

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

In the Matter of)
COMMONWEALTH OF VIRGINIA) File Nos. 0001583565 and 0001583569
Request for Waiver of Part 80 Rules to Permit Use)
of Maritime Frequencies for Private Land Mobile)
Radio Communications.)
Applications for Assignment of 150 MHz Marine)
Channels to the Commonwealth of Virginia)

ORDER

Adopted: August 11, 2004

Released: August 12, 2004

By the Chief, Public Safety and Critical Infrastructure Division, Wireless Telecommunications Bureau:

1. Introduction. On February 20, 2004, MariTEL Mid-Atlantic, Inc. and MariTEL Mississippi River, Inc. (collectively, MariTEL) filed two applications for consent to assign portions of two VHF Public Coast (VPC) geographic licenses to the Commonwealth of Virginia (Virginia).1 In conjunction with the assignment applications, Virginia filed a request for waiver of Part 80 of the Commission's Rules to permit it to use the subject frequencies to upgrade its analog public safety communications system. Virginia proposes that its system, which will be used only for internal, public safety purposes, be licensed under, and governed by, Part 90 of the Commission's Rules; in the alternative, Virginia seeks a waiver of relevant provisions of Part 80. For the reasons that follow, the waiver request is granted in part and denied in part. Accordingly, the above-captioned applications are granted in part and dismissed in part.

2. Background. Virginia states that its conventional analog public safety radio system is severely congested, difficult to maintain and not capable of meeting, or expanding to meet, its public safety and emergency communications needs. To address its needs, Virginia developed a plan to implement a trunked, digital state-of-the-art voice and data communications network using narrowband technology to serve Federal, state and local agencies. Virginia states that the VHF band offers the most workable spectrum for this new system. It also states that, because its current system uses VHF frequencies, the continued use of the VHF band allows for an easier transition to a new system and lower transition costs. However, according to Virginia, sufficient Part 90 VHF spectrum is not available. Consequently, as permitted under Section 80.60 of the Commission's Rules, Virginia seeks to acquire from MariTEL, which holds the geographic licenses for VPC Service Areas 2 (Call Sign WPOJ533) and 4 (Call Sign WPOJ535), VPC spectrum in central (approximately thirty-five to sixty-five miles from the Atlantic coast and navigable inland waterways) and western (approximately sixty-five miles or more from the coast and navigable waterways) Virginia.2 Virginia emphasizes that it is not seeking to use VPC

1 See FCC File Nos. 0001583565, 001583569.

2 Specifically, the applications propose to partition and disaggregate twelve 12.5 kHz channel pairs (157.2250/161.8250 MHz, 157.2375/161.8375 MHz, 157.2500/161.8500 MHz, 157.2625/161.8625 MHz, 157.2750/161.8750 MHz, 157.2875/161.8875 MHz, 157.3000/161.9000 MHz, 157.3125/161.9125 MHz, (continued...))

channels in areas where they might otherwise be used to meet demand for marine VHF communications. Virginia requests that its public safety use of the spectrum be licensed under, and governed by, Part 90 of the Commission's Rules.³

3. Among the frequencies that Virginia seeks to use for public safety purposes in western Virginia are VHF maritime Channel 87 (157.3750/161.9750 MHz) and the two surrounding interstitial channels,⁴ known as Channels 227 (157.3625/161.9625 MHz) and 287 (157.3875/161.9875 MHz). The base station frequency of Channel 87 (161.9750 MHz), known as Channel 87B, is one of two frequencies allocated internationally for Automatic Identification Systems (AIS).⁵ AIS is an international maritime navigation safety communications system adopted by the International Maritime Organization and Safety of Life at Sea Convention intended for collision avoidance, monitoring and tracking. It employs on-board transponders, Differential Global Positioning System technology, and other technology to provide a VHF ship-to-ship and ship-to-shore radio service in which vessels and designated shore stations broadcast a unique identifier, coupled with safety-related data on, for example, ship positions, routes, dimensions and navigational status. AIS-transmitted information can be received by similarly equipped vessels and shore stations in order to improve collision and facilitate vessel monitoring and tracking.⁶ In the wake of the events of September 11, 2001, AIS has been recognized as an important tool in service of Maritime Domain Awareness (MDA), a critical component of homeland security.⁷ On November 25, 2002, the President signed the Maritime Transportation Security Act of 2002 (MTSA), which mandates domestic deployment of AIS for all navigable waters in the U.S.⁸ The regulations promulgated by the United

(...continued from previous page)

157.3250/161.9250 MHz, 157.3375/161.9375 MHz, 157.3500/161.9500 MHz, and 157.4000/162.0000 MHz) in the central Virginia counties of Amelia, Brunswick, Clarke, Culpeper, Cumberland, Goochland, Greensville, Louisa, Lunenburg, Madison, Nottoway, Orange, Powhatan, Rappahannock, and Warren; and to partition and disaggregate those twelve 12.5 kHz channel pairs and an additional five 12.5 kHz channel pairs (157.2000/161.8000 MHz, 157.2125/161.8125 MHz, 157.3625/161.9625 MHz, 157.3750/161.9750 MHz, and 157.3875/161.9875 MHz) in the western Virginia counties of Albemarle, Alleghany, Amherst, Appomattox, Augusta, Bath, Bedford, Bland, Botetourt, Buchanan, Buckingham, Campbell, Carroll, Charlotte, Craig, Dickenson, Floyd, Fluvanna, Franklin, Frederick, Giles, Grayson, Greene, Halifax, Henry, Highland, Lee, Mecklenburg, Montgomery, Nelson, Page, Patrick, Pittsylvania, Prince Edward, Pulaski, Roanoke, Rockbridge, Rockingham, Russell, Scott, Shenandoah, Smyth, Tazewell, Washington, Wise, and Wythe. Under the proposed transaction, MariTEL would retain all of its VPC spectrum in eastern Virginia.

³ In the alternative, Virginia seeks a waiver of Sections 80.123 and 80.371(c)(1)(i) of the Commission's Rules to permit use of the frequencies for private land mobile radio communications. It also requests a waiver of Section 80.123(e) to allow the base station equipment of its system to operate with 125 watts transmitter output power and 285 watts effective radiated power, consistent with the power levels permitted for operations licensed under Part 90. In addition, Virginia seeks a waiver of Section 80.123(f) prohibition on mobile-to-mobile communications on land.

⁴ *I.e.*, the frequencies offset 12.5 kHz from the marine VHF band public correspondence frequencies. *See* 47 C.F.R. § 80.371(c)(1)(iii).

⁵ *See* WRC-97 Final Acts (amending ITU Radio Regulations App. S18). Channel 87B was designated AIS1 and Channel 88B (162.0250 MHz) was designated AIS2.

⁶ *See* Amendment of Parts 13 and 80 of the Commission's Rules Concerning Maritime Communications, *Second Report and Order and Second Further Notice of Proposed Rule Making*, WT Docket No. 00-48 and PR Docket No. 92-257, 19 FCC Rcd 3145, 3179 ¶ 64 (2004).

⁷ *See* Homeland Security: Efforts to Improve Information Sharing Need to be Strengthened, U.S. General Accounting Office, August 2003 at 39. (Viewable at <http://www.gao.gov/new.items/d03760.pdf>) "MDA is a concept that captures total awareness of vulnerabilities, threats and targets of interest on the water. MDA is the comprehensive information, intelligence, and knowledge of all entities within America's waterways that could affect our safety, security, economy, or environments."

⁸ *See* P.L. 107-295, § 102(e), 116 Stat. 2084 (2002) (codified at 46 U.S.C. § 70114).

States Coast Guard (Coast Guard) to implement the MTSA impose an AIS carriage requirement on certain vessels and provide that equipment installed in satisfaction of that requirement must comply with the international standard.⁹

4. The instant applications went on public notice on February 25, 2004.¹⁰ In addition, the Public Safety and Critical Infrastructure Division released a public notice on March 26, 2004 seeking specific comment on the waiver request.¹¹ On March 26, 2004, the National Telecommunications and Information Administration (NTIA) filed a Petition to Deny the assignment applications.¹² On April 20, 2004, Virginia and Motorola (Virginia's equipment vendor) filed a consolidated Opposition to NTIA's Petition to Deny and comment in response to the *Public Notice*.¹³ On April 20, 2004, MariTEL also filed a consolidated Opposition to NTIA's Petition to Deny and comments in response to the *Public Notice*.¹⁴ On April 30, 2004, NTIA filed reply comments to the *Public Notice*.¹⁵

5. *Discussion.* Section 1.925 of the Commission's Rules provides that we may grant a waiver if it is shown that (a) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and grant of the requested waiver would be in the public interest; or (b) in light of unique or unusual circumstances, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.¹⁶ Based on the record before us, we conclude that the waiver request should be granted in part and denied in part. Specifically, we grant the waiver request except with respect to Channel 87 and the two surrounding interstitial channels. Regarding the other channels, we conclude that the underlying purpose of the subject rules would not be served by application to the instant case and grant of the requested waiver would be in the public interest.

6. NTIA and MariTEL have filed a number of petitions in another proceeding relating to Channels 87B and 88B.¹⁷ NTIA argues that the present applications should be denied or held in abeyance pending the outcome of that proceeding.¹⁸ It states that the applications should not be granted because

⁹ See 33 C.F.R. § 164.46(a) Note.

¹⁰ *Public Notice*, Report No. 1754 (WTB rel. Feb. 25, 2004).

¹¹ See Wireless Telecommunications Bureau Seeks Comment on the Commonwealth of Virginia's Request for Waiver of Commission Rules to Use VHF Public Coast Frequencies to Support Public Safety Activities, *Public Notice*, 19 FCC Rcd 5353 (WTB PSCID 2004).

¹² See Letter dated Mar. 26, 2004 from Fredrick R. Wentland, Associate Administrator, Office of Spectrum Management, NTIA to John B. Muleta, Chief, Wireless Telecommunications Bureau (NTIA Petition).

¹³ See Letter dated Apr. 20, 2004 from Robert L. Pettit, counsel for the Commonwealth of Virginia to Marlene H. Dortch, Office of the Secretary, Federal Communications Commission (Virginia Opposition). Although oppositions to the NTIA Petition were due April 8, 2004, NTIA did not oppose Virginia's request to consolidate its opposition to the NTIA Petition with its comment in response to the *Public Notice*, which was due April 20, 2004.

¹⁴ Opposition of MariTEL, Inc. to Petition to Deny (filed Apr. 20, 2004) (MariTEL Opposition).

¹⁵ See Letter dated Apr. 30, 2004 from Fredrick R. Wentland, Associate Administrator, Office of Spectrum Management, NTIA to Marlene H. Dortch, Office of the Secretary, Federal Communications Commission (NTIA Reply Comments).

¹⁶ 47 C.F.R. § 1.925(b)(3). See also *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

¹⁷ See, e.g., Wireless Telecommunications Bureau Seeks Comment on MariTEL, Inc. Petition for Declaratory Ruling and National Telecommunications and Information Administration Petition for Rulemaking Regarding the Use of VF Channels 87B and 88B, *Public Notice*, 18 FCC Rcd 23260 (WTB PSCID 2003).

¹⁸ NTIA Petition at 1; NTIA Reply Comments at 1.

they propose to encumber the channels in a manner inconsistent with NTIA's rulemaking petition,¹⁹ and because the pending AIS proceeding could, in the end, designate one of the other maritime channels for AIS.²⁰ We agree with Virginia, however, that these applications can be processed without prejudice to resolution of the pending AIS issues. In this connection, we note that Virginia's operations would be subject to any rule changes adopted in that proceeding. Moreover, given the existing need for additional public safety spectrum that has been demonstrated by Virginia, we do not believe that it would be in the public interest to defer its use of all of the frequencies in question because of questions involving only a few of them. As a result, we believe that the public interest would be best served under an approach whereby NTIA's interests in resolving the pending AIS issues are accommodated without suspending implementation of the proposed transaction in its entirety.

7. Next, NTIA asserts that granting the requested waiver would amount to a reallocation of frequencies from maritime mobile to land mobile service in the partitioned areas.²¹ We disagree. As MariTEL states, grant of the requested waiver would no more be a de facto reallocation than would grant of any waiver of otherwise applicable service rules.²² Indeed, the Commission's rules permit VHF public coast licensees to serve units on land.²³ Further, the Rules previously permitted land mobile users to be licensed on VHF public coast frequencies in some areas.²⁴ We find it decisionally significant that neither rule was ever deemed a reallocation of spectrum. In addition, we find the requested relief to be consistent with Commission precedent. Specifically, we have granted similar assignment applications and waiver requests to permit public safety use of VHF public coast spectrum (albeit not in areas with substantial marine activity).²⁵ Taking all of these factors into account, we conclude that granting Virginia's request for waiver would not affect a reallocation of frequencies and, as Virginia states,²⁶ would promote the Commission's goals of providing for flexible and efficient use of the spectrum.

8. Finally, NTIA and the Coast Guard state that Virginia's proposed operations would cause interference to AIS operations on Channel 87B, which could adversely affect the safe navigation of vessels in or near Virginia's navigable waterways and the Coast Guard's ability to perform its missions.²⁷ Based on the record before us, it appears that Virginia limited its request for Channel 87B and the surrounding interstitial channels to counties set back at least sixty-five miles from the coastline in order to avoid interference to maritime operations.²⁸ The Coast Guard, points out, however, that the setback does not appear to account for navigation on the James River.²⁹ NTIA and the Coast Guard also argue that the

¹⁹ NTIA Petition at 1.

²⁰ NTIA Reply Comments at 2.

²¹ NTIA Petition at 2; NTIA Reply Comments at 1.

²² MariTEL Opposition at 5.

²³ See 47 C.F.R. § 80.123.

²⁴ See 47 C.F.R. § 90.283 (1997).

²⁵ See Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications Action, *Public Notice*, Report No. 1411 (rel. Feb. 5, 2003) (FCC File No. 0001132016) (consenting to assignment from MariTEL to State of South Dakota); Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications Action, *Public Notice*, Report No. 1852 (rel. June 9, 2004) (FCC File Nos. 0001662537 and 0001662656) (consenting to assignment from Warren C. Havens to State of Montana).

²⁶ Virginia Opposition at 5 – 6.

²⁷ NTIA Petition at 1; Coast Guard Letter at 2.

²⁸ Waiver Request at 6.

²⁹ See Letter dated Mar. 8, 2004 from Rear Admiral C.I. Pearson, U.S. Coast Guard, Department of Homeland Security to Fredrick R. Wentland, Associate Administrator, Office of Spectrum Management, NTIA (Coast Guard Letter) (attached to NTIA Petition).

technical parameters of Virginia's proposed operations on those channels pose a threat of interference to AIS operations even in areas that are set back at least sixty-five miles from a navigable waterway.³⁰ The Coast Guard asks that land mobile operations on Channel 87B and the surrounding interstitial channels be permitted only where propagation to navigable waterways is clearly blocked by terrain, and only on a not-to-interfere basis.³¹ It also asks that land mobile operations on adjacent Channels 27B (161.950 MHz) and 28B (162.000 MHz) be limited to fifty watts power.³²

9. MariTEL³³ and Virginia³⁴ contend that the project was engineered so as not to interfere with AIS operations. In response to the Coast Guard's concerns and in order to facilitate the project, however, Virginia states that it is willing to modify the proposal to remove Channel 87B and the surrounding interstitial channels.³⁵ MariTEL also believes that the Coast Guard's requested protection to adjacent Channels 27B and 28B goes beyond that sought by NTIA's AIS petition for rulemaking because the sixty-five mile setback, coupled with the Coast Guard's proposed power limitation, would afford AIS more protection than NTIA has previously argued is necessary on the adjacent channels.³⁶ NTIA and the Coast Guard welcome Virginia's offer to remove Channel 87B and the surrounding interstitial channels, but argue that this does not ensure that no interference to AIS operations will occur, because the pending AIS proceeding could, in the end, designate one of the other maritime channels for AIS.³⁷ The Coast Guard also states that more information is needed in order to determine conclusively whether Virginia's proposed operations would cause interference to maritime communications, but it does not offer additional information in support of its position that such interference would occur.³⁸ Finally, the Coast Guard notes that upwards of ten million mobile maritime VHF radios are in use throughout the U.S., licensed "by rule," operating on land for a variety of reasons, and operating on channels intended for use by the Commonwealth.³⁹ While recognized, this note requires no action.

10. We recognize the importance of interference-free AIS operations and other maritime communications. We do not believe, however, that the record before us demonstrates that Virginia's proposed operations on frequencies other than Channel 87B and the surrounding interstitial frequencies pose a sufficient interference threat to warrant a complete denial of the waiver request. Moreover, as noted above, we conclude that the pendency of the AIS rulemaking proceeding does not require us to withhold approval of Virginia's entire request. Instead, we will grant the applications for all of the requested frequencies except Channel 87B and the surrounding interstitial frequencies. In addition, we grant Virginia's request for a waiver of the Part 80 rules to permit its public safety operations on VPC spectrum to be governed by Part 90 of the Commission's Rules. We have granted similar waivers to the States of South Dakota and Montana,⁴⁰ and we believe that the same factors that warranted grant of those

³⁰ *Id.* at 1; NTIA Petition at 1.

³¹ Coast Guard Letter at 2.

³² *Id.*

³³ MariTEL Opposition at 3.

³⁴ Virginia Opposition at 4.

³⁵ *Id.*

³⁶ MariTEL Opposition at 3-4.

³⁷ NTIA Reply Comments at 2; Letter dated Apr. 29, 2004 from Commander B. Judge, U.S. Coast Guard, Department of Homeland Security to Fredrick R. Wentland, Associate Administrator, Office of Spectrum Management, NTIA (Coast Guard Reply Letter) (attached to NTIA Reply Comments).

³⁸ Coast Guard Reply Letter at 2.

³⁹ *Id.*

⁴⁰ *See supra* note 24.

waivers are present in the instant matter. Unlike Virginia, however, those states do not include any areas of substantial marine activity. In order to address the concerns raised by NTIA and the Coast Guard, we expressly condition our grant of the application and waiver request on Virginia not causing interference to current or future marine communications, including but not limited to AIS operations. We believe that this condition obviates any need for a lower power limit on Channels 27B and 28B, as requested by the Coast Guard. We therefore expect Virginia to work closely with the Coast Guard and NTIA to ensure that all contemplated operations pose no potential for interference to marine communications, and to act quickly in the event interference is reported.

11. *Conclusion.* We will grant the applications for the requested frequencies, excluding Channel 87B (161.975 MHz) and the surrounding interstitial frequencies (161.9625 and 161.9875 MHz). In addition, we grant Virginia's request for a waiver of Part 80 of the Commission's Rules to permit its public safety operations on VPC spectrum to be governed by Part 90 of the Commission's Rules. However, because Virginia presents concerns regarding interference to marine communications that were not present with respect to similar applications and waiver requests, this application and waiver request are granted on the express condition that no interference is caused to current or future marine communications, including but not limited to AIS operations.

12. For reasons set forth above, IT IS ORDERED, pursuant to the authority of Sections 4(i) and 303(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(i), and Section 1.925 of the Commission's Rules, 47 C.F.R. § 1.925, that the Request for Waiver filed by Commonwealth of Virginia on February 20, 2004, IS GRANTED TO THE EXTENT STATED HEREIN AND ON THE CONDITION THAT no interference is caused to current or future marine communications, including but not limited to AIS operations. In all other respects, the Request for Waiver IS DENIED.

13. IT IS FURTHER ORDERED that applications FCC File Nos. 0001583565 and 0001583569 SHALL BE PROCESSED consistent with this *Order*.

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 COMMUNICATIONS COMMISSION

Michael J. Wilhelm
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Wireless Telecommunications Bureau