

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

In the Matter of Application of )
CITY OF COMMERCE ) FCC File No. 9804R295496
For Renewal of Authorization for Conventional )
Other Industrial/Land Transportation Station )
WPCE379, Pasadena, California )

ORDER ON RECONSIDERATION

Adopted: July 23, 2001

Released: July 26, 2001

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

I. INTRODUCTION

1. On May 4, 1998, James A. Kay, Jr. (Kay) filed a Petition for Reconsideration of an action by the Licensing and Technical Analysis Branch (Branch), Public Safety and Private Wireless Division on April 10, 1998. That action was the grant of a renewal application filed by the City of Commerce for Private Land Mobile Radio Station WPCE379, Pasadena, California. For the reasons discussed below, we grant the Petition, dismiss the City of Commerce's renewal application, and dismiss the AFR.

II. BACKGROUND

2. On May 11, 1993, Kay was granted a license to operate seventy-two (72) mobile units on conventional Specialized Mobile Radio (SMR) Station WNWB332, Van Nuys, California, on frequencies 851.8125 MHz/806.8125 MHz. Pursuant to Section 90.633(b) of the Commission's Rules, Kay enjoyed exclusive use of the above noted frequency channel. Nonetheless, on June 1, 1993, the City of Commerce was licensed to operate sixteen mobile units for Conventional Other Industrial/Land Transportation Station WPCE379 on the same frequency pair. According to our licensing records, Industrial Telecommunications Association, Inc. (ITA) coordinated the City of Commerce application. On September 9, 1993, ITA acknowledged that it had been unaware of Kay's application at the time it recommended the use of the

1 James A. Kay, Jr., Petition for Reconsideration (filed May 4, 1998) (Petition).

2 Kay also filed a Motion for Issuance of Cease and Desist Order (Cease and Desist Motion) on May 4, 1998. Our grant of the Petition renders the action sought by Kay in the Cease and Desist Motion moot. We therefore dismiss the Cease and Desist Motion as moot. On January 27, 2000 Kay filed an Application for Review (AFR). The AFR is addressed at ¶ 7, infra.

3 47 C.F.R. § 90.633(b) (1993) (providing that a channel will not be assigned to additional licensees when it is loaded to 70 mobile stations).

frequency pair to City of Commerce.<sup>4</sup> ITA further stated that if it had known of Kay's application, it would not have recommended the frequency pair to City of Commerce.<sup>5</sup> Although the Land Mobile Branch ("Land Mobile Branch"), Licensing Division, Private Radio Bureau set-aside the City of Commerce's license to operate Station WPCE379 on November 3, 1993,<sup>6</sup> the license was subsequently reinstated because the set-aside action was not timely.<sup>7</sup>

3. The Reinstatement Letter noted that the frequency coordination for the City of Commerce was defective.<sup>8</sup> City of Commerce was "urged to contact the frequency coordinators to ascertain whether an alternate frequency is available."<sup>9</sup> The Reinstatement Letter concluded with a notification to the City of Commerce that its license to operate Station WPCE379 "will not be renewed."<sup>10</sup> On January 10, 1994, the City of Commerce was issued a modified license for Station WPCE379 to reflect the imposition of a special condition stating "[t]his authorization will not be renewed for 851.8125 per letter dated Nov. 24, 1993."<sup>11</sup> The City of Commerce nevertheless filed an application to renew its license without modifying the proposed facilities to specify a new frequency.<sup>12</sup> On April 10, 1998, the Branch granted the renewal application. On May 4, 1998, Kay filed the instant Petition.

