

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

In the Matter of
Request of James A. Kay Jr.
Seeking a Finder's Preference
for Call Sign WNPA325
File No. 93F627

ORDER

Adopted: December 8, 2003

Released: December 11, 2003

By the Commission:

I. INTRODUCTION

1. We have before us an Application for Review filed by James A. Kay Jr. ("Kay") on September 30, 2002. Kay seeks Commission review of a decision by the Wireless Telecommunications Bureau's ("Bureau") Commercial Wireless Division, Policy and Rules Branch ("Branch"), which denied Kay's petition for reconsideration of a decision by the Bureau's former Office of Operations denying a finder's preference request against SMR station WNPA325, licensed to William F. Kelsey d/b/a AVCOM Company ("AVCOM").

II. BACKGROUND

2. The Commission created the finder's preference program in order to relieve the scarcity of spectrum in certain frequency bands by creating "new incentives for persons to provide [the Commission with] information about unconstructed, non-operational, or discontinued private land mobile radio systems. . . ."

1 See In the Matter of Request of James A. Kay Jr., Order, 17 FCC Rcd 16306 (CWD 2002) ("Branch Order").

2 See Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, Report and Order, PR Docket No. 90-481, 6 FCC Rcd 7297, ¶ 77 (1991) ("Finder's Preference Report and Order").

licensing to geographic area licensing.³

3. On October 11, 1993, Kay filed a finder's preference request against AVCOM's station WNPA325, licensed to operate on 854.7125 MHz in Banning, California.⁴ Kay alleged that AVCOM violated: (i) rule section 90.157(a), which provides that a license cancels automatically upon permanent discontinuance of operations; and (ii) rule section 90.157(b), which provides that any station that has not operated for one year or more is considered to have permanently discontinued service.⁵ In support of his Finder's Preference Request, Kay provided Commission licensing records that reflected no authorized end users associated with target station WNPA325. Kay alleged that station WNPA325 did not operate during the one year period following the departure of AVCOM's last authorized end user, Cardin Asphalt, Inc. ("Cardin"), from AVCOM's SMR system, thereby eliminating required "loading" on the channel.⁶ Kay also noted that AVCOM failed to pursue an alternative option for system loading, *i.e.* modifying its SMR license to directly add control or mobile units to the system.⁷ As a result, Kay argued that station WNPA325 cancelled automatically through permanent discontinuation of operations because of a lack of authorized users for a period of one year or more, as Commission rules require associated licensed units on the system to be deemed "operational."⁸

4. At the time Kay filed the Finder's Preference Request, the licensing status of AVCOM's SMR station WNPA325 had been under review by Commission staff for approximately eight months in connection with the alleged fraudulent assignment of Cardin's end user license from Cardin to L.A. Scrap Iron & Metal Corporation ("L.A. Scrap"), a customer of Kay.⁹ That review was initiated by the filing of Petitions to Deny by AVCOM on February 4, 1993,¹⁰ and Cardin on March 29, 1993¹¹ (collectively,

³ See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking*, PR Docket No. 93-144, 11 FCC Rcd 1463, 1634, ¶ 416 (1995).

⁴ See Finder's Preference Request against Specialized Mobile Radio System-Conventional Station WNPA325 at Banning California, filed by James A. Kay Jr. (October 11, 1993) ("Finder's Preference Request"); see also Supplement to Finder's Preference Request, filed by James A. Kay Jr. (July 18, 1994).

⁵ 47 C.F.R. §§ 90.157(a), 90.157(b).

⁶ See Finder's Preference Request at 2-3. The Commission previously required separate licensing of end users on SMR systems, also known as system "loading." See 47 C.F.R. §§ 90.633(b), 90.655 (1992). In 1992, the Commission eliminated separate end user licensing for SMR stations in most circumstances, permitting end users to operate under a blanket license issued to an SMR base station licensee rather than under their own individual licenses. See In the Matter of Amendment of Part 90 of the Commission's Rules to Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems, *Report and Order*, 7 FCC Rcd 5558 (1992).

⁷ *Id.*

⁸ *Id.*

⁹ Cardin was an authorized end user on AVCOM's SMR system under call sign WNVW802.

¹⁰ See Petition to Deny Application for Modification filed by AVCOM, dated February 4, 1993 ("AVCOM Petition to Deny").

Petitions to Deny). The Petitions to Deny were filed in response to an Application for Modification filed by Kay,¹² which sought to add 854.7125 MHz to Kay's trunked SMR station WNJL306. The Petitions to Deny alleged that the fraudulent assignment of Cardin's end user license to L.A. Scrap caused the applicable frequency coordinator, Industrial Telecommunications Association (ITA), to mistakenly certify that station WNPA325 was not loaded and therefore non-operational. This action allowed Kay to seek modification to add 854.7125 MHz to his trunked SMR station for exclusive use without the prior written concurrence of AVCOM, the co-channel licensee, which would otherwise have been required under Commission rules.¹³ AVCOM and Cardin requested that the Commission invalidate the alleged fraudulent assignment and return the end user license to Cardin.¹⁴

5. Under the finder's preference program, finder's were required to present *prima facie* evidence of a violation of the Commission's construction and operational rules, and the Commission placed certain restrictions on the timeliness of finder's preference requests.¹⁵ For example, a preference request based on a construction or placed-in-operation violation filed less than 180 days after the construction deadline of the target license was considered untimely.¹⁶ Further, former rule 90.173(k)(2) provided that "[a] request targeting a license under Commission review or investigation is also considered untimely."¹⁷ On October 5, 1995, the Office of Operations dismissed Kay's Finder's Preference Request, finding that no preference was available for the license associated with station WNPA325 because "the target license was the subject of a Commission compliance action at the time of the filing of the finder's preference request."¹⁸ On October 12, 1995, the Office of Operations determined that the assignment of Cardin's end user license was unauthorized and reinstated Cardin's end user license.¹⁹

6. On November 6, 1995, Kay filed a Petition for Reconsideration of the dismissal of his Finder's Preference Request, arguing, *inter alia*, that there was no "compliance action" pending against

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¹¹ Petition to Deny Application for Modification filed by Cardin, dated March 29, 1993 ("Cardin Petition to Deny").

¹² See Application for Modification filed by Kay, dated October 29, 1992, Universal Licensing System (ULS) File No. 613739 ("Kay Application for Modification").

¹³ See AVCOM Petition to Deny at 1-2; Cardin Petition to Deny at 1-2. See also 47 C.F.R. § 90.615(b)(2)(ii) (1992).

¹⁴ AVCOM Petition to Deny at 1-2; Cardin Petition to Deny at 1-2.

¹⁵ See 47 C.F.R. § 90.173(k), § 90.173(k)(2) (1992).

¹⁶ See 47 C.F.R. § 90.173(k)(2) (1992).

¹⁷ 47 C.F.R. § 90.173(k)(2) (1992).

¹⁸ See Letter dated October 5, 1995, from William Knowles-Kellett, Attorney, Office of Operations, to Robert Schwaninger, Jr., Esq. (counsel for Kay) and Shirley Fujimoto, Esq. (counsel for AVCOM) ("October 5, 1995 Letter Ruling"). The October 5, 1995 Letter Ruling inadvertently cited "47 C.F.R. § 173(k)(2)" instead of 47 C.F.R. § 90.173(k)(2).

