

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

DOCKET FILE COPY ORIGINAL

In the Matter of)
)
Replacement of Part 90 by Part 88)
to Revise the Private Land Mobile)
Radio Services and Modify the)
Policies Governing Them)
)
and)
)
Examination of Exclusivity and)
Frequency Assignments Policies of)
the Private Land Mobile Services)

RECEIVED
MAY 16 1997
Federal Communications Commission
Office of Secretary

PR Docket No. 92-235

TO: The Commission

PETITION FOR RECONSIDERATION

INTERNATIONAL TAXICAB AND
LIVERY ASSOCIATION

William K. Keane
Arter & Hadden
Suite 400K
1801 K Street, N. W.
Washington, D. C. 20006
(202) 775-7123

May 16, 1997

Its Counsel

No. of Copies rec'd 0211
LIST ABCDE

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	i
I. INTRODUCTION	2
II. BACKGROUND	4
III. ARGUMENT	6
A. The Separation Rules	6
1. Elimination of the Separation Rule Was Arbitrary and Capricious	6
2. The Decision Treats Similar Situations In An Arbitrary and Inconsistent Manner ..	9
3. Elimination of the Separation Rule Is Unsound As A Matter of Policy	13
B. The Failure to Require ITLA Coordination for Access to Formerly Taxi-Only Frequencies Is Erroneous	17
IV. CONCLUSION	21
Attachment A	
Attachment B	

SUMMARY

International Taxicab and Livery Association ("ITLA") hereby seeks reconsideration of two aspects of the Second Report and Order in the re-farming proceeding. First, ITLA asks the Commission to reconsider deletion of the long-established rule requiring geographic separation of taxi and non-taxi users on VHF frequencies. Second, ITLA asks that the Commission require coordination through ITLA for any proposed use of a former taxi-exclusive frequency.

With respect to the first request, reconsideration is critical inasmuch as (1) the Report and Order eliminated a rule of nearly 40 years' standing without a reasoned explanation, or any explanation at all for that matter. This omission, in and of itself, is contrary to administrative law.

In addition, elimination of the separation is contrary to, and inconsistent with, numerous other function-specific limitations (some of which also involve geographic separations) which the Commission has seen fit to maintain.

Finally, as a matter of policy the basis for the geographic separation remains valid; namely, the avoidance of intermixing single channel simplex operations with paired duplex operations -- a situation fraught with potential interference.

With respect to its second request, ITLA urges that there is as much, if not more, reason to require ITLA coordination for former taxi-exclusive frequencies as there is to require coordination with AAR, UTC and API in the case of exclusive frequencies for those Services. Taxi drivers suffer the highest rate of homicide of any occupation in the U.S., and a fatality rate far in excess of the other three services. In order to avoid a heightened risk of interference to communications channels, the immediate availability of which may make the difference between life and death, required coordination by ITLA is clearly warranted. This is especially the case given deletion of the geographic separation rule.

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of)
)
Replacement of Part 90 by Part 88)
to Revise the Private Land Mobile)
Radio Services and Modify the)
Policies Governing Them)
)
and) PR Docket No. 92-235
)
Examination of Exclusivity and)
Frequency Assignments Policies of)
the Private Land Mobile Services)

TO: The Commission

PETITION FOR RECONSIDERATION

International Taxicab and Livery Association ("ITLA"),
by its counsel, hereby requests reconsideration of the Second
Report and Order in the above-captioned proceeding (FCC 97-61,
released March 12, 1997; hereinafter "Report and Order"). In
particular ITLA seeks reconsideration of the Report and Order's
elimination of rules geographically separating taxi and non-taxi
use of VHF channels, and its failure to require ITLA coordination
for access to taxi-exclusive frequencies. In support ITLA submits
the following:

I.

INTRODUCTION

As the Commission is aware, ITLA is the international trade association of private, for-hire ground transportation fleets. ITLA's membership includes providers of taxi, limousine, livery, van and minibus services. Its membership includes approximately 900 fleet operators in the United States, Canada, Mexico and 11 other countries. Besides representing the taxicab industry in the United States, ITLA's membership includes the operators of airport ground transportation fleets serving all of the major metropolitan airports in the U.S. such as SuperShuttle at BWI and National Airports.

The taxi and livery industry transports about two billion passengers per year -- six million passengers per day; 80 percent of these trips are dispatched via radio. Twenty percent, or one out of every five public transportation passengers are served by the industry. Many companies provide transportation services under contract with public and non-profit agencies. Such services include transportation of blood products to and from blood banks and hospitals; contract transportation for nearly 10,000 public aid seniors and disabled persons in the San Francisco area alone; discounted or even free transportation during weather emergencies and to aid intoxicated motorists;

Medicaid-funded transportation for non-emergency medical trips; and emergency transportation for police departments, hospitals, and public agencies.

About 60 percent of all passengers using taxicabs and public transit are disadvantaged, i.e. low income persons, the elderly, the disabled and the unemployed. In many suburban and rural communities ITLA members provide the only means of public transportation.

Taxis are thus an essential element in this country's transportation network, helping to reduce traffic congestion, improve air quality and increase public mobility. All of this is accomplished without taxpayer subsidy. By contrast, while taxpayer-subsidized mass transit systems carry more passengers per year (about eight billion), this can be done only at a cost in excess of \$13.9 billion per year in taxpayer support.

Among its many services to the industry, ITLA is the Commission-certified coordinator for the Taxicab Radio Service. This coordination facilitates utilization of the limited spectrum resource in ways which meet the special requirements of the private ground transportation industry.

ITLA has participated actively at every stage of this proceeding. ITLA is also a member of the Coalition of Industrial and Land Transportation Users. The Coalition submitted a four-

pool consolidation proposal which would have grouped land transportation users like Taxi, Motor Carrier, Railroad and Automobile Emergency in one pool. ITLA continues to believe that such an arrangement would have advanced the Commission's consolidation goals while minimizing user disruption and interference.

However, ITLA does not here reargue the pros and cons of two versus three versus four pools. Rather this Petition is intended to rectify two omissions in the Report and Order: (1) the failure to preserve the geographic separation which has governed taxi and business use of certain VHF frequencies; and (2) the failure to require that applicants seeking access to a former Taxicab Service-exclusive frequency do so by coordinating with and through ITLA.

II.

BACKGROUND

The Report and Order effects a sweeping revision to the private land mobile radio services. It consolidates the twenty separate Radio Services into two pools: One for Public Safety and one for Industrial/Business users. In addition, it preserves coordination prerogatives for three discrete Radio Services; namely, Power, Petroleum and Railroad. This latter determination was based on the view that allowing access to exclusive

frequencies in these Services only via the coordinator for each Service was necessary since radio "is used as a critical tool for responding to emergencies that could impact hundreds or even thousands of people [footnote omitted]". Id. at ¶ 41.¹ The decision goes on to observe that, for example, the inability of trains to communicate with each other could present a risk to public safety. Ibid.

In addition, the Report and Order without discussion eliminates Rules which have required geographic separation between taxi and other co-channel users. For example, the Report and Order eliminates Business Radio Service Rule §90.75(c)(9) which provided that:

This frequency is shared with the Taxicab Radio Service and is available for assignment in the Business Radio Service only to stations which are used exclusively in areas outside of Standard Metropolitan Statistical Areas of 50,000 or more population (1950 census). Operations on this frequency are on a secondary basis to operations in the Taxicab Radio Service.

See also Taxicab Radio Service Rule §90.93(c)(1) and (2).

¹ The coordinator for the Power Radio Service is Utilities Telecommunications Council ("UTC"); for the Petroleum Radio Service, American Petroleum Institute ("API"); and for the Railroad Radio Service, Association of American Railroads ("AAR").

III.

ARGUMENT

In the respects noted above the Report and Order is in error. It contravenes important principles of administrative law by (1) failing to provide a reasoned explanation -- or any explanation at all -- for deletion of the long-established geographic separation rules; and (2) by deleting these rules while inexplicably retaining all manner of other function-specific limitations.

Likewise, by failing to accord ITLA the same prerogative as AAR, UTC and API the agency disregarded facts showing that the public has just as much need for interference-free channels utilized solely by the taxi industry as it does for interference-free communications on exclusive frequencies in these other Services.

A. The Separation Rules.

1. Elimination of the Separation Rule
Was Arbitrary and Capricious.

It is axiomatic in administrative law that an agency may change its position; it is equally axiomatic that, in order to do so lawfully, the agency must provide a reasoned explanation for the change.

An agency's view of what is in the public interest may change, either with or without a

change in circumstances. But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.

Greater Boston Television Corporation v. FCC, 444 F. 2d 841, 852 (1970), cert. den., 403 U.S. 923 (1971).

Here the agency maintained a geographic separation between taxi and non-taxi users for nearly 40 years. See Third Report and Order in Docket No. 11959, 39 F.C.C. 536, 538-539 (1958). Indeed, the validity of the separation concept has been reaffirmed on several occasions.

For example, in the course of allocating additional VHF frequencies in the late '80s, the agency determined not to require business and taxi use of the same frequencies. Instead, business users were assigned one group of frequencies for use outside SMAs, while taxi users were assigned a different group. Report and Order in PR Docket No. 88-373, 4 FCC Rcd. 5756 (1989). In so doing the Commission acknowledged the operational differences between taxi and business usage, such as the fact that taxi eligibles operate in a two-frequency simplex (half-duplex) mode while business eligibles operate in a single frequency simplex mode, and the fact that taxi channel occupancy is very intense.

Accordingly, the Commission declined to intermix business and taxi use on the same channels holding that this "will help to avoid a number of potential difficulties that might arise among incompatible users." Id. at 5759.

On reconsideration the agency took further action to protect taxi users from business licensee operations, only this time the protection extended even to adjacent channels. In particular the Commission "minimize[d] the potential interference problem [between the two groups]" by limiting Business Radio use of four new VHF frequencies to mobile-only operation, thus avoiding high power business base station interference to low power taxi mobile communications. Memorandum Opinion and Order on Reconsideration in PR Docket No. 88-373, 5 FCC Rcd. 4784, 4787 (1990).

Taxi and business use has been separated in other contexts as well. For instance in 1977 the Commission allocated two VHF frequencies to the Taxi, Forest Products and Special Industrial Radio Services with geographic separation from adjacent high-power Business paging channels. See Report and Order in

Docket No. 20685, 66 FCC 2d 980. This was done, again, in order to avoid serious interference problems.²

Despite this, the Report and Order deletes the geographic sharing rules -- rules formerly deemed integral by the agency to the avoidance of interference -- without even a reference to the change, much less an explanation. For this reason alone, the Report and Order is fatally flawed.³

2. The Decision Treats Similar Situations
In An Arbitrary and Inconsistent Manner.

Apart from the failure to give a reasoned explanation for a change of position, the Report and Order is internally inconsistent. While silently deleting the business-taxi separation, the agency has seen fit to preserve, or create, all manner of other, very specific limitations designed to protect one type of frequency usage from another. Few, if any, of these

² The Commission adopted similar geographic separation rules for the Taxi Service at UHF. For instance, in Northwestern States frequency pairs in the 452/457 MHz bands primarily allocated for taxicab use, were allocated to the Forest Products Radio Service outside urbanized areas of 200,000 or more population. First Report and Order in Docket No. 21395, 67 F.C.C.2d 1338 (1978); see also former Rule 90.93(c)(10). Indeed, taxicabs were assigned exclusive use of these channels within a 40-mile limit from the center of each protected urban area. Id.

³ This omission combined with the matters set forth in Section III.B. likewise call into question the adequacy of the regulatory impact statement in Appendix C.

limitations have received the repeated Commission endorsement received by the business-taxi separation over the years. Judged in this light, elimination of the separation rules is even more troubling.

A partial list of these limitations, and a summary description of each is set forth below:

<u>Rule</u>	<u>Limitation</u>
90.35(a)(1)	eligibility restrictions for entities prospecting for oil and gas for power and water distribution, for exploration for mineral resources, and for repairs of telecommunications circuits.
90.35(b)(3), (7)	reservation for geophysical purposes
90.35(b)(8), (15)	oil spill containment
90.35(b)(16)	utility communications plans
90.35(b)(20)	primary assignment for common carriers for meteor burst communications in Alaska
90.35(b)(21)	primary assignment for private radio meteor burst communications in Alaska
90.35(b)(28), (31)	frequencies available in Puerto Rico, Virgin Islands
90.35(b)(32)	frequencies not available in Puerto Rico and Virgin Islands
90.35(b)(35), (40), (47)	radio remote control and telemetering only
90.35(b)(36)	one-way paging only
90.35(b)(43)	primary assignment for multiple address

- 90.35(b) (44) specific types of emissions authorized
- 90.35(b) (45) secondary assignment for tone signaling with or without other emissions
- 90.35(b) (50) railroad defect signaling
- 90.35(b) (51) assigned for shared basis in Puerto Rico and Virgin Islands with broadcast auxiliary stations
- 90.35(b) (52) frequency available to all stations operating in the Industrial/Business Pool in Puerto Rico and the Virgin Islands only
- 90.35(b) (53) available only for hydrological or meteorological data, or for low power wireless microphones
- 90.35(b) (55) available to certain services subject to Section 90.259
- 90.35(b) (56) available under Subpart T for narrowband communications
- 90.35(b) (57) secondary fixed use requirements set forth in Rule 90.261
- 90.35(b) (58) available for secondary fixed used subject to geographic separation from primary mobile stations and subject to other technical criteria
- 90.35(b) (59) railroad remote control
- 90.35(b) (60) available for communications in connection with loading and unloading ships
- 90.35(b) (61) assigned primarily for airport use; Industrial/Business use subject to geographic separations and power restrictions
- 90.35(b) (63) frequency reserved exclusively for central station alarm service within urbanized areas

of 200,000 or more; other Business/Industrial use precluded within 75 miles of the referenced urbanized areas

90.35(b) (64), (65), central station alarm service
(66)

90.35(b) (69) authorizing secondary use by hospitals for medical telemetry

90.35(b) (73) reserved for one-way paging

90.35(b) (77) frequencies available only for communications confined to boundaries of licensee's business premises

To be sure, many of these are not "new"; that is, they were in Part 90 in one form or another prior to the Report and Order and have been re-codified or edited to conform to the consolidation decision. But even so, why is it that so many of these function-specific limitations survived (including even a number of geographic limitations), and the taxi limitation did not?

"[An agency] cannot act arbitrarily nor can it treat similar situations in dissimilar ways". Herbert Harvey v. National Labor Relations Board, 424 F.2d 770, 780 (1969). An agency must articulate "...which factual distinctions separate arguably similarly situated licensees, and why those distinctions are important". Public Media Center v. FCC, 587 F.2d 1322, 1331 (1978). Furthermore, "It is clear ... not only that 'more than enumeration of factual differences between cases is required,' but

also that 'the Commission must explain their relevance to the purposes of the' legislation it administers". Garrett v. FCC, 513 F.2d 1056, 1060 (1975) (citing Melody Music v. FCC, 345 F.2d 730, 733 (1965)).

For this reason as well ITLA urges the Commission to reconsider the separations issue.

3. Elimination of the Separation Rule
Is Unsound As A Matter of Policy.

It may be that the Commission simply overlooked the significance of the separations rule given the host of other issues and arguments raised in this proceeding. If so, or if the Commission is persuaded to revisit the matter by virtue of the arguments made in Section 1. or 2. above, then it may be helpful to review why, as a matter of policy, the rules should be restored.⁴

As indicated previously, the taxi industry utilizes half-duplex transmission at VHF: The dispatcher transmits on one frequency, but receives transmissions from drivers only on another frequency; similarly, drivers transmit on one frequency (the one received by the dispatcher), but receive only on another frequency

⁴ ITLA provided a detailed explanation of the basis for maintaining the separation rules in Reply Comments in this Docket filed July 30, 1993.

(the one used by the dispatcher for transmission). This configuration is utilized in order to minimize cross-talk among drivers while at the same time maximizing dispatcher efficiency. Such considerations are particularly important in the taxi industry due to the almost non-stop usage which characterizes taxi dispatch.

By contrast VHF Business users typically operate single-channel simplex operations. Such configuration well suits the less intense usage characteristic of the typical Business user.

Geographic separation has served the two groups well by ensuring that incompatible classes of users not be required to share frequencies. Among other things, it ensures that taxi systems are not required to share channels with entities whose usage cannot be monitored -- a situation fraught with potential interference. Moreover, users with less intense requirements are not required to share with users whose communications are virtually non-stop during the taxi business day (6:00 a.m. - midnight).

By consolidating the Radio Services and eliminating the separation rules, the Report and Order greatly increases the risk of interference to and from taxi radio systems. As discussed previously, incompatible users will now be able to occupy the same

channels in the same area. The complicated RF environment emerging as a result of the Commission's re-farming program (a world in which co-channel and adjacent channel, wideband and narrowband, high power and low power, shared and exclusive, analog and digital users all seek to co-exist) further underscores the risks.

Nor is the new one-day notice coordination procedure a sufficient answer. There is no requirement that VHF channels be licensed in pairs; old and new Rule 90.173 simply makes this an option. Hence, any coordinator can propose single frequency business use on top of, or adjacent to, a taxi pair in the same or a nearby area. The best that could be hoped for is that ITLA would catch the proposal and be able to lodge a timely objection, thereby leading to a dispute as to whether the application should or should not be granted.

But what is the point to requiring such an exercise in the first place? Users certainly would not benefit: They would be put to the expense and aggravation of filing an application that will become the subject of contention and delay. ITLA certainly does not benefit: It is put to the expense and aggravation of having to review applications which, in the majority of cases, will be dead on arrival. The Commission will not benefit: Its own limited resources will likely be called upon to resolve disagreements which need never have arisen in the first

place had appropriate rules been in place. Only one party benefits: The coordinator which initiates such recommendations.

In other words, by eliminating geographic separations, the Commission does not confer consumer benefits, one of the bases for the consolidation decision. See, e.g., Report and Order at paras. 19, 38. Instead, the Commission fosters consumer confusion, unnecessary cost, and wasteful argumentation. Even in this era of new thinking concerning spectrum management, the Commission should retain rules, such as the separation rules, which help fulfill its abiding responsibility to minimize interference.

Licensing taxi and non-taxi operations on the same channel in the same area has yet another adverse effect. The taxi industry is moving increasingly to computerized mobile data systems. These systems are expensive; the average cost for a large metropolitan taxi company is over one million dollars. Yet the systems produce significant efficiency gains in terms of quality and speed of service; they also produce dramatic gains in spectrum conservation. However, in order to function as intended, it is absolutely necessary that such systems operate on clear channels. Intermixture of taxi and non-taxi users on the same channels will perversely undermine adoption of a technology which promises significant gains toward the very goal which is at the heart of re-farming: Improved spectrum efficiency.

Accordingly, on reconsideration, the agency should restore the VHF taxi/non-taxi geographic limitations. In particular the Commission should specify that the limitations should apply to all former VHF Taxi Service frequencies (whether Taxi-exclusive or those previously shared) now in the Industrial/Business Pool.

B. The Failure to Require ITLA Coordination for Access to Formerly Taxi-Only Frequencies Is Erroneous.

The Report and Order implements special treatment for the Power, Petroleum and Railroad Radio Services. ITLA does not take issue with that result. What ITLA does object to is the decision's failure to recognize that the same factors which led the Commission to restrict access to exclusive frequencies in these Services are present in the case of the taxicab frequencies. This failure subjects the taxi industry to the type of disparate treatment criticized in Melody Music, supra.

In its earlier filings in this proceeding, ITLA documented the industry's important role in the nation's transportation system, and the part that interference-free radio communications plays in public safety. ITLA noted, for example, that it transports two billion passengers per year; that its operations are conducted pursuant to certificates of public convenience issued by governmental authorities; and that its

drivers are frequently witnesses to, and report, crimes, fires and accidents in progress.⁵ These factors suggest that the industry is imbued with a public trust every bit as important to the traveling public as are Petroleum, Power and Railroad communications. This is especially the case for the 60 percent of taxi passengers for whom taxi service is the only form of transportation available -- the elderly, the infirm, and the poor.

But this is not all. As ITLA has explained, the industry's drivers are subject to the highest rate of homicide of any occupation in the United States -- police included.⁶ It is far more dangerous than the other three industries for which special provision was made.

The total fatality rate for taxi drivers was 46.5 per 100,000 employees in 1995, compared with 29.3 for electric power installers and repairers; 22.9 for petroleum production workers;

⁵ See, e.g., Comments filed November 20, 1995.

⁶ Id. at 4.

and 14.6 for railroad workers. This trend has been consistent for several years. Attachment A.⁷

Murders and attacks on drivers have been widely reported in recent newspaper articles (see Attachment B). These include, for example,

- The March 26, 1997 slaying of two drivers in separate incidents on Chicago's West Side, one the father of five children.
- The January 30 murder of a sixth cab driver in two-and-a-half years in Columbia, S.C.
- The January 29 shooting of a driver (the father of four) in the Crown Heights section of Brooklyn; this was the fifth attack on drivers in two months (one of those murdered being an immigrant driver with 13 children).
- The armed robbery and car-jacking of four cab drivers in two days (January 13-15) in Tucson.
- A knife attack on a Las Vegas driver January 14.

The list, unfortunately, could go on and on.⁸

⁷ A 1995 U.S. Department of Transportation funded-study found that taxi drivers suffered 3,866 assaults per 100,000 drivers. "Assaults Against Taxi Drivers and Protection Strategies", John R. Stone, Ph.D., et al. North Carolina State University (January 1995).

⁸ Homicides and assaults aside, ITLA data reveal that the taxi industry experiences nearly 19,000 serious accidents per year (meaning damages in excess of \$10,000 which equates to serious personal injury). Being the first on the scene, it is also important that taxi channels be interference-free in calling for assistance for accident victims.

The industry has developed a variety of techniques to deal with the danger. These include the use of hidden buttons which can transmit an alarm signal to a dispatcher and the use of certain code words and phrases to signal a driver in distress (see Attachment B, page 3-5). However, all of the techniques depend in the end on immediate access to a clear channel. The Commission's failure to preserve access to the formerly exclusive Taxi frequencies only via ITLA needlessly jeopardizes driver safety -- especially given elimination of the geographic separation discussed in Section III.A.

This result is even more disturbing when one realizes that the agency took pains to preserve coordination prerogatives for the Special Emergency Radio Service, including veterinarians, and the Forestry-Conservation Radio Service, including nature conservatories and the like. See Report and Order at paras. 37-39. This invites the question whether the agency has unwittingly valued cats and dogs more than people.

IV.

CONCLUSION

Accordingly, the Commission should restore the geographic separation between taxi and non-taxi users, and require that any entity seeking access to one of the formerly Taxi-only frequencies do so via coordination with ITLA. The Report and Order should be reconsidered and revised as indicated.

Respectfully submitted,

INTERNATIONAL TAXICAB AND
LIVERY ASSOCIATION



William K. Keane^{*/}

Arter & Hadden
Suite 400K
1801 K Street, N. W.
Washington, D. C. 20006-1301
(202) 775-7100

May 16, 1997

Its Counsel

*/ Robin L. Miller assisted in the preparation of this Petition.