

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

In the Matter of )
COUNTY OF SILVERBOW, MONTANA ) File No. 0002806667
Request for Waiver Pursuant to Section 337(c) of ) File No. 0002898490
the Communications Act of 1934, as Amended )

ORDER

Adopted: October 9, 2009

Released: October 9, 2009

By the Chief, Policy Division, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. The County of Silverbow, Montana (Silverbow or the County) filed two applications for new facilities to construct a new public safety private land mobile radio (PLMR) communications system. The first application seeks to operate a trunked system on 16 non-maritime public safety frequencies, nine Part 80 maritime ship and private coast station frequencies in the VHF 156-162 MHz band, a frequency adjacent to a Part 80 VHF Public Coast Station (VPC) frequency, and four VPC frequencies designated for public safety use under Part 90. The second application requests a non-maritime public safety frequency and one Part 80 VPC frequency for a conventional system.

1 See File No. 0002806667 (filed Nov. 2, 2006, as amended Nov. 21, 2006, April 16, 2007, Aug. 20, 2007, and Oct. 5, 2007) and associated initial Waiver Request (Initial Waiver Request) (filed Nov. 2, 2006), Waiver Clarification for Part 80 frequencies (Waiver Clarification) (filed Aug. 20, 2007), Letter Supplementing Waiver Clarification (Supplemental Waiver Letter) (dated Oct. 5, 2007), Clarification Letter from John Walsh, Sheriff, Silverbow County, to Public Safety and Homeland Security Bureau, Policy Division (Amended Waiver Request) (filed July 29, 2008), Supplemental Map to Amended Waiver Request (filed July 30, 2008) (Supplemental Map to Amended Waiver Request), "FCC Concurrence Letter" from Motorola, Inc. (filed Aug. 12, 2008), Supplemental Contour Amendment (filed Aug. 25, 2008), Supplemental Waiver Request of Part 90 Rules (Part 90 Waiver Request) (filed Aug. 25, 2008), Part 90 Waiver Clarification Letter from John Walsh, Sheriff, Silverbow County, to Public Safety and Homeland Security Bureau, Policy Division, and associated Letter of Concurrence from Motorola, Inc. (Part 90 Waiver Clarification) (filed Aug. 29, 2008), Supplemental Part 90 Contours Amendment (filed Aug. 29, 2008), "LOC with PacifiCorp for 161.790 & 161.825" (filed Dec. 4, 2008), "requested loc" (Statement of Concurrence by Montana Department of Transportation) (filed July 1, 2009).

2 See 47 C.F.R. Part 80.

3 See 47 C.F.R. Part 90.

4 File No. 0002898490 (filed Feb. 1, 2007, as amended Mar. 1, 2007, June 26, 2007, July 2, 2007) and associated initial Waiver Request (Initial Waiver Request – Second Silverbow Application) (filed Feb. 1, 2007), Waiver Clarification for Part 80 frequencies (Waiver Clarification for Second Silverbow Application) (filed Oct. 16, 2007), Letter Supplementing Waiver Clarification (Supplemental Waiver Letter – Second Silverbow Application) (filed Oct. 23, 2008), Clarification Letter from John Walsh, Sheriff, Silverbow County, to Public Safety and Homeland Security Bureau, Policy Division (Amended Waiver Request – Second Silverbow Application) (filed July 29, 2008), Supplemental Map to Amended Waiver Request – Second Silverbow Application (filed July 30, 2008).

2. Those portions of the applications that pertain to the County's request for non-maritime public safety frequencies are routine and can be granted without further analysis. However, Silverbow seeks, for each application, waiver of Sections 80.105, 80.106, 80.123, 80.203, 80.213, 80.371, and 80.373,<sup>5</sup> and such other sections of Part 80 of the Commission's rules, as may be necessary,<sup>6</sup> to use frequencies that are designated for maritime use under Part 80 for its public safety PLMR communications system under Part 90. Silverbow seeks relief under Section 337(c) of the Communications Act of 1934, as amended (the Act),<sup>7</sup> or in the alternative, under Section 1.925 of the Commission's rules.<sup>8</sup> As part of the first application, Silverbow also seeks waiver under Section 1.925 of certain Part 90 power and antenna height limits for use of the four Part 90 VPC frequencies.<sup>9</sup> By this Order, we deny Silverbow's requests for relief under Section 337(c) but grant the majority of Silverbow's alternative requests in part under Section 1.925, subject to certain conditions. Specifically, we deny Silverbow's request to use VPC frequency 161.950 MHz and grant waiver relief for use of the other maritime frequencies as follows:

- We grant relief to use frequency 161.790 MHz, which is adjacent to a Part 80 designated VPC frequency,
- We grant relief to use the nine requested ship and private coast station frequencies designated under Section 80.373(f),
- We limit Silverbow's operation on 161.790 MHz and the nine ship and private coast station frequencies to a maximum transmitter output power of 50 watts for base station and 25 watts for mobile units to ensure interference protection, because the County has not demonstrated that a waiver of Part 80 technical requirements is warranted,
- We grant relief from Part 90 power and height limitations regarding requested frequency pairs 157.250 MHz/161.850 MHz (Channel 25) and 157.225 MHz/161.825 MHz (Channel 84).

## II. BACKGROUND

3. *Silverbow's Waiver Requests.* Silverbow is one of four Montana counties that have formed the I-15/90 Corridor Interoperability Communications Consortium (I-15/90 Consortium) "to conduct a needs assessment of the current communication environment"<sup>10</sup> and "to leverage their combined efforts in planning and implementing an interoperable communications system."<sup>11</sup> Silverbow submits that its "system was engineered as a multi[-]cast county wide system for all county public safety

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<sup>5</sup> 47 C.F.R. §§ 80.105, 80.106, 80.123, 80.203, 80.213, 80.371, and 80.373. Section 80.373 specifically applies to ship and private coast stations. Concerning its second application, File No. 0002898490, because Silverbow is not requesting the use of ship and private coast station frequencies, a waiver of Sections 80.373, as requested by Silverbow concerning that application, is not required. *See* 47 C.F.R. § 80.373 (describing the working frequencies assignable to ship and private coast stations). Therefore, Silverbow's request with respect to this rule section is moot.

<sup>6</sup> *See* Waiver Clarification and Waiver Clarification for Second Silverbow Application.

<sup>7</sup> 47 U.S.C. § 337(c).

<sup>8</sup> *See* Waiver Clarification and Waiver Clarification for Second Silverbow Application at 1.

<sup>9</sup> *See* Part 90 Waiver Request.

<sup>10</sup> Amended Waiver Request at 1. The other three Montana counties in the I-15/90 Consortium are Anaconda-Deer Lodge, Beaverhead, and Butte-Silverbow. *See id.* *See also* Amended Waiver Request – Second Silverbow Application at 1.

<sup>11</sup> Amended Waiver Request at 2 and Amended Waiver Request – Second Silverbow Application at 2.

services . . . , [including] Four County Consortium Interoperability repeaters with local paging and Four County Consortium wide paging.”<sup>12</sup>

4. Silverbow also states that the Consortium is part of the Montana Interoperability Consortia/Interoperability Montana (IM) Project “aimed at achieving a reliable, effective fully interoperable communications system within and between the counties; between the Southwest Interoperability Project and Missoula [Montana] and between all local, state and federal entities involved in emergency management and response.”<sup>13</sup> Silverbow asserts that the Montana statewide system consists of several “[c]onsortia of Federal, state, Tribal Nation and County agencies to assist in the funding and deployment of a statewide voice and data interoperability system that is currently being deployed as a VHF system.”<sup>14</sup> Silverbow adds that Montana’s IM Project “is a statewide trunked/conventional hybrid P25 system available to all local, tribal, state and federal responders in Montana.”<sup>15</sup>

5. Silverbow seeks to construct a new trunked facility and a new conventional system to provide upgraded public safety operations on VHF frequencies in its service area and to participate in Montana’s statewide interoperable VHF communications system.<sup>16</sup> Silverbow states that its frequency coordinator, the American Association of State Highway and Transportation Officials (AASHTO), “conducted a thorough search of the Public Safety frequency pool and could not identify suitable frequencies to satisfy all of the system operating parameters.”<sup>17</sup> In support, the County provides channel studies purporting to demonstrate that the available Public Safety Radio Service Pool frequencies in the VHF band are insufficient to meet its public safety needs<sup>18</sup> and insufficient “to complete [its] system.”<sup>19</sup> Silverbow adds that it “has no reasonable alternative due to the intensive use of Public Safety Radio service spectrum in the Silverbow County[,] Montana area.”<sup>20</sup> Consequently, in separately filed requests, Silverbow seeks relief under Section 337(c) of the Communications Act of 1934, and, alternatively, waivers under Section 1.925 of the Commission’s rules to operate its proposed systems on Part 80 maritime frequencies.<sup>21</sup>

6. Silverbow asserts that the requested “maritime spectrum will enhance [its] public safety systems in the coverage areas (footprint) where alternative usable VHF spectrum is not readily available.”<sup>22</sup> Silverbow claims that “interference from its proposed operations” on the requested Part 80

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<sup>12</sup> See File No. 0002806667 (as amended April 16, 2007) (attaching “Silverbow Consortia Letter”) and File No. 0002898490 (as amended Jun 26, 2007) (attaching “Consortia Explanation”) (Consortia Letters).

<sup>13</sup> Amended Waiver Request at 1-2 and Amended Waiver Request – Second Silverbow Application at 1-2.

<sup>14</sup> Consortia Letters.

<sup>15</sup> Amended Waiver Request at 6 and Amended Waiver Request – Second Silverbow Application at 6.

<sup>16</sup> See File Nos. 0002806667 and 0002898490 and Consortia Letters.

<sup>17</sup> Initial Waiver Request and Initial Waiver Request – Second Silverbow Application.

<sup>18</sup> See File No. 0002806667 (as amended Nov. 21, 2006) (attaching “Silverbow Showing,” “Silverbow Showing Location 1,” “Silverbow Showing Location 2,” and “Silverbow Showing Location 3”) (together, Silverbow Frequency Showing – First Silverbow Application). See also File No. 0002898490 (as amended March 1, 2007) (attaching “Location 1” and “Location 2”) (Silverbow Frequency Showing – Second Silverbow Application).

