

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

In the Matter of	)	
	)	
SMARTROUTE SYSTEMS	)	
LIMITED PARTNERSHIP	)	Case No. 95F842
	)	
Finder's Preference Request	)	
Regarding Station KBI821	)	
Boston, Massachusetts	)	

**ORDER**

**Adopted: November 2, 1999**

**Released: November 2, 1999**

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. On May 8, 1997, SmartRoute Systems Ltd. Partnership (SmartRoute) filed a petition for reconsideration (Petition)<sup>1</sup> of the October 23, 1996, award of a dispositive preference under the finder's preference program<sup>2</sup> to A.D. Fillebrown, Inc. (ADF), for Boston area Station KBI821. For the reasons set forth below, we affirm the October 23, 1996, action awarding frequency pair 472.4625/475.4625 MHz to ADF, and deny SmartRoute's Petition.

**II. BACKGROUND**

2. On September 11, 1995, ADF filed a finder's preference request (Request) targeting Consolidated Freightways' authorization to operate Station KBI821 on frequency pair 472.4625/475.4625 MHz in the Boston area.<sup>3</sup> ADF alleged in its Request that Station KBI821 had not operated for a period in excess of one year, in violation of Section 90.157 of the Commission's Rules.<sup>4</sup> To substantiate its Request, ADF provided, *inter alia*, a copy of a work order from Motorola C&E,

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<sup>1</sup>Petition for Reconsideration (filed May 8, 1997).

<sup>2</sup>The Commission eliminated the finder's preference program with respect to the 220-222 MHz band and in the 470-512 MHz, 800 MHz and 900 MHz Private Land Mobile Radio bands as of July 29, 1998. Finder's preference requests for these frequencies pending as of July 29, 1998, however, are being processed. *See Report and Order*, 13 FCC Rcd 23816 (1998).

<sup>3</sup>Finder's Preference Request (filed September 11, 1995).

<sup>4</sup>*See* 47 C.F.R. § 90.157 (1995).

Inc. (Motorola), reflecting removal by Motorola on April 22, 1994, of the system equipment associated with Station KBI821.<sup>5</sup>

3. Additionally, ADF stated in its Request that it had continuously monitored Station KBI821 during regular business hours for a two-month period from August to September, 1995, without detecting any transmissions.<sup>6</sup> Attached to the Request was a declaration, certified under penalty of perjury, by Allan D. Fillebrown, president of ADF, attesting to the truth and accuracy of the information submitted on behalf of ADF.<sup>7</sup> On September 25, 1995, the former Office of Operations of the Wireless Telecommunications Bureau (Office of Operations) served the instant Request on Consolidated Freightways, the licensee of record on the date of service.<sup>8</sup>

4. On July 26, 1995, SmartRoute filed an application seeking assignment of Station KBI821 from Consolidated Freightways.<sup>9</sup> On December 8, 1995, this application was granted. On October 23, 1996, ADF was awarded a dispositive preference for Station KBI821 under the finder's preference program.<sup>10</sup> Consolidated Freightways, the former licensee of Station KBI821, was notified by letter dated October 23, 1996, that the authorization to operate Station KBI821 had cancelled automatically.<sup>11</sup> On December 20, 1996, ADF filed an application for the frequencies associated with Station KBI821, attaching a copy of the Award Letter to its application.<sup>12</sup>

5. SmartRoute alleges that it did not receive notice of the finder's preference proceeding from the Office of Operations until April 9, 1997, approximately six months after the October 23, 1996, action cancelling Station KBI821's authorization.<sup>13</sup> On April 9, 1997, Bureau staff provided

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<sup>5</sup>Request at 10.

<sup>6</sup>Request at 2.

<sup>7</sup>Request at 11.

<sup>8</sup>Letter from William H. Kellett and Anne Marie Wypijewski, Federal Communications Commission, to Consolidated Freightways (September 25, 1995) (Service Letter). Any Opposition to the Request had to be filed on or before October 25, 1995. An Opposition to the Request was not filed.

<sup>9</sup>See Application Number 95084160303, filed on July 26, 1995, requesting assignment from Consolidated Freightways to SmartRoute Systems Ltd. Partnership (Assignment Application).

