

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
) File Nos. 0001988156 and 0001988415
PacifiCorp)
)
and)
)
MariTEL Southern Pacific, Inc. and)
MariTEL Northern Pacific, Inc.)
)
Request for Waiver of Part 80 Rules to)
Permit Use of Maritime Frequencies for)
Private Land Mobile Radio Communications)

To: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

John M.R. Kneuer
Acting Assistant Secretary for
Communications and Information

Kathy Smith
Chief Counsel

Fredrick R. Wentland
Associate Administrator
Office of Spectrum Management

National Telecommunications and
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August 24, 2006

**Before the
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To: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

In accordance with Section 1.115(d) of the Federal Communications Commission's (Commission) rules, the National Telecommunications and Information Administration (NTIA) requests that the Commission deny the Application for Review filed by PacifiCorp challenging the July 10, 2006 Order issued in the above-captioned matter by the Chief, Public Safety and Critical Infrastructure Division, Wireless Telecommunications Bureau.¹ NTIA initially filed a Petition to Deny the subject applications because they would cause interference to frequencies used for Automatic Identification System (AIS) operations.² Since that time, the Commission designated VHF Channel 87B, a frequency at issue in this matter, exclusively for AIS

¹ *In re PacifiCorp and MariTel Southern Pacific, Inc. and MariTel Northern Pacific, Inc. Request for Waiver of Part 80 Rules to Permit Use of Maritime Frequencies for Private Land Mobile Radio Communications*, File Nos. 0001988156 and 0001988415, DA 06-1414 (rel. July 10, 2006) (the "Order").

² *See* Letter dated July 6, 2005 from Fredrick R. Wentland, Associate Administrator, Office of Spectrum Management, NTIA to Catherine Seidel, Acting Chief, Wireless Telecommunications Bureau (Petition to Deny).

operations.³ For the reasons discussed below, and explained more fully in the attached letter from the United States Coast Guard (Coast Guard), PacifiCorp's Application for Review should be denied.⁴

NTIA takes this opportunity to reiterate its concern over the use of waiver requests to reallocate frequencies. PacifiCorp requests a waiver of the maritime regulations in Part 80 of the Commission's rules to permit it to deploy land mobile operations under Part 90 of the Commission's rules. NTIA considers such waiver requests as an attempt to circumvent the FCC's rulemaking process by reallocating spectrum through the Commission's waiver procedures. As noted in the Petition to Deny, a grant of the requested waiver amounts to an impermissible reallocation of these frequencies from their primary maritime purpose to Private Land Mobile Radio (PLMR) use. As such, the waiver request greatly exceeds an *ad hoc* exception to the rule for which a rule waiver can be authorized.

PacifiCorp's Application for Review also fails to recognize the Commission's rules that permit certain *ex parte* presentations from the Federal Government. Specifically, the rules exempt presentations to or from an agency or branch of the Federal Government that involves a matter over which that agency and the Commission share jurisdiction.⁵ NTIA manages and authorizes the U.S. Government's use of the radio spectrum and, as such, shares jurisdiction

³ See Amendment of the Commission's Rules Regarding Maritime Automatic Identification Systems, Report and Order and Further Notice of Proposed Rulemaking and Fourth Memorandum Opinion and Order, WT Docket No. 04-344, RM-10821, PR Docket No. 92-257, FCC 06-108 (rel. July 24, 2006).

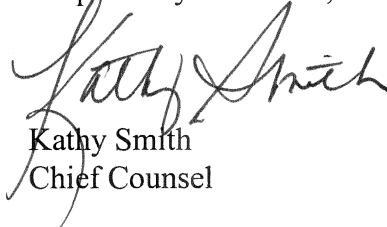
⁴ See Letter to Fredrick R. Wentland, Associate Administrator, Office of Spectrum Management, NTIA from Joseph D. Hersey, Chief, Spectrum Management Division, U.S. Coast Guard, Department of Homeland Security (August 24, 2006).

⁵ See 47 C.F.R. § 1.1204(5).

with the Commission over the regulation of all of the nation's airwaves.⁶ Any presentation to the Commission regarding the use of maritime frequencies is therefore exempt under the Commission's *ex parte* rules.

For the reasons stated above, and more fully addressed in the attached letter from the Coast Guard, NTIA respectfully urges the Commission to deny PacifiCorp's Application for Review.

Respectfully submitted,



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Chief Counsel

John M.R. Kneuer
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Dated: August 24, 2006

⁶ See 47 U.S.C. § 902(b)(2)(A); see also 47 U.S.C. § 305.

U.S. Department of
Homeland Security

United States
Coast Guard



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August 23, 2006

Mr. Fredrick R Wentland
Associate Administrator, Office of Spectrum Management
National Telecommunications and Information Administration
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Dear Mr. Wentland:

We reviewed the "Application For Review" ("AFR") submitted by PacifiCorp in connection with the FCC Decision to grant the PacifiCorp applications and waiver requests pursuant to certain conditions the USCG found acceptable. Just as the United States Coast Guard ("USCG" or "Coast Guard") was opposed to the waiver requests, it is similarly opposed to the AFR.

The USCG is opposed to the AFR filed by PacifiCorp challenging the July 10, 2006 Order issued by the Chief, Public Safety and Critical Infrastructure Division, Wireless Telecommunications Bureau ("WTB").¹ PacifiCorp's Application for Review should be summarily dismissed or, in the alternative, denied. The WTB's action in this proceeding was proper as it deemed that the public interest would be served by placing limited conditions on the grant of multiple waiver requests in order to protect the core purpose of the subject internationally allocated, internationally interoperable, frequencies: to promote the safety of life and property at sea and on our nation's waterways.

1. PacifiCorp's Application For Review is Procedurally Defective

Because PacifiCorp's AFR fails to concisely and plainly state the questions presented for review, fails to state with particularity the respects in which the action taken by the designated authority should be changed, and fails to state the form of relief sought, it is procedurally defective pursuant to the requirements of § 1.115 of the rules and should be summarily dismissed.

Pursuant to § 1.115 of the FCC's rules, an application for review must: (i) concisely and plainly state the questions presented for review;² (ii) state with particularity the respects in which the action taken by the designated authority should be changed;³ and, (iii) state the form of relief sought.⁴ In the subject Order, the WTB granted in part, and dismissed in part, PacifiCorp's multiple waiver requests. The Commission granted the assignment applications for the requested

¹ *In re PacifiCorp and MariTEL Southern Pacific, Inc. and MariTEL Northern Pacific, Inc. Request for Waiver of Part 80 Rules to Permit Use of Maritime Frequencies for Private Land Mobile Radio Communications*, File Nos. 0001988156 and 0001988415, DA 06-1414 (rel. July 10, 2006)(the "Order").

² 47 C.F.R. § 115(b)(1).

³ 47 C.F.R. § 115(b) 3)

⁴ 47 C.F.R. § 115(b)(4)

frequencies⁵ and the multiple waivers of Part 80 of the rules to permit private land mobile radio (“PLMR”) operations on VHF Public Coast (“VPC”) spectrum to be governed by Part 90 of the rules, as opposed to the Maritime Part 80 rules, in areas more than 20 miles from the Pacific Ocean and the Columbia River, on the express condition that no interference is caused to current or future marine communications.⁶

In its Application For Review, PacifiCorp does not present any questions for review. PacifiCorp presents argument headings and arguments, which could answer certain questions, but no questions are “concisely and plainly stated” in accordance with the rules. The rules require that questions be presented so that the Commission and other parties to the proceeding are not forced to “guess” what the AFR is requesting.⁷ Moreover, in its AFR, PacifiCorp states that the Commission’s “Order must be reversed and PacifiCorp’s applications and waiver should be granted as filed.”⁸ Because the Commission granted the license assignment applications, and the Commission granted the multiple rule waivers, subject to certain conditions, PacifiCorp’s AFR neither states “with particularity” the respects in which the action taken by the designated authority should be changed nor the form of relief sought. PacifiCorp seems to be requesting the impossible – if the Commission’s Order is reversed, as requested, it would not be possible to grant the applications and rule waivers. Furthermore, it is uncertain from a reading of PacifiCorp’s AFR what its position is on the condition that its communications not cause interference to present or future marine communications. The Commission might be able to infer that PacifiCorp is opposed to that condition, but the position is by no means clearly stated. While the Commission might be able to venture a guess as to what PacifiCorp is actually requesting in its AFR, the rules were designed to avoid such a guessing game when they specifically provide that the AFR shall concisely and plainly state with particularity what the AFR is requesting.

In *Dial-A-Page, Inc*⁹, the Commission indicated that an application for review that did not conform with § 1.115 of the rules should be dismissed. This was based on the Commission’s statement in *NAACP Legal Defense Fund*¹⁰ where the Commission found that the application for review under consideration presented only generalized arguments and issues for review were not “stated with particularity.” While the Commission ruled on the merits in that particular case, it gave clear direction concerning the filing of applications for review: “in the future we will look with extreme disfavor upon appeals to the Commission that are formulated in such a generalized manner.”¹¹

⁵ The grant excluded Channel 87B, an Automatic Identification System (“AIS”) frequency; however, PacifiCorp states that it is not challenging this exclusion, see PacifiCorp AFR at p.5, n.11.

⁶ Order, ¶ 12.

⁷ See *NAACP Legal Defense Fund*, 45 RR 2d 1705 (1979) n.7 (“The requirements that applicants state with particularity the basis for seeking Commission review provides important procedural protection to opposing parties, since they are thereby afforded reasonable notice of the basis upon which to formulate their own arguments to the Commission.”)

⁸ PacifiCorp AFR at 2.

⁹ 75 F.C.C. 2d 432 (1980).

¹⁰ 45 RR 2d 1505 (1979)

¹¹ *Id.* at n.7.

The AFR is also defective with relation to allegations of impermissible *ex parte* contacts. The Commission's *ex parte* rules provide, at §1.1214, that:

Any party to a proceeding . . . who has substantial reason to believe that any violation of this subpart has been . . . committed shall promptly advise the Office of General Counsel in writing of all the facts and circumstances which are known to him or her.¹²

Obviously, if PacifiCorp believes that an impermissible *ex parte* contact was made, the proper procedure is to notify the General Counsel's office, not to file an AFR. Furthermore, the appropriate remedy for violation of the *ex parte* rules is disqualification from further participation in the proceeding, have the offending party's claim "dismissed, denied, disregarded, or otherwise adversely affected."¹³ A violation of the *ex parte* rules does not mandate the reversal of a Commission Order as requested by PacifiCorp in its AFR. Accordingly, the AFR is not an appropriate vehicle to allege *ex parte* rule violations, nor is the remedy requested by PacifiCorp for the alleged violation appropriate. This provides yet another reason why the AFR should be summarily dismissed as procedurally defective.

2. Maritime Frequencies and PLMR Operations

PacifiCorp had requested a complex series of rule waivers that were granted, with some limitations. PacifiCorp requested waiver of the following rule provisions: 47 C.F.R. §§ 80.105 (general obligations of coast stations), 80.106 (intercommunication with ships and aircraft), 80.123 (affording priority to marine communications, transmitter power and height limitations), 80.203 (equipment certification and operations), 80.213 (modulation requirements), 80.371 (public correspondence frequencies) *and* "any additional Part 80 provisions the Commission deems necessary in order to operate the frequencies in a manner consistent with its current Part 90 licenses."¹⁴ As evidenced by its filing, PacifiCorp desires to operate Part 80 stations as Part 90 stations, not only in areas that are geographically removed from the Pacific Ocean and the Columbia River, but also up to and including approximately 450 miles of heavily traveled Pacific coastline and the Columbia River, which includes some of the busiest ports in the U.S. The WTB noted in its Order that "past requests have not involved the extensive coastal and major river coverage as that proposed [by PacifiCorp] herein."¹⁵

The VPC frequencies in question are governed by Part 80 of the Commission's rules which provide, among other things, that the maritime rules are in accordance with applicable statutes, international treaties, and agreements and recommendations to which the United States is a party, including, but not limited to the International Telecommunication Union Radio Regulations (which allocate the VPC frequencies internationally for maritime communications)¹⁶ and the International Convention for Safety of Life at Sea ("SOLAS") Convention¹⁷ (signatories to SOLAS will make available shore-based facilities for maritime mobile service in the band

¹² 47 C.F.R. §1.1214.

