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

In the Matter of	)	
	)	
Amendment of the Commission's Rules Concerning Maritime Communications	)	PR Docket No. 92-257
	)	
Petition for Rule Making filed by Regionet Wireless License, LLC	)	RM-9664

SECOND MEMORANDUM OPINION AND ORDER AND FIFTH REPORT AND ORDER

Adopted: March 13, 2002 **Released: April 8, 2002**

By the Commission:

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. In the *Fourth Report and Order* in this proceeding, the Commission amended its rules to promote operational, technical, and regulatory flexibility for Automated Maritime Telecommunications System (AMTS) and high seas public coast stations.[1] In the *Third Further Notice of Proposed Rule Making* in this proceeding, the Commission sought comment on proposals that would simplify the licensing process for AMTS and high seas public coast applicants.[2] The Commission also suspended the acceptance and processing of AMTS and certain high seas public coast station applications, pending the outcome of this proceeding.[3] In the *Second Memorandum Opinion and Order* portion of this *Second Memorandum Opinion and Order and Fifth Report and Order*, we address a petition filed by Warren C. Havens (Havens) that seeks reconsideration of certain Commission decisions in the *Fourth Report and Order*, as well as a petition filed by Havens that seeks reconsideration of the suspension of acceptance and processing of applications, and related pleadings.[4] In the *Fifth Report and Order*, we adopt rules that will streamline our licensing process for AMTS stations, by utilizing a geographic licensing system. We conclude that our method of licensing high seas public coast frequencies should remain unchanged.

2. We believe that these decisions will increase competition in the provision of telecommunications services, promote more efficient use of maritime spectrum, increase the types of telecommunications services available to vessel operators, allow maritime commercial mobile radio service (CMRS) providers to respond more quickly to market demand, and reduce regulatory burdens on AMTS and high seas public coast station licensees. We conclude that giving licensees more flexibility in the use of maritime spectrum, while preserving the core purpose of this internationally allocated radio service, *i.e.*, to promote safety of life and property at sea, serves the public interest. The major rule changes we adopt today are summarized below:

- We adopt a geographic licensing approach for AMTS stations in lieu of the site-based approach currently used. We designate ten licensing regions (patterned primarily on the very high frequency (VHF) public coast (VPC) geographic licensing areas).
- We adopt 10 dB co-channel protection standard to protect incumbent AMTS stations' 38 dBu service contour from geographic area licensee operations.
- We permit AMTS applicants to acquire both, rather than only one, spectrum block.
- We adopt a construction requirement of substantial service by the completion of the ten-year license term for AMTS geographic area licensees.

[1] Amendment of the Commission's Rules Concerning Maritime Communications, *Fourth Report and Order and Third Further Notice of Proposed Rule Making*, PR Docket No. 92-257, 15 FCC Rcd 22585, 22587 ¶ 1 (2000) (*Fourth Report and Order* and *Third Further Notice*).

[2] *Id.* at 22587 ¶ 2.

[3] *Id.* at 22621-22 ¶¶ 76-78.

[4] Havens Petition for Reconsideration (filed Jan. 8, 2001), and Havens Petition for Reconsideration (filed Jan. 16, 2001).

- With respect to high seas spectrum, we will process applications on a first-come, first served basis, thereby precluding the filing of mutually exclusive applications and thus, the need to use competitive bidding procedures.

- We will use the competitive bidding procedures that were applied to the auction of VPC licenses for AMTS station licensing.

3. Our decisions in this *Second Memorandum Opinion and Order and Fifth Report and Order* further our goal to improve maritime communications. In developing these new rules we are guided by several broad policy initiatives. First, we seek to establish a flexible regulatory framework that will (1) provide opportunities for continued development of competitive new services using maritime spectrum, (2) expedite market entry through streamlined licensing procedures, (3) promote technological innovation, and (4) eliminate unnecessary regulatory burdens. Second, we seek to enhance regulatory symmetry among maritime CMRS providers and between maritime CMRS providers and other CMRS providers to ensure that market forces, rather than regulatory forces, shape the development of the CMRS marketplace. Finally, we take into account the unique nature of the Maritime Services. Specifically, we note that (1) frequencies are allocated internationally to facilitate interoperability; (2) use of maritime spectrum is subject to various statutes, treaties, and agreements; and (3) the primary purpose of these services is to provide for the safety of life and property at sea and on inland waterways.

II. BACKGROUND

4. The Maritime Services provide for the unique distress, operational, and personal communications needs of vessels at sea and on inland waterways.[5] There are two types of coast stations: public coast stations and private coast stations. Public coast stations are CMRS providers that allow ships at sea to send and receive messages and to interconnect with the public switched network.[6] Each public coast station has exclusive use of one or more public correspondence channels within its service area or region of operation. By contrast, private coast stations operate on shared frequencies to serve vessels' business and operational needs, and may not charge fees for the provision of communications services. Both public and private coast stations may use VHF band frequencies (156-162 MHz) to serve a port or coastal area; or low frequency (LF) (.100-.160 MHz), medium frequency (MF) (.405-.525 and 2 MHz), and high frequency (HF) (4, 6, 8, 12, 16, 18/19, 22, and 25/26 MHz) band frequencies to serve vessels on the high seas, often hundreds or even thousands of miles from land. These maritime frequencies are allocated internationally by the International Telecommunication Union (ITU) to facilitate interoperable radio communications among vessels of all nations and stations on land worldwide. In addition, AMTS is a public coast service that was established in 1981 as an alternative to VHF public coast service.[7] AMTS relieves vessel operators from having to change frequencies and contact new coast stations (which may have different call set-up and billing procedures) during their travel along waterways.[8]

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[5] For a fuller description of the Maritime Services and the history of this proceeding, 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, 16953-56 ¶¶ 4-9 (1997) (*Second Report and Order* and *Second Further Notice*).

[6] *See* Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services, *Second Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 1411, 1448 ¶ 83 (1994) (*CMRS Second Report and Order*); *see also* 47 C.F.R. § 20.9(a)(5).

[7] *See* Amendment of Parts 2, 81 and 83 of the Commission's Rules to Allocate Spectrum for an Automated Inland Waterways Communications System (IWCS) Along the Mississippi River and Connecting Waterways, *Report and Order*, GEN Docket No. 80-1, 84 FCC 2d 875, 876 ¶ 2, on reconsideration, *Memorandum Opinion and Order*, GEN Docket No. 80-1, 88 FCC 2d 678 (1981), *aff'd sub nom.*, WJG Tel. Co. v. FCC, 675 F.2d 386 (D.C. Cir. 1982).

[8] *See* Amendment of Parts 2 and 80 of the Commission's Rules Applicable to Automated Maritime Telecommunications Systems (AMTS), *First Report and Order*, GEN Docket No. 88-372, 6 FCC Rcd 437, 437 ¶ 3 (1991).

5. Based on the comments received in response to the 1992 *Notice of Proposed Rule Making and Notice of Inquiry* in this proceeding,[9] the Commission released a *First Report and Order* in 1995 adopting rules that increased the flexibility of VHF and high seas public coast station licensees.[10] It also released a *Further Notice of Proposed Rule Making* in response to commenters' requests for more flexible regulatory treatment of public coast stations and accommodations for enhancements in marine communications equipment.[11] In 1997, the Commission released a *Second Report and Order and Second Further Notice of Proposed Rule Making*, in which it adopted rules to allow public coast stations to use various innovative technologies.[12] The Commission also (1) proposed rules for geographic area licensing in the VPC station service, and sought comment on various related proposals; (2) proposed to streamline AMTS licensing procedures; and (3) proposed to provide additional flexibility for AMTS and high seas public coast stations.[13]

6. Section 309(j)(2) of the Communications Act formerly stated that mutually exclusive applications for initial licenses or construction permits were auctionable if the principal use of the spectrum was for subscriber-based services, and competitive bidding would promote the expressed objectives of the Communications Act.[14] The Commission concluded that the public coast service, including VHF, high seas, and AMTS public coast stations, was a CMRS[15] and subsequently decided that mutually exclusive applications for public coast station licenses would be resolved through competitive bidding.[16] On August 5, 1997, after release of the *Second Further Notice*, President Clinton signed into law the Balanced Budget Act of 1997 (Balanced Budget Act),[17] which expanded the Commission's auction authority by amending Section 309(j) of the Communications Act to provide that all mutually exclusive applications for initial licenses or construction permits *shall* be auctioned, with certain exceptions not applicable here.[18] The Balanced Budget Act does not require a reexamination of the conclusion that public coast station licenses may be subject to auction.[19]

7. In 1998, the Commission released a *Third Report and Order and Memorandum Opinion and Order* in this proceeding, in which it adopted rules to utilize a geographic area licensing approach for VPC stations.[20] It designated forty-two licensing regions, known as VHF Public Coast Service Areas (VPCSAs):

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[9] Amendment of the Commission's Rules Concerning Maritime Communications, *Notice of Proposed Rule Making and Notice of Inquiry*, PR Docket No. 92-257, 7 FCC Rcd 7863 (1992).

[10] Amendment of the Commission's Rules Concerning Maritime Communications, *First Report and Order*, PR Docket No. 92-257, 10 FCC Rcd 8419, 8421-25 ¶¶ 5-12, 8431 ¶ 26 (1995).

[11] Amendment of the Commission's Rules Concerning Maritime Communications, *Further Notice of Proposed Rule Making*, PR Docket No. 92-257, 10 FCC Rcd 5725 (1995) (*Further Notice*).

[12] *Second Report and Order*, 12 FCC Rcd at 16951-52 ¶ 1.

[13] *Id.* at 16952 ¶ 2.

[14] *See* 47 U.S.C. § 309(j) (1996).

[15] *See Second Further Notice*, 12 FCC Rcd at 17011 ¶ 123 (citing *CMRS Second Report and Order*, 9 FCC Rcd at 1448).

[16] *See* 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, 19881 ¶ 59 (1998) (*Third Report and Order*) (citing *Second Further Notice*, 12 FCC Rcd at 17011 (citing Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2356-57 (1994) (*Competitive Bidding Second Report and Order*))).

[17] Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (Balanced Budget Act).

[18] 47 U.S.C. § 309(j) (as amended by Balanced Budget Act, § 3002).

[19] *Third Report and Order*, 13 FCC Rcd at 19881 ¶ 61.

[20] *Id.* at 19855-56 ¶ 1.

nine maritime VPCSAs near major waterways based on U.S. Coast Guard Districts, and thirty-three inland VPCSAs based on the Commerce Department's Economic Areas (EAs).[21] The new rules provided for a single licensee for all unassigned VHF public correspondence channels in each VPCSA, to be selected by competitive bidding.[22] It permitted the continued operation of incumbents using VHF public coast station spectrum, and required incumbents and VPC licensees to afford each other interference protection.[23] It also adopted a substantial service construction requirement for VPC licenses and permitted partitioning[24] and disaggregation[25] of those licenses.[26] The *Third Report and Order* did not address the proposals in the *Second Further Notice* regarding AMTS and high seas spectrum, deferring resolution of those issues until they could be considered as part of a broader reexamination of the AMTS and high seas licensing schemes.[27] In accordance with the *Third Report and Order*, the Commission conducted an auction of the forty-two VPC licenses from December 3, 1998, to December 14, 1998.[28] On May 19, 1999, twenty-six VPC licenses were granted by the Commission.[29]

8. On November 16, 2000, the Commission released a *Fourth Report and Order and Third Further Notice of Proposed Rule Making* in this proceeding, in which it provided additional flexibility for AMTS coast stations by permitting the construction and operation of fill-in stations without prior Commission authorization,[30] extending the construction period,[31] eliminating the current emission restrictions and channel plan,[32] and increasing the permitted power level for point-to-point communications.[33] It also provided additional flexibility for high seas public coast stations by eliminating the required showing of channel loading[34] and extending the construction period.[35] The Commission also proposed rules for geographic area licensing of AMTS coast stations, and sought comment on various

[21] *Id.* The Bureau of Economic Analysis of the Department of Commerce has divided the United States into 172 EAs to facilitate regional economic analysis. Each EA consists of one or more economic nodes (metropolitan areas or similar areas that serve as centers of economic activity) and the surrounding counties that are economically related to the nodes. Final Redefinition of the BEA Economic Areas, Department of Commerce, Docket No. 950-3020-64-5064-01, 60 Fed. Reg. 13114 (1995).

[22] *Third Report and Order*, 13 FCC Rcd at 19855-56 ¶ 1.

[23] *Id.*

[24] "Partitioning" is the assignment of geographic portions of a license along geopolitical or other boundaries.

[25] "Disaggregation" is the assignment of discrete portions or "blocks" of spectrum licensed to a geographic licensee or qualifying entity.

[26] *Id.* at 19872-74 ¶¶ 38-43.

[27] *Id.* at 19855 n.3.

[28] *See* Auction of 156-162 MHz VHF Public Coast Service Licenses, *Public Notice*, 13 FCC Rcd 24874, 2874 (1998); VHF Public Coast Service Auction Closes, *Public Notice*, 14 FCC Rcd 480, 480 (1999).

[29] *See* FCC Announces the Conditional Grant of 26 VHF Public Coast Service Licenses, *Public Notice*, DA 99-195, at 1 (rel. May 21, 1999). On June 13, 2001, the Commission completed the auction for the remaining sixteen VPC licenses. *See* VHF Public Coast and Location and Monitoring Service Spectrum Auction Closes, *Public Notice*, DA 01-1443 (rel. June 15, 2001). Four parties submitted the high bids for the sixteen VPCSAs. *Id.* at Attachment A.The applications for those licenses remain pending. *See* The Wireless Telecommunications Bureau Announces that Applications for VHF Public Coast Service Licenses Are Accepted for Filing, *Public Notice*, DA 01-1871 (WTB rel. Aug. 6, 2001).

[30] *Fourth Report and Order*, 15 FCC Rcd at 22593 ¶ 12.

[31] *Id.* at 22595 ¶ 17.

[32] *Id.* at 22596 ¶ 19.

[33] *Id.* at 22597 ¶ 21.

[34] *Id.* at 22599 ¶ 25.

[35] *Id.* at 22600 ¶ 27.

related proposals.[36] In addition, it proposed competitive bidding procedures for AMTS and high seas public coast stations.[37] Finally, it suspended the acceptance of applications for new AMTS and certain high seas licenses.[38] Eight comments and five reply comments to the *Third Further Notice* were received.

9. While our actions in this proceeding are designed to improve maritime telecommunications, applicants should be aware that an FCC auction represents an opportunity to become an FCC licensee in this service, subject to certain conditions and regulations. The FCC does not endorse any particular services, technologies, or products, and grant of an FCC license does not guarantee business success. Applicants should perform their individual due diligence before proceeding in an auction, as they would with any new business venture.

III. SECOND MEMORANDUM OPINION AND ORDER

10. In this *Second Memorandum Opinion and Order*, we address two petitions filed by Havens[39] that seek reconsideration of the *Fourth Report and Order and Third Further Notice of Proposed Rule Making* in this proceeding. For the reasons discussed below, we dismiss his petition for reconsideration of the *Fourth Report and Order*, and deny his petition for reconsideration of the licensing suspension enacted in the *Third Further Notice*. We also deny Haven's request for declaratory ruling, where he argues that the Communications Act does not permit the dismissal of those pending mutually exclusive applications against which petitions to deny have been filed without first addressing the petition. Finally, we deny Havens's related request, submitted May 25, 2001, that certain pending applications for new AMTS stations be dismissed.

