

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CASE No. 04-1014
—————

JAMES A. KAY, JR.

Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee
—————

ON APPEAL OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION
—————

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GLOSSARY

AVCOM	The licensee of SMR station WNPA325, the target of appellant Kay's finder's preference request.
ITA	Industrial Telecommunications Association. An industry frequency coordinator that identifies and coordinates radio frequency occupancy.
SMR	Specialized Mobile Radio. A private or common carrier land mobile radio system that provides voice and data communications.

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BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

JURISDICTION

This Court has jurisdiction pursuant to 47 U.S.C. § 402(b).¹

¹ Appellant Kay filed a notice of appeal under 47 U.S.C. § 402(b) of the FCC's dismissal of his application for a finder's preference, but this Court's decision in *Cassell v. FCC*, 154 F.3d 478 n.1 (D.C. Cir. 1998), which involved a denial of an application for a finder's preference, suggests that Kay should have filed a petition for review under 47 U.S.C. § 402(a). The Court does not have to resolve the jurisdictional question, however, because Kay's appeal was filed timely and in the proper court irrespective of whether Section 402(a) or 402(b) is the correct jurisdictional basis for this case.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are appended to the appellant's brief, except 47 C.F.R. § 90.173(k)(1992) which governs this case and is attached hereto.²

STATEMENT OF ISSUE PRESENTED

The finder's preference rule, 47 C.F.R. § 90.173(k)(2)(1992), was designed to encourage and reward reports to the Commission of mobile radio frequencies that were unused, either because the authorized station was never built or because the station discontinued operation. Because the rule was intended to generate new information, the rule states that "[t]he preference shall not apply . . . to any case under Commission review or investigation."

The issue presented in this case is whether the FCC reasonably held that a station's discontinued operation, which was reported in appellant Kay's application for a finder's preference, was implicated in a case that was already before the Commission so that the discontinuance could not serve as the basis for the requested finder's preference.

² Attached to, and quoted in, appellant's brief is the 1993 version of the rule, which is somewhat different. That version did not become effective until November 1993, after the filing of Kay's finder's preference application that is at issue in this case on October 12, 1993. *See Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations*, 8 FCC Rcd 6690 (1993)(amending the rule); *Memorandum Opinion and Order*, 58 FR 53,245 (Oct. 14, 1993)(noting the effective date of the amendment is November 1, 1993). The difference in the two versions is not of decisional significance.

COUNTERSTATEMENT

On appeal is a decision of the Federal Communications Commission to dismiss as untimely the application of appellant James A. Kay, Jr., for a “finder’s preference” by which he attempted to acquire a “dispositive preference” for a certain mobile radio license. A dispositive preference would have entitled Kay to apply for the license without being subject to mutually exclusive applications. Under Commission finder’s preference rules then in effect, a dispositive preference was awarded to those who informed the Commission that a mobile radio license was not being utilized, contrary to the Commission’s rules, either because the station was never built or because, as in this case, the station’s operation had been discontinued for more than one year. Kay’s application for a finder’s preference, based on his report of the station’s discontinuation of service for one year, was dismissed as untimely because the application was filed after the status of the target license was already implicated in a case that was “under review or investigation.” *See* 47 C.F.R. § 90.173(k)(2)(1992); *Request of James A. Kay, Jr., Seeking a Finder’s Preference for Call Sign WNPA325*, 17 FCC Rcd 16306 (Wireless Bureau 2002) (J.A. 85), *review denied*, 18 FCC Rcd 26468 (2003) (J.A. 97).

A. Regulatory Background: Specialized Mobile Radio Systems

In 1974 the FCC allocated new radio frequencies to both common carrier and private land mobile radio services to meet the growing public demand for mobile communications services.³ The commercially operated private radio systems are known as “Specialized Mobile Radio Systems,” or SMR. These systems provide voice and data communications services to eligible entities. *See* 47 C.F.R. § 90.7.

