

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

In the Matter of)
)
James A. Cassell and Kelley Communications, Inc.)
Finders Preference Requests)
Station KNEW202)
Golden, Colorado)
)
Lawrence E. Vaughn, Jr.)
Finder's Preference Request)
Station WNXE819)
Sherman Oaks, CA)

MEMORANDUM OPINION AND ORDER

Adopted: November 22, 1996;

Released: December 4, 1996

By the Commission:

Introduction and Executive Summary

1. On August 23, 1995, James A Cassell (Cassell) and Kelley Communications, Inc. (KCI) filed an Application for Review of a decision by the Wireless Telecommunications Bureau (Bureau) denying their consolidated petition for reconsideration of the denial of their requests for finder's preferences regarding Specialized Mobile Radio (SMR) Station KNEW202, using frequencies 856.5625, 857.5625, 858.5625, 859.5625, 860.5625, 861.6125, 862.6125, 863.6125, 864.6125 and 865.6125 MHz, Golden, Colorado.¹ On September 21, 1995, Lawrence E. Vaughn, Jr. (Vaughn) filed an Application for Review of the Bureau's denial of his finder's preference request for SMR Station WNXE819, using frequencies 856.0875, 857.0875, 858.0875, 859.0875 and 860.0875 MHz, Sherman Oak, CA.² Both Applications for Review involve similar factual scenarios and relate to the minimum amount of variation from a facility's authorized coordinates required before an interested party can obtain a finder's preference for the frequency. Thus, we are resolving both of these pleadings in this Memorandum Opinion and Order. For the reasons discussed below, we affirm the Bureau's decisions and deny both Applications for Review.

¹ Letter from W. Riley Hollingsworth, Deputy Associate Bureau Chief, to A. B. Cruz III, Esquire and Karen Kincaid, Esquire dated July 28, 1996.

² 10 FCC Rcd 10885 (1995).

Background

2. In 1991, we established the finder's preference program to supplement our compliance review efforts in the private land mobile radio services by providing incentives to parties to survey private land mobile usage and identify licensees who have failed to construct, place in operation, or continue to operate their stations.³ Pursuant to this program, an entity who submits evidence conclusively demonstrating that a license assigned on an exclusive basis in the 220-222 MHz, 470-572 MHz and 800-900 MHz bands cancelled automatically for failure to construct, place-in-operation, or continue to operate a station in compliance with our rules would be able to obtain a preference for the use of the licensed frequencies in the assigned area.⁴

3. Cassell and KCI Finder's Preference Requests. On May 26, 1994, Cassell and KCI each filed a finder's preference request against Potomac Corporation, Crescent Communications (Potomac), license of SMR Station KNEW202, Golden, Colorado, operating on frequencies 856.5625, 857.5625, 858.5625, 859.5625, 860.5625, 861.6125, 862.6125, 863.6125, 864.6125 and 865.6125 MHz. Cassell and KCI sought preference awards for five of the ten channels associated with Potomac's station. The basis for their finder's preference requests was that no tower was located at the authorized coordinates. In response, Potomac demonstrated that its station is fully constructed and operational at the tower address listed on its license. The tower, however, is located 639 feet from the coordinates indicated on its license.

4. On May 11, 1995, the former Private Radio Bureau denied the finder's preference requests filed by Cassell and KCI.⁵ The Private Radio Bureau determined that a discrepancy of 600 feet between the location of the site where the tower was constructed and the authorized coordinates is de minimis. On June 12, 1995, Cassell and Kelley filed a Petition for

³ 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, 6 FCC Rcd 7297, 7303 (1991).

⁴ See 6 FCC Rcd at 7305, 47 C.F.R. § 90.173(k). *But see* Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Implementation of Sections 3(n) and 322 of the Communications Act, PR Docket No. 89-553, PP Docket No. 93-253, GN Docket No. 93-252, 11 FCC Rcd 2639, 2658 (1995) (para. 49) (excluding 900 MHz SMR stations from finder's preference program); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Implementation of Sections 3(n) and 322 of the Communications Act Regulatory Treatment of Mobile Services, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PR Docket Nos. 93-144, RM-8117, RM-8030, RM-8029, GN Docket No. 93-252, PP Docket No. 93-253, 11 FCC Rcd 1463, 1501 (1995) (para. 60) (excluding 800 MHz SMR stations from finder's preference program); Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, WT Docket No. 96-18, PP Docket No. 93-253, 11 FCC Rcd 3108, 3113 (1996) (para. 22) (proposing to exclude 929 MHz paging stations from finder's preference program).

⁵ Letter from William Kellett, Licensing Division, Private Radio Bureau to A. B. Cruz, Esquire, and Karen A. Kincaid, Esquire.

Reconsideration of the May 11, 1995, denial of their requests. They asserted that the Private Radio Bureau improperly failed to apply the same substantial accordance standard described in *Fred B. Lott*, 9 FCC Rcd 225 (1994). On July 28, 1995, the Private Radio Bureau denied this petition, stating that Cassell and Kelley misinterpreted *Lott*, and that the 600 foot discrepancy was de minimis. The Private Radio Bureau also indicated that it would allow Potomac, the licensee, to correct the error rather than cancel the license.⁶ On August 23, 1995, Cassell and KCI filed an Application for Review regarding the denial of their finder's preference requests.