11. *Petition for Reconsideration of Fourth Report and Order.* Havens seeks reconsideration of certain decisions that the Commission adopted in the *Fourth Report and Order*.[40] Petitions for reconsideration of a rule making action must be filed within thirty days of its publication in the Federal Register.[41] The *Fourth Report and Order* was published in the Federal Register on December 13, 2000.[42] Consequently, petitions for reconsideration were due on Friday, January 12, 2001. Havens states that he experienced difficulties when he attempted to file his petition for reconsideration by attaching it to an electronic mail message sent to the Commission's Electronic Comment Filing System (ECFS) on January 12, 2001.[43] Ultimately, the petition was received by ECFS on January 16, 2001. Included with the late-filed petition was a request for waiver of the filing deadline.[44]

12. The Commission has consistently held that absent extraordinary circumstances, such as lack of notice, it is without authority to waive the statutory thirty-day filing period for filing petitions for reconsideration.[45] We find no extraordinary circumstances surrounding this particular filing by Havens. Moreover, waiver requests are granted only if it is shown that (1) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the

[36] *Id.* at 22587-88 ¶ 2.

[37] *Id.*

[38] *Fourth Report and Order*, 15 FCC Rcd at 22621 ¶ 76.

[39] Havens is a current AMTS licensee. In addition, he has a number of pending AMTS applications.

[40] Havens Petition for Reconsideration (filed Jan. 16, 2001).

[41] *See* 47 C.F.R. §§ 1.4(b)(1), 1.429(d).

[42] 65 Fed. Reg. 77821 (2000).

[43] Havens Waiver Request at 1 (filed Jan. 16, 2001).

[44] *Id.*

[45] 47 U.S.C. § 405(a); *see* Sunjet Car Service, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 25451, 25451 ¶ 4 (EB 2000).

requested waiver would be in the public interest; or (2) 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.[46] The Commission does not require petitions for reconsideration of a final order in a rulemaking proceeding to be electronically filed. Havens had the opportunity to manually file an original and eleven copies of his petition for reconsideration to the Secretary, Federal Communications Commission, prior to the filing deadline.[47] When we consider that Havens had the option to manually file his petition prior to the deadline, we do not believe that his waiver request should be granted simply because the option he did choose, electronic filing, proved to be unsuccessful.[48] In addition, Havens's difficulty in filing the petition was not due to any technical problem with ECFS, but to his failure to submit the petition correctly. As noted above, Havens attempted to submit the petition as an attachment to an electronic mail message. Our ECFS internet site, however, specifically instructs electronic mail filers that submittals cannot be attached to the electronic mail message, and instead must be copied and pasted in American Standard Code for Information Interchange (ASCII)[49] text into the body of the electronic mail message. We do not consider extraordinary circumstances to be present when a petitioner, who attempts to file for the first time on the last day of the thirty-day period, is unaware that petitions cannot be attached to electronic mail messages sent to ECFS. Moreover, we caution Havens and other future petitioners not to wait until the last day of the thirty-day period to file or, in the alternative, to plan ahead to account for unforseen last-minute difficulties.[50] For the foregoing reasons, we deny Havens's waiver request and dismiss the late-filed petition for reconsideration.[51]

13. *Petition for Reconsideration of Licensing Suspension.* In the *Third Further Notice*, the Commission suspended acceptance of applications for new AMTS and HF radiotelephone high seas public coast stations; and suspended processing of all such applications that were pending as of November 16, 2000, unless as of that date they were not mutually exclusive with any other applications and the relevant period for filing competing applications had expired.[52] The Commission stated that pending applications not meeting the above criteria would be held in abeyance until the conclusion of this proceeding, whereupon it would determine, in accordance with such new rules as are adopted, whether to process or return any such pending applications.[53]

14. In his petition for reconsideration filed January 8, 2001, Havens argues that the Commission did not provide the public with adequate prior notice of its decision to suspend the processing of AMTS applications.[54] He contends that he has been harmed by the processing suspension because by the time it went into effect, he had already spent substantial time and money to prepare the service coverage showings and the engineering studies that are included with his pending AMTS applications.[55]

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[46] 47 C.F.R. § 1.925.

[47] *See* 47 C.F.R. § 1.429(h).

[48] *See* 220 MHz Non-Nationwide Licensees, *Order*, 15 FCC Rcd 4569, 4575 ¶ 15 (WTB CWD 2000).

[49] ASCII is plain text without any formatting.

[50] *See, e.g.*, Bell Mountain Communications, Inc. Request for Waiver of Upfront Payment Deadline in Auction No. 30, *Memorandum Opinion and Order*, 16 FCC Rcd 4893, 4896 ¶ 6 (WTB 2000).

[51] Havens's petition focuses mainly on the Commission decision to eliminate the engineering study requirement for new AMTS stations that are fill-ins. *See Fourth Report and Order*, 15 FCC Rcd at 22593 ¶ 12. One of his complaints (the lack of a service contour definition for fill-in stations), *see* Petition for Reconsideration at 3-8, is addressed in the *Fifth Report and Order* where we establish the service contour that will be protected for incumbents. *See infra* ¶ 32.

[52] *Fourth Report and Order and Third Further Notice*, 15 FCC Rcd at 22621-22 ¶¶ 76-78.

[53] *Id.* at 22622 ¶ 78.

[54] Havens Petition for Reconsideration at 6 (filed Jan. 8, 2001).

[55] *Id.* at 7-9.

Consequently, he requests that the processing suspension be lifted and that the applications be reviewed.[56] He believes that we should process those applications that comply with the service coverage and broadcast television interference protection requirements and dismiss any mutually exclusive applications that do not comply with such requirements.[57] Regionet Wireless LLC (Regionet), in its opposition, argues that a grant of Havens's petition would undermine the purpose of the suspension, prejudice Regionet and other AMTS applicants, and devalue any future AMTS auctions.[58] It notes that inherent in the Commission's processes since the institution of competitive bidding has been the imposition of a suspension of the acceptance and processing of applications as a prelude to an auction.[59]

15. When the Commission suspended the acceptance and processing of AMTS applications, it considered the interests of pending applicants, such as Havens, as well as future applicants and consumers. The same reasons which prompted the Commission to impose the suspension on November 16, 2000 remain today. We continue to believe that suspension of acceptance and processing of AMTS applications is warranted in order to facilitate the orderly and effective resolution of the matters pending in this proceeding. Moreover, providing advance notice of the suspension could have compromised the underlying goal of this proceeding (*i.e.*, to update the regulatory structure of AMTS) by triggering an influx of applications for new licenses and modifications to existing licenses which, if granted under the current rules, could lead to results inconsistent with our ultimate decisions.[60] By maintaining the processing suspension, we will be able to weigh the costs and benefits of the existing regulatory framework against those of the Commission's proposals. This approach provides us with the opportunity to make meaningful regulatory changes.

16. Contrary to what Havens suggests, the processing suspension does not impose a greater burden on AMTS applicants than it did on applicants for other services that were subject to a processing suspension.[61] For instance, in 1996 the Commission suspended the acceptance and processing of applications for the Digital Electronic Message Service (DEMS).[62] These DEMS applicants, similar to AMTS applicants, were required to submit an interference study of the potential for harmful interference with other stations if the coordinates of any proposed station were located within 50 miles of the coordinates of any authorized or previously proposed station that utilizes or would utilize the same frequency or an adjacent potentially interfering frequency.[63]

17. Havens also argues that two applications he filed should not be subject to the processing suspension. First, he contends that his Keota, Oklahoma, application was filed with the other applications for his lower Arkansas River system, but was subject to the suspension because it was placed on a later public notice than the other applications.[64] We note, however, that the Keota application is part of a

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[56] *Id.* at 9.

[57] *Id.* at 6.

[58] Regionet Opposition at 2.

[59] *Id.* at 3.

[60] *See Kessler v. FCC*, 326 F.2d 673, 684 (D.C. Cir. 1963) (concluded that it was not arbitrary and capricious to fail to give advance notice because "to have given advance notice would have brought, prior to the cut-off date fixed in the notice, a flow of new applications, all to be decided upon existing and possible inadequate standards"); *see also* Amendment of the Commission's Rules with Regard to the 3650-3700 MHz Government Transfer Band, *First Report and Order and Second Notice of Proposed Rule Making*, ET Docket No. 98-237, 15 FCC Rcd 20488, 20540 ¶ 134 (2000).

[61] *See* Petition for Reconsideration at 7.

[62] Freeze on the Filing of Applications for New Licenses, Amendments, and Modifications in the 18.8-19.3 GHz Frequency Band, *Order*, 11 FCC Rcd 22363 (1996).

[63] *See* 47 C.F.R. § 101.509(c).

[64] Petition for Reconsideration at 13.

proposed McClellan/Kerr/Arkansas River system,[65] the applications for which are mutually exclusive with Regionet applications,[66] so the processing of the Keota application would be suspended even if it had appeared on an earlier public notice.[67] Therefore, we need not address the timing of the public notice on which the Keota application appeared. He also contends that his Boulder, Colorado, application should be processed because it neither expands the South Platte River system's service area nor seeks to obtain additional spectrum.[68] We agree that the Boulder application for Group B does not expand Havens's proposed South Platte River system. Nevertheless, the application is suspended because it appeared on public notice on October 31, 2000, less than thirty days before the processing suspension took effect.[69] The exception to the suspension for applications that do not expand an AMTS system's service area or seek to obtain additional spectrum applies only to applications to add stations to an already-licensed system, not applications to add stations to a proposed system for which applications are pending, such as is the case with the Boulder application.[70]

18. *Request for Declaratory Ruling*. Havens argues that Section 309(d)(2) of the Communications Act[71] does not permit the dismissal of those pending applications against which petitions to deny have been filed, but instead requires that we either grant the application and dismiss the petition or, as provided in Section 309(e),[72] designate the application for hearing.[73] We disagree. Sections 309(d)(2) and (e) do not restrict our authority to dismiss an AMTS application that, as of November 16, 2000, was mutually exclusive with other applications or for which the relevant period to file mutually exclusive applications had not expired. Because Sections 309(d)(2) and (e) require a comparative hearing when there is a material question of fact regarding an application, they are inapplicable in a competitive bidding context.[74] We also reject Havens's argument that in instances where a petition to deny was filed against one or more mutually exclusive applications that were subject to the processing suspension, Section 309(j)(6)(E)[75] requires us to first address the petition to deny because a grant of the petition could resolve the mutual exclusivity, thus enabling the surviving application(s) to be processed.[76] The Commission has previously concluded that it has an obligation to attempt to avoid mutual exclusivity by the methods prescribed in Section 309(j)(6)(E)

[65] FCC File Nos. 853570-576, 853578-581, 853611.

[66] FCC File Nos. 853620-26.

[67] For purposes of the suspension of processing, AMTS applications are mutually exclusive if they are either directly mutually exclusive with each other, or if they are part of a proposed system that includes applications that are mutually exclusive with other applications and the system is not grantable without the directly mutually exclusive applications. *See Third Further Notice*, 15 FCC Rcd at 22622 n.266.

[68] Petition for Reconsideration at 13-14.

[69] FCC File No. 853615; *see Public Notice*, Report No. 2117 (rel. Oct. 31, 2000); *see also* Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Notice of Proposed Rule Making and Order*, ET Docket No. 95-183, 11 FCC Rcd 4930, 4988 ¶ 122 (1995).

[70] *See Third Further Notice*, 15 FCC Rcd at 22622 ¶ 77.

[71] 47 U.S.C. § 309(d)(2).

[72] 47 U.S.C. § 309(e).

[73] Havens Request for Declaratory Ruling at 4 (filed June 4, 2001).

[74] *See* 47 U.S.C. § 309(j)(6)(B); *see also* Amendment of the Commission's Rules Regarding the 37.0-38.6 and 38.6-40.0 GHz Bands, *Memorandum Opinion and Order*, ET Docket No. 95-183, 14 FCC Rcd 12428, 12444 ¶ 27 (1999) (*39 GHz MO&O*) ("we uphold our finding that comparative hearings would be slower and more costly, both to the government and applicants, than competitive bidding, and that comparative hearings are not in the public interest where, as here, large numbers of applications and large protected service areas are involved").

[75] The Commission has the "obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means to avoid mutual exclusivity in applications and licensing proceedings." 47 U.S.C. § 309(j)(6)(E).

[76] Request for Declaratory Ruling at 5.

only when it would further the public interest goals of Section 309(j)(3).[77] In furtherance of Section 309(j)(3), we have determined above that the public interest would be served by licensing AMTS spectrum through a geographic area licensing rather than site-by-site licensing. Having made this determination, we conclude that it would be contrary to the public interest goals of Section 309(j)(3) to continue to process site-based applications, including the review and resolution of petitions to deny those applications.[78] Section 309(j)(6)(E) merely requires that we take certain measures, when it is in the public interest, to avoid mutual exclusivity within the framework of existing, not outmoded, licensing policies.[79]

19. *Request to dismiss Mobex applications.* On May 25, 2001, Havens requested that the Commission dismiss the Mobex Communications, Inc. (Mobex) applications for AMTS stations to serve the Truckee River,[80] Carson River,[81] Great Salt Lake[82] and Lake Mead.[83] He contends that the Mobex applications for all these systems should have been dismissed upon receipt because, under our current Rules, these waterways are not eligible for AMTS service because they can be completely covered by one station.[84] He requests that the Commission, upon the dismissal of the mutually exclusive Mobex applications,[85] process his mutually exclusive applications.[86]

20. In effect, Havens asks us to process these Mobex applications (*i.e.*, address the petition to deny) that he deems defective. This would be inconsistent with the Commission's processing suspension, and would undermine one of the purposes of the processing suspension, *i.e.*, to prevent the further grant of licenses under our current rules that could lead to results inconsistent with the decisions ultimately made in this rulemaking proceeding. For that reason, we deny Havens's request to dismiss Mobex's applications during the processing suspension. Because Havens and Mobex's applications are mutually exclusive, they will be held in abeyance until the conclusion of this proceeding, whereupon we will determine, in accordance with such new rules as are adopted, whether to process or return any such pending applications.[87]

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[77] *See 39 GHz MO&O*, 14 FCC Rcd at 12441-42 ¶ 24; *see also DIRECTV, Inc. v. FCC*, 110 F.3d 816, 828 (D.C. Cir. 1997) (*DIRECTV, Inc*) ("Nothing in § 309(j)(6)(E) requires the FCC to adhere to a policy that it deems outmoded 'to avoid mutual exclusivity in ... licensing proceedings'"); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Second Report and Order*, PR Docket No. 93-144, 12 FCC Rcd 19079, 19104 ¶ 62, 19154 ¶ 230 (1997); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Memorandum Opinion and Order on Reconsideration*, PR Docket No. 93-144, 12 FCC Rcd 9972, 10009-10 ¶ 115 (1997) (Section 309(j)(6)(E) does not prohibit the Commission from conducting an auction without first attempting alternative licensing mechanisms to avoid mutual exclusivity).

[78] *See Bachow Communications, Inc., et. al., v. FCC*, 237 F.3d 683, 690 (D.C. Cir. 2001).

[79] *DIRECTV, Inc.*, 110 F.3d at 828.

[80] FCC File Nos. 853146-147.

[81] FCC File Nos. 853148-49.

[82] FCC File Nos. 853128-29.

[83] FCC File Nos. 853126-27.

[84] Request to Dismiss at 1-2. With regard to Mobex's Truckee River applications, Havens also believes that the service coverage requirements, 47 C.F.R. § 80.475(a), were not met. Request to Dismiss at 2.