An SMR system usually consists of one or more base station transmitters, one or more antennas, and end user mobile radio units. The system may be either conventional or trunked. A conventional system allows individual end users the use of only one channel, although the system may contain multiple channels. A trunked system combines channels and contains microprocessing capabilities that automatically search for an open channel. A trunked system generally has exclusive use of all channels assigned to the system, whereas a conventional system attains exclusive use of its channel only after it is fully “loaded,” *i.e.*, it serves at least 70 mobile unit end users.

If the licensee of a trunked system wishes to integrate into its system the frequencies assigned to a conventional SMR in the same operational area, it must obtain the consent of the licensee of that conventional system. If the frequencies sought to be integrated are unused, either because the conventional system was not

³ *See Land Mobile Radio Service*, 46 F.C.C.2d 752 (1974)(subsequent history omitted).

built or because it went silent, the licensee of the trunked system must obtain the certification of an industry frequency coordinator, such as the Industrial Telecommunications Association (“ITA”), that the frequencies are vacant.⁴

The Commission previously required separate licensing of end users on SMR systems, but in 1992 it eliminated separate end user licensing in favor of permitting end users to operate under a blanket license issued to the SMR base station.⁵

B. Regulatory Background: The Finder’s Preference

In the years that followed the initial frequency allocations, the growth of SMR was dramatic. By the early 1990s virtually every channel designated for SMR in major markets had been assigned. In many areas of the country it had become difficult for new applicants to become licensed and difficult for existing licensees to expand their systems because of the scarcity of available spectrum.⁶

The Commission became aware that not all assigned frequencies were being utilized as required by Commission regulations, either because the authorized

⁴ See generally *Trunking in the Private Land Mobile Radio Services for More Effective and Efficient Use of the Spectrum*, 5 FCC Rcd 4016 (1990).

⁵ See *Amendment of Part 90 of the Commission Rules to Eliminate Separate Licensing of End Users of SMR Systems*, 7 FCC Rcd 5558 (1992).

⁶ See *Further Notice of Proposed Rulemaking*, 10 FCC Rcd 7970, 7975 (1994); *Report and Order*, 6 FCC Rcd 7297 at ¶¶ 2, 33 (1991) (“*Finder’s Preference Report and Order*”).

stations had not been built or because station operations had been terminated.⁷ The Commission also became aware that its own monitoring activities were inadequate to detect all such violations. To alleviate this problem, the Commission in 1991 adopted an incentive called a “finder’s preference” in which interested and qualified entities were encouraged to report nonoperational systems. If an individual reported an unconstructed or discontinued system, and if the Commission was thereby able to recapture the unused spectrum, that individual was rewarded with a “dispositive preference,” *i.e.*, he would be entitled to file an application for a license to use that spectrum without being subject to competition from mutually exclusive applications.⁸ “Through this program,” the Commission said in adopting the finder’s preference program, “we will enhance spectrum efficiency by identifying more unused channels and reassigning them to persons who will use them effectively.”⁹

The Commission stressed that because the finder’s preference was intended to help the Commission discover and recover unused channels, it exempted from the preference any channel scheduled for regular review or any case already under

⁷ Land mobile radio stations must be placed in operation within 12 months from the date of authorization, else the authorization automatically cancels and must be returned to the Commission. 47 C.F.R. § 90.155(a). (At the time this case was decided, some stations had to be built within eight months.) Likewise, a station license automatically cancels upon “permanent discontinuation” of operations, which is defined as a station that has not operated for one year or more. 47 C.F.R. § 90.157.

⁸ *Finder’s Preference Report and Order*, 6 FCC Rcd at 7302-03 ¶¶ 30-33.

⁹ *Finder’s Preference Report and Order*, 6 FCC Rcd at 7309 ¶ 77.

review or investigation.¹⁰ “The finder’s preference program will supplement rather than duplicate our compliance efforts,” the Commission explained.¹¹

The Commission promulgated the finder’s preference in an amendment to section 90.173 of its rules:

(k) Notwithstanding any other provisions of this Part, any eligible person may seek a dispositive preference for exclusive channel assignment in the [mobile radio] bands by submitting information that ultimately leads to the recovery of frequencies in these bands. Recovery of such frequencies will come about as a result of information provided regarding the failure of existing licensees to comply with various provisions of 90.155, 90.157, 90.629, 90.631(e) or (f), or 90.633(c) or (d) of this Part [*i.e.*, construction, placed-in-operation, and discontinuance-of-operation rules].¹²

(k)(2) Timeliness of finder’s request – . . . The preference shall not apply to any case scheduled for regular review during the Private Radio Bureau’s normal compliance activities or to any case under Commission review or investigation.¹³

The Commission discontinued the finder’s preference program for SMR in 1995 after transitioning from site-by-site licensing to geographic area licensing.¹⁴

¹⁰ *Finder’s Preference Report and Order*, 6 FCC Rcd at 7306-07 ¶¶ 57, 59. *See also Finder’s Preference NPRM*, 5 FCC Rcd 6401, 6404 (1990).

¹¹ *Finder’s Preference Report and Order*, 6 FCC Rcd at 7307 ¶ 59.

¹² 47 C.F.R. § 90.157 is the basis for Kay’s claim in this case. That rule states, as mentioned in note 7 above: “A station license shall cancel automatically upon permanent discontinuance of operations. Unless stated otherwise in this part or in a station authorization, for purposes of this section, any station which has not operated for one year or more is considered to have been permanently discontinued.”

¹³ *See Finder’s Preference Report and Order*, 6 FCC Rcd at 7313-14 ¶ 7.

¹⁴ *See Amendment of Part 90 Concerning the Commission’s Finder’s Preference Rules, Report and Order*, 13 FCC Rcd 23,816 (1998); *Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems*, 11 FCC Rcd 1463, 1634 ¶ 416 (1995).

C. Factual Background: The License at Issue

In late 1992, William F. Kelsey, d/b/a/ AVCOM, was the licensee of conventional SMR station WNPA325, located in Banning, California. The station operated on the frequency pair 809/854.7125 MHz, which it shared with appellant Kay's conventional SMR station WNZZ731. Kay also operated a trunked SMR system in the same area under the call sign WNLJ306.

AVCOM served only 12 end users, all of which were licensed to Cardin Asphalt, Inc., under the call sign WNVW802. On August 31, 1992, Cardin and Los Angeles Scrap Iron & Metal Corp. ("L.A. Scrap"), which was a customer of Kay's SMR station WNZZ731, filed an application with the Commission requesting that Cardin's end user license for Station WNVW802 be assigned to L.A. Scrap and associated with Kay's base station WNZZ731. On October 7, 1992, the FCC granted the unopposed application, and as a consequence, as of that date AVCOM was without any customers and fell silent.

Kay then obtained a certification from an industry frequency coordinator, ITA, that AVCOM was nonoperational, and the 809/854.7125 MHz frequency pair to which AVCOM had been licensed under the call sign WNPA325 was unoccupied. On October 29, 1992, Kay filed an application to modify his license to allow integration of those frequencies with his trunked system, station WNLJ306. See pages 4-5 above.¹⁵

¹⁵ "FCC Application for Wireless Telecommunications Bureau Radio Service Authorization," file number 613739, filed Oct. 29, 1992, by James A. Kay, Jr. (J.A. 111).

AVCOM and Cardin filed petitions to deny the requested modification on the ground that the application to assign the end user license from Cardin to L.A. Scrap, which had been approved by the Commission and which enabled the filing of the modification application, was fraudulent. They claimed that the assignment application had been signed by a Cardin employee who had no authority to do so.¹⁶

As a result of this fraudulent assignment, they said:

[T]he loading count for AVCOM's station dropped to zero, thus permitting the Industrial Telecommunications Association (ITA) to erroneously certify that AVCOM's station WNPA 325 was non-operational. On the basis of AVCOM's erroneous designation by ITA as being non-operational, James A. Kay, Jr. submitted the above-referenced modification application requesting the consolidation of a co-channel single channel station into his existing trunked SMR without first obtaining AVCOM's concurrence.¹⁷

AVCOM and Cardin also asked the Commission to reinstate Cardin's license as an authorized end user of AVCOM's SMR system.¹⁸

On October 12, 1993 – approximately one year after Kay filed his modification application and some eight months after AVCOM and Cardin filed their petitions to deny that application – Kay filed the instant application for a finder's preference for AVCOM's station WNPA325. Kay stated that “[t]he

¹⁶ “Petition to Deny Application for Modification,” filed Feb. 4, 1993, by AVCOM, at 2 (J.A. 124). *See also* “Petition to Dismiss or Deny,” filed March 29, 1993, by Cardin Asphalt, Inc. (J.A. 217).

¹⁷ AVCOM's “Petition to Deny,” *supra*, at 1-2 (J.A. 123-24). As mentioned above at pages 4-5, if the licensee of a trunked system wishes to integrate the frequencies assigned to a conventional SMR in the same operational area, it must first obtain the consent of the licensee of that SMR.

¹⁸ AVCOM's “Petition to Deny,” *supra*, at 2 (J.A. 124); Cardin's “Petition to Dismiss or Deny,” *supra*, at 1-2 (J.A. 217-18).

Commission's records show that the last authorized end user of AVCOM's station, Cardin Asphalt (Cardin), discontinued operation in association with station WNPA325 more than one year ago." Kay then invoked 47 C.F.R. § 90.157, which states that "any station which has not operated for one year or more is considered to have been permanently discontinued."¹⁹

On October 5, 1995, the Commission's Office of Operations in the Wireless Telecommunications Bureau dismissed as untimely Kay's request for finder's preference.²⁰ (This decision is explained below.) A few days later the Office issued an order that agreed with AVCOM and Cardin that the assignment of the Cardin end user license to L.A. Scrap had been fraudulently obtained and held the assignment void *ab initio*. The Office therefore reinstated and renewed AVCOM's license for station WNPA325, which rendered defective Kay's application to integrate WNPA325 into its trunked system, and it accordingly denied Kay's application for modification.²¹

AVCOM thereafter ceased operation, and at AVCOM's request the Commission cancelled the AVCOM license for WNPA325 as of December 22, 2001. By that time, the Commission had transitioned to a system of geographic SMR licensing by which the licenses were no longer site-specific and were

¹⁹ "Finder's Preference Request," filed by James A. Kay, Jr., on Oct. 11, 1993, at 1-2 (J.A. 8-9).

²⁰ Letter from William H. Kellett, dated Oct. 5, 1995, *recon. denied sub nom. Request of James A. Kay, Jr., Seeking a Finder's Preference for Call Sign WNPA325*, 17 FCC Rcd 16,306 (2002), *review denied*, 18 FCC Rcd 26,468 (2003) (J.A. 60, 85, 97).

²¹ Letter from William H. Kellett, dated Oct. 12, 1995 (J.A. 190), *pet. for reconsideration pending*.

distributed through competitive bidding.²² Indeed, even before AVCOM ceased operating, the frequencies assigned to WNPA325 had also been assigned to Nextel Spectrum Acquisition Corp. on a wide-area basis pursuant to an auction in late 2000.²³

In a proceeding unrelated to the facts underlying the instant case, the Commission later revoked 34 of Kay's wireless radio licenses for lack of candor and imposed a forfeiture of \$10,000 for failing to respond to Commission inquiries.²⁴ Among the licenses revoked was that for WNJL306, the trunked SMR system into which Kay planned to integrate AVCOM's license for conventional SMR station WNPA325.²⁵

²² *Amendment of Part 90 of The Commission's Rules, First Report and Order*, 11 FCC Rcd 1463 (1995); *Implementation of Sections 3(n) and 332 of the Communications Act, Third Report and Order*, 9 FCC Rcd 7988 (1994).