### III. DISCUSSION

4. In the Petition, Kay argues that our "action granting the renewal was incorrect and should be set-aside."<sup>13</sup> Kay first asserts that the City of Commerce's operation of Station WPCE379 continually causes harmful co-channel interference to Kay's operation of Station WNWB332.<sup>14</sup> Kay therefore reiterates that "the City of Commerce coordination request should have been rejected pursuant to Section 90.633(b) of the Rules."<sup>15</sup> Kay argues that the language of the Reinstatement Letter and the special condition precluded the City of Commerce from submitting and the Commission from granting a renewal application for Station WPCE379 operating on frequencies 851.8125 MHz/806.8125 MHz.<sup>16</sup> Therefore,

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<sup>4</sup> See Letter from Andre F. Cote, Senior Vice President, ITA, to Mr. Terry L. Fishel, Chief, Land Mobile Branch, Licensing Division, Private Radio Bureau ) (dated Sept. 9, 1993) (ITA Letter).

<sup>5</sup> *Id.*

<sup>6</sup> See Letter from Terry L. Fishel, Chief, Land Mobile Branch, Licensing Division, Private Radio Bureau, to Daniel Gomez, City of Commerce (rel. Nov. 3, 1993) (Set-Aside Letter).

<sup>7</sup> See Letter from Terry L. Fishel, Chief, Land Mobile Branch, Licensing Division, Private Radio Bureau, to Elizabeth R. Sachs, Esq. (rel. Nov. 24, 1993) (Reinstatement Letter).

<sup>8</sup> *See id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See License for Station WPCE379, File No. 9302624411 (issued Jan. 10, 1994).

<sup>12</sup> See FCC File No. 9804R295496.

<sup>13</sup> Petition at 2.

<sup>14</sup> *Id.* at 1.

<sup>15</sup> *Id.* at 2 (citing 47 C.F.R. § 90.633(b)).

<sup>16</sup> *Id.* at 1-2.

Kay requests that we set aside our action granting the renewal.

5. We agree with Kay that the grant of the City of Commerce renewal application was erroneous. Under Section 90.633(b) of the Commission's Rules, Kay was entitled to exclusive use of the frequency pair because he had loaded the frequency pair to over 70 mobile units.<sup>17</sup> ITA and City of Commerce do not dispute that the City of Commerce should not have been authorized to use the subject frequency due to the apparent defective coordination.<sup>18</sup> Rather, in 1993 and 1994, the City of Commerce defended its authorization on procedural grounds.<sup>19</sup> Because neither the Commission nor Kay raised the issue of the City of Commerce's defective coordination until September of 1993, the Land Mobile Branch recognized that its attempt to set aside the City of Commerce's license was untimely.<sup>20</sup> In the Reinstatement Letter, however, the Land Mobile Branch notified City of Commerce that it should attempt to obtain new frequencies and that its license would not be renewed on the channel pair at issue.<sup>21</sup> Significantly, the City of Commerce did not seek reconsideration of this action. Land Mobile Branch subsequently placed a special condition on the license explicitly stating that its authorization to operate on the frequency 851.8125 MHz would not be renewed.<sup>22</sup> The license for Station WPCE379 was modified for unrelated reasons on May 3, 1994.<sup>23</sup> That license contained the same special condition.<sup>24</sup>

6. In *P&R Temmer v. FCC*,<sup>25</sup> the Court noted, "An FCC licensee takes its license subject to the conditions imposed on its use. These conditions may be contained in both the Commission's regulations and in the license. Acceptance of a license constitutes accession to all such conditions." By accepting its licenses without protesting the special condition placed on those licenses, the City of Commerce agreed to be bound by the special condition.<sup>26</sup> Notwithstanding that agreement, City of Commerce sought renewal of its license without making any attempt to modify its license to specify a different frequency. Kay's Station WNWB332 remains authorized to operate on the frequency pair with seventy-two mobile units. Therefore, Kay is entitled to the exclusive use of the subject frequency. City of Commerce has not sought a waiver of Section 90.633(b). Accordingly, the City of Commerce renewal application was defective for failure to comply with the special condition and with Section 90.633(b). We therefore grant Kay's Petition, reverse

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<sup>17</sup> See 47 C.F.R. § 90.633(b).

