

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

In the Matter of)	
)	
Thomas K. Kurian,)	
Renewal and Modification of 800 MHz Station)	File Nos. 0000539507, 0000530603 and
WNXN838)	0000608115

MEMORANDUM OPINION AND ORDER

Adopted: May 19, 2004

Released: May 28, 2004

By the Commission:

I. INTRODUCTION

1. On April 14, 2003, Nextel Communications, Inc. (Nextel) filed an Application for Review of the *Memorandum Opinion and Order and Proposed Order of Modification* by the Policy and Rules Branch, Commercial Wireless Division,¹ Wireless Telecommunications Bureau in the above-captioned proceeding.² In that order, the Policy and Rules Branch denied Nextel's request to rescind the renewal of Station WNXN838, licensed to Thomas K. Kurian (Kurian), and proposed to modify certain parameters of Station WNXN838. Nextel requests that we rescind the renewal of Kurian's license or, in the alternative, modify Kurian's license to limit operations to private, mobile-only Business Radio Service on a secondary basis. For the reasons stated below, we grant Nextel's request to limit Kurian to mobile-only operations and otherwise deny Nextel's Application for Review.

II. BACKGROUND

2. On April 11, 2001, the Licensing and Technical Analysis Branch of the Commercial Wireless Division approved the assignment of Station WNXN838 from CB Display Service to Kurian.³ At the time of assignment to Kurian, Station WNXN838 was classified as a conventional Business Radio Service (GB) license, and was authorized to provide mobile-only service on a secondary, non-interference basis with 50 mobile units, at a maximum transmitter output power of 15 watts, and a maximum transmitter ERP of 30 watts. The station was authorized to operate within a 113 km (70 miles) radius of Las Vegas, Nevada on five General Category paired frequencies: 851.7625, 852.2375, 852.8375,

¹ In November, 2003, responsibilities of the Commercial Wireless Division were transferred to the new Mobility Division and the new Spectrum and Competition Policy Division of the Wireless Telecommunications Bureau.

² In *The Matter of Thomas K. Kurian, Renewal and Modification of 800 MHz Station WNXN838*, File Nos. 0000539507, 0000530603 and 0000608115, *Memorandum Opinion and Order and Proposed Order of Modification* 18 FCC Rcd 4576 (WTB, CWD 2003) (*Kurian Order*). Kurian filed an Opposition to Nextel's Application for Review (AFR) on April 29, 2003. Nextel filed a Reply on May 9, 2003.

³ File No. 0000391339. See "Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications Action," Report Number: 829, *Public Notice*, 2001 WL 357034 (F.C.C.) (Apr. 11, 2001).

853.3625, and 854.5875 MHz.⁴ Nextel won numerous 800 MHz SMR Economic Area (EA) licenses in Auction No. 34,⁵ including EA 153 (Las Vegas, NV-AZ-UT) Blocks DD, E, EE, and FF, which contain the five frequencies authorized to Station WNXN838.

3. On July 7, 2001, Kurian filed an application to modify Station WNXN838 (file no. 0000530603) in four respects: (1) to change the radio service from conventional Business Radio Service (GB) to commercial Specialized Mobile Radio (SMR) Service (GX); (2) to increase the number of mobile units from 50 to 100; (3) to increase the maximum transmitter output power for the mobile units from 15 to 30 watts, with no change in the maximum transmitter ERP of 30 watts; and (4) to add a fixed base station on a primary basis with a maximum transmitter output power of 30 watts and a maximum transmitter ERP of 30 watts. The Licensing and Technical Analysis Branch granted the application on August 27, 2001.⁶ On September 25, 2001, Nextel filed a Petition for Reconsideration to set aside the modification of license. In the *Kurian Order*, the Policy and Rules Branch granted the relief requested by Nextel, in part, by requiring that all operations on frequencies 851.7625, 852.2375, 852.8375, 853.3625, and 854.5875 MHz be conducted on a secondary, non-interference basis.⁷ Kurian did not seek review of that decision.

4. On July 26, 2001, Kurian filed an application to renew Station WNXN838 (file No. 0000539507), which the Licensing and Technical Analysis Branch granted on July 27, 2001. In the *Kurian Order*, the Policy and Rules Branch rejected Nextel's request to set aside the renewal of Station WNXN838, finding that Nextel had provided no evidence that Kurian's secondary operations had or would interfere with Nextel's operations.⁸

5. On September 27, 2001, Kurian filed an application to modify Station WNXN838 (file no. 0000608115) to add a second fixed base station on a primary basis with a maximum transmitter output power of ten watts and a maximum transmitter ERP of five watts, and to increase the maximum transmitter output power and ERP of mobile units from 30 watts to 50 watts. The Licensing and Technical Analysis Branch granted the application on October 25, 2001.⁹ In the *Kurian Order*, the Policy and Rules Branch proposed, on its own motion, to modify Kurian's license pursuant to section 316 of the Communications Act, as amended (Act),¹⁰ by requiring that all operations be conducted on a secondary basis and by reducing the maximum authorized transmitter output power and ERP of mobile units from 50 watts to 30 watts on frequencies 851.7625, 852.2375, 852.8375, 853.3625, and 854.5875 MHz.¹¹ Kurian did not protest the proposed modifications.

⁴ The General Category channels consist of Channel Nos. 1-150 (806-809.750/851-854.750 MHz) and may be used for either conventional or trunked operations. See 47 C.F.R. § 90.615.

⁵ The SMR General Category auction (Auction No. 34) concluded on September 1, 2000, after 14 winning bidders purchased 1030 800-MHz General Category licenses. See "800 MHz Specialized Mobile Radio (SMR) Service General Category (851- 854 MHz) and Upper Band (861-865 MHz) Auction Closes; Winning Bidders Announced," *Public Notice*, 15 FCC Rcd 17162 (WTB 2000).

⁶ See "Wireless Telecommunications Bureau Site-By-Site Action," Report Number: 957, *Public Notice*, 2001 WL 1006866 (F.C.C.) (Sept. 5, 2001).

⁷ *Kurian Order*, 18 FCC Rcd at 4580 ¶ 13.

⁸ *Id.* at 4578 ¶ 9.

⁹ See "Wireless Telecommunications Bureau Site-By-Site Action," Report Number: 1008, *Public Notice*, 2001 WL 1335043 (F.C.C.) (Oct. 31, 2001).

¹⁰ 47 U.S.C. § 316.

¹¹ *Kurian Order*, 18 FCC Rcd at 4582 ¶ 21, and at 4583 ¶ 29.

III. DISCUSSION

6. In its Application for Review, Nextel argues that we should rescind the renewal of Kurian's license. Alternatively, Nextel argues that Kurian's license should be modified to (1) change his radio service from commercial SMR Service to conventional Business Radio Service, (2) decrease the number of mobile units from 100 to 50, and (3) eliminate Kurian's fixed base stations.

7. Renewal of Station WNXN838. We deny Nextel's request to rescind the renewal of Kurian's license. Nextel argues that the Commission's *Dickinson* decision provides that secondary operations are impermissible within 70 miles of a co-channel primary station.¹² In *Dickinson*, the Commission observed that "a secondary station may be forced to terminate operations if a co-channel licensee should locate within 70 miles of the secondary site."¹³ The Commission did not state or imply that a secondary station must terminate operations without exception when a co-channel licensee locates within 70 miles. Rather, we may require a secondary station to terminate operations should a co-channel licensee locate a primary site within seventy miles of the secondary station, and the secondary station causes interference to the primary station.¹⁴ Nextel has provided no evidence that Kurian's secondary operations would interfere with its own and, thus, there is no basis in the record to rescind the renewal of Kurian's license on a secondary basis.¹⁵ Kurian, however, erroneously asserts that Nextel "assumed whatever risk that the secondary operations of Station WNXN838 might pose to its intended primary operations."¹⁶ We remind Kurian that, as a holder of secondary operating authority, his operations must not cause interference to Nextel's primary operations and are not protected from interference from Nextel's primary operations.¹⁷

8. Commercial Status. In the *Kurian Order*, the Policy and Rules Branch upheld the grant of Kurian's modification application (file no. 0000530603) to the extent that it changed the authorized radio service from conventional Business Radio Service (GB) to commercial SMR Service (GX), noting that there is no Commission rule, policy or precedent that would prohibit GX operations on a secondary, non-interference basis.¹⁸ Nextel argues that granting the change in radio service status is equivalent to granting an application for a new General Category authorization and thus violates the freeze on granting new General Category frequencies.¹⁹ The freeze was intended to preserve the 800 MHz licensing landscape.²⁰ Unlike the Licensing and Technical Branch's erroneous grant of primary operating authority

¹² Nextel AFR at 8, citing Roger Dickinson D/B/A Portable Walkie Talkies To Go, *Memorandum Opinion and Order*, 15 FCC Rcd 4845, 4850 ¶ 15 (2000) (*Dickinson*).

¹³ *Id.* (emphasis added).

¹⁴ See, e.g., In the Matter of Charles T. Crawford, *et al.*, *Order*, 17 FCC Rcd 2014, 2017 ¶ 7 (2001). See 47 C.F.R. § 90.7 (Secondary operations "may not cause interference to operations authorized on a primary basis and . . . are not protected from interference from those primary operations.").

¹⁵ Nextel does note that Kurian complained to the Commission of interference caused by Nextel. However at that time, Kurian had been operating pursuant to the erroneous grant of primary operating authority and thus was co-primary with Nextel. See Nextel AFR at 8.

¹⁶ Opposition at 6.

¹⁷ See 47 C.F.R. § 90.7. The Policy and Rules Branch found that Nextel had provided no evidence that Kurian's secondary operations have or would interfere with Nextel's operations, and that "absent such evidence, there is no basis in the record to set aside the renewal of Station WNXN838, as a secondary authorization." *Kurian Order*, 18 FCC Rcd at 4578 ¶ 9.

¹⁸ *Kurian Order*, 18 FCC Rcd at 4581 ¶ 16.

¹⁹ Nextel AFR at 8; Nextel Reply at 6.

²⁰ In the Matter of Licensing of General Category Frequencies in the 806-809.750/851-854.750 MHz Bands, *Order*, 10 FCC Rcd 13190 ¶ 3 (WTB 1995).

to Kurian,²¹ a change in Kurian's authorized radio service does not alter the 800 MHz licensing landscape. Whether Kurian conducts secondary operations as a commercial SMR provider or for his own private internal operations will not affect Nextel's authorized use of the five frequencies at issue. In either case, Kurian's secondary operations may not interfere with Nextel's primary use of the five channels and Kurian must accept interference from Nextel's operations. We therefore deny Nextel's request to modify Kurian's radio service.

9. Mobile Units. In the *Kurian Order*, the Policy and Rules Branch denied Nextel's request that it reverse the grant of Kurian's modification application (file no. 0000530603) to the extent that it increased the number of authorized mobile units from 50 to 100. The Branch reasoned that because it set aside the grant of primary operating authority to Kurian, the number of mobile units is immaterial.²² Nextel argues that granting additional mobile units to Kurian violates the freeze on granting new General Category frequencies.²³ An increase in the number of authorized mobile units, however, does not alter the 800 MHz licensing landscape because it is not a new application for a general category frequency. Rather, it is a permissible modification of an existing license. We also note that Nextel is not required to afford Kurian any protection to the additional mobile units because of Kurian's secondary status. We therefore deny Nextel's request to reduce the number of mobile units authorized to Kurian.

10. Fixed Base Stations. In the *Kurian Order*, the Policy and Rules Branch upheld the grant of two fixed base stations (on a secondary basis) to Kurian. Nextel argues that grant of the fixed stations to Kurian is outside the narrow exception to the General Category freeze set forth in section 90.693(b) of our rules.²⁴ Section 90.693 permits incumbent licensees "to add, remove or modify transmitter sites within their original 22 dBuV/m field strength contour without prior notification to the Commission so long as their original 22 dBuV/m field strength contour is not expanded and the station complies with the Commission's short-spacing criteria in §§ 90.621(b)(4) through 90.621(b)(6)."²⁵ Nextel argues that section 90.693 only applies to existing incumbent primary fixed base station licenses, and that no 22 dBuV/m field strength contour could be calculated based on Kurian's mobile-only license.²⁶ The Commission intended the exception to the General Category freeze provided for by section 90.693(b) to be limited to fixed stations and Kurian cites no precedent to support his claim that section 90.693(b) permits the addition of fixed sites to a mobile-only authorization.²⁷ Section 90.693(b) requires that a

²¹ In the *Kurian Order*, the Policy and Rules Branch found that conversion of Kurian's secondary authorization to primary status abrogated the right of primary co-channel licensees to be free from harmful interference and violated the General Category freeze. *Kurian Order*, 18 FCC Rcd at 4579 ¶ 12 & 4582 ¶ 21.

²² *Id.*, 18 FCC Rcd at 4580 ¶ 14.

²³ Nextel Reply at 6.

²⁴ Nextel AFR at 6-7; Nextel Reply at 2-5.

²⁵ 47 C.F.R. § 90.693. Section 90.621(b)(4), in turn, provides that a licensee may locate a station 113 km (70 miles) to 88 km (55 miles) from a co-channel licensee, provided that it complies with transmitter effective radiated power (ERP) and antenna height limitations set forth in the rule, and that it may locate a station less than 55 miles from a co-channel licensee, provided that it obtains a Commission waiver, notifies all affected co-channel licensees, and submits an engineering analysis showing that co-channel licensees will be protected from interference. 47 C.F.R. § 90.621(b)(4)

²⁶ Nextel AFR at 6-7; Nextel Reply at 3.

²⁷ Kurian Opposition at 2. In adopting this narrow exception, the Commission explained that it would enable incumbent licensees "to add new transmitters in their existing service area, . . . to fill in 'dead spots' in coverage or to reconfigure their systems to increase capacity within their service area, so long as their 22 dBu interference contours are not expanded." See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *First Report and Order Eighth Report and Order, and Second Further Notice of Proposed Rule Making*, 11 FCC Rcd 1463, 1514 ¶ 86 (1995).

contour be calculated “along each radial.”²⁸ Kurian’s mobile-only license had no fixed site, and thus no radials from which to calculate a 22 dBuV/m field strength contour. Accordingly, we find that the Policy and Rules Branch erred in upholding the grant of two fixed sites to secondary Station WNXN838. Nextel’s Application for Review (like its petition for reconsideration below) contests the grant of a fixed site by file no. 0000530603. We therefore direct Kurian to cease operations at that site within 30 days of the release date of this order. Nextel did not, however, contest the fixed site added by application file no. 0000608115. We therefore, on our own motion, propose to eliminate the fixed site licensed to Station WNXN838 by file no. 0000608115.²⁹

11. Pursuant to Section 1.87(a) of the Commission’s Rules,³⁰ we will not issue a modification order until Kurian has received notice of our proposed action and has had an opportunity to interpose a protest. To protest the proposed modification, Kurian must, within 30 days of the release date of this order, submit a written statement with sufficient evidence to show that the modification would not be in the public interest. The protest must be filed with the Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W., Room TW-A325, Washington, D.C. 20554.³¹ If no protest is filed, Kurian will be deemed to have waived his right to protest the modification and will be deemed to have consented to the proposed modification.³²

12. Modification. As noted above, in the *Kurian Order*, the Policy and Rules Branch proposed to modify Kurian’s license pursuant to section 316 of the Act,³³ by requiring that all operations be conducted on a secondary basis and by reducing the maximum authorized transmitter output power and ERP of mobile units from 50 watts to 30 watts on frequencies 851.7625, 852.2375, 852.8375, 853.3625, and 854.5875 MHz (file no. 0000608115).³⁴ Kurian did not protest the proposed modifications and, therefore, is deemed to have consented to the modifications.³⁵ We therefore modify Kurian’s license accordingly.³⁶

²⁸ 47 C.F.R. § 90.693(b).

²⁹ We propose to modify Kurian’s license, rather than remanding this task to the Bureau, for administrative efficiency. *See, e.g.*, In the Matter of License Communications Services, Inc., Application File No. 415669, etc., *Memorandum Opinion and Order*, 13 FCC Rcd 23781 (1998) (Commission proposal to modify wireless license).

³⁰ 47 C.F.R. § 1.87(a).

³¹ This address is proper only for protests submitted by U.S. mail. For hand-delivered or messenger-delivered paper filings, the proper address is 236 Massachusetts Ave., N.E., Suite 110, Washington, D.C. 20002. For documents sent by overnight delivery service other than United States Postal Service Express Mail and Priority Mail, the proper address is 9300 East Hampton Dr., Capitol Heights, MD 20743. For further information, contact the Office of the Secretary at (202) 418-0300 or mdortch@fcc.gov.

³² 47 C.F.R. § 1.87(g) & (h).

³³ 47 U.S.C. § 316.

³⁴ *Kurian Order*, 18 FCC Rcd at 4582 ¶ 21, and at 4583 ¶ 29.

³⁵ *Id.* at 4582 ¶ 22.

³⁶ The Commission is considering proposals for abating interference to 800 MHz public safety systems, including possible modification of the 800 MHz land mobile band. *See* Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels, WT Docket No. 02-55, *Notice of Proposed Rulemaking*, 17 FCC Rcd 4873 (2002), *modified by Erratum*, 17 FCC Rcd 7169 (PSPWD 2002). If the Commission was to adopt a modified 800 MHz band plan in that proceeding, and it requires change of any frequency for Station WNXN838, adoption of the modified band plan would not affect our findings in this Memorandum Opinion and Order, including, without limitation, our affirmation of the secondary status of Kurian’s authorization.

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 405 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, the Application for Review filed by Nextel Communications, Inc. on April 14, 2003 is GRANTED to the extent specified above and is otherwise DENIED.

14. IT IS FURTHER ORDERED that pursuant to Sections 4(i) and 405 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 405 and Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, within 30 days of the release date of this order, Thomas K. Kurian, licensee of Station WNXN838, shall cease all operations from the fixed site located at Latitude 36-7-12.9 (N), Longitude 115-10-20.0 (W) (file no. 0000530603).

15. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 316(a) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 316(a) and Section 1.87 of the Commission's rules, 47 C.F.R. § 1.87, the license for Station WNXN838, licensed to Thomas K. Kurian, IS MODIFIED, by reducing the maximum authorized transmitter output power and ERP of mobile units from 50 watts to 30 watts on frequencies 851.7625, 852.2375, 852.8375, 853.3625, and 854.5875 MHz (file no. 0000608115).

16. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 316(a) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 316(a) and Section 1.87 of the Commission's rules, 47 C.F.R. § 1.87, the license for Station WNXN838, licensed to Thomas K. Kurian, IS MODIFIED, by requiring that all operations on frequencies 851.7625, 852.2375, 852.8375, 853.3625, and 854.5875 MHz be conducted on a secondary, non-interference basis (file no. 0000608115).

17. IT IS PROPOSED that, pursuant to Sections 4(i) and 316(a) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 316(a) and Section 1.87 of the Commission's rules, 47 C.F.R. § 1.87, the license for Station WNXN838, licensed to Thomas K. Kurian, BE MODIFIED by eliminating the fixed site, Latitude 36-10-45.3 (N), Longitude 114-59-51.3 (W) (file no. 0000608115).

18. IT IS ORDERED that, pursuant to Section 316 of the Communications Act of 1934, as amended, 47 U.S.C. § 316, this proposed modification shall become final and effective 30 days after release of this order if no protests are filed within that period. The Wireless Telecommunications Bureau is delegated authority to dispose of any such protests in accord with Section 316(a).

19. IT IS FURTHER ORDERED that this Memorandum Opinion and Order shall be sent by certified mail, return receipt requested, to Thomas K. Kurian, 4019 S. Industrial Rd., Las Vegas, Nevada 89103, and to counsel for Thomas K. Kurian, Dennis C. Brown, Esq., 126/B North Bedford Street, Arlington, Virginia 22201.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary