

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of Request of)
)
ENGINEERS FREQUENCY ADVISORY)
COMMITTEE, LLC) WP Docket No. 14-235
)
To be Certified as Frequency Advisory Committee)
for the Part 90 Public Safety and Business/Industrial)
Radio Frequencies)

COMMENTS OF APCO

The Association of Public-Safety Communications Officials-International, Inc. (“APCO”) hereby submits the following comments in response to the Commission’s *Public Notice*, DA 14-1729 (December 2, 2014), regarding the above-captioned Request submitted on November 4, 2014, in which Engineers Frequency Advisory Committee, LLC (“EFAC”) seeks to be certified as a frequency coordinator. As discussed below, APCO opposes the Request as EFAC is not representative of public safety frequency users.

Founded in 1935, APCO is the nation’s oldest and largest public safety communications organization. APCO is a non-profit association with over 20,000 members, most of whom are state or local government employees who manage and operate communications systems for police, fire, emergency medical, forestry conservation, highway maintenance, disaster relief, and other public safety agencies. APCO appears regularly before the Commission on a wide range of public safety communications issues, and is the largest FCC-certified frequency coordinator for Public Safety Pool channels. APCO’s frequency coordination is conducted by 9 full time APCO employees, with the support of 61 volunteer local frequency advisors across the nation who are active members of APCO.

EFAC states that it is a newly formed entity consisting of three for-profit professional firms, Tusa Consulting Group, LLC (“Tusa”), Blue Wing Services (“Blue Wing”), and Shulman Rogers Pordy & Ecker, PA (“Shulman”). EFAC is not otherwise an association or organization of any type, has no public safety members, and, most importantly, is ultimately governed by the private owners of Tusa, Blue Wing, and Shulman. While those private firms count public safety entities among their paying clients, that does not make them “representative” of public safety users as a class. Thus, EFAC fails to meet the FCC’s long-established “representativeness” requirement for certified frequency coordinators.¹

I. REPRESENTATIVENESS IS THE PRIMARY CONSIDERATION FOR FREQUENCY COORDINATOR CERTIFICATION.

In 1982, Congress expressly authorized the Commission to certify “advisory coordinating committees” for the private land mobile radio services.² The Conference Report for the legislation stated that “to further promote fairness in frequency allocation, the Conferees encourage the Commission to recognize those frequency coordinating committees for any given service which are most representative of the users of that service.”³ Thus, when the Commission exercised its authority and established procedures for frequency coordinator certification in 1986, it stated that “representativeness is a primary consideration and criterion in our selection of frequency coordinators.”⁴ The Commission noted that it had previously recognized the role of

¹ As such, it is not necessary in this context to address whether EFAC has satisfied the Commission’s other criteria for certification.

² The Communications Amendments Act of 1982, P.L. 97-259, 96 Stat. 1087, September 13, 1982. Section 331 of the Communications Act of 1934, as amended, codified at 47 U.S.C. § 332(b).

³ Conference Report No. 97-765, 97th Cong. 2nd Sess., August 19, 1982, at 53, reprinted in 1982 U.S. Code Cong. & Ad. News 2237.

⁴ Frequency Coordination in the Private Land Mobile Radio Services, PR Docket No. 83-737. *Report and Order*, 103 FCC 2d 1093 (1986) (“1986 Order”) at ¶18.

informal frequency advisory committees, which “were generally representative of the entities using the services” and that “[c]onsequently, for the most part, applicants could be assured that, in selecting a frequency for their use, the committees would be both knowledgeable and impartial.”⁵ The Commission had also previously set forth general principles for recognizing frequency coordinating committees, the first being that “a frequency coordinating committee must be representative of all eligible in the radio service the committee purports to serve.”⁶

The Commission’s *1986 Order* proceeded to examine the qualifications of the entities seeking certification, and in each case the Commission selected associations or organizations that were representative of users.⁷ Of particular relevance to the matter at hand, the Commission addressed a certification request from a private firm, Comp Comm, Inc., that claimed to have “extensive experience and technical expertise in the design of land mobile communication systems and in the development and management of data bases.”⁸ The Commission rejected Comp Comm’s request, explaining that “[w]e have repeatedly stated that the most important criterion in choosing the coordinators is representativeness.”⁹

In 1997, the Commission consolidated the private land mobile radio services into two pools, the Public Safety Pool and the Industrial Business Pool, which broadened eligibility for frequencies. Significantly, the Commission continued to limit coordination in the Public Safety Pool to the representative entities that it had previously certified, and stood by its prior determination, that “special emphasis” should be “placed on the need for each coordinator to be

⁵ *Id.* at ¶3.

⁶ Frequency Coordination in the Industrial Radio Services, 16 FCC 2d 305, 306 (1969).

⁷ *1986 Order* at ¶¶70-108.

⁸ *Id.* at ¶98.

⁹ *Id.*

representative of the users of the radio service in which it was certified.”¹⁰ Within the Public Safety Pool (and for certain Industrial Business Pool categories), the Commission also required that applications for frequencies in the original service-specific categories must continue to be coordinated by the representative coordinators for those services.¹¹

Representativeness of users continues to be an essential requirement for frequency coordination, as it ensures the fairness and effectiveness of the process for both applicants and incumbent licensees. Associations representing users necessarily balance not only the needs of an applicant, but also the potential for interference to existing operations. This is especially important in the Public Safety Pool where interference could disrupt emergency communications of first responders and other public safety personnel. In contrast, a non-representative coordinator (especially if it is a for-profit entity) will be primarily interested in assigning channels to its paying clients/applicants. It will have no obligation, fiduciary or otherwise, to protect incumbents. Representative coordinators are also well-suited to resolve disputes among licensees and applicants (who, in most cases, will be its members), without the need for Commission intervention. Finally, representative coordinators have a unique understanding of the particular operational needs and concerns of their constituents.

¹⁰ Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignments Policies of the Private Land Mobile Services, *Second Report and Order*, PR Docket No. 92-235, 12 FCC Rcd 14307, ¶34 (1997). (Referring to the representation criteria, the Commission stated: “Our decision to permit each of the current certified coordinators to provide coordination service in a consolidated pool is not a rejection of this concept.”)

¹¹ Through procedures established by the Public Safety Communications Council, an applicant seeking a Public Safety Pool channel may file its application initially with any of the four certified public safety coordinators. If the frequency is subject to coordination by a different coordinator pursuant to Section 90.20(c), the application will be shared with the relevant coordinator for its approval.

II. EFAC DOES NOT SATISFY THE “REPRESENTATIVENESS” REQUIREMENT

Despite the critical importance of the representativeness requirement, EFAC’s sole argument in that regard is that the three professional firms that constitute EFAC count public safety agencies among their paying clients. That hardly unique claim fails to meet the Commission’s requirements. Just because an engineering consultant or attorney “represents” public safety entities in particular licensing or legal proceedings does not make that firm “representative” of public safety users as a class. The Commission’s long standing policy, discussed above, is obviously using the term “representative” to mean “having or showing the qualities associated with the members of a particular group or kind,”¹² which does not typically apply to attorneys, engineers and other professionals that may be retained by members of such a group.¹³

EFAC emphasizes that “literally hundreds of public safety and industrial/business Part 90 users” and others have signed retainer letters with the Shulman law firm, one of the component members of EFAC.¹⁴ However, retaining a law firm because of its legal expertise is quite different than joining an association governed by your elected peers. In addition, the retainer letters were presumably intended to be limited to the specific legal matters for which Shulman was retained,¹⁵ and it is likely that many of the “hundreds” of matters for which Shulman was

¹² <http://www.merriam-webster.com/thesaurus/representative%5Badjective%5D>.

¹³ To consider an extreme example, nobody would argue that a large Wall Street law firm suddenly becomes “representative” of farmers merely because it may be retained by farmers in a legal proceeding.

¹⁴ EFAC Request at 10.

¹⁵ *E.g.*, 800 MHz rebanding matters (in which case Shulman’s fees would have been paid by Sprint Nextel, with services presumably limited to rebanding).

retained are now inactive or closed. In any event, Shulman’s current and prior clients would obviously have no control over Shulman’s frequency coordination activities.¹⁶

A truly representative entity is an association or organization which is governed by those it purports to represent and has as its mission to serve those members. APCO is a non-profit association governed by elected, volunteer members serving as officers and on the APCO Board of Directors. In contrast, the three for-profit professional firms that constitute EFAC are governed by their private owners, not by public safety entities. For example, Shulman is owned and controlled by the lawyers who are partners/owners of the firm, not by any of its clients.

Elsewhere in EFAC’s request, it notes that it will be establishing advisory boards to “set coordination procedures and standards.”¹⁷ However, EFAC will apparently have the sole authority to appoint and remove the advisory board members, and it is unclear to what extent, if any, EFAC will be legally bound to the “advice” of those boards. Clearly, the advisory boards will not control EFAC.¹⁸ Thus, EFAC has it backwards. Rather than a certified coordinator that consists of users and their elected representatives, who may choose to retain or hire professionals to conduct certain frequency activities under its direction, EFAC will be owned and controlled by the professionals themselves, and merely receive “advice” from actual users.

In contrast, APCO’s elected officers and Board of Directors establish policy for frequency coordination (with the input of an advisory committee consisting of APCO members appointed by APCO’s elected President). APCO’s frequency coordination policies are

¹⁶ Another problem with the EFAC Request is that it is unclear how EFAC would handle conflicts that involve one or more clients of Tusa, Blue Wing, or Shulman.

¹⁷ EFAC Request at 12.

¹⁸ EFAC states that that the “Board will have the ability to set coordination procedures and standards for EFAC...including pricing.” *Id.* EFAC needs to explain that relationship, as it is hardly likely that EFAC would turn over final pricing or other critical policy decisions to an independent “advisory” board. A for-profit business does not let a group of its customers establish pricing (except of course as a result of supply and demand in the marketplace).

implemented by employees of APCO with the assistance of volunteer local advisors, but those employees (and advisors) are ultimately subject to the oversight and control of APCO's elected Board of Directors and officers.

Should the Commission ignore these failings of the EFAC request, the door would be left wide open for dozens of similar certification requests from consultants, engineers and attorneys who claim to "represent" public safety based on nothing more than their client base. How would the Commission make meaningful subjective choices regarding certification of such entities? Simply eliminating the representativeness criteria or certification requirements in general would be an even worse result, as it would create chaos in frequency coordination with no effective means to ensure that frequency assignments will not interfere with critical communications that protect the safety of life and property. Perhaps such a "Wild West" approach could work in the Industrial/Business Pool, but certainly not in the Public Safety Pool where the consequences of inadequate frequency coordination could endanger first responders and the public they serve.

CONCLUSION

Therefore, for the reasons set forth above, the Commission must dismiss EFAC's Request as it is clearly not representative of Public Safety Pool frequency users.

Respectfully submitted,

/s/

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