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Summary

Pursuant to Section 312(d) of the Communications Act, the Bureau has the burden of proceeding and the burden of proof. The Bureau failed to carry its burdens. The instant submission will demonstrate that, on all issues, there is no basis for license revocation or any other sanction. The evidence adduced at hearing does not reveal any significant transgression by Kay of the Communications Act or of any Commission regulation or policy. Assuming *arguendo* that Kay may have inadvertently failed to comply with any requirement, the record more than amply demonstrates numerous mitigating factors. All issues should, therefore, be resolved in Kay's favor.

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the matter of)
)
JAMES A. KAY, JR.) WT Docket No. 94-147
)
Licensee of One Hundred Fifty Two Part 90)
Licenses in the Los Angeles, California Area)

To: The Honorable Joseph Chackin
Chief Administrative Law Judge

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

James A. Kay, Jr. ("Kay"), by his attorneys, hereby submits his reply to the *Wireless Telecommunications Bureau's Proposed Findings of Fact and Conclusions of Law* (hereinafter "*WTB PF&C*") in the above-captioned proceeding.

A. Introduction

1. Kay stands by his *Proposed Findings of Fact and Conclusions of Law* (hereinafter "*Kay PF&C*") as submitted on May 10, 1999, and will not attempt herein to address each and every proposed factual finding or legal conclusion offered by the Bureau. Kay instead will focus on the more important aspects requiring treatment under each of the issues. Kay's failure to specifically respond to any particular assertion in the Bureau's proposed findings and conclusions should not be deemed a concession of that point by Kay.

B. The Section 308(b) Issue

2. The Bureau devotes a significant portion of its proposed conclusions of law on the Section 308(b) issue to a tutorial on licensees' and applicants' obligations to be truthful and candid in submitting information to the Commission. *WTB PF&C* at ¶¶ 201-208. There was no

suggestion by the Commission in the *HDO* that Kay made any false statement to the Commission in his responses to the 308(b) Request, nor is there any record evidence to support that contention.¹ The issue, as designated, is whether Kay violated Section 308(b) “by failing to provide information requested in his responses to Commission inquiries.” *HDO* at ¶ 10(a). Accordingly, the reliance on *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946); *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981); and *Trinity Broadcasting of Florida, Inc.*, 10 F.C.C.R. 12020 (ALJ 1995) is misplaced. Those cases address the effect on a licensee’s qualifications of intentional misrepresentation and lack of candor. The question under this issue, by contrast, is whether Kay’s alleged failure to provide information requested by Commission staff violated any obligations he might have had under Section 308(b).

3. The Bureau relies on *Carol Music, Inc.*, 37 F.C.C. 37, 3 Rad. Reg. 2d (P&F) 477 (1964) and *Warren L. Percival*, 8 F.C.C.2d 333 (1967), *WTB PF&C* at ¶¶ 208-210, but those cases do not address the situation of a licensee who resists requests for information by Commission staff prior to the initiation of formal proceedings, but who complies thereafter. See *Kay PF&C* at ¶¶ 184-187. The Commission has recognized that a staff request for information—even one that invokes Section 308(b) of the Act—is subject only to **voluntary** compliance by the recipient, unless the Commission invokes formal procedures, *e.g.*, the issuance of a subpoena. In *PTL of Heritage Village Church and Missionary Fellowship, Inc.*, 71 F.C.C.2d 324, 45 Rad. Reg. 2d (P&F) 639 (1979) the Commission observed:

[T]he Commission expects its licensees to cooperate with staff-conducted informal investigations. Sections 403 and 409 of the Act provide the Commission the formal means, *i.e.* subpoena, to obtain books, records and information, but resort to these means in informal investigations has traditionally been unnecessary since most licensees

¹ It is improper for the Bureau, at this late stage, to attempt to transform the 308(b) issue into a misrepresentation issue when (a) the Commission did not designate it as such, and (b) the Bureau did not timely seek any such modification or enlargement of the issues.

recognize the Commission's authority to inspect such documents. However, when licensees refuse to cooperate in this *voluntary procedure* and insist upon formal procedures the Commission will institute a formal proceeding to obtain the information. Under these circumstances, the Commission does not believe its request of licensees to *voluntarily make available information* under their control constitutes an unreasonable search under the Fourth Amendment to the Constitution.

Id. at ¶ 12 (emphasis added).

4. This view is supported by an examination of other provisions of the Communications Act. Section 409(e) confers upon the Commission “the power to require by subpoena ... the production of all books, papers, schedules of charges, contracts, agreements, and documents relating to any matter under investigation.” 47 U.S.C. § 409(e). But Commission subpoenas are not self-enforcing. Section 409(g) provides that an order compelling compliance with such a subpoena shall issue from an appropriate federal district court. 47 U.S.C. § 409(f). Clearly, if a subpoena issued by the Commission in a formal proceeding requires judicial enforcement, it is absurd to suggest that an informal request for information from a low-level Commission employee² imposes a mandatory obligation on a licensee.

5. The Presiding Judge asked Kay whether his various legal objections to the 308(b) Request had been presented to a court. Kay explained:

We never had an opportunity to litigate this. If they had given us a subpoena for the documents, we would have been able to challenge their request for the information. Basically, Your Honor, this hearing is the only legal opportunity I have had to challenge their demand for the documents under the 308(b). This is it, Your Honor.

Tr. 1031. But the Commission did not issue a subpoena pursuant to Section 409 of the Act; instead, it designated a hearing pursuant to Section 312 of the Act to determine whether Kay’s

² The 308(b) Request and all of the other pre-designation correspondence on the matter from the Bureau were authored by W. Riley Hollingsworth, Esquire, who was at that time only a deputy division chief within what was then the Private Radio Bureau. *See* WTB Ex. 1.

authorizations should be revoked. Once that formal proceeding was initiated, Kay complied with all valid discovery rulings of the Presiding Judge.

