

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

In the Matter of)	
)	
AVISTA CORPORATION)	
)	
Applications To Modify Licenses for Automated)	File Nos. 0004076538, 0004076539,
Maritime Telecommunications System Stations)	0004076544
WQKP817, WQKP819, and WQKP820)	

MEMORANDUM OPINION AND ORDER

Adopted: August 17, 2016

Released: August 18, 2016

By the Commission:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we affirm the decision to allow Avista Corporation (Avista) to add Automated Maritime Telecommunications System (AMTS) transmitter locations with appropriate mitigation of any harmful interference to the reception of a nearby television station. Avista applied to modify its licenses for AMTS Stations WQKP817, WQKP819, and WQKP820 to add transmitter locations in Idaho, Montana, and Washington. The Mobility Division (Division) of the Wireless Telecommunications Bureau substantially granted the Avista applications,¹ and subsequently denied a petition for reconsideration filed by Spokane Television, Inc. (Spokane TV).² Spokane TV now seeks review of the *Order on Reconsideration*.³ For the reasons discussed below, we deny the application for review.

II. BACKGROUND

2. AMTS⁴ stations are authorized on the condition that no harmful interference will be caused to reception of existing television stations.⁵ In addition, Section 80.475(a) of the Commission's Rules requires an applicant proposing to locate an AMTS station within 169 kilometers (105 miles) of a

¹ Avista Corporation, *Order*, 27 FCC Rcd 263 (WTB MD 2012) (*Order*).

² Avista Corporation, *Order on Reconsideration*, 28 FCC Rcd 5258 (WTB MD 2013) (*Order on Reconsideration*).

³ Spokane Television, Inc. Application for Review (filed May 20, 2013) (AFR). Avista filed an opposition. Avista Corporation Opposition to Application for Review (filed June 4, 2013) (Opposition).

⁴ The AMTS service (originally termed the Automated Inland Waterways Communications System, or IWCS) was established to meet the communications needs of vessels on inland waterways, *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 (1981) (*IWCS Report and Order*), but the rules now permit AMTS service to units on land, including private land mobile radio service, *see* MariTEL, Inc. and Mobex Network Services, LLC, *Report and Order*, WT Docket No. 04-257, 22 FCC Rcd 8971, 8974-78 ¶¶ 4-10 (2007), *on recon.*, *Memorandum Opinion and Order*, 25 FCC Rcd 533 (2010), *Order on Reconsideration*, 26 FCC Rcd 2491 (2011), *application for review dismissed*, *Second Memorandum Opinion and Order*, 26 FCC Rcd 16579 (2011).

⁵ 47 C.F.R. § 80.215(h).

Channel 13 television station, or within 129 kilometers (80 miles) of a Channel 10 television station, to submit “an engineering study clearly showing the means of avoiding interference with television reception within the Grade B contour.”⁶ If there are at least one hundred residences within both the proposed AMTS station’s predicted interference contour and the television station’s Grade B contour, the AMTS applicant must also (1) show that its proposed site is the only suitable location, (2) develop a plan to control any interference its operations cause within the Grade B contour, and (3) agree to make any necessary adjustments to affected television receivers to eliminate such interference.⁷ Any AMTS licensee that, despite these precautions, causes interference to television reception within the Grade B contour must cure the problem within 90 days of the time it is notified in writing by the Commission or discontinue operation of the station.⁸

3. Avista proposed to add AMTS transmitter sites at locations within 105 miles of Spokane TV’s Channel 13 Digital Television (DTV) Station KXLY-TV. It therefore submitted the required engineering study and interference mitigation plan with its applications. The engineering study collectively analyzed the potential interference of all of the proposed stations within 105 miles of Station KXLY.⁹ Spokane TV filed a petition to deny two of the applications,¹⁰ asserting that Avista’s interference analysis was flawed methodologically and Avista’s interference mitigation plan was inadequate.¹¹

4. At the request of Division staff, Avista submitted a new engineering study with a separate analysis for each proposed AMTS station.¹² In response, Spokane TV supplemented its petition to deny, and submitted an engineering review of the Avista engineering study in support of its assertion that Avista’s interference analyses continued to contain methodological flaws.¹³

5. In light of the fact that there is no single method for predicting interference to DTV stations on Channel 13 from the type of operation proposed by Avista and the disagreement between the parties regarding methodology and the potential for interference, Commission staff undertook its own technical analysis of predicted interference from Avista’s proposed stations to reception of Station KXLY.¹⁴ The staff study was based on the same technical parameters (location, antenna height, transmitter power) regarding Station KXLY and the proposed AMTS stations that were used in Avista’s studies (and which Spokane TV did not contest), but utilized a different method for predicting where those parameters would result in interference to television reception.¹⁵ The AMTS rules refer to a

⁶ See 47 C.F.R. § 80.475(a)(1); see also 47 C.F.R. § 80.215(h)(2).

