

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
JAMES A. KAY, JR.)
)
Licensee of One Hundred Fifty Two)
Part 90 Licenses in the)
Los Angeles, California Area)

WT DOCKET NO. 94-147

To: The Commission

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**REPLY TO THE ENFORCEMENT BUREAU'S
OPPOSITION TO PETITION FOR RECONSIDERATION**

James A. Kay, Jr. ("Kay"), by his attorneys and pursuant to Section 1.106(h) of the Commission's Rules and Regulations, 47 C.F.R. § 1.106(h), hereby replies to the *Opposition to Petition for Reconsideration* filed by the Enforcement Bureau ("Bureau") in the above-captioned matter, and respectfully shows the following:

A. The Conflict Between Judges

1. Kay did not urge that the Commission favor Judge Chachkin's decision over that of Judge Frysiak simply "because ... the Kay hearing lasted longer." *Opposition* at ¶ 2. The length of the hearing in itself is not determinative, but what *is* highly significant is that Judge Chachkin had the opportunity to observe the demeanor of the witnesses over several days, and also had the opportunity to hear from several witnesses adverse to Kay and Sobel. He thus had a decided advantage in the ability to evaluate the demeanor and credibility of Kay and Sobel.

2. While the Bureau is correct that the Kay hearing was longer because it involved more issues, *Opposition* at ¶ 3, this does not minimize the importance of Judge Chachkin's demeanor findings. He certainly heard both men testify on matters relative to the candor issue, and his further observation of them testifying on additional issues is certainly useful in his assessment of their demeanor and credibility. Besides, the Bureau can not have it both ways.

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Since it seeks to make testimony on unrelated issues relevant to the candor issue by falsely claiming it shows “a “pattern of deception,” e.g. *Opposition* at ¶ 10, it can not also dismiss as irrelevant the demeanor and credibility with which Kay and Sobel testified on those and other issues as well.

3. Regardless of the proper posture of the transfer of control issue in the Kay hearing, a lack of candor issue was clearly and fully in play in the Kay proceeding, and it is inextricably intertwined with the alleged unauthorized transfer of control. Indeed, Judge Chachkin explicitly advised the parties at the outset of the hearing that he deemed the question of *de facto* control to be enmeshed with the candor issue. Kay Tr. 800-805. The Bureau itself also acknowledges that this is the case. It alleges, for example, that Kay was “motivated by a desire to avoid Commission scrutiny of his control of stations licensed to Sobel. *Opposition* at ¶ 10. The important question is whether Kay and Sobel *thought* there was an unauthorized transfer of control. If they did not *believe* the agreement constituted an unauthorized transfer of control, they had no motive to conceal it. Judge Chachkin’s determinations regarding the transfer of control issue are, at a minimum, relevant to the question whether Kay and Sobel *believed* there was a transfer of control, because absent such belief—and the record substantially indicates a lack of such belief—it is not possible to find the deceptive intent necessary to a lack of candor.

4. As for the significance of Judge Frysiak’s prior adverse ruling in the Sobel proceeding, Kay does not suggest that the mere existence of “an earlier decision of a fellow judge,” *Opposition* at ¶ 2, made it unlikely that Judge Chachkin would come to a contrary conclusion. However, this knowledge certainly would have heightened his sensitivity and caused him to be particularly discerning before reaching a contrary conclusion on the same facts. This,

coupled with the extensive record and the specific demeanor and credibility findings lends substantial weight to Judge Chachkin's ruling vis-à-vis that of Judge Frysiak.¹

5. The Bureau would have the Commission disregard the demeanor and credibility findings simply because it reversed Judge Chachkin's determination that the Bureau had engaged in prosecutorial misconduct. *Opposition* at ¶ 4. This does not follow. Even assuming the Commission were correct in its assessment on this particular point,² it is not relevant to the substantive issues in the case. The judge properly concluded, based on the record evidence, that Kay and Sobel did not act with deceptive intent and that they lacked any motive to deceive the Commission. This determination must be judged on its own merits and, on the record below, must be affirmed. It is not affected one way or the other by the Judge's separate determination regarding Bureau misconduct.

6. The Bureau relies on *Milton Broadcasting Co.*, 34 FCC 2d 1036, 1045 (1972), for the proposition that the Commission may disregard or subordinate a judge's demeanor and credibility "findings which are patently in conflict with ... the facts established by the record." *Opposition* at ¶ 4 n.9. But *Milton Broadcasting* actually supports Kay's position. The Commission there rejected the judge's demeanor and credibility findings because: "He accepted [a proffered] version of what had occurred despite the existence of substantial, probative and, in some cases, unrebutted evidence to the contrary. 34 FCC 2d at 1045. The Bureau asks the

¹ The Bureau contends that the Commission did not defer to Judge Frysiak, but rather that "it critically examined the evidence and resolved the conflict based on the records in the two proceedings." *Opposition* at ¶ 2. The problem with this tack is that it ignores the lack of any evidence of the essential element of deceptive intent, as well as the abundance of record evidence negating deceptive intent. See Section C, *infra*.