6. The Bureau has failed to demonstrate that Kay's reticence, assuming *arguendo* it was violative of Section 308(b), was disqualifying under the circumstances. In particular, the Bureau does not adequately account for the extenuating circumstances which, if they do not excuse Kay's failure, certainly make it understandable and provide mitigation.

7. The Bureau dismisses Kay's evidence and arguments regarding the impact of the Northridge earthquake and its significance to the Section 308(b) issue. The Bureau states: "Kay's alleged concerns about damage from the Northridge earthquake do not justify his wholesale refusal to provide the information." *WTB PF&C* at ¶ 213. Kay does not suggest the earthquake provides a "wholesale excuse," but rather that it provides an explanation and must be included in the overall consideration of what was going on in Kay's life at the time. Kay's state of mind is inextricably part of the analysis of his culpability, if any, under this issue. The Bureau has not disputed any of the evidence offered on Kay's behalf regarding the extent of the damage from the earthquake to Kay's business and residence, and its affect on his mental and emotional state. The Bureau further demurs that Kay should have formally raised the Northridge earthquake in 1994 as a reason for his inability to respond to the 308(b) Request. *Id.* The record demonstrates, however, that Kay was preoccupied and left the details of protecting and advancing his legal rights in connection with the 308(b) Request to his attorneys.

8. The Bureau acknowledges that "Kay did have a legitimate interest in assuring that his proprietary customer information remained confidential," *WTB PF&C* at ¶ 211, but assigns no weight whatsoever to this in its evaluation of the Section 308(b) issue, *id.* at ¶¶ 211-212. The Bureau first objects that the method by which Kay's lawyers attempted to secure confidentiality

did not comport with the specific requirements of FCC regulations. *Id.* at ¶ 211. But it is relevant to determining Kay's state of mind that the Bureau refused to follow the same confidentiality procedure he had successfully used in the past, whether or not the method comported with the technical requirements of the rules. Tr. 944-945.

9. The Bureau further contends that Kay's confidentiality concerns are of no value because, on May 27, 1994, the Bureau wrote to 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." *WTB PF&C* at ¶ 212. That statement gave Kay no comfort. He was legitimately concerned that several of his competitors were quite capable of driving the FOIA truck through the "except-to-the-extent-we-would-be-required-by-law-to-do-so" loophole. Kay's mistrust of the Bureau rested on firm ground. The evidence adduced at hearing established that the Bureau had already distributed copies of the 308(b) Request to Kay's competitors, so they knew precisely what information was being requested and could carefully tailor FOIA requests to obtain it. That the Bureau intended to distribute the information provided in response to the 308(b) Request was an understandable apprehension on Kay's part in light of the unexplained demand for 50 copies of the materials.

10. If actions indeed speak louder than words, the Bureau's "assurance" could not be heard above its deafening actions. The incident in which Anne Marie Wypijewski improperly contacted Thompson Tree in an apparent attempt to undermine Kay's attempt to acquire and place into public service an unused channel occurred in April 1994. *Kay PF&C* at ¶¶ 39-43, 202. This was only a few short weeks before the Bureau's May 1994 "assurance" of confidentiality. It is not reasonable to expect that, in light of this kind of treatment, Kay would simply accept what must have seemed to him shallow promises by Bureau staff.

11. This pattern of conduct by the Bureau unfortunately appears to continue even to this day. On May 24, 1999, Kay submitted a *Petition for Reconsideration* of the recent grant of an STA to the City of Compton Police Department (“Compton”). A copy of this pleading was served on the Presiding Judge and Bureau counsel. Based on the information presented therein—which is based largely on documents either generated by the Bureau or on file with the Commission—it appears that the Bureau nominally denied an STA request that Kay had opposed, neglected to serve Kay or notify him of this action, but nonetheless alerted Compton (Kay’s adversary) of the action in advance, and may even have advised the applicant on how to resubmit a revised STA request. The revised STA request was filed a day *before* the Bureau denied the first STA request, indicating that the Bureau, on an *ex parte* basis, provided Compton with advance notice of its action on the first STA request. Even though the follow-up STA request made false accusations against Kay, and even though its grant adversely affected Kay’s business interests, and even though the Bureau knew of Kay’s interest in the matter, the Bureau nonetheless proceeded to grant the STA on a purely *ex parte* basis, and without any notice to Kay.

12. This situation is eerily similar to the Thompson Tree incident. In both situations the Bureau took an action adverse to an opponent of Kay, but communicated that action to the adverse party before Kay was notified, thus enabling the adverse party to take follow-up action that would effectively negate any benefit to Kay, even though the Bureau was nominally in each case granting the relief Kay initially requested. In Thompson Tree the Bureau specifically advised the adverse party how to go about the follow-up action, and it appears that similar *ex parte* advice was given to Compton. Finally, in both cases the Bureau knew of Kay’s interest in the matter and knew or should have known that its actions were adverse to Kay’s business

interests. This is but the latest incident in a documented pattern of actions by the Bureau apparently designed to undermine Kay's business interests,³ and it further corroborates Kay's assertion that he had good reason, in 1994, to be extremely suspicious of the Bureau's good faith in connection with matters of confidentiality and otherwise.

C. Construction and Operation Requirements

(1) Loading Issue

13. The Bureau proposes adverse findings and conclusions against Kay under the so-called "loading" issue only as to Kay's conventional channels. There are no loading "requirements" *per se* for conventional UHF channels. Unlike trunked systems that might be subject to certain loading schedules, periodic loading reporting, and channel recovery procedures, *see* 47 C.F.R. § 90.631 (1994),⁴ loading on conventional channels becomes an issue only in specified application processing contexts. For example, an applicant for a conventional channel may, depending of the circumstances, be required to demonstrate that any existing systems licensed to him in the same area and in the same frequency band are loaded. *E.g.*, 47 C.F.R. §§ 90.313(c), 90.623(d), & 90.633(e). Thus, a determination of whether a conventional channel licensee has violated "loading" rules requires much more than a simplistic snapshot comparison of authorized mobile units versus current actual loading count. It requires, rather, a demonstration that an applicant filed a particular application that required loading which the

³ *See Petition for Extraordinary Relief* filed by Kay on June 12, 1998, in WT Docket No. 94-147 (in particular Section II.D, pages 35-45), and *Revised Request for Inquiry and Investigation* filed by Marc D. Sobel on February 27, 1998, in WT Docket No. 97-56 (in particular Section IV, pages 30-38).

