

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

In the Matter of)	
)	
REGENTS OF THE UNIVERSITY OF CALIFORNIA)	Case Nos. 93F730 and 94F060
)	
Finder's Preference Requests filed by James A. Kay, Jr. For Conventional Business Station WNXC946, Irvine, California)	

ORDER

Adopted: July 1, 2002

Released: July 2, 2002

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

1. In this *Order*, we dismiss a Petition for Reconsideration (Petition) filed on February 14, 2002, by James A. Kay, Jr. (Kay).¹ Kay seeks reconsideration of the *Memorandum Opinion and Order (Regents MO&O)*² wherein the Commission concluded that Kay had prematurely filed two finder's preference³ requests targeting Conventional Business Radio Station WNXC946, Irvine, California, which enjoyed extended implementation authority⁴ at the time Kay filed his requests. The *Regents MO&O* denied Kay's consolidated Application for Review, which sought reversal of the Wireless Telecommunications Bureau's (Bureau) denial of his petition for reconsideration and dismissal of his second finder's preference request targeting Station WNXC946.⁵ For the reasons that follow, we dismiss

¹ Kay Petition for Reconsideration (filed Feb. 14, 2002) (Petition).

² Regents of the University of California, *Memorandum Opinion and Order*, 17 FCC Rcd 1393 (2002) (*Regents MO&O*).

³ The Commission established the finder's preference program to facilitate the recovery of unused spectrum. As a general matter, the Commission would give a preference to an eligible licensee which brought to the Commission's attention a station which had not met the Commission's construction, loading or operational rules. Specifically, persons with information that might lead to a channel recovery would file that information with the Commission. If the Commission determined that there had been a material rule violation by the "target" licensee, the "finder's" application would be granted and the "target" station would have to relinquish the frequency. See Amendments of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, PR Dkt. No. 90-481, *Report and Order*, 6 FCC Rcd 7297 (1991). In 1998, the Commission eliminated the finder's preference program. See Amendment of Part 90 Concerning the Commission's Finder's Preference Rules, WT Dkt. No. 96-199, *Report and Order*, 13 FCC Rcd 23816 (1998).

⁴ Land mobile applicants, upon proper showing, may receive an extended period of time for constructing and placing a station in operation. See 47 C.F.R. § 90.629. On August 29, 1991, Regents was granted a three-year extended implementation schedule to construct Station WNXC946. The "slow growth" period was scheduled to end on August 29, 1994. Regents subsequently requested an extension of the slow growth period on July 28, 1994. See *Regents MO&O*, 17 FCC Rcd at 1394 ¶ 3.

⁵ In 1993 Kay filed a finder's preference request targeting Station WNXC946. See Finder's Preference Request Case No. 93F730 (filed Dec. 17, 1993). In 1994 the former Private Radio Bureau's (now the Wireless Telecommunications Bureau) Licensing Division dismissed Kay's finder's preference request. See Letter from William H. Kellett, Attorney, (continued...)

the Petition as repetitious.

2. Section 1.106(b)(3) of the Commission's Rules provides that a petition for reconsideration of an order denying an application for review which fails to rely on new facts or changed circumstances may be dismissed by the staff as repetitious.⁶ In the Petition, Kay reiterates arguments already considered and rejected by the Commission in denying his Application for Review. It is settled Commission policy that petitions for reconsideration are not to be used for the mere reargument of points previously advanced and rejected.⁷ Reconsideration will not be granted merely for the purpose of again debating matters on which the Commission has already deliberated and decided.⁸ Yet, this is exactly what Kay has attempted to do in the Petition when reargues matters that the Commission previously considered and rejected in ruling on his Application for Review. For instance, Kay reiterates his assertion that the applicable construction deadline from which to determine whether his finder's preference requests were timely filed expired on August 29, 1992.⁹ The Commission already resolved this matter in the *Regents MO&O* when it found that the two finder's preference requests were filed several months before the end of the applicable construction deadline, August 29, 1994, and were therefore premature under the procedural requirements set by the Commission.¹⁰ Similarly, Kay repeats his argument that a distinction should be drawn between a licensee that fails to meet an implementation benchmark and a

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Licensing Division to Kathleen A. Kaercher, Esq. (dated Feb. 17, 1994). Kay subsequently sought reconsideration of the Division decision alleging that Regents was in violation of the Commission's construction and placed-in-operation rules. See Petition for Reconsideration (filed Mar. 21, 1994) (1994 Petition). Kay also filed a second finder's preference request targeting Station WNXC946 repeating allegations raised in his 1994 Petition. See Finder's Preference Request Case No. 94F060 (filed Mar. 24, 1994). Regents filed an opposition to Kay's finder's preference request and Kay filed a reply to Regent's opposition. See Opposition to Finder's Preference Request (filed Jun. 9, 1994); Reply to Opposition to Finder's Preference Request (filed Jun. 20, 1994). In 1996 the Bureau denied Kay's reconsideration petition and dismissed Kay's second finder's preference request. See Letter from W. Riley Hollingworth, Deputy Associate Bureau Chief, Office of Operations, to Robert J. Keller, Esq., and Willi K. Bokenkamp (dated Jan. 24, 1996). Kay subsequently filed an application for review of the Bureau's decision. See Kay Application for Review (filed Feb. 26, 1996) (Kay AFR). In March 1996, Regents filed an "Opposition to Application for Review." See Opposition to Application for Review (filed Mar. 11, 1996). In January 2002, we denied Kay's AFR and affirmed the Bureau's decision regarding Kay's 1994 reconsideration petition and second finder's preference request. See *Regents MO&O*, 17 FCC Rcd at 1396 ¶ 10.

⁶ 47 C.F.R. § 1.106(b)(3).

⁷ See *Mandeville Broadcasting Corp. and Infinity Broadcasting of Los Angeles, Order*, 3 FCC Rcd 1667 ¶ 2 (1988) (*Mandeville*); *M&M Communications, Inc., Memorandum Opinion and Order*, 2 FCC Rcd 5100 ¶ 7 (1987) (*M&M Communications*).

⁸ See *M&M Communications*, 2 FCC Rcd 5100, ¶ 7 citing *Knoxville Broadcasting Corp., Memorandum Opinion and Order*, 87 FCC 2d 1103, 1107 (1981); *Petition of Thomas Rockler, Second Memorandum Opinion and Order*, 2 FCC Rcd 1629 (1987); *The President and Directors of Georgetown College, Memorandum Opinion and Order*, 50 Rad.Reg.2d (P&F) 366 (1981); *The Pacific FM, Inc., Memorandum Opinion and Order*, 45 Rad.Reg.2d (P&F) 659 (1979); *WEOK Broadcasting Corp., Memorandum Opinion and Order*, 4 Rad.Reg.2d (P&F) 503 (1965); *WWIZ, Inc., Memorandum Opinion and Order*, 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965) *cert. denied*, 383 U.S. 967 (1966), *petition for rehearing denied*, 384 U.S. 947 (1966).

⁹ Compare Petition at 2 and AFR at 4-5 (disagreeing with Bureau's interpretation of when a finder's preference request could be filed targeting a slow growth license) with *Regents MO&O*, 17 FCC Rcd at 1395 ¶ 7 citing Amendment of Part 90 of the Commission's Rules Governing Extended Implementation Periods, PR Dkt. No. 92-210, *Report and Order*, 8 FCC Rcd 3975, 3977 ¶ 14 (1993) (establishing when a finder's preference request may be filed against a slow growth license).

¹⁰ See *Regents MO&O*, 17 FCC Rcd at 1395 ¶ 8.

licensee that fails to engage in any construction whatsoever.¹¹ The Commission recognized that Kay was attempting to make that distinction,¹² but nonetheless explained that even if an extended implementation authority is terminated, the licensee still has a six month grace period to complete construction.¹³ In sum, Kay merely repeats statements he offered previously in his two finder's preference requests, his petition for reconsideration, and his Application for Review.¹⁴ Given that Kay offers neither new facts nor changed circumstances,¹⁵ we find that Kay's Petition is defective as filed. Therefore, we dismiss Kay's Petition as repetitious.¹⁶

3. Accordingly, IT IS ORDERED that pursuant to Sections 4(i) and 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 405(a), and Sections 1.106(b)(2) and (3) of the Commission's Rules, 47 C.F.R. §§ 1.106(b)(2), (3), the Petition for Reconsideration filed by James A. Kay, Jr. on February 14, 2002, IS DISMISSED.

4. This action is taken under delegated authority pursuant to Sections 0.131 and 1.106(b)(3) of the Commission's Rules, 47 C.F.R. §§ 0.131, 1.106(b)(3).

FEDERAL COMMUNICATIONS COMMISSION

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

¹¹ Compare AFR at 3-5 and Petition at 2-4.

¹² *Regents MO&O*, 17 FCC Rcd at 1395 ¶ 6.

¹³ *Id.* at 1395 ¶ 7.

¹⁴ Compare Petition at 2-4 with AFR at 2-5. See note 5 *supra*.

¹⁵ See, e.g., *S&L Teen Hospital Shuttle, Order on Reconsideration*, 17 FCC Rcd 7899 ¶ 2 (2002) (S<HS).

¹⁶ 47 C.F.R. § 1.106(b) (3). We also note that Kay has failed to meet the Commission's procedural requirements for reconsideration, See, e.g., *S<HS*, 17 FCC Rcd at 7899 ¶ 2. Section 1.106(b)(2) of the Commission's Rules provides that where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances is present: (1) the petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters, or (2) the petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not - through the exercise of ordinary diligence - have been learned prior to such opportunity. 47 C.F.R. §1.106(b)(2). As discussed in detail herein, Kay has neither presented new facts nor facts that were unknown to him previously. Accordingly Kay's Petition may not be considered under Section 1.106(b)(2).