

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

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

ORDER

Adopted: October 16, 2001

Released: October 17, 2001

By the Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau:

1. On January 5, 1994, James A. Kay, Jr. ("Kay") filed a finder's preference request ("Request") for frequency pair 807/852.7875 MHz under SMR station WNJF770, licensed to Stanley W. Harris ("Harris") d/b/a Western Communications Company.¹ Harris filed an opposition to the finder's preference request on March 16, 1994, and Kay filed a reply to the opposition on April 19, 1994.

2. In his Request, Kay alleges a violation of section 90.155(a) of the Commission's rules,² which requires that stations in the private land mobile radio services be placed in operation within eight months from the date of grant or the authorization cancels automatically and must be returned to the Commission.³ Kay cites section 90.155(c) of the Commission's rules,⁴ which states that a base station is not considered to be placed in operation unless at least one associated mobile station is also placed in operation.⁵ Kay relies solely on Commission records as evidence that no mobile stations were authorized to operate on Harris's station during the eight-month construction period, and that Harris did not modify

¹ We note that this license was canceled on June 5, 2001 for failure to renew. However, it is still necessary for us to address the finder's preference request on the merits.

² Kay Request at 1-2.

³ 47 C.F.R. § 90.155(a).

⁴ Kay Request at 2.

⁵ 47 C.F.R. § 90.155(c).

his license to add mobile units.⁶ Kay also relies on this information to allege a violation of former rule sections 90.157(b),⁷ which stated that any station that has not operated for one year or more is considered to be permanently discontinued,⁸ and 90.157(a), which held that the license for a station shall cancel automatically upon permanent discontinuance and the licensee shall forward the license to the Commission.⁹

3. The Commission developed the finder's preference program in order to relieve the scarcity of spectrum in several 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"¹⁰ Under the finder's preference 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 then award a dispositive preference for those frequencies to the finder.¹¹

4. The Commission specifically excluded loading violations from the scope of the finder's preference program.¹² This is because it would be difficult to generate conclusive evidence of loading violations because loading is a dynamic concept that, by its very nature, can vary from day to day.¹³ Although Kay alleges a violation of former section 90.157(b), his finder's preference request relies entirely on loading records. Failure to license end users, as evidenced by Commission records, is not a violation subject to a finder's preference request.¹⁴ The finder's preference program was designed to supplement, rather than duplicate, our efforts.¹⁵ Relying solely on Commission records to support a finder's preference request merely duplicates our efforts.

⁶ Kay Request at 2.

⁷ *Id.*

⁸ 47 C.F.R. § 90.157(b) (1993).

⁹ 47 C.F.R. § 90.157(a) (1993).

¹⁰ 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, 7309, ¶ 77 (1991) (*Finder's Preference Report and Order*).

¹¹ The Commission discontinued the finder's preference program for the 800 MHz service on December 15, 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).

¹² *Finder's Preference Report and Order*, 6 FCC Rcd at 7305, ¶ 49 (1991).

¹³ *Id.*

¹⁴ *Id.* Violations are limited to a licensee's failure to construct, place in operation, or continue operation as noted in 47 C.F.R. § 90.173(k) (1994).

¹⁵ *Id.* ¶ 59.

5. Accordingly, IT IS ORDERED that, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, the finder's preference request filed by James A. Kay, Jr. on January 5, 1994, and assigned the above-referenced file number IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Katherine M. Harris
Deputy Chief, Commercial Wireless Division
Wireless Telecommunications Bureau