<sup>19</sup> Supplemental Waiver Letter, Amended Waiver Request at 4; Waiver Clarification for Second Silverbow Application, Amended Waiver Request – Second Silverbow Application at 4.

<sup>20</sup> Initial Waiver Request and Initial Waiver Request – Second Silverbow Application.

<sup>21</sup> See Waiver Clarification and Waiver Clarification for Second Silverbow Application.

<sup>22</sup> Amended Waiver Request at 4 and Amended Waiver Request – Second Silverbow Application at 4.

maritime frequencies “is highly unlikely, as there are no other licensees on the specified channels within its proposed area of operation.”<sup>23</sup> Furthermore, Silverbow argues that its proposed “use of Part 80 frequencies meet[s] interoperability capability by fulfilling the spectrum requirements of the frequency combining equipment and will allow federal, state, tribal, and local government agencies to share the infrastructure without having to have two different radios.”<sup>24</sup>

7. *Maritime Ship and Private Coast Station Frequencies.* The Commission’s rules provide that frequencies in the maritime VHF band are allocated primarily for maritime use under Part 80 of the rules.<sup>25</sup> Maritime frequencies allocated in the VHF band under Part 80 are available for assignment as either private communications frequencies for ship-to-ship and ship-to-private coast communications (ship-to-private coast station or ship and private coast station frequencies)<sup>26</sup> or public correspondence frequencies to ship and public coast stations (VHF public coast station frequencies or VPC frequencies).<sup>27</sup>

8. Silverbow’s first application seeks the following nine ship and private coast station frequencies: 156.275 MHz, 156.325 MHz, 156.350, 156.500, 156.550, 156.600, 156.850, 157.000, and 161.600 MHz.<sup>28</sup> Because these requested maritime frequencies are private communications frequencies designated under Part 80,<sup>29</sup> the County requests a waiver of Sections 80.105, 80.373(f), 80.203, and 80.213.<sup>30</sup>

9. *Maritime VHF Public Coast Stations (VPC frequencies).* Silverbow’s first application requests one VHF frequency, 161.790 MHz, to use under Part 90 at three of six proposed locations.<sup>31</sup> However, 161.790 MHz is not specifically designated as a VPC frequency but rather is adjacent to and overlaps designated VPC frequency 161.800 MHz.<sup>32</sup> We therefore will refer to 161.790 MHz as an “adjacent VPC frequency.” In its second application, the County requests a designated VPC frequency,

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<sup>23</sup> Amended Waiver Request at 5.

<sup>24</sup> Amended Waiver Request at 4 and Amended Waiver Request – Second Silverbow Application at 4.

<sup>25</sup> See 47 C.F.R. §§ 80.371(c), 80.373(f).

<sup>26</sup> See 47 C.F.R. § 80.373(f). Private correspondence consists of communications serving the user's business and operational needs.

<sup>27</sup> See 47 C.F.R. § 80.371(c). Public correspondence communications are personal or private communications between two or more persons. Reflecting that public correspondence service is offered by coast stations on a common carrier basis, public correspondence is defined more precisely under the Part 80 Maritime Service Rules as “[a]ny telecommunication which the offices and stations must, by reason of their being at the disposal of the public, accept for transmission.” See 47 C.F.R. § 80.5.

<sup>28</sup> See File No. 0002806667, FCC 601 – Schedule H at 3-5, 7, requesting 156.275 MHz, 156.325 MHz, 156.350, 156.500, 156.550, 156.600, 156.850, 157.000, and 161.600 MHz; see also “Frequencies” tab. See 47 C.F.R. § 80.373(f), including accompanying tables and notes. The nine frequencies are on private communication channels allocated under Part 80 for maritime use (Channels 65A, 66A, 07A, 10, 11, 12, 17, and 20A (for 157.00 MHz, with Channel 20 for the 157.000 and 161.600 MHz duplex pair). See 47 C.F.R. § 80.373(f) tables and notes associated with these channel designators (note 12 is applicable to 161.600 MHz).

<sup>29</sup> See 47 C.F.R. § 80.373(f).

<sup>30</sup> See 47 C.F.R. §§ 80.105, 80.373(f), 80.203, and 80.213. Section 80.105 addresses the general obligations of coast stations. See 47 C.F.R. § 80.105. Section 80.373(f) designates the private communications frequencies. See 47 C.F.R. § 80.373(f). Section 80.203 addresses authorization of transmitters for licensing in the maritime services. See 47 C.F.R. § 80.203. Section 80.213 addresses modulation requirements. See 47 C.F.R. § 80.213.

<sup>31</sup> See File No. 0002806667, FCC 601 – Schedule H at 4,7, 9, requesting 161.790 MHz; see also “Locations” and “Frequencies” tab. See generally 47 C.F.R. § 80.371(c) and accompanying table, “Working Carrier Frequency Pairs in the 156-162 MHz Band.”

<sup>32</sup> See *id.*

161.950 MHz, for public safety use.<sup>33</sup> The County requests a waiver of Sections 80.106, 80.123, and 80.371 to enable it to use both of these frequencies.<sup>34</sup>

10. *Maritime VPC Frequencies Designated for Public Safety Under Part 90 and Public Coast Station Communications under Part 80 Automatic Identification System (AIS) Use.* In its first application, Silverbow requests maritime Channel 25 and maritime Channel 84. Silverbow seeks waiver of the height and power limitations applicable to using those channels under the provisions of Sections 90.20(g)(5)(ii), (iv), and (vi).<sup>35</sup> Channel 25 consists of VPC frequencies 157.250 MHz and 161.850 MHz, designated under Part 90 for public safety use in inland VHF public coast service areas (VPCSAs), including the VPCSAs designated for Montana. Channel 84, which consists of frequency pair 157.225 MHz and 161.825 MHz, was similarly designated under Part 90, but in 2008, the Commission redesignated the channel for VPC communications in the inland VPCSAs under Part 80.<sup>36</sup> However, the Commission accorded grandfathering protection to licenses granted pursuant to applications filed prior to the release date of the *AIS Second Report and Order*.<sup>37</sup> Because Silverbow's application was pending as of the *AIS Second Report and Order* release date, it is eligible for this grandfathering provision, and therefore we evaluate Silverbow's request for Channel 84 as well as Channel 25 under the Part 90 rules.<sup>38</sup>

11. *Public Notice.* On February 4, 2008, the Public Safety and Homeland Security Bureau (Bureau) issued a *Public Notice* seeking comment on Silverbow's application and waiver requests.<sup>39</sup> The Bureau also sought comment on whether the 700 MHz public safety band would provide a viable alternative, in light of the approaching digital television (DTV) transition date (then scheduled to occur on February 17, 2009) and the Commission's actions to facilitate a 700 MHz nationwide, interoperable

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<sup>33</sup> File No. 0002898490, FCC 601 – Schedule H at 3, requesting 161.950 MHz; *see also* “Locations” and “Frequencies” tab. *See* 47 C.F.R. § 80.371(c) and accompanying table, “Working Carrier Frequency Pairs in the 156-162 MHz Band.”

<sup>34</sup> *See* 47 C.F.R. §§ 80.106, 80.123, and 80.371. Section 80.106 addresses the obligation of public coast stations for intercommunication in the mobile service to exchange radio communications with any ship or aircraft station at sea. *See* 47 C.F.R. § 80.106. Section 80.123 addresses general requirements of marine VHF public coast stations for providing service to stations on land, including the requirement for “affording priority to marine-originating communications . . . .” *See* 47 C.F.R. §§ 80.123, 80.123(b). Section 80.371 designates the public coast stations communications frequencies, specifically, as concerning Silverbow's waiver requests, Section 80.371(c) listing the working frequencies in the marine VHF 156-162 MHz band. *See* 47 C.F.R. §§ 80.371, 80.371(c) and accompanying table, listing the working carrier frequency pairs in the 156-162 MHz band.

<sup>35</sup> *See* Part 90 Waiver Request; Part 90 Waiver Clarification. *See* 47 C.F.R. §§ 90.20(g)(5)(ii), (iv), (vi) and accompanying tables. At the time Silverbow filed its first application, the Commission had not redesignated Channel 84 under Part 80.

<sup>36</sup> *See* In the Matter of Amendment of the Commission's Rules Regarding Maritime Automatic Identification Systems, WT Docket No. 04-344, *Second Report and Order*, 23 FCC Rcd 13711, 13724-25 ¶¶ 20 & n.91 (2008), *recon. pending (AIS Second Report and Order)*.

<sup>37</sup> *See id.* *See* 47 C.F.R. § 90.20(g)(2)(ii) (authorizing public safety operations “licensed pursuant to an application filed prior to September 19, 2008” until March 2, 2024). Section 90.20(g), as amended by the *AIS Second Report and Order*, became effective March 1, 2009, thirty days after publication in the Federal Register, January 29, 2009.

<sup>38</sup> *See infra* paras. 44-48.

<sup>39</sup> *See* Public Safety and Homeland Security Bureau Seeks Comment on Applications and Requests for Waiver Filed by the County of Beaverhead, County of Silverbow, and County Silverbow, Montana to Operate Public Safety Radio Systems Using Part 80 Maritime VHF Frequencies, *Public Notice*, 23 FCC Rcd 1641 (PSHSB 2008) (*Public Notice*).

broadband public safety network.<sup>40</sup> No comments addressing the merits of the applications and waiver requests were filed in response to the *Public Notice*.

### III. DISCUSSION

#### A. Section 337(c) Analysis

12. Section 337(c) of the Act provides that, in connection with an application by an “entity seeking to provide public safety service,” the Commission “shall waive any requirement of this Act or its regulations implementing this Act (other than its regulations regarding harmful interference) to the extent necessary to permit the use of unassigned frequencies for the provision of public safety services ...” if the Commission finds that:

- “no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use;”
- “the requested use is technically feasible without causing harmful interference to other spectrum users entitled to protection from such interference under the Commission’s regulations;”
- “the use of the unassigned frequency for the provision of public safety services is consistent with other allocations for the provision of such services in the geographic area for which the application is made;”
- “the unassigned frequency was allocated for its present use not less than 2 years prior to the date on which the application is granted; and”
- “granting such application is consistent with the public interest.”<sup>41</sup>

We note that an applicant’s failure to meet any one of the five criteria constitutes sufficient cause for the Commission to deny a request for waiver under Section 337(c).<sup>42</sup>

13. When considering requests under Section 337, we must first find that the applicant is an “entity seeking to provide public safety services.”<sup>43</sup> Silverbow County states that its “system was

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<sup>40</sup> See *id.* at 4, citing *Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band*, PS Docket No. 06-229; *Development of Operational, Technical and Spectrum Requirements for Meeting Federal State and Local Public Safety Communications Requirements through the Year 2010*, WT Docket No. 96-86, *Second Report and Order*, 22 FCC Rcd 15289 (2007) (*700 MHz Second Report and Order*).

<sup>41</sup> 47 U.S.C. § 337(c).

<sup>42</sup> See *South Bay Regional Public Communications Authority, Memorandum Opinion and Order*, 13 FCC Rcd 23781, 23796 ¶ 33 (1998); *Township of Cinnaminson, New Jersey, Order*, 22 FCC Rcd 4583, 4585 ¶ 6 (2007) (*Cinnaminson*), citing *University of Southern California, Memorandum Opinion and Order*, 16 FCC Rcd 2978, 2984 ¶ 15 (2001). See also *Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as amended, Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 99-87, 15 FCC Rcd 22709, 22768-69 ¶ 131 (2000) (footnotes omitted).

<sup>43</sup> 47 U.S.C. § 337(c). Section 337(f) defines the term “public safety services” as “services- (A) the sole or principal purpose of which is to protect the safety of life, health, or property; (B) that are provided— (i) by State or local government entities; or (ii) by non-government organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and (C) that are not made commercially available to the public by the provider.” 47 U.S.C. § 337(f).

engineered as a multi[-] cast county wide system for all county public safety services<sup>44</sup> and that it provides “Law Enforcement, Fire/Wild Land Fire response, Emergency Medical services, . . . , Search and Rescue . . . [, and] Disaster Emergency [services].”<sup>45</sup> Thus, we find that, based on these representations, Silverbow is an entity providing public safety services eligible to hold public safety authorizations in the Public Safety Pool.<sup>46</sup>

14. Next we must find that the “frequencies [requested] for the provision of public safety services” are “unassigned.”<sup>47</sup> To determine whether the non-public safety frequencies are “unassigned,” we use the technical rules that govern the spectrum requested.<sup>48</sup> Although Silverbow asserts that the requested maritime frequencies are unassigned,<sup>49</sup> we examine in closer detail whether other entities having access to them under the Commission’s rules have a claim that may render them unassignable to Silverbow. We find that two of the requested frequencies do not qualify as “unassigned” frequencies under Section 337.

15. Frequency 161.950 MHz is licensed under a geographic area licensing approach.<sup>50</sup> Under this licensing scheme, only one licensee is authorized to operate on a given frequency within a geographic licensing area. The Commission’s ULS licensing database shows that the State of Montana is the geographic area licensee for 161.950 MHz licensee for VPCSA 30, which contains Silverbow County.<sup>51</sup> Therefore, we cannot authorize Silverbow to operate on this frequency pursuant to Section 337 of the Act because Silverbow can not meet the threshold requirement of Section 337(c) that the requested frequency must be unassigned.

16. As noted above, frequency 161.790 MHz is not a designated frequency within the Commission’s Part 80 rules, but is adjacent to VPC frequency 161.800 MHz.<sup>52</sup> Moreover, due to Silverbow’s proposed 12.5 kilohertz channel bandwidth, frequency 161.790 MHz actually overlaps 161.800 MHz. Under Commission precedent, this overlap causes the requested frequency to be classified as “assigned.”<sup>53</sup> Because frequency 161.790 MHz does not meet the statutory definition of an unassigned frequency, we cannot authorize Silverbow to operate on this frequency pursuant to Section 337 of the Act.

17. Having found that Silverbow is not eligible for waiver relief under Section 337 for frequencies 161.950 MHz and 161.790 MHz, we exclude these frequencies from the rest of our Section

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<sup>44</sup> See Consortia Letters.

<sup>45</sup> See *id.*

<sup>46</sup> See 47 C.F.R. § 90.20(a)(1) (stating, in part, “[a]ny territory, possession, state, city, county, town . . . is eligible to hold authorizations in the Public Safety Pool . . .”).

<sup>47</sup> See 47 U.S.C. § 337(c). See *Monroe County, New York, Order*, 19 FCC Rcd 11828, 11830 ¶ 5 (WTB PSCID 2004).

<sup>48</sup> See *City of El Segundo, Order*, 19 FCC Rcd 6992, 6995 ¶ 8 (WTB PSCID 2004) (*El Segundo*), citing *Syosset Fire District, Memorandum Opinion and Order*, 18 FCC Rcd 16635, 16639 ¶ 8 (WTB PSPWD 2003).

<sup>49</sup> See Amended Waiver Request at 6 and Amended Waiver Request – Second Silverbow Application at 6.

<sup>50</sup> See 47 C.F.R. § 80.371(c) (listing working carrier frequencies in the marine VHF 156-162 MHz band). VPC licensees are assigned channel blocks of 25 kHz bandwidth with the carrier frequencies listed in Section 80.371(c) being the center frequencies. Thus, VPC frequency 161.950 MHz is such a center frequency in channel block 161.94375-161.95625 MHz.

<sup>51</sup> See Commission ULS license database, Call Sign WPOJ516 (licensed to the State of Montana for VPCSA 030).

<sup>52</sup> See *supra* para. 9. See 47 C.F.R. § 80.371(c).

<sup>53</sup> See *El Segundo*, 19 FCC Rcd at 6995-96 ¶ 8.

337 analysis below.<sup>54</sup> In contrast, from a review of the Commission's ULS licensing database, we find that the requested nine ship and private coast station frequencies are unassigned in Montana, and therefore may be considered for relief under Section 337.

18. We next turn to the five-prong test under Section 337(c) in considering Silverbow's request for those ship and private coast station frequencies in its first application. As discussed below, we find that Silverbow does not meet the first criterion of Section 337(c) of the Act, *i.e.*, it fails to demonstrate that no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use.

19. Silverbow rests its argument with respect to the first Section 337(c) criterion on an analysis of the unavailability of public safety spectrum in the VHF band, and contends that frequency bands other than the VHF band would not satisfy its requirements.<sup>55</sup> Silverbow represents that it needs "twenty-eight (28) frequencies and one UHF (1) frequency" to participate in the IM system.<sup>56</sup> Further, Silverbow represents that "[o]nly fifteen [public safety] frequencies [are] available" and that therefore it needs "fourteen (14) [sic] Part 80 VHF [maritime] frequencies to complete its system."<sup>57</sup> Silverbow states that its frequency coordinator, AASHTO, "conducted a thorough search of the Public Safety Radio Service frequency pool and could not identify suitable frequencies to satisfy all of the system operating parameters."<sup>58</sup> The County submits a frequency showing letter from AASHTO, stating that Silverbow's "proposed fixed transmitter locations are significantly higher than average terrain," making "frequencies which appear to be usable not assignable."<sup>59</sup> Moreover, the AAHSTO letter attaches the objections filed by other Public Safety Coordinators, "making those frequencies not available."<sup>60</sup>

20. Based on the information before us, we find that Silverbow has not given adequate consideration under the Section 337(c) waiver standard to public safety frequencies outside the VHF band that might be available. Although Silverbow contends that non-VHF channels would not satisfy its requirements,<sup>61</sup> this is not sufficient to meet the statutory waiver standard. The Commission has previously apprised Section 337 applicants "that the statute requires that there be no unassigned public safety spectrum, or not enough for the proposed public safety use, in any band in the geographic area in which the Section 337 applicant seeks to provide public safety services."<sup>62</sup> Consistent with the Commission's position, the Bureau and the Wireless Telecommunications Bureau have rejected the argument that an applicant must only show either the unavailability of frequencies in its preferred public

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<sup>54</sup> As discussed below, we include both frequencies in our separate waiver analysis under Section 1.925. We conclude that waiver relief is warranted with respect to frequency 161.790 MHz but not with respect to frequency 161.950 MHz. *See infra* paras. 18-22.

<sup>55</sup> File No. 0002806667, Amended Waiver Request at 3.

<sup>56</sup> File No. 0002806667, Amended Waiver Request at 4.

<sup>57</sup> *Id.*

<sup>58</sup> *See* File No. 0002806667, Initial Waiver Request.

<sup>59</sup> File No. 0002806667 (attaching Letter from Cindy Matzel, RS/AASHTO, re: Silverbow, County of, filed Nov. 21, 2006 (AASHTO Letter) (attaching Silverbow Frequency Showing – First Silverbow Application).

<sup>60</sup> File No. 0002806667, AASHTO Letter (also attaching objections from APCO and FCCA that contain certain technical objections from these other public safety frequency coordinators to particular frequencies requested by Silverbow County).

<sup>61</sup> *See* Waiver Clarification at 1.

<sup>62</sup> *Balanced Budget Act Report and Order*, 15 FCC Rcd at 22769 ¶ 132 (footnotes omitted); *see also* H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess., at 579-80 (1997) ("Conference Report") ("spectrum must not be immediately available on a frequency already allocated to public safety services.").



safety band or, conversely, the unsuitability of frequencies in other public safety bands, for purposes of satisfying Section 337(c) of the Act.<sup>63</sup>

21. Silverbow does not meet the Section 337(c) standard because it analyzed only the availability of 156-162 MHz spectrum in the VHF high band in which the Montana IM system operates. Specifically, we find that the AASHTO frequency showing only demonstrates that an insufficient number of VHF channels are available in the Public Safety Pool,<sup>64</sup> and therefore is inadequate to show the unavailability of public safety frequencies in other bands in the geographic area where Silverbow proposes to operate on the requested maritime frequencies. Moreover, as noted above, the record indicates that Silverbow also intends to use one UHF frequency at four of the six sites proposed in its first application.<sup>65</sup> The County, however, does not address why other frequencies in the UHF band are not available for any part of its proposed operations.<sup>66</sup>

22. Based upon our review of the record, we note that a sufficient showing pursuant to Section 337(c) requirements would have included (i) a complete analysis of the availability of public safety frequencies in any spectrum band and (ii) the results of a frequency coordinator's thorough search specifying that the coordinator searched all frequency bands to determine whether any other public safety spectrum was available.<sup>67</sup> Thus we find that, without the necessary frequency search, Silverbow does not satisfy the first criterion of Section 337(c), and therefore cannot obtain relief pursuant to Section 337.

#### **B. Section 1.925 Analysis of Waiver Requests to Use Maritime Frequencies**

23. Our finding that Silverbow County does not warrant waiver relief pursuant to Section 337 of the Act does not foreclose consideration of the County's alternative request for waiver relief pursuant to Section 1.925 of the Commission's rules.<sup>68</sup> Rather, the Bureau's ability to undertake a waiver analysis pursuant to that section rests on the Commission's plenary authority under the Act to make rules and regulations necessary to achieve the Commission's over-arching statutory purposes, including "promoting safety of life and property through the use of radio communication."<sup>69</sup> As discussed below, we find that

<sup>63</sup> See County of Marin, California, *Order*, 22 FCC Rcd 9165, 9167-68 ¶ 6 (PSHSB PD 2007); State of Ohio, *Memorandum Opinion and Order*, 17 FCC Rcd 439, 446-47 ¶ 15 (WTB PSPWD 2002) (*Ohio*); State of Tennessee Department of Transportation, *Order on Reconsideration*, 15 FCC Rcd 24645, 24648-49 ¶ 9 (WTB 2000).

<sup>64</sup> See AASHTO Letter and Frequency Showing.

<sup>65</sup> See File No. 0002806667, "Locations" and "Frequencies" tabs.

<sup>66</sup> See File No. 0002806667 (as amended April 16, 2007) (attaching Consortia Letter). Silverbow's Frequency Showings also examined Industrial/Business VHF frequencies listed under 47 C.F.R. § 90.35(b)(3).

<sup>67</sup> See City of Boston, Massachusetts, *Order*, 22 FCC Rcd 18393, 18396-97 ¶¶ 6-7 (PSHSB PD 2007) (finding engineering report "spectrum analysis" and letter from frequency coordinator sufficient); *Ohio*, 17 FCC Rcd at 447 ¶ 16. The Commission's interpretation of Section 337(c) of the Act "requires that there be no unassigned public safety spectrum, or not enough for the proposed public safety use, in any band in the geographic area in which the Section 337 applicant seeks to provide public safety services." *Balanced Budget Act Report and Order*, 15 FCC Rcd at 22769 ¶ 132.

<sup>68</sup> *Balanced Budget Act Report and Order* at 22769 ¶ 132 n.366, citing 47 C.F.R. § 1.925. See also County of Ocean, New Jersey, *Order*, DA 09-1976, released Aug. 31, 2009 (PSHSB PD), 2009 WL 2751088 (F.C.C.); Letter to Alan S. Tilles, Esq., 22 FCC Rcd 13577, 13581 & fn.30 (2007) (noting that "[i]n addition to the Section 337 process, [public safety] entities can also seek a conventional waiver under Section 1.925 of rules.>").

<sup>69</sup> County of Granite, Montana, *Order*, 24 FCC Rcd 5704, 5712 ¶ 17 (PSHSB PD 2009) (*Granite County*), citing 47 U.S.C. § 151. However, consideration of a Section 1.925 waiver request does not predetermine that we will grant relief. See, e.g., *Tennessee DOT*, 15 FCC Rcd at 24650 ¶ 12 (finding that applicant had not met its burden of showing that Section 1.925 waiver relief is justified); *New Hampshire DOT*, 14 FCC Rcd 19438, 19442-43 ¶¶ 10-11 (making similar findings). Generally, we have not proceeded to consider whether waiver relief is warranted under Section 1.925 when public safety entities have submitted vague and insufficiently specific information. See

(continued....)

Silverbow County has provided sufficient information in the record for us to consider whether waiver relief is justified under Section 1.925 of the rules.

24. To obtain a waiver under Section 1.925 of the Commission's rules, a petitioner must demonstrate either that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the present case, and that a grant of the waiver would be in the public interest;<sup>70</sup> or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.<sup>71</sup> Thus, an applicant seeking a waiver under Section 1.925 of the rules faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.<sup>72</sup>

### 1. VPC Frequency 161.950 MHz

25. In analyzing Silverbow's waiver request for authority to operate on this frequency, we first consider whether granting Silverbow a site-based authorization for a frequency the Commission licenses on a geographic area basis would not serve or would frustrate the underlying purposes of adopting geographic licensing in this band. The purposes of geographic area licensing included the chief goal of "improv[ing] maritime radio in ways that take into account the unique nature of the Maritime Services, including its primary purpose of providing safety of life and property at sea."<sup>73</sup> The Commission, further considering the licensing scheme to achieve this goal, concluded that "the public interest will best be served by a transition to geographic area licensing for VHF public coast station spectrum."<sup>74</sup> The Commission also found that "[t]his approach will facilitate the development of wide-area, multi-channel automated maritime communications systems."<sup>75</sup> Subsequently, the Commission stressed stakeholders' concerns for safeguarding "the principle that maritime spectrum, and in particular the VPC frequencies, should not be reallocated or any action taken to remove the spectrum from the maritime community" and not "jeopardize the maritime community's ability to meet its operational, safety and security communications needs."<sup>76</sup>

26. We find that Silverbow has not demonstrated that the purposes of the Part 80 rules would not be served or would be frustrated by its proposed use of 161.950 MHz. As the geographic area licensee for the 156-162 MHz VPC band in VPCSA 30, the State of Montana is authorized to operate on all unassigned VHF VPC frequencies in the area included in the VPCSA. As a result, granting waiver relief to Silverbow to use a frequency in this band would conflict with Montana's authorization.

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*Cinnaminson*, 22 FCC Rcd at 4585-86 ¶ 7 (applicant did not make any assertions specific to the requested frequency pair); *City of Richmond, Virginia*, *Order*, 21 FCC Rcd 14384, 14390 ¶ 15 (2006) (granting limited waiver relief under Section 337 but further finding that the applicant did not provide sufficient information about all of its proposed sites or implementation schedule to evaluate its request concerning the entire economic area).

<sup>70</sup> 47 C.F.R. §1.925(b)(3)(i).

<sup>71</sup> 47 C.F.R. §1.925(b)(3)(ii).

<sup>72</sup> *WAIT Radio v. FCC*, 413 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*), *aff'd*, 459 F.2d 1203 (D.C. Cir. 1972); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

<sup>73</sup> *See* Amendment of the Commission's Rules Concerning Maritime Communications, *Third Report and Order and Memorandum Opinion and Order*, PR Docket 92-57, 13 FCC Rcd 19853, at 19859-60 ¶ 10 (1998).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *In the Matter of Maritel, Inc. and Mobex Network Services, LLC*, WT Docket No. 04-257, *Report and Order*, 22 FCC Rcd 8971, 8983 ¶ 19 (2007) (*Coast Station Flexibility Order*).

Silverbow's contour showings,<sup>77</sup> purporting to show that interference is unlikely, are unavailing here, because granting relief would circumvent the specifically prescribed licensing process and other mechanisms that the Commission has established for obtaining VPC frequencies.<sup>78</sup> On balance, the record does not show that Silverbow has demonstrated a justification to obtain designated VPC frequency 161.950 MHz for its participation in Montana's VHF system that outweighs the Commission's rationale for adopting a geographic area licensing process. Therefore, we find that we cannot grant the requested waiver under the first prong of Section 1.925.

27. We also find that Silverbow fails to meet the second prong of Section 1.925 with respect to this frequency, *i.e.*, Silverbow has not shown that precluding it from receiving authorization on VPC working frequencies under Section 80.317(c) would be inequitable and unduly burdensome or that Silverbow has no reasonable alternative method to obtain this frequency. The Commission's geographic area licensing scheme permits licensees to partition, disaggregate, or lease their spectrum, which provides Silverbow with an alternative means of obtaining use of VPC spectrum.<sup>79</sup> Because Silverbow could enter into such an arrangement with Montana, the geographic area licensee,<sup>80</sup> we find that it does not meet the second prong of Section 1.925, and we therefore deny its request for waiver relief to use VPC frequency 161.950 MHz.

## 2. Other Maritime Frequencies

28. We next turn to Silverbow's request for authorization to operate on the nine ship and private coast station frequencies as well as the adjacent VPC frequency 161.790 MHz. Silverbow asks for waiver of the following rule sections in conjunction with this request:

- Section 80.373(f), which designates nine of Silverbow's requested maritime frequencies for specific ship and private coast station uses,<sup>81</sup>
- Section 80.105 regarding ship and private coast stations' general obligations,<sup>82</sup>
- Section 80.371(c), which designates specific channel pairs in the 156-162 MHz range for assignment to public coast stations,
- Sections 80.106 and 80.123 regarding public coast stations' general obligations, and

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<sup>77</sup> See File No. 0002898490, as amended June 26, 2007 (attaching "AOP Showing" and "Marine Showing").

<sup>78</sup> The Commission has consistently maintained that public safety entities may obtain Part 80 VPC spectrum only through the specific processes in a regulatory framework that the Commission has established. See *infra* para. 27.

<sup>79</sup> The Commission has recently revised the Part 80 rules to provide VPC licensees with the flexibility to provide (or, *e.g.*, lease spectrum for) private land mobile radio service, which may include public safety or critical infrastructure industry communications. See *Coast Station Flexibility Order*, 22 FCC Rcd at 8976-77 ¶ 8. Such operations, however, must be consistent with the Part 80 rules in the absence of a waiver permitting operation under Part 90. See *id.* at 8983-85 ¶¶ 20-21.

<sup>80</sup> See, *e.g.*, Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications Action, *Public Notice*, Report No. 1852 (Rel. June 9, 2004) (File Nos. 0001662537 and 0001662656) (consenting to assignment from Warren C. Havens to State of Montana). See also *County of Placer, California, Order*, 20 FCC Rcd 3675, 3661 ¶ 11 (WTB PSCID 2005) (*County of Placer*); *Commonwealth of Virginia, Order*, 19 FCC Rcd 15454, 15457 ¶ 7 (WTB PSCID 2004) (*Commonwealth of Virginia*). In this regard, Silverbow could also explore reaching an agreement with Montana consistent with the provisions of Section 90.179 to share the frequency. See 47 C.F.R. § 90.179.

<sup>81</sup> See 47 C.F.R. § 80.373(f), accompanying tables and notes.

<sup>82</sup> See 47 C.F.R. § 80.105.

- The technical requirements of Part 80, Subpart E.<sup>83</sup>

Because Silverbow generally “requests waiver of the [Part 80] regulations appropriate to permit private land mobile use of the spectrum consistent with the technical specifications set forth in [its] application,”<sup>84</sup> on our own motion, we will also examine whether Silverbow warrants waiver of Sections 80.205 (specifying bandwidth requirements), 80.211 (specifying emission requirements), and 80.215 (specifying transmitter power limitations).<sup>85</sup>

29. The “core purpose” of Part 80 rule requirements is to “serve the communications needs of marine vessels, especially with respect to communications in support of the safety of life and property at sea and on inland waterways.”<sup>86</sup> The Commission closely scrutinizes requests to use the spectrum outside of the Part 80 framework to ensure that unintended erosion of the maritime spectrum and consequent derogation of the core purpose for that spectrum does not occur.<sup>87</sup> In the *Coast Station Flexibility Order*, the Commission provided guidance on “some of the factors” that it will consider in evaluating waiver applications seeking to use maritime spectrum for land mobile radio operations.<sup>88</sup> Specifically, the Commission requires that waiver applicants provide an explanation of the following:

- The intention of the applicant to provide priority to maritime communications or why they believe the requirement should be waived;
- The distance of a proposed land mobile radio operation from the nearest navigable waterways;
- The magnitude of divergence sought from specific Part 80 technical requirements, such as power limits and emission masks;
- A showing that alternative spectrum that could accommodate the proposed PLMR or other land mobile radio service is unavailable or unsuitable for that purpose;
- A showing that authorization of the proposed operation, and grant of the associated waiver(s), would benefit public safety or homeland security “will be a factor militating in favor of grant of a waiver.”<sup>89</sup>

Although Silverbow filed its request for relief prior to the Commission’s release of the *Coast Station Flexibility Order* outlining the above factors, we find that examining Silverbow’s requests in light of that guidance is appropriate in order to fully evaluate its waiver request and to provide guidance to prospective

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<sup>83</sup> See 47 C.F.R. Part 80, Subpart E.

<sup>84</sup> See Waiver Clarification.

<sup>85</sup> See 47 C.F.R. Part 80, Subpart E, §§ 80.205, 80.211, 80.215.

<sup>86</sup> See *Coast Station Flexibility Order*, 22 FCC Rcd at 8971-72 ¶ 1. See generally In the Matter of Amendment of the Commission’s Rules Concerning Maritime Communications, PR Docket No. 92-257, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, 12 FCC Rcd 16949, 16982-84 ¶¶ 66, 68 (1997).

<sup>87</sup> See *Coast Station Flexibility Order*, 22 FCC Rcd at 8995 ¶ 21 (stating the Commission’s concern over use of VHF Public Coast Station (VPC) and automated maritime telecommunications system (AMTS) spectrum pursuant to non-maritime radio service rules).

<sup>88</sup> See *id.* at 8986-87 ¶ 26 (2007).

<sup>89</sup> See *id.*

waiver applicants seeking to use ship and private coast stations as well as VPC frequencies for public safety communications under Part 90.<sup>90</sup>

30. We will consider Silverbow's request for frequency 161.790 MHz under this standard as well. As we note above,<sup>91</sup> in contrast to VPC frequency 161.950 MHz, discussed at paragraphs 9, 15, and 25-27, *supra*, frequency 161.790 MHz is not designated as a VPC frequency, but instead is adjacent to and overlaps VPC frequency 161.800 MHz.<sup>92</sup> Because Section 80.371(c) specifically designates 161.800 MHz as a VPC frequency and that frequency is the center frequency in its relevant channel block,<sup>93</sup> we consider frequency 161.790 MHz as "offset" from 161.800 MHz. Further, our staff analysis finds that a 12.5 kilohertz channel, such as Silverbow proposes to operate, is mostly outside the VPC band and overlaps only 8.75 kilohertz of the 25 kilohertz Channel 24 (161.800 MHz). Moreover, while frequency 161.790 MHz overlaps center frequency 161.800 MHz, we note that no licensees are similarly overlapped on the lower side of 161.790 MHz. Due to these characteristics, we find that frequency 161.790 MHz is unlike frequency 161.950 MHz for the purposes of evaluating whether relief is warranted under Section 1.925, and we will therefore include frequency 161.790 MHz under the waiver analysis concerning Silverbow's other requested ship and private coast stations below. We note here that the State of Montana is authorized to operate on Channel 24 (161.800 MHz) as a geographic area licensee,<sup>94</sup> and we will consider this matter below.<sup>95</sup>

31. *Providing priority to maritime communications or explaining why the requirement should be waived.* The first factor requires waiver applicants seeking VPC or AMTS spectrum either to show how they intend to provide priority to maritime communications or to explain why the requirement should be waived.<sup>96</sup> Under Section 80.123 of the rules, VPC public coast stations serving stations on land must provide priority to "marine-originating communications."<sup>97</sup> The Commission contemplated in adopting the priority requirement that "licensees would utilize technology" capable of "identify[ing] the source of a given communication on a channel that is use for both maritime and land mobile communications."<sup>98</sup> Further, Section 80.123 mandates that VPC PLMR services may be provided only on a non-interference basis to marine communications.<sup>99</sup>

32. Applying the *Coast Station Flexibility Order's* first guideline to the adjacent VPC frequency 161.790 MHz, we find that the County's proposed use will not undermine the purpose of

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<sup>90</sup> See *supra* note 88.

<sup>91</sup> See *supra* para. 9.

<sup>92</sup> See 47 C.F.R. § 80.371(c). See *supra* paras. 15-16.

<sup>93</sup> See 47 C.F.R. § 80.371(c). Frequency 161.800 MHz is a center frequency in channel block, 161.78750-161.80625 MHz.

<sup>94</sup> The relevant Montana licenses are under call signs WPOJ515, WPOJ516, and WQAV770.

<sup>95</sup> See *infra* para. 33 and note 113.

<sup>96</sup> See 47 C.F.R. § 80.123 (requiring priority to maritime communications). *But see Coast Station Flexibility Order*, 22 FCC Rcd at 8987 n.114 (stating that "if the applicant does not seek a waiver of the priority requirement, but instead intends to comply with that requirement, and satisfactorily demonstrates how it will achieve such compliance, that showing will be a factor favoring grant of the waiver(s)"). See also *id.* at 8991 ¶ 15.

<sup>97</sup> 47 C.F.R. § 80.123(b) (stating that such priority must be afforded "through any appropriate electrical or mechanical means.>").

<sup>98</sup> *Coast Station Flexibility Order*, 22 FCC Rcd at 8991 ¶ 15 (emphasizing that "the rules do not prescribe or prefer any particular means of ensuring priority . . .," as long as the licensee's approach ensures priority for effective transmission of maritime communications).

<sup>99</sup> See 47 C.F.R. § 80.123(g).

Section 80.123. Silverbow states that it will “agree to either eliminate any harmful interference at its expense or cease operation on the requested frequenc[y] to provide interference protection, even if Silverbow County’s operations are under Part 90 power and height limitations.”<sup>100</sup> Additionally, Silverbow submits that it has a “point of contact for any current interference issue and would continue to use this method to [e]nsure immediate interference assistance.”<sup>101</sup> We find that the record supports Silverbow’s representations. Silverbow also asserts that its frequency coordinator, AASHTO, “frequency coordinated the application[,] reflect[ing] AASHTO’s certification for each frequency and location that Silverbow meets the requirements for trunked, exclusive operation within a protected service area.”<sup>102</sup> Silverbow also submits a spacing study<sup>103</sup> purporting to show that its proposed operations under Part 90 on the requested maritime frequencies are not likely to create harmful interference to licensees on either private communications frequencies<sup>104</sup> or correspondence frequencies in VPCSA’s.<sup>105</sup> In particular, with respect to ship and private coast station frequencies, we note that all licensees listed in the spacing study are public safety licenses; no Part 80 licensees on ship and private coast station frequencies operate in the vicinity.<sup>106</sup>

33. In addition, Silverbow supplies four letters of concurrence concerning its proposed operation on 161.790 MHz at the three proposed locations.<sup>107</sup> The first concurrence letter is from the State of Montana Public Safety Services Bureau (Montana PSSB) for use of frequency 161.790 MHz.<sup>108</sup> The Montana PSSB letter provides concurrence “for the use of frequency 161.790 [MHz] . . .” and recognizes the State’s right to operate as a geographic area licensee on the adjacent VPC channel 161.800 MHz under Montana call signs WPOJ515 and WQAV770.<sup>109</sup> The letter expresses the intent of Silverbow “to work with [Montana] and the Interoperability Montana project . . . to negate any harmful systems interference issues that may arise on [VPC] frequenc[y] 161.800 MHz.”<sup>110</sup>

<sup>100</sup> Amended Waiver Request at 5.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* (submitting “that Silverbow obtained the written consent of all licensees that may be affected by the operations proposed . . .”).

<sup>103</sup> File Nos. 0002806667, as amended April 16, 2007 (attaching Exhibit “Marine Showing”).

<sup>104</sup> *See* 47 C.F.R. § 80.373(f).

<sup>105</sup> *See* 47 C.F.R. § 80.371(c).

<sup>106</sup> That is, the Commission’s Universal Licensing System does not reflect any licenses for any co-channel Part 80 ship and private coast stations in the vicinity. However, it is possible that ship stations authorized under Part 80 – either pursuant to licenses with addresses outside the vicinity or on vessels that are licensed by rule – do or will operate on these frequencies in the vicinity, given the existence of at least one waterway in the area that is designated as navigable. *See* 47 C.F.R. § 80.13(c) (addressing ship stations licensed by rule). The spacing study, however, lists one Industrial/Business pool licensee on the Channel 84 frequency pair (157.225/161/825 MHz). *See* “Marine Showing.” *See infra* para. 47 and note 162, concerning Channel 84, formerly designated under Part 90.

<sup>107</sup> *See* File No. 0002806667, “Locations” and “Frequencies” tabs.

<sup>108</sup> *See* File No. 0002806667, attaching “LOC from State of MT” (Letter of Concurrence from Scott Bradford, State of Montana, State of Montana Public Safety Services Bureau) (filed Aug. 20, 2007) (Montana PSSB August 20, 2007 Concurrence Letter) (further stating that “all appropriate expense to remedy such interference shall be at the expense of [Silverbow].”).

<sup>109</sup> *See* Montana PSSB August 20, 2007 Concurrence Letter (stating that Montana PSSB “concur[s] . . . with the [Silverbow] application for the use of frequency 161.790 . . . at Red Mountain [Location 2]” but specifying that the concurrence “in no way limits [Montana] from further licensing and deploying spectrum within the state ([under call signs] WPOJ515 and WQAV770 . . .”). Montana also states that it “will not utilize new use of [its] adjacent [161.800 MHz] channel within 120 km of the Red Mountain site.” *See id.* (underlining in original).

<sup>110</sup> *Id.*

34. The second letter provides concurrence from Montana DOT with respect to two other Montana call signs that have locations that are potentially affected by Silverbow's proposed operations.<sup>111</sup> The final two letters provide concurrence from two other geographic area licensees for the VPC 156-162 MHz band. PacificCorp, the licensee for VPCSA 31, "consents to the use of frequenc[y] 161.790 MHz," providing that "[Silverbow] will correct any problems associated with the use of the [frequency] should any interference be encountered or caused to PacifiCorp's operations."<sup>112</sup> Also, Silverbow supplies a similar letter from Motorola, Inc., licensee on WQHE706 in VPCSA 12.<sup>113</sup> Motorola bases its concurrence "on the understanding that signal levels from [Silverbow's] communications system will be no greater than 5 dBu at the boundary of Motorola's licensed area."<sup>114</sup> Both Motorola and Silverbow agree that "operation by [Silverbow] . . . will be pursuant to [Section] 90.187, trunking under 512 MHz."<sup>115</sup> Based on the record, we therefore conclude that Silverbow will provide a level of interference protection on the requested channels so as to ensure interference-free inland maritime communications on a primary basis sufficient to support a waiver of Section 80.123.

35. Further, in the context of the first guideline in the *Coast Station Flexibility Order*, we address the potential interference risk to maritime communications from Silverbow's proposed operation on the requested ship and private coast station frequencies. We note that Section 80.123's requirement to provide priority to "marine-originating communications" does not extend to licensees authorized to use ship and private coast station frequencies, and Silverbow does not address this factor.<sup>116</sup> We find, however, that Silverbow's proposed measures to address potential interference from the requested frequencies are part of the same interference resolution plan as the requested adjacent VPC frequency<sup>117</sup> and, accordingly, demonstrate that Silverbow will be able to achieve an equivalent operational end that

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<sup>111</sup> See File No. 0002806667, attaching "LOC," (FCC Concurrence Letter from the Office of the Sheriff, Butte-Silverbow County, signed by Kevin Bruski, Communications Bureau Chief, Montana DOT and John Walsh, Sheriff, Butte-Silverbow County) (filed Nov. 2, 2006) (providing concurrence with respect to Montana's Call Signs KOA564 and KFV81, which have locations that are within VPCSA 30 but not under Montana's geographic area licensed Call Sign WPOJ516).

<sup>112</sup> See File No. 0002806667, attaching "LOC with PacifiCorp for 161.790 & 161.825" (filed Dec.4, 2008) (PacifiCorp December 4, 2008 Concurrence Letter). See also 47 C.F.R. § 80.317(c), accompanying table, specifying that VPCSA 31 is for Idaho Falls, ID. On August 25, 2008, Silverbow filed a contour showing for frequency 161.790 MHz, depicting that the 5 dBu contour overlapped VPCSA 31. Consequently, Silverbow obtained the PacifiCorp December 4, 2008 Concurrence Letter.

<sup>113</sup> See File No. 0002806667, attaching "FCC Concurrence Letter," (Letter of Concurrence from Stu Overby, Senior Director, Global Spectrum Strategy, Motorola, Inc., filed Aug. 12, 2008) (Motorola August 12, 2008 Concurrence Letter) (stating that "[Silverbow] will correct any problems . . . should any co-channel interference be encountered or caused by the construction or use of the new frequency." See also 47 C.F.R. § 80.317(c), accompanying table, specifying that VPCSA 12 is Bismarck, ND; VPCSA 12 includes parts of North Dakota, South Dakota, and a small section of eastern Montana; unlike VPCSA 31 – Idaho Falls, ID, VPSCA 12 is not adjacent to VPCSA 30, in which Silverbow County is located. See Commission's ULS licensing database, call sign, WQHE706. Silverbow's 5 dBu contour showing for frequency 161.790 MHz shows, that, except for overlapping VPCSA 31 in Idaho, this contour does not extend beyond VPCSAs 28, 29, and 30 in Montana. See Commission's ULS licensing database, State of Montana call signs, WPOJ515, WPOJ516, and WQAV770.

<sup>114</sup> Motorola August 12, 2008 Concurrence Letter.

<sup>115</sup> *Id.*

<sup>116</sup> Regarding the requested ship and private coast station frequencies, a waiver of Section 80.123, concerning public coast stations "affording priority to marine-originating communications[.]" is not required. See 47 C.F.R. § 80.123(b). See *Granite County*, 24 FCC Rcd at 5713-15 ¶¶ 22-24.

<sup>117</sup> See Amended Waiver Request at 5.

does not undermine the chief objective of the Part 80 rules to ensure that maritime communications are “transmitted immediately, reliably, and accurately.”<sup>118</sup>

36. Moreover, our independent engineering analysis confirms that, of the nine requested ship and private coast station frequencies, only one, frequency 157.000 MHz, is likely to create harmful interference to radio communications on co-channel or adjacent-channel VHF frequencies or to other licensees operating in Montana.<sup>119</sup> Silverbow seeks to operate on 157.000 MHz at two of six proposed locations,<sup>120</sup> while the State of Montana Department of Transportation (Montana DOT) is licensed to operate on an adjacent frequency, 156.990 MHz.<sup>121</sup> However, Silverbow submits a letter of concurrence from Montana DOT, stating that “should any interference problems arise as a result of Butte-Silver Bow using adjacent channel 157.00[0] [MHz], that [Silverbow] will take any and all responsibility for correcting the problems immediately.”<sup>122</sup> In light of this concurrence letter, we find that Silverbow has provided a sufficient showing to support granting a waiver with respect to all nine requested ship and private coast station frequencies.

37. *The distance of a proposed land mobile radio operation from the nearest navigable waterways.* We find that Silverbow meets this factor with regard to its requested ship and private coast station frequencies because there are no existing port, vessel traffic, or maritime control service areas in the license areas under consideration (and thus no authorized Federal operations).<sup>123</sup> With regard to frequency 161.790 MHz, we find that, although VPC geographic area licensees are permitted to operate in areas with no navigable waterways, Silverbow provides evidence of consent by potentially affected VPC licensees and a contour showing that depicts limited overlap of inland VPCSA adjacent to the inland VPCSA in which Silverbow will operate as a participant in the IM system.<sup>124</sup> We further note that the Commission has also found that, with respect to licensees’ operations in inland VPCSA, the demand to use VPC frequencies for maritime public correspondence communications “seems to be waning.”<sup>125</sup>

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<sup>118</sup> See generally *Coast Station Flexibility Order*, 22 FCC Rcd at 8991 ¶ 15.

<sup>119</sup> See “Marine Showing.”

<sup>120</sup> See File No. 0002806667, “Locations tab.”

<sup>121</sup> See Commission’s ULS database, listing the Montana DOT as authorized to operate on frequency 156.990 MHz under call sign KOA554.

<sup>122</sup> See File No. 0002806667, attaching “requested loc” (Statement of Concurrence by Montana DOT) (filed July 1, 2009) (Montana DOT July 1, 2009 Concurrence Letter) (noting that Montana DOT “operat[es] in . . . the vicinity of Butte, Montana on frequency 156.990 MHz” under call sign KOA554 and adding that Silverbow’s “responsibility would include any cost or actions . . . to correct the interference[,] . . . including moving to a different frequency.”). The Montana DOT July 1, 2009 Concurrence Letter also states that “[Montana has] no objections to [Silverbow’s] request to use the frequency 157.0000 MHz at locations 4 and 5 . . . .”

<sup>123</sup> In referring to the term “maritime control” as it relates to the ship and private coast station frequencies under Part 80, we clarify that we are not referring to AIS channels within the VPC band 156-162 MHz under Section 80.371(c). Regarding such waterways in Montana, case precedent has recognized that a high demand for maritime commercial communications or port operation communications does not exist within the state. See *State of Montana, Order*, 19 FCC Rcd 9816, 9818-19 ¶ 6 (WTB PSCID 2004) (*State of Montana*).

<sup>124</sup> See *supra* paras. 33-34.

<sup>125</sup> See *Coast Station Flexibility Order*, 22 FCC Rcd at 8977 ¶ 8 (noting the availability of cellular, PCS, and satellite services to mariners). See generally *AIS Second Report and Order*, 23 FCC Rcd at 13722-23 ¶ 17 (considering that “there is less maritime activity in inland VPCSA” (such as the ones that Montana is located in)).



38. *The magnitude of divergence from Part 80 technical requirements.* Given the site elevations for the proposed three fixed locations,<sup>126</sup> we find that the primary technical factor to evaluate here is the magnitude of divergence from the Part 80 power limitations.<sup>127</sup> Section 80.215 limits the transmitter output power of coast stations and mobile units in the 156-162 MHz band to 50 watts and 25 watts, respectively.<sup>128</sup> In contrast, Silverbow proposes to operate with a transmitter output power of 100 watts at three fixed locations and 100 watts for mobile units.<sup>129</sup> Given the Commission's guidance that "[r]elatively small variations" from Part 80 technical requirements "will be considered more favorably than large variations,"<sup>130</sup> we find that Silverbow has not specifically explained the impact of the magnitude of this variance concerning power limits on the risk of potential interference to inland maritime communications. In this connection, we also recognize that Silverbow has not submitted a showing sufficient to demonstrate why waiver relief of Sections 80.203, 80.205, 80.211, and 80.213 is warranted.<sup>131</sup> We find that Silverbow's spacing study and letters of concurrence lessen but do not completely remove our concern regarding the technical requirements of Sections 80.203, 80.205, 80.211, 80.213, and 80.215 in relation to a potential inference risk from Silverbow's proposed operation on the requested Part 80 maritime frequencies at its proposed locations under the requirements of Part 90. Accordingly, in light of our analysis of the other factors below, we will condition any waiver relief granted herein on Silverbow's complying with the Part 80 power limitations under Section 80.215 and other technical requirements under Sections 80.203, 80.205, 80.211, and 80.213, as may be applicable.

39. *Alternative spectrum is unavailable or unsuitable for the intended purpose.* For purposes of our Section 1.925 analysis, we find persuasive Silverbow's argument that "other spectrum allocations are not technically or economically feasible . . ." <sup>132</sup> and that it "must . . . establish an effective public safety communications system which interleaves into the State of Montana's Statewide public safety communications system . . ." <sup>133</sup> Concerning this statement, we note that the Montana State Interoperability Executive Council (SIEC) set the VHF high band as the standard for the statewide

<sup>126</sup> See File No. 0002806667, "Locations" tab (listing elevations of 1757.0 m for Location 1, 2704.0 m for Location 2, and 1742.0 m for Location 3). See also AASHTO Letter (referring to "proposed fixed transmitter locations [at] significantly higher [than] average terrain . . .").

<sup>127</sup> See generally *Coast Station Flexibility Order*, 22 FCC Rcd at 8986-87 ¶ 26.

<sup>128</sup> See 47 C.F.R. § 80.215(c)(1), (e)(1) (limiting ship stations in the VHF band to 25 watts).

<sup>129</sup> See File No. 0002806667.

<sup>130</sup> See *id.*

<sup>131</sup> Although the *Coast Station Flexibility Order* focused on providing greater flexibility to use maritime spectrum, namely VPC frequencies, for providing service to units on land, the Commission also emphasized that it was not affording "unfettered discretion to provide PLMR service pursuant to technical and service rules other than those contained in Part 80." *Coast Station Flexibility Order*, 22 FCC Rcd at 8971-72 ¶ 1. To ensure that this latter objective was adhered to, the Commission established the waiver guidelines, such as the salient third factor that focuses on the magnitude of divergence from Part 80 technical requirements. Also, the Commission has recognized the growing demand for maritime spectrum by PLMR licensees and end users, including public safety entities, that has arisen in recent years. Cf. *id.*; *State of Montana*, 19 FCC Rcd 9816, 9818-19 ¶¶ 6-8 (granting a waiver to use a ship and private coast station frequency without conditions; denying a request for an adjacent VPC frequency on other grounds); *County of Placer*, 20 FCC Rcd at 3660 ¶ 8 n.29, citing *Commonwealth of Virginia*, 18 FCC Rcd at 15454, and related Public Notices granting requests to allow the partitioning and disaggregation of VPC spectrum for use in public safety radio systems (citations omitted). Consequently, a detailed showing addressing the divergence from Part 80 power limits and other technical requirements strongly weighs in favor of granting a waiver request.

<sup>132</sup> Waiver Clarification at 2.

<sup>133</sup> *Id.* (stating that Silverbow is "part of the . . . Montana Interoperability VHF System . . ."). See also Amended Waiver Request at 4 (asserting Part 80 frequencies are needed for "interoperability capability").

interoperable system that Silverbow must follow.<sup>134</sup> In this regard, granting the County waiver relief will promote the public interest by permitting Silverbow to enhance its county-wide communications capability<sup>135</sup> and to integrate its proposed operations with Montana's statewide VHF system.<sup>136</sup> Also, we find tenable Silverbow's submission that spectrum other than the VHF band is unsuitable for purposes of its VHF system due to differences in propagation characteristics, weaker signal penetration, and the need more sites to cover the proposed service area. Silverbow states that the propagation characteristics of VHF frequencies will allow constructing a system "with fewer transmitters and with better signal penetration than . . . if [Silverbow] were required to use channels" in the 400, 700, and 800 MHz bands.<sup>137</sup> We also note Silverbow's reference to Montana's estimate that three to four times more sites would be required to provide comparable coverage using 700 MHz or 800 MHz technology.<sup>138</sup> Based on the above record, we therefore conclude that in Silverbow's case alternative spectrum is unavailable or unsuitable for the intended purpose of meeting the County's need for interoperability with the Montana statewide VHF system.

40. *Authorization of the proposed operation, and grant of the associated waiver(s), would benefit public safety or homeland security.* We find that Silverbow satisfies this criterion for the following reasons. First, Silverbow's operation on the Montana statewide system is in the public interest because that system is designed to "provide seamless communication for first responders."<sup>139</sup> Also, Silverbow states that "enhancing [Silverbow's] interoperability and increasing the effectiveness of [its] public safety and homeland security communications systems" will further improve its ability to partner with the I-15/90 Consortium, Montana, and Federal entities.<sup>140</sup> Further, as Silverbow notes, "the State will be able to avoid material lapses in public safety communications capabilities during system migration as well as meet the individual transition schedules and funding requirements of participating agencies."<sup>141</sup> Consequently, we find that granting the instant request will improve the interoperability and the public safety responsiveness of Silverbow with its public safety community partners—local and state agencies, Tribal Nations, and federal government users.<sup>142</sup> Silverbow adds that such partnering will contribute to spectrum efficiency.<sup>143</sup> Based on the record, we therefore find that granting the County's application will

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<sup>134</sup> See Amended Waiver Request at 3. However, given that the 700 MHz spectrum is now immediately available after the DTV transition on June 12, 2009, we would expect that any future planning by SIECs would take this availability into account and that, if there were solutions using 700 MHz spectrum that could meet public safety's needs, then we would not find it in the public interest to grant a waiver for proposed solutions that required the use of non-public safety spectrum, including Part 80 maritime frequencies in the VHF band.

<sup>135</sup> See Amended Waiver Request at 6.

<sup>136</sup> See Waiver Clarification at 2.

<sup>137</sup> Amended Waiver Request at 4.

<sup>138</sup> *Id.* (explaining that fewer sites using the VHF band are required "because VHF channels are less susceptible to attenuation from trees and foliage" and other variations in topography. VHF band transmissions "generally are able to: (1) diffract over hills and around other obstacles and (2) penetrate buildings more effectively . . . so as to reduce 'dead' spots within the service footprint.").

<sup>139</sup> File No. 0002806667, Consortia Letter.

<sup>140</sup> Amended Waiver Request at 6. Silverbow adds that operation on narrowband, 12.5 kHz channels "increases compatibility with federal systems, such as the United States Forest Service and other agencies as they also transition to narrowband operation." *Id.* at 3.

<sup>141</sup> *Id.* at 3.

<sup>142</sup> See *id.* at 4.

<sup>143</sup> See *id.* at 6.

serve the public interest by promoting flexible and efficient use of the spectrum and promoting safety of life and property through the use of radio communication.<sup>144</sup>

41. *Conditional Grant Concerning the Requested Part 80 Maritime Frequencies.* Based on our findings and review of the record, we conclude that the underlying purpose of Sections 80.105 and 80.373(f), concerning the ship and private coast station frequencies, and 80.106, 80.123, and 80.371(c), concerning frequency 161.790 MHz, would not be served or would be frustrated by application to instant case and that grant of the Waiver Request would be in the public interest. Because Silverbow has substantially addressed the waiver factors articulated by the Commission in the *Coast Station Flexibility Order*, we waive the above rule sections, as conditioned below, so that Silverbow may use the nine Part 80 ship and private coast station frequencies and the adjacent VPC frequency.

42. However, we are not persuaded that a waiver with respect to Sections 80.203, 80.205, 80.211, 80.213, and 80.215 is warranted in this instance, because Silverbow has not explained why the magnitude of the divergence of its proposed operating parameters from these technical requirements is necessary and justified. As observed above, although sufficiently material to support waiver relief, Silverbow's spacing study, contour studies, and representations regarding measures for interference protection do not eliminate our concern of potential inference risk posed by Silverbow's proposed operation of these Part 80 frequencies under Part 90's technical parameters.<sup>145</sup> We therefore condition Silverbow's use of the nine requested ship and private coast station frequencies and frequency 161.790 MHz on operating its fixed and mobile stations consistent with Part 80 power limitations, emissions masks,<sup>146</sup> and other Part 80 technical requirements.<sup>147</sup> Should Silverbow later prefer to operate on these frequencies under Part 90's technical rules, Silverbow may apply to modify its license; and we may then consider modifying this condition if Silverbow appropriately addresses the magnitude of divergence of its desired operating parameters from Part 80. We further condition Silverbow's waiver relief on (i) operating under the terms of the letters of concurrence from Montana DOT, Montana PSSB, Motorola, Inc., and PacifiCorp and (ii) protecting any maritime communications, including Coast Guard operations, from interference as set forth below.<sup>148</sup>

43. We emphasize that it is in the public interest to ensure that any primary maritime communications that occur in Montana are protected from interference. To provide the appropriate protection, we condition the County's authorization to use the requested maritime frequencies on providing interference protection to any current or future Coast Guard and other marine operations. Specifically, if the Coast Guard or licensees on Part 80 maritime frequencies report interference, Silverbow must take immediate steps to address and otherwise resolve any harmful interference experienced by any licensee, including, if necessary, immediate cessation of operations on the nine ship

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<sup>144</sup> 47 U.S.C. § 151.

<sup>145</sup> See *supra* para. 38.

<sup>146</sup> See *Coast Station Flexibility Order*, 22 FCC Rcd at 8986-87 ¶ 26.

<sup>147</sup> See 47 C.F.R. §§ 80.203, 80.205, 80.211, and 80.213. However, because Silverbow seeks to use the frequencies for private land mobile use to provide public safety services, certain Part 80 technical limitations, such as those on AMTS operations, would not be applicable. See, e.g., 47 C.F.R. § 80.215(h).

<sup>148</sup> Although under the United States Table of Frequency Allocations, frequencies 156.600, 157.000, 161.600, and 156.550 MHz are in a band that is allocated for non-federal use under the Commission's jurisdiction, we find that it is in the public interest to condition, as specified below, Silverbow's operations on protecting maritime communications, including Coast Guard operations, from interference. See 47 C.F.R. § 2.106, Table of Frequency Allocations. Although access by Federal stations, including the Coast Guard, to the above four frequencies is permitted, the allocation of the frequencies for non-federal use is within the Commission's jurisdiction. Cf. 47 C.F.R. § 2.105(d)(1), (5)(ii); 47 C.F.R. § 2.106, UNITED STATES (US) FOOTNOTES, US77 (noting that "Federal stations *may* also be authorized" for specified maritime uses) (emphasis added).

and private coast station frequencies and the adjacent VPC frequency.<sup>149</sup> We further expect that, through its capability for monitoring interference, Silverbow will coordinate with any geographic area licensees on VPC frequencies, the Coast Guard, and the State of Montana to ensure that all contemplated operations on the shared frequencies pose no potential for harmful interference to maritime communications.

### 3. Maritime VPC Frequencies Designated for Public Safety Use Under Part 90

44. Silverbow also seeks to operate on maritime frequency pairs 157.250/161.850 MHz (Channel 25) and 157.225/161.825 MHz (Channel 84).<sup>150</sup> As explained in paragraph 10 *supra*, Silverbow meets the eligibility requirements for both these channels. However, the Commission's rules limit transmitter power to a maximum of 50 watts for base stations and 20 watts for associate mobile stations.<sup>151</sup> The rules also limit antennas for base stations to 122 meters height above average terrain (HAAT).<sup>152</sup>

45. Silverbow requires a waiver of these limits because it proposes operating with a transmitter output power of 100 watts for fixed stations at various antenna heights and 50 watts for mobile units<sup>153</sup> at four out of its six proposed locations. Additionally, Silverbow requires a waiver of the parameters governing the minimum separation required from co-channel public coast stations under Section 90.20(g)(5)(iv).<sup>154</sup> Commission rules specify that applicants may seek to be licensed on these frequencies in excess of the specified limits if the applicant seeks a waiver of the limits and submits an interference analysis demonstrating that protected co-channel entities would receive the required level of protection.<sup>155</sup>

46. We analyze Silverbow's waiver requests of the power and antenna height limits in regard to its proposed operations on the Channel 25 and Channel 84 frequency pairs under the waiver criteria of Section 1.925.<sup>156</sup> We find that Silverbow's requests for waiver of Sections 90.20(g)(5)(ii) and (iv)<sup>157</sup> are warranted because application of these rules in the present case would not serve the underlying purpose of the rules; that is, to ensure efficient spectrum use by licensees and to prevent interference.<sup>158</sup> The specific

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<sup>149</sup> In the *State of Montana*, specific conditions were not imposed on the use of the frequency adjacent to the ship and private coast station frequency. *See generally State of Montana*, 19 FCC Rcd at 9818-19 ¶ 6. However, in participating in the I15/90 Consortium and the statewide Montana VHF system, Silverbow intends to share the requested maritime frequencies on wide area basis for public safety and homeland security communications. We find that such use demands a comprehensive approach to interference protection that requires Silverbow to closely scrutinize and diligently monitor all aspects of its trunked operations on the frequencies for harmful interference.

<sup>150</sup> *See* File No. 0002806667.

<sup>151</sup> *See* 47 C.F.R. § 90.20(g)(5)(ii) (requiring that the “[s]tation power [be] measured to the output terminals of the transmitter . . .”).

<sup>152</sup> *Id.*

<sup>153</sup> *See* File No. 0002806667, “Locations” and “Frequencies” tabs. At the fourth location, Location 5, Silverbow proposes to use 157.250 MHz and 157.225 MHz at an output power of 50 watts. *See id.*

<sup>154</sup> *See* 47 C.F.R. § 90.20(g)(5)(iv) and accompanying table (specifying the required minimum separations between the proposed base stations and the co-channel public coast stations license prior to July 6, 1988 under Part 80).

<sup>155</sup> *See* 47 C.F.R. § 90.20(g)(5)(vi).

<sup>156</sup> The waivers requested under the subsections of Section 90.20(g)(5) must be analyzed under the criteria of Section 1.925. *See* 47 C.F.R. § 1.925(b)(3).

<sup>157</sup> *See* Part 90 Waiver Request; Part 90 Waiver Clarification.

<sup>158</sup> *See, e.g., 2006 Biennial Review Wireless Telecommunications Bureau Staff Report*, 22 FCC Rcd. 3006, 3091 (2006)(*2006 Biennial Review*) (“The purposes of the Part 90 rules are to establish basic ground rules for assignment of spectrum in Part 90 services, to ensure efficient spectrum use by licensees, and to prevent interference.”).

purpose of Section 90.20(g) in providing authorization on the VPC channels under Part 90 is to protect incumbent coast station, public safety, and PLMR licensees (including by rule waiver) on maritime frequencies) from interference.<sup>159</sup> Based on analysis of the record, we are persuaded that, even with its proposed operation of base stations at greater than 50 watts with antenna heights greater than 122 meters and mobile units at greater than 20 watts, Silverbow either will create no risk of harmful interference to incumbent operators on the requested VPC frequency pairs or will implement measures to eliminate it.

47. Specifically, we find that Silverbow's contour studies show that, with one exception, at the proposed fixed base station locations for Channels 25 and 84, its operations will not cause interference to a non-public safety licensee in an adjacent VPCSA.<sup>160</sup> However, even though the contour study for frequency 161.825 MHz (that is part of Channel 84) at proposed Location 2 shows a contour overlapping a geographic area licensee in the adjacent inland VPCSA, VPCSA 31, Silverbow has submitted a Letter of Concurrence from the affected licensee, stating that Silverbow "will correct any problems . . . should interference be encountered or caused . . ." <sup>161</sup> Moreover, we concur with Silverbow's spacing study that shows no co-channel licensees within 200 kilometers of the proposed sites.<sup>162</sup>

48. We also find that the public interest will be served by allowing Silverbow to add these channels with the requested technical specification because these additional channels will enable Silverbow to upgrade its communications facilities and promote interoperability with its participation in Montana's IM system. Moreover, Silverbow has indicated that it will immediately address and resolve any instances of harmful interference and establish a procedure to do so. We note, however that in the event of interference the Commission may later require, without a hearing, that Silverbow "reduce power, decrease antenna height, and/or install directions antennas."<sup>163</sup> Also, Silverbow must operate its mobile stations "only within range of their associated base station."<sup>164</sup> Further, we condition the waiver relief on Silverbow's operations on Channel 84 causing no interference to AIS communications.<sup>165</sup>

#### IV. CONCLUSION

49. Based on the record before us, we conclude that Silverbow has not made the requisite showing for a waiver under Section 337(c) of the Act to use the Part 80 maritime frequencies that it requests. Moreover, we conclude that Silverbow has not shown that waiver relief under Section 1.925 of the Commission's rules is warranted to use VPC frequency 161.950 MHz, designated for public coast station use under 80.371(c).

50. We further conclude, however, that Silverbow has shown good cause under Section 1.925 for granting its requested waiver in part for the remainder of the requested frequencies. We find that

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<sup>159</sup> See 47 C.F.R. §§ 90.20(g)(4), (5)(iii).

<sup>160</sup> See Supplemental Part 90 Contours Amendment (depicting the 5 dBu contours at Location 3 for frequencies 157.250 and 161.850 MHz).

<sup>161</sup> Supplemental Letter of Concurrence from PacifiCorp (filed Dec. 4, 2008).

<sup>162</sup> See Supplemental Part 90 Contours Amendment (submitting additional spacing study). See also Marine Showing (listing one Industrial/Business pool licensee on the Channel 84 frequency pair (157.225/161/825 MHz) and operating at a distance exceeding 200 km from the location proposed).

<sup>163</sup> 47 C.F.R. § 90.20(g)(5)(v). Such action would be taken for any of Silverbow's base stations that are located as described in the rule. See *id.*

<sup>164</sup> *Id.*

<sup>165</sup> Case precedent has expressly conditioned the non-maritime use of the frequencies on there being no harmful interference to current or future marine communications, including but not limited to AIS. See *County of Placer*, 20 FCC Red at 3662 ¶ 12; *Commonwealth of Virginia*, 19 FCC Red at 15459 ¶ 10.

Silverbow satisfies the criteria set forth under Section 1.925 to warrant waivers of Sections 80.105 and 80.373(f), concerning the nine requested Part 80 ship and private coast station frequencies, and of Sections 80.106, 80.123, and 80.371(c), concerning adjacent VPC frequency 161.790 MHz, to permit Silverbow to modify its public safety communications PLMR system and operate on those maritime frequencies in the 156-162 MHz band. However, Silverbow has not demonstrated that a waiver of Sections 80.203, 80.205, 80.211, 80.213, and 80.215 is warranted. Accordingly, we limit Silverbow's operation to a maximum transmitter output power of 50 watts for base station and 25 watts for mobile units on Part 80 maritime spectrum, ship and private coast station frequencies 156.275, 156.325, 156.350, 156.500, 156.550, 156.600, 156.850, 157.000, and 161.600 MHz, and adjacent VPC frequency 161.790 MHz, to ensure interference protection to maritime communications and to Montana DOT on frequency 156.990 MHz.

51. Further, we find that Silverbow satisfies the criteria set forth under Section 1.925 to warrant a waiver of Sections 90.20(g)(5)(ii) and (iv), as specified by Section 90.20(g)(5)(vi). Thus, we conclude that Silverbow demonstrates that for the requested VPC channels 25 and 84, the requirements and conditions of Section 90.20(g) are met.

## V. ORDERING CLAUSES

52. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 337(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 337(c), that the Requests for Waiver as amended, associated with the File Nos. 0002806667 and 0002898490, filed by the Silverbow County, Montana, ARE DENIED to the extent that Silverbow County seeks relief under Section 337(c) of the Act.

53. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and to Section 1.925 of the Commission's rules, 47 C.F.R. § 1.925, the Request for Waiver as amended, associated with File No. 0002898490, filed by the Silverbow County, Montana, IS DENIED.

54. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and to Section 1.925 of the Commission's rules, 47 C.F.R. § 1.925, the Request for Waiver as amended, associated with File No. 0002806667, filed by the Silverbow County, Montana, to use the requested Part 80 maritime frequencies IS GRANTED IN PART, to the extent described and as conditioned herein.

55. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and to Section 1.925 of the Commission's rules, 47 C.F.R. § 1.925, the Request for Waiver as amended, associated with File No. 0002806667, filed by the Silverbow County, Montana, to use the requested Part 90 maritime frequencies IS GRANTED, to the extent described and as conditioned herein.

56. IT IS FURTHER ORDERED that File Nos. 0002806667 and 0002898490 SHALL BE PROCESSED in accordance with this *Order* and the Commission's rules.

57. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Beers  
Chief, Policy Division  
Public Safety and Homeland Security Bureau