

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

In the Matter of	)	
	)	
VERACON, INC.	)	Case No. 93F632
	)	
Finder's Preference Request	)	
Regarding Station WNVA790,	)	
Chicago, Illinois	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: January 3, 2001**

**Released: January 8, 2001**

By the Commission:

**I. INTRODUCTION**

1. We have before us an application for review, filed on November 1, 1999, by Calumet Bus Service (Calumet).<sup>1</sup> Calumet seeks reversal of a decision by the Public Safety and Private Wireless Division (Division) of the Wireless Telecommunications Bureau (Bureau) granting a finder's preference request filed by Veracon, Inc. (Veracon) targeting Station WNVA790.<sup>2</sup> For the reasons discussed below, the application for review is denied.

**II. BACKGROUND**

2. On October 26, 1993, Veracon filed a finder's preference request (Request) targeting Calumet's authorization to operate Station WNVA790, on frequency pair 853.2375/808.2375 MHz, in the Chicago, Illinois area.<sup>3</sup> Veracon contended that Calumet failed to timely construct and operate Station WNVA790 in accordance with Sections 90.157 and 90.633 of the Commission's Rules.<sup>4</sup> As evidence of Calumet's failure to construct, Veracon submitted the sworn affidavit of Mr. Robert Barcal, Sr., president of Veracon, who stated (1) that he had inspected Calumet's authorized transmitter site for Station WNVA790, but was unable to locate any equipment operating on the subject frequencies; (2) that he had monitored Station WNVA790 on two separate occasions in February 1993, but was unable to detect any transmissions; and (3) that he had observed that Calumet's buses were operating on Station KNHQ715 (VHF base/mobile frequency 155.2800 MHz), another station authorized to Calumet, rather than on Station WNVA790, and the type of equipment utilized by Calumet at Station WNVA790's control point

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<sup>1</sup>Calumet Application for Review (filed Nov. 1, 1999).

<sup>2</sup>See Veracon, Inc., *Order*, DA 99-2055 (WTB PSPWD rel. Oct. 1, 1999) (*1999 Order*).

<sup>3</sup>Finder's Preference Request (filed Oct. 26, 1993).

<sup>4</sup>Request at 1 (*citing* 47 C.F.R. §§ 90.157, 90.633 (1993)).

location was the type of equipment typically employed for VHF frequencies, not for an 800 MHz system.<sup>5</sup> Veracon also submitted a notice from the Illinois Secretary of State stating that Calumet was involuntarily dissolved in 1960 for failure to file an annual report and/or pay franchise taxes.<sup>6</sup>

3. Calumet opposed Veracon's Request by providing information relating to Station WNVA790. Calumet indicated that its lack of corporate existence in Illinois was due to a name change from Calumet to Vancom-Indiana.<sup>7</sup> Calumet also noted that Robert Barcal might not have heard transmissions when he monitored the subject frequencies due to light channel occupancy used in connection with the operation of buses.<sup>8</sup> Moreover, Calumet indicated that its 800 MHz equipment would not have been observable to Mr. Barcal, because Calumet had relocated its control point.<sup>9</sup> As evidence of construction and operation, Calumet provided the statement of Mr. Bruce Hamann of Vancom, a work order, three purchase orders, and three invoices, none of which were frequency or station-specific.<sup>10</sup>

4. On June 15, 1994, the Bureau's former Office of Operations denied Veracon's Request.<sup>11</sup> The Office of Operations determined that Veracon did not conclusively demonstrate that Calumet failed to construct Station WNVA790 by its construction deadline, nor did it demonstrate that Calumet discontinued operations for a period in excess of one year.<sup>12</sup> On July 15, 1994, Veracon filed a petition for reconsideration (Petition), arguing that the Office of Operations did not carefully consider the information Veracon provided.<sup>13</sup>

5. On October 1, 1999, the Division reversed the earlier finding, and granted Veracon's Request. The Division found that Veracon had sufficiently demonstrated Calumet's failure to timely construct and operate Station WNVA790, and Calumet failed to adequately rebut Veracon's claim of non-construction and discontinuance of operation of Station WNVA790.<sup>14</sup> Specifically, the Division found that Calumet did not satisfy its burden of proof in providing conclusive evidence of construction and operation of Station WNVA790, either in its own name or in the name of Vancom-Illinois, its sister subsidiary.<sup>15</sup> On November 1, 1999, Calumet requested review of the Division's decision and alleged that

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<sup>5</sup>1999 Order, ¶¶ 2-3.

<sup>6</sup>*Id.* ¶ 2.

<sup>7</sup>*Id.* ¶ 5.

<sup>8</sup>*Id.* ¶ 6.

<sup>9</sup>*Id.* Calumet had not previously notified the Commission of any change of control point location, as our Rules required. *Id.* ¶ 14 (citing 47 U.S.C. § 90.135(a)(5), (e) (1993)).

<sup>10</sup>*Id.* ¶¶ 7, 9, 13.

<sup>11</sup>See Letter from William H. Kellet, Federal Communications Commission, to Robert Barcal, President of Veracon (dated June 15, 1994).

<sup>12</sup>*Id.* at 1.

<sup>13</sup>Petition for Reconsideration at 2, 4-6 (filed July 15, 1994).

<sup>14</sup>1999 Order, ¶ 16.

<sup>15</sup>*Id.*

the Division improperly shifted the burden of proof to Calumet to demonstrate that it had timely constructed and continuously-operated Station WNVA790.<sup>16</sup>

### III. DISCUSSION

6. In 1991, the Commission established the finder's preference program to augment its compliance review efforts in the private land mobile radio services.<sup>17</sup> The Commission fashioned the program to provide incentives for individuals to survey licenses assigned in the 220-222 MHz, 470-572 MHz and 800/900 MHz bands to identify licensees who had failed to construct, place in operation or continue to operate their stations.<sup>18</sup> Pursuant to the finder's preference program, an individual filed a request by presenting the Commission with sufficient information to establish a *prima facie* case against the target licensee.<sup>19</sup> The finder initially carried the burden of proof to conclusively demonstrate that a violation of the Commission's construction and operational rules had occurred.<sup>20</sup> The target licensee received an adequate opportunity to respond to the allegations.<sup>21</sup> If a rule violation was demonstrated, a successful finder was issued a letter awarding a dispositive preference to the finder for the target station.<sup>22</sup>

7. In the instant case, Veracon properly filed its Request and established a *prima facie* case. The burden of proof shifted to Calumet to rebut the *prima facie* case. However, Calumet provided insufficient evidence to rebut the substantial showing submitted by Veracon.<sup>23</sup> Calumet never put forth a

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<sup>16</sup>Application for Review at 2.

<sup>17</sup>See Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, *Report and Order*, PR Docket No. 90-481, 6 FCC Rcd 7297, 7302-7303 ¶¶ 30-38 (1991) (*PLMR R&O*); see also Amendment of Parts 1 and 90 of the Commission's Rules concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, PR Docket No. 90-481, *Memorandum Opinion and Order*, 8 FCC Rcd 6690 (1993). The Commission eliminated the finder's preference program in 1998. See Amendment of Part 90 Concerning the Commission's Finder's Preference Rules, *Report and Order*, PR Docket No. 90-481, 13 FCC Rcd 23816 (1998).

<sup>18</sup>See *PLMR R&O*, 6 FCC Rcd 7302 ¶ 30.

<sup>19</sup>*Id.* at 7308 ¶ 68; see also Joseph P. Mayenchak, Jr. d/b/a J&H Radio, *Order*, 15 FCC Rcd 5869, 5871 ¶ 5 (2000); SmartRoute Systems Limited Partnership, *Order*, DA 99-2393, ¶ 20 (WTB PSPWD rel. Nov. 2, 1999) (finders provided sufficient information to establish a *prima facie* case against the target licensees).

<sup>20</sup>*PLMR R&O*, 6 FCC Rcd at 7308 ¶ 68; see also Cellular Design Corporation, *Memorandum Opinion and Order*, 14 FCC Rcd 13059, 13063 ¶ 12 (1999); Leflore Communications, Inc., *Memorandum Opinion and Order*, DA 99-1902, ¶ 4 (WTB CWD rel. Sept. 16, 1999) (finders did not prevail after failing to initially carry the burden of proof to conclusively demonstrate that a violation of the Commission's construction and operation rules had occurred).

<sup>21</sup>*PLMR R&O*, 6 FCC Rcd at 7308 n.111.

<sup>22</sup>*Id.* at 7309.

<sup>23</sup>See generally West Coast Cab Company, *Memorandum Opinion and Order*, 15 FCC Rcd 5909, 5914 ¶ 12 (2000); Dale Kane d/b/a Kane Communications, *Order*, 14 FCC Rcd 14052, 14057 ¶ 13 (WTB PSPWD 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).

coherent description of the construction and operation of the station. Thus, we conclude that Calumet failed to make the showing required to retain its station license, and we affirm the Division's *Order*.

#### IV. CONCLUSION AND ORDERING CLAUSES

8. For the reasons stated above, the Division's decision reversing the denial of Veracon's request and granting Veracon a dispositive preference for Station WNVA790 is affirmed. Accordingly, a dispositive preference under the finder's preference program IS AWARDED to Veracon, Inc. for Station WNVA790, formerly licensed to Calumet Bus Service, Inc. Veracon, Inc. has ninety days from the date of release of this *Memorandum Opinion and Order* to follow regular application requirements and file an acceptable application with the Commission for the targeted frequencies.

9. Accordingly, IT IS ORDERED that pursuant to Section 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c) and Section 1.115(e) of the Commission's Rules, 47 C.F.R. § 1.115(e), the Application for Review filed on November 1, 1999, by Calumet Bus Service IS DENIED.

COMMISSION

FEDERAL

COMMUNICATIONS

Magalie Roman Salas  
Secretary