<sup>10</sup>Letter from William H. Kellett, Federal Communications Commission, to Alan S. Tilles, Esquire, counsel to ADF (October 23, 1996) (Award Letter).

<sup>11</sup>Letter from William H. Kellett, Federal Communications Commission, to Consolidated Freightways (October 23, 1996) (Cancellation Letter). On October 23, 1996, however, SmartRoute was the licensee of record of Station KBI821, having already taken assignment of the station from Consolidated Freightways.

<sup>12</sup>See Application No. D065224, filed on December 20, 1996 (ADF Application). Further action on the ADF Application has been held in abeyance, pending the outcome of the instant Petition.

<sup>13</sup>See Petition at 1-2.

SmartRoute with copies of the October 23, 1996, Award and Cancellation Letters.<sup>14</sup> Upon learning of the Cancellation Letter and the ADF Application requesting authorization to operate the frequencies associated with Station KBI821, SmartRoute filed the instant Petition, seeking reversal of the October 23, 1996, action cancelling the authorization to operate Station KBI821.<sup>15</sup> On May 13, 1997, SmartRoute filed a Motion for Stay, requesting that the Bureau stay the processing of the ADF Application until the matters raised in SmartRoute's Petition were resolved.<sup>16</sup>

6. In its Petition, SmartRoute argues that ADF failed to meet its burden of proving that a violation of the Commission's Rules had occurred.<sup>17</sup> SmartRoute noted that Consolidated Freightways was the holder of approximately 220 licenses at the time the Request was filed, and alleged that the work orders provided by ADF were not station or frequency specific, and could have related to any of Consolidated Freightway's stations.<sup>18</sup> SmartRoute further stated:

Fillebrown proffered Motorola work orders in an effort to prove that the station had been deconstructed in 1994. However, Fillebrown did not provide any indication of the provenance of the work orders, or any independent verification of their meaning or their original. It is not even explained how these work orders came into Fillebrown's possession.<sup>19</sup>

7. SmartRoute additionally argued that the two month monitoring period conducted by ADF was insufficient and should be disregarded.<sup>20</sup> SmartRoute did not provide any other arguments in its Petition, and never stated that Station KBI821 was operational continuously during the subject period.

8. On May 21, 1997, ADF filed an Opposition to SmartRoute's Petition.<sup>21</sup> ADF argues in its Opposition that SmartRoute's Petition was devoid of merit and should be dismissed.<sup>22</sup> ADF explained that after monitoring Station KBI821 during 1995, Mr. Fillebrown contacted Mr. Robert F. Driscoll of

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<sup>14</sup>Letter from William H. Kellett, Federal Communications Commission, to SmartRoute Systems Ltd. Partnership (April 9, 1997).

<sup>15</sup>*Supra* note 1.

<sup>16</sup>Motion for Stay (filed May 13, 1997).

<sup>17</sup>Petition at 2.

<sup>18</sup>*Id.* at 4.

<sup>19</sup>*Id.* at 2-3.

<sup>20</sup>*Id.* at 5.

<sup>21</sup>Consolidated Opposition to the Petition for Reconsideration (May 21, 1997) (Opposition).

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

Consolidated Freightways, and inquired about acquiring the repeaters which Consolidated Freightways no longer utilized.<sup>23</sup> A copy of Mr. Fillebrown's long distance telephone bill, covering the period August 25, 1995, through September 24, 1995, was attached to the Opposition, as evidence that Mr. Fillebrown had contacted Mr. Driscoll's telephone number on two separate occasions, with time totalling 26 minutes.<sup>24</sup>

9. In its Opposition, ADF also stated that Mr. Driscoll arranged for Motorola, Consolidated Freightway's service shop, to provide ADF with copies of Motorola's invoices for Station KBI821's repeater equipment.<sup>25</sup> One of the invoices stated that the system had been removed from operation on April 22, 1994.<sup>26</sup>

