

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

In re Application of)
)
JAMES A. KAY, JR.)
) File No. 666672
For Consent to Assign the License)
For Conventional SMR Station WNXR890)
Newbury Park, California)

ORDER

Adopted: November 9, 2001

Released: November 14, 2001

By the Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau:

1. This order addresses a petition for reconsideration (“Petition”) filed by James A. Kay, Jr. (“Kay”) on November 3, 2000. Kay seeks reconsideration of the dismissal of the above-captioned assignment application by the Commercial Wireless Division’s Licensing and Technical Analysis Branch (“Branch”). For the reasons discussed below, we deny Kay’s Petition.

2. On May 6, 1994, Kay filed an application seeking Commission approval of the assignment of the station license for conventional SMR call sign WNXR890 from Vince Cordaro (“Cordaro”) to Kay. Cordaro’s license expired while the assignment application was pending for failure to renew on or before the license expiration date of November 4, 1996.¹ On September 24, 2000, the Branch dismissed Kay’s assignment application because the underlying license had expired.

3. In his Petition, Kay argues that expiration of the underlying license does not justify the dismissal of a pending assignment application for that license.² Kay further argues that section 9(b) of the Administrative Procedure Act (APA)³ requires that Kay’s assignment application be treated as an application for a new license, and that the authorization for the underlying license continued in effect until final action was taken on the assignment application.⁴

4. We find Kay’s arguments to be without merit. Under the Commission’s rules in effect at

¹ See Commission Rule 90.149(b), 47 C.F.R. § 90.149 (c) (1996), which provided that “[i]f no application for reinstatement has been filed as specified in this part, the authorization shall be deemed to have been automatically cancelled on the date specified on the authorization.”

² Petition at 2.

³ See 5 U.S.C. § 558.

⁴ *Id.* at 3.

the time of the expiration of call sign WNXR890, renewal applications were required to be filed during the term of the license⁵ and licensees were afforded an additional thirty days after the expiration of the license term to apply for reinstatement.⁶ If no application for reinstatement was filed, the license was deemed to have been automatically cancelled on the date specified on the authorization.⁷ Requests for reinstatement filed more than thirty days after license expiration were reviewed on a case-by-case basis under our waiver rules.⁸

5. In the instant case, Cordaro failed to file for renewal for call sign WNXR890, did not request reinstatement of his license, and did not seek a waiver of the Commission's late-filed reinstatement provision. Further, neither Kay nor Cordaro sought reconsideration of the Commission's action in deleting Cordaro's expired call sign WNXR890. It is well settled that a license remains subject to our rules, including operational and renewal provisions, even where an assignment or transfer of control application is pending for the underlying license.⁹ The filing of an assignment application does not relieve a Commission licensee of the responsibility of renewing its authorization and Cordaro, a former licensee, cannot assign an expired license.¹⁰ Kay fails to cite any Commission precedent to support his argument that an expired license may be assigned.

6. We also find Kay's argument that section 9(b) of the APA applies to be misplaced. Kay cites section 558(c), which provides, in pertinent part, that "[w]hen the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency." Kay argues that the Commission erred in not treating his assignment application regarding call sign WNXR890 as a "new" application for the facilities associated with Cordaro's expired license, as Kay was allegedly eligible for the specified facilities. On its face, Kay's application does not seek approval for operation of a new facility; rather, Kay seeks Commission approval of the assignment and modification of a previously authorized station.¹¹ Further, Kay misinterprets the requirements of section 558(c). The portion of section 558(c) cited by Kay was intended "to protect those persons who already have regularly issued licenses from the serious hardships occasioned both to them and

⁵ 47 C.F.R. § 1.926(b) (1996).

⁶ 47 C.F.R. § 90.149(a) (1996).

⁷ 47 C.F.R. § 90.149(b) (1996).

⁸ 47 C.F.R. § 90.151(a) (1996).

⁹ See *In the Matter of Peacock's Radio and Wild's Computer Service, Inc., and 21st Century Wireless Group, Inc.*, *Memorandum Opinion and Order*, FCC 01-213 (rel. August 1, 2001).

¹⁰ See *In the Matter of Applications of Transit Mix Concrete and Material Company*, *Memorandum Opinion and Order*, FCC 01-210 (rel. August 2, 2001).

¹¹ Assuming, *arguendo*, that Kay had submitted a new co-channel application requesting authority for the identical parameters as call sign WNXR890, such an application would not have been grantable unless Cordaro failed to load his conventional SMR station with 70 mobile units within eight months of grant.

to the public by expiration of a license before the agency finds time to pass upon its renewal.”¹² The term “regularly issued licenses” has been clarified by the courts to “suggest an activity that is normally carried on indefinitely under licenses that as a regular matter are renewed or replaced with new licenses issued to the current holder.”¹³ Kay’s argument fails in the context of the issuance of a Commission license like that of Cordaro’s former call sign WNXR890, which can be renewed by the licensee and is not replaced with a new license issued to the current holder. Under section 558(c), the Commission is required to permit a current licensee to continue to operate while its renewal application is pending. In the instant case, no such renewal application was filed and, accordingly, Kay’s assignment/modification application was properly dismissed.

7. Accordingly, IT IS ORDERED that, pursuant to section 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (405), and sections 0.331 and 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. on November 3, 2000, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Katherine M. Harris
Deputy Chief, Commercial Wireless Division
Wireless Telecommunications Bureau

¹² See *Miami MDS Company v. Federal Communications Commission*, 14 F.3d 658, 659, 304 U.S. App. D.C. 360, 361 (1994), quoting *Pan- Atlantic Steamship Corp. v. Atlantic Coast Line*, 353 U.S. 436, 444-45, 77 S.Ct. 999, 1004-1005 (1957) (Burton, J., dissenting), quoted in *County of Sullivan v. Civil Aeronautics Board*, 436 F.2d 1096, 1099 (2d Cir. 1971) (Friendly, J.).

¹³ *Id.*