

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

In the Matter of	)	
	)	
MOBILE RELAY ASSOCIATES	)	
	)	
Petition For Reconsideration of Grant Filed by	)	File No. 0001398092
National Science and Technology Network, Inc.	)	
	)	
Informal Petition to Dismiss or Deny Filed by	)	File No. 0002906356
National Science and Technology Network, Inc.	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 20, 2008**

**Released: February 27, 2008**

By the Commission:

1. *Introduction.* In a January 30, 2007 *Order*, the Mobility Division (Division) of the Wireless Telecommunications Bureau (Bureau) denied a petition filed by National Science and Technology Network, Inc. (NSTN) for reconsideration of the grant of application file number 0001398092 filed by Mobile Relay Associates (MRA).<sup>1</sup> We have before us pleadings that we treat as an application for review of the *Order*.<sup>2</sup> In addition, on March 5, 2007, NSTN filed an informal petition to dismiss or deny MRA's application file number 0002906356.<sup>3</sup> The filings raise overlapping issues, and will be addressed together in the interest of administrative efficiency.<sup>4</sup> For the reasons set forth below, we deny NSTN's application for review and its petition to dismiss or deny.

2. *Background.* MRA's application 0001398092 for a new trunked Industrial/Business Pool station at Avalon, Santa Catalina Island, California, was granted on January 13, 2005 under Call Sign WQBZ908. NSTN sought reconsideration of the grant on the grounds that MRA's operations would result in unacceptable interference to NSTN's facilities authorized under Call Signs WPME695, WPLR710, WPMP967, and WPMM274. Specifically, NSTN noted that its licenses authorize the operation of temporary base stations<sup>5</sup> anywhere within thirty miles of the permanent base stations. It contended that MRA's application should not have been granted because, while the proposed site satisfied the distance separation requirements in Section 90.313 of the Rules<sup>6</sup> with respect to NSTN's permanent

<sup>1</sup> See Mobile Relay Associates, *Order*, 22 FCC Rcd 1600 (WTB MD 2007) (*Order*).

<sup>2</sup> See *infra* at paras. 4, 6.

<sup>3</sup> Letter dated Feb. 25, 2007 from Ted S. Henry, President, NSTN, to Terry Fishel, FCC-Gettysburg (filed Mar. 5, 2007) (Informal Petition). MRA filed an Opposition. See Opposition (filed Mar. 13, 2007). NSTN filed a reply. See Response to Objection to Informal Petition and Statement Regarding Why NSTN's Pleading Is Not Frivolous (filed Apr. 3, 2007).

<sup>4</sup> See, e.g., Clarendon Foundation, *Memorandum Opinion and Order*, 18 FCC Rcd 13437, 13438 ¶ 1 (2003) (addressing four separate applications for review together for administrative efficiency, because they raised essentially the same issues); Comcast Cablevision of Dallas, Inc., *Order*, 20 FCC Rcd 14299, 14300 ¶ 3 (MB PD 2005) (addressing appeals of two separate municipal rate orders together for administrative efficiency, because they raised essentially the same issues).

<sup>5</sup> Temporary base stations are authorized to operate for up to one year at unspecified locations within a specified geographic area. See 47 C.F.R. § 90.137(a)(1), (b).

<sup>6</sup> 47 C.F.R. § 90.313.

base stations, it did not meet those requirements with respect to every potential temporary fixed repeater location. NSTN also argued that MRA's proposed site did not satisfy the protection criteria for adjacent channel television operations in Section 90.307 of the Rules<sup>7</sup> with respect to Station KPBS-TV, San Diego, California, licensed to the Board of Trustees for San Diego State University.

3. On January 30, 2007, the Division denied NSTN's petition for reconsideration. It concluded that the spacing requirements in Section 90.313 for stations in the 470-512 MHz band are based on non-temporary, *i.e.*, permanent, facilities, and that temporary facilities need not be taken into consideration in the frequency coordination process.<sup>8</sup> It noted that requiring protection for each potential temporary transmitter site would result in an inefficient use of the spectrum, and that NSTN had pointed to no authority for its assertion that the rules require protection of temporary base stations.<sup>9</sup> The Division also determined that MRA's proposed facilities complied with Section 90.307.<sup>10</sup>

4. On January 30, February 2, and February 25, 2007, NSTN filed similar pleadings each identified as a petition for reconsideration of the *Order*.<sup>11</sup> On February 8, February 20, and March 13, 2007, MRA moved to dismiss the petitions pursuant to Section 1.106(k)(3) of the Commission's Rules,<sup>12</sup> on the grounds that they were repetitious of the petition for reconsideration that was denied in the *Order*.<sup>13</sup> In response, NSTN requested that its pleadings be deemed an application for review, rather than a petition for reconsideration.<sup>14</sup> MRA opposed the request.<sup>15</sup>

5. On March 5, 2007, NSTN filed an informal petition to dismiss or deny MRA's application 0002906356, which also proposes permanent base stations at locations that satisfy the distance separation requirements with respect to NSTN's permanent base stations, but not with respect to every potential NSTN temporary fixed repeater location.<sup>16</sup> NSTN recognizes that the Division's *Order* rejected NSTN's position on this issue, and that resolution of the petition is contingent on the outcome of its application for review.<sup>17</sup>

6. *Discussion.* As an initial matter, we must address NSTN's request that we treat its pleadings as an application for review. Because NSTN's pleadings were filed within the time for filing an

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<sup>7</sup> 47 C.F.R. § 90.307.

<sup>8</sup> *See Order*, 22 FCC Rcd at 1601 ¶ 4.

<sup>9</sup> *See id.*

<sup>10</sup> *See id.* at 1601 ¶ 6.

<sup>11</sup> *See* Letters dated January 30, February 2, and February 25, 2007 from Ted S. Henry, President, NSTN, to Secretary, Federal Communications Commission.

<sup>12</sup> 47 C.F.R. § 1.106(k)(3).

<sup>13</sup> *See* Motion to Dismiss or, in the Alternative, Opposition to "Informal" Petition for Reconsideration (filed Feb. 8, 2007); Supplement to Motion to Dismiss (filed Feb. 20, 2007); Motion to Dismiss (filed Mar. 13, 2007).

<sup>14</sup> *See* Opposition to Motion to Dismiss and Cross Motion to Strike MRA's Caption, and Further to Consider Pleading as Application for Review (filed Apr. 2, 2007).

<sup>15</sup> *See* Response to Opposition and Cross Motion (filed Apr. 11, 2007).

<sup>16</sup> *See* Informal Petition at 1.

<sup>17</sup> *See id.*

application for review, and were directed to the Commission rather than to the Division, we will consolidate them and treat them as an application for review.<sup>18</sup>

7. NSTN asserts that all stations authorized under Subpart L of Part 90, which governs stations in the 470-512 MHz band, are primary and entitled to protected operating areas. NSTN contends that its temporary facilities deserve the same protection around their potential locations as is afforded permanent fixed stations, because Subpart L does not distinguish between permanent and temporary base stations. It asserts that if the Commission had intended to afford lesser interference protection for temporary base stations, the 470-512 MHz rules would expressly so provide. NSTN argues that the Division's interpretation leads to the "absurd result" that NSTN is authorized to operate temporary transmitters at locations where it could not be authorized for permanent transmitters, because the sites would be closer to MRA's permanent site than Section 90.313 permits.<sup>19</sup>

8. We conclude that the Division interpreted the rule correctly. Section 90.313(c), which sets forth the required distance separation requirement from fully loaded<sup>20</sup> co-channel stations in the 470-512 MHz band, provides, "A frequency pair may be reassigned at distances of 64 km. (40 mi.) . . . or more from the location of base stations authorized on that pair without reference to loading at the point of original installation."<sup>21</sup> Under NSTN's interpretation, the required forty-mile separation would apply not only to its permanent base stations, but also to any potential temporary base stations it is licensed to operate within thirty miles of the permanent base stations, *i.e.*, within the authorized operating area for mobile units associated with the permanent base station.<sup>22</sup> This would result in the permanent base station being surrounded not by an exclusive area with a forty-mile radius, but by a seventy-mile area in which no co-channel station could be authorized. This was not the Commission's intent<sup>23</sup> and, as pointed out by the Division, would result in an inefficient use of the spectrum. The phrase "point of original installation"

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<sup>18</sup> See Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Anniston and Ashland, Alabama, and College Park, Covington, Milledgeville and Social Circle, Georgia), *Memorandum Opinion and Order*, 16 FCC Rcd 19857, 19857 n.1 (2001) (granting request to treat pleading captioned petition for reconsideration as application for review); WPBN/WTOM License Subsidiary, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 1838, 1838 n.1 (2000) (same); Texas Media Group, Inc., *Memorandum Opinion and Order*, 5 FCC Rcd 2851, 2851 n.1 (1990) (same).

<sup>19</sup> NSTN also asserts that the Division's determination that MRA satisfied Section 90.307 is belied by the fact that two other MRA applications for authority to operate at the same location as Station WQBZ908 were dismissed due to potential interference to Station KPBS-TV. This argument is factually incorrect, for one of the applications cited by NSTN, FCC File No. 0001995876, is still pending, and the other, FCC File No. 0001996438, was dismissed because of potential interference to an NSTN station, rather than Station KPBS-TV. See *Mobile Relay Associates, Order*, 21 FCC Rcd 3551, 3552 ¶ 3 (WTB MD 2006).

<sup>20</sup> The maximum channel loading for frequencies in the 470-512 MHz band is fifty mobile units for Public Safety Pool systems and ninety units for Industrial/Business Pool systems. 47 C.F.R. § 90.313(a).

<sup>21</sup> 47 C.F.R. § 90.313(c).

<sup>22</sup> 47 C.F.R. § 90.305(b).

<sup>23</sup> See Amendment of Parts 21, 89, 91 and 93 of the Rules to Reflect the Availability of Land Mobile Channels in the 470-512 MHz Band in the 10 Largest Urbanized Areas of the United States, *Second Report and Order*, Docket No. 18261, 30 F.C.C. 2d 221, 229 ¶ 19 (1971) ("the 40-mile separation . . . is designed as a reasonable frequency assignment criterion to assist in establishing uniform and predictable loading of the frequencies in the 470-512 MHz band and to provide a suitable but not absolute measure of the degree of usage of frequencies assigned within a 40-mile radius"); see also *id.* at 278-81 (examples measuring forty-mile separation only from permanent base station locations).

in Section 90.313(c) clearly refers only to permanent base stations, and not to potential temporary base stations.<sup>24</sup>

9. We thus conclude that the Division correctly decided that the spacing requirements in Section 90.313(c) for new stations in the 470-512 MHz band are based on incumbent permanent facilities, and incumbents' potential temporary locations need not be considered in the frequency coordination process.<sup>25</sup> MRA is permitted to locate a permanent base station more than forty miles from NSTN's co-channel permanent base stations, without regard to NSTN's potential temporary transmitter sites. MRA's application 0001398092 was properly granted, and NSTN's petition for reconsideration of that grant was properly denied. We therefore deny NSTN's application for review of the Division's decision. For the same reasons, we deny NSTN's informal petition to dismiss or deny MRA's application 0002906356, and the application will be processed accordingly.

10. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 155(c), and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, that the petition for reconsideration filed by National Science and Technology Network, Inc., on January 30, 2007 and supplemented on February 2 and February 25, 2007, when treated as an application for review, IS DENIED.

11. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 155(c), and Section 1.41 of the Commission's Rules, 47 C.F.R. § 1.41, that the informal petition to dismiss or deny filed by National Science and Technology Network, Inc., on March 5, 2007 IS DENIED, and application 0002906356 SHALL BE PROCESSED in accordance with this *Memorandum Opinion and Order* and the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>24</sup> NSTN's position in the present matter appears to conflict with its position in a prior dispute with MRA, where the Bureau's former Public Safety and Critical Infrastructure Division concluded that NSTN satisfied the distance separation requirement in Section 90.313(c) with a proposed base station forty-five miles from an MRA station that was authorized to operate temporary base stations within a thirty-mile area. *See* National Science and Technology Network, Inc., *Order on Reconsideration*, 21 FCC Rcd 3548, 3549 ¶ 3 (WTB PSCID 2006).

<sup>25</sup> We note that the converse proposition – that new temporary base stations may be authorized within forty miles of a fully loaded co-channel permanent base station – is not true, because Section 90.313 does not permit any reassignment of the channel within that distance, be it for permanent or temporary base stations. *See* Mobile Relay Associates, *Order*, 18 FCC Rcd 12974, 12981 ¶ 16 (WTB PSPWD 2003).