<sup>18</sup> See ITA Letter at 1; City of Commerce, Opposition to Petition for Set Aside of License and Other Relief 2 (filed Oct. 12, 1994) ("If [Kay's] application was fully compliant with applicable FCC requirements, and he was properly entitled to the channel exclusivity he requested, then the grant to the City was, indeed, in error.").

<sup>19</sup> See, e.g., Letter from Elizabeth R. Sachs, Lukas, McGowan, Nace & Gutierrez, to Terry L. Fishel, Chief, Land Mobile Branch, Licensing Division, Private Radio Bureau (dated Nov. 15, 1993).

<sup>20</sup> See Reinstatement Letter at 1.

<sup>21</sup> See *id.*

<sup>22</sup> See License for Station WPCE379, File No. 9302624411 (issued Jan. 10, 1994).

<sup>23</sup> See License for Station WPCE379, File No. 9302624411 (issued May 3, 1994).

<sup>24</sup> See *id.*

<sup>25</sup> 743 F.2d 918, 928 (D.C. Cir. 1984).

<sup>26</sup> See 47 C.F.R. § 1.110; *Central Television, Inc. v. FCC*, 834 F.2d 186 (D.C. Cir. 1987); *P&R Temmer v. FCC*, *supra*.

the grant of the renewal application, and dismiss the renewal application as defective.<sup>27</sup>

7. On January 27, 2000, Kay filed an AFR<sup>28</sup> seeking Commission review of the matter because the Bureau had not yet acted on his Petition. We dismiss the AFR because it was not validly served on City of Commerce. In this regard, we note that Section 1.115(f) of the Commission's Rules<sup>29</sup> requires a party filing an application for review to render service of process upon parties to the proceeding. Kay served Elizabeth R. Sachs, Esq., Lukas, Nace, Gutierrez & Sachs Chtd. with the AFR. Ms. Sachs, however, had previously informed Kay and the Commission on May 28, 1998 that she no longer represented the City of Commerce.<sup>30</sup> Upon receipt of the AFR, Ms. Sachs reminded Kay and the Commission that she no longer represented the City of Commerce.<sup>31</sup> Notwithstanding that reminder, Kay did not provide evidence to the Commission that he served the AFR on City of Commerce. Since Kay's AFR did not comply with the service requirements of Section 1.115(f), we are dismissing Kay's AFR pursuant to Section 0.331(c) of the Commission's Rules.<sup>32</sup>

### III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that, 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, the Petition for Reconsideration filed by James A. Kay, Jr. on May 4, 1998 IS GRANTED.

9. IT IS FURTHER ORDERED THAT, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.934(d)(2) and 90.633(b) of the Commission's Rules, 47 C.F.R. §§ 1.934(d)(2), 90.633(b), the application for renewal of license filed by City of Commerce (FCC File No. 9804R295496) IS DISMISSED.

10. IT IS FURTHER ORDERED THAT, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 155(c), and Sections 0.331(c) and 1.115(f) of the Commission's Rules, 47 C.F.R. §§ 0.331(c), 1.115(f), the Motion for Issuance of Cease and Desist Order filed by James A. Kay, Jr. on May 4, 1998 and the Application for Review filed by James A. Kay, Jr. on January 27, 2000 ARE DISMISSED.

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<sup>27</sup> See 47 C.F.R. § 1.934(d)(2).

<sup>28</sup> James A. Kay, Jr., Application for Review (filed Jan. 27, 2000) (AFR).

<sup>29</sup> 47 C.F.R. § 1.115(f).

<sup>30</sup> See City of Commerce, Request for Extension of Time to Respond to Petition for Reconsideration (filed May 28, 1998).

<sup>31</sup> See Elizabeth R. Sachs, Esq., Notification of Non-Representation (filed Feb. 11, 2000).

<sup>32</sup> 47 C.F.R. § 0.331(c).

11. These actions are taken pursuant to delegated authority granted under the provisions of 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  
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