

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

In the Matter of Applications for )  
 )  
VERY HIGH FREQUENCY (VHF) PUBLIC ) File Nos. 0000002980, 0000002997, 0000003008,  
COAST SPECTRUM IN THE ) and 0000003026  
156-162 MHZ BANDS )

**MEMORANDUM OPINION AND ORDER**

**Adopted: May 14, 1999**

**Released: May 19, 1999**

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

**I. INTRODUCTION**

1. On January 14, 1999, WJG MariTEL Corporation (MariTEL) filed a petition<sup>1</sup> to deny the VHF Public Coast Service long-form applications (FCC Form 601s) of itself and Warren Havens (Havens).<sup>2</sup> For the reasons discussed below, the Petition is dismissed in part and denied in part.

**II. BACKGROUND**

2. On December 3, 1998, the Federal Communications Commission commenced an auction of licenses for very high frequency (VHF) public coast spectrum in the 156-162 MHz bands.<sup>3</sup> At the conclusion of the auction, which occurred on December 14, 1998, there were four high bidders for twenty-six of the forty-two VHF Public Coast area (VPC) licenses<sup>4</sup> available in the VHF Public Coast Service auction.<sup>5</sup> MariTEL and Havens were the high bidders for nine and thirteen VPCs, respectively, and two other bidders--namely,

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<sup>1</sup> MariTEL Petition to Deny Long-Form Applications (filed Jan. 14, 1999) (Petition). Data Radio Management Co., Inc. (Data Radio) and SMR Systems, Inc. (SSI) separately filed oppositions to the Petition on January 22, 1999, and Warren Havens filed an opposition on January 27, 1999. MariTEL filed a consolidated reply on February 5, 1999.

<sup>2</sup> MariTEL also petitioned to deny the applications of Data Radio and SSI but later withdrew its objection to granting those licenses. Reply at 1 n.1.

<sup>3</sup> See Auction of 156-162 MHz VHF Public Coast Service Licenses -- 8 Qualified Bidders, *Public Notice*, DA 98-2347, at 1 (rel. Nov. 20, 1998).

<sup>4</sup> The forty-two VPCs consist of nine maritime VPCs (which are those near one or more major waterways) and thirty-three inland VPCs. 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, 19862 (1998) (*Maritime Third Report and Order*); 47 C.F.R. § 80.371(c)(1)(ii).

<sup>5</sup> VHF Public Coast Service Auction Closes, *Public Notice*, DA 98-2542, at 1 (rel. Dec. 16, 1998). The Commission plans to conduct an auction in the second or third quarter of 1999 for the sixteen VPC licenses that remained unawarded at the conclusion of the auction. *Id.* at 2.

Data Radio and SSI--won a total of four other VPCs.<sup>6</sup> After a preliminary review, the four<sup>7</sup> FCC Form 601s for the twenty-six VPC licenses were accepted for filing.<sup>8</sup>

3. On January 14, 1999, MariTEL filed a petition to deny all four FCC Form 601s. On February 5, 1999, it withdrew its objection to granting the Data Radio and SSI applications.<sup>9</sup>

4. In its Petition, MariTEL contends that Havens bid on the maritime VPCs insincerely, solely to inflate the price MariTEL would have to pay so as to prevent MariTEL from putting resources toward inland VPCs in which Havens was interested.<sup>10</sup> MariTEL bases its allegation that Havens had neither the intent nor the ability to provide maritime communications services<sup>11</sup> on the fact that Havens has never held a maritime license; that he is a licensee, and authorized bidder for licenses, in other services; and that his FCC Form 601 did not report sufficient revenue to support the acquisition of maritime VPC licenses and the provision of wide-area maritime service.<sup>12</sup>

5. In addition, MariTEL maintains that, due to Havens' allegedly insincere bidding, MariTEL's high bids for the maritime VPC licenses do not reflect the market value of the spectrum.<sup>13</sup> MariTEL therefore requests that its applications be denied and the licenses reauctoned, or, in the alternative, that its payment obligation be reduced to the price that would have resulted from the auction without insincere bidding.<sup>14</sup> MariTEL also argues that the applications for inland VPC licenses for which Havens was the high bidder should be denied and the licenses reauctoned, because all winning bids are interdependent,<sup>15</sup> and because Havens' actions during the auction call into question his character qualifications.<sup>16</sup>

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<sup>6</sup> *Id.* at Att. A.

<sup>7</sup> High bidders applying for multiple licenses were not required to submit a separate FCC Form 601 for each market. *Id.* at 6.

<sup>8</sup> 156-162 MHz VHF Public Coast Service Applications Accepted for Filing, *Public Notice*, DA 99-101 (rel. Jan. 4, 1999).

<sup>9</sup> Reply at 1 n.1.

<sup>10</sup> Petition at 3. MariTEL and Havens bid against each other for all nine maritime VPCs, but MariTEL prevailed.

<sup>11</sup> *Id.*; Reply at 2-3.

<sup>12</sup> Reply at 2-3.

<sup>13</sup> Petition at 3.

<sup>14</sup> *Id.* at 1, 5. MariTEL states that it intends to pay the full amount due if its petition is denied. *Id.* at 1 n.1; Reply at 7.

<sup>15</sup> Petition at 2-3 n.4.

<sup>16</sup> *Id.* at 4.

### III. DISCUSSION

6. First, we conclude that the Commission's Rules do not allow an applicant to petition for denial of its own application. Section 1.2108 provides that "[a]n applicant may file an opposition to any petition to deny, and the petitioner a reply to such opposition," indicating that the Rules contemplate petitions to deny being filed only by entities other than the applicant.<sup>17</sup> Further, the Commission's Rules provide a different remedy for an applicant who no longer wants its application granted -- requesting that the application be dismissed.<sup>18</sup> Thus, to the extent that the Petition sought denial of MariTEL's long-form application, we find it not only procedurally deficient and inconsistent with the Commission's Rules but bordering on an abuse of process. Accordingly, we dismiss that portion of the Petition. We see some merit to Havens' suggestion<sup>19</sup> that MariTEL should be sanctioned for its actions.<sup>20</sup> Based on the facts presented it appears that MariTEL was using the Commission processes in a frivolous manner in filing such a petition. The apparent purpose was to delay the timing of its down payment deadline. We issue a stern warning to MariTEL and future auction participants that pleadings that appear designed to delay a bidder's payment obligation or avoid a payment obligation imposed by the Commission's competitive bidding rules (*e.g.*, bid withdrawal or default payments) will be closely scrutinized for sanctionable conduct. We reserve the right to take enforcement action against MariTEL for its actions in this case.

7. In addition, we deny MariTEL's request that its payment obligations be reduced. Grant of the requested relief to MariTEL would adversely affect the integrity of the Commission's bidding process. Allowing a high bidder to pay less than the amount bid is contrary to the principles underlying the competitive bidding process.<sup>21</sup> Further, the readily available and most appropriate remedy for a party that would prefer not to honor its high bid is to withdraw it prior to the close of the auction.<sup>22</sup> If, on the other hand, a high bidder elects to withdraw its bid after the close of the auction, then its application is dismissed and the bidder

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<sup>17</sup> 47 C.F.R. § 1.2108(c); *see also* 47 C.F.R. § 1.962(g), (h).

<sup>18</sup> 47 C.F.R. § 1.961(a). In the case of an application for a license won at auction, the applicant would then be liable for a default payment equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission, plus three percent of the subsequent winning bid (except that if the subsequent winning bid exceeds the defaulting bidder's bid amount, the three percent payment will be calculated based on the defaulting bidder's bid amount). 47 C.F.R. §§ 1.2104(g), 1.2109(c).

<sup>19</sup> *See* Havens Opposition at 2, 8.

<sup>20</sup> *See generally, e.g.*, Shareholders of Pulitzer Publishing Co., *Memorandum Opinion and Order*, 13 FCC Rcd 22876, 22895 (MMB 1998); K.O. Communications, Inc., *Memorandum Opinion and Order*, 13 FCC Rcd 12765, 12780 (WTB 1998) (citing Commission Taking Tough Measures Against Frivolous Pleadings, *Public Notice*, 11 FCC Rcd 3030, 3030 (1996)).

<sup>21</sup> Jack Bond, 13 FCC Rcd 4504, 4505-06 (Auctions and Industry Analysis Div. 1998).

<sup>22</sup> *See* 47 C.F.R. § 1.2104(b)(1). The Commission's rules are designed to encourage a bidder that wishes to default on its bid to do so before bidding ceases, thereby resulting in less disruption and damage to the auction process. *See, e.g.*, BDPCS, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 15341, 15345-46 (1997); 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, *Third Report and Order and Fifth Notice of Proposed Rule Making*, PR Docket No. 89-552, 12 FCC Rcd 10943, 11058 (1997); Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rule Making*, IB Docket No. 95-91, 12 FCC Rcd 5754, 5822 (1997).

is liable for a default payment.<sup>23</sup> Consequently, if MariTEL is interested in not satisfying its winning bid amounts, it should have availed itself of the remedy already afforded under the Commission's Rules for such circumstances.

