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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of)
)
JAMES A. KAY, JR.)
)
Licensee of 152 Part 90 Stations in the)
Los Angeles, California Area)

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FEDERAL COMMUNICATIONS COMMISSION
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To: The Commission

WIRELESS TELECOMMUNICATIONS BUREAU'S
EXCEPTIONS AND BRIEF

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SUMMARY

The *Initial Decision (I.D.)* in this proceeding must be reversed because it ignores critical record evidence, relies on evidence not in the record, and is inconsistent with both precedent and prior Commission rulings in this case. The record amply demonstrates in this proceeding that without any justification, James A. Kay, Jr. (Kay) refused to comply with the staff's legitimate request for information. Kay also blatantly failed to comply with the Commission's channel-sharing requirements, abused the Commission's processes by filing applications in the name of others, and misrepresented facts and lacked candor. Such behavior shows that he is not qualified to remain a Commission licensee.

In concluding that the Commission's Section 308(b) inquiry letter was an unlawful "fishing expedition," the *I.D.* reaches conclusions that were outside the scope of the designated issues, acted inconsistently with the Commission's ruling that the Commission's investigation of Kay was justified, mischaracterized what the letter requested, and ignored Commission precedent which shows that Commission's staff has wide latitude to conduct investigations. Moreover, in accepting Kay's excuses that he did not provide information because of the Northridge earthquake and Kay's concerns as to whether the Bureau would keep information confidential, the *I.D.* fails to consider record evidence that (a) despite a claim of inconvenience, Kay never explained prior to designation for hearing that the Northridge earthquake prevented him from providing the required information, (b) Kay continued to refuse to provide the information even months after the earthquake, and (c) the Commission gave repeated assurances to Kay that the information would be kept confidential.

In resolving the issue concerning Kay's compliance with Sections 90.313 and 90.633 of the Rules (the loading/channel sharing issue) in Kay's favor, the *I.D.* fails to recognize that land mobile licensees must share channels. It therefore fails to consider evidence that Kay had *thousands* fewer mobiles than he needed to justify the licenses he held and that Kay was therefore required to share those channels. The *I.D.* also erroneously applies to conventional stations a standard that only applies to trunked stations. Finally, the *I.D.* also ignores the

Commission's holdings that licensees must substantiate their loading when directed by the Commission.

The *I.D.* erroneously resolved the abuse of process issue in Kay's favor. The *I.D.* ignores the fact that four witnesses independently testified that Kay filed applications in their names when they had no interest in providing or receiving land mobile service. The *I.D.* also fails to consider the total lack of any justification for the number of mobile units requested in the end user applications at issue and that the named licensees of the stations Kay "managed" had next to no involvement in running their stations. The *I.D.* also improperly held that the Bureau was required to prove a motive for Kay's misconduct, when the fact that Kay filed applications in the name of others is sufficient to show the existence of abuse of process.

The *I.D.*'s resolution of the Sobel issues in Kay's favor is directly inconsistent with Judge Frysiak's resolution of similar issues in WT Docket No. 97-56. The *I.D.*'s attempt to collaterally attack Judge Frysiak's decision by claiming that the Bureau hid information from Judge Frysiak is patently unsupportable and procedurally improper. The *I.D.* ignored Commission precedent in analyzing Kay's *de facto* control of stations licensed to Marc Sobel. The *I.D.* also ignores evidence that Kay deliberately concealed his relationship with Mr. Sobel even though he knew the Commission wanted information on that relationship, as well as evidence that Kay knew the statements he was making to the Commission were false.

The record as a whole demonstrates that Kay is not qualified to remain a Commission licensee and that his licenses should be revoked.

Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
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JAMES A. KAY, JR.) WT DOCKET NO. 94-147
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Licensee of 152 Part 90 Stations in the)
Los Angeles, California Area)

To: The Commission

WIRELESS TELECOMMUNICATIONS BUREAU'S
EXCEPTIONS AND BRIEF

1. The Chief, Wireless Telecommunications Bureau, by his attorneys, now submits his exceptions to the *Initial Decision of Administrative Law Judge Joseph Chachkin*, FCC 99D-04 (released September 10, 1999) (*I.D.*). As shown below, the *I.D.* errs in its analysis of the record evidence and misapplied or ignored prevailing law. Accordingly, the *I.D.* should be reversed.

I. STATEMENT OF THE CASE

2. This case arose when the Commission received a number of complaints that James A. Kay, Jr. (Kay), a land mobile licensee, had not constructed or properly loaded his stations. The Commission requested Kay to produce relatively routine construction and loading information. Kay repeatedly refused to provide the information over the course of six months. By *Order to Show Cause, Hearing Designation Order, and Notice of Opportunity For Hearing for Forfeiture*, 10 FCC Rcd 2062 (released December 13, 1994) ("*Show Cause Order*"), the Commission commenced the instant revocation proceeding and designated eight issues. The originally designated issues *pertinent to this appeal* are:

(a) To determine whether James A. Kay, Jr. has violated Section 308(b) of the Act and/or Section 1.17 of the Commission's Rules, by failing to provide information requested in his responses to Commission inquiries;

(c) To determine if Kay has willfully or repeatedly violated any of the Commission's construction and operation requirements in violation of Sections 90.155, 90.157, 90.313, 90.623, 90.627, 90.631, and 90.633 of the Commission's Rules;

(d) To determine whether James A. Kay, Jr. has abused the Commission's

processes by filing applications in multiple names in order to avoid compliance with the Commission's channel sharing and recovery provisions in violation of Sections 90.623 and 90.629;

(g) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether James A. Kay, Jr. is qualified to remain a Commission licensee;

10 FCC Rcd at 2064-65. By *Memorandum Opinion and Order*, FCC 98M-15 (released February 2, 1998), the then-Presiding Judge (Judge Sippel) added the following issues:

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.

To determine whether in light of the evidence adduced under the aforementioned added issues whether James A. Kay, Jr. is qualified to hold a Commission license.

These issues will be referred to as the "Sobel issues," because they relate to Kay's relationship with Marc Sobel. After considerable delays, the hearing in this case was held in December 1998 and January 1999.

3. Following an evidentiary hearing, the *I.D.* found in Kay's favor on all of these issues. In so doing, the *I.D.* made numerous material errors warranting reversal. It is critical that the Commission correct these errors given the adverse impact that the *I.D.* could have on the Commission's ability to effectively enforce its rules, particularly in the land mobile services.

4. This case raises fundamental policy issues concerning the Commission's ability to enforce the Communications Act and its rules, and the Commission's willingness to take appropriate action when licensees attempt to prevent enforcement of its rules by refusing to provide information when directed by the Commission. The Commissioners have emphasized the importance of enforcement to the mission of this agency. Indeed, the Commission's strategic plan recognizes an "increase in fraudulent practices by certain providers of telecommunications

services” and emphasizes the importance of enforcement in responding “swiftly and effectively to complaints that companies are taking advantage of other companies or consumers.”¹

5. In order to properly resolve the issues, the Commission must consider its spectrum management policies for land mobile channels and how these policies are to be enforced. The *I.D.* patently fails to recognize the scheme for allocating channels and as a result does not apply the rules appropriately. Land mobile channels are normally shared by multiple licensees. The Commission uses the "units-in-use" or mobile loading criterion to allocate channels. *Amendment of Parts 21, 89, 91 and 93 of the Rules to Reflect the Availability of Land Mobile Channels in the 470-512 MHz Band in the 10 Largest Urbanized Areas of the United States*, 30 FCC 2d 221, 226-227 (1971). The Court of Appeals approved of the use of loading as the basis for channel allocation stating, “The self-regulating forces of the marketplace govern channel usage. Licensees who load their systems retain them; licensees who fail to load their systems lose them.” *P & R Temmer v FCC*, 743 F.2d 918, 931-932 (D.C. Cir. 1984).

6. In 1992, the Commission significantly deregulated the land mobile industry and made clear that it would henceforth commence enforcement actions in appropriate cases rather than requiring extensive licensee reporting.² This case is exactly the type of enforcement proceeding contemplated by these rule changes. In 1992 and 1993, the staff received over 30 complaints alleging, among other things, that Kay had not constructed stations and that he was engaging in “paper loading” of stations. *See Bureau’s Response to Kay’s First Set of Interrogatories*, served March 8, 1995. On January 31, 1994, the staff sent Kay a letter of inquiry, pursuant to Section 308(b) of the Act,³ informing Kay that complaints had been received “questioning the

¹ “A New FCC for the 21st Century,” p. 15. Commissioner Powell has advocated “enforcement as a means to protect the public against certain identifiable harms without hindering companies from improving their existing offerings and entering new markets that lie outside their traditional regulatory boundaries.” Michael K. Powell, *Communications Policy Leadership for the Next Century*, 50 Fed. Comm. L. J. 529, 545 (1998).

² *Amendment of Part 90 of the Commission’s Rules Pertaining to End User and Mobile Licensing Information*, 7 FCC Rcd 6344 (1992) (“*List Elimination Order*”), *Amendment of Part 90 of the Commission’s Rules to Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems*, 7 FCC Rcd 5558, 5561 (1992) (“*End User Licensing Elimination Order*”).

³ Section 308(b) provides, “The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee

construction and operational status of a number of your licensed facilities” and alleging “that the licensed loading of the facilities does not realistically represent the actual loading of the facilities, thereby resulting in the warehousing of spectrum.” WTB Ex. 1. The letter requested that Kay: 1) identify the stations he owns or operates, 2) verify the dates of construction, 3) provide certain information regarding forest service permits for stations he operates on U.S. forest service land, and 4) provide a list of his customers (with addresses and phone numbers) and the number of mobile units and control stations they are operating on each call sign as of January 1, 1994. This inquiry letter precipitated multiple exchanges of correspondence between Kay and the Commission over a period of many months. In the end, notwithstanding the Commission’s attempts to respond to, and, where appropriate, accommodate Kay’s concerns, Kay informed the Commission in no uncertain terms:

there is no date subsequent to January 1, 1994, for which the submission of the requested information would be convenient. We trust that that report terminates the Commission's request at Items five and six of its January 31, 1994 letter.

WTB Ex. 15, p. 3, Tr. 1035.

7. The *I.D.* resolves each of the pending issues in Kay’s favor, although with respect to the automatic cancellation issue, the Presiding Judge noted that automatic cancellation of portions of some of Kay’s authorizations is appropriate. As shown below, except for the malicious interference issue (which the Bureau believes was properly resolved in Kay’s favor) and the automatic cancellation issue, the conclusions reached in the *I.D.* were based on prejudicial procedural error, failed to consider critical portions of the record, and ignored applicable Commission precedent (including rulings by the Commission in this proceeding).

II. SECTION 308(b) ISSUE

8. The *I.D.* mistakenly concludes that Kay did not violate Section 308(b) of the Act and Section 1.17 of the Commission’s rules despite Kay’s repeated refusal to provide information in response to the staff’s January 31, 1994 inquiry letter. The *I.D.* erroneously concludes that the Commission inquiry letter was impermissibly broad and was an unlawful fishing expedition,

further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked.”

I.D., ¶¶ 177-79. The *I.D.* also errs in concluding that Kay's refusal to provide a response should be excused because (a) the Northridge earthquake allegedly affected Kay's ability to respond to the inquiry letter; (b) Kay allegedly had valid concerns about the Bureau keeping information confidential; and (c) the Bureau's denial of a finders' preference request involving Kay was allegedly irregular. *I.D.*, ¶¶180-181. A proper analysis of the record necessarily leads to the conclusion that Kay, without any justification, refused to respond to a legitimate request for information, and that issue should be resolved adversely to Kay.

9. **The Section 308(b) letter did not constitute an unlawful fishing expedition.** The *I.D.* concludes that the 308(b) letter was not a legitimate inquiry but "a fishing expedition with the hope that something would turn up." *I.D.*, ¶179. This conclusion, however, is procedurally improper because it is contrary to: (a) the Commission's analysis of the letter in its *Show Cause Order* in this proceeding; (b) the Commission's treatment of the letter in an order denying a Petition for Extraordinary Relief filed by Kay on June 12, 1998; and (c) prior rulings in this case by the Presiding Judges in this case. The conclusion is also erroneous because it is based on errors of both fact and law.

10. The Commission implicitly considered the propriety of the inquiry letter when it reviewed and paraphrased the inquiry letter and the staff investigation in the *Show Cause Order*, *supra*, 10 FCC Rcd at 2063. Later, the Commission explicitly addressed the issue of the basic propriety of the investigation when it addressed Kay's "Petition for Extraordinary Relief," in which he argued that "the hearing was improvidently designated because the HDO is based upon the biased and unreliable complaints of competitors without sufficient corroborating evidence." *James A. Kay, Jr.*, 13 FCC Rcd 16369, 16372 (1998). In rejecting this argument, the Commission held:

We also find no merit to the contention that this proceeding was improvidently designated for hearing. We do not consider it error, as Kay suggests, to conduct an investigation based on numerous complaints of competitors. As the Bureau observes, under 47 U.S.C. § 403, the Commission enjoys wide discretion to initiate investigations with our [sic] without a complaint and has a responsibility to investigate where there is reason to believe that a licensee is violating the Commission's rules or policies. See Tidewater Radio Show, Inc., 75 FCC 2d 670,

677-78 ¶ 15 (1980). Moreover, even assuming arguendo that some measure of probable cause is necessary to justify the investigation of Kay, we do not find a clear lack of probable cause here. Although Kay's competitors may be biased against him, a reasonable and prudent person could conclude that 'numerous complaints' of the nature presented here warranted investigation. See United States v. Davis, 458 F.2d 819, 821-22 (D.C. Cir. 1972) (circumstances suspicious in the eyes of experienced investigators support a finding of probable cause).

Id. In designating the proceeding for hearing, and in denying the petition for extraordinary relief, the Commission found that there was a valid basis for initiating an investigation of Kay.

11. In addition, Judge Sippel had previously ruled that the propriety of the Bureau's investigation and conduct was not at issue. During discovery, Kay sought to take depositions of Commission staff who were involved in the pre-designation investigation of Kay. Kay incorporated by reference a "Request for Inquiry and Investigation" filed by Marc Sobel which alleged the following misconduct by the Bureau during the Bureau's investigation: wrongful prejudgment of Kay, *ex parte* communications interfering with Kay's business, designation of issues without a sufficient basis, reliance on "biased" witnesses, and coaching of witnesses. *See Memorandum Opinion and Order*, FCC 98M-32 (released March 18, 1998) at ¶7. Judge Sippel ruled that no inquiry would be allowed into these areas. *Id.* He also ruled that discovery would be impermissible on Kay's concerns regarding confidentiality. *Id.* at ¶9. Since the standard for discovery is broader than the standard for admissibility of evidence at trial, Judge Sippel properly placed Kay's allegations of improper treatment by the Bureau outside the scope of the hearing. Moreover, at hearing, the Presiding Judge ruled that the Bureau's letters to Kay were being admitted into evidence only for the purpose of showing what Kay received from the Commission. Tr. 552. Indeed, the Presiding Judge specifically ruled that so long as the letters were not being used as proof of Kay's wrongdoing (which the Bureau never attempted to do), "then there's no basis to cross-examine Mr. Hollingsworth." Tr. 551. For the *I.D.* to have properly considered the propriety of the Bureau's investigation, at a minimum, due process required during trial the modification of the hearing issues and notice that Judge Sippel's ruling was being reconsidered. *See RKO General, Inc. v. FCC*, 670 F.2d 215, 235 (D.C. Cir. 1981). Rather, the *I.D.* reached conclusions that were outside the scope of the designated issues and

which required consideration of evidence not in the record to be properly decided.

12. Moreover, the conclusion that the 308(b) letter was a fishing expedition was based upon a critical mischaracterization of what the staff letter requested. The *I.D.* characterizes the inquiry letter as seeking “complete details regarding the technical configuration of Kay’s systems and the operations of Kay’s customers” *I.D.*, ¶¶ 11, 31, 179. The letter, however, did not request **any** technical details relating to Kay’s systems. Instead, the letter requested: (a) “the call signs and licensee names of all facilities owned or operated by you or by any companies under which you do business,” with an annotation of those facilities on Forest Service land; (b) “the original date of grant of each call sign, the date the licensed station was constructed and placed in operation, and the type of facility;” (c) a Forest Service permit for each station constructed and placed in operation on Forest Service land; (d) to the extent Kay did not have a Forest Service permit for stations not located on Forest Service property, an explanation as to why a permit had not been obtained; (e) a user list for each station, including “user name, business address and phone number, and a contact person, along with the number of mobile units and, for trunked systems, the number of control stations, operated by the user;” and (f) “the total number of units operated on each station” (with an admonition that “Such demonstration of use must be substantiated by business records”). WTB Ex. 1, pp. 1-2. Indeed, the 308(b) letter in this case requests fewer types of information than FCC Form 800I, which the Commission routinely sends to licensees when additional information regarding the construction of stations in these services is needed.⁴ Moreover, the *I.D.* also incorrectly concludes that Kay would have had to produce 30,000 pages of documents in response to the 308(b) letter. *I.D.*, n.5. In this regard, the *I.D.* appears to confuse the scope of the predesignation 308(b) letter (which sought limited information as to any point after January 1, 1994 convenient to Kay (WTB Ex. 12, p.1)), with the

⁴ FCC Form 800I, OMB Control No. 3060-0640, requests that licensees provide the following information regarding the construction of their stations: 1) Purchase orders/invoices for the base station, transmitter(s), antenna; 2) Work order/invoices demonstrating completion of station construction; 3) Name, address, and phone number of the individual(s) performing station construction; 4) Model and serial numbers of mobiles in operation; and 5) A list of users and phone numbers of this system at the time of construction. The Commission’s inquiry letter did not ask Kay for information such as invoices for transmitters and antennas demonstrating construction, or model and serial numbers of all mobiles to corroborate mobile usage.

scope of discovery in this proceeding (which sought, *inter alia*, all of Kay's loading information on or after January 1, 1991). *Order*, FCC 95M-203 (released October 31, 1995). Kay could have complied with the 308(b) letter by providing the following documents, which total far fewer than 30,000 pages: (a) a chart showing call signs and licensee names of stations he operated, the grant date of each license, the date the station was placed in operation, the type of facility, and a notation if the station was on Forest Service property, (b) copies of Forest Service permits (or an explanation why a station on Forest Service property did not have a permit), (c) a user list with the number of mobiles for each user (*i.e.*, a document in the form of WTB Ex. 19), and (d) invoices or other supporting documentation sufficient to support loading as of one date (not historical loading).

13. The *I.D.* cites *Stahlman v. FCC*, 126 F.2d 124 (D.C. Cir. 1942) for the proposition that the Commission may not seek records "in the hope that something will turn up or to invade the privacy protected by the Fourth Amendment." *I.D.*, ¶177. In fact, the *Stahlman* case shows that the inquiry letter to Kay was a legitimate exercise of the Commission's powers under Section 308(b) of the Act. In *Stahlman*, the Court of Appeals affirmed the issuance of a subpoena to a newspaper executive summoned to testify before the Commission on relationships between newspapers and radio stations as "within the administrative powers of the Commission to initiate the proposed investigation for the purpose of ascertaining the facts for its guidance in making reasonable and proper public rules, for application to existing stations, and in the consideration of future requests." *Id.* at 128. Similarly, the Commission has held that it has the power under Section 308(b) of the Act to request, as it did here, loading information from licensees in compliance cases. *List Elimination Order*, 7 FCC Rcd at 6345 n.21. Nothing in *Stahlman* requires the Commission to have proof that misconduct has occurred before starting an investigation.

14. The *I.D.*'s suggestion that the Bureau should have narrowed its inquiry by limiting it to specific licenses (*I.D.*, ¶179) ignores the fact that licensees are capable of moving customers from station to station and then substantiating loading on the channels at issue. Kay explained that it was easy for him to move customers from one system to another. Tr. 1077-1080. The

Commission has recognized that operators are capable of impermissibly avoiding channel takebacks by moving “a large number of mobile units . . . from one system to another like a swarm of bees” *End User Licensing Elimination Order*, 7 FCC Rcd at 5561 (¶20). Had the staff merely asked for information concerning some of Kay’s stations, Kay could have moved users from other systems to the target systems, thereby making it appear that he was properly loaded. Under these circumstances, the Bureau was totally justified in asking for loading information for each of Kay’s systems.

15. **Kay’s Excuses Do Not Justify His Refusal to Produce the Required Information**

The *I.D.* holds that Kay’s failure to produce information *prior* to designation should be excused because (a) Kay provided the information *after* designation for hearing, (b) the Northridge earthquake affected Kay’s ability to provide the information, (c) Kay was concerned as to whether the Bureau would keep information confidential, and (d) the circumstances surrounding a denial of Kay’s finder’s preference request somehow justified Kay’s non-production of the material. *I.D.*, ¶¶180-181. As demonstrated below, the *I.D.* fails to consider record evidence that (a) despite his claim of inconvenience, Kay never asserted prior to designation for hearing that the Northridge earthquake prevented him from providing the required information, (b) Kay continued to refuse to provide the information even months after the earthquake, and (c) the Commission gave repeated assurances to Kay that the information would be kept confidential.

16. The *I.D.* offers no authority that a licensee’s refusal to provide information during a staff investigation may be excused if the licensee provides information pursuant to an ALJ’s order after designation. Such a ruling would make it virtually impossible for the Bureau to investigate suspected misconduct and require the commencement of a hearing proceeding each time the Bureau sought information. It would effectively render Section 308(b) a nullity. It is bedrock policy that the Commission can and must demand complete and accurate responses from its licensees. *RKO General, Inc. V. FCC*, *supra*, 670 F.2d at 232. Moreover, the Commission has ruled that refusal to provide information requested by the Commission may justify “denial or

revocation of a license . . . on this ground alone.” *Carol Music, Inc.*, 37 FCC 379, 383-84 (1964), *see also Warren L. Percival*, 8 FCC 2d 333, 333-334 (1967).⁵

17. Any concerns Kay may have had concerning confidentiality do not excuse his refusal to provide information. Initially, in ruling on Kay’s petition for extraordinary relief, the Commission held, “we find no merit to Kay’s allegation that the Bureau sought to make Kay’s confidential lists available to competitors by requesting their submission in the 308(b) letter.” *James A. Kay, Jr., supra*, 13 FCC Rcd at 16374 n.3. The *I.D.* faults the Bureau for its alleged “unwillingness” to assure Kay that the information would be kept confidential. *I.D.*, ¶181. In fact, the Bureau assured Kay on May 27, 1994 that “we have no intention of disclosing Kay’s proprietary business information, except to the extent we would be required by law to do so.” WTB Ex. 10. P. 1. On June 2, Kay was told, “information submitted will be kept confidential by the Commission, and only 1 original and 1 copy of the information need be filed.” WTB Ex. 12, p. 1. The *I.D.* does not suggest what further step was required to assuage Kay’s concerns regarding confidentiality. The Bureau went well beyond the requirements of the rule regarding requests for confidentiality, Section 0.459, which only provides for the filing of a request at the same time the information is supplied. In sum, Kay had no legitimate basis for questioning the Bureau’s representations concerning confidentiality.⁶

18. Similarly, the *I.D.* improperly concluded that the Northridge earthquake justified Kay’s refusal to respond to the 308(b) letter. Kay never sought an extension of time to provide the requested information based on the earthquake. Kay only once referred to the earthquake in

⁵ As the Commission indicated in *Carol Music* and *Percival*, revocation may still be warranted even if a licensee invokes its Fifth Amendment rights. In the instant case, Kay repeatedly invoked his privilege against self-incrimination in refusing to provide information. WTB Ex. 348, p. 2, WTB Ex. 3, p. 5, WTB Ex. 15, p. 3.

⁶ In that regard, the *I.D.*’s findings of fact concerning a hearsay account of the so-called “Thompson Tree” matter (*I.D.*, ¶¶32-36) are immaterial and outside the scope of this proceeding. The Commission considered Kay’s allegations concerning the Thompson Tree matter when it ruled that Kay had no basis for alleging that the Bureau sought to disclose confidential information. Moreover, Kay’s finder’s preference was defective because the Commission had already initiated an investigation at Kay’s request. Tr. 2525-2526. Such a ruling was not questionable – the Commission has ruled 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).

his correspondence with the Commission. WTB Ex. 3, p. 6. Even five months after the earthquake, Kay still refused to provide the materials, although by June 1994, he did not offer the earthquake as a reason for his failure to comply. Moreover, while Kay's office was damaged during the earthquake, Kay was able to bill customers and file applications using a computer program during the period from February 1994 to June 1994. Tr. 1688-1689, WTB Exs. 35, p.1, 41, p. 1, 83, p. 1, 91, p. 1, 107, p. 1 and 192, p. 1. Craig Sobel, Kay's computer programmer, testified that he thought Kay had the capability to print loading reports in the format used in WTB Ex. 19 (excluding former customers) by May 1994. Tr. 1413-1414. Under these circumstances, Kay's claims that the earthquake made it impossible for him to respond to the staff inquiry letter cannot be credited.⁷ In sum, Kay's repeated refusals to provide the requested information prior to designation constituted an egregious violation of his statutory obligations under Section 308(b) of the Act, and the *I.D.*'s conclusions to the contrary must be reversed.

III. LOADING/CHANNEL SHARING ISSUE

19. The *I.D.* makes several errors that require reversal of its resolution of the issue relating to compliance with Commission Rule Sections 90.313 and 90.633. The *I.D.* misconstrues the Commission's requirements applicable to 470-512 MHz and conventional 800 MHz land mobile stations by failing to recognize the requirement that the channels in these services must be shared. As a result of this error, as explained below, the *I.D.* applies the wrong standard in resolving this issue. The *I.D.* also erroneously applies a methodology for calculating loading of trunked stations to conventional stations. Finally, the *I.D.* fails to acknowledge a licensee's duty to substantiate loading when directed by the Commission. By ignoring that duty, the Presiding Judge placed an impossible burden on the Bureau.

⁷ The *I.D.* also failed to consider that the Commission's Rules required Kay to keep much of the information he was directed to provide. Section 90.437 required Kay to keep a copy of all station authorizations. Section 90.215(a)(1) required Kay to take transmitter measurements when a transmitter was first installed. Kay admitted that he kept a folder of his Forest Service permits (although some permits may be misplaced). Tr. 2416-2417. Finally, the Commission had warned licensees in 1992 that it had the right to request loading data in compliance cases. *List Elimination Order, supra.*

20. **The I.D. fails to recognize that channel sharing is required for licensees of 470-512 MHz and conventional 800 MHz land mobile systems.** The *I.D.* erroneously resolves the issue of Kay's compliance with Sections 90.313 and 90.633 by incorrectly concluding, "there are no loading 'requirements' *per se* for conventional channels." *I.D.*, ¶186. The *I.D.* incorrectly concludes that loading is relevant only in the context of a pending application. *I.D.*, ¶190.

21. As the Bureau explained in its Proposed Findings, ¶230, in the frequency bands at issue, there is an "overall requirement" that the channels be shared to the extent they are not being fully utilized. *Frequency Coordination in the Private Land Mobile Radio Services*, 103 FCC 2d 1093, ¶ 3 (1986). Pursuant to Sections 90.313 and 90.633, each channel is divided into a certain number of slots for mobile units (the maximum loading capacity); unused slots must be returned to the Commission for use by others. Thus Section 90.313, applicable to the 470-512 MHz band, states, "Until a channel is loaded to capacity, it will be available for assignment to others in the area." Similarly, Section 90.633, applicable to 800 MHz conventional stations, states, "Where a licensee does not load a channel to 70 mobiles the channel will be available for assignment to other licensees." To comply with these rule sections, a licensee must not seek or retain authorization for unused slots.⁸ As discussed below, had the *I.D.* not failed to consider the requirement that licensees share channels that are not loaded to capacity, the conclusion that Kay violated Sections 90.313 and 90.633 would have been inescapable.

22. **The I.D. fails to apply the applicable standard to the record evidence.** The record evidence demonstrates that Kay's loading on various stations in the 470-512 MHz and 800 MHz conventional bands was, on the two dates for which Kay reported loading (March 1995 and November 1995) literally *thousands* of mobiles below what he claimed to be operating.⁹

⁸ Two other provisions also require that loading be accurately reported. One of these provisions, Section 90.127(c), requires that licensees limit their applications to the number of mobiles they are ready to operate (have on hand or have ordered) within eight months of grant. Another related provision, Section 90.135(a) requires licensees to modify their authorizations to reflect actual loading whenever their actual loading level is below the maximum.

⁹ The record demonstrates that Kay's records failed to report any evidence of loading on 18 stations: WIK310, WIK331, WIK376, WIL235, WIL256, WIL342, WIL350, WIL372, WIL392, WIL441, WIL625, WIL653, WIL659, WIL665, WNM773, WNQK959, WNYQ437, and WPBW517. WTB Ex. 19 (Kay loading records), and WTB Exs. 24, 26, 27, 28, 29, 30, 33, 34,

Contrary to the holding in the *I.D.* (at ¶¶192-193), a shortfall of this magnitude cannot reasonably be explained solely on the basis of Kay's self serving testimony that he permitted other shops, loaners, and rental units to utilize these channels. Even if it were reasonable to credit Kay's own estimates of 600-700 mobile units used as loaners, demos, etc. (*I.D.*, ¶91) and approximately 360-480 mobile units used by other shops (Tr. 2378-2382), and Kay were permitted to allocate the total number of mobile to whichever system has a shortfall, his loading would still be short by more than a *thousand* mobiles. This unused capacity should have been available for licensing to other operators in the Los Angeles area.

23. Furthermore, the *I.D.* unreasonably fails to draw an adverse inference that Kay's stations were not properly loaded in 1994 because of Kay's refusal to provide loading information prior to designation. Had the information been turned over upon request, the information would have shown early on Kay's rampant noncompliance with the loading and channel sharing requirements. See *James A. Kay, Jr.*, 13 FCC Rcd 16369 (1998) (¶11). Indeed, at that time, Kay did not even track the number of mobiles operating on his stations, thereby belying any effort to share channels as required. WTB Ex. 16, pp. 2-3.

24. **The *I.D.* uses an erroneous standard to calculate loading.** The *I.D.* fails to recognize that the record evidence that Kay operated far fewer mobiles than he was authorized to operate and failed to amend his authorizations demonstrates a violation of the channel sharing

35, 38, 41, 44, 47, 50, 53, 54, 55 and 56 (authorizations showing loading level). The total loading under these authorizations was 760. The record evidence also shows that Kay underutilized the following authorizations by a total of at least 2500 mobiles in March 1995 and November 1995: KJV843, WEC934, WIE974, WIF759, WIH315, WIH339, WIH868, WIH886, WIH946, WII621, WII787, WII874, WII905, WIJ644, WIJ700, WIJ712, WIJ893, WIK208, WIK216, WIK270, WIK294, WIK303, WIK332, WIK373, WIK374, WIK375, WIK377, WIK611, WIL733, WIK613, WIK660, WIK726, WIK896, WIK983, WIL469, WIL260, WIL432, WIL436, WIL458, WIL462, WIL522, WNMT755, WNXW549, WNYR747, WPAP683, WPBZ518, and WQP957. See generally WTB Exs. 57-280. Finally, the evidence also shows that Kay had hundreds fewer mobiles operating on stations WIH872, WIK823, WIJ635, WIK261, WIK205, WIJ754, WIK878, WIL724, WIK329, WIK330, WIK761, and WIK762 than authorized. These stations were licensed to operate in the conventional mode but allowed to operate "Spillman-style" using the LTR trunking format. WTB Exs. 80, 81, 82, 130, 133-134, 154-156, TR. 1138-39. (These exhibits include the listing from the Commission's database of applications to modify licenses filed by Kay).

requirements. Rather, the *I.D.* considers whether the record evidence would demonstrate a violation of Section 90.135, which requires licensees to modify their licenses to reflect accurate loading levels, and then applied an inappropriate methodology for calculating loading.¹⁰ This improper methodology should not be used to assess the evidence with respect to violations of the channel sharing requirements.

25. The *I.D.* makes a finding that the Bureau improperly relied on a “snapshot” of loading (*I.D.*, ¶196) to show that Kay’s reported loading was below the level authorized. The *I.D.*, without any authority, speculates that Section 90.135(a) must be read to allow for reasonable fluctuation in customer levels that requires conventional licensees to modify their authorizations when their loading changes. *I.D.*, ¶197. The *I.D.* concludes that the six-month averaging rule, Section 90.658, applies. *I.D.* ¶ 198. In reaching these conclusions, the *I.D.* mistakenly relies on a Commission order adopting rules for calculating loading on *trunked* stations that are not shared,¹¹ and finds that the Bureau would have needed to demonstrate that the six month average of Kay’s loading was below the level authorized. *I.D.* ¶¶191, 198. The Commission order in question, the *List Elimination Order*, specifically held that “in contrast” the analysis adopted therein did not apply to conventional (shared) channels because the Commission needs to know when it can license other mobiles on the channel. 7 FCC Rcd at 5562, ¶24. Moreover, Kay’s shortfall of over a thousand mobiles is of a magnitude that cannot be explained by routine customer fluctuations.

26. **The *I.D.* fails to acknowledge that licensees must substantiate loading when directed.** The *I.D.* concludes that the Bureau improperly limited its evidence regarding Kay’s loading to his answers to interrogatories, as opposed to presenting evidence that no other record of mobile usage on particular stations was present in the more than 30,000 pages of discovery received from Kay. *I.D.*, ¶¶ 192-193. As noted above at ¶13 with respect to the 308(b) issue,

¹⁰ Contrary to the conclusion at *I.D.*, ¶¶194-195, the Bureau never sought to present evidence to prove a Section 90.135 issue that was never designated. The evidence presented by the Bureau demonstrated violations of Sections 90.313 and 90.633, the rules that require channel sharing. The fact that the Bureau’s evidence would also support a showing that Section 90.135 was violated is inconsequential.

¹¹ *I.D.*, ¶191, citing *End User Licensing Elimination Order*, *supra*, 7 FCC Rcd at 5560-61.

licensees are required to substantiate their loading when directed to do so by the Commission. While licensees have discretion as to how they keep their records, the Commission has clearly stated that it takes seriously its spectrum management responsibilities and will request mobile loading information from licensees in compliance cases.¹² The *I.D.*'s rejection of the requirement that licensees provide current, accurate loading information in compliance cases could severely hamper the Commission's ability to manage the spectrum; would impede the Commission's ability to take back underutilized spectrum; and constitutes reversible error.¹³

IV. ABUSE OF PROCESS

27. Contrary to the holding in the *I.D.*, ¶¶199-207, the record evidence demonstrates that Kay filed applications in the names of friends and employees for authority to use large numbers of mobile units ("end user licenses") on SMR systems when those individuals had no intention of using the mobile units requested (a practice known as "paper loading"). Kay also used surrogates to obtain SMR service provider licenses that he then treated as his own. The *I.D.*'s analysis of the facts must be reversed because it fails to consider major logical flaws in Kay's story and because the *I.D.* confuses intent (which is an essential element of abuse of process) with motive (which need not be proven). When the evidence is analyzed, it must be concluded that Kay abused the Commission's processes by filing applications in the name of others.

28. **The *I.D.* fails to consider the consistency of the testimony of four witnesses and the impact of that consistency on their credibility.** As discussed below, Carla Pfeifer, Roy Jensen, Kevin Hessman, and Vincent Cordaro, all testified that Kay presented them with application forms for them to sign when they had no *bona fide* interest in providing or receiving

¹² *Licensing Information Order*, 7 FCC Rcd at 6345 (see also accompanying note 21).

¹³ Early in the case, the Bureau successfully prosecuted a motion to compel seeking to have Kay list his loading by call sign because it was impossible for the Bureau to discern from Kay's paper billing records which mobiles operated on which call signs. *Order*, FCC 95M-203 (released October 31, 1995)(finding that Kay was required to fully answer the interrogatory both by the discovery rules and by Section 308(b) of the Communications Act). In prehearing conference, the then Presiding Judge held that the time would come when based on the loading information submitted, the onus of providing additional evidence or explanation of shortfalls in the loading reports submitted as answers to interrogatories would shift to Kay. Tr. 198. Prior to hearing, when Judge Chachkin took over for Judge Sippel, he explicitly held that, except for evidentiary rulings, Judge Sippel's rulings were not being revisited. Tr. 441.

communications service. Kay, on the other hand, testified that while he prepared the applications, he understood the applications to be legitimate requests by individuals who had an interest in providing or obtaining communications service, and his role was as a legitimate facilitator or preparer of the applications. *I.D.* ¶¶ 97, 104, 115, 126. The *I.D.* concludes that Messrs. Jensen, Hessman, and Cordaro were not credible, and that Ms. Pfeifer's testimony was not reliable enough to sustain the Bureau's burden of proof. *I.D.*, ¶¶202-203.

29. "Credibility involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." *TeleSTAR, Inc.*, 2 FCC Rcd 5, 13 (Rev. Bd. 1987), quoting *Carbo v. U.S.*, 314 F.2d 718, 749 (9th Cir. 1963). The Bureau agrees that there is some basis for questioning the individual credibility of Messrs. Hessman, Jensen, and Cordaro. The *I.D.* erred, however, by failing to recognize the significance that the *independent* testimony of these four witnesses adverse to Kay was entirely consistent. Each of the individuals described a situation in which Kay presented them with applications to sign. In the case of Ms. Pfeifer, Kay persuaded her to sign an application with the promise of monetary gain when "her" station was fully loaded. Tr. 1541-42. Kay at least implicitly made it clear that Messrs. Hessman, Jensen, and Cordaro were expected to sign applications as part of their employment. Tr. 1480, 1798-99, 1822. Furthermore, in each of the cases, the applications described businesses that did not exist. Tr. 1478-79, 1797, 1843. In the case of Mr. Jensen and Ms. Pfeifer, respectively, the businesses were bogus investment consulting firms. Tr. 1478, 1548. In Mr. Hessman's case, the business was a non-existent security firm. Tr. 1797. In Mr. Cordaro's case, while the business's name had been registered with California and was associated with a cable TV installation operation, the "radio communications consulting company" described in Cordaro's application did not exist. Tr. 1843. While Messrs. Jensen and Hessman were friends, Tr. 1796, there is no evidence that any of the other witnesses communicated with each other on these matters. When independent witnesses testify consistently with each other, that consistency is *substantial evidence* that the testimony in question is credible. See e.g., *Black Television Workshop of Los Angeles, Inc.*, 8 FCC Rcd 4192, 4194-4195 (Rev. Bd. 1993). In the instant case, to discredit their testimony, one

would have to advance an explanation as to why these four witnesses would independently concoct stories that are so consistent with each other. The *I.D.* offers no such explanation.

30. **The *I.D.* fails to consider the lack of any basis for the number of mobiles requested in the end user applications at issue.** There is no evidence that Mr. Jensen or Mr. Cordaro ever engaged in any outside activity that involved any significant use of radios. Mr. Jensen testified that he never indicated that he wanted 37 mobile units. *I.D.*, ¶96, Tr. 1488. Nevertheless, Kay requested 37 mobile units when he filled out the application in Mr. Jensen's name. Similarly, Kay had no basis for believing that Mr. Cordaro wanted 64 mobile units on the Cordaro station (WNXR890) that Kay managed. *I.D.*, ¶115. Mr. Cordaro's "outside enterprise" involved installing cable television systems with just one other person. *I.D.*, ¶119. The *I.D.* does not explain why such a small business would require 64 mobile units. There is also no evidence that Kay even considered how many mobile units Hessman needed. The evidence shows that one of the licenses Kay obtained in Mr. Hessman's name authorized 73 mobile units for a security firm that did not exist. *I.D.*, ¶104, WTB. Ex. 308. Even assuming, *arguendo*, that Hessman's volunteer police work warranted the use of 20 mobiles, the applications overstated the number of mobile units needed by 53 units.

31. **The *I.D.* fails to recognize that the named licensee for stations Kay "managed" had so little involvement with the stations that they were simply surrogates.** The *I.D.* acknowledges the principle that "it is an abuse of process to specify a surrogate to apply for a station," but concludes that Kay did not engage in such misconduct. *I.D.*, ¶205. The record evidence establishes the contrary. With respect to base stations licensed in the names of Ms. Pfeifer, Mr. Cordaro, and Jerry Gales, the *I.D.* fails to consider the evidence of the individuals' total lack of involvement in stations licensed in their name and Kay's absolute control over these stations. For example, Ms. Pfeifer never received any revenues from the station. Tr. 1569. Ms. Pfeifer was never given any information concerning station expenses, and she has no knowledge as to where the station revenues went. Tr. 1570-1571. Moreover, the *I.D.* does not even acknowledge that Kay submitted to the Commission: (a) a check from Ms. Pfeifer purporting to pay Kay for repeater equipment, although Kay in fact paid Ms. Pfeifer the cash she needed to

cover that check, and (b) a lease agreement under which Ms. Pfeifer would pay Kay \$600 a month in site rent, although their actual agreement was that Kay would pay all expenses. WTB Exs. 299-301, Tr. 1544-1545, 1556-1557, 1577. These documents painted a false picture of the Kay-Pfeifer relationship to the Commission and are evidence of abusive intent. Similarly, the *I.D.* does not explain how Mr. Cordaro could have been the real-party-in-interest in applications filed in his name when Mr. Cordaro had to ask Kay what had been filed in his name as of September 1992, and he had had no discussions with Kay concerning these stations prior to that time. WTB Ex. 319, Tr. 1827-1828, 1924. Mr. Cordaro does not know whether the stations licensed in his name were ever constructed. Tr. 1829-1830. Similarly, Mr. Gales did not have any involvement in the operation of the station licensed in his name. *I.D.*, ¶123. Kay admitted these stations were operated in the same manner as Marc Sobel's stations, *i.e.*, (the stations that Judge Frysiak found were controlled by Kay). Tr. 1280-81. The record evidence thus demonstrates that Kay abused the Commission's processes by "specify[ing] a surrogate to apply for" stations.

32. **The *I.D.* improperly requires that the motive for abusing the Commission's processes be shown.** The *I.D.* finds (¶¶199, 207) that the Bureau did not adequately show that Kay had a motive for paper loading his systems or that he used surrogates to avoid the requirements of Section 90.623. Section 90.623 prohibits a licensee from acquiring additional 800 MHz conventional stations if the licensee has an unloaded trunked or conventional station in the vicinity. The *I.D.* concludes that the Bureau did not sustain its burden of proof because it did not demonstrate Kay's ineligibility to apply for any of the frequencies that were applied for in the names of the Bureau's witnesses. *I.D.*, ¶207.

33. In this regard, the decision confuses intent with motive. The record, as discussed above, shows that Kay intentionally filed applications in the name of others when the individuals had no intention of operating the number of mobile units requested or operating the base stations in question. The effect of applying for licenses in the names of other persons at locations where Kay held numerous licenses was that Kay avoided scrutiny of his loading required by Section 90.623. By intentionally filing applications under false pretenses, Kay abused the Commission's

processes. The Bureau was not required to establish a definitive motive for Kay to file each such application. The fact that a licensee is in fact abusing the Commission's processes is serious enough in and of itself to warrant sanctions. The fact that Kay paper loaded stations and used surrogates to apply for licenses is enough to justify a conclusion that he abused the Commission's processes.¹⁴

V. SOBEL ISSUES

34. The *I.D.* improperly resolves the Sobel issues in Kay's favor. In the Sobel proceeding (WT Docket No. 97-56), Administrative Law Judge John Frysiak concluded that Kay had *de facto* control of the 800 MHz stations licensed to Mr. Sobel and that Mr. Sobel had misrepresented facts and lacked candor concerning his relationship with Kay. *Marc Sobel*, 12 FCC Rcd 22879 (ALJ 1997) (Sobel I.D.)¹⁵ The *I.D.*'s resolution of the Sobel issues in Kay's favor is directly inconsistent with Judge Frysiak's resolution of similar issues involving Mr. Sobel. While the initial decision in the Sobel proceeding was based upon a careful analysis of the facts and the law, the *I.D.* in this proceeding was fatally tainted by a patently unsupportable and unjustifiable finding that the Bureau conspired to hide information from Judge Frysiak. The *I.D.* ignores important evidence that Kay knew his statements were false when he made them, as well as his prior false denials that he operated stations licensed to others. Judge Frysiak found Sobel's and Kay's explanations to be not credible, and the *I.D.*'s attempt to undercut Judge Frysiak's ruling does not withstand scrutiny. Kay's serious misconduct, particularly his blatant misrepresentations and lack of candor to the Commission, demonstrate that he is not qualified to remain a Commission licensee.

¹⁴ There is, however, extrinsic evidence beyond the testimony of Hessman and Jensen that this was done to help Kay's business to support the idea that this was done to avoid Rule Section 90.623. With this in mind, if one looks at WTB Ex. 310, it is clear that the Hessman Security end user licenses made it possible for Kay to acquire other stations at Mt. Lukens and Corona without worrying that his stations WNXS450 and WNYR747, which were not in fact serving 70 mobiles at the time, would be recognized to pose a Section 90.623 problem. A perusal of WTB Ex. 290, pp. 16-20 demonstrates that Kay was acquiring numerous 800 MHz stations during the 1990-1993 time frame, many of these were co-located with WNXS450 at Corona or WNYR747 at Montrose (aka Mt. Lukens). See also Carla Pfeifer's testimony at Tr. 1541-1542.

¹⁵ Kay and Sobel have filed exceptions to the Sobel I.D. Those exceptions are pending before the Commission.

35. **The I.D. is based upon a totally unsupported claim that the Bureau hid information from Judge Frysiak.** The *I.D.* attempts to collaterally attack Judge Frysiak's conclusions that Kay and Sobel engaged in an unauthorized transfer of control in two ways. First, the *I.D.* claims that Judge Frysiak's conclusion "that Sobel was unfit to be a licensee was tainted by the fact that the Bureau deliberately concealed the fact that Kay provided to the Bureau a copy of the Management Agreement in March 1995." *I.D.*, ¶210. The *I.D.*'s conclusions concerning the Sobel case are improperly based upon evidence not of record in this proceeding and outside the scope of the designated issues in this proceeding. The *I.D.* cites seven pleadings and other documents in the Sobel proceeding, none of which is in evidence in this proceeding. *I.D.*, ¶169. The *I.D.*'s specious attack on the Bureau's motives and actions is outside the designated issues, which required an inquiry into the motives of Kay, not the Bureau. Moreover, the Presiding Judge never gave the Bureau notice that its conduct was at issue or an opportunity to speak on its behalf. See *RKO General, Inc. v. FCC*, *supra*, 670 F.2d at 235. Accordingly, the *I.D.*'s findings and conclusions on this point must be summarily stricken.¹⁶

36. Moreover, the idea that the Bureau hid from Judge Frysiak the fact that Kay produced the management agreement in March of 1995, or that such fact would have changed Judge Frysiak's conclusions in the Sobel case, is preposterous. Indeed, Sobel's counsel told Judge Frysiak that the document was produced in March 1995, but Judge Frysiak ruled in the Sobel proceeding that such information was irrelevant. On March 19, 1997, Mr. Sobel filed a "Request for Admission of Facts and Genuineness of Documents By the Bureau" (Attachment 1 to these exceptions). Sobel's proposed Admission Number 7 read:

7. A copy of the Radio System Management and Marketing Agreement referred to at paragraph number 3 of the hearing designation order in this proceeding has been in the possession of the Bureau since 24 March 1995.

¹⁶ The *I.D.*'s gratuitous reference at n. 49 to "prosecutorial misconduct," in addition to being wholly baseless, is contrary to the Commission's admonition in *Opal Chadwell*, 2 FCC Rcd 3458 (1987) that "questions of attorney conduct, should not, except where necessary, be adjudicated in the course of an ongoing licensing proceeding."

Judge Frysiak ruled that the proposed admission, among others, was irrelevant because it had “no bearing on Sobel’s mental disposition at the time the agreement was executed.” *Memorandum Opinion and Order*, FCC 97M-57 (released April 17, 1997) (submitted as Attachment 2 to these exceptions). Moreover, at hearing, Judge Frysiak ruled with respect to the misrepresentation and lack of candor issue that “what is important here is the witness’s intention and frame of mind at that time he signed the declaration.” WT Docket No. 97-56, Tr. 298-299. Because Kay was a party to the Sobel proceeding, and because co-counsel for Kay in this proceeding represented Sobel in that proceeding, the adverse parties knew what Kay did in March 1995. Despite that knowledge, however, neither Kay nor Sobel made any attempt to enter that fact into evidence during the Sobel hearing.¹⁷ Thus, the *I.D.*’s claims that Judge Frysiak’s decision was somehow “tainted” are baseless.¹⁸

37. **The I.D. ignores Commission precedent in analyzing the unauthorized transfer of control.** The *I.D.* correctly states that the issues added by Judge Sippel “does not permit him to make independent findings as to whether the Management Agreement between Sobel and Kay constituted an unauthorized transfer of control.” *I.D.*, n.48. Indeed, Judge Sippel explicitly ruled that Kay and Sobel may not relitigate in this proceeding the issue of whether there was an

¹⁷ The references in the Bureau’s comments to “pleadings filed in 1994 and 1995,” when read in context of what was in the record, clearly refer to Sobel’s 1994 letter and the motions filed by Kay in January 1995. The Bureau could not properly refer to evidence outside the record in its findings and conclusions. Moreover, given Judge Frysiak’s rulings that Kay’s March 1995 disclosure was not relevant, and the fact that the Bureau was focusing on Sobel’s state of mind in January 1995, there was no reason to discuss events in March 1995.

¹⁸ In his January 1995 motion, Kay was attempting to remove the Sobel licenses from the hearing. WTB Ex. 343. Only after Judge Sippel denied Kay’s motion and ordered Kay to produce all the documents requested by the Bureau (including management agreements) did Kay first disclose the management agreement. *Memorandum Opinion and Order*, FCC 95M-77 (released March 22, 1995) (second ordering clause). While a disclosure prior to January 1995 would have been relevant under the misrepresentation/lack of candor issue, Kay’s tardy disclosure has no bearing on his (or Sobel’s) state of mind in January 1995. Moreover, the *I.D.*’s conspiracy theory ignores the fact that what was relevant in the Sobel proceeding was Sobel’s state of mind. Sobel has never claimed to have contemporaneous knowledge that Kay produced the agreement in March 1995. Indeed, he tried to claim that the agreement was produced with the motion, but his counsel then stipulated that Sobel’s testimony was incorrect, he admitted that Sobel “was not familiar with the motion to enlarge. . . .” Tr. 303.

unauthorized transfer of control. *Memorandum Opinion and Order*, FCC 98M-26 (released March 5, 1998). Notwithstanding those rulings, however, the *I.D.* uses an incorrect reading of the applicable standards for an unauthorized transfer of control to criticize Judge Frysiak's ruling. Both in the Sobel Hearing Designation Order, (12 FCC Rcd 3298 (1997)) and in *Norcom Communications Corporation*, 13 FCC Rcd 21493 (1998), the Commission has held that possible *de facto* transfers of control of land mobile stations shall be analyzed using the six criteria contained in *Intermountain Microwave*, 24 RR 983 (1963). Judge Frysiak properly used the *Intermountain Microwave* test to determine that Kay had acquired *de facto* control of Mr. Sobel's stations. See Sobel *I.D.*, 12 FCC Rcd at 22899. Notwithstanding that clear precedent, however, the *I.D.* claims that *Intermountain* does not apply. *I.D.*, n.48. The *I.D.*'s failure to apply well-established Commission precedent demonstrates the extent to which its conclusions are defective. Moreover, nothing in the *Third Report and Order in GN Docket. No. 93-252*, 9 FCC Rcd 7988, 8095-8096 n.434 (1994) (*I.D.*, n.48), supports the proposition that *Intermountain Microwave* does not apply to CMRS stations -- such as Sobel's SMR stations.

38. **Kay Misrepresented Facts to and Lacked Candor with the Commission.** Apart from the *I.D.*'s baseless speculation that the Bureau hid something from Judge Frysiak, the *I.D.*'s analysis of the Sobel issues must be reversed because it ignores critical record evidence and applicable Commission precedent. The *I.D.* concludes, "An unauthorized transfer of control, in and of itself, is not grounds for disqualification unless coupled with an intent to deceive or disqualifying conduct." *I.D.*, ¶211. The *I.D.* also concludes, "The Commission's usual response to unauthorized transfers is to require them to be undone." *I.D.*, ¶212. While the Bureau agrees that such a remedy may be appropriate in some cases, when an unauthorized transfer of control is combined with an intent to either deceive the Commission or abuse the Commission's processes, disqualification of a licensee is generally mandated. *Trinity Broadcasting of Florida, Inc.*, 15 Comm. Reg. 757 (1999), *Black Television Workshop of California, supra*, 8 FCC Rcd at 4200, *Stereo Broadcasters, Inc.*, 87 FCC 2d 87 (1981). In this case, contrary to the *I.D.*'s conclusions, Kay knowingly misrepresented facts and attempted to hide the nature and extent of his

relationship with Mr. Sobel from the Commission, both in his January 1995 motion, and previously.

39. Shortly after the *Show Cause Order* was released, on January 25, 1995, Kay filed WTB Ex. 343, a “Motion to Enlarge, Change or Delete Issues.” The pleading contained the following statements concerning the relationship between Kay and Mr. Sobel:

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

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

WTB Ex. 343, pp. 4-5 (emphasis added). Kay declared under penalty of perjury that the motion was true and correct. WTB Ex. 343, p. 23. Kay’s motion, however, did not disclose the following key facts: (a) Kay manages Mr. Sobel’s 800 MHz stations pursuant to a Management Agreement (WTB Ex. 328, p. 103-104, 108-109); (b) Kay was responsible for finding the frequencies and preparing the applications for the Management Agreement stations (WTB Ex. 328, p. 73-75); (c) Kay provided all the money and the equipment needed to build the Management Agreement stations (WTB Ex. 328, p. 144); (d) when Mr. Sobel worked on the stations, he did so as a contractor selected and paid by Kay (WTB Ex. 328, p. 106-108); (e) Kay made the arrangements to acquire and dispose of these licenses (WTB Ex. 328, p. 101, 126-128, 366); (f) Kay’s employees were involved in virtually every aspect of the stations’ daily operations (WTB Ex. 329, p. 339-347); (g) Kay paid all the expenses of the Management Agreement stations, including Mr. Sobel’s legal fees (WTB Ex. 328, p. 109, 131); (h) the revenues from the

Management Agreement stations were deposited in Kay's bank account, and Mr. Sobel has not received any of the operating revenues of the stations (WTB Ex. 328, p. 144, 348); and (i) Kay may purchase the Management Agreement stations at any time for the nominal sum of \$500 each (WTB Ex. 328, p. 125).

40. The circumstances surrounding the filing of Kay's motion show that Kay deliberately withheld information from the Commission that he knew the Commission wanted. Kay knew in 1994 that the Commission wanted to know about stations he managed for others. The original 308(b) letter of January 31, 1994 specifically sought "the call signs and licensee names of all facilities owned or operated by you" WTB Ex. 1, p. 1. In his June 2, 1994, response to the Commission, Kay represented that "he does not operate any station of which either he, [Buddy Corp., or Oat Trunking Group, Inc.] is not the licensee." WTB Ex. 11, p.1. At that time, however, he knew that he was operating Sobel's 800 MHz stations as a manager. Under those circumstances, his failure to inform the Commission of his relationship with Sobel, was, at a minimum, a clear lack of candor, and at worst, an outright misrepresentation. While the *I.D.* recognizes that Kay made this certification (*I.D.*, ¶42), it nevertheless fails to consider that the statement was patently false when it was made to the Commission.¹⁹

41. Moreover, if there were any doubt in Kay's mind that the Commission wanted to know what stations he managed, such doubt would have been removed in December 1994, when Kay received the *Show Cause Order* in this case. That order described the Commission's information request as follows: "In order to assess compliance with our construction and operation requirement [sic], the staff requested that Kay identify the stations for which he holds FCC licenses **as well as those he manages.**" 10 FCC Rcd at 2063 (¶ 6)(Emphasis added).²⁰

¹⁹ Indeed, as early as 1993, in preparing responses to inquiry letters from the Commission concerning Sobel's stations, Kay took pains to conceal his relationship with Sobel by masking his name and address from bills before sending those bills to the Commission. See WTB Proposed Exhibits 332-337. In this case, however, the Presiding Judge refused to admit the same documents into evidence. Tr. 783-790. For the reasons stated by Judge Frysiak, in the Sobel case, however (Sobel *I.D.*, ¶76), the documents are pertinent evidence of Kay's intent to conceal his relationship with Mr. Sobel, and the Bureau excepts to the Presiding Judge's refusal to admit those documents into evidence.

²⁰ In late September or early October 1994, Kay received a draft of the hearing designation order

42. Although Kay was clearly on notice that the Commission wanted to know what stations he managed, his January 1995 motion (supported by his personal affidavit) made no disclosure whatsoever that he managed Sobel's stations. Judge Frysiak found that the intended effect of Sobel's affidavit attached to Kay's motion (which made the same representations as Kay made in the underlying pleading) "was to persuade the Commission to understand that Kay and Sobel were separate entities, each operating his separate business and neither having any interest in the other's stations or licenses." Sobel I.D., ¶71. Under these circumstances, Kay had a clear obligation to inform the Commission that he managed Mr. Sobel's stations. The classic statement of a licensee's duty of absolute candor is contained in the Court of Appeals opinion *RKO General, Inc. v. FCC, supra*, 670 F.2d at 229:

Unlike a private party haled into court, or a corporation such as General Tire facing an investigation by the SEC, RKO had an affirmative obligation to inform the Commission of the facts the FCC needed in order to license broadcasters in the public interest. As a licensing authority, the Commission is not expected to "play procedural games with those who come before it in order to ascertain the truth," FCC Brief at 60, and license applicants may not indulge in common-law pleading strategies of their own devise.

In *Trinity Broadcasting of Florida, Inc, supra*, 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." Nobody reading Kay's pleading would have had any idea that Kay managed Sobel's stations or that Sobel worked for Kay as a contractor.

43. The context in which Kay's pleading was filed is important. Kay knew that the Commission wanted information on stations that he managed. Kay was attempting to *remove* the Sobel licenses from this proceeding. Under those circumstances, Kay had a clear duty to disclose the nature of his relationship with Mr. Sobel. Even if Kay's statements could be considered to be technically true (and they cannot), the pleading is a classic case of lack of candor. Although the Bureau made a detailed showing in its proposed findings and conclusions

containing the same language, in response to one of his FOIA requests. WTB Ex. 329, p. 261, Kay Ex. 5. Kay's receipt of the draft order led to the written management agreement between Kay and Sobel. Tr. 1761-1762, WTB Ex. 328, p. 108-109, WTB Ex. 329, p. 262.

concerning lack of candor (Bureau PF&Cs, ¶¶277-284), the *I.D.* does not even address this problem or Judge Frysiak's analysis of how the statements constituted a lack of candor.

44. Furthermore, the *I.D.* fails to consider critical evidence that Kay knew the statements he was making in January 1995 were false. The most glaring misrepresentation is the claim that Kay had "no interest in any radio station or license of which" Sobel is the licensee. Given Kay's ownership interest in the equipment, Kay's direct role in acquiring and disposing of the licenses used in connection with the Management Agreement stations, Kay's receipt of all the revenues derived from the operation of these stations, Kay's payment of all the expenses relating to the stations, and Kay's right to purchase the Management Agreement stations for \$500 at any time, the claim that Kay has no interest in the stations or licenses is an outright fabrication. In Judge Frysiak's words, "All this amounts to a fair amount of interest." Sobel *I.D.*, ¶73. The *I.D.* concludes that there was no misrepresentation or lack of candor because Kay understood that statement to mean that he had no "ownership" interest in Sobel's licenses. *I.D.*, ¶216. That conclusion ignores critical testimony by Kay concerning his understanding of that language. Kay recalls that when he and Sobel met to discuss the affidavit, Sobel asked him about the meaning of the word "interest." WTB Ex. 329, p. 371. Kay told him that to the best of his knowledge, as it had been explained to him:

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

Id. (emphasis added). Sobel testified that Kay has a direct financial stake in the stations that are licensed to Sobel but "managed" by Kay. WTB Ex. 328, p. 150. Kay denied having a financial stake in the licenses, but admitted that he has a stake in the stations because he owned the equipment and obtains revenues from the stations. WTB Ex. 329, p. 372. When Mr. Sobel made a similar claim in his proceeding, Judge Frysiak relied upon that testimony to conclude that "this assertion must be rejected as being false." Sobel *I.D.*, ¶73. He also noted that "[b]oth Kay and Sobel had strong motive to withhold from the Commission the true nature of their business relationship." The *I.D.* ignores this evidence, except to blithely claim that Kay's current

testimony is consistent with Kay's and Sobel's testimony in the Sobel proceeding. *I.D.*, n.30. That assertion is wrong.

45. The *I.D.* ignores further evidence that Kay's attempt to equate "stations" with "licenses" was an *ex post facto* rationalization. First, if Kay believed "license" and "station" meant the same thing, the use of the word "station" would be superfluous. Second, their management agreement defines the term "Stations" as "800 MHz band **radio facilities** in and about the Los Angeles Metropolitan Area, **licensed by the FCC** under call signs . . ." WTB Ex. 340, p. 1 (emphasis added). In other words, their agreement refers to stations as the physical facilities, in which Kay admits he has an "interest." Indeed, their agreement provided that Kay would have an **exclusive** interest in the stations' equipment. WTB Ex. 340, p. 3. Moreover, Section 90.439 makes clear that the Commission refers to "stations" as physical facilities when it says that "stations" shall be made available for inspection. The *I.D.* fails to address any of those points. "[T]he fact of misrepresentation coupled with proof that the party making it had knowledge of its falsity [is] enough to justify a conclusion that there was fraudulent intent." *Leflore Broadcasting Co. Inc. v. FCC*, 636 F.2d 454, 462 (D.C. Cir. 1980). Here, Kay's own testimony shows that his claims of having no interest in Sobel's stations were false when he made them. The Commission must conclude that Kay knowingly misrepresented in his motion, and therefore conclude that he is not qualified to remain a Commission licensee.

46. Furthermore, the *I.D.* fails to address another misrepresentations or lack of candor in the statement. The motion contained Sobel's claim that "I am not an employer or employee of Mr. Kay . . ." WTB Ex. 343, p. 22. Again, Kay failed to disclose the pertinent facts -- in this case, that Mr. Sobel performed extensive work for Kay as a contract technician both on stations licensed to Kay and stations licensed in Sobel's own name, and Kay paid him for that work. While the statement may be technically correct if one refers to IRS guidelines for distinguishing between an independent contractor and an employee, in the context of describing their relationship to the Commission, the claim is utterly disingenuous. In the common definition of the word "employ", "to use or engage the services of",²¹ Kay employed Sobel. As in *RKO*

²¹ *Meriam Webster's Collegiate Dictionary, Tenth Edition*, 1994, p. 379.

General, Inc. v. FCC, supra, the unqualified statement, albeit technically correct, constituted a lack of candor because it failed to provide material facts concerning the work Sobel did for Kay.

47. The *I.D.* suggests that no sanction is warranted because Kay and Mr. Sobel relied on counsel. *I.D.*, ¶213. In fact, there was no reliance upon counsel, nor did Kay make a good faith attempt to ascertain whether his conduct complied with Commission Rules. Kay never approached counsel and asked for a written agreement until he learned that this litigation was imminent. Tr. 1761-1762, WTB Ex. 328, p. 108-109, WTB Ex. 329, p. 262. Kay had been managing Mr. Sobel's stations well before counsel was approached. WTB Ex. 328, p. 103-104. Moreover, Mr. Sobel admitted that the written agreement did not change his relationship with Kay in any way. Tr. 1764. Accordingly, Kay did not seek his counsel's advice in order to determine whether his conduct was proper and lawful, and reliance on counsel cannot excuse Kay's conduct.²² 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).

48. Finally, the Presiding Judge's attempt to make "credibility findings" in Kay's and Sobel's favor (*I.D.*, ¶173) cannot be credited. These findings are contrary to Judge Frysiak's conclusions, which found Sobel and Kay to not be credible. Moreover, unlike Judge Frysiak's conclusions, the *I.D.*'s credibility findings are completely separated from any analysis of the evidence. Unlike Judge Frysiak's conclusions, which were based upon a full analysis of the record, the *I.D.*'s "credibility" findings are devoid of any meaningful consideration of evidence unfavorable to the *I.D.*'s position. Indeed, it appears that the credibility findings in the *I.D.* are not based upon an examination of witness demeanor. *See* Tr. 1303-1320. Under these

²² Furthermore, the Presiding Judge's reliance on a revised management agreement Kay and Mr. Sobel entered into in 1999 (*I.D.*, ¶167) is improper. This agreement was not entered into until over five years after they learned Kay's relationship with Mr. Sobel was a matter of concern to the Commission, almost two years after Sobel's licenses were designated for hearing in this proceeding, and over a year after Judge Frysiak held that Kay "clearly" controlled Sobel's licenses. Such an action comes far too late to have any meaningful impact on the decision in this case. The FCC has ruled that parties may not wait until after an adverse initial decision, and then try to present evidence that could have been presented earlier. *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941).

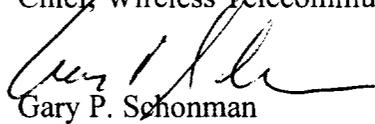
circumstances, the *I.D.*'s defective analysis cannot be saved by making general references to credibility.

49. The *I.D.*'s analysis of these issues is based upon a specious assumption that the Bureau hid information from Judge Frysiak (which information Judge Frysiak had ruled was not relevant). The *I.D.* also ignores Commission precedent and critical evidence. When the record is objectively examined, the evidence clearly shows that Kay deliberately concealed his relationship with Mr. Sobel from the Commission and knowingly made false statements to the Commission as part of that concealment. These issue must be resolved adversely to Kay.

VI. CONCLUSION

50. The record amply demonstrates in this proceeding that without any justification, Kay refused to comply with the staff's legitimate request for information. Kay also blatantly failed to comply with the Commission's channel-sharing requirements, abused the Commission's processes by filing applications in the name of others, and misrepresented facts and lacked candor. Such behavior shows that Kay is not qualified to remain a Commission licensee. Accordingly, the Bureau asks the Commission to reverse the *I.D.* and revoke Kay's licenses.

