

**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)	

SECOND ORDER ON RECONSIDERATION

Adopted: January 10, 2003

Released: January 13, 2003

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

I. INTRODUCTION

1. This order denies the petition filed by Nextel License Holdings 4, Inc. (Nextel) on April 4, 2002,¹ seeking reconsideration of an order released by the Commercial Wireless Division's Policy and Rules Branch on March 5, 2002 (*March 5 Order*).² The *March 5 Order* affirmed an earlier order released on February 26, 2002 (*February 26 Order*), which granted in part a petition filed by Jen-Shenn Song (Song) seeking reconsideration of dismissal of Song's renewal application for Station WNKS326.³

II. BACKGROUND

2. Song was granted a five-year license for Specialized Mobile Radio (SMR) Station WNKS326, on July 14, 1988.⁴ After constructing facilities for this station, Song 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 action was denied on May 21, 1993,⁶ and he filed an application for review on June 21, 1993.⁷

¹ Petition for Reconsideration filed by Nextel License Holdings 4, Inc. (Apr. 4, 2002) (Petition for Reconsideration). Jen-Shenn Song filed an Opposition to the Petition on April 16, 2002. Opposition to Petition for Reconsideration filed by Jen-Shenn Song (Apr. 16, 2002).

² 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 on Reconsideration*, 17 FCC Rcd. 4306 (Mar. 5, 2002) (*March 5 Order*).

³ 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*, 17 FCC Rcd. 3503 (Feb. 26, 2002) (*February 26 Order*).

⁴ See In the Matter of Billy J. Rutledge Request for a Finder's Preference Against Station WNKS326, Tacoma, Washington, Licensed to Jen-Shenn 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.

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

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, which 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 for reconsideration on February 28, 2001, and Nextel filed its opposition on March 14, 2001. In response to Song's petition, the Policy and Rules Branch released its *February 26 Order*. The *February 26 Order* reversed the Licensing and Technical Analysis Branch's October 1998 decision to renew Song's license and extend the expiration date to February 12, 1999. The order 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. It also dismissed Nextel's opposition as late-filed.

6. In its *March 5 Order*, the Policy and Rules Branch, on its own motion, reversed its decision to dismiss Nextel's Opposition as untimely filed. In this order, the Policy and Rules Branch addressed the arguments raised by Nextel's Opposition, but affirmed the decision to establish a construction deadline and expiration date of February 26, 2003, for Song's license. On April 4, 2002, Nextel filed a Petition for Reconsideration of the *March 5 Order*.

III. DISCUSSION

7. We reject Nextel's argument that Song's license automatically cancelled ninety days after the Commission reinstated his license in the April 8, 1999 *Finder's Preference Order*. Nextel cites Section 90.631(f) of the Commission's rules, which provides that "[a]n SMR licensee with facilities that have discontinued operations for 90 continuous days is presumed to have permanently discontinued operations."⁹ According to Nextel, Song's failure to resume operations resulted in the automatic cancellation of the license ninety days following reinstatement, or July 8, 1999.¹⁰ We disagree. Section 90.631(f) does not apply to trunked SMR stations that were taken out of service before June 5, 1995, the effective date of the rule. Rather, Section 90.157 of the Commission's rules, which provides that any

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

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

⁹ 47 C.F.R. § 90.631(f).

¹⁰ Petition at 2. Nextel therefore argues that the recovered 800 MHz channels associated with Station WNKS326 automatically reverted to Nextel, the economic area licensee. Petition at 2-3.

station that does not operate for one year or more is considered to have permanently discontinued operations, applies to stations taken out of service on or before the effective date of Section 90.631(f).¹¹ Because Song dismantled the station's facilities on April 8, 1992, prior to June 5, 1995, the one-year rule applies. Song's license therefore did not cancel automatically on July 8, 1999, and the spectrum associated with Station WNKS326 did not revert to Nextel.

8. In the *February 26 Order*, we reasonably determined that Song's deadline for placing Station WNKS326 into operation will be February 26, 2003, twelve months from the release date of the *February 26 Order*. As we discussed in that order, the *Finder's Preference Order* reinstating Song's license did not provide an expiration date or construction deadline, and we decline to establish these deadlines retroactively.¹² In reinstating Song's license, the Commission was aware that Song had dismantled the facilities for Station WNKS326, and we believe it intended to provide Song with a reasonable period of time to reconstruct those facilities.¹³ We therefore established an expiration date based on the twelve-month construction period allowed under the Commission's rules for trunked SMR systems.¹⁴ We reject Nextel's argument that granting relief to Song "rewards" his inattention and lack of diligence.¹⁵ The Commission has considered the factual circumstances surrounding this case in its *Finder's Preference Order*, and made a determination that Song is entitled to relief. The *February 26 Order* is, therefore, consistent with the Commission's *Finder's Preference Order*.

9. Finally, we reject Nextel's argument that, because we did not reinstate Song's license *nunc pro tunc*, Song must select a new site that will protect Nextel's co-channel facilities.¹⁶ When Nextel

¹¹ 47 C.F.R. § 90.157. Prior to 1993, Section 90.157 applied to all SMR station operations. In 1993, the Commission adopted Section 90.631(f), which provided that an SMR license would automatically cancel if the licensee discontinued operations for more than 60 consecutive days. In the Matter of 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, *First Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd. 1469, 1482, ¶ 55 (1993). The new rule became effective on April 2, 1993. 58 Fed. Reg. 12176 (Mar. 3, 1993). In late May 1993, however, the Commission suspended enforcement of the 60-day rule and clarified that Section 90.157 still applied to SMR stations. In the Matter of 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, *Order*, 8 FCC Rcd. 3974, ¶ 4 and n.7 (1993). In April 1995, the Commission lifted the suspension of Section 90.631(f) and amended the rule to provide for automatic cancellation of a license based on 90 days of discontinued operations. In the Matter of 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, *Second Report and Order on Reconsideration and Second Further Notice of Proposed Rulemaking*, 10 FCC Rcd. 6885, 6909, ¶ 65 (1995). The 90-day rule became effective on June 5, 1995. 60 Fed. Reg. 21987 (May 4, 1995). Finally, in September 1995, the Commission clarified that Section 90.157, the one-year rule, applied to stations taken out of service prior to June 5, 1995, and that Section 90.631(f), the 90-day rule, applied to stations taken out of service on or after June 5, 1995. In the Matter of 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, *Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd. 2639, 2642, ¶ 8 and 2661-62, ¶ 55 (1995).

¹² *February 26 Order*, 17 FCC Rcd. at 3508, ¶10.

¹³ *February 26 Order*, 17 FCC Rcd. at 3508, ¶10.

¹⁴ 47 C.F.R. § 90.631(e)

¹⁵ Petition at 3. Nextel argues that Song should not be granted relief after "doing nothing" with his system for nearly ten years. *Id.*

¹⁶ Petition at 4. Nextel asks the Branch to clarify that it did not reinstate Song's license *nunc pro tunc*, because such treatment was neither requested nor granted. *Id.* Nextel requests that the Branch either revoke Song's license on the

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bid on the channels associated with Station WNKS326 in the Tacoma, Washington area, Nextel was on notice that pending claims to the spectrum might affect the availability of that spectrum. Prior to the 800 MHz upper band auction, the Wireless Telecommunications Bureau notified potential bidders that pending matters might not be resolved before the auction, and warned bidders 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 Economic Area licenses.¹⁷ Thus, Nextel was on notice that pending claims, including Song's, could affect the availability of the spectrum. Because Song's claims preserved his original license at the originally licensed site, we will not require Song to select a new site.

IV. ORDERING CLAUSE

10. ACCORDINGLY, IT IS 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 Petition for Reconsideration filed by Nextel License Holdings 4, Inc. on April 4, 2002, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

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grounds that Song has no interference protection against Nextel, or, at a minimum, require Song to select a new site that will protect Nextel's co-channel facilities. *Id.*

¹⁷ See Wireless Telecommunications Bureau Identifies Petitions and Applications Affecting 800 MHz Specialized Mobile Radio Upper Band Spectrum, *Public Notice*, 13 FCC Rcd. 4283 (1997).