8. With respect to MariTEL's contentions in its Petition regarding the other long-form applications for VPC licenses, because MariTEL was qualified to bid for every VPC,<sup>24</sup> we find that it has standing to petition the Havens application.<sup>25</sup> MariTEL argues that "[t]he FCC has a statutory duty to inquire further if a challenger raises substantial and material questions of fact concerning an applicant's qualifications" to bid on maritime VPC licenses.<sup>26</sup> Based on the record in this proceeding, we conclude that MariTEL has failed to raise "substantial and material questions of fact" regarding Havens' ability to be a maritime VPC licensee. We disagree with MariTEL's suggestion that the fact that Havens previously has not held a maritime license is a decisive factor bearing on his qualifications to be a VPC licensee, particularly given that the Commission explicitly decided to give new entrants the same opportunity as incumbents to acquire VHF public coast spectrum.<sup>27</sup> Finally, because the financial information in the FCC Form 601 relates only to the applicant's revenues, not its assets or sources of credit, we do not believe that this is an intended or accurate indicator of an applicant's ability to acquire licenses and construct a system.<sup>28</sup> In addition, MariTEL's premise overlooks the fact that our Rules place no limit on the amount of spectrum that a maritime VPC licensee may partition or disaggregate, rather than use to provide service itself.<sup>29</sup>

9. Moreover, even were the allegations of insincere bidding, which Havens denies,<sup>30</sup> sufficiently supported, they do not appear to state a violation of the Commission's rules.<sup>31</sup> MariTEL complains that a bidder competing with it bid higher than it on occasion not hoping on that particular bid to win, but rather hoping that MariTEL would bid even higher. Thus, the essence of MariTEL's petition is to ask us to look behind each bid in a competitive bidding process to determine the express motivation of the bidder. Moreover, MariTEL carries this one step further to contend that a competitive bidder that did not have a "suitable" motivation for its bid has questionable character. Notably, MariTEL provides no objective corroborating support for its predictions regarding the motivations or underlying rationale for Havens' bidding strategy. We believe that the absence of such information constitutes a significant procedural flaw with the Petition.

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<sup>23</sup> See 47 C.F.R. § 1.2109(b).

<sup>24</sup> Auction of 156-162 MHz VHF Public Coast Station Licenses -- Status of Applicants to Participate in the Auction, *Public Notice*, DA 98-2248 (rel. Nov. 6, 1998).

<sup>25</sup> Baker Creek Communications, L.P., *Memorandum Opinion and Order*, 13 FCC Rcd 18709, 18709 n.1 (WTB 1998); Nextel License Acquisition Corp., *Memorandum Opinion and Order*, 13 FCC Rcd 11983, 11984 (WTB 1998); NextWave Personal Communications, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 2030, 2034 (WTB 1997); DCR PCS, Inc., *Order*, 11 FCC Rcd 16849, 16857 (WTB 1996).

<sup>26</sup> Reply at 2 (citing 47 U.S.C. § 309(j)(4)(C), (5)); see also Petition at 2-3.

<sup>27</sup> *Maritime Third Report and Order*, 13 FCC Rcd at 19877-78.

<sup>28</sup> See *id.* at 19875-76.

<sup>29</sup> *Id.* at 19872.

<sup>30</sup> Havens Opposition at 5.

<sup>31</sup> See Nextel License Acquisition Corp., 13 FCC Rcd at 11987-88.

MariTEL makes no factual showing whatsoever regarding its allegation that Havens bid on the maritime VPCs despite being neither interested in nor qualified to hold a maritime VPC license. Instead of the "allegations of fact supported by affidavit of a person or persons with personal knowledge thereof"<sup>32</sup> required by our Rules, MariTEL presents only speculation and innuendo ratified by a *pro forma* declaration stating that the assertions in the petition are correct.<sup>33</sup> We agree with the parties opposing the petition<sup>34</sup> that this is not sufficient.<sup>35</sup> Therefore, for these reasons, we find that the Petition regarding the disposition of the Havens application must be denied.<sup>36</sup>

#### IV. CONCLUSION

10. Having reviewed the applications and the pleadings filed in this matter, we conclude that grant of the subject applications will serve the public interest, convenience, and necessity, and that MariTEL has not alleged facts establishing that a grant of the applications would be inconsistent with the public interest, convenience, and necessity. Therefore, we dismiss MariTEL's petition in part and deny it in part, and grant the above applications, conditioned on payment of the balance of the winning bids in a lump sum within ten business days following the release of a public notice establishing the payment deadline.<sup>37</sup>

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<sup>32</sup> 47 C.F.R. § 1.2108(b); *see also* 47 U.S.C. § 309(d)(1); 47 C.F.R. § 1.962(g).

<sup>33</sup> *See, e.g.*, Petition at 3 ("Havens *may* even have learned of MariTEL's contract with the United States Coast Guard and realized that MariTEL wished to fulfil its obligations to the Coast Guard under the contract. *It appears to MariTEL* that Havens'[s] strategy was to raise the bid prices for maritime VPCs, in an attempt to prevent MariTEL from using any of its resources to purchase inland VPC licenses for which Haven[s] was ultimately the high bidder.") (emphasis added).

<sup>34</sup> Data Radio Opposition at 2; Havens Opposition at 2; SSI Opposition at 2.

<sup>35</sup> *See, e.g.*, Texas RSA 1 Limited Partnership, *Memorandum Opinion and Order*, 7 FCC Rcd 6584, 6585 (1992).

<sup>36</sup> In its Reply, MariTEL argues that the Havens application should be denied because Havens failed to disclose his part-ownership and directorship of a cellular and fixed microwave licensee, as required by 47 C.F.R. § 1.2112(a)(1), (5). Reply at 3-4. Reply briefs must be "limited to matters raised in the oppositions." 47 C.F.R. § 1.45(b). MariTEL contends that the issue is properly raised in its Reply because the Havens Opposition states, "Havens complied with the Commission's application rules." Reply at 3 n.3 (citing Havens Opposition at 5). The context of Havens' statement, however, was as follows:

To the extent required, Havens categorically denies all of MariTEL's unsupported and derogatory allegations. Havens complied with the Commission's application rules and posted an upfront deposit of \$175,000. On his Form 175, he duly indicated that he wanted to be able to bid on all available licenses. . . . Havens exercised his bidding rights wholly within the purview of the Commission's auction rules, of which Havens was fully aware.

Havens Opposition at 5. Thus, the partial sentence that MariTEL quotes out of context responded to MariTEL's argument in its Petition that Havens violated the Commission's rules by making insincere bids on maritime VPCs. The statement did not relate to broader activities, and thus is not a basis for MariTEL to belatedly attack the disclosures in Havens' FCC Forms 175 and 601. Moreover, even if the statement were more general, it would not support MariTEL's last-minute assertion of a specific issue. *See* KMAP, Inc., *Memorandum Opinion and Order*, 72 FCC 2d 241, 243-44 (1979). Because we are not considering this issue, we deny Havens' motion for leave to respond to it.

<sup>37</sup> 47 C.F.R. § 1.2109(a).

**V. ORDERING CLAUSES**

11. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i) and 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 309(d), and Sections 1.962 and 1.2108 of the Commission's Rules, 47 C.F.R. §§ 1.962 and 1.2108, the Petition to Deny filed by WJG MariTEL Corporation on January 14, 1999, IS DISMISSED IN PART and DENIED IN PART.

12. IT IS FURTHER ORDERED that, pursuant to Section 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(a), application 0000002980 filed by Data Radio Management Co., Inc. for VHF Public Coast Service licenses for VHF Public Coast areas 24, 25, and 36 IS GRANTED, subject to the conditions set forth above.

13. IT IS FURTHER ORDERED that, pursuant to Section 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(a), application 0000002997 filed by WJG MariTEL Corporation for VHF Public Coast Service licenses for VHF Public Coast areas 1-9 IS GRANTED, subject to the conditions set forth above.

14. IT IS FURTHER ORDERED that, pursuant to Section 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(a), application 0000003008 filed by SMR Systems, Inc. for a VHF Public Coast Service license for VHF Public Coast area 17 IS GRANTED, subject to the conditions set forth above.

15. IT IS FURTHER ORDERED that, pursuant to Section 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(a), application 0000003026 filed by Warren Havens for VHF Public Coast Service licenses for VHF Public Coast areas 27-35, 37, 39, 41, and 42 IS GRANTED, subject to the conditions set forth above.

16. IT IS FURTHER ORDERED that the Motion for Leave to File Supplemental Pleading filed by Warren Havens on February 18, 1999 IS DENIED.

17. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry

Chief, Public Safety and Private Wireless Division  
Wireless Telecommunications Bureau

**5/19/99** draft