

Kay provided virtually none of the information sought by the Bureau in violation of his obligation as a licensee to respond to Commission inquiries. *Id.* at ¶ 41. In reaching this conclusion, the Commission examined and rejected Kay's specific and general reasons for not providing the requested information. *Id.* at ¶¶ 41-49. These included contentions that the Bureau's inquiry was overbroad, that Kay had concerns about whether the Bureau would respect the confidentiality of the business data it asked for, and arguments that complying with the Bureau's inquiry was unduly burdensome. The Commission noted that if Kay objected to the Bureau's inquiry, he should have sought Commission review. *Id.* at ¶ 43. Because the Commission did not find that Kay's responses lacked candor, it did not find Kay's misconduct disqualifying. Instead the Commission imposed the lesser sanction of a \$10,000 forfeiture. *Id.* at ¶ 100.

3. The Commission did conclude, however, based on its findings in WT Docket No. 97-56 (adjudicating Sobel's qualifications),⁴ that Kay lacked candor in a motion that he filed on January 25, 1995. Kay filed the motion after the Commission designated Kay's stations for hearing to determine whether they should be revoked. The Commission had noted that Kay may have conducted business under a number of names, including "Marc Sobel." Kay sought severance of the Sobel licenses from hearing, supported by an affidavit from Sobel stating:

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.

Decision at ¶¶ 73-74.⁵ The Commission concluded that these factual assertions were intentionally false and misleading, since Kay had a considerable interest in some of Sobel's stations under the Management Agreement and that in light of the Management Agreement, it was misleading to say that Kay was not Sobel's partner or employer and that Sobel did not do business in Kay's name. *Id.* at ¶¶ 92-99.

II. KAY PETITION FOR RECONSIDERATION

4. In his petition for reconsideration, Kay reiterates many of the arguments that he previously made to the Commission, and which we thoroughly considered in our decision. As we have stated: "rehearing will not be granted merely for the purpose of again debating matters on which the tribunal has once deliberated and spoken." *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*,

⁴ Because this issue was relevant to the qualifications of both Kay and Sobel, the then presiding judge in this proceeding made the findings in WT Docket No. 97-56 (in which Kay was made a party) binding here. *See* Decision at ¶¶ 71, 78.

⁵ The motion itself contained substantially the same language. Decision at ¶ 80.

383 U.S. 967 (1966). We will therefore not discuss Kay's contentions at great length. Certain points, however, warrant discussion.

5. With respect to the 308(b) issue, Kay continues to argue that he had no obligation to respond to the Bureau letter and that he had legitimate reasons for refusing to provide the information specified by the Bureau. We have, however, thoroughly considered and rejected these arguments in our decision. Decision at ¶¶ 40-49. There we explained Kay's obligations as a Commission licensee to respond to inquiries and rejected Kay's proffered grounds for not complying with the Bureau's investigation.⁶ In this regard, we disagree with Kay's interpretation of PTL of Heritage Village, 71 FCC 2d 324, 329 ¶ 12 (1979), in which the Commission termed compliance with an informal staff investigation "voluntary." The Commission, in rejecting an argument that a staff request to inspect books and records constituted an "unreasonable search" within the meaning of the Fourth Amendment,⁷ stated that:

Section 403 and 409 of the Communications Act provide the Commission the formal means, i.e. subpoena, to obtain books, records and information, but resort to these means in informal investigations has traditionally been unnecessary since most licensees recognize the Commission's authority to inspect such documents. However, when licensees refuse to cooperate in this voluntary procedure and insist upon formal procedures the Commission will institute a proceeding to obtain the information. Under these circumstances, the Commission does not believe its request of licensees to voluntarily make available information under their control constitutes an unreasonable search under the Fourth Amendment to the Constitution.

71 FCC 2d at 329-30 ¶ 12. Kay insists that: "if a subpoena issued by the Commission in a formal proceeding requires judicial enforcement, an informal request for information from a low-level Commission employee can not possibly impose a mandatory obligation." Petition for Reconsideration at 5-6. We reject the suggestion that our stated willingness to use our subpoena power, where a licensee does not "recognize the Commission's authority to inspect" documents and insists on the use of formal procedures, means that a licensee may simply refuse to comply with information requests in an informal investigation. Section 308(b) authorizes the Commission to "require" further written statements of fact, not simply to request them. As we stated in our decision, we expect licensees to recognize our authority. Decision at ¶ 40. The Commission's reference to "voluntary" compliance in PTL thus served only to distinguish the formal subpoena process; it did not in any way suggest that licensee compliance with other information requests is optional. The Commission could not carry out its licensing functions without the ability to request and receive information promptly from licensees and applicants. Moreover, if Kay wished to challenge the staff's 308(b) letter, he could have sought Commission

⁶ Thus, for example, Kay complains that the so-called "Thompson Tree Incident" demonstrates that the Bureau was hostile toward him. But if Kay believed that the 308(b) letter was improperly motivated, his recourse was to seek Commission intervention.

⁷ The Fourth Amendment permits warrantless administrative searches of regulated businesses, where the search furthers a substantial government interest, advance notice is given, and the search is reasonably limited in time, place, and scope. See Western States Cattle Co., Inc. v. Edwards, 895 F.2d 438, 441 (8th Cir. 1990).

or court review, for example, by requesting, as PTL indicates, that the Commission issue a subpoena.⁸ He did not do so.

6. Turning to the lack of candor issue, we consider this matter in the memorandum opinion and order, which we adopt today in WT Docket No. 97-56, in which Kay and Sobel jointly assert most of the same arguments that Kay makes here. Two of Kay's arguments, however, are especially germane to the decision in this proceeding. Kay takes issue with the Commission's finding that the lack of candor manifested in the January 25, 1995 motion was consistent with other instances in which Kay was not forthcoming about the stations he managed. Kay maintains that we should not, in this regard, have relied on the testimony of witnesses Carla Pfeiffer and Vincent Cordaro. He also asserts that we should not have considered evidence that Kay crossed out the name of his company on application return notices that he prepared for Sobel, which the presiding administrative law judge (ALJ) excluded as irrelevant. Our decision explains that, while the ALJ questions Pfeiffer's "reliability" as to certain matters, he did not question her credibility generally, and neither do we. Decision at ¶ 97. We did not rely on Cordaro's testimony. Id. We also explained that we reversed the ALJ's exclusion of evidence concerning the return notices, since, consistent with precedent, we deemed it relevant to establishing a pattern of conduct in which Kay was not forthcoming about his relationship with Sobel. Id.⁹

7. Additionally, Kay faults the Commission for resolving this case without relying on an ALJ's assessment of Kay's and Sobel's credibility. This case is unusual in that evidence regarding the transfer of control and the lack of candor issues were heard by two different ALJ's: Chief Judge Joseph Chachkin in WT Docket No. 94-147 and Judge John M. Frysiak in WT Docket No. 97-56. Chief Judge Chachkin found that Kay and Sobel were truthful, while Judge Frysiak reached the opposite conclusion. Decision at ¶¶ 75-76, 78-79. In view of the fact that two ALJ's, each of whom had an opportunity to observe the witnesses reached contrary conclusions, the Commission, did not defer to either of them in resolving the issues, but rather relied on its own independent review of the full record in both cases. Id. at ¶¶ 86-91. Kay argues that the Commission should have preferred Chief Judge Chachkin's findings over Judge Frysiak's because: (1) Chief Judge Chachkin had a more extensive opportunity to observe the witnesses, since the hearing before him was longer, (2) Chief Judge Chachkin made explicit credibility findings and Judge Frysiak did not, (3) Judge Chachkin was aware of Judge Frysiak's

⁸ Kay contends that he was deprived of an opportunity to seek review because the Bureau did not issue an "ultimate ruling" on his legal objections but instead recommended that the Commission designate Kay's licenses for hearing. Petition for Reconsideration at 6. The Bureau's letters, however, made clear that the Bureau rejected Kay's objections, and Kay does not indicate what further "ultimate ruling" he was expecting. Even aside from the procedure suggested by PTL, and even assuming that the Bureau's letters were not reviewable as of right, Kay could have petitioned the Commission for special relief if he felt that the Bureau's requests were improper.

⁹ Kay asserts that his "redaction" of his billing address from the return notices was "hardly a clandestine attempt at concealment," since it was obvious to the Bureau that information had been deleted. Petition for Reconsideration at 22. Kay does not, however, explain why he deleted the information.

decision when he made his own but not vice versa, and (3) Kay was ill¹⁰ during the hearing before Judge Frysiak.¹¹

8. We continue to believe, however, that Judge Frysiak's conflicting findings, which are consistent with our own de novo review of the record as a whole, bear on whether Chief Judge Chachkin's findings are supported by substantial evidence. Decision at ¶ 86, nn. 18-19. As we noted in our decision (Decision at n.18), we indisputably have the power to reject an ALJ's credibility findings in appropriate circumstances and make our own findings in the first instance. We therefore decline to follow Kay's suggestion that the determination involved here: "is not a simple matter of examining the transcripts and exhibits to discern an objective, external fact, and the deliberative processes of the judges may not be ignored in favor of the Commission's own take on a cold record." Petition for Reconsideration at 2. Just as we would not arbitrarily ignore an ALJ's credibility findings, we do not feel justified in ignoring the fact that a conflict exists between two experienced administrative law judges both of whom observed the witnesses. We also believe that the "cold" record in this case contains sufficient circumstantial and testimonial evidence for us to make reliable findings on the material questions of fact. We therefore decline to defer to Chief Judge Chachkin's credibility findings.¹²

III. BUREAU PETITION FOR RECONSIDERATION

9. The Bureau states that the ordering clause of the Commission's decision contains clerical errors. In specifying the sanction to be applied for Kay's lack of candor, the Commission stated:

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.

