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

In the Matter of	)	
	)	
JAMES A. KAY, JR.	)	WT Docket No. 94-147
	)	
Licensee of One Hundred Fifty Two	)	
Part 90 Licenses in the	)	
Los Angeles, California Area	)	

APPEARANCES

Robert J. Keller and Aaron P. Shainis on behalf of James A. Kay, Jr.; and Charles W. Kelley, Gary P. Schonman, William H. Knowles-Kellett and John J. Schauble, on behalf of the Wireless Telecommunications Bureau and the Enforcement Bureau,[1] Federal Communications Commission.

DECISION

Adopted: November 20, 2001 **Released:** January 25, 2002

By the Commission: Commissioner Martin concurring in part, dissenting in part, and issuing a statement.

I. INTRODUCTION

1. This decision modifies an Initial Decision by Chief Administrative Law Judge Joseph Chachkin concluding that James A. Kay, Jr. is qualified to remain the licensee of 152 Part 90 land mobile stations. James A. Kay, Jr., FCC 99D-04 (ALJ Sept. 10, 1999). We find that Kay failed to respond to Commission inquiries and filed a pleading that lacked candor. We will therefore revoke Kay's stations in the 800 MHz band and assess a forfeiture of $10,000 against Kay.

II. BACKGROUND

[1] The Enforcement Bureau was established effective November 8, 1999. See News Release FCC Reshapes for the Future (Oct. 26, 1999). Its responsibilities include serving as trial staff in formal Commission hearings. It has participated in this proceeding in lieu of the Wireless Telecommunications Bureau beginning in November 1999.

2. On December 13, 1994, the Commission designated this proceeding for hearing to determine whether Kay, a licensee of land mobile radio facilities under Part 90 of the Commission's rules, has complied with those rules and whether he possesses the character qualifications to remain a Commission licensee. James A. Kay, Jr., 10 FCC Rcd 2062 (1994), modified, 11 FCC Rcd 5324 (1996). Kay was ordered to show cause why his licenses should not be revoked or cancelled, why he should not be ordered to cease and desist from certain violations of the Communications Act, and why an order for forfeiture should not issue.

3. The Commission had received numerous complaints about Kay's operations, including allegations that he was falsely reporting the number of mobile units he serves in order to avoid the channel sharing and recovery provisions of the rules. James A. Kay, Jr., 10 FCC Rcd at 2062 ¶ 2. On January 31, 1994, the Bureau, pursuant to 47 U.S.C. § 308(b), served Kay with a letter of inquiry requesting him to provide certain information, including information about the loading of his stations. Id. at 2063-64 ¶¶ 6-7. After an exchange of correspondence and extensions of time, the Bureau, on June 10, 1994, repeated its request. Kay responded on June 24, 1994 that: "[T]here is no date . . . for which the submission of the requested information would be convenient." Id. at 2064 ¶ 8. The Commission thereupon designated this case for hearing. Id. Of the eight issues originally designated, four remain before us:

> a) To determine whether James A. Kay, Jr. has violated Section 308(b) of the Act and/or Section 1.17 of the Commission's Rules by failing to provide information requested in his responses to Commission inquiries;
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> . . . .
>
> c) To determine if Kay has willfully or repeatedly violated any of the Commission's construction and operation requirements in violation of Sections 90.155, 90.157, 90.313, 90.623, 90.627, 90.631, and 90.633 of the Commission's Rules;
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> d) To determine whether [Kay] has abused the Commission's processes by filing applications in multiple names in order to avoid compliance with the Commission's channel sharing and recovery provisions in violation of Sections 90.623 and 90.629;
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> . . . .
>
> g) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether [Kay] is qualified to remain a Commission licensee . . . .

4. This matter was originally assigned to Administrative Law Judge Richard L. Sippel, who, following further proceedings, issued a summary decision in which he

revoked Kay's licenses and ordered Kay to forfeit $75,000. James A. Kay, Jr., 11 FCC Rcd 6585 (ALJ 1996). That decision was subsequently vacated and the proceeding was remanded for a full hearing. James A. Kay, Jr., 12 FCC Rcd 2898 (OGC 1997). After the remand, Judge Sippel added a further issue against Kay based on findings made in another proceeding (WT Docket No. 97-56), that an individual named Marc D. Sobel had transferred control of several Part 90 stations to Kay without Commission authorization and that he made misrepresentations and lacked candor. James A. Kay, Jr., FCC 98M-15 (Feb. 2, 1998). See Paragraph 71, infra. On October 19, 1998, the Commission ordered the appointment of a new administrative law judge to preside over this case. James A. Kay, Jr., FCC 98-274 (Oct. 19, 1998). Then-Chief Administrative Law Judge Joseph Chachkin (ALJ)[2] appointed himself to preside. James A. Kay, Jr., FCC 98M-122 (Oct. 30, 1998).

5. In his Initial Decision (ID), the ALJ concluded that the Bureau failed to demonstrate any misconduct by Kay that would warrant revocation of his licenses. ID at ¶ 223. On the contrary, the ALJ strongly faulted the Bureau's own conduct, finding:

> This Judge has never seen prosecutorial misconduct of this magnitude in the twenty years he has presided over Commission cases. Such misconduct can not be countenanced. It is completely contrary to the Commission's duty and responsibility to treat all of its licensees in a fair and evenhanded manner.

ID at n.49.[3]

6. The ALJ found no basis to fault Kay under the § 308(b) issue. ID at ¶¶ 175-81. He found that the Bureau did not allege that Kay's responses to the Bureau's inquiry contained misrepresentations or lacked candor. He further found that (1) the Bureau's inquiry was excessively broad and constituted an impermissible "fishing expedition,"(2) that Kay ultimately produced the information requested after designation for hearing, and (3) that Kay had legitimate concerns as to whether the Bureau would keep the sensitive business information requested confidential.

7. The ALJ rejected the Bureau's contention that Kay had underutilized the frequencies on which he was licensed. ID at ¶¶ 186-98. He found that the Bureau had not shown that Kay was subject to any specific loading requirement. He also found significant flaws in the manner that the Bureau analyzed the evidence in attempting to support its claims.

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[2] Chief Judge Chachkin retired from the Commission on October 31, 1999.

[3] In James A. Kay, Jr., 13 FCC Rcd 16369 (1998), pet. for recon. dismissed, 14 FCC Rcd 14 FCC Rcd 1291 (1998), we considered Kay's allegations of "prosecutorial misconduct" against the Bureau. Without endorsing all aspects of the Bureau's conduct, we found that Kay had not shown that the Bureau's conduct was outrageous or shocking or that Kay had suffered material prejudice. Having reviewed the record of this proceeding, we adhere to this conclusion. We therefore disavow the ALJ's conclusions regarding the Bureau. Similarly, we find no reason to adopt the dissent's suggestion that we remand for new hearings as to this matter.

8. Additionally, the ALJ rejected allegations that Kay abused the Commission's processes by filing applications in multiple names. ID at ¶¶ 199-207. Although the ALJ found that Kay was involved in filing applications on behalf of four individuals, the ALJ found that Kay had a factual basis for believing that these individuals had a bona fide intention to use the radio facilities applied for. Moreover, the ALJ questioned the credibility of the witnesses against Kay. According to the ALJ, Kay had no motive to acquire facilities in the manner alleged, since he could have legitimately applied for them in his own name.

9. Finally, although the ALJ accepted the conclusion in WT Docket No. 97-56, that Sobel transferred control of the facilities in question to Kay without authorization, he found no basis for disqualifying Kay. ID at ¶¶ 209-18. In this regard, he found that Kay did not make any misrepresentation or engage in other deception in connection with the alleged transfer.

10. Now before the Commission are: (1) the Wireless Telecommunications Bureau's Exceptions and Brief, filed October 12, 1999; (2) the Reply of James A. Kay, Jr., to the Wireless Telecommunications Bureau's Exceptions and Brief; and (3) related procedural matters. For the reasons set forth below, we will modify the initial decision. We find that Kay's responses to the Bureau's 308(b) request failed to provide information that he was obligated as a licensee to produce. We also find that Kay filed a pleading concerning Sobel that lacked candor. We will therefore revoke Kay's stations in the 800 MHz band and assess a forfeiture of $10,000 against Kay.

III. PROCEDURAL MATTERS

11. Before turning to the merits of this case, we wish to address two procedural matters. First, Kay contends that the "clear and convincing evidence" standard of proof applies in this case, rather than the more lenient "preponderance of evidence" test. We disagree. Since the Supreme Court's ruling in Steadman v. SEC, 450 U.S. 91 (1981), it is well established that the preponderance of the evidence test applies in administrative proceedings. See Silver Star Communications-Albany, Inc., 6 FCC Rcd 6905, 6907 n.3 (1991); Fox River Broadcasting, Inc. , 88 FCC 2d 1132, 1136 n.9 (Rev. Bd. 1982). Citizens for Jazz on WRVR, Inc. v. FCC, 775 F.2d 392, 395 n.1 (D.C. Cir. 1985), cited by Kay, does not hold to the contrary.

12. Second, Kay argues that the Bureau's exceptions and brief should be stricken as violating the provisions of 47 C.F.R. §§ 1.276 and 1.277. According to Kay, the Bureau's pleading lacks a separate statement of the questions of law presented as required by 47 C.F.R. § 1.276(a)(2). Moreover, Kay submits that the pleading exceeds the limit of 30 pages[4] because, in addition to 29 pages of text, the pleading has seven

[4] The provisions of 47 C.F.R. § 1.277 limits exceptions and briefs to 25 pages. The General Counsel granted the parties a five page extension in this case. James A. Kay, Jr., FCC 99I-19 (Oct. 7, 1999).

pages of attachments. 47 C.F.R. § 1.277(c). The Bureau's pleading does not exceed the page limitation. Attachments consisting of materials that factually support exceptions are not counted in determining the page limit. See Belo Broadcasting Corp., 61 FCC 2d 10, 11 ¶ 4 (1976); Gross Broadcasting Co., 65 FCC 2d 514, 514 ¶ 3 (Rev. Bd. 1977); 47 C.F.R. § 1.48(a). While, the Bureau's pleading does not have a separate statement of the questions of law presented, as required by the rule, a statement does precede the discussion of each individual issue. The Bureau indicates that a "reformatted" pleading could be refiled without exceeding the page limitation. We see no reason to disrupt the proceeding at this point merely to require such a "reformatting."

IV. § 308 ISSUE

13. The ALJ found that Kay operated Part 90 land mobile radio facilities in the Los Angeles, California, area and that he began providing two-way mobile service to others on a commercial basis in approximately 1982-84. He operated a sole proprietorship under the name of Lucky's Two-Way Radio. Lucky's sold repeater service, rented repeater site space, and provided technical consulting services. ID at ¶¶ 8-9. He offered these services through Specialized Mobile Radio (SMR) stations that operated in the 800 MHz band,[5] and through private carrier stations that operated in the 470-512 MHz or "UHF" band. Kay's UHF stations were licensed in the Business Radio Service.[6] ID at ¶ 84.

14. On January 31, 1994, the Bureau requested, pursuant to 47 U.S.C. § 308(b), that Kay furnish the Bureau various information concerning his licensed facilities. ID at ¶ 10. The Bureau stated that:

> The Commission has received complaints questioning the construction and operational status of a number of your licensed facilities. Specifically, the complaints allege that numerous facilities licensed to you are on U.S. Forest Service Land, but do not have the requisite permits for such use. The presumption is that those facilities were not constructed and made operational as required by the Commission's rules and therefore, the licenses have canceled. In addition, the Commission has also received complaints questioning the actual loading and use of your facilities. The complaints allege that the licensed loading of your facilities does not realistically represent the actual loading of the facilities, thereby resulting in the warehousing of spectrum. [Emphasis in the original.]

[5] SMR stations are classified as either conventional or trunked. When trunking is used, channel access is controlled by a computer, which gives the user access to the first available channel or places the user in a waiting line to be served. See Amendment of Part 90, 10 FCC Rcd 7970, 7974-75 ¶¶ 3-4 (1994); Amendment of Part 90, 60 RR 2d 867, 868 ¶ 2 (1986).

