

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

In the Matter of)	
)	
SAMUEL MOSES PR)	
Application to Operate an Industrial/Business)	File Nos. 0000415681, 0000423812
Station in the Private Land Mobile Radio Services)	
(YG) in Montrose, California)	
)	
Application for Assignment of Industrial/Business)	File No. 0002100058
Station WPSI886 in the Private Land Mobile)	
Radio Services (YG) in Montrose, California)	
)	
KEVIN R. NIDA)	
Applications for Assignment of)	File Nos. 0002134475, 0002134486
Industrial/Business Stations WPSI886 and)	
WQAK850 in the Private Land Mobile Radio)	
Services (YG) in Montrose, California)	
)	
Application for Special Temporary Authority to)	FCC File No. 0002799178
Operate an Industrial/Business Station in the)	
Private Land Mobile Radio Services (YG) in)	
Montrose, California)	
)	
JAMES A. KAY, JR.)	
Application for Modification of the License for)	File No. 0001419150
Industrial/Business Pool, Commercial Trunked)	
(YK) Station KJV843 in Los Angeles, California)	
)	
Application for a New License for an)	File No. 0001420784
Industrial/Business Pool, Commercial Trunked)	
(YK) Station in Los Angeles, California)	

SECOND ORDER ON FURTHER RECONSIDERATION

Adopted: June 29, 2009

Released: June 29, 2009

By the Acting Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. Kevin R. Nida (Nida) requests reconsideration and stay of actions taken by the Wireless Telecommunications Bureau (Bureau) and the Bureau's Mobility Division (MD) regarding the above-captioned applications. Specifically, on October 4, 2006, the Bureau released an *Order on Further Reconsideration (2006 Order)*¹ that, in relevant part, deleted eight of nine frequency pairs from Nida's licenses for Private Land Mobile Radio (PLMR) Industrial/Business (I/B) Pool Stations WPSI886 and WQAK850 (Station WPSI886/WQAK850).² Shortly thereafter, MD returned to pending status and granted a new station application filed by James A. Kay, Jr. (Kay) that had previously been dismissed

¹ Samuel Moses, *Order on Further Reconsideration*, 21 FCC Rcd 11257 (WTB 2006) (2006 Order).

² As explained below, the license for Station WQAK850 duplicates the license for Station WPSI886.

because the proposed operations would cause interference to Station WPSI886. Similarly, in an *Order* released October 17, 2006 (*MD Order*),³ MD indicated that it would grant a Kay modification application that had been dismissed for the same reason once Kay amended it to reflect the intervening assignment of the license, and dismissed as moot Kay's petition for reconsideration of the dismissal of the applications.

2. Nida informally requested a stay of the *2006 Order* on October 24, 2006 (Informal Request for Stay);⁴ requested special temporary authority (STA) to continue to operate on the eight deleted frequency pairs during the pendency of this proceeding on October 27, 2006 (STA Request),⁵ and, on October 31, 2006, requested reconsideration of the *2006 Order* or in the alternative a waiver of the frequency coordination requirements for Station WPSI886/WQAK850 (Nida First Petition),⁶ and formally requested a stay of the *2006 Order* (Request for Stay).⁷ In the Request for Stay, Nida also requested a stay of the *MD Order* and the associated licensing actions. On November 6, 2006, Nida requested reconsideration of the *MD Order* (Nida Second Petition).⁸ For the reasons set forth below, we deny the Nida First Petition, and dismiss as moot the Informal Request for Stay, Request for Stay, STA Request, and Nida Second Petition.

3. Kay and Comm Enterprises, LLC (Comm Enterprises) jointly filed a petition seeking partial reconsideration of the *2006 Order* on November 3, 2006 (Kay/Comm Enterprises Petition), asking the Bureau to delete the remaining frequency pair authorized to Station WPSI886/WQAK850.⁹ For the reasons set forth below, we dismiss the Kay/Comm Enterprises Petition.

³ James A. Kay, Jr., *Order*, 21 FCC Rcd 11747 (WTB MD 2006) (*MD Order*).

⁴ Letter from Delaney M. DiStefano, Counsel for Kevin R. Nida, to Catherine W. Seidel, Acting Chief, Wireless Telecommunications Bureau (Oct. 24, 2006). Kay and Mobile Relay Associates (MRA) filed oppositions. Letter from Robert J. Keller, Counsel for James A. Kay, Jr., to Catherine W. Seidel, Acting Chief, Wireless Telecommunications Bureau (Oct. 25, 2006); Letter from David J. Kaufman, Counsel for Mobile Relay Associates to Catherine W. Seidel, Acting Chief, Wireless Telecommunications Bureau (Oct. 25, 2006).

⁵ FCC File No. 0002799178 (Oct. 27, 2006). Kay and MRA requested that no action be taken on the application. *See* Letter from Robert J. Keller, Counsel for James A. Kay, Jr., to Catherine W. Seidel, Acting Chief, Wireless Telecommunications Bureau (Oct. 31, 2006); Letter from David J. Kaufman, Counsel for Mobile Relay Associates, to Catherine W. Seidel, Acting Chief, Wireless Telecommunications Bureau (Nov. 1, 2006).

⁶ Petition for Reconsideration and Request for Waiver, filed by Kevin R. Nida (Oct. 31, 2006) (Nida First Petition). Kay and MRA filed oppositions. Opposition to Nida's Petition for Reconsideration, filed by Mobile Relay Associates (Nov. 15, 2006) (MRA Opposition to Nida First Petition); Opposition to Petition for Reconsideration and Request for Waiver, filed by James A. Kay, Jr. (Nov. 16, 2006) (Kay Opposition to Nida First Petition). Nida filed replies. Reply to Kay's Opposition to Petition for Reconsideration and Waiver, filed by Kevin R. Nida (Nov. 28, 2006) (Nida Reply to Kay Opposition); Reply to Mobile Relay Associates' Opposition to Petition for Reconsideration, filed by Kevin R. Nida (Nov. 28, 2006) (Nida Reply to MRA Opposition). The parties also traded pleadings regarding the timeliness of the oppositions. *See* Motion for Extension of Time, filed by James A. Kay, Jr. (Nov. 15, 2006); Motion to Strike, filed by Kevin R. Nida (Nov. 28, 2006); Opposition to Motion to Strike, filed by Mobile Relay Associates (Dec. 4, 2006); Motion for Leave to Submit Pleading Out of Time, filed by James A. Kay, Jr. (Dec. 7, 2006).