⁷ See 47 C.F.R. § 80.215(h)(3).

⁸ 47 C.F.R. § 80.215(h)(4). The AMTS licensee also is expected to help resolve complaints of interference outside the Grade B contour. *Id.*

⁹ See Analysis of the Potential for Interference to Television Reception Associated with AVISTA Utilities’ 217 MHz Band Private Land Mobile Radio System at 22-24 (filed Dec. 23, 2009).

¹⁰ As required by the AMTS rules, Avista gave written notice of the filing to Spokane TV and other potentially affected television stations. See 47 C.F.R. § 80.475(a)(2). In addition, the applications were placed on public notice. See Wireless Telecommunications Bureau Applications Accepted for Filing, *Public Notice*, Report No. 4880 (WTB rel. Apr. 15, 2009).

¹¹ See *Order*, 27 FCC Rcd at 265 ¶¶ 4-5 & nn.17-18.

¹² See *id.* at 265 ¶ 4.

¹³ See Spokane Television, Inc. Supplement to Petition to Deny at 7-9 (filed Mar. 17, 2011); Engineering Review of Avista Corp. DTV Receiver & Translator AMTS Interference Study (filed Mar. 17, 2011).

¹⁴ See *Order*, 27 FCC Rcd at 265 ¶ 5.

¹⁵ Commission staff utilized a widely-used commercial software program that implements the Longley-Rice irregular terrain propagation model and provides integrated mapping and U.S. Census-based population counting. *Id.* at 266 ¶ 6. Interference from the proposed Avista operations to Station KXLY-TV was assumed to exist at locations where the desired-to-undesired (D/U) signal ratio was below -33 dB. The Division explained that, even

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television station's Grade B contour, which was used to define the service area of an analog television station. With the conversion to DTV, the Commission developed the noise limited service contour (NLSC) to approximate the same probability of service as the analog Grade B contour.¹⁶ Consequently, the Division defined Station KXLY's service area by reference to its NLSC.¹⁷

6. Pursuant to this technical analysis, the Division concluded that there was no predictable interference from 21 of Avista's proposed locations within Station KXLY's NLSC or that they would cause interference only within uninhabited or sparsely inhabited areas.¹⁸ Of the four proposed locations that were predicted to cause interference to populated areas within Station KXLY's NLSC, the Division concluded with respect to three of them that the potential for interference was manageable on the condition that Avista undertake specified outreach activities to augment its interference mitigation plan.¹⁹ The Division dismissed one application with respect to the final location, which the Division concluded posed an unacceptable potential for interference.²⁰

7. Regarding the adequacy of Avista's interference mitigation plan, Spokane TV argued that Avista's initial pledge to "bear[] the cost of upgrading subscriber antennas and antenna components" did not satisfy its obligation to agree to make any necessary adjustments to affected television receivers to eliminate such interference, because Spokane TV construed Avista's commitment as unduly limiting the remedial actions Avista would undertake to address instances of actual interference.²¹ Noting that Avista had more clearly stated on the record in other pleadings that it would rectify harmful interference or cease operation, the Division concluded that Avista had adequately agreed, without limitation, to make whatever adjustments to affected TV receivers may be needed to eliminate interference caused by its operations.²²

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though the standard D/U ratio for upper-adjacent channel analog National Television Systems Committee (NTSC) television station interference into DTV is -48 dB, it concluded that a more conservative D/U ratio of -33 dB was more appropriate, as "[t]he effective occupied bandwidth of the Avista operations . . . appears to be greater than that of a conventional NTSC visual carrier. . . ." *Id.* at 266 ¶ 6 & n.22 (citing LoJack Corporation, *Declaratory Ruling and Order*, WT Docket No. 06-142, 26 FCC Rcd 12991, 12999 ¶ 18 (PSHSB 2011) (noting that the D/U threshold ratio for lower adjacent DTV signals into a DTV receiver has been measured to be about -33 dB)).

¹⁶ See, e.g., Review of the Commission's Part 95 Personal Radio Services Rules, *Notice of Proposed Rule Making and Memorandum Opinion and Order on Reconsideration*, WT Docket No. 10-119, 25 FCC Rcd 7651, 7676 ¶ 65 (2010); Study of Digital Television Field Strength Standards and Testing Procedures, *Report To Congress: The Satellite Home Viewer Extension and Reauthorization Act of 2004*, ET Docket No. 05-182, 20 FCC Rcd 19504, 19507 ¶ 3 (2005). The NLSC is defined using the F(50,90) field strength contour, the area in which at least fifty percent of the locations can be expected to receive a signal that exceeds a specified field strength value at least ninety percent of the time. See Establishment of a Model for Predicting Digital Broadcast Television Field Strength Received at Individual Locations, *Notice of Proposed Rule Making and Further Notice of Proposed Rule Making*, ET Docket No. 10-152, 25 FCC Rcd 10474, 10485 ¶ 25 (2010).

¹⁷ See *Order*, 27 FCC Rcd at 266 ¶ 7.

¹⁸ See *id.* at 266-67 ¶ 8.

¹⁹ See *id.* at 267-68 ¶ 12.

²⁰ See *id.* at 267 ¶ 11. Avista subsequently filed an application to operate at that location with reduced power. See FCC File No. 0005838913 (filed June 28, 2013). Spokane TV did not object to this application, which was granted by the Division on February 26, 2014.

²¹ See *Order*, 27 FCC Rcd at 268 ¶ 13.

²² See *Order*, 27 FCC Rcd at 269 ¶ 13 (citing, e.g., Avista Corporation Opposition to Petitions to Deny at 12 (filed Feb. 16, 2010) ("In the event that some TV receivers experience interference, Avista will bear the cost of remedying the interference at the receiver as required by the Commission's rules.")).

8. Spokane TV filed a petition for reconsideration of the *Order*.²³ It argued that, due to the absence of rules specifically addressing how to predict interference from the operation of AMTS stations in the vicinity of DTV stations, a notice-and-comment rulemaking proceeding was required to consider the issues raised by Avista's applications. In the *Order on Reconsideration*, the Division concluded that it had discretion to apply the existing rules to the instant applications.²⁴ The Division also rejected Spokane TV's claim that the fact that Commission staff performed an independent technical analysis demonstrated that Avista's applications did not contain sufficient information to show the means of avoiding interference, and thus should have been dismissed. The Division concluded that it was reasonable and permissible for the staff to supplement the record in that manner.²⁵ The Division also concluded that, contrary to Spokane TV's position, granting the Avista applications did not conflict with the Commission's decision in the TV White Spaces proceeding²⁶ to prohibit fixed TV Band Devices (TVBDs) from operating within an adjacent-channel TV station's service contour.²⁷ In addition, the Division rejected Spokane TV's assertion that the interference potential of Avista's proposed mobile operations should have been considered in addition to that of its proposed base stations, noting that the rules on AMTS interference to television stations address interference from base station operations only.²⁸ Finally, the Division again stated that it deemed Avista's commitment to make whatever adjustments to affected TV receivers may be needed to eliminate interference caused by its operations to be adequate, even though Avista did not expressly agree to take specific actions desired by Spokane TV.²⁹

III. DISCUSSION

9. We will grant an application for review only if the staff's decision (1) conflicts with statute, regulation, case precedent, or established Commission policy; (2) involves a question of law or policy that has not been previously resolved by the Commission; (3) involves precedent or policy that should be overturned or revised; (4) makes an erroneous finding as to an important or material question of fact; or (5) commits a prejudicial procedural error.³⁰ For the reasons set forth below, we deny the application for review.

10. Spokane TV first reiterates its argument that processing the subject applications without a notice-and-comment rulemaking proceeding to determine whether to use the existing rules to regulate potential AMTS-to-DTV interference was arbitrary and capricious, and constituted an abuse of discretion.³¹ It argues that specifying an acceptable level of AMTS-to-DTV interference potentially impacts TV broadcasters in general, and thus constitutes a new "rule" that cannot not be adopted in a specific licensing proceeding.³² As explained in more detail below, however, in applying to Avista's case Section 80.475(a) and the related rules for evaluating the interference potential posed by an applicant's proposed broadcast television operations – rules promulgated during the analog television era – the Division was merely following the Commission-level rulemaking determination to apply these rules to

²³ Spokane Television, Inc. Petition for Reconsideration (filed Feb. 13, 2012) (Petition for Reconsideration).

²⁴ See *Order on Reconsideration*, 28 FCC Rcd at 5260-61 ¶ 6.

²⁵ See *id.* at 5261 ¶ 7.

²⁶ See Unlicensed Operation in the TV Broadcast Band, *Second Memorandum Opinion and Order*, ET Docket Nos. 04-186 & 02-380, 25 FCC Rcd 18661 (2010) (*White Spaces 2nd MO&O*).

²⁷ See *Order on Reconsideration*, 28 FCC Rcd at 5262 ¶ 8.

²⁸ See *id.*

²⁹ See *id.*

³⁰ 47 C.F.R. § 1.115(b)(2)(i)-(v).

³¹ See AFR at 7-11.

³² See *id.* at 8-10.

the current digital television regime. Moreover, the Division's adjudicative approach toward evaluating the appropriate methodology for determining whether Avista's proposed operations would meet acceptable levels of interference protection was precisely what the Commission envisioned in promulgating these rules. Finally, to the extent Spokane TV asserts that the Commission lacks the legal authority to promulgate rules that leave for the adjudicative process – rather than prescribe *a priori* by rule – the determination of whether a given methodology is an acceptable means for evaluating the relevant interference issues, Spokane TV's assertion is without merit.

