

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

In the Matter of)
STATE OF MONTANA)
Request for Waiver of 47 C.F.R. § 90.20 to Permit) FCC File No. 0000602499
Station KA92875 to Operate on Frequencies)
156.990 MHz and 161.790 MHz)
Request for Waiver of 47 C.F.R. § 90.20 to Permit) FCC File No. 0000896907
Station KOA554 to Operate on Frequency 156.990)
MHz)

ORDER

Adopted: May 27, 2004

Released: May 28, 2004

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

1. Introduction. We have before us two applications¹ and associated requests for waiver of Section 90.20 of the Commission’s Rules² filed by the State of Montana (“Montana”) seeking to modify the licenses for two Public Safety Pool stations to add frequencies adjacent to certain Part 80 maritime frequencies. In particular, Montana requests waivers to permit Station KA92875, a mobile-only statewide license, to operate with a 20 kHz bandwidth on frequencies 156.990 MHz and 161.790 MHz, and to permit Station KOA554, Butte, Montana, to operate with a 20 kHz bandwidth on frequency 156.990 MHz. For the reasons stated below, we grant the requests for a waiver to permit the stations to use frequency 156.990 MHz, but deny the request for a waiver to permit Station KA92875 to use frequency 161.790 MHz.

2. Background. Montana is a governmental entity that conducts public safety communications. Section 90.20(c)(3) of the Rules sets forth the frequencies available for assignment to Public Safety Pool stations.³ Frequencies 156.990 MHz and 161.790 MHz, however, are not listed for assignment under this section of the Rules; rather, they are adjacent to frequencies governed by Part 80 of the Commission’s Rules. Specifically, Montana’s proposed use of frequency 156.990 MHz would overlap VHF maritime Channel 79A (156.975 MHz), which is used for maritime commercial communications, and VHF maritime Channel 20A (157.000 MHz), which is used for intership or ship-to-coast port operations communications.⁴ Further, Montana’s proposed use of frequency 161.790 MHz would overlap VHF maritime Channel 24B (161.800 MHz), the base transmit frequency of a VHF Public

¹ FCC File Nos. 0000602499 (filed Sept 25, 2001, amended Oct. 4, 2001, Feb. 8, 2002, and Sept. 24, 2003), 0000896907 (filed May 22, 2002, amended July 31, 2002).

² 47 C.F.R. § 90.20.

³ 47 C.F.R. § 90.20(c)(3).

⁴ See 47 C.F.R. § 80.373(f).

Coast (VPC) channel.⁵

3. In 1995, the Commission adopted rules that allowed the use of VPC frequencies, including Channel 24, by eligible private land mobile radio (PLMR) entities away from navigable waterways.⁶ In 1997, the Commission amended its rules to permit VPC licensees to serve fixed and mobile units on land, as well as maritime vessels.⁷ It also proposed to adopt a geographic licensing approach for VPC spectrum,⁸ and suspended the acceptance and processing of applications for new or expanded systems, including applications for PLMR use.⁹ In 1998, the Commission adopted a geographic licensing approach for VPC spectrum,¹⁰ adopted service and competitive bidding rules, and removed the rule allowing PLMR entities to be licensed on VPC spectrum.¹¹ The Commission conducted the initial auction of VPC geographic licenses in 1998, and conducted a second auction in 2001 for those licenses that were not assigned pursuant to the first auction.¹² The licenses for the VPC areas encompassing almost all of the state of Montana were granted to Warren C. Havens (Havens) on May 19, 1999.¹³ Licenses for the VPC areas covering the remainder of the state were granted to Maritel, Inc.¹⁴ and SMR Systems, Inc.¹⁵ on October 9, 2001.

4. In its waiver requests, Montana notes that its Department of Transportation (DOT) operates a statewide two-way radio system that already utilizes, *inter alia*, frequencies 156.990 MHz¹⁶

⁵ See 47 C.F.R. § 80.371(c).

⁶ See Amendment of the Commission's Rules Concerning Maritime Communications, *First Report and Order*, PR Docket No. 92-257, 10 FCC Rcd 8419, 8423 ¶ 9 (1995); see also 47 C.F.R. § 90.283 (1997).

⁷ See Amendment of the Commission's Rules Concerning Maritime Communications, *Second Report and Order and Second Further Notice of Proposed Rule Making*, PR Docket No. 92-257, 12 FCC Rcd 16969, 16965 ¶ 24 (1997) (*Public Coast Second R&O and Second FNPRM*); see also 47 C.F.R. § 80.123.

⁸ See *Public Coast Second R&O and Second FNPRM*, 12 FCC Rcd at 16989 ¶ 76.

⁹ See *id.* at 17015 ¶ 132.

¹⁰ Amendment of the Commission's Rules Concerning Maritime Communications, *Third Report and Order and Memorandum Opinion and Order*, PR Docket No. 92-257, 13 FCC Rcd 19853, 19859 ¶ 10 (1998) (*Public Coast Third R&O*).

¹¹ *Id.* at 19912. The Commission expressly declined a suggestion to permit the continued licensing of PLMR systems away from navigable waterways. See *id.* at 19871 ¶ 36. While VPC geographic licensees are required to protect pre-existing incumbent licensees from harmful interference, *id.* at 19863 ¶ 18; see also 47 C.F.R. § 80.773(b), incumbent operations may not be expanded without the consent of the affected geographic area licensee(s). *Public Coast Third R&O*, 13 FCC Rcd at 19864 ¶ 20.

¹² At the end of the initial auction, which concluded on December 14, 1998, bids were received for twenty-six of the forty-two VPC geographic area licenses. See VHF Public Coast Service Auction Closes, *Public Notice*, 14 FCC Rcd 480 (1998), Attachment C. The remaining sixteen VPC geographic area licenses were auctioned on June 13, 2001. See VHF Public Coast and Location and Monitoring Service Spectrum Auction Closes: Winning Bidders Announced, *Public Notice*, DA 01-1443 (rel. June 15, 2001).

¹³ See licenses for Call Signs WPOJ514, WPOJ515, and WPOJ516. We note that, subsequent to the filing of the above-captioned applications and waiver requests, Havens filed applications to assign to Montana Havens's VPC spectrum in Montana. See FCC File Nos. 0001662537, 0001662656 (filed Apr. 2, 2004). Those applications remain pending. The grant of those applications would not obviate the need for the present waiver requests, however, because Havens is not the only VPC licensee in Montana, and because Montana also has requested non-VPC Part 80 spectrum.

¹⁴ See license for Call Sign WPTI476.

¹⁵ See license for Call Sign WPTI483.

¹⁶ Specifically, Call Signs KOA555, Bozeman, Montana, KOA564, Helena, Montana, and KOU36, Lodge Grass, Montana, are authorized to operate on frequency 156.990 MHz. Montana also was authorized to use that frequency under Call Signs KOK28, Whitlash, Montana, and KON20, Libby, Montana, but those licenses were terminated on

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and 161.790 MHz¹⁷ under other call signs. It argues that the fact that the Commission granted those licenses is evidence that there are no alternate Public Safety Pool frequencies available.¹⁸ Montana further asserts that the justification for adding these two frequencies to the subject licenses is that they currently are licensed to Montana and not used by any other agency in Montana.¹⁹ Montana claims there are no other frequencies which can be used throughout the entire state, a feature which, it contends, is necessary because Montana DOT crews must have communications in all areas of Montana.²⁰

5. *Discussion.* To obtain a waiver of the Commission's Rules, a petitioner must demonstrate either that the underlying purpose of the rule(s) would not be served or would be frustrated by application to the present case and that grant of the waiver would be in the public interest;²¹ or that, in view of unique or unusual factual circumstances, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.²² We conclude that, under the circumstances presented, grant of a waiver is warranted with respect to frequency 156.990 MHz, but not with respect to frequency 161.790 MHz.

6. As noted above, frequency 156.990 MHz lies between frequency 156.975 MHz, which is used for maritime commercial communications (*i.e.*, communications to or from commercial transport vessels²³ that directly relate to the purposes for which the ship is used, including the piloting of vessels, movement of vessels, obtaining vessel supplies, and scheduling of repairs²⁴), and frequency 157.000 MHz, which is designated for intership and ship-to-coast port operations communications (*i.e.*, communications in or near a port, in locks or in waterways, which relate to the operational handling, movement and safety of ships²⁵).²⁶ The underlying purpose of Section 80.373(f) is to designate certain VHF channels for such communications in order that interference from other use is mitigated. We take

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March 11, 2003. (One of the waiver requests also lists Call Sign KOV26, but this station is assigned to the State of Idaho.) We note that licensees in the public safety radio services holding a valid authorization on June 30, 1958, to operate in the frequency band 156.27-157.47 MHz may, on proper application, continue to be authorized for such operation, including expansion of existing systems, until such time as harmful interference is caused to the operation of any authorized station other than those licensed in the public safety radio service. *See* 47 C.F.R. § 2.106 n.US266. Montana has not asserted that it is eligible under this provision to add frequency 156.990 MHz to the licenses for Stations KA92875 and KOA554 as an “expansion” of one or more of the other stations already licensed to use that frequency, and our licensing records do not reflect whether any of those stations was authorized on or prior to June 30, 1958.

¹⁷ Specifically, Call Signs KJV81, Dillon, Montana, KOA564, Helena, Montana, and WCC990, Salt Lake, Montana, are authorized to operate on frequency 161.790 MHz.

¹⁸ Letter January 31, 2002 from Larry A. Miller, Frequency Coordination Manager, American Association of State Highway Transportation Officials, to Federal Communications Commission.

¹⁹ *Id.*

²⁰ *Id.*

²¹ 47 C.F.R. § 1.925(b)(3)(i).

²² 47 C.F.R. § 1.925(b)(3)(ii).

²³ *I.e.*, ships used primarily in commerce for transporting persons or goods to or from any harbor(s) or port(s) or between places within a harbor or port area; or in connection with the construction, change in construction, servicing, maintenance, repair, loading, unloading, movement, piloting, or salvaging of any other ship or vessel. 47 C.F.R. § 80.5.

²⁴ *Id.*

²⁵ *Id.*

²⁶ 47 C.F.R. § 80.373(f).

notice of the fact that there is not a high demand for maritime commercial communications or port operations communications in Montana. Consequently, we conclude that Montana has shown that the underlying purposes of Section 90.20, for which Montana is seeking a waiver, and Section 80.373(f) would not be served by application to the circumstances presented and that granting the waiver is in the public interest, thereby warranting waiver of the rules. We believe that applying the rule in this case would not serve the purpose because licensing an adjacent frequency to Montana would create little risk of harmful interference to ship and coast communications. Further, we believe that granting the waiver of the rules on this frequency is in the public interest because the frequency would be used by Montana in connection with public safety communications.

7. With respect to frequency 161.790 MHz, however, we conclude that grant of a waiver would not be in the public interest. As noted above, frequency 161.790 MHz is adjacent to frequency 161.800 MHz, which is the base transmit frequency for VPC Channel 24. VPC licensees are permitted to serve units on land, as well as maritime vessels.²⁷ In addition, VPC geographic area licensees are permitted to operate in areas with no navigable waterways.²⁸ Because frequency 161.790 MHz falls within VPC Channel 24, the potential for interference to VPC operations from Montana's use of frequency 161.790 MHz is significant, particularly given that Montana is applying for a statewide authorization. We find that it significant that the record before us does not provide evidence to the contrary or consent by the affected VPC licensees. We conclude that Montana has not shown that the underlying purposes of Section 90.20, for which Montana is seeking a waiver, and Section 80.371 would be frustrated or not served by application to Montana's case and that granting the waiver is in the public interest. Therefore, based on the record before us, we find that granting the waiver for this frequency is not in the public interest under the circumstances presented.

8. *Conclusion.* In sum, we find that Montana has met the burden for grant of its waiver requests with respect to frequency 156.990 MHz, but not with respect to frequency 161.790 MHz. Consequently, we grant the request for waiver to permit Station KOA554 to use frequency 156.990 MHz. We grant in part and deny in part the waiver regarding Station KA92875; the waiver is granted with respect to frequency 156.990 MHz, but denied with respect to frequency 161.790 MHz.

9. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.925 of the Commission's Rules, 47 C.F.R. § 1.925, that the waiver request associated with application FCC File No. 0000602499 IS GRANTED IN PART and DENIED IN PART to the extent set forth above, and the application SHALL BE PROCESSED consistent with this *Order*.

²⁷ 47 C.F.R. § 80.123.

²⁸ *Public Coast Third R&O*, 13 FCC Rcd at 19866 ¶ 25; *see also* 47 C.F.R. § 80.371(c)(4) (permitting operation anywhere within the geographic licensee's region).

10. IT IS FURTHER ORDERED pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.925 of the Commission's Rules, 47 C.F.R. § 1.925, that the waiver request associated with application FCC File No. 0000896907 IS GRANTED, and the application SHALL BE PROCESSED consistent with this *Order*.

11. 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

D'wana R. Terry
Chief, Public Safety and Critical Infrastructure Division
Wireless Telecommunications Bureau