10. ADF further argues in its Opposition that SmartRoute's Petition was untimely filed, since it was filed on May 8, 1997, more than six (6) months after the Commission's October 23, 1996, dispositive preference award to ADF.<sup>27</sup> ADF noted that when it filed its Request, Consolidated Freightways was the licensee of record of Station KBI821, and was therefore the proper party of the instant finder's preference proceeding.<sup>28</sup> ADF contends that Consolidated Freightways failed to notify SmartRoute of the pending Request, because Station KBI821 was already out of operation at the time the Request was filed.<sup>29</sup>

11. On June 2, 1997, SmartRoute filed a Motion to Strike certain statements contained in ADF's Reply.<sup>30</sup> Specifically, SmartRoute argues that ADF's initial Request was deficient, and that its Reply contained supplemental evidence submitted to demonstrate a *prima facie* showing to support its initial Request.<sup>31</sup> SmartRoute additionally argues that we may not consider any statement relating to who ADF did or did not contact at Consolidated Freightways or Motorola, regarding Station KBI821.<sup>32</sup>

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<sup>23</sup>*Id.* at 1-2.

<sup>24</sup>*Id.* at Exhibit 1.

<sup>25</sup>*Id.* at 2.

<sup>26</sup>*Id.* at 2.

<sup>27</sup>*Id.* at 4.

<sup>28</sup>*Id.* at 5.

<sup>29</sup>*Id.* at 5-6.

<sup>30</sup>Motion to Strike (filed June 2, 1997).

<sup>31</sup>*Id.* at 2.

<sup>32</sup>*Id.*

Finally, SmartRoute argues that the sworn statement of Mr. Fillebrown, contained at the end of ADF's Reply, fails to support the facts within the Reply, because Mr. Fillebrown did not indicate which of the facts in the Reply he knew to be correct, versus the facts he believed to be correct.<sup>33</sup>

12. On June 2, 1997, SmartRoute also filed a Reply to ADF's Opposition.<sup>34</sup> The Reply contained the same arguments as the Motion to Strike, as well as an allegation that ADF had not demonstrated eligibility for use of the subject frequencies.<sup>35</sup> SmartRoute argued that ADF was licensed for at least seven other stations in the area (Stations WIK258, KAB8106, KAB8107, WRP822, WIK362, KAE2127 and WIM357) at the time the Request was filed, and was therefore not eligible to be licensed to operate Station KBI821.<sup>36</sup> SmartRoute additionally questioned the loading of ADF's stations, stating: "The Bureau may very well question whether Fillebrown is fully loaded on each of the channels, and whether Fillebrown meets the eligibility requirements to apply for an additional channel."<sup>37</sup>

### III. DISCUSSION

13. In addressing SmartRoute's allegations contained in the Petition, we note that SmartRoute initially argues that it should have been served with a copy of the Request at the time the Request was served on Consolidated Freightways. We disagree. Consolidated Freightways was the licensee of record on September 25, 1995, the date of service, and was properly served with the Request.

14. At the time of assignment of Station KBI821 from Consolidated Freightways to SmartRoute, SmartRoute "stood in the shoes" of Consolidated Freightways. The assignor may only convey that which the assignor actually holds.<sup>38</sup> In light of the filing of ADF's Request on September 11, 1995, Consolidated Freightways conferred upon SmartRoute an authorization which was the target of a finder's preference proceeding. We note that the instant Request was listed on the Bureau's weekly listing of pending finder's preference matters, as well as displayed in the Public Reference Room, as

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<sup>33</sup>*Id.* at 3.

<sup>34</sup>Reply to Consolidated Opposition to the Petition for Reconsideration (June 2, 1997) (Reply).

<sup>35</sup>*Id.* at 6-7.

<sup>36</sup>*Id.* at 6.

<sup>37</sup>*Id.* at 6-7.