Respectfully submitted,
Thomas J. Sugrue
Chief, Wireless Telecommunications Bureau



Gary P. Schonman
Chief, Compliance and Litigation Branch
Enforcement and Consumer Information Division



William H. Knowles-Kellett
John J. Schauble
Attorneys, Wireless Telecommunications Bureau

Federal Communications Commission
445 12th Street, S.W., Room 3-C438
Washington, D.C. 20554
(202) 418-0569

October 12, 1999

ATTACHMENT 1

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

MARC SOBEL

Applicant for Certain Part 90 Authorizations
in the Los Angeles Area and Requestor of
Certain Finder's Preferences

MARC SOBEL & MARC SOBEL d/b/a
AIR WAVE COMMUNICATIONS

Licensee of Certain Part 90 Stations in the
Los Angeles Area

WT DOCKET No. 97-56

**SOBEL'S REQUEST FOR ADMISSION
OF FACTS AND GEUNINENESS OF
DOCUMENTS BY THE BUREAU**

To: Wireless Telecommunications Bureau

Marc D. Sobel d/b/a Air Wave Communications ("Sobel"), by his attorney and pursuant to Sections 1.246 of the Commission's Rules and Regulations, 47 C.F.R. § 1.246, hereby submits to the Wireless Telecommunications Bureau ("Bureau") requests for admission of fact and genuineness of documents.

Instructions and Definitions.

For purposes of these requests, the definitions set forth in *Sobel's First Set of Written Interrogatories to the Bureau*, served on January 13, 1997, shall apply. In the case of documents, (a) an admission of the genuineness of a document that was authored by the Commission means that the presented specimen appears to be a true and/or accurate copy of the document authored and/or sent by the Commission. Where the Bureau is asked to consent to the genuineness of a document; and (b) an admission of the genuineness of a document received by and/or in the custody of the Commission (but not authored by the Commission) means that the document presented specimen appears to be a true and/or accurate copy of the document received by and/or in the custody of the Commission. For purposes

of these Instructions and Definitions, "**Commission**" means the Federal Communications Commission, including its delegated authorities, employees, bureaus, divisions, staff, etc.

Requests for Admission

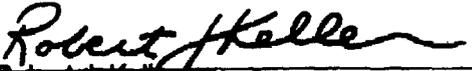
The Bureau is respectfully asked to admit or deny the following facts:

1. In February or March of 1996, the following parties participated in a telephone conference call to discuss Marc Sobel:
 - (a) Mr. Gary Schonman, then of the Mass Media Bureau, but service as counsel for the Wireless Telecommunications Bureau in WT Docket No. 94-147;
 - (b) Mr. William H. Kellett, of the Bureau staff in Gettysburg, Pennsylvania;
 - (c) Ms. Anne Marie Wypijewski, of the Bureau staff in Gettysburg, Pennsylvania; and
 - (d) Mr. Robert J. Keller, counsel Sobel.
2. During the telephone conference call described in Request No. 1, Mr. Keller expressed the desire of Sobel to discuss and to attempt to resolve any concerns of Commission staff regarding Sobel's stations, operations, or activities.
3. During the course of the telephone conference call described in Request No. 1, Mr. Keller advised the other participants that Sobel was ready, willing, and able to travel to Washington, D.C. and/or Gettysburg, Pennsylvania to meet with Commission staff to discuss his situation, to provide staff with information, and to answer staff questions.
4. On other occasions, both before and after the telephone conference call described in Request No. 1, Mr. Keller expressed to Mr. Kellett Sobel's desire and willingness to cooperate in an effort to informally resolve any concerns of Commission staff.
5. During a personal meeting prior to the telephone conference call described in Request No. 1, and on at least one other occasion by telephone after the referenced personal meeting, Mr. Keller expressed to Mr. Schonman Sobel's desire and willingness to cooperate in an effort to informally resolve any concerns of Commission staff.

6. The Bureau never accepted any of Sobel's invitations to meet personally with staff, or to any of Sobel's requests to attempt to resolve matters informally.
7. A copy of the Radio System Management and Marketing Agreement referred to at paragraph number 3 of the hearing designation order in this proceeding has been in the possession of the Bureau since 24 March 1995.
8. The Bureau, on January 19, 1996, sent to Sobel a request for information pursuant to Section 308(b) of the Communications Act.
9. Attachment A hereto is a genuine specimen of the Section 308(b) request described in Request No. 7.
10. After January 19, 1996 and prior to February 22, 1996, Counsel for Sobel orally advised Bureau staff that a response to the Section 308(b) request described in Request No. 7 was being prepared and would be timely submitted.
11. By letter dated February 22, 1996, the Bureau withdrew the Section 308(b) request described in Request No. 7, the Bureau, by letter dated withdrew the request.
12. The Bureau never advised Sobel why the Section 308(b) request described in Request No. 7 was withdrawn.
13. Attachment B hereto is a true and genuine copy of the letter described in Request No. 10.
14. The Bureau, on June 11, 1996, sent to Sobel (through his counsel) a second request for information pursuant to Section 308(b) of the Communications Act.
15. The June 11, 1996 request described in Request No. 13 asked for exactly the same information as the January 19, 1996 request described in Request No. 7.
16. Attachment C hereto is a genuine specimen of the letter described in Request No. 14.
17. Attachment D hereto is a genuine specimen copy of a letter, dated December 4, 1996, from Sobel to Mr. Gary Stanford at the Commission in Gettysburg.
18. The Bureau has never responded to the letter described in Request No. 16.

19. At no time prior to release of the hearing designation order in the above-captioned proceeding did the Bureau (a) advise Sobel that it had formed an opinion or belief that his arrangement with James A. Kay, Jr. constituted an unauthorized transfer of control.

Dated this 19th day of March, 1997


Robert J. Keller

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Email: rjk@telcomlaw.com

Counsel for Marc D. Sobel d/b/a
Air Wave Communications

CERTIFICATE OF SERVICE

I, Robert J. Keller, counsel for Marc D. Sobel d/b/a Air Wave Communications, hereby certify that on this 19th day of March, 1997, I caused copies of the foregoing *Sobel's Request for Admission of Facts and Genuineness of Documents* to be sent by first class United States mail, postage prepaid, except as otherwise indicated below, to the presiding officer and the parties in WT Docket No. 97-56, as follows:

The Honorable John M. Frysiak
Administrative Law Judge
Federal Communications Commission
2000 L Street, N.W. - Room 223
Washington DC 20554

Gary Schonman, Esquire
Enforcement Division
Wireless Telecommunications Bureau
Federal Communications Commission
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¹ Counsel for James A. Kay, Jr.; *Petition to Intervene* pending.

ATTACHMENT 2

RECEIVED

Federal Communications Commission

APR 30 3 25 PM '97

ENFORCEMENT DIVISION
TELECOMMUNICATIONS
BUREAU

Before the
Federal Communications Commission
Washington, D.C. 20554

DOC 97M-57
71102

In the Matter of)	WT Docket No. 97-56
)	
MARC SOBEL)	
)	
Applicant for Certain Part 90 Authorizations)	
in the Los Angeles Area and Requestor Of)	
Certain Finder's Preferences)	
)	
MARC SOBEL and MARC SOBEL)	
d/b/a AIR WAVE COMMUNICATIONS)	
)	
Licensees of Certain Part 90 Stations in the)	
Los Angeles Area)	
)	

MEMORANDUM OPINION AND ORDER

Issued: April 15, 1997 ; Released: April 17, 1997

1. Under consideration are:

Request for Admission of Facts and Genuineness of Documents by the Bureau, dated March 19, 1997, from Marc D. Sobel d/b/a/Air Wave Communications ("Sobel");

Answers to Request for Admission of Facts and Genuineness of Documents, filed March 24, 1997, by The Wireless Telecommunications Bureau ("Bureau"); and

Response to the Bureau's Objections to Requests for Admission, filed March 27, 1997, by Sobel.

2. In its Answers to Request for Admission of Facts and Genuineness of Documents, the Bureau objected to Requests 1 - 7, 15 and 19 on the grounds that each request was irrelevant to determining whether Sobel engaged in an unauthorized transfer of control; whether Sobel is qualified to be a licensee; whether Sobel's applications should be granted; and whether the captioned licensee should be invoked.

Federal Communications Commission

3. Sobel now moves to have the Bureau's objections overruled on the grounds that said requests have a bearing on whether Sobel deliberately violated the Communications Act and/or intentionally misrepresented or concealed the transfer of control or any resulting rules violations.

4. Sobel's request must be denied. At issue in this proceeding is whether by virtue of a certain agreement dated December 30, 1994, Sobel has wilfully and/or repeatedly engaged in an unauthorized transfer of control of his stations to James A. Kay, Jr. However, Sobel's requests for admissions center on his counsel's contacts with the Bureau more than a year subsequent to the above-named agreement. These contacts have no bearing on Sobel's mental disposition at the time the agreement was executed.

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION


John M. Fysiak

Administrative Law Judge

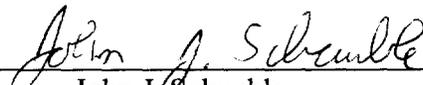
CERTIFICATE OF SERVICE

I, John J. Schauble, an attorney in the Enforcement and Consumer Information Division, Wireless Telecommunications Bureau, certify that I have, on this 12th day of October, 1999, sent by hand delivery (unless otherwise indicated), copies of the foregoing "Wireless Telecommunications Bureau's Exceptions and Brief" to:

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(Via Facsimile)

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(Via Hand Delivery)


John J. Schauble