¹⁹ See Letter dated October 12, 1995, from William Knowles-Kellett, Attorney, Office of Operations, to Shirley Fujimoto Esq. (counsel for AVCOM) and Robert Schwaninger Jr., Esq. (counsel for Kay) ("October 12, 1995 Letter Ruling").

station WNPA325 at the time he filed his Finder's Preference Request, and that the Bureau must reconsider its dismissal and reinstate his Finder's Preference Request.²⁰ On November 20, 1995, Kay filed a separate Petition for Reconsideration of the former Office of Operations' decision to reinstate and renew AVCOM's license under call sign WNPA325 and deny the Kay Modification Application.²¹ On August 30, 2002, the Branch denied Kay's request for reconsideration of the dismissal of his Finder's Preference Request, finding that: (i) a finder's preference was not available under former Commission rule 90.173(k)(2) where a license was the subject of normal compliance activities or Commission investigation or review; and (ii) Kay failed to provide the Commission with new information regarding that operational status of the target license.²² On September 30, 2002, Kay filed the instant Application for Review.

III. DISCUSSION

7. We deny Kay's Application for Review. We agree with the Office of Operation's and Branch's determination that Kay's Finder's Preference Request was untimely under former rule section 90.173(k)(2).²³ Kay argues that former section 90.173(k)(2) does not apply because the Commission's investigation did not constitute a "compliance" action affecting the "validity" of station WNPA325.²⁴ We note that the decision here does not turn on whether the Office of Operations properly characterized the status of the Commission's investigation of the alleged unauthorized assignment of the end user license from Cardin to L.A. Scrap as a "compliance action." Former rule section 90.173(k)(2)²⁵ applies in this case, because Kay's Finder's Preference Request targeted a station with a licensing status that was the subject of an existing Commission review or investigation. Former section 90.173(k)(2) provided, without limitation, that a finder's preference is not available if the finder's request is "related to any case scheduled for review as a part of normal compliance activities" or to "any case under Commission review or investigation."²⁶ Here, the case under Commission review and investigation arose from the filing of the Petitions to Deny alleging unauthorized assignment of the sole end user license of the SMR system

²⁰ Petition for Reconsideration filed by Kay, dated November 6, 1995, at 2-3 (Kay Petition I).

²¹ Petition for Reconsideration filed by Kay, dated November 20, 1995 (Kay Petition II). We note that Kay Petition II remains pending and therefore we only address in this Order Kay's contention that the Branch improperly denied reconsideration of the dismissal of Kay's Finder's Preference Request against station WNPA325.

²² Branch Order, 17 FCC Rcd at 16308, 16309, ¶¶ 6-7.

²³ See October 5, 1995 Letter Ruling.

²⁴ See Application for Review at 3-4.

²⁵ 47 C.F.R. § 90.173(k)(2) (1992). Former section 90.173(k)(2) was in effect at the time this matter was initially decided, but was eliminated when the Commission eliminated the finder's preference program. See Amendment of Part 90 Concerning the Commission's Finder's Preference Rules, *Report and Order*, 13 FCC Rcd 23816 (1998).

²⁶ *Id.* In the Finder's Preference Report and Order, the Commission exempted from the finder's preference program "the channels of those licensees scheduled or currently under review for violations by our Compliance Branch." 6 FCC Rcd at 7307, ¶59. The Commission further stated that it would not "apply the preference to any case scheduled for regular review during our normal compliance activities or any case already under review or investigation." 6 FCC Rcd at 7306, ¶57.

Kay targeted.²⁷

8. Kay argues that the review of the Cardin assignment was “peripheral” to call sign WNPA325, and that former rule 90.173 (k)(2) required the Commission investigation to be directly related to the specific violations complained of in the Finder’s Preference Request.²⁸ However, there is no authority for such a narrow reading of the rule. Moreover, we disagree that the existing investigation into the alleged unauthorized assignment of Cardin’s license was “peripheral” to the status of call sign WNPA325. In fact, the alleged unauthorized assignment of Cardin’s license provided the direct basis for Kay’s Finder’s Preference Request alleging that station WNPA325 permanently discontinued operations in violation of the Commission’s rules. Were it not for the assignment of the last end user from AVCOM’s SMR system, Kay could not have argued in his Finder’s Preference Request that AVCOM permanently discontinued operations as a result of a lack of authorized users. We recognize that Kay has sought reconsideration of the former Office of Operations’ determination that the assignment of Cardin’s end user license was fraudulent. Notwithstanding the outcome of that proceeding, Kay’s finder’s preference request was filed eight months after the initiation of a Commission review or investigation surrounding issues that directly impacted the licensing status of target station WNPA325. Accordingly, Kay’s finder’s preference request is untimely under former section 90.173(k)(2).