5. Vaughn's Finder's Preference Request. On March 11, 1994, Vaughn filed a finder's preference request against Ross Shade Trust (RST), licensee of SMR Station WNXE819, Sherman Oaks, California, operating on frequencies 856.0875, 857.0875, 858.0875, 859.0875 and 860.0875 MHz. In his finder's preference request, Vaughn presents evidence indicating that RST had not constructed Station WNXE819 at its authorized coordinates. In response, RST states that the station was constructed approximately one-half mile from its authorized coordinates. RST indicates that this variance was inadvertent and a consequence of this reliance on the coordinates for the stations's location, as provided by an already existing licensee.

6. On August 18, 1994, the former Private Radio Bureau denied Vaughn's finder's preference request.⁷ The decision stated that stations constructed within 1.6 kilometers of their authorized coordinates generally should not be the subject of finders preference requests based on violations of the Commission's construction requirements. Vaughn and other interested parties filed petitions for reconsideration of this decision.⁸ The Bureau denied Vaughn's petition, finding that Vaughn incorrectly interpreted applicable precedent, and that a "one second" (*i.e.*, 60 feet) substantial accordance standard is unworkable.⁹

Discussion

7. When we established the finder's preference program, the Commission indicated that it limited the scope of rule violations that qualify for a finder's preference to violations of our

⁶ Letter from W. Riley Hollingsworth, Deputy Associate Bureau Chief to A.B. Cruz, Esquire and Karen A. Kincaid, Esquire.

⁷ 9 FCC Rcd 4438 (1994).

⁸ Vaughn filed a petition for reconsideration on September 16, 1994. Stephen Orr, Kelley Communications, Patrick E. Connelly, James A. Cassell, Joy Rheins, Fred B. Lott, Laura Lee Fairbanks, John Roeder, and David E. Huffman filed a joint petition on September 6, 1994 ("Orr Petition"). These petitioners generally support Mr. Vaughn's petition. Two other parties, Lyle, Ltd. and Century Communications, Inc., filed a joint petition on September 19, 1994 ("Lyle Petition"). These petitioners seek to recover channels used by other systems on similar actual grounds to those stated in Vaughn's finder's preference request.

⁹ *Lawrence E. Vaughn, Jr.*, 10 FCC Rcd 10885 (1995).

construction, placed-in-operation and discontinuance-of-operation rules.¹⁰ We determined that these type of violations lend themselves to conclusive and expeditious action.¹¹ The Cassell, KCI, and Vaughn finder's preference requests involve the question of what types of violations of our construction rules qualify for finder's preferences. In this connection, we previously indicated that if a base station is not constructed in "substantial accordance" with the parameters specified in the station authorization (e.g., authorized antenna height), the channel associated with such base station would be recovered from the licensee.¹² Thus, the disposition of these requests revolve around the meaning of "substantial accordance." We have not defined the substantial accordance standard; thus, the meaning of substantial accordance has been determined on a case-by-case basis. In this connection, Cassell, KCI, and Vaughn contend that different and inconsistent definitions have been provided for substantial accordance. We disagree with this contention.

8. First, Cassell, KCI, and Vaughn argue that the former Private Radio Bureau defined "substantial accordance" in *Fred B. Lott*. Specifically, they point to the Licensing Division's statement that "[a]s a rule of thumb, construction more than one second, (60 feet), away from the licensed location is not in accordance with the station's authorization"¹³ as the meaning of substantial accordance.¹⁴ To the contrary, the *Lott* decision, particularly the language cited by Cassell, KCI, and Vaughn, describes a situation where exact accordance with a licensee's authorization is not met rather than defining substantial accordance. Consequently, this discussion in *Lott* does not bear on the meaning of substantial accordance.

9. Second, Cassell, KCI, and Vaughn contend that the Bureau's disposition of their finder's preference requests was inconsistent with other decisions regarding violations of our construction rules. For example, they rely heavily upon a decision by the Licensing Division's Consumer Assistance Branch regarding Cell Mobile Communications, Inc. (CMCI).¹⁵ By this letter decision, the Licensing Division determined that CMCI's license cancelled automatically when it constructed approximately 500 feet from its licensed coordinates.¹⁶ Significantly, this

¹⁰ See *Report and Order*, 6 FCC Rcd at 7305; 47 C.F.R. §§ 90.155, 90.157, 90.629, 90.631(e) and (f), 90.633(c) and (d).

¹¹ *Id.*

¹² *Id.* at 7299.

¹³ *Fred B. Lott*, 9 FCC Rcd 225.

¹⁴ Application for Review at 4.

¹⁵ See Letter to Linda Pagano from Kathryn M. Garland, Chief, Consumer Assistance Branch, dated October 9, 1992.

¹⁶ *Id.*

decision subsequently was reversed and CMCI's license reinstated.¹⁷

10. With respect to the meaning of substantial accordancy, we believe that both of the approaches advocated by Cassell, KCI, and Vaughn would be unnecessarily restrictive. At this juncture, we believe that it would be helpful for us to reiterate the motivating factors for our implementation of the finder's preference program. We indicated that the program was intended to facilitate a means for recapturing unused channels so that licensing opportunities could be provided in those areas where there is limited available spectrum.¹⁸ We further indicated that the program would provide incentives for parties to survey private land mobile usage and identify licensees who have failed to construct, place in operation, or continue to operate their stations, thus, supplementing our compliance review activities.¹⁹ We are concerned that our finder's preference program not be used as a means to disrupt service being provided to the public by alleging license cancellation based on minor variations from authorized parameters.

11. As a result, we believe that it would enhance the overall effectiveness and efficiency of our finder's preference program if we were to provide additional guidance regarding the meaning of substantial accordancy. When the Wireless Telecommunications Bureau ruled on the Vaughn finder's preference request, it used a 1.6 kilometer benchmark.²⁰ We agree with the use of this benchmark in the context of finder's preference requests premised on construction at variance from authorized coordinates. First, this benchmark is consistent with a variety of relevant factors including: the range of private land mobile radio systems, our experience with the accuracy of systems currently licensed,²¹ and the type of violation which evidences an inappropriate disregard for the requirements of our rules. While Cassell, Kelley and Vaughn advocate a more restrictive standard, we conclude that a rational standard that fosters continued provision of service to the public rather than requiring disruption of service through cancellation of licenses for minor errors in location of stations would best further the public interest.

12. We note, however, that this benchmark will not operate as an absolute bar against filing of finder's preference requests when the variance is less than 1.6 kilometers. We recognize that there may be situations where such variance is not "minor", e.g., when it causes air safety problems, or where a licensee knowingly constructed at another site for purposes of changing its station's coverage footprint. Thus, the purpose of this 1.6 kilometer benchmark

¹⁷ See Letter from Robert Baird, Technical Manager, Cell Mobile Communications, Inc. to Kathryn M. Garland, Chief, Consumer Assistance Branch dated November 10, 1992.

¹⁸ *Report and Order*, 6 FCC Rcd at 7303.

¹⁹ *Id.*

²⁰ See *Lawrence E. Vaughn, Jr.*, 10 FCC Rcd at 10887.

²¹ For example, a 1.6 kilometer benchmark has been used successfully in the context of geographic coordinates near certain mountain peaks. Pursuant to 47 C.F.R. § 90.621(b), all stations within 1.6 kilometers of certain mountain peaks are considered to be at the peak for purposes of applying certain rules applicable to those peaks.

is to provide potential filers of finder's preference requests guidance regarding their burden of proof. In this connection, for variations from authorized coordinates of less than 1.6 kilometers, filers have a burden to demonstrate that the variance is not minor based on the specific facts. Absent such a showing, if the affected licensee provides sufficient evidence that it has indeed constructed a station, a preference will not be awarded.

13. In accordance with the above discussion, we conclude that no finder's preference should be awarded in the instant cases. Both RST and Potomac have demonstrated that they constructed their respective stations. In response to the Vaughn, Cassell and KCI finder's preference requests, RST and Potomac also have demonstrated that the deviation between the actual and authorized coordinates for their respective stations does not exceed 1.6 kilometers. Moreover, parties have not shown that such deviation warrants cancellation of the target licenses -- for example, no evidence of air safety hazards or other extraordinary circumstances was presented. Accordingly, we affirm the denial of the finder's preference requests filed by Cassell, Kelley and Vaughn.

14. Although we find that finder's preference awards are not warranted in the instant cases, we remain concerned that the subject licensees failed to construct at their authorized coordinates. In this connection, we take this opportunity to reiterate the importance of a licensee's construction of facilities in exact compliance with its authorization. Full compliance with our rules requiring construction at licensed coordinates results in several public interest benefits. First, it facilitates coordination among and prevents harmful interference to licensees operating in the same area. Second, it promotes public safety by protecting against the creation of air safety hazards. Third, it ensures the integrity and accuracy of the Commission's licensing database, upon which Commission licensing staff, existing and potential licensees, and frequency coordinators rely. While we may choose not to award a finder's preference in certain instances based on the "substantial accordancy" definition we have clarified today, in the future, we may choose to take another course of action where a licensee has failed to construct at its authorized coordinates, *e.g.*, imposing a forfeiture for such conduct. As a result, we encourage licensees to carefully review their authorizations to ensure that they have constructed at their authorized coordinates. In addition, we note that if licensees discover that they have not constructed at their authorized coordinates, our licensing rules provide procedures whereby such licensees can file an application seeking modification of their licenses so that the authorizations reflect the accurate location of their facilities.

Ordering Clause

14. IT IS ORDERED THAT, for the foregoing reasons, the Applications for Review filed by Vaughn, Cassell and Kelley Communications are HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary