

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

In the Matter of)
)
NATIONAL SCIENCE AND TECHNOLOGY) File No. D108068
NETWORK, INC.)
Licensee of Private Land Mobile Radio Station)
WPMJ456, Glendale, California)
)
FISHER WIRELESS SERVICES, INC.) File No. C007248
Licensee of Private Land Mobile Radio Station)
WPNQ697, Running Springs, California)
)
HENRY RADIO, INC.)
Informal Petitions)
)
AMERICAN AUTOMOBILE ASSOCIATION)
Informal Complaint)
)
MOBILE RELAY ASSOCIATES)
Licensee of Private Land Mobile Radio Stations)
WPHH415, La Crescenta, California, WPQF246,)
Palm Springs, California, WPQA973, Indio,)
California, WPPE290, Claremont, California,)
WPPE823, Escondido, California, WPPE824,)
Dulzura, California, WPPF223, Pasadena,)
California, and WPPF353, Poway, California)
)
and)
)
SUNLINE TRANSIT AGENCY) File No. 0001519120
Licensee of Private Land Mobile Radio Station)
WPZY383, Riverside, California)

MEMORANDUM OPINION AND ORDER

Adopted: February 20, 2008

Released: February 28, 2008

By the Commission:

I. INTRODUCTION

1. We have before us an application for review filed by National Science and Technology Network, Inc. ("NSTN") on September 5, 2006.1 NSTN seeks review of an Order on Reconsideration2 by the Public Safety and Critical Infrastructure Division ("PSCID") of the Wireless Telecommunications

1 Application for Review, filed September 5, 2006 (AFR).

2 National Science and Technology Network, Inc., Order on Reconsideration, 21 FCC Rcd 9050 (WTB PSCID 2006) (Reconsideration Order).

Bureau (“Bureau”). The *Order on Reconsideration* denied NSTN’s petition for reconsideration of an *Order of Modification*³ by the Bureau’s Public Safety and Private Wireless Division (“PSPWD”)⁴ that modified NSTN’s license for Station WPMJ456, Glendale, California, by changing the station class code from FB8 (centralized trunked)⁵ to FB6 (decentralized trunked).⁶ In its application for review, NSTN argues that PSPWD improperly failed to hold a formal evidentiary hearing, and that the procedures followed by PSPWD amounted to an abuse of discretion and a denial of due process. For the reasons discussed below, we conclude that the PSPWD and PSCID acted properly, and accordingly deny the application for review. Additionally, as a result of our action today, we dismiss as moot NSTN’s December 20, 2006 petition for reconsideration⁷ of the denial by the Bureau’s Mobility Division⁸ of NSTN’s informal petition requesting deletion of a channel pair from the license of Sunline Transit Agency (Sunline Transit) for Station WPZY383, Riverside, California.⁹

II. BACKGROUND

2. In 1997, the Commission decided to permit centralized trunking in the private land mobile radio (PLMR) bands between 150 MHz and 512 MHz.¹⁰ The Commission emphasized that centralized trunking would be permitted only in those areas where exclusivity is recognized by the Commission or where an applicant/licensee has obtained the consent of all licensees whose service areas overlap a circle with a radius of seventy miles from the proposed trunked system’s base station.¹¹ Section 90.187(b)(2)(v) of the Commission’s Rules requires trunked licensees to maintain letters of consent and to provide copies to the FCC upon request.¹²

³ National Science and Technology Network, Inc., *Order of Modification*, 18 FCC Rcd 11321 (WTB PSPWD 2003) (*Order of Modification*).

⁴ The Commission reorganized the Wireless Telecommunications Bureau effective November 13, 2003, and the relevant duties of the Public Safety and Private Wireless Division were assumed by the Public Safety and Critical Infrastructure Division. See Reorganization of the Wireless Telecommunications Bureau, *Order*, 18 FCC Rcd 25414, 25414 ¶ 2 (2003).

⁵ In a “centralized trunked system,” the base station controller provides dynamic channel assignments by automatically searching all channels in the system for, and assigning to a user, an open channel within that system.

⁶ In a “decentralized trunked system,” which is also a system of dynamic channel assignment, the system continually monitors the assigned channels for activity both within the trunked system and outside the trunked system, and transmits only when an open channel is found.

⁷ National Science and Technology Network, Inc. Petition for Reconsideration, filed December 20, 2006 (NSTN 2006 Petition).

⁸ Pursuant to a reorganization effective September 25, 2006, certain duties of the Public Safety and Critical Infrastructure Division were assumed by the Mobility Division. See Establishment of the Public Safety and Homeland Security Bureau, *Order*, 21 FCC Rcd 10867 (2006).