[85] Mobex's Truckee and Carson River applications are mutually exclusive with Havens's Truckee River applications. Mobex's Great Salt Lake applications are mutually exclusive with Havens's Provo River applications. Mobex's Lake Mead applications are mutually exclusive with Havens's Lake Mohave applications.

[86] Request to Dismiss at 3.

[87] *Fourth Further Notice*, 15 FCC Rcd at 22622 ¶ 78. *See infra*, ¶ 80.

IV. FIFTH REPORT AND ORDER

21. In this *Fifth Report and Order*, we adopt rules that will streamline our licensing process for AMTS stations by utilizing a geographic licensing system. We will conduct an auction to resolve mutually exclusive applications for AMTS licenses. We conclude that our general competitive bidding rules, and the rules regarding the participation of small businesses in auctions that were applied to the auction of VPC licenses, should be used for auctioning AMTS licenses. We also conclude that our current method of licensing high seas public coast spectrum should be modified to preclude the filing of mutually exclusive applications, thereby obviating the need to use competitive bidding procedures. For that reason, we will process applications for high seas public coast spectrum on a first-come, first-served basis.

A. Automated Maritime Telecommunications System (AMTS) Spectrum

22. An AMTS is a specialized system of coast stations providing integrated and interconnected marine voice and data communications, somewhat like a cellular phone system, for tugs, barges, and other vessels on waterways.[88] AMTS licensees must provide continuity of service to either a substantial navigational area along a coastline; or sixty percent of one or more inland waterways, except that a waterway less than 240 kilometers (150 miles) long must be served in its entirety,[89] and waterways small enough to be served by a single station are not eligible for AMTS service.[90] AMTS licensees are permitted to provide service to units on land, so long as marine-originating communications receive priority.[91] There currently are two AMTS providers: Regionet[92] and Paging Systems, Inc. (PSI), which are licensed to serve much of the Atlantic, Pacific, Hawaii (PSI only), Great Lakes, and Puerto Rico (PSI only) coastlines,[93] and the Mississippi River system (Regionet only) and the Gulf of Mexico (Regionet only).[94] There are two frequency groups of one MHz each (.5 MHz for coast transmit and .5 MHz for ship transmit) in the 217-220 MHz band available for assignment to AMTS stations[95] to use for voice, facsimile, and radioteletypewriter communications.[96] AMTS stations also are licensed, by rule, to use the 216.750-217 MHz band for low

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[88] Amendment of Parts 2 and 80 of the Commission's Rules Applicable to Automated Maritime Telecommunications Systems (AMTS), *First Report and Order*, RM-5712, 6 FCC Rcd 437, 437 ¶ 3 (1991) (*AMTS First Report and Order*).

[89] 47 C.F.R. § 80.475(a).

[90] Fred Daniel d/b/a Orion Telecom, *Memorandum Opinion and Order*, 13 FCC Rcd 25313, 25315 ¶ 7 (WTB PSPWD 1998), *aff'd*, *Order on Reconsideration*, 14 FCC Rcd 1050 (WTB PSPWD 1999), *aff'd*, *Memorandum Opinion and Order*, 14 FCC Rcd 19912 (1999).

[91] *See Second Report and Order*, 12 FCC Rcd at 16964-65 ¶ 25; 47 C.F.R. § 80.123(b).

[92] Regionet is the successor of Fred Daniel d/b/a Orion Telecom (Orion). Regionet has been assigned all AMTS licenses that were originally issued to Waterway Communications System LLC (Watercom), which was licensed to serve the Mississippi River system and the Gulf of Mexico. *See Fourth Report and Order*, 15 FCC Rcd at 22592 ¶ 10. Both Regionet and Watercom are now controlled by Mobex.

[93] Fred Daniel d/b/a Orion Telecom, *Memorandum Opinion and Order*, 13 FCC Rcd 17474, 17476, 17481 ¶¶ 3-4, 15-16 (WTB PSPWD 1998).

[94] *Second Further Notice*, 12 FCC Rcd at 17005 ¶ 112. In addition, Havens is authorized to operate AMTS stations along certain inland waterways, but has not completed construction.

[95] 47 C.F.R. § 80.385(a)(2). AMTS originally was allocated eighty frequency pairs, divided into four twenty-pair groups: Groups A and B in the 217-218 MHz and 219-220 MHz bands, and Groups C and D in the 216-217 MHz and 218-219 MHz bands. The 216-217 MHz band, however, was found to be unusable by high power AMTS coast stations close to television broadcast stations due to the potential for harmful interference to television reception, and in 1996 the Commission designated this band for low power communications. In addition, the 218-219 MHz band has been reallocated to the 218-219 MHz Service. Thus, Groups C and D are no longer assignable to AMTS coast stations. *Second Further Notice*, 12 FCC Rcd at 17005 n.242.

[96] 47 C.F.R. § 80.479(a).

power point-to-point network control communications under the Low Power Radio Service (LPRS) in Part 95 of our Rules.[97]

1. Geographic area licensing

23. *Proposal.* The Commission noted in the *Third Further Notice* that it already had adopted rules to utilize a geographic licensing approach for VPC stations, and tentatively concluded that VPC and AMTS stations serve similar markets.[98] It also tentatively concluded that its current procedure for determining mutual exclusivity is no longer in the public interest because it could delay assignment of subsequent AMTS licenses and place undue administrative burdens on the public and the Commission.[99] Therefore, it proposed a transition from the current approach of licensing AMTS stations by individual sites within multi-station systems[100] to geographic area licensing, because such an approach would speed assignment of subsequent AMTS licenses, reduce processing burdens on the Commission, facilitate the expansion of existing AMTS systems and the development of new AMTS systems, eliminate inefficiencies arising from the intricate web of relationships made possible by site-specific authorization, and enhance regulatory symmetry.[101] Finally, it sought comment on licensing band managers for the AMTS spectrum, and whether it may be an appropriate alternative method to partitioning and disaggregation.[102]

24. *Decision.* We conclude that the public interest will be best served by a transition to geographic area licensing for AMTS spectrum. This approach will expedite the licensing of unassigned AMTS spectrum and facilitate the development of wide-area systems.[103] As noted, it will also promote regulatory symmetry between AMTS licensees and CMRS providers in other services where geographic licensing has been introduced.[104] We agree with PSI and Mobex that geographic area licensing can also help applicants avoid the excessive application costs as well as the excessive delays in authorization grants that exist under the current system of site-based licensing.[105]

25. We decline to license band managers in the AMTS band. We received little comment on this issue. We agree with Mobex that diverse uses of AMTS spectrum can be better accomplished by allowing AMTS licensees the option to make service area and spectrum available to third parties via partitioning and disaggregation agreements, as well as using the spectrum themselves.[106] We disagree with the one commenter that advocates the use of band managers in this band. Instantel, Inc. (Instantel), a manufacturer of devices employed in patient, personnel and asset security systems for the health care industry, argues that we should license band managers as a means to protect the Part 15 unlicensed 217.003 MHz operators that use its products from possible AMTS interference.[107] We believe that it would be inappropriate to subject licensed users of spectrum to a band manager approach solely as a

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[97] 47 C.F.R. § 95.629(a).

[98] *Third Further Notice*, 15 FCC Rcd at 22601 ¶ 29.

[99] *Id.*

[100] 47 C.F.R. § 80.54.

[101] *Third Further Notice*, 15 FCC Rcd at 22601-02 ¶ 30.

[102] *Id.* at 22602 ¶ 30.

[103] *See* American Mobile Telecommunications Association, Inc. (AMTA) Comments at 2-3; Mobex Comments at 4; PSI Comments at 1; Securicor Wireless Holdings, Inc. (Securicor) Reply Comments at 2.

[104] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 § 6002(a)(2)(A), (B), 107 Stat. 312 (largely codified at 47 U.S.C. § 332 *et seq.*).

[105] Mobex Comments at 4; PSI Comments at 1.

[106] Mobex Comments at 4-5.

[107] Instantel Comments at 1.

means to protect unlicensed users.[108] Moreover, Instantel admits that in most cases, the users of its products have not received interference from AMTS providers that currently operate at the coastlines and inland waterways because those AMTS providers have employed relatively low power levels or directional antennas.[109] Because incumbent AMTS licensees and the unlicensed 217.003 MHz operators that use Instantel's products have been able to coexist in the coastal areas, we can reasonably assume that coexistence in the inland areas can be similarly accomplished.[110]

26. Finally, we are not persuaded by Havens's suggestion that we defer any proposed auction of AMTS spectrum and instead commence a new rulemaking proceeding to consolidate the AMTS, 218-219 MHz and 220-222 MHz bands into one service.[111] He also suggests the possible inclusion of most or all of the 216-217 MHz band, currently allocated to LPRS, as well as the 222-225 MHz, which he contends is being underused by the Amateur Radio Service, to which it is allocated.[112] He argues that viable communications service cannot be supported under the current allocations and, therefore, this consolidated band would be in the public interest.[113] Besides being beyond the scope of this proceeding, we reject Havens's suggestion to consolidate the 216-225 MHz band in a new rulemaking proceeding for the following reasons. A reallocation of the 216-217 MHz band would place the broadcast television stations at a greater risk of interference. Indeed, it was this concern for interference to television stations that prompted this band to be reallocated to LPRS from its original AMTS allocation.[114] Reallocation of this spectrum could also have a negative impact on existing LPRS users, who may be unable to coexist in a new environment with high power transmissions. Reallocation of the 218-219 MHz band would be contrary to the public interest in light of recent rule changes that are expected to foster new and innovative uses of this band.[115] Reallocation of the 220-222 MHz band could severely disrupt incumbent operations, including numerous public safety entities. Finally, contrary to what Havens contends, that there are in fact hundreds of repeaters nationwide that are being used by amateurs in the 222-225 MHz band.[116]

2. Service areas

27. *Proposal.* The Commission noted in the *Third Further Notice* that it had established large maritime VPCSAs and small inland VPCSAs as the geographic licensing areas for VPC stations because it believed that this approach would facilitate the development of wide-area multi-channel systems along waterways, as well as accommodate the current use of those frequencies away from waterways, where the

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[108] For similar reasons, we also reject Instantel's alternative suggestion of reallocating the 217-218 MHz band to the LPRS in the inland geographic areas. *See id.*

[109] Instantel Comments at 7.

[110] To the extent that conflicts cannot be avoided, we remind Instantel that it is a condition of Part 15 operation that no harmful interference be caused to, and that interference be accepted from, authorized stations. 47 C.F.R. § 15.5(b).

[111] Havens Comments at 2-3, 10-11.

[112] *Id.* at 11.

[113] *Id.* at 2-4.

[114] *See AMTS First Report and Order*, 6 FCC Rcd at 437 ¶ 5; *see also supra* n.79.

[115] The Commission redesignated the 218-219 MHz Service from a strictly private radio service (*i.e.*, a service that is used to support the internal communications requirements of an entity) to a service that can be used in both common carrier and private operations; and it clarified that both one- and two-way communications and Response Transmitter Unit-to-Response Transmitter Unit (RTU-to-RTU) communications, regardless of regulatory status, is permitted in the 218-219 MHz Service. *See* Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, WT Docket No. 98-169, 15 FCC Rcd 1497 (1999).

[116] *See* American Radio Relay League, The ARRL Repeater Directory, at 333-80 (1996).

spectrum is shared by certain private land mobile radio (PLMR) licensees.[117] The Commission sought comment on whether VPCSAs provide an appropriate basis for defining AMTS geographic licensing areas, or whether the VPCSA boundaries should be adapted for AMTS by combining the inland VPCSAs into a single licensing area, or redistributing them among the surrounding maritime VPCSAs.[118] As an alternative proposal, the Commission suggested that the AMTS service areas could be based on those used in the adjacent 220-222 MHz band, where some channels are licensed nationwide, others are licensed among six Regional Economic Area Groupings, and some are licensed by Economic Area.[119] The Commission also sought comment on whether it should take any steps to facilitate use of AMTS spectrum by public safety entities, including setting aside some channels for public safety use.[120]

28. *Discussion.* Most commenters agree that we should adopt a plan for AMTS geographic licensing where all channels are licensed under a single service area definition, rather than multiple areas as are used in the 220-222 MHz band.[121] We also agree with the commenters that use of the numerous, small inland VPCSAs in AMTS would make it difficult for a single entity to obtain enough geographically and spectrally contiguous stations to develop a wide-area system.[122] After reviewing the record in this proceeding, we conclude that the best service area definition for AMTS would be to adopt the maritime VPCSAs[123] and consolidate the inland VPCSAs into a single inland geographic service area.[124] We believe that our approach is preferable to those suggested by the commenters. We reject AMTA's proposal to allocate the inland VPCSAs among the maritime VPCSAs based on U.S. Coast Guard Districts[125] because the resulting service area corresponding to the Eighth Coast Guard District which the Commission indicated in the *Third Report and Order* was unreasonably large, would reach from the Appalachians to the Rocky Mountains and from the Dakotas to the Gulf of Mexico.[126] We also disagree with PSI and Mobex's proposal to merge the inland VPCSAs that abut maritime VPCSAs into these maritime VPCSAs and consolidate the remaining inland VPCSAs into one inland geographic service area[127] because the resulting hourglass-shaped inland service area does not appear to maximize operational efficiencies. Furthermore, the approach we adopt will allow for greater compatibility between VPC and AMTS, which should benefit both the maritime community and the administration of the two services.

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[117] *Third Further Notice*, 15 FCC Rcd at 22602 ¶ 31 (citing *Third Report and Order*, 13 FCC Rcd at 19861-62 ¶ 15).

[118] *Third Further Notice*, 15 FCC Rcd at 22603 ¶ 32.

[119] *Id.*; *see* Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Service, *Third Report and Order; Fifth Notice of Proposed Rulemaking*, PR Docket No. 89-552, 12 FCC Rcd 10943, 10949 ¶ 7 (1997) (*220 MHz Third Report and Order*).

[120] *Third Further Notice*, 15 FCC Rcd at 22603 ¶ 33.

[121] AMTA Comments at 4; Mobex Comments at 7; PSI Comments at 4.

[122] Mobex Comments at 5-6; PSI Comments at 2-4.

[123] We note that the Hawaii VPCSA (which, in addition to Hawaii, includes American Samoa, Guam, and the Northern Mariana Islands) is not coterminous with the Hawaii AMTSA. *See Third Further Notice*, 15 FCC Rcd at 22603 ¶ 32, n.135. AMTS service may not be provided in American Samoa, Guam, and the Northern Mariana Islands, for they lie within ITU Region 3, and the ITU has allocated the 216-220 MHz band for AMTS use in Region 2 only. *Id.*

[124] *See* Appendix D, Mountain AMTSA.

[125] AMTA Comments at 3-4.

[126] *See Third Report and Order*, 13 FCC Rcd at 19862 n.48 (the Commission divided the geographic service area corresponding to the Eighth U.S. Coast Guard District into numerous service areas in order to reduce its size, as the commenters requested).

[127] Mobex Comments at 5-6; PSI Comments at 2-4.

