

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

In the Matter of)	
)	
S&L TEEN HOSPITAL SHUTTLE)	File No. D122643
)	
Application to Modify and Reinstate the)	
License for Business Radio Service Station)	
WIJ767, Montrose, California)	

MEMORANDUM OPINION AND ORDER

Adopted: March 29, 2001

Released: April 12, 2001

By the Commission:

I. INTRODUCTION

1. James A. Kay, Jr. (Kay) has filed an Application for Review.¹ Kay seeks review of an *Order* by the Chief of the Public Safety and Private Wireless Division (Division) of the Wireless Telecommunications Bureau (Bureau).² The *Order* dismissed Kay's Petition for Reconsideration and Request for Initiation of License Revocation Proceedings (Petition for Reconsideration) as untimely and filed at the wrong location.³ After considering the arguments and evidence presented by Kay, we find that the Division erred in dismissing his reconsideration request. Therefore, we reinstate the Petition for Reconsideration and grant Kay's request for *de novo* consideration. For the reasons set forth below, however, we find that Kay has not established grounds for denying the above-captioned application. Thus, Kay's Application for Review is granted insofar as we will consider the merits of his case, but denied in all other respects.

II. BACKGROUND

2. S&L Teen Hospital Shuttle (SLTHS) held a license for Station WIJ767 that expired on January 31, 1999.⁴ On March 1, 1999, SLTHS filed the above-captioned application to reinstate and

¹ Kay Application for Review (filed Feb. 25, 2000) (Application for Review). Kay is the licensee of Business Radio Service Station WIJ893 authorized on frequency pair 507/510.8875 MHz at locations in and around the Los Angeles, California, area.

² S&L Teen Hospital Shuttle, *Order*, 15 FCC Rcd 3055 (WTB PSPWD 2000) (*Order*).

³ Kay Petition for Reconsideration and Request for Initiation of License Revocation Proceedings (filed June 24, 1999) (Petition for Reconsideration).

⁴ Station WIJ767, a Business Radio Service station, was initially authorized to S&L Teen Hospital Shuttle, also known as SLTHS, on 507/510.8875 MHz at Montrose, California. On its license reinstatement application, SLTHS mistakenly requested reinstatement for 507/510.7785 MHz instead of 507/510.8875 MHz. Consequently, as Kay points out, the Commission's database incorrectly reflects 507/510.7785 MHz as SLTHS's frequency. *Id.* at 1 n.1.

modify the subject license (Reinstatement Application). On May 14, 1999, Kay filed a Petition to Dismiss or Deny Application and Request to Cancel and Purge Authorization (Petition to Deny).⁵ By inadvertence, the Petition to Deny was not associated with the Reinstatement Application, and, thus, not reviewed prior to processing of the application.⁶ On May 25, 1999, the subject application was granted in part by the Division's Licensing and Technical Analysis Branch (Branch). Specifically, SLTHS's license was reinstated, but the request for an increase in the number of authorized mobiles was denied. On June 28, 1999, the Branch -- located in Gettysburg, Pennsylvania -- received a copy of Kay's Petition for Reconsideration. Because it appeared that the Petition for Reconsideration was not filed within thirty days from the release date of the Commission's action,⁷ on February 17, 2000, the Division dismissed the Petition for Reconsideration as untimely.⁸

3. In his Application for Review, Kay asserts that the Division erroneously dismissed his Petition for Reconsideration on procedural grounds. Kay contends that, contrary to the Division's statements, the petition was filed timely and at the correct location.⁹ He further submits that the Division dismissed his reconsideration request without reaching the merits of the case because of the Bureau's alleged bias against him.¹⁰ Kay also asks whether an objection may be disposed of on a procedural basis when substantial and material questions of a license applicant's basic qualifications have been raised.¹¹ He requests that we reverse the Division's action and consider the issues raised in both the Petition for Reconsideration and the Petition to Deny on their merits.¹²

III. DISCUSSION

4. Based on our review of this matter, it appears that at the time Kay's Petition for Reconsideration was dismissed, the Division was unaware that the pleading had been filed in a timely manner in the correct location, *i.e.*, on June 24, 1999, in the Office of the Secretary in Washington, D.C. A copy of this petition was received on June 28, 1999, at the Commission's Gettysburg, Pennsylvania, office. However, it appears that the Division's Washington, D.C. staff was not cognizant that the petition received in Gettysburg was merely a courtesy copy and, due to this administrative inadvertence, dismissed

⁵ Kay Petition to Dismiss or Deny Application and Request to Cancel and Purge Authorization (filed May 14, 1999) (Petition to Deny).