²³ During the time AVCOM and Nextel were both operating on the same frequency pair, Nextel was required to protect AVCOM's grandfathered operations. If it were ultimately determined as a result of this litigation that Kay is entitled to a dispositive finder's preference for the frequency pair previously licensed to AVCOM's WNPA325 and still part of Nextel's area-wide service, Nextel would again be required to protect Kay's operations on this frequency. See 47 C.F.R. § 90.693; *Amendment of Part 90 of the Commission's Rules, Second Report and Order*, 12 FCC Rcd 19,079 (1997).

²⁴ See *In re James A. Kay, Jr.*, 17 FCC Rcd 1834 (2002), *recon. granted in part*, 17 FCC Rcd 8554, *appeal pending sub nom. Kay v. FCC*, D.C. Cir. 02-1175 (filed June 5, 2002), *consolidated with Sobel v. FCC*, D.C. Cir. 04-1045.

²⁵ See *In re James A. Kay, Jr.*, *supra*, 17 FCC Rcd at 8560. Kay was not disqualified to be a Commission licensee, so even if the Commission is affirmed in Case No. 02-1175, the instant case will not be moot. That is, if this litigation ultimately results in a determination that Kay is entitled to a finder's preference for Station WNPA325, he would be allowed to apply for that station notwithstanding the revocation of his other SMR licenses. If his application were granted, he could operate a single-channel conventional SMR on the acquired channel – a highly unlikely proposition in today's marketplace – or, more likely, he could sell the rights to that channel to Nextel which would otherwise be required to protect Kay's SMR operations. See note 23 above.

D. The Commission's Decision

As mentioned above, The Wireless Telecommunications Bureau's Office of Operations, by letter decision in October 1995, dismissed Kay's application for a finder's preference. The Office held that "[t]he target license was the subject of a Commission compliance action at the time of the filing of the finder's preference request. Accordingly, no finder's preference is available for this station license. 47 C.F.R. § [90.] 173(k)(2)."²⁶

Kay petitioned for reconsideration of this decision, contending that the pending proceeding involving Kay's application for modification and AVCOM's and Cardin's petitions to deny did not constitute a compliance action.²⁷ The Bureau denied reconsideration, observing that 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."²⁸ The Bureau held that the then-pending modification proceeding, and the related effort by AVCOM and Cardin to reinstate Cardin's end user license, fell within the latter part of the rule's exemption.²⁹

²⁶ Letter from William H. Kellett, dated Oct. 5, 1995, *supra*. (J.A. 60). At the time of this decision, 47 C.F.R. § 90.173(k)(2)(1992) stated: "The preference shall not apply to any case scheduled for regular review during the Private Radio Bureau's normal compliance activities or to any case under Commission review or investigation." See note 2 above.

²⁷ "Petition for Reconsideration," filed Nov. 6, 1995, by James A. Kay, Jr., at 1-2 (J.A. 61-62).

²⁸ *Request of James A. Kay, Jr., Seeking a Finder's Preference for Call Sign WNP4325*, *supra*, 17 FCC Rcd at 16,308 (J.A. 87).

²⁹ *Id.* at 16,309 (J.A. 88).

“[T]he finder’s preference program was designed to uncover facts of which the Commission was not aware or could not readily ascertain,” the Bureau explained, and “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.”³⁰ Rather, the Bureau continued, it was the assignment of Cardin’s end user license – the validity of which was already being litigated before the Commission at the time Kay filed his finder’s preference application – that led directly to Kay’s allegation that station WNPA325 was non-operational in violation of Commission rules and therefore a proper subject for a finder’s preference request. “Thus,” the Bureau concluded, “Kay did not identify to the Commission [for the first time] a non-operational licensee; he only harvested information already known to the Commission.”³¹

On application for review, the full Commission agreed with the Bureau:

At the time Kay filed the Finder’s Preference Request, 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 Cardin’s end user license from Cardin to [L.A. Scrap], a customer of Kay. That review was initiated by the filing of Petitions to Deny by AVCOM on February 4, 1993, and Cardin on March 29, 1993.³²

The Commission rejected Kay’s argument that under 47 C.F.R. § 90.173(k)(2) the matter under investigation had to be directly related to the specific

³⁰ *Id.* at 16,308-09 (J.A. 87-88).

³¹ *Id.* at 16,309 (J.A. 88).

³² *Request of James A. Kay, Jr., Seeking a Finder’s Preference for Call Sign WNPA325*, 18 FCC Rcd 26,468, 26,469 ¶ 4 (2003) (J.A. 98).

rule violations referenced in the finder's preference request, rather than peripheral. "[T]here is no authority for such a narrow reading of the rule," the Commission said.³³ In any event, the Commission continued, "we disagree that the existing investigation into the alleged unauthorized assignment of Cardin's license was 'peripheral' to the status of call sign WNPA325."³⁴ The Commission explained:

[T]he alleged unauthorized assignment of Cardin's license provided the direct basis for Kay's Finder's Preference Request alleging that station WNPA325 permanently discontinued operations in violation of the Commission's rules. Were it not for the assignment of the last end user from AVCOM's SMR system, Kay could not have argued in the Finder's Preference Request that AVCOM permanently discontinued operations as a result of a lack of authorized users.³⁵

Finally, the Commission rejected Kay's argument that his claim for a finder's preference should be granted because he was the one who furnished the information that led to the investigation of the status of WNPA325. The Commission stated:

The fact that the Commission review or investigation arose from Kay's separate attempt to obtain the frequency associated with call sign WNPA325 through the filing of a modification application does not invalidate rule 90.173(k)(2), nor its application to a filing involving an allegation of permanent discontinuance of operations.³⁶

Moreover, the Commission noted, "it was never [the Commission's] intention to offer finder's preference on an unrestricted basis."³⁷

³³ *Id.* at 26,472 ¶ 8 (J.A. 101).

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Id.* at 26,472 ¶ 9 (J.A. 101).

³⁷ *Ibid.*, quoting *Finder's Preference Report and Order*, *supra*, 6 FCC Rcd at 7307 ¶ 59.

SUMMARY OF ARGUMENT

The finder's preference is unavailable with respect to "any case under Commission review or investigation." 47 C.F.R. § 90.173(k)(2)(1992)(emphasis added). Kay argues that "any case" includes only those in which the Commission is investigating non-construction or permanent discontinuance of the target station, brief at 22, but Kay provides no basis for such a narrow reading. On the contrary, such a restriction would contradict the purpose of the finder's preference, which was to discover and recover unused channels.³⁸ Here, by Kay's own admission, the pleadings in the license modification proceeding showed that "as of October 7, 1992, there were no mobile units associated with Station WNPA325." Brief at 23. In other words, the pleadings informed the Commission that the station was nonoperational; Kay did not provide the Commission with any information in his application for a finder's preference that the Commission did not already have before it. Rather, he "harvested information already known to the Commission."³⁹

³⁸ *Finder's Preference Report and Order*, 6 FCC Rcd at 7302-03 ¶¶ 30-33.

³⁹ *Request of James A. Kay, Jr., Seeking a Finder's Preference for Call Sign WNPA325*, *supra*, 17 FCC Rcd at 16,309 (J.A. 88).

ARGUMENT

THE FCC’S HOLDING THAT THE MODIFICATION PROCEEDING FELL UNDER THE “ANY CASE UNDER REVIEW OR INVESTIGATION” EXEMPTION WAS A REASONABLE EFFECTUATION OF BOTH RULE AND POLICY.

It is well established that the FCC’s interpretation of its own rule is “controlling” unless it is “plainly erroneous or inconsistent with the regulation.”⁴⁰

That deferential standard is easily met here.

The finder’s preference rule, 47 C.F.R. § 90.173(k)(2)(1992), states that “[t]he preference shall not apply . . . to any case under Commission review or investigation.” (emphasis added). The Commission interpreted that rule in this case to mean that the preference was not available where the fact underlying the request – the cessation of operations by SMR station WNPA325 – was already before the Commission in the context of Kay’s modification of license application and the petitions to deny that application. That interpretation is perfectly consistent with the letter of the regulation as well as the policy behind the regulation, namely, to discover and recover unused SMR channels. Kay did not identify for the Commission in his finder’s preference request an unused SMR channel about which the Commission did not already know.

Kay objects to the Commission’s holding that AVCOM’s violation of the rule against discontinuance of service for one year or more, 47 C.F.R. § 90.157, which provided the formal basis for Kay’s finder’s preference application, was related to a case “under Commission review or investigation” in the modification

⁴⁰ *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Cassell v. FCC*, *supra*, 154 F.3d at 483; *C.F. Communications Corp. v. FCC*, 128 F.3d 735, 738 (D.C. Cir. 1997).

proceeding and therefore could not be the basis for a finder's preference request. Kay contends that his modification application had nothing to do with AVCOM's rule violation. Indeed, Kay continues, AVCOM's cessation of service did not ripen into a violation of the rule against discontinuance for one year or more until October 7, 1993, just a few days before Kay filed his finder's preference application on October 12, 1993. Therefore, he concludes, the rule violation could not have been a matter already under review or investigation in the modification proceeding. Brief at 22-24.

The critical flaw in Kay's argument is that the rule does not exempt from a finder's preference "an alleged rule violation under Commission review or investigation." The rule uses the much more expansive term "any case under Commission review or investigation." *See* 47 CFR § 90.173(k)(2)(1992). Thus, it is immaterial whether the modification proceeding directly involved the precise issue of whether AVCOM had violated the rule against nonoperation for one year, which supported Kay's application for finder's preference. Rather, what matters is that the modification proceeding placed AVCOM's licensing status squarely before the Commission when Kay reported in his modification application that "as of October 7, 1992 there were no mobile units associated with Station WNPA325," *i.e.*, the station was nonoperational. Brief at 23. It does not matter how long AVCOM had been nonoperational. At the time Kay filed his request for a finder's preference, the basis for that request was already implicated in a "case under Commission review or investigation."

The strategic choice to file initially an application for modification and then an application for a finder's preference was Kay's. Kay could have waited until after October 7, 1993 – the date as of which he asserts that AVCOM was in violation of the “one year out of service” rule – and then filed his finder's preference request. Then, if successful, he could have filed his modification application to incorporate WNPA325 into his trunked system. Instead, not content to wait until October 1993 when he believed that AVCOM's silence had ripened into a violation of 47 C.F.R. § 90.157, Kay chose to file his modification application at the earliest opportunity in October 1992. That was his right, but he should have known that by reporting AVCOM's discontinuation of service, he was forfeiting his right under 47 C.F.R. § 90.173(k)(2)(1992) to claim a year later in his finder's preference application that he was telling the Commission something it did not already know.

While it is true that Kay himself was responsible for reporting the facts surrounding AVCOM's termination of service in his modification application, the fact remains that his later application for a finder's preference did not alert the Commission to the previously unknown existence of an unused SMR frequency and thus it did not serve the purpose for which the finder's preference was intended. The Commission cannot be faulted for declining to award Kay the right to file an uncontested application for the vacated frequency where neither the finder's preference policy nor the letter of the rule would be served.

CONCLUSION

Nothing in the Commission's interpretation of the rule in this case contradicts the letter or policy of the rule or any previous Commission construction of the rule. The Commission's interpretation is not "plainly erroneous" and so is entitled to judicial deference,⁴¹ and its decision to dismiss Kay's application for a finder's preference should be affirmed.

Respectfully submitted,

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⁴¹ See *Auer v. Robbins*, *supra*, 519 U.S. at 461; *Cassell v. FCC*, *supra*, 154 F.3d at 483. See also *Capital Network System, Inc. v. FCC*, 28 F.3d 201, 206 (D.C. Cir. 1994), quoting *United States v. Larionoff*, 431 U.S. 864, 872 (1977).

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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)	
JAMES A. Kay, Jr.)	
)	
APPELLANT)	
)	
V.)	CASE NO. 04-1014
)	
FEDERAL COMMUNICATIONS COMMISSION)	
)	
APPELLEE)	
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CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying “Brief for the Federal Communications Commission” in the captioned case contains 4806 words.

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