

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

In the Matter of	)	
	)	
NATIONAL SCIENCE AND TECHNOLOGY	)	File No. D102126
NETWORK, INC.	)	
Licensee of Station WPME699, Monte Nido, La	)	
Crescenta, and Glendale, California	)	
	)	
MOBILE RELAY ASSOCIATES	)	File Nos. 414473, D134244
Licensee of Station WPPG553, Corona, California	)	

**MEMORANDUM OPINION AND ORDER AND ORDER PROPOSING MODIFICATION**

**Adopted: January 11, 2010**

**Released: January 14, 2010**

By the Commission:

**I. INTRODUCTION**

1. In this item, we (1) grant an application for review of a decision declining to modify an Industrial/Business Pool station license, and (2) propose to modify the license. Mobile Relay Associates (MRA) filed an application for review<sup>1</sup> of an *Order on Reconsideration*<sup>2</sup> by the Mobility Division (MD) of the Wireless Telecommunication Bureau (Bureau). The *Order on Reconsideration* denied MRA's request to modify the license of National Science and Technology Network, Inc. (NSTN) for Industrial/Business Pool Station WPME699.<sup>3</sup> For the reasons discussed below, we grant the application for review, and initiate a proceeding to modify NSTN's license.

**II. BACKGROUND**

2. Pursuant to Section 90.313 of the Commission's Rules, the maximum loading for a 470-512 MHz Industrial/Business Pool channel is ninety units, and a channel loaded to capacity cannot be assigned to other users within forty miles without the consent of the affected licensee(s) or pending applicants.<sup>4</sup> In 1992, MRA filed an application for a new base station at Sierra Peak, Corona, California, and two associated mobile units, operating on frequency pair 472/475.3125 MHz.<sup>5</sup> NSTN filed an

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<sup>1</sup> Application for Review (filed January 3, 2008) (AFR). National Science and Technology Network, Inc. filed an opposition. Opposition of National Science and Technology Network, Inc. to the Application for Review Filed by Mobile Relay Associates (filed January 11, 2008) (Opposition). MRA filed a reply. Reply to Opposition to Application for Review (filed January 22, 2008) (Reply).

<sup>2</sup> National Science and Technology Network, Inc., *Order on Reconsideration*, 22 FCC Rcd 20973 (WTB MD 2007) (*Order on Reconsideration*).

<sup>3</sup> See National Science and Technology Network, Inc., *Order*, 22 FCC Rcd 3916 (WTB MD 2007) (denying MRA's modification request) (*Order*), *aff'd*, *Order on Reconsideration*, 22 FCC Rcd 20973.

<sup>4</sup> See 47 C.F.R. § 90.313(a)(2) (maximum loading for Industrial/Business Pool is ninety units), (b) (loading standards can be exceeded by agreement of all those sharing the channel), (c) (a channel may be assigned without reference to loading at locations forty miles or farther away).

<sup>5</sup> See FCC File No. 414473.

informal objection, arguing that the application was coordinated in error, and NSTN already had all the available loading on the channel.

3. In 1998, while the MRA application was pending, NSTN filed an application to modify its license for Station WPME699 to increase the number of mobile units operating on frequency pair 472/475.3125 MHz from eighty-eight to five thousand, and to employ centralized trunking so that NSTN would no longer have to monitor the channel before transmitting.<sup>6</sup> Station WPME699's Glendale base station is approximately thirty-seven miles from Sierra Peak. NSTN did not coordinate its application with MRA. In 1998, the Bureau's Public Safety and Private Wireless Division (PSPWD) granted NSTN's application.

4. MRA's 1992 application was granted in 1999 under Call Sign WPPG553.<sup>7</sup> In 2004, MRA requested that NSTN's license for Station WPME699 be modified, pursuant to Section 316 of the Communications Act of 1934, as amended (the Act),<sup>8</sup> to reduce the mobile count and permit only decentralized trunking, which would require NSTN to monitor the channel before transmitting.<sup>9</sup> MRA asserted that NSTN's 1998 application was defective because it lacked MRA's consent, which was required because NSTN proposed to operate co-channel within forty miles of the site requested in MRA's then-pending 1992 application.<sup>10</sup>

5. In 2007, MD denied MRA's modification request, concluding that under the rules in effect at the time, NSTN was required to obtain consent only from existing licensees, and not pending applicants.<sup>11</sup> On reconsideration, however, MD agreed with MRA<sup>12</sup> that NSTN's application should not have been granted without consideration of pending applicants.<sup>13</sup> Nonetheless, MD denied the petition for

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<sup>6</sup> See FCC File No. D102126. In a "centralized trunked system," the base station controller provides dynamic channel assignments by automatically searching all channels in the system and assigning to a user an open channel within that system. In a "decentralized trunked system," 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. See Amendment of Part 90 of the Commission's Rules, *Notice of Proposed Rulemaking and Order*, WP Docket No. 07-100, 22 FCC Rcd 9595, 9602 n.49 (2007).

