

Original

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC

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In the Matter of

**JAMES A. KAY, JR.**

Licensee of 152 Part 90 Stations in the  
Los Angeles, California Area

To: Honorable Joseph Chachkin  
Chief Administrative Law Judge

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) WT DOCKET NO. 94-147  
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**WIRELESS TELECOMMUNICATIONS BUREAU'S**  
**REPLY TO PROPOSED FINDINGS OF FACT**  
**AND CONCLUSIONS OF LAW**

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## SUMMARY

Kay's proposed findings and conclusions repeatedly ignore record evidence that contradicts his position. The Bureau must prove its case by a preponderance of the evidence standard, not by clear and convincing evidence. The record overwhelmingly shows that Kay is not qualified to remain a Commission licensee.

With respect to the 308(b) issue, Kay's claim that he did not make any "misrepresentation or willful material omission in responding to the 308(b) Request" is clearly contrary to the record. While he describes his behavior as "interposing legal objections," he does not offer any legal justification for his obstruction of the Commission's investigation. His argument that precedent does not support revocation of his licenses ignores the holdings of the pertinent cases. Finally, none of the "extenuating circumstances" Kay offers serve to excuse his conduct in any way.

Kay's pleading fails to meaningfully address the loading issue. Kay fails to even acknowledge that he operates thousands fewer mobiles than he was actually authorized to operate. His argument that a licensee cannot violate Section 90.313 of the Commission's Rules is contradicted by the *Show Cause Order* and by precedent. The absence of Sections 90.127 and 90.135 of the Commission's Rules from the *Show Cause Order* is inconsequential. Finally, Kay's May 1994 application that sought a waiver of the trunking rule does not mitigate his violations.

Kay's proposed findings and conclusions under the abuse of process issue fail to deal with the evidence that is contrary to Kay's position. His claim that the applicants, not Kay, were

the real-parties-in-interest of the applications in question is totally unsupported. Moreover, Kay ignores the various misrepresentations and deceptions he made with respect to those applications.

With respect to the issue to determine the effect of the unauthorized transfer of control of Marc Sobel's stations to Kay on Kay's qualifications, Kay's attempt to relitigate the issue of whether there was an unauthorized transfer of control is improper. Moreover, contrary to Kay's arguments, the *Motorola* case should have placed Kay on notice that his relationship with Sobel was improper.

Kay's findings under the misrepresentation/lack of candor issue ignore his lack of candor in failing to disclose his relationship with Mr. Sobel, as well as the evidence showing that he knew that he had an interest in Mr. Sobel's licenses. Kay repeats arguments that were considered and rejected by Judge Frysiak in the Sobel proceeding. Furthermore, Kay's own testimony in the Sobel proceeding shows that he did not interpret the word "interest" in the manner he now claims to understand it.

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**WIRELESS TELECOMMUNICATIONS BUREAU'S**  
**REPLY TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Chief, Wireless Telecommunications Bureau, by his attorneys, now replies to the proposed findings of fact and conclusions of law filed by James A. Kay, Jr. (Kay) on May 10, 1999. The Bureau's failure to respond to a particular finding of fact or conclusion of law is not a concession that the finding or conclusion is accurate or meritorious.

**I. INTRODUCTION**

2. There are two issues on which Kay and the Bureau essentially agree. On the issue as to whether Kay failed to construct stations or permanently discontinued operation of stations, Kay concedes, pursuant to his stipulation at hearing, that he either never constructed or permanently discontinued operation of 69 base stations. See Kay Findings, ¶89, Kay

Conclusions, ¶208, *compare* Bureau Findings, ¶¶107-110, Bureau Conclusions, ¶¶240-243.<sup>1</sup> Furthermore, while the parties may not agree on the reasoning, the Bureau concludes that the willful and malicious interference issue should be resolved in Kay's favor. *See* Bureau Conclusions, ¶¶244-247. With respect to the other issues, however, there are major disagreements between the parties as to the appropriate findings and conclusions to be reached under those issues. As the Bureau will show in detail below, with respect to the disputed issues, Kay's proposed findings and conclusions may not be relied upon because they fail to meaningfully deal with important record evidence and legal principles. At the end of the hearing, the Presiding Judge instructed the parties, "I would expect that both parties will file findings, what the records shows – what they believe the record shows and the conclusions reached on the basis of that record and the governing law, and then file replies to those positions in replies, if there are any replies." Tr. 2567. In many instances, Kay's findings simply ignore important parts of the record and fail to even acknowledge important instances in which Kay violated the Commission's Rules or failed to be candid with the Commission. Accordingly, Kay's proposed findings and conclusions cannot be relied upon as an accurate analysis of the record in this proceeding.

3. As a preliminary matter, Kay's argument that the Bureau was required to prove its case by "clear and convincing" evidence is incorrect. Kay Conclusions, ¶181. As Kay implicitly recognizes, the Supreme Court held in *Steadman v. SEC*, 450 U.S. 91 (1981) that the preponderance of evidence standard applies to cases under Section 556(d) of the Administrative

<sup>1</sup> References to the proposed findings and conclusions of the parties will consist of the party whose pleading is being referenced (Bureau or Kay), the word "Findings" (for proposed findings of fact), or "Conclusions" (for proposed conclusions of law), and a citation to the relevant paragraph(s).

Procedure Act. Kay ignores the Commission's holding in *Silver Star Communications – Albany, Inc.*, 6 FCC Rcd 6905, 6907 n.3 (1991) that “the preponderance of the evidence standard -- not the clear and convincing standard -- generally applies to Commission revocation proceedings.”<sup>2</sup> Furthermore, Kay has not established any special or unusual circumstances that would justify departing from the normal rule in this case.

