

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

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In the Matter of)
)
MARC SOBEL)
)
Applicant for Certain Part 90 Authorizations)
in the Los Angeles Area and Requestor of)
of Certain Finder's Preferences)
)
MARC SOBEL AND MARC SOBEL)
d/b/a AIR WAVE COMMUNICATIONS)
)
Licensee of Certain Part 90 Stations in the)
Los Angeles Area)

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
WT DOCKET NO. 97-56

To: The Commission

**JOINT PETITION FOR RECONSIDERATION
ON BEHALF OF
MARC D. SOBEL AND JAMES A. KAY, JR.**

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SUMMARY

The Commission erred in failing to give deference, as between two ALJs who came to conflicting evaluations of the same situation, to the judge who had greater exposure to the party witnesses; who also heard substantially more evidence and testimony, both critical of the party witnesses; who heard the case second and was acutely aware of the previous ruling, and who made explicit credibility and demeanor findings in support of this position.

The Commission further erred at the outset by designating a license revocation hearing without first affording the licensee prior notice and an opportunity to demonstrate or achieve compliance, as required by the Administrative Procedure Act.

The Commission erred in attributing a disqualifying lack of candor to the licensee. There is absolutely not evidence in the record to demonstrate deceptive intent, an essential element for a lack of candor finding. The overwhelming record evidence in fact shows that there was no intent to deceive and no incentive to do so.

Finally, in reconsidering the transfer of control issue the Commission should also take into account the extensive relevant factual findings in WT Docket No. 94-147.

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JOINT PETITION FOR RECONSIDERATION

Marc D. Sobel d/b/a AirWave Communications ("Sobel") and James A. Kay, Jr. ("Kay") (sometimes jointly referred to herein as "Petitioners"), by their attorneys and pursuant to Section 405 of the Communications Act of 1934, 47 U.S.C. § 405, as amended, and Section 1.106 of the Commission's Rules and Regulations, 47 C.F.R. § 1.106, respectfully petition the Commission to reconsider the actions announced by its *Decision* (FCC 01-342), released January 25, 2002 ("*Sobel Decision*"), in the above-captioned matter.¹

I. THE CONFLICT BETWEEN TWO JUDGES

Two different administrative law judges, in different hearings, considered essentially the same core facts and issues of this matter but came to irreconcilably different factual

¹ Rather than reargue all of the issues that culminated in the *Sobel Decision*, Petitioners limit this *Petition For Reconsideration* to the specific subjects addressed herein. Petitioners do not, however, concede or abandon any previous position or argument. Petitioners' silence herein as to any particular matter shall not be construed as an acquiescence, concession, or waiver. Petitioners expressly reserve the right to argue, in any judicial appeal or other proceeding, matters previously presented to the Commission in the following pleadings: (a) Sobel's *Consolidated Brief and Exceptions* (12-Jan-98), as corrected by *Errata* (13-Jan-98) (b) *James A. Kay's Consolidated Brief and Exceptions to the Initial Decision of Administrative Law Judge John M. Frysiak* (12-Jan-98) (c) *Motion for Leave to File Supplement to Consolidated Exceptions* (28-May-98) (d) *Further Motion for Leave to File Supplement [to] Exceptions* (2-Oct-98); (e) *Petition to Defer and Consolidate Consideration* (2-Mar-99) (f) *Supplement to Petition to Defer and Consolidate Consideration* (29-Nov-99); and (g) *Motion for Special Relief* (5-May-97).

determinations and legal conclusions.² This is of no small concern, because the central and most grave issue in these cases—the assertion that Sobel and Kay lacked of candor with the Commission—inescapably turns on determining the subjective intent of the licensees. This is not a simple matter of examining the transcripts and exhibits to discern an objective, external fact, and the deliberative processes of the judges and may not be ignored in favor of the Commission’s own take on a cold record.³ The Commission’s decision to favor the *Frysiak Decision* over the *Chachkin Decision* is not justified in the present circumstances.

First, Chief Judge Chachkin, unlike Judge Frysiak, made specific credibility and demeanor findings. He expressly found that “Kay and Sobel testified . . . and answered questions put to them in a candid and forthright manner” and that “[t]heir testimony that they did not intend to deceive the Commission concerning their business dealings is entirely credible and is accepted.”⁴ These express findings may not be ignored.⁵

As the only decision maker to actually observe the witnesses’ testimony, an ALJ’s “findings are by law entitled to great weight and considerable deference,”⁶ and the Commission “may not upset these findings unless such reversal is supported by substantial evidence.”⁷ Thus,

² Compare: *Initial Decision of Administrative Law Judge John M. Frysiak*, 12 FCC Rcd 22879 (1997) (“*Frysiak Decision*”) in WT Docket No. 97-56, and *Initial Decision of Chief Administrative Law Judge Joseph Chachkin*, FCC 99D-04 (ALJ, 10-Sep-99) (“*Chachkin Decision*”) in WT Docket No. 94-147.

³ Petitioners nonetheless maintain, for the reasons asserted herein as well as in previous arguments presented to the Commission, that even such an objective review of the record fully justifies resolving all issues in their favor.

⁴ *Chachkin Decision*, Findings ¶ 173.

⁵ While Judge Frysiak did not make explicit demeanor findings, moreover, it should be noted that Kay was seriously ill during the course of his testimony in the Sobel Proceeding. Sobel Tr. 321-323. Attachment No. 1 hereto are documents corroborating the fact that Mr. Kay, his worsening condition prompting him to visit a clinic, was thereafter transported to a hospital emergency room on the evening before he testified. Petitioners do not contend that this condition in any way affected the accuracy of Mr. Kay’s testimony, but the Commission may not dismiss the possibility that his condition might have impacted his demeanor as perceived by Judge Frysiak. In the absence of explicit demeanor findings by Judge Frysiak, including his assessment of the impact, if any, of Kay’s medical condition on his demeanor—the Commission may not dismiss Judge Chachkin’s favorable demeanor findings simply because the judges’ conclusions differed.

⁶ *Ramon Rodriguez and Associates, Inc.*, 9 FCC Rcd 3275 at ¶ 4 (Rev. Bd. 1994), citing *Lorain Journal Co. v. FCC*, 351 F.2d 824 (DC Cir 1965), cert. denied, 383 US 967 (1966).

⁷ *Ramon Rodriguez and Associates*, supra, 9 FCC Rcd at ¶ 4, citing *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1141-42 (DC Cir 1985). Accord, *WEBR, Inc. v. FCC*, 420 F.2d 158, 162 (DC Cir 1969).

an ALJ's credibility and demeanor findings are "entitled to great weight,"⁸ and must be upheld unless they patently conflict with other record evidence.⁹

There is ample reason for the Commission to afford weight to Judge Chachkin's credibility findings notwithstanding Judge Frysiak's earlier contrary ruling. First, Judge Chachkin had a substantially greater opportunity to observe the demeanor of the witnesses. The Sobel Hearing was completed in less than two days, including the admissions session. The Kay hearing, by contrast, consumed some 12 days of trial, not including the admissions session. Kay testified for more than 5 days, and Sobel testified for the better part of one day.

Judge Chachkin also had the benefit of hearing several other witnesses whose testimony had a bearing on the issues at hand, many of whom were adverse to Kay and Sobel. He was therefore able to compare the totality of the testimony from all the witnesses. Kay and Sobel were the only witnesses in the Sobel proceeding. In the Kay proceeding, however, there were a total of fourteen witnesses in addition to Kay and Sobel, including past and present employees, colleagues, and business associates who knew and have worked closely with one or both men. Judge Chachkin had the benefit of being able to consider and weigh their testimony and demeanor in addition to that of the licensees.

The fact that the *Frysiak Decision* preceded the *Chachkin Decision* by nearly two years is further reason to give deference and greater weight to the latter. Judge Chachkin is a competent attorney and judge, with years of hearing experience, and more than twenty years on the bench. He naturally would not take lightly the fact that a fellow judge had already heard testimony and considered evidence on the same situation, and he would therefore demand convincing evidence to be lead to a contrary result. While this would be true of human nature as a purely

⁸ *Broadcast Associates of Colorado*, 104 FCC 2d 16, 19 (1986).

⁹ *Milton Broadcasting Co.*, 34 FCC 2d 1036, 1045 (1972); *KQED, Inc.*, 3 FCC Rcd 2821, 2823 (Rev. Bd. 1988), rev. denied, 5 FCC Rcd 1784 (1990), recon. denied, 6 FCC Rcd 625 (1991), aff'd sub nom. *California Public Broadcasting Forum v. FCC*, 947 F.2d 505 (D.C. Cir. 1991) (Memorandum).

subconscious matter, it was something very much in Chief Judge Chachkin's conscious mind. He specifically acknowledged and addressed the *Frysiak Decision*. This is not merely a case of two judges arriving at different conclusions on the same evidence, it is rather a case of one judge subsequently taking a harder look at much more extensive evidence and carefully considering the strength of that evidence in light of the prior ruling.

There is yet an additional reason for discounting the *Frysiak Decision*, particularly with regard to the candor issue. Judge Frysiak made the demonstrably erroneous statement that "Sobel has not offered any proposed findings on the added misrepresentation issues."¹⁰ In fact, Sobel expressly "denie[d] the allegations of misrepresentation and reserve[d] the right to reply to any proposed findings or conclusions offered by the Bureau on the added issues," but did not offer specific findings in his initial pleading on the grounds that the Bureau had not met its burdens of proceeding and proof.¹¹ In response to the Bureau's pleading, moreover, Sobel offered extensive reply findings and conclusions on the issue.¹² Thus, Judge Frysiak did not even acknowledge, much less address, Sobel's extensive proposed findings and conclusions regarding the candor issue. As between the two judges, the Commission certainly may not defer to the one who entirely ignored Sobel's and Kay's side of the case on the most crucial issue.

II. APA NOTICE ISSUE

Section 9(b) of the Administrative Procedure Act ("APA") provides in pertinent part: "Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, *before the institution of agency proceedings therefor*, the licensee has been given — (1) *notice by the agency in writing* of the facts or conduct which may warrant the action; and (2) *opportunity*

¹⁰ *Frysiak Decision* at 15 n.3.

¹¹ *Proposed Findings of Fact and Conclusions of Law* at 2 n.1.

¹² See *Sobel's Reply to the Wireless Telecommunications Bureau's Proposed Findings of Fact and Conclusions of Law* at 1-16.

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¹⁰ *Frysiak Decision* at 15 n.3.

¹¹ *Proposed Findings of Fact and Conclusions of Law* at 2 n.1.

¹² See *Sobel's Reply to the Wireless Telecommunications Bureau's Proposed Findings of Fact and Conclusions of Law* at 1-16.

to demonstrate or achieve compliance with all lawful requirements."¹³ This provision "makes revocation unlawful unless the licensee is given notice and an opportunity to demonstrate or achieve compliance with all lawful requirements *before proceedings are instituted*."¹⁴ The purpose of Section 9(b) is to protect licensees from "unfair surprise" in enforcement proceedings and to afford a noncompliant licensee a "second chance" to bring itself into compliance prior to imposition of the ultimate and extreme sanction of license revocation.¹⁵ A licensee is thus entitled to "an opportunity to change his conduct before his license can be revoked."¹⁶ "[I]f a particular licensee should under ordinary circumstances transcend the bounds of the privilege granted to him, the agency which has granted him the license must inform him in writing of such conduct and afford him an opportunity to comply ... before it can revoke ... his license."¹⁷

The misconduct alleged against Sobel in the designation order did not constitute "willfulness" within the meaning of Section 9(b).¹⁸ The "willfulness" exception to Section 9(b) applies only in the case of an intentional misdeed or such gross neglect of a known duty as to be the equivalent thereof.¹⁹ The willfulness must be manifest.²⁰ The licensee must have acted intentionally or with notorious neglect of "explicit provisions" of law.²¹ The designation order

¹³ 5 U.S.C. § 558(c) (emphasis added).

¹⁴ *Pass Word, Inc.*, 86 F.C.C.2d 437, 440 (1981) (emphasis added).

¹⁵ See, e.g., *Air North America v. Department of Transportation*, 937 F.2d 1427 (9th Cir. 1991); *Hutto Stockyard, Inc. v. Department of Agriculture*, 903 F.2d 299, 304 (4th Cir. 1990); *Lawrence v. Commodities Futures Trading Commission*, 759 F.2d 767 (9th Cir. 1985); *Great Lakes Airlines, Inc. v. CAB*, 291 F.2d 354 (9th Cir. 1961).

¹⁶ ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT at 90-91 (1947).

¹⁷ This is not an onerous requirement; indeed, the Commission already has specific regulations that provide for it. E.g., 47 C.F.R. § 1.89.

¹⁸ *Id.* Section 312 of the Communications Act defines "willful" as "the conscious and deliberate commission or omission of [an] act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States." 47 U.S.C. § 312(f)(1). "Willfulness" as used in Section 9(b) of the APA, however, must have a more restrictive meaning, lest the exception apply to virtually any license revocation proceeding under Section 312, which clearly is not what Congress intended.

¹⁹ The "public health, interest, or safety" exception is also inapplicable here. The term "public interest" as used in Section 9(b) means something more than the general public interest standard applicable to all agency actions. *Air North America v. Dept. of Transportation*, 937 F.2d 1427 at n.8 (9th Cir. 1991).

²⁰ *Packing Co. v. United States*, 350 F.2d 67 (10th Cir. 1965).

²¹ *Eastern Produce Co. v. Benson*, 278 F.2d 606 (3rd Cir. 1960).

charged Sobel with violating Section 310(d) of the Communications Act²² by virtue of a management agreement with Kay. But neither Section 310(d) nor any other statutory provision or agency regulation clearly states the circumstances in which a management agreement will be considered an unauthorized transfer of control. Indeed, in making the case that Sobel had allegedly violated Section 310(d), the designation order relied on a 1963 Commission decision, *Intermountain Microwave*,²³ and subsequent cases interpreting it. But at the time Sobel and Kay entered into the management agreement, *Motorola, Inc.*,²⁴ not *Intermountain Microwave*, was the governing case for SMR services. Neither case, moreover, provides a clear, objective test; rather, they teach that the determination turns on the subjective evaluation of numerous potential factors, each considered on an ad hoc basis in light of specific circumstances. Even if the agreement did constitute a transfer or control, therefore, Sobel certainly had not acted in intentional violation or wanton disregard of any "explicit provision" of law.²⁵

The Commission's application of the standard Communications Act interpretation of "willfulness" to this APA provision²⁶ is inapposite. Congress clearly intended in adopting APA Section 9(b) that the general rule would be that licensee's are entitled to an "opportunity to demonstrate or achieve compliance," and that the exclusion of "willful" conduct from the scope of this provision would be an exception. But if the Commission's definition of willful—i.e., simply an intention to do the act, even absent a violative intent—were applied, then it is virtually impossible to imagine *any* sort of violative conduct deserving of potential license revocation that would fall within the scope of the statute. The absurdity of this conclusion thus condemns the Commission's interpretation.

²² 47 U.S.C. § 310(d).

²³ 24 RR 983 (1963).

²⁴ *Order*, issued 30 July 1985, File Nos. 50705 *et al.*

²⁵ Under proper circumstances, a "*de jure*" transfer of control as determined by objective factors might come within the "explicit provision" language, but a "*de facto*" transfer of control judged on a variety of subjective factors certainly does not.

²⁶ *Sobel Decision* at ¶ 7.

The designation order was Sobel's first notification that the Bureau believed he had engaged in conduct that warranted license revocation. Sobel had no reason to know that the Bureau believed there had been an unauthorized transfer of control of his stations to Kay by virtue of the management agreement; indeed, he was justified in thinking otherwise. A copy of the management agreement had been provided to the Bureau as early as March of 1995.²⁶ Later that year, Counsel for Sobel orally advised the Bureau that there was a written agreement between Sobel and Kay, and reminded Bureau staff that a copy of it had been produced in discovery in WT Docket No. 94-147.²⁷ Sobel provided another copy of the management agreement to the Commission with his July 3, 1996 response to the Bureau's 308(b) request.²⁸ The Bureau had the management agreement in its possession for nearly two years prior to the designation order, but it did not once during that time notify Sobel, in writing or otherwise, that he was allegedly guilty of an unauthorized transfer of control, and certainly not that the alleged misconduct warranted license revocation.

The Section 308(b) letters sent to Sobel on January 19, 1996,²⁹ and on June 11, 1996,³⁰ did not satisfy the written notice requirement of Section 9(b). Even assuming they gave notice of a suspected unauthorized transfer of control, it is not notice of "facts or conduct which may warrant" license revocation. An unauthorized transfer of control is not grounds for disqualification unless coupled with an intent to deceive or other disqualifying conduct.³¹ In any event, after withdrawal of the first Section 308(b) letter and only a month prior to issuance of the

²⁶ Kay's Response to Wireless Telecommunications Bureau's First Request for Documents (24-Mar-95).

²⁷ Kay Tr. 1784-1785

²⁸ Sobel Ex. 6 p. 41.

²⁹ SBL Ex. 6, p. 24.

³⁰ SBL Ex. 6, pp. 36-37.

³¹ E.g., *Deer Lodge Broadcasting, Inc.*, 86 FCC 2d 1066, 49 RR 2d 1317 at ¶¶ 63-67 (1981); *Blue Ribbon Broadcasting, Inc.*, 90 FCC 2d 1023, 51 RR 2d 1474 at ¶¶ 7-9 (Rev. Bd. 1982); *Silver Star Communications - Albany, Inc.*, 3 FCC Rcd 6342 at ¶¶ 52-58 (Rev. Bd. 1988), *aff'd* 6 FCC Rcd 6905, 70 RR 2d 18 at ¶¶ 13-20 (1991); *Roy M. Speer*, 11 FCC Rcd 18393 at ¶ 88 (1996). While this principal evolved in broadcast cases, it applies equally in the wireless services. *Brian L. O'Neill*, 6 FCC Rcd 2572, 69 RR 2d 129 at ¶ 30 (1991); *Century Cellunet of Jackson MSA Limited Partnership*, 6 FCC Rcd 6150, 70 RR 2d 214 at ¶ 8 (1991); *Catherine L. Waddill*, 8 FCC 2710, 72 RR 2d 500 at ¶ 19 (1993).

second one, the Commission expressly stated "there is no reason at this time to subject [Sobel] to possible sanctions."³²

For more than a year prior to designation, Sobel repeatedly and continuously requested a statement of the Bureau's concerns and an opportunity to address them informally. Sobel volunteered to travel from California to either Washington, DC or Gettysburg to meet with Bureau staff, to provide any required information, and to be apprised of the nature of any concerns and how they might be resolved.³³ The Bureau ignored Sobel's entreaties while continuing its unexplained inaction on his pending applications. Sobel was so frustrated that he eventually sought a judicial writ of mandamus to compel the Commission "to immediately resume processing [Sobel's pending applications] ... or to provide Sobel with a detailed statement of the reasons" for its continued inaction.³⁴ Sobel also requested that he be given "a meaningful opportunity to respond" prior to the designation of any hearing.³⁵ In effect, although Sobel had no idea that license revocation proceedings were being contemplated, he expressly sought the rights guaranteed him by Section 9(b) of the APA, and the Commission was on actual notice of this request.

The Bureau presented to the Commission, without Sobel's knowledge, a designation order, seeking revocation of all of Sobel's licenses.³⁶ In the January 27, 1997 response to the mandamus request³⁷ it was revealed that the Bureau had presented to the Commission an item addressing the Sobel matter, but neither the nature of the item nor what action it recommended

³² *James A. Kay, Jr.*, 11 FCC Rcd at 5324.

³³ Sobel Ex. 6 pp. 21-22, 28, 34, 39-40.

³⁴ *SBL Ex. 6* at p 9.

³⁵ *Id.* at p 10.

³⁶ The Bureau has a role in the public release and Federal Register publication of orders it has recommended to the Commission for adoption. Sobel suspects, but of course can not prove, that the Bureau (a) expedited the release of the designation order (or at least made no effort to delay it) prior to any opportunity for the Commission to respond to Sobel's February 11 letter, and (b) delayed Federal Register publication to give itself additional time to move for enlargement of issues. *See Motion for Special Relief*, filed by Sobel on May 5, 1997.

³⁷ *FCC Opposition to Petition for Writ of Mandamus* filed with the United States Court of Appeals for the District of Columbia Circuit on January 27, 1997 in Case No. 96-1361.

was disclosed. Sobel wrote directly to the Commissioners and the Chief of the Bureau, requesting that:

prior to acting on the staff recommendation before you, whatever it may be, you first give Mr. Sobel an opportunity to come forward and to hear first hand what the Bureau staff's concerns are. Mr. Sobel will use his best efforts to answer all questions, and to reach a mutually satisfactory resolution of the matter. Mr. Sobel is prepared to come to Washington on short notice to meet with you, your staff, or any other Commission personnel necessary to advance this matter.³⁸

Sobel's request was ignored for several days, despite repeated telephone calls to the Bureau Chief's office. Then, on or after February 6, 1997, Bureau counsel telephoned counsel for Sobel stating that Bureau staff would be willing to meet, but that there was little to discuss insofar as the Commission had already adopted a hearing designation order. It was through this telephone call that Sobel learned for the first time that Bureau was seeking revocation of Sobel's licenses because of an alleged unauthorized transfer of control to Kay.³⁹

After ignoring Sobel's repeated pleas for a statement of the charges against him and an opportunity to address them informally, it was only after release of the designation order on February 12, 1997, that Bureau staff finally agree to meet with counsel for Sobel, but then the Bureau took the position that Section 1.93(b) of the Commission's Rules,⁴⁰ precluded any possibility of a resolution without hearing because basic qualifications issues had been designated against Sobel. It is a bad enough thing to fail to provide the proper APA notice and opportunity, it is quite another and more serious infraction to manipulate and exploit procedural technicalities in a decided determination to preclude such notice and opportunity. As a matter of fundamental fairness as well as a mandate of law, the Commission must reconsider its ruling on this issue.

³⁸ January 31, 1997, letter from Robert J. Keller, Esq. to Reed H. Hundt, et al.

³⁹ February 11, 1997, letter from Robert J. Keller, Esq. to Reed H. Hundt, et al. Sobel anticipated, but sought to avoid, a possible hearing pursuant to Section 309 of the Communications Act. The designation of a hearing pursuant to Section 312 came as a complete surprise.

⁴⁰ 47 C.F.R. § 1.93(b).

III. LACK OF CANDOR ISSUE

A. Deceptive Intent a Prerequisite

"A necessary and essential element of both misrepresentation and lack of candor is intent to deceive."⁴¹ Inaccuracy due to carelessness, exaggeration, faulty recollection, etc., do not suggest the deceptive intent normally required for disqualification.⁴² The Commission's treatment of Sobel in this case can not be squared with well-established precedent. For example, in *Curators of the University of Missouri*, the Commission found "no evidence of an intent to deceive that would support a finding of misrepresentation or lack of candor" where the licensee's failure to report prior discrimination complaints in its FCC Form 396 (a standard EEO reporting form), even though (1) the Commission rejected the licensee's contention that it was unclear whether the form applied to part time employees; (2) the licensee further failed to disclose the complaints in response to direct correspondence from Commission staff explicitly directing it to identify "any other employment discrimination complaint(s) filed ... during the current license term"; and (3) the licensee disclosed the complaints only after the matter was called to the Commission's attention in a challenge of the licensee's renewal application.⁴³ If the Commission is unable to find intent to deceive in circumstances such as those, it can not possibly attribute such intent to Sobel.

⁴¹ *Trinity Broadcasting of Florida, Inc.*, 10 FCC Rcd. 12020, 12063 (1995). See also *Weyburn Broadcasting Limited Partnership v. FCC*, 984 F.2d 1220, 1232 (D.C. Cir. 1993); *Garden State Broadcasting Ltd. ship v. FCC*, 996 F.2d 386, 393 (D.C. Cir. 1993); *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1196 (1986); *Fox Television Stations, Inc.*, 10 FCC Rcd 8452, 8478 (1995); *Swan Creek Communications v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994); *Abacus Broadcasting Corp.*, 8 FCC Rcd 5110, 5112 (Rev. Bd. 1993); *Pinelands, Inc.*, 7 FCC Rcd 6058, 6065 (1992).

⁴² See *MCI Telecommunications Corp.*, 3 FCC Rcd 509, 512 (1988), citing *Kaye-Smith Enterprises*, 71 FCC 2d 1402, 1415 (1979); *Standard Broadcasting, Inc.*, 7 FCC Rcd 8571, 8574 (Rev. Bd. 1992).

⁴³ 16 FCC Rcd 1174 at ¶¶ 2-24 (2001). Accord, *Kansas Public Telecommunications Services, Inc.*, 14 FCC Rcd 12112 (1999); *National Broadcasting Co.*, 14 FCC Rcd 9026 (1999); *WRKL Rockland Radio, L.L.C.* [cite?] (1999); *CRC Broadcasting Company, Inc.*, 14 FCC Rcd 1038 (1999).

B. No Record Evidence of Deceptive Intent

The erroneous conclusion that Sobel was lacking in candor with the Commission must be reversed for the lack of evidence of any deceptive intent on Sobel's part. Not only is the record devoid of any evidence whatsoever that Sobel intended to falsify or conceal information from the Commission, there is indeed substantial and compelling evidence to the contrary. This is clear from even a cursory review of the record, and the following chronological review of the relevant events makes it inescapably obvious.

(1) Unexplained Freeze on Sobel's Applications (Early to Mid 1994)

In 1994 Bureau staff inexplicably stopped processing applications submitted by Sobel on his as well as some he had submitted on behalf of his customers.⁴⁴ The Bureau neither announced nor notified Sobel of this action, and at no time did it offer Sobel any explanation whatsoever of the reason, if any, for this selective and unilateral processing freeze.

(2) The Draft Designation Order (Fall 1994)

In the fall of 1994, Kay obtained (through a FOIA request) the draft of a hearing designation order proposing the revocation of Kay's licenses. The draft, which Kay shared with Sobel,⁴⁵ contained the following language: "Information available to the Commission also includes that James A. Kay, Jr. has done business under a number of assumed names. We believe that these names include some or all of the following: Air Wave Communications ... [and] Marc Sobel dba Airwave Communications."⁴⁶ Air Wave Communications is a name under which Sobel does business separate and apart from any of his dealings with Kay.⁴⁷

⁴⁴ Sobel Ex. 6 p. 21-22.

⁴⁵ Sobel Tr. 262-262; Kay Tr. 1751-1752.

⁴⁶ Kay Ex. 5 at p. 2, ¶ 4.

⁴⁷ Kay Tr. 1152-1153, 1752.

(3) 800 MHz Resale/Management Agreement (Oct-Dec 1994)

Although Sobel operated his own land mobile radio business independently of Kay, primarily involving UHF facilities in the 470-512 MHz range, he also held some 800 MHz authorizations that were subject to an oral resale/management arrangement with Kay. After learning of the draft designation order and the Commission's apparent misunderstanding of his actual existence, Sobel asked the law firm of Brown and Schwaninger to prepare a written agreement to document the relationship between him and Kay with respect to these 800 MHz stations.

The Commission's statement that "the parties drafted the Management Agreement because they learned of the forthcoming hearing designation order and realized that the need to put the details of their relationship in writing,"⁴⁸ has no basis in fact or in the record. The record indicates no such thing. The draft designation order to which Sobel and Kay became privy in the Fall of 1994 said nothing about any contractual or business relationship between the two men. As already discussed, the draft designation order deemed Sobel to be a fictitious alias being used by Kay. Indeed, had the draft designation order made some reference to business dealings between Kay and Sobel, or had it expressed some suspicion that Kay and Sobel had engaged in an unauthorized transfer of control, the Bureau's concerns would have been less mysterious—even if no less misguided—and therefore easily answered by Kay and Sobel. But the draft designation order did not even acknowledge Sobel's existence as a separate licensee, and it most certainly did not single out or even mention in any way the minority of Sobel stations that were subject to the 800 MHz resale/management agreement with Kay.

The very transcript pages cited by the Commission⁴⁹ make perfectly clear that Sobel's purpose in having the agreement reduced to writing was nothing other than an attempt to

⁴⁸ *Sobel Decision* at ¶ 74.

⁴⁹ Sobel Tr. 261-263, 299-301.

concretely clarify his separateness and distinction from Kay as unique individual. Apart from the Commission's apparent misconception that Sobel was not a real person, there was no need in put anything in writing. The parties had quite happily and satisfactorily operated under an oral understanding up to that time. Sobel was not dissatisfied with Kay's performance under the pre-existing oral arrangement and had no reason to distrust Kay. Sobel had no desire to modify the relationship, and the parties in fact did not change the operative aspects of the relationship in any way after executing the written agreement.⁵⁰ The written agreement was simply intended to clarify their position on paper.⁵¹ The sole purpose of drafting such a written agreement was "to clarify our separateness, our positions as two businesses, and our relationship in [Sobel's 800 MHz] stations that [Kay] managed."⁵²

The written agreement was prepared by Brown and Schwaninger and was executed by Sobel and Kay on October 28, 1984. The agreement was later corrected and supplemented and a virtually identical version was re-executed on December 30, 1994. Sobel was assured by Brown and Schwaninger that the written agreement was compliant with applicable Commission regulations and policy.

(4) Gary Stanford Letter (December 6, 1994)

Surprised to learn that the Commission staff mistakenly believed that he was a fictitious alias of James Kay, Sobel surmised that this was probably the reason for the processing freeze. On December 6, 1994, Sobel sent a letter to Gary Stanford of Bureau staff in Gettysburg in an attempt to clear up the apparent misunderstanding. Sobel advised Stanford:

I would like to assure you that I am an Independent Two Way Radio Dealer. I am not an employee of Mr. Kay's or of any of Mr. Kay's companies. I am not related to Mr. Kay in any way. I have my own office and business telephone numbers. I advertise under my own company name in the Yellow Pages. My business tax

⁵⁰ Sobel Tr. 258, 263.

⁵¹ Kay Tr. 1764.

⁵² Sobel Tr. 259; Kay Tr. 1761.

registration and resale tax permits go back to 1978—long before I began conducting any business whatsoever with Mr. Kay.⁵³

The Commission faults Sobel for calling himself an “Independent” radio dealer,⁵⁴ saying that “the obvious implication of his representation [is] that his stations are operated and/or marketed independently of Kay, which they are not.”⁵⁵ But the fact is that insofar as the subject matter of the Stanford letter was concerned, the statement was absolutely true and in no way whatsoever misleading.

The primary focus of the letter was Sobel’s pending applications on which processing had been frozen. The two applications specifically mentioned in the letter (FCC File Nos. 415367 and 129176) were applications for UHF facilities, not 800 MHz facilities, and one of those applications was not for Sobel himself, but for one of his customers, the Los Angeles chapter of the American Red Cross. The fact of the matter is that the vast majority of Sobel’s pending applications at any given time were UHF, not 800 MHz, applications.⁵⁶ Moreover, the only intelligence from the Bureau that Sobel had to go on was the statement by Hollingsworth that he would dismiss a Sobel application (File No. 415367) if Kay failed to respond to a Commission inquiry. That application involved one of Sobel’s UHF facilities and had no connection whatsoever to Kay.

At the time Sobel wrote this letter to Mr. Stanford, he was primarily concerned with the Commission’s failure to process his pending UHF applications that had nothing whatsoever to do with Kay. And the Bureau, for its part, while it had not bothered to make any attempt whatsoever

⁵³ Sobel Ex. 6 p. 21-22.

⁵⁴ As the agency responsible for regulating the land mobile radio industry, the Commission surely must be aware that the phrase “Independent Two Way Radio Dealer” or similar constructions are typical terms of art used to distinguish truly independent dealers, such as Sobel, from those who are affiliated with the various radio equipment manufacturers, such as Motorola, GE, EF Johnson, etc. Even if the Commissioners themselves are not aware of this, seasoned land mobile staffers in Gettysburg such as Mr. Stanford most certainly were. It is simply not possible—and the record is devoid of any indication—that this use of terminology misled Mr. Stanford in any way.

⁵⁵ *Sobel Decision* at ¶ 75.

⁵⁶ Eight of the eleven pending applications listed in Appendix A to the Sobel designation order were UHF applications.

to communicate directly with Sobel, had indicated only two things indirectly: (a) that it intended to dismiss one of Sobel's UHF applications unless Kay responded to an inquiry, and (b) that it thought Sobel was fictitious alias being used by Kay for some untoward purpose. The Bureau had not at that point expressed concern with *any* sort of contractual relationship between Sobel and Kay, much less the management agreement regarding Sobel's 800 MHz stations; indeed, the Bureau seemed to believe Sobel did not in reality exist as a separate person from Kay.

Far from concealing a business affiliation with Kay, Sobel actually acknowledged such a relationship in the letter. He stated that he had established his own independent business operations "long before I began conducting any business whatsoever with Mr. Kay."⁵⁷ The clear implication of that statement is that he did, in fact, do business with Kay. As we have already seen, however, the 800 MHz management agreement was not relevant to the pending applications at issue, so it is neither surprising nor an indication of deceit that Sobel did not mention it. His point was not that he had no dealings with Mr. Kay, but rather that he was not a fictitious business name of Mr. Kay.

