

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the matter of)	
)	
MARC SOBEL)	WT Docket No. 97-56
)	
Applicant for Certain Part 90 Authorizations in the Los Angeles Area and Requestor of Certain Finder's Preferences)	
)	
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

Adopted: May 2, 2002

Released: May 8, 2002

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

1. This memorandum opinion and order denies the Joint Petition for Reconsideration on Behalf of Marc D. Sobel and James A. Kay, Jr., filed February 25, 2002.¹ Kay and Sobel seek reconsideration of the Commission’s decision, Marc Sobel, 17 FCC Rcd 1872 (2002)² (Decision), which revoked Sobel’s licenses and denied Sobel’s applications for several stations in the 800 MHz service.

I. COMMISSION DECISION

2. The decision found that Kay and Sobel violated 47 U.S.C. § 310(d) by transferring to Kay without authorization control of 15 stations licensed to Sobel, pursuant to a document

¹ Also before the Commission is the Enforcement Bureau’s Opposition to Petition for Reconsideration, filed March 12, 2002, and the Joint Reply to the Enforcement Bureau’s Opposition to Petition for Reconsideration, filed March 26, 2002, by Kay and Sobel. Because we agree in substance with the Bureau, we will not summarize its arguments in detail.

² Commissioner Martin concurring in part, dissenting in part, and issuing a statement.

entitled “Radio System Management Agreement” (Management Agreement). Decision at ¶¶ 56-58.

3. Additionally, the Commission found that Sobel lacked candor in an affidavit submitted to support a motion, filed January 25, 1995, by Kay. 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 and submitted an affidavit by 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 ¶¶ 59-60.

4. The Commission found that this statement lacked candor since Kay had 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. Examining the record as a whole, the Commission concluded that the statements were intentionally deceptive. Decision at ¶¶ 70-75.

II. PETITION FOR RECONSIDERATION

5. In their petition for reconsideration, Sobel and Kay reiterate many of the arguments that they 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, 383 U.S. 967 (1966). We will therefore not discuss their contentions at great length. Certain points, however, merit discussion.

6. The petition repeats the argument, made previously, that the Commission could not properly designate the transfer of control and lack of candor issues because it did not give the parties prior notice of the violations and an opportunity to achieve compliance as required by 5 U.S.C. § 558(c). Kay and Sobel further argue that the alleged misconduct could not be deemed to reflect “willfulness,” which would exempt it from the notice requirement in section 558(c). In this regard, Kay and Sobel contend that the Commission erred by evaluating the “willfulness” of their conduct by applying the definition of “willful” found in 47 U.S.C. § 312(f)(1), i.e., that the alleged misconduct was “conscious and deliberate.” Kay and Sobel argue that that the term “willful” “must have a more restrictive meaning, lest the exception apply to virtually any license revocation proceeding under Section 312.” Petition for Reconsideration at 5 n. 18. They, however, provide no reason to depart from our view that, consistent with precedent, it is

appropriate to refer to the provision of the Communications Act specifically applicable to revocation proceedings to find the most relevant definition of “willful.” Decision at ¶¶ 7-8.

7. Kay and Sobel argue at length that the Commission had no basis for finding that the January 25, 1995 motion and the supporting affidavit lacked candor.³ Noting that such a finding requires a determination that Kay and Sobel manifested deceptive intent, they argue that the record discloses no indication that Kay and Sobel intended to deceive the Commission. Our decision, however, explains in detail why we believe that Kay and Sobel intended to deceive the Commission, and Kay and Sobel do not provide any basis for us to reconsider that determination. Decision at ¶¶ 70-75. For the most part they merely repeat the arguments previously made to the Commission. Thus, we continue to believe that the fact that the hearing designation order dealt mainly with stations other than the Management Agreement stations does not refute the inference that Kay and Sobel intended to mislead the Commission about the latter stations. The record contains evidence that we consider probative of their state of mind, which we discuss in the Decision at ¶¶ 70-75.⁴

8. In their petition, Kay and Sobel newly assert that the result in this case cannot be reconciled with the result in Curators of the University of Missouri, 16 FCC Rcd 1174 (2001), in which, according to Kay and Sobel:

the Commission found “no evidence of an intent to deceive that would support a finding of misrepresentation or lack of candor” where the licensee’s failure to report prior discrimination complaints in its FCC Form 396 (a standard EEO reporting form), even though (1) the Commission rejected the licensee’s contention that it was unclear whether the form applied to part time employees; (2) the licensee further failed to disclose the complaints in response to direct correspondence from Commission staff explicitly directing it to identify “any other employment discrimination complaint(s) . . . filed during the current license term”; and (3) the licensee disclosed the complaints only after the matter was called to the Commission’s attention in a challenge to the licensee’s renewal application.

Petition for Reconsideration at 10.

9. We find no conflict between Curators and the present case. In Curators, the Commission imposed a forfeiture of \$8,000 against the licensee for willfully omitting material facts in its submissions to the Commission. 16 FCC Rcd at 1180-81 ¶¶ 25-26. The Commission did not find lack of candor only because the unreported discrimination complaints were resolved

³ We consider an additional argument relating to this issue in ruling on a petition for reconsideration by Kay in our Memorandum Opinion and Order in WT Docket No. 94-147. Kay and Sobel argue that the Commission erred in not relying on favorable credibility findings made by the presiding judge in WT Docket No. 94-147. Since we originally addressed that question in WT Docket No. 94-147, we do so again on reconsideration.

⁴ Kay and Sobel specifically object to the Commission’s finding that Sobel’s reference to himself as an “Independent Two Way Radio Dealer” in an earlier letter to the Bureau, which denied that he had a relationship with Kay, was misleading. Petition for Reconsideration at 14. They explain that the term merely indicates that Sobel was not affiliated with a radio equipment manufacturer. Our Decision, however, explains why the terminology was misleading in the context it was used. Decision at ¶ 75. We specifically noted that Sobel’s own testimony as to what he meant was unconvincing.

favorably to the licensee, which, in the Commission's view, undermined any finding that the failure to disclose was motivated by an intent to deceive. *Id.* at 1180 ¶ 24. Here, by contrast, our decision cited specific facts and circumstances indicating that Kay and Sobel did intend to deceive the Commission. Decision at ¶¶ 70-75.

10. Kay and Sobel also give cursory attention to two additional issues. They note that the evidence regarding the transfer of control issue was heard in both WT Docket No. 94-147 (relating to Kay's qualifications) and in this proceeding, WT Docket No. 97-56 (relating to Sobel's qualifications). They submit that the Commission should take into consideration the presiding judge's findings and conclusions in WT Docket No. 94-147 in resolving the present proceeding. Our decision in this case, however, thoroughly analyzes this issue and Kay and Sobel give us no reason to depart from that analysis. Decision at ¶¶ 12-58.

11. Finally, Kay and Sobel observe that the Commission's decision dealt with Sobel's pleading entitled Revised Request for Inquiry and Investigation, filed February 27, 1998, which alleged that the Bureau committed improprieties in this proceeding. Decision at ¶ 9. The Commission concluded that the matters raised in the pleading had no impact on the resolution of this proceeding and that no further action was warranted. Kay and Sobel observe that the ordering clauses in our decision did not explicitly address the pleading. We will remedy this oversight and deny the request in this order.

III. ORDERING CLAUSES

9. ACCORDINGLY, IT IS ORDERED, That the Joint Petition for Reconsideration on Behalf of Marc D. Sobel and James A. Kay, Jr., filed February 25, 2002. IS DENIED.

10. IT IS FURTHER ORDERED, That the Revised Request for Inquiry and Investigation, filed February 27, 1998, by Marc Sobel IS DENIED.

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.