

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: August 29, 2002

Released: August 30, 2002

By the Chief, Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On November 6, 1995, James A. Kay Jr. ("Kay") filed a petition for reconsideration ("Petition") of a decision by the Wireless Telecommunications Bureau's Office of Operations, which denied Kay's finder's preference request for SMR station WNPA325, currently licensed to William F. Kelsey d/b/a/ AVCOM Company ("AVCOM").

II. BACKGROUND

2. On October 11, 1993, Kay filed a finder's preference request against AVCOM, licensee of SMR station WNPA325, operating on frequency 854.7125 MHz in Banning California. Kay alleged that AVCOM was in violation of rule section 90.157(a), which provides that the license for a station shall cancel automatically upon permanent discontinuance, and 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.

1 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")

2 See Finder's Preference Request 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).

3 47 C.F.R. §§ 90.157(a), (b).

4 See Finder's Preference Request at 2.

licensee had not modified its license to add its own control or mobile units and thus had ceased operations.⁵

3. At the time Kay filed his finder's preference request, the circumstances surrounding 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 an end user license from Cardin to L.A. Scrap Iron & Metal Corporation ("L.A. Scrap").⁶ That review was initiated by the filing of Petitions to Deny by AVCOM on February 4, 1993⁷ and Cardin on March 29, 1993,⁸ filed in response to an Application for Modification filed by Kay.⁹ Kay's Application for Modification sought to add AVCOM's co-channel frequency for station WNPA325 to Kay's trunked station WNJL306. The Petitions to Deny alleged that the fraudulent assignment of Cardin's end user license caused the Industrial Telecommunications Association (ITA) to mistakenly certify that station WNPA325 was non-operational, thereby allowing Kay to apply for the modification without the prior written concurrence of the licensee, which is required by the Commission's rules.¹⁰ AVCOM and Cardin also requested that the Commission invalidate the alleged fraudulent assignment and return the end user license to Cardin. The parties filed numerous pleadings and affidavits with the Bureau during the pendency of the matter. On October 12, 1995, the Bureau issued an order, determining that an unauthorized assignment had taken place and invalidating the assignment.¹¹

4. On October 5, 1995, the Bureau's Office of Operations dismissed Kay's finder's preference request on the ground that "the target license was the subject of a Commission compliance action at the time of the filing of the finder's preference request."¹² Relying on section 90.173(k)(2) of the Commission's rules, the Bureau's Office of Operations concluded that no finder's preference request

⁵ *Id.* at 3.

⁶ *See* Petition to Deny Application for Modification filed by AVCOM, dated February 4, 1993 and Petition to Deny Application for Modification filed by Cardin dated March 29, 1993 (collectively "Petitions to Deny"). Cardin is an end user licensee on AVCOM's SMR system under call sign WNVW802.

⁷ Petition to Deny Application for Modification filed by AVCOM, dated February 4, 1993.

⁸ Petition to Deny Application for Modification filed by Cardin dated March 29, 1993.

⁹ *See* Application for Modification filed by Kay, dated October 12, 1992, Universal Licensing System (ULS) File No. 61739.

¹⁰ *See* AVCOM Petition to Deny at 1-2; Cardin Petition to Deny at 1-2. Section 90.615(b)(2)(ii) of the Commission's rules requires the written concurrence of the co-channel conventional licensee prior to the grant of the modification under 47 C.F.R. § 90.615(b)(2)(ii) (1992).

¹¹ *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"). Kay's Petition for Reconsideration of the Bureau's Order of October 12, 1995 denying Kay's Application for Modification and reinstating AVCOM's license, remains pending and will be decided in a separate order.

¹² *See* October 5, 1995 Letter Ruling.

was available for the license associated with AVCOM's station WNPA325.¹³

5. On November 6, 1995, Kay filed a Petition for Reconsideration claiming that there was no "compliance action" pending against station WNPA325 at the time he filed his finder's preference request and that, as such, the Bureau must reconsider its dismissal and reinstate his finder's preference request. Kay maintains that the dispute involving the circumstances surrounding the assignment of Cardin's end user license to L.A. Scrap is unrelated and does not constitute the requisite "compliance action" with respect to station WNPA325.¹⁴

III. DISCUSSION

6. We deny Kay's petition for reconsideration. We agree with the decision of the Office of Operation's, which found that Kay's finder's preference was untimely under section 90.173(k)(2) of the Commission's rules because Kay's request targeted a license that was already under Commission review in connection with the alleged fraudulent assignment of an end user license from Cardin to L.A. Scrap.¹⁵ We disagree with Kay's argument that the Commission's proceeding involving the alleged unauthorized assignment from Cardin to L.A. Scrap did not constitute a compliance action and that section 90.173(k)(2) does not, therefore, apply in this case.¹⁶ Section 90.173(k)(2) not only exempted licenses subject to a pending compliance action, but also exempted any case under Commission review or investigation,¹⁷ because the finder's preference program was designed to uncover facts of which the Commission was not aware or could not readily ascertain.¹⁸

¹³ 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).

¹⁴ See Petition, at 2.

¹⁵ Section 90.173(k)(2) of the Commission's rules provided 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. 47 C.F.R. § 90.173(k)(2) (1992).

¹⁶ In the *Finder's Preference Report and Order*, the Commission stressed that the "finder's preference program will supplement rather than duplicate [the Commission's] compliance efforts." 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*, 6 FCC Rcd 7297, 7309 ¶77 (1991) ("*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." *Id.* 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." *Id.* at 7306 ¶57. To this end, the Commission adopted section 90.173(k)(2), which expressly excluded from the scope of the finder's preference "any case scheduled for regular review during the Private Radio Bureau's normal compliance activities or to any case under Commission review or investigation." 47 C.F.R. § 90.173(k)(2) (1992). Although section 90.173(k)(2) was in effect at the time this matter was initially decided, this rule was eliminated when the Commission eliminated its finder's preference program. See Amendment of Part 90 Concerning the Commission's Finder's Preference Rules, *Report and Order*, 13 FCC Rcd 23,816 (1998).

¹⁷ See 47 C.F.R. 90.173(k)(2) (1992).

¹⁸ See 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, 6404 ¶22 (1990).

7. Kay's finder's preference request did not bring to the Commission's attention any new information about the non-operational status of the target license. Indeed, the staff ultimately determined on October 12, 1995 that the assignment of Cardin's license to L.A. Scrap constituted an unauthorized assignment.¹⁹ It was the unauthorized assignment of Cardin's end user license that led directly to Kay's allegation that station WNPA325 was non-operational in violation of the Commission's rules, and therefore, subject to his finder's preference request. Thus, Kay did not identify to the Commission a non-operational licensee, he only harvested information already known to the Commission. We therefore deny Kay's finder's preference request pursuant to section 90.173(k)(2).²⁰

V. ORDERING CLAUSE

8. ACCORDINGLY IT IS ORDERED that, pursuant to section 154(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and sections 0.331 and 1.106 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.106, the petition for reconsideration filed by James A. Kay, Jr. on November 6, 1995, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Paul D'Ari
Chief, Policy and Rules Branch
Commercial Wireless Division
Wireless Telecommunications Bureau

¹⁹ See October 12, 1995 Letter Ruling.

²⁰ See 47 C.F.R. 90.173(k)(2) (1992).