11. When the Commission adopted a new Table of Allocations for DTV in the *Seventh Report and Order* in MB Docket No. 87-268, it expressly concluded that Section 80.475 would govern how AMTS licensees must protect DTV stations. Thus, in accordance with notice and comment procedures in this DTV rulemaking proceeding, the Commission stated:

We agree with [commenters] that Section 80.475(a) of the rules governs how AMTS licensees must protect TV broadcast stations. As acknowledged by [commenters], AMTS applicants must protect broadcast television stations with existing authorizations to operate on TV channels 10 and 13, whether the broadcast television station is providing analog or digital service.³³

12. In making clear that Section 80.475(a) was not limited to the analog context, the Commission left intact the adjudicative approach it had prescribed pre-DTV (also by rule making) for evaluating the methodology used in an applicant's Section 80.475(a) engineering study.³⁴ Accordingly, and as discussed further below,³⁵ AMTS applicants in today's digital environment continue to receive the flexibility under Section 80.475(a) to employ any methodology in conducting the required study, so long as the methodology is scientifically sound and appropriate for the particular circumstances covered by the study. While the Commission, when it first promulgated the rule, stated that it would publish a sample format of a type of study envisioned by the rules, the Commission made clear that this format would “not be prescribed, [but] merely a sample of an acceptable format.”³⁶ The Commission's Office of Science and Technology subsequently released this guidance,³⁷ which often is referred to as the Eckert Report. In a later rulemaking proceeding, the Commission acknowledged arguments that subsequent methodologies were more accurate than the Eckert Report, but it declined to reevaluate that format, reiterating that “[i]f AMTS applicants so prefer, then they may use a study methodology other than that of the Eckert Report, provided that it is adequate to show that interference to television reception will be avoided.”³⁸ It also

³³ Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Seventh Report and Order and Eighth Further Notice of Proposed Rule Making*, MB Docket No. 87-268, 22 FCC Rcd 15581, 15595 ¶ 33 (2007) (footnote omitted).

³⁴ More specifically, and as discussed further below, when the Commission adopted what is now Section 80.475(a), it did not prescribe a specific methodology for the required engineering study showing the means of avoiding interference to television reception, and instead gave the applicant the flexibility to employ a methodology that would best suit the circumstances of the proposed operations, to be evaluated on an individual basis as the Commission considered the disposition of the application. See 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, 22607-09 ¶¶ 45-48 (2000) (*Maritime Fourth Report and Order*) (citing *IWCS Report and Order*, 84 FCC 2d at 900 ¶ 93) (proposing to retain engineering study requirement without specifying methodology), *affirmed*, *Second Memorandum Opinion and Order and Fifth Report and Order*, 17 FCC Rcd 6685, 6705 ¶¶ 42-44 (2002) (*Maritime Fifth Report and Order*) (subsequent history omitted) (adopting rule proposal).

³⁵ See, *infra* paras. 12-16.

³⁶ See *IWCS Report and Order*, 84 FCC 2d at 900 ¶ 93.

³⁷ FCC/OST Technical Memorandum 82-5, “Guidance for Evaluating the Potential for Interference to TV from Stations of Inland Waterways Communications Systems” (July 1982).

declined to adopt any other specific engineering methodology, concluding 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.”³⁹

13. When the Commission made clear that Section 80.475 would apply without regard to the analog or digital character of the broadcast television stations involved, it did not modify the existing rule to eliminate the flexibility to determine the appropriate means for determining whether a particular proposed station would cause interference. Therefore, it had no reason to establish a new rulemaking to ascertain a new standard, and no reason to suggest that all such applications would be suspended until the Commission promulgated a separate methodology for predicting interference to DTV stations. Thus, the Commission has never mandated the use of a particular methodology for predicting interference from AMTS stations to reception of TV signals – analog or digital – leaving each such application to be decided based on facts specific to the proceeding, including but not limited to, the choice of methodology for the interference study, what level of interference might occur, and what means of avoiding interference may be taken. The decision to use a flexible approach permits the Commission to analyze the specific facts and request supplemental information from the parties to appropriately consider the concerns raised. In the instant matter, Commission staff analyzed the applications using an engineering methodology developed in the context of the disagreement between Avista and Spokane TV about how to predict interference to reception of Station KXLY. Although the decision in this matter provides guidance as to one way to analyze interference in the context of AMTS-to-DTV interference, it is not meant to be prescriptive about other interference methodologies that may be appropriate (*e.g.*, where the terrain, population, and other factors associated with an application as to this service may vary). The rule remains a flexible one, and “[i]f AMTS applicants so prefer, then they may use [another] study methodology ... provided that it is adequate to show that interference to television reception will be avoided.”⁴⁰

14. While the Commission could have chosen to use the rulemaking process to require that an AMTS applicant use a specified methodology to demonstrate compliance with the study requirement, the agency opted against promulgating such a rule of general applicability. Instead, the Commission exercised its discretion to employ an adjudicative process for resolving issues about the adequacy of the methodology used. An administrative agency’s use of its informed discretion to choose between an adjudicative or rulemaking approach for structuring the various elements of the regulatory framework it develops and administers is well-established and longstanding.⁴¹ Indeed, the courts have recognized that an adjudicative approach may be particularly well-suited for dealing with matters that turn on highly fact-intensive determinations, where it may be difficult to fashion a general rule that can deal effectively with

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³⁸ See *Maritime Fourth Report and Order*, 15 FCC Rcd at 22609 ¶ 48.

³⁹ See *Maritime Fifth Report and Order*, 17 FCC Rcd at 6705 ¶ 43.

⁴⁰ See note 36, *supra*.

⁴¹ See, *e.g.*, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (*Bell Aerospace*) (confirming NLRB’s discretion to use adjudicative process in lieu of rulemaking to develop standards for determining whether a buyer would be classified as a “managerial employee,” and stating that agency’s judgment that adjudication best serves its goal of developing such standards “is entitled to great weight”); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (*Chenery*) (stating that “the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency”); *Viacom International v. FCC*, 672 F.2d 1034, 1042 (2d Cir. 1982) (*Viacom International*) (stating that “[t]he choice between rule-making or [the adjudicative vehicle of] declaratory order is primarily one for the agency regardless of whether the decision may affect policy and have general prospective application”); *Busse Broad. Corp. v. FCC*, 87 F.3d 1456, 1463 (D.C. Cir. 1996) (*Busse Broad. Corp.*) (reiterating Supreme Court’s pronouncement in *Bell Aerospace* that “choice between rulemaking and adjudication lies in the first instance with the [agency]’s discretion”) (quoting *Bell Aerospace*, 416 U.S. at 294); *United Church of Christ v. FCC*, 590 F.2d 1062, 1069-70 (D.C. Cir. 1978) (upholding FCC use of adjudicative process in revising its interpretation of Section 315(a)(4) of the Communications Act).

all the variegated circumstances of such matters.⁴² That is the case here, where the Commission decided against adopting a one-size-fits-all methodology requirement for assessing the interference potential for every AMTS station, and instead instituted an approach that permits AMTS applicants to use a methodology of their own choosing, so long as it results in a sound interference analysis that takes into account the diverse set of geographic, spectral and temporal variables that pertain to the particular case.

15. Spokane TV, however, appears to challenge the idea that such use of the adjudicative process is ever appropriate, arguing, in essence, that the Commission acts in an arbitrary and capricious manner whenever it grants the license application of an applicant who has used a methodology that the Commission has not specifically vetted through the notice-and-comment rulemaking process. Thus, Spokane TV asserts that the Division's Order should be set aside as arbitrary and capricious on the ground that the Division modified Commission policy without a reasoned explanation and without providing adequate notice of the change.⁴³ While it is not entirely clear what policy Spokane TV has in mind,⁴⁴ to the extent Spokane TV generally contests an agency's authority to use the adjudicative process to develop a body of precedent that evolves into a set of standards of increasingly broad applicability, we disagree. The Supreme Court has clearly upheld such use of the adjudicative process as a legitimate exercise of agency authority and discretion.⁴⁵ And if Spokane TV is challenging the particular way the Commission has structured its own adjudicative processes (as compared with those used by other agencies), we reject as unfounded the charge that the FCC's processes inherently result in arbitrary and capricious decisionmaking when used to address issues left open by the rulemaking process. The adjudicative procedures followed by the Commission – whether used to modify or establish policy, interpret existing law, fill in the law's interstices, or simply to resolve factual disputes – provide parties to the proceeding with a forum that fully meets their APA and due process rights, even though the issue under consideration may be one of first impression.⁴⁶ Similarly, the use of this process for such purposes

⁴² See, e.g., *Bell Aerospace*, 416 U.S. at 294 (noting that “adjudication [was] especially appropriate” where there were a large number of potential cases and the facts “var[ie]d widely” from situation to situation); *Chenery*, 332 U.S. at 202-03 (similar); *Busse Broad. Corp.*, 87 F.3d at 1463-64 (similar).

⁴³ See, e.g., Petition for Reconsideration at 3-4 (citing *Massachusetts v. EPA*, 549 U.S. 497 (2007)).

⁴⁴ Clearly, it cannot be the Commission's rulemaking determination that the adjudicative process is the best approach for evaluating the sufficiency of the methodology used in a given case, since the decision to employ this approach was adopted through the rulemaking process and was not altered by the Division's actions in this case. Nor does it make sense to characterize every AMTS license grant a modification of policy whenever a new methodology has been used to support the interference determination, since the acceptance in the case of the new methodology is specific to the facts of that case, and any wider effects are limited to the bounds of case law precedent.