29. We will not set aside any AMTS spectrum for public safety use. No commenter supports such a set-aside.[128] We are concerned that a public safety set-aside in this instance could adversely affect the development of AMTS service by reducing the amount of available spectrum to a level at which viable service could not be maintained. Moreover, as the commenters note, the Commission has responded to the needs of the public safety community by designating 24 MHz of spectrum in the 700 MHz band[129] and 50 MHz of spectrum in the 4.9 GHz band.[130]

3. Treatment of incumbent licensees

30. *Proposal.* In the *Third Further Notice*, the Commission tentatively concluded that the public interest would be best served by ensuring the continued operation of incumbent systems while, at the same time, reducing implementation barriers for geographic licensees.[131] Therefore, it proposed that each incumbent AMTS licensee continue to be authorized to operate under the terms of its current station license.[132] Recognizing that its rules do not define a co-channel interference protection standard for AMTS stations, the Commission proposed to rely on the co-channel interference protection standard used in the 220-222 MHz band.[133] It sought comment on whether this is the best standard or, as an alternative, whether the VPC standard,[134] is more appropriate.[135] To protect geographic area licensee operations, the Commission proposed that an incumbent AMTS licensee would be allowed to renew, transfer, assign, or modify its license only if the modifications do not extend the system's service area or frequency assignment.[136] It also proposed to entertain incumbents' modification requests, filed after the close of the auction for geographic area licenses, to consolidate the stations of each system under a single license, which would expire on the expiration date of the earliest-to-expire licensed station.[137] Finally, the Commission tentatively concluded that mobile-to-mobile communications should not be permitted on AMTS spectrum because there was insufficient information regarding channel capacity and co-channel interference protection, as well as concern that mobile-to-mobile may impair the Maritime Services' safety functions.[138]

31. *Discussion.* We conclude that allowing incumbent licensees to continue operating under the terms of their current station licenses will further the public interest by avoiding interruption of the services they provide. As noted above, the rules under which the incumbents were licensed do not specify a co-channel interference standard.[139] We conclude that AMTS geographic licensees should adhere to the co-

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[128] AMTA Comments at 5; Havens Comments at 16; Mobex Comments at 7; PSI Comments at 5.

[129] *See* Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the 2010, *First Report and Order and Third Notice of Proposed Rule Making*, WT Docket No. 96-86, 14 FCC Rcd 152 (1998).

[130] *See* The 4.9 GHz Band Transferred from Federal Government Use, *Second Report and Further Notice of Proposed Rule Making*, WT Docket No. 00-32, FCC 02-47 (rel. Feb. 27, 2002).

[131] *Third Further Notice*, 15 FCC Rcd at 22603 ¶ 34.

[132] *Id.*

[133] *Id.* at 22604 ¶ 35; *see* 47 C.F.R. §§ 90.723(k), 90.763(b)(1)(i).

[134] 47 C.F.R. § 80.773(a).

[135] *Third Further Notice*, 15 FCC Rcd at 22604 ¶ 35.

[136] *Id.* at ¶ 36.

[137] *Id.*

[138] *Id.* at 22604-05 ¶ 37.

[139] Heretofore, applicants generally have demonstrated that proposed systems will provide "continuity of service," 47 C.F.R. § 80.475(a), by showing that the stations' service contours will overlap. Different applicants have used different contours, including the standard we now adopt, which have been accepted pending the outcome of this rulemaking proceeding. *See* Fred Daniel d/b/a Orion Telecom, *Memorandum Opinion and Order*, 13 FCC Rcd

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channel interference protection standard that is used in the adjacent 220-222 MHz band. Therefore, we will require geographic licensees to locate their base stations at least 120 kilometers from the base stations of co-channel incumbents, except that such licensees may on a case-by-case basis be permitted to locate their base stations closer if they provide 10 dB protection to the incumbent's predicted 38 dBu service contour.[140]

32. We note that with respect to the 220-222 MHz band, which has many of the same physical characteristics as the AMTS band, the Commission determined that incumbents should be protected to a 38 dBu service contour because it doubted that the signal strength beyond such a contour produces a quality of service deserving of protection.[141] For that reason, we believe that requiring protection to a larger service contour, such as Mobex and PSI's suggested 17 dBu contour,[142] is unnecessary, and would reduce the area that could be served by geographic licensees without any corresponding protection to existing service. We disagree with Mobex and PSI when they argue that an incumbent's service area should be protected at the level upon which its authorization was granted,[143] because authorizations of incumbent AMTS stations were not granted upon a specific service contour, only upon a showing of continuity of service.[144] Our own engineering analysis of incumbent systems that were designed on the basis of a larger service contour, such as 17 dBu, demonstrates that the system's continuity of service will not be severed (*i.e.*, that it will not be possible for a geographic licensee to interpose a facility between co-system incumbent stations) if the incumbent is protected to a 38 dBu service contour.[145]

33. We also disagree with Mobex and PSI that while 10 dB co-channel interference protection may be adequate with the amplitude modulation used in the 220-222 MHz band, it will be inadequate for AMTS incumbents who use frequency modulation (FM).[146] They argue that the field experience of Motorola, Inc. (Motorola) demonstrated that FM trunked systems in the 800 MHz and 900 MHz bands could not receive adequate co-channel interference protection at 10 dB, but instead required 14 to 17 dB protection.[147] Because Motorola presented an engineering analysis specific to its service, the Commission was able to make a reasoned decision regarding its request for a greater co-channel protection standard in the 800/900 MHz bands.[148] Given the differences in propagation characteristics, we feel that the burden is on the proponents to demonstrate why the Motorola 800/900 MHz analysis should govern our decision in the

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17474, 17478 n.19 (WTB PSPWD 1998). That does not suggest, however, that different incumbents are licensed for different service contours.

[140] The transmitter power output is expressed in deciBels (dB). The signal level at a given location removed from the transmitter is expressed in dBu.

[141] *See* Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, *Memorandum Opinion and Order on Reconsideration*, PR Docket No. 89-552, 13 FCC Rcd 14569, 14581 ¶¶ 19-20 (1998) (*220 MHz MO&O on Recon*).

[142] Mobex Comments at 9; PSI Comments at 6.

[143] *See* Mobex Comments at 9; PSI Comments at 6; *see also* AMTA Comments at 6.

[144] 47 C.F.R. § 80.475(a); *see* Securicor Reply Comments at 3. Because the rules set forth no specific service contour for AMTS stations, the grant of AMTS stations was not necessarily based on the applicant's proposed service contours. Rather, the Commission, when reviewing applications, would exercise its engineering judgment regarding the size of the service contours and whether the proposed system would provide continuity of service.

[145] A 17 dBu contour is larger than a 38 dBu contour because as the contour becomes larger (*i.e.*, as the distance from the transmitter becomes greater), the signal level (dBu) becomes weaker.

[146] *See* Mobex Comments at 10; PSI Comments at 7.

[147] Mobex Comments at 10; PSI Comments at 7.

[148] *See* Co-Channel Protection Criteria for Part 90, Subpart S Stations Operating Above 800 MHz, *Notice of Proposed Rule Making*, PR Docket No. 93-60, 8 FCC Rcd 2454, 2457 ¶¶ 15-16 (1993); *see also* Co-Channel Protection Criteria for Part 90, Subpart S Stations Operating Above 800 MHz, *Report and Order*, PR Docket No. 93-60, 8 FCC Rcd 7293 (1993).

AMTS band. In the absence of an engineering analysis specific to the AMTS band that demonstrates a need for greater co-channel interference protection, we are not persuaded by Mobex and PSI's argument.[149] Therefore, we conclude that 10 dB co-channel interference protection is appropriate for AMTS. By our calculations, 10 dB protection to an incumbent's 38 dBu service contour provides the incumbent with sufficient protection from potential interference.[150] We are concerned that an overly conservative co-channel interference protection standard would be spectrally inefficient because it would prevent AMTS geographic licensees from providing service in areas that could be served without harming incumbents.[151]

34. As the Commission provided with respect to incumbents using VPC spectrum,[152] we will prohibit AMTS incumbents from renewing, transferring, assigning, or modifying their licenses in any manner that extends their system's service area[153] or results in their acquiring additional frequencies, unless there is consent from each affected geographic area licensee. We also conclude that after the close of the auction for geographic area licenses, we will accept incumbents' modification requests to consolidate the stations of their systems under a single license with a single call sign. To avoid manipulation and evasion of construction and renewal requirements by licensees who consolidate licenses, the expiration / renewal date of the earliest-to-expire licensed station in the system will apply to the consolidated license.

35. With respect to the Commission's proposal to prohibit mobile-to-mobile communications in the AMTS band, Mobex suggests that AMTS licensees could designate a certain channel that subscribers could use for such communications.[154] It states that licensee agreements that designate a particular channel for talk-around or mobile-to-mobile communications would be submitted to the Wireless Telecommunications Bureau (Bureau), which would be responsible for resolving any disputes that arise from the agreements.[155] We do not believe that such agreements should or need to be submitted to the Commission as a matter of course. Instead, we will amend our Rules to permit mobile-to-mobile communications where the written consent of all affected licensees is obtained. Only if the Bureau is called upon to resolve a dispute arising from such use would the submission of the agreement be required.

4. Licensing

36. *Proposal.* The Commission made several proposals regarding how to implement geographic licensing for AMTS stations.[156] It proposed to eliminate the current coverage requirements and permit each

[149] We note that the Commission rejected this exact argument in the 220-222 MHz proceeding. *See 220 MHz MO&O on Recon*, 13 FCC Rcd at 14599 ¶ 61.

[150] Using maximum power (1 kW) and antenna height above average terrain (61 meters), we found that 10 dB will provide 6.2 kilometers of protection to the 38 dBu contour.

[151] *See* Securicor Reply Comments at 3.

[152] *See Third Report and Order*, 13 FCC Rcd at 19864 ¶ 20.

[153] As proposed in the *Third Further Notice*, expanding an incumbent system's contour over water only (disregarding uninhabited islands) shall not be deemed to extend the system's service area. Such an expansion shall not reduce the area that can be served by the geographic area licensee because the geographic licensee would not be able to serve the additional water area without causing interference to areas served by the incumbent.

[154] Mobex/Regionet Ex Parte Meeting Summary at 3 (Apr. 18, 2001).

[155] *Id.*

[156] In addition to the matters discussed below, the Commission also tentatively concluded that it should retain the 218-219 MHz allocation to the Amateur Radio Service on a secondary basis, *see* 47 C.F.R. §§ 80.385(a)(3), 97.301(a). *Third Further Notice*, 15 FCC Rcd at 22606 ¶ 41. Because we are addressing the reallocation of the 216-220 MHz band from Government to non-Government use in ET Docket No. 00-221, we believe that that proceeding is the more appropriate forum to decide whether to retain the 218-219 MHz secondary status allocation to the Amateur Radio Service. *See* Reallocation of the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1670-1675 MHz, and 2385-2390 MHz Government Transfer Bands, *Notice of Proposed Rule Making*, ET Docket No. 00-221, 15 FCC Rcd 22657, 22664 ¶ 17 (2000). We also believe that until the allocation issue is resolved, it would be

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geographic area licensee to place stations anywhere within its service area to serve vessels or units on land, so long as incumbent operations are protected, marine-originating traffic is given priority and certain major waterways are served.[157] Although base stations and land units will be blanket licensed under the geographic license, the Commission proposed individual licenses for any base station that requires an Environmental Assessment[158] or international coordination,[159] or would affect radio frequency quiet zones,[160] or would require broadcaster notification and an engineering study.[161] With respect to the broadcaster notification and engineering study requirements, the Commission proposed to clarify its Rules to require that the applicant show that the AMTS station is based in an especially, rather than the only, suitable location.[162] With regard to the co-channel interference protection that geographic area licensees provide to other geographic area licensees, it proposed to rely on the standard used in the 220 MHz band.[163] It sought comment on whether this is the best standard or, as an alternative, whether the VPC standard[164] would be more appropriate.[165] It proposed that the spectrum authorized to an AMTS incumbent that fails to construct, discontinues operations, or otherwise has its license terminated, will automatically revert to the geographic area licensee, and that a negotiated assignment or transfer of an incumbent station to a geographic area licensee will be presumed to be in the public interest.[166] It tentatively concluded that an incumbent should be permitted to assign or transfer any part of an existing system, even if the assigned portion or the remainder would no longer satisfy the current AMTS coverage requirements.[167] Finally, it proposed to authorize two geographic area licensees in each licensing area, with each licensee authorized to use only one of the two AMTS frequency blocks.[168]

37. *Discussion*. We conclude that the public interest will be served by allowing AMTS geographic area licensees to place stations anywhere within their service areas to serve vessels or units on land, so long

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premature to address either the Commission's proposal to require AMTS geographic area licensees to provide the location of their blanket-licensed stations to the administrator of the database of amateur radio service stations, so amateur service licensees can abide by the our notification and distance requirements, 47 C.F.R. §§ 80.385(a)(3), 97.303(e)(4), (5); *see Third Further Notice*, 15 FCC Rcd at 22606 ¶ 41; or the request of the National Association for Amateur Radio (also known as American Radio Relay League, Incorporated) (ARRL) that an AMTS licensee provide at least a technical explanation for withholding consent upon an amateur licensee's notification of a proposed amateur station, ARRL Comments at 6. (ARRL filed its comments one date late, on February 7, 2001, and filed a motion to accept late-filed comments. Because we do not believe any interested party was harmed by ARRL's comments being filed one day late, we will grant its request and accept the comments. *See* 47 C.F.R. § 1.925.)

[157] *Third Further Notice*, 15 FCC Rcd at 22605 ¶ 39.

[158] 47 C.F.R. § 1.1307.

[159] To date, no existing agreements between the United States and Mexico or Canada restrict AMTS channel availability in the Mexican and Canadian border areas. Licensees will, however, be subject to any future agreements regarding international assignments and coordination of such channels.

[160] 47 C.F.R. § 1.924.

[161] 47 C.F.R. § 80.215(h)(3)(i); *see Third Further Notice*, 15 FCC Rcd at 22605 ¶ 39.

[162] *Third Further Notice*, 15 FCC Rcd at 22606 ¶ 40.

[163] 47 C.F.R. § 90.771(a); *see Third Further Notice*, 15 FCC Rcd at 22607 ¶ 42.

[164] 47 C.F.R. § 80.773.

[165] *Third Further Notice*, 15 FCC Rcd at 22607 ¶ 42.

[166] *Id* at 22607 ¶ 43.

[167] *Id.*

[168] *Id* at 22607 ¶ 44.

as incumbent operations are protected, marine-originating traffic is given priority[169] and certain major waterways[170] are served.[171] This approach will ensure that service areas with small navigable inland waterways or no waterways at all can receive valuable communications service from AMTS stations. This approach should also provide geographic area licensees with a great degree of flexibility and freedom when choosing how to best serve the public. Because we believe that vital interests are at stake where base stations require an Environmental Assessment,[172] international coordination, broadcaster notification and an engineering study,[173] or affect radio frequency quiet zones,[174] we will require that such base stations be individually licensed in order to ensure that they receive proper consideration and attention from Commission staff.[175]

38. With the support of most of the commenters addressing the issue, we adopt the proposal to clarify the broadcaster notification and engineering study requirement to require affected applicants to demonstrate that the proposed station location is especially suitable, rather than the only suitable location.[176] Unless and until a third party opposes the application, the applicant will not be expected to refute the suitability of alternative locations. Because this rule amendment merely reflects the Commission's long-standing interpretation,[177] we do not believe, as KM LPTV of Chicago-13, L.L.C. (KM) suggests, that this will impose upon television stations a greater burden of monitoring for and objecting to poorly engineered AMTS applications.[178] The responsibility to suggest the suitability of alternative locations has always been placed on the affected television stations. We also conclude that we should maintain the requirement that an AMTS licensee that causes interference to television reception or to the U.S. Navy SPASUR system cure the problem or discontinue operations.[179]

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[169] That is, if a vessel attempts to place a call through an AMTS station and there are no channels available, the system must be capable of connecting marine-originating calls before land-originating traffic. *See Second Report and Order*, 12 FCC Rcd at 16965 ¶ 26.

