

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

Adopted: June 23, 2005

Released: June 28, 2005

By the Commission:

I. INTRODUCTION

1. We have before us a second Application for Review filed by James A. Kay, Jr. (Kay) on March 18, 2004 (Second Application for Review). Kay's Second Application for Review seeks review of an order released on February 20, 2004, by the former Commercial Wireless Division (Division) denying Kay's petition seeking reconsideration of the Commission's Memorandum Opinion and Order (Commission Order). The Commission Order denied Kay's first Application for Review and affirmed the dismissal of the above-captioned assignment application. For the reasons discussed below, we affirm the Division's dismissal of Kay's petition seeking reconsideration of the Commission Order and dismiss Kay's Second Application for Review as moot.

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. On September 24, 2000, the Division's Licensing and Technical Analysis

1 Second Application for Review, filed by James A. Kay, Jr. (Mar. 18, 2004).

2 In the Matter of James A. Kay, Jr. Application for Consent to Assign the License for Conventional SMR Station WNXR890, Newbury Park, California, Order on Reconsideration, 19 FCC Rcd 2938 (MD 2004). 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).

3 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).

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

5 Under former rule Section 90.149(b), effective at the time Kay filed his assignment application, 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) (1995). The currently effective rule, Section 1.955(a)(1), is not substantively different from the rule effective at the time Kay filed his assignment application. 47 C.F.R. § 1.955(a)(1) (providing (continued...))

Branch (Branch) dismissed Kay's assignment application because the underlying license for Station WNXR890 had expired.⁶

3. Kay filed his first petition on November 3, 2000, seeking reconsideration of the Branch dismissal of his assignment application (First Petition).⁷ On November 14, 2001, the Division denied Kay's First Petition and affirmed the Branch's dismissal of the assignment application.⁸ 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.⁹ 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.¹⁰ On December 14, 2001, Kay filed his first Application for Review, incorporating by reference the arguments from his First Petition.¹¹ The Commission denied the Application for Review, citing precedent that a pending assignment application does not extend the expiration date of an underlying Commission license.¹² 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 concluded that the Branch correctly applied its rules when it dismissed the assignment application.¹³ The Commission also found no merit in Kay's allegations that staff bias motivated the delay in processing his application. Rather, the Commission explained that the delay in acting on Kay's assignment application was the result of Kay's being the subject of a pending hearing proceeding regarding his fitness to be a Commission licensee.¹⁴

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that "[a]uthorizations automatically terminate, without specific Commission action, on the expiration date specified therein, unless a timely application for renewal is filed").

⁶ Notice of Application Dismissal, File No. 666672 (dated Sept. 25, 2000).

⁷ Petition for Reconsideration, filed by James A. Kay, Jr. (Nov. 3, 2000).

⁸ 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 (CWD 2001) (*First Division Order*).

⁹ *Id.* at 20184, ¶ 5.

¹⁰ *Id.* at 20184-85, ¶ 6.

¹¹ Application for Review at 1.

¹² *Commission Order*, 18 FCC Rcd at 7586, ¶ 5 (citing 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*, 18 FCC Rcd 2366 (2003) (*Kay-Padilla*)).

¹³ *Commission Order*, 18 FCC Rcd at 7586-87, ¶ 5. The Commission further dismissed Kay's arguments that Section 9(b) of the Administrative Procedure Act protected his application from dismissal. *Id.* at 7587, ¶ 6. 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." 47 U.S.C. § 558(c). The Commission explained that Section 9(b) applies to renewal and new applications, not to assignment applications, and rejected 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. Consistent with prior decisions, the Commission found that Section 9(b) did not apply in this case. *Commission Order*, 18 FCC Rcd at 7587, ¶ 6.

¹⁴ *Commission Order*, 18 FCC Rcd at 7587, ¶ 8 (citing *Kay-Padilla*, 18 FCC Rcd at 2366, ¶ 3, n.5). The Commission explained that with respect to bias, Kay presented no evidence whatsoever that the Bureau's delay in acting on Kay's application was the result of staff bias. *Id.* Moreover, the Commission emphasized that Kay's bias argument overlooked 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. *Id.*

4. Kay filed a second Petition on May 19, 2003, seeking reconsideration (Second Petition) of the *Commission Order* only on the issue of delay.¹⁵ On February 20, 2004, the Division dismissed Kay's Second Petition as repetitious, finding that Kay's argument did not rely on any new facts or changed circumstances as required under Commission rules.¹⁶ We now turn our attention to Kay's Second Application for Review.

III. DISCUSSION

5. In his Second Application for Review, Kay contends that without a ruling by the full Commission on his Second Petition, he will be deprived of the opportunity for judicial review in this proceeding, because his only option for seeking that review would be to file an appeal of the Division's *Order on Reconsideration*, which a court would dismiss as premature.¹⁷ Kay further argues that the Division had no delegated authority to rule on his Second Petition and that he is entitled under Sections 5(c) and 405(a) of the Communications Act, as amended,¹⁸ to independent Commission review of that Petition.¹⁹ After full consideration of this case, we find that Kay, for the reasons specified in the Division's *Order on Reconsideration* of the *Commission Order*, failed to satisfy the Section 1.106(b)(2) requirements for seeking reconsideration of the *Commission Order* because Kay failed to support his arguments with any new facts or unknown facts or circumstances that changed after he filed his Application for Review.²⁰ Accordingly, we affirm the Division's dismissal of Kay's Second Petition. In light of this ruling, the issues raised in Kay's Second Application for Review are moot, and we therefore dismiss that Application.

IV. ORDERING CLAUSE

6. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 5(c)(5), 303(r) and 405 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 155(c)(5), 303(r), 405, and Sections 1.115(g) and 1.106 of the Commission's Rules, 47 C.F.R. §§ 1.115(g) and 1.106, the Commercial Wireless Division's *Order on Reconsideration*, 19 FCC Rcd 2938 (MD 2004), IS AFFIRMED, and the Second Application for Review filed by James A. Kay, Jr. on March 18, 2004, IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁵ Petition for Reconsideration, filed by James A. Kay, Jr. (May 19, 2003).

¹⁶ In the Matter of James A. Kay, Jr. Application for Consent to Assign the License for Conventional SMR Station WNXR890, Newbury Park, California, *Order on Reconsideration*, 19 FCC Rcd 2938, 2939, ¶ 4 (MD 2004) (*Second Division Order*) (citing 47 C.F.R. § 1.106(b)(2)).

¹⁷ Second Application for Review at 2.

¹⁸ 47 U.S.C. §§ 155(c) and 405(a).

¹⁹ Second Application for Review at 2-6.

²⁰ 47 C.F.R. § 1.106(b)(2). Section 1.106(b)(2) provides "[w]here 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.*