

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

In the Matter of Application of)
)
NATIONAL READY MIXED CONCRETE CO.,) FCC File No. 0001799643
Assignor)
)
MOBILE RELAY ASSOCIATES,)
Assignee)
)
For Consent to the Assignment of Licenses for)
Private Land Mobile Radio Stations KLH414 and)
KL3784, Corona, California)

ORDER

Adopted: May 10, 2006

Released: May 12, 2006

By the Chief, Public Safety and Critical Infrastructure Division, Wireless Telecommunications Bureau:

1. Introduction. We have before us an informal Petition to Dismiss or Deny (Petition)1 filed by National Science and Technology Network, Inc. (NSTN) against the above-captioned application to assign the licenses for private land mobile radio Stations KLH414 and KL3784, Corona, California, from National Ready Mixed Concrete Co. (NRMC) to Mobile Relay Associates (MRA).2 NSTN argues that the licenses have cancelled automatically pursuant to Section 90.157 of the Commission’s Rules3 due to permanent discontinuance of station operation, so the application should be dismissed or denied.4 For the reasons discussed below, we deny the Petition.

2. Background. In support of its claim that the subject licenses cancelled automatically due to permanent discontinuance of station operation, NSTN asserts that NRMC had been NSTN’s customer, paying NSTN to operate on NSTN’s co-channel Station WPPZ334, Glendale, California, for more than four years.5 From this circumstance, NSTN infers that the NRMC stations must have discontinued operation.6

3. MRA filed an Opposition to the Petition, arguing that NSTN’s assertions are unsubstantiated and that its argument is based on a faulty premise.7 It attaches declarations under penalty

1 Letter dated July 14, 2004 from Ted. S. Henry, President, National Science and Technology Network, Inc., to Secretary, Federal Communications Commission (Petition).

2 FCC File No. 0001799643 (filed July 8, 2004), amended on August 17, 2004. The KLH414 license covers the base station and the KL3784 license authorizes the associated mobile units.

3 47 C.F.R. § 90.157.

4 See Petition at 1.

5 Id.

6 Id. (“Clearly, [NRMC] would not pay us to use our license if they already had their own valid license.”).

7 Mobile Relay Associates, Opposition to Informal Petition to Dismiss or Deny (filed July 27, 2004) (Opposition). On August 17, 2004, MRA filed an Erratum to its Opposition to provide an attachment – copies of checks from NRMC for rental of its transmitter site – that had been referenced in, but not included with, a declaration submitted (continued...)

of perjury from principals of MRA and NRMC attesting that the NRMC stations have been in continuous operation, including during the four-year period when NRMC was a customer of NSTN.⁸ According to MRA, NRMC purchased service on NSTN's station to supplement, rather than replace, its own operations.⁹

4. In response, NSTN disputes that NRMC maintained its own operations even while it was purchasing service from NSTN, reiterating that, beginning in March 2000, NRMC's mobiles operated exclusively with Station WPPZ334.¹⁰ In addition, NSTN's Response includes a declaration from NSTN's president, who attests that "NSTN has routinely monitored the channel in order to maintain ultimate control over the operation of its stations ... [but] never heard [NRMC or its predecessor in interest] use any of its call signs in its transmissions."¹¹

5. *Discussion.* We conclude that NSTN has not substantiated its allegation that the licenses for Stations KLH414 and KL3784 have cancelled automatically due to permanent discontinuance of station operation. As noted, the Petition is premised on the supposition that the stations must have discontinued operation because NRMC operated as a customer of NSTN on Station WPPZ334, using the same frequencies as the NRMC stations in the same geographic area. This contention is purely conjectural, and not persuasive. The fact that a private land mobile radio licensee also operates mobiles on a co-channel private land mobile radio station licensed to another party does not demonstrate that the

(...continued from previous page)

with the Opposition. *See* Mobile Relay Associates, Erratum to Opposition to Informal Petition to Dismiss or Deny (filed August 17, 2004) (Erratum). On August 30, 2004, NSTN filed a Response to the Erratum, arguing that the referenced tower site payments are neither disputed nor relevant, and seeking to present additional information regarding business dealings between NSTN and NRMC. *See* Response of National Science and Technology Network, Inc. (NSTN) to Opposition to Erratum of Opposition [sic] to Informal Petition to Dismiss or Deny (filed August 30, 2004) (Response to Erratum). MRA filed a Response to Improper Pleading, arguing that the Response to Erratum is procedurally defective and should be stricken from the record, and requesting that the Commission consider an attached declaration of an NRMC principal in rebuttal of the Response to Erratum if the latter pleading is not stricken. *See* Mobile Relay Associates, Response to Improper Pleading (dated September 8, 2004) (Response to Improper Pleading). On October 4, 2004, NSTN filed a pleading in opposition to MRA's Response to Improper Pleading, in which it defends NSTN's Response to Erratum as procedurally appropriate, and challenges statements in the declaration attached to the Response to Improper Pleading. *See* National Science and Technology Network, Inc., Reply of NSTN to "Response of MRA, dated September 8, 2004" (filed October 4, 2004) (Reply). Commission review of informal objections and responsive pleadings is discretionary with the Commission. *See, e.g.,* Automobile Club of Southern California, *Order on Reconsideration*, 16 FCC Rcd 2934, 2936 ¶ 6 (WTB PSPWD (2001)); Colorado RSA 7B(2) Limited Partnership, *Order*, 13 FCC Rcd 22079, 22081 n.17 (WTB CWD 1998). In exercise of that discretion, we decline to permit NSTN to introduce by way of the Response to Erratum new factual allegations that could have been provided earlier. We therefore dismiss the Response to Erratum, Response to Improper Pleading, and Reply. In any event, for reasons discussed in the text, the matters raised in these pleadings are of no decisional significance.

⁸ *See* Attachments to Opposition (undesignated and unpaginated).

⁹ *See* Opposition at 2.

¹⁰ *See* Response of National Science and Technology Network, Inc. (NSTN) to Opposition to Informal Petition to Dismiss or Deny at 1 (filed August 16, 2004) (Response). NSTN submits with the Response copies of checks and invoices paid by NRMC to Henry Radio, NSTN's agent and affiliate, to demonstrate that NRMC was a customer of NSTN. *See* Response, Exhibits 1 and 2. As noted in the text, MRA does not dispute that NRMC was a customer of NSTN.

¹¹ *See* Response, Declaration of Ted S. Henry at 3. Henry also avers that "[r]ecent monitoring indicates that [NRMC] no longer uses the stations for the dispatching of its concrete trucks." *Id.*

licensee has discontinued operation of its own station(s).¹² It is plausible that the licensee would use the other station's facilities to augment its own operations, as MRA asserts is the case here.

6. With respect to the monitoring mentioned in the declaration attached to NSTN's Response, we note that it is well established that "claims of a station's non-operation or permanent discontinuance should be substantiated by detailed radio frequency (RF) monitoring studies."¹³ Commission precedent is clear that, at a minimum, proof of detailed monitoring studies must be presented to substantiate allegations of permanent discontinuance of operations.¹⁴ NSTN's declaration does not present such detailed monitoring evidence, but asserts only that NSTN "routinely monitored the channel" without hearing NRMCM or its predecessor in interest use the KLH414 and KL3784 call signs in transmissions.¹⁵ NSTN's showing thus falls far short of what is required to demonstrate permanent discontinuance of station operations.

7. *Conclusion and Ordering Clauses.* NSTN has not substantiated its allegation that the licenses for Stations KLH414 and KL3784 cancelled automatically due to discontinuance of station operation, pursuant to Section 90.157 of the Commission's Rules. Accordingly, we deny NSTN's informal Petition to Dismiss or Deny the application.

8. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.41 of the Commission's Rules, 47 C.F.R. § 1.41, the informal Petition to Dismiss or Deny filed by National Science and Technology Network, Inc., on or about July 14, 2004, IS DENIED.

9. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communication Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.41 of the Commission's Rules, 47 C.F.R. § 1.41, the Response of National Science and Technology Network, Inc. (NSTN) to Opposition to Erratum of Opposition to Informal Petition to Dismiss or Deny filed by National Science and Technology, Inc., on August 30, 2004, the Response to Improper Pleading filed by Mobile Relay

¹² Cf. Mobile U.H.F., Inc., *Order*, 15 FCC Rcd 12844, 12845 ¶ 3 (WTB PSPWD 2000) (evidence that Trojan Security Services, Inc. (Trojan) discontinued operations and procured service from another licensee corroborated by evidence that Trojan's transmitter was dismantled).

¹³ See Cumulous Communications Corporation, *Memorandum Opinion and Order*, 19 FCC Rcd 15631, 15633 ¶ 9 (WTB PSCID 2004).

¹⁴ See, e.g., Cellular Design Corporation, *Memorandum Opinion and Order*, 14 FCC Rcd 13059, 13064 ¶ 12 (1999) (holding that evidence of sporadic monitoring was insufficient by itself to conclusively establish discontinuance of station operation); Quatron Communications, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 4749, 4753 ¶ 13 (2000) (same); Mayer Reprographics, Inc., *Order on Reconsideration*, 18 FCC Rcd 11328, 11330 ¶ 7 (WTB PSPWD 2003) (evidence that licensee terminated its service agreement to use a community repeater station, even when coupled with allegation that licensee's station was monitored for more than one year, was deemed insufficient to demonstrate discontinuance of operation in the absence of monitoring studies); Bay Ventures, *Order*, 17 FCC Rcd 8766, 8771 (WTB CWD 2002) (holding that individual site-log entries and isolated visits do not provide sufficient evidence to demonstrate that a station did not operate for a period of one year or more); cf. Elmont Trans Med Corporation, *Order*, 18 FCC Rcd 18692, 18694-95 ¶ 9 (WTB PSPWD 2003) (finding that discontinuance of operation was established by a detailed, sworn declaration of continuous monitoring of the station over a specified period of more than one year, in rebuttal to which the licensee offered only an unsworn general statement that the station was in operation).

¹⁵ An assertion that the frequency was monitored "routinely" does not obviate the need for detailed monitoring logs or similar records showing the exact duration of the monitoring. See, e.g., Brookfield Development, Inc., *Memorandum Opinion and Order*, 19 FCC Rcd 14385, 14391 ¶ 18 (2004) (holding that a petitioner's statement that it had "constantly" monitored the channel in question without noticing any co-channel operations did not suffice to substantiate claim of discontinuance in the absence of detailed monitoring records).

Associates, dated September 8, 2004, and the Reply of NSTN to “Response of MRA, dated September 8, 2004,” filed by National Science and Technology Network, Inc., on October 4, 2004, ARE DISMISSED.

10. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 310(d), the Application to Assign Licenses KLH414 and KL3784 from National Ready Mixed Concrete Co. to Mobile Relay Associates filed on July 8, 2004, FCC File No. 0001799463, SHALL BE PROCESSED consistent with this *Order* and the Commission’s Rules.

11. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission’s Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Michael J. Wilhelm
Chief, Public Safety and Critical Infrastructure Division
Wireless Telecommunications Bureau