⁷ Request for Stay, filed by Kevin R. Nida (Oct. 31, 2006). Kay and MRA filed oppositions. Opposition to Request for Stay, filed by Mobile Relay Associates (Nov. 15, 2006); Opposition to Request for Stay, filed by James A. Kay, Jr. (Nov. 16, 2006).

⁸ Petition for Reconsideration, filed by Kevin R. Nida (Nov. 6, 2006) (Nida Second Petition). Kay and Comm Enterprises, LLC jointly filed an opposition. *See* Opposition to Kevin R. Nida's Petition for Reconsideration, filed by James A. Kay, Jr. and Comm Enterprises, LLC (Nov. 21, 2006).

⁹ Petition for Partial Reconsideration, filed by James A. Kay, Jr. and Comm Enterprises, LLC (Nov. 3, 2006) (Kay/Comm Enterprises Petition). Nida filed an opposition. *See* Opposition to Petition for Partial Reconsideration, (continued....)

II. BACKGROUND

4. *Moses Application.* In 1997, the Commission directed the certified frequency coordinators for the PLMR Services to reach a consensus on the applicable coordination procedures for the 12.5 kHz “offset” channels.¹⁰ That consensus is embodied in the Land Mobile Communications Council (LMCC) procedures for evaluating adjacent channel interference in the 470-512 MHz band using the interference criteria of TIA/EIA/TSB-88 (TSB-88).¹¹ The LMCC Consensus provides that an application shall not be certified if an incumbent or the applicant has unacceptable interference of more than five percent reduction of the calculated service area reliability.¹²

5. On March 27, 2001, Samuel Moses (Moses) applied to operate a trunked PLMR station in Montrose, California, on I/B Pool offset frequencies in the 470-512 MHz band.¹³ The United Telecom Council (UTC), an FCC-certified frequency coordinator, coordinated the frequencies and submitted the application to the Bureau’s Public Safety and Private Wireless Division (PSPWD).¹⁴ The application received FCC File No. 0000415681. A second, identical application later appeared in the Commission’s licensing database under FCC File No. 0000423812. On May 14, 2001, PSPWD granted application FCC File No. 0000415681, and issued Moses a license to operate trunked PLMR Station WPSI886 on the requested frequencies. Moses withdrew application FCC File No. 0000423812 on May 26, 2001.

6. On June 11, 2001, Kay requested dismissal or denial — or, if the application was granted before the request was received, reconsideration of the grant — of the application due to potential harmful interference to Kay’s PLMR stations in the Los Angeles area.¹⁵ Kay’s request, which was served on Moses, referenced application FCC File No. 0000423812, but not application FCC File No. 0000415681. On July 24, 2001, PSPWD’s Licensing and Technical Analysis Branch asked UTC to explain its frequency recommendation for Station WPSI886 in light of the interference issues.¹⁶ On July 31, 2001, UTC replied that additional technical studies revealed that use of the frequencies may cause interference and degradation in service to adjacent-channel licensees, and it recommended that PSPWD set aside the

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filed by Kevin R. Nida (Nov. 13, 2006). Kay and Comm Enterprises jointly replied. *See* Reply to Opposition to Petition for Partial Reconsideration, filed by James A. Kay, Jr. and Comm Enterprises, LLC (Nov. 24, 2006).

¹⁰ *See* Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Services, *Second Report and Order*, PR Docket No. 92-235, 12 FCC Rcd 14307, 14330-31 ¶ 43 (1997).

¹¹ *See* Filing Freeze to Be Lifted for Applications Under Part 90 for 12.5 kHz Offset Channels in the 421-430 and 470-512 MHz Bands, *Public Notice*, 13 FCC Rcd 5942, 5942 (WTB 1997) (citing Letter from Larry A. Miller, President, LMCC, to Daniel B. Phythyon, Esq., Acting Chief, Wireless Telecommunications Bureau (Sept. 10, 1997) (LMCC Consensus)).

¹² *See* LMCC Consensus, Attachment at 2.

¹³ 471/474.7000 MHz, 471/474.7250 MHz, 471/474.8500 MHz, 471/474.8750 MHz, 472/475.1750 MHz, 472/475.2000 MHz, 472/475.2250 MHz, 472/475.2750 MHz, 472/475.5500 MHz, and 472/475.7250 MHz. *See* FCC File No. 0000415681 (Mar. 27, 2001).

¹⁴ *See* FAC No. NV0UU01612.

¹⁵ *See* Letter from Robert J. Keller, Esq., Counsel for James Kay, Jr., to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, FCC (June 11, 2001). In addition, on June 8, 2001, Ted S. Henry (Henry) filed an informal petition requesting that PSPWD set aside the grant of Moses’s application. *See* Informal Petition, filed by Henry Radio (June 8, 2001) (Henry Request).

¹⁶ *See* Letter from Mary Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission, to United Telecom Council (July 24, 2001).

grant of the license.¹⁷ On August 14, 2001, Moses opposed UTC's letter, but did not respond to Kay.¹⁸

7. *2002 and 2004 Orders.* On December 18, 2001, PSPWD consented to the assignment of the license for Station WPSI886 from Moses to Thomas K. Kurian (Kurian).¹⁹ In an *Order* released September 16, 2002 (*2002 Order*), PSPWD, based on UTC's recommendation, granted Kay's June 11, 2001 request, set aside the grant of the license for Station WPSI886, dismissed application FCC File No. 0000415681, and instructed Kurian to cease operation of the station.²⁰ On October 15, 2002, Kurian requested reconsideration of the *2002 Order*, arguing, *inter alia*, that Kay's reconsideration request was procedurally defective, and that interference studies submitted with Kurian's petition demonstrated that Station WPSI886 would not cause interference to adjacent-channel stations.²¹