⁴⁵ See, e.g., *Bell Aerospace*, 416 U.S. at 294-95 (upholding independent agency's use of adjudicative process to develop standards for classifying buyers as managerial employees). Moreover, if Spokane TV is arguing that the Commission acted in an arbitrary and capricious manner because it abused its discretion at the outset in crafting Section 80.475 so as to employ an adjudicative process for evaluating the sufficiency of the methodologies used in the AMTS licensing process, Spokane TV's argument must be rejected. As explained above, the Commission's decision to employ an adjudicative process for this aspect of its licensing processes was the result of an APA notice-and-comment rulemaking proceeding, ensuring that members of the public received full due process rights to participate meaningfully in the decisionmaking process. Furthermore, Spokane TV has failed to meet the high hurdle of demonstrating that the decision itself was arbitrary or capricious, given that (a) an agency's choice between the rulemaking and adjudicative vehicles for implementing regulatory change is a matter that lies in the first instance within the agency's discretion, (b) the agency's judgment in how to exercise this discretion is entitled to great weight, and (c) the courts have recognized that the use of the adjudicative process for handling matters like the one at issue here is particularly appropriate. See *supra* notes 41-42.

⁴⁶ See, e.g., cases cited in note 41, *supra*; *TelQuest Ventures, L.L.C., Memorandum Opinion and Order*, 16 FCC Rcd 15026 (2001) (*TelQuest Ventures*). In the *TelQuest Ventures* case, the Commission concluded that in light of the adjudicative process employed by the International Bureau, notice and comment rulemaking was unnecessary for establishing a requirement that earth station applications identify a licensed satellite with which the earth station

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fully protects the rights of the next set of parties in a future case, because such parties retain the right to argue the merits of such issues (*e.g.*, a rule interpretation, a policy change) regardless of the determinations made in earlier adjudications in which they did not participate.

16. Finally, to the extent Spokane TV bases its charge of arbitrary and capricious decisionmaking on a purported failure of the agency to provide the parties here with an adequate opportunity to address the substantive areas of dispute or to provide an adequate substantive explanation of its actions, we disagree that such a failure occurred. The parties have had ample opportunity to present their cases and have them fully considered, as evidenced by the multiple rounds of pleadings (which include numerous filings from Spokane TV), and the orders rendered by this agency throughout this process (including the instant *Memorandum Opinion and Order*) fully explain the record-based disposition of the issues raised here by Spokane TV.⁴⁷ Thus, it cannot be said that Spokane TV has suffered any injury as a result of the Commission's determination to handle this matter through the adjudicative process.

17. Next, citing Section 80.475(a)(1) of the Rules, Spokane TV argues that the engineering study that Avista initially submitted with the applications did not "clearly show[] the means of avoiding interference with television reception,"⁴⁸ so it was inappropriate and unfair to Spokane TV for the staff to permit Avista to supplement the record with a second engineering study and subsequently to undertake an independent technical analysis, rather than dismiss the applications as defective pursuant to Section 1.934 of the Rules.⁴⁹ We disagree. For some locations, the initial engineering study did clearly show that no interference to television reception would be caused because the proposed AMTS stations' interference contours did not overlap any populated television service area. For the other proposed locations, additional information was initially needed to establish whether interference would result from the proposed operations. Commission staff has discretion in dealing with applications that exhibit deficiencies, including, but not limited to, dismissal, return with instructions to amend, and acceptance for filing with suggestions to amend, depending on the circumstances.⁵⁰ And in fact, staff routinely returns

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intends to operate. As the Commission explained, "assuming for the sake of argument that the Bureau's practice is a substantive rule, the Bureau has authority to establish this practice in the context of an adjudication. The Supreme Court has recognized that administrative agencies are confronted with cases of first impression from time to time, and must be free to address those issues in the absence of a general rule. . . . [R]equiring a notice-and-comment rulemaking proceeding to resolve every question regarding filing requirements could cause extensive delay and all but paralyze this agency. The Bureau correctly relied on adequate policy rationales in dismissing these earth station applications." *TelQuest Ventures*, 16 FCC Rcd at 15031 ¶ 14 (citing *Chenery*, 332 U.S. at 203).

⁴⁷ See, *e.g.*, *Order on Reconsideration*, 27 FCC Rcd at 5259-60 ¶¶ 4-5 (explaining the Commission staff's methodology and conclusions); *supra*, paras. 5-6.

⁴⁸ See AFR at 11-12 (citing 47 C.F.R. § 80.475(a)(1)).

⁴⁹ 47 C.F.R. § 1.934.

⁵⁰ Thus, staff is not required to dismiss every defective application outright. The Commission explained this practice in detail in the 2003 *Third Memorandum Opinion and Order* of PR Docket No. 92-257 (an AMTS rulemaking proceeding), in which it stated the following:

Section 1.934 did not obligate the Bureau to automatically dismiss Mobex applications that did not comply with certain technical AMTS requirements prior to accepting them for filing. Section 1.934 does not mandate dismissal; rather it is discretionary, *i.e.*, Section 1.934(d) states that the Commission *may* dismiss an application that it finds to be defective. While our rules clearly provide that a defective application may be dismissed upon receipt, an application also may be accepted for filing, then dismissed as defective later upon subsequent review and processing. The Commission's stated practice with respect to all services is to automatically dismiss applications that fail to comply with signature, filing fee and timeliness requirements. Applications with other defects may be returned to the applicant for correction or dismissed after being accepted for filing, depending on the circumstances.