Decision at ¶ 101. The Commission therefore specified the call signs of 25 stations as those to be revoked. These were: WNIZ676, WNMT755, WNVL794, WNVW779, WNWB268,

¹⁰ Kay submits documentation indicating that, the night before he testified, he was seen at the George Washington University Hospital ER for the treatment of pain resulting from a kidney stone. Petition for Reconsideration, Attachment No. 1. Kay does not contend that his condition affected the content of his testimony. Id. at n.5.

¹¹ Kay faults Judge Fysiak for stating that: "Sobel has not offered any proposed findings on the misrepresentation issue." Petition for Reconsideration at 4. Kay admits, however, that Sobel did not file any specific proposed findings and conclusions on the issue, but only replied to the Bureau's findings and conclusions. Id.

¹² Kay also briefly addresses the transfer of control issue as do Sobel and Kay in the petition for reconsideration in WT Docket No. 97-56. We address the issue in WT Docket No. 97-56.

WNWB332, WNWK982, WNWN703, WNWQ651, WNXB280, WNXQ372, WNXQ353, WNXQ911, WNXS450, WNXS753, WNXW280, WNXW549, WNYQ437, WNYR747, WNZY505, WNZZ731, WPAP683, WPAZ639, WPBW517, WNXW487. *Id.* at ¶108. The Bureau asserts that this list reflects two errors. First, the Bureau observes that the number of Kay's licenses at issue is 34 stations not 25. The nine additional stations not listed in the ordering clause are: WNJA910, WNJL306, WNKV762, WNMV402, WNMV773, WNJP874, WNSK552, WNXW327, and WPBZ518. Second, the Bureau states that station WNXQ372 listed in the ordering clause is not licensed to Kay and that the correct call sign of the station licensed to Kay is "WNXG372." The Bureau asks the Commission to correct these apparent oversights.

10. Kay responds that since none of Kay's 800 MHz stations were involved in the Management Agreement, in contrast to Sobel's 800 MHz stations, the Commission has no basis to revoke any of Kay's 800 MHz stations. In any event, Kay argues that the Commission's determination to revoke his 800 MHz stations is arbitrary since the Commission did not explain why the revocation of all of the 800 MHz stations, as opposed to more or fewer stations was mandated by the Commission's character policy. Kay notes that he was not found totally unqualified to be a licensee and that, even if the Commission did not revoke his 800 MHz stations, the revocation of Sobel's stations and the \$10,000 forfeiture would nevertheless serve as sanctions, according to the Commission's own analysis.

11. The Bureau is correct in its belief that the Commission intended to revoke all of Kay's stations in the 800 MHz service and that the deviations pointed out by the Bureau represent inadvertent clerical errors. Decision at ¶ 101. We will correct the list of stations that are revoked in this memorandum opinion and order. As to Kay's arguments, we recognize that we cannot justify the extent of the sanction here with mathematical precision. Rather, we hope to achieve a reasonable proportionality between the offense and the sanction. Here, we have attempted to take into account both the seriousness with which we view lack of candor, as well as the expectation that, given the deterrent effect of the sanction here, total disqualification may not be necessary. In this regard, making a distinction between Kay's 800 MHz authorizations and his other authorizations seems both reasonable and relevant, since his misconduct was related to the 800 MHz service.

IV. ORDERING CLAUSES

12. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration on Behalf of James A. Kay, Jr., filed February 25, 2002 IS DENIED.

13. IT IS FURTHER ORDERED, That the Petition for Reconsideration, filed February 25, 2002, by the Enforcement Bureau IS GRANTED and paragraph 108 of FCC 01-341 IS AMENDED to read:

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, WNXG372, WNXQ353, WNXQ911, WNXS450, WNXS753, WNXW280, WNXW549, WNYQ437, WNYR747, WNZY505, WNZZ731, WPAP683, WPAZ639, WPBW517, WNXW487, WNJA910, WNJL306, WNKV762, WNMV402, WNMV773, WNJP874, WNSK552, WNXW327, WPBZ518.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
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, Memorandum Opinion and Order, 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, Memorandum Opinion and Order, WT Docket No. 97-56

As I stated in my separate statement concerning our initial decisions in these matters, I disagree with the determinations 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. See Consolidated Separate Statement of Commissioner Kevin J. Martin, *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 (rel. Jan 25, 2002), *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 (rel. Jan 25, 2002). Accordingly, for the reasons explained in my earlier separate statement, I would grant in part Kay's and Sobel's petitions for reconsideration and refer this case for a hearing in front of a new ALJ.