¹³ 47 C.F.R. § 1.1216.

¹⁴ PacifiCorp, *Request for Waiver of Various Part 80 Rules to Operate VPC Stations as Part 90 PLMR Stations*, Application File Nos. 0001988156 and 0001988415.

¹⁵ Order at ¶ 6.

¹⁶ See *International Telecommunication Union Radio Regulations*, Appendix 18.

¹⁷ See 47 C.F.R. § 80.1.

between 156 MHz and 174 MHz)¹⁸. The VPC frequencies involved in this proceeding represent the last internationally interoperable maritime radio spectrum available in the United States.¹⁹ Because of the importance of these frequencies for maritime communications to promote the important national public interest in maritime safety and homeland security, these frequencies must be protected and preserved for current and future maritime use.²⁰ While § 80.123 of the Commission's rules (47 C.F.R. § 80.123) does provide for service to stations on land there are carefully crafted rule provisions that create limits on such operations, including transmitter power and antenna height limitations, and required safety watches in order to protect the primary and priority marine communications. PacifiCorp sought waivers of these very rule provisions.

The Commission has previously held that while the public interest would be served by giving licensees more flexibility in the use of the VPC maritime spectrum by allowing certain land mobile operations, the **core purpose** of this of this internationally allocated radio service spectrum -- to promote the safety of life and property at sea -- must be maintained.²¹ The Commission has specifically discussed arguments relating to expanded use of VPC frequencies. In rejecting a proposal to reallocate the VPC frequencies for PLMRS use, the Commission stated:

[W]hen the Commission permitted VPC stations to serve units on land, and again when it converted VPC licensing to a geographic approach, it remained committed to maintaining the core purpose of the Maritime Services-providing for the unique distress, operational, and personal communications needs of vessels at sea and on inland waterways. We recently reiterated this commitment in another proceeding, when we rejected Maritel's suggestion that the watch requirement be modified for VPC stations that serve units on land. We are concerned that implementation of Maritel's proposed rule changes would undermine that purpose by, in effect, reallocating Part 80 spectrum for primary land mobile radio use. That demand for VHF maritime public correspondence services has decreased does not decrease our commitment to marine safety. We recognize that upwards of ten million U.S. and foreign mariners in American waters have radios that operate in this spectrum, and we further recognize the importance of ensuring that there remains adequate, available internationally-interoperable spectrum to the American maritime public to meet their common needs, and for purposes of safety and security. Although we are here proposing to relax the Part 80 regulations to allow for more efficient use of the spectrum, we are not

¹⁸ SOLAS Regulations, Chapter 4, Reg. 5.1.3.

¹⁹ These frequencies are allocated on an international basis for port operation, ship movement, and public correspondence, see *International Telecommunication Union Radio Regulations*, Appendix 18.

²⁰ See *In re Commonwealth of Virginia Request For Waiver of Part 80 Rules to Permit Use of Maritime Frequencies For Private Land Mobile Communications*, FCC File Nos. 0001583565, 0001583569, DA-04-2516 (rel. Aug. 12, 2004) ¶ 10; *In re County of Placer, California, Warren C. Havens, and MariTEL Southern Pacific, Inc. Request for Waiver of Part 80 Rules To Permit Use of Maritime Frequencies For Private Land Mobile Radio Communications*, File Nos. 0001750425, 00017754000, 0001791005, 0001823171, DA 05-437 (rel. Feb. 16, 2005) ¶ 15.

²¹ 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 16949, ¶ 1 (1997).

considering actions that would effectively create a *de facto* reallocation or otherwise remove this spectrum from the maritime community.²²

The Commission should consider the foregoing procedural background if it decides to review the WTB's Order in this proceeding.

3. The WTB's Order Is Not Arbitrary, Capricious or An Abuse of Discretion

The instant AFR involves a request for a rule waiver. In this proceeding, the WTB found, in accordance with §1.925, that subject to the limitations imposed, the underlying purpose of the subject rules would not be served by application to the instant case, and a grant of the waiver, as conditioned, would be in the public interest.²³ Implicit in this decision is the fact that the WTB also found a grant of the waiver without the limitations imposed would not serve the public interest. Therefore, if the Commission reviews the WTB Order, the question for consideration must focus on whether the WTB properly considered and explained its public interest findings. Because this is not a rulemaking proceeding, the WTB has latitude to make determinations it believes are in the public interest without seeking or relying on comments, so long as it explains its reasoning.

Reviewing courts have found that an agency's action is neither arbitrary nor capricious so long as the agency examines the relevant data and articulates a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.²⁴ The examination is limited to determining whether the agency considered the relevant factors and offered a rational explanation for its chosen policy.²⁵ An agency's explanation need not be of "ideal clarity," but need simply rationally connect the facts found and the agency's choice. An agency has never been required to respond to each and every comment, or to analyze every issue or alternative raised in the proceeding.²⁶ In a recent decision challenging the denial of a waiver by the Commission, the D.C. Circuit held that its review was extremely limited, and that it vacated waiver denials only when "the agency's reasons are so insubstantial as to render that denial an abuse of discretion."²⁷

The WTB Order clearly and succinctly considered the relevant factors involved in this proceeding and offered a rational explanation for its chosen policy. The WTB explained that

²² MariTEL, INC. and Mobex Network Services, LLC, *Notice of Proposed Rule Making*, WT Docket No. 04-257, 19 FCC Rcd 15225 (2004), ¶ 13.

²³ *Order*, ¶ 5. 47 C.F.R. § 1.925(b)(3) provides that to grant a waiver the Commission must find that (a) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and grant of the requested waiver would be in the public interest; or, (b) in light of unique or unusual circumstances, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative. 47 C.F.R. § 1.925(b)(3); *see also WAIT Radio v. FCC*, 418 F. 2d 1153, 1159 (D.C. Cir. 1969).

²⁴ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Reyblatt v. NRC*, 105 F.3d 715, 722 (D.C. Cir. 1997).

²⁵ *United States Air Tour Ass'n v. FAA*, 298 F.3d 997, 1005 (D.C. Cir. 2002).

²⁶ *See Thompson v. Clark*, 741 F.2d 401, 408 (D.C. Cir. 1984).

²⁷ *ICO Global Communications v. FCC*, 428 F. 3d 264, 269 (D.C. Cir. 2005); *citing BDPCS, Inc. v. FCC*, 351 F. 3d 1177, 1181-82 (D.C. Cir. 2003) (*citing Mountain Solutions, Ltd. V. FCC*, 197 F.3d 512 (D.C. Cir. 1999)).

while, on the one hand, this request was similar in many respects to other waiver requests, it was, on the other hand, very different due to the extensive coverage of the Pacific coastline (approximately 450 miles) and the Columbia River (with some of the busiest ports in the country) (*Order*, ¶ 6). The WTB discussed the USCG propagation analysis, and indicated that there was disagreement over whether there would be interference from the proposed operations, and noted it was suggested that there are other ways to mitigate interference (*Order* ¶ 7). The WTB then went on to discuss the setbacks provided for in the in response to the *Commonwealth of Virginia* waiver request and noted that the 20-mile geographic setback proposed by MariTEL and PacifiCorp was substantially less than the setback deemed insufficient in Virginia for the use of AIS Channel 87B, and indicated it recognized the importance of interference free AIS operations and other maritime communications (*Order* ¶ 8). With respect to other VPC channels, the WTB indicated it believed there should be some setbacks in response to the instant waiver request, and indicated that those setbacks be 20 miles from the coast and the Columbia River (*Order* ¶ 9). Thus, the WTB found that the 20-mile setback proposed by PacifiCorp was inadequate to protect AIS operations but, the 20-mile setback coupled with the condition applied in other similar waivers that no interference be caused to current or future maritime communications would be adequate to protect other maritime communications (*see Order* ¶10).

PacifiCorp presents several arguments as to why the WTB Order is arbitrary, capricious, and an abuse of discretion. Because PacifiCorp failed to comply with the rules requiring concise and plainly stated questions for review, it raised several arguments, many of which are irrelevant to a review of the WTB decision. As is evident from a review of PacifiCorp's Request for Waivers, its arguments largely represent the same arguments raised in that request. PacifiCorp's relevant arguments in its AFR revolve around the 20-mile setback and technical proposals to mitigate interference. An examination of PacifiCorp's arguments reveals that the Commission considered all of the issues raised by PacifiCorp and, in acting on the rule waiver requests in accordance with the public interest requirements of § 1.925 of the rules, considered the relevant factors and offered a rational explanation for its decision.

PacifiCorp alleges that the 20-mile setback adopted by the Commission was not suggested anywhere in the record, and that the setback was, therefore, arbitrarily adopted without any reasoned explanation. This 20-mile setback was, in fact, suggested by PacifiCorp in its waiver request as that was the setback suggested to protect MariTEL's operations on maritime Channels 85 and 87, the two channels MariTEL was maintaining for maritime communications.²⁸ Evidently, PacifiCorp believed that a 20-mile setback was necessary to protect maritime communications. While PacifiCorp did suggest additional technical parameters along with the 20-mile setback, the WTB explained it believed that the 20-mile setback, coupled with the condition that PacifiCorp not cause interference to current or future maritime communications would protect maritime communications and therefore serve the public interest.²⁹ In making this finding, the Commission noted that there was disagreement over whether there would, in fact, be interference from the proposed operations, and explained that there were various proposals presented to mitigate interference.³⁰

²⁸ See e.g. PacifiCorp AFR, pp. 3, 4.

²⁹ See *Order*, ¶¶ 8-10.

³⁰ *Id.* At ¶ 7. PacifiCorp also alleges that the WTB's decision was arbitrary and capricious because it failed to acknowledge or cite PacifiCorp's Opposition, specifically with respect to "technical alternatives" proffered by

4. The USCG Did Not Engage in Impermissible *Ex Parte* Contacts

PacifiCorp alleges that the USCG made impermissible *ex parte* contacts with the FCC staff. Even assuming for the sake of argument that such contacts were made, these contacts would be exempt under the Commission's *ex parte* rules. Section 1.1204(5) of the Commission's rules provides an exemption for *ex parte* presentations where the Federal agency making the presentation shares jurisdiction with the FCC.³¹ Section 80.2 of the rules, relating to "Other regulations that apply" specifically provides that "The Commandant, U.S. Coast Guard has promulgated regulations which affect radio telecommunication equipment carriage . . . requirements for certain ships."³² The USCG is a military service³³ responsible for, among other things, promulgating and enforcing regulations for the promotion of safety of life and property on the high seas and waters subject to the jurisdiction of the U.S.³⁴ In furtherance of its mission, the USCG has promulgated rules requiring the carriage of equipment operating within the 156-162 MHz frequency band to provide for communications with public coast stations.³⁵ The USCG also actively participates in the formulation and adoption of treaties, agreements and recommendations of the ITU and SOLAS, to which Part 80 of the Commission's rules are subject.³⁶

Furthermore, the International Maritime Organization ("IMO") has noted that distress and safety communications with stations operated by the USCG are insufficient in themselves for ensuring the safety of vessels for which the USCG (and the Commission) is responsible.³⁷ Participation in this proceeding by the USCG is specifically related to its functions of protecting the safety of life and property, and protecting the safety and security of navigation in our nation's waterways. The USCG is not seeking spectrum for its own uses as alleged by PacifiCorp; rather the USCG's interest in this proceeding is to ensure that the spectrum needs of the maritime community to whom it is responsible, are and will continue to be met. As noted earlier and as recognized by the Commission, the spectrum addressed in this proceeding is the last remaining internationally interoperable spectrum available in the United States. Any Commission decision concerning these frequencies affects the overall USCG mission, which includes, but is not limited to, matters concerning military operations and functions, homeland security, safety of life and property on the waterways, and the safety and security of navigation.

PacifiCorp. Other than mentioning that "technical alternatives" were proffered, PacifiCorp offers no explanation of how these alternatives would have had a bearing on the WTB's decision. While the WTB did not cite the Opposition, it did indicate in its *Order* that there were several proposals presented for interference mitigation (*Order*, ¶ 7). So, the fact that the Opposition was not cited does not mean that the proposals were not considered by the WTB in making its public interest finding.

³¹ 47 C.F.R. § 1.1204(5).

³² 47 C.F.R. 80.2.

³³ See 14 U.S.C. § 1.

³⁴ See 14 U.S.C. § 2.

³⁵ See 46 C.F.R. 28.245(a)(1) ("Each vessel must be equipped with a VHF radiotelephone capable of transmitting and receiving on the frequency or frequencies within the 156-162 MHz band necessary to communicate with a public coast station . . .").

³⁶ See 47 C.F.R. § 80.1.

³⁷ See SOLAS Regulations, Chapter IV, Regulation 4.1.8 ("Every ship, while at sea shall be capable of transmitting and receiving general radiocommunications to and from shore-based radio systems . . .")

Based on the foregoing, it is clear that the USCG shares jurisdiction over the subject matter involved in this proceeding. If an *ex parte* contact were made, it would be exempt under the Commission's rules.

PacifiCorp next argues that even if an *ex parte* contact is exempt, there must be a disclosure by the Commission.³⁸ This is not completely accurate because the rule provision only requires "new factual information" to be disclosed.³⁹ PacifiCorp does not provide an explanation of what "new" information it believes was involved. A review of the formal pleadings filed demonstrates that everything the WTB relied upon in its Order was contained in those filings. As discussed previously, the notion of a 20-mile setback (which PacifiCorp alleges was inserted at the behest of the USCG) was introduced by MariTEL and PacifiCorp in their filings as that which was necessary to protect the maritime communications that MariTEL would be providing. It is quite reasonable for the Commission to conclude that a 20-mile setback would be necessary to protect all maritime communications – and that conclusion could be drawn from the record.

PacifiCorp also argues that because the USCG is a "party" in the proceeding, it is not entitled to an exemption in accordance with § 1.1204(a)(6).⁴⁰ This rule provision relates to specific parties and proceedings only, and is not a general overall prohibition. Obviously, if the Commission had intended to make this provision applicable in all circumstances, it would not have singled out these parties and proceedings. Therefore, this provision is inapplicable to this proceeding.

Accordingly, there has been no impermissible *ex parte* contact by the USCG. As discussed previously at Section 1. herein, an AFR is not the proper vehicle to bring this issue to the attention of the Commission, and even if a violation of the *ex parte rules* occurred, it would not trigger an automatic reversal of the WTB's decision as suggested by PacifiCorp.

For all of the foregoing reasons, the United States Coast Guard believes that PacifiCorp's Application For Review should be summarily dismissed or, in the alternative, denied in all respects.

Sincerely,



JOSEPH D.H ERSEY, Jr.
Chief, Spectrum Management Division
By Direction of the Commandant

³⁸ PacifiCorp AFR 21.

³⁹ 47 C.F.R. 1.1204(a)(5).

⁴⁰ PacifiCorp AFR 21-22.

CERTIFICATE OF SERVICE

I, Milton Brown, do hereby certify that on this 24th day of August 2006, the foregoing opposition to PacifiCorp's Application for Review was served on the following persons (via hand-delivery or first class mail, postage pre-paid)

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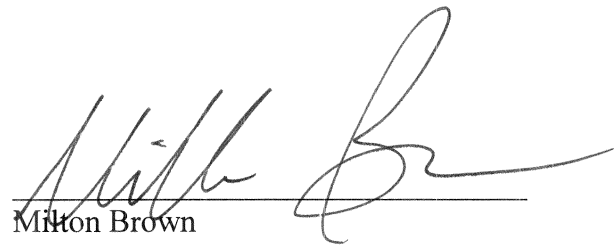
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