<sup>38</sup>*See* Jefferson Radio Company, Inc. v. FCC, 340 F.2d 781, 783 (D.C. Cir. 1964) (where the Commission had terminated the authority to operate the radio station, there was no authorization susceptible of being assigned). *See also* Letter to Ms. Cheryl E. Cox of Lone Star, from D'wana R. Terry, Federal Communications Commission (dated September 29, 1999), ordering Lone Star to cease operating on frequencies 936.0000/897.0000 MHz, which had been assigned to Lone Star on September 29, 1998, from Waste Management, since the underlying authorization held by Waste Management had been previously set aside on May 19, 1995.

of the date of filing.<sup>39</sup> A due diligence search by SmartRoute, made prior to the time of filing the Assignment Application, would have revealed that Station KBI821 was the target of a pending finder's preference proceeding. Because SmartRoute was not served with a copy of the Cancellation Letter until April 9, 1997, we are considering the instant Petition as a timely filed Petition.<sup>40</sup>

15. SmartRoute additionally argues that ADF failed to meet its burden of proving that a violation of the Commission's Rules had occurred. SmartRoute noted that Consolidated Freightways held approximately 220 licenses at the time the Request was filed, and that Motorola's work order relating to the deconstruction of a system was not station or frequency specific.<sup>41</sup> We disagree with SmartRoute's interpretation of the record evidence. Although the April 22, 1994, work order did not refer to Station KBI821, the work order is linked to the station, in that Station KBI821's sole repeater was located at One Beacon Street in Boston at the time the Request was filed. The repeater location was not moved until SmartRoute modified the site as part of its Assignment Application.<sup>42</sup>

16. At the time the Request was filed, Consolidated Freightways was licensed for three other 470-512 MHz systems in Massachusetts (WSY489, KSZ665 and KNBD688). None of the other Massachusetts stations were licensed to operate from One Beacon Street in Boston.<sup>43</sup> The April 22, 1994, work order clearly states:

SERVICE REQUESTED: REMOVE BASE FROM  
1 BEACON AND RETURN TO CUSTOMER.

SERVICE PERFORMED: REMOVED AND DIS-  
CONNECTED BASE, DELIVERED TO EMERY  
TERMINAL BOSTON AIRPORT.<sup>44</sup>

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<sup>39</sup>The listing may currently be viewed on the FCC's web site ([www.fcc.gov](http://www.fcc.gov)), and has always been made available to the public for viewing in the Commission's Public Reference Room or by contacting the Commission's copy contractor. See e.g. Public Notices released, April 10, 1992, October 27, 1993, and September 8, 1994 (notice to the public that the current listing of pending finder's preference request is available from ITS, the Commission's copy contractor).

<sup>40</sup>See 47 C.F.R. § 1.106(f) (a petition for reconsideration shall be filed within 30 days from the date of public notice of the final Commission action, as that date is defined in Section 1.4(b) of the Commission's Rules, 47 C.F.R. § 1.4(b). Section 1.4(b)(5) of the Commission's Rules, 47 C.F.R. § 1.4(b)(5), states that if a document is neither published in the Federal Register nor released, and a Public Notice is not released, the date to be used when computing time is the date on the document sent to persons affected by the action. By letter dated April 9, 1997, SmartRoute was sent a copy of the Cancellation Letter).

<sup>41</sup>Opposition at 4.

<sup>42</sup>Reply at 8.

<sup>43</sup>Reply at 8.

<sup>44</sup>*Supra* note 3.

17. We additionally disagree with SmartRoute's argument that the two month monitoring period conducted by ADF was insufficient and should be disregarded. ADF's monitoring evidence was not provided as the sole evidence of non-operation of Station KBI821. Rather, the monitoring evidence was provided to corroborate ADF's allegation that Station KBI821 was not in operation during the subject period.

18. We also considered SmartRoute's Motion to Strike certain statements contained in ADF's Reply and we deny SmartRoute's Motion to Strike. We find that ADF's Request was not deficient, and that its Reply did not contain supplemental evidence which should have initially been contained in its Request, as alleged by SmartRoute.<sup>45</sup> The statements contained in the Reply were filed in direct response to the allegations made by SmartRoute in its Opposition. In its Opposition, SmartRoute questioned the authenticity of the work orders and the manner in which they were obtained by ADF. In the Reply, ADF provided details relating to the genuineness and origin of the work orders. Although SmartRoute questioned the wording of Mr. Fillebrown's declaration relating to ADF's Reply, we find that Mr. Fillebrown's declaration that the statements contained in the Reply were "true and correct to the best of my knowledge and belief" is in conformance with Section 1.16 of the Commission's Rules.<sup>46</sup>

19. We further disagree with SmartRoute's allegation that ADF was not eligible for the frequencies associated with Station KBI821. Our licensing records reflect that at the time the Request was filed, ADF was licensed to operate Stations KAB8106, KAB8107, WRP822 and KAE2127, but those stations were on shared channels operating below 470 MHz and were not subject to loading requirements.<sup>47</sup> ADF was additionally licensed to operate Stations WIK362 and WIM357, but the channels were operating in the 470-512 MHz band and were fully loaded at the time the Request was filed.<sup>48</sup>

20. Upon evaluation of the entirety of all the evidence, we therefore find that the record in this proceeding consists of a *prima facie* showing that Station KBI821 failed to operate for a period in excess of one year. In this connection, we note that SmartRoute failed to provide any documentation, such as canceled checks, system maintenance records, equipment serial numbers, or sworn affidavits from employees using the system, to demonstrate operation of Station KBI821 during the subject

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<sup>45</sup>*Supra* note 30 at 1-2.

<sup>46</sup>47 C.F.R. § 1.16.

<sup>47</sup>See 47 C.F.R. § 90.173 (frequencies assigned pursuant to this rule are available only on a shared basis and will not be assigned for the exclusive use of any licensee).

<sup>48</sup>See 47 C.F.R. § 90.313(a)(3), which states that the maximum channel loading on frequencies in the 470-512 MHz band in the Business Radio Service is 90 units. Our licensing records reflect that Station WIK362 was renewed in the name of Allan D. Fillebrown on March 24, 1995, for 50 mobiles. Also licensed on the same channel was David F. Unkles dba Metro Repeater Service for 40 mobile units. Our licensing records also reflect that Station WIM357 was issued on April 26, 1995, in the name of ADF Communications Co., Inc., for 89 mobile units. Also licensed on the same channel was Senior Home Care for one mobile unit. The channels associated with Stations WIK362 and WIM357 were therefore fully loaded with ninety units in operation at the time the Request was filed.

period.<sup>49</sup> Under the Commission's Rules, a license for a station cancels automatically upon permanent discontinuance of operation for a period of one year or more.<sup>50</sup> We therefore affirm the October 23, 1996, action awarding a dispositive preference to ADF for Station KBI821.<sup>51</sup>

#### IV. CONCLUSION AND ORDERING CLAUSES

21. For the reasons stated above, IT IS ORDERED that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and pursuant to Sections 1.104(b) and 1.106(f) of the Commission's Rules, 47 C.F.R. §§ 1.104(b), 1.106(f), the Petition for Reconsideration filed by SmartRoute Systems Ltd. Partnership IS DENIED.

22. Accordingly, grant of the finder's preference request filed by A.D. Fillebrown, Inc. on September 11, 1995, IS AFFIRMED. A.D. Fillebrown, Inc.'s Application No. D065224 requesting authorization to operate on the frequencies associated with Station KBI821 will be reinstated and processed in the regular course of business. The Motion to Stay the processing of Application No. D065224, pending a decision in this matter, IS DISMISSED AS MOOT. The Motion to Strike certain statements contained in ADF's Reply IS DENIED.

23. 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

D'wana R. Terry  
Chief, Public Safety and Private Wireless Division  
Wireless Telecommunications Bureau

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<sup>49</sup>See generally In the Matter of Dale Kane d/b/a Kane Communications, *Order*, 1999 WL 680443 (F.C.C.), \_\_\_ FCC Rcd \_\_\_ (WTB PSPWD rel. Sept. 1, 1999); In the Matter of Veracon, Inc., *Order*, 1999 WL 777529 (F.C.C.), \_\_\_ FCC Rcd \_\_\_ (WTB PSPWD rel. Oct. 1, 1999) (target licensees of finder's preference proceedings did not prevail after failing to provide any objective and documentary evidence of compliance with the Commission's construction and operation rules).

<sup>50</sup>See 47 C.F.R. § 90.157 (1995).

<sup>51</sup>See *Report and Order*, 6 FCC Rcd. 7297 (1991).