## II. SECTION 308(B) ISSUE

4. Kay does not deny that he refused to provide information when directed to by the Commission. He argues, however, that “there is no basis for sanctioning Kay here.” Kay Conclusions, ¶203. Kay attempts to rationalize his conduct by claiming he did not make any “misrepresentation or willful material omission in responding to the 308(b) Request.” Kay Conclusions ¶183. He argues that he responded to the 308(b) request by interposing “legal objections” and that the material was eventually provided to the Commission after designation. *Id.* He argues that precedent does not justify his disqualification based upon his refusal to provide the information prior to designation. Kay Conclusions, ¶¶184-187. He then offers a variety of “extenuating circumstances” to excuse his misconduct: the Northridge earthquake (Kay Conclusions, ¶¶188-189), the state of his business records (Kay Conclusions, ¶199), and his alleged concerns about the confidentiality of the requested information (Kay Conclusions, ¶¶200-202). Kay's attempt to defend his conduct simply does not fit the facts. The record shows that Kay misled the Commission in his responses to the 308(b) letters, and his attempted

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<sup>2</sup> The Commission affirmed the Review Board's decision that the reasoning in *Sea Island Broadcasting Corp. v. FCC*, 627 F.2d 240 (D.C. Cir. 1980) was no longer valid after the Supreme Court's decision in *Steadman v. SEC*, 450 U.S. 91 (1981). *Silver Star Communications-Albany, Inc.*, 3 FCC Rcd. 6342, 6348-49 (1988).

deceptions continued after designation. Furthermore, none of the “extenuating circumstances” Kay produces provide any justification for his blatant attempt to “thumb his nose” at the Commission by not complying with a legitimate Commission directive to provide information.

5. It takes unmitigated gall for Kay to claim that he did not make any misrepresentations or material omissions in responding to the 308(b) request. For example, in his June 3, 1994, response, Kay falsely certified that he did not operate any stations not licensed to himself, Buddy Corp. and Oat Trunking Group. WTB Ex. 11, pp. 1 and 7. At the time, Kay operated fifteen stations licensed to Marc Sobel, (WTB Exs. 340, p. 1, 341, 328, pp. 103-104, *see also* WTB Ex. 290 at 20-21, where Kay admits that he runs various stations licensed to Marc Sobel); one station licensed to Jerry Gales, (WTB Ex. 326, Tr. 1240); and stations licensed to Vincent Cordaro (WTB Exs. 321, p. 5, 322, 323, Tr. 1273-80, 1290-91).<sup>3</sup> Another example of Kay’s dishonesty is his certification that he had an “interest” in Buddy Corp. and Oat Trunking Group, Inc., but that the interest should not effect his eligibility for other licenses. WTB Ex. 11, p. 1. Kay did not tell the Commission that he was the sole owner of Oat Trunking Group, Inc., a fact that would effect his eligibility to hold other licenses.

6. His responses were also full of material omissions. For example, although he knew complaints had been filed alleging that he had not constructed stations in a timely manner, he did not tell the Commission that he had 69 stations that were not constructed or that had permanently discontinued operation. *See* Bureau Findings, ¶¶107-110. Kay did not tell the Commission that

<sup>3</sup> Kay received advance notice of the designation of this proceeding when a draft of the designation order was erroneously released to Kay through FOIA. In preparation for the designation of this matter for hearing, Kay entered into written management agreement contracts with Sobel, Gales and Cordaro. He, however, did not correct his false certification to the Commission (approximately three months prior to the written agreements) that he did not operate any stations not licensed to himself, Buddy Corp. or Oat Trunking Group.

he was short thousands of mobiles from his authorized loading on many of his stations. Bureau Findings, ¶¶48, 101, 106. He even refused to provide a list of stations he operated. Bureau Findings, ¶15. Clearly, Kay's claim that he did not make any misrepresentations or willful omissions in his responses to the Commission's 308(b) letters is ludicrous.

7. Kay's claim that he merely interposed "legal objections" to the Commission's letter of inquiry is nothing more than a nice-sounding euphemism for his crude attempt to obstruct the Commission's legitimate inquiry. Kay does not cite one provision of the Communications Act, one Commission rule, or one case that would offer any justification or legal entitlement whatsoever for his refusal to comply with the Commission's demand for information. This absolute lack of legal justification must be contrasted to the overwhelming body of law giving the Bureau the authority to initiate an investigation of Kay and to require information from Kay. The primary authority is Section 308(b) of the Communications Act, which states that the Commission "may **require** from an applicant or licensee further written statements of fact to enable it to determine" whether applications should be granted or licenses revoked" (emphasis added). The statute allows the Commission to command such disclosure; it provides no exception for licensees who do not wish to provide information. Furthermore, the case law is clear that the Commission can and must demand complete and accurate responses from its licensees (*RKO General, Inc.*, 670 F.2d 215, 232 (D.C. Cir. 1981)) and that Commission staff has wide discretion to conduct investigations. *Tidewater Radio Show, Inc.*, 75 FCC 2d 670, 677-678 (1980).

8. Even if Kay had provided some authority that would allow him to interpose "legal

objections” to the Commission’s letter of inquiry, the record shows that many of Kay’s objections were either frivolous or interposed in bad faith. For example, prior to designation, Kay claimed that United States Forest Service permits were irrelevant to any inquiry the Commission could undertake. WTB Ex. 3, p. 2, WTB Ex. 11, pp. 2-3. At the hearing, however, Kay used those “irrelevant” permits to show that certain stations had been constructed. Kay Exs. 14, 17, 19 and 26. The main objection Kay presented that could be considered “legal” in nature was his request for immunity from criminal prosecution.

9. Next, Kay’s argument that the precedent does not support revocation of licenses for failure to provide information to the Commission should be handily rejected. Kay argues that *Carol Music, Inc.*, 37 FCC 379 (1964) is distinguishable from this case because the information that was not disclosed in that case was extremely incriminating and because the disqualification was “not exclusively or even primarily based on the licensee’s failure to provide the required information.” Kay Conclusions, ¶185. First, the Bureau has shown that the information Kay has withheld (*i.e.*, his failure to construct or permanent discontinuance of 69 stations, his huge loading shortfall, and his failure to disclose operation of stations licensed to others) was “extremely incriminating.” As to Kay’s second point, the Commission clearly held that when a licensee refuses to provide information required under Section 308(b), “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.” 37 FCC at 384. Kay attempts to distinguish *Faith Center, Inc.*, 82 FCC 2d 1 (1980) *aff’d sub nom Faith Center, Inc. v FCC*, 679 F.2d 261 (D.C. Cir. 1982), *cert. denied* 459 U.S.

1203 (1983) from the instant case by saying that this case does not involve repeated refusals to comply with information requests. Kay Conclusions, ¶186. As in *Faith Center*, Kay's refusal to provide information and provision of false information continued post-designation. The two most prominent examples of Kay's continuing course of conduct are his attempt to remove the Sobel licenses from this proceeding (*See* Section V, *infra*) and his refusal, prior to his deposition, to explain that he was operating Spillman-style LTR trunk systems on conventional channels. Bureau Findings, ¶46.<sup>4</sup> Finally, Kay's discussion of *Warren L. Percival*, 8 FCC 2d 333 (1967) ignores the ruling in that case that the license was revoked for failure to comply with the Commission's 308(b) inquiry. As in *Carol Music*, the Commission held that such a refusal was sufficient grounds in and of itself to justify revocation of a license.

10. Next, none of Kay's "extenuating circumstances" provides any excuse for his actions. While the Northridge earthquake may have caused some disruption to Kay's business, the record does not support Kay's claim that he was unable to respond to the inquiry because of the earthquake. Barbara Ashauer testified that Kay's computer system was able to bill customers except during power outages. Tr. 1688-1689. Kay was able to file applications using his computer system during early 1994. *See* Bureau Findings, ¶38. Moreover, Kay's refusal to provide the information throughout 1994, well after his business resumed normal operation. Most importantly, Kay never told the Commission that earthquake damage made it impossible to respond to the Commission's inquiry, and he never requested an extension of time to respond on that basis. *Id.* Furthermore, Kay refused to provide information that he could have easily

<sup>4</sup> At Kay's deposition the Bureau learned that Kay's certification to the Presiding Judge that he only kept customer records by frequency band and could not pair them with call signs, WTB Ex 16, p. 2, was false.

provided regardless of the earthquake (*e.g.*, a list of the stations he operated). In short, Kay's reliance on the Northridge earthquake is disingenuous.

11. Kay's concerns about confidentiality also fail to excuse his refusal to provide information he was required to provide. Kay simply ignores the fact that the Commission responded to his concerns by telling him that information he provided would be kept confidential. Bureau Conclusions, ¶212. Kay also conveniently fails to provide any authority for the proposition that a licensee can refuse to provide information it is directed to provide merely because the licensee wants information to be kept confidential. *See* Bureau Conclusions, ¶211. Furthermore, Kay's citation to a staff member's conversations with Gail Thompson of "Thompson Tree" provides absolutely no justification for his actions. Kay Conclusions, ¶202. In denying Kay's "Petition for Extraordinary Relief," in which Kay prominently mentioned the "Thompson Tree" discussions, the Commission specifically held that "we find no merit to Kay's allegation that the Bureau sought to make Kay's confidential client lists available to competitors by requesting their submission in the 308(b) letter." *James A. Kay, Jr.*, 13 FCC Rcd 16369, 16374 n.3 (1998). Furthermore, when Kay claims that "the Bureau then rejected one of Kay's finder's preference requests on highly questionable grounds" (Kay Conclusions, ¶202), he misstates the record. Kay's finder's preference was defective because the Commission had already initiated an investigation at Kay's request. Tr. 2526. Such a ruling was not questionable – the Commission said in 1991 that it would handle finders' preferences in that manner. *Amendment of Parts 1 and 90 of the Commission's Rules Relating to Construction, Licensing and Operation of Private Land Mobile Stations*, 6 FCC Rcd 7297, 7307 (1991).

12. The rule is quite simple -- licensees who refuse to cooperate with Commission inquiries or provide false information or provide misleading information in response to Commission inquiries are not qualified to be Commission licensees. WTB Conclusions, ¶¶ 203-208. During the Commission's pre-hearing investigation, Kay managed to refuse to provide information, to provide false information and to provide misleading information. The Supreme Court explained in *FCC v WOKO*, 329 U.S. 223, 227 (1946), that the same analysis applies to affirmative misrepresentations, material omissions and refusals to respond to inquiries -- in each case the licensee deprives the Commission of the information it needs to perform its duties. The governing precedent is unequivocal that the Commission is **not** required to bargain with licensees in order to obtain the information it needs to regulate licensees in the public interest. *Carol Music*, 37 FCC 379, 384 (1964). The Commission has far too many licensees to tolerate such behavior. Kay's stonewalling and deception requires a holding that he is not qualified to remain a Commission licensee.

### III. LOADING ISSUE

13. In its proposed findings, the Bureau showed in great detail that Kay was authorized thousands of mobiles more than he actually had operating on his stations. Bureau Findings, ¶¶ 48-106. Kay totally ignores this shortfall. Indeed, he totally fails to propose findings of fact relating to the loading of his conventional stations. Instead, Kay attempts to turn the issue into a nullity by arguing that a licensee cannot violate Section 90.313 of the Commission's Rules. Kay Conclusions, ¶ 210. Kay further states that he believes that the rule section that applies is Section 90.135(a) of the Commission's Rules, which was not specifically mentioned in the *Show*

*Cause Order. Id.* None of these arguments have any merit. Indeed, Kay's arguments are little more than an attempt to ignore the plain facts that Kay's actual loading does not come close to matching his loading representations to the Commission.

14. With respect to Kay's argument that a licensee cannot violate Section 90.313 of the Commission's Rules, the Commission implicitly determined otherwise in the *Show Cause Order* when it designated an issue to determine whether Kay violated that rule. Furthermore, the Commission has indicated that licensees may be found to have violated Section 90.313 if they fail to share channels by modifying their licenses to reduce their loading. For example, in a rulemaking establishing the finders preference program, the Commission proposed a rule listing § 90.313 as a rule that could provide a basis for a finders preference when "an existing licensee has failed to comply with the provisions" of that rule. *Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, Notice of Proposed Rulemaking*, 5 FCC Rcd 6401, 6407 (1990).<sup>5</sup> The Commission has recognized that private land mobile licensees are frequently not diligent about accurately reporting their loading in these services. *Amendment of Part 90 of the Commission's Rules Pertaining to End User and Mobile Licensing Information*, 7 FCC Rcd 6344, 6346 (1992). The Commission concluded, however, that to assure the integrity of Commission's records and promote channel sharing, licensees who do not have enough mobiles in operation to have earned exclusivity must continue to modify their authorizations to reflect the loss of exclusivity. *Id.* at

<sup>5</sup> The Commission ultimately determined that loading violations could not easily be demonstrated by finders and therefore did not include loading violations, including violations of § 90.313 within the purview of the finders preference program. *Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, Report and Order*, 6 FCC Rcd 7297, 7305 (1991). That ruling, however, did not modify the principle that a licensee could violate Section 90.313 by failing to share

6347. The basic principle of Section 90.313 is simple -- if a licensee does not have sufficient loading to justify exclusive use of a channel, the licensee must modify its license to allow sharing of the channel. The record in this case shows that Kay violated that requirement in countless instances.

