

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

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

**ORDER ON RECONSIDERATION**

**Adopted: February 20, 2004**

**Released: February 20, 2004**

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

**I. INTRODUCTION**

1. On May 19, 2003, James A. Kay, Jr. (Kay) filed a petition seeking reconsideration (Second Petition)<sup>1</sup> of the Commission's *Memorandum Opinion and Order* (*Commission Order*) affirming the dismissal of the above-captioned assignment application.<sup>2</sup> The *Commission Order* denied Kay's Application for Review<sup>3</sup> of the former Commercial Wireless Division's (Division)<sup>4</sup> order released on December 14, 2001, denying Kay's first petition seeking reconsideration of the dismissal of his assignment application (First Petition).<sup>5</sup> For the reasons discussed below, we dismiss Kay's Second Petition as repetitious.

**II. BACKGROUND**

2. On May 6, 1994, Kay filed an application seeking approval of the assignment of the license for conventional Specialized Mobile Radio (SMR) Station WNXR890 from Vince Cordaro (Cordaro) to Kay. On November 4, 1996, Cordaro's license expired because Cordaro failed to submit a license renewal application.<sup>6</sup> On September 24, 2000, the Division's Licensing and Technical Analysis

<sup>1</sup> Petition for Reconsideration, filed by James A. Kay, Jr. (May 19, 2003).

<sup>2</sup> In the Matter of James A. Kay, Jr. Application for Consent to Assign the License for Conventional SMR Station WNXR890, Newbury Park, California, *Memorandum Opinion and Order*, 18 FCC Rcd 7585 (2003). On June 23, 2003, Kay filed an Erratum to his Second Petition correcting the citation to the *Commission Order*. Erratum to Petition for Reconsideration, filed by James A. Kay, Jr. (June 23, 2003). In Kay's Second Petition, he cites the *Division Order* as the order for which he is seeking reconsideration, rather than the *Commission Order*.

<sup>3</sup> Application for Review, filed by James A. Kay, Jr. (Dec. 14, 2001) (Application for Review).

<sup>4</sup> In late 2003, the Commission's Wireless Telecommunications Bureau was reorganized. Many of the mobile radio services licensing issues formerly under the Bureau's Commercial Wireless Division, including Part 90 conventional Specialized Mobile Radio (SMR) operations, are now under the purview of the Bureau's Mobility Division. See FCC's Wireless Bureau Announces Reorganization, *Public Notice* (rel. Nov. 24, 2003).

<sup>5</sup> In the Matter of James A. Kay, Jr. Application for Consent to Assign the License for Conventional SMR Station WNXR890, Newbury Park, California, *Order*, 16 FCC Rcd 20183 (WTB 2001) (*Division Order*).

<sup>6</sup> Under former rule Section 90.149(b), if a licensee failed to file a renewal application, the license was deemed to have automatically cancelled on the date specified on the authorization. 47 C.F.R. § 90.149(b) (1996).

Branch (Branch) dismissed Kay's assignment application because the license for Station WNXR890 had expired.<sup>7</sup>

3. Kay filed his First Petition on November 3, 2000, seeking reconsideration of the Branch dismissal.<sup>8</sup> On November 14, 2001, the Division denied Kay's First Petition and affirmed the Branch's dismissal of the assignment application.<sup>9</sup> On December 14, 2001, Kay filed an Application for Review, incorporating by reference the arguments from his First Petition.<sup>10</sup> The Commission denied the Application for Review because an expired license cannot be assigned, and Cordaro had failed to renew his license for Station WNXR890 while the assignment application was pending. The Commission further dismissed Kay's arguments that Section 9(b) of the APA protected his application from dismissal and found that his claims of misrepresentation and bias were without merit. Specifically, the Commission found no merit in Kay's allegations that staff bias motivated the delay in processing his application. Kay filed his Second Petition on May 19, 2003, seeking reconsideration only on the issue of delay.

### III. DISCUSSION

4. We dismiss Kay's Second Petition as repetitious under Section 1.106(b) of the Commission's rules because he fails to support his arguments with any new facts or circumstances that changed after he filed his Application for Review.<sup>11</sup> Kay contends that the Commission's explanation that the uncharacteristic delay in acting on his assignment application was the result of his being the subject of a pending hearing proceeding regarding his fitness to be a Commission licensee fails both "factually and legally."<sup>12</sup> Kay argues that his assignment application was not dismissed because of any decision regarding his qualifications to be a Commission licensee, and the delay in processing his application for six years "was tantamount to a denial without a hearing" in violation of the Communications Act, as amended.<sup>13</sup> Kay further argues that only his licenses, not this application, were designated for hearing for revocation, and that not dismissing his application shortly after the underlying license expired precluded him from applying for a new license for the same facilities.<sup>14</sup> Kay's reiteration of his argument that because of the delay in processing, the Commission must reinstate his assignment

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<sup>7</sup> Notice of Application Dismissal, File No. 666672 (dated Sept. 25, 2000).

<sup>8</sup> Petition for Reconsideration, filed by James A. Kay, Jr. (Nov. 3, 2000).

<sup>9</sup> The Division found that the filing of an assignment application does not relieve a Commission licensee of the responsibility to renew its license, and that Cordaro could not assign an expired license. *Division Order*, 16 FCC Rcd at 20184, ¶ 5. The Division also rejected Kay's argument that his assignment application was protected from dismissal under Section 9(b) of the Administrative Procedure Act (APA), 5 U.S.C. § 558(c), which permits an existing licensee to continue to operate while its renewal application is pending. *Division Order*, 16 FCC Rcd at 20184-85, ¶ 6.

<sup>10</sup> Application for Review at 1.

<sup>11</sup> 47 C.F.R. § 1.106(b). 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: "(i) 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 (ii) 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." *Id.* § 1.106(b)(2). Section 1.106(b)(3) 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." *Id.* § 1.106(b)(3).

<sup>12</sup> Second Petition at 1-2.

<sup>13</sup> Second Petition at 2.

<sup>14</sup> Second Petition at 2-3.

application does not rely on any new facts or changed circumstances as required under Commission rules. We therefore dismiss Kay's Second Petition as repetitious.

5. 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 and 1.106(b) of the Commission's Rules, 47 C.F.R. §§ 0.331, 1.106(b), the Petition for Reconsideration filed by James A. Kay, Jr. on May 19, 2003, IS DISMISSED.

**FEDERAL COMMUNICATIONS COMMISSION**

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