

**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)	

MEMORANDUM OPINION AND ORDER

Adopted: April 10, 2003

Released: April 17, 2003

By the Commission:

I. INTRODUCTION

1. We have before us an Application for Review (Application) filed by James A. Kay, Jr. (Kay) on December 14, 2001.¹ The Application seeks review of an Order released by the Commercial Wireless Division (Division) on November 14, 2001,² denying a Petition for Reconsideration (Petition) filed by Kay on November 3, 2000.³ The Division affirmed the decision of its Licensing and Technical Analysis Branch (Branch), which dismissed Kay’s application seeking to assign the license for station WNXR890 from Vince Cordaro (Cordaro) to Kay. For the reasons discussed below, we deny Kay’s Application for Review.

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 Cordaro to Kay. On November 4, 1996, Cordaro’s license expired because Cordaro failed to submit a license renewal application.⁴ On September 24, 2000, the Branch dismissed Kay’s assignment application because the license for station WNXR890 had expired.⁵

3. Kay filed a Petition for Reconsideration on November 3, 2000. First, Kay contended that the pendency of his assignment application extended the effectiveness of the underlying license, and thus his application should have been processed notwithstanding the fact that the license expiration date had

¹ Application for Review filed by James A. Kay, Jr. (Dec. 14, 2001) (Application).

² *In re* Application of James A. Kay, Jr. for Consent to Assign the License For Conventional SMR Station WNXR890, Newbury Park, California, *Order*, 16 FCC Rcd 20183 (2001) (*Division Order*).

³ Petition for Reconsideration filed by James A. Kay, Jr., File No. 666672 (Nov. 3, 2000) (Petition).

⁴ 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).

⁵ Notice of Application Dismissal, File No. 666672 (dated Sept. 25, 2000) (*Dismissal Notice*).

passed.⁶ Second, Kay argued that the Branch's decision to dismiss his assignment application should be set aside because the *Dismissal Notice* used the term "recently" to describe the expiration of a license that had occurred four years previously.⁷ Third, Kay argued that the staff's failure to act on his application in a timely manner was motivated by bias and caused the dismissal of his application.⁸

4. On November 14, 2001, the Division denied Kay's Petition and affirmed the Branch's dismissal of Kay's assignment application.⁹ 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.¹⁰ 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),¹¹ which permits an existing licensee to continue to operate while its renewal application is pending.¹² On December 14, 2001, Kay filed an Application for Review, incorporating by reference the arguments in the Petition, and asked the Commission to review the arguments *de novo*.¹³

III. DISCUSSION

5. As an initial matter, we note that most of the arguments raised in this case are identical to arguments that Kay previously raised and we rejected in the recently decided-*Kay-Padilla* case.¹⁴ As we held in *Kay-Padilla*, a pending assignment application does not extend the expiration date of an underlying Commission license.¹⁵ A Commission licensee remains subject to our rules, including operational and renewal provisions, even where an assignment or transfer of control application is pending for the underlying license.¹⁶ As the licensee for station WNXR890, Cordaro was responsible for filing a renewal application notwithstanding the pending assignment application. As a result of Cordaro's failure to renew his authorization – a fact that Kay does not dispute – the license for station WNXR890

⁶ Petition at 2-3.

⁷ Petition at 1-2.

⁸ Petition at 4-6.

⁹ *Division Order*, *supra* note 2.

¹⁰ *Division Order*, 16 FCC Rcd at 20184, ¶ 5.

¹¹ 5 U.S.C. § 558(c).

¹² *Division Order*, 16 FCC Rcd at 20184-85, ¶ 6.

¹³ Application for Review at 1.

¹⁴ In the Matter of James A. Kay, Jr., Application for Modification of and Consent to the Assignment of the License for Business Radio Service Station WIK902, *Order*, FCC 03-27 (rel. Feb. 11, 2003) (*Kay-Padilla*). In *Kay-Padilla*, Kay filed an assignment application in 1994, the underlying license expired while the assignment application was pending because the licensee failed to file a renewal application, and the assignment application was dismissed in 2000.

¹⁵ *Kay-Padilla*, FCC 03-27 at ¶ 5. We also note that, in other proceedings, Kay himself has argued that an assignment application for an expired license cannot be granted. See In the Matter of A-1-A Repeater Company, *Memorandum Opinion and Order*, 16 FCC Rcd. 9748, ¶¶ 5, 7 (2001) (granting Kay's Application for Review and setting aside the Branch's consent to the assignment of a cancelled license).

¹⁶ See In the Matter of Peacock's Radio and Wild's Computer Service, Inc., and 21st Century Wireless Group, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd. 15,016, ¶¶ 5, 6 (2001); In the Matter of Applications of Robert D. Ryan, *Order on Reconsideration*, 2002 WL 1798576, ¶ 8 (PSPWD 2002). See also Biennial Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd. 11,476, ¶ 21 (1999).

expired on its own terms. Because an expired license cannot be assigned,¹⁷ the Branch correctly applied our rules when it dismissed the assignment application.

6. We also disagree with Kay's contention that his assignment application is protected from dismissal under Section 9(b) of the APA. Section 9(b) provides, in relevant part, that "[w]hen the licensee has made timely and sufficient application for a renewal or new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency."¹⁸ As we stated in *Kay-Padilla*, Section 9(b) applies to renewal and new applications, not to assignment applications, and we reject the notion that a license assignment should be treated as synonymous to an initial grant or a license renewal for purposes of this statutory provision.¹⁹ Consistent with the decision in *Kay-Padilla*, the Division correctly determined that Section 9(b) does not apply here.

7. We find that Kay's claims of misrepresentation and bias are also without merit. Specifically, Kay takes issue with language in the September 2000 *Dismissal Notice* describing the station license as "recently" expired, which Kay regards as evidence of bias because the license expiration date had actually occurred four years earlier and thus was not "recent."²⁰ The *Dismissal Notice* sent to Kay was computer-generated as a result of routine Universal Licensing System (ULS) processing and does not evidence staff bias. The use of the term "recently," while not an accurate characterization given the timing of the notice, was unintended and had no substantive effect on the dismissal of Kay's application. The dismissal occurred because the license for station WNXR890 had expired, and the disputed language is, therefore, immaterial.

8. We also find no merit in Kay's general allegations that delay in the processing of his application was motivated by bias or that any such delay caused the license to expire and thereby affected the outcome of this proceeding.²¹ With respect to bias, Kay has presented no evidence whatsoever that the Bureau's delay in acting on Kay's application was the result of staff bias. As noted in *Kay-Padilla*, the Bureau's uncharacteristic delay in acting on Kay's assignment applications was the result of Kay's being the subject of a pending hearing proceeding regarding his fitness to be a Commission licensee.²² Moreover, Kay's bias argument overlooks the fundamental fact that it was Cordaro's failure to file for renewal, not the staff's inaction on the assignment application, that caused the license for station WNXR890 to expire. It is well-established that licensees are responsible for submitting renewal

¹⁷ *Kay-Padilla*, FCC 03-27 at ¶ 5, n.14.

¹⁸ 5 U.S.C. § 558(c).

¹⁹ See *Kay-Padilla*, FCC 03-27 at ¶ 7. In *Kay-Padilla*, the Commission stated that it has been previously found that a license that expires on its own terms is not protected under Section 9(b) of the APA. *Id.* at ¶ 7 (citing *Atlantic Richfield Co. v. United States*, 774 F.2d 1193 (D.C. Cir. 1985)).

²⁰ Petition at 1-2.

²¹ We have rejected Kay's similar allegations of staff bias in other cases. See, e.g., In the Matter of S&L Teen Hospital Shuttle, *Order on Reconsideration*, 17 FCC Rcd. 7899, ¶ 3 (2002) (finding that the Commission had already resolved Kay's allegation of staff bias in the underlying Memorandum Opinion and Order when it found that inadvertent procedural errors had occurred, not bias on the part of staff) (citing In the Matter of S&L Teen Hospital Shuttle, *Memorandum Opinion and Order*, 16 FCC Rcd. 8153, ¶ 5 n.13 (2001)). See also James A. Kay, Jr., *Decision*, 17 FCC Rcd. 1834, ¶¶ 88-91 (finding no basis for concluding that the Wireless Telecommunications Bureau engaged in misconduct in prosecuting the revocation hearings of Kay and Marc Sobel).

²² *Kay-Padilla*, FCC 03-27 at ¶ 3, n.5 (citing Connex Freight, *Order on Reconsideration*, 15 FCC Rcd 13345, 13345 at ¶ 2 (WTB 2000)). In 2002, the Bureau disposed of 77 percent of assignment applications within 90 days, 95 percent within 180 days, and 99 percent within one year.

applications in a timely manner.²³ Because Cordaro failed to file a renewal application, the license expired on its own terms, and, therefore, as we stated above, there was nothing to assign. Accordingly, we deny Kay's Application for Review.

IV. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 5(c)(5), and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 155(c)(5), 303(r), and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, the Application for Review filed by James A. Kay, Jr. on December 14, 2001, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²³ See, e.g., In the Matter of Applications of Peacock's Radio and Wild's Computer Service, Inc., and 21st Century Wireless Group, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd. 15,016, ¶ 5 (2001) (holding that "[e]ach licensee is solely responsible for knowing the terms of its license and submitting a renewal application in a timely manner"); In the Matter of the Application of Sierra Pacific Power Company, *Order*, 16 FCC Rcd. 188, ¶ 6 (PSPWD 2001) (holding that "each licensee bears the exclusive responsibility of filing a timely renewal application"); In the Matter of Alameda-Contra Costa Transit District Private Land Mobile Stations KBY746, WFS916, and KM8643, *Order*, 15 FCC Rcd. 24,547, ¶ 10 (PSPWD 2000) (holding that "each licensee is responsible for knowing the expiration date of its licenses and submitting a renewal of [its] license application in a timely manner"). See also Biennial Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd. 11,476, ¶ 21 (1999).