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applications and/or requests amendments, instructing the applicant to correct, clarify, or provide additional information, as appropriate, to enable staff to determine whether the proposed operations should be authorized. Similarly, staff frequently undertakes its own analysis of technical issues to supplement its review of materials submitted by applicants.⁵¹ Thus, it was within the Division's discretion to permit Avista to amend the applications with a more thorough analysis of the interference potential of its proposed AMTS stations operating at the proposed technical parameters and, in this specific instance, for staff to base its own analysis on the additional information that Avista subsequently produced. Accordingly, we find nothing improper in the Division's handling of these applications.

18. Spokane TV also continues to argue that the Commission's decision to prohibit TVBDs from operating on channels adjacent to occupied television channels⁵² should be extended to the facts in this proceeding.⁵³ We conclude that the TV White Spaces proceeding does not provide meaningful precedent regarding the instant applications. TVBDs operate on an unlicensed basis at unknown locations, whereas AMTS base stations within the specified distance of Channel 10 and 13 television stations are licensed by individual site. In addition, AMTS does not operate immediately adjacent to Channel 13; instead, Channel 13 occupies 210-216 MHz, while AMTS base stations operate in the 217-218 MHz band⁵⁴ and emissions must be attenuated at the band edges.⁵⁵ Finally, as Avista observes, "Spokane TV ignores the fact that its proposal to entirely exclude AMTS transmitters from within KXLY's NLSC would contradict decades of precedent and the unambiguous language in Part 80 which grants AMTS licensees this flexibility."⁵⁶ As discussed above, the Commission has always permitted AMTS stations to be located within the protected contours of Channel 10 and 13 television stations provided that they comply with the rules intended to prevent interference to television reception.

19. Spokane TV asserts that the Division should have assessed whether Avista's mobile stations could cause harmful interference to Spokane TV.⁵⁷ Section 80.215(h), upon which Spokane TV

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Amendment of the Commission's Rules Concerning Maritime Communications, *Third Memorandum Opinion and Order*, PR Docket No. 92-257, 18 FCC Rcd 24391, 24398 ¶ 17 (2003) (footnotes omitted).

⁵¹ See Sprint Nextel Corporation, *Memorandum Opinion and Order*, 23 FCC Rcd 17570, 17610 ¶ 103 (2009) ("An application is defective if it is 'incomplete with respect to required answers to questions, informational showings, or other matters of a formal character' While AT&T argues that the application is defective because it did not contain the type of analysis AT&T believes is appropriate, the important consideration under the rule is whether the Applicants provided the information needed for the Commission to conduct an analysis. Based on that standard, the application is not defective under Section 1.934(d)(1) of the Commission's Rules because the Applicants provided all necessary and requested information for us to conduct our analysis.") (quoting 47 C.F.R. § 1.934(d)(1)) (footnote omitted); see also, e.g., Blues and Gospel Heritage Association, *Memorandum Opinion and Order*, 29 FCC Rcd 4222, 4222 ¶ 1 (2014) (denying an application for review that argued that the Media Bureau erred in relying on its independent engineering analysis to determine the coverage of a proposed FM station, and observing that the application contained the information necessary to conduct the analysis); Mount Pleasant Partners Alpha, *Memorandum Opinion and Order*, 18 FCC Rcd 13443, 13446-47 ¶ 8 (2003) (similar).

⁵² See *White Spaces 2nd MO&O*, 25 FCC Rcd at 18714 ¶ 131.

⁵³ See AFR at 13.

⁵⁴ Thus, the 216-217 MHz band sits between Channel 13 and AMTS spectrum. The 216-217 MHz band is utilized by the Part 95 Low Power Radio Service. See 47 C.F.R. § 95.629.

⁵⁵ See 47 C.F.R. §§ 80.211, 80.481.

⁵⁶ Opposition at 9. See, e.g., *IWCS Report and Order*, 84 FCC 2d at 897 ¶ 80 (establishing AMTS despite interference concerns of broadcast commenters, given that provisions were made to protect TV receivers on channels 10 and 13 and that AMTS base stations would only be authorized if the TV receivers were protected from harmful interference).

⁵⁷ See AFR at 14.

relies, refers expressly to coast stations;⁵⁸ AMTS ship stations, which operate in the 219-220 MHz band, are governed by Section 80.215(e) of the Commission's Rules.⁵⁹ The AMTS licensing and operating rules do not require license applicants to provide an analysis of ship stations' potential for interference to television reception,⁶⁰ and when the Commission amended the AMTS rules to permit service to mobile units on land, it authorized operation of these units under the same conditions as those that pertain to ship stations.⁶¹ With respect to the AMTS application process, Spokane TV has not provided any reason to require an interference analysis for mobile units on land when we have no such requirement for the same type of units when they are located on water (*i.e.*, the ship stations).⁶² So long as the mobile units on land are operated under the same power limits and antenna heights as ship stations – a result that the operating requirements for AMTS are designed to ensure – broadcast stations like Spokane TV should be adequately protected against interference. For these reasons, we agree with the Division that there is no need to add a new element to the application process by requiring AMTS applicants to making a separate showing (or the agency to make a specific finding) regarding the interference potential of mobile units located on land.

20. Lastly, Spokane TV continues to argue that the Division should have required Avista to provide more explicit mitigation plans beyond its pledge to cure any instance of actual interference.⁶³ The approach we have established in this service, however – much like the approach we take for many others – relies on a band plan and a framework of technical and operational regulations as a general prophylactic against interference, with a specific requirement to cure any instance of actual interference should it arise.⁶⁴ As the *Order* emphasized, “Avista is obligated to cure any instance of actual interference to

⁵⁸ See 47 C.F.R. § 80.215(h) (“Coast stations in an AMTS may radiate as follows, subject to the condition that no harmful interference will be caused to television reception except that TV services authorized subsequent to the filing of the AMTS station application will not be protected.”).

⁵⁹ See 47 C.F.R. § 80.215(e).

⁶⁰ Compare 47 C.F.R. § 80.215(h) (prescribing conditions under which interference limitation plans must be submitted for coast stations) with 47 C.F.R. § 80.215(e) (setting forth ship station power limits, with no requirement for submission of interference plans). See *IWCS Report and Order*, 84 FCC Rcd at 897 ¶ 81 (indicating that interference to television reception from mobile units will be avoided through the equipment approval process to ensure that the radios do not produce emission outside the authorized bandwidth), 912 (noting that interference from mobile units is minimized because they operate in the part of the band farthest from Channel 13, with limited power); see also, *e.g.*, 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, 439 ¶¶ 16-17 (1991) (noting that land mobile stations have operated in spectrum adjacent to television channels for years without any adverse effects on television reception, and suggesting that AMTS mobile units are more likely to incur interference from television stations than to cause it); *cf.* Allocation of the 219-220 MHz Band for Use by the Amateur Radio Service, *Notice of Proposed Rulemaking*, ET Docket No. 93-40, 8 FCC Rcd 2352, 2354-55 ¶ 18 (1993) (concluding that amateur radio stations could share the 219-220 MHz band without interference from or to AMTS mobile stations or land mobile stations in the adjacent 220-222 MHz segment).

⁶¹ 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, 16964-65 ¶ 25 (2007) (permitting AMTS base stations to serve mobile units on land, provided that such units are used under the same power limitations as marine radios and their antennas are not mounted higher than those on vessels).

⁶² Indeed, even before the Commission amended the AMTS rules to permit service to units on land, a predecessor of the Division concluded that interference to television reception from AMTS land units was unlikely and granted waivers permitting such operation. See, *e.g.*, Request for Waiver of the Requirements in Section 80.453 of the Rules to Permit Public Coast Station KAE889 (Corona, CA) to Serve Mobile Units on Land, *Order*, 13 FCC Rcd 8770, 8772 ¶ 5 (WTB PWD 1997).

⁶³ See AFR at 14-15.

⁶⁴ See, *e.g.*, Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, *Order on Reconsideration*, PR Docket No. 93-61, 11 FCC Rcd 16905, 16910 ¶ 12 (1996) (“the (continued....)

television reception”⁶⁵ under Section 80.215(h)(4),⁶⁶ and, while the evidence described above reflects that interference is unlikely to arise in the future, Avista clearly is aware that this continuing obligation is not limited to those specific acts of mitigation that it has committed in this proceeding to undertake. This is the basic interference management approach that applies to this service, and Spokane TV has provided no basis for deviating from it.⁶⁷

IV. CONCLUSION

21. Spokane TV has not demonstrated that the Division’s decision was in error. Therefore, we affirm the *Order on Reconsideration* and deny the application for review.

I. ORDERING CLAUSE

22. Accordingly, IT IS ORDERED pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), and Section 1.115 of the Commission’s Rules, 47 C.F.R. § 1.115, that the Application for Review filed by Spokane Television, Inc. on May 20, 2013 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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Commission adopted a spectrum band plan and established technical criteria for the operators of the various systems designed to minimize the potential for interference and provide a more conducive environment for sharing of the band by disparate services.”).

⁶⁵ See *Order*, 27 FCC Rcd at 269 ¶ 14.

⁶⁶ 47 C.F.R. § 80.215(h)(4).

⁶⁷ See *Opposition* at 10-11.