⁶ *Order*, 15 FCC Rcd at 3055 ¶ 2.

⁷ *See* 47 C.F.R. § 1.106(f).

⁸ *Order*, 15 FCC Rcd at 3055-3056 ¶¶ 3-4. It was also noted that the Petition for Reconsideration was filed in the wrong location, *i.e.*, Gettysburg, Pennsylvania. *Id.* at 3056 n.7. The Commission's Rules require that petitions for reconsideration be filed with the Office of the Secretary in Washington, D.C. 47 C.F.R. § 1.106(i). Pursuant to 47 C.F.R. § 0.401, filings submitted to the wrong location will not be processed.

⁹ Application for Review at 2.

¹⁰ Kay also asks for a Commission investigation into alleged instances of discrimination and bias against him. *Id.* at 3-4.

¹¹ *Id.* at 2.

¹² *Id.* at 2-3.

the Petition for Reconsideration.¹³ As a similar matter of administrative inadvertence, Branch staff did not consider Kay's original Petition to Deny because it was not associated with SLTHS's license reinstatement application when it was first received.

5. Although the Communications Act and Commission rules do not provide a right for opposing parties to file petitions to deny private land mobile radio license applications,¹⁴ the Bureau and the Division, as a matter of practice, have treated pleadings such as Kay's as informal requests for Commission action pursuant to Section 1.41 of the Commission's Rules.¹⁵ Had Branch staff been aware of Kay's opposition, it would have – in keeping with its own practices – considered the merits of the Petition to Deny before ruling on the subject application for reinstatement. Similarly, had the Division known of the timeliness and proper procedural filing of Kay's petition for reconsideration, it would not have dismissed that petition on the stated procedural grounds. We are therefore granting Kay's Application for Review in part, in order to conduct a *de novo* review of the merits of Kay's opposition to the grant of SLTHS's reinstatement application,¹⁶ and to correct the inadvertent procedural errors that have occurred in this case.

6. Kay essentially seeks the same relief and repeats the same allegations in all of his pleadings, *i.e.*, Petition to Deny, Petition for Reconsideration and Application for Review. He requests that SLTHS's reinstatement application be either dismissed or denied, and that the authorization for Business Radio Service Station WIJ767 be canceled and purged from the Commission's license database.¹⁷ First,

¹³ In light of our decision, as explained in detail below, to review the merits of Kay's opposition to SLTHS's reinstatement application, Kay's allegations of bias against the Division are moot. Nevertheless, we note that Kay's assertions that Division staff intentionally disregarded his appropriately filed petition are not substantiated by the record in this proceeding. Rather, it appears that the Division's action was the result of an error that occurred due to a clerical oversight. To the extent the Division believed that the petition for reconsideration was not filed on a timely basis, it was constrained to deny it. *See* 47 U.S.C. § 405(a) (setting forth a 30-day limitation for filing petitions for reconsideration); 47 C.F.R. § 1.106(f) (same); *Reuters Ltd. v. FCC*, 781 F.2d 946, 951-952 (D.C. Cir. 1986) (strictly enforcing 30-day statutory restriction on filing petitions for reconsideration, in light of absence of extraordinary circumstances).

¹⁴ Section 309 of the Communications Act of 1934, as amended, provides that any party in interest may oppose grant of a license application in the broadcasting and common carrier services, as well as in certain other specified services not relevant here, if that grant would be inconsistent with the public interest, convenience and necessity standard set forth in Section 309(a) of that Act. *See* 47 U.S.C. § 309(a), (b), (d). Since this statutory framework for opposing applications does not cover the service at issue here – a private land mobile radio service – the filing of a petition to deny a private radio license application is not a matter of right, but rather a matter within the Commission's discretion.

¹⁵ 47 C.F.R. § 1.41. *See, e.g.*, Michael McDermott d/b/a McDermott Communications Co., *Memorandum Opinion and Order*, 11 FCC Rcd 5750, 5751 ¶ 6 (1996).

¹⁶ For cases in which we granted *de novo* review, see *In the Matter of Application of Long Island Lighting Company*, *Memorandum Opinion and Order*, 14 FCC Rcd 16521, 16526 ¶ 10 (1999); and *In the Matter of Expanded Interconnection with Local Telephone Company Facilities*, *Second Memorandum Opinion and Order on Reconsideration*, 8 FCC Rcd 7341, 7344 ¶ 8 (1993).

¹⁷ Petition to Deny at 1; Application for Review at 3. Kay, as the licensee of a station (WIJ893) operating on the same frequencies (507/510.8875 MHz), and in the same general locale (Los Angeles, California) as SLTHS, asserts that grant of the reinstatement application adversely affects his own station operation. Kay also alleges that improper maintenance of the SLTHS station is interfering with his efforts to modify his existing facilities to better (continued....)

Kay contends that Station WIJ767 had not been in operation for one year prior to the expiration of its license term on January 31, 1999.¹⁸ As such, Kay submits, the license canceled automatically for permanent discontinuance of operations.¹⁹ Given that, under the rules in existence when the Reinstatement Application was filed, a reinstatement request had to be submitted within thirty days of a license's expiration - - and Kay asserts that SLTHS discontinued operation of Station WIJ767 sometime in January of 1998 - - he argues that the reinstatement application filed on March 1, 1999, was untimely and, thus, procedurally defective.²⁰

7. If this conclusion is not reached, however, then Kay argues, in the alternative, that the subject application and any other pending applications by SLTHS or its affiliates should be set for hearing to determine if SLTHS is qualified to be a licensee.²¹ Kay asserts that SLTHS has demonstrated a pattern of misconduct and/or misrepresentation.²² Specifically, he contends that SLTHS made a false statement in the Reinstatement Application by asserting that it is a hospital providing emergency service to the general public rather than what it is, a transportation shuttle service and, thus, ineligible for the subject authorization.²³ Also, he contends that SLTHS originally applied for licensing in the name "S&L Teen Hospital Shuttle" rather than the current "SLTHS."²⁴ Further, Kay submits, SLTHS incorrectly represented itself as a corporation, which it is not.²⁵ According to Kay, neither entity is a corporation, but rather a partnership.²⁶ Kay further asserts²⁷ that the withdrawal on July 1, 1998 of Leslie Miller from SLTHS's ownership and operations might constitute an unauthorized transfer of control in violation of Section 310(d) of the Communications Act²⁸ and Section 1.948 of the Commission's Rules.²⁹ Kay submits

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serve his customers. Petition to Deny at 2.

¹⁸ Petition to Deny at 3.

¹⁹ 47 C.F.R. § 90.157 provides that a station license shall cancel automatically upon permanent discontinuance of operations. It further states that any station which has not operated for one year or more is considered to have been permanently discontinued.

²⁰ Petition to Deny at 3-4.

²¹ In the alternative, Kay suggests that the Commission initiate license revocation proceedings with respect to the subject application and any other authorizations held by SLTHS or its affiliates. Application for Review at 3.

²² Petition for Reconsideration at 4-5.

²³ *Id.* at 4; Application for Review at 4 n.7. Kay submitted a statement by Ed Santiago, a private investigator, who contacted the Los Angeles County Department of Health Services Licensing and Certification Department to determine the business nature of SLTHS. According to Mr. Santiago, the County's records indicated that SLTHS was neither an acute care medical facility or an acute care psychiatric facility. See Declaration of Ed Santiago (June 23, 1999), Petition to Deny at Attachment No. 4.