⁹ National Science and Technology Network, Inc., *Letter*, 21 FCC Rcd 14381 (WTB MD 2006) (*Division Letter*).

¹⁰ See Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, *Second Report and Order*, PR Docket No. 92-235, 12 FCC Rcd 14307, 14337-38 ¶¶ 56-59 (1997).

¹¹ *Id.* In 1999, the Commission provided applicants with an alternate means of obtaining an authorization for a centralized trunked system by obtaining the concurrence of any existing co-channel or adjacent channel licensee whose 39 dBu service contour (UHF) or 37 dBu service contour (VHF) is intersected by the 21 dBu (UHF) or 19 dBu (VHF) interference contour of a proposed trunked station. See Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, *Third Memorandum Opinion and Order*, PR Docket No. 92-235, 14 FCC Rcd 10922, 10926-27 ¶¶ 6-9 (1999).

¹² See 47 C.F.R. § 90.187(b)(2)(v).

3. On May 14, 1998, the American Automobile Association (AAA), an FCC-certified frequency coordinator for PLMR spectrum, filed an application on behalf of NSTN to operate in the centralized trunked mode in the 450 MHz band.¹³ NSTN received an authorization to operate centralized trunked Industrial/Business Station WPMJ456 on August 12, 1998.

4. On November 5, 1998, the Industrial Telecommunications Association, Inc. (ITA), another FCC-certified PLMR frequency coordinator, filed an application on behalf of Fisher Wireless Services, Inc. (Fisher), requesting authorization for Fisher to operate in the decentralized trunked mode in the 450 MHz band.¹⁴ NSTN objected to Fisher's proposed operations on frequency pairs 452/457.3000 MHz and 452/457.6500 MHz due to the close proximity of NSTN's use of the same frequencies in its operation of Station WPMJ456. In response to an FCC request to examine the frequency coordination and procedural issues surrounding the Fisher application, ITA submitted a frequency analysis demonstrating that on virtually every frequency at each of the four base station sites authorized for Station WPMJ456, there were multiple incumbent co-channel or adjacent channel licensees located within seventy miles of NSTN's base stations.¹⁵ As a result, ITA suggested that NSTN's application for Station WPMJ456 should not have been granted.¹⁶

5. On June 26, 2000, PSPWD's Licensing and Technical Analysis Branch (Branch) requested that AAA demonstrate the sufficiency of the frequency coordination conducted for Station WPMJ456, and stated that if the coordination was not valid, PSPWD would "institute a license modification proceeding."¹⁷ On July 21, 2000, AAA responded not by supplying the requested information, but by taking the position that it was "unreasonable" to ask it to recreate the "state of affairs" that existed in 1997 or 1998.¹⁸ On January 22, 2001, NSTN submitted a letter asserting that the license could not be revoked without a hearing.¹⁹

6. On August 9, 2002, PSPWD proposed to modify NSTN's license for Station WPMJ456 by changing its station class code from a centralized trunked station (station class FB8) to a decentralized trunked station (station class FB6).²⁰ PSPWD concluded that the original NSTN application should not have been coordinated or granted because it did not provide the requisite interference protection to several existing stations and pending applications, and there was no record that the required consents were obtained.²¹ It also concluded that the proposed modification would serve the public interest by allowing

¹³ See FCC File No. D108068 (filed May 14, 1998).

¹⁴ See FCC File No. C007248 (filed Nov. 5, 1998).

¹⁵ See Letter dated June 16, 1999 from Mark E. Crosby, President/CEO, ITA, to Eric Smith, Commercial Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission at 1.

¹⁶ *Id.* at 1-2.

¹⁷ See Letter dated June 26, 2000 from Steve Linn, Deputy Chief, on behalf of Mary Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, to Elizabeth Sachs, counsel to Fisher at 1-2.

¹⁸ See Letter dated July 21, 2000 from Gary Ruark, Frequency Coordinator, AAA, to Mary Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety & Private Wireless Division, Wireless Telecommunications Bureau.

¹⁹ See Letter dated January 22, 2001 from Alan M. Lurya, counsel to NSTN, to Mary Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau ("ITA proposes once again that the Bureau revoke NSTN's license without a hearing. . . . [N]o such action may occur, absent a full trial before an administrative law judge, on legally sufficient grounds for license revocation.").

²⁰ See National Science and Technology Network, Inc., *Memorandum Opinion and Order*, 17 FCC Rcd 15728, 15734 ¶ 19 (WTB PSPWD 2002) (*Modification MO&O*).