[6] Kay was also the President and sole shareholder of Buddy Corp., which operated under the business name of Southland Communications. Southland was engaged primarily in the sales, service, installation, and maintenance of mobile radios and two-way mobile radio systems. Some, but not all, customers of Lucky's were customers of Southland, and vice versa. ID at ¶ 8-9.

Id.; WTB Exh. 1 (the "308(b) Letter").

15. The 308(b) Letter directed Kay to produce: (1) an alphabetical list of the call signs and licensee names for all facilities owned or operated by Kay or any companies under which he does business, annotated to show which facilities are located on U.S. Forest Service land, (2) the original license grant date for each call sign, the date the facility was constructed and placed into operation, and the type of station, (3) copies of all U.S. Forest Service permits, (4) an explanation for the lack of a U.S. Forest Service permit for any station located on U.S. Forest Service land, (5) a list of all of Kay's customers, including "the user name, business address and phone number, and a contact person" along with the number of mobile units and, for trunked systems, the number of control stations operated by the user, and (6) a list of the total number of mobile units operated on each of Kay's stations, substantiated by business records. ID at ¶11; WTB Exh. 1.

16. Kay's then attorney, Dennis C. Brown, a partner at Brown & Schwaninger, responded on February 16, 1994. Brown sought "written assurance that any information which Kay submits in response to the Commission's request will be held in strictest confidence and will not be disclosed under any circumstances to any person who is not a Commission employee." WTB Exh. 348 at 1. Brown further requested that Kay be afforded immunity from any forfeiture action or criminal prosecution based on any information supplied, and asked that the running of the sixty day response period be tolled pending action on the requests set forth in the letter. ID at ¶ 15; WTB Exh. 348.

17. The Bureau responded with a letter, dated March 1, 1994, addressed to Brown. The Bureau stated that, pursuant to 47 C.F.R. § 0.459, if Kay wished to have submitted material withheld from public inspection, he would be required to submit such a request concurrently with the submission of the materials. The Bureau further stated that Brown's February 16, 1994, letter did not comply with 47 C.F.R. § 0.459 and therefore "is not considered a request that information submitted . . . be withheld from public scrutiny." The request for immunity was denied on the grounds that "Congress has not provided for immunity when responding to [Section 308(b)] requests." The deadline for responding to the 308(b) Letter was extended to April 14, 1994. ID at ¶ 16; WTB Exh. 349.

18. On April 7, 1994, Brown wrote two letters to the Bureau. In the first letter, Brown specifically requested confidential treatment pursuant to 47 C.F.R. § 0.459. Brown sought confidential treatment to prevent an unwarranted invasion of privacy in that Kay was submitting (via Brown's second April 7 letter) personal information, such as the extent of his resources and how his business was affected by a recent earthquake. Brown also requested confidentiality on competitive grounds. The letter specifically advised the Bureau that some of Kay's competitors obtained copies of the 308(b) Letter

and used it to disparage Kay's reputation in the radio communications service market. Brown expressed concern that Kay's competitors would obtain the information which he is submitting and distribute it in an effort to disparage Kay among his customers, and would use the information to probe for weaknesses in his business strategy, and to solicit his current customers directly. ID at ¶ 17; WTB Exh. 2.

19. In the second letter dated April 7, 1994, Brown addressed the substance of the 308(b) Letter. He presented a number of legal objections and challenges to the scope of the request and provided none of the requested information. In response to item (1), he asserted that the Commission already knew the call signs of Kay's stations and declined to "duplicate that information" or perform "secretarial sorting tasks" that the Commission could "more expeditiously" perform itself. WTB Exh. 3 at 1. He denied that the Commission had jurisdiction to inquire into the status of Kay's U.S. Forest Service Permits, and suggested that the Commission could "plot each station on a map" if it desired to ascertain which facilities were located on U.S. Forest Service Land. Id. As to item (2), he asserted that the Commission records already showed the dates the licenses were granted, and that Kay was not required to keep any records of when they were constructed. Addressing items (3) and (4), he declined to provide information about Forest Service permits, claiming that such information was irrelevant to the Commission's jurisdiction and that a presumption that facilities lacking a permit were not constructed was unreasonable. ID at ¶ 18; WTB Exh. 3.

20. As to item (5), Brown characterized the Bureau's request for customer lists and usage data as "an unlawful fishing expedition," since it was not directly related to specific complaints. WTB Exh. 3 at 5. He denied that Kay was required to maintain any record of user names or of the other information about users that was requested. He complained that the Bureau's March 1, 1994 letter (paragraph 17, supra) did not provide the requested confidentiality. Brown also asserted that item (6) essentially required Kay to "tell the Commission everything about everything" and complained that the March 1 letter declined to provide Kay with immunity. WTB Exh. 3 at 4. He further protested that the request did not specify the time frame for which the data was to be supplied and that, in any event, the usage of Kay's facilities fluctuated over time. For that reason, and because many of Kay's customers had access to multiple facilities, Brown maintained that Kay might not know the number of mobile units in operation on each station. Additionally, Brown asserted that Kay was not required by the Commission's rules to supply loading information except in connection with certain applications and that Kay had provided such information when appropriate. Brown also deemed the request unduly burdensome in light of local conditions, since Kay was still recovering from the Northridge Earthquake, which occurred on January 17, 1994 and severely damaged Kay's home and business, and since he was adversely affected by the difficult economic conditions in the Los Angeles market. ID at ¶ 19-20; WTB Exh. 3.

21. Thereafter, on May 11, 1994, the Bureau responded with a letter addressed directly to Kay. The Bureau told Kay that it required answers to the Bureau's January 31

letter in order to act on several pending applications and that these applications would be dismissed unless Kay responded within 14 days. The letter also noted that the April 7 responses contained copyright notices at the bottom.[7] The Bureau told Kay that if he claimed copyright protection he would be required to file 50 copies of his response and justify why the copyright laws apply. ID at ¶ 24; WTB Exh. 4.

22. Brown replied on May 17, 1994. He specifically challenged the Bureau's request for 50 copies, which is more than required by section 1.51 of the Commission's rules. See 47 C.F.R. § 1.51. He stated: "Since the Commission could not possibly require 50 copies for its own internal use, the only reasonable conclusion is that the Commission intends to make further circulation of Mr. Kay's response beyond the Commission." With respect to the copyright notice on Kay's response, Brown stated that the notice was intended to prevent distribution of the response outside of the Commission, but otherwise declined to "advise the Commission as to its obligations under the law of copyright." ID at ¶ 26, WTB Exh. 5 at 2. Brown also reiterated some of the same legal objections to the 308(b) Letter that he had set forth in the second April 7, 1994, letter. Brown complained that the Commission had declined to furnish him with information about specific complaints under the Freedom of Information Act and suggested that progress could be made on the matter if the Bureau would request specific information concerning each of the specified facilities. He further complained that the Bureau had no justification for threatening to dismiss Kay's applications to get information. ID at ¶ 27; WTB Exh. 5.

23. The Bureau thereupon, on May 20, 1994, responded to Brown's April 7, 1994, letters. The Bureau characterized Brown's April 7 letter as "inadequate, evasive, and contrived to avoid full and candid disclosure to the Commission." WTB Exh. 6 at 1. The Bureau called it "a studied effort to avoid producing any information." Id.; ID at ¶ 28. The Bureau stated that:

> With respect to Kay's request that information provided to the Commission in response to our inquiry be withheld from public inspection, we will not make those materials which are specifically listed under the provisions of [the Commission regulations implementing the Freedom of Information Act] routinely available for inspection to the public. Therefore, materials which include any information containing trade secrets or commercial, financial, or technical data which would customarily be guarded from competitors, will not be made routinely available to the public.

WTB Exh. 6 at 1. The Bureau specifically responded to an allegation, made in Brown's first April 7 letter, that the Commission had improperly disclosed confidential information about an individual named Joe Hiram. The Bureau observed that Hiram had

[7] The notice, included at the bottom of each page of several of Brown's letters, stated: "Entire contents copyright, James A. Kay, Jr., 1994. All rights reserved. No portion of this document may be copied or reproduced by any means."

consented to the release of the information and that Brown & Schwaninger had been so informed. The Bureau clarified its January 31 request to indicate that Kay should provide loading information as of January 31, 1994 and extended the response date to June 3, 1994. WTB Exh. 6.

24. On May 25, 1994, Brown made a further response asking the Bureau to "clarify" its request by specifying the facilities involved in specific complaints. He suggested that Commission employees could inspect relevant records at Kay's office. He also suggested that: "[t]he Commission might want to scrutinize the complaints to assess the likely validity of each item in light of its knowledge of the credibility of the complaining parties and in light of its knowledge of the benefits of which they may hope to gain by harassing Mr. Kay." WTB Exh. 7 at 2. He proposed that "While Mr. Kay might not be convinced that the complainants had presented a *prima facie* case . . . Mr. Kay would not need to raise such procedural objections were the Commission to clarify its request as suggested." WTB Exh. 7 at 2. Brown asked the Commission to defer the response date until 14 days after the conclusion of Kay's FOIA litigation seeking to obtain copies of the complaints against him. ID at ¶¶ 38-39; WTB Exh. 7.

25. On the next day, May 26, 1994, the Bureau issued a short letter summarily rejecting the request for clarification, stating:

> The Commission's request asks for basic information that Mr. Kay would have readily available if he is indeed providing communication services to customers. In fact, such information would be a necessity in order to even issue monthly bills to users of the many systems for which he is apparently licensed.

The Bureau refused to extend the response date beyond June 3. ID at ¶ 40; WTB Exh. 8.

26. Brown responded to the Commission the same day. Brown again sought "clarification" of items in the January 31 308(b) Letter. With respect to specific items, he asked for the following clarifications: (1) what licensee information the Commission did not possess, (2) what information about the grant and construction of the licenses the Commission did not have, (3) and (4) the relevance of the Forest Service permits, and (5) whether the Commission would keep Kay's user information confidential. As to item (6), Brown did not seek further clarification, but stated that: "Mr. Kay states that his business records substantiate that a total of in excess of 7,000 mobile units and control stations operate in association with all of the facilities which he and his companies own and operate." WTB Exh. 10 at 3. Brown urged that a failure to provide further information did not warrant a revocation proceeding. ID at ¶ 40; WTB Exh. 10.

27. The following day, May 27, 1994, the Bureau answered that no clarification was required. ID at ¶ 40; WTB Exh. 10. The Bureau further stated:

> Regarding the request for user information, we have no intention of disclosing Mr. Kay's proprietary business information, such as customer lists, except to the extent that we would be required by law to do so. Our intent is not to divulge Mr. Kay's proprietary business information to competitors or any non-Commission personnel . . . .

WTB Exh. 10 at 1. The Bureau termed Brown's answer to item (6) "ludicrous" and "frivolous." Id. at 1-2.

28. On June 2, 1994, Brown again responded to the Bureau. As to item (1), Brown explained that Kay, in addition to holding licenses in his own name, had an interest in two closely held corporations, Buddy Corp. and Oat Trunking Group, Inc., and that Kay "does not operate any station of which either he or the two above named corporations is not the licensee." WTB Exh. 11 at 1. The letter further explained that Kay did not hold any license that the Commission would not already have in its own records. ID at ¶ 43; WTB Exh. 11.

29. Brown also renewed his various legal objections to the Bureau's request for information regarding Kay's U.S. Forest Service permits, including relevancy and the Bureau's refusal to disclose the particulars of the alleged complaints against Kay. Brown claimed that there is no requirement that Kay maintain records of license grant dates, that the Commission already had the license grant dates in its own records, and, to the extent Commission rules required Kay to report construction completion dates, he had already done so at the appropriate times. ID at ¶ 43; WTB Exh. 11. Brown stated that: "Had any license held by Mr. Kay cancelled automatically because he failed to construct an authorized station in a timely manner, we respectfully submit that such an automatic action of law could not, in any way, raise a question concerning his qualifications to be a Commission licensee." ID at ¶ 43; WTB Exh. 11 at 3.

30. In response to the Bureau's request for Kay's loading numbers, Brown again stated that Kay's combined systems served a grand total of 7,000 units, but he asserted that providing specific loading information as of January 31, would not prove or disprove any complaint the Bureau may have received, because the systems were in continual churn with customers being added and deleted all the time. Brown again claimed that loading was not a factor as to any of the specific pending applications. ID at ¶ 44; WTB Exh. 11.

31. Brown once again stated that Kay was not "convinced that the Commission would keep confidential any information that the Commission requested." WTB Exh. 11 at 5. Brown again cited Bureau's unexplained request for 50 copies of Kay's response. Brown submitted only the number of copies of his June 2, 1994, letter required by 47 C.F.R. § 1.51. He also included the copyright notice across the bottom of each page. ID at ¶ 45; WTB Exh. 11.

32. Finally, Brown asserted that the Bureau's refusal to disclose the complaints on which the 308(b) Letter was based, its refusal to postpone the response date until a court resolved Kay's FOIA litigation, its refusal to grant Kay criminal immunity, and its stated intention to initiate hearing proceedings against Kay violated Kay's constitutional rights. ID at ¶ 46; WTB Exh. 11.

33. The Bureau sent Brown a responsive letter on June 10, 1994. The Bureau labeled Kay's response "woefully inadequate" and threatened that it "places Mr. Kay in jeopardy of Commission sanctions which include revocation of licenses, monetary forfeiture, or both." WTB Exh. 12 at 1. The Bureau stated that any information submitted would be kept confidential and dropped its demand for 50 copies of any response, requiring only 1 original and 1 copy. The Bureau again claimed that loading information was readily available to Kay and required a further response by July 1. The Bureau indicated that it would accept a user list as of any date "convenient to Mr. Kay." WTB Exh. 12 at 1. [Emphasis in the original.] ID at ¶ 47; WTB Exh. 12.

34. On June 17, 1994, Brown wrote to the Bureau, informing it that a Federal District court had required the Commission to submit a "Vaughn Index" of documents withheld from Kay's FOIA request. Brown requested that Kay's disclosure date be extended until 30 days after conclusion of the FOIA litigation. ID at ¶ 48; WTB Exh. 13. The Bureau refused on June 22, 1994, noting that it had released over 1,000 documents to Kay. The Bureau characterized Brown's requests as "dilatory tactics" that exposed Kay to the threat of revocation. ID at ¶ 49; WTB Exh. 14 at 1. Finally, on June 30, 1994, Brown responded again. As to each of the specific items in the 308(b) Letter, Brown referred the Bureau to earlier responses filed on behalf of Kay. Brown reiterated his legal objection on the ground that the specifics of the alleged complaints had not been disclosed to Kay. He stated 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." WTB Exh. 15 at 3.

35. The ALJ found that Kay's responses did not violate either 47 U.S.C. § 308(b) or 47 C.F.R. § 1.17. He found that the Bureau had not alleged that Kay's responses constituted misrepresentations or lacked candor. ID at ¶¶ 175-76. He criticized the Bureau's 308(b) Letter as exceeding the permissible bounds of Commission inquiry, as defined by Stahlman v. FCC, 126 F.2d 123 (D.C. Cir. 1942), in that they did not specifically inform Kay of the conduct in question and narrowly focus to obtain necessary information. ID at ¶ 177-79. The ALJ held that, instead, the Bureau had engaged in a "fishing expedition with the hope that something would turn up." ID at ¶ 179. He faulted the Bureau for not explaining particular complaints, for requiring sensitive information, such as customer lists and technical configurations, and for ignoring Kay's requests for modification. He said that Kay's actions cannot be viewed as an "act of defiance." ID at ¶ 179. The ALJ also found that Kay disclosed nearly 36,000 documents during discovery and that Kay's ability to respond to the 308(b) Letter had been impaired by his limited computer capabilities and the aftereffects of the Northridge

earthquake. The ALJ also found that Kay had legitimate concerns about whether data would be kept confidential. These included the breadth of the Bureau's request, the Bureau failure to provide requested assurances, its demand for 50 copies of responses, and an incident in which the Bureau apparently frustrated a finder's preference request filed by Kay. ID at ¶¶ 180-81.

36. The Bureau challenges the ALJ's adverse findings. The Bureau denies that the 308(b) Letter constitutes an unlawful fishing expedition. According to the Bureau, the Commission has already indicated its approval of the 308(b) Letter in the hearing designation order and other rulings in this proceeding. The Bureau asserts that charges of Bureau misconduct are irrelevant to the issues in this proceeding. The Bureau disputes the ALJ's findings that the 308(b) Letter sought excessive detail about Kay's technical operations or that compliance was excessively burdensome. The Bureau asserts that Kay could have complied with the request by furnishing: (1) a chart of call signs and license names, (2) copies of Forest Service permits, (3) a user list showing the number of mobile units for each user, and (4) invoices supporting the loading of Kay's systems on one specified date. The Bureau also takes issue with the suggestion that it should have limited its inquiry to the facilities involved in specific complaints.

37. The Bureau discounts Kay's various excuses for noncompliance with the 308(b) request. The Bureau contends that Kay had no valid concerns about confidentiality, since the Bureau twice assured Kay in writing that sensitive material would be kept confidential. The Bureau also argues that the Northridge earthquake did not justify noncompliance. According to the Bureau, Kay did not rely on the earthquake to justify noncompliance and Kay could have complied despite the earthquake.

38. Kay responds that the Commission intended to permit inquiry into the propriety of the 308(b) Letter and to permit Kay to show that he was aggrieved by the Bureau's conduct. Kay argues that Congress did not intend 308(b) to be a "blank check" for requesting information. He further argues that compliance with a 308(b) Letter is voluntary and that the Commission can issue a subpoena, enforceable in the federal courts, if it wants to compel disclosure. Kay characterizes the 308(b) Letter as overbroad and excessively burdensome, requiring production of billing records, contracts, and invoices regarding more than 150 facilities. In Kay's view, the Bureau should have limited its requests to the facilities involved in specific complaints.

39. Additionally, Kay cites several mitigating factors. He observes that he provided some 38,000 documents after designation for hearing, which demonstrates that he had no intention to deceive the Commission. He asserts that the Bureau gave him ample reason to be concerned about confidentiality, especially in light of its apparent bad faith and animosity towards Kay. Kay asserts that the Northridge earthquake severely disrupted his business, personal life, and computer system, making it difficult for him to comply with the request. In this regard, he submits that compliance with the request required three months of staff time.

40. We find that Kay violated his obligations under 47 U.S.C. § 308(b) and 47 C.F.R. § 1.17. Licensees have an obligation to respond to Commission inquiries. See Fox Television Stations, Inc., 10 FCC Rcd 8452, 8508 ¶ 139 (1995). See also 47 C.F.R. § 1.17 ("The Commission or its representatives may, in writing, require . . . written statements of fact. . . . No applicant, permittee or licensee shall in any response to Commission correspondence or inquiry . . . make any . . . willful material omission bearing on any matter within the jurisdiction of the Commission.") We recognize that a licensee must be free to assert a principled basis for resisting requests for information, such as a contention that the information is privileged or that production would be unduly burdensome. However, a licensee's belief that the request is immaterial under its own interpretation of law is not a sufficient basis for failing to answer questions. Fox Television Stations, Inc., 10 FCC Rcd at 8508 ¶¶ 138-39. "The Commission is not required to bargain with its licensees for the information to which it is entitled in order properly to carry out its functions." Carol Music, Inc., 37 FCC 379, 384 (1964). Although the Commission has the authority to seek information by formal means, such as subpoena, where necessary, the Commission expects its licensees to recognize its authority and to cooperate with staff-conducted informal investigations. See PTL of Heritage Village, 71 FCC 2d 324, 329 ¶ 12 (1979). See also RKO General, Inc. v. FCC, 670 F.2d 215, 229 (D.C. Cir. 1981) ("As a licensing authority, the Commission is not expected to 'play procedural games with those who come before it in order to ascertain the truth' . . . . license applicants may not indulge in common-law pleading strategies of their own devise"). Moreover, the failure to provide information known to be relevant or a failure to respond based on a facially implausible theory may constitute lack of candor. Fox Television Stations, Inc., 10 FCC Rcd at 8508 ¶¶ 137.

41. Kay's responses to the Bureau's inquiries disclosed virtually none of the information requested. He failed to provide a list of calls signs based solely on his belief that the Bureau should look up the information itself and because he declined to perform "secretarial sorting tasks." WTB Exh. 3 at 1. He declined to provide information about which of his facilities were located on Forest Service land and whether he had permits for the use of such land, based on the unavailing theory that the Commission lacked authority to inquire whether a licensee has obtained necessary governmental authorizations, such as permits from the U.S. Forest Service. In fact, the Commission clearly has jurisdiction to determine whether licensees are violating federal permit requirements and whether the licensees have constructed facilities without authorization. The case cited by Kay, Fort Collins Telecasters, 103 FCC 2d 978, 980-81 ¶ 3 (Rev. Bd. 1986), does not hold, as Kay asserted in his response (WTB Exh. 3 at 2), that governmental consent to operation of a facility on its land was irrelevant; it holds that the applicant in that case had demonstrated reasonable assurance of obtaining such consent. See also Arizona Number One Radio, Inc., 103 FCC 2d 550, 553-54 ¶¶ 3-4 (Rev. Bd. 1976). In any event, as noted above, Kay's unilateral belief that the information is not relevant does not justify nondisclosure. His suggestion that "if the Commission desires to ascertain [which facilities are located on U.S. Forest Service land], we respectfully suggest that it may desire to plot each

station on a map which shows the boundaries of the U.S. Forest Service land" was inconsistent with the licensee's responsibilities and likely intended to be sarcastic rather than a legitimate suggestion.[8] Equally unavailing is Kay's response that he was not required to maintain certain records, such as documentation of grant dates. WTB Exh. 3 at 2. Investigations frequently require examination of material not required to be maintained by Commission rules. PTL of Heritage Village, 71 FCC 2d at 327 ¶ 8.

42. Kay's failure to provide this information, as well as that regarding customers and loading was also based on three more general rationales: (1) the argument that the requests were overbroad because they were not based on specific complaints, (2) concerns over confidentiality, and (3) issues regarding the burden and practicality of providing the information. We disagree with Kay and with the ALJ's treatment of these factors.[9] As to the first issue, both Kay and the ALJ rely on the following dictum in Stahlman v. FCC, 126 F.2d 124, 128 (D.C. Cir. 1942), as indicating that the Bureau's inquiry was impermissibly broad:

> . . . [W]e do not mean to hold or to suggest that the Commission is authorized to require appellant or other witnesses whom they may summon to bare their records, relevant or irrelevant, in the hope that something will turn up . . . but only that the Commission may, without interference, seek through an investigation of its own making information properly applicable to the legislative standards set up in the [Communications] Act.

43. We do not read that case as saying that the Commission may only seek information relevant to specific complaints. We believe that it is reasonably within our discretion (and the Bureau's) to determine that the existence of numerous complaints about a licensee may warrant a broad investigation of that licensee's compliance. See Tidewater Radio Show, Inc., 75 FCC 2d 670, 677 ¶ 15 (1980) (". . . full authority and power are given to the Commission to institute an inquiry on its own motion, with or without complaint, as to any matter falling within its jurisdiction. [Footnote omitted]. See Stahlman . . . . "). In any event, as noted above, Kay's unilateral belief that the Bureau's inquiry was overbroad did not justify a failure to respond. If Kay objected to the scope of the Bureau's inquiry, he should have sought Commission review, as he did following designation for hearing. See James A. Kay. Jr., 13 FCC Rcd 16369 (1998).

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[8] We are similarly troubled by Kay's response to the Bureau's request that he explain the applicability of the copyright law to his use of a copyright notice on his correspondence. Kay's former attorney responded: ". . . we must respectfully decline to advise the Commission concerning its obligations under the law of copyright. We can, if the Commission requests, refer the Commission to a firm which practices in the field of copyright and with whose services some of our clients have expressed satisfaction." WTB Exh. 5 at 2. This response is anything but "respectful."

[9] The dissent asserts that the Commission should defer to Judge Chachkin's findings regarding the adequacy of Kay's responses to the Bureau's 308(b) letter of inquiry. We, however, disagree with the legal standards applied by Judge Chachkin in evaluating Kay's responses and therefore find that deference is unwarranted

44. We also disagree with the ALJ's treatment of confidentiality. The Commission's rules provide procedures under which a person submitting information may request confidentiality. 47 C.F.R. § 0.459. These rules do not, however, authorize a person to withhold information from the Commission on that basis. See 47 C.F.R. § 0.459(e) (where the Commission denies a request for confidentiality, the person submitting the information may request its return only if the material was submitted absent any direction by the Commission). Thus, Kay's concerns about confidentiality did not justify withholding information. In any event, the Bureau twice expressly granted Kay's request for confidentiality. WTN Exh. 6 at 1-2; WTB Exh. 10 at 1. The ALJ's extensive analysis of Kay's doubts about the Bureau's intention to provide confidentiality (ID at ¶¶ 16, 23-37, 45, 181) are beside the point. Whatever doubts Kay might have had did not justify nondisclosure. As noted, Kay should have sought Commission intervention if he desired to pursue this issue.

45. As a related matter, Kay provides no support for justifying the withholding of information because the Commission did not grant him immunity from criminal prosecution or forfeiture. Kay's lawyer stated:

> In view of the reason stated by the Commission [i.e., to determine Kay's qualifications to be a licensee] . . . please also assure us in writing that that the information requested will be used solely to determine whether Mr. Kay is qualified to be a licensee and that submission of the requested information will immunize Mr. Kay against any forfeiture action by the Commission or any criminal prosecution."

Kay did not claim, however, that providing the requested information would, in fact, subject him to criminal prosecution in violation of his Fifth Amendment right against self-incrimination. See Lefkowitz v. Cunningham, 431 U.S. 801, 805 (1977) (the state may not compel testimony by threatening to impose administrative sanctions unless the constitutional privilege against self-incrimination is surrendered). He therefore had no foundation for requesting immunity. In any event, the right against self-incrimination applies only to the threat of criminal prosecution and not to administrative or civil action, such as forfeiture. See United States v. Balsys, 524 U.S. 666, 671 (1998). Thus, Kay had no basis to request immunity against forfeiture.

46. We reject Kay's suggestion, apparently endorsed by the ALJ,[10] that licensees of the channels in question here are not required to track the loading on their facilities. The provisions of 47 C.F.R. § 90.135(a)(5) (1994), in effect at the time,[11] specified that:

[10] See, e.g., ID at ¶ 179, in which the ALJ concludes: "Under the circumstances, Kay cannot be faulted for raising legal objections and for failing to provide all of the information sought [involving all of Kay's 152 licenses]. In this connection, the findings establish that Kay did not have the computer capability to provide the Bureau the information it sought." The ALJ thus treated Kay's failure to have a computer system capable of tracking the loading on his stations as a mitigating circumstance.

[11] The section was later amended. See Biennial Regulatory Review, 13 FCC Rcd 21027 (1998).

> (a) The following changes in authorized stations require an application for modification of license:
>
> . . . .
>
> (5) . . . for systems operating on non-exclusive assignments in the 470-512 MHz, 800 MHz or 900 MHz bands, a change in the number of mobile transmitters . . . .

47. In retaining this provision for shared channels, such as Kay's, while eliminating it for exclusive channels, the Commission observed that the provision is intended "to maintain the integrity of our licensing records . . . . " Amendment of Part 90 of the Commission's Rules, 7 FCC Rcd 6344, 6347 n.40 (1992). It clearly contemplates that the licensee must keep track of the loading on its facilities in order to file the necessary modification applications so that the Commission's records accurately reflect the availability of the channels. In that same report and order, which eliminated the routine submission of end user lists, the Commission further noted:

> Information regarding eligibility of end users and confirmation of whether a system is really serving those end users or is "paper loading" are important parts of our spectrum management responsibilities. These issues, however, generally arise in the context of compliance action and, in such instances, we obtain information directly from the licensee, pursuant to [308(b)] . . . .

Id. at 6345 n.21. Moreover, for the shared channels involved in this case, it is appropriate to examine "snapshots" of loading on particular days. The six-month averaging rule applicable to trunked SMR stations (47 C.F.R. § 90.658) does not apply to conventional stations, because it is necessary to know whether the channels involved are available for shared use. See Amendment of Part 90 of the Commission's Rules, 7 FCC Rcd 5558, 5562 ¶ 24 (1992). It should therefore come as no surprise to Kay or others to be required to produce such documentation. Over the past several years, the Commission has attempted to reduce the routine reporting requirements of its licensees. As a result, operators, such as Kay, do not have to submit annual or other periodic reports of their loading, such as the Commission otherwise might have seen fit to impose in the past. The Commission has made clear, however, that licensees must be able to produce such information when requested. Limiting the demand for such information to situations in which a licensee's compliance has been questioned represents a reasonable balancing of the need for this information to effectuate the Commission's public interest responsibilities and the burden on licensees of submitting this information.

48. Although Kay's responses raised some legitimate points, such as the need to specify a relevant time period and the practical difficulties involved in assembling large amounts of data, especially in light of the disruption caused by the Northridge earthquake, they do not manifest a good faith intent to provide the requested information.

The April 7, 1994 response asserts that as a result of fluctuations in use and other factors: ". . . at any given instant of time, Mr. Kay may not know the number of mobile units operated on each of his stations." WTB Exh. 3 at 5. That response further asserts:

> . . . the Commission's Rules require a licensee to know the loading on a given channel only at the time he requests additional channels or at the time he requests renewal of the authorization . . . . Since the Commission's rules do not require Mr. Kay to know the loading on his stations except at those specified times, we respectfully submit that the Commission is not authorized to request such information . . . .

Id. at 6.

49. On June 3, having been given additional time and clarification, Kay did not give an adequate response. He merely indicated that: "Mr. Kay states that his business records substantiate that a total in excess of 7,000 mobile units and control stations operate in association with all of the facilities which he and his companies own and operate." WTB Exh. 9 at 3. When the Bureau aptly pointed out that this response was "hardly helpful" (WTB Exh. 10 at 1), Kay declined to supply information as to loading on the specified date of January 31, 1994. He instead complained that the Bureau did not specify the date and facilities involved in each individual complaint and stated that because of the continual churn of customers: "such information would neither prove nor disprove the complaints which served as the expressly stated basis for the [308(b) request]." WTB Exh. 11 at 5. Kay thus refused to provide information on the loading of his systems generally.

50. Kay's failures to give productive responses to the Bureau's inquiries warrant a finding that he acted in a recalcitrant manner in violation of 47 U.S.C. § 308(b) and 47 C.F.R. § 1.17, and thereby failed to meet his responsibilities as a licensee. We note, in this regard, as did the ALJ, that the Bureau does not make the further case that Kay's responses contained misrepresentations or lacked candor. The Bureau has not demonstrated that Kay's unresponsiveness reflected a conscious intent to conceal known violations of the Commission's technical rules.[12] Accordingly, we do not deem Kay's violations disqualifying. We will discuss the ultimate impact of his violations at paragraph 100, infra.

V. SYSTEM LOADING ISSUE

51. Of the various issues originally designated concerning the construction and operation of Kay's stations, only the question of Kay's system loading remains before

[12] As to the statement in the June 24 letter, that Kay did not operate stations other than those licensed to him, we believe that this matter is best considered in the context of the misrepresentation issue. See paragraph 99, infra.

us.[13] The ALJ made findings concerning the legal relevance of system loading, i.e., the number of mobile units operating in connection with a licensed facility. At relevant times, one of the items on an application for a private carrier UHF repeater license or a conventional SMR 800 MHz repeater license requested the number of mobile units to be authorized. ID at ¶ 85. Thus, Kay filed applications specifying the pertinent number of mobile units. ID at ¶ 87.

52. The ALJ found that the Bureau submitted into evidence two exhibits (WTB Exhs. 19 and 347) that were intended to document the actual loading of Kay's licensed facilities in contrast to the numbers specified in Kay's applications and licenses. ID at ¶ 88. The data contained in these exhibits were derived from Kay's computer-based billing system. The ALJ found that the billing system did not provide a complete or accurate accounting of the loading on Kay's system. ID at ¶¶ 88-89, 91-92. Of the 152 call signs at issue in this proceeding, the ALJ made findings as to the specific number of mobiles operating on seven of Kay's trunked SMR systems, which he found to be fully loaded. ID at ¶ 90. He made no findings as to the specific number of mobiles operating on any of Kay's non-trunked systems.

53. The ALJ rejected the Bureau's assertion that adverse findings should be made against Kay based on 47 C.F.R. §§ 90.313 or 90.633, both relating to conventional (i.e., non-trunked) facilities. He concluded that these rules do not impose loading requirements per se. ID at ¶¶ 186-89.

54. According to the ALJ, the record does not show that Kay submitted any application that would have required Kay to provide information as to the loading on a particular channel. The ALJ rejected the Bureau's assertion that Kay did not maintain the information that would be needed to demonstrate loading in the event that he filed such an application. According to the ALJ, Kay could have made such a showing based on his billing system and various paper records, although it was impractical for him to do so for all 152 stations at once, as the Bureau required. ID at ¶ 190.

55. The ALJ further found that, even assuming that the rules contained a specific loading requirement, the Bureau used invalid means to measure Kay's loading. In the ALJ's view, loading cannot validly be measured based on a snapshop of a single point in time. Rather, loading should be measured based on average loading over a six month period. ID at ¶ 191. Moreover, the ALJ found that the Bureau erred in measuring

[13] The ALJ made findings under an issue concerning the timely construction and permanent discontinuance of operation of Kay's facilities. He found that the parties stipulated that 69 facilities licensed under 53 call signs were not in operation as of May 11, 1995 and thus subject to automatic cancellation. ID at ¶¶ 219-222. See WTB Exh. 290. See also Wireless Telecommunications Bureau's Proposed Findings of Fact and Conclusions of Law (WTB PF&C) at 44-46 ¶¶ 107-08. Kay indicated that these facilities were control stations or secondary base stations, rather than primary base stations. The ALJ accepted the Bureau's suggestion that these facilities be referred to the staff for "appropriate license maintenance." ID at ¶ 222. PF&C at 111 n.23. He therefore took no other action based on these findings and the Bureau suggests no other action.

loading based solely on Kay's computerized billing records and ignoring other, paper records that Kay disclosed. The ALJ found that the billing records did not include "loaner" or "demo" units, did not include non-current customers, and did not take into account access to multiple repeater sites. ID at ¶¶ 88-89, 192-93.

56. Finally, the ALJ found that the Bureau had failed to demonstrate that Kay violated 47 C.F.R. § 90.135, which, in any event, was not mentioned in the Commission's hearing designation order. That section requires certain licensees to modify their licenses to reflect a reduction in the number of mobile units. He held that, for the reasons discussed above, the Bureau failed to make a valid demonstration that Kay's facilities were underutilized. He also held that the Bureau had not shown when Kay was supposed to seek modification of his licenses. ID at ¶¶ 194-98.

57. The Bureau asserts that the ALJ failed to appreciate the significance of Kay's underutilization of his facilities. The Bureau observes that the channels in question are used on a shared basis. According to the Bureau, it is fundamental to the licensing of shared channels that licensees must not seek to retain unused authorizations. In this regard, the Bureau claims that the data disclosed by Kay indicate that the number of mobile units actually used in connection with his facilities is several thousand less than authorized. The Bureau asserts that the various factors cited by the ALJ do not begin to account for a shortfall of this magnitude, indicating that Kay had no intention of sharing the channels in question. The Bureau maintains that Kay had an obligation under the rules to substantiate the loading on his facilities.

58. Kay replies that the Bureau has not shown when he would be required to amend his authorizations to reflect reductions in the number of mobile units served and argues that he should not be required to amend to show temporary fluctuations in use. He further argues that the Bureau ignores factors that explain the apparent shortfall in utilization, such as economic conditions, the need to consult records other than billing records, and channel sharing.

59. We have no basis to find that Kay violated either 47 C.F.R. § 90.313 or 47 C.F.R. § 90.633. As the ALJ correctly notes, neither of these rules imposes any specific requirements on licensees. Section 90.313, applicable to the 470-512 MHz band, provides that until a channel is loaded to 90 mobile units it will be available for assignment to other users in the same area on a shared basis. Section 90.633 similarly provides for SMR facilities that where a channel is not loaded to 70 mobile units it will be available for assignment to other users. As the Bureau suggests, the application of these rules requires that the Commission's licensing records accurately reflect whether the channels are loaded to the benchmarks specified in the rules, and thus whether they are available for sharing. The relevant provisions do not, however, contain any language imposing a particular duty on individual licensees in this regard. The Bureau offers no support for its assertion that: "To comply with these rule sections (i.e., §§ 90.313 and

90.633), a licensee must not seek or retain authorization for unused slots." Wireless Telecommunications Bureau's Exceptions and Brief at 12.

60. Rather, as discussed in paragraphs 46-47, supra, the provisions of 47 C.F.R. § 90.135(a)(5) (1994), which during the relevant time period, required licensees on shared channels to seek modification of license to reflect changes in loading, protected the integrity of the Commission's licensing records in this regard. The Bureau's attempted showing that Kay's actual loading did not conform to that specified in his licenses appears relevant to Kay's compliance with § 90.135. This provision was not, however, included in the hearing designation order, and the Bureau expressly denies that it is attempting to demonstrate a violation of 47 C.F.R. § 90.135:

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

Wireless Telecommunications Bureau's Exceptions and Brief at 14 n.10. The difficulty with the Bureau's statement is that the relevant provisions of 47 C.F.R. §§ 90.313 and 90.633 do not impose any explicit requirements on licensees.

61. We decline to consider the issue of Kay's § 90.135 compliance absent the designation of an issue.[14] To do so would risk depriving Kay of basic due process rights. See RKO General, Inc. v. FCC, 670 F.2d 215, 229 (D.C. Cir. 1981) (". . . reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are 'basic to our system of jurisprudence. . . . '"). Moreover, 47 U.S.C. § 503(b)(4) requires that forfeitures may be imposed only pursuant to a notice of apparent liability that shall "identify each specific provision, term, and condition of any . . . rule . . . which such person apparently violated or with which such person failed to comply. . . . " We will therefore not address this matter further.[15]

VI. ABUSE OF PROCESS ISSUE

62. The ALJ made findings concerning allegations that Kay filed applications in multiple names to avoid compliance with the Commission's channel sharing and recovery provisions. He found that four individuals testified that Kay had engaged in relevant conduct.

[14] As our discussion at paragraphs 46-47, supra, suggests, however, we disagree with the ALJ's analysis with regard to Kay's obligations under § 90.135. We believe that the rules clearly required Kay to track the loading of his facilities and to seek modification of his licenses to reflect changes in loading. We expect Kay to comply with all relevant rules in the future with respect to his remaining UHF stations.

[15] Because we do not reach the merits of the loading issue, Kay's Motion for Leave to File Supplement to Reply Exceptions, which seeks to further address this issue, is moot and will be dismissed.

63. Roy Jensen was a former general manager of Southland from 1990-92. He testified that Kay asked him to sign an application for a land mobile end user license in the name of Roy Jensen dba Consolidated Financial Holdings. Jensen denied that Consolidated Financial Holdings ever operated any radio devices and denies that he intended to operate 37 mobile units, as specified in the application. ID at ¶¶ 94-96. Kay testified that he intended to help Jensen pursue his own business interests. ID at ¶ 97.

64. Kevin Hessman was an employee of Southland from 1990-93 and a friend of Jensen's. Hessman testified that Kay and Jensen approached him and asked him to sign some FCC application forms to "help [Kay] . . . . " Hessman claims that the entity specified on the license, Hessman Securities, did not exist and never operated mobiles. ID at ¶¶ 99-102. Kay testified that Hessman approached him to use radio devices in connection with an off-hours security operation. ID at ¶ 104.

65. Vincent Cordaro worked for Southland from 1991-95 in various capacities including general manager. He formerly owned his own two-way radio business. In November/December, 1994 Kay and Cordaro entered into a "Radio System Management and Marketing Agreement" under which Kay would manage a repeater station licensed to Cordaro. A few months earlier, in April 1994, Kay filed an application (which was, however, dated November 11, 1992) for the assignment of the repeater station from Cordaro to Kay. Cordaro claimed that Kay induced him to sign a blank application form and did not consent to the assignment. He also testified that Kay had asked him to sign blank forms on other occasions. ID at ¶¶ 107-13. Kay participated in filing applications in the name of Vince Cordaro dba VSC Enterprises. Cordaro testified that VSC in fact never used radio devices. ID at ¶¶ 115-16, 121.

66. Carla Marie Pfeifer and Kay were friends. In 1990, Kay assisted Pfeifer in obtaining a repeater license, pursuant to an arrangement under which Kay constructed the station and marketed its services. Kay and Pfeifer shared in the revenues. A number of documents were entered into evidence that purported to bear Pfeifer's signature, but, as to which, Pfeifer questioned whether the signature was hers. Kay denied signing any document in Pfeifer's name. ID at ¶¶ 125-30.

67. The ALJ found that Kay had a factual basis for believing that Jensen, Hessman, and Cordaro were engaged in or intended to engage in their own pursuits in which they desired to use radios. ID at ¶ 201. He also questioned the credibility of these witnesses. He found that both Jensen and Hessman made misrepresentations to the Office of Appeals of the California Unemployment Insurance Appeals Board regarding the circumstances of their discharge from Kay's employ. ID at ¶¶ 98, 106, 202. Additionally, the ALJ found that Cordaro had filed a sworn statement with the Commission in another proceeding inconsistent with his testimony in this proceeding that he was not using radio devices as part of his independent business activities. ID at ¶¶ 121-22, 202. Although the ALJ did not question Pfeifer's veracity, he nevertheless

questioned whether she was a reliable witness because of her vague and incomplete recollection. ID at ¶¶ 128-29, 203. Additionally, the ALJ found that Kay had not attempted to conceal his involvement in various applications. ID at ¶ 204. He also found that the Bureau had not shown that Kay was ineligible to apply for the facilities in question in his own name. Thus, according to the ALJ, the Bureau failed to show that Kay had a motive to abuse the Commission's processes. ID at ¶¶ 205-07.

68. The Bureau faults the ALJ for discounting the testimony of Jensen, Hessman, Cordaro and Pfeifer. The Bureau suggests that even if there is reason to question their credibility individually, the consistency of their testimony should be taken into account. Moreover, the Bureau asserts that the circumstances indicate that Jensen, Hessman, and Cordaro really did not require radio devices. The Bureau accuses the ALJ of ignoring evidence that Pfeifer and Cordaro were not involved in the management of stations supposedly licensed to them and were simply surrogates for Kay. The Bureau denies that it needed to show a motive for Kay's abuse of process.

69. Kay retorts that the ALJ had ample reason to credit Kay's testimony over that of Jensen, Hessman, Cordaro, and Pfeifer. He denies that he had a motive to abuse the Commission's processes and claims that he made no attempt to conceal his involvement in the various applications. He characterizes the Bureau's position as mere speculation.

70. This issue presents a difficult factual question. In many respects, it boils down to a determination of the relative credibility of Kay and his chief accusers, Jensen, Hessman, and Cordaro. Under these circumstances, the ALJ's findings concerning the relative credibility of witnesses are generally entitled to great weight. See, e.g., TeleSTAR, Inc., 2 FCC Rcd 5, 13 ¶ 23 (Rev. Bd. 1987), citing Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074, 1078-80 (9th Cir. 1977) (administrative law judges' factual determinations based on testimonial inferences are entitled to special deference). Here, however, the Bureau correctly points to factors that tend to undermine the ALJ's treatment of this issue. The fact that three independent witnesses testified consistently concerning Kay tends to bolster their crediblity. See Black Television Workshop of Los Angeles, Inc., 8 FCC Rcd 4192, 4194-95 ¶ 19 (1993). Moreover, we are unable to discern the evidentiary foundation for the ALJ's conclusion that "the undisputed record establishes" that Kay had a "factual basis" to believe that Jensen, Hessman, and Cordaro "were engaged in or intended to engage in pursuits beyond the scope of their employment by Kay in which they desired to use Kay's radios and repeaters." ID at ¶ 201 citing Kay's Proposed Findings of Fact and Conclusions of Law at ¶¶ 95-97, 104, 115. As the Bureau aptly observes, Jensen, Hessman, and Cordaro denied that they had any need for the authorizations applied for, and there is no independent evidence that they did. Tr. 1488, 1797, 1844. Nevertheless, because this issue depends critically on an evaluation of Kay's state of mind, as to which the ALJ's demeanor findings have considerable weight, as well as his conduct, we are reluctant to overturn the ALJ's assessment of Kay's testimony based solely on the circumstances set forth above. Moreover, like the ALJ, we find that the record does not sufficiently demonstrate that Kay had a motive for abusing

the Commission's processes in this context. We note, however, that evidence under this issue concerning Kay's agreements with Pfeifer, and Cordaro reflects a pattern of conduct, relevant to the de facto control and misrepresentation issues, and we will consider it in that context.

VII. DE FACTO CONTROL/MISREPRESENTATION ISSUES

71. Judge Sippel, the original presiding judge in this proceeding, added the following issues:

> To determine, based on the findings and conclusions of Initial Decision FCC 97D-13 reached in WT Docket No. 97-56 concerning James A. Kay, Jr.'s (Kay) participation in an unauthorized transfer of control, whether Kay is basically qualified to be a Commission licensee.
>
> To determine whether James A. Kay, Jr. misrepresented facts or lacked candor in presenting a Motion To Enlarge, Change, or Delete Issues that was filed by Kay on January 12, 1995, and January 25, 1995.
>
> To determine whether in light of the evidence adduced under the aforementioned added issues whether James A. Kay, Jr. is qualified to hold a Commission license.

James A. Kay, Jr., FCC 98M-15 (Feb. 2, 1998).

72. In WT Docket No. 97-56, then Administrative Law Judge John M. Frysiak[16] concluded that Marc Sobel was unqualified to be a Commission licensee because he had transferred control of 15 SMR stations to Kay without authorization. Marc Sobel, 12 FCC Rcd 22879 (ALJ 1997). He found that the transfer occurred pursuant to an arrangement between Sobel and Kay reflected in a document called "Radio System Management Agreement and Marketing Agreement" (Management Agreement). Marc Sobel, 12 FCC Rcd at 22899-900 ¶¶ 65-68. Pursuant to this arrangement, Kay managed the stations, paid the station's construction and operating expenses, and shared the revenues of the stations. Kay also had a purchase option for the stations. The ALJ found based on an analysis of the facts and circumstances surrounding Kay's management of the stations that Kay had ultimate control of the facilities.

73. Judge Frysiak, in the Sobel proceeding, further found that an affidavit executed by Sobel in connection with a Motion To Enlarge, Change, or Delete Issues that was filed by Kay in this proceeding, misrepresented Kay's relationship to the Management Agreement stations. Marc Sobel, 12 FCC Rcd at 22900-902 ¶¶ 69-78. Kay had filed the motion in this proceeding because the Commission had initially included 11 licenses held by Sobel in the hearing designation order in this proceeding (WT Docket No. 94-147),

[16] Judge Frysiak retired on December 31, 1999.

based on the belief that Kay was doing business in Sobel's name. James A. Kay, Jr., 10 FCC Rcd at 2063 ¶ 3.

74. The affidavit 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 holds an interest. I am not related to Mr. Kay in any way by birth or marriage.

12 FCC Rcd at 22893-94 ¶ 51.

75. Judge Frysiak found that the affidavit and pleading did not provide any description of the actual relationship between Sobel and Kay, although it was purportedly prepared in part because Sobel believed that the Commission was delaying the processing of his pending applications due to confusion about the relationship between Sobel and Kay. 12 FCC Rcd at 22894-95 ¶¶ 52-53. The ALJ rejected as false the statement in the affidavit that Kay had no "interest" in stations or licenses assertedly held by Sobel. The ALJ did not credit Sobel's attempts to reconcile this statement with the fact that Kay owned the stations' equipment, had an option to purchase the stations, and had a stake in the stations' revenues, holding that this arrangement constituted "a fair amount of interest." 12 FCC Rcd at 22895-96 ¶¶ 56-58, 22901 ¶ 73. The ALJ concluded that the affidavit was intended to "ward off" the Commission from being apprised of the true nature of the Kay-Sobel business relationship and that it therefore lacked candor. 12 FCC Rcd at 22901 ¶ 73.

76. Judge Frysiak further found that Sobel also lacked candor both by failing to submit voluntarily the Management Agreement to the Commission and in correspondence with the Commission. 12 FCC at 22897 ¶ 62, 22901-02 ¶ 74. The ALJ therefore revoked Sobel's licenses, denied his applications, and dismissed his finder's preference requests.

77. Based on the foregoing, Judge Sippel held that the issue of control in the Sobel proceeding should not be relitigated in this proceeding and that Kay should be permitted to offer evidence only on the issue of whether his exercise of control over the Sobel stations has an impact on his qualifications to hold a Commission license. FCC 98M-15 at ¶ 5. As to the issue of misrepresentation, Judge Sippel ruled that the initial decision in WT Docket No. 97-56 raised a substantial question of misrepresentation or lack of candor and provided the factual basis for adding an issue against Kay. Id. at ¶¶ 6-11.

78. In his initial decision in this proceeding, Chief Judge Chachkin observed that the issues as framed did not permit him to make independent findings as to whether the Management Agreement constituted an unauthorized transfer of control.[17] ID at n.48. In any event, however, the ALJ found that an unauthorized transfer was not disqualifying misconduct unless accompanied by deception. ID at ¶ 211. He found that in this case Kay did not intend to conceal the Management Agreement, since he voluntarily gave a copy to the Bureau on March 24, 1995, after this case was designated for hearing, in response to a Bureau discovery request. ID at ¶¶ 165, 213. He also found that Kay and Sobel had been advised by counsel that the Management Agreement complied with FCC requirements. ID at ¶¶ 161, 213. The ALJ therefore found no basis to impose sanctions against Kay.

79. As to the issue of misrepresentations, Judge Chachkin found that Judge Frysiak's initial decision in the Sobel proceeding was "tainted" because the Bureau misrepresented to Judge Frysiak that Sobel did not disclose the Management Agreement until his July 3, 1996 response to a 308(b) letter from the Bureau, and that the Bureau concealed from Judge Frysiak that Kay voluntarily disclosed the Management Agreement to the Bureau during discovery in March 1995. ID at ¶¶ 168-69, 210.

80. Turning to the specific facts, the ALJ found that Kay's allegedly false statement with respect to this matter occurred in the Motion to Enlarge, Change, or Delete Issues filed by Kay on January 12 and 25, 1995. See Paragraph 73, supra. Kay's motion states:

> 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.

ID at ¶ 170; WTB Exh 343 at 3-4.

[17] Despite this acknowledgment, Judge Chachkin made 35 paragraphs of findings (ID at ¶¶ 143-74) that largely overlap Judge Frysiaks's findings in the Sobel proceeding, and also questioned the legal standard applied by Judge Frysiak (ID at n.48). Because Kay was a party to the Sobel proceeding and had a full opportunity to litigate the transfer of control issue there, we have not set forth Chief Judge Chachkin's duplicative findings at length. In our review of the Sobel proceeding, discussed at paragraph 85, infra, we address the question of the relevant legal standard.

81. The ALJ found that Kay understood that his lawyers meant that Kay had no "interest" in the sense that Kay had no legal or ownership interest in the licenses, such as by being a partner. Kay testified that he and his then attorney, Brown, used the terms "license" and "station" interchangeably. ID at ¶ 171. The ALJ also found that the motion was not primarily intended to address the Management Agreement, since only two of the 11 stations sought to be deleted were Management Agreement stations. Moreover, Kay's lawyer specifically advised him that the Management Agreement did not constitute an "interest." ID at ¶ 172. The ALJ found that Kay and Sobel testified in a candid and forthright manner. ID at ¶ 173. Additionally, he found that Kay had disclosed the Management Agreement in March 1995 during discovery. ID at ¶ 174. The ALJ observed that the Bureau did not seek the addition of a misrepresentation issue against Sobel until April 1997. ID at ¶ 174, n.31.

82. The ALJ concluded that Kay had not attempted to deceive the Commission. The ALJ found that Kay believed that the statement concerning "interest" was accurate and did not attempt to conceal the Management Agreement. In the absence of deceptive intent, the ALJ resolved the misrepresentation issue in Kay's favor. ID at ¶¶ 214-18.

83. The Bureau observes that the ALJ's treatment of this issue is inconsistent with Judge Frysiak's analysis in the Sobel proceeding. The Bureau claims that Judge Frysiak was aware of the disclosure of the Management Agreement in March 1995, but considered the disclosure outside the relevant time period (since the Management Agreement was not disclosed until two months after Sobel's affidavit was submitted in January 1995). The Bureau contends that the statement that Kay had no "interest" in Sobel's stations is plainly false in light of the financial claims he had under the Management Agreement and that Kay's attempts to reconcile the statement are unpersuasive. The Bureau asserts that Kay had no basis for his claimed reliance on counsel and that he deceitfully intended to conceal his relationship with Sobel from the Commission.

84. Kay maintains that the motion reflects no intent to deceive. According to Kay, the motion merely intended to show that, contrary to the representation in the hearing designation order, Kay did not conduct business in Sobel's name. Kay observes that only two of the 11 stations listed in the hearing designation order were Management Agreement stations. He asserts that arguments over the meaning of the words "interest" and the like are merely quibbles. Kay observes that he disclosed the Management Agreement during discovery and suggests that he would not even have put it in writing if he intended to deceive the Commission. He also argues that he legitimately relied on advice of counsel. Kay maintains that the Bureau has been disingenuous about his disclosure of the Management Agreement in March 1995.

85. In a companion decision to this one, we have today ruled on exceptions filed by Sobel and Kay to the initial decision in WT Docket No. 97-56. Marc Sobel, FCC 01-342 (adopted Nov. 20, 2001) (Decision). Because Kay is a party in WT Docket No. 97-56, he is bound by the determinations made in that proceeding to the extent that they involve

findings and conclusions common to the two proceedings. See Westel Samoa, Inc., 13 FCC Rcd 6342, 6346 ¶ 13 (1998) (doctrine of collateral estoppel). In the Sobel decision, we affirmed the ALJ's determination that under the Management Agreement, Sobel transferred de facto control of his facilities to Kay without Commission authorization. We noted that some ambiguity existed as to the applicable standard for determining control in this context and found that the same result obtained under the holdings of both Intermountain Microwave, 24 RR 98 (1963) (which we intend to apply in the future) and Motorola, Inc., File Nos. 50705 (PRB 1985) (unpublished). Decision at ¶¶52-59.

86. We further found that Sobel's January 24, 1995 affidavit lacked candor. In this regard, we were not swayed by Chief Judge Chachkin's finding in this proceeding that "Kay and Sobel testified in this proceeding and answered questions put to them in a candid and forthright manner. Their testimony that they did not intend to deceive the Commission concerning their business dealings is entirely candid and is accepted." ID at ¶ 173. These findings are not entitled to deference (see paragraph 70, supra) 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. We believe that the existence of these conflicting findings bears on whether such findings are supported by substantial evidence. See, e.g., Bauzo v. Bown, 803 F.2d 917, 922 (7th Cir. 1986). In view of the apparent conflict between the two judges' assessment of the witnesses' credibility, we did not defer to either ALJ but based our decision on our own independent assessment of the nature of the representations made and the circumstances that were involved.[18]

87. In this regard, we do not accept Kay's suggestion that Judge Frysiak's evaluation of the witnesses' credibility should be accorded less weight than Chief Judge Chachkin's because the former's initial decision was "tainted." Kay bases this contention on Chief Judge Chachkin's finding that:

> Judge Frysiak's decision was tainted because the Bureau deliberately concealed the fact that Kay had given a copy of the Management Agreement to the Bureau on March 24, 1995. Thus, in reaching his conclusion, the Judge was unaware of the March 24, 1995 filing and erroneously assumed that the Commission first received a copy of the Management Agreement on July 3, 1996.

[18] The dissent suggests that a new hearing should be held to allow a new ALJ to make credibility findings. We believe that no further hearing is necessary given the Commission's power of de novo review. See FCC v. Allentown Broadcasting Corp., 349 U.S. 358, 364-65 (1955); Parker v. Bowen, 788 F.2d 1512, 1520 (11th Cir. 1986); Moore v. Ross, 687 F.2d 604, 608-09 (2d Cir. 1982) (agency has the power to make findings of fact in the first instance and is not bound by the credibility determinations of an ALJ). Moreover, additional hearings would be wasteful and time consuming. No matter how the new ALJ ruled, there would still be conflicting credibility determinations that the Commission would have to resolve. We don't, for example, see a justification for adopting an automatic "majority rules" policy. We therefore choose to exercise our power of de novo review.

ID at ¶ 169. See also ID at ¶ 210. Chief Judge Chachkin also listed several pleadings and orders, which he found, demonstrated the Bureau's "elaborate scheme" to conceal the March 24, 1995 submission from Judge Frysiak. ID at ¶ 169.

88. Our examination of the record, however, provides no support for the assertion that Judge Frysiak's decision was "tainted" or that the Bureau engaged in an "elaborate scheme." Initially, we find no reason to believe that Judge Frysiak would have changed his view of Sobel's state of mind based on the March 1995 submission. He had already ruled that the relevant timeframe for determining Sobel's state of mind was when Sobel executed his affidavit in January 1995, not afterwards. Tr. WT Docket No. 97-56 at 297-99. The mere fact that the Management Agreement was produced in discovery in March 1995 thus would not have had material impact on Judge Frysiak's analysis.

89. The record also undercuts the suggestion that the Bureau engaged in an "elaborate scheme" to conceal the March 1995 submission from Judge Frysiak, inasmuch as Sobel himself could readily inform Judge Frysiak of the submission and did so explicitly at least twice during the proceeding. During discovery, Sobel sought the Bureau's admission that: "A copy of the Radio System Management and Marketing Agreement . . . has been in the possession of the Bureau since 24 March 1995." Sobel's Request for Admission of Facts and Genuineness of Documents by the Bureau, filed March 19, 1997 at 3 ¶ 7. Judge Frysiak denied Sobel's requested admission as irrelevant, based on the timing of the disclosure. (see paragraph 88, supra). See Marc Sobel, FCC 97M-57 (Apr. 17, 1997).[19] Later, the Bureau sought the addition of the misrepresentation/lack of candor issue now under discussion. (The hearing designation order in the Sobel proceeding specified only the transfer of control issue.) Sobel argued in opposition that he could not have intended to deceive the Commission because he: ". . . was aware that Kay intended to produce a copy of the agreement in response to Bureau discovery requests and assumed that this had already been done." Opposition to the Bureau's Motion to Enlarge Issues, filed April 21, 1997 at 5 n.8. Apparently referring to his earlier request for admission, Sobel further stated:

> Sobel has attempted in discovery in this proceeding to determine precisely when the Bureau became aware of and received a copy of the agreement, but the Bureau has thus far refused to provide such information.

Id. As the request for admission filed a month earlier indicated, however, Sobel already knew the precise date; the Bureau did not conceal it.

[19] The dissent suggests that it is not possible to assess after the fact the potential impact of the March 1995 disclosure on Judge Frysiak's decision. We see no reason, however, to disregard Judge Frysiak's own rulings discounting the significance of subsequent disclosure of the Management Agreement. Moreover, the ultimate question, of course, is not whether Judge Frysiak would have reached a different decision, but whether the record, on review, warrants a different decision. In this regard, as indicated below, our evaluation of the record as a whole is consistent with Judge Frysiak's assessment that Kay and Sobel made intentional deceptive representations about their relationship, notwithstanding the March 1995 disclosure.

90. At the hearing Sobel had the opportunity to testify as to this point. Sobel testified that at the time he signed the affidavit he expected that the Bureau would obtain a copy of the Management Agreement or become aware of it, if they had not already done so. Tr. WT Docket No. 97-56 at 302. Judge Frysiak then asked Sobel whether he filed the Management Agreement with the Commission. Sobel answered that Kay filed it along with the January 1995 motion. Tr. WT Docket No. 97-56 at 303. Sobel's attorney (who represents Kay in this proceeding) stipulated that Sobel was incorrect in this assertion, without mentioning the March 1995 submission. Id. Later, Bureau counsel specifically asked Sobel: "when was the first time you provided a copy of [the] management agreement to the Commission." Tr. WT Docket No. 97-56 at 313. Sobel responded: "In reference to the Commission's request for information under 308(b)." Id. Sobel's attorney (Kay's here) stipulated that the date was July 3, 1996, again without mentioning the March 1995 submission. Tr. WT Docket No. 97-56 at 314.

91. Judge Frysiak's finding that: ". . . Sobel did not submit the Management Agreement to the Commission until July 3, 1996 . . . . " (12 FCC Rcd at 22897 ¶ 62) was based on and consistent with the above-cited evidence. It does appear that neither the Bureau[20] nor Judge Frysiak addressed Sobel's contention in a footnote to his reply findings and conclusions, that:

> The Presiding ALJ may take official notice that a copy of the written agreement was produced to the Commission on 24 March 1995, as an attachment to Kay's Responses to Wireless Telecommunications Bureau's First Request for Documents in WT Docket No. 94-147, the Kay license revocation proceeding.

Reply to the Wireless Telecommunications Bureau's Proposed Findings of Fact and Conclusions of Law, filed October 27, 1997 at 9 n. 5.[21] The record does not disclose why the Bureau and Judge Frysiak did not address this footnote. As explained in paragraph 88, supra, however, we have no basis to find that this omission had a material impact on Judge Frysiak's initial decision. Moreover, the Bureau could hardly have "concealed" the footnote, especially since the Bureau discussed and cited the paragraph containing the footnote in its reply. Wireless Telecommunications Bureau's Comments on Replies to Proposed Findings of Fact and Conclusions of Law, filed October 31, 1997 at 5-6 ¶ 9.

[20] The Bureau stated in its reply to the relevant pleading that: "None of Sobel's or Kay's filings in 1994 or 1995 disclosed the relationship between Sobel and Kay with respect to the Management Agreement stations." Wireless Telecommunications Bureau's Comments on Replies to Proposed Findings of Fact and Conclusions of Law, filed October 31, 1997 at 3 ¶ 4. The record does not disclose whether the Bureau believed that the production of the Management Agreement in discovery on March 24, 1995 was not a "filing," or whether the Bureau inadvertently overlooked the March 24, 1995 submission in making this statement.

[21] The associated text in the body of the pleading states: "By this time [when the Commission modified the hearing designation order to delete Sobel's stations], the Bureau had been provided, in discovery, with a copy of the written agreement between Sobel and Kay."

92. In our decision, we found that Sobel's affidavit went beyond denying that Sobel was Kay's alter ego and made several factual assertions that were misleading. Most notably, we found that the claim that Kay had no "interest" in Sobel's stations was false in light of the substantial financial interests he had under the Management Agreement. Decision at ¶ 71. We also found that several other statements, while perhaps technically correct, tended to be misleading, such as that Sobel was not an "employee" or "partner" of Kay. Id. at ¶ 73. We found that, in light of the facts as fully disclosed, the affidavit, and the pleading it supported, left the false impression that ". . . Kay has no interest in any license or station in common with Marc Sobel . . . . " Id. at ¶ 74.

93. We found that Sobel appreciated the questionable nature of the claim that Kay had no "interest" in his stations, since Kay had told him that the word connoted "a direct financial stake." Decision at ¶ 72. Additionally, we found that Sobel and Kay understood that the Commission would want to know the true relationship between them. Id. at ¶ 74-75. Because Sobel could appreciate the nature of the representation, we rejected his attempt to rely on advice of counsel. Id. at ¶ 77.

94. In determining the sanction to be imposed against Sobel, we found that an unauthorized transfer of control accompanied by deception constituted disqualifying misconduct. Decision at ¶ 80. We took into account, however, that the Management Agreement and the misleading affidavit concerned only some of Sobel's facilities and that he had operated most of his facilities for over twenty years without any record of misconduct. Id. at ¶ 80. We therefore revoked or denied only those facilities on the 800 MHz band, the band on which the Management Agreement Stations operated.

95. We find that our conclusions regarding Sobel reflect adversely on Kay. The representations that we found false and misleading were made in a pleading filed by Kay. For the reasons discussed in the Sobel decision (Decision at ¶ 74), we reject Kay's argument that the case against him represents mere "quibbles" over the meaning of the words used. We do not believe that a reasonable reader could square the language used with the facts as fully disclosed. Moreover, Kay, like Sobel, understood the questionable nature of the claim that he had no "interest" in Sobel's stations and knew that the Commission would want to know the true relationship between Sobel and Kay. Accordingly, Kay too has no basis to rely on advice of counsel as a defense.

96. We also reject Kay's argument that his disclosure of the Management Agreement during discovery negates any possible intent to deceive. While Kay subsequently disclosed the Management Agreement after specifically being requested by the Bureau during discovery to produce all management documents, he did not disclose the Management Agreement in connection with the pleading at issue here (submitted two months earlier), although it would have served to clarify his relationship with Sobel. See Wireless Telecommunications Bureau's First Request for Documents, filed February 17, 1995, at 6-7 ¶ 12 (requesting all management documents).

97. Moreover, a finding that Kay deliberately intended to conceal his relationship with Sobel is consistent with other instances in the record indicating that Kay was not forthcoming about stations he managed. For example, beginning in the early 1990s, Kay managed stations that were licensed to Pfeifer, Cordaro, and Sobel. ID at ¶¶ 108-09, 123-24, 126. In Pfeifer's case, the ALJ found that in 1987, Kay assisted Pfeifer in obtaining a license pursuant to an arrangement whereby Kay was to construct the station and market service when it was filled with users. ID at ¶ 126. The ALJ did not question Pfeifer's testimony[22] that, to document to the Commission that the station had been constructed, Kay prepared an invoice (WTB Exh. 301) and had Pfeifer issue a check (WTB Exh. 302) for $1,511.87, but had then reimbursed Pfeifer for the amount of the check. Tr. 1556-57. The purported payment was thus not a real payment but was designed merely to generate documentation for the Commission. Although Pfeifer and Kay entered into a lease agreement calling for Pfeifer to pay Kay $600 a month rent for the transmitter site (WTB Exh. 300), Pfeifer testified that Kay did not actually expect any payment. Tr. 1544-45. Pfeifer testified that Kay told her he "needed to have [the lease] to comply with FCC regulations." Tr. 1544.

98. Similarly, the record in the Sobel proceeding showed that Kay prepared responses to application return notices (which are sent to indicate problems with land mobile applications) on Sobel's behalf. On customer invoices attached to the responses, Kay blacked out the name of his business, "Lucky's Two-Way Radios." Marc Sobel, 12 FCC Rcd at 22898-99 ¶ 64, 22902 ¶ 76.[23]

99. Finally, Kay's June 2, 1994, response to the Bureau's 308(b) Letter contained the following language: "Mr. Kay states that he does not operate any station of which either he or [Buddy Corp. or Oat Trunking Group, Inc.] is not the licensee." WTB Exh. 11 at 1. Kay was in fact operating Sobel's stations under an oral agreement at the time. Marc Sobel, 12 FCC Rcd at 22883 ¶ 12. We believe the aforementioned matters are relevant to the designated issues because they confirm the existence of a pattern of conduct. See Ismail v. Cohen, 706 F. Supp. 243, 252-53 (S.D.N.Y. 1989); Fed. R. Evid. 404(b).[24]

VIII. SANCTIONS

100. The record in this proceeding indicates that Kay has violated his obligations as a licensee. Under the 308(b) issue we found that Kay deliberately withheld material information from the Commission without justification in violation of 47 C.F.R. § 1.17. As discussed previously, Kay's inadequate responses do not warrant disqualification. The

[22] The ALJ did not question Pfeifer's credibility, although he did question her "reliability" as to some matters. ID at ¶ 203.

[23] We found that this matter was irrelevant with respect to Sobel because Kay, not Sobel, had blacked out the information. Decision at n.6. We believe it is relevant here as demonstrating a pattern of conduct. We therefore reverse Judge Chachkin's rejection of WTB Exhs. 332-33 based on his determination that this matter was irrelevant to the alleged misconduct here. See Tr. 783-90.

[24] In view of this pattern of conduct, we do not believe that it is necessary to reach the question of whether this representation by itself constitutes disqualifying misconduct.

hearing designation order, however, also served as a notice of apparent liability for forfeiture. James A. Kay, Jr., 10 FCC Rcd 2062 ¶ 16 (1994). See Abacus Broadcasting Corp., 8 FCC Rcd 5110, 5114-15 ¶¶ 16-18 (Rev. Bd. 1993) (appropriateness of forfeiture for violation of 47 C.F.R. § 1.17 absent a finding of deception). We believe that, under the Commission's forfeiture standards, the category most relevant to Kay's misconduct is "Failure to respond to Commission communications," for which the base forfeiture amount is $4,000 per instance. 47 C.F.R. § 1.80(b)(4) Note. Because Kay's nonresponsiveness was of a continuous nature, we adjust the forfeiture upwards to $10,000. Id.

101. The record also shows that Kay's Motion to Enlarge, Change, or Delete Issues filed by Kay on January 12 and 25, 1995 lacked candor. Although lack of candor may warrant revocation of all licenses, we believe that it is appropriate to limit the sanction imposed here. In particular, we note that deterrence is an important element of the character qualifications process. See Character Qualifications, 102 FCC 2d 1179, 1128 ¶ 103 (1986). The misconduct found here, concerning Sobel's stations, involves only stations operating on the 800 MHz band. We find that the revocation of Kay's licenses for stations operating on this band will serve as a significant deterrent to future misconduct. Moreover, because we found that the control of Sobel's Management Agreement stations had been transferred to Kay and that Kay shared in the value of these stations, the revocation of these stations also serves to deter future misconduct by Kay as well as by Sobel. We will therefore limit the sanction applicable to Kay to revocation of the 25 licenses for his stations operating on the 800 MHz band.

IX. ORDERING CLAUSES

102. ACCORDINGLY, IT IS ORDERED, That, good cause for filing an additional pleading concerning his November 2, 1999 Motion to Strike not having been shown, the Request for Leave to File Reply, filed November 5, 1999, by James A. Kay, Jr., IS DENIED, and, for the reasons set forth in paragraph 12, supra, the Motion to Strike, filed November 2, 1999, by James A. Kay, Jr. IS DENIED.

103. IT IS FURTHER ORDERED, That, for the reasons set forth in note 13, supra, the Motion for Leave to File Supplement to Reply Exceptions, filed December 30, 1999, and the Motion for Leave to File a Reply to the Bureau's Opposition to the December 30, 1999 Filing , filed January 20, 2000, by James A. Kay, Jr. ARE DISMISSED as moot.

104. IT IS FURTHER ORDERED, That, because oral argument would not materially assist the Commission, the Request for Oral Argument, filed November 2, 1999, by James A. Kay, Jr. IS DENIED.

105. IT IS FURTHER ORDERED, That the Wireless Telecommunications Bureau's Exceptions and Brief, filed October 12, 1999, IS GRANTED in part and IS DENIED in part.

106. IT IS FURTHER ORDERED, That the Initial Decision of Chief Administrative Law Judge Joseph Chachkin, FCC 99D-04 (ALJ Sept. 10, 1999) IS MODIFIED to the extent indicated above.

107. IT IS FURTHER ORDERED that, pursuant to Section 1.80(h) of the Rules, 47 C.F.R. § 1.80(h), James A. Kay, Jr. shall, within thirty (30) days of the release of this Decision, pay the amount of $10,000 for the violations described above.[25] Payment of the forfeiture shall be made by check or money order drawn on a U.S. financial institution payable to the Federal Communications Commission. Payment may also be made by credit card with the appropriate documentation.[26] The remittance should be marked "NAL/Acct. No. 915KC0002" and mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

Forfeiture penalties not paid within thirty (30) days will be referred to the U.S. Attorney for recovery in a civil suit. 47 U.S.C. § 504(a).

108. IT IS FURTHER ORDERED, That the following licenses of James A. Kay, Jr., ARE REVOKED: WNIZ676, WNMT755, WNVL794, WNVW779, WNWB268, WNWB332, WNWK982, WNWN703, WNWQ651, WNXB280, WNXQ372, WNXQ353, WNXQ911, WNXS450, WNXS753, WNXW280, WNXW549, WNYQ437, WNYR747, WNZY505, WNZZ731, WPAP683, WPAZ639, WPBW517, WNXW487.

109. IT IS FURTHER ORDERED, That the licensee IS AUTHORIZED to continue operation of the stations mentioned in paragraph 108 until 12:01 A.M. on the ninety-first day following the release date of this decision to enable the licensee to conclude the stations' affairs; PROVIDED, HOWEVER, that if the licensee seeks reconsideration or judicial review of our action revoking its license, it is authorized to operate the stations until final disposition of all administrative and/or judicial appeals.

110. IT IS FURTHER ORDERED that a copy of this order shall be sent by certified mail, return receipt requested, to James A. Kay, Jr., P.O. Box 7890, Van Nuys, California 91409-7890.

[25] Claims of inability to pay should be supported by tax returns or other financial statements prepared under generally accepted accounting principles for the most recent three year period.

[26] Requests for installment plans should be mailed: Chief, Credit & Debt Management Center, Mail Stop 1110A2, 445 Twelfth Street, S.W., Washington, D.C. 20554. Payment for the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Rules, 47 C.F.R. § 1.1914. Please contact Chief, Credit & Debt Management Center for information regarding credit card payments.

111. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

CONSOLIDATED SEPARATE STATEMENT OF COMMISSIONER KEVIN J . MARTIN, CONCURRING IN PART AND DISSENTING IN PART

Re: *James A. Kay, Jr., Licensee of One Hundred Fifty Two Part 90 Licenses in the Los Angeles, California Area*, Decision, WT Docket No. 94-147;
Marc Sobel and Marc Sobel d/b/a Air Wave Communications, Licensee of Certain Part 90 Stations in the Los Angeles Area, Decision, WT Docket No. 97-56

I dissent in large part from this item. I am unwilling to approve, based on the conflicting and confusing record before us, the determination that James A. Kay, Jr. improperly failed to respond to requests for information and that Kay and Marc Sobel lacked candor in filings they made to the Commission. In the information request decision, the Commission reverses an ALJ's explicit findings that Kay acted reasonably in the face of a demanding inquiry by the Bureau – findings that are ordinarily accorded great deference. In the lack of candor decision, upon which two ALJs reached opposite conclusions, the Commission essentially sides with the first ALJ, even though he did not have accurate information on all of the relevant facts. In my view, the Commission does itself a disservice by making these decisions on the cold record before it. At the very least, the Commission should have referred this proceeding to a new ALJ to reconcile the conflicting decisions and make definitive findings.

I. Failure To Respond to Commission Inquiries

This case began as an investigation into whether Kay was falsely reporting the number of mobile units he served in order to avoid certain channel sharing and recovery rules. Having received several complaints making such allegations, the Wireless Bureau served Kay with a request for information. A lengthy exchange ensued, in which Kay and the Bureau wrestled over what information Kay would provide and when he would provide it. Kay's actions during the course of this exchange are the basis for the Commission's determination that Kay improperly failed to respond to the Bureau's inquiries in violation of 47 U.S.C. § 308(b) and 47 C.F.R. § 1.17.

The Commission makes this determination in the face of a contrary decision and express findings by the ALJ. That ALJ, Judge Chachkin, found that "the Bureau was engaged in a fishing expedition with the hope that something would turn up," that "Kay was being asked to provide virtually every detail regarding the operation of his business[,] . . . include[ing] sensitive information such as his entire customer list and details regarding the technical configuration of each of his customers' system[s]," and that "all of Kay's reasonable requests for modification of the extremely broad inquiry were arbitrarily ignored." *James A. Kay, Jr., Licensee of One Hundred Fifty Two Part 90 Licenses in the Los Angeles, California Area*, Initial Decision of Chief Administrative Law Judge Joseph Chachkin, WT Docket No. 94-147, FCC 99D-04, ¶ 179 ("*Chachkin Decision*"). In addition, Judge Chachkin found that the Bureau's request for information

"was received by Kay only two weeks after the Northridge earthquake, a devastating natural disaster that did substantial damage to his business and personal residence" and that, ultimately, "Kay turned over some 36,000 documents." *Id.* ¶ 180. Finally, Judge Chachkin ruled that Kay's actions were based on "legitimate concerns in Kay's mind whether the data sought would be kept confidential" (*id.* ¶ 181), because, among other things, Kay's competitors had received a copy of the Bureau's inquiry letter to Kay (*id.* ¶ 29) and the Bureau at one point demanded 50 copies of Kay's response (*id.* ¶ 181).

In my view, the Commission goes too far in reversing Judge Chachkin's conclusions. There can be no question that Kay and the Bureau were engaged in a heated dispute. Judge Chachkin made a number of factual determinations to resolve that dispute and determine that Kay did not violate the statute or Commission rules. In such situations, I am reluctant to reverse an ALJ's determinations based on a cold record. It is well established that, generally, the initial trier of fact is "closer to the course of the litigation," *Bonds v. District of Columbia*, 93 F.3d 801, 808 (D.C. Cir. 1996), and "has a better 'feel' . . . for the litigation" than a reviewing tribunal, *Founding Church of Scientology v. Webster*, 802 F.2d 1448, 1457 (D.C. Cir. 1986). Thus, the Commission routinely defers to the ALJ on these sorts of decisions. *See, e.g.*, *Applications of WWOR-TV, Inc. for Renewal of License of Station WWOR(TV), Secaucus, New Jersey and Garden State Broadcasting Limited Partnership for Construction Permit, Secaucus, New Jersey*, Memorandum Opinion and Order, 5 FCC Rcd 4113, ¶ 11 (1990) ("[W]e are reluctant to reverse the ALJ, to whom broad discretion is ceded in ordering discovery . . . ."); *Applications of Mid-Ohio/Capitol Communications Limited Partnership et al. for Construction Permit for a New FM station on Channel 298A in Columbus, Ohio*, Memorandum Opinion and Order, 4 FCC Rcd 8125, ¶ 6 (1989) ("[T]he Commission routinely entrusts the determination of the scope of such discovery in comparative hearings to the broad discretion of the ALJ."). Indeed, this principle of deference extends well beyond the FCC; in the similar arena of discovery disputes, appellate tribunals traditionally afford great deference to the decisions of the trial court. *See, e.g.*, *United States v. Davis*, 244 F.3d 666, 670 (8th Cir. 2001) ("The district court has broad discretion in imposing sanctions on parties for failing to comply with discovery orders."); *accord Bonds*, 93 F.3d at 807. Accordingly, on this record, I would not have reversed the ALJ's decision.

II. Lack of Candor

The Commission's lack of candor decisions against Kay and Sobel stem from other events in this case. During the course of the Bureau's investigation of Kay, it received information indicating that Kay may have conducted business under several other people's names, including Marc Sobel's. The Commission thus included Sobel's licenses in the order designating Kay's licenses for hearing. Kay filed a motion to remove Sobel's licenses from the hearing designation and attached an affidavit signed by Sobel stating that Kay had no interest in any of Sobel's stations. Based on this submission, the Commission removed Sobel's licenses from the Kay proceeding.

The Bureau subsequently discovered that Kay operated a number of Sobel's stations pursuant to a management agreement. Accordingly, the Commission designated Sobel's licenses for hearing, asking whether Sobel had engaged in misrepresentation or lack of candor. The ALJ assigned to Sobel's case, Judge Frysiak, concluded that Sobel's actions showed a lack of candor. Judge Frysiak based that determination on, among other things, statements in the affidavit and on Sobel's apparent failure to provide the Bureau the management agreement in a timely manner.

However, Judge Chachkin, in *later* reviewing the same conduct in Kay's case, came to the opposite conclusion. Judge Chachkin found that Kay understood the affidavit's statement that Kay had no interest in any of Sobel's stations to mean that Kay had no ownership interest in any licenses that were issued to Sobel. *Chachkin Decision* ¶ 216. Judge Chachkin determined that "Kay was specifically advised, by counsel, that . . . the management agreement did not constitute an interest." *Id.* ¶ 172. He thus concluded that "Kay's testimony as to what he meant by the word 'interest' and the phrase 'stations or licenses' is entirely reasonable and credible." *Id.* ¶ 216.

Judge Chachkin also found that Kay's and Sobel's actions showed no intent to deceive the Bureau or conceal the management agreement. He pointed out that Kay and Sobel provided the management agreement to the Bureau just two months after they filed the challenged motion and accompanying affidavit, long before anyone raised any questions about lack of candor. *Id.* ¶ 217.

Finally, Judge Chachkin addressed Judge Frysiak's prior decision on the lack of candor issue and concluded that Judge Frysiak had been misled by the Bureau. Judge Chachkin explained that, although Kay had provided the Bureau a copy of the management agreement in March of 1995, the Bureau represented to Judge Frysiak that no copy was provided until late 1996. *Id.* ¶ 210. "There is no doubt," Judge Chachkin concluded, "that [Judge Frysiak's] ultimate conclusion that 'Sobel made misrepresentations and lacked candor . . .' was based on his erroneous assumption as to when the Agreement was given to the Bureau." *Id.* ¶ 210.

Based on these conflicting decisions and on Judge Chachkin's view that Judge Frysiak was misled, I cannot support this decision. As the Commission acknowledges, determinations of credibility must rest in large part on factual determinations made by an ALJ. I am unable, on the record before us, to reconcile the ALJ's conflicting decisions and determine that Judge Frysiak was not misled.[1] Particularly given the severity of the sanctions at issue, I would not find that Kay and Sobel lacked candor.

[1] I also take issue with the Commission's conclusion that Judge Frysiak would not have made a different decision had he known Kay and Sobel provided the Bureau a copy of the management agreement in March of 1995, long before lack of candor was an issue. Judge Frysiak's decision explicitly rests in part on the determination that "even though the Management Agreement fully disclosed their relationship, Sobel did not voluntarily submit it to the Commission until requested by the Commission to do so in [1996]." *Marc*

III. Conclusion

At best, this is a case of conflicting opinions by ALJs that ought to be remanded to a third ALJ to reconcile their determinations. Even worse, however, this case involves allegations that Commission staff misled a judge into reaching an erroneous conclusion. While I am confident that Commission staff engaged in no misconduct in this case, we do them a disservice by depriving them of an opportunity, in a new hearing, to explain what occurred. Such a hearing would defend the reputation of our staff and ensure the integrity of our process. Thus, for all of these reasons, the more reasonable course would be to refer this case for a hearing in front of a new ALJ. Accordingly, I dissent from parts IV, VII, VIII, and IX of the Kay Order and from parts V, VI, and VII of the Sobel Order. I concur with respect to the other parts of these Orders.

Sobel and Marc Sobel d/b/a Air Wave Communications, Licensee of Certain Part 90 Stations in the Los Angeles Area, Decision, WT Docket No. 97-56, FCC 97D-13, ¶ 74. While this may not have been the largest factor in Judge Frysiak's decision, I find it impossible to assess its impact after the fact. I do not understand how my colleagues, on the record before us, can make such a conclusion on Judge Frysiak's state of mind.