²⁴ Petition to Deny at 2. See Application File No. 8812411544, FCC Form 574, Item 31.

²⁵ Petition to Deny at 2.

²⁶ *Id.*

²⁷ See Petition to Deny at 2-3.

²⁸ 47 U.S.C. § 310(d).

that even if this is not an unauthorized transfer of control, at the least it is an inaccurate, untruthful identification of SLTHS's ownership, thereby requiring dismissal of the application as defective.³⁰ Finally, Kay asserts that the license application is deficient because it sought to increase the number of authorized mobiles for Station WIJ767 without prior frequency coordination.³¹

8. First, the record does not establish Kay's allegation that the license for Station WIJ767 canceled automatically.³² Kay's statements do not sufficiently establish that SLTHS failed to operate the subject station for an entire year. He asserts that because he has been both the equipment provider for the subject station since December 1993, and a co-channel licensee familiar with operations on this frequency, he knows that operations on the subject station ceased in January 1998.³³ However, the record does not contain sufficient data supporting this allegation. No monitoring studies substantiating claims of inoperation have been submitted.³⁴ Furthermore, although Kay's statement is sworn and notarized, the non-specific nature of his allegations do not demonstrate that the operations of the subject station ceased in January 1998.³⁵ As the application for license reinstatement was filed on March 1, 1999 -- within the required thirty-day time period after license expiration -- we find SLTHS's application to have been timely filed.

9. Moreover, contrary to Kay's assertions, the subject license application is not defective. The record fails to substantiate allegations of misrepresentation. As the Court of Appeals for the D.C. Circuit has observed, "[d]irect misrepresentations or omissions to the Commission can result, by themselves, in disqualification."³⁶ We expect applicants and licensees to be accurate and fully forthcoming in their dealings with the Commission. In this instance, however, although the application did contain certain inaccuracies, we are not persuaded that they rise to the level of misrepresentation.³⁷ SLTHS's current use of its initials rather than its full name "S&L Teen Hospital Shuttle" is an insignificant matter

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²⁹ 47 C.F.R. § 1.948.

³⁰ Petition to Deny at 2-3.

³¹ Petition for Reconsideration at 2. See 47 C.F.R. §§ 1.913(e), 90.129, 90.175. Although Kay opposes an increase in the number of authorized mobiles for SLTHS's station, he questions whether there were any *ex parte* communications between the Commission and SLTHS that resulted in the denial of the latter's request for additional mobiles. Petition for Reconsideration at 3. The record does not support a finding that any prohibited *ex parte* communications occurred. Moreover, the Branch's decision denying SLTHS's request for an increase in the number of authorized mobiles was exactly the result sought by Kay and, thus, he has suffered no injury.

³² See *In the Matter of Interstate Consolidation, Inc.*, *Memorandum Opinion and Order*, 15 FCC Rcd 3330, 3334 ¶ 9 (2000).

³³ Petition to Deny at 3.

³⁴ See *Quatron*, 15 FCC Rcd at 4753 ¶ 13.

³⁵ See *In the Matter of MCI Telecommunications Corporation*, *Order and Notice of Apparent Liability*, 3 FCC Rcd 509, 510 ¶ 19 (1988) (MCI).

³⁶ *Swan Creek Communications v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994).

³⁷ See *MCI*, 3 FCC Rcd at 512 ¶ 35.

that has no import. Also, whether SLTHS is a hospital, or a shuttle service, or a hospital shuttle service³⁸ is not determinative of its eligibility to hold the subject authorization. In each case, SLTHS would be eligible to hold a Business Radio Service license.³⁹ Furthermore, a license applicant may be either a partnership or a corporation.⁴⁰ Consequently, even if the SLTHS's business structure was designated incorrectly, the error is not a material one.

10. Additionally, we find that Kay has failed to establish any intentional concealment of a change in SLTHS's ownership.⁴¹ Failure to report Leslie Miller's voluntary removal from the partnership appears to be nothing more than mere inadvertence. No new parties were introduced into this business entity. Steven Sawhill continues as owner of SLTHS, the licensee of Station WIJ76.⁴² He signed both the initial application and the Reinstatement Application and, from the record currently before us, appears to have acted as the principal proprietor at all times. Upon our review of the record in this proceeding, we find that it is devoid of a motive to deceive. The irrelevancy of the representations in issue supports the finding that there was no intentional lack of candor or willful misrepresentation.⁴³ Nor, as Kay alleges, is the whole greater than the sum of its parts.⁴⁴ We do not believe that the inaccuracies in the subject application, whether taken in part or in whole, raise substantial or material questions of fact regarding character. We will, however, refer the transfer of control matter to the Enforcement Bureau to determine what action, if any, is appropriate.

11. Finally, there is no dispute regarding Kay's allegations that SLTHS failed to comply with our frequency coordination rules. The Branch denied SLTHS's request for additional mobiles because the application for license modification was not first submitted to the applicable frequency coordinator pursuant to Sections 90.135 and 90.175 of the Commission's Rules.⁴⁵ SLTHS also failed to comply with Section 90.313(b) of the Commission's Rules,⁴⁶ which requires that licensees operating on a shared channel who seek an increase in authorized mobiles submit a signed statement by all those sharing the channel

³⁸ In its Reinstatement Application, SLTHS describes itself as "a local hospital providing emergency response to the general public." See Application File No. D122643, FCC Form 600, Item D12

³⁹ See 47 C.F.R. § 90.35(a).

⁴⁰ See 47 C.F.R. §§ 1.917(a), 90.33.

⁴¹ Section 310(d) of the Communications Act of 1934, as amended, and Section 1.948 of the Commission's Rules, provide that no license shall be transferred or assigned, or disposed of by transfer of control of any corporation holding such license, to any person except upon application to the Commission, and upon a finding by the Commission that the public interest, convenience and necessity will be served.

⁴² See Letter from Leslie Miller to Luckey's Two Way Radio (July 1, 1998). This correspondence indicated that Leslie Miller relinquished his partnership in SLTHS and that Steven Sawhill was to retain the business as a sole proprietor.

⁴³ See In the Matter of Nextel Licensee Holdings 4, Inc., *Order*, 14 FCC Rcd 6985, 6987-6988 ¶ 8 (WTB 1999); MCI, 3 FCC Rcd at 513 ¶ 38.

⁴⁴ Petition for Reconsideration at 5.

⁴⁵ 47 C.F.R. §§ 90.135, 90.175.

⁴⁶ 47 C.F.R. §§ 90.313(b).

agreeing to the increase. The appropriate administrative action in light of the failure to properly coordinate the request for additional mobiles was denial of that request – which is what the Branch did -- not dismissal of the application for reinstatement. Accordingly, we reject Kay's assertion that, because of these coordination problems, the applications should have been dismissed as deficient.

IV. CONCLUSION AND ORDERING CLAUSES

12. We conclude that the Division erroneously dismissed Kay's Petition for Reconsideration. On consideration of the merits of the Petition for Reconsideration and the Petition to Deny, we agree with Kay that SLTHS's license -- as reinstated -- indicates the wrong frequency.⁴⁷ Therefore, we direct the Wireless Telecommunications Bureau to correct SLTHS's license and the Commission's licensing database. In all other respects, however, based on the record in this proceeding and for the foregoing reasons, we affirm the Branch's finding that the grant of SLTHS's application for license reinstatement serves the public interest, convenience and necessity, pursuant to Section 309(a) of the Communications Act,⁴⁸ and is, therefore, proper.

13. Accordingly, IT IS ORDERED that pursuant to Sections 4(i) and 309(d)(2) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(d)(2), and Section 1.115(g) of the Commission's Rules, 47 C.F.R. § 1.115(g), the Application for Review filed by James A. Jay IS GRANTED IN PART to the extent indicated above and otherwise DENIED.

COMMISSION

FEDERAL COMMUNICATIONS

Magalie Roman Salas
Secretary

⁴⁷ See *supra* note 4.

⁴⁸ 47 U.S.C. § 309(a).