²¹ *Id.* at 15734 ¶¶ 16-17.

NSTN to continue serving customers, while avoiding harmful interference.²² In accordance with Section 316(a)(1) of the Communications Act of 1934, as amended (“the Act”),²³ and Section 1.87(a) of the Commission’s Rules,²⁴ NSTN was given thirty days to protest the proposed action.²⁵

7. On September 9, 2002, NSTN filed a petition protesting the proposed license modification.²⁶ In its protest, NSTN made two arguments why the license for Station WPMJ456 should not be modified. First, NSTN asserted that the frequency coordination performed for the Fisher application was “improper due to the congestion of the relevant frequencies.”²⁷ Second, NSTN pointed to its reliance on the Commission’s grant of its license and stated that it would “suffer grievous injury as a result of any change in status of the license.”²⁸ In the *Order of Modification*, released June 4, 2003, PSPWD rejected both arguments. With respect to the first argument, PSPWD concluded that NSTN had not provided any legal or technical support for its contention that the frequencies were fully occupied; and, even if the frequencies were fully occupied, the argument failed to address the conclusion that NSTN’s application was improperly granted.²⁹ With respect to the second argument, PSPWD concluded that the effect of the proposed modification on NSTN did not outweigh the benefits, because it would be more equitable to modify NSTN’s license than it would be to completely bar others from operating on the subject frequencies.³⁰ Consequently, PSPWD modified NSTN’s license for Station WPMJ456 by altering its station class code from FB8 to FB6.³¹

8. On July 2, 2003, NSTN filed a petition for reconsideration of the *Order of Modification*. It argued that the modification was the equivalent of a license revocation because it destroyed the license’s economic value, so NSTN was entitled to a hearing pursuant to Section 312 of the Act. It also argued that PSPWD was prohibited from taking any action with respect to the license once the grant became final. PSCID rejected both arguments. With respect to the first argument, PSCID concluded that modification of a license is not equivalent to revocation, even if it reduces the station’s value from the licensee’s perspective, because the licensee is still authorized to operate the facility.³² PSCID thus concluded that the matter was governed not by Section 312 of the Act, but by Section 316, which does not provide for an automatic right to a formal hearing prior to license modification.³³ PSCID concluded that the case did not meet the standard for a Section 316 hearing and, in any event, that NSTN could be deemed to have waived any right to a hearing because it never requested one.³⁴ With respect to the

²² *Id.* at 15734 ¶ 17.

²³ 47 U.S.C. § 316(a)(1).

²⁴ 47 C.F.R. § 1.87(a).

²⁵ *See Modification MO&O*, 17 FCC Rcd at 15734 ¶ 17.

²⁶ Protest of Proposed License Modification, filed Sept. 9, 2002.

²⁷ *Id.* at 5.

²⁸ *Id.* at 6.

²⁹ *See Order of Modification*, 18 FCC Rcd at 11325-26 ¶ 12.

³⁰ *Id.* at 11326 ¶ 13.

³¹ *Id.* at 11327 ¶ 15. In addition, PSPWD dismissed as moot NSTN’s petition for reconsideration of the Branch’s dismissal of NSTN’s informal petition requesting that the Commission cancel certain co-channel licenses, because the petition was premised on Station WPMJ456 having FB8 status. *Id.* at 11326 ¶ 14.

³² *See Reconsideration Order*, 21 FCC Rcd at 9054 ¶ 10 (citing, e.g., *Pacific Gas and Electric Company, Memorandum Opinion and Order*, 18 FCC Rcd 22761, 22765 ¶ 11 (2003) (*Pacific Gas and Electric*)).

³³ *Id.* at 9054 ¶ 11.

³⁴ *Id.* at 9054-55 ¶¶ 11-13 (citing, e.g., *Modification of FM or Television Licenses Pursuant to Section 316 of the Communications Act, Order*, 2 FCC Rcd 3327, 3327 ¶ 1 (1987) (*Section 316 Order*)).

second argument, PSCID found that ample authority supported its conclusion that Commission authority to modify licenses under Section 316 is not limited in time.³⁵ On September 5, 2006, NSTN filed the instant application for review.³⁶

9. On December 12, 2006, the Mobility Division denied NSTN's informal petition³⁷ requesting the deletion of frequency pair 452/457.625 MHz from Sunline Transit's license for Station WPZY383 due to Sunline Transit's failure to obtain NSTN's consent as required by Section 90.187(b).³⁸ The Mobility Division concluded that Section 90.187(b) did not apply, because it pertains only to centralized trunked stations, and both Sunline Transit's Station WPZY383 and NSTN's Station WPMJ456 are decentralized trunked stations.³⁹ On December 20, 2006, NSTN filed a petition for reconsideration of that action, requesting that the action be reversed, or that the grant of Sunline Transit's license at least be conditioned on the outcome of the instant application for review regarding the status of the license for Station WPMJ456.⁴⁰

