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September 15, 1997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

92-257

Dear Mr. Caton:

Enclosed, on behalf of WJG MariTEL, are an original and four copies of its Emergency Request for Stay and Application Freeze.

Should there be any questions in connection with this transmittal, please do not hesitate to contact the undersigned.

Sincerely,



Jocelyn R. Roy

Enclosures

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

SEP 15 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of the)	
Commission's Rules Concerning)	PR Docket No. 92-257
Maritime Communications)	
)	
Licensing of Private Land Mobile)	
Radio Spectrum Pursuant to Section)	
90.283 of the Rules)	

To: The Commission

**EMERGENCY REQUEST FOR STAY
AND APPLICATION FREEZE**

WJG MariTEL Corporation ("MariTEL") by its attorneys and pursuant to Section 1.44(e) of the Rules and Regulations of the Federal Communications Commission ("FCC" or "Commission"),^{1/} hereby requests a stay of the licensing, and a freeze on the acceptance of applications in the Private Land Mobile Radio ("PLMR") Service, pursuant to Section 90.283 of the Rules pending the conclusion of PR Docket No. 92-257 (the "Maritime Proceeding"), which is designed to consider a new licensing scheme for channels in the maritime service. Section 90.283 governs the interservice-sharing of VHF public coast station frequencies in the 156-162 MHz band by entities eligible in the PLMR service. MariTEL is concurrently submitting comments in PR Docket No. 92-257 opposing, among other things, the continued licensing of this spectrum to PLMR users. In order not to burden the record, MariTEL respectfully requests

^{1/} 47 C.F.R. § 1.44 (e) (1997).

that the Commission incorporate the factual background and arguments raised therein by reference.^{2/}

I. DISCUSSION

In *Virginia Petroleum Jobbers Association v. FPC*^{3/} the U.S. Court of Appeals enumerated the factors necessary to justify a request for stay: (1) whether the petitioner made a strong showing that it is likely to prevail on the merits; (2) whether the petitioner has shown that without such relief, it will be irreparably injured; (3) whether the issuance of a stay will substantially harm other parties interested in the proceedings; and (4) where the public interest lies. In *Washington Metropolitan Area Transit Commission v. Holiday Tours*^{4/} the same court noted further that when the second, third and fourth factors strongly favor interim relief, a tribunal may exercise its discretion to grant a stay “if the movant has made a substantial case on the merits.”^{5/}

A. MariTEL is likely to prevail on the merits

As noted in MariTEL’s comments, the purpose of the Commission’s actions in the Maritime Proceeding is to promote regulatory symmetry between providers of maritime services and other commercial mobile radio service (“CMRS”) in order to encourage effective competition by maritime service licensees. To date, maritime users have been unable to compete effectively because of regulatory impediments not imposed on other CMRS licensees. The Commission’s actions in the Maritime Proceeding are designed to relax these impediments. An

^{2/} MariTEL’s arguments concerning the licensing of PLMR spectrum begin on page 7 of its comments.

^{3/} 259 F. 2d 921, 925 (D.C. Cir. 1958).

^{4/} 559 F. 2d 841, 843 (D.C. Cir. 1977).

^{5/} The Commission has stated that when it considers a request for stay it also uses the four-factor test established in *Virginia Petroleum Jobbers Association v. FPC*. See *In the Matter of Price Cap Regulation of Local Exchange Carriers Rate-of-Return Sharing and Lower Formula Adjustment*, 10 FCC Rcd 11979, 11986 (1995).

important element of achieving parity between the maritime services and other CMRS providers is the Commission's plan to make sufficient spectrum available to maritime licensees. The continued licensing of this spectrum to PLMR licensees is antithetical to that goal.

In the Maritime Proceeding, the Commission initially contemplated adopting a plan for allowing maritime licensees to share 400 kHz of land mobile spectrum, based upon two premises: 1) certain channels allocated domestically to the PLMR are allocated internationally to the maritime services; and 2) few PLMR licensees were operating from fixed locations within 80 km of the U.S. coastline. However, in response to opposition from some commenting parties and the subsequent introduction of a narrowband channel and consolidation plan in the PLMR Service, the Commission declined to adopt rules to allow the proposed intercategory sharing of spectrum between the maritime service and PLMR service. The Commission's decision not to permit sharing of PLMR spectrum by maritime users was based, at least in part, on the potential introduction of market-based forces in the licensing of PLMR spectrum.^{6/} Because the FCC has proposed to award maritime spectrum on a geographic area basis, the Commission should similarly prohibit PLMR users from sharing maritime spectrum.

Moreover, continued licensing on a site-specific basis in instances where the FCC has proposed geographic licensing is inconsistent with the Commission's prior practices.^{7/} As the

^{6/} *Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignments Policies of the Private Land Mobile Services*, PR Docket No. 92-235, *Report and Order and Further Notice of Proposed Rule Making*, 10 FCC Rcd 10096, *Second Report and Order* (released March 12, 1997).

^{7/} *See e.g. Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems*, WT Docket No. 96-18, *Notice of Proposed Rulemaking*, 11 FCC Rcd 3108, 3136-37 (1996) ("*Notice*") (suspending acceptance of new applications for paging channels as of February 8, 1996); *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988, 8047-48, (1994) ("*CMRS Third Report and Order*") (suspending the acceptance of applications for 800 MHz SMR channels).

