

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

In the Matter of)	
)	
JOSEPH P. MAYENCHAK, JR.)	Case No. 97F016
d/b/a J & H Radio)	
)	
Finder's Preference Request)	
Regarding Station WIL269)	
New York, New York)	

ORDER

Adopted: March 24, 2000

Released: March 28, 2000

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On July 28, 1999, Joseph P. Mayenchak, Jr. d/b/a J&H Radio (J&H) filed a petition for reconsideration¹ of the June 28, 1999, action by the Chief, Policy and Rules Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau (Division), canceling J&H's conditional authorization² to operate Station WIL269 on frequency pair 471.7875/474.7875 MHz in the New York City area,³ and awarding a dispositive preference under the finder's preference program⁴ to Marina Concrete, Inc. (Marina) for Station WIL269.⁵ For the reasons set forth below, we affirm the June 28, 1999,

¹Petition for Reconsideration (filed July 28, 1999) (Petition).

²J&H Radio filed Assignment Application Number D054896 on September 26, 1996, seeking assignment of Station WIL269 from Automatic Data Processing to J&H Radio. The assignment application was conditionally granted on January 30, 1997, pending the outcome of the instant finder's preference proceeding.

³See Letter to Marjorie K. Conner, counsel to Joseph P. Mayenchak, Jr., d/b/a J&H Radio, from John J. Borkowski, Federal Communications Commission (dated June 28, 1999).

⁴The Commission eliminated the finder's preference program with respect to the 220-222 MHz band and in the 470-512 MHz, 800 MHz and 900 MHz Private Land Mobile Radio bands as of July 29, 1998. Finder's preference requests for these frequencies pending as of July 29, 1998, however, are being processed. *See Report and Order*, 13 FCC Rcd 23816 (1998).

⁵See Letter to Lloyd Coward, counsel to Marina Concrete, Inc., from John J. Borkowski, Federal Communications Commission (dated June 28, 1999).

action awarding a dispositive preference for frequency pair 471.7875/474.7875 MHz to Marina, and deny J&H's Petition.

II. BACKGROUND

2. On January 15, 1997, Marina filed a finder's preference request⁶ targeting Automatic Data Processing's authorization to operate Station WIL269 on frequency pair 471.7875/474.7875 MHz in the New York City area. Marina alleged in its Request that Station WIL269 had not operated from November 1995, through January 1997, a period in excess of one year, in violation of Section 90.157 of the Commission's Rules.⁷ To substantiate its Request, Marina provided, *inter alia*, the separate declarations of two of Station WIL269's co-channel licensees, sworn under penalty of perjury, stating that they had extensively monitored Station WIL269 for activity during a period of ten and fourteen months, respectively, without detecting any transmissions. On January 30, 1997, Station WIL269 was assigned to J&H from Automatic Data Processing on a conditional basis, subject to the outcome of this proceeding.⁸ On March 11, 1997, J&H was served with Marina's Request.⁹

3. On April 10, 1997, J&H filed an Opposition to Marina's Request.¹⁰ In Opposition, J&H did not indicate that the station had continuously operated, but instead argued only that the Request was procedurally defective, since Station WIL269 operated on a shared 470 MHz Business Radio Service channel. J&H argued that only frequencies assigned on an exclusive basis could be the subject of a finder's preference proceeding.¹¹ By letter dated June 28, 1999, J&H was notified that its conditional authorization to operate Station WIL269 had cancelled automatically.¹² On June 28, 1999, Marina was awarded a dispositive preference for Station WIL269 under the finder's preference program. The Division held that since Marina was operating on an exclusive channel, the Request was not procedurally defective.¹³ J&H filed the instant Petition on July 28, 1999,¹⁴ reiterating its original argument that Station WIL269 could not be the proper target of a finder's preference proceeding, since Station WIL269 operates on a shared 470 MHz Business Radio Service channel.¹⁵

⁶Finder's Preference Request (filed January 15, 1997) (Request).

⁷Request at 1 (citing 47 C.F.R. §90.157 (1997)).

⁸*Supra* note 2.

