

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

In the Matter of)	
)	
JAMES A. KAY, JR.)	File No. 93F746
)	
Request for a Finder's Preference for Station)	
WNJF770 Licensed to Stanley W. Harris d/b/a)	
Western Communications Company on Base)	
Station Frequency 852.7875 MHz at Heaps Peak)	
(San Bernardino) California)	

MEMORANDUM OPINION AND ORDER

Adopted: April 10, 2003

Released: April 18, 2003

By the Commission:

I. INTRODUCTION

1. The Commission has before it an Application for Review filed by James A. Kay, Jr. (Kay) on November 14, 2001. Kay seeks review of an order by the Commercial Wireless Division (Division) of the Wireless Telecommunications Bureau (Bureau), which denied Kay's finder's preference request.¹ For the reasons discussed below, we deny Kay's Application for Review.

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. . . ."² Under the program, a person could file a finder's preference request by presenting the Commission with evidence of a licensee's noncompliance with certain regulations. Upon recovering channels from a target licensee deemed to be in violation of those regulations, the Commission would

¹ In the Matter of James A. Kay, Jr., Finder's Preference Request for SMR Station WNJF770 Licensed to Stanley W. Harris d/b/a Western Communications Company at Heaps Peak (San Bernardino) California, *Order*, 16 FCC Rcd 18,572 (CWD 2001) (*Division 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 Order*).

then award a dispositive preference for those frequencies to the finder.³

3. On January 5, 1994, Kay filed a finder's preference request against call sign WNJF770, a conventional Specialized Mobile Radio (SMR) station, formerly licensed in the 800 MHz General Category frequency pool to Stanley W. Harris d/b/a Western Communications Company (Harris) in San Bernadino, CA.⁴ In his request, Kay alleged that Harris violated former rule section 90.155(a), which provided that, if a conventional 800 MHz station is not placed in operation within eight months from the date of grant, the authorization cancels automatically.⁵ The rule also required that to be considered operational, the station must have at least one associated mobile unit in operation.⁶ Kay argued that Harris violated this rule by failing to have any mobile units operating on the station by the eight-month deadline.⁷ Kay also alleged that Harris violated former rule section 90.157, which held that any station that has not operated for one year or more is considered to be permanently discontinued and therefore cancels automatically.⁸ In support of his allegations, Kay relied exclusively on the absence from the Commission's loading records of any record of mobiles associated with Harris' station.⁹

4. On October 17, 2001, the Division denied Kay's finder's preference request. The Division found that because the request relied entirely on Commission loading records, it was insufficient to justify award of a finder's preference.¹⁰ The Division further noted that in establishing the finder's preference program, the Commission had specifically excluded loading violations from the types of target licensee rule violations that could result in the award of a preference. The Division concluded that Kay's request fell within this exclusion, and therefore could not result in a finder's preference award.¹¹

5. In his Application for Review, Kay does not dispute that the Commission excluded loading violations from the scope of the finder's preference program, but instead argues that the Bureau incorrectly characterized his request as alleging a loading violation.¹² Kay contends that the request was not a loading complaint at all, but properly alleged that Harris had failed to construct and commence operations, thus violating rules that were within the scope of the finder's preference program.¹³ Kay also argues that the loading records on which it relied should be regarded as Commission "licensing records," and that the absence from these records of any mobiles associated with station WNJF770 demonstrated

³ The Commission discontinued the finder's preference program for the 800 MHz service in 1995. *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 *Division Order* at ¶ 1. Call sign WNJF770 was cancelled on June 5, 2001.

⁵ 47 C.F.R. § 90.155(a) (1993).

⁶ 47 C.F.R. § 90.155(c) (1993).

⁷ *Division Order* at ¶ 2.

⁸ 47 C.F.R. 90.157 (1993).

⁹ *Division Order* at ¶¶ 2, 4.

¹⁰ *Id.* at ¶ 4.

¹¹ *Id.*

¹² Application for Review at 2-3.