8. In 2003, Kay filed two applications for licenses to provide commercial service in the 470-512 MHz band. The first application, FCC File No. 0001419150, sought authority to add certain frequencies to Kay's license for trunked, commercial I/B Pool for Station KVJ843 in the Los Angeles, California area.²² The second application, FCC File No. 0001420784, sought authority to construct a new trunked, commercial I/B Pool station that would operate on some of the same frequencies, also located in the Los Angeles area.²³

9. In an *Order* released January 9, 2004 (*2004 Order*), the Bureau's Public Safety and Critical Infrastructure Division (PSCID)²⁴ granted Kurian's October 15, 2002 petition, concluding that Kay's June 11, 2001 reconsideration request was procedurally defective because it sought reconsideration of the grant of application FCC File No. 0000423812 (which had been withdrawn), rather than application FCC File No. 0000415681.²⁵ PSCID accordingly restored the license for Station WPSI886 to active status.²⁶ On January 16, 2004, Kay requested reconsideration of the *2004 Order*, arguing that he properly sought reconsideration of the license grant notwithstanding his reference to the incorrect file number, and that the public interest justified setting aside the authorization for Station WPSI886 because it was likely to cause interference to his operations in the Los Angeles area.²⁷

¹⁷ See Letter from Renee McIlwain, Director of Spectrum Services, United Telecom Council, to Mary Shultz, Chief, Licensing and Technical Analysis Branch, Federal Communications Commission (July 31, 2001) (UTC Letter).

¹⁸ See Letter from Dennis C. Brown, Counsel for Samuel Moses, to Magalie Roman Salas, Secretary, FCC (dated Aug. 14, 2001, and filed Aug. 16, 2001). This letter also responded to the Henry Request.

¹⁹ See FCC File No. 0000681221 (Dec. 4, 2001). Kurian filed the construction notification for Station WPSI886 on May 2, 2002. FCC File No. 0000873203 (May 2, 2002).

²⁰ See Samuel Moses, *Order on Reconsideration*, 17 FCC Rcd 17137, 17138-39 ¶¶ 5, 7 (WTB PSPWD 2002).

²¹ See Petition for Reconsideration, filed by Thomas K. Kurian (Oct. 15, 2002).

²² FCC File No. 0001419150 (Aug. 15, 2003). Those frequencies included 471/474.7250 MHz, 471/474.7375 MHz, 471/474.8625 MHz, 471/474.8750 MHz, 471/474.9000 MHz, and 472/475.2000 MHz.

²³ FCC File No. 0001420784 (Aug. 18, 2003). Those frequencies included 471/474.7250 MHz, 471/474.8750 MHz, 472/475.2000 MHz, 471/474.8625 MHz, and 471/474.9000 MHz.

²⁴ The Commission reorganized the 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 ¶ 2 (2003).

²⁵ See Samuel Moses, *Order on Further Reconsideration*, 19 FCC Rcd 1, 3-4 ¶ 8 (WTB PSCID 2004). PSCID did not address Kurian's other arguments. See *id.* at 4 n.28.

²⁶ *Id.* at 4 ¶ 10.

²⁷ See Petition for Reconsideration, filed by James A. Kay, Jr. (Jan. 16, 2004). Radio Communications Associates also requested reconsideration of the *2004 Order*. See Petition for Reconsideration of Order on Further

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10. In light of the *2004 Order*, MD, on March 15, 2004, dismissed Kay's 2003 commercial applications because the proposed operations would cause unacceptable interference to Station WPSI886.²⁸ On April 6, 2004, Kay filed a petition seeking reconsideration of the dismissals.²⁹

11. *Assignments.* On June 24, 2004, PSCID erroneously granted Moses an additional license under Call Sign WQAK850 for the frequencies he requested in application FCC File No. 0000415681.³⁰ On March 11, 2005, MD consented to the assignment of the license for Station KVJ843 from Kay to his affiliate, Comm Enterprises.³¹ On March 30, 2005, PSCID consented to the assignment of the license for Station WPSI886 from Kurian back to Moses.³² On May 4, 2005, PSCID consented to the assignment of nine of the frequency pairs³³ authorized to Stations WPSI886³⁴ and WQAK850³⁵ from Moses to Nida.³⁶

12. *2006 Order.* On October 4, 2006, the Bureau released an Order granting in part Kay's January 16, 2004 petition, and deleting eight of the nine frequency pairs from the licenses for Station WPSI886/WQAK850.³⁷ The Bureau first reversed PSCID's decision in the *2004 Order* that Kay's June 11, 2001 reconsideration request was defective merely because it referenced the wrong file number.³⁸ The Bureau concluded that because Moses filed only one application, which was given two different file numbers, it was clear that Kay sought reconsideration of the grant of that application regardless of which file number he listed in his petition.³⁹

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Reconsideration, filed by Radio Communications Association (Feb. 9, 2004). In addition, Kay and MRA filed requests that the license for Station WPSI886 be modified pursuant to Section 316 of the Communications Act of 1934, as amended, 47 U.S.C. § 316, by deleting channels that were short-spaced with their adjacent-channel facilities. See Petition for License Modification, filed by James A. Kay, Jr. (Jan. 14, 2004) (Kay Modification Request); Request to Initiate Modification Proceedings, filed by Mobile Relay Associates (Feb. 2, 2004) (MRA Modification Request).

²⁸ Notice of Dismissal, Reference No. 2624354, File No. 0001419150 (Mar. 15, 2004); Notice of Dismissal, Reference No. 2624355, File No. 0001420784 (Mar. 15, 2004).

²⁹ See Petition for Reconsideration, filed by James A. Kay, Jr. (Apr. 6, 2004).

³⁰ Moses filed a construction notification for Station WQAK850 on March 11, 2005. FCC File No. 0002075647 (Mar 11, 2005).

³¹ See FCC File No. 0002089379 (Mar. 24, 2005).

³² See FCC File No. 0002100058 (Mar. 25, 2005).

³³ The tenth frequency pair, 472/475.5500 MHz, had previously been assigned to FM Radio Services LLC (FM Radio) under Call Signs WQCJ919 and WQCL258. See FCC File Nos. 0002075529 (Mar. 11, 2005), 0002084666 (Mar. 14, 2005). The FM Radio licenses are no longer at issue in this proceeding.