⁹*See* Service Letter from William H. Kellett and Anne Marie Wypijewski, Federal Communications Commission, to Joseph P. Mayenchak, Jr. (dated March 11, 1997).

¹⁰Opposition (filed April 10, 1997).

¹¹*Id.* at 1-2.

¹²*Supra* note 3.

¹³*Supra* note 5.

¹⁴*Supra* note 1.

¹⁵*Id.* at 2.

4. Marina filed an Opposition to the Petition on August 10, 1999,¹⁶ arguing that Station WIL269 is the proper subject of a finder's preference proceeding, because it became an exclusive channel when it became loaded to capacity.¹⁷ A Reply to the Opposition to Petition was filed on behalf of J&H on August 19, 1999.¹⁸ J&H argued that only channels assigned on an exclusive basis in the 800 MHz General Category Pool are subject to finder's preference proceedings.¹⁹ To support its argument, J&H cited a footnote in the Finder's Preference *Order on Reconsideration*, for the proposition that shared-use channels may only be targeted if the shared-use channels are in the 800 MHz General Category Pool.²⁰

III. DISCUSSION

5. Upon evaluation of the entirety of the evidence, we find that the record in this proceeding consists of a *prima facie* showing that Station WIL269 failed to operate from November 1995, through January 1997, a period in excess of one year. In this connection, we note that J&H failed to provide any documentation, such as canceled checks, system maintenance records, equipment serial numbers, or sworn affidavits from employees using the system, to demonstrate operation of Station WIL269 during the subject period.²¹ By contrast, Marina submitted the statements of two co-channel users operating on the same channel assigned to J&H, attesting that Station WIL269 had been continuously monitored during the respective periods of December, 1995, through September, 1996, and November, 1995, through January, 1997. Both co-channel licensees certified under penalty of perjury that they did not detect any transmissions on the subject channel.

6. We disagree with J&H's contention that this is not an "exclusively assigned" channel subject to a finder's preference proceeding. First, we note that former Section 90.173(k) of the Commission's Rules specifically included 470-512 MHz stations.²² Station WIL269 was authorized to operate in the 470-512 MHz shared band of the former Business Radio Service. Under the pertinent provisions of former Section

¹⁶Opposition to Petition for Reconsideration (filed August 10, 1999) (Opposition to Petition).

¹⁷*Id.* at 2.

¹⁸Reply to Opposition to Petition for Reconsideration (filed August 19, 1999) (Reply).

¹⁹*Id.* at 3.

²⁰*Id.* (citing 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, 6693, at n. 38 (1993) (*Order on Reconsideration*)).

²¹*See generally* In the Matter of Dale Kane d/b/a Kane Communications, *Order*, 13 FCC Rcd 18735 (1999); In the Matter of Veracon, Inc., 1999 WL 777529 (F.C.C.) (WTB PSPWD rel. Oct. 1, 1999) (target licensees of finder's preference proceedings did not prevail after failing to provide any objective and documentary evidence of compliance with the Commission's construction and operation rules).

²²*See* 47 C.F.R. § 90.173(k) (1997) which states that "any eligible person may seek a dispositive preference for a channel assignment on an exclusive basis in the 220-222 MHz, 470-512 MHz, and 800/900 MHz bands by submitting information that leads to the recovery of channels in these bands."

90.313(a)(2) of the Commission's Rules, the maximum channel loading on frequencies in the 470-512 MHz band in the former Business Radio Service was ninety (90) units.²³ Once such a channel had reached its maximum loading level of ninety (90) units, that channel became exclusive and new applicants were not eligible to be licensed on the channel's shared spectrum.²⁴ On January 15, 1997, the date the instant Request was filed, the target licensee was authorized to operate forty-four (44) mobile units on Station WIL269. The combined loading of the co-channel licensees equaled one hundred fifteen (115) mobile units on the subject channel, frequency pair 471.7875/474.7875 MHz.²⁵ We therefore conclude that Station WIL269 was the proper subject of a finder's preference proceeding. The station achieved exclusive status in the area in which it operates, through the separate licensing of more than one licensee. Total mobile loading on the subject channel had exceeded its maximum loading level of ninety (90) mobile units, due to modification of loading levels on the channel by the existing co-channel licensees. In adopting the finder's preference program, the Commission held that 470-512 MHz channels may be the target of finder's preference proceedings. Specifically, the Commission stated: "[w]e adopt our initial proposal to apply the finder's preference to those frequencies assigned on an exclusive basis in the 220-222 MHz, 470-512 MHz and 800/900 MHz bands."²⁶

7. J&H does not dispute the fact that the Commission specifically included the 470-512 MHz band when it adopted the finder's preference program. J&H contends, however, that channels in the 470-512 MHz band cannot be the subject of a finder's preference proceeding, where the Commission aggregated the loading of more than one license on a 470-512 MHz channel to achieve "exclusivity."²⁷ J&H fails to provide any precedent to support its contention. J&H's analysis also ignores Subsection (c) of Section 90.313 of the Commission's Rules, which provides, in pertinent part, that "[c]hannel capacity may be reached either by the requirements of a single licensee or by several users sharing a channel."²⁸ Channel exclusivity occurred on frequency pair 471/7875/474.7875 MHz, in the context of Section 90.313 of the Commission's Rules, when the subject channel was loaded to capacity. We also note that the Division's June 28, 1999, decision is consistent with precedent in the 470-512 MHz band, where a dispositive preference was awarded to a finder who had filed a finder's preference request against a station in the 470-512 MHz band, where the channel had achieved exclusivity by being loaded to capacity, but where the target licensee was only one of several

²³47 C.F.R. § 90.313(a)(2) (1997).

²⁴*Id.*

²⁵Norman Phillips was authorized to operate five (5) mobile units on co-channel Station KNS872; New York Hospital was authorized to operate twenty-four (24) mobile units on co-channel Station WIL572; Computer Associates International was authorized to operate thirty (30) mobile units on co-channel Station WIL596; Horizon Communications was authorized to operate nine (9) mobile units on co-channel Station WIM494; and Atlantic Telecommunications was authorized to operate three (3) mobile units on co-channel Station WIM603.

²⁶*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 at 7304, para. 44 (1991).

²⁷*Supra* note 1 at 2.

²⁸47 C.F.R. § 90.313(c) (1997).

licensees comprising the total loading count on the channel.²⁹

8. We also conclude that J&H's argument that only channels assigned on an exclusive basis in the 800 MHz General Category Pool may be subject to finder's preference proceedings is without merit. J&H's reading of the Commission's clarification of footnote 38 of the *Order on Reconsideration* must be rejected. J&H incorrectly interprets footnote 38 to be a dispositive and carefully implemented rule change intended to expand the finder's preference program to include shared channels for the first time, in the limited context of Conventional 800 MHz General Category frequencies. Rather, footnote 38 specifically references 800 MHz General Category channels in response to a petition requesting clarification of whether exclusivity could be reached on shared channels through a compilation of total loading on the channel. The Commission clarified the issue in the affirmative, without ever extending the finder's preference program to include shared channels for which no exclusivity could be obtained (450-460 MHz channels, for example). In sum, we find that J&H presented no new facts or arguments that would lead us to change our earlier decision.

9. IT IS ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405 and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the petition for reconsideration filed by Joseph P. Mayenchak, Jr., d/b/a J&H Radio, is DENIED. As a result of this action, a dispositive preference under the finder's preference program is AFFIRMED to Marina Concrete, Inc., for the frequencies associated with Station WIL269, formerly conditionally licensed to Joseph P. Mayenchak, Jr. d/b/a J&H Radio. Marina Concrete has ninety (90) days from the date of release of this Order to follow regular application requirements and file an acceptable application with the Commission for the targeted frequencies.

10. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau

²⁹See, e.g., Mobile UHF, Inc., *Order* (WTB PSPWD rel. June 23, 1999) *aff'd*, *Memorandum Opinion and Order*, FCC 00-43 (Feb. 15, 2000).