¹³ *Id.* at 4.

that Harris could not have complied with his construction and operation requirements.¹⁴

III. DISCUSSION

6. The Division denied Kay's petition based on the conclusion that Kay had alleged a loading violation that fell outside the scope of the finder's preference program.¹⁵ As a threshold matter, we agree with Kay that the Division erred in reaching this conclusion, and that Kay's finder's preference request did in fact allege violation of the Commission's rules relating to construction and operation rather than loading. Nonetheless, we find that Kay's request fails on other grounds. First, Kay is not entitled to a finder's preference because the finder's preference program applied only to exclusively licensed frequencies, and the target frequency in this case was not exclusively licensed to Harris. Second, the sole evidence provided by Kay in support of his preference request came from existing, publicly available Commission records. Because this information was readily available to Commission staff, it does not constitute the type of information, taken alone, that merits award of a finder's preference.

7. At the time that Kay filed its request, the loading rules applicable to conventional SMR stations required a licensee to load a channel with 70 mobiles in order to obtain exclusive use of that channel.¹⁶ Licensees were further required to report the number of mobiles loaded on their systems to the Commission, which maintained this information in its loading records. A licensee who failed to report this information accurately (e.g., by reporting more mobiles than were actually in use) would of course be in violation of Commission rules. However, in establishing the finder's preference program, the Commission concluded that loading violations should not be the subject of finder's preference requests, because loading was inherently "dynamic," could vary from day to day, and violations would therefore be difficult to prove conclusively.¹⁷ Instead, the Commission limited the availability of finder's preferences to violations of the construction and operation rules, which it regarded as "lend[ing] themselves to conclusive and expeditious action."¹⁸

8. On review of the record in this case, we agree with Kay that the alleged rule violation that formed the basis of his finder's preference request was not a loading violation of the type discussed above. The essential allegation in Kay's request was not that Harris had falsely reported non-existent mobiles, but that the Commission's records accurately indicated that Harris had no mobiles associated with his station, and therefore was in violation of the Commission's construction and operation rules that required operation of at least one mobile on the station by the end of the construction period, and required continued operation of one mobile to avoid the station being considered permanently discontinued.¹⁹

¹⁴ *Id.*

¹⁵ *Division Order* at ¶ 4.

¹⁶ 47 C.F.R. § 90.633 (1994).

¹⁷ *Finder's Preference Order* at ¶ 49.

¹⁸ *Id.*

¹⁹ In several prior cases, the Commission has found conventional 800 MHz licenses to be subject to cancellation for non-operation because the licensee failed to license any of the end users on its system and a subsequent licensee fully loaded the channel. *See, e.g.,* In the Matter of Nationwide Radio Communications, Inc., Application to Modify the License for Specialized Mobile Radio Station KNFG237, in Chicago, Illinois, Channel 851.3875 MHz, *Memorandum Opinion and Order*, 2001 WL 322107 (2001); In the Matter of A-1-A Repeater Company, for Consent to the Assignment of the Authorization and for Modification of the Authorization for Conventional SMR (GX) Station WPAH737 from Harry A. Thompson d/b/a 1st Mobile Communications to A-1-A Repeater Company, *Memorandum Opinion and Order*, 16 FCC Rcd 9751 (2001); In the Matter of Abraham Communications, Inc.,

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Because these rules were within the scope of the finder's preference program, we conclude that the Division erred in concluding that Kay's request alleged a rule violation outside the scope of the program.

9. We further conclude, however, that Kay's finder's preference request fails on other grounds. Because the Division erroneously found Kay's request to be based on a loading violation, it did not reach the issue of whether Kay was entitled to a finder's preference based on Harris' alleged violation of the construction and operation rules. We address this issue below, and conclude that Kay was not entitled to a preference.

10. First, Kay was not entitled to a finder's preference because the channel at issue was not licensed exclusively to Harris. In the *Finder's Preference Order*, the Commission limited application of the finder's preference program to channels assigned on an exclusive basis.²⁰ The Commission did not apply the finder's preference program to shared channels because there was "no preclusion of eligible new applicants from being licensed on shared spectrum," and a "preference awarded to an applicant for a shared channel would, therefore, offer no greater opportunity for acquiring a particular channel than that which is already available"²¹

11. In this case, as noted above, the rules applicable to conventional SMR stations required a licensee to load a channel with 70 mobiles in order to obtain exclusive use of that channel.²² Failure to load the station with 70 mobiles rendered the channel open to sharing, allowing any other applicant to apply for the same channel.²³ The record clearly reflects that Harris failed to license 70 mobiles on the system, and therefore did not have exclusive use rights. However, the non-exclusive status of the channel also precludes the award of a finder's preference to Kay: because the channel was not exclusively licensed to Harris, any other applicant, including Kay, could apply for it in any event, and the finder's preference program was therefore inapplicable.²⁴

12. Second, we find that Kay's evidentiary submission in support of his preference request, which was based entirely on Commission records, does not constitute the type of information, taken alone, that could support a finder's preference claim.²⁵ As the Commission noted in the *Finder's*

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Application for Renewal of License for Conventional SMR Station WNJV707, Tampa, Florida, *Memorandum Opinion and Order*, 1996 WL 526232 (1996).

²⁰ *Finder's Preference Order* at ¶ 44.

²¹ *Id.*

²² 47 C.F.R. § 90.633 (1994).

²³ 47 C.F.R. § 90.633 (1994).

²⁴ On reconsideration of the *Finder's Preference Order*, the Commission clarified that "conventional 800 MHz General Category Pool channels are subject to target *if assigned on an exclusive basis to one or more licensees.*" Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, *Memorandum Opinion and Order*, PR Docket No. 90-481, 8 FCC Rcd 6690, n. 38 (emphasis added).

²⁵ See In the Matter of Request of James A. Kay, Jr. Seeking a Finder's Preference for Call Sign WNPA325, *Order*, 2002 WL 2002870 (CWD 2002); In the Matter of Jim and Linda Doering d/b/a J. Doering Communications, Finder's Preference Request for SMR Station WNXS753 Licensed to James A. Kay, Jr. at Corona, Montrose, and Running Springs, California, *Order*, 16 FCC Rcd 20,407 (CWD 2001); In the Matter of Thomas A. Baker, Finder's Preference Request for Specialized Mobile Radio Station WNRU-207, licensed to K-Comm at Mahoney Township, PA, *Memorandum Opinion and Order*, 16 FCC Rcd 8448 (WTB 2001); In the Matter of James A. Cassell, Finder's Preference Request for SMR Station WNNH846 Licensed to Delta Communications of Watertown, Inc. at Black

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Preference proceeding, the finder's preference program was designed to "supplement rather than duplicate our compliance efforts,"²⁶ and was intended to "reward persons who constructively and effectively assist us in ensuring proper use of the private radio spectrum."²⁷ In this case, Kay submitted no independent evidence that would supplement information already in the Commission's possession, and provided no assistance to the Commission's own efforts to ensure proper spectrum use. We see no reason to award a finder's preference to Kay for providing information the Commission already possessed and equally available to any other member of the public.

IV. ORDERING CLAUSE

13. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act, as amended, 47 U.S.C. § 155(c)(5), and Section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g), the Application for Review filed by James A. Kay, Jr. on November 14, 2001 in the above-captioned proceeding IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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River, NY, *Memorandum Opinion and Order*, 14 FCC Rcd 18,992 (CWD 1999); In the Matter of Ray C. Heffron, Finder's Preference Proceeding Involving SMR Station WNRS618 Licensed to Leon's Radio, Inc. at Stroud, Oklahoma, *Memorandum Opinion and Order*, 14 FCC Rcd 17,084 (CWD 1999); In the Matter of M. Sonomura Contracting Co., Finder's Preference Proceeding Involving SMR Station WNSM690 at Hilo, Hawaii, *Memorandum Opinion and Order*, 1999 WL 781661 (CWD 1999).

²⁶ *Finders Preference Order* at ¶ 59.

²⁷ Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, *Notice of Proposed Rulemaking*, 5 FCC Rcd 6401, ¶ 22 (1990).