III. DISCUSSION

10. NSTN reiterates certain arguments that it made in its petition for reconsideration. Specifically, it again contends that the modification of its license changing the station class from FB8 to FB6 was the equivalent of a license revocation because it rendered the license economically valueless, and thus required a hearing pursuant to Section 312 of the Act.⁴¹ We disagree. PSPWD and PSCID correctly concluded that license modification is not the equivalent of license revocation, even if the licensee believes that the modification reduces the station's value.⁴² We agree with PSCID that changing the station class code did not render the license valueless because NSTN is still authorized to operate the station⁴³; requiring NSTN to share frequencies with preexisting licensees is not equivalent to depriving NSTN of the use of the license.⁴⁴ NSTN also reasserts that PSPWD was prohibited from taking any action with respect to the license once the grant became final.⁴⁵ This is incorrect. It is well established that the Commission's authority to modify licenses pursuant to Section 316 is not limited in time or to the

³⁵ *Id.* at 9055 ¶ 14 (citing, *e.g.*, *California Metro Mobile Communications, Inc. v. FCC*, 365 F.3d 38, 45 (D.C. Cir. 2004) (*CMMC*)).

³⁶ Mobile Relay Associates (MRA) filed an opposition to the application for review on October 4, 2006. Opposition to Application for Review, filed October 4, 2006 (MRA Opposition). Fisher filed a reply on October 13, 2006 concurring with MRA. Reply to Opposition to Application for Review, filed October 13, 2006.

³⁷ Letter dated December 8, 2003 from Ted S. Henry, President, NSTN, to Mary Shultz, FCC-Gettysburg.

³⁸ 47 C.F.R. § 90.187(b).

³⁹ *See Division Letter*, 21 FCC Rcd at 14382.

⁴⁰ NSTN 2006 Petition at 2.

⁴¹ *See AFR* at 11.

⁴² *See, e.g.*, Review of Spectrum Sharing Plan among Non-Geostationary Satellite Orbit Mobile Satellite Service Systems in the 1.6/2.4 GHz Bands, *Report and Order, Fourth Report and Order and Further Notice of Proposed Rulemaking*, IB Docket No. 02-364, 19 FCC Rcd 13356, 13395 ¶ 89 (2004) (rejecting assertion that changing the Big LEO channel plan constituted a revocation rather than a modification); *Pacific Gas and Electric*, 18 FCC Rcd at 22765 ¶ 11 (concluding that modifying a license by reducing the base transmitter power did not constitute a revocation).

⁴³ *See Reconsideration Order*, 21 FCC Rcd at 9054 ¶ 10; *see, e.g.*, Thomas K. Kurian, *Memorandum Opinion and Order*, 19 FCC Rcd 10056, 10060 ¶ 12 (2004) (modifying license from primary to secondary status).

⁴⁴ Indeed, the D.C. Circuit has upheld the Commission's authority to *delete* a frequency from a license pursuant to Section 316. *See CMMC*, 365 F.3d at 46.

⁴⁵ *See AFR* at 6, 11-12.

correction of post-licensing events.⁴⁶ The authority that NSTN cites for the proposition that the time to act was limited pertains to license rescission rather than modification, and thus is inapposite.⁴⁷

11. NSTN also argues that it was entitled to a hearing under Section 316 of the Act, and that PSPWD misallocated the burden of proof in the modification proceeding. Section 316 provides in relevant part as follows:

(a)(1) Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any Treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall be given reasonable opportunity, of at least thirty days, to protest such proposed order of modification; except that, where safety of life or property is involved, the Commission may by order provide, for a shorter period of notice.

...

(b) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission⁴⁸

12. Contrary to NSTN's assertions,⁴⁹ Section 316 does not provide for an automatic right to a formal hearing prior to license modification, and PSPWD was not required to offer to hold one.⁵⁰ Rather, to warrant an evidentiary hearing, the licensee's protest "must . . . set forth a substantial and material question of fact,"⁵¹ *i.e.*, specific allegations of fact sufficient to show that the action would be *prima facie* inconsistent with the public interest, convenience and necessity.⁵² Only if this *prima facie* case is made

⁴⁶ See *CMMC*, 365 F.2d at 45 (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); see also, *e.g.*, 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); Improving Public Safety Communications in the 800 MHz Band, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, WT Docket No. 02-55, 19 FCC Rcd 14969, 15011 n.214 (2004).