² Whether or not the Commission agrees that the Bureau improperly withheld the disclosure of the management agreement from Judge Frysiak, it can not escape the fact that Judge Chachkin found Kay's production of the agreement, in conjunction with all the other evidence and his demeanor findings, negated any suspicion of deceptive intent. Nor is it responsive to suggest that the production of the agreement was in fact argued to Judge Frysiak by Kay and Sobel, *Kay Decision* at ¶ 89, insofar as Judge Frysiak committed "profound errors, which cast doubts on his conclusions," *Opposition* at ¶ 4, to wit, his blatantly false statement that Sobel did not present findings or conclusions on the candor issue and his resulting failure to acknowledge or address Sobel's extensive presentation on that issue, see, in WT Docket No. 97-56, *Joint Petition for Reconsideration* (Feb. 25, 2002) at 4; *Proposed Findings of Fact and Conclusions of Law* at 2 n.1; and *Sobel's Reply to the Wireless Telecommunications Bureau's Proposed Findings of Fact and Conclusions of Law* at 1-16.

Commission to do the same thing for which the *Milton Broadcasting* judge was criticized, namely, to accept the Bureau's unsupported assertion that Kay and Sobel acted with deceptive intent "despite the existence of substantial, probative and, in some cases, un rebutted evidence to the contrary." The overwhelming weight of the evidence on this point is discussed more fully in Section C of this reply.

C. The Lack of Candor Issue

7. The fatal problem with the Bureau's theory of this case is that there is absolutely no record to support it. Indeed, the record in these proceedings overwhelmingly contradicts it. On the crucial candor issue, the *sine qua non* is the existence of deceptive intent, and there simply is no record to support the Commission's decision on this point or the Bureau's defense of it.

8. The Bureau, relying on *Leflore Broadcasting Co. v. FCC*, 636 F.2d 454, 462 (D.C. Cir. 1980), demurs that intent may be inferred from the falsity of a statement coupled with the knowledge that it is false. *Opposition* at ¶ 9. But on the facts of the instant case this results only in circular reasoning. In order to find that the statement was false, one must find that the Bureau's post hoc interpretation of the meaning of the word "interest" should be applied retroactively, **and that Kay and Sobel actually held that meaning of the word in their minds when they uttered the affidavits**. This is contradicted by every single shred of evidence on the question.

9. Nor does the *RKO General, Inc.*, 4 FCC Rcd 4679 (Rev. Bd. 1989), support the Bureau's position. First, a fair reading of the case is not, as the Bureau asserts, deceptive intent may be inferred from a "clear motive to deceive." *Opposition* at ¶ 9. Rather, the Review Board found a clear motive as a matter of fact, and found this relevant to inferring intent from the party's "deceptive conduct." 4 FCC Rcd at 4684. This point is confirmed by the next precedent relied on by the Bureau itself, *American International Development, Inc.*, *Opposition* at ¶ 9,

which confirms that the crucial factor is the existence of deceptive conduct, not motive. 86 FCC 2d 808, 816 n.39 (1981).

10. Indeed, in *RKO General* the Commission there rejected the Bureau's finding of deceptive intent for at least three reasons: (a) the lack of any record evidence of deceptive conduct, *id.*, and (b) favorable demeanor and credibility findings by the presiding judge, 86 FCC 2d at 815, and (c) conduct by the applicant that was inconsistent with an intent to deceive, 86 FCC 2d at 816. All three factors are equally present here: (a) there is no evidence of deceptive intent, (b) Judge Chachkin made specific and favorable demeanor and credibility findings, and (c) the conduct of Kay and Sobel is inconsistent with an intent to deceive. On top of that, there is ample evidence directly negating any deceptive intent.

11. There are substantial facts established on the records in both proceedings that demonstrate a lack of deceptive intent on the part of either Kay or Sobel in connection with the January 1995 affidavit. To mention only some of the more important factors:

- The parties voluntarily reduced the agreement to writing, even though they were perfectly content with the oral arrangement under which they had operated for years. Sobel Tr. 258-263, 305.³ Such an action can not be reconciled with the view that they wanted to conceal the agreement. Those acting with deceptive intent do not voluntarily and unilaterally create written records of their improper conduct.
- The 1995 motion and the affidavits supporting it were not primarily concerned with the management agreement stations. When the Commission inexplicably froze action on Sobel's applications, the impact was largely on UHF stations, not 800 MHz stations subject to the management agreement. And of the eleven Sobel call signs improperly listed in the Kay designation order, nine were UHF stations, not 800 MHz stations subject to the management agreement. And fourteen of the sixteen stations subject to the management agreement were not listed in Kay designation order. (Compare Exhibit A of the Kay designation order (items 154-154) with the list of Sobel call signs and applications in the Sobel designation order.)

³ The relevant portions of the Sobel Transcript were also admitted into evidence in the Kay proceeding, and Sobel was presented for further cross-examination thereon.

- The Commission itself never suggested that transfer or control was an issue. Both the draft and final versions of the designation order stated that Sobel was a fictitious name being used by Kay, not that Kay had improperly assumed control of some of Sobel's stations. Indeed, the Commission did not designate a transfer of control or a real party in interest issue against Kay. It simply suggested that Sobel was a fictitious alias of Kay.
- Sobel had no expectation that by executing the affidavit he would conceal the fact of the agreement from the Commission, nor was that his intent. In fact, he fully expected that the agreement would be produced to the Commission in the Kay hearing if it had not already been so produced. Sobel Tr. 303.
- Kay did in fact produce the agreement—less than three months after submitting the affidavits—and he did so before there was any ruling on the January 1995 motion seeking deletion of the Sobel call signs. He did this because his request to delete the Sobel call signs was entirely irrelevant to the question of whether to produce and disclose the agreement. As mentioned before, most of the call signs that were at issue in the motion were not even subject to the agreement. Indeed, Kay also produced similar management agreements he had with parties whose call signs were never implicated in the designation order at all. *Kay's Response to Wireless Telecommunications Bureau's First Request for Production of Documents* in WT Docket No. 94-147 (Mar. 24, 1995).
- Kay had absolutely no incentive to conceal his involvement with the Sobel stations. The Bureau never presented any evidence (indeed, never even alleged) that Kay was precluded from licensing in his own name the Sobel stations that were subject to the management agreement. The Bureau has not demonstrated that Kay and Sobel had any reason or motive to conceal their arrangement.
- Kay and Sobel both relied on the fact that the communications lawyers who drafted the January 1995 motion and the supporting affidavits were the same lawyers who had, only weeks before, also drafted the management agreement. They were therefore justified in concluding that there was no inconsistency between the two sets of documents. Indeed, Kay was specifically advised by legal counsel—and relayed the advice to Sobel—that the management agreement did not constitute an “interest” within the meaning of the affidavit. Sobel Tr. 140-142, 154, 161-163, 370-371; Kay Tr. 2444-2445.

By contrast, the only thing the Bureau can point to in support of its assertion of deceptive intent is its effort to use a hyper-technical legal definition of the word “interest” and then, contrary to all evidence, impute that meaning to Sobel’s and Kay’s laymen’s understanding of the term.

12. The Bureau’s claim that Kay’s agreements with Carla Pfeiffer and Vincent Cordaro, coupled with the Sobel agreement, indicates a “pattern of deception,” *Opposition* at ¶ 10 pp. 7-8, is easily refuted. First, Kay never had a management agreement with Carla Pfeiffer, he merely leased equipment and antenna space to her. Second, she acknowledged in her testimony that she viewed the arrangement as a business opportunity for herself.⁴ As for Cordaro, the fact that Kay voluntarily produced the management agreement with him—even though the subject call sign was not at issue in the Kay proceeding—at once negates the suggestion that Kay was being deceptive regarding Cordaro and that the January 1995 motion to remove the Sobel call signs had any relationship whatsoever to Kay’s intention to disclose the Sobel agreement. Moreover, during the Kay hearing Cordaro’s credibility was destroyed and his dishonest bias against Kay was demonstrated. It was shown by unrefuted—indeed, irrefutable—evidence that he stole data from Kay for the express purpose of attempting to use it to discredit Kay with the Bureau, and then he lied to the Bureau both as to the nature of the data and the way he came to acquire it.

⁴ Pfeiffer also has memory and credibility problems. See Kay’s *Petition for Reconsideration* (Feb. 25, 2002) at n.68.

D. Conclusion

WHEREFORE, Petitioner respectfully renews his request that the Commission reconsider its *Decision* in the above-captioned matter.

Respectfully submitted this 26th day of March, 2002:

James A. Kay, Jr.

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Certificate of Service

I, Robert J. Keller, counsel for James A. Kay, Jr., hereby certify that on this 26th day of March, 2002, I caused copies of the foregoing pleading to served, by U.S. mail, first class postage prepaid, and by facsimile, on the following:

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A handwritten signature in black ink, reading "Robert J. Keller", written over a horizontal line.

Robert J. Keller