Commission has previously acknowledged, in order for spectrum to be of maximum utility to the auction winner, there should be an identifiable landscape of co-channel licensees, prior to the initiation of the auction. The only way to achieve this goal is to cease licensing PLMR users on the VHF public coast station channels and, further, to require existing licensees to register their sites and provide a map of their coverage areas to the regional public coast station licensee in order to receive co-channel protection. Without this action, licensees in the maritime service will remain at a competitive disadvantage *vis a vis* other CMRS providers, contrary to the Commission's ultimate goal of regulatory parity.

B. MariTEL and other maritime licensees will be irreparably harmed if a stay is not issued

If a stay of the intercategory licensing of VHF public coast spectrum is not granted prior to the auction of maritime spectrum, MariTEL and other public coast station licensees will be irreparably harmed. As noted above, licensees in the maritime service have been at a competitive disadvantage because of the dissimilarity in their regulatory treatment. In order to compete effectively and provide innovative service to the public, they must be able to access all available spectrum. If the Commission continues to permit PLMR licensing on maritime service spectrum, there may be little spectrum available for licensing during the auction process.^{8/}

Further, the Commission has consistently ceased the site-specific licensing of spectrum proposed to be licensed on a geographic-area basis in order to allow winning bidders to achieve the maximum future benefit accompanying the award of a geographic license. To continue to

^{8/} MariTEL is aware that PLMR use of maritime spectrum is only permitted at distances far from public coast stations and navigable waterways. Nevertheless, the FCC intends to license this spectrum on a geographic-area basis throughout the U.S., in both land-based and marine environments. Continued licensing of the spectrum by entities eligible in the PLMR service will significantly reduce the utility of the geographic-area license to the auction winner.

license VHF public coast spectrum by PLMR entities on a site-specific basis prior to the start of an auction would be to treat maritime applicants differently from other geographic based applicants in other services in contravention to law.^{9/}

C. Issuance of a stay will not cause harm to any other party

Neither the FCC, nor any other party, will be injured by a freeze on the acceptance of PLMR applications for VHF public coast station frequencies. Entities in the PLMR service have access to spectrum other than maritime frequencies to meet their communications requirements. In fact, new rules in the FCC's "refarming" proceedings are about to make additional channels available to entities eligible in the PLMR service.^{10/} On the other hand, prospective bidders and incumbent licensees will not be able to fully evaluate the use of the existing spectrum and develop strategies to make the most efficient use of the spectrum available without a freeze. To continue to license spectrum, pursuant to Section 90.283, will only ensure that potential bidders will not have an accurate picture of the landscape or the interference protection to be afforded to incumbent licensees.

D. Issuance of the relief sought is in the public interest

As noted above, the issuance of a freeze on the acceptance of applications for VHF public coast station channels from PLMR users will assist in the Commission's ability to maximize the maritime spectrum available for licensing and provide a clear picture to potential bidders regarding the value of the spectrum they will seek to acquire. In addition, a freeze on the

^{9/} See *Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965) (requiring the Commission to treat similarly situated parties in a similar manner).

^{10/} *Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignments Policies of the Private Land Mobile Services*, PR Docket No. 92-235, *Report and Order and Further Notice of Proposed Rule Making*, 10 FCC Rcd 10096, *Second Report and Order* (released March 12, 1997).

licensing of VHF public coast station frequencies will assist the Commission in its goal of achieving regulatory parity between maritime licensees and other CMRS providers, thereby encouraging the development of innovative services to the boating public, including those services related to maintaining safety and assisting in emergency situations.

II. CONCLUSION

MariTEL has demonstrated herein that it satisfies all of the criteria necessary to warrant a stay of the licensing of VHF public coast station frequencies to PLMR users pursuant to Section 90.283 of the rules. First, the continued licensing of this spectrum is inconsistent with the Commission's actions regarding the geographic licensing of spectrum in other services in similar proceedings. Second, MariTEL and other maritime licensees and potential bidders will be irreparably harmed absent a stay. Licensing VHF public coast spectrum to PLMR users decreases the spectrum pool available to maritime licensees, thereby reducing the amount of spectrum maritime licensees will have available to offer services to the public. Third, issuance of the requested stay will not harm the FCC or another party; in fact a stay will assist existing and potential maritime licensees in obtaining a clear picture of the licensing landscape. Finally, issuance of a stay would be in the public interest. A stay will assist the Commission in achieving its goal of regulatory symmetry among all CMRS providers and speed the development of new and competitive services to the public .

WHEREFORE, for all of the foregoing reasons, WJG MariTEL respectfully

requests that the Commission grant its emergency request for stay and application freeze.

Respectfully submitted,

By: 

Russell H. Fox

Jocelyn R. Roy

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(202)408-7100

Dated: September 15, 1997

CERTIFICATE OF SERVICE

I, Barbara N. Haile, a secretary in the law firm of Gardner, Carton & Douglas, hereby certify that a true and correct copy of the foregoing Emergency Request for Stay and Application Freeze were sent via hand delivery, this 15th day of September, 1997, to each of the following:

Mr. Dan Phythyon
Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, Room 5002
Washington, DC 20554

Mr. David Horowitz
Deputy Chief
Wireless Telecommunications Bureau
Federal Communications Commission
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Barbara N. Haile