

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

In the Matter of Licenses of)	
)	
NATIONAL SCIENCE AND TECHNOLOGY)	FCC File Nos. D133825, D134193, D134194,
NETWORK, INC.)	D134195, D134196, D134197, D134370,
)	D134371, and D134372
To Operate Temporary Industrial/Business)	
Conventional Stations WPPY931, WPPZ712,)	
WPPY935, WPPZ716, WPPZ719, WPPY937,)	
WPPZ660, WPPZ661 and WPPZ662 in the Los)	
Angeles, California Area)	

MEMORANDUM OPINION AND ORDER

Adopted: August 26, 2003

Released: September 26, 2003

By the Commission:

1. *Introduction.* We have before us an Application for Review (AFR) filed by National Science and Technology Network, Inc. (NSTN) on July 19, 2002.¹ The AFR seeks review of an *Order on Further Reconsideration* released on June 19, 2002 by the Wireless Telecommunications Bureau's Public Safety and Private Wireless Division (Division).² The Division's *Order on Further Reconsideration* denied a petition filed by NSTN³ seeking reconsideration of the Division's earlier *Order on Reconsideration*. In the *Order on Reconsideration*, the Division set aside six of the nine captioned license grants to NSTN based on a determination that the underlying applications were defective, and concluded that the licenses for three other licenses cancelled automatically for failure to construct the authorized stations.⁴ For the reasons discussed below, we dismiss the AFR as moot.

2. *Background.* Between November 12 and November 22, 1999, NSTN filed nine applications seeking authorization to operate private land mobile radio (PLMR) stations in the 450-470 MHz and 470-512 MHz bands in the Los Angeles, California area.⁵ On February 17, 2000, Mobile Relay

¹ National Science and Technology Network, Inc. Application for Review (filed July 19, 2002) (AFR).

² National Science and Technology Network, Inc., *Order on Further Reconsideration*, 17 FCC Rcd 11133 (WTB PSPWD 2002) (*Order on Further Reconsideration*).

³ National Science and Technology Network, Inc. Petition for Reconsideration (filed Nov. 16, 2001) (NSTN Petition).

⁴ National Science and Technology Network, Inc., *Order on Reconsideration*, 16 FCC Rcd 18719 (WTB PSPWD 2001) (*Order on Reconsideration*).

⁵ NSTN Application File Nos. D133825 (filed Nov. 12, 1999), D134193 (filed Nov. 18, 1999), D134194 (filed Nov. 18, 1999), D134195 (filed Nov. 18, 1999), D134196 (filed Nov. 18, 1999), D134197 (filed Nov. 18, 1999), D134370 (filed Nov. 22, 1999), D134371 (filed Nov. 22, 1999) and D134372 (filed Nov. 22, 1999).

Associates (MRA) filed an informal objection to these nine NSTN applications.⁶ During the period of March 22, 2000 through April 5, 2000, NSTN's nine applications were granted without resolving the informal objection.⁷ The Division neither placed the grant of NSTN's applications on public notice, nor notified MRA of the grant of NSTN's applications. Pursuant to the Commission's rules governing operation of PLMR facilities, NSTN had one year from the date the licenses were granted to construct the stations.⁸

3. On June 30, 2000, MRA filed a petition for reconsideration of the Division's grant of the applications.⁹ MRA alleged that NSTN's intent in filing the nine applications was to circumvent the Commission's frequency coordination, licensing and construction requirements, to enable it to operate temporary stations at fixed locations, in violation of Section 90.137 of the Commission's Rules.¹⁰ In June 2001, MRA requested cancellation of the nine licenses in question, alleging that NSTN had failed to construct the stations.¹¹

4. In its October 19, 2001 *Order on Reconsideration*, the Division granted the MRA Petition in part and set aside the licenses for Stations WPPY931, WPPZ712, WPPY935, WPPZ716, WPPZ719, and WPPY937.¹² The Division first addressed NSTN's procedural objections to the MRA Petition, rejecting NSTN's arguments that the MRA Petition was not timely filed¹³ and that MRA lacked standing to file such a petition.¹⁴ The Division then determined that the underlying applications for the six stations were defective because they proposed to operate on 6.25 kHz offset channels with a

⁶ Mobile Relay Associates Informal Objection relating to NSTN Application File Nos. D133825, D134193, D134194, D134195, D134196, D134197, D134370, D134371, and D134372 (filed Feb. 17, 2000) (MRA Informal Objection).