If upon reading this letter the Bureau had questions regarding the specific nature of the admitted business relationship between Sobel and Kay, it is more than curious that Sobel was not thereupon asked about it. In concluding his letter to Gary Stanford, Sobel extended the following invitation: "Should you need further assistance ... in this matter, please call me at your earliest convenience."⁵⁸ Neither Stanford nor anyone else from the Commission ever responded to Sobel's letter.⁵⁹

(5) The Kay Designation Order (December 14, 1994)

On December 14, 1994, the Commission released the formal hearing designation order in the Kay license revocation proceedings. That order included virtually the same language

⁵⁷ Sobel Ex. 6 p. 22.

⁵⁸ *Id.*

⁵⁹ Sobel Tr. 305; Kay Tr. 1559.

asserting that Sobel was a fictitious Kay alias: "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."⁶⁰ The designation order did not state that the Commission was inquiring into the relationship between Sobel and Kay, nor did it state that the Commission was concerned about the propriety of contractual relationships between Sobel and Kay.⁶¹ The Commission erroneously believed Sobel was a fictitious name being used by Kay. The specific call signs being targeted for revocation were listed in Appendix A to the designation order, and included eleven call signs that were licensed to Sobel.⁶²

(6) The Motion and Affidavit (January 25, 1994)

On or about January 25, 1995, Brown and Schwaninger, acting on Kay's behalf, submitted in the above-captioned proceeding a pleading entitled "Motion to Enlarge, Change or Delete Issues."⁶³ That pleading included the following statement:

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. ... 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 party to the instant proceeding, the Commission should either change the [designation order] to delete the reference to the stations identified as stations 154 through 164 in Appendix A, or should dismiss the [designation order] with respect to those stations.⁶⁴

⁶⁰ *James A. Kay, Jr.*, 10 FCC Rcd 2062 at ¶ 3 (1994) ("*Kay HDO*"). 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.

⁶¹ Conspicuously absent from the designation order were any real party in interest or transfer of control issues.

⁶² *Kay HDO*, Appendix A, items 154-164

⁶³ WTB Ex. 343.

⁶⁴ WTB Ex. 343 at pp. 4-5.

This was the sole reference to Sobel in the entire sixteen page pleading that addressed numerous other matters.

Shortly before the pleading was filed, Kay advised Sobel that their common communications counsel, Brown and Schwaninger—the same law firm that had less than three months earlier also prepared the written version of the 800 MHz agreement—had prepared an affidavit for Sobel’s signature to be used in connection with the motion. The attorneys drafted the affidavit and sent it to Kay, and after discussing the affidavit with the attorneys, Kay briefly discussed it with Sobel and secured his signature.⁶⁵ Sobel was not a party to the Kay revocation proceeding—notwithstanding that eleven of his call signs were mistakenly implicated—and the pleading was not being offered on his behalf.

A lack of candor typically arises when a party under some compulsion to provide information to the Commission (either in connection with an application or in response to a specific request for information) obfuscates or fails to disclose some pertinent piece of data. In this instance, however, Sobel was under no such compulsion. He was not a party to the Kay proceeding, nor was he intimately involved in the filing in question. Kay, one of only two parties to the license revocation proceeding, made a procedural request (that the Sobel call signs be deleted) based on an accurately stated summary of a factual situation (that the call signs were licensed to Sobel, not to Kay). Sobel merely executed an affidavit in support of that request.

Sobel did not review or even see the underlying motion, did not see a copy of it, and was not familiar with its contents, although he did understand that it would seek deletion of his eleven call signs from the designation order.⁶⁶ To be sure, the affidavit did not disclose the existence of the 800 MHz agreement, but Sobel could hardly have thought this to be relevant in view of at least two crucial facts: (a) nine of the eleven Sobel call signs erroneously listed in the

⁶⁵ Sobel Tr. 141-142, 144-145, 161-166.

⁶⁶ Sobel Tr. 162-165.

Kay designation were UHF stations having no affiliation with Kay whatsoever, with or without the 800 MHz agreement; and (b) neither the Kay designation order nor any other indication from the Commission to that point suggested that contractual relations between Sobel and Kay were at issue. Under these circumstances, it is not realistic to expect Sobel to have discerned that the specifics of the 800 MHz agreement was the reason for the mistaken inclusion of his call signs. The Commission did not, after all, include all of Sobel's call signs in the designation order, only eleven of them. And only a tiny fraction of those were even 800 MHz stations. What ever was going on, there was, based on the Commission's own statements and actions, no reason whatsoever for Sobel to conclude that the existence of the 800 MHz agreement was in any way, shape, or form relevant to the correction of the erroneous inclusion of his call signs in the designation order.

The motion which Sobel's affidavit supported was not responding to an expressed concern about real party in interest or transfer of control or about any contractual arrangement between him and Mr. Kay. Once again, the designation order in WT Docket No. 94-147 listed Sobel's licenses as belonging to Kay, not on the theory that there had been an unauthorized transfer of control of those licenses to Kay, but rather on the mistaken theory that Marc Sobel was a fictitious alias used by Kay. Sobel's primary focus and his entire mindset at the time he signed the affidavit was simply to clarify that he was indeed a unique individual, separate and distinct from Kay, and not a mere fictitious alias of the latter. The issue that was foremost in Sobel's mind and the point that he was trying to communicate was that he was a separate individual from Kay, not a fictitious alias.

In 1996 when the Bureau itself made a similar request—i.e., that the Sobel call signs be removed from the Kay designation order—the Bureau did not consider the 800 MHz agreement to be relevant or of necessity to disclose. In an effort to clear a path for its own motion for summary decision in the Kay proceeding, the Bureau in 1996 prevailed upon the Presiding ALJ

and later the full Commission to remove the Sobel call signs from the Kay designation order. Although the Bureau had been in possession of the 800 MHz agreement since March of 1995, at no time during that process did the Bureau disclose the existence of the agreement or even suggest to the Presiding ALJ or to the Commission that it believed Kay was the true party in interest with respect to the Sobel licenses by virtue of the agreement. The Bureau did not consider the management agreement of sufficient significance or materiality to warrant disclosure as part of its own 1996 effort to remove the Sobel licenses from the proceeding, and the agreement was equally irrelevant to Kay's virtually identical request in 1995.

In any event, Sobel certainly did not intend to conceal the agreement—he simply did not consider it relevant to the specific issue at hand. He was under the belief, moreover, that the agreement either was being contemporaneously produced to the Commission or would be so produced very shortly—and it in fact was produced to the Bureau on March 24, 1995.

It is truly absurd to assert that Sobel lacked candor in failing to realize in the few short weeks between January 25 and March 24, 1995, that an agreement had not yet been produced in a proceeding to which he was not a party, and for not thereupon immediately grasping the significance of an 800 MHz agreement to the logical request to have his UHF call signs deleted from the designation order of a different man. Even the combined fictional genius of Ionesco and Beckett would be taxed by the absurd suggestion that Sobel was so intent upon concealing the existence and substance of his 800 MHz arrangement with Kay that his immediate reaction upon learning of the draft designation order was to have the agreement committed to writing.

Turning to the specific assertions in the affidavit, the Commission maintains that Sobel exhibited a lack of candor in attesting (a) that Kay had no “interest” in Sobel’s stations,⁶⁷ (b) that Sobel was not an “employee” of Kay,⁶⁸ and (c) that Sobel did not do business Kay’s name.⁶⁹ To

⁶⁷ *Sobel Decision* at ¶¶ 70-72.

⁶⁸ *Sobel Decision* at ¶ 73.

⁶⁹ *Id.*

quickly dispose of the last item first, the Commission finds the statement misleading because “that statement is true in the sense that Sobel does not conduct a business using Kay’s name ... [h]owever, the Management Agreement stations, which are licensed to Sobel, are marketing by Kay under his own name as part of his business.”⁷⁰ First, as has been stated before, the 800 MHz stations were not the primary focus of the affidavit or the pleading, since nine of the eleven stations in question were not subject to the agreement. Second, and more important, the statement is not merely technically accurate, it is substantially true as well. The arrangement between Sobel and Kay is not functionally different from any typical resale agreement in the land mobile communications industry in which one licensee markets mobile service using airtime capacity provided in whole or in part via facilities of a third party licensee. Absent a specific agency or dealer relationship, no one suggests that the reseller is “doing business” in the name of the facilities based carrier. Nor was Kay doing business in Sobel’s name.

As for the meaning of the words “interest” and “employee,”⁷¹ the Commission’s fundamental error is that it is attempting, after the fact, to attribute hyper-technical interpretations of those terms, rather than looking at what the record reveals about what Sobel actually intended at the time he executed the affidavit. The Commission refuses to give any weight to Sobel’s contention that, regardless of the words used, his intention in executing the affidavit was to correct the false impression that he was a non-existent fictitious name for Kay and that he did not intend by executing the affidavit to conceal the management agreement. There is absolutely nothing in the record that contradicts this, and there are numerous established facts in the record to support it: (a) the language in the draft of the Kay designation order, (b) Sobel’s effort to clarify the matter by writing to Stanford, (c) the fact that not only was his

⁷⁰ Id.

⁷¹ Sobel, as all business operators, understands the word “employee” in the same sense that the IRS does. He has never considered himself an “employee” of Kay by virtue of doing work for Kay as an independent contractor, and it would thus never have occurred to him to question the accuracy of the term as used in the affidavit.

Stanford letter ignored, but that substantially the same language was maintained in the official version of the Kay designation order, (d) the fact that nine of Sobel's UHF licenses and two of his 800 MHz licenses were set for revocation in the Kay proceeding without notice to Sobel and without making him a party, (e) the specific testimony of both Kay and Sobel that the primary focus of the affidavit was addressing the mistaken fictitious name assumption, and (f) Sobel action that is totally inconsistent with an intention to conceal the agreement, namely, reducing it to writing after learning of the draft designation order. It is grave error for the Commission to simply disregard all of this evidence and base its decision on its own mere speculation that Sobel must have carefully selected the words "interest" and "employee" with an intent to deceive.

In addressing an issue as crucial and grave as deceptive intent, the Commission must not adopt a Pharisaic linguistic analysis. What the Court of Appeals recently instructed the Commission on interpreting subjective intent in connection with the use of words having multiple, and often nuanced, meanings, squarely applies here. The "imprecise use of [a] phrase" does not support a finding of deceptive intent.⁷³ In *Lutheran Church-Missouri Synod v. FCC*,⁷⁴ the United States Court of Appeals for the District of Columbia Circuit addressed the issue of whether intent to deceive may be attributed on the basis of interpretation of words of potentially ambiguous meaning. At issue there was whether a broadcast licensee lacked candor with the Commission in describing its hiring practices in connection with an EEO review by stating that a background in classical music was a "requirement" for certain positions when, in fact, some positions were occasionally filled by individuals with no such background. The Court stated:

There remains the \$25,000 forfeiture for the station's lack of candor. The Commission insists that substantial evidence supports its finding. But the only evidence is two pleadings in which the Church's counsel described classical music training as a "requirement." The Commission relies on the AMERICAN HERITAGE DICTIONARY (New College Ed. 1976), which defines "requirement" as "[T]hat which is required; something needed" or "[S]omething obligatory; a prerequisite." *Id.* at 1105. But WEBSTER'S THIRD

⁷³ *CJW Transportation Specialists*, 14 FCC Rcd 21417 at ¶ 6 (1999).

⁷⁴ 141 F.3d 344 (D.C. Cir. 1998)

NEW INTERNATIONAL DICTIONARY (1981 ed.) gives the word "requirement" more leeway, defining it: "something that is *wanted or needed*" or "something *called for or demanded*." *Id.* at 1929 (emphasis added.) We are not exalting one dictionary over another, but simply pointing out that the Commission has overstated the word's clarity. The Church's explanation for its use of the word "required" jibes with common understanding of the term. It is unremarkable to call a particular criterion a "requirement" even if you must sometimes bend it to fill a job opening. Particularly since the Church immediately clarified its position when questioned, it is an intolerable stretch to call its use of an ambiguous word an "intent to deceive." We are not surprised that the Commission could not point us to a single case where we have affirmed a finding of lack of candor on such slim facts. We vacate both the lack of candor determination and the \$25,000 forfeiture.⁷⁴

Certainly the Commission may not ignore substantial record evidence that totally supports the affiant's own entirely rational and uncontradicted testimony of what he intended, only to substitute its own speculation as to what intended by imposing, post hoc, a hyper-technical definition of terms.

(7) Attempts to Communicate with the Bureau (1995-1996)

Further evidence negating any deceptive intent is that, for more than a year prior to the designation order in the above-captioned proceeding, Sobel repeatedly and continuously attempted to initiate a dialog with the Bureau, requesting a statement of the Bureau's concerns and an opportunity to address them informally. Sobel volunteered to travel from California to either Washington, D.C. or Gettysburg to meet with Bureau staff, to provide any required information, and to be apprised of the nature of any concerns and how they might be resolved. During the course of these efforts, all of which were ignored or rebuffed by the Bureau, Counsel for Sobel explicitly advised Bureau staff that Sobel had a management agreement with Kay regarding 800 MHz stations, and that a copy of the agreement had been provided to the Bureau in the course of discovery in the Kay proceeding. Clearly, Sobel never had any intention of concealing the agreement from the Commission. Indeed, as stated previously, had this been his intent, he never would have reduced the oral arrangement to writing.

⁷⁴ *Id.* (emphasis in original).

The Bureau ostensibly sought Sobel's separation from the Kay proceeding so that the Sobel-Kay relationship could "be explored initially in a nonadjudicatory investigation." Wireless Telecommunications Bureau's Request for Certification at 4. The Bureau's subsequent conduct showed this to be a false representation. After purportedly conducting its "investigation" the Bureau arranged to have the Commission adopt a designation order against Sobel solely and exclusively on the basis of the management agreement which it had held in its possession for nearly two years, and well before it had even begun the ostensible Sobel investigation. In short, the Bureau was all along in possession of all the information it would eventually use to initiate these license revocation proceedings, Sobel had repeatedly told the Bureau it had this information and repeatedly offered to provide additional information, yet the Bureau refused to make any communication whatsoever of its concerns to Sobel.

(8) Response to 308(b) Requests (January-June 1996)

On January 19, 1996, the Bureau sent Sobel a Section 308(b) request for information about his business relationship with Kay.⁷⁵ Sobel advised the Bureau through counsel that he intended to respond, but on February 22, 1996, the Bureau withdrew the request without explanation.⁷⁶ Not understanding the nature of this maneuver, Sobel once again attempted to engage in a dialog with the Bureau to learn what, if any, impediment was preventing the processing of his long-pending applications. Bureau staff advised him to wait until his status in the Kay proceeding was clarified.⁷⁷ After Sobel's call signs were removed from the Kay designation order, however, the Bureau continued to reject Sobel's overtures.

On June 11, 1996, the Bureau issued another Section 308(b) request, virtually identical to the one it had inexplicably withdrawn four months earlier, and with no explanation whatsoever

⁷⁵ SBL Ex. 6 at 24.

⁷⁶ *Id.* at 26.

⁷⁷ *Id.* at 34, 39.

for its on again/off again tactics.⁷⁸ Sobel timely responded, providing all information requested, including a copy of the same management agreement that had been produced previously.⁷⁹

IV. UNAUTHORIZED TRANSFER OF CONTROL ISSUE

Without conceding, but also without fully rearguing, all of the matters previously asserted regarding this issue, Petitioners again reassert the request that this case be consolidated with WT Docket No. 94-147, and that the findings and conclusions in the *Chachkin Decision* also be taken into consideration. Among the specific items that should thus be considered are:

- the specific factual finding that Sobel was intimately involved in the application for, establishment, and management of his stations; that he did not passively accept Kay's input, even sometimes rejecting Kay's suggestions; and that he based decisions on his own extensive experience in and knowledge of the Los Angeles dispatch mobile radio business (*Chachkin Decision*, Findings ¶ 145, 152-153);
- the specific factual finding that the relationship between Sobel and Kay was that of a facilities based licensee (Sobel) to a reseller of airtime capacity (Kay); a recognition and acknowledgement of the fact that under such a resale arrangement Kay would naturally be the one to bill and collect funds from end users (*Chachkin Decision*, Findings ¶ 150, 152, 156-157);
- the specific factual finding that Sobel had valid and sound business reasons for the nature and structure of his arrangement with Kay as to the 800 MHz licenses (*Chachkin Decision*, Findings ¶ 151);
- the specific factual finding that the sharing of common transmitter sites between different licensees, sometimes even competitors, in the Los Angeles area is a common practice; and that Sobel's sharing of antenna sites with Kay is consistent with this practice (*Chachkin Decision*, Findings ¶ 155);
- the specific factual finding that, although the station equipment is owned by Kay, it is in fact leased by Sobel (*Chachkin Decision*, Findings ¶ 166);
- the specific recognition of the fact that the written management agreement had been in the Commission's and the Bureau's possession for two years before the Bureau ever suggested to Sobel that the agreement was improper (*Chachkin Decision*, Findings ¶ 174);
- the specific factual finding that Sobel had attempted, long before initiation of this proceeding, to clarify an apparent misunderstanding by Bureau staff as to his identity

⁷⁸ SBL Ex. 6, pp. 36-37.

⁷⁹ *Id.* at pp. 39-44.

vis-à-vis Kay, only to have such efforts totally ignored by the Bureau (*Chachkin Decision*, Findings ¶ 159);

- the specific factual finding that Sobel requested that his oral arrangement with Kay as to the 800 MHz stations be reduced to writing precisely because of the Bureau's apparent misunderstanding and to document and clarify that he was a separate person and business entity from Kay; that Sobel relied on communications legal counsel to prepare such an agreement; and that he was provided with what was represented to him as a standard boilerplate agreement that complied with applicable FCC requirements (*Chachkin Decision*, Findings ¶¶ 160-161);
- the specific recognition of the express language in the written agreement reserving ultimate control over the licensed station to Sobel (*Chachkin Decision*, Findings at ¶ 162);

The reasoning set forth in Section I of this *Petition for Reconsideration* not only justifies, but requires the consideration and evaluation of these matters in this case.

V. THE REQUEST FOR INQUIRY AND INVESTIGATION

On March 2, 1998, Sobel filed his *Revised Request for Inquiry and Investigation*.⁸⁰ In the ruling under review, the Commission states "that Sobel's request has no bearing on our review of the initial decision, and we need not consider it further here," and that "no further action is warranted."⁸¹ Moreover, there is no mention of the *Revised Request for Inquiry and Investigation* in the ordering clauses.⁸² Petitioners therefore assume that the Commission has not taken any action, much less a final action, on the matter, and that it is therefore still pending. Out of an abundance of caution, however, if this understanding is not correct, then *Petitioners* also respectfully seeks reconsideration of the *Sobel Decision* insofar as it purports to be a final action on the *Revised Request for Inquiry and Investigation*. In this regard, *Petitioners* reassert all showings and arguments made in that pleading as well as in the Reply to Opposition filed on March 23, 1998, none of which have been addressed by the Commission.

⁸⁰ The March 2, 1998, filing included extensive exhibits and documentary evidence and corrected typographical and other clerical errors in Sobel's February 27, 1998, *Request for Inquiry and Investigation*.

⁸¹ *Sobel Decision* at ¶ 9.

⁸² *Id.* at ¶¶ 81-91.

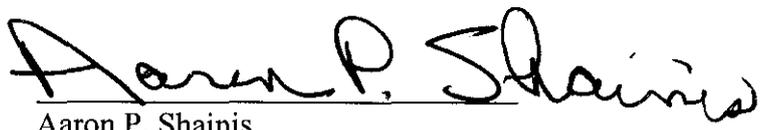
WHEREFORE, Petitioners Marc D. Sobel d/b/a AirWave Communications and James A. Kay, Jr., respectfully request that the Commission reconsider its *Decision* (FCC 01-342), released January 25, 2002, in the above-captioned matter.

Respectfully submitted:

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Dated: February 25, 2002

ATTACHMENT No. 1

ATTACHMENT No. 1



**DISTRICT OF COLUMBIA
FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT
EMERGENCY MEDICAL SERVICES BUREAU
P.O. BOX 37433, WASHINGTON, D.C. 20013
(202) 289-2235**

TAX I.D. # 53-6001131

DTXDB9809

AMBULANCE SERVICE BILL

97075383

**JAMES KAY
P.O BOX 7890
VAN NUYS, CA 91409-7890**

7890 7881
08/01/97 06

According to our records, you have failed to respond to our NOTICE OF EMERGENCY SERVICE FEES, REQUEST FOR INFORMATION. As a result you are now being billed directly for these services. Ambulance service fees are the responsibility of the person receiving the service.

THIS BILL IS SEPARATE FROM YOUR HOSPITAL BILL.

Make checks or money orders payable to the **D.C. TREASURER**. If you desire to pay by credit card, please complete the credit card authorization on the reverse side. Please return this notice with payment or insurance information in the envelope provided. Your canceled check is your receipt.

ACCOUNT NUMBER: 97075383	DATE OF SERVICE: 07/28/97	INCIDENT NUMBER: 075383	COST OF SERVICE: \$362.00
SERVICE FROM: 815 CONN AVE NW		SERVICE TO: GEORGE WASH. UNIV. HOSPITA	

If you have Medicaid, Medicare, or other medical insurance (Blue Cross/Blue Shield, Continental, Kaiser etc.), they may pay this fee for you. Please provide your Medicaid, Medicare, or other medical insurance information and signature below. We will bill your insurance company for you. You are responsible for any balance not paid or not covered by your insurance.

MEDICARE		MEDICAID	
Medicare Number		Medicaid Number	
OTHER HEALTH INSURANCE			
Insurance Company Name:		Policy Number:	
Insurance Company Address:		Group Number:	
City, State and Zip Code:		Policy Holder's Name:	

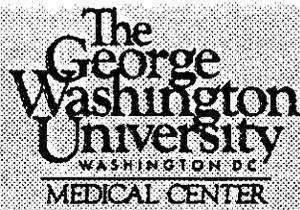
I do not have Medicaid, Medicare, or other medical insurance.
IS MEDICARE SECONDARY? YES NO IS THIS WORK RELATED? YES NO
YOU MUST SIGN BELOW FOR PAYMENT TO BE SENT DIRECTLY TO US.

RELEASE OF INFORMATION & PAYMENT AUTHORIZATION

I request that payment of authorized Medicare and/or insurance benefits be made to me or on my behalf for any services furnished me by the DC Fire and Emergency Medical Services Department. I authorize any holder of medical or other information about this or any other Medicare or insurance claim to release to the Health Care Financing Administration, its agents or insurers any information needed to determine these benefits to related services.

T RESPONDED.PLEASE PAY AMOUNT SHOWN.

Signature: _____ Date: _____



901 23RD STREET, NW
WASHINGTON, DC 20037
202 994-8844
FE1 # 23-2896725

DATE OF BILL	DATE OF PREV. BILL
CYCLE 08/06/97	
INS.	

X	E	PATIENT NAME	PATIENT NUMBER	SEX	AGE	ADMISSION DTE	DISCHARGE DTE	DAYS	OUT PATIENT
		KAY, JAMES	43305648	M		07/28/97			
GUAR PH: 818-894-3566									

GUARANTOR NAME AND ADDRESS	JAMES KAY P.O. BOX 7890 VAN NUYS, CA 91409	COB	INSURANCE COMPANY NAME	GROUP NO.	POLICY NUMBER
		1	S/P HMO NO CONTRA		1483040000

PLEASE RETURN THIS PORTION WITH YOUR PAYMENT.

AMOUNT OF PAYMENT	\$
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DATE OF SERVICE	DESCRIPTION OF HOSPITAL SERVICES	SERVICE CODE	TOTAL CHARGES	EST. COVERAGE INS. CO. NO. 1	EST. COVERAGE INS. CO. NO. 2	EST. COVERAGE INS. CO. NO. 3	EST. COVERAGE INS. CO. NO. 4	AMOUNT
DETAIL OF CURRENT CHARGES, PAYMENTS AND ADJUSTMENTS								
7/28	0001 IV SOLUTION	25194218	30.00	30.00				
7/28	0001 ER I.V. THE	25194242	35.00	35.00				
7/28	0001 ER PULSE OX	25093238	49.00	49.00				
7/28	0001 ER CARDIAC	25093170	116.00	116.00				
7/28	0001 ELECTROCARD	24230005	59.00	59.00				
7/28	0001 PROMETHAZIN	28123800	5.91	5.91				
7/28	0001 KETOROLAC (28138691	22.35	22.35				
7/28	0001 MORPHINE 10	28443554	6.50	6.50				
7/28	0002 PERCOCET-5	28935328	7.40	7.40				
7/29	0001 URINALYSIS,	27710763	7.00	7.00				
7/28	0001 BASE LEVEL	25092479	378.00	378.00				
SUMMARY OF CURRENT CHARGES								
	RESPIRATORY SVCS		49.00	49.00				
	CARDIOLOGY		175.00	175.00				
	EMERGENCY ROOM		443.00	443.00				
	CLINICAL PATH		7.00	7.00				
	PHARMACY		42.16	42.16				
SUB-TOTAL OF CURR. CHARGES			716.16	716.16				

GUAR RELATIONSHIP: ACC DATE: 07/28/97 TYPE: 8 SEX: M TIME: 0:01 AM GUAR NO: 1483040000 PLACE: EMPL REL: N
DIAGNOSIS: 592.0

TOTALS	716.16	716.16					
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43305648 PATIENT NUMBER
PLEASE REFER TO PATIENT NUMBER ON ALL INQUIRIES AND CORRESPONDENCE.
ADDITIONAL PATIENT BILLING MAY BE NECESSARY FOR ANY CHARGES NOT POSTED WHEN THIS BILL WAS PREPARED, OR IF INSURANCE CARRIERS DO NOT PAY ANY PART OF THE AMOUNTS SHOWN UNDER ESTIMATED INSURANCE COVERAGE.

MAKE CHECKS PAYABLE TO:



2150 Pennsylvania Ave.
Washington, DC 20037

FORWARDING AND ADDRESS CORRECTION REQUESTED

SELF PAY #1 1483040000

PAGE # 1

Telephone Inquiries: 703-846-9364

IF PAYING BY MASTERCARD, VISA OR AMERICAN EXPRESS, FILL OUT BELOW.

CHECK CARD USING FOR PAYMENT

MASTERCARD
 VISA
 AMERICAN EXPRESS

CARD NUMBER: _____ AMOUNT: _____

SIGNATURE: _____ EXP. DATE: _____

STATEMENT DATE 07/31/97	PAY THIS AMOUNT \$297.00	ACCT. # 1483040
DUE DATE 08/15/97	SHOW AMOUNT PAID HERE \$	

ADDRESSEE

REMIT TO

JAMES KAY
 P.O. BOX 7890
 VAN NUYS, CA 91409

THE GEORGE WASHINGTON UNIVERSITY
 MEDICAL FACULTY ASSOCIATES
 DEPARTMENT 0005
 WASHINGTON, DC 20073

Please check box if above address is incorrect or insurance information has changed, and indicate change(s) on reverse side.

STATEMENT

PLEASE DETACH AND RETURN TOP PORTION WITH YOUR PAYMENT

0-Aia-381

DATE OF SERVICE / TRANSACTION	INVOICE	DESCRIPTION OF SERVICES	CHARGES / PAYMENTS / ALLOWANCES	PAYMENTS FROM PATIENT	BALANCE DUE FROM PATIENT
07/28/97	3196033	SERV BY SUNG LEE MD (HB) EKG #148	64.00		64.00
07/28/97	3200992	EKG INTERPRET & REPORT			
		SERV BY TENAGNE HAILEMARIAM			
		DEM EMERGENCY ME			
07/28/97	99284	EXTENDED (LEVEL IV)	233.00		233.00
<i>No info to billing cust. svc. check again.</i>					
BILL DATE:	PATIENT NAME:		ACCOUNT #:		PLEASE PAY THIS BALANCE
07/31/97	JAMES KAY		1483040		\$297.00

* PAYMENTS RECEIVED AFTER BILL DATE WILL APPEAR ON YOUR NEXT STATEMENT.

YOUR BALANCE IS NOW DUE. HOWEVER, IF YOU HAVE INSURANCE COVERAGE, PLEASE INFORM US IMMEDIATELY. PLEASE COMPLETE THE REVERSE SIDE OF THE STATEMENT AND RETURN IT TO US.



75366

KAY, JAMES
AW 43305648 MR 1483040
10-09-1956 DOS 07-28-97
P.O. BOX 7890 CA
VAN NUYS 91409
HOME 818-94-3568 M
WORK 818-94-3568 X

Patient Information

PHYSICIAN ORDERS

FOR RESULTS OF LABORATORY TESTS AND CULTURE REPORTS CALL 994-3878 FROM 9 a.m.-1 p.m. MONDAY-FRIDAY

YOUR FOLLOW-UP CARE IS VERY IMPORTANT - PLEASE KEEP YOUR APPOINTMENT. IF YOUR ILLNESS GETS WORSE OR CHANGES IN AN UNEXPECTED WAY, RETURN TO THE EMERGENCY DEPARTMENT. IF YOU HAVE DIFFICULTY ARRANGING THE APPROPRIATE FOLLOW-UP VISIT, PLEASE CALL 994-3878 AND OUR QUALITY ASSURANCE NURSE WILL ASSIST YOU.

THE EMERGENCY DEPARTMENT ATTENDING PHYSICIAN INTERPRETED X-RAY FILMS TAKEN DURING YOUR VISIT. YOU WILL BE NOTIFIED IF THERE ARE ANY SIGNIFICANT DISCREPANCIES WHEN THE RADIOLOGIST REVIEWS THE FILM. YOUR PHYSICIAN MAY CALL THE RADIOLOGY DEPARTMENT AT 994-4603 TO OBTAIN A FINAL READING.

PLEASE TURN PAGE OVER FOR INSTRUCTION ON HEAD INJURY, ABDOMINAL PROBLEMS, SPRAINS, BRUISES, AND WOUND INSTRUCTIONS.

INSTRUCTIONS

DIAGNOSIS	Kidney Stone	SYMPTOMS ▶	Pain
		MECH. OF INJURY ▶	
CO-MORBIDITY ▶	Hypertension	PROCEDURES ▶	
1. FOLLOW-UP:	Unrelieved pain		YOU WERE SEEN BY (PRINT CLEARLY) DR. <u>Hell</u> DR. <u>Hell</u>
<input type="checkbox"/> YOU SHOULD BE RE-EXAMINED IN <u>4-5</u> DAYS. CALL AS SOON AS POSSIBLE FOR APPOINTMENT. <input type="checkbox"/> IF NOT IMPROVING AFTER _____ DAYS, CALL FOR THE NEXT AVAILABLE APPOINTMENT. <input type="checkbox"/> ADDITIONAL FOLLOW-UP: <u>7-14-97</u>			WORK RELATED? <input type="checkbox"/> YES <input type="checkbox"/> NO _____ DAYS FULL DISABILITY _____ DAYS LIGHT DUTY <input type="checkbox"/> SICK CERTIFICATE GIVEN
2. RETURN TO EMERGENCY UNIT IF:	<u>Worse pain than before</u>		
3. ADDITIONAL INSTRUCTIONS (e.g. activity, diet):	<u>Rest & lots of fluids</u> <u>Strain urine</u>		
PRESCRIPTIONS ▶	1. <u>Advil 34 pills every 6 hrs for pain</u>	#Rx ▶	#To Go ▶
	2. <u>Penicillin - every 4 hrs as needed</u>	#Rx ▶	#To Go ▶
	3. <u>Rest - every 4 hrs as needed</u>	#Rx ▶ <u>20</u>	#To Go ▶ <u>2</u>
INSTRUCTION SHEETS ▶		PENDING LABS ▶	
I HAVE READ, UNDERSTOOD AND RECEIVED A COPY OF MY DISPOSITION RECORD.		<input checked="" type="checkbox"/> <u>Hell</u> PATIENT'S SIGNATURE	

DIAGNOSTIC TESTS

L A B	<input type="checkbox"/> CBC	<input type="checkbox"/> SMA-6	<input type="checkbox"/> GLU	<input type="checkbox"/> C.E.:	RADIOLOGY STUDY	DEM PHYS. READING
	WBC	+ <	<input type="checkbox"/> ETOH	OTHER: <u>u/dip (A) Bld @ M.F</u>		
	HCT		<input type="checkbox"/> AMY			
	Pit		<input type="checkbox"/> HCG (URINE)			
<input type="checkbox"/> EKG E.D. INTERPRETATION			D STICK	BREATHLIZER	CONDITION ON DISCHARGE: <input type="checkbox"/> IMPROVED <input type="checkbox"/> UNCHANGED <input type="checkbox"/> OTHER	
<input type="checkbox"/> CONSULT(S)		CASE DISCUSSED WITH ▶			THIS PATIENT HAS _____ BEEN PERSONALLY SEEN AND EXAMINED BY ME	
NURSE'S SIGNATURE		TIME OUT	HOUSESTAFF SIGNATURE		<u>Hellman</u> ATTENDING PHYSICIAN'S SIGNATURE	

Certificate of Service

I, Robert J. Keller, counsel for Marc D. Sobel, hereby certify that on this 25th day of February, 2002, I caused copies of the foregoing **PETITION FOR RECONSIDERATION** to served, by U.S. mail, first class postage prepaid, and by facsimile to the officials and parties or record in WT Docket No. 97-56, as follows:

Charles W. Kelley, Chief
Investigations and Hearing Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W. – Room 3-B431
Washington, D.C. 20554

William H. Knowles-Kellett, Esquire
Investigations and Hearing Division
Enforcement Bureau
Federal Communications Commission
1270 Fairfield Road
Gettysburg, Pennsylvania 17325-7245


Robert J. Keller