15. Indeed, the Bureau is unaware of any other instance of a licensee having such a reckless disregard for the channel sharing requirement. It is disturbing in this case that Kay does not even pretend to take seriously the Commission's requirement that he share channels he is not fully utilizing. Prior to the Commission compelling Kay to figure out which license goes with each frequency/site combination, Kay had no idea of how many units were operating on particular call signs. Before producing WTB Ex. 19 in November 1995, Kay went so far as to falsely represent to the Commission that it would be futile to order him to attempt to figure out which mobiles were operating on which stations. WTB Ex. 16, p. 2.

16. Kay also asserts that the Bureau has not shown that Kay violated Section 90.135(a) of the Commission's Rules because the Bureau has not shown that Kay's actual loading combined with the loading of others on the channel was insufficient to achieve exclusivity, and has not shown that Kay did not timely file applications to modify the authorizations in question. Kay Conclusions, ¶ 211. Kay cites no authority for his interpretation of that rule. As the Bureau explained in its proposed conclusions, this interpretation would lead to the absurd situation where two licensees could each avoid its respective duty to modify by pointing at the other licensee. WTB Conclusions, ¶238. For example, on an 800 MHz channel, if two licensees were each licensed for 60 mobile units on that channel but only had 10 mobile units each in operation,

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channels.

under Kay's theory, the licensees could collectively hoard the channel and refuse to modify their licenses. This result could occur because each licensee could point to the 10 mobile units they had in operation, add the 60 mobile units that the other licensee had, and claim that the channel was full because the loading criterion of 70 mobile units had been met. The result would be that the channel could not be fully utilized.

17. The Bureau has demonstrated that with respect to large numbers of Kay's stations, Kay's actual loading is thousands of mobile units below what he claims to be operating. The Bureau believes that the Presiding Judge need not make particular findings regarding details such as whether rental and demo units operating on unidentified frequencies count as units operating on a particular station, etc. The Presiding Judge also need not determine the loading of particular stations, but instead can simply make an overall finding that Kay is operating substantially fewer mobiles than he claims to be operating with respect to a number of his stations, and Kay has repeatedly violated the Commission's channel sharing requirement.

18. Kay is correct that Sections 90.127 and 90.135 of the Commission's Rules were not specifically mentioned in the *Show Cause Order*. That fact is inconsequential, however, because the Commission clearly indicated that his loading was the proper subject of this hearing. Kay does not claim that he failed to receive notice prior to the hearing that his loading would be at issue. Indeed, several months prior to the hearing, the Bureau filed a "Statement of Readiness for Hearing" laying out specific violations of the Commission's loading requirement. The essence of the Commission's channel allocation program is that licensees share channels until the channels are fully loaded. That basic requirement is codified in Section 90.313, and the Bureau

has shown how Kay has recklessly and repeatedly violated that rule. As explained in the Bureau's Conclusions, ¶¶ 230 et seq., Sections 90.127 and 90.135 of the Commission's Rules flesh out that requirement, but the fact that those rules are not mentioned in the *Show Cause Order* is inconsequential.

19. With respect to Kay's assertion that the Bureau has not shown that he did not file timely applications to modify, the Bureau has made such a showing with respect to all but two of the stations discussed in the loading section of its proposed findings of fact. The first page of the data base print out of the authorization information for each call sign included in the Bureau's exhibits indicates the pending applications associated with that call sign, including modification applications for each of Kay's licenses. For example, WTB Ex. 20 shows that an application to modify was granted on April 23, 1993, and that no modification applications are pending. Kay testified that the listed applications marked with the letter "M" are modification applications. Tr. 1148-49. With respect to WIJ893 and WNQK532, Kay is correct because the licensing data base shows a pending modification application that Kay filed prior to January 31, 1994 (when Kay learned he was under investigation). WTB Exs. 124, 241. With respect to WIL392, WIL625, WII621, and WII905, the records show that modification applications were filed after January 31, 1994. WTB Exs. 35, 41, 91, and 107. Even if the Presiding Judge assumes that those applications sought to reduce Kay's mobile count, those applications were not filed until after Kay knew the Commission was investigating him. With respect to the remaining stations, the Bureau's evidence includes a listing of pending modification applications and negates any claim by Kay that he filed timely modification applications. Further, Kay's failure to provide

1994 loading information when requested should result in an adverse inference against Kay on the loading issue. Licensees must not be permitted to destroy records and thus avoid scrutiny of their compliance with Commission Rules. *See* WTB Findings, ¶ 37.

20. When questioned regarding the shortfall in the loading of his 470-512 MHz stations, Kay testified that he filed an application in May 1994 -- several months after Kay learned he was under investigation -- seeking a rule waiver to trunk and apply aggregate loading principles to certain 470-512 MHz conventional stations. He requested that, if the waiver is granted, certain frequencies be deleted and that his aggregate mobile count be dropped. Tr. 1116, 2383 *et seq.*, Kay Ex. 66. The application omits any indication that Kay was operating substantially fewer mobiles than authorized when he applied for the waiver.<sup>6</sup> Section 90.135(a) of the Commission's Rules requires that Kay inform the Commission when his loading count changes. Instead of meeting this obligation, in the face of a Commission investigation, Kay proposed a trade to the Commission -- Kay would relinquish some of the spectrum he was hoarding in exchange for a rule waiver. This hardly excuses his nonperformance of his channel sharing obligations. Moreover, it is not surprising that Kay would attempt to cure his violations of the loading rules after learning that his loading practices were under investigation. Curiously, this application was filed during the time period when Kay claimed he could not provide loading information to the Commission. He did not explain how he was able to determine the appropriate loading count in this application, while claiming to be unable to compile loading information and provide it to the Commission during this time frame.

<sup>6</sup> In the 800 MHz band, being loaded was a prerequisite to a request to convert conventional channels to trunked use. *See* 47 C.F.R. § 90.615 (1994). Because Kay had not filed the modification applications required by § 90.135(a), his request for rule waiver carries with it an implicit representation that the stations involved were loaded

21. Kay's proposed findings and conclusions simply ignore the elementary fact that Kay's claims to the Commission concerning loading do not come close to matching his actual loading. Kay's violations of these rules are so pervasive and reflect such a reckless disregard for the Commission's Rules that they reflect adversely on his qualifications to be a Commission licensee. The issue must be resolved adversely to Kay.

#### **IV. ABUSE OF PROCESS ISSUE**

22. Kay's proposed findings and conclusions on the abuse of process are so shallow and ignore so many details as to be virtually useless. In short, Kay argues that he "never did anything to conceal his involvement in any of these applications," and he claims that with respect to each of the applications at question, the individuals in whose names the applications were filed were the real-parties-in-interest of the applications. Kay Conclusions, ¶222. Kay's argument simply ignores the evidence that is contrary to his position. For example, Kay does not explain why the applications filed in the names of Carla Pfeifer, Roy Jensen, and Kevin Hessman claim that these individuals operate businesses requiring the use of mobile radios, when those individuals deny that such businesses ever existed, and they denied that they had any interest in or use for mobile radios as described in the applications. *See* WTB Findings, ¶119 (Carla Pfeifer), ¶¶125-126 (Roy Jensen), ¶130 (Mr. Hessman testified he had no idea what the licenses in his name were for, other than to assist Kay in his business). Furthermore, Kay totally ignores the evidence that Kay prepared a phony invoice and check for submission to the Commission (making it appear that Ms. Pfeifer paid for equipment) when Kay actually reimbursed Ms. Pfeifer for the same amount

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to the levels authorized.

of money that the check was written for. Bureau Findings, ¶118. Kay does not explain how the collective testimony of Messrs. Jensen, Hessman and Cordaro, that Kay approached them and asked them to sign the applications, could differ so profoundly from his own self-serving testimony that those individuals approached Kay and requested his assistance. Bureau Findings, ¶¶125, 130, 135. Kay also fails to explain why he represented to the Commission that “separate and apart from his work for Kay, as fully disclosed in Cordaro’s application, Cordaro also operates a radio communications consulting company” when Mr. Cordaro denied any such business ever existed. Bureau Findings, ¶144.

23. Similarly, when Kay claims that the Bureau has not refuted Kay’s showing that the applicants were the real-parties-in-interest (Kay Conclusions, ¶222), Kay can only make that claim by ignoring the evidence. Carla Pfeifer testified that although she repeatedly asked Kay, she never received any information concerning station finances or Kay’s attempts to place customers on the station. Tr. 1569-1571. Mr. Cordaro did not even know whether the Rasnow Peak and Santiago Peak stations licensed in his name were ever constructed. WTB Exs. 317, 319, Tr. 1829-1830. Indeed, Mr. Cordaro had to ask Kay what stations were licensed in his name. WTB Ex. 319, Tr. 1825. With respect to Ms. Pfeifer, Mr. Jensen, Mr. Hessman, and Mr. Cordaro, the record shows that they were nothing more than handy names that Kay could use to apply for licenses. *See* Bureau Conclusions, ¶¶257-264.

24. Finally, the Bureau notes that Kay references in his proposed findings of fact the unemployment compensation decisions relating to Kevin Hessman and Roy Jensen. Kay Findings, ¶¶105, 113. Although Kay does not reference these proposed findings in his

conclusions, the Bureau anticipates that Kay will argue in his reply that their testimony should be discredited because of those decisions. As the Bureau noted in its proposed findings and conclusions, while there are some reasons to examine the credibility of the Bureau's witnesses, when their testimony is compared to Kay's testimony, their testimony must be credited. Bureau Conclusions, ¶¶255-263.

25. The record clearly shows that Kay used the names of individuals to apply for and control base station licenses and to hoard scarce loading capacity by submitting bogus end user applications. Such conduct is clearly an abuse of the Commission's processes. The issue must be resolved adversely to Kay.

## **V. SOBEL ISSUES**

### **1. Effect of Unauthorized Transfer of Control Issue**

26. These issues require the Presiding Judge to make the following determinations:

To determine, based on the findings and conclusions of Initial Decision FCC 97D-13 reached in WT Docket No. 97-56 concerning James A. Kay, Jr.'s (Kay) participation in an unauthorized transfer of control, whether Kay is basically qualified to be a Commission licensee.

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

In his proposed findings and conclusions, Kay argues at length that there was no transfer of control of Kay's stations to Sobel. Kay Conclusions, ¶¶227-236. That argument, however, is not appropriately raised in this proceeding. By its very wording, the first issue assumes the existence of an unauthorized transfer of control; the matter to be resolved is whether Kay's participation in

that unauthorized transfer of control renders him unqualified to remain a Commission licensee. Moreover, Judge Sippel specifically held that Kay would not be allowed to relitigate in this proceeding whether there was an unauthorized transfer of control of Sobel's stations to Kay. *Memorandum Opinion and Order*, FCC 98M-26 (released March 5, 1998). While Kay claims that Judge Chachkin modified the issue at the prehearing conference (Kay Findings, ¶150), nothing in the Presiding Judge's comments indicates any intention to modify that issue. Indeed, at the first prehearing conference, the Presiding Judge clearly stated that the only type of rulings of Judge Sippel he would reconsider "is something that relates to evidentiary matters involving the hearing itself." Tr. 441. Furthermore, at the end of the hearing, when the parties were discussing this issue, both the Presiding Judge and counsel for Kay agreed that "we do not have a transfer of control issue here." Tr. 2561. Accordingly, Kay's attempt to relitigate the question of whether there was an unauthorized transfer of control must be rejected.

27. In any event, the arguments Kay presents are the same arguments his counsel presented to Judge Frysiak on behalf of Sobel in the Sobel proceeding. If the Presiding Judge compares Kay's findings in this case with Sobel's proposed findings and conclusions in the Sobel case (WT Docket No. 97-56), he will see that the factual assertions and arguments are very similar. Notwithstanding these arguments, Judge Frysiak concluded that "it is abundantly clear that Kay has the ultimate control of Sobel's Management Agreement stations." *Marc Sobel*, 12 FCC Rcd 22879, 22900 (ALJ 1997). Kay's proposed findings and conclusions do not even acknowledge Judge Frysiak's *Initial Decision*, nor do they make any attempt to identify any defect in Judge Frysiak's reasoning or analysis. Accordingly, Kay's document does not provide

any basis for disturbing Judge Frysiak's well-reasoned legal analysis.

28. Moreover, in attempting to defend his dealings with Mr. Sobel, Kay mischaracterizes his arrangements with Mr. Sobel or ignores important indications of Kay's absolute control over these stations. For example, Kay's pleading repeatedly refers to Sobel leasing station equipment from Kay. *See* Kay Conclusions, ¶229 ("Sobel entered into an arrangement to lease the equipment from Kay. . . .") In fact, there was no "lease" in the ordinary meaning of that term.

Paragraph IV of the written management agreement provides:

During the term of this agreement all equipment provided by Agent and leased by Licensee 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. Sobel does not make any "lease payments" to Kay for the equipment - Kay is responsible for paying all expenses relating to the construction and operation of the stations.

*Id.* In essence, Kay provides the equipment and pays all the expenses in order to serve Kay's customers. This arrangement is indistinguishable from stations licensed to Kay.

29. Furthermore, while Kay argues that Sobel has "unimpeded access" to the equipment (Kay Conclusions, ¶229), Kay ignores his control over Sobel's access. The management agreement provides that *Kay* shall be the sole supplier of equipment and labor needed to maintain the stations. *Id.* While Sobel does perform repair and maintenance work on the stations, he does so as a contractor selected and paid by Kay. WTB Ex. 338, WTB Ex. 328, p. 106. Thus, while Sobel currently has access to the equipment, most of that access is subject to Kay's control.

30. With respect to policy decisions, Kay restricts his discussions to the preparation of applications. Kay Conclusions, ¶231. He fails to discuss three important policy areas where Kay controls the Management Agreement stations: the acquisition and disposition of licenses (Bureau Findings, ¶¶174-179), the setting of prices (Bureau Findings, ¶¶ 180-181), and retention of counsel (Bureau Findings, ¶182). For example, Kay makes no mention of the fact that while Kay can sell the stations at any time, Sobel cannot sell any license without Kay's approval. Bureau Findings, ¶177. With respect to the preparation of applications, Kay argues that he did much of the work under Sobel's supervision and direction. Kay Conclusions, ¶231. The record does not support that claim. The Bureau agrees with Kay that a licensee can hire an application preparer to assist the licensee in preparing filings with the Commission. *See* Kay Conclusions, p. 99 n.40. Here, however, Kay was much more than an application preparer. He controlled the decisions normally made by a licensee, such as determining the frequency and the site to be used for a proposed station. Indeed, with one exception, Kay made the arrangements with the property owners that allowed the stations to operate from their sites. Bureau Findings, ¶¶170-171.

31. Kay's discussion (Kay Conclusions, ¶¶233-234) of the finances of the Management Agreement stations also fails to accurately characterize what the record shows. With respect to expenses, the record plainly shows that Kay is responsible for paying **all** the expenses. WTB Ex. 340, pp. 3, 6, WTB Ex. 328, p. 131. The record also reflects that Kay has received all of the operating revenues from the Management Agreement stations, even though, under the terms of the written agreement, Sobel would be entitled to receive revenue from four stations. Bureau Findings, ¶187. Kay, however, attempts to obfuscate these plain facts by writing:

Sobel made a business decision and entered into a contractual arrangement in

which Kay agreed to assume these expenses and, in compensation, was permitted to retain the first \$600 in monthly revenue from each repeater.

Kay Conclusions, ¶233. Similarly, with respect to revenues, Kay attempts to describe the facts as “a voluntary deferral of distribution of profits. . . .” Kay Conclusions, ¶234. Under *Intermountain Microwave*, 24 RR 2d 983 (1963), the pertinent questions are (a) “Who is in charge of the payment of financial obligations, including expenses arising out of operations?,” and (b) “Who receives monies and profits from the operation of the facilities?” The answer to both questions is clearly “Kay.” Kay’s attempt to gloss over these facts demonstrates that his proposed findings and conclusions on this issue cannot be relied upon.

32. While Kay has no basis for arguing that there was no unauthorized transfer of control, some of his arguments could be relevant to the question of whether he had some basis for acting as he did. In particular, Kay argues throughout his conclusions (as he and Sobel did in the Sobel proceeding), that their management agreement was consistent with the standards contained in *Motorola, Inc.*, File Nos. 507505, *et al.* (Private Radio Bureau, July 30, 1985). Kay also argues that any transgression was “unintentional” and that Kay and Sobel relied upon counsel. Kay Conclusions, ¶235. In fact, however, the *Motorola* decision should have put Kay and Sobel on notice that Sobel’s arrangement with Kay was an unauthorized transfer of control, and the circumstances surrounding Kay’s actions do not show that Kay and Sobel acted with a good-faith intent to comply with the Commission’s Rules.

33. In *Motorola*, the Commission considered two agreements Motorola had with licensees. The first agreement was with Comven, Inc. (Comven). In concluding that Motorola’s

agreement with Comven was not an unauthorized transfer of control, the Bureau analyzed that agreement as follows:

Turning to the specifics of the Motorola management contracts with Comven, the Bureau finds that an unauthorized transfer of control has not occurred. Comven owns both the repeaters and the central controller for each system. The financing is with a finance company which is independent from Motorola. Additionally, there is no evidence that Motorola sells any equipment to Comven for a reduced price in return for managing the system. Petitioners have not presented any facts which distinguish Comven's purchase of Motorola equipment from any other SMR licensee purchasing equipment from Motorola. Further, the contracts provide that Motorola must perform its functions pursuant to the supervision and instructions of Comven. Should this fail to occur Comven can terminate the agreement and exercise full responsibility over all matters involving the operation of the systems.

A second agreement, between Motorola and Mt. Tamalpais Communications (Mt. Tamalpais), was found to constitute an unauthorized transfer of control. In reaching that conclusion, the Private Radio Bureau reasoned:

Motorola has stated that pursuant to a site rental agreement in which it paid Mt. Tamalpais a monthly fee, Mt. Tamalpais transferred authority to maintain and operate its system to Motorola on April 1, 1984. On that date, the end user agreements were transferred from Mt. Tamalpais' name to Motorola, Motorola began operating the system, billing the users and receiving 100 percent of the revenues generated by the system. Motorola itself has characterized this situation as a "de facto transfer of control."

*Motorola, supra* at ¶21.

34. A comparison of the Kay-Sobel arrangement with the agreements at issue in *Motorola* shows that their agreement bears much more of a resemblance to the improper agreement with Mt. Tamalpais than the permissible Comven agreement. Kay received *all* the revenues from the station and paid *all* the expenses. As with the Mt. Tamalpais agreement, Kay

was made responsible for “all management functions associated with the operation of the Stations. . .” and he was named the “sole and exclusive” management agent. WTB Ex. 340, p. 2. The end users enter into contracts with Kay for service. WTB Ex. 328, p. 119. The Kay-Sobel arrangement is very different from the permissible Comven agreement. While Comven owned the equipment, Sobel has no title or interest in the equipment used in connection with the Management Agreement stations. WTB Ex. 340, p. 3. Furthermore, while Comven had the explicit right to supervise and instruct Motorola, when Sobel (the licensee) worked on the Management Agreement stations, he did so as a contractor selected and paid by Kay. *See* WTB Ex. 340, p. 3 (“Agent [Kay] shall be the sole and exclusive supplier of all equipment and labor required to maintain and repair the Stations’ facilities. . . .”) Furthermore, while Comven had the right to terminate the agreement, the Kay Sobel agreement has a ten year term (with an automatic right exclusive to Kay to extend the agreement for *fifty (50)* more years), and Sobel does not have any right to terminate the agreement. WTB Ex. 340, p. 6. Kay claims that the “written agreement was silent as to the term.” Kay Conclusions, p. 98 n.39. Kay can only make that claim by willfully ignoring Paragraph 14 of his own agreement. Under these circumstances, and given Kay’s other indicia of control, Kay cannot seriously point to the *Motorola* case as justification for his actions. Instead, the *Motorola* case should have placed Kay on notice that his course of conduct was inconsistent with the Commission’s Rules.

35. Furthermore, Kay cannot plead reliance on counsel as an excuse for his misconduct. Factually, there is no evidence that Kay relied on counsel prior to entering into his oral agreements with Sobel. Moreover, when they entered into the written management agreements,

Sobel admitted, “Nothing changed at all” as a result of those agreements. Tr. 1764. In any event, advice of counsel cannot excuse a clear breach of duty by a licensee. *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419, 420 n.6 (1986).

36. In his conclusions, Kay writes, “An unauthorized transfer of control, in and of itself, is not grounds for disqualification unless coupled with an intent to deceive or other disqualifying misconduct.” Kay Conclusions, ¶235. With respect to an isolated instance of *de facto* control, Kay’s statement would generally be correct. The record in this proceeding, however, shows that Kay’s dealings with Sobel are part of a pattern of abusing the Commission’s processes to suit his desires to control spectrum. Moreover, Kay has made misrepresentations to the Commission and shown a stubborn refusal to be candid with the Commission (see below). Accordingly, Kay’s repeated and flagrant misconduct shows that he is not qualified to remain a Commission licensee.

## **2. Misrepresentation/Lack of Candor Issue**

37. Kay’s proposed findings and conclusions under this issue suffer from the same defects as with respect to the other issues. Kay fails to even acknowledge his “affirmative obligation to inform the Commission of the facts the FCC needed in order to license broadcasters in the public interest.” *RKO General, Inc. v. FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981). Kay treats the issue as if the Bureau is merely engaging in “linguistic nitpicking” over the meaning of the word “interest.” Kay Conclusions, ¶241. In fact, the record here shows that Kay deliberately withheld material information concerning his relationship with Sobel, and he made statements to the Commission that he knew were false. Such dissembling to the Commission is further proof that he is not qualified to remain a Commission licensee.

38. The issue seeks to determine whether Kay misrepresented facts or lacked candor in connection with his filing in this proceeding. Kay's proposed findings and conclusions totally ignore the lack of candor portion of the issue. Lack of candor is a concealment, evasion, or other failure to be fully informative which is accompanied by an intent to deceive the Commission. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983). In *Trinity Broadcasting of Florida, Inc.*, FCC 98-313 (released April 15, 1999), at ¶117, the Commission 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." Furthermore, the Commission also clarified that "[r]eckless disregard is the equivalent of knowing deception." *Id.* at p. 32 n.15. As the Bureau has shown in its proposed findings, Kay specifically knew that the Commission wanted information about stations that he managed. Bureau Findings, ¶¶191-192. He also believed that the Commission had erroneously included some of Sobel's licenses in the hearing designation order. Tr. 1300. Under those circumstances, Kay "had an affirmative obligation to inform the Commission of the facts the FCC needed in order to license" him. *RKO General, Inc. v. FCC*, *supra*. In other words, he had a clear obligation to tell the Commission and Judge Sippel that he managed Sobel's stations. See Bureau Conclusions, ¶281. Instead, he submitted a highly misleading pleading and affidavit from which no reasonable person would conclude that he "managed" Sobel's stations. Neither the pleading nor the affidavit (*See* WTB Ex. 343) admits to any sort of relationship with the Management Agreement stations. If Kay honestly believed that his relationship with Sobel was above board, he had every incentive to tell the Bureau and Judge Sippel that there was a misunderstanding and that he managed some of the stations at issue, as

opposed to being the licensee. Instead, Kay's submission went to great pains to deny *any* sort of relationship with Sobel's stations. Furthermore, as shown by the result of the Sobel hearing, Kay had a clear motive to conceal his involvement in (*i.e.*, control of) Sobel's stations. Intent to deceive can be inferred when a party has a clear motive to deceive. *See, e.g., RKO General, Inc.*, 4 FCC Rcd 4679, 4684 (Rev. Bd. 1989). Kay's failure to even address his blatant lack of candor in his proposed findings and conclusions is a major shortcoming that demonstrates why his pleading is unreliable.

39. Furthermore, Kay also ignores the context in which he offered his pleading. Kay had previously misrepresented that he did not operate any stations not licensed to himself, Buddy Corp., or Oat Trunking Group. *See* ¶5, *supra*. The *Order to Show Cause* specifically reiterated that the Commission was interested in stations Kay managed. Kay Ex. 5, p. 2. Under those circumstances, it did not take a man as intelligent and as experienced with the Commission's Rules as Kay to understand that the Commission wanted to know what stations Kay managed. Instead of providing that information, however, Kay filed a pleading deliberately calculated to remove Sobel's licenses from the scrutiny of the hearing proceeding. *See* Bureau Conclusions, ¶¶282-283. Kay also had repeatedly and deliberately refused to provide information when directed to by the Commission. *See* Section II, *supra*. Under those circumstances, Kay's refusal to admit that he managed Sobel's stations reflects a deliberate intent to hide that information from the Commission, as opposed to an accidental or otherwise innocent omission.

40. To the extent Kay's pleading does address the misrepresentation portion of the issue, his arguments must be rejected as contrary to the record and to common sense. Kay claims that

the statement “Kay has no interest in any of Sobel’s stations or licenses” was and is a true statement. Kay Conclusions, ¶238-241. In making these arguments, Kay simply rehashes arguments that were considered and thoroughly rejected by Judge Frysiak in the Sobel proceeding. For example, in attempting to explain why he claimed he did not have an interest in Kay’s **stations or licenses**, Kay argues that he and Sobel used these terms interchangeably. Kay Conclusions, ¶240. Judge Frysiak readily saw this argument for what it was – a crude excuse for lying to the Commission. After detailing Kay’s pervasive control over the stations, Judge Frysiak wrote:

All of this amounts to a fair amount of interest. Sobel maintains that the word interest used in the context of the affidavit only means having legal title. But this assertion must be rejected as being false. Sobel has admitted that when he read the affidavit [he] wondered about the word ‘interest’ and met with Kay to discuss the affidavit. Kay recalls that he told Sobel that it was explained to him that the word interest referred to ‘ownership . . . as having a direct financial stake in something.’ Finding 58. Both Kay and Sobel had strong motive to withhold from the Commission the true nature of their business relationship. Sobel well realized that had he been truthful in his affidavit his requests for finders’ preference would have been placed in jeopardy. The wording of the affidavit was calculated to ward off the Commission from being apprised of the true nature of the Kay – Sobel business relationship. Such dissembling may not be countenanced.

*Sobel Initial Decision*, ¶73, 12 FCC Rcd at 22901.

41. Moreover, Kay has not explained how he could have no “interest” in the Management Agreement stations licensed in Mr. Sobel’s name when those stations were run in a manner indistinguishable from Kay’s own stations. Mr. Sobel is a contractor who does extensive work for Kay. WTB Findings, ¶ 150. These fifteen stations were so thoroughly integrated into Kay's operation that Kay's employees, who were responsible for their day to day operation and

revenue collection, did not know the stations were licensed to Mr. Sobel. WTB Findings, ¶ 169. Further, Mr. Sobel worked on these stations at the same hourly rate he charged Kay to work on any of Kay's stations, and made no distinction in his billing between stations licensed in his own name and stations licensed to Kay. WTB Findings, ¶153. Mr. Sobel had essentially the same role with respect to the Management Agreement stations as he did with respect to Kay's own stations – a contractor selected and paid by Kay. WTB Findings, ¶¶ 149, 160, 164. Furthermore, Mr. Sobel received the same hourly rate regardless of whether he was working on a Management Agreement station or Kay's station. WTB Ex. 329, pp. 245-246.

42. The Presiding Judge has recognized that if Kay controlled Mr. Sobel's stations or licenses, Kay necessarily had an interest in those stations or licenses. Judge Frysiak concluded that Kay did control these stations, and he thought it plain that Kay had "a fair amount of interest" in these stations or licenses. In light of all those circumstances, it was perfectly clear at the time Kay submitted his pleading that Kay had an "interest" in Mr. Sobel's stations under any reasonable interpretation of that term.

43. Notwithstanding the facts, Kay argues that "even assuming a case could be made that Kay's statement was in any way not consistent with the facts, the record amply demonstrates that there was no intent to deceive." Kay Conclusions, ¶242. In that regard, Kay claims, "At the time Kay executed the legal affidavit, he was advised by legal counsel that the management agreement did not constitute an 'interest.'" Kay Conclusions, ¶243. That statement is demonstrably false.<sup>7</sup>

<sup>7</sup> Moreover, even if the record contained evidence to this effect, Kay should not be allowed to assert such a defense because he has consistently asserted attorney-client privilege to prevent discovery of his communications with counsel. Indeed, in the Sobel case, he successfully asserted attorney-client privilege to prevent disclosure of the memorandum from his counsel transmitting the pleading at issue to him for his review. See WTB Ex. 329, p. 213. Kay may not use the attorney-client privilege to prevent disclosure of his communications with counsel while

Indeed, Kay knew the statement was false when he submitted it to the Commission. At the Sobel hearing, Kay specifically testified that a “direct financial stake” is an “interest.” WTB Ex. 329, p. 371. Despite Kay’s current attempt to obfuscate his prior testimony by claiming that he used the terms “stations” and “licenses” interchangeably, Kay clearly understood at the Sobel hearing that “stations” was a reference to the physical equipment (as opposed to the licenses). The following excerpt from his testimony is most revealing:

JUDGE FRYSIK: On an ongoing basis, do you have a financial stake in those stations?

THE WITNESS: Not in the licenses.

BY MR. SCHAUBLE:

Q. But you have a stake in the stations, don’t you?

A. Well, I have some hardware up there. If they wouldn’t be doing that, they’d be doing something else.

WTB Ex. 329, p. 372. In those answers, when Kay was asked about the stations, he first tried to evade the question by referring back to the licenses. When the question was repeated, however, he interpreted the word “stations” as referring not to the licenses, but to the “hardware.”

Moreover, Mr. Sobel agreed that Kay had a direct financial stake in the Management Agreement stations. WTB Ex. 328, p. 150. Kay thus clearly knew that he had an “interest” in the Management Agreement stations. When a statement is made with the knowledge that the statement is false, the intent to deceive needed to establish misrepresentation is present. *Leflore Broadcasting Co. v. FCC*, 636 F.2d 454, 461-462 (D.C. Cir. 1980). Kay’s attempt to rely on

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at the same time using reliance on counsel as a defense. See the Bureau’s March 17, 1998 “Motion for Ruling Regarding Attorney Witnesses.” Judge Sippel dismissed that motion as moot after Kay dropped his attorneys from his witness list. *Order*, FCC 98M-51 (released April 17, 1998).

*Lutheran Church – Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998) (Kay Conclusions, ¶241) is unavailing. While the only evidence of deceptive intent in *Lutheran* were the pleadings that contained the alleged misrepresentations, this record contains overwhelming evidence that Kay actively attempted to conceal his role in the Management Agreement stations and that he knew the statement was false.

44. Accordingly, it must be concluded, consistent with Judge Frysiak’s reasoning in the Sobel case, that Kay both affirmatively misrepresented facts and lacked candor in his January 1995 pleading. Each form of deception shows that Kay is not qualified to remain a Commission licensee.

45. Accordingly, the Presiding Judge should issue a decision revoking all of Kay's licenses. If such action is necessary, the Bureau does not believe it is necessary to issue a forfeiture against Kay.

Respectfully submitted,  
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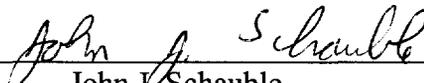
CERTIFICATE OF SERVICE

I, John J. Schauble, an attorney in the Enforcement and Consumer Information Division, Wireless Telecommunications Bureau, certify that I have, on this 1st day June, 1999, sent by hand delivery (unless otherwise indicated), copies of the foregoing "Wireless Telecommunications Bureau's Reply to Proposed Findings of Fact and Conclusions of Law" to:

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