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Before the

Federal Communications Commission

Washington, DC 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	)	PR Docket No. 92-235
	)	
and	)	
	)	
Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Radio Services	)	

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To: The Commission

REPLY TO OPPOSITION TO MOTION FOR EXPEDITED PARTIAL STAY

MRFAC, Inc. ("MRFAC"), by its counsel, hereby replies to the Opposition to Motion for Expedited Partial Stay filed by United Telecom Council ("UTC") (formerly UTC, The Telecommunications Association); and American Petroleum Institute ("API"). As discussed below, the Opposition fails to rebut the points made by MRFAC in its Motion. Accordingly, the Commission should immediately stay the new coordination rule which is currently scheduled to become effective August 5.[1]

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List A B C D E

[1] Under the rule announced in the Second Memorandum Opinion and Order, FCC 99-68, 64 Fed. Reg. 36258 (July 6, 1999) frequencies shared by the utility and petroleum industries prior to consolidation must be coordinated by UTC or API (the latter of whose coordinations are actually done by Petroleum Frequency Coordinating Committee, an arm of Industrial Telecommunications Association), or their concurrence obtained -- even as against industries and coordinators, such as manufacturers and MRFAC, which have had equal access to these channels for decades.

UTC/API argue that the new rule is a logical outgrowth of earlier proposals by the Commission, citing in support Natural Resources Defense Council v. EPA, 824 F.2d 1258, 1283 (1st Cir. 1987); that the new rule is not arbitrary and capricious inasmuch as, with consolidation and the transition to ULS, UTC/API can have no assurance that incompatible users will not be coordinated on their frequencies (Opposition, p. 7); that MRFAC and its customers will not be irreparably harmed without a stay; and that grant of a stay would harm UTC/API by threatening public safety.

In support of its logical outgrowth argument, UTC/API contend that the Commission undertook "a broad investigation of all issues pertaining to consolidation;" that "the specific issue of expanding the existing coordination protection for critical radio systems was formally raised by API in its Petition for Reconsideration; and indeed, that "[t]he 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...." Id. at 6.

There is no merit to these points. The fact that the Commission undertook a "broad investigation" of issues pertaining to consolidation does not constitute adequate notice: If this were the correct standard, Section 553 of the Administrative Procedures Act, 5 U.S.C. § 553, would be virtually meaningless. Rather, the correct standard is illustrated aptly by Natural Resources Defense Council, supra. In that case the Court held that the Environmental Protection Agency had failed to give proper notice regarding certain ