum management responsibilities.<sup>19</sup> When commentators suggested that licensees might present inflated reports about their loading, the Commission noted that Congress has provided revocation, fines and prison terms as possible sanctions for misrepresenting facts to the Commission.<sup>20</sup>

234. The record evidence demonstrates that Kay did not share channels that he was required to share. More importantly, the record evidence demonstrates that Kay did not have the ability to accurately determine or report his loading to the Commission. Kay recklessly operates a plethora of channels in a populated urban area without any ability to accurately track his

---

<sup>18</sup> *Amendment of Part 90 of the Commission's Rules Pertaining to End User and Mobile Licensing Information*, 7 FCC Rcd 6344, 6347 (1992).

<sup>19</sup> 7 FCC Rcd at 6345.

<sup>20</sup> 7 FCC Rcd at 5561.

loading. He does not know which channels he should be sharing. He does not know or keep records of where loaners, demos, and rentals operate. He does not know which channels or how many radios other radio dealers use. In many cases, he does not even know which of his paying customers are operating from other locations licensed to him.

235. Kay is claiming exclusive use of channels in areas where he never even constructed a repeater. For example, with respect to WIL659, authorized for 90 mobiles, Kay admits he never constructed the repeater. *See* Paras. 48 and 108, *supra*. Kay testified that his customers who use the channel in other areas "probably" wandered into this area and used their radios in the area authorized by this call sign. Kay's conduct is an egregious example of the channel hoarding that violates Section 90.633 of the Commission's Rules.

236. Kay's disregard of the need to rigorously track his loading and share channels where required is a particularly serious offense given that he operates in the greater Los Angeles area. *See* para. 1 *supra*. Channel sharing is particularly important in highly populated urban areas, and most important in Los Angeles which is subject to much longer propagation characteristics due to the location of stations on the mountain tops where Kay has his stations (*see* . 47 C.F.R. § 90.621(b) (1994)).<sup>21</sup> The same propagation characteristics of these mountain top locations that allow stations to offer a much larger coverage area warranting this extra area of protection greatly inhibit channel reuse.

237. The records Kay produced show that with respect to the stations included in the

---

<sup>21</sup> This rule section provides for co-channel separation of 70 miles for most of the country, but requires 105 miles of separation from stations licensed on Mount Lukens, Sierra, Santiago and Wilson. Kay has numerous stations at each of these sites.

list above, Kay is short *thousands* of mobiles from his authorized numbers. While Kay tries to fill in the shortfalls with radios from categories for which he does not know how many mobiles are operating and does not keep records of how many are operating.<sup>22</sup> Kay does not pay attention to how many mobiles are operating on a channel compared to how many are authorized to operate there--neither he nor his staff know how many are operating on particular stations. WTB Ex 16, pp. 2-3. Kay's mode of operation does not suffice to meet his obligation as a licensee in the 470-512 MHz and 800 MHz bands to share the channels in question. In order to meet his sharing obligations, he has to measure his use by the Commission's standard—mobile units in use. It is insufficient to simply say that he has other radios around to make up the shortfalls.

238. Kay may claim that he is not subject to channel sharing because he, in combination with co-channel licensees, have earned exclusivity. This is an erroneous self-serving interpretation of the requirement that stations that have not earned exclusivity need to modify their authorizations when their mobile count changes. This interpretation would allow two licensees to retain exclusivity by each authorizing 90 mobiles on a station -- then claiming that they do not need to modify their respective licenses (even if they are each operating substantially less than 90 mobiles) due to the large number of mobiles the other claims to be operating.

---

<sup>22</sup> Kay produced his customer print screens and loading reports, WTB Exs. 347 and 19, in response to an interrogatory and Judge Sippel's order that Kay produce records of his loading information. To the extent that Kay attempted to provide testimony of unreported loading to make up for the shortfalls identified by the Bureau, Kay should be precluded from doing so for several reasons. The first is that the Bureau does not have the opportunity to test the testimony. Second, Kay's failure to comply with a valid discovery order should not be countenanced—Section 1.17 of the Commission's Rules requires that licensees provide complete responses to Commission inquiries. Kay has wholly failed to explain why he can only now explain where he had non-paying customers and which dealers had free use of his systems. Kay is still unable to tell the Commission how many units were operating on particular channels.

239. Sections 90.313 and 90.633 of the Commission's Rules require that 470-512 MHz channels and conventional 800 MHz channels be shared where the licensee does not have sufficient loading to have earned exclusivity. Kay does not even track his loading. After more than a year, the Commission was able to get him to produce his records. These records revealed that Kay is claiming to operate thousands of mobiles that are not in operation. Thus, the record evidence demonstrates that Kay has repeatedly violated the channel sharing requirements of Sections 90.313 and 90.633 of the Commission's Rules.

## 2. Non-Construction and Permanent Discontinuance of Stations

240. Kay has admitted that the sixty-nine base stations (repeaters) listed in paras. 107-110, *supra*, were either not constructed or discontinued operation within the meaning of the rules. Rule Sections 90.155, 90.157, 90.631, and 90.633 of the Commission's Rules, provide that stations which are not constructed by their construction deadline or discontinue operation for more than one year cancel automatically. If the Presiding Judge ultimately determines that Kay is qualified to be a licensee, then it will be necessary to address the issue of the effect of the cancellation of particular base stations (repeaters) on a license and whether talk around (also called duplex operation) is permissible in the absence of an authorization to operate a repeater.<sup>23</sup>

241. The effect of the cancellation of the base station differs between the 470-512 MHz band and the 800 MHz band. In the 470-512 MHz band, direct mobile to mobile operation or "talk around" is permitted in the absence of a repeater authorization. The frequency allocation

---

<sup>23</sup> The Presiding Judge may simply wish to conclude that these base stations were either not constructed or discontinued operation within the meaning of the rules and direct the Commission licensing staff to perform the appropriate license maintenance.

table in Rule Section 90.311, provides for base **and** mobile operation on one half of the channel pair and mobile operation on the other half. This allocation allows for mobile to mobile operation on the channel. Thus, only the base station portion of the authorization cancels automatically.

242. In contrast, Section 90.613 of the Commission's Rules, which is applicable to 800 MHz stations, authorizes base station operation on one of the frequencies in the pair that comprises a channel. In the preamble to the table, the rule states that the base station frequencies are listed, and that the frequencies are assigned in pairs. It also states that the mobile/control station frequencies are 45 MHz higher than the listed base station frequency. Section 90.621(a)(2)(ii) of the Commission's Rules provides that mobiles may transmit on any frequency assigned to its associated base station. The result is that direct mobile to mobile operation is only permitted in the presence of an associated base station. If a base station is not placed in operation or discontinues operation, the portion of the license authorizing operation in the corresponding area cancels automatically.

243. With respect to the 12 other stations that the Bureau listed in its Statement of Readiness for Hearing as not being constructed, the Bureau believes that in light of the rebuttal evidence Kay offered, including additional USFS permits and Kay's testimony, that the stations were timely constructed.

**D. Willful and Malicious Interference Issue**

244. Issue (e) requires the Presiding Judge:

To 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;

In this case, the Bureau presented two separate lines of evidence relating to willful and malicious interference by Kay. The first line of evidence relates to a Commission inspection at Kay's office that revealed equipment that could be used to interfere with a co-channel station. Thus, Kay had the means of causing objectionable interference. Kay's claim that he was authorized to operate the equipment in question as a control station (FX1) is incorrect. As Commission agent Paul Oei testified, in order to operate that equipment as a fixed relay between two repeaters, Kay was required to be licensed in a different manner. Specifically, in a letter to Alan S. Tilles dated May 3, 1993,<sup>24</sup> the Chief, Land Mobile Branch set forth conditions under which fixed relay stations could be used to link SMR stations. The letter makes clear that while such use can be licensed in connection with systems that have exclusivity, the facilities "irrespective of their configuration should be licensed using the FX3 station class." Kay, however, was only authorized to operate as a control point (FX1 operation).

245. Moreover, Kay's argument that he was not required to protect Mr. Doering's stations because it was more than seventy miles away from his station at Oat Mountain is incorrect. The Tilles letter clearly states that any use of a fixed relay "is permitted only on a secondary, non-interference basis to base/mobile operations." *See* Section 90.637(c)(1) of the Commission's Rules. If Kay's operation had been afforded primary status, Kay's explanation would have been correct. Under Section 90.621(b) of the Commission's Rules, primary stations

---

<sup>24</sup> A copy of this letter is attached to these exceptions.

“will be afforded protection solely on the basis of the fixed distance separation criteria” – *i.e.*, in this case, the seventy mile spacing separation. Since Kay was required to operate the fixed relay on a secondary basis, however, he was required to not cause interference to Mr. Doering’s station, irrespective of the distance. Accordingly, Kay was not authorized to operate in the manner he did, and any interference he caused was not “legal interference.”

246. In *Capitol Radiotelephone, Inc.*, 11 FCC Rcd 2335, 2339 (Rev. Bd. 1996), the Review Board held that Section 333 of the Communications Act only prohibits intentional interference:

The Bureau is mistaken, however, insofar as its argument extends to the malicious interference prohibition of Section 333 of the Communications Act, 47 U.S.C. § 333, the crux of this proceeding. Section 333 forbids any person from "willfully or maliciously interfer[ing] with or caus[ing] interference to any radio communications of any station ... authorized by or under this Act." The legislative history of that section explicitly states that Section 333 fills a statutory void in the Communications Act against "willful or malicious interference." H.R. Rept. 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.* (Emphases added); see also HDO at n.13 ("this section [333] specifically prohibits harmful, intentional interference").

Kay is incorrect that his operation of the fixed relay station was authorized and that any interference to Mr. Doering’s system was “legal interference.” Under these circumstances, however, there is insufficient evidence to conclude that Kay acted with an intent to interfere in order to establish a clear violation of Section 333.

247. The second line of testimony relevant to interference is Mr. Jensen’s testimony that Kay used a service monitor to interfere with other licensees. While his testimony is

disturbing, his recollection was not clear or specific enough to meet the Bureau's burden of proving a Section 333 violation, particularly in light of Kay's explanations as to what he did. Accordingly, this issue should be resolved in Kay's favor.

**E. Abuse of Process Issue**

248. Issue (d) requires the Presiding Judge:

To 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;

In *Trinity Broadcasting of Florida, Inc., supra*, at ¶83, the Commission explained its concept of abuse of process:

Abuse of process includes the use of a Commission process to achieve a result that the process was not intended to achieve. *See Broadcast Renewal Applicants*, 3 FCC Rcd 5179, 5199 n.2 (1988). That is certainly the case here. However, abuse of process further implies not only that the purposes of a Commission policy have been subverted but that the parties had specific abusive intent. *See Evansville Skywave, Inc.*, 7 FCC Rcd 1699, 1702 n.10 (1992). Thus, the issue becomes whether TBN's principals acted with a good faith belief that NMTV could honestly be presented as "minority-controlled" or whether they acted with knowledge that the claim was false or with reckless disregard of the truth.<sup>15</sup>

<sup>15</sup>Reckless disregard is the equivalent of knowing deception. *See RKO General, Inc.*, 670 F. 2d 215, 225 (D.C. Cir. 1981), *citing Golden Broadcasting Systems, Inc.*, 68 FCC 2d 1099, 1106 ¶ 16 (1978).

249. In *Trinity*, the Commission disqualified a television licensee that had abused the Commission's processes by claiming that a corporation was minority-controlled when the principals knew that "their claim of minority control was at best doubtful and at worst false." *Id.* at ¶83. The Commission has held, "it is an abuse of process to specify a surrogate to apply for a

station so as to deny the Commission and the public the opportunity to review and pass on the qualifications of the party.” *Arnold L. Chase*, 5 FCC Rcd 1642, 1643 (1990).

250. In this case, evidence points to two ways in which Kay abused the Commission’s processes. The first means is by submitting applications for end user licenses in the names of individuals who had no *bona fide* intention of using radios. Kevin Hessman, Roy Jensen, and Vincent Cordaro’s testimony confirm that Kay engaged in such abusive conduct. As discussed under the loading issue, *supra*, the concept of loading is critical to the Commission’s allocation scheme for land mobile stations. In order to ensure that frequencies are properly and fully utilized, the Commission must have accurate information concerning loading. Under the Commission’s former allocation system, in which each individual end user was required to hold a license, there was an unintended incentive for deceptive licensees or dealers to file applications to use radios even though the end user had no intention of using the radios. As Mr. Jensen explained, in the repeater business, if a provider of radio service does not have the capacity to provide service to new customers, that dealer has to refer that customer to another operator, who earns the revenue from that customer. On the other hand, if the radio dealer has the capacity to place a customer on his system, the dealer can keep the revenue for repeater service for himself. Obviously, it is very important for a radio dealer to have the capacity he needs to serve new and existing customers. Hence, there was a clear motive to warehouse spectrum.

251. If licensees warehouse spectrum by claiming spectrum that they are not entitled to, the available frequency will be underutilized, and users with legitimate communications needs will be denied the opportunity to receive communications service. To take an extreme example,

a licensee could file an application for authority to operate 100 mobile units on a channel and thus earn exclusive use of that channel. If the licensee does not make any use of the frequency, the frequency will lie empty.

252. The Commission recognized that there was a tension between a licensee's need to plan for future capacity and the need to avoid warehousing of spectrum. The Commission's determination as to the appropriate balance between these interests is contained in Section 90.127(c) of the Commission's Rules. That rule provides that when an applicant seeks authorization for to use mobile or paging transmitters, the applicant shall limit its request to:

Mobile transmitters and paging transmitters that will be installed and operated immediately after authorization issuance; or

Mobile transmitters and paging receivers for which purchase orders have already been signed and which will be in use within eight months of the authorization date.

253. During the time when end user applications were filed, if a radio dealer encouraged others to file an end user application when that individual had no interest or intention of using mobile radios, such an action would be a clear abuse of the Commission's processes. The result of such an action would be a warehousing of spectrum and the inability of other licensees with present legitimate needs for spectrum to obtain that spectrum. The record shows that Kay filed bogus end user applications in the names of Roy Jensen, Kevin Hessman, and Vincent Cordaro. While those applications represented that these individuals had businesses that required the use of mobile radios, those individuals, who were employees of Kay, had no intention of using mobile radios in these alleged businesses.

254. The second means by which Kay abused the Commission's processes is by using

the names of others to apply for additional frequencies for himself. As the Presiding Judge has noted, “The Commission has held that it is an abuse of process to specify a surrogate to apply for a station so as to deny the Commission and the public the opportunity to review and pass on the qualifications of that party.” *Trinity Broadcasting of Florida, Inc., supra*, 10 FCC Rcd at 12060. In the 470-512 MHz band, Section 90.313(c) of the Commission’s Rules provides, “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.” In the 800 MHz band, for non-SMR stations, Section 90.623(c) of the Commission’s Rules provides that a licensee with an existing conventional system will not receive another authorization for a conventional station within forty miles of the existing system, unless the existing system is fully loaded.<sup>25</sup> If a licensee’s systems are not fully loaded, that licensee has a clear motive to circumvent the limitations on applying for new frequencies by being the undisclosed real-party-in-interest behind applications filed in the name of others. The testimony of Carla Pfeifer and Vincent Cordaro, the record concerning Marc Sobel, and the record concerning Jerry Gales, all confirm that Kay persuaded or directed them to sign application forms that resulted in repeater licenses being issued in their name. Such action was a clear abuse of the Commission’s processes.

255. The evidence on this issue consists of sharply contrasting explanations concerning Kay’s involvement with respect to applications filed in the name of others. Carla Pfeifer, Roy Jensen, Kevin Hessman, and Vincent Cordaro, have all testified that Kay presented them with

---

<sup>25</sup> The rule also allows an exception when the additional frequency pair will provide service to a single entity, and the single entity’s requirements justify the additional frequency. Section 90.623(c)(1) of the Commission’s Rules. Kay’s loading records show, however, that there is virtually no frequency licensed to him in which only one customer uses the frequency. Accordingly, for purposes of resolving this issue, this exception is not applicable.

application forms for them to sign when they had no *bona fide* interest in providing or receiving communications service. Kay, on the other hand, has testified that he understood the applications to be legitimate requests by individuals who had an interest in providing communications service, and his role was as a legitimate facilitator or preparer of the applications. In order to draw conclusions under this issue, the Presiding Judge must evaluate the credibility of the witnesses.

256. The Review Board has noted, "Credibility involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." *TeleSTAR, Inc.*, 2 FCC Rd 5, 13 (Rev. Bd. 1987), *quoting Carbo v. U.S.*, 314 F.2d 718, 749 (9th Cir.1963).

257. In this case, the Bureau concedes there are reasons to question the credibility of some of the witnesses who testified against Kay. Messrs. Hessman and Jensen were found to be somewhat less than honest in connection with their claims for unemployment compensation. With respect to Mr. Cordaro, there is reason to question his account of how he came to copy and obtain the customer data that was on floppy disks. Furthermore, it is clear that these witnesses have reason to dislike Kay. However, when the record evidence is closely examined, it must be concluded that the testimony of these witnesses is more credible than Kay's testimony.

258. It is significant that the independent testimony of the witnesses adverse to Kay was entirely consistent. Each of the individuals described a situation in which Kay presented them with applications to sign. In the case of Ms. Pfeifer, Kay persuaded her to sign an application with the promise of monetary gain when "her" station was fully loaded. In the case

of the former employees, Kay at least implicitly made it clear that the employees were expected to sign applications. Furthermore, in each of the cases, the applications described businesses that did not exist. In the case of Ms. Pfeifer and Mr. Jensen, the business was an investment consulting firm. In Mr. Hessman's case, the business was a security firm. In Mr. Cordaro's case, the business was described as a "radio communications consulting company." While Messrs. Jensen and Hessman were friends, there is no evidence that any of the other witnesses had any reason to communicate with each other on these matters. When independent witnesses testify consistently with each other, that consistency is substantial evidence that the testimony in question is credible. For example, in *Black Television Workshop of Los Angeles, Inc.*, 8 FCC Rcd 4192, 4194-4195 (Rev. Bd. 1993), the Review Board relied upon the internal consistency of the testimony of several witnesses in concluding that their testimony was credible. In the instant case, to discredit their testimony, one would have to advance an explanation as to why these four witnesses would independently concoct stories that are consistent with each other. The Bureau strongly believes that, when considered together, the testimony of these witnesses outweighs Kay's testimony.

259. Another reason for crediting the witnesses' collective testimony is that by testifying as they did, the witnesses have implicitly admitted that they assisted Kay in Kay's attempt to circumvent the Commission's Rules. Kay had Ms. Pfeifer write a check showing that she paid for equipment and prepared an invoice showing the purchase of equipment, and he then immediately paid her back in cash. It should have occurred then to Ms. Pfeifer that Kay was going to make it appear to the Commission that she was actually paying for the equipment, when

she knew otherwise. Similarly, Mr. Jensen had sufficient knowledge of the land mobile industry to understand the concept of “paper loading” and that it was improper. As the former owner of his own business involving two-way radios, Mr. Cordaro should have known that it was improper to sign application forms in blank. At the risk of stating the obvious, witnesses generally do not lie in order to describe instances in which they behaved questionably.

260. By contrast, Kay’s explanations concerning the applications in question do not withstand logical scrutiny. With respect to Ms. Pfeifer, Kay did not attempt to offer any meaningful explanation, except to deny that he forged Ms. Pfeifer’s signature on documents filed with the Commission. The Presiding Judge expressed the opinion that the record does not support a finding that Ms. Pfeifer did not sign the documents in question. Tr. 1596. While the Bureau believes that the Presiding Judge is not giving sufficient credit to Ms. Pfeifer’s ability to recognize her own signature, Kay abused the Commission’s processes even if Ms. Pfeifer signed the documents in question. The record clearly shows that Ms. Pfeifer had no involvement in constructing or operating the station in question and that she was the licensee of the station in name only. Furthermore, there is no dispute that Kay prepared and filed documents with the Commission in an attempt to mislead the Commission into believing that Ms. Pfeifer had paid for the equipment used to construct the station.

261. With respect to Mr. Jensen, Kay explained that he prepared an application for Mr. Jensen so that Mr. Jensen could use company radios on his own time. That explanation, however, cannot be accepted at face value. First, the application filed in Mr. Jensen’s name refers to Mr. Jensen operating “a financial services investment company,” which is different from

operating company radios on his own time. Second, Kay did not provide any explanation as to why a financial services investment company would require 37 two-way radios. Third, Kay admitted that he did not have that much knowledge concerning what Mr. Jensen was doing. Mr. Jensen, however, was Kay's full-time general manager. If Mr. Jensen had his own independent business interest, it strains credulity that Kay would not learn enough about that business to make sure that it did not conflict with his duties to Kay. Finally, Kay did not explain why, if the application was prepared for the purpose of allowing Mr. Jensen to use radios on evenings and weekends, the application requested authority to use 37 mobile units. Section 90.127(c) of the Commission's Rules required that the application be limited to mobile units that would be placed in service within eight months after the application was granted. Kay did not offer any basis for believing that Mr. Jensen would be operating 37 mobile units within that time period. Under these circumstances, Mr. Jensen's version of events must be credited.

262. With respect to Mr. Hessman, Kay's explanation that he had Mr. Hessman apply for end user licenses because Messrs. Jensen and Hessman wanted to use Southland radios for some sort of security work cannot be credited because his claims do not match the representations contained in the application and the record evidence. Moreover, while Mr. Hessman was found to have been less than honest when claiming unemployment, it turns out that Kay's reason for firing Mr. Hessman was different than he testified to at the unemployment hearing. Specifically, while Kay relied upon Mr. Hessman's conduct towards other employees, it turns out that Kay's real motivation for firing Mr. Hessman was an alleged attempt by Hessman and Jensen to discredit Kay (which Kay admittedly could not prove). Accordingly, neither Kay

nor Hessman can be considered to have been totally candid at the unemployment hearing.

263. Finally, with respect to Mr. Cordaro, Kay's attempt to explain his involvement to the Commission contains demonstrable misrepresentations. When one of the end user applications filed in Mr. Cordaro's name was challenged, a response was filed in the name of both Kay and Cordaro by the law firm of Brown & Schwaninger. Mr. Cordaro, however, never talked to anybody at that law firm, and he never authorized Brown & Schwaninger to act on his behalf. Moreover, Kay paid for the response, so the response was actually filed on Kay's behalf. That response claimed, "Separate and apart from his work for Kay, as fully disclosed in Cordaro's application, Cordaro also operates a radio communications consulting company." The evidence does not support Kay's claim. In fact, Mr. Cordaro did not operate such a company during that time. Indeed, Kay stated, "What all Vince was doing I don't know." This statement is very curious coming from an individual who has described the competition in the Los Angeles radio communications market as "savage" and who endlessly expressed concern at hearing about disclosing customer information to competitors. It is also very curious given Kay's evident intelligence and knowledge of the two-way radio market. Under those circumstances, it is simply not credible that Kay would not know or care whether his General Manager was operating a radio communications consulting company. Once Mr. Cordaro's end user application was challenged, Kay misrepresented in order to make an application that he filed appear to be a legitimate end user application. As for the SMR stations licensed in Mr. Cordaro's name, Kay clearly controlled those stations. Indeed, Mr. Cordaro's involvement in those stations was considerably less than Mr. Sobel's involvement in the stations licensed in Mr. Sobel's name.