⁷ The licenses for Stations WPPY931, WPPY935 and WPPY937 were granted on March 22, 2000; the licenses for Stations WPPZ660, WPPZ661 and WPPZ662 were granted on April 4, 2000; and the licenses for Stations WPPZ712, WPPZ716 and WPPZ719 were granted on April 5, 2000.

⁸ 47 C.F.R. § 90.155(a).

⁹ Mobile Relay Associates Petition for Reconsideration (filed June 30, 2000) (MRA Petition). NSTN filed an opposition to the Petition on July 10, 2000. NSTN Opposition to Petition (filed July 10, 2000). MRA filed a reply to the Opposition to Petition on July 11, 2000. MRA Reply to Opposition to Petition (filed July 11, 2000). MRA supplemented its Petition on December 15, 2000. MRA Supplement to Petition (filed Dec. 15, 2000).

¹⁰ MRA Petition at 2-4 (citing 47 C.F.R. § 90.137).

¹¹ Mobile Relay Associates Request for Cancellation of Licenses (filed June 22, 2001) (MRA Cancellation Request). NSTN filed an opposition to the Cancellation Request on June 25, 2001. NSTN Opposition to Cancellation Request (filed June 25, 2001). MRA filed a Reply to NSTN's Opposition to the Cancellation Request on July 5, 2001. MRA Reply to Cancellation Request (filed July 5, 2001). NSTN filed a Response to the Reply to Cancellation Request on July 16, 2001. NSTN Response to Reply to Cancellation Request (filed July 16, 2001).

¹² See *Order on Reconsideration*, 16 FCC Rcd at 18721-22 ¶ 7.

¹³ *Id.* at 18720-21 ¶ 4. The Division noted that the grant of NSTN's applications was neither published in the Federal Register nor announced in a public notice, and that as a consequence, the date of public notice of these actions was the date appearing on the document sent to persons affected by the action. *Id.* (citing 47 C.F.R. § 1.4(b)(5)). Since the Commission did not provide any actual notice of these actions to MRA, notwithstanding that MRA was affected by the actions by virtue of its filing the Informal Objection, and in the absence of any evidence to refute MRA's representation that it did not learn of the NSTN license grants until June 2000, the Division determined that the filing of the MRA Petition on June 30, 2000 was timely. *Id.*

¹⁴ *Id.* at 18721 ¶ 5. The Division concluded that MRA had standing as a party to the proceeding because of its earlier filing of the Informal Objection. *Id.* at 18721 ¶ 5 & n.16.

bandwidth of 11.3 kHz, while the applicable rules limit the bandwidth for such operations to 6 kHz.¹⁵ Furthermore, with respect to the remaining three stations that were the subject of the MRA Petition, namely, Stations WPPZ660, WPPZ661 and WPPZ662, the Division found that these licenses had cancelled automatically because, according to the terms of the licenses, NSTN was required to construct the stations by April 4, 2001, yet the stations could not have been timely constructed because the Commission had not type-certified any suitable 6 kHz equipment prior to July 13, 2001.¹⁶

5. On November 16, 2001, NSTN filed the NSTN Petition, seeking reconsideration of the *Order on Reconsideration*. NSTN repeated, and the Division again rejected, NSTN's procedural challenges to the MRA Petition based on timing¹⁷ and standing.¹⁸ The Division also found no merit in NSTN's assertion that the integrity of the licensing process is compromised by allowing entities to secure party status by simply filing an informal objection. The Division observed that NSTN did not articulate any particular adverse consequences stemming from this practice, and added that it, the Division, did not discern any such adverse consequences.¹⁹

