

BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 02-1175, 04-1045

JAMES A. KAY, JR., *ET AL.*,

Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

ON APPEAL OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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GLOSSARY

Act	The Communications Act of 1934, as amended
ALJ	Administrative Law Judge
Bureau	Wireless Telecommunications Bureau or Enforcement Bureau
Management Agreement stations	Stations subject to the Kay/Sobel Management Agreement
Kay	James A. Kay, Jr.
Sobel	Marc D. Sobel
SMR	Specialized Mobile Radio
WT Docket No. 94-147	Kay hearing
WT Docket No. 97-56	Sobel hearing

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STATEMENT OF ISSUE

Whether substantial evidence supports the Commission’s findings on the basis of its de novo review of the evidentiary record that Appellants lacked candor in an affidavit and a related pleading filed with the FCC about their business arrangement with respect to certain stations, which arrangement the FCC had found to effect an unauthorized transfer of control?

JURISDICTION

In their brief, Appellants invoke this Court’s jurisdiction pursuant to 47 U.S.C. §§ 402(b)(1)(2) and (5), and 47 U.S.C. § 402(a) “to the extent that Section 402(a) could apply to the “revocation sanction.” Brief, p. 1 & n.2. This Court has jurisdiction pursuant to 47 U.S.C. § 402(b)(5) to hear appeals of Commission orders revoking station licenses.

Appellants do not state in their brief why they invoke additional jurisdictional sources when the issue they specify refers only to the “revocation sanction.” Brief, p. 1 & n.2. The Notice of Appeal in Case No. 04-1045, however, refers to both the revocation of certain of appellant Marc Sobel’s land mobile radio licenses and to the denial of certain of his applications for such facilities. To the extent, therefore, that the reference in Appellants’ brief to the “revocation sanction” also encompasses the denial of Sobel’s applications, the Court has jurisdiction to review this aspect of the relevant Commission order pursuant to 47 U.S.C. §§ 402(b)(1) and (2).¹

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in an appendix to this brief.

COUNTERSTATEMENT

The Federal Communications Commission, after conducting full evidentiary hearings, concluded that James A. Kay, Jr. (“Kay”) and Marc D. Sobel (“Sobel”) (collectively “Appellants”) lacked candor in an affidavit and a related motion filed with the Commission

¹ The order appealed from in Case No. 04-1045 also dismissed certain of Sobel's finder's preference requests, but the Notice of Appeal does not refer to this action by the Commission. To the extent that the Court may nevertheless conclude that the Commission’s dismissal of the finder's preference requests also has been put in issue, 47 U.S.C. § 402(a) and 28 U.S.C. § 2342 (Hobbs Act) is the source of the Court's jurisdiction over this action. Cassell v. FCC, 154 F.3d 478 n.1 (D.C. Cir. 1998). No. 04-1045 is timely filed under both Section 402(b) and the Hobbs Act and this court is a proper judicial forum under both statutes. However, if Sobel intended to invoke this Court's jurisdiction over the Commission's dismissal of his finder's preference requests, the United States should have been named as a party, 28 U.S.C. §§ 2344 & 2348; FRAP 15(a)(2)(B). This was not done although Appellants served their brief on the Department of Justice. The Court therefore may wish to consider whether its proceeding under Case No. 04-1045 to exercise jurisdiction over the Commission's dismissal of the finder's preference requests "would vitiate the scheme of the Administrative Orders Review Act - a scheme designed to ensure that the Attorney General has an opportunity to represent the interests of the Government whenever an order of one of the specified agencies is reviewed." See Port of Boston Marine Term. Ass’n v. Rederi. Transatlantic, 400 U.S. 62, 70 (1970)

about their business arrangement with respect to certain land mobile radio stations in the Specialized Mobile Radio (SMR) service on the 800 MHz band that were licensed to Sobel, which arrangement, the Commission found, had effected an unauthorized transfer of control from Sobel to Kay of the subject stations. In light of these findings, the Commission revoked appellants' licenses for stations in the 800 MHz band. It also denied Sobel's applications and dismissed his finder's preference requests for stations in that spectrum band. Because the misconduct involved only facilities on the 800 MHz band, appellants were permitted to retain all other licenses and to keep on file all other applications and finder's preference requests.² See James A. Kay, Jr., 17 FCC Rcd 1834 (“Kay Order”) (JA 835), recon. denied, 17 FCC Rcd 8554 (2002) (“Kay Reconsideration Order”) (JA 893); Marc D. Sobel, 17 FCC Rcd 1872 (“Sobel Order”) (JA 314), recon. denied, 17 FCC Rcd 8562 (2002) (“Sobel Reconsideration Order”) (JA 398), further recon. denied, 19 FCC Rcd 801 (2004) (“Sobel Further Reconsideration Order”) (JA 419). In these cases, Appellants challenge the “revocation sanction,” Brief, p. 1 & n.2, on the sole ground that there is no substantial evidence to support the Commission's lack of candor finding.

I. Factual Background

James A. Kay, Jr. operates land mobile radio facilities in the Los Angeles, California area. Kay began providing two-way mobile service on a commercial basis in the early 1980s and, by the mid-1990s, he held over 150 land mobile station licenses under Part 90 of the

² The Commission also imposed a \$10,000 forfeiture on Kay for a separate violation by Kay of his obligations as a licensee under Section 308(b) of the Communications Act, 47 U.S.C. § 308(b), in responding in 1994 to certain requests for information by the FCC's staff. See pp. 22-23, 26, infra. Kay has not challenged the forfeiture sanction in Case No. 02-1175. See Brief, pp. 1, 40-58.

Commission's rules, 47 C.F.R. § 90.1, et seq., including 34 licenses for land mobile stations on the 800 MHz band. Kay sells land mobile radio service under the business name Lucky's Two-Way Radios. He also sells, services, and installs mobile radios and two-way radio systems through a wholly owned corporation, Buddy Corp., under the business name Southland Communications.³

Sobel also is involved in the land mobile business in the Los Angeles area and has known Kay for about 20 years. Since the mid-to-late 1980s, Sobel has installed, maintained, and serviced Kay's repeaters (commercial land mobile radio transmitting facilities) as a contractor working for Kay. Sobel held 28 licenses for commercial land mobile radio stations, including 15 for facilities on the 800 MHz band.⁴

II. Designation For Hearing

A. The Bureau's § 308(b) Letter Of Inquiry

By 1994, the Commission had received numerous complaints from other licensees concerning the construction and operation of a number of Kay's licensed facilities, including allegations that Kay was falsely reporting the number of mobile units he was serving in order to avoid the channel sharing and recovery provisions of the FCC's rules. Information available to the Commission at the time indicated that Kay may have been conducting business under other names. A licensee could use multiple names to thwart the FCC's channel sharing and recovery provisions, for example, by reporting the same mobile users in connection with a number of different names. See 47 C.F.R. §§ 90.313, 90.623, 90.627, 90.631 and 90.633 (1994). One of

³ See, e.g., Marc Sobel, 12 FCC Rcd 22879, 22882 (ALJ 1997) (JA 70, 73); Kay Reconsideration Order, 17 FCC Rcd at 8559 (JA 898).

⁴ See Marc Sobel, 12 FCC Rcd at 22882-83 (JA 73-74); Sobel Order, 17 FCC Rcd at 1873 (JA 315).

the names the FCC believed that Kay may have been using to conduct his business was “Marc Sobel dba Airwave Communications.” James A. Kay, Jr., 10 FCC Rcd 2062, 2063 (1994) (“Kay HDO”) (JA 569, 570), modified, 11 FCC Rcd 5324 (1996) (“Modified Kay HDO”) (JA 629).

The Commission also had information that Kay may willfully have been causing interference to radio systems in order to coerce or mislead the affected FCC licensees into retaining him as their communications provider. Additional information indicated that Kay may have been misusing the Commission’s processes by, for example, fraudulently inducing licensees and others to sign blank Commission forms seeking modification of licenses. Kay was alleged to have then used the forms to cancel, modify or gain control of the licenses by having them assigned to himself. 10 FCC Rcd at 2063 (JA 570).

Section 308(b) of the Communications Act provides in pertinent part that “[t]he Commission, at any time . . . during the term of any such [station] licenses, may require from [the] . . . licensee further written statements of fact to enable it to determine whether . . . such license [should be] revoked.” 47 U.S.C. § 308(b). On January 31, 1994, the FCC’s Wireless Telecommunications Bureau (“Bureau”),⁵ acting pursuant to 47 U.S.C. § 308(b), sent Kay a letter of inquiry (“Section 308(b) Letter”) directing him to provide certain information regarding the construction and operation of his stations, in order to allow the Bureau to assess Kay’s compliance with the FCC’s station construction and operation requirements. The Bureau requested Kay to identify the stations for which he held licenses and those that he managed, and to identify those stations that were on U.S. Forest Service land (for which certain permits are

⁵ Beginning in November 1999, the newly created Enforcement Bureau participated in the hearing proceedings involving the appellants’ qualifications in lieu of the Wireless Telecommunications Bureau. For simplicity’s sake, this brief refers to both the Wireless Telecommunications Bureau and the Enforcement Bureau as the “Bureau.”

required prior to construction). The letter also directed Kay to identify all licenses he held under any other names pursuant to which he did business. The letter requested that Kay substantiate the loading of his stations by providing customer lists and telephone numbers. 10 FCC Rcd at 2063-64 (JA 570-71), citing Letter from W. Riley Hollingsworth, Deputy Chief, Licensing Division, Private Radio Bureau, to James A. Kay, Jr., dated Jan. 31, 1994 (JA 908-09).

Over the next five months, an exchange of correspondence ensued between the Bureau and Kay's then-attorney, Dennis C. Brown ("Brown"). Inter alia, Brown requested that the Bureau afford Kay immunity from any forfeiture action or criminal prosecution based on any information that Kay might supply in response to the Bureau's letter, and that Kay be given written assurance that any such information would be afforded confidentiality. See Kay Order, 17 FCC Rcd at 1839 (JA 840). Brown also objected on a number of grounds to the substance and scope of the Bureau's information request. He asserted, for example, that the Commission lacked jurisdiction to inquire into the status of Kay's U.S. Forest Service permits. He objected that the information request was not directly related to specific complaints against Kay, and he asserted that Kay was not required to maintain any record of user names or other information about users requested by the Bureau. Brown also contended that the request was unduly burdensome because Kay was recovering from the effects of a recent earthquake that had severely damaged Kay's home and business. See id. at 1840- 44 (JA 841-45).

In its correspondence, the Bureau stated that it found Brown's responses to the Section 308(b) information request to be "inadequate, evasive, and contrived to avoid full and candid disclosure to the Commission." 17 FCC Rcd at 1841 (JA 842), quoting WTB Exh. 6 (WT Doc. 94-147) at 1 (JA 933). It stated that the information requested was basic information that Kay would have readily available if indeed he were providing communication services to customers.

Id. at 1842 (JA 843). The Bureau denied the immunity request as beyond the authority granted by Congress to the FCC pursuant to Section 308(b). Id. at 1839 (JA 840). With respect to the confidentiality request, however, the Bureau assured Brown that it had no intention of disclosing Kay's proprietary business information. Id. at 1843 (JA 844), citing WTB Exh. 10 (WT Doc. No. 94-147) at 1 (JA 949). The Bureau also called to Kay's attention the provisions of the FCC's rules that allow parties to request confidential treatment for their submissions to the Commission. Id. at 1841 (JA 842). See 47 C.F.R. § 0.459.

In its final letter, dated June 10, 1994, the Bureau admonished Brown that Kay's "woefully inadequate" response to the Section 308(b) Letter placed Kay in jeopardy of Commission sanctions, including revocation of his licenses, monetary forfeiture, or both. 17 FCC Rcd at 1844 (JA 845), citing WTB Exh. 12 (WT Doc. No. 94-147) at 1 (JA 960). The Bureau again stated that any information submitted by Kay would be kept confidential, and set July 1, 1994, as the final date by which Kay's response was due. Id.

In his final response on Kay's behalf, Brown referred the Bureau to the responses he had made previously. Regarding the Bureau's request for user lists, Brown added that: "Mr. Kay respectfully reports that there is no date subsequent to January 31, 1994 for which the submission of the requested information would be convenient." 17 FCC Rcd at 1844 (JA 845), quoting WTB Exh. 15 (WT Doc. No. 94-147) at 3 (JA 971).

B. The Kay Hearing Designation Order

Following the Bureau's unsuccessful attempt pursuant to Section 308(b) to obtain information from Kay about the construction and operation of his stations, the Commission, on December 13, 1994, issued an order designating all of Kay's station licenses for hearing. Kay HDO, 10 FCC Rcd 2062 (JA 569). The designated issues included (1) whether Kay had violated

Section 308(b) of the Communications Act by failing to provide requested information to the FCC, (2) whether Kay had willfully violated any of the Commission's rules governing station construction and operation, (3) whether Kay had abused the FCC's processes by filing applications in multiple names in order to avoid compliance with the FCC's channel sharing and recovery rules, and (4) whether, in light of the evidence adduced with respect to those issues, Kay was qualified to be a licensee. *Id.* at 2064-65 (JA 571-72). The order identified 164 licenses subject to the hearing, including 17 licenses issued in other names that the Commission believed that Kay may have been using to conduct his business. Eleven of the licenses were issued in Sobel's name. *Id.* at 2067-80 (Appendix A) (JA 574-87).

On January 25, 1995, Kay filed a motion with the administrative law judge ("ALJ"), Richard L. Sippel, requesting, among other things, the deletion of Sobel's licenses from the hearing designation order. Motion to Enlarge, Change, or Delete Issues ("Motion"), filed Jan. 25, 1995 (JA 588). In support of that request, the Motion stated:

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

Motion, pp. 4-5 (JA 594-95). Sobel's affidavit, attached in support of the Motion, stated:

I, Marc Sobel, am an individual, entirely separate and apart in existence and identity from James A. Kay, Jr. Mr. Kay does not do business in my name and I do not do business in his name. Mr. Kay has no interest in any radio station or license of which I am the licensee. I have no interest in any radio station or license of which Mr. Kay is the licensee. I am not an employer or employee of Mr. Kay, am not a partner with Mr. Kay in any enterprise, and am not a

shareholder in any corporation in which Mr. Kay also holds an interest. I am not related to Mr. Kay in any way by birth or marriage.

Sobel Order, 17 FCC Rcd at 1888 (JA 330), quoting Affidavit, dated January 24, 1995 (JA 612).

After the matter was certified to the Commission, the Commission, on May 8, 1996, deleted Sobel's licenses from the Kay proceeding. Kay Modified HDO, 11 FCC Rcd 5324 (JA 629).

C. The Sobel Hearing Designation Order

Shortly thereafter, the Bureau, on June 11, 1996, sent a Section 308(b) letter of inquiry to Sobel asking him to detail his business association with Kay. Sobel Order, 17 FCC Rcd at 1873 (JA 315). With his response, Sobel, on July 3, 1996, submitted to the Bureau a document entitled "Radio System Management Agreement and Marketing Agreement" ("Management Agreement"). That agreement, initially executed by Sobel and Kay in October 1994 and re-executed on December 30, 1994 (JA 451, 460),⁶ set out the terms by which Kay had been managing, during the previous three years, 15 SMR stations licensed to Sobel on the 800 MHz band (the "Management Agreement stations").⁷

⁶ In September or October 1994, Kay had received, in response to a Freedom Of Information Act request, a copy of a draft hearing designation order relating to his licenses (which, as noted in the text, also dealt with some of Sobel's licenses). On October 28, 1994, Sobel and Kay reduced their existing oral management agreement to writing. The written agreement was corrected, supplemented, and re-executed on December 30, 1994. Sobel Order, 17 FCC Rcd at 1876 (JA 318-19).

⁷ On March 24, 1995, Kay had produced a copy of this Management Agreement to the Bureau in the Kay proceeding in response to a specific Bureau discovery request seeking production of all management agreements to which Kay was a party. See Kay Order, 17 FCC Rcd at 1860 (JA 861).

On February 12, 1997, the Commission designated Sobel's land mobile station licenses, applications, and finder's preference requests⁸ for hearing. The Commission found, on the basis of the terms of the Management Agreement, that a substantial and material question of fact had been raised as to whether Sobel had transferred control of the Management Agreement stations to Kay without the FCC's authorization, in violation of Section 310(d) of the Act. 47 U.S.C. § 310(d).⁹ Although the Management Agreement stated that Sobel would retain ultimate supervision and control over the operation of the stations, the Commission found that the overwhelming thrust of the agreement suggested that Kay's dominion over the facilities was virtually absolute. Marc Sobel, 12 FCC Rcd 3298, 3300 (1997) ("Sobel HDO") (JA 1, 3).

Following designation, the presiding ALJ, Judge John M. Frysiak, granted Kay's request to be added as a party to the proceeding. See MO&O, FCC 97M-43 (released March 24, 1997) (JA 10). Later, at the Bureau's request, the ALJ added an issue to determine whether Sobel had misrepresented facts or lacked candor with the FCC in the Affidavit that had been submitted by Kay in support of the January 1995 Motion seeking to sever Sobel's licenses from the Kay hearing. Marc Sobel, FCC 97M-82 (released May 8, 1997) (JA 22).

⁸ A "finder's preference" was an incentive initiated by the Commission in 1991, pursuant to which an interested entity was permitted to report to the FCC SMR systems that had not been constructed or SMR systems that had discontinued operations. If the Commission was thereby able to recapture the unused spectrum, the reporting entity was rewarded with a "dispositive preference," *i.e.*, he would be entitled to file an application for a license to use the recovered spectrum without being subject to competition from mutually exclusive applications. Finder's Preference Report and Order, 6 FCC Rcd 7297, 7302 (1991).

⁹ 47 U.S.C. § 310(d) provides in pertinent part that "[n]o construction permit or station license . . . shall be transferred . . . directly or indirectly . . . to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby."

III. Initial Decisions

A. The Sobel Decision

Although the Sobel HDO was the later of the two designation orders, the Sobel hearing was the first to be completed, and developments therein played a prominent role in the Kay hearing. We therefore discuss it first.

In his Initial Decision, issued on November 28, 1997, Judge Frysiak resolved both the transfer of control and lack of candor issues against Sobel. See Marc Sobel, 12 FCC Rcd 22879 (ALJ 1997) (“Sobel ID”) (JA 70). Consistent with the criteria the Commission, in Intermountain Microwave, 24 Rad. Reg. (P&F) 983, 984 (1963) (“Intermountain”), had identified as being relevant to a determination of whether de facto control has been transferred,¹⁰ Judge Frysiak concluded that Kay had been entrusted with, and in fact, exercised control over virtually all aspects of operation of the Management Agreement stations. 12 FCC Rcd at 22899 (JA 90). The ALJ found, inter alia, that Kay had prepared the license applications for the Management Agreement stations; he had selected, purchased and provided all the equipment used in connection with those stations; he was the exclusive supplier of labor required to maintain and repair the station facilities; and he controlled the hiring and firing of personnel to operate the stations. The judge found that Kay had assumed all administrative duties associated with marketing the Management Agreement stations; he had the discretion to negotiate (including the discretion to set prices) and to execute contracts with customers on those stations; and he was responsible for paying all expenses associated with the operation of those stations. The revenues from the operation of the stations were deposited into Kay’s banking accounts and Kay had the exclusive option to purchase any of the stations at any time for \$500 each. Id. at 22883-93, 22899-900 (JA

¹⁰ The Intermountain criteria are set out in the Sobel Order, 17 FCC Rcd at 1877 (JA 319).

74-84, 90-91). Judge Frysiak concluded, on the basis of these and other findings on the record, that “it is abundantly clear that Kay has the ultimate control of Sobel’s Management Agreement stations,” and therefore, he resolved the transfer of control issue against Sobel. Id. at 22900 (JA 91).

With respect to the misrepresentation/lack of candor issue, Judge Frysiak concluded that the intended effect of the Affidavit submitted in January 1995, in an effort to remove Sobel’s licenses from the scope of the Kay hearing, was to persuade the Commission that Kay and Sobel were separate entities, each operating his separate business and neither having any interest in the other’s licenses. However, the record demonstrated that the averments in the Affidavit differed from the actual state of the facts. The record clearly showed that, at the time Sobel executed the Affidavit, in January 1995: (1) Kay owned the stations’ equipment, (2) Kay had an option to purchase the stations, and (3) Kay had a stake in the stations’ revenues. Additionally, at the time Sobel executed the Affidavit, he worked for Kay with respect to stations licensed to Kay as well as the Management Agreement stations, and Sobel’s Management Agreement stations were being marketed in Kay’s name or names in which Kay conducted business. 12 FCC Rcd at 22901 & 22895-96 (JA 92, 86-87). “All of this,” the ALJ pointed out, “amounts to a fair amount of interest.” Id. at 22901 (JA 92).

The judge rejected, as false, Sobel’s assertion that the word “interest” as used in the context of the Affidavit meant an ownership interest in the license, as in having legal title. Sobel admitted when he read the Affidavit that he wondered about the word “interest,” and met with Kay to discuss the Affidavit. Kay testified that he recalled telling Sobel that it was explained to him that the word “interest” referred to “ownership . . . as having a direct financial stake in something.” 12 FCC Rcd at 22901, 22896 (JA 92, 87), quoting Tr. 371 (JA 567). The ALJ

found that Kay and Sobel both had a strong motive to withhold from the Commission the actual nature of their business relationship, and that “[t]he wording of the affidavit was calculated to ward off the Commission from being apprised of the true nature of the Kay-Sobel business relationship.” *Id.* at 22901 (JA 92).

The judge also found that there were other instances in which Sobel exhibited lack of candor regarding the Management Agreement. For example, Sobel maintained at the hearing that, in late 1994, he requested of Kay that their oral management agreement be reduced to writing because the Commission was confused about their relationship. But, even though the Management Agreement fully disclosed their relationship, Sobel did not voluntarily submit it to the Commission until requested by the FCC to do so in a letter of inquiry. He found that considering the context of the Management Agreement, Sobel could “ill afford” to apprise the Commission of it. 12 FCC Rcd at 22901-02, 22897 (JA 92-93, 88). The ALJ also took issue with a letter that Sobel, in December 1994, had sent to a Bureau staff member (“December 1994 Letter”), regarding the FCC’s failure to process Sobel’s pending license applications and other requests. Sobel had the opportunity then to disclose to the Commission his true relationship with Kay, but he failed to do so. Instead, he asserted, without reservation, his independence from Kay in the operation of his stations. *Id.* at 22902, 22897-98 (JA 93, 88-89), citing WTB Ex. 46 (WT Doc. No. 97-56) at 1 (JA 471).

The record further showed that Kay had masked out the name and address of “Lucky’s Two Way Radio” (one of Kay’s business names) on station invoices for stations subject to the Management Agreement that were sent to the Bureau in response to the return of certain applications involving those stations. Kay and Sobel testified that the masking was made because the information was irrelevant, but no other information, including fees to customers, was masked

out. And, the judge observed, “not to have masked out Kay’s business name and address from Sobel’s invoice would have alerted the Commission that Kay & Sobel were not as independent of one another as Sobel has claimed.” 12 FCC Rcd at 22902, 22898-99 (JA 93, 89-90).

Concluding that Sobel lacked the qualifications to be a Commission licensee, the judge revoked all 28 of Sobel’s land mobile station licenses, denied all of his applications, and dismissed his finder’s preference requests to file applications for such licenses. 12 FCC Rcd at 22903 (JA 94). Both Sobel and Kay filed Exceptions to the initial decision,¹¹ and the Bureau replied.¹² In addition, shortly thereafter, Sobel filed a Request for Inquiry and Investigation (“Request For Inquiry”) seeking an inquiry and investigation by the Commission into the conduct of Bureau personnel in connection with the Sobel proceeding. Request for Inquiry, filed Feb. 27, 1998 (revised March 2, 1998) (JA 185, 243).

B. The Kay Decision

Two months after the release of the initial decision in the Sobel hearing, in February 1998, Judge Richard L. Sippel, the then-presiding ALJ in the Kay hearing, added issues in that hearing to determine: (1) whether, on the basis of Judge Frysiak’s unauthorized transfer of control findings, Kay was qualified to be a Commission licensee, and (2) whether Kay had misrepresented facts or lacked candor in his January 1995 Motion, seeking deletion of Sobel’s licenses from the Kay hearing designation order, and to which the Sobel Affidavit had been attached. See MO&O, FCC 98M-15 (released Feb. 2, 1998) (JA 675).

¹¹ Consolidated Brief And Exceptions, filed Jan. 12, 1998 (as corrected, Jan. 13, 1998) (JA 95); James A. Kay, Jr.’s Consolidated Brief And Exceptions To The Initial Decision Of Administrative Law Judge John M. Frysiak, filed Jan. 12, 1998 (JA 125).

¹² Bureau’s Reply Brief, filed Jan. 23, 1998 (JA 155).

In October 1998, the Commission rejected Kay's arguments that the ALJ should be disqualified for cause, but nevertheless concluded that it would conduce to the proper dispatch of business to reassign the case to another ALJ and ordered the appointment of a new ALJ to preside over the case. James A. Kay, Jr., FCC 98-274 (Oct. 19, 1998) (JA 687). Chief Judge Joseph Chachkin subsequently appointed himself as the presiding judge, James A. Kay, Jr., FCC 98M-122 (October 30, 1998), presided over the hearing sessions, and, on September 10, 1999, issued his Initial Decision. James A. Kay, Jr., FCC 99D-04, 1999 WL 700534 (ALJ, released Sept. 10, 1999) ("Kay ID") (JA 688).

Chief Judge Chachkin concluded that the Bureau had failed to demonstrate any misconduct by Kay that would warrant revocation of his licenses. Kay ID at ¶ 223 (JA 757). The judge rebuked the Bureau's conduct, which he described as an egregious case of "prosecutorial misconduct . . . that can not be countenanced." Id. at ¶ 210 n.49 (JA 753).

The judge found no basis in the record to fault Kay for failing to provide information in response to the Bureau's Section 308(b) Letter. Kay ID at ¶¶ 175-181 (JA 742-44). He found that the Bureau had not alleged that Kay's responses to the Bureau's inquiry contained any false statements and that there was no evidence in the record to support such a contention. Id. at ¶ 176 (JA 742). He found that (1) the Bureau's information request had been excessively broad and constituted an impermissible "fishing expedition," id. at ¶¶ 177-79 (JA 742-44), and (2) Kay had legitimate concerns as to whether the Bureau would keep the requested information confidential. Id. at ¶¶ 180-181 (JA 744).

Chief Judge Chachkin resolved all the remaining issues from the HDO in Kay's favor as well. See Kay ID at ¶¶ 182-208 (JA 744-52). Although the judge found that Kay had been involved in filing applications on behalf of four other individuals, he questioned the credibility of

three of the four witnesses testifying against Kay regarding the filing of those applications.¹³ He found that Kay had a factual basis for believing that those individuals had a bona fide intention to use the facilities applied for, and he concluded that Kay had no motive to acquire facilities in the manner alleged by the Bureau because Kay legitimately could have applied for those facilities in his own name. Id. at ¶¶ 199-207 (JA 750-52).

As to whether Kay participated in an unauthorized transfer of control, Chief Judge Chachkin accepted Judge Frysiak's finding that Kay had participated in an unauthorized transfer of the Management Agreement stations. Kay ID at ¶ 209 n.48 (JA 752-53). However, he concluded that the misconduct was not disqualifying because he found that the transfer of control was not accompanied by any intent to deceive the Commission about that business arrangement. Id. at ¶¶ 168-174, 209-18 (JA 738-41, 752-56). Chief Judge Chachkin accepted as "entirely credible" Kay's and Sobel's testimony that they did not intend to deceive the Commission concerning their business dealings. Id. at ¶ 173 (JA 741). He also found that Kay and Sobel did not intend to conceal the Management Agreement because, two months after Kay had filed his January 1995 Motion to delete the Sobel licenses from the Kay hearing, Kay had produced a copy of the agreement in response to a Bureau discovery request. Id. at ¶¶ 213, 217 (JA 754, 755).

Judge Chachkin discounted Judge Frysiak's finding that Sobel misrepresented facts and lacked candor about his business relationship with Kay when he swore to the Affidavit in support of Kay's effort to sever Sobel's licenses from the Kay hearing. Chief Judge Chachkin concluded

¹³ The judge did not question the veracity of the fourth witness, Carla Marie Pfeifer, but he did question whether she was a reliable a witness because of her vague and incomplete recollection. Kay ID, ¶¶ 128-29, 203 (JA 727, 751).

that Judge Frysiak’s finding of a lack of candor “rest[ed], in large part” on Judge Frysiak’s finding that Sobel intentionally concealed the Management Agreement from the Commission until July 1996. This decision was “tainted,” Judge Chachkin concluded, because the Bureau had “deliberately concealed” from Judge Frysiak the fact that Kay had produced a copy of the Management Agreement in March 1995, during discovery in the Kay proceeding. Kay ID at ¶¶ 168-69, 210 (JA 738-40, 753). Concluding that Judge Frysiak’s ultimate conclusion that Sobel lacked candor about the transfer of control “was based on his erroneous assumption as to when the [Management] Agreement was given to the Bureau,” Chief Judge Chachkin decided that Judge Frysiak’s conclusion “must be disregarded in determining Kay’s fitness to be a licensee.” Id. at ¶ 210 (JA 753).

The Bureau filed exceptions,¹⁴ and Kay filed a reply.¹⁵

IV. Commission Orders

Acting on its own motion, the Commission considered the exceptions and related pleadings in the Sobel and Kay cases concurrently and issued companion orders on the same day deciding the various issues raised in each proceeding. Again, because the Commission’s resolution of the transfer of control and lack of candor issues in the Sobel proceeding had implications with respect to similar issues in the Kay proceeding, we address the Sobel Order first.

¹⁴ Wireless Telecommunications Bureau’s Exceptions And Brief, filed October 12, 1999 (JA 758).

¹⁵ Reply of James A. Kay, Jr. To The Wireless Telecommunications Bureau’s Exceptions and Brief, filed Nov. 2, 1999 (JA 801).

A. The Sobel Order

(1) Allegation Of Misconduct

Although Sobel expressly did not challenge the ALJ's conduct of the hearing or the Commission's action designating the hearing in his case, the Commission reviewed Sobel's allegations on those issues "out of an abundance of caution." 17 FCC Rcd at 1875 (JA 317). After its review, however, the Commission found no basis on which to conclude that the Bureau's conduct prejudiced Sobel, *id.* (JA 317-18), and additionally further determined that there were ample grounds to designate the licenses for hearing and Sobel was not denied a full opportunity to meet the issues raised. *Id.* at 1876 (JA 318).

(2) Transfer Of Control

The Commission upheld Judge Frysiak's finding that Sobel engaged in an unauthorized transfer of control of his station licenses to Kay. On that issue, the Commission analyzed the hearing record *de novo* with respect to each of the Intermountain criteria for control.¹⁶ 17 FCC Rcd at 1876-87 (JA 318-29). The Commission found that the terms of the Management Agreement established that it was Kay who routinely exercised control over the daily operations of the subject stations, and it discerned no reason in the record to depart from the ALJ's "ample findings concerning the dominant role of Kay and his employees in the stations' daily operations pursuant to these provisions." *Id.* at 1878-80 (JA 320-22). Additionally, the record showed that

¹⁶ The Commission acknowledged that, prior to 1994, guidelines set out by the Bureau in Motorola, Inc., File No. 50705 (PRB 1985) (unpublished), and restated in Public Notice, 64 Rad. Reg. 2d 840 (PRB 1988), had been used to evaluate whether management agreements involving SMR licensees constituted an improper transfer of control. However, while those guidelines permitted licensees to hire entities to manage their systems, licensees had to retain bona fide proprietary interests in and exercise supervisory control over their systems. Sobel Order, 17 FCC Rcd at 1886 (JA 328). On the record in this case, the Commission concluded that whether judged by the Motorola test or with reference to the Intermountain criteria, Sobel failed to retain the requisite degree of control over the Management Agreement stations consistent with his status as a licensee. *Id.* at 1886-87 (JA 328-30).

Sobel had delegated to Kay the authority to make policy decisions regarding the preparation and filing of applications, setting of billing rates, clearing of channels shared with other licensees for exclusive use by Sobel's stations, buying and selling of stations, and retention of legal counsel. Id. at 1880-82 (JA 322-24). The Commission concluded that the record established a failure by Sobel to exercise positive authority over policy decisions affecting the Management Agreement stations and suggested a "wholesale deferral" by Sobel to Kay. Id. at 1882 (JA 324).

The Commission found that the Management Agreement was structured to relieve Sobel – the FCC licensee – of any liability for the construction and operation of the subject stations. 17 FCC Rcd at 1883 (JA 325). In addition, the agreement entitled Kay to receive a large percentage of the stations' revenues. Kay received the first \$600 a month earned by each station as compensation to Kay for his services, expenses and equipment rental, and Kay and Sobel arranged to share any additional proceeds of the stations more or less equally in the manner of partners. Id. at 1884 (JA 326).

Central to the Commission's analysis was its finding that Sobel did not have the requisite proprietary interest in the licensed facilities. 17 FCC Rcd at 1887 (JA 329). Sobel did not purchase the stations' equipment or finance it independently of Kay. Rather Kay owned the station equipment and he made the corresponding capital investment. Although Sobel ostensibly leased the station equipment, Kay had a proprietary interest in the equipment. Despite the lease, Kay continued to possess the equipment as part of his day-to-day management of the stations, in relation to which Sobel was a contract technician. In addition, no particular sum was designated in the agreement as the rental payment for the equipment; rather the rent was simply an unspecified portion of the total compensation received by Kay. 17 FCC Rcd at 1885 (JA 327).

The Management Agreement purchase option gave Kay a further proprietary interest in the subject stations. That option permitted Kay, for a period of ten years, to purchase any of the 15 stations for \$500 per station, an amount that the Commission determined was considerably less than the fair market value of the stations. 17 FCC Rcd at 1885 (JA 327). Sobel was precluded from either selling the stations or using them for security. In addition, he had no right to terminate his relationship with Kay because, after an initial ten-year term, the agreement renewed automatically at Kay's sole discretion for up to 50 years. The Commission concluded that these provisions gave Kay "significant leverage" over Sobel. Id.

The Commission thus concluded, on the basis of the entire record, that Sobel had transferred control of the Management Stations to Kay without the FCC's authorization, in violation of Section 310(d) of the Act. 17 FCC Rcd at 1887 (JA 330).

(3) Lack Of Candor

On the basis of its de novo review of the record, the Commission further agreed with the ALJ that Sobel lacked candor in submitting his January 1995 Affidavit in support of Kay's efforts to remove the Sobel licenses from the Kay hearing. Although Sobel testified that he intended merely to clear up the Commission's misimpression that he and Kay were alter egos, 17 FCC Rcd 1890 (JA 332), citing TR 142-43 (JA 530-31), the Affidavit, in addition to stating that Sobel was a separate individual from Kay, made several specific factual assertions about the relationship between Sobel and Kay. Most notably, the Affidavit stated that "Mr. Kay has no interest in any radio station or license of which I [Sobel] am the licensee." Id., quoting Affidavit (JA 612). As the Commission had concluded with respect to the transfer of control issue, however, Kay in fact had "substantial interests" in the Management Agreement stations. Id.

Sobel had attempted at the hearing to justify his representation that Kay had no “interest” in any Sobel station or license as referring only to “ownership of the license.” 17 FCC Rcd at 1890 (JA 333), citing TR 147 (JA 532). That argument, the Commission concluded, relied on an “unreasonably restrictive use of the word ‘interest.’” The Commission rejected, for example, as “wholly unpersuasive” and “self-serving [Sobel’s] explanation that because Kay leased the station’s equipment to Sobel, . . . Kay did not have an interest in the equipment.” Id.

The Commission found that the hearing testimony cast further doubt on the candor of Sobel’s representation in the Affidavit that Kay had no “interest” in Sobel’s stations or licenses. 17 FCC Rcd at 1890-91 (JA 333), citing TR 156-57 (JA 536-37). Kay acknowledged in his testimony that he had talked with Sobel about the meaning of the word interest, and recalled he had told Sobel that it referred to “ownership as in a partnership or ownership of stock, as having a direct financial stake in something. Being an owner or a stockholder or a direct party to something.” Id. at 1891 (JA 333) (emphasis in the original), quoting TR 371 (JA 567). For his part, Sobel acknowledged that he understood Kay had a direct financial stake in the Management Agreement stations. Id., citing TR 150 (JA 533). Together, the Kay and Sobel testimony suggested that Sobel did not submit his affidavit in good faith. Id. See Kay Order, 17 FCC Rcd at 1863 (JA 864).

The Commission also found that other statements in the Affidavit, while perhaps “technically correct,” tended to be misleading concerning the actual nature of Kay’s and Sobel’s business relationship. 17 FCC Rcd at 1891 (JA 333). For example, Sobel’s statement that he was not a partner with Kay in any enterprise is true, but only if a distinction is made between the technical legal definition of “partner” and the colloquial usage of that term. Id. Similarly, while the statement that Sobel did not do business in Kay’s name is true in the narrow sense that Sobel

did not actually conduct a business using Kay's name, Sobel's Management Agreement stations were being marketed by Kay under his own name as part of Kay's land mobile radio business. Id., citing TR 15-53 (JA 478-516).

The Commission concluded, therefore, that the Affidavit leaves the "wholly misleading" impression that, as the Motion it supported argues: ". . . Kay has no interest in any license or station in common with Marc Sobel" 17 FCC Rcd at 1891 (JA 333), quoting Motion (JA 588). The Commission further noted that Kay and Sobel put their Management Agreement into writing because they had learned of the forthcoming HDO in the Kay proceeding and realized the need to provide the Commission the details of their pre-existing oral agreement relationship with respect to these stations. Accordingly, the Commission determined that Sobel's failure during the same time period to be forthcoming in his Affidavit about the Kay/Sobel business relationship must be regarded as deliberately deceptive. Id. at 1892 (JA 334), citing TR 261-63, 299-301 (JA 552-54, 557-59).

Finally, the Commission rejected as unpersuasive Sobel's attempted reliance on the advice of counsel to justify the representations in the Affidavit. The Commission found that Sobel could appreciate the misleading nature of the Affidavit, had reviewed the draft of the Affidavit, and understood that he could change it. 17 FCC Rcd at 1892 (JA 334). The Commission pointed out that in a December 1994 Letter to the Bureau (see p. 13, supra) which he composed himself, Sobel had similarly assured the staff he was an "Independent Two-Way Radio Dealer," id., quoting WTB Exh. 46 (WT Doc. No. 97-56) at 1 (JA 471) (emphasis in the original). The Commission found that Sobel's failure to disclose the Management Agreement in this correspondence, even though disclosure would have served to clarify his relationship with Kay, further evidenced a pattern of deceptive conduct by Sobel. Id. (JA 335).

B. The Kay Order

(1) Hearing Designation Order Issues

Reversing Chief Judge Chachkin’s ruling on the § 308 issue, the Commission found that, in responding in 1994 to the Bureau’s requests for information, Kay violated his obligations as a licensee under Section 308(b) of the Act. Although Kay’s responses to the Bureau’s information request had raised legitimate concerns about the need for the Bureau to specify a relevant time period for information about Kay’s operations and the practical difficulties associated with assembling large amounts of data, the Commission found that, overall, Kay’s responses did not manifest a good faith intent to provide the requested information. The Commission determined, however, that the misconduct was not sufficient to disqualify Kay from being an FCC licensee, because the record did not establish that Kay’s unresponsiveness reflected a conscious intent to conceal known violations of the Commission’s technical rules. 17 FCC Rcd at 1846-50 (JA 847-51).¹⁷

The Commission resolved the remaining issues framed in the HDO in Kay’s favor. See 17 FCC Rcd at 1850-56 (JA 851-57). It observed that the issue of whether Kay had abused the Commission’s processes by filing applications in multiple names to avoid compliance with the FCC channel sharing provisions presented a difficult factual question because, in many respects, “it boil[ed] down to a determination of the relative credibility of Kay and his chief accusers.” 17 FCC Rcd at 1855 (JA 856). The Commission recognized that generally an ALJ’s findings concerning the relative credibility of witnesses are entitled to great weight. Because this issue “depend[ed] critically on an evaluation of Kay’s state of mind,” and “the record d[id] not suffi-

¹⁷ The Commission concluded that a statement in a June 24, 1994, response that Kay did not operate stations other than those licensed to him would best be considered in the context of the misrepresentation/lack of candor issue. 17 FCC Rcd at 1850 n.12 (JA 851).

ciently demonstrate that Kay had a motive for abusing the Commission's processes in this context," the Commission declined to overturn Judge Chachkin's assessment of Kay's testimony despite the fact that three independent witnesses gave consistent testimony against Kay. 17 FCC Rcd at 1855-56 (JA 856-57).

(2) The Transfer Of Control And Lack Of Candor Issues

Because Kay was a party in the Sobel hearing, the Commission found that he was bound by the determinations made in that proceeding to the extent they involved findings and conclusions common to the two proceedings. These determinations included the Commission's findings and conclusions in the Sobel Order that (1) Sobel had transferred control of the Management Agreement stations to Kay without the FCC's authorization, and (2) the Sobel Affidavit was lacking in candor with respect to Kay's and Sobel's business relationship regarding the Management Agreement stations. 17 FCC Rcd at 1859-60 (JA 860-61).

The Commission concluded that Chief Judge Chachkin's credibility findings in favor of Kay and Sobel on these issues were not entitled to deference "in view of the fact that Judge Frysiak, who heard essentially the same testimony in the Sobel proceeding, clearly did not find these witnesses credible." 17 FCC Rcd at 1860 (JA 861). The Commission rejected Kay's contention that Chief Judge Chachin's findings that appellants did not lack candor were entitled to deference (and Judge Frysiak's contrary findings were not) because the Bureau allegedly sought to conceal from Judge Frysiak that Kay, in March 1995, produced a copy of his Management Agreement with Sobel in response to a Bureau discovery request. (Sobel, by contrast, did not provide the Commission the Management Agreement until July 1996.) The Commission found no reason to believe that Kay's March 1995 submission of the agreement would have changed

Judge Frysiak's view of the parties' state of mind, because Judge Frysiak had determined the relevant time for determining the parties' candor with the Commission concerning any business relationship Kay had with Sobel was in January 1995, when Kay filed the Motion to sever the Sobel stations from the Kay hearing and Sobel supported the Motion with his Affidavit.¹⁸ *Id.* at 1861 (JA 862), citing TR (WT Doc. No. 97-56) at 297-99 (JA 555-57). Deferring to neither of the conflicting ALJ decisions, the Commission based its decision on the lack of candor issue on its "own independent assessment" of the representations made and the circumstances that were involved. *Id.* at 1860 (JA 862).

The Commission rejected Kay's contention that the written hearing record did not establish any intent by Kay to deceive the Commission with respect to the Management Agreement. The Commission observed that Kay did not disclose the Management Agreement in January 1995 when he was trying to narrow the scope of his hearing by excluding the Sobel licenses, even though the Management Agreement clarified his relationship with Sobel. Kay did not disclose this agreement until two months later, in March 1995, and then only in a response to a specific discovery request from the Bureau seeking all management documents to which Kay was a party. 17 FCC Rcd at 1863 (JA 864).

In addition, the Commission found other evidence in the record that supported a finding that Kay intentionally concealed his relationship with Sobel. Specifically, the Commission cited (1) Kay's action masking his business name and address from station invoices before Sobel submitted them to the Bureau; (2) Kay's concealment of construction expenses he had incurred

¹⁸ The Commission also found no basis on which to conclude that the Bureau had schemed to conceal Kay's March 1995 submission from Judge Frysiak, inasmuch as Sobel himself could readily inform the ALJ of that submission and that he did so at least twice during the Sobel proceeding. 17 FCC Rcd at 1861-62 (JA 862-63).

with respect to a land mobile station he managed for one of the witnesses who testified in connection with the abuse of process issue; and (3) a statement in one of Kay's responses to the Bureau's Section 308(b) Letter that Kay did not operate any station of which he was not a licensee. (See p. 23 n.17, *supra*). 17 FCC Rcd at 1864 (JA 865).

C. Sanctions

Because Sobel's unauthorized transfer of control to Kay and Appellants' lack of candor in the Commission proceedings affected only Sobel's SMR stations on the 800 MHz band, the Commission concluded that revoking Appellants' land mobile interests solely in that spectrum band would be an adequate deterrent to future misconduct. Accordingly, the Commission revoked Kay's and Sobel's licenses, denied Sobel's applications, and dismissed Sobel's finder's preference requests with respect to facilities on the 800 MHz band. Sobel Order, 17 FCC Rd at 1893-94 (JA 335-36); Kay Order, 17 FCC Rcd at 1865 (JA 866). In addition, the Commission imposed a \$10,000 forfeiture on Kay for his violation of Section 308(b). Kay Order, 17 FCC Rcd at 1864-65 (JA 865-66). Kay does not challenge the forfeiture sanction in his appeal of the Kay Order. See Brief, p. 1.¹⁹

After unsuccessful attempts by Appellants to secure reconsideration,²⁰ see Sobel Reconsideration Order, 17 FCC 8562 (JA 398); Sobel Further Reconsideration Order, 19 FCC Rcd 801 (JA 419); Kay Reconsideration Order, 17 FCC Rcd at 8554 (JA 893), Appellants timely filed the

¹⁹ Appellants request (Brief, p. 58) the Court to reverse and remand these cases to the FCC for vacatur of the Commission's orders on appeal. Because Kay does not present any challenge to the forfeiture sanction, any relief with respect to that aspect of the Kay Order would be inappropriate.

²⁰ The relevant pleadings before the Commission on reconsideration are included in the Joint Appendix.

instant appeals.²¹ The appeals were consolidated for all purposes by Order of this Court, filed March 10, 2004.

SUMMARY OF ARGUMENT

Appellants argue that the Commission was required to adopt Judge Chachkin's findings in the Kay hearing, which accepted as credible Kay and Sobel's testimony that they did not intend to deceive the Commission about their actual business relationship. It was the Commission's considered judgment, however, that Judge Frysiak's contrary findings in the Sobel hearing deserve weight as well. The Commission reasonably determined that when two experienced judges disagreed after observing the same witnesses testify with respect to the same issue, the appropriate approach was to resolve the issue on the basis of the Commission's independent review of the record in both proceedings.

Substantial evidence in the record supports the Commission's findings, on the basis of its de novo review, that appellants lacked candor about the actual nature of their business relationship in submitting the January 1995 Affidavit and the Motion it supported. The Affidavit left the overall impression that Kay had no interest in any of Sobel's stations or licensees. In fact, Kay had substantial financial interest in the Management Agreement stations licensed to Sobel. Kay owned the station equipment, he had a right to a large share of the radio revenues, and he held an option to purchase the Agreement stations.

The Commission reasonably rejected Appellants' testimony that "interest" as used in the Affidavit meant only an "ownership" interest in Sobel's licenses, as in having legal title. Other

²¹ An earlier appeal, Sobel v. FCC, D.C. Case No. 02-1174, filed June 5, 2002, while Sobel's second petition for reconsideration was pending before the agency, was dismissed by this Court for lack of jurisdiction. See Order, filed Oct. 2, 2002.

testimony by the Appellants indicated that Sobel understood the questionable nature of the representations made in the Affidavit, and that Sobel understood that Kay had a financial interest in the Agreement stations. The record further showed that Kay and Sobel put the Management Agreement into writing late in 1994, after they had learned about the upcoming designation order in the Kay proceeding, for the purpose of clarifying their business arrangements with respect to the agreement stations. Although Kay later produced the Management Agreement in response to a direct request by the Bureau in the Kay hearing for all management agreements to which Kay was a party, Appellants did not disclose the Management Agreement with the Affidavit, even though disclosure would have served to clarify the Kay/Sobel relationship. The Commission justifiably concluded that when Appellants knew that the content of their recently executed Management Agreement was likely to be of interest to the Commission, but nevertheless filed an Affidavit that was contrary to the details of the Management Agreement and avoided any mention of the Agreement, Appellants were deliberately seeking to deceive the Commission concerning the true extent of their relationship.

STANDARD OF REVIEW

The standard of review is set out in section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), which permits the Court to set aside agency action only if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” This is a “deferential standard” that “presume[s] the validity of agency action.” Global Naps, Inc. v. FCC, 247 F.3d 252, 257 (D.C. Cir. 2001) (quotation omitted). “The court must determine whether the agency has articulated a ‘rational connection between the facts found and the choice made.’” The Court “may reverse only if the agency’s decision is not supported by substantial evidence, or the agency has made a clear error in judgment.” Kisser v. Cisneros, 14 F.3d 615, 619 (D.C. Cir.

1994), citing Bowman Transportation v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974), rehearing denied, 420 U.S. 956 (1975) & Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415-16 (1971).

This Court has held that “questions respecting misrepresentations of fact are, perforce, fact questions peculiarly within the province of the Commission to consider.” WEBR, Inc. v. FCC, 420 F.2d 158, 164 (D.C. Cir. 1969); accord, American Message Centers v. FCC, 50 F.3d 35, 41 (D.C. Cir. 1995). Moreover, in reviewing the agency’s resolution of allegations of misrepresentation, this Court “look[s] only to see whether the [agency’s] conclusions and findings are supported by substantial evidence and that they are not arbitrary and capricious.” WHW Enterprises, Inc. v. FCC, 753 F.2d 1132, 1139 (D.C. Cir. 1985).

Substantial evidence can be “something less than the weight of the evidence,” Consolo v. FMC, 383 U.S. 607, 620 (1966) (citations omitted), and need be only “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Millar v. FCC, 707 F.2d 1530, 1540 (D.C. Cir. 1983), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). This standard can be satisfied even if there is also substantial evidence to the contrary. Lorain Journal Co. v. FCC, 351 F.2d 824, 828 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966). See Sec’y of Labor, Mine Safety and Health Admin. v. Federal Mine Safety and Health Review Comm., 111 F.3d 913, 918 (D.C. Cir. 1997) (“[a]n agency’s conclusion may be supported by substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary view”) (quotation omitted). See also INS v. Elias-Zacarias, 502 U.S. 478, 481 n.1 (1992) (for the Court to reverse an agency’s findings the Court must find that the evidence not only supports a contrary conclusion but that it compels it).

ARGUMENT**A. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S FINDING THAT APPELLANTS LACKED CANDOR WITH RESPECT TO THEIR BUSINESS RELATIONSHIP**

Appellants' challenge only the Commission's "revocation sanction," on the ground that the Commission's lack of candor findings are not supported by substantial evidence. See Brief, pp. 1, 38-52).²² The Commission defines lack of candor as "a concealment, evasion or other failure to be fully informative accompanied by an intent to deceive." E.g., Trinity Broadcasting of Florida, Inc., 10 FCC Rcd 12020, 12063 (1995). In the instant cases, the Commission concluded, on the basis of its de novo review of the record in both evidentiary hearings, that Kay and Sobel lacked candor with the agency with respect to their business relationship. Specifically, in an effort to remove the licenses that were in Sobel's name from the Kay hearing, Kay filed a motion, in January 1995, that he supported with an affidavit from Sobel. The Commission found that (1) the Affidavit left the "wholly misleading" impression that Kay and Sobel had no interest whatsoever in each other's businesses, when in fact Kay had "substantial interests" in Sobel's Management Agreement stations, and (2) Kay and Sobel were intentionally deceptive in the Affidavit about the actual nature of their business arrangements. These findings are supported by substantial evidence in the hearing records.

²² Appellants do not raise a separate issue challenging the FCC's finding that Kay and Sobel participated in an unauthorized transfer of control of the Management Agreement stations. See p. 32, infra. Appellants did vigorously contest before the Commission Judge Frysiak's finding that there had been an unauthorized transfer of control. Thus, the Sobel Order includes considerable discussion of that issue, as well as the lack of candor issue. Appellants do not challenge the forfeiture sanction imposed on Kay for his violation of Section 308(b) of the Act.

B. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S FINDING THAT THE AFFIDAVIT LEFT THE "WHOLLY MISLEADING" IMPRESSION THAT KAY HAD NO INTEREST IN ANY OF SOBEL'S STATIONS OR LICENSES

The issue of Appellants' lack of candor with the Commission arose in connection with Kay's January 1995 Motion seeking to delete the Sobel licenses from the Kay hearing designation order. The Commission had designated certain of Sobel's licenses in the Kay hearing because it believed, at the time, that Kay may have been operating his land mobile system under other names, including the name "Marc Sobel d/b/a Airwave Communications." Kay HDO, 10 FCC Rcd at 2063 (JA 570). Kay stated in his Motion that: (1) Kay and Sobel were separate individuals; (2) Kay did not do business in Sobel's name or use Sobel's name in any way; and (3) Kay had no interest in any of the licenses or stations held by Sobel. Motion, pp. 4-5 (JA 594-95). Sobel similarly stated in his Affidavit in support of the Motion that: (1) Sobel and Kay were different individuals; (2) Kay did not do business in Sobel's name and Sobel did not do business in Kay's name; and (3) Kay had no interest in any radio station or license of which Sobel was the licensee. Affidavit (JA 612). Additionally, Sobel stated in his Affidavit that he was not an employer or employee of Kay, a partner with Kay in any enterprise, or a shareholder in any corporation in which Kay held an interest. Id.

The Commission, acting on the basis of its independent review of the records in both hearings, reasonably concluded that the Affidavit was lacking in candor concerning Kay's business relationship with Sobel with respect to the Management Agreement stations. Sobel Order, 17 FCC Rcd at 1890-92 (JA 332-34). The Affidavit explicitly states that Kay had no interest in any of Sobel's radio stations or licenses. The record in the Sobel proceeding showed, however, that at the time this averment was made, Kay had substantial financial interests in the

Management Agreement stations licensed to Sobel. Kay owned the station equipment; he was entitled to a large share of the station revenues; and he held an option to purchase the subject stations. Id. at 1890 (JA 332). See id. at 1884-85 (JA 326-27).

Appellants are mistaken when they assert (Brief, p. 46) that the Commission found that the statement in the Affidavit that Kay had no interest in Sobel's stations or licenses was not candid because the Management Agreement effectuated an unauthorized transfer of control of the subject stations. The Commission rested its lack of candor finding on certain factual findings it had made in connection with its consideration of the transfer of control issue, see 17 FCC Rcd at 1890 (JA 332), but it was not necessary to the lack of candor finding that the Commission also found an unauthorized transfer of control. Thus, assertions challenging the sufficiency of the evidentiary support for the FCC's unauthorized transfer of control finding (see Brief, pp. 47-48) are peripheral to the issue whether the Commission's lack of candor finding is supported by substantial evidence.

Appellants' invocation of the transfer of control finding in the context of challenging the basis of the FCC's findings that Kay had "substantial interests" in the Management Agreement stations, is not sufficient to place a separate transfer of control issue before this Court for review. See, e.g., Sioux Valley Rural Television, Inc. v. FCC, 349 F.3d 667, 678 (D.C. Cir. 2003), cert. denied, 124 S.Ct. 2032 (2004), citing Bartholdi Cable Co. v. FCC, 114 F.3d 274, 279 (D.C. Cir. 1997). Appellants' contention (Brief, pp. 46-48) that the transfer of control finding is not supported by substantial evidence is unpersuasive, in any event. Appellants do no more than to repeat claims that the Commission specifically rejected its discussion of the Intermountain

factors used to make a transfer of control determination. See Sobel Order, 17 FCC Rcd at 1884-85, 1887 (JA 326-27, 329).²³

The Commission's relevant conclusion was that Kay held "substantial interests" in the Management Agreement stations licensed to Sobel. 17 FCC Rcd at 1890 (JA 332). That conclusion is supported by the record in the Sobel proceeding. The record shows that Kay owned the station equipment and, although Sobel purported to be leasing the equipment from Kay pursuant to Management Agreement, Kay continued to possess the equipment as part of his day-to-day management of the subject stations, in relation to which Sobel was a contract maintenance technician working for Kay. See 17 FCC Rcd at 1885 (JA 327). Kay also was entitled to a large percentage of the stations' revenues. Id. at 1884 (JA 326). In addition, Kay held an option to purchase any of the agreement stations for \$500 each -- a sum that was considerably less than the fair market value of the stations. 17 FCC Rcd at 1885 (JA 327). Sobel was precluded from selling any of the stations or using any station for security, and he had no right to terminate the purchase option because, after an initial ten-year term, the Management Agreement renewed at Kay's sole discretion, for up to 50 years. Id. By any ordinary understanding of the term "interest," Kay had "substantial interests" in the Management Agreement stations licensed to Sobel at the time the Affidavit was submitted.

²³ The rulemaking Appellants refer to (Brief, p. 47 & n.9) was not raised before the Commission in the proceeding below and has no decisional significance with respect to the instant case in any event. It applies on a going-forward basis and only to a specific situation, i.e., spectrum leasing, that is not involved here. Moreover, a licensee entering into a spectrum leasing arrangement must comply with specific requirements imposed by the Commission in order to ensure that ultimate control over the license is retained by the licensee, see Promoting Efficient Use Of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, 18 FCC Rcd 20605, 20629-42 (2003), something that in the instance case, Sobel failed to do.

Additional representations made in the Affidavit depended (at best) on hair-splitting definitions and were in their full context misleading about Kay's and Sobel's business relationship with respect to the Management Agreement stations. Id. at 1891 (JA 333). As Sobel acknowledged at the hearing, the assertion that Sobel was not an employee of Kay could be deemed accurate only insofar as there is a technical distinction between "employee" and "independent contractor," in which capacity Sobel had long served Kay. Id., citing TR 150-51 (JA 533-34). The statement that Sobel was "not a partner with Kay in any enterprise" also is true only if a distinction is made between the technical legal definition of "partner" and common usage. As Sobel testified, he and Kay "agree to split" the Management Agreement stations. Id., citing TR 151-52 (JA 534-35). Moreover, the Management Agreement reflected an intent to share the station profits more or less equally in the manner of partners. Id. at 1884 (JA 326). Finally, the representation that Sobel did not do business in Kay's name, although true in the limited sense that Sobel did not conduct a business using Kay's name, was misleading because Kay was marketing the agreement stations under his own name as part of his mobile service business. Id. at 1891 (JA 333), citing TR 15-53 (JA 478-516) .

Appellants contend (Brief, p. 51) that the Commission singled out certain words in the Affidavit – in particular the word "interest" – in order to reach an impermissible finding that Sobel and Kay lacked candor with the Commission. As the Commission's orders make clear, however, the Commission's finding of a lack of candor rests on more than "mere quibbles" over the particular words that were used in the Affidavit. Kay Order, 17 FCC Rcd at 1863 (JA 864). The Commission found that the statements and representations made in the Affidavit taken as a whole, and as understood by a reasonable reader who (like the Commission at the time) lacks the benefit of a factual disclosure with respect to Appellants' actual business arrangements regarding

the Management Agreement stations, leave the impression that Kay and Sobel had no interest in each other's mobile radio service operations. This impression was wholly at odds with the "substantial interests" Kay actually held in Management Agreement stations. *Id.* See Sobel Order, 17 FCC Rcd at 1891 n.5 (JA 333). Thus, contrary to appellants' assertion based on Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 356 (D.C. Cir.), rehearing denied, 154 F.3d 487 (1998) (Brief, pp. 50-51), the Commission's lack of candor analysis does not place excessive weight on the Commission's own interpretation of any ambiguous word. See Sobel Order, 17 FCC Rcd at 1891 n.5 (JA 333).

C. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S FINDING THAT THE AFFIDAVIT WAS INTENDED BY APPELLANTS TO DECEIVE THE COMMISSION ABOUT THEIR ACTUAL BUSINESS RELATIONSHIP

The instant cases are unusual in that evidence regarding the lack of candor issue was heard by two different ALJs in separate hearings. In the Kay hearing, Chief Judge Chachkin found that Appellants testified in a "candid and forthright manner," and he accepted as "entirely credible" their testimony that they did not intend the statements in the Affidavit to deceive the FCC about their business relationship. In the Sobel hearing, Judge Frysiak, who heard essentially the same testimony, did not accept these protestations as credible. Kay Order, 17 FCC Rcd at 1860 (JA 861).

Appellants rely heavily on the Commission's alleged error in refusing to accept Chief Judge Chachkin's findings that they did not lack candor. Appellants assert (Brief, pp. 43-44) that Chief Judge Chachkin's findings should be dispositive because (1) Chief Judge Chachkin was aware of Judge Frysiak's decision when he made his own decision; (2) he had more time to

observe the witnesses testify because the Kay hearing was the longer of the two hearings; and (3) he made express findings about the witnesses' demeanor whereas Judge Frysiak did not.

It was the Commission's considered judgment, however, that Judge Frysiak's lack of candor findings reasonably bore on whether it should defer to Chief Judge Chackin's findings in favor of the Appellants on the lack of candor issue. Just as the Commission would not be justified in arbitrarily ignoring an ALJ's decision, the Commission reasonably considered the fact that a conflict existed between the findings of two experienced administrative law judges, both of whom had observed the same witnesses testify with respect to the same issues. See Kay Order, 17 FCC Rcd at 1860-61 & nn. 18 & 19 (JA 861-62); Kay Reconsideration Order, 17 FCC Rcd at 8558 (JA 897).

The Commission also gave a reasoned explanation for rejecting Appellants' contention (following Chief Judge Chachkin's suggestion in his initial decision, Kay ID, ¶¶ 168-169, 210 (JA 738-40, 753)) that Judge Frysiak's lack of candor findings in the Sobel hearing should be discounted because the Bureau allegedly had attempted to mislead Judge Frysiak about when it first received a copy of the Management Agreement. See Kay Order, 17 FCC Rcd at 1860 (JA 861). The Commission found unpersuasive the suggestion that the Bureau attempted to conceal Kay's March 1995 submission in the Sobel proceeding, inasmuch as Sobel was free to inform the ALJ about that submission, and the record showed that he did so at least twice during the

proceeding.²⁴ Id. at 1861 (JA 862). More fundamentally, the Commission found no reason to believe that Kay's March 1995, submission of the Management Agreement in response to the Bureau's discovery request cast doubt on Judge Frysiak's conclusion that the parties lacked candor with the Commission concerning their business relationship in the January 1995 document submissions. Judge Frysiak had ruled during the hearing that the relevant time for determining Sobel's state of mind was when he executed the Affidavit in January 1995 not afterwards.²⁵ Id. Thus, the Commission reasoned, the fact that a copy of the Management Agreement later was produced by Kay in March 1995, would not have materially impacted Judge Frysiak's analysis of whether Sobel lacked candor in the January 1995 Affidavit. Id.

The Commission also believed it was appropriate, in lieu of deferring to the findings of either ALJ, to exercise its power of de novo review with respect to the lack of candor issue because the record in the two hearings contained sufficient circumstantial and testimonial evi-

²⁴ During the hearing, Sobel had sought the Bureau's admission that a copy of the Management Agreement had been in its possession since March 24, 1995, a request that Judge Frysiak denied as irrelevant based on the timing of that disclosure in relation to the time that Sobel signed his Affidavit (January 24, 1995). See Kay Order, 17 FCC Rcd at 1861 (JA 862), citing TR (WT Doc. No 97-56) at 297-99 (JA 555-57) & Marc Sobel, FCC 97M-57 (April 17, 1997). Later, after the hearing record was closed, Sobel stated in his Reply Findings that by the time the Commission had modified the designation order in the Kay hearing (in May 1996) the Bureau had been provided a copy of the agreement. In a footnote associated with that statement, Sobel stated that Kay had produced a copy of the agreement on March 24, 1995, as an attachment to his response to a Bureau's document. See id. at 1862 (JA 863), citing Reply to the Wireless Telecommunications Bureau's Proposed Findings of Fact And Conclusions of Law, filed Oct. 27, 1997, at 9 & n.5 (JA 35).

²⁵ See n.24, supra.

dence for the Commission to make reliable findings on material questions of fact.²⁶ See id. at 1861 & n.18 (JA 861). Accordingly, the Commission reasonably decided to rely on its independent review of the written record compiled in both evidentiary hearings to determine whether representations in the Affidavit were deliberately deceptive.

The Commission clearly has the power to reject an ALJ's credibility findings in appropriate circumstances and to make its own findings in the first instance. Faulkner Radio, Inc. v. FCC, 557 F.2d 866, 870 n.23 (D.C. Cir. 1977). See Lorain Journal Co. v. FCC, 352 F.2d at 828, citing FCC v. Allentown Broadcasting Co., 349 U.S. 358, 364 (1955).²⁷ The Commission must consider an ALJ's decision, but, as the above recital shows, the Commission addressed itself to the situation presented by the conflicting credibility findings and decided, for sound reasons, that neither ALJ's findings should be afforded deference. Thereafter, it was for the Commission to draw its own inferences and reach its own conclusions from the written record. See Lorain Journal Co. v. FCC, 351 F.2d at 828.

The Commission's independent review reasonably led it to conclude that the January 1995 Affidavit in support of Kay's Motion was intentionally misleading about the parties' business relationship. Intent to deceive is "a 'factual question that may be inferred if other evidence shows that a motive or logical desire to deceive exists.'" SBC Communications, Inc.,

²⁶ Compare Kay Order, 17 FCC Rcd at 1855 (JA 856) (Commission declined to overturn Chief Judge Chachkin's credibility findings with respect to abuse of process issue because the issue depended critically on a determination of Kay and his chief accusers' relative credibility and the record did not sufficiently demonstrate that Kay had a motive for abusing the FCC's process in the given circumstances).

²⁷ See also United States v. Raddatz, 447 U.S. 667, 680, rehearing denied, 448 U.S. 916 (1980) (commission or board may defer to the findings of a hearing officer but it is not compelled to do so), citing, e.g., Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

16 FCC Rcd 19091, 19115 (2001), quoting Black Television Workshop, 8 FCC Rcd 4192, 4198 n.41 (1993), aff'd sub nom. Woodfork v. FCC, 70 F.3d 639 (D.C. Cir. 1995) (table). The ultimate facts often are proved through circumstantial evidence, as such evidence may be the only way of proving knowledge of falsity or intent. Id. The Commission in these cases considered the relevant factors and gave a reasoned explanation in support of its conclusion that the Affidavit – in the context in which it was submitted, without a contemporaneous disclosure of the facts with respect to the Management Agreement stations – evidenced Appellants' deceptive intent. See Sobel Order, 17 FCC Rcd at 1892 (JA 334-35); Kay Order, 17 FCC Rcd at 1860-64 (JA 861-65).

The Commission reasonably rejected various testimony by the Appellants that attempted to justify the statements in Sobel's Affidavit and Kay's associated motion that Kay had no interest in any Sobel station or license. For example, Sobel testified that when the word "interest" was used in the Affidavit, it referred only to "ownership" of a license, as in holding the legal title. The Commission found this to be an "unreasonably restrictive use of the word 'interest'" in the context of the Affidavit. Sobel Order, 17 FCC Rcd at 1890 (JA 333). In addition, the Commission found that Sobel's testimony showed that Sobel was aware of the questionable nature of this representation. Kay acknowledged in his testimony that Sobel had asked about the meaning of the word "interest," and he recalled telling Sobel that he understood it to refer to "ownership as in a partnership or ownership of stock, as having a direct financial stake in something. Being an owner or stockholder or a direct party to something." Id. at 1891 (JA 333) (emphasis in the original), quoting TR 371 (JA 567). Sobel acknowledged in his testimony that he understood that Kay had a direct financial stake in the Management Agreement stations. Id., citing TR 150 (JA 533).

The Commission also reasonably rejected Sobel's attempts to rely on the advice of counsel for the wording used in the Affidavit. Although the affidavit was originally drafted by Kay's and Sobel's then-counsel, Brown & Schwaninger, the Commission found that Sobel could appreciate the nature of the representations made. Appellants' testimony indicated that Sobel had reviewed the affidavit and discussed it with Kay, and that Sobel understood that he could correct or supplement it. 17 FCC Rcd at 1892 (JA 334), citing TR 140-41, 156, 161, 371 (JA 528-29, 536, 541, 567).

Appellants contend there can be no reasonable inference drawn from the record that the Affidavit was deliberately deceptive about their business relationship because (1) at the time the Affidavit was filed in January 1995 supposedly neither Kay nor Sobel had "any reason to think" their business relationship was under scrutiny by the Commission (Brief, pp. 51-52), and (2) they had the Management Agreement put into writing in 1994 for the very purpose of clarifying their separateness, their positions as two businesses, and their business relationship with respect to the subject stations. They contend that in these circumstances it would not have made sense for them to use the Affidavit to conceal the Management Agreement from the Commission (Brief, p. 51).

Even if Appellants' suggested reading of the record were plausible, it was reasonable for the Commission to reach a contrary conclusion. As Appellants' testimony indicated, Kay and Sobel decided to put the Management Agreement into writing in October 1994 for the very reason they had learned of the forthcoming designation order in the Kay proceeding. Sobel Order, 17 FCC Rcd at 1892 (JA 334), citing TR. 261-63, 299-301 (JA 552-54, 557-59).

Appellants' action to reduce their agreement to writing in response to the Commission's inquiry strongly suggests that Kay and Sobel recognized at the time the Affidavit was filed, in January

1995, that their business arrangements were a matter of interest to Commission. The Commission justifiably concluded that when Kay and Sobel knew that the content of their Management Agreement was likely to be of interest to the Commission, and filed an Affidavit that was contrary in its essential thrust to the details of the Management Agreement and avoided any mention of the recently executed Agreement, those parties were deliberately seeking to deceive the Commission concerning the true extent of their relationship. Id.

The Commission rejected Appellants' contention (Brief, p. 63) that Kay's disclosure of the Management Agreement in March 1995, two months after Affidavit was submitted, negates any inference of deceptive intent. Kay disclosed the Management Agreement only after specifically being requested by the Bureau during discovery to produce all management agreement documents. Kay Order, 17 FCC Rcd at 1862 (JA 863). At the time he filed the Affidavit in January 1995, he elected not to disclose the agreement, although making that disclosure would have done much to clarify his relationship with Sobel and respond to the question put at issue by the Kay HDO.

Contrary to the impression Appellants attempt to create (Brief, pp. 51-55), there is nothing inherently contradictory about a scenario in which Kay and Sobel might decide (1) to put their Management Agreement into writing after learning of the impending Kay HDO, in order to clarify their business relationship, (2) to withhold that agreement from the Commission while attempting through the Affidavit and Kay's motion to limit the scope of the hearing to persuade the Commission that Kay and Sobel had no business relationship, and (3) to produce the agreement when later specifically requested to do so during discovery in the Kay hearing. What the Commission basically concluded in these cases was that the record indicated that Appellants

were hoping to conceal their business relationship, but if compelled to tell, they wanted to be in the best possible position to try to explain themselves with a written Management Agreement.

Finally, the Commission's conclusion that Appellants were intentionally deceptive about their business relationship in preparing and filing the Affidavit is consistent with evidence tending to show a pattern of deceptive conduct by Kay and Sobel concerning the actual nature of their business relationship. The record showed, for example, that in his December 1994 Letter to the Bureau (JA 471), which Sobel testified was sent for the purpose of clarifying his relationship with Kay, Sobel assured the staff he was an "Independent Two-Way Radio Dealer." However, Sobel did not disclose the Management Agreement or its essential terms to the Bureau with that letter, even though a disclosure would have served to clarify that relationship. See Sobel Order, 17 FCC Rcd at 1892 (JA 334-35). Relevant evidence with respect to Kay included evidence (1) that Kay had masked out the name of his business on the Management Agreement stations' customer invoices before they were submitted to the Commission, see Kay Order, 17 FCC Rcd at 1864 (JA 865), citing Sobel ID, 12 FCC Rcd at 22898-99, 22902 (JA 89-90, 93); and (2) that one of the responses to the Bureau's 308(b) Letter stated that Kay did not operate any station of which he was not a licensee, but that Kay, at the time, was operating Sobel's stations under the oral agreement which later became the Management Agreement. Id. In addition, the record showed that with respect to another licensee for whom he had constructed a station and for whom he was marketing services, Kay prepared an invoice that falsely indicated that payment had been made by the licensee to Kay for the construction expenses, and that although a lease had been entered into pursuant to which Kay was to be paid for the transmitter site, Kay had entered into the lease only "to comply with FCC regulations." Id., citing Kay ID, ¶ 126 (JA 726); TR (WT Doc. No. 94-147), 1544-45, 1556-57 (JA 1017-18, 1019-20).

CONCLUSION

For the foregoing reasons, the Commission's orders should be affirmed.²⁸

Respectfully submitted,

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²⁸ See Jurisdictional Statement, p. 2 n.1, supra, which suggests that insofar as this case involves an attempt to have the Court review the dismissal of Sobel's finder's preference requests, the case should be dismissed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES A. Kay, Jr., et al.,)
)
 APPELLANTS,)
)
 V.) Nos. 02-1175, 04-1045
)
 FEDERAL COMMUNICATIONS COMMISSION,)
)
 APPELLEE.)

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying “Brief for Federal Communications Commission” in the captioned cases contains 13590 words.

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