³⁴ See FCC File No. 0002134475 (Apr. 25, 2005).

³⁵ See FCC File No. 0002134486 (Apr. 25, 2005).

³⁶ MRA filed a petition for reconsideration of the consent to the assignment application on June 8, 2005, arguing that the grant should be rescinded until resolution of the MRA Modification Request. See Petition for Reconsideration, filed by Mobile Relay Associates (June 8, 2005) (MRA Petition for Reconsideration).

³⁷ *2006 Order*, 21 FCC Rcd at 11263 ¶ 19.

³⁸ See *id.* at 11260 ¶ 10.

³⁹ *Id.* (citing Alert Cable TV of North Carolina, Inc., d/b/a/ Time Warner Cable, *Memorandum Opinion and Order*, 18 FCC Rcd 12848, 12848 n.3 (MB PD 2003); Patrick Shannon, Esq., *Letter*, 18 FCC Rcd 11552 (WTB ASAD 2003)).

13. The Bureau then addressed Kurian's other procedural and substantive arguments PSCID had declined to address in its *2004 Order*. First, the Bureau concluded that Kay had met the requirement of Section 1.106(b)(1) of the Commission's Rules⁴⁰ that a person not previously a party to a proceeding who files a petition for reconsideration show good reason why he could not have participated earlier, because Moses's application was neither placed on public notice (because it was a PLMR application) nor served on Kay.⁴¹ The Bureau also concluded that Kay had not failed to satisfy the requirement of Section 1.106(e) of the Commission's Rules⁴² that a petition for reconsideration based on a claim of electrical interference be accompanied by an affidavit of a qualified engineer, because the July 31, 2001 UTC letter satisfied the purpose of the requirement.⁴³ In addition, the Bureau rejected Kurian's argument that he could be ordered to cease operation of Station WPSI886 only after a revocation proceeding pursuant to Section 312 of the Communications Act of 1934, as amended (the Act),⁴⁴ concluding that the procedural requirements associated with Section 312 revocation are not germane to the grant of a timely petition for reconsideration.⁴⁵

14. With respect to the merits, the Bureau noted that UTC and Kurian disagreed with respect to whether use of the frequencies assigned to Station WPSI886/WQAK850 would cause unacceptable interference.⁴⁶ To resolve the interference issues, PSCID's engineering staff performed an independent analysis using the criteria of TSB-88, and concluded that eight of the nine channels assigned to Station WPSI886/WQAK850 were predicted to cause greater than five percent reduction of the calculated service area reliability of incumbent Kay stations.⁴⁷ Consequently, the Bureau partially granted Kay's petition for reconsideration of the *2004 Order*, and deleted eight frequency pairs from the licenses for Station WPSI886/WQAK850.⁴⁸ Nida was permitted to continue to operate on the ninth frequency pair.⁴⁹

15. *MD Order*. In light of the actions taken in the Bureau's *2006 Order*, MD returned Kay's 2003 applications to pending status on October 11, 2006, and granted FCC File No. 0001420784 on October 12, 2006.⁵⁰ In the *MD Order*, released October 17, 2006, MD explained that it stood ready to grant FCC File No. 0001419050 once Kay amended it to reflect that the underlying station license had been assigned to Comm Enterprises.⁵¹ Kay filed the amendment on October 18, 2006, and MD granted

⁴⁰ 47 C.F.R. § 1.106(b)(1).

⁴¹ See *2006 Order*, 21 FCC Rcd at 11260 ¶ 11 (citing Pacific Gas and Electric Company, *Memorandum Opinion and Order*, 14 FCC Rcd 13400, 13404 ¶ 10 (PSPWD 1999); Tektron Micro Electronics, Inc., *Order on Reconsideration*, 15 FCC Rcd 4438, 4439 ¶ 2 (PSPWD 2000)).

⁴² 47 C.F.R. § 1.106(e).

⁴³ See *2006 Order*, 21 FCC Rcd at 11261 ¶ 12 (citing C.L. Tadlock, d.b.a. Tadlock's Radio Dispatch, *Memorandum Opinion and Order*, 8 F.C.C. 2d 197, 199 ¶ 7 (1967)).

⁴⁴ 47 U.S.C. § 312.

⁴⁵ See *2006 Order*, 21 FCC Rcd at 11261 ¶ 13 (citing LocalOne Texas, Ltd, *Letter*, 20 FCC Rcd 13521, 13524 (MB 2005)).

⁴⁶ See *2006 Order*, 21 FCC Rcd at 11262 ¶ 15.

⁴⁷ See *id.*

⁴⁸ See *id.* at 11263 ¶ 16. The eight deleted frequency pairs were 471/474.7000 MHz, 471/474.7250 MHz, 471.474.8500 MHz, 471.474.8750 MHz, 472/475.1750 MHz, 472/475.2000 MHz, 472/475.2250 MHz, and 472/475.7250 MHz. The Bureau also dismissed as moot the Kay Modification Request, MRA Modification Request, and MRA Petition for Reconsideration. See *id.* at 11263 ¶ 17.

⁴⁹ See *id.* at 11263 ¶ 16. The ninth frequency pair was 472/475.2750 MHz.

⁵⁰ See *Public Notice*, Report No. 2687 at 8 (WTB rel. Oct. 18, 2006).

⁵¹ See *MD Order*, 21 FCC Rcd at 11748 ¶¶ 2-3.

the application on October 19, 2006.⁵² The *MD Order* also dismissed as moot Kay's petition for reconsideration of the dismissal of the applications.⁵³

III. DISCUSSION

A. Nida Petitions

16. *Standing.* As noted above, Section 1.106(b)(1) requires that if a person who is not a party to the proceeding files a petition for reconsideration, the petition must show good reason why it was not possible for the petitioner to participate in the earlier stages of the proceeding.⁵⁴ A petitioner therefore obtains standing under Section 1.106(b) by either being a party to the proceeding or showing good reason why it was not possible to participate in the earlier stages of the proceeding.⁵⁵ Kay and Mobile Relay Associates⁵⁶ argue that the Nida First Petition should be dismissed because Nida did not participate earlier in the proceeding.⁵⁷ We disagree. Instead, we conclude that Nida is a party to this proceeding by virtue of being the licensee of Station WPSI886/WQAK850.⁵⁸

17. *Kay's June 11, 2001 Reconsideration Request.* Nida argues that the *2006 Order* incorrectly reversed the *2004 Order*, and Kay's June 11, 2001 reconsideration request should have been dismissed as defective. First, Nida contends that Moses did not receive due process or notice that Kay sought reconsideration of the grant of application FCC File No. 0000415681 because Kay referenced only FCC File No. 0000423812.⁵⁹ According to Nida, it was "not up to [Moses] to . . . make inferences as [to]

⁵² See *Public Notice*, Report No. 2695 at 13 (WTB rel. Oct. 25, 2006).

⁵³ See *MD Order*, 21 FCC Rcd at 11748 ¶ 3.

⁵⁴ 47 C.F.R. § 1.106(b)(1).

⁵⁵ *Regionet Wireless License, LLC*, 17 FCC Rcd 21263, 21267 ¶ 10 (2002) (*Regionet Wireless*).

⁵⁶ Nida contends that MRA's oppositions should be dismissed pursuant to Section 1.106(b)(1) because MRA did not file a petition for reconsideration within thirty days of the original grant of the license for Station WPSI886, and did not file a petition for reconsideration of the *2006 Order*. See Nida Reply to MRA Opposition at 2-3. Nida is incorrect because, as the Commission has explained, that rule applies to petitioners for reconsideration, not to parties that file oppositions. See *Regionet Wireless*, 17 FCC Rcd at 21266 ¶ 9; see also *Sagir, Inc. v. N.E. Colorado Cellular, Inc.*, *Memorandum Opinion and Order*, 12 FCC Rcd 17594, 17595 n.2 (WTB ECID 1997) (finding that even though Sagir's complaint for damages resulting from NECC's rule violations had been denied and NECC would not be required to pay damages to Sagir, Sagir did not lose his party status and could file an opposition to NECC's petition for reconsideration of the determination that NECC had violated those rules).

⁵⁷ See Kay Opposition to Nida First Petition at 2; MRA Opposition to Nida First Petition at 4-5, 6-7.

⁵⁸ See *Quests, Inc.*, *Memorandum Opinion and Order*, 7 FCC Rcd 29, 29 ¶ 5 (MMB 1991) (finding that the proposed assignee was a party and had standing to seek reconsideration of an order revoking the license), *review denied*, 7 FCC Rcd 5273 (1992). We have reviewed the cases cited by Kay and MRA, and conclude that they are inapposite because they concern petitions for reconsideration that were filed by third parties – applicants whose applications or licensees whose authorizations were not the continuing subject of the proceeding. For example, in *Algrec Cellular Engineering*, *Memorandum Opinion and Order*, 18 Communications Reg. (P&F) 301 (1999) (*Algrec*), the Commission set aside a Review Board decision dismissing a number of cellular applications that had been designated for hearing, and granted the applications. Entities whose applications were subsequently dismissed as mutually exclusive with the granted applications then sought reconsideration of the Commission's decision. The Commission dismissed their petitions under Section 1.106(b)(1) because the petitioners were not parties to the proceeding, and failed to show why it was not possible for them to participate in the earlier stages of the proceeding. The present matter is clearly distinguishable in that the *Algrec* petitioners' applications were not the ongoing subject of the proceeding, but the licenses for Station WPSI886/WQAK850 have been at issue from the start of this proceeding.

⁵⁹ See Nida First Petition at 6-7.

what [Kay] intended or did not intend to do or say.”⁶⁰

18. We do not believe that Moses had any difficulty inferring what Kay intended. As the *2006 Order* explained, “Moses had filed one application, which was given two file numbers.”⁶¹ Kay objected to the application due to potential harmful interference from the proposed operations to stations licensed to Kay, not because FCC File No. 0000423812 duplicated FCC File No. 0000415681. Kay unambiguously opposed grant of the requested authorization, and it should have been clear that Kay sought reconsideration of the grant of the license for Station WPSI886. Moses, who knew of the dual file numbers, was not free to ignore the obvious.⁶² Thus, Moses was or should have been aware that Kay sought reconsideration of the grant of application FCC File No. 0000415681, notwithstanding the reference to FCC File No. 0000423812.⁶³ Accordingly, we reaffirm our conclusion that the reconsideration request should not have been deemed defective for having referenced application FCC File No. 0000423812 rather than FCC File No. 0000415681.

19. Nida also argues⁶⁴ that Kay’s June 11, 2001 reconsideration request should have been dismissed as defective because it did not comply with the requirement of Section 1.106(e) that a petition for reconsideration based upon a claim of electrical interference must be accompanied by an affidavit of a qualified electrical engineer.⁶⁵ We conclude, however, that it was appropriate to waive that requirement under the circumstances presented.

20. The standard for granting a waiver of the Commission’s rules is whether (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and a grant of the requested waiver would be in the public interest; or (2) in view of unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.⁶⁶ As the *2006 Order* explained, the purpose of Section 1.106(e) is to provide “mathematical and graphical

⁶⁰ See *id.* at 7.

⁶¹ *2006 Order*, 21 FCC Rcd at 11260 ¶ 10 (quoting *2002 Order*, 17 FCC Rcd at 17138 ¶ 6).

⁶² See *Mobilfone Service, Inc., Second Order on Reconsideration*, 22 FCC Rcd 3275, 3282 ¶ 20 (WTB 2007) (“Mobilfone contends that the Commission’s display is not reasonably calculated to inform the public because, according to Mobilfone, ‘the chosen display method requires the public to know the name and content of every rulemaking proceeding concluded by the FCC and because the approach conflicts with the FCC’s own procedure for listing document control numbers for discrete regulations.’ Mobilfone’s attempt to obscure what is very clear is not persuasive. The Commission’s display of the control number in this case referred very directly and simply to ‘auction forms,’ as well as to the initial relevant FCC proceeding. No arcane knowledge of FCC proceedings was required to understand this disclosure.”) (footnote omitted). The *Monroe Cablevision* decision, *Monroe Cablevision, Inc., Order on Reconsideration*, 16 FCC Rcd 20251 (CSB 2001), on which Nida relies, see Nida Reply to Kay Opposition at 5, to support his argument that Moses lacked notice, is distinguishable. In that case, the Cable Services Bureau (CSB) directed a subscriber to resubmit a complaint regarding cable rates on a new form and to follow certain requirements for notifying the cable operator about the complaint. *Monroe Cablevision*, 16 FCC Rcd at 20252 ¶ 3. The subscriber did not follow those requirements and the cable operator was not notified about the pending complaint. As a result, CSB vacated a prior order requiring the cable operator to submit a filing that would justify its rates. *Id.* Unlike in *Monroe Cablevision* where the cable operator was completely denied notice of the subscriber’s complaint, Moses had notice of the Kay reconsideration request.

⁶³ We also note that, because Moses responded to the UTC Letter and the Henry Request, PSPWD took Moses’s views into consideration prior to release of the *2002 Order*.

⁶⁴ See Nida First Petition at 10-11.

⁶⁵ 47 C.F.R. § 1.106(e).

⁶⁶ 47 C.F.R. § 1.925(b)(3).

determination based upon accepted rules and standards,” because such data is particularly useful in resolving allegations of interference.⁶⁷ Because the engineering opinion from UTC was an empirical determination based on accepted rules and standards, the 2006 Order concluded that the underlying purpose of the rule was served by the UTC letter.⁶⁸ We also conclude that it was in the public interest to accept the UTC letter for these purposes, in order to resolve the interference dispute on the basis of the best available information.⁶⁹

21. *Evidentiary Hearing.* Nida argues⁷⁰ that, before his license can be terminated, he must be afforded an evidentiary hearing under Section 309(e) of the Act, which requires the Commission to designate certain types of application for hearing if a substantial and material question of fact is presented.⁷¹ Nida is incorrect. Section 309 by its terms does not apply to PLMR applications.⁷²

22. Moreover, the right to a hearing under Section 309, when applicable, is not automatic.⁷³ Nida contends that “Section 309(e) allows for hearings to be held in cases where a ‘substantial and material question of fact is presented’” and that, in this case, the 2001 UTC letter and the 2002 Kurian interference study present competing engineering studies that are “the very definition of a material question of fact.”⁷⁴ We disagree. When the Commission formalized the frequency coordination process, it anticipated that applicants would occasionally disagree with a frequency coordinator’s conclusion that the proposed operations would result in interference to other users, and it provided that such disputes would be resolved by the staff within the licensing process, rather than through a formal evidentiary

⁶⁷ See 2006 Order, 21 FCC Rcd at 11261 ¶ 12 & n.43 (quoting C.L. Tadlock, d.b.a. Tadlock’s Radio Dispatch, *Memorandum Opinion and Order*, 8 F.C.C.2d 197, 199 ¶ 7 (1967) (*Tadlock*)); see also, e.g., Empire Mobilcomm Systems, Inc., *Memorandum Opinion and Order*, 73 F.C.C. 2d 203, 204 ¶ 4 (CCB 1979) (stating that “[m]ere opinion, unsubstantiated by actual engineering data, is insufficient to prove the existence of harmful interference” in reviewing a claim of interference under former Section 21.504 of the Commission’s Rules). Nida argues that the Bureau misapplied the holding in *Tadlock* because the Commission made the statement in the context of dismissing as defective a petition for reconsideration that was not supported by the required affidavit, rather than accepting a technically defective pleading. See Nida First Petition at 10. We disagree. *Tadlock*’s description of the purpose of the rule is applicable in either situation.

⁶⁸ See 2006 Order, 21 FCC Rcd at 11261 ¶ 12. Nida argues that the defects in the Kay request cannot be waived because no explanation was given as to why the circumstances were so unique as to justify a rule waiver. Nida First Petition at 11. We note, however, that the Commission’s standard for reviewing waiver requests is stated in the alternative, and that a waiver can be granted pursuant to Section 1.925(b)(3)(i) even if it does not satisfy Section 1.925(b)(3)(ii). Nida also argues that the UTC Letter cannot be used to support the Kay reconsideration request because PSPWD requested it only to evaluate the issues raised in the Henry Request. See Nida First Petition at 11. This argument also fails, for the UTC Letter, which was requested after both Henry and Kay challenged the grant of the Moses application, specifically stated that its recommendation was “in response to concerns expressed to us on behalf of *two licensees* on frequencies adjacent to those of the referenced call sign,” and concludes that Station WPSI886 “may cause interference and an unacceptable degradation of service to the adjacent, 12.5 kHz, channel *licensees*.” UTC Letter at 1 (emphasis added). Thus, the UTC engineering analysis covered both licensees in response to the Commission staff inquiry.

⁶⁹ See, e.g., Century M.L. Cable Corp., *Memorandum Opinion and Order*, 16 FCC Rcd 14102, 14103 ¶ 3 (2001); Christian Family Network, Inc., *Memorandum Opinion and Order*, 23 FCC Rcd 18369, 18371 n.12 (EB 2008).

⁷⁰ See Nida First Petition at 15.

⁷¹ 47 U.S.C. § 309(e).

⁷² See 47 U.S.C. § 309(a) (listing applications to which Section 309 applies); see also, e.g., Interstate Consolidation, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 3330, 3333 ¶ 8 (2000) (*Interstate*).

⁷³ See, e.g., Brookfield Development, Inc., *Memorandum Opinion and Order*, 19 FCC Rcd 14385, 14390-92 ¶¶ 16-18 (2004); *Interstate*, 15 FCC Rcd at 3333 n.26.

⁷⁴ See Nida First Petition at 15.

hearing.⁷⁵ We therefore reject Nida's argument that an evidentiary hearing under Section 309(e) was required to resolve interference issues raised in this proceeding.⁷⁶

23. *Public Interest.* Finally, Nida argues that it would be in the public interest to restore his authorization to operate on the eight deleted frequency pairs, either by granting his petition for reconsideration of the 2006 Order or granting him a waiver of the frequency coordination requirements⁷⁷ for Station WPSI886/WQAK850. We do not find these arguments persuasive.⁷⁸

24. First, we reject Nida's argument that the 2006 Order is not in the public interest and conflicts with the Commission's rules⁷⁹ requiring 25 kHz PLMR licensees to transition to more efficient equipment by 2013.⁸⁰ That Nida began operating with narrowband technology before it was required

⁷⁵ See Frequency Coordination in the Private Land Mobile Radio Services, *Report and Order*, PR Docket No. 83-737, 103 F.C.C. 2d 1093, 1147-48 ¶ 110 (1986) ("Under our new procedures, applicants desiring a specific frequency must submit a technical justification for that frequency along with the application. If the coordinator disagrees with the justification, the application, the technical submission, the coordinator's written reasons for rejection, and the alternate frequency recommendation shall be submitted to the Commission for evaluation and decision."); 47 C.F.R. § 90.187(b)(2)(v). It is common practice for Commission staff to conduct an independent analysis to resolve interference issues. See, e.g., Pappamal Wellington Kurian, *Order of Modification*, 22 FCC Rcd 10965 (WTB MD 2007); National Science and Technology Network, Inc., *Order on Reconsideration*, 22 FCC Rcd 18644 (WTB MD 2007), *recon. pending*.

⁷⁶ Nida also argues that the contested operations are not capable of causing interference to Kay and others, as evidenced by the lack of interference complaints. See Nida First Petition at 13. As Nida is now aware, his assertion that no licensee complained of interference is incorrect. In response to a 2006 Freedom of Information Act request, the Commission's Enforcement Bureau sent Nida's counsel copies of complaints regarding interference from Station WPSI886 received during the pendency of this proceeding. See Electronic Mail from Delaney DiStefano to FOIA, FCC (Control 2007-012) (Oct. 10, 2006); Letter from Rebecca L. Dorch, Regional Director, Western Region, Enforcement Bureau to Delaney DiStefano, Counsel for Kevin R. Nida (Jan. 31, 2007); Letter from Rebecca L. Dorch, Regional Director, Western Region, Enforcement Bureau to Delaney DiStefano, Counsel for Kevin R. Nida (Mar. 13, 2007). Nida also acknowledges that he knew about a complaint that MRA filed in 2003, but discounts it because no action was taken as a result of the investigation. See Nida First Petition at 13 n.44. Regardless of any action taken, the existence of the complaint contradicts Nida's argument that no actual interference has been alleged. Moreover, the absence of specific complaints would not provide grounds for permitting operations that do not comply with the required interference protection standards. See California Metro Mobile Communications, Inc., *Memorandum Opinion and Order*, 17 FCC Rcd 22974, 22977 ¶ 11 (2002) (rejecting a licensee's allegation that PSPWD could not modify its license because there had been no claim of "actual interference" to the protesting party's facilities when the objectionable interference standard was based on whether the interference contour of a proposed trunked station would intersect the service contour of an existing station).

⁷⁷ See 47 C.F.R. § 90.175(e).

⁷⁸ As noted above, the standard for granting a waiver of the Commission's rules is whether it can be demonstrated that (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (2) in view of unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative. 47 C.F.R. § 1.925(b)(3). Thus, both prongs of the waiver standard require a finding that grant of a waiver would be in the public interest. Therefore, a conclusion that a request is not in the public interest renders moot any discussion of the remaining portions of either prong. Cf. Maritime Communications/Land Mobile LLC, *Order*, 21 FCC Rcd 13735, 13740 n.34 (WTB MD 2006), *recon. denied*, *Order on Reconsideration*, 22 FCC Rcd 4780 (WTB MD 2007), *recon. and review pending*.

⁷⁹ See 47 C.F.R. § 90.209(b)(5) n.3; Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, *Second Report and Order and Second Further Notice of Proposed Rule Making and Order*, WT Docket No. 99-87, RM-9332, 18 FCC Rcd 3034, 3038 ¶ 12 (2003).

⁸⁰ See Nida First Petition at 14.

does not relieve him of the obligation to avoid interference to other licensees today. While the Commission has mandated migration to more efficient technology, it did not intend to disadvantage the incumbent licensees still operating on 25 kHz channels.⁸¹ The narrowbanding mandate is thus not grounds to reduce 25 kHz licensees' privileges prior to the mandatory migration date.⁸²

25. We also reject Nida's argument that we should grant his request because a majority of the users of Station WPSI886/WQAK850 provide service to public safety and critical infrastructure entities.⁸³ Even public safety use of a frequency is not grounds to permit operations that will cause interference to incumbent licensees.⁸⁴ A licensee cannot justify a request for waiver by merely asserting that its proposed service is more beneficial than services that might be provided by another licensee operating in the same band.⁸⁵ Moreover, as we pointed out in the *2006 Order*, Nida consummated the assignment subject to the risk that one or more of the then-pending pleadings would be granted.⁸⁶

26. *Conclusion.* In summary, we conclude that Nida has not presented grounds for reconsideration of the decision in the *2006 Order* to delete eight of the nine frequency pairs from the licenses for Station WPSI886/WQAK850. Nor has he set forth circumstances warranting a waiver of the frequency coordination requirements for the station. We therefore deny his petition for reconsideration and request for waiver. As noted above, Nida also requested a stay of the *2006 Order*, and applied for an STA to permit him to continue operating on the eight deleted frequencies during the pendency of his petition for reconsideration. Similarly, Nida's petition for reconsideration of the *MD Order* argued that action on the Kay applications should be deferred pending resolution of Nida's petition for reconsideration and requests for stay of the *2006 Order*.⁸⁷ In light of the resolution of Nida's petition for reconsideration herein, we dismiss as moot Nida's petitions for stay of the *2006 Order* and for

⁸¹ In fact, to allow such incumbent licensees increased flexibility in their migration, the Commission extended the deadline for the acceptance of new applications for new operations using 25 kHz channels, and for modification of operations that expand the authorized contour of such stations, from January 13, 2004 to January 1, 2011. See Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, *Third Memorandum Opinion and Order, Third Further Notice of Proposed Rule Making and Order*, WT Docket No. 99-87, RM-9332, 19 FCC Rcd 25045, 25046 ¶ 2 (2004).

⁸² See National Science and Technology Network, Inc., *Order on Reconsideration*, 23 FCC Rcd 5723, 5726 ¶ 7 (WTB MD 2008) (citing Association of American Railroads, *Order*, 22 FCC Rcd 1304, 1308-09 ¶ 9 (WTB MD 2007) (denying request for waiver that would grant railroads exclusive access to spectrum shared with other industries in order to facilitate the railroads' transition to 12.5 kHz operations)), *review pending*.

⁸³ See Nida First Petition at 19-20. Nida states that eighty to ninety percent of his customers "provide service" to public safety entities, and those entities rely on the system, which is designed to provide cost-effective interoperability. *Id.* at 19. Nida further explains that Station WPSI886/WQAK850 has been "serving public safety and critical infrastructure entities such as ambulance companies and transportation companies, each of which is under contract with local county and federal governments respectively to supply needed support services." *Id.* at 20.

⁸⁴ See, e.g., State of Montana, *Order*, 19 FCC Rcd 9816, 9819 ¶ 7 (WTB PSCID 2004) (rejecting request of State of Montana to use a frequency because of potential interference to adjacent-channel VHF Public Coast licensee).

⁸⁵ See NetSat 28 Company, L.L.C., *Memorandum Opinion and Order*, 19 FCC Rcd 17722, 17732 ¶ 28 (IB 2004) (denying a request for waiver of milestone deadlines to complete construction of its satellite system after rejecting the argument that a licensee cannot justify a waiver request by merely asserting that its proposed service is more beneficial than services that might be provided by another satellite operator).

⁸⁶ See *2006 Order*, 21 FCC Rcd at 11263 ¶ 16. We note that the MRA Petition for Reconsideration summarized the arguments in the then-pending MRA Modification Request, listed other pending pleadings, and provided a copy of the UTC Letter.

⁸⁷ See Nida Second Petition at 4-5.

reconsideration of the *MD Order*, and his STA application.⁸⁸

B. Kay/Comm Enterprises Petition for Partial Reconsideration

27. Kay and Comm Enterprises seek partial reconsideration of the *2006 Order*.⁸⁹ We dismiss the petition as defective.

28. In 2004, Kay asserted that operation of Station WPSI886 on frequency pair 472/475.2750 MHz would cause interference to his Stations WIK983 and WIL469.⁹⁰ The engineering analysis in the *2006 Order* concluded, however, that the effect on those stations was within the five percent reduction of the calculated service area reliability permitted by the LMCC Consensus.⁹¹ Consequently, Nida was permitted to continue to operate on that frequency pair.⁹² In their instant petition, Kay and Comm Enterprises argue⁹³ that frequency pair 472/475.2750 MHz should be deleted the licenses for Station WPSI886/WQAK850 due to interference to adjacent-channel Station WIJ316, which Kay assigned to Comm Enterprises in 2005.⁹⁴

29. Section 1.106(c) of the Commission's rules provides that new facts may be presented in a petition for reconsideration only if the facts relate to events that occurred or circumstances that changed since the last opportunity to present such matters; the facts were not known to the petitioner, and could not reasonably have been learned prior to such opportunity; or the public interest requires consideration of the facts.⁹⁵ Kay and Comm Enterprises have not demonstrated (or even argued) that their petition seeking to introduce arguments regarding Station WIJ316 meets any of these requirements. Moreover, the petition is not accompanied by an affidavit of a qualified electrical engineer as required by Section 1.106(e),⁹⁶ and offers no grounds for waiving that requirement. We therefore dismiss the petition.

IV. ORDERING CLAUSES

30. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 303(r), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 405, and Sections 1.106 and 1.925 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.925, the Petition for Reconsideration and Request for Waiver filed by Kevin R. Nida on October 31, 2006, is DENIED.

31. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 303(r), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 405, and Sections 1.102 and 1.106 of the Commission's Rules, 47 C.F.R. §§ 1.102, 1.106, the Informal Request for Stay filed by Kevin R. Nida on October 24, 2006, the Request for Stay filed by Kevin R. Nida on October 31, 2006, and the Petition for Reconsideration filed by Kevin R. Nida on November 6, 2006, are DISMISSED as moot.

⁸⁸ See, e.g., Morris Communications, Inc., *Memorandum Opinion and Order*, 23 FCC Rcd 3179, 3201 ¶ 52 (2008).

⁸⁹ Kay/Comm Enterprises Petition at 3.

⁹⁰ See Kay Modification Request at 5.

⁹¹ See *2006 Order*, 21 FCC Rcd at 11263 n.55.

⁹² See *id.* 11263 ¶ 16.

⁹³ See Kay/Comm Enterprises Petition at 3.

⁹⁴ See File No. 0002089613 (Mar. 17, 2005). Kay was initially licensed for the Station WIJ316 facilities in 1994. Kay/Comm Enterprises Petition at 3 n.4.

⁹⁵ 47 C.F.R. § 1.106(c)(1) and (2).

⁹⁶ 47 C.F.R. § 1.106(e).

32. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Sections 0.331 and 1.931 of the Commission's Rules, 47 C.F.R. §§ 0.331 and 1.931, the Request for Special Temporary Authority filed by Kevin R. Nida on October 27, 2006, FCC File No. 0002799178, shall be DISMISSED.

33. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Sections 1.41 and 1.46 of the Commission's Rules, 47 C.F.R. §§ 1.41, 1.46, the Motion for Extension of Time filed by James A. Kay, Jr. on November 15, 2006, the Motion to Strike James A. Kay's Opposition to Request for Stay filed by Kevin R. Nida on November 28, 2006, the Motion to Strike Motion to Strike MRA's Opposition to Request for Stay filed by Kevin R. Nida on November 28, 2006, and the Motion for Leave to Submit Pleading Out of Time filed by James A. Kay, Jr. on December 7, 2006, are DISMISSED as moot.

34. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 303(r) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 405, and Section 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. and Comm Enterprises, LLC on November 3, 2006, is DISMISSED.

35. This action is taken under delegated authority pursuant to Section 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting
Acting Chief, Wireless Telecommunication Bureau
Federal Communications Commission