[170] *See infra* n.181.

[171] Last year, the Commission confirmed its decision to exempt VPC station licensees from the requirement that they provide emergency service through the use of 911 to the extent that they offer maritime service. *See* Implementation of 911 Act, *Fifth Report and Order, Memorandum Opinion and Order on Reconsideration*, WT Docket No. 00-110, 16 FCC Rcd 22264, 22286 ¶ 55 (2001) (*911 Fifth R&O*); *see also* Revision of the Commission's Rules to Ensure Compatability with Enhanced 911 Emergency Calling Systems, *Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 94-102, 11 FCC Rcd 18676, 18717-18 ¶¶ 82-83 (1996). Neither the *911 Fifth R&O* nor the present item addresses whether our 911 and enhanced 911 (E911) requirements apply or should apply to AMTS operations. Instead, we will address this question in a separate future proceeding, within the context of a broader review of the scope of our 911 and E911 rules.

[172] 47 C.F.R. § 1.1307.

[173] 47 C.F.R. § 80.215(h)(3)(i).

[174] 47 C.F.R. § 1.924.

[175] KM Reply Comments at 11. KM did not file its comments in a timely fashion. Comments were due on February 6, 2001, but were not filed by KM until February 12, 2001. In its reply comments, KM requested the acceptance of its late filed comments. Because KM resubmitted its views in its timely filed reply comments, *see* KM Reply Comments at 4, we believe that its request is moot.

[176] *See* Mobex Comments at 11; PSI Comments at 8.

[177] *See* Waterway Communications System, Inc., *Memorandum Opinion and Order*, Mimeo 36540, at ¶¶ 8, 13, 14 (rel. Mar. 31, 1986); Fred Daniel d/b/a Orion Telecom, *Memorandum Opinion and Order*, 13 FCC Rcd 15446, 15448-50 ¶¶ 5-8 (WTB PSPWD 1998).

[178] KM Reply Comments at 7-8.

[179] 47 C.F.R. §§ 80.215(h)(4), 80.385(a)(2).

39. We believe that the 220-222 MHz standard of allowing a 38 dBu field strength at the geographic boundaries is appropriate for AMTS.[180] To require a lower field strength might unnecessarily restrict licensees' ability to provide quality service to mobile units operating in boundary areas. Because we believe that it is in the public interest that geographic area licensees be able to provide a quality signal to all parts of their service area, we will allow them to transmit up to a predicted 38 dBu field strength at their geographic area boundaries, unless the bordering geographic area licensee agrees to a higher field strength. In instances where interference occurs, we will expect the licensees to coordinate among themselves to minimize such interference and to cooperate to resolve any interference problems that may arise.

40. We believe that it is in the public interest to afford geographic area licensees with the opportunity to consolidate spectrum. Therefore, if an incumbent fails to construct, discontinues operations, or otherwise has its license terminated, the spectrum covered by the incumbent's authorization will automatically revert to the geographic area licensee. We will presume that a negotiated assignment or transfer of an incumbent station to a geographic area licensee is in the public interest. An incumbent will be permitted to assign its existing license to any qualified entity whether or not that entity is the geographic area licensee. Finally, we will permit an incumbent to assign or transfer any part of an existing system, even if the assigned portion or the remainder would no longer satisfy the current AMTS coverage requirements.

41. After reviewing the comments in this proceeding, we now conclude that the proposal to prohibit a single licensee from acquiring more than one AMTS frequency block in the same geographic area is unnecessarily restrictive.[181] We agree with Mobex that permitting an applicant to bid on only one channel block per geographic area in an auction could impede vigorous competition.[182] We conclude that, given the competing CMRS providers, such as VPC and 220-222 MHz, allowing one applicant to acquire both AMTS channel blocks in the same geographic area will not have anti-competitive consequences for the public. Furthermore, where we have allowed a site-based licensee with one AMTS spectrum block to acquire the other block upon a showing of need, we have recognized no discernable harm to the public.[183] Therefore, we will permit a single licensee to acquire more than one AMTS frequency block in the same geographic area, either initially or by partitioning and disaggregation.

5. Engineering study requirement

42. *Proposal.* As indicated, our rules require an AMTS applicant proposing to locate a transmitter (1) within 169 kilometers (105 miles) of a Channel 13 television station, (2) within 105 kilometers (80 miles) of a Channel 10 television station, or (3) with an antenna height greater than 61 meters (200 feet), to provide an engineering study showing how harmful interference to television reception will be avoided.[184] In the *Third Further Notice*, the Commission sought comment on its tentative conclusion that there should be no modification to the engineering study requirement for new AMTS stations that are not fill-in stations because it was unconvinced that the requirement could be eliminated while still protecting television reception.[185] It noted that AMTS applicants may use an engineering study methodology other than the model offered by the Commission (the Eckert Report),[186] provided that it adequately shows that interference

[180] *See* Mobex Comments at 11; PSI Comments at 8.

[181] AMTA Comments at 4-5; Havens Comments at 17; Mobex Comments 13-15.

[182] Mobex Comments at 15.

[183] AMTA Comments at 5.

[184] 47 C.F.R. § 80.475(a).

[185] *Third Further Notice*, 15 FCC Rcd at 22609 ¶ 47. Regionet suggested eliminating the requirement in a petition for rule making, RM-9664.

[186] In 1982, the Commission conducted a study to analyze the interference potential from AMTS systems to television reception. *See* R. Eckert, *Guidance for Evaluating the Potential for Interference to TV from Stations in the Inland Waterways Communications Systems*, FCC/OST TM 82-5 (July 1982) (Eckert Report); *see also* H. Davis, *Field Tests of 216 to 220 MHz Transmitters for Compatibility with TV Channels 13 and 10*, FCC/OST TM 82-4

(continued....)

to television reception will be avoided.[187] The Commission also sought comment on its tentative conclusion that submitting a survey plan as a means to identify harmful interference to television reception is not a reasonable substitute for an engineering study because its rules require a prospective showing that television reception will be protected, and a survey can only identify interference after it has occurred.[188]

43. *Discussion*. In the *Third Further Notice*, the Commission stated that it was of paramount importance that it continue to ensure that AMTS operations do not interfere with television reception on Channels 10 and 13.[189] Therefore, we are not persuaded by Mobex and PSI's assurances that even without the engineering study requirement, an AMTS geographic area licensee's own self-interest will cause it to choose only sites where it can provide service indefinitely without causing interference to television reception.[190] Because we remain unconvinced that the engineering study requirement can be eliminated while still protecting television reception, we will not modify it, and it will still apply to new AMTS stations that are not fill-in stations.[191] While we are not convinced at this time that removal of the requirement is warranted, we will, nevertheless, examine the requirement in light of additional experience in the next biennial review. Although both KM and Havens urge the Commission to adopt a specific engineering study methodology, such as the Eckert Report, to which all applicants would be required to adhere,[192] we continue to believe that the present regime should be retained. We believe that it is in the public interest to provide AMTS licensees with the flexibility to choose methodologies that, for instance, may be less costly than the Eckert Report methodology, but equally effective. Therefore, we conclude that AMTS applicants may use an engineering study methodology other than that of the Eckert Report, provided that it is adequate to show that interference to television reception will be avoided.

44. We also decline to adopt KM's proposal that AMTS applicants notify all residences predicted to receive interference within five miles of a television station, and either (at the affected television station's option) fifty percent of the residences predicted to receive interference beyond the file-mile radius or all known viewers identified by the television station beyond the five-mile radius.[193] We conclude that KM's notification proposal would be unnecessary, burdensome, and costly.[194] The Commission's Rules already seek to protect residences from interference by requiring AMTS licensees to develop a plan to control interference in instances where there are more than a hundred residences within the AMTS station's interference contour and the television station's Grade B contour.[195] This current requirement is sufficient, particularly since there have been few reported cases of interference.

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(July 1982); L. Middlekamp, H. Davis, *Interference to TV Channels 10 and 13 from Transmitters Operating at 216-225 MHz*, Project No. 2229-71 (Oct. 1975).

[187] *Third Further Notice*, 15 FCC Rcd at 22609 ¶ 48.

[188] *Id.* at 22610 ¶ 49.

[189] *Id.* at 22609 ¶ 47.

[190] *See* Mobex Comments at 13; PSI Comments at 9.

[191] Havens Comments at 17; KM Reply Comments at 4. Fill-in stations are new AMTS stations whose predicted interference contours do not encompass any land area beyond the composite interference contour of the applicant's existing system (except a system's contour can expand over water only (disregarding uninhabited islands)).

[192] Havens Comments at 17; KM Reply Comments at 4.

[193] KM Reply Comments at 11.

[194] Mobex Reply Comments at 13.

[195] 47 C.F.R. § 80.215(h)(3).

6. Broadcaster notification requirement

45. *Proposal.* As noted earlier, our rules require an AMTS applicant proposing to locate a transmitter (1) within 169 kilometers (105 miles) of a Channel 13 television station, (2) within 105 kilometers (80 miles) of a Channel 10 television station, or (3) with an antenna height greater than 61 meters (200 feet), to give written notice of the application to the television stations that may be affected.[196] In the *Third Further Notice*, the Commission declined to propose to amend Section 80.475(a)(2) to require that notification be made on or near the date the application is filed, on the grounds that this already is required.[197] The Commission also tentatively concluded that it is unnecessary to require that every AMTS applicant for a station meeting the broadcaster notification criteria provide a copy of the entire application to every potentially affected broadcaster because it had no reason to believe that AMTS applicants would not voluntarily comply with requests from interested broadcasters for copies of applications if such requests would arise.[198] Moreover, it noted that all interested parties would soon be able to review AMTS applications and licensing information in our Universal Licensing System (ULS), which can be accessed through the Internet.[199]

46. *Discussion.* Havens argues that notification to television stations should include sending a copy of the AMTS application to the television station on or before the date of filing at the Commission.[200] He believes that mere notice of the Commission filing is insufficient. We find that Havens has offered no tangible evidence that would compel a reconsideration of the presumption that AMTS applicants would voluntarily comply with requests from interested broadcasters for copies of applications if such requests would arise. In addition, we note that AMTS applications are now accessible via ULS.[201] Therefore, we continue to believe that it is unnecessary to require every AMTS applicant for a station meeting the broadcaster notification criteria to provide a copy of the entire application to every potentially affected broadcaster.

7. Coverage requirements

47. *Proposal.* In the *Third Further Notice*, the Commission proposed to adopt AMTS station geographic licensee construction requirements similar to those that were adopted for VPC station geographic area licensees.[202] Specifically, it proposed that AMTS licensees be required to provide substantial service to their service areas within five years (which for service areas that contain major waterways[203] can be demonstrated by coverage of one-third of those waterways; and for service areas without major waterways can be demonstrated by coverage of one-third of the area's population) and ten years (which for service areas that contain major waterways can be demonstrated by continuous coverage of

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[196] 47 C.F.R. § 80.475(a)(2).

[197] *Third Further Notice*, 15 FCC Rcd at 22610 ¶ 51. That the notification required by Section 80.475(a)(2) must be made on or near the date the application is filed does not preclude earlier, additional notification. *Id.* at 22611 ¶ 52.

[198] *Id.* at 22611 ¶ 53.

[199] *Id.* at 22611 n.199.

[200] Havens Comments at 17.

[201] Wireless Telecommunications Bureau Implements Deployment of the Universal Licensing System for Maritime Coast and Aviation Ground Services on April 30, 2001, *Public Notice*, DA 01-971 (WTB rel. Apr. 18, 2001).

[202] *Third Further Notice*, 15 FCC Rcd at 22611 ¶ 54.

[203] *I.e.*, the Atlantic Ocean; the Pacific Ocean below the Arctic Circle; the Great Lakes; the Gulf of Mexico and Gulf Intracoastal Waterway; the Mississippi River upriver to Brainerd, Minnesota; the Missouri River to Sioux City, Iowa; the Ohio River to Pittsburgh, Pennsylvania; the Tennessee River to Knoxville, Tennessee; the Arkansas River to Tulsa, Oklahoma; the Red River to Fulton, Arkansas; and the Columbia River to Richland, Washington. *Third Report and Order*, 13 FCC Rcd at 19862 n.46.

two-thirds of those waterways; and for service areas without major waterways can be demonstrated by coverage to two-thirds of the area's population).[204]

48. *Discussion*. Upon further consideration, we will adopt coverage requirements that deviate slightly from what was proposed, by not requiring licensees to meet a five-year benchmark. In the *Third Report and Order*, the Commission reconsidered its proposal in the *Second Further Notice* to require provision of substantial service only within ten years, and added a five-year benchmark, "because of the importance of [VHF] public coast stations to maritime safety."[205] The importance of AMTS stations to maritime safety does not equal that of VPC stations, which, for example, have safety watch requirements not applicable to AMTS stations.[206] Moreover, the Commission has decided with respect to other services that requiring a showing of substantial service only at the end of the license term is sufficient.[207] Therefore, we will require that geographic area licensees provide substantial service within ten years, *i.e.*, at the time of license renewal. We believe that requiring substantial service at the time of license renewal will ensure efficient use of AMTS spectrum, as well as expeditious provision of service to the public.

49. The following "safe-harbor" examples are intended to provide licensees with a degree of certainty regarding how to comply with the substantial service requirement. For service areas with major waterways, substantial service can be demonstrated by continuous coverage of two-thirds of those waterways; and for service areas without major waterways, substantial service can be demonstrated by coverage of two-thirds of the area's population. To satisfy the substantial service requirement along a river or the Gulf Intracoastal Waterway, service should be provided across the entire width;[208] to satisfy the requirement on other waterways, coverage should extend out 20 nautical miles from the coastline (unless limited to a smaller area by an international or AMTS geographic area border) or, where applicable, from the line established by the Coast Guard to divide inland waters from territorial seas.[209] In AMTS geographic areas with more than one major waterway, the safe-harbor coverage requirement refers to the total length of all major waterways; coverage need not necessarily be provided to every major waterway, or to any minimum percentage of each major waterway.[210] If a major waterway extends into more than one geographic area, the licensee need only be concerned with the prescribed coverage in its geographic area. The substantial service requirement can be met in other ways, which will vary depending on the market served, and we will review licensees' showings on a case-by-case basis. We note that this requirement of substantial service at the conclusion of the ten-year license term only applies to geographic area licensees, not to AMTS incumbents.[211] Geographic area licensees shall be afforded a renewal expectancy when their license term expires, provided that they demonstrate that they (1) have

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[204] *Third Further Notice*, 15 FCC Rcd at 22611 ¶ 54.

[205] *Third Report and Order*, 13 FCC Rcd at 19869-70 ¶ 33.

[206] *See* 47 C.F.R. § 80.303.

[207] *See, e.g.*, Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Service at 24 GHz, *Report and Order*, WT Docket No. 99-327, 15 FCC Rcd 16934, 16952 ¶ 41 (2000); Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Report and Order and Second Further Notice of Proposed Rule Making*, ET Docket No. 95-183, 12 FCC Rcd 18600, 18625 ¶ 47 (1997).

[208] *See Third Report and Order*, 13 FCC Rcd at 19870 ¶ 34.

[209] *Id.*; *see* 33 C.F.R. § 2.05-20(b), Part 80.

[210] *See Third Report and Order*, 13 FCC Rcd at 19870 ¶ 34.

[211] AMTS differs from the 800/900 MHz Specialized Mobile Radio (SMR) service, where it was decided that the incumbent SMR licensees that were granted extended implementation authority to construct special wide-area systems (as opposed to SMR systems subject to the general construction requirement) were entitled to the geographic licensees' construction requirement. *See Fresno Mobile Radio, Inc., et al., v. Federal Communications Commission*, 165 F.3d 965 (D.C. Cir. 1999). In contrast to 800/900 MHz SMR, all incumbent AMTS systems were governed by the same construction requirements that existed before the adoption of geographic licensing. Therefore, the decision in *Fresno* does not apply here.

provided substantial service during their license term; and (2) have complied with applicable Commission rules and policies, and the Communications Act.[212]

50. As noted, the substantial service safe harbor for some geographic areas depends on what constitutes a major waterway. Both Havens and Mobex take issue with the Commission's list of major waterways.[213] Havens, in particular, argues that the list of the major waterways should reflect the judgement of the Coast Guard and Army Corp of Engineers.[214] We are satisfied that the list, which the Commission developed in conjunction with the Coast Guard,[215] accurately reflects vessel traffic patterns.[216] Mobex, also not satisfied with the list of major waterways, recommends that we apply the population standard as the coverage requirement in all cases.[217] We decline to adopt Mobex's recommendation because as the safe harbor substantial service examples suggests, demonstration of compliance with the coverage requirement should remain flexible. Furthermore, a demonstration of substantial service for AMTS that only relies on population could, depending on the particular circumstances, fail to reflect the historical and current role that AMTS plays in maritime communications.

8. Partitioning and disaggregation

51. *Proposal.* The Commission proposed to adopt for AMTS geographic area licensees the same partitioning and disaggregation provisions that were adopted for VPC station geographic area licensees.[218] It also proposed to permit disaggregation by incumbent AMTS licensees, provided that the disaggregatee's operations do not extend beyond the disaggregator's service area.[219] It sought comment on how to apportion responsibility for satisfying the two-year construction requirement.[220] It proposed not to permit partitioning by incumbent AMTS licensees, because its rules did not clearly define the service area of an incumbent AMTS station that would be available for partitioning.[221]

52. *Discussion.* We conclude that AMTS geographic area licensees should be permitted to partition any portion of their geographic service area, and to disaggregate any amount of spectrum, at any time to any entity eligible for a public coast station license.[222] Partitionees and disaggregatees would hold their licenses for the remainder of the original licensee's license term, and qualify for a renewal expectancy, if they provide substantial service and comply with the Commission's rules and policies and the Communications Act. In authorizing partitioning and disaggregation, we will follow existing license assignment procedures.[223] We will permit parties to partitioning agreements to choose between two options for satisfying the construction requirements: (a) the parties may either agree to meet the construction

[212] *See Third Report and Order*, 13 FCC Rcd at 19871 ¶ 33.

[213] Havens Comments at 17; Mobex/Regionet Ex Parte Meeting Summary at 2.

[214] Havens Comments at 17.

[215] We note that the Coast Guard, in its comments, did not offer any objections to this list.

[216] We decline to revise the list based on the 23-year old data presented by Mobex regarding commercial traffic on the Mississippi River system and the Gulf Intracoastal Waterway. Mobex/Regionet Ex Parte Meeting Summary at Exhibit IV.

[217] Mobex/Regionet Ex Parte Meeting Summary at 3.

[218] *Third Further Notice*, 15 FCC Rcd at 22612 ¶ 55.

[219] *Id.* at 22613 ¶ 56.

[220] *Id.*

[221] *Id.*

[222] AMTA Comments at 7.

[223] *See* 47 C.F.R. § 1.948.

requirements for their respective portions of the service area,[224] or (b) the original licensee may certify that it has met or will meet the construction requirements for the entire market.[225] We will establish two options for disaggregating licensees: (a) the disaggregator and disaggregatee may certify that they will share responsibility for meeting the substantial service requirements for the geographic service area,[226] or (b) the parties may agree that either the disaggregator or the disaggregatee will be responsible for meeting the substantial service requirements for the geographic service area.[227] We believe that these requirements should prevent licensees from using partitioning and disaggregation to circumvent our rules governing construction requirements. Our Part 1 unjust enrichment provisions will govern partitioning and disaggregation arrangements involving licenses owned by small businesses afforded a bidding credit that later elect to partition or disaggregate their licenses to an entity that does not meet the same small business definition as the licensee.[228]

53. We will permit disaggregation by incumbent AMTS licensees, provided that the disaggregatee's operations do not extend beyond the disaggregator's service area. Also, because we have determined that AMTS incumbents will be protected to a 38 dBu service contour,[229] we now have a clearly defined service contour that AMTS incumbents will be permitted to partition. Partitionees and disaggregatees will hold their licenses for the remainder of the original licensee's term, and be eligible for the same renewal expectancy as other site-based AMTS licensees. We will permit parties to partitioning agreements that involve incumbent licensees to choose between two options for satisfying the construction requirements: (a) the parties may either agree to meet the construction requirements for their respective portions of the site-based service area,[230] or (b) the original licensee may certify that it has met or will meet the construction requirements for the entire service area.[231] We will establish two options for disaggregating licensees: (a) the disaggregator and disaggregatee may certify that they will share responsibility for meeting the construction requirements for the site-based service area,[232] or (b) the parties may agree that either the disaggregator or the disaggregatee will be responsible for meeting the construction requirements for the service area.[233] We believe that these requirements should prevent licensees from using partitioning and disaggregation to circumvent our rules governing construction requirements.

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[224] If either licensee failed to meet its substantial showing requirement, only the non-performing licensee's renewal application would be subject to forfeiture at renewal.

[225] If the partitioner fails to meet the substantial service standard, only its renewal application would be subject to forfeiture at renewal.

[226] If either party fails to meet the substantial service requirement, both licenses would be subject to forfeiture at renewal.

[227] If the party responsible for meeting the construction requirement fails to do so, only its license would be subject to forfeiture at renewal.

[228] *See Third Report and Order*, 13 FCC Rcd at 19874 (citing Amendment of Part 1 of the Commission's Rules -- Competitive Bidding, *Third Report and Order and Second Further Notice of Proposed Rule Making*, WT Docket No. 97-82, 13 FCC Rcd 374, 405 (1997)); 47 C.F.R. § 1.2111.

[229] *See supra.* ¶ 30.

[230] If either licensee failed to meet its construction requirement, only the non-performing licensee's renewal application would be subject to forfeiture at renewal.

[231] If the partitioner fails to meet its construction requirement, only its renewal application would be subject to forfeiture at renewal.

[232] If either party fails to meet the construction requirement, both licenses would be subject to forfeiture at renewal.

[233] If the party responsible for meeting the construction requirement fails to do so, only its license would be subject to forfeiture at renewal.

9. Technical flexibility

54. *Proposal.* Unlike VHF coast stations, AMTS coast stations currently are not permitted by our rules to transmit data.[234] The Commission noted in the *Third Further Notice*, however, that a number of applications with waiver requests to authorize AMTS stations to use data emissions have been granted, and no complaints of harmful interference have been received.[235] In light of its tentative conclusion that VHF and AMTS public coast stations serve similar markets, the Commission proposed to authorize AMTS coast stations to use the same types of data emissions as VPC stations are permitted to use.[236]

55. *Discussion.* We conclude that AMTS licensees should be able to use the same types of data emissions as VPC stations are permitted to use.[237] We believe that affording AMTS licensees this technical flexibility will enhance their ability to meet customer demands, and it will promote regulatory symmetry between AMTS licensees and other CMRS providers.

B. High Seas Public Coast Station Spectrum

56. High seas public coast stations, which operate on LF (.100-.160 MHz band), MF (.405-.525 and 2 MHz bands), and HF (4, 6, 8, 12, 16, 18/19, 22, and 25/26 MHz bands) frequencies, can serve vessels thousands of miles away from the coastline.[238] These stations provide a variety of voice and data telecommunications services, including radiotelephone (voice), radiotelegraph (manual Morse code), facsimile, and narrow-band direct printing (NB-DP) and data transmission.[239] High seas public coast frequencies are assigned for exclusive use in accordance with the ITU Radio Regulations, which specify how each frequency may be used.[240] They are allotted on a geographic or nationwide basis, depending on the type of service to which they are allocated, and are assigned on a site-by-site basis.[241] These frequencies' propagation characteristics make some bands unusable at certain hours due to varying atmospheric or solar conditions, so high seas stations require frequencies in several bands in order to be able to provide service at all times.[242] In the *Fourth Report and Order*, the Commission eliminated the HF channel loading requirements, including any limit on the number of frequencies that may be obtained in an initial or subsequent application.[243]

57. Applications for high seas public coast station frequencies are placed on public notice.[244] Under our current procedures, conflicting applications are accepted within thirty days of the public notice listing the first application as having been accepted for filing.[245] It has been our experience, however, that applicants during the thirty-day filing period choose frequencies that do not conflict with the first application.[246] Almost all instances of conflicting applications have occurred because the second applicant

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[234] *See* 47 C.F.R. § 80.207(d).

[235] *Third Further Notice*, 15 FCC Rcd at 22613 ¶ 58.

[236] *Id.*

[237] *See* Mobex Comments at 15; PSI Comments at 10.

[238] *Second Further Notice*, 12 FCC Rcd at 17001-02 ¶¶ 103-104.

[239] *Id.*

[240] *Id.* at 17002 ¶ 104.

[241] *Id.* at 17002-04 ¶ 109.

[242] *Id.* at 17001 ¶ 103.

[243] *Fourth Report and Order*, 15 FCC Rcd at 22600 ¶ 26.

[244] *See* 47 U.S.C. § 309(b)(1).

[245] *See* 47 C.F.R. § 1.227(b)(4).

was unaware of the first application, and have been resolved by the parties agreeing to non-conflicting frequency assignments.

1. Radiotelephone (voice)

58. HF radiotelephone frequencies. *Proposal.* HF radiotelephone frequencies are allotted among ITU-defined regions, and assigned by frequency pairs on a site-by-site basis.[247] As noted in the *Third Further Notice*, many HF radiotelephone frequency pairs are listed as available in multiple regions, but as a practical matter some are not available in each listed region, for assignment to different licensees would result in harmful interference.[248] Therefore, the Commission proposed to codify its current practice to grant a later license on a secondary, non-interference basis with respect to the first licensee on a particular HF frequency.[249] In addition to mutually exclusive applications (*i.e.*, conflicting applications filed within the thirty-day public notice period), which must be resolved by competitive bidding, the Commission proposed to auction all unassigned HF radiotelephone frequency pairs.[250] It also proposed to continue to license such frequency pairs individually, rather than licensing all currently unassigned frequency pairs in each MHz band to a single licensee.[251]

59. *Discussion.* We note that it is within our authority to replace a licensing scheme that generally avoids mutual exclusivity with one that is more likely to give rise to the filing of mutually exclusive applications, provided that the new licensing mechanism is in the public interest.[252] However, such an action should be taken only when the benefits of converting to a new licensing system clearly outweigh the costs.[253] For the reasons expressed by the commenters, we believe that the public interest would be served by using a licensing method for HF radiotelephone frequencies that eliminates the possibility of mutual exclusivity, thereby obviating the need for competitive bidding. The Coast Guard and Globe Wireless point out that there may be several problems with a licensing approach that allows for the possibility of mutually exclusive applications and auctions. They point to the extensive international coordination required for HF radiotelephone frequencies, as well as the need to conform to the changing allocations and allotments instituted by the World Radio Conference (WRC).[254] Often, the ability to operate on an HF radiotelephone frequency over a ten-year license term may be adversely affected by such factors as coordination with another user of the frequency or WRC decisions regarding allocations and

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[246] This is the case because there generally is more than one unassigned frequency pair among the frequency pairs allotted to each region in each band, and applicants have no reason to prefer any particular frequency pair over another in the same band. Also, in an instance where there are not multiple unassigned frequency pairs in a band, applicants choose to request a frequency pair in the band that has not been allotted to that region. In such an instance, the Commission asks the ITU to reallot the frequency pair to the requested region, and cannot act on the application without ITU consent. We also then update our rules to reflect the new allotment.

[247] *Third Further Notice,* 15 FCC Rcd at 22613-14 ¶ 59.

[248] *Id.* at 22614 ¶ 59.

[249] *Id.*

[250] *Id.* at 22614 ¶ 61.

[251] *Id.*

[252] *See, e.g.,* Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, *Memorandum Opinion and Order*, WT Docket No. 99-87, FCC 02-XX, ¶¶ 14-15 (rel. MM, DD, 2002) (citing *Berkelman Telephone Co. v. FCC*, 220 F.3d 601, 606 (D.C. Cir. 2000), *petition for rehearing denied* (Oct. 25, 2000)).

[253] Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, *Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 99-87, 15 FCC Rcd 22709, 22725 ¶ 31 (1999).

[254] Coast Guard Comments at 1; Globe Wireless Comments at 3.

allotments.[255] Specifically, the licensee may learn under real world conditions that its authorized HF radiotelephone frequency has little practical use because it cannot be coordinated with a foreign user of the frequency, or the ITU may decide at its quadrennial WRC that the licensee's authorized frequency needs to be reallocated to another use or can no longer be allotted to that region. Under current practice, an applicant or licensee can immediately search for a new and available frequency if its requested or authorized frequency could not be coordinated or is no longer usable. Under a competitive bidding scheme for all unassigned HF radiotelephone frequencies, the licensee would have to wait until the next HF radiotelephone auction to apply for a new frequency. In the interim, the licensee would have the facility, but not the HF radiotelephone spectrum, to provide service to the public. It is also worth noting that high seas public coast stations can offer important assistance to the Coast Guard.[256] If that station needs to cancel its license for business reasons, the frequency will lie dormant until the next auction, leaving the Coast Guard with less assistance.[257] Finally, as the Coast Guard notes, a competitive bidding scheme may inhibit the authorized sharing of this spectrum by federal government and non-governments users.[258]

60. As indicated, because some of the HF radiotelephone bands are unusable at certain times due to varying atmospheric and solar conditions, it is essential that applicants obtain frequencies in several bands. Because licensing all unassigned HF radiotelephone frequency pairs individually, as proposed by the Commission, would entail the risk that an entity will become licensed to use frequency pairs in some, but not enough of the HF bands to enable it to provide communications service at all times under consistently changing conditions, we also have considered licensing sets of HF radiotelephone frequency pairs that are aggregated from several bands. We nonetheless believe that licensing aggregated suites of channel pairs would be contrary to the public interest because it would foreclose incumbents from applying for any additional frequencies that may be needed to increase capacity in particular bands, or to seek replacements only for particular frequencies that must be changed due to interference or ITU action. Moreover, any attempt to establish aggregated sets of frequency pairs would be complicated by the fact that certain bands have fewer frequency pairs than others.

61. In addition, given the above considerations, we conclude that it would be in the public interest to modify our current licensing procedures to preclude the filing of mutually exclusive applications for HF radiotelephone frequency pairs, thereby obviating the need to use competitive bidding procedures. Specifically, instead of accepting mutually exclusive applications during the thirty-day period that commences when an application is listed on public notice as accepted for filing, we will process applications on a first-come, first-served basis. We believe that our decision to preclude the filing of mutually exclusive applications will not cause any hardship or inconvenience to other applicants for HF radiotelephone frequencies because, as noted above, few mutually exclusive applications are filed under this procedure, and almost none are intentional. Should circumstances change such that this procedure no longer serves the public interest, we reserve discretion to revisit the question of whether to accept mutually exclusive applications and resolve them by means of competitive bidding.