9. Kay further argues that his Finder’s Preference Request should be granted because he furnished the information leading to the investigation and that denying his request would create a “disincentive” to report such violations to the Commission. Kay states that “the Commission never intended former section 90.173(k)(2) to be used to disqualify a finder due to information that he himself presented to the Commission.”²⁹ The fact that the Commission review or investigation arose from Kay’s separate attempt to obtain the frequency associated with call sign WNPA325 through the filing of a modification application does not invalidate rule 90.173(k)(2), nor its application to a filing involving an allegation of permanent discontinuance of operations.³⁰ Moreover, while the Commission recognized that imposing limitations on the availability of a finder’s preference might prove a “disincentive” to some filers, the Commission has previously stated “it was never [the Commission’s] intention to offer finder’s preference on an unrestricted basis.”³¹

10. Finally, we find no merit to Kay’s general allegations that delay in the processing of Kay’s Finder’s Preference Request and Petition for Reconsideration is the result of staff bias.³² Kay has

²⁷ See Petitions to Deny.

²⁸ See Application for Review at 4-6.

²⁹ See Application for Review at 3. We note that the Commission indicated that the “finder’s preference program will supplement rather than duplicate [the Commission’s] compliance efforts.” See Finder’s Preference Report and Order, 6 FCC Rcd 7297, 7309, ¶77 (1991).

³⁰ See 47 C.F.R. § 90.173(k)(2) (1992).

³¹ Finder’s Preference Report and Order, 6 FCC Rcd at 7307, ¶59.

³² We have rejected Kay’s similar allegations of staff bias in other cases. See, e.g., James A. Kay, Jr., *Decision*, 17 FCC Rcd 1834, ¶¶ 88-91 (2002) (“Kay Decision”) (finding no basis for concluding that the Wireless Telecommunications Bureau engaged in misconduct in prosecuting the revocation hearings of Kay and Marc Sobel); In the Matter of S&L Teen Hospital Shuttle, *Order on Reconsideration*, 17 FCC Rcd 7899, ¶ 3 (2002) (finding that the Commission had already resolved Kay’s allegation of staff bias in the underlying (continued....))

presented no evidence that any delay in deciding this matter was the result of bias or improper motive on behalf of the Bureau.³³

IV. ORDERING CLAUSE

11. ACCORDINGLY, IT IS ORDERED that, pursuant to sections 4(i), 5(c)(5), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c)(5), 303(r), and section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, the Application for Review filed by James A. Kay, Jr. on September 30, 2002, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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Memorandum Opinion and Order when it found that inadvertent procedural errors had occurred, not bias on the part of staff) (citing *In the Matter of S&L Teen Hospital Shuttle*, *Memorandum Opinion and Order*, 16 FCC Rcd 8153, ¶ 5, n.13 (2001)).

³³ In fact, any delay in deciding this matter was due to the fact that Kay was the subject of a pending hearing proceeding regarding his fitness to be a Commission licensee. *See In the Matter of James A. Kay, Jr., Decision*, 17 FCC Rcd 1834 (2002). In the *Kay Decision*, the Commission revoked Kay's 800 MHz authorizations and assessed a forfeiture of \$10,000, finding that Kay failed to respond to Commission inquiries and filed a pleading that lacked candor. On May 8, 2002, the Commission denied Kay's Petition for Reconsideration of the *Kay Decision*. *See In the Matter of James A. Kay, Jr., Memorandum Opinion and Order*, 17 FCC Rcd 8554 (2002). Kay has appealed the *Kay Decision* to the U.S. Court of Appeals for the District of Columbia Circuit.