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

In the Matter of	)	
	)	
JEN-SHENN SONG	)	File No. D139187
	)	
Renewal Application for Station WNKS326	)	
And Request for Waiver of Section 1.949(a)	)	
Of the Commission's Rules	)	

ORDER ON RECONSIDERATION

Adopted: March 4, 2002 **Released: March 5, 2002**

By the Chief, Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On February 26, 2002, the Commercial Wireless Division's Policy and Rules Branch released an order (*February 26 Order*) in the above-captioned proceeding in response to a petition for reconsideration filed by Jen-Shenn Song (Song) on February 28, 2001 (Petition).[1] The order granted Song's petition and established an expiration date of February 26, 2003, for Song's license for Station WNKS326. It also dismissed the opposition to the Petition (Opposition) that Nextel License Holdings 4, Inc. (Nextel) filed on March 14, 2001, as untimely filed.[2] As discussed below, on our own motion, we reverse the decision to dismiss the Opposition as untimely filed and address the arguments presented. As further explained below, however, we affirm our decision to grant Song's Petition.

II. BACKGROUND

2. As we explain fully in the *February 26 Order*,[3] Song was granted a five-year license for Station WNKS326 on July 14, 1988,[4] and after constructing facilities for this station, he dismantled them and terminated service on April 8, 1992.[5] Billy J. Rutledge (Rutledge) was awarded a dispositive finder's preference on February 16, 1993, for Station WNKS326 and Song was notified that his license had automatically terminated as of that date. Song's petition seeking reconsideration of the February 16, 1993

[1] In the Matter of Jen-Shenn Song Renewal Application for Station WNKS326 and Request for Waiver of Section 1.949(a) of the Commission's Rules, *Order*, DA 02-423 (rel. Feb. 26, 2002).

[2] Opposition to Petition for Reconsideration filed by Nextel License Holdings 4, Inc. (Mar. 14, 2001).

[3] *See February 26 Order*, DA 02-423 at ¶¶ 2-4.

[4] *See* In the Matter of Billy J. Rutledge Request for a Finder's Preference Against Station WNKS326, Tacoma, Washington, Licensed to Jen-Shen Song, *Memorandum Opinion and Order*, 14 FCC Rcd 6565, 6566, n.5 (1999) (*Finder's Preference Order*).

[5] *Finder's Preference Order*, 14 FCC Rcd at 6569, ¶ 9, 6570, ¶ 10.

action was denied on May 21, 1993,[6] and he filed an application for review on June 21, 1993.[7]

3. Song filed an application for renewal in July 1993, which was not processed because the application for review was still pending at the time. On June 17, 1998, Nextel was granted a geographic area license that included the spectrum that had been licensed to Song under call sign WNKS326 in the Tacoma, Washington area, subject to Song's pending application for review. In October 1998, the Licensing and Technical Analysis Branch inadvertently put Song's July 1993 renewal application back into the processing queue and granted the application, extending the expiration date from July 1998, to February 12, 1999.

4. On April 8, 1999, the Commission resolved the issues raised in Song's application for review by releasing its *Finder's Preference Order*. Specifically, the Commission granted Song's application for review, denied Rutledge's finder's preference request, and reinstated Song's license for WNKS326.[8] The *Finder's Preference Order*, however, did not provide an expiration date or a construction deadline for the reinstated license.

5. Song was out of the country when the Licensing and Technical Analysis Branch granted his July 1993 renewal application and the Commission released its *Finder's Preference Order*. After returning from his business trip, Song found that (1) Rutledge's finder's preference request had been denied and Song's license had, therefore, been reinstated; and (2) his license automatically terminated on February 12, 1999, because of his failure to file a timely renewal application. On March 20, 2000, Song submitted an application for renewal together with a request for waiver of the filing deadline for renewal applications. The waiver request was denied and the renewal application dismissed on January 31, 2001. Song filed his Petition on February 28, 2001, Nextel filed its Opposition on March 14, 2001, and Song filed his reply on March 21, 2001 (Reply).[9] In response to the Petition, on February 26, 2002, the Policy and Rules Branch released an order that (1) dismissed Nextel's Opposition as late-filed; (2) reversed the Licensing and Technical Analysis Branch's decision of October 1998, to renew Song's license and extend the expiration date to February 12, 1999; and (3) established, pursuant to the *Finder's Preference Order*, an expiration date as well as a construction deadline of February 26, 2003, for Song's reinstated license.

III. DISCUSSION

6. Although we affirm our decision to grant Song's Petition as provided in the *February 26 Order*, we recognize that the decision to dismiss Nextel's Opposition as untimely filed was an error. Section 1.106(g) of the Commission's rules provides that an opposition to a petition for reconsideration shall be filed within 10 days after the petition is filed.[10] In the *February 26 Order*, the Policy and Rules Branch dismissed the Opposition because Nextel filed the Opposition 14 days after the Petition was filed.[11] Upon reconsideration on our own motion,[12] we reverse that decision because Section 1.4(h) of the Commission's rules provides that if a document is served on other parties by mail and the filing period for a response is 10 days or less, an additional three days, excluding holidays, will be allowed to all parties in the proceeding.[13] Song filed his Petition on February 28, 2001, creating a ten-day deadline for filing an

[6] *Finder's Preference Order*, 14 FCC Rcd at 6567, ¶¶ 3, 4.

[7] *Finder's Preference Order*, 14 FCC Rcd at 6567, ¶ 5.

[8] *Finder's Preference Order*, 14 FCC Rcd at 6570, ¶¶ 11-13.

[9] Reply to Opposition to Petition for Reconsideration filed by Jen-Shenn Song (Mar. 21, 2001).

[10] 47 C.F.R. § 1.106(g).

[11] February 26 Order, DA 02-423 at ¶ 5.

[12] 47 C.F.R. § 1.108.

[13] 47 C.F.R. § 1.4(h).

opposition of March 10, 2001, which fell on a Saturday. By adding three days to that deadline, excluding Sunday, because Song served the document on Nextel by first-class mail,[14] we find that Nextel filed its Opposition in a timely manner on March 14, 2001. We now address the arguments that Nextel raised in its Opposition. Because we are addressing the arguments raised in the Opposition, we will also consider Song's arguments raised in his Reply.

7. Nextel first argues in its Opposition that Song provides no support in his Petition for granting the request for waiver that he filed on March 20, 2000, of the filing deadline for renewal applications.[15] We do not need to address the issues raised with respect to the waiver request because the request is moot. Song filed his March 20, 2000 waiver request based on information from our licensing database that the license he received pursuant to his July 1993 renewal application had terminated on February 12, 1999. As explained in the *February 26 Order*, we reversed the action that granted Song a renewed license because he was ineligible to file a renewal application for Station WNKS326 in July 1993.[16] We therefore do not address issues raised regarding the denial of Song's March 20, 2000 waiver request because the February 12, 1999 expiration date is invalid and, therefore, not a basis for renewal.

8. Nextel also argues that once Song's license terminated on February 12, 1999, the spectrum associated with Station WNKS326 reverted to Nextel as the geographic area licensee.[17] We disagree because Song's license did not terminate on February 12, 1999; it terminated on February 16, 1993, well before Nextel became the geographic area licensee. The Commission's rule on spectrum reversion provides that "recovered channels in the 800 MHz SMR service will revert automatically to the holder of the [Economic Area] EA licensee within which such channels are included."[18] This rule applies only where there is an existing EA licensee and an incumbent licensed on a site-specific basis in the geographic market loses its license for failure to comply with Commission rules.[19] Spectrum cannot revert to an EA licensee if no EA licensee exists at the time an incumbent loses its license. In the *February 26 Order*, we determined that the license granted pursuant to Song's July 1993 renewal application along with the associated February 12, 1999 expiration date were invalid. In making that decision, we concluded that Song was ineligible to file an application for renewal in July 1993, because the license had terminated on February 16, 1993.[20] Accordingly, Song was not an incumbent licensee that lost his license after June 1998, when Nextel became the geographic area licensee for the Tacoma, Washington market. Rather, Song lost his license before Nextel became the EA licensee. The Commission's policy on spectrum reversion is therefore inapplicable in this case.

9. Nextel finally asserts that it "stands to suffer competitive harm as well as potential interference to its economic area authorization" if Song's license is reinstated.[21] While the spectrum

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[14] Petition at Certificate of Service.

[15] As we described in the February 26 Order, Song argued that he had no notice that he needed to file a renewal application. February 26 Order, DA 02-423 at ¶8; Reply at 2. In its Opposition, Nextel argues that not receiving a renewal notice is not an excuse for failure to file a renewal application. Nextel further contends that "granting a waiver request for a licensee who went on an extended business trip and lost track of his own licensing proceeding" is neither unique or unusual circumstances nor in the public interest. Opposition at 2-3.

[16] February 26, Order, DA 02-423 at ¶6.

[17] Opposition at 3.

[18] 47 C.F.R. § 90.173(n).

[19] In the Matter of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Memorandum Opinion and Order*, 12 FCC Rcd 9972, 9982, ¶ 29 (1997).

[20] February 26 Order, DA 02-423 at ¶ 6.

[21] Opposition at 4.

associated with Station WNKS326 did not revert to Nextel under the Commission's spectrum reversion policy, the spectrum was included in the auction of the upper 200 channels in the 800 MHz service. Nextel, however, was on notice that the status of that spectrum could change because Song's application for review was pending before the Commission when Nextel elected to bid on the channels associated with Station WNKS326 in the Tacoma, Washington area. Specifically, prior to the 800 MHz upper band auction, the Wireless Telecommunications Bureau notified potential bidders that pleadings, including applications for review, were pending before the Commission and might not be resolved before the auction. Potential bidders were also warned that resolution of the pending matters might affect the availability of the spectrum for the EA licensee. Finally, potential bidders were warned that they were solely responsible for investigating and evaluating the degree to which any pending matter might affect spectrum availability in areas where they sought EA licenses.[22] Thus, Nextel was on notice that pending claims to the spectrum associated with Station WNKS326 might affect the availability of that spectrum even though it was included in the auction. In fact, once the Commission reinstated Song's license, that spectrum was no longer available to Nextel. Any decision that Nextel made to use the spectrum associated with Station WNKS326 during this proceeding was made at Nextel's own risk.

10. As explained above, we reverse our decision to dismiss Nextel's Opposition. After carefully considering Nextel's Opposition, we find that Nextel does not present any arguments that would warrant reversing the *February 26 Order* on the merits. We therefore affirm our decision of February 26, 2002, to grant Song's petition for reconsideration.

IV. ORDERING CLAUSES

11. ACCORDINGLY, IT IS ORDERED that, pursuant to Sections 4(i), 303(r), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 405, and Sections 0.331, 1.106, and 1.108 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.106, 1.108, the decision to dismiss the Opposition to Petition for Reconsideration filed by Nextel License Holdings 4, Inc. on March 14, 2001, in the *February 26 Order* IS REVERSED on our own motion.

12. IT IS FURTHER ORDERED that, pursuant to Section 4(i), 303(r), and 405 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), 405, and Sections 0.331 and 1.106 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.106, the Opposition to Petition for Reconsideration filed by Nextel License Holdings 4, Inc. on March 14, 2001, IS DENIED.

FEDERAL COMMUNICATIONS COMMISION

Paul D'Ari
Chief, Policy and Rules Branch
Commercial Wireless Division
Wireless Telecommunications Bureau

[22] *See* Wireless Telecommunications Bureau Identifies Petitions and Applications Affecting 800 MHz Specialized Mobile Radio Upper Band Spectrum, *Public Notice*, 13 FCC Rcd 4283 (1997). As a courtesy, the Public Notice includes a table that identifies matters of which the Commission is aware that related to licenses or applications for the 800 MHz upper band spectrum. *Id*. at Att. In addition, the Commission expressly states in the Public Notice that it makes no representations or guarantees that the listed matters are the only pending matters that could affect spectrum availability in the 800 MHz upper band. *Id*. at 1.