

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

In the Matter of)	
)	
MOBILE RELAY ASSOCIATES)	FCC File No. 0002906356
Station WQIM782, Avalon, California)	
)	
NATIONAL SCIENCE AND TECHNOLOGY)	FCC File No. 0002919005
NETWORK, INC.)	
Station WPMP967, San Rafael Hills, California)	

ORDER ON RECONSIDERATION AND ORDER PROPOSING MODIFICATION

Adopted: March 17, 2009

Released: March 19, 2009

By the Deputy Chief, Mobility Division, Wireless Telecommunications Bureau:

1. *Introduction.* Mobile Relay Associates (MRA) seeks modification of the license of National Science and Technology Network, Inc. (NSTN) for Industrial/Business Pool Station WPMP967, San Rafael Hills, California.¹ NSTN seeks modification of MRA's license for Industrial/Business Pool Station WQIM782, Avalon, California,² and reconsideration of the grant of MRA's underlying application.³ Based upon our review and analysis of the information before us, we grant MRA's modification request, and deny NSTN's modification request and petition for reconsideration. Accordingly, we commence a proceeding to modify NSTN's license for Station WPMP967.

2. *Background.* Section 90.313 of the Commission's Rules provides that the maximum loading for a 470-512 MHz Industrial/Business Pool channel is ninety units, and a channel loaded to capacity cannot be reassigned within forty miles without the consent of the affected licensee(s).⁴ In 1998, NSTN was authorized to operate Station WPMP967 on, *inter alia*, frequency pair 472/475.5750 MHz with base stations at Oat Mountain, Santa Monica Mountains, and Castro Peak, California, with five thousand mobile units associated with each base station.

3. On February 8, 2007, MRA filed an application proposing to operate new base stations on frequency pair 472/475.5750 MHz at Avalon, Sunset Ridge, Sierra Peak, and Table Mountain, California, with ninety mobile units associated with each base station.⁵ NSTN filed an informal petition to dismiss or

¹ See Request to Initiate Modification Proceedings (filed Mar. 13, 2008) (MRA Modification Request). NSTN filed an opposition. See Opposition Filed by National Science and Technology Network (NSTN) to Request to Initiate Modification Proceedings (filed Mar. 25, 2008) (NSTN Opposition).

² See Request for Modification of Mobile Relay Associates' (MRA) License WQIM 782, Filed by National Science and Technology Network Inc. (NSTN) (filed Oct. 21, 2008) (NSTN Modification Request). MRA filed an opposition. See Opposition to Request for Modification (filed Nov. 5, 2008).

³ See Petition for Reconsideration of Grant of Station License Filed by National Science and Technology Network, Inc. (NSTN) (filed Apr. 18, 2008) (NSTN Petition for Reconsideration). MRA filed an opposition. See Opposition to Petition for Reconsideration (filed Apr. 24, 2008). NSTN filed a reply. See Reply to Opposition to Petition for Reconsideration of Grant of Station License Filed by National Science and Technology Network, Inc. (NSTN) (filed Apr. 28, 2008).

⁴ 47 C.F.R. § 90.313(a)(2), (b), (c).

⁵ FCC File No. 0002906356.

deny MRA's application, on the grounds that MRA's proposed operations did not meet the required distance separation with respect to temporary fixed sites associated with Station WPMP967's permanent base stations.⁶

4. While MRA's application was pending, NSTN filed an application on February 20, 2007, to modify its license for Station WPMP967 by, *inter alia*, adding frequency pair 472/475.5750 MHz at San Rafael Hills, California.⁷ NSTN's application was granted on August 21, 2007. On March 13, 2008, MRA requested that NSTN's license be modified pursuant to Section 316 of the Communications Act of 1934, as amended (the Act),⁸ to delete the authorization for operation at San Rafael Hills on frequency pair 472/475.5750 MHz, on the grounds that the facility did not meet the required distance separation with respect to the co-channel Sunset Ridge and Sierra Peak locations in MRA's prior-filed application.⁹

5. On March 20, 2008, MRA's application was granted under Call Sign WQIM782, after the Commission denied NSTN's informal petition to dismiss or deny the application, concluding that the mileage separation in Section 90.313 prohibits new facilities within forty miles of permanent base stations, but not temporary fixed stations.¹⁰ On April 18, 2008, NSTN requested reconsideration of the grant, on the grounds that the Sunset Ridge and Sierra Peak are within forty miles of NSTN's co-channel site at San Rafael Hills.¹¹ On October 21, 2008, NSTN requested that MRA's license be modified by deleting the Sunset Ridge, Sierra Peak, and Table Mountain locations, because those sites are within forty miles of NSTN's San Rafael Hills site.¹²

6. *Discussion.* As an initial matter, we reject NSTN's suggestion that MRA's request for modification of NSTN's license is untimely.¹³ The Commission rejected this argument in a proceeding addressing a request for modification of a different NSTN license in 2008.¹⁴ We will not address it

⁶ See Letter dated Feb. 25, 2007 from Ted S. Henry, President, NSTN, to Terry Fishel, FCC-Gettysburg (filed Mar. 5, 2007).

⁷ FCC File No. 0002919005.

⁸ 47 U.S.C. § 316.

⁹ See MRA Modification Request at 2. MRA stated that it did not learn of NSTN's application until NSTN demanded that MRA's frequency coordinator withdraw its coordination of MRA's application. See *id.* at 3-4, Ex. B (Letter dated Feb. 28, 2008 from Alan M. Lurya, counsel for NSTN, to Mark Crosby, President, Enterprise Wireless Alliance). MRA's frequency coordinator declined to do so. See *id.* at Ex. C (Letter dated Mar. 3, 2008 from Andre F. Cote, Senior Vice President, Enterprise Wireless Alliance, to Alan M. Lurya).

¹⁰ See Mobile Relay Associates, *Memorandum Opinion and Order*, 23 FCC Rcd 3202, 3204-05 ¶ 8 (2008).

¹¹ See NSTN Petition for Reconsideration at 1-2.

¹² See NSTN Modification Request at 1.

¹³ See NSTN Opposition at 1-3.

¹⁴ See National Science and Technology Network, Inc., *Memorandum Opinion and Order*, 23 FCC Rcd 3214, 3219 ¶ 10 (2008) (citing *California Metro Mobile Communications, Inc. v. FCC*, 365 F.2d 38, 45 (D.C. Cir. 2004) (concluding that "section 316 'contains no limitation on the time frame within which [the Commission] may act to modify a license' and that its action under the section 'is not subject to the limitations on revocation, modification or reconsideration imposed by [s]ection 405'" (citations omitted); Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, *Eighth Report and Order, Fifth Notice of Proposed Rule Making and Order*, ET Docket No. 00-258, 20 FCC Rcd 15866, 15877 n.62 (2005)).

further, other than to note that acceptance of NSTN's argument that the MRA's modification request was untimely would lead to a similar conclusion with respect to NSTN's modification request.¹⁵

7. We agree with MRA that NSTN should not have been authorized to operate on frequency pair 472/475.5750 MHz at San Rafael Hills.¹⁶ The San Rafael Hills site is within forty miles of MRA's fully-loaded co-channel sites at Sunset Ridge, Sierra Peak, and Table Mountain,¹⁷ for which MRA filed an application before NSTN applied to add frequency pair 472/475.5750 MHz at San Rafael Hills. Consequently, the NSTN application did not comply with the distance separation required by Section 90.313.

8. NSTN does not dispute this. Instead, it argues that the MRA application was defective and should not have been granted because Section 90.313 also requires a licensee "to show that an assigned [470-512 MHz] frequency pair is at full capacity before it may be assigned a second or additional frequency pair,"¹⁸ and MRA had 470-512 MHz frequencies in the same area that were not constructed.¹⁹ We decline to entertain NSTN's collateral attacks on MRA licenses other than the one at issue in this proceeding. If NSTN believes that it has sufficient evidence of non-construction or permanent discontinuance of operation,²⁰ it may file a separate request for license cancellation. Even if we were inclined to consider these ancillary issues, it is not clear that the stations identified by NSTN would be relevant, for they involve different locations from the Station WQIM782 sites.²¹

9. We believe that Section 316(a)(1) of the Act provides the appropriate vehicle for resolving this matter.²² Section 316(a) permits the Commission to modify a station license if the action will promote the public interest, convenience, and necessity.²³ Because the coordination and eventual grant of NSTN's application were defective, we believe that a modification of the NSTN license to remove authorization for frequency pair 472/475.5750 MHz at San Rafael Hills is appropriate. Moreover, we do not believe that the deletion of one frequency pair from one site authorized to Station WPMP967 will

¹⁵ It is not clear how NSTN's counsel, who signed both the NSTN Opposition and the NSTN Modification Request, could believe that the MRA Modification Request filed seven months after grant of NSTN's application was untimely and that the NSTN Modification Request filed seven months after grant of MRA's application was proper. We remind counsel that an attorney may be subjected to appropriate disciplinary action pursuant Section 1.24 of the Commission's Rules, 47 C.F.R. § 1.24, for a willful violation of Section 1.52 of the Commission's Rules, 47 C.F.R. § 1.52, which provides that an attorney's signature on a pleading constitutes a certificate by him that there is good ground to support it, to the best of his knowledge, information, and belief.

¹⁶ See NSTN Modification Request at 4-5.

¹⁷ The San Rafael Hills site is approximately twenty-eight miles from the Sunset Ridge site, thirty-seven miles from the Sierra Peak site, and thirty-four miles from the Table Mountain site.

¹⁸ 47 C.F.R. § 90.313(c).

¹⁹ See NSTN Opposition at 3. Specifically, MRA alleges that NSTN Stations WQBZ908, Avalon, California, and WQGU853, Adelanto, California, were not constructed. See *id.* at 4, Ex. B (Declaration of Alan M. Lurya).

²⁰ See National Ready Mix Concrete Co., *Memorandum Opinion and Order*, 23 FCC Rcd 5250, 5253-54 ¶ 11 (2008).

²¹ Decisions discussing the requirement in Section 90.313(c) that existing channels be loaded before additional channels may be assigned have addressed only the situation where additional channels are requested at the same location. See *Mobile Relay Associates, Order*, 23 FCC Rcd 4099 (WTB MD 2008); *National Science and Technology Network, Order on Reconsideration*, 19 FCC Rcd 23134 (WTB PSCID 2004). Station WQBZ908 clearly would not be relevant, for it is more than forty miles from the nearest site of Station WQIM782.

²² See 47 U.S.C. § 316(a)(1).

²³ *Id.*

unduly burden NSTN's operations.²⁴ In accordance with Section 1.87(a) of the Commission's Rules,²⁵ we will not issue a modification order until NSTN has received notice of our proposed action and has had an opportunity to interpose a protest. To protest the modification, NSTN must, within thirty days of the release date of this *Order on Reconsideration and Order Proposing Modification*, 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. 20554.²⁶ If no protest is filed, NSTN will have waived its right to protest the modification and will be deemed to have consented to the modification.

10. *Conclusion.* For the reasons stated above, we conclude that the underlying frequency coordination and subsequent grant of NSTN's application was defective. Accordingly, we grant MRA's modification request to the extent that we propose to modify NSTN's license for Station WPMP967 by deleting frequency pair 472.5750/475.5750 MHz at San Rafael Hills, California.²⁷ In light of this conclusion, we deny NSTN's modification request and petition for reconsideration, which are premised on the validity of its authorization for frequency pair 472.5750/475.5750 MHz at San Rafael Hills.²⁸

11. ACCORDINGLY, IT IS PROPOSED that, pursuant to Sections 4(i) and 316(a) of the Communications Act of 1934, 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 Private Land Mobile Radio Service Station WPMP967 BE MODIFIED to delete frequencies 472.5750 MHz and 475.5750 MHz from locations 1, 7, and 8.

12. IT IS FURTHER ORDERED that this *Order on Reconsideration and Order Proposing Modification* SHALL BE SENT by certified mail, return receipt requested to National Science and

²⁴ See NSTN Opposition at Ex. A (Letter dated Mar. 6, 2008 from Alan M. Lurya, counsel for NSTN, to Terry Fishel, Chief, Licensing and Technical Analysis Branch, Private Wireless Bureau, Federal Communications Commission) ("The recent expansion to San Rafael Hills simply formalized NSTN's mobile operations in areas where its mobiles have already been operating, utilizing NSTN's already licensed repeaters at [Oat Mountain and Castro Peak]. These stations have much of the same overlapping mobile operating area and are all less than 40 miles away from San Rafael Hills."). In addition, the Commission's licensing database indicates that NSTN has twenty-four other 470-512 MHz stations at San Rafael Hills.

²⁵ See 47 C.F.R. § 1.87(a).

²⁶ The address for FCC locations should be used only for documents filed by United States Postal Service first-class mail, Express Mail, and Priority Mail. Hand-delivered or messenger-delivered documents for the Commission's Secretary are accepted only at our new location at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. Other messenger-delivered documents, including documents sent by overnight mail (other than United States Postal Service, Express Mail, and Priority Mail) should be addressed for delivery to 9300 East Hampton Drive, Capitol Heights, MD 20743. See FCC Announces a New Filing Location for Paper Documents and a New Fax Number for General Correspondence, *Public Notice*, 16 FCC Rcd 22165 (2001).

²⁷ We note that a previous request filed by MRA to modify the license for Station WPMP967 and other NSTN authorizations at remains pending. See Request To Initiate Modification Proceedings (filed Aug. 21, 2003).

²⁸ In addition, we note that the NSTN Petition for Reconsideration is subject to dismissal as untimely. It was filed within thirty days of the grant of MRA's application, but more than thirty days after the Commission denied NSTN's informal petition to dismiss or deny the application. The grant of the application was a ministerial act implementing the Commission's decision, so the petition for reconsideration was due within thirty days of public notice of the Commission's decision. See, e.g., Motorola, Inc., *Order on Reconsideration*, 22 FCC Rcd 18649, 18650 ¶ 2 (WTB MD 2007) (March 2 petition for reconsideration of January 19 order granting waiver request was untimely even though public notice of grant of application was released January 31) (citing *Mobile Telephone, Inc., Memorandum Opinion and Order*, 91 F.C.C. 2d 907, 908 ¶ 4 (1982) (citing *Microwave Communications, Inc. v. FCC*, 515 F.2d 385, 395-97 (D.C. Cir. 1974)); *Public Communications, Inc., Memorandum Opinion and Order*, 54 F.C.C. 2d 390, 393 ¶ 9 (1975) (citing *Storer Broadcasting Co. (WJBK-TV), Memorandum Opinion and Order*, 41 F.C.C. 2d 792 (1973))), *review pending*.

Technology Network, Inc., 2050 S. Bundy Drive, Suite 285, Los Angeles, CA 90025, Attn: Ted S. Henry; and to Professional Licensing Consultants, Inc., P.O. Box 1714, Rockville, MD 20849, Attn: J. A. (Josie) Lynch.

13. IT IS FURTHER ORDERED that the Request to Initiate Modification Proceedings filed by Mobile Relay Associates on March 13, 2008 IS GRANTED TO THE EXTENT INDICATED HEREIN; and the Petition for Reconsideration of Grant of Station License Filed by National Science and Technology Network, Inc. (NSTN) and the Request for Modification of Mobile Relay Associates' (MRA) License WQIM 782, Filed by National Science and Technology Network Inc. (NSTN) filed by National Science and Technology Network, Inc. on April 18 and October 21, 2008, respectively, ARE DENIED.

14. 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 COMMUNICATION COMMISSION

Scot Stone
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau