

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

In the Matter of)
)
PACIFICORP) File Nos. 0001988156 and 0001988415
)
Amended Request for Waiver to Permit Use of)
Maritime VHF Public Coast Frequencies for)
Private Land Mobile Radio Communications)

ORDER

Adopted: May 20, 2009

Released: May 21, 2009

By the Deputy Chief, Mobility Division, Wireless Telecommunications Bureau:

1. *Introduction.* On December 16, 2008, MariTEL Northern Pacific, Inc. and MariTEL Southern Pacific, Inc. (collectively, MariTEL) and PacifiCorp amended the above-captioned applications for consent to partition and disaggregate portions of two VHF Public Coast (VPC) geographic licenses from MariTEL to PacifiCorp, and the associated request for waiver of Part 80 of the Commission’s Rules to permit PacifiCorp to use the frequencies to upgrade its private land mobile radio (PLMR) system used to support critical power utility operations.¹ For reasons set forth below, we grant the amended waiver request, and will process the applications accordingly. We also grant PacifiCorp’s request to withdraw its pending application for review of an *Order*² relating to the original applications in the event that the amended applications and waiver request are granted.³

2. *Background.* In 2005, MariTEL filed two applications for consent to partition and disaggregate VPC spectrum in portions of Oregon, California, Washington, and Idaho to PacifiCorp.⁴ MariTEL proposed to assign all of its VPC spectrum in the partitioned areas to PacifiCorp, except that MariTEL would retain VHF maritime Channels 85 and 87 within twenty miles of the Pacific Ocean and Columbia River.⁵ PacifiCorp also filed a corresponding request for waiver of Part 80 of the Commission’s Rules to permit it to use the frequencies for internal, safety purposes, and for them to be licensed under, and governed by, Part 90 of the Commission’s Rules; in the alternative, PacifiCorp sought a waiver of relevant provisions of Part 80.

3. In 2006, the Wireless Telecommunications Bureau, Public Safety and Critical Infrastructure Division (Division) released an *Order* granting the waiver request in part.⁶ The Division noted that it had granted similar requests to allow MariTEL to partition and disaggregate VPC spectrum

¹ Amended Request for Rule Waiver (filed Dec. 16, 2008) (Amended Waiver Request).

² PacifiCorp, *Order*, 21 FCC Rcd 7762 (WTB PSCID 2006) (*Order*).

³ Contingent Request for Withdrawal of Application for Review (filed Dec. 16, 2008).

⁴ See FCC File Nos. 0001988156, 0001988415 (filed June 13, 2005).

⁵ That is, MariTEL proposed to assign Channels 24, 84, 25, 26, 86, 27, and 28 in the portions of the partitioned area within twenty miles of the Pacific Ocean and Columbia River; and Channels 24, 84, 25, 85, 26, 86, 27, 87, and 28 in the portions of the partitioned area more than twenty miles from the Pacific Ocean and Columbia River. (See 47 C.F.R. § 80.371(c)(1)(i) for the frequencies corresponding to these channel designations.) In addition, MariTEL and PacifiCorp privately agreed to field strength limitations to ensure that PacifiCorp’s operations would not adversely affect maritime operations.

⁶ See *Order*, 21 FCC Rcd at 7764 ¶ 5.

for use in public safety radio systems, and had permitted PacifiCorp to acquire VPC spectrum for PLMR use farther inland than the areas at issue,⁷ and concluded that the same factors that warranted those grants were present in the instant matter.⁸ The Division also noted, however, that previous MariTEL assignments did not involve as extensive coastal and major river coverage as PacifiCorp proposed⁹; and that previous associated waivers permitted operations only on frequencies other than Channel 87B,¹⁰ and only in areas set back from coastlines and other major waterways.¹¹ Consequently, in light of concerns expressed by the National Telecommunications and Information Administration (NTIA) on behalf of the U.S. Coast Guard (Coast Guard) that PacifiCorp's proposed operations could cause interference to maritime communications,¹² the Division granted the requested waiver only on frequencies other than Channel 87B and the surrounding interstitial channels, and only with respect to operations more than twenty miles from the Pacific Ocean and Columbia River.¹³ The Division granted PacifiCorp's request for a waiver to permit PLMR operations on VPC spectrum to be governed by Part 90 of the Commission's Rules only until resolution of the Commission's then-pending proceeding proposing to amend the Part 80 rules to permit PLMR use of VPC spectrum,¹⁴ but stated that PacifiCorp ultimately would be subject to the rules adopted in that proceeding.¹⁵ As it had with respect to other proposed PLMR operations near areas of substantial marine activity, the Division also expressly conditioned its grant of the waiver request on PacifiCorp not causing interference to current or future marine communications.¹⁶ PacifiCorp filed a timely application for review of the *Order*, challenging the Division's decision to grant the waiver only in areas set back twenty miles from the Pacific Ocean and Columbia River.¹⁷

⁷ See *id.* (citing, e.g., County of Placer, California, *Order*, 20 FCC Rcd 3657 (WTB PSCID 2005) (*Placer Order*); Commonwealth of Virginia, *Order*, 19 FCC Rcd 15454 (WTB PSCID 2004) (*Virginia Order*); Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications Action, *Public Notice*, Report No. 1816 (WTB rel. Apr. 28, 2004)).

⁸ See *id.* at 7766 ¶ 9.

⁹ See *id.* at 7764 ¶ 5.

¹⁰ Channel 87B (161.975 MHz) is one of two frequencies allocated internationally for Automatic Identification Systems (AIS), 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. See generally, e.g., Amendment of the Commission's Rules Regarding Maritime Automatic Identification Systems, *Second Report and Order*, WT Docket No. 04-344, 23 FCC Rcd 13711 (2008), *recon. pending*. Channel 87B is now designated exclusively for AIS use. See *id.*; Amendment of the Commission's Rules Regarding Maritime Automatic Identification Systems, *Report and Order and Further Notice of Proposed Rule Making and Fourth Memorandum Opinion and Order*, WT Docket No. 04-344 & PR Docket No. 92-257, 21 FCC Rcd 8892 (2006); see also 47 C.F.R. § 80.371(c)(3).

¹¹ See *Order*, 21 FCC Rcd at 7765-66 ¶¶ 8-9.

¹² See Letter dated July 6, 2005 from Fredrick R. Wentland, Associate Administrator, Office of Spectrum Management, NTIA to Catherine Seidel, Acting Chief, Wireless Telecommunications Bureau; Letter dated July 3, 2005 from Joseph D. Hersey, Jr., Chief, Spectrum Management Division, U.S. Coast Guard to Fredrick R. Wentland, Chief Associate Administrator, Office of Spectrum Management, NTIA.

¹³ See *Order*, 21 FCC Rcd at 7766 ¶ 9.

¹⁴ See MariTEL, Inc. and Mobex Network Services, LLC, *Notice of Proposed Rule Making*, WT Docket No. 04-257, 19 FCC Rcd 15225 (2004).

¹⁵ See *Order*, 21 FCC Rcd at 7766 ¶ 9.

¹⁶ See *id.* at 7766 ¶ 10 (citing *Placer Order*, 20 FCC Rcd at 3662-63 ¶ 15; *Virginia Order*, 19 FCC Rcd at 15458-59 ¶ 10).

¹⁷ Application for Review (filed Aug. 9, 2006). NTIA filed an opposition. PacifiCorp filed a reply.

4. In 2007, the Commission amended the Part 80 rules to permit PLMR use of VPC spectrum.¹⁸ Consequently, operations of the type proposed by PacifiCorp are now permitted without waiver, even in coastal areas, provided that certain requirements are met.

5. In 2008, MariTEL and PacifiCorp amended the applications and waiver request.¹⁹ The applications were amended to remove Channel 87B from the proposed assignment, and to request the assignment of fewer frequencies near the Pacific Ocean and Columbia River.²⁰ PacifiCorp asserts that these amendments will protect Automatic Identification Systems (AIS) on Channel 87B, and preserve spectrum for maritime VPC service.²¹ PacifiCorp also states that its proposed operations generally comply with the rules adopted by the Commission in 2007,²² and requests only a waiver of the requirement in Section 80.123(b) of the Commission's Rules that priority be afforded to marine-originating communication,²³ to the extent such a waiver is necessary.²⁴ NTIA and Coast Guard asserted no objection to the amended applications and waiver request.²⁵

6. *Discussion.* 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.²⁶ Based on the record before us, we conclude that the waiver request should be granted. Specifically, we conclude that the underlying purpose of the subject rules

¹⁸ See MariTEL, Inc. and Mobex Network Services, LLC, *Report and Order*, WT Docket No. 04-257, 22 FCC Rcd 8971 (2007) (*Flexibility Order*), *recon. pending*.

¹⁹ Because the Division never formally consented to the assignment applications, they remained in pending status and thus could be amended. In addition to the changes discussed below, the applications also were amended to provide that MariTEL will meet all construction deadlines for the entire licensed areas, which coincide with the licenses' renewal date of May 19, 2009. See Minor Amendment at 1 (filed Dec. 16, 2008) (Minor Amendment).

²⁰ Specifically, MariTEL now proposes to assign Channels 25, 26, 86, 27A, and 28A in the portions of the partitioned area within twenty miles of the Pacific Ocean and Columbia River; Channels 24, 84, 25, 85, 26, 86, 27, 87A, and 28 in the portions of the partitioned area more than twenty miles from the Pacific Ocean and Columbia River, except that Channels 27B and 28B would be assigned only in the portions of the partitioned area more than thirty miles from the Pacific Ocean and Columbia River. See Minor Amendment at 1; Amended Waiver Request at 2, 6-8. (The amendment initially indicated that MariTEL also proposed to assign Channel 87A in the portions of the partitioned area within twenty miles of the Pacific Ocean and Columbia River, but the parties subsequently further amended the application to delete this reference as erroneous. See Minor Amendment (March 2009) at 1.) In addition, MariTEL and PacifiCorp privately agree to field strength limitations to ensure that PacifiCorp's operations do not adversely affect maritime operations.

²¹ See Amended Waiver Request at 7-8.

²² See *id.* at 12. In the original waiver request, the parties represented that PacifiCorp's proposed operations were consistent with the Commission's proposed rules, see *Order*, 21 FCC Rcd at 7766 ¶ 9, and the Commission adopted the rules essentially as proposed, see *Flexibility Order*, 22 FCC Rcd at 8976 ¶ 8.

²³ See 47 C.F.R. § 80.123(b).

²⁴ See Amended Waiver Request at 12-13.

²⁵ PacifiCorp states that the amendments to the applications and waiver request were formulated in consultation with the Coast Guard in order to minimize the potential for harmful interference to maritime communications. See *id.* at 10. Pursuant to a memorandum of understanding between the Commission and NTIA for coordination of spectrum issues involving both Federal and non-Federal users, see FCC and NTIA Sign New Memorandum of Understanding on Spectrum Coordination, *Press Release* (rel. Jan. 31, 2003), NTIA reviewed a draft of this *Order* and requested that the conditions imposed on the waiver closely track the language of the Amended Waiver Request.

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

would not be served by application to the instant case, and grant of the requested waiver would be in the public interest.

7. The Division previously concluded that grant of the assignment applications and waiver request would serve the public interest by providing support for PacifiCorp's electric utility operations to help meet public safety needs and operate critical infrastructure.²⁷ We agree with PacifiCorp that this has not changed.²⁸

8. Maritime communications is the "core purpose" for which VPC spectrum is allocated.²⁹ The Division limited the geographic scope of the waiver in order to prevent harmful interference to such communications.³⁰ We agree with PacifiCorp that the amendments to the applications and waiver request, which significantly reduce the spectrum that it will use near major waterways, addresses these concerns.³¹

9. Finally, we also conclude that a waiver of the requirement in Section 80.123(b) to afford priority to marine-originating communications is appropriate. As the Commission has explained,

using separate channels for maritime and land mobile traffic can serve as a reasonable basis for meeting the maritime priority requirement under appropriate circumstances. Specifically, if a licensee wishes to meet the maritime priority requirement by designating discrete channels for maritime and for land mobile, it must also ensure that the maritime channel capacity is sufficient to ensure against blocked or delayed marine-originating calls. Under a separate-channels approach, therefore, we would expect the licensee to either incorporate a mechanism allowing maritime communications to override communications on the land mobile channels when necessary . . . , or regularly monitor the adequacy of the channel capacity dedicated to maritime communications by whatever measure or combination of measures is deemed appropriate.³²

MariTEL is retaining the spectrum along the Pacific Coast and Columbia River that is not being assigned to PacifiCorp, and will use that spectrum to provide maritime communications services.³³ The parties assert that the retained spectrum will be sufficient to accommodate maritime needs in the region.³⁴ We have no grounds on the present record to question this representation. Consequently, maritime communications will receive equivalent priority as they would in the absence of partitioning and disaggregation to PacifiCorp. We therefore agree with PacifiCorp that a waiver of the rule is warranted under these circumstances.³⁵ In the event that the spectrum retained by MariTEL proves insufficient to accommodate maritime needs in the region, however, the parties will be required to adopt other means to ensure against blocked or delayed marine-originating calls.

²⁷ See *Order*, 21 FCC Rcd at 7764 ¶ 5.

²⁸ See Amended Waiver Request at 2-3.

²⁹ *Flexibility Order*, 22 FCC Rcd at 8972 ¶ 1.

³⁰ See *Order*, 21 FCC Rcd at 7766 ¶ 9.

³¹ See Amended Waiver Request at 10.

³² *Flexibility Order*, 22 FCC Rcd at 8981 ¶ 15.

³³ See *id.* at 7-8.

³⁴ See *id.* at 7, 13.

³⁵ See Amended Waiver Request at 13. To the extent PacifiCorp suggests that the proposed arrangement actually conforms with the rule, we disagree, for the rule by its terms requires "[e]ach [VPC] station serving units on land" to afford priority to marine-originating communications. See 47 C.F.R. § 80.123(b) (emphasis added).

10. Moreover, PacifiCorp recognizes that the VPC frequencies involved with this Request are allocated for internationally interoperable maritime communications in accordance with Appendix 18 of the International Telecommunications Union (ITU) *Radio Regulations*, and that it is possible that at some point in the future a proposal may be advanced at the Commission to redesignate one or more of these frequencies for maritime operations along the Pacific Coast and the Columbia River.³⁶ PacifiCorp states that if there is a demonstrated need in the national interest for an additional maritime VHF frequency or VHF frequencies along the Pacific Coast or the Columbia River to protect maritime safety and security, and such frequency or frequencies are not readily available in other government or non-government allocations, PacifiCorp will exercise its best efforts to adjust its operations in coordination with the maritime community so that the public safety needs of both PacifiCorp and the maritime community can be accommodated.³⁷ PacifiCorp also understands that, in the absence of such good faith efforts, or if the maritime requirements cannot be accommodated, PacifiCorp's authorization to use this spectrum along the Pacific Coast and Columbia River, including the associated waivers, may be subject to review and modification by the Commission as provided under Section 316 of the Communications Act of 1934, as amended.³⁸

11. *Conclusion.* For the reasons stated above, we grant PacifiCorp's amended waiver request, and will consent to the amended assignment applications for the requested frequencies. Because PacifiCorp's operations could, in some circumstances, present a potential for interference to maritime operations, or could preclude the use of these maritime frequencies in the national interest, the instant waiver request is granted on the express conditions that no interference is caused to current or future marine communications, including but not limited to AIS operations; and that, if necessary, PacifiCorp will exercise its best efforts to adjust its operations in coordination with the maritime community so that the public safety needs of both PacifiCorp and the maritime community can be accommodated. In addition, because PacifiCorp requests to withdraw its application for review of the *Order*, on the contingency that the amended applications and waiver request are granted, we grant the withdrawal request and dismiss the application for review.

12. IT IS ORDERED, pursuant to 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 Amended Request for Rule Waiver filed by PacifiCorp in association with applications FCC File Nos. 0001988156 and 0001988415 on December 19, 2008, IS GRANTED, and the applications SHALL BE PROCESSED consistent with this *Order* and the Commission's Rules.

13. IT IS FURTHER ORDERED that the Contingent Request for Withdrawal of Application for Review filed by PacifiCorp on December 16, 2008 IS GRANTED, and the Application for Review filed by PacifiCorp on August 9, 2006 IS DISMISSED.

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

Scot Stone
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau

³⁶ See Amended Waiver Request at 8-9.

³⁷ *Id.*

³⁸ *Id.*; see 47 U.S.C. § 316.