<sup>7</sup> PSPWD dismissed MRA's 1992 application in the belief that MRA had replaced it with another application. After MRA informed PSPWD that the intent was to replace a different application, PSPWD reinstated MRA's application under a new file number, and granted it the same day. See FCC File No. D134244. NSTN filed an informal petition for reconsideration, which PSPWD denied in 2000. See Letter dated December 30, 1999 from Ted S. Henry, President, NSTN to Richard Henderson, FCC—Gettysburg (Informal Petition for Reconsideration). NSTN argued that MRA's application was properly dismissed pursuant to NSTN's informal objection, and stated that NSTN never applied for five mobile units on frequency pair 472/475.3125 MHz at Sierra Peak for which it had been awarded a finder's preference because the channel was fully loaded. See *National Science & Technology Network, Inc., Order*, 14 FCC Rcd 17671 (WTB PSPWD 1999), *rev'g* Letter dated November 6, 1995 from William H. Kellett, Federal Communications Commission, to Ted. S. Henry, President, NSTN, *aff'd*, 15 FCC Rcd 16491 (WTB PSPWD 2000); see also Informal Petition for Reconsideration at 1. The informal petition for reconsideration was the first time that MRA learned of NSTN's informal objection, because NSTN had not been required to serve MRA under the *ex parte* rules in effect in 1992. See *Mobile Relay Associates, Memorandum Opinion and Order*, 15 FCC Rcd 20732, 20733-34 ¶¶ 2-3 (1999).

<sup>8</sup> 47 U.S.C. § 316.

<sup>9</sup> Request to Initiate Modification Proceedings (filed October 1, 2004) (Modification Request). In the alternative, MRA asked that the Glendale site and the associated mobile and temporary-fixed transmitters be deleted.

<sup>10</sup> See *id.* at 1.

<sup>11</sup> See *Order*, 22 FCC Rcd at 3916-17 ¶ 3.

<sup>12</sup> See Petition for Reconsideration (filed March 29, 2007, erratum filed April 2, 2007).

<sup>13</sup> See *Order on Reconsideration*, 22 FCC Rcd at 20975 ¶¶ 8-9.

reconsideration, because it was not clear from the petition whether MRA's 1992 application was properly coordinated.<sup>14</sup>

6. MRA then filed the instant application for review, arguing its 1992 application was properly coordinated, and that the license for Station WPME6990 should be modified because NSTN's 1998 application should not have been granted.

### III. DISCUSSION

7. *Coordination.* MRA argues that its 1992 application was properly coordinated, and directs our attention to the 1992 coordination certification (submitted as an exhibit to its 2004 modification request) showing that frequency pair 472/475.3125 MHz was loaded to only eighty-eight mobile units.<sup>15</sup> We agree with MRA that this information indicates that its 1992 application was correctly coordinated. Because MRA's application was properly coordinated and NSTN lacked MRA's consent, NSTN's application to increase loading and employ centralized trunking was improperly coordinated, and granted in error. We conclude that the *Order on Reconsideration* erred in failing to consider this evidence.<sup>16</sup>

8. *License Modification.* MD's conclusion in the *Order on Reconsideration* that modification of NSTN's license would not promote the public interest, convenience and necessity was based primarily on its erroneous conclusion regarding coordination.<sup>17</sup> In light of the evidence that MRA's application was properly coordinated while NSTN's application was improperly coordinated, we find it appropriate to propose to modify NSTN's license as requested by MRA. Modifying the license to permit only decentralized trunking would allow MRA's Station WPPG553 to share the channel.<sup>18</sup> We also note that it appears that the proposed modification would not unduly disrupt NSTN's operations, as NSTN has other 470-512 MHz band licenses nearby.<sup>19</sup>

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<sup>14</sup> *Id.* at 20975-76 ¶ 10.

<sup>15</sup> See AFR at 7. Specifically, seventy-three mobile units authorized to NSTN's Station WIK219, ten mobile units authorized to Warmington Development Inc.'s Station WIJ210, and five mobile units authorized to Southern California Alarm Service's Station WIK720 (the subsequent object of NSTN's finder's preference request, note 7, *supra*). See Modification Request, Exhibit 1. NSTN does not dispute this.

<sup>16</sup> After MD concluded that its reason for denying the modification request was erroneous, it should have addressed the merits of the request, rather than restricting itself to the arguments in MRA's petition for reconsideration. See, e.g., S&L Teen Hospital Shuttle, *Memorandum Opinion and Order*, 16 FCC Rcd 8153, 8155 ¶ 5 (2001) (after reversing determination that a petition was procedurally defective, Commission considered the merits of the petition *de novo*); Samuel Moses, *Order on Further Reconsideration*, 21 FCC Rcd 11257, 11260 ¶ 10 (WTB 2006) (similar), *aff'd*, *Second Order on Further Reconsideration*, 24 FCC Rcd 8857 (WTB 2009), *recon. pending*.

<sup>17</sup> See *Order on Reconsideration*, 22 FCC Rcd at 20976 ¶ 10 ("MRA argues that NSTN's application should not have been granted in 1998 due to the pendency of MRA's 1992 co-channel application. NSTN contends that MRA's 1992 application should not have been granted in 1999 because NSTN already had all the available loading when MRA's application was filed. We are unable to determine conclusively whether frequency pair 472/475.3125 MHz was fully loaded at Sierra Peak in 1992, or 1998, or 1999. It therefore is not clear whether MRA's or NSTN's or neither or both applications were improperly granted.").

<sup>18</sup> Modifying an erroneously granted license to require monitoring has been found to be in the public interest because requiring the licensee to monitor the frequency is more equitable than barring others from using it. See National Science and Technology Network, Inc., *Memorandum Opinion and Order*, 23 FCC Rcd 3214, 3217 ¶ 7 (2008) (NSTN); Cara Enterprises, Inc., *Memorandum Opinion and Order*, 17 FCC Rcd 8009, 8013 ¶ 12, *vacated as moot*, *Order*, 17 FCC Rcd 3682 (WTB PSPWD 2002).

<sup>19</sup> See, e.g., Jack in the Box, Inc., *Order of Modification*, 23 FCC Rcd 337, 338 n.7 (WTB MD 2008) (noting that the effect of modification was mitigated by the licensee's alternate facilities); Hall and Bartley, *Order of Modification*, 23 FCC Rcd 1848, 1849 n.8 (WTB MD 2008) (same).

9. *Timeliness.* Notwithstanding NSTN's assertion to the contrary, MRA was not time-barred from seeking modification of the grant of NSTN's application.<sup>20</sup> There is no time limit for filing a modification request.<sup>21</sup> Nor are we persuaded that MRA's license for Station WPPG553 should be canceled due to permanent discontinuance of operations based on the failure of NSTN's periodic monitoring to detect any traffic.<sup>22</sup> This evidence of monitoring is insufficient, for, as we explained to NSTN in another matter, "a claim of permanent discontinuance of operations that relies materially on the complainant's contention that the licensee has not been heard on the authorized frequencies must, under Commission precedent, be supported by continuous monitoring."<sup>23</sup> We thus are not persuaded by NSTN's objections.<sup>24</sup>

#### IV. CONCLUSION AND ORDERING CLAUSES

10. Therefore, to prevent harmful interference to Station WPPG553, we grant MRA's application for review and propose to modify NSTN's license for Station WPME699 by changing the station class code for frequency 472.3125 MHz at location 3 from FB8 (centralized trunked) to FB6 (decentralized trunked), and reducing the number of mobile units on frequency 475.3125 MHz at location 8 from five thousand to eighty-eight.<sup>25</sup> In accordance with Section 1.87(a) of the Commission's Rules,<sup>26</sup> a modification order will not be issued until NSTN has received notice of our proposed action and has had an opportunity to file a protest. To protest the modification, NSTN must, within thirty days of the release date of this *Memorandum Opinion and Order 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 mailed to the Office of the Secretary, Federal Communications Commission, 445 Twelfth

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<sup>20</sup> See Opposition at 3.

<sup>21</sup> See, e.g., *NSTN*, 23 FCC Rcd at 3218 ¶¶ 8, 10 (citing *California Metro Mobile Communications, Inc. v. FCC*, 365 F.3d 38, 45 (D.C. Cir. 2004)). We have upheld the modification of licenses to mitigate the effect of erroneous grants even when no petition for reconsideration of the grant was filed. See, e.g., *id.*; *California Metro Mobile Communications, Inc., Memorandum Opinion and Order*, 17 FCC Rcd 22974 (2002), *aff'd*, 365 F.3d 38, 45 (D.C. Cir. 2004).

<sup>22</sup> See Opposition at 8-10. MRA contests this contention. See Reply at 8.

<sup>23</sup> See *National Ready Mixed Concrete Co., Memorandum Opinion and Order*, 23 FCC Rcd 5250, 5254 ¶ 11 (2008); see also *Quatron Communications, Inc., Memorandum Opinion and Order*, 15 FCC Rcd 4749, 4753 ¶ 13 (2000); *Cellular Design Corporation, Memorandum Opinion and Order*, 14 FCC Rcd 13059, 13064 ¶ 12 (1999).

<sup>24</sup> NSTN also argues that MRA cannot viably operate Station WPPG553 as a trunked repeater with only two mobile units. See Opposition at 5-8. NSTN originally raised this argument in a surreply to MRA's reply to NSTN's opposition to MRA's petition for reconsideration of the *Order*. See Response Filed by National Science and Technology Network, Inc. (NSTN) to Petition for Reconsideration filed by Mobile Relay Associates (MRA) at 2-3 (filed April 27, 2007). NSTN did not explain why it did not make this argument earlier, and the Division agreed with MRA that NSTN should not be permitted to introduce new arguments at that stage of the proceeding. See *Order on Reconsideration*, 22 FCC Rcd at 20973 n.1. NSTN cannot now raise issues previously rejected as untimely. See, e.g., *Regionet Wireless License, LLC, Memorandum Opinion and Order*, 17 FCC Rcd 21263, 21266 ¶ 8 (2002); *Plaincom, Inc., Order on Reconsideration*, 14 FCC Rcd 21421, 21422 ¶ 5 (WTB PSPWD 1999), *review denied, Memorandum Opinion and Order*, 15 FCC Rcd 8219 (2000). Moreover, the argument is not persuasive; trunked Station WPPG553 is viable because MRA is licensed on other 470-512 MHz channels at Sierra Peak under other call signs, and the two mobiles operate on those channels under those licenses.

<sup>25</sup> We need not propose to reduce the number of associated mobile units on frequency 472.3125 MHz at location 8 or to change the station class code for the associated temporary-fixed station on that frequency at location 9, because, while MRA's application for review was pending, NSTN modified the license for Station WPME699 by, *inter alia*, deleting that frequency from location 8 and changing the station class code for that frequency at location 9 from FB8T to FB6T. See FCC File No. 0003607349 (granted July 9, 2009).

<sup>26</sup> 47 C.F.R. § 1.87(a).

Street, S.W., Washington, DC 20554, Attn: Stana Kimball.<sup>27</sup> 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.

11. 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 Mobile Relay Associates on January 3, 2008 IS GRANTED.

12. Further, IT IS PROPOSED, pursuant to Sections 4(i) and 316(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 316, and Section 1.87 of the Commission's Rules, 47 C.F.R. § 1.87, that the license for Station WPME699 held by National Science and Technology Network, Inc., BE MODIFIED by changing the station class code for frequency 472.3125 MHz at location 3 from FB8 to FB6, and reducing the number of mobile units on frequency 475.3125 MHz at location 8 from five thousand to eighty-eight. The Wireless Telecommunications Bureau is delegated authority to dispose of any protests and take other appropriate action in this proceeding in accord with Section 316.

13. IT IS FURTHER ORDERED that this *Memorandum Opinion and Order and Order Proposing Modification* SHALL BE SENT by certified mail, return receipt requested to (1) National Science and Technology Network, Inc., 2050 S. Bundy Drive, Suite 285, Los Angeles, CA 90025 Attn.: Ted S. Henry; (2) Professional Licensing Consultants, Inc., P.O. Box 1714, Rockville, MD 20849, Attn.: J. A. Lynch; and (3) Alan M. Lurya, Attorney at Law, 18662 MacArthur Blvd., Suite 200, Irvine, CA 92612.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>27</sup> 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 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).