⁴ Kay does not concede that all aspects of Section 90.631 are applicable to the particular trunked systems licensed to Kay, but this is a moot point in that the Bureau has not presented evidence supporting (and has not urged) an adverse determination against Kay under the loading issue as to his trunked systems.

applicant did not, at the time of the application, have. The Bureau, of course, has not so demonstrated.⁵

14. Channels below 470 MHz are not assigned on an exclusive basis, regardless of loading, and are not subject to any sort of loading requirements. Accordingly, the Bureau's inclusion of Kay's stations operating below 470 MHz in its loading analysis⁶ was improper and inapposite. As to Business Radio Service stations operating in the 470-512 MHz band, there is only a *maximum* loading limit, in that no more than 90 mobile units will be authorized on a given channel in a given service area. 47 C.F.R. § 90.313(a)(3) (1994). The Bureau has not demonstrated, or even alleged, that Kay exceeded the maximum loading level.

15. For 800 MHz Conventional SMR stations, an existing licensee typically may only receive authorization for an additional channel in the same service area if loading on the existing channel is at least 70 units. 47 C.F.R. § 90.633(e) (1994). It is important to understand that this loading requirement applies to the channel as a whole, not any one particular licensee. Accordingly, to determine whether an existing licensee is eligible for an additional channel it is necessary to examine the loading of all licensees sharing that channel, not simply the loading of the applicant.

16. The Bureau has not demonstrated that Kay ever submitted any application which triggered Section 90.633(c) of the rules for which he was not adequately loaded at the time. The Bureau instead complains about Kay's lack of historical loading records. The Bureau

⁵ Instead, the Bureau engages in hyperbole: "Despite the fact that [Kay] operates hundreds of sites subject to loading requirements, he kept no record of which mobile units were operating on each call sign." *WTB PF&C* at ¶ 44. Actually, *none* of Kay's "sites" are subject to loading requirements (which works out to a few less than "hundreds"), although *some* of his applications may have been.

⁶ WNQK532, WNQK959, WNXC713, WNZL447, WPBX246, WPBX247, and WPEE253. *WTB PF&C* at ¶¶ 48, 90-91, 94, 96-96, 99.

erroneously states: “[T]he record evidence demonstrates that Kay did not have the ability to accurately determine or report his loading to the Commission.” *WTB PF&C* at ¶ 234. Elsewhere the Bureau falsely asserted: “The evidence ... indicates that Kay did not have a means of accurately counting his loading to determine his eligibility” *Id.* at ¶ 216.⁷ The record shows no such thing. As to any particular application as to which specific loading requirements might be applicable, Kay would have been able to provide current loading information if the Commission requested it. For example, if the Commission had at any time requested the loading on a particular conventional, Kay could first check his billing system, then examine his paper records, and, if necessary, collect relevant information from additional sources, *e.g.*, determining from dealers how many units are active on the system. But to collect historical information on an across-the-board basis for more than 150 calls signs, many of them involving multiple channels and/or multiple base station sites, was virtually impossible.⁸

17. Moreover, in evaluating Kay’s loading, the Bureau improperly limits its analysis solely and exclusively to Kay’s computer billing records, even though the evidence shows that they were not kept primarily for loading information and do not present a complete or accurate picture of the system loading.⁹ The rules do not specify any particular form for loading records—

⁷ The Bureau went on to assert that Kay “avoided scrutiny of his loading by filing applications in the name of surrogates, and wholly owned corporations.” *Id.* at ¶ 217. The Bureau is apparently referring to the applications it discusses under the Abuse of Process Issue. But in no case has the Bureau demonstrated, as to any one of these applications, that Kay was ineligible to apply for the same facilities in his own name, or that Kay’s involvement with the application was concealed in any way from the Commission.

⁸ The Commission does not have the investigatory authority “to require [licensees] to bare their records, relevant or irrelevant, in the hope that something will turn up.” *Stahlman v. FCC*, 126 F.2d 124, 128 (D.C. Cir. 1942).

⁹ Kay explained at hearing the many reasons why the computer billing records will not give a full or accurate picture. For example, due to limitations in earlier versions of the billing software, a customer who has access to four mountain top repeaters might only show in the billing records as having access to two. *E.g.*, Tr. 1074-1075.

indeed, the Commission does not expressly require loading records at all, but rather states that it will evaluate loading based on the licensees “business records.” Kay’s computerized billing records tell only part of the story. There are also the paper files for each customer which include more detailed information that will also be informative as to system loading.¹⁰ Although these were among the 36,000 documents produced by Kay in discovery, the Bureau chooses instead to myopically focus solely and exclusively on the computerized billing records. The Bureau does not get to dictate which of Kay’s business records will count for loading purposes and which do not.¹¹ If the Bureau wishes to do that, it must have the Commission amend the rules to specifically specify what records will count and how they are to be maintained. But there is no such rule, and it is therefore entirely improper for the Bureau to limit its examination solely to business records that admittedly do not tell the full story.

18. In addition to idiosyncrasies in the way the billing records themselves are kept (thus requiring comparison to the paper files to determine completeness and accuracy), the

¹⁰ One example of how review of the customer’s paper files (which are also part of Kay’s business records and therefore may be used to establish loading) can be used to clarify specific questions is the situation with Yale Chase Materials Handling, a Kay repeater customer. When confronted with a specific question in a Bureau exhibit suggesting a possible discrepancy as to their number of mobiles, Kay was able to go to that specific customer file and resolve the matter. Tr. 2499-2503. Had the 308(b) Request asked Kay to justify loading for a specific station or even for a manageable group of stations, he could have engaged in a similar analysis and presented loading information supported by these customer records. But the 308(b) Request asked him for the complete loading of all his authorizations—without regard to whether they were subject to any loading requirements. This was, at best, an improper fishing expedition and, at worst, an *ultra vires* witch hunt. See footnote 8, *supra*.

¹¹ The Bureau disputes Kay’s assertion that the 36,000 documents produced in discovery are essentially the same documents that would have been required to answer the 308(b) Request, retorting that the Bureau only sought a “list” of Kay’s customers. *WTB PF&C* at ¶ 43. This is not true. The 308(b) Request sought a report of which customers were using which stations. Because of the limitations on Kay’s billing system—which was neither designed nor used to maintain loading records for regulatory purposes—the paper files and other records would also have been required.

billing records did not include information about loaners and demo units, rental units, or the extensive use of Kay's system by other radio shops and dealers. The Bureau's objection that nothing other than the billing records may be considered because the billing records are what Kay produced when ordered by Judge Sippel to produce loading records, *WTB PF&C* at n.22, is way off base. When he produced this information, Kay expressly disclosed these limitations, stating:

Kay's records do not reflect Kay's own shop use, nor records of other users in other shops who used radios at no charge, and these records do not include rentals, demos and loaners, because none of these records resulted in customer billing for repeater services, even though use of the repeaters did occur.

WTB Ex. 19 at p. 2.¹² Moreover, in addition to the billing information, Kay also produced 36,000 documents including his paper files for each repeater customer.

19. Unable to demonstrate that Kay lacked eligibility as to any particular application or that he was not properly loaded in the context of any application requiring it, the Bureau has attempted to come in the back door by arguing that Kay should have amended his authorizations to reflect changes in loading. The Bureau's contention is that as to a number of Kay's stations, the billing records, as of 1995, in many cases reflect less units than are authorized for the system. According to the Bureau, Kay was required by Section 90.135(a)(5) of the Rules, as in effect at the time of designation, 47 C.F.R. § 90.135(a)(5) (1994), to amend the authorizations for these stations to reduce the number of authorized mobiles. *WTB PF&C* ¶¶ 231-238.

20. Kay respectfully submits that Section 90.135(a)(5) of the Rules does not require an immediate amendment each and every time there is a change in the loading on a station used to provide commercial service to public customers. It is to be expected that the actual loading

¹² This was way back in 1995. The Bureau had more than ample opportunity to conduct further discovery to test these assertions, but chose not to do so.

count for a commercial service provider (*i.e.*, a private carrier licensee in the 470-512 MHz band and/or an SMR licensee in the 800 MHz band) will go up and down over any particular period of time. For example, let us assume a given UHF channel is loaded to 90 units, and a customer who is using 25 of those units cancels service. The Bureau certainly can not expect the operator to immediately amend its license down to 65 units, only to then be unable to accommodate the customer who comes in a month or two later requiring new service for 25 units. Surely there is some reasonable allowance for the normal ebb and flow of business.

21. A careful search of reported cases indicates that the Commission has never directly addressed the question of how soon after a change in actual loading a commercial operator must amend, assuming the applicability of 90.135(a)(5). But Kay respectfully submits that Section 90.157 of the Commission's Rules already provides the solution to this dilemma.

That rule provides:

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

47 C.F.R. § 90.157 (1998). Thus, by applying this rule, a commercial operator should be required to amend its authorization (in cases where 90.135 is applicable) if the drop in the actual mobile count is permanent. If the drop is temporary, which is typical of commercial service providers, the licensee would only be required to amend after one year.¹³ Any other interpretation leads to

¹³ The Bureau concedes that this rule can and does operate to cancel only part of an authorization. *See WTB PF&C* at ¶¶ 241-242. The Bureau there explains that Section 90.157 can operate to cancel a base station portion of a license but not the mobile portion of the license. So there is nothing remarkable about suggesting that Section 90.157 can and does operate to automatically cancel the authorization for some or all of the mobiles on a license.

the absurd result that immediate amendment is required for the temporary loss of a few units, but the entire station could be shut down for up to a year without any amendment.

22. Accordingly, assuming *arguendo* that an obligation to amend a particular authorization to reflect changes in actual loading count applies, a showing that Kay has violated it would require a demonstration that his mobile count *permanently* fell below some relevant level. It should be noted that the numbers relied upon by the Bureau are from 1995, less than a year after a devastating earthquake, during a time of general downturn in the Los Angeles local economy, and at a time when Kay was overwhelmed with legal and regulatory problems. It would not be remarkable to discover that Kay's loading might be "off" at this time—but that is hardly a showing that he had permanently discontinued service to the authorized number of mobiles. The record supports Kay's contention that at all relevant times he had on hand an adequate number of radios to cover his loading requirement. Kay respectfully submits that the rules do not require that each one of those radios be in service continuously at all times.

23. The Bureau's disregard of the facts in its zeal to smear Kay often goes beyond the bounds of aggressive advocacy and crosses the line into gross impropriety. An example is paragraph 235 of the Bureau's proposed findings and conclusions. There the Bureau asserts that Kay maintains exclusivity with respect to station WIL659, a UHF station authorized for 90 units, even though Kay admits he never constructed the repeater. The Bureau then states: "Kay's conduct is an egregious example of the channel hoarding that violates Section 90.633 of the Commission's Rules." *WTB PF&C* at ¶ 235.¹⁴ Had the Bureau simply taken the time to review its own licensing records, however, it would have discovered that the authorization for Station

¹⁴ Section 90.633 of the Rules does not even apply to UHF stations (it is applicable only to 800 and 900 MHz stations), so Kay's conduct with respect to Station WIL659 (a UHF station) could not possibly be considered a violation of this rule.

WIL659 had little, if any, impact on the availability of 471.9125 MHz (the applicable channel) at the authorized location. Station WIJ644 was already authorized to serve 84 units at Oat Mountain, less than 40 miles from the South Mountain location of WIL659.¹⁵ Thus, the maximum number of units that could have been authorized to any other licensee at that location would have been 6 units, hardly the “egregious example” of “hoarding” 90 units the Bureau improperly suggests.¹⁶

(2) Non-Construction and Permanent Discontinuance of Stations

24. The Bureau has suggested that “[t]he Presiding Judge may simply wish to conclude [certain] base stations were either not constructed or [permanently] discontinued operation ... and direct the Commission licensing staff to perform the appropriate licensing maintenance.” *WTB PF&C* at n.23. This is consistent with Kay’s offer “to cooperate with the Bureau, after the hearing, to determine which authorizations, if any, should be purged from the Commission’s database as a result of this stipulation.” *Kay PF&C* at n.27. The parties seem to be in agreement, therefore, that this is an administrative housekeeping chore that can be better

¹⁵ The Presiding Judge may take official notice of the fact that Station WIJ644 is authorized for a total of 84 units at Mount Lukens and Oat Mountain. Because these two locations are within 40 miles of one another, the full 84 count applies at both locations. Oat Mountain is less than 40 miles from South Mountain, the site specified in WIL659. Thus, even in the absence of WIL644, only 6 units, at most, were potentially available on this channel at South Mountain.

¹⁶ Moreover, the history of Kay’s authorization for WIL659 hardly paints a picture of hoarding. Kay applied for the authorization prior to the Northridge earthquake and before receiving the 308(b) Request. Commission records will reflect that the authorization was granted on March 15, 1994. This authorization was subject to an eight month construction deadline, requiring completion by November 15, 1994. By that time, the combination of the aftermath of the earthquake, a general downturn in the Los Angeles local economy, and ongoing legal and regulatory proceedings (including the 308(b) Request), combined to prevent Kay from implementing the planned facility. While Kay arguably should have promptly surrendered the authorization at that time, he in fact did advise the Bureau in March of 1995 that the station was not in operation.

accomplished on an informal basis in a post-hearing context, and Kay therefore urges the Presiding Judge to so direct.

25. It is respectfully requested, however, that the Presiding Judge specifically direct the Bureau staff to coordinate this matter with Kay, *i.e.*, this should be a joint and cooperative determination, not a unilateral determination of the Bureau staff. The Commission staff, of course, will ultimately make the determination and act accordingly, but it would be an inefficient use of public and private resources to have the Bureau act unilaterally only to have Kay then seek reconsideration of one or more of its determinations and actions. Kay is confident that, in a post-hearing context, the parties can come to a mutual understanding as to most, if not all, of the affected authorizations.

26. Notwithstanding the foregoing, and out of an abundance of caution, Kay is compelled to respond to and clarify some representations made by the Bureau under this issue. The Bureau lists a number of UHF repeaters which Kay has admitted are not in operation. *WTB PF&C* at ¶ 107. It should be clarified that in most cases it is not the entire station authorized under the call sign that is not in operation, but only certain parts thereof. A single authorization may, in addition to one or more base station locations, also authorize control stations, mobile and talk-around authority, etc. In reviewing the list set forth by the Bureau in paragraph 107 of its proposed findings, Kay notes that the vast majority of the locations listed are designated as Signal Hill. In April 1994 Kay submitted an application to modify a large number of his UHF authorizations, and part of that proposal was to delete all the base stations authorized at Signal Hill. That application is still pending before the Bureau to this day, more than five years later. *See Kay Ex. 65; Tr. 2383-2394.* Of the remaining listed locations, a reference to the authorizations themselves will reveal that the vast majority of these are control stations, not base

stations. As such they are not subject to construction deadlines, and the maintenance of that particular portion of an authorization does not have any preclusive effect on other licensees and applicants. In any event, most if not all of these items would be deleted if long-pending modification applications are granted.¹⁷

27. Similarly, the Bureau lists a number of 800 MHz stations which Kay has admitted are not in operation. *WTB PF&C* at ¶ 108. A reference to the authorizations in question will reveal that each of these is a secondary base station site. At 800 MHz, a licensee may be authorized for both primary and secondary locations on the same authorization. While primary sites are subject to applicable construction deadlines, Secondary sites are not subject to construction deadlines and are not protected from interference.¹⁸ Secondary sites have no preclusive effect on other licensees and applicants. Automatic cancellation of authority for a secondary site would have no significant regulatory effect as a practical matter, because the site could be added back to the authorization at any time, subject to the restrictions applicable to all secondary sites.¹⁹

¹⁷ In many, if not most, of these instances, the Bureau is attempting to sanction Kay for situations that exist only because the Bureau is maintaining a five year old freeze on the processing of any of Kay's applications. In effect, the Bureau has chained Kay's car down in a thirty-minute parking zone, and then comes by every hour and writes a parking ticket.

¹⁸ See, e.g., *Sharon Mutter*, 4 F.C.C.R. 2654 at n.18 & n.19 (PRB 1989); *Environmental Exploration Corp.*, 4 F.C.C.R. 2651 at n.16 & n.17 (PRB 1989). See also, D. Fertig, *Specialized Mobile Radio* at p. 15 n.19 (published February 1991 by the Private Radio Bureau's Policy and Planning Branch).

¹⁹ For the record, Kay disagrees with the Bureau's assertion that the automatic cancellation provisions operate significantly differently for 800 MHz SMR stations than they do for 470-512 MHz private carrier stations. *WTB PF&C* at ¶¶ 241-242. However, insofar as Kay does not have any 800 MHz primary sites implicated under Section 90.157 that are in dispute, the disagreement is not relevant to a resolution of this proceeding.

D. Willful and Malicious Interference Issue

28. The Bureau has recommended resolution of this issue in Kay's favor. Without conceding the accuracy or propriety of the various proposed findings and conclusions offered under this issue by the Bureau,²⁰ Kay will not address the matter further.

E. Abuse of Process Issue

29. The Bureau asserts that Kay abused the Commission process "by submitting applications for end user licenses in the names of individuals who had no *bona fide* intention of using radios." *WTB PF&C* at ¶ 250. Specifically, the Bureau claims: "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 radios, these individuals, who were employees of Kay, had no intention of using radios in these alleged businesses." *Id.* at 253. The Bureau's theory is that Kay did this as part of a scheme to "warehouse" spectrum so that he would have capacity to serve future users. *Id.* at ¶¶ 251-252.²¹

30. Kay will not repeat here the extensive factual basis in the record for his belief that each of these individuals either were engaged in or intended to engage in pursuits beyond the scope of their employment by Kay in which they desired to use Kay's radios and repeaters. *See Kay PF&C* at ¶¶ 102-104, 111, 122. In these circumstances, prior to October of 1992, it would

²⁰ Kay expressly reserves the right to dispute the Bureau's inaccurate factual analysis and erroneous legal interpretation should this matter be pursued in another enforcement venue.

²¹ The Bureau thus makes inconsistent arguments. Here, in furtherance of its charge of abuse of process, it asserts that Kay was in such dire need of excess capacity that he had to file bogus applications to make certain he would be able to serve users. Under the loading issue, however, the Bureau argues that Kay had dozens upon dozens of unloaded repeaters (and, hence, excess capacity). The Bureau can not have it both ways, and has not met its burden of proving either theory.

have been unlawful for Kay to have permitted these individuals to operate radios on his system for their own outside pursuits unless such operations were licensed.

31. The credibility of the witnesses against Kay on this issue is questionable. Both Hessman and Jensen were found to have made misrepresentations under oath before the Office of Appeals of the California Unemployment Insurance Appeals Board regarding the circumstances of their discharge from Kay's employ. Cordaro tells inconsistent stories. At hearing he denied having obtained an authorization in pursuit of an independent business activity; but in 1992 he signed and submitted to the Commission a declaration, under penalty of perjury, attesting to the opposite. WTB Ex. 351 at pp. 2 & 5. Also, the evidence adduced indicates that Cordaro further misrepresented to the Bureau during the investigation, to Kay during discovery, and to the Presiding Judge and the Commission during the hearing regarding the facts and circumstances surrounding computer files he removed from Kay's system. All three of these men have reason to dislike Kay and are clearly biased against him. Their testimony can not be taken at face value.²²

²² There is also reason to question the reliability, if not the credibility, of Carla Pfeifer. She purports to have vague and incomplete recollections about events that allegedly occurred ten plus years ago. She questions whether her signature on various documents is genuine, even though (a) the documents were all in her possession until such time as they were turned over to FCC investigators, and (b) she has no idea of who might have signed them. She acknowledged that she acquired the station as a business opportunity, but then she claims to have agreed to assign the license without any information or understanding of what the terms of the assignment were to be; indeed, she was not even aware until she was cross-examined at the hearing that the assignment had in fact been granted years ago. It is questionable whether Ms. Pfeifer's testimony is good for anything, but it is certainly not adequate to sustain the Bureau's burden of proof. The Bureau has failed, in any event, to show that Kay would have had any motive for using Pfeifer as an application shill. *See*, paragraph 35, below.

32. The Bureau attempts to negate the findings that Jensen and Hessman misrepresented facts in their unemployment hearings, by accusing Kay of similar misconduct. The Bureau claims:

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 toward 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).

WTB PF&C at ¶ 262. This desperate attempt by the Bureau to manufacture a misrepresentation by Kay is a blatant and inexcusable distortion of Kay's testimony. The reasons relied upon by Kay at the unemployment hearing were true and legitimate. The fact that Kay also had another reason for wanting to discharge Hessman—the one he could not absolutely prove—does not make the reason on which he did rely untrue or any less legitimate. Kay testified in this hearing as follows:

[Hessman] very nicely gave me a justifiable firing by his actions, so he was fired *both* for what he did that I could not prove and for something he conveniently gave me that I could prove and did prove, and I fired him.

Tr. 1294. If the Bureau believes that Kay did not fire Hessman for the reasons stated by Kay at the unemployment hearing, then it was incumbent upon the Bureau to present evidence supporting that contention. But for the Bureau to sit back, offer no evidence, and then proceed to misrepresent the evidence in its proposed findings and conclusions is despicable and reprehensible. Unfortunately, Kay is not permitted to challenge the character qualifications of the Bureau.

33. Amazingly, the Bureau is charging Kay with preparing and filing false applications, but in many cases it has not even bothered to place copies of the applications in evidence. In the cases of Jensen and Cordaro, for example, the Bureau offered only copies of the

resulting licenses, but Kay forthrightly admitted that he probably prepared or assisted in the preparation of the applications. There is no evidence that Kay in any way concealed his involvement. In the Roy Jensen end user application, for example, Kay's name and the call sign of Kay's associated station were handwritten (most likely by Kay) on the application. WTB Ex. 306 at p. 3. And the contact phone number provided at two different places on the application is a business number that rings at Kay's offices. WTB Ex. 306 at p. 1.

34. The Bureau further charges that Kay abused Commission process "by using the names of others to apply for additional frequencies for himself." *WTB PF&C* at ¶ 254. In this connection the Bureau is referring principally to the base station licenses held by Carla Pfeifer, Vincent Cordaro, Jerry Gales, and Marc Sobel. As the Bureau correctly notes, "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." *Id.*, quoting *Trinity Broadcasting of Florida, Inc.*, 10 F.C.C.R.12020, 12060 (ALJ 1999). But the Bureau has not met its burden of proving that Kay did any such thing. The Bureau has presented absolutely no evidence or other showing that Kay was ineligible to hold the licenses in question, and the Bureau has offered no evidence showing that Kay in any way acted to conceal his involvement in the applications; indeed, in many instances Kay's name and telephone number was provided in the applications as the contact person and the one who prepared the application.

35. Kay explicitly testified that he could have easily applied, in his own name, for the Castro Peak license held by Carla Pfeifer had he so desired, Tr. 2432-2433, and the Bureau has not contradicted this. The record indicates that most, if not all, of the management agreement station licenses held by Marc Sobel were, at the time he obtained them, on encumbered channels. *E.g.*, WTB Ex. 229 at pp. 198-199. The Bureau has not disputed this. Kay demonstrated that, if

he had desired to apply in his own name for the Rasnow Peak authorization held by Cordaro, he would have been able to do so by simply demonstrating a need for only 9 mobile units, based on an analysis of the loading environment on the channel at that time. Tr. 2479-2483. The Bureau has not disputed this.²³ Kay explained that he was adept at obtaining licenses on encumbered channels in his own name in circumstances where there were existing users already on the channel. *E.g.*, *Kay PF&C* at ¶ 100.

36. Abuse of process, especially the particular manifestation of it alleged here, is a very serious charge. It can not be supported by mere speculation. It was incumbent upon the Bureau to prove that Kay did the acts it alleges. The Bureau can not even make out a case that Kay had any motive to do the things alleged—the Bureau can only offer the general and hypothetical tutorial on how an unscrupulous SMR operator might use sham applications to his benefit. This does not satisfy the Bureau’s evidentiary burdens, and it certainly does not support the draconian sanction of license revocation.

F. Unauthorized Transfer of Control Issue

37. Kay will not belabor matters by responding to each aspect of the Bureau’s contention that the arrangement between Kay and Marc Sobel constitutes an unauthorized transfer of control. Kay has adequately addressed this issue and stands on his previous factual showings and legal arguments in this regard. *Kay PF&C* at ¶¶ 150-175, 227-236.

²³ While there was no evidence offered at trial, the Presiding Judge may also take official notice of the fact that the authorization held by Jerry Gales, Call Sign WFFF295 at Heaps Peak, is co-channel to and short-spaced with Trunked SMR Station WNPJ874 operated by Kay at Mount Lukens. Heaps Peak, being only 65 miles from Mount Lukens, is well within the 105 mile protection area for Station WNPJ874. Accordingly, there would have been no need for Kay to have used Jerry Gales as a shill if he wanted to apply for this channel in his own name at Heaps Peak.

G. Misrepresentation and Lack of Candor Issue

38. The Bureau contends that Kay misrepresented facts and lacked candor in the “*Motion to Enlarge, Change, or Delete Issues*” submitted in this proceeding in January of 1995 because he) did not disclose therein full details regarding his business relationship with Marc Sobel, and he affirmatively misrepresented that he had no “interest” in Sobel’s stations and that Sobel was not an “employee” of Kay. This issue has already been addressed extensively in Kay’s proposed findings and conclusions. *Kay PF&C* at ¶¶ 176-179, 237-245. Kay must nonetheless respond to a few key aspects of the Bureau’s presentation on this issue.

39. The *HDO* in this proceeding initially contained an error based on a misunderstanding by the Commission of the pertinent facts. The Commission stated in the *HDO*: “Information available to the Commission also indicates that James A. Kay, Jr. may have conducted business under a number of names. Kay could use multiple names to thwart our channel sharing and recovery provisions We believe these names include some or all of the following: Air Wave Communications [and] Marc Sobel dba Airwave Communications.” *Kay HDO*, 10 FCC Rcd at ¶ 3.²⁴ The *HDO* did not state that the Commission was inquiring into the relationship between Sobel and Kay, but rather the Commission erroneously believed Sobel was a fictitious name being used by Kay. It was this error that Kay sought to correct through the January 1995 pleading, and the statements made therein must be understood in that context.

40. When Kay submitted the pleading, his mind was not focused on the specifics of the management agreement, nor was it focused on whether the arrangements by which he

²⁴ Some of the other names listed were in fact trade names used by Kay or entities owned by Kay and through which he did business, *e.g.*, Buddy Corp., Southland Communications, and Oat Trunking. It is clear from the context that the Commission considered *all* of the listed names, including Sobel, to be Kay aliases or companies owned by Kay.

manages stations of other licensees constituted unauthorized transfers of control.²⁵ His mind was focused on correcting the erroneous listing of several of Sobel's call signs as being stations licensed to Kay. That was the purpose of the filing, and what Kay intended when he submitted the January 1995 pleading must be understood in that context.

41. The Bureau's contention is that Kay had an affirmative duty to disclose the management agreement when he submitted the January 1995 pleading, and that Kay intended by the pleading to conceal the fact of the management agreements from the Commission. But this position can not be reconciled with the record in this proceeding for a number of reasons.

42. First, the vast majority of the management agreement stations were not even affected by the *HDO*. Fourteen out of the sixteen management agreement stations were *not* listed in the *HDO*. Compare *HDO*, Appendix A, items 154-164, and WTB Ex. 341 pp. 1 & 837. Nine of the eleven Sobel call signs erroneously listed in the *HDO* were *not* subject to the management agreement and had no connection to Kay whatsoever. *Id.* In short, the managed stations were not the focus of the *HDO* or of the January 1995 pleading.²⁶

43. Second, the actions of Sobel and Kay are inconsistent with an intent on their part to conceal the management agreement from the Commission. Sobel and Kay happily operated under an oral agreement for at least two years before the written agreement was executed. It was only after Sobel saw an advance draft of the *HDO* and learned that the Commission was operating under the false impression that Sobel was a mere fictitious alias being used by Kay that he insisted on having the management arrangement reduced to writing. If it had been the

²⁵ Indeed, only a few months earlier, his attorneys had provided him with their standard form SMR management agreement which he was assured met all FCC requirements.

²⁶ Indeed, the entire matter of removing the erroneously included Sobel call signs was a minor part of the January 1995 pleading. Only one paragraph in the sixteen page pleading was devoted to this matter. WTB Ex. 343.

intention of Kay and Sobel to conceal their business arrangement, they certainly would not have put it in writing at a time when they both knew Kay's affairs were being intensely investigated.

44. Third, only three months after the January 1995 pleading, Kay produced copies of agreements for stations he managed, including the Sobel management agreement. *Kay's Responses to Wireless Telecommunications Bureau's First Request for Documents* (March 24, 1995). The Bureau has suggested that Kay would not have produced the Sobel management agreement if the January 1995 pleading had been successful, but the facts do not support this speculation. As earlier explained, the vast majority of the management agreement stations were not affected by the January 1995 pleading, and the vast majority of the stations that were the subject of that pleading were not subject to the management agreement. In the March 1995 discovery response, Kay produced other management agreements that had no relevance to the January 1995 pleading and that were not expressly implicated in the *HDO*. For example, it was by virtue of this discovery production that the Bureau received a copy of the management agreement between Kay and Jerry Gales. WTB Ex. 326.

45. The *sine qua non* of disqualifying misrepresentation or lack of candor is a fraudulent or deceptive intent. *Leflore Broadcasting v. FCC*, 636 F.2d 454, 461 (D.C. Cir. 1980); *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179, 1196, 59 Rad. Reg. 2d (P&F) 801 (1986); *Fox River Broadcasting, Inc.*, 93 F.C.C.2d 127, 129, 53 Rad. Reg. 2d (P&F) 44 (1983). In a futile effort to compensate for its failure to establish the crucial element, the Bureau places far too much reliance on semantic disputation of the meaning of the words "interest" or "employee" or "station".

46. Kay believes that when his attorneys wrote in the pleading that he had no "interest" in Sobel's licenses, they meant that "James Kay does not have a legal interest, an

ownership interest, in the licenses held by Marc Sobel.” Tr. 1301. Kay understood the language denying an interest in Sobel’s licenses or stations to mean that Kay “had no ownership interest as in owning a part of this, being a partner, in any licenses that were issued to Marc Sobel.”

Tr. 2444. Kay, in his mind, clearly distinguishes between the repeater equipment (which is fungible and interchangeable) and the station license, and the record shows that when he made statements regarding having an “interest” in a station or “operating a station he was referring to stations licensed to him in his name. Kay did not consider his contribution of equipment to be used in the station to confer on him an interest in the license itself.

47. As Kay explained, he viewed the essence of the business relationship in a managed station to be very similar to that applicable to community repeater stations for which he provided equipment and services. He thus did not consider his provision of equipment and services in connection with a managed station to give him an interest in that station license, any more than he considers his provision of equipment and services to a community repeater to give him an interest in the licenses held by the users of the community repeater. Tr. 937-939; *see also*, *Kay PF&C* at ¶ 239 & n.42.

48. The Bureau further contends that Kay lacked candor because the January 1995 pleading stated that Sobel was not an “employee” of Kay. According to the Bureau’s interpretation, Kay “employed” Sobel’s services as an independent contractor, therefore rendering the statement false. Absent from the record, however, is any indication that Kay intended to mislead the Commission or to conceal information. Kay is a businessman. When business people use the term “employee” they naturally assume the literal Internal Revenue Service meaning of the term. This distinction has very important legal consequences, *e.g.*, whether income taxes and social security must be withheld from payments, whether workman's

compensation regulations apply, *etc.* It is only natural, therefore, that when an entrepreneur uses the word "employee," he means it in this literal sense. The record is clear that Sobel is a separate and distinct business entity from Kay. Sobel maintains his own business office to which Kay does not have access. Sobel provides, markets, contracts, and bills for his own UHF repeater services, with no involvement from Kay. Sobel's provision of services as an independent contractor is not limited to Kay, but extends to other Los Angeles area mobile radio system operators as well. The statement that Sobel is not an "employee" of Kay is accurate and entirely reasonable.

49. In its proposed findings and conclusions the Bureau ignores the record in the proceeding, and instead attempts to impose on Mr. Kay the particular meanings of these words "employee" and "interest" selected by the Bureau from a dictionary. *E.g.*, *WTB PF&C* at ¶¶ 286 & 287 n.28. The Court of Appeals has made clear, however, that a finding of intent to deceive can not be based on a selective choice by the Commission from among a number of different possible meanings of a particular word. *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 356-357, 11 Communications Reg. (P&F) 1186 (D.C. Cir. 1998) (Section III of opinion).²⁷

50. Finally, the Bureau simply ignores a very compelling reason to conclude that Kay did not intend to conceal information from or misrepresent facts to the Commission in the January 1995 pleading, namely, his reasonable reliance on counsel. This point should not be

²⁷ The same analysis applies to the Bureau's attempt to impose on Kay's intention a regulatory definition of the word "station". The Bureau contends that Section 2.1(c) of the Rules defines "station" to include "equipment," and on that basis challenges Kay's statement that he did not have an "interest" in Sobel's stations even though he owned the repeater equipment. But at issue in this proceeding is not a determination of the correct technical definition of the word "station" for regulatory purposes, but rather what Kay intended when he used the word. The regulatory definition is not instructive as to Kay's intention in making the January 1995 statement.

misunderstood. The question is not whether misconduct should be excused because of reliance on advice of counsel; rather, in this case the advice and actions of counsel provide independent evidence negating an intent to conceal or deceive. The essence of the lack of candor and misrepresentation issue is that the January 1995 pleading includes statements that are inconsistent with the management agreement. Kay's former attorneys drafted both of these documents within months of one another. Brown & Schwaninger drafted the management agreement that Sobel and Kay executed in October 1994 and re-executed in December 1995. Brown & Schwaninger also wrote the January 1995 pleading and the verifying affidavit that Kay, at their request, executed in January 1995, less than a month after re-executing the agreement. It was certainly reasonable for Kay to assume that his own legal counsel would not ask him to sign, under oath, a statement that was factually at odds with another document the same attorneys had also prepared for his signature. Indeed, a finding of deceptive intent would require the fantastic conclusion that Kay's own legal counsel knowingly asked him to commit perjury, and the Bureau has presented absolutely no evidence to that effect.

H. Conclusion

51. In view of the foregoing, Kay respectfully submits that all issues, should be resolved in his favor.

Respectfully submitted this 1st day of June, 1999

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CERTIFICATE OF SERVICE

I, Robert J. Keller, counsel for James A. Kay, Jr., hereby certify that on this 1st day of June, 1999, I caused copies of the foregoing **KAY'S REPLY TO THE WIRELESS TELECOMMUNICATIONS BUREAU'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** to served, by hand delivery (except as otherwise indicated) on the officials and parties in WT Docket No. 94-147, as follows:

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