6. In addition, the Division disagreed with NSTN's contention that the *Order on Reconsideration* was overly broad in deleting all of the channels that had been licensed to NSTN pursuant to the grant of the nine applications, and that the license grants should be set aside only to the extent of removing those of NSTN's licensed channels that were adjacent to channels licensed to MRA. The Division stated that all of the subject applications were defective in that NSTN proposed to use 6.25 kHz offset channels in the 470-512 MHz band with a bandwidth of 11.3 kHz, in excess of the permitted

¹⁵ *Id.* at 18721-22 ¶ 7. See 47 C.F.R. § 1.934(d)(2) (specifying that the Commission may dismiss an application as defective if, *inter alia*, “[i]t requests an authorization that would not comply with one or more of the Commission’s rules and does not contain a request for waiver of these rule(s) ...”).

¹⁶ See *Order on Reconsideration*, 16 FCC Rcd at 18722 ¶ 8.

¹⁷ NSTN argued that the Division's conclusion that the MRA Petition was timely was erroneous because MRA was not entitled to a ruling on its Informal Objection. The Division found this argument to be inapposite, pointing out that, regardless of whether MRA was entitled to a decision on the merits of its Informal Objection, the filing of the Informal Objection entitled MRA to notice of the Commission's decision. The Division's determination to assess the timeliness of the MRA Petition by reference to the date MRA received actual notice of the Division's ruling stemmed not from the fact that MRA never received a ruling on the Informal Objection but from the fact that MRA was not served with the decision granting the NSTN applications. *Order on Further Reconsideration*, 17 FCC Rcd at 11135 ¶ 4.

¹⁸ The Division observed that NSTN's standing argument was premised on its contention that MRA was not a party to the proceeding, but that NSTN had confused the meaning of “party” for purposes of the Commission's *ex parte* rules, the relevant term in this context, with the term “party-in-interest,” as used in Section 309(d) of the Communications Act of 1934, as amended (Act), to identify who may file a petition to deny. 47 U.S.C. § 309(d). The Division explained that MRA was a “party” for purposes of the *ex parte* rules because it had filed a written submission referencing NSTN's pending filing, *i.e.*, the MRA Informal Objection, and had served that pleading on NSTN. See 47 C.F.R. § 1.1202(d)(1). This was why MRA was entitled to notice of the Commission's decision. The question of MRA's standing to file a petition to deny was irrelevant, the Division further explained, because MRA's filing was an informal objection, not a petition to deny. *Order on Further Reconsideration*, 17 FCC Rcd at 11135-36 ¶ 5 (citing 47 C.F.R. §§ 1.41, 1.939; Landlinx Communications, *Second Order on Reconsideration*, 15 FCC Rcd 24932, 24933 ¶ 4 (2000); Applications of WINV, Inc., Assignor, and WGUL-FM, Inc., Assignee, *Memorandum Opinion and Order*, 14 FCC Rcd 2032 ¶ 2 (1998); Nextel License Holdings 4, Inc., *Order*, DA 02-876 ¶ 16 (rel. Apr. 16, 2002)). In fact, MRA could not have filed a petition to deny against NSTN's applications because private land mobile radio applications are not subject to the formal procedures associated with petitions to deny as set forth in Section 1.939 of the Commission's Rules, 47 C.F.R. § 1.939. Rather, objections to such applications are governed by the Commission's informal request rules set forth in Section 1.41, 47 C.F.R. § 1.41. See, *e.g.*, S&L Teen Hospital Shuttle, *Memorandum Opinion and Order*, 16 FCC Rcd 8153, 8155 ¶ 5 & n.14 (2001).

¹⁹ *Order on Further Reconsideration*, 17 FCC Rcd at 11136 ¶ 6.

bandwidth of 6 kHz, and that it was thus unnecessary to make channel-specific determinations in lieu of setting aside the grants in their entirety.²⁰

7. Finally, the Division reaffirmed its conclusion that the licenses for Stations WPPZ660, WPPZ661 and WPPZ662 had cancelled as a matter of law upon the expiration of the construction period. The Division noted that NSTN did not challenge the factual predicate for this action – that NSTN had not constructed the stations within the one-year time period – and instead argued that the Commission should grant a blanket extension of time to construct for all licensees proposing to operate on the 6.25 kHz offset channels because of the lack of type-certified equipment. The Division declined to consider such an extension in this context because NSTN's request for an extension came over six months after the cancellation of its licenses.²¹ On July 19, 2002, NSTN filed the subject AFR.²²

8. *Discussion.* NSTN does not dispute that the authorized stations have not been constructed. NSTN says that it was unable to construct the stations because of the unavailability of suitable certified equipment to operate on the 6.25 kHz offset frequencies for which it was licensed.²³ NSTN's requests in the AFR and the NSTN Petition for an extension of time to construct the stations were made more than twelve months after the grant of the subject licenses. Thus, the licenses had cancelled automatically prior to these requests.²⁴ NSTN's untimely request for an extension of time to construct is therefore moot because NSTN made the request at a time when it no longer held the underlying authorization. A party may not seek to extend an authorization that it no longer has.²⁵ In addition, we conclude that NSTN's request that we extend the construction periods for all licensees proposing 6.25 kHz offset operations in the 470-512 MHz band due to a lack of suitable, available equipment²⁶ has no basis in equity or policy because NSTN and other applicants could have waited until equipment was available before they filed their applications, or could have filed timely requests to extend their construction periods. Accordingly, we affirm the Division's rejection of NSTN's belated invitation to extend NSTN's and other licensees' construction periods.²⁷

9. Further, even if we were to determine that the Division erred in setting aside the license grants, it remains that the one-year construction period expired for the licenses in question. Accordingly, even if the license grants were reinstated, the licenses have cancelled automatically pursuant to the

²⁰ *Id.* at 11136 ¶ 7 (citing Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Rules Governing Them, *Report and Order and Further Notice of Proposed Rule Making*, PR Docket No. 92-235, 10 FCC Rcd 10076, 10094, 10114-15 ¶¶ 27, 76 (1995)). As noted by the Division, in the 450-470 MHz band, this 6 kHz bandwidth limitation is codified at 47 C.F.R. § 90.20(d)(44) and 47 C.F.R. § 90.35(c)(33). In the 470-512 MHz band, this limitation is not codified in a specific rule because the specific frequencies available in that band are not listed in the Commission's Rules. *Order on Further Reconsideration*, 17 FCC Rcd at 11136 n.27.

²¹ *Id.* at ¶ 8.

²² Also before us are an MRA Opposition to Application for Review (filed Aug. 5, 2002) (MRA Opposition), and an NSTN Reply (filed Aug. 20, 2002).

²³ AFR at 12.

²⁴ *See* 47 C.F.R. § 90.155(a).

²⁵ *See* Midport Electronics, Inc., *Order*, 17 FCC Rcd 13778, 13782-83 ¶ 10 (WTB PSPWD 2002); Winstar Wireless Fiber Corporation and New Winstar Spectrum, LLC, *Order*, 17 FCC Rcd 7118, 7123 ¶ 13 (WTB PSPWD 2002), and cases cited therein.

²⁶ AFR at 12-13; NSTN Reply at 2, 4-5.

²⁷ We view as beyond the scope of this proceeding NSTN's argument in its Reply that the Commission should notify similarly situated licensees who may miss their construction deadlines and give those licensees an opportunity to comment. *See* NSTN Reply at 1-2.

express terms of Section 90.155 of the Commission's Rules.²⁸ We are therefore unable to grant NSTN the relief it seeks: the restoration of active licenses for the captioned stations. Consequently, we dismiss the AFR as moot.

10. *Conclusion.* The licenses which NSTN seeks to have reinstated in its name no longer exist, having cancelled automatically due to NSTN's undisputed failure either to construct and initiate operation of the authorized facilities within one year from the date of the license grant or to file a timely request for an extension of time to construct. This circumstance renders the AFR moot, and we accordingly dismiss it as such.

11. Accordingly, IT IS ORDERED that pursuant to Sections 4(i), 5(c), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), 303, and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, the Application for Review filed by National Science and Technology Network, Inc. on July 19, 2002 IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁸ See 47 C.F.R. § 90.155(a).