62. Because HF frequency will propagate throughout these ITU-defined regions and beyond, the Coast Guard recommends that the regions be eliminated.[259] We decline to adopt the Coast Guard's recommendation because we are already acknowledging the HF frequency's propagation characteristics when we grant a later HF radiotelephone license on a secondary, non-interference basis with respect to the

[255] Coast Guard Comments at 2; Globe Wireless Comments at 3.

[256] *See* 47 C.F.R. § 80.301(d).

[257] Coast Guard Comments at 3. The Coast Guard stated that it will pursue sharing arrangements through the National Telecommunications and Information Administration and the Commission in order to obtain two additional sets of usable duplex radiotelephone channels that would be used for weather warnings, forecasts, distress, safety and routine calling. *Id.* at 4.

[258] 47 C.F.R. § 2.106.

[259] Coast Guard Comments at 4-5.

first licensee in the ITU-defined region. For that reason, we will codify this current practice. Moreover, by adhering to the ITU allotments, we will remain consistent with ITU regulations.

63. MF radiotelephone frequencies. *Proposal.* MF radiotelephone frequencies are allotted among Commission-created regions and assigned by frequency pair on a site-by-site basis.[260] Because the frequencies are reused in multiple, non-interfering regions in different pairings, the Commission tentatively concluded that it would not be in the public interest to disrupt incumbent operations and impose transition costs by establishing nationwide channel pairs.[261] Therefore, it proposed to make no change to the MF radiotelephone frequency allotments and method of assignment of frequency pairs.[262] It stated that where mutually exclusive applications are accepted for filing, competitive bidding procedures would be used. It sought comment on whether, in the alternative, it should proceed with scheduling an auction of all currently unassigned MF radiotelephone spectrum.[263] The Commission also sought comment on whether it should specifically define the eight MF public coast station geographic regions by reference to ITU regions or Coast Guard Districts, in order to enhance licensee certainty regarding the siting of facilities.[264] Finally, because the Commission believed that permitting private coast stations to share 2 MHz public correspondence frequencies would promote the more efficient use of maritime spectrum and reduce congestion for MF private coast licensees, it proposed to make a 2 MHz frequency available for assignment to private coast stations for business and operational radiotelephone communications in each region with unassigned frequencies.[265]

64. *Discussion.* For the reasons given in the *Third Further Notice*, we conclude that it is in the public interest to make no changes to the MF radiotelephone frequency allotments and the method of assigning frequency pairs on a site-by-site basis. Similar to HF radiotelephone frequency, we note the existence of several factors (*i.e.*, frequency coordination, WRC decisions on reallocation and allotments, lack of mutually exclusive applications under current procedures) that lead us to the conclusion that a licensing scheme under which mutually exclusive applications are possible for unassigned MF radiotelephone frequency pairs would be contrary to the public interest. Accordingly, for the reasons stated above with respect to HF radiotelephone frequencies, we also adopt first-come, first-served processing for MF radiotelephone frequencies. Because no commenter supported the proposal to establish definitions for the eight MF public coast station geographic regions, we will not change the rule.[266] We also conclude that it is in the public interest that we make a 2 MHz MF frequency available for assignment to private coast stations for business and operational radiotelephone communications in each region with unassigned frequencies.[267] This should assist the private coast stations operating in this band, which have experienced a marked increase in congestion on their shared frequencies, whereas the number of public coast stations operating in the 2 MHz MF band has decreased by twenty-five percent since 1989.[268] If any of these frequencies has not been assigned to a private coast station within one year of being made available for such use, then the frequency shall revert to a public correspondence frequency.

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[260] *Third Further Notice*, 15 FCC Rcd at 22614 ¶ 62.

[261] *Id.*

[262] *Id.*

[263] *Id.*

[264] *Id.* at 22615 ¶ 62.

[265] *Id.* at 22615 ¶ 63.

[266] *See* Globe Wireless Comments at 2 ("The current licensing procedures for this band are supported.").

[267] Specifically, frequency pair 2382.0/2482.0 MHz on the East Coast, frequency pair 2430.0/2482.0 MHz on the West Coast, frequency pair 2382.0/2482.0 MHz on the Gulf Coast, and frequency pair 2131.0/2309.0 MHz in Alaska.

[268] *See Second Further Notice*, 12 FCC Rcd at 17014 ¶ 130.

65. Shared 4/8 MHz spectrum. *Proposal.* Frequencies in the 4000-4063 kHz and 8100-8195 kHz bands (4/8 MHz bands) are shared on a co-primary basis between the fixed and maritime mobile services.[269] These frequencies are available to ship and public coast stations, and frequencies in the 4000-4063 kHz band also are available to private coast stations.[270] When a 4000-4063 kHz band frequency is licensed first to a private coast station, it remains available to other private coast stations, but not to public coast stations; if a public coast station is the initial licensee, that public coast station has exclusive nationwide use of the frequency.[271] Frequency availability in the 4/8 MHz bands is limited, because assignments require government coordination and approval by the Interdepartment Radio Advisory Committee (IRAC),[272] and these bands are used extensively by the government fixed services.[273] In addition, use of these frequencies by U.S. stations is not protected against harmful interference from, and must not cause harmful interference to, foreign ship stations.[274] In consideration of the foregoing factors, and the current limited use and low demand for these frequencies, the Commission proposed to retain its current procedures for assigning these frequencies.[275] It proposed that where mutually exclusive applications are filed, competitive bidding procedures would be used. It also sought comment on whether, in the alternative, it should proceed with scheduling an auction of all currently unassigned spectrum in the 4000-4063 kHz and 8100-8195 kHz bands that is available for exclusive use.[276]

66. *Discussion.* We note the existence of several factors (*e.g.*, limited frequency availability, no interference protection with respect to foreign ship stations) that lead us to the conclusion that an auction of all unassigned shared 4/8 MHz spectrum would be contrary to the public interest. Therefore, for the reasons given in the *Third Further Notice* and for the reasons stated above with respect to HF radiotelephone frequencies, we also adopt first-come, first-served processing for applications for shared 4/8 MHz spectrum.

2. Radiotelegraph (manual Morse code) and facsimile

67. *Proposal.* High seas public coast station radiotelegraph frequencies, distributed among the LF, MF, and HF bands ("the radiotelegraph table frequencies"), are allotted among eleven geographic regions and are assigned on a site-by-site basis.[277] The Commission proposed to codify its current practice to grant a later license on such a frequency only on a secondary, non-interference basis with respect to the first licensee.[278] In addition to the radiotelegraph table frequencies, the following frequencies also are available for assignment for public coast station radiotelegraph use, upon IRAC coordination and approval: (1) LF

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[269] 47 C.F.R. § 80.374. These frequencies are available to ship and public coast stations for supplementary ship-to-shore duplex operations with public coast stations already assigned HF radiotelephone frequencies, intership simplex operations and crossband operations, and ship-to-shore or shore-to-ship simplex operations. *Id.*

[270] *Id.*

[271] *Third Further Notice*, 15 FCC Rcd at 22616 ¶ 64.

[272] 47 C.F.R. § 80.374. IRAC is responsible for frequency coordination efforts on behalf of the Federal Government and is composed of representatives of various government agencies. It advises the National Telecommunication and Information Administration concerning spectrum management issues and coordinates spectrum issues among government users and with the Commission. *Second Further Notice*, 12 FCC Rcd at 17002 n.237.

[273] Amendment of Parts 2 and 80 of the Commission's Rules Regarding Revision of the High Frequency (HF) Channels for the Maritime Mobile Service to Implement the Final Acts of the World Administrative Radio Conference for the Mobile Services, Geneva, 1987, *Report and Order*, PR Docket No. 90-133, 6 FCC Rcd 786, 787 ¶ 16 (1991).

[274] 47 C.F.R. § 80.374.

[275] *Third Further Notice*, 15 FCC Rcd at 22616 ¶ 64.

[276] *Id.*

[277] *See* 47 C.F.R. § 80.357(b)(1).

[278] *Third Further Notice*, 15 FCC Rcd at 22616-17 ¶ 65.

and MF frequencies offset from the radiotelegraph table frequencies,[279] and (2) any frequency in addition to the radiotelegraph table frequencies that is within the segments of the maritime mobile HF bands where coast station use of facsimile is permitted internationally ("the facsimile bands").[280]

68. Facsimile frequencies are assigned for nationwide use to a single public coast station.[281] Our rules do not establish specific frequencies for high seas public coast station facsimile use;[282] rather, licensees may select for facsimile use any 3 kHz channel in (1) the facsimile bands,[283] or (2) the 2000-27500 kHz bands (except the 4/8 MHz bands) listed in Part 2 of the Commission's Rules as available for shared use by the maritime mobile service and other radio services ("the shared bands").[284] After coordination and approval by IRAC, the chosen frequency will be assigned if its use will not cause harmful interference to another licensee, even if such use will preclude assignment of an unassigned frequency also allocated to another service or another type of transmission.[285]

69. The Commission tentatively concluded that the radiotelegraph table frequencies should remain available for radiotelegraph use and for facsimile use.[286] It proposed to retain our current procedures for assigning the radiotelegraph and facsimile frequencies, and to use competitive bidding procedures to resolve mutual exclusivity.[287] It also sought comment on whether, in the alternative, it should proceed with scheduling an auction of all currently unassigned spectrum.[288] Finally, it requested comment on whether it should eliminate the operator licensing requirement for all public coast stations transmitting radiotelegraph (manual Morse code).[289]

70. *Discussion.* As is the case with HF radiotelephone frequency pairs, some radiotelegraph frequencies allotted to multiple regions are as a practical matter not available in each of those regions, for assignment to different licensees would result in harmful interference. Therefore, we believe that it is in the public interest to codify our current practice to grant a later license on a radiotelegraph frequency only on a secondary, non-interference basis with respect to the first licensee. We conclude that the radiotelegraph table frequencies should remain available for radiotelegraph use, so that high seas radiotelegraph public coast station operators can take advantage of the elimination of the channel loading requirement, and for facsimile use, because we expect more facsimile use of these frequencies than telegraph use in the future. Therefore, for the reasons stated in the *Third Further Notice* and for the reasons stated above with respect to HF radiotelephone frequencies, we also adopt first-come, first-served processing for applications for radiotelegraph and facsimile frequencies.

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[279] *Second Further Notice*, 12 FCC Rcd at 17002. Licensees obtain these frequencies in order to avoid interference from a co-channel or adjacent channel station in another region or another country. *Id.*

[280] 47 C.F.R. § 80.357(b)(1). The HF radiotelegraph table frequencies fall within the facsimile bands. *Compare id. with* 47 C.F.R. § 80.363(a)(2).

[281] *Second Further Notice*, 12 FCC Rcd at 17002 ¶ 104.

[282] *See* Commission's Rules to Provide for Facsimile Communications in the Maritime Mobile Service, PR Docket No. 83-90, 48 Fed. Reg. 9890, 9890 (1983).

[283] *See* 47 C.F.R. § 80.363(a)(2).

[284] *See* 47 C.F.R. §§ 80.122(b)(1), 80.363(a)(2).

[285] *See* 47 C.F.R. § 80.363(a)(2).

[286] *Third Further Notice*, 15 FCC Rcd at 22618 ¶ 68.

[287] *Id.* at 22618 ¶ 69.

[288] *Id.*

[289] *Id.* at 22618 ¶ 70.

71. Finally, we agree with the commenters that certain factors, such as recent ITU decisions[290] and modern computer technology,[291] render obsolete the operator licensing requirement for all public coast stations transmitting radiotelegraph (manual Morse code as well as narrow-band direct printing (NB-DP)[292]). Therefore, we will eliminate this requirement. Although the Commission proposed to eliminate the operator licensing requirement only as it concerned manual Morse code,[293] we believe that it is logical to extend the elimination of this requirement to NB-DP, which is considered a form of radiotelegraphy,[294] in order to conform our licensing requirements to the ITU regulations.

3. NB-DP and data transmission

72. *Proposal.* Frequency pairs for NB-DP and data transmission are distributed among the HF bands, and are assigned for nationwide use to a single public coast station.[295] In the *Third Further Notice*, the Commission sought comment on whether it should continue assigning these frequency pairs individually using current procedures.[296] Finally, it sought comment on whether, in the alternative, it should commence auction proceedings for all currently unassigned frequency pairs for NB-DP and data transmission.[297]

73. *Discussion.* Consistent with our decisions regarding other high seas public coast station spectrum, we will adopt first-come, first-served processing for NB-DP and data transmission frequencies, but otherwise retain our current licensing scheme.

4. Use flexibility

74. *Proposal.* High seas public correspondence spectrum is allocated for specific uses in accordance with the ITU Radio Regulations. In the *Third Further Notice*, the Commission recognized that the current low demand for this spectrum may be due to certain aspects of its rules that prevent this spectrum from being used for other services.[298] Therefore, it sought comment on whether it should introduce flexibility into its rules to permit additional uses of this spectrum, for domestic use only and/or on a secondary basis to maritime communications.[299] It requested that comments for additional uses also include appropriate changes to specific service rules.[300]

75. *Discussion.* Although the Coast Guard expressed its support for the introduction of flexible uses, provided the uses are restricted to maritime services and safety purposes are considered,[301] it did not

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[290] *See* Coast Guard Comments at 5; Globe Wireless Comments at 5; *see also* ITU Radio Regulations S52.54, S52.54.1.

[291] Mobile Marine Radio, Inc. Comments to *Further Notice* at 20 (filed Sept. 22, 1995).

[292] NB-DP is a form of radiotelegraphy, standardized internationally for the automatic transmission and reception of data communications in the marine HF band. NB-DP is used for communications either from ships to public coast stations or between ships. *See Second Report and Order*, 12 FCC Rcd at 16974 ¶ 45.

[293] *Third Further Notice*, 15 FCC Rcd at 22618 ¶ 70.

[294] *See* 47 C.F.R. § 80.351.

[295] *Second Further Notice*, 12 FCC Rcd at 17002 ¶ 104; *see* 47 C.F.R. § 80.361(a)(1).

[296] *Third Further Notice*, 15 FCC Rcd at 22619 ¶ 71.

[297] *Id.*

[298] *Id.* at 22619 ¶ 72.

[299] *Id.*

[300] *Id.*

[301] Coast Guard Comments at 5. The Coast Guard opposes secondary, non-maritime uses of this spectrum. *Id.*

offer any specific uses or the appropriate changes that would need to be made to specific rules. Because no other commenters addressed this matter with any degree of specificity either, we decline to adopt flexible use of high seas public correspondence spectrum at this time. As the Commission noted in the *Third Further Notice*, it may not always be in the public interest to distribute all spectrum resources to licensees immediately.[302]

5. Partitioning and disaggregation

76. *Proposal.* The Commission proposed to permit partitioning of any geographic portion of the high seas public coast frequencies (or, as the case may be, frequency pairs) allotted nationwide or to multiple regions at any time to any entity eligible for a public coast station license. With respect to instances where there are multiple co-channel incumbents, the Commission proposed that only the prior incumbent be allowed to partition frequencies, and that the partitionee's operation be conditioned on a secondary, non-interference basis to the later incumbent.[303] It tentatively concluded that no purpose would be served by permitting single-region licensees to partition their frequencies, for their authorized service areas cannot accommodate multiple co-channel licensees without harmful interference resulting.[304] Finally, the Commission sought comment on how to apportion responsibility for satisfying the twelve-month construction requirement between partitioner and partitionee.[305]

77. *Discussion.* We adopt the Commission's proposals, which were not opposed by any commenter. Partitioning of frequencies subject to IRAC approval and coordination requirements will itself require IRAC approval and coordination. Partitionees will hold their licenses for the remainder of the original licensee's term, and will be eligible for the same renewal expectancy as other high seas public coast station licensees. In order to ensure that an incumbent licensee does not use partitioning as a means of circumventing the twelve-month construction requirement,[306] we will hold the partitionees to the incumbent licensee's original construction deadline. Because we will continue to assign high seas spectrum by individual frequency (or, as the case may be, individual frequency pair) rather than by frequency block, disaggregation is not an option, and normal assignment procedures will continue to apply.

C. Competitive Bidding Procedures

78. *Proposal.* In the *Third Report and Order* in this proceeding, the Commission decided that the general competitive bidding rules found in Subpart Q of Part 1 of the Commission's Rules should apply to the auction of public coast spectrum.[307] The Commission also adopted provisions to facilitate the participation of small businesses in auctions of public coast licenses.[308] It defined small businesses as those entities, together with their affiliates and controlling interests, with not more than fifteen million dollars in average gross revenues for the preceding three years, and very small businesses as those entities, together with their affiliates and controlling interests, with not more than three million dollars in average gross revenues for the preceding three years.[309] The Commission further provided that small businesses would receive a bidding credit of 25 percent and very small businesses would receive a

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[302] *Third Further Notice*, 15 FCC Rcd at 22619 ¶ 72.

[303] *Id.* at 22619-20 ¶ 73.

[304] *Id.* at 22620 ¶ 74.

[305] *Id.* at 22619-20 ¶ 73.

[306] 47 C.F.R. § 80.49(a)(2).

[307] *Third Report and Order*, 13 FCC Rcd at 19884 ¶ 64; *see* 47 C.F.R. §§ 80.1251, 80.1252(a).

[308] *Third Report and Order*, 13 FCC Rcd at 19884-88 ¶¶ 65-73.

[309] *Id.* at 19884 ¶ 65; *see* 47 C.F.R. § 80.1252(b).

bidding credit of 35 percent.[310] In the *Third Further Notice*, the Commission tentatively concluded that these provisions would be appropriate for AMTS and high seas services licenses.[311]

79. *Discussion.* As discussed above, pursuant to statutory mandate, competitive bidding procedures will be used to resolve mutually exclusive applications for AMTS licenses.[312] Consistent with the Commission's proposals in the *Third Further Notice*, we will use the general competitive bidding rules set forth in Part 1, Subpart Q, of the Commission's rules to conduct any auctions of initial licenses in the AMTS service.[313] Our decision to adopt the Part 1 rules is consistent with our ongoing effort to streamline our general competitive bidding rules for all radio services that are subject to competitive bidding and increase the efficiency of the competitive bidding process.[314] This decision is also consistent with the approach that has been employed in the auction of VPC spectrum.[315] Application of the Part 1 rules will be subject to any modifications that the Commission may subsequently adopt.[316]

80. We will also extend bidding preferences to small business entities that participate in any auctions of AMTS licenses. The Commission has long recognized that bidding preferences for qualifying bidders provides such bidders with an opportunity to compete successfully against large, well-financed entities.[317] The Commission has also found that the use of tiered or graduated small business definitions is useful in furthering our mandate under Section 309(j) to promote opportunities for and disseminate licenses to a wide variety of applicants.[318] In developing these definitions, we evaluate the likely

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[310] *Third Report and Order*, 13 FCC Rcd at 19888 ¶ 72; *see* 47 C.F.R. § 80.1252(d).

[311] *Third Further Notice*, 15 FCC Rcd at 22620-21 ¶ 75.

[312] *See* 47 U.S.C. § 309(j).

[313] *See* 47 C.F.R. Section 1.2101 *et. seq.* (Subpart Q -- Competitive Bidding Proceedings).

[314] The Commission has previously observed that "our general competitive bidding rules are intended to streamline our regulations and eliminate unnecessary rules wherever possible, increase the efficiency of the competitive bidding process, and provide more specific guidance to auction participants." *Part 1 Third Report and Order*, 13 FCC 375, 376 ¶ 1. Further, continual changes and improvements "advance our auction program by reducing the burden on the Commission and the public of conducting service-by-service auction rule makings." *Id.*

[315] *Third Report and Order*, 13 FCC Rcd at 19884 ¶ 64 (citing Amendment of Part 1 of the Commission's Rules – Competitive Bidding, *Third Report and Order and Second Further Notice of Proposed Rule Making*, WT Docket No. 97-82, 13 FCC Rcd 374, 377-81 ¶ 3 (1997) (*Part 1 Third Report and Order*)).

[316] The Commission has recently clarified and amended its general competitive bidding procedures for all auctionable services. *See* Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, WT Docket No. 97-82, 15 FCC Rcd 15293 (2000), *recons. pending* (*Part 1 Order on Reconsideration, Fifth Report and Order, and Fourth FNPRM*). The Commission has also recently amended its prohibition on collusion in competitive bidding, which is found in Section 1.2105(c) of the Commission's Rules. *See* Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures, *Seventh Report and Order*, WT Docket 97-82, FCC 01-270 (Sept. 27, 2001). Consistent with our established competitive bidding scheme, matters such as the appropriate competitive bidding design for the auction of AMTS licenses, as well as minimum opening bids and maximum bid increments, will be determined by the Wireless Telecommunications Bureau pursuant to its existing delegated authority. *See Third Report and Order*, 13 FCC Rcd at 19884 ¶ 64 (citing *Part 1 Third Report and Order*, 13 FCC Rcd at 448-49 ¶ 125 , 454-55 ¶ 139; *see also* 47 C.F.R. §§ 0.131(c), 0.331, 0.332).

[317] *See, e.g.*, Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, WT Docket No. 96-18, PR Docket No. 93-253, 14 FCC Rcd 10030, 10117 ¶ 178 (1999)

[318] 47 U.S.C. § 309(j)(3)(B), (4)(C)-(D).

characteristics and capital requirements of the specific service.[319] As noted in the *Third Further Notice*, the VPC and AMTS operate under many of the same Part 80 service rules.[320] Moreover, AMTS transmitting equipment is similar in technology and cost to VHF transmitting equipment.[321] For the foregoing reasons, we believe that the capital requirements for AMTS may be comparable to those for the VPC service. We therefore conclude that the competitive bidding provisions regarding small and very small business definitions and bidding credits that were applied to the auction of VPC licenses are appropriate for the AMTS licenses. Therefore, in any auction of AMTS spectrum, we will define a "small business" as any entity with average annual gross revenues for the three preceding years not exceeding $15 million, and a "very small business" as any entity with average annual gross revenues for the three preceding years not exceeding $3 million.[322] We will also use our standard schedule of bidding credits, which may be found at Section 1.2110(f)(2) of the Commission's Rules.[323] The standard bidding credit schedule provides for the following levels of credits: small businesses will receive a bidding credit of 25 percent and very small businesses will receive a bidding credit of 35 percent.

81. We reject Mobex's recommendation that we should allow applicants seeking bidding credits to exclude operating revenues from activities that have been discontinued more than one year prior to the filing of the short form application when determining the average gross revenues for the preceding three years.[324] We note that a business's gross revenue stream may fluctuate over a three-year period and that certain revenue-producing activities may be discontinued. By averaging the total gross revenues for the preceding three years, including those revenues that come from any discontinued activity, the applicant is able to provide an accurate and equitable measure of the size of a business and whether that business has the resources to compete in an auction.[325] For that reason, the Commission has not excluded such revenue from the definition of gross revenues it has applied to applicants for licenses in other services. Moreover, we are concerned that adoption of Mobex's recommendation could invite business practices that are designed to circumvent our competitive bidding provisions in order to qualify as a small or very small business, *i.e.*, to shield revenue or shelve revenue-producing activities for the year preceding the auction. We believe our current definition of "gross revenues" has worked well to date as a measure of an applicant's size and Mobex has failed to present any evidence to the contrary.

V. PROCEDURAL MATTERS

A. Suspension of Acceptance and Processing of Applications

82. In the *Third Further Notice*, the Commission suspended acceptance of applications for new licenses, applications to modify existing licenses, and amendments to applications for new licenses or

[319] *See Part 1 Third Report and Order*, 13 FCC Rcd at 388 ¶ 18; Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 7245, 7269 ¶ 145 (1994).

[320] *Third Further Notice*, 15 FCC Rcd at 22620-21 ¶ 75.

[321] *Id.*

[322] These small business size standards have been approved by the U.S. Small Business Administration, pursuant to Section 3 of the Small Business Act. *See* Letter from Aida Alvarez, Administrator, Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission (dated November 3, 2000) (approving size standards for AMTS and high seas public coast services); *see also* 15 U.S.C. § 632(a)(2) (establishment of size standards by federal agencies); 13 C.F.R. §121.90(b) (promulgation of special size standards by federal agencies).

[323] 47 C.F.R. § 1.2110(f)(2).

[324] Mobex Comments at 16.

[325] Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rule Making*, WT Docket No. 97-82, 13 FCC Rcd 374, 388-89 ¶ 19 (1997); *see generally* 15 U.S.C. § 632(c)(2)(ii).

modifications, for AMTS (217-220 MHz)[326] and HF radiotelephone (4-27.5 MHz)[327] frequencies as of November 16, 2000.[328] However, it stated that it would continue to accept and process applications for such frequencies involving renewals, transfers, assignments, and modifications, and amendments to such applications, that proposed neither to expand a station's (or AMTS system's) service area or to obtain additional spectrum.[329] With respect to applications that were pending as of November 16, 2000, it suspended the processing of those applications that were mutually exclusive with other applications and were still within the relevant period for filing competing applications.[330]

83. Due to the transition to geographic area licensing in this *Fifth Report and Order*, all applications to use AMTS spectrum the processing of which was suspended shall be dismissed. This action is consistent with the general approach we have taken in other services where we have transitioned to geographic area licensing and auction rules.[331] In addition, the suspension of acceptance of new applications to use this spectrum shall remain in effect beyond the date that the final rules adopted herein become effective, and until such time as the Wireless Telecommunications Bureau begins to accept applications for the AMTS auction.

84. Because we decided to modify the current licensing procedures of all HF radiotelephone frequencies to preclude the filing of mutually exclusive applications, thereby obviating the need to use competitive bidding procedures, we will, on the date that the rules adopted in the *Second Memorandum Opinion and Order and Fifth Report and Order* go into effect, lift the suspension of acceptance and processing of new applications for HF radiotelephone frequencies. Thereafter, rather than resume our previous practice of accepting such applications and placing them on public notice individually to allow for the filing of competing applications, we will process such applications on a first-come, first-served basis.[332]

B. Regulatory Flexibility Act

85. Appendix B contains a Final Regulatory Flexibility Analysis (FRFA) with respect to the *Fifth Report and Order*. As required by the Regulatory Flexibility Act,[333] the Commission has prepared the analysis of the possible impact on small entities of the rules and set forth in this document. The Commission's Consumer Information Bureau, Reference Information Center, will send a copy of this *Second Memorandum Opinion and Order and Fifth Report and Order*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with the Regulatory Flexibility Act.

C. Paperwork Reduction Act of 1995

86. This *Fifth Report and Order* contains a new information collection for which the Commission is submitting to the Office of Management and Budget (OMB) a request for emergency clearance under the Paperwork Reduction Act of 1995, Pub. L. No. 104-13.

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[326] 47 C.F.R. § 80.385(a)(2).

[327] 47 C.F.R. § 80.371(b).

[328] *Fourth Report and Order*, 15 FCC Rcd at 22621 ¶ 76.

[329] *Id.* at 22622 ¶ 77.

[330] *Id.* at 22622 ¶ 78.

[331] *See, e.g., Third Report and Order*, 13 FCC Rcd at 19889 ¶ 75.

[332] Because we are modifying the current licensing procedures for HF radiotelephone frequency pairs, *see supra* ¶ 61, we believe that it is in the public interest that the applications that were filed under such procedures and have been held in abeyance since November 16, 2000, be dismissed without prejudice. Dismissed applicants will be allowed to re-file under the new procedures.

[333] *See* 5 U.S.C. § 601, *et. seq.*

D. Ordering Clauses

87. Authority for the issuance of this *Second Memorandum Opinion and Order and Fifth Report and Order* is contained in Sections 4(i), 4(j), 7(a), 302, 303(b), 303(f), 303(g), 303(r), 307(e), 332(a), and 332(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 157(a), 302, 303(b), 303(f), 303(g), 303(r), 307(e), 332(a), and 332(c).

88. Accordingly, IT IS ORDERED that Part 80 of the Commission's Rules, 47 C.F.R. Part 80 ARE AMENDED as specified in Appendix C.

89. IT IS FURTHER ORDERED that this *Second Memorandum Opinion and Order and Fifth Report and Order* will be effective 30 days after publication in the Federal Register.

90. IT IS FURTHER ORDERED that, effective April 8, 2002, pending applications to use the frequencies listed in Sections 80.371(b), and 80.385(a)(2) of the Commission's Rules, 47 C.F.R. §§ 80.371(b), 80.385(a)(2), that were held in abeyance pursuant to the *Fourth Report and Order and Third Further Notice of Proposed Rule Making* ARE DISMISSED.

91. IT IS FURTHER ORDERED that, effective 30 days after publication in the Federal Register, new applications to use the frequencies listed in Section 80.371(b) of the Commission's Rules, 47 C.F.R. § 80.371(b), WILL BE ACCEPTED FOR FILING.

92. IT IS FURTHER ORDERED pursuant to Sections 4(i), 303(r), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the petition for reconsideration filed by Warren C. Havens on January 8, 2001 IS DENIED.

93. IT IS FURTHER ORDERED pursuant to Sections 4(i), 303(r), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 405, and Section 1.925 of the Commission's Rules, 47 C.F.R. § 1.925, that the waiver request filed by Warren C. Havens on January 16, 2001 IS DENIED.

94. IT IS FURTHER ORDERED pursuant to Sections 4(i), 303(r), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the petition for reconsideration filed by Warren C. Havens on January 16, 2001 IS DISMISSED.

95. IT IS FURTHER ORDERED pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Section 1.939 of the Commission's Rules, 47 C.F.R. § 1.939, that the petition to deny filed by Warren C. Havens on May 25, 2001 IS DISMISSED.

96. IT IS FURTHER ORDERED pursuant to Sections 4(i), 303(r), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 405, and Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, that the request for declaratory ruling filed by Warren C. Havens on June 4, 2001 IS DENIED.

97. IT IS FURTHER ORDERED pursuant to Sections 4(i), 303(r), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 405, and Section 1.401 of the Commission's Rules, 47 C.F.R. § 1.401, that the petition for rule making filed by Regionet Wireless License, LLC, on May 12, 1999, RM-9664, IS DENIED.

98. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Second Memorandum Opinion and Order and Fifth Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

E. Contact for Information

99. For further information, contact Keith Fickner of the Wireless Telecommunications Bureau, Public Safety and Private Wireless Division, Policy and Rules Branch, at (202) 418-0680, TTY (202) 418-7233, or via e-mail to kfickner@fcc.gov.

100. Alternative formats (computer diskette, large print, audio cassette, and Braille) are available to persons with disabilities by contacting Brian Millen at (202) 418-7426, TTY (202) 418-7365, or via e-mail to bmillen@fcc.gov. This *Second Memorandum Opinion and Order and Fifth Report and Order* can be downloaded at http://www.fcc.gov/Wireless/Orders/2002/fcc0272.txt.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary