

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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 Assignment Policies of the)
Private Land Mobile Radio Services)

PR Docket No. 92-235

To: The Commission

Opposition to Motion for Expedited Stay Filed by MRFAC, Inc.

The United Telecom Council (UTC), formerly UTC, The Telecommunications Association, and the American Petroleum Institute (API) hereby submit this *Opposition to Motion for Expedited Stay Filed by MRFAC, Inc.* The *Motion for Expedited Stay (Motion)*,¹ asks the Federal Communications Commission (FCC) to stay the effectiveness of the rule adopted in its *Second Memorandum Opinion and Order (Second MO&O)* in this proceeding, which requires that frequencies that had been shared by Power, Petroleum, and Railroad industries with manufacturers (shared frequencies) be coordinated by, or subject to the concurrence of, the Power, Petroleum or Railroad frequency coordinators. For reasons of public safety and sound spectrum management, UTC and API strongly oppose the efforts of MRFAC to threaten the reasonable coordination protections enacted by the FCC for Power, Petroleum and Railroad radio systems in the *Second MO&O*.

¹ The *Motion* was filed on July 7, 1999. Pursuant to Section 1.45(d) of the FCC's Rules, oppositions are due within seven days of filing.

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I. Background

UTC is the national representative on communications matters for the nation's electric, gas, water and steam utilities, and natural gas pipelines. UTC's approximately 1,000 members range in size from large combination electric-gas-water utilities which serve millions of customers, to smaller, rural electric cooperatives and water districts which serve only a few thousand customers each. UTC's members provide electric gas and water service to the majority of US households and businesses and operate in all fifty (50) states and the District of Columbia. UTC also serves as an authorized frequency advisory committee in the Industrial/Business Pool below 512 MHz.

API is a national trade association representing approximately 350 companies involved in all phases of the petroleum and natural gas industries, including exploration, production, refining, marketing, and transportation of petroleum, petroleum products and natural gas. Among its many activities, API acts on behalf of its members as spokesperson before federal and state regulatory agencies. The API Telecommunications Committee is one of the standing committees of the organization's Information Systems Committee. The Telecommunications Committee evaluates and develops responses to state and Federal proposals affecting telecommunications facilities used in the petroleum and natural gas industries. API, through the Petroleum Frequency Coordinating Committee (PFCC), serves as an authorized frequency advisory committee in the Industrial/Business Pool below 512 MHz.

UTC and API have been active participants in the FCC's efforts to introduce greater efficiency in the private land mobile radio bands below 512 MHz, and have filed numerous comments both jointly and separately to encourage efficiency while protecting the important communications systems of the nation's critical infrastructure industries (CII). In June 1998, UTC and API jointly filed an *Emergency Request for Limited Licensing Freeze (Emergency Request)* proposing temporary relief to problems

relating to the coordination of new industrial radio systems on channels that, previous to the FCC's decision to consolidate the radio services pools, had been shared by the former Power or Petroleum Radio Service with a few other radio services. Noting that instances of interference were occurring on these previously shared channels and that the number of instances was likely to grow, UTC and API urged the FCC to freeze licensing on these channels unless nearby incumbent utility or petroleum licensees or the appropriate frequency advisory committee (UTC or PFCC) concurred with the coordination.

The *Emergency Request*, however, was not the first time that potential problems had been noted regarding the threat that the FCC's pool consolidation may pose to CII operations on shared channels. This same general concern had been raised by API in its *Petition for Reconsideration (API Petition)* of the FCC's *Second Report and Order (Second R&O)* in this proceeding. The *API Petition* urged the FCC to provide additional protections for incumbent petroleum systems on shared channels.² Moreover, UTC and its individual member companies have, since the effectiveness of the *Second R&O*, brought to the FCC's attention a number of coordination and interference problems threatening the safe and reliable use of Power radio systems.

II. MRFAC Has Not Met the Standard for the Granting of the Stay

As MRFAC correctly notes, in order to support stay, a petitioner must establish that: (1) the petitioner will likely prevail on the merits; (ii) the petitioner will suffer irreparable harm if a stay is not granted; (iii) other interested parties will not be harmed if the stay is granted; and (iv) the grant of the stay would be in the public interest. UTC and API note that MRFAC has failed to meet the requirements for the granting of a stay. Indeed, MRFAC's *Motion* fails to satisfy any of the four requirements.

² *API Petition* at p. 6-7 (filed May 19, 1997).

A. MRFAC is Not Likely to Prevail on the Merits

MRFAC states that it is likely to prevail on the merits for at least two reasons: (1) the FCC's decision in the *Second MO&O* was adopted in violation of the Administrative Procedures Act;³ and (2) the FCC's decision to provide additional coordination protection for Power, Petroleum and Railroad systems was arbitrary and capricious.⁴ Neither claim has merit.

1. The FCC Provided Adequate Notice to Interested Parties of the Change in Frequency Coordination Requirements

MRFAC is incorrect, for a variety of reasons, in alleging that inadequate notice of the FCC's rule change was provided to interested parties under the Administrative Procedures Act.

First, as MRFAC itself points out in its *Motion*, a final rule need not exactly match the rule proposed. The final rule must merely be a "logical outgrowth" of the proposed rule.⁵ In fact, "[a]n agency can even make substantial changes from the proposed version, as long as the final changes are 'in character with the original scheme' and a 'logical outgrowth' of the notice and comment." Natural Resources Defense Council v US EPA, 824 F. 2d 1258, 1283 (1st Cir. 1987).⁶ The FCC's decision to provide additional coordination protections is clearly appropriate as a logical outgrowth of the FCC's request for comments regarding the consolidation of the radio service pools.

Contrary to MRFAC's assertions, throughout this proceeding the FCC has broadly inquired into the appropriate level of consolidation and other proposals that might satisfy the goals established by the FCC to protect existing users while maximizing the benefits of private land mobile radio (PLMR) spectrum. In the *Notice of Proposed Rulemaking*, the FCC offered two alternatives for pool

³ 5 U.S.C. § 553.

⁴ MRFAC *Motion* at p. 9.

⁵ MRFAC *Motion* at p. 10.

⁶ See also American Medical Association v. US, 887 F.2d 760, 767 (7th Cir. 1989). ("That an agency changes its approach to the difficult problems it must address does not signify the failure of the administrative process. Instead, an agency's change of course, so long as generally consistent with the tenor of its original proposals, indicates that the agency treats the notice-and-comment process seriously, and is willing to modify its position where the public's reaction persuades the agency that its initial regulatory suggestions were flawed.")

consolidation, but also specifically requested comment on “any other alternatives that will fulfill the goals and objectives of this proceeding.”⁷

In the *First Report and Order and Further Notice of Proposed Rulemaking*, the FCC refused to adopt specific rules for pool consolidation, noting that no consensus among the PLMR community had been reached. Instead, the FCC sought further comment on a pool consolidation proposal “representative of the interests and needs of the PLMR community and frequency coordinators.”⁸ In this order, the FCC also indicated that its investigation of pool consolidation was not limited to its initial two proposals, stating that the plan for consolidation outlined in the *NPRM* provides an initial “guideline for consolidation,”⁹ and recognized the need to consider “the importance of different services.”¹⁰

Finally, in the *Second R&O*, the FCC adopted a pool consolidation plan that included special protection for the “quasi-public safety” Power, Petroleum and Railroad industries. The FCC acknowledged that these industries provide “critical, public safety-related communications”¹¹ in that they “employ radio not just for day-to-day business needs but also to respond to emergencies that could be extremely dangerous to the general public.”¹² The FCC has also recognized that “the nature of [these services’] day-to-day operations provides little or no margin for error and in emergencies they can take on an almost quasi-public safety function.”¹³ Furthermore, the FCC has noted that “[a]ny failure in their ability to communicate by radio could have severe consequences on the public welfare.”¹⁴ In light of these considerations, the FCC adopted rules which provide for coordination by UTC, API and AAR for

⁷ *Notice of Proposed Rulemaking*, 7 FCC Rcd 8105, 8111 (1992).

⁸ *First Report and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 10076, 10106 (1995).

⁹ *Id.* at 101015.

¹⁰ *Id.* at 10106.

¹¹ *Second Report and Order*, 12 FCC Rcd 14307, 14309 (1997).

¹² *Id.* at 14329.

¹³ *Id.*

¹⁴ *Id.*

channels that, prior to pool consolidation, had been allocated for exclusive access by Power (IW) and Petroleum (IP) or Railroad (IR) licensees, respectively.¹⁵

The FCC's decision to provide additional frequency coordination protections for channels formerly shared by Power, Petroleum and Railroad services with a small number of other services is no doubt a logical outgrowth of the FCC's exploration of the issues relating to pool consolidation. As noted above, the FCC undertook a broad investigation of all issues pertaining to consolidation and requested comment on how best to meet the needs of PLMR users while allowing more efficient use of PLMR spectrum. While the expansion of the coordination protection to shared channels was not specifically noted by the FCC in its previous orders and notices, it was definitely "in character" with, and a logical outgrowth of, the proposals made by the FCC regarding pool consolidation. In fact, the FCC's requirement for concurrence on these shared channels is largely a revision to the prior rule that also required prior concurrence from the other coordinator(s) for the channels.¹⁶

Moreover, the specific issue of expanding the existing coordination protection for critical radio systems was formally raised by API in its *Petition for Reconsideration of the Second R&O*. API raised serious public safety concerns with the FCC's decision to permit any FCC-authorized coordinator to coordinate systems on the shared channels. API also restated the FCC's findings that Petroleum, Power, and Railroad services are critical for responding to emergencies that could impact large numbers of people. The FCC was correct in finding that the extension of the relief to the other CII or quasi-public safety industries was a logical outgrowth of API's petition and thus provided MRFAC and others with sufficient public notice of the issue.

¹⁵ 47 C.F.R. §90.35(b).

¹⁶ See 47 C.F.R. § 90.175 (1996).

2. The FCC's Action is Not Arbitrary or Capricious

MRFAC also claims that the FCC's decision in the *Second MO&O* is not supported by substantial evidence based on a consideration of the relevant factors, and thus is arbitrary and capricious. This argument defies rational analysis.

There is substantial evidence as to the danger posed by the lack of coordination protection for shared channels. UTC has noted on many occasions and in many proceedings that there have been numerous instances of interference to utility systems by new licensees operating on these shared channels. These instances of interference were foreshadowed by the API Petition's acknowledgment that the lack of protection for shared channels "could have unanticipated, and even dangerous results."¹⁷

There is also substantial evidence to support the potential for danger stemming from future coordination by MRFAC on the shared channels. While UTC and API agree that there have been no reported instances of interference from MRFAC-coordinated systems and that coordination traditionally has been successful with the small number of generally compatible users, including manufacturers, changes to the FCC's licensing rules may thwart even the most well-intentioned coordinators. For instance, the FCC's Universal Licensing System (ULS) rules establish a new consolidated licensing database for multiple radio services. Upon implementation of ULS for PLMR services, data will be collected on a new consolidated Form 601, which will replace existing FCC licensing form Form 600.¹⁸ This form will no longer collect data regarding the specific type of industrial/business pool licensee, making it difficult for MRFAC or any other coordinator to ensure the compatibility of the new licensees with the incumbent utility or petroleum systems. Only by requiring the concurrence of those

¹⁷ API Petition at ¶6.

¹⁸ Report and Order, WT Docket No. 98-20, WT Docket No. 96-188, RM-8677, 13 FCC Rcd 21027 (1998).

coordinators that are most familiar with utility and pipeline operations can future instances of interference be minimized.¹⁹

B. Neither MRFAC nor its Frequency Coordination Customers Will Suffer Irreparable Harm

MRFAC has failed to prove that it or its customers will suffer irreparable harm from the FCC's expanded coordination protections. The standard for irreparable harm is high – “the injury must be both certain and great; it must be actual and not theoretical.”²⁰ MRFAC's concerns deal with the possible loss of business and potential for customer confusion. Neither of these alleged injuries is “certain” or “great.” First, the expanded coordination rules may not result in the loss of business by MRFAC. These rules provide, after all, that MRFAC may freely coordinate on many more channels than it could prior to pool consolidation, and it may be possible for MRFAC to continue to coordinate systems on the formerly shared channels as long the concurrence of the appropriate frequency coordinator is obtained.²¹ Moreover, MRFAC's existing customers may continue to work with MRFAC regardless of any additional administrative procedures that might be necessary based on MRFAC's knowledge of their industry and previous business relationship. Indeed, the FCC provided that coordinators could reach mutually acceptable procedures to facilitate this concurrence process.

UTC and API also disagree that consumer confusion will likely increase under the FCC's new coordination rules. These rules provide simply that the shared channels, which prior to the *Second R&O* were subject to the concurrence of a small number of coordinators,²² will need to be coordinated (or have the coordination concurred to) by the appropriate utility or petroleum coordinator. If anything, this process may be easier for consumers to understand.

¹⁹ Item 1 on Form 601 requests the Radio Service Code for the system at issue, and page 6 of the FCC's instructions to the form, indicate only four (4) acceptable codes may be used: IG (Industrial/Business Pool Conventional); YG (Industrial/Business Pool Trunked); PW (Public Safety Pool Conventional); and YW (Public Safety Pool Trunked).

²⁰ Wisconsin Gas v. FERC, 758 F.2d 669, 674 (DC Cir. 1985); In the Matter of Cincinnati Bell Telephone Company Requests for Stay Order Finding Violations of the Commission's Rate of Return, 8 FCC Rcd 679 (1993).

²¹ *Second MO&O* at ¶9.

C. The Grant of the Stay Would Pose Serious Threats to Utility and Petroleum Systems

As noted in Section IIA above, both UTC and API have demonstrated that the lack of sufficient protection for shared channels has posed, and would continue to pose, serious threats to utility and petroleum systems. Even in the first year of the FCC's pool consolidation rules, instances of interference arose throughout the country. As new systems are coordinated under evolving FCC licensing rules, the number of instances would only rise. UTC and API forecast in their *Emergency Request* that without these protections, "it is no longer a question of whether a catastrophe will be caused by interference to one of these systems, but when and how bad it will be."²³

D. Granting the Stay Would Not Serve the Public Interest

By removing important protections for critical services, granting the stay would be contrary to the public interest. The coordination requirements were adopted to protect public safety, and no matter how well-intentioned MRFAC may be, the new competitive environment has created unfortunate incentives for some coordinators to ignore public safety in their zeal to secure business and load customers indiscriminately onto channels that are heavily relied upon by utility and petroleum companies. Grant of MRFAC's stay request would likely cause UTC and API's fears concerning future instances of interference to critical systems to become reality.

III. UTC and API Remain Committed to Working with MRFAC to Reduce the Administrative Burdens

Although UTC and API strongly urge the FCC to deny MRFAC's motion, UTC and API are committed to working with MRFAC and the other organizations affected by the expanded coordination requirement to minimize administrative burdens associated with the new rules. Neither UTC nor API views the FCC's expanded coordination protection as a coordination business opportunity, but rather as a means of protecting public safety. In fact, UTC and API suggested in their *Emergency Request* that

²² See 47 C.F.R. §90.175 (1996). ("When frequencies are shared by more than one service, concurrence must be obtained from the other applicable certified coordinators.")

applicants have the alternative of seeking concurrence from incumbents rather than the coordinators to “eliminate any concern that this request is being filed for the benefit of coordinators themselves.”²⁴ UTC and API will work with MRFAC and others to address all reasonable concerns, but without jeopardizing the necessary protections afforded to utility and petroleum systems by the FCC.

WHEREFORE, THE PREMISES CONSIDERED, UTC and API urge the Federal Communications Commission to deny the Motion for Expedited Stay.

Respectfully submitted,

United Telecom Council

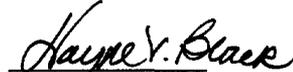
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²³ *Emergency Request* at p. 5.

²⁴ *Emergency Request* at p 8, n. 9.

CERTIFICATE OF SERVICE

I, Thomas Goode, do hereby certify that I have caused to be sent, this 14th day of July, 1999, by first class mail, postage prepaid, copies of the foregoing to the following:

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