

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

In the Matter of )  
 )  
**MAYER REPROGRAPHICS, INC.** ) FCC File No. 0000645662  
 )  
Application for Modification of Authorization for )  
Station KNGK514, San Diego, California )

**ORDER ON FURTHER RECONSIDERATION**

**Adopted:** January 22, 2007

**Released:** January 23, 2007

By the Chief, Mobility Division, Wireless Telecommunications Bureau:

1. *Introduction.* In this *Order on Further Reconsideration*, we deny the Petition for Reconsideration filed by Agnes Pennington d/b/a Radio America (Pennington) on July 7, 2003 (Pennington PFR).<sup>1</sup> Pennington seeks reconsideration of a June 4, 2003 *Order on Reconsideration*<sup>2</sup> by the Wireless Telecommunications Bureau's Public Safety and Private Wireless Division<sup>3</sup> that denied Pennington's petition for reconsideration<sup>4</sup> of the January 7, 2002 grant of the above-captioned application to modify the license of Mayer Reprographics, Inc. (Mayer) for Station KNGK514, San Diego, California. For the reasons set forth below, we deny the instant Pennington PFR.

2. *Background.* On March 1, 2000, the Commission renewed Mayer's authorization to operate Station KNGK514 on 811.475/856.475 MHz using a community repeater located at Mount San Miguel, San Diego. On July 10, 2001, Pennington filed a complaint with the Commission's Enforcement Bureau, claiming that Mayer's license had canceled automatically pursuant to Section 90.157 of the Commission's Rules<sup>5</sup> because the station was not operational for a period of more than twelve months.<sup>6</sup>

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<sup>1</sup> Petition for Reconsideration, filed July 7, 2003, by Agnes Pennington d/b/a Radio America (Pennington PFR).

<sup>2</sup> See Mayer Reprographics, Inc., *Order on Reconsideration*, 18 FCC Rcd 11328 (WTB PSPWD 2003) (*Mayer Order*).

<sup>3</sup> The Commission reorganized the Wireless Telecommunications Bureau effective November 13, 2003, and the relevant duties of the Public Safety and Private Wireless Division were assumed by the Public Safety and Critical Infrastructure Division. See Reorganization of the Wireless Telecommunications Bureau, *Order*, 18 FCC Rcd 25414, 25414 ¶ (2003). Pursuant to a Commission reorganization effective September 25, 2006, certain duties of the Public Safety and Critical Infrastructure Division were assumed by the Mobility Division. See Establishment of the Public Safety and Homeland Security Bureau, *Order*, 21 FCC Rcd 10867 (2006).

<sup>4</sup> Petition for Reconsideration and Request for License Revocation Proceedings, filed Feb. 6, 2002, by Agnes Pennington d/b/a Radio America (2002 PFR).

<sup>5</sup> 47 C.F.R. § 90.157 (license for a station which has not operated for one year or more cancels automatically).

3. On October 31, 2001, Mayer filed an application to modify its license to relocate its transmitter for Station KNGK514 to another location in San Diego.<sup>7</sup> On November 15, 2001, Pennington filed an informal request for Commission action, seeking denial of the Mayer modification application on the grounds that the license had canceled automatically pursuant to Section 90.157.<sup>8</sup> On January 7, 2002, the Commission granted the Mayer modification application. On February 6, 2002, Pennington filed a petition for reconsideration of the grant, and requested that the Commission cancel Mayer's license, again alleging that the license for Station KNGK514 canceled automatically pursuant to Section 90.157 because Mayer's station had not been operational for a period of more than twelve consecutive months.<sup>9</sup> Pennington submitted an affidavit from the operator of the community repeater at Mount San Miguel stating that Mayer canceled its service agreement effective December 31, 1999, and that the community repeater was dismantled on March 20, 2000.<sup>10</sup> Pennington stated that she monitored the Mayer frequency for more than a year after that date, and did not detect any activity.<sup>11</sup> Further, she said that Henry Mayer told her in July 2001 that Mayer was using the frequency as a mobile-only system without the repeater.<sup>12</sup> Since Mayer did not file the modification application until October 31, 2001, Pennington contended that Station KNGK514 had not been operational for a period of more than twelve consecutive months, resulting in the automatic termination of its authorization for Station KNGK514.<sup>13</sup>

4. In response, Mayer explained that it "made a transition from using a community repeater to using our own repeater," but was "unable to pinpoint the specific dates."<sup>14</sup> Mayer stated that its Mount San Miguel transmitter site and its mobile relay remained physically located in the "exact same location and in the same building in which it had always been in" through the end of 2001, that it did not remove its equipment from this location until February 14, 2002, and that it began transmitting from its new site on March 8, 2002, pursuant to the modification granted by the Commission on January 7, 2002.<sup>15</sup> Mayer also provided a letter dated February 14, 2002 from Pinnacle Towers Inc., which owns the Mount San Miguel site, stating that Mayer's equipment for Station KNGK514 was removed on that date.<sup>16</sup> Mayer suggested

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<sup>6</sup> Letter, dated July 10, 2001, from Agnes Pennington to Federal Communications Commission, Enforcement Bureau.

<sup>7</sup> FCC File No. 0000645662 (filed Oct. 31, 2001).

<sup>8</sup> Letter, dated Nov. 15, 2001, from Agnes Pennington to Federal Communications Commission, Wireless Telecommunications Bureau, Public Safety and Private Wireless Division, Land Mobile Branch.

<sup>9</sup> 2002 PFR at 1-3, Ex. 5.

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

<sup>11</sup> *Id.* at Ex. 1.

<sup>12</sup> *Id.* at 3.

<sup>13</sup> *Id.* at 1-3.

<sup>14</sup> See Letter, dated August 13, 2002, from Jack Mayer, Mayer Reprographics, Inc., to Roberto Mussenden, Federal Communications Commission at 1 (Mayer August Letter).

<sup>15</sup> See Letter, dated Mar. 9, 2002, from Jack Mayer, Mayer Reprographics, Inc., to Annette Ritchie, Federal Communications Commission at 3 (Mayer March Letter).

<sup>16</sup> *Id.* at Ex. IV.

that Pennington's monitoring of the channel may not have detected any use because Mayer uses its radio system only sporadically, and then only to maintain contact with personnel responsible for delivering blueprints and other company products to customers and to provide directions in the event that a member of the delivery crew is unable to find a customer's location.<sup>17</sup> Mayer also stated that Henry Mayer, from whom Pennington stated she obtained her information regarding Mayer's operations, had no knowledge of Mayer's telecommunications activities, because Jack Mayer handles such matters.<sup>18</sup> Mayer stated that it "continued radio communications on the community repeater long past the date that Agnes Pennington is using as a termination date for our community repeater" and that it was "certain that there was not more than a year between the time that we discontinued use of the community repeater, and the time we began use of our own repeater,"<sup>19</sup> but it did not produce specific documentation regarding its operations between December 31, 1999 and March 2002.<sup>20</sup>

5. On June 4, 2003, the Public Safety and Private Wireless Division denied Pennington's petition for reconsideration, concluding that the record did not establish that the license for Station KNGK514 canceled automatically.<sup>21</sup> Specifically, the *Order on Reconsideration* concluded that Pennington's statements did not sufficiently demonstrate that Mayer failed to operate the subject station for an entire year, and that Pennington failed to supply sufficient data, such as monitoring studies, in support of her allegations.<sup>22</sup> It also noted that Pennington's allegations of discontinuance of operation are undercut by the letter confirming the 2002 removal of Mayer's equipment from Mount San Miguel.<sup>23</sup>

6. In the instant petition for reconsideration, Pennington argues that the Public Safety and Private Wireless Division erred in holding that the record did not establish that Mayer failed to operate Station KNGK514 for an entire year. Specifically, Pennington argues that she produced credible disinterested evidence to support a *prima facie* case of discontinuance of operation, which Mayer failed to rebut.<sup>24</sup> She also argues that the reliance in the *Order on Reconsideration* on a lack of monitoring studies ignores Pennington's status as a co-channel licensee to Station KNGK514,<sup>25</sup> which requires her to monitor the

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<sup>17</sup> Mayer August Letter at 3-4.

<sup>18</sup> Mayer March Letter at 3. Mayer provided an affidavit from Henry Mayer stating that, while he did have a brief conversation with Agnes Pennington, he did not discuss the station's operations, because he has no knowledge of such matters. *Id.* at Ex. V.

<sup>19</sup> *Id.* at 3.

<sup>20</sup> *Mayer Order*, 18 FCC Rcd at 11330 ¶ 6.

<sup>21</sup> *See id.* at 11330 ¶ 7.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *See* Pennington PFR at 3-4, 7-9. Pennington argues that Commission precedent involving similar situations holds against parties that produced limited evidence when rebutting allegations of discontinuance of station operation. *Id.* at 9 (citing *West Coast Cab Company, Memorandum Opinion and Order*, 15 FCC Rcd 5909 (2000); *Joseph P. Mayenchak Jr. d/b/a J & H Radio, Order*, 15 FCC Rcd 5869 (WTB PSPWD 2000)).

<sup>25</sup> Pennington PFR at 2-3 n.6.

channel each and every time she transmits pursuant to Section 90.403(e) of the Commission's Rules.<sup>26</sup>

7. *Discussion.* As an initial matter, we note that the instant petition raises no new facts that either have not already been considered or could not have otherwise been known or learned by Pennington through the exercise of ordinary due diligence.<sup>27</sup> Pennington states that the Division erred because third party evidence already entered into the record supports a *prima facie* showing that the station was not operational for a period of a year or more. Specifically, Pennington cites affidavits from third parties that state that Mayer had discontinued service on its repeater effective December 31, 1999, and that the repeater was deconstructed on March 20, 2000.<sup>28</sup> She then argues that because Mayer failed to produce evidence sufficient to rebut this showing, Commission precedent required the Division to find that Mayer had not satisfied the evidentiary burden supporting Mayer's claim that the station was operational.<sup>29</sup>

8. However, Commission precedent also requires claims of a station's non-operation or permanent discontinuance should be substantiated by detailed radio frequency (RF) monitoring studies.<sup>30</sup> As noted in the *Order on Reconsideration*, Pennington did not submit monitoring studies to substantiate claims that operation of Station KNGK514 had permanently discontinued and therefore cancelled automatically. Pennington argues that she was not engaged in mere "sporadic monitoring" because, as a co-channel licensee, she had to monitor the channel before transmitting, which obviates the need for detailed monitoring studies.<sup>31</sup> We disagree, for Commission precedent rejects claims based on casual monitoring, even when the complainant is a co-channel licensee.<sup>32</sup> Moreover, Pennington did not provide evidence of the frequency of transmissions from her co-channel facility, thus failing to provide any evidence of the frequency of her monitoring. The Commission requires, at a minimum, proof of detailed RF monitoring studies to substantiate allegations of permanent discontinuance of operations to avoid the very outcome now sought by Pennington—that is, cancellation of a license based on third party statements or second-hand knowledge.

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<sup>26</sup> 47 C.F.R. § 90.403(e).

<sup>27</sup> See 47 C.F.R. § 1.106(b)(2), (c)(1).

<sup>28</sup> Pennington PFR at 3-4.

<sup>29</sup> *Id.* at 7-9.

<sup>30</sup> See, e.g., S&L Teen Hospital Shuttle, *Memorandum Opinion and Order*, 16 FCC Rcd 8153, 8157 ¶ 8 (2001) (allegation of inoperation deemed unsubstantiated without monitoring studies) (*S&L*); Quatron Communications, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 4749, 4753 ¶ 13 (2000) (evidence of sporadic monitoring by itself does not conclusively demonstrate that a station licensee has discontinued operations as defined in Section 90.157 of the Commission's Rules) (*Quatron*); Cellular Design Corporation, *Memorandum Opinion and Order*, 14 FCC Rcd 13059, 13064 ¶ 12 (1999) (an allegation of sporadic monitoring, by itself, is insufficient to conclusively demonstrate that a station has permanently discontinued operation) (*Cellular Design*); University of Southern California, *Memorandum Opinion and Order*, 16 FCC Rcd 2978, 2982 ¶ 11 (WTB PSPWD 2001) (sporadic monitoring of a channel does not make a *prima facie* case that a licensee has permanently discontinued operations); Mildred Ballentine, *Memorandum Opinion and Order*, 14 FCC Rcd 18956, 18957-58 ¶ 5 (WTB CWD 1999) (an allegation of sporadic monitoring is insufficient to demonstrate non-operation).

<sup>31</sup> Pennington PFR at 2-3 n.6.

<sup>32</sup> See, e.g., *S&L*, 16 FCC Rcd at 8157 ¶ 8; *Quatron*, 15 FCC Rcd at 4753 ¶ 13; *Cellular Design*, 14 FCC Rcd at 13064 ¶ 12.

9. *Conclusion.* Although it is conceivable that Station KNGK514 was non-operational for a period of time, Pennington bears the burden to demonstrate *prima facie* that the station was non-operational for a least a year or more. The *Order on Reconsideration* correctly determined that Pennington failed to substantiate her claim with the requisite studies, and thus properly denied the previous petition for reconsideration. Accordingly, for the reasons stated herein, the instant petition for reconsideration is denied.

10. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 405 of the Communications Act, 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 Agnes Pennington d/b/a Radio America on July 7, 2003 IS DENIED.

11. 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

Roger S. Noel  
Chief, Mobility Division  
Wireless Telecommunications Bureau