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March 2, 2010

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW, Suite TW-A325  
Washington, D.C. 20554

In re: WT Docket Nos. 94-147 and 97-56  
James A. Kay, Jr., and Marc D. Sobel  
Motion to Modify Sanction

Dear Ms. Dortch:

Submitted herewith on behalf of the above-referenced licensees is a *Memorandum of Law* to the Commissioners addressing the FCC's legal authority to consider and take the actions proposed in the August 3, 2005, *Motion to Modify Sanction* in the referenced matter, the finality of judicial review notwithstanding.

Kindly direct any questions or correspondence concerning this matter to the undersigned.

Very truly yours,



Robert J. Keller  
Counsel for James A. Kay, Jr., and Marc D. Sobel

cc: William Davenport, Deputy Chief, Enforcement Bureau  
Hillary S. De Nigro, Chief, Investigations & Hearings Division, Enforcement Bureau  
Austin Schlick, General Counsel  
Daniel M. Armstrong, Associate General Counsel & Chief, OGC Litigation Division  
The Honorable Julius Genachowski, Chairman  
The Honorable Michael J. Copps, Commissioner  
The Honorable Robert M. McDowell, Commissioner  
The Honorable Mignon Clyburn, Commissioner

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To: The FCC Commissioners  
From: Robert J. Keller  
Date: 2 March 2010  
In re: WT Docket Nos. 94-147 & 97-56  
FCC's Legal Authority to Modify Sanction

**MEMORANDUM OF LAW**

James A. Kay, Jr., and Marc D. Sobel (“Licensees”) petitioned the Commission to modify the sanction imposed in the referenced enforcement proceedings.<sup>1</sup> Licensees believe the Office of General Counsel or other legal staff may have advised that the agency lacks legal authority to modify the sanction, citing the finality of an appellate court judgment affirming the FCC prior decisions in these matters.<sup>2</sup> This memorandum demonstrates that the FCC retains the necessary jurisdiction, legal authority, and regulatory discretion to modify the sanction.

**A. Background**

In these proceedings the Commission found that Licensees had engaged in an unauthorized transfer of control, by virtue of a 1994 management agreement, and lacked candor in connection with supporting affidavits in a 1995 pleading.<sup>3</sup> However, considering all the circumstances, the Commission concluded that the violations were *not disqualifying* and *did not warrant revoking all of Licensees’ authorizations*.<sup>4</sup> The agency fashioned a “limited” sanction, revoking only the Licensees’ 800 MHz authorizations,<sup>5</sup> deeming this adequate to deter any future misconduct.<sup>6</sup> The U.S. Court of Appeals for the D.C. Circuit affirmed, finding sufficient evidence in the administrative record to justify the unauthorized transfer and lack of candor conclusions. *The Court did not address the limited revocation sanction.*

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<sup>1</sup> *Motion to Modify Sanction*, filed August 3, 2005, (revised and corrected version filed on August 4, 2005). On August 23, 2005, licensees also filed a *Motion for Stay Pending Action on Motion to Modify*.

<sup>2</sup> The belief is based on statements made by Commission staff and at least one Commissioner during meetings in which the alternative sanction proposal was discussed.

<sup>3</sup> *James A. Kay, Jr.*, 17 FCC Rcd 1834 (2001), *recon. denied*, 17 FCC Rcd 8554 (2002) and *Marc Sobel*, 17 FCC Rcd 1872, *recon. denied*, 17 FCC Rcd 8562 (2002), *further recon. denied*, 19 FCC Rcd 801 (2004), *consolidated on appeal and aff’d sub nom. Kay v. FCC*, 396 F.3d 1184 (D.C. Cir. 2005), *cert. denied*, 546 U.S. 871 (2005).

<sup>4</sup> *Marc Sobel*, 17 FCC Rcd at 1893-1894; *James Kay*, 17 FCC Rcd at 1864-1865.

<sup>5</sup> The was *not* due to anything intrinsic to the 800 MHz band generally or these particular licenses. Having decided that partial revocation was an adequate deterrent (see n.6, below), the 800 MHz licenses were selected because the violations involved Sobel’s 800 MHz licenses. *Id.*

<sup>6</sup> Deterrence was the stated purpose for the sanction. “In this case, we find that loss of ... interests involving the 800 MHz band alone will be an adequate deterrent.” *Marc Sobel*, 17 FCC Rcd at 1893-189, quoting *Character Qualifications*, 102 FCC 2d 1179, 1128 ¶ 103 (1986); see also *James Kay*, 17 FCC Rcd at 1864-1865.

Licenseses do *not* seek to disturb the judgment on the merits, i.e., the motion does not challenge the findings of non-disqualifying regulatory violations, findings affirmed by the Court. Nor do they even challenge the Commission's decision to impose a limited sanction as a deterrent to future misconduct, a matter not addressed by the Court. Licensees simply propose an alternative sanction that (a) does not affect in any way the judgment on the merits, and therefore is fully consistent with the Court's mandate, (b) satisfies the stated purpose of the original sanction, i.e., deterrence of future misconduct, and (c) and provides significant public interest benefits that are absent from the original sanction—in particular with respect to first responder and other public safety communications in the Los Angeles area.

**B. Question of Law Presented**

The following question of law is presented:

*Where the FCC issues an order, finding regulatory violations and imposing a sanction; an appellate court affirms, entering an opinion holding that the agency's finding of violations was adequately supported by "substantial evidence" in the administrative, but the court does not address the sanction imposed—*

*Does the agency, after the appellate court issues the mandate, have the legal authority to modify the sanction (leaving the finding of violations unaltered) if it determines that (a) the modified sanction will fulfill the regulatory purpose of the original sanction, (b) additional important regulatory policies will also be served, (c) such modification would serve the public interest, convenience, and necessity?*

This memorandum demonstrates that the Commission has the required jurisdiction, legal authority, and regulatory discretion to modify previously imposed enforcement sanctions in such circumstances.

**C. The Proposed Modification of the Sanction Would Not Violate the Court's Mandate.**

A court reviewing actions of an administrative agency "has power to pass judgment upon challenged principles of law insofar as they are relevant to the disposition made by the Commission." *Federal Power Commission v. Pacific Power & Light Co.*, 307 U.S. 156 (1939), *cited by FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940). As to such questions of law resolved by the Court, "a judgment rendered will be a final and indisputable basis of action as between" the agency and the parties. *ICC v. Baird*, 194 U.S. 25, 38 (1904). "Issuance of the mandate formally marks the end of appellate jurisdiction. Jurisdiction returns to the tribunal to which the mandate is directed, for such proceedings as may be appropriate." *Johnson v. Bechtel Associates*, 801 F.2d 412 (D.C. Cir. 1986) (*citing United States v. DiLapi*, 651 F.2d 140, 144 (2d Cir. 1981), *cert. denied*, 455 U.S. 938 (1982)). "The mandate of a federal appellate court 'establishes the law binding further action in the litigation by another body subject to its authority.'" *Finberg v. Sullivan*, 658 F.2d 94, 97 n.5 (9th Cir. 1980) (*quoting City of Cleveland v. FPC*, 561 F.2d 344, 346 (D.C. Cir. 1977)).

A court's mandate is thus a rule of law, and like any other rule of law, its proper application requires reasoned interpretation to discern the intent of its maker. Any opinion accompanying the issuing court's judgment is the principal source used in discerning the requirements of the mandate. *Iowa Utilities Board v. FCC*, 135 F.3d 535, 541 (8th Cir. 1998) ("[T]he mandate [must be] construed in the light of the opinion of the court deciding the case."); *Finberg v. Sullivan*, 658 F.2d at 97 n.5 (9th Cir. 1980) ("[T]he court's opinion should be consulted to ascertain the intent of the mandate.") (*citing In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895); *FTC v. Standard Educational. Society*, 148 F.2d 931, 932 (2d Cir. 1945); and *Miller v. United States*, 173 F.2d 922 (6th Cir. 1949)).

The D.C. Circuit, in its relatively short opinion in the consolidated Kay/Sobel appeals, presents a single determination of law, namely, that the Commission's finding of regulatory violations was adequately supported by "substantial evidence" in the record. The first of only two sentences in the introductory paragraph simply recites that the FCC found that Kay and Sobel lacked candor and engaged in an unauthorized transfer of control. The second sentence then frames the ensuing discussion as follows: "Kay and Sobel argue that the administrative record does not contain substantial evidence to support the orders." *Kay v. FCC*, 396 F.3d at 1185. There is no preview or harbinger of any other issue, and no other issue is discussed in the ensuing two Sections of the opinion.

Section I is merely a recitation of the facts and procedural history of the matter. *Kay v. FCC*, 396 F.3d at 1185-1188. The only mention of the revocation sanction in the entire opinion appears here. It is mentioned once, as a neutral statement of fact, that the Commission ordered the revocation of the 800 MHz licenses. 396 F.3d at 1187. The first three paragraphs of Section II are devoted to a discussion of "the Commission's determination that there had been an unauthorized transfer of control of Sobel's stations to Kay, in violation of § 310(d)." 396 F.3d at 1188-1189. The next four paragraphs, constituting the balance of the opinion, address "the Commission's finding that Kay and Sobel lacked candor with respect to their business relationship." 396 F.3d at 1189. The Court held "that the record as a whole demonstrates ample support for the Commission's conclusions." 396 F.3d at 1189.

The Court, based on its own opinion, decided a single question of law, i.e., whether the FCC finding of violations was based on an administrative record sufficient to satisfy the "substantial evidence" test. The Court found that it was. That is the substance of the mandate, and the proposed sanction modification not violate it. The modification would not alter or challenge that finding in any way. Indeed, the alternative sanction would be imposed precisely because of those violations, and it would be fashioned in a manner the Commission determines will adequately deter future misconduct. Thus, not only would the finding of violations—the subject of the Court's mandate—remain undisturbed, the stated purpose for the sanction (deterrence of future misconduct)—a matter not addressed by the Court and thus beyond the scope of its mandate—would also remain intact.

**D. The Commission and the Licensees  
Are the Only Parties to This Matter.**

The mandate doctrine (i.e., a mandate is binding on the tribunal to which it is issued) is grounded in a strong public policy favoring judicial finality.<sup>7</sup> Once appellate review is final and the mandate issues, "the parties thereafter are entitled to rely upon such adjudication as a final settlement of their controversy." *BellSouth Corp. v. FCC*, 96 F.3d 849, 851 (6th Cir. 1996) (citing *Hines v. Royal Indemnity Co.*, 253 F.2d 111 (6th Cir. 1958)). But this policy is not a mere abstraction or theoretical principle arising in a vacuum. It is for the benefit and protection of "the parties" who are "entitled to rely" upon the finality of the judgment. Thus, in *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, (D.C. Cir. 1971), the Court deemed it a "critical fact" that an FCC proposal to reopen the record in a completed comparative hearing proceeding would have the practical effect of rescinding a construction permit that had been granted pursuant to the Court's mandate and after such grant had become "a final order." 463 F.2d at 286. The grantee was a party to both the FCC proceedings (a comparative hearing) and the subsequent appeal resulting in the mandate.

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<sup>7</sup> Without conceding the points presented herein, however, Licensees are certainly willing to join the Commission in or consent to a motion to the Court requesting recall of the mandate. Assuming the mandate were applicable to the sanction, Licensee's believe a strong case could be made for recall on the basis of, *inter alia*, the lack of any other parties to the proceeding and the strong public interest basis for modification of the sanction.

In this case, however, there were no parties to the enforcement proceedings or to the judicial appeals other than Licensees and the Commission itself. Moreover, as previously discussed, most of the subject 800 MHz spectrum will ultimately go to exclusive public safety use, whether or not the Licensees' authorizations are revoked.<sup>8</sup> This is not spectrum that will be re-auctioned, so there is no adverse impact on the U.S. Treasury. The alternative sanction proposal would actually be a net gain from the U.S. Treasury. The original sanction includes the assessment of a \$10,000 forfeiture against Mr. Kay for a violation of Section 308(b) occurring in 1994. *James Kay*, 17 FCC Rcd at 1865. But the statute of limitations on any action for collection of a forfeiture is five years—measured from the date of the violation, not entry of the forfeiture order. 28 U.S.C. 2462. That deadline had already expired when the forfeiture was assessed. Under the modified sanction as proposed, however, the forfeiture would be paid voluntarily, and Licensees would also make a substantial cash voluntary contribution to the U.S. Treasury.

**E. The Court's Mandate Does Not Negate the FCC's Authority, and Obligation to Regulate According to the Public Interest.**

The proposed modified sanction would also support important public interest objectives and telecommunications policy goals. Specifically, it will enhance and improve the quality, efficiency, and capacity of fully interoperable first responder and other public safety communications in the Los Angeles area. Under the original sanction, the Commission will revoke the 800 MHz authorizations held by Licensees, but this will not free up any significant amount of additional spectrum. Indeed, under the Commission's 800 MHz band reconfiguration program, the majority of the 800 MHz channel subject to the original sanction will eventually be cleared for exclusive public safety use whether or not the licenses are revoked.<sup>9</sup> Under the modified sanction this 800 MHz spectrum will still go to exclusive public safety use, but additional UHF spectrum would also be contributed for public safety use. The 470-512 MHz band is heavily used for public safety voice communications in the Los Angeles area.

In the motion to modify, Licensees propose assigning UHF channels to the Interagency Communications Interoperability System ("ICIS") an joint powers agency created by California statute in 2003 to form a regional mobile radio communications network for local governments. ICIS is an interoperability network, enabling the sharing by multiple agencies of their existing UHF systems. Each agency thereby gains collective access to greater coverage area, expanded channel capacity, and enhanced trunking efficiencies, in addition to true interoperability among and between the individual agencies. By networking existing systems, local governments expand and improve public safety communications without the substantial costs of obtaining licenses for other bands and replacing repeaters, mobile units, and other equipment. ICIS has filed comments in this matter stating that (a) it requires additional spectrum to improve and expand its network and to enable additional agencies to participate, (b) the spectrum offered under the alternative sanction proposal is fully compatible with the ICIS system, and (c) ICIS would make immediate use of any channels awarded to it as the result of a modification of the sanction.

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<sup>8</sup> To the extent that some of the subject authorizations represent an encumbrance on the 800 MHz geographic licensee in the market, the ultimate impact is nil due to the 800 MHz band reconfiguration program. Even if Licensees' authorizations are not revoked, the geographic licensee will be relocated to the ESMR portion of the band, thereby effectively "shedding" any encumbrances from Licensee's who would be relocated to the interleave band.

<sup>9</sup> In fact, as to some of the channels, revocation may even result in spectrum that would otherwise be reserved for public safety and/or critical infrastructure eligibles becoming available for commercial and other private sector applicants.

Providing additional spectrum for ICIS will enhance the capabilities of a wide-area, cooperative, interoperability network, benefitting not only the public safety entities involved, but all the citizens of the entire Los Angeles area. Additional public safety spectrum in virtually any large city would be a significant public interest gain. For an area such as Los Angeles, the public interest value is enormous. Los Angeles, arguably the most spectrum congested market in the country, is the site of frequent natural phenomena (earthquakes, fires, mudslides, etc.), putting first responder communications to the acid test. It is the second largest metropolitan area in the U.S., and among the top 15 worldwide. It is the site of both an international seaport and one of the country's largest international airports. Los Angeles is thus a critical focus of the nation's homeland security efforts. Increased spectrum capacity for first responder communications in Los Angeles is an intangible public interest asset that can scarcely be comprehended, much less quantified.

The Court's opinion, as discussed in the preceding section of the memorandum, does not address the sanction at all. The mandate therefore cannot and should not be construed in a manner that would prevent the Commission from pursuing such an important public interest objective. Congress as conferred on the FCC broad discretion, and an obligation, to wield regulatory power in furtherance of the public interest. Subject to the narrow confines of judicial review, this legislative mandate may not be vetoed by a judicial mandate. As the Supreme Court has explained, this public interest authority and discretion remain intact even after an appeal in which the court corrects legal error on the part of the Commission:

[A]n administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge. ... The Commission's responsibility at all times is to measure [its actions] by the standard of "public convenience, interest, or necessity." ... [To hold otherwise] would mean that for practical purposes the contingencies of judicial review and of litigation, rather than the public interest, would be decisive factors.

*Pottsville*, 309 U.S. at 145-146 (citing *Pacific Power & Light*, 307 U.S. 156, and *Ford Motor Co. v. NLRB*, 305 U.S. 364 (1939)). This is more so where the court affirmed the agency, and the post-appeal matter being pursued is not within the ambit of the Court's mandate in any event.

## **F. Conclusion**

As demonstrated above, the Court's opinion did not address the matter of the sanction to be imposed, and the Court's mandate does not preclude the Commission from modifying the sanction. The judgment on the merits will continue to stand, undisturbed. The modified sanction will be entirely consistent with the judgment and will fulfill the purpose of deterrence for which the original sanction was imposed. Finally, and most important, there are substantial public interest benefits to be gained by modifying the sanction. To hold that the Court's mandate precludes modification of the sanction in these circumstances would be to sacrifice the public interest to the legal technicalities, precisely the type of form over substance the Supreme Court warned of in *Pottsville*. 309 U.S. at 145-146. The Commission should evaluate the proposal on its merits. It should not abdicate its public interest obligations based on artificial and inapposite procedural technicalities.