⁴⁷ See AFR at 6 (citing California Water Service Company, *Memorandum Opinion and Order*, 18 FCC Rcd 11609 (2003)).

⁴⁸ 47 U.S.C. § 316; see also 47 C.F.R. § 1.87(a), (e).

⁴⁹ See, *e.g.*, AFR at 6-8.

⁵⁰ *Section 316 Order*, 2 FCC Rcd at 3327 ¶ 1. The authority that NSTN cites for the proposition that PSPWD was required to offer it a hearing is inapposite in that it involves a license application under Section 309 of the Act rather than license modification Section 316, and because the aggrieved party in that matter specifically requested a hearing. See AFR at 7 (citing *Gencom Inc. v. FCC*, 832 F.2d 171 (D.C. Cir. 1987)).

⁵¹ *Section 316 Order*, 2 FCC Rcd at 3327 ¶ 5.

⁵² See, *e.g.*, *Serafyn v. FCC*, 149 F.3d 1213 (D.C. Cir. 1998); *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394-95 (D.C. Cir. 1985) (*Citizens for Jazz*).

must the Commission proceed to the second level of inquiry and determine whether the totality of the evidence arouses sufficient doubt that further inquiry to determine the facts is necessary.⁵³

13. In its application for review, NSTN for the first time sets forth the issues that it believes merited a hearing.⁵⁴ Section 1.115(c) of the Commission's Rules, however, specifically prohibits grant of an application for review that relies on questions that the designated authority has been afforded no opportunity to consider.⁵⁵ "[T]he Commission has reiterated that a party may not 'sit back and hope that a decision will be in its favor, and then, when it isn't, to parry with an offer of more evidence.'"⁵⁶ Because NSTN did not previously offer grounds for a hearing, it may not do so now.

14. Indeed, NSTN did not request a modification hearing at all prior to filing its application for review. It therefore may be deemed to have waived any right to a hearing. Filing a written protest of the proposed modification is a separate action from requesting a hearing,⁵⁷ and did not preserve any right to a hearing that NSTN may have once had. Nor can NSTN's insistence in 2001 that the Commission not revoke its license without a hearing be deemed a request for a Section 316 hearing, because it related to license revocation rather than modification, and predated the *Modification MO&O*.⁵⁸

15. Finally, NSTN argues that the burden of proof in the modification should have been on the Commission, and PSPWD and PSCID misallocated that burden.⁵⁹ As set forth above, however, Section 316 allocates the burden of proof to the Commission only when a hearing is held.

IV. CONCLUSION AND ORDERING CLAUSES

16. Therefore, we affirm PSCID's *Order on Reconsideration* denying NSTN's petition for reconsideration of PSPWD's *Order of Modification*. We conclude based on the record before us that PSPWD and PSCID acted properly. Consequently, we deny NSTN's September 5, 2006 application for review. In light of this resolution of the application for review, we also dismiss as moot NSTN's petition for reconsideration of the Mobility Division's denial of NSTN's petition for reconsideration of the dismissal of its request that frequency pair 452/457.625 MHz be deleted from Sunline Transit's license for Station WPZY383.

17. 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 application for review filed by National Science and Technology Network, Inc. on September 5, 2006 IS DENIED.

⁵³ *Section 316 Order*, 2 FCC Rcd at 3327 ¶ 5; *Citizens for Jazz*, 775 F.2d at 394-95.

⁵⁴ See AFR at 10-14.

⁵⁵ 47 C.F.R. § 1.115(c).

⁵⁶ Improving Public Safety Communications in the 800 MHz Band, *Order*, WT Docket No. 02-55, 20 FCC Rcd 1560, 1562 n.21 (2005) (quoting *Colorado Radio Corp. v. FCC*, 118 F.3d 24, 26 (D.C. Cir. 1941)).

⁵⁷ *Cf., e.g., KABN(AM), Order to Show Cause*, 10 FCC Rcd 10725, 10727 ¶ 3 (MMB ASD 1995) ("failure to file a written statement or to request a hearing within the time specified will result in a waiver of the right to file such a statement or to request a hearing").

⁵⁸ The 2001 statement was a demand for an automatic hearing under Section 312; it was not a request for a hearing under Section 316 and did not attempt to meet the standard to justify a Section 316 hearing.

⁵⁹ AFR at 7.

18. IT IS FURTHER ORDERED that the petition for reconsideration filed by National Science and Technology Network, Inc. on December 20, 2006, IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary