

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

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| 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 |) | |

MEMORANDUM OPINION and ORDER

Adopted: January 11, 2002

Released: January 15, 2002

By the Commission:

I. INTRODUCTION

1. On February 23, 1996, James A. Kay, Jr. (Kay) filed a consolidated application for review of the Wireless Telecommunications Bureau's (Bureau's) denial of his petition for reconsideration and dismissal of his finder's preference request targeting Conventional Business Station WNXC946, Irvine, California.¹ The application for review seeks reversal of the Bureau's decisions. We find that the Bureau correctly followed Commission policy in denying and dismissing Kay's reconsideration petition and finder's request, respectively. Accordingly, for the reasons set forth below, the application for review is denied.

II. BACKGROUND

2. In 1991, the Commission adopted a Finder's Preference Program designed to assist the Commission in the recovery of unused private land mobile channels in certain bands.² Finders who offered the Commission assistance in the recovery of channels by informing the Commission about licensees who were not in compliance with the Commission's construction, placed-in-operation, and discontinuance-of-operation rules would be given a "dispositive" preference to become licensed for the recovered channels.³ In 1993, the Commission clarified that the Finder's Preference program would apply to authorizations granted an extended implementation or "slow growth" schedule.⁴

3. On August 29, 1991, the Regents of the University of California (Regents) was granted a three-year extended implementation schedule to construct Station WNXC946. The slow growth period

¹ Application for Review (filed Feb. 23, 1996) (Kay AFR).

² Amendments of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, PR Docket No. 90-481, *Report and Order*, 6 FCC Rcd 7297 (1991) (*Finder's Preference Report and Order*). In 1998, the Commission eliminated the Finder's Preference Program. See Amendment of Part 90 Concerning the Commission's Finder's Preference Rules, WT Docket No. 96-199, *Report and Order*, 13 FCC Rcd 23816 (1998).

³ *Finder's Preference Report and Order*, 6 FCC Rcd at 7302 and 7305 ¶¶ 30 and 49.

⁴ Amendment of Part 90 of the Commission's Rules Governing Extended Implementation Periods, PR Docket No. 92-210, *Report and Order*, 8 FCC Rcd 3975, 3977 ¶ 14 (1993) (*Slow Growth Report and Order*).

was scheduled to end on August 29, 1994. Regents subsequently requested an extension of the slow growth period on July 28, 1994.⁵

4. On December 17, 1993, Kay filed finder's request 93F730.⁶ The Commission's Licensing Division dismissed finder's request 93F730 as prematurely filed.⁷ On March 21, 1994, Kay filed a petition for reconsideration and, for the first time, alleged Regents did not notify the Commission that it failed to meet certain interim construction requirements.⁸ On March 24, 1994, Kay submitted a second finder's preference request 94F060, which repeated allegations submitted in the previously filed reconsideration petition.⁹ On September 27, 1994, the Land Mobile Branch (Branch) of the Private Radio Bureau (now the Wireless Telecommunications Bureau) extended the Regents slow growth period until April 1996, after finding Regents had made substantial progress toward implementation of Station WNXC946.¹⁰ However, the Branch conditioned Station WNXC946 on the outcome of finder's requests 93F730 and 94F060.¹¹

5. On January 24, 1996, the Wireless Telecommunications Bureau, by letter decision, denied Kay's reconsideration petition because finder's request 93F730 was premature.¹² At that time, the Bureau also dismissed finder's request 94F060 because that request was prematurely filed.¹³ The Bureau explained that, at most, finder's preference request 94F060 demonstrated that Regents did not meet its interim deadlines.¹⁴ The Bureau further explained that Section 90.629 of the Commission's Rules provides for an automatic six-month extension in the event that the Commission makes a finding that a licensee has failed to meet its interim requirements.¹⁵ Under this mechanism, the Bureau said, the target licensee still holds a valid authorization and is not subject to a finder's preference request until the final construction deadline and an additional 180 days has passed.¹⁶ On February 23, 1996, Kay submitted a consolidated application for review of the Bureau's decision.¹⁷

⁵ Letter from Jack C. Lockhart, on behalf of the Regents of the University of California to Terry L. Fishel, Chief, Land Mobile Branch (dated July 28, 1994).

⁶ Finder's Preference Request (filed Dec. 17, 1993).

⁷ Letter from William H. Kellett, Attorney, Licensing Division to Kathleen A. Kaercher, Esq. (dated Feb. 17, 1994). The Bureau also noted that the finder's request failed to identify any rule violation. *Id.*

⁸ Petition for Reconsideration 1-2 nn. 1-2 (filed Mar. 21, 1994) (Petition) citing Letter from Henry L. Richter, on behalf of the University of California to Ralph Haller, Chief, Private Radio Bureau (dated Jan. 13, 1994).

⁹ Finder's Preference Request (filed Mar. 24, 1994). *See* Letter from Anne Marie Wypijewski, Attorney-Advisor, Licensing Division, to Regents of the University of California (dated May 9, 1994). Regents filed an "Opposition" denying Kay's allegations. *See* Opposition to Finder's Preference Request (filed Jun. 9, 1994). Kay filed a "Reply," which repeats the previous allegations. *See* Reply to Opposition to Finder's Preference Request (filed Jun. 20, 1994).

¹⁰ Letter from Terry L. Fishel, Chief, Land Mobile Branch, to Jack C. Lockhart, on behalf of the Regents of the University of California, (dated Sept. 27, 1994) (Branch Letter).

¹¹ Branch Letter *supra* n.6.

¹² 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).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*, citing 47 C.F.R. § 90.629.

¹⁶ *Id.*, citing 47 C.F.R. § 90.173(k)(2) (former). *See* 47 C.F.R. § 90.629(c).

¹⁷ Kay AFR. On March 11, 1996, Regents filed an "Opposition to Application for Review." *See* Opposition to Application for Review (filed Mar. 11, 1996) (Opposition to AFR).

III. DISCUSSION

6. In this matter, we must determine whether Kay's finder's preference requests were filed prematurely. Kay argues that a distinction should be drawn between a licensee that totally fails to construct any portion of its station and a licensee that constructs its station but otherwise fails to meet its interim benchmarks.¹⁸ Regents, however, argues that in the context of channels granted extended implementation status, the Commission's rules and policies prohibited the filing of Kay's finder's preference requests until 180 days after expiration of the slow growth period or a six-month grace period following Commission termination of the slow growth period.¹⁹

7. We agree with the Bureau and with Regents that Kay's finder's preference requests were premature. When the Commission clarified that the Finder's Preference Program would apply to licensees authorized under the extended implementation program, the Commission stated it would permit such requests to be filed "only at the *end* of the extended implementation period and *after* the Commission has followed its normal channel recovery procedures" (emphasis in original).²⁰ After noting that finder's preference requests may not be filed until 180 days after the deadline for a licensee to construct and place its station in operation, the Commission further clarified that individuals wishing to file a finder's preference request with regard to the channels of a licensee granted extended implementation, may file such request no sooner than (1) 180 days after the original extended implementation period has expired or (2) 180 days after the expiration of the six-month "grace" period for constructing and placing a system in operation granted to the licensee whose extended implementation period was prematurely terminated by the Commission.²¹ The Commission may cancel a license prior to the expiration of the extended implementation period if "the Commission concludes ... that a licensee has failed to meet its commitments," and the licensee is then allowed a six month grace period to complete construction.²²

8. Kay filed his finder's preference requests on December 17, 1993, and on March 24, 1994. Regents' slow growth period was originally scheduled to expire on August 29, 1994, but was extended by nearly two years. The Commission did not terminate the original slow growth period.²³ The finder's requests, filed several months before the end of Regents' original slow growth period, were therefore premature under the requirements set by the Commission. Therefore, the requests were properly dismissed.

9. With respect to the reconsideration petition, we find that the Bureau properly denied the petition because Commission precedent dictates that Kay could not allege a new rule violation on reconsideration that he had not alleged in his initial finder's preference request.²⁴ We note that the Petition was not based on new or previously undiscovered facts or circumstances and therefore, Kay's Petition was procedurally defective under Section 1.106(c)(1) of the Commission's Rules.²⁵ We also

¹⁸ *Id.* at 4, 5 n.2.

¹⁹ Opposition to AFR at 2-4 n.1.

²⁰ *Slow Growth Report and Order*, 8 FCC Rcd at 3977 ¶ 14.

²¹ *Id.* at n.17.

²² See 47 C.F.R. § 90.629(c).

²³ See Kay AFR at 4 n.1 (noting that the alternative test for evaluating the timeliness of a finder's preference request is not applicable in the instant matter given that the Commission did not terminate Regents' license).

²⁴ 47 C.F.R. § 1.106(c). See e.g. Peterson Electric, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 314 ¶ 2 (1999).

²⁵ 47 C.F.R. § 1.106(c)(1) (incorporating 47 C.F.R. § 1.106(b)(2)(i)-(ii)).

conclude that there was no public interest reason to consider Kay's Petition pursuant to Section 1.106(c)(2).²⁶ Finally, we remove the condition from the license for Station WNXC946 with this affirmance of the Bureau's action dismissing Kay's finder's preference claims.

IV. CONCLUSION

10. Kay presents no arguments in its application for review that would lead us to change the Bureau's decision. Accordingly, based on the record in this proceeding, we concur with, and affirm, the Bureau's determination in this instance, and deny Kay's application for review.

V. ORDERING CLAUSES

11. IT IS ORDERED that pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), and Section 1.115(g) of the Commission's Rules, 47 C.F.R. § 1.115(g), the Application for Review filed by James A. Kay, Jr. on February 23, 1996 IS DENIED.

12. IT IS FURTHER ORDERED, effective immediately, that the condition imposed on Conventional Business Station WNXC946, that Station WNXC946 is conditionally authorized pending the outcome of the finder's preference request in case numbers 93F730 and 94F060, BE REMOVED.

13. IT IS FURTHER ORDERED THAT this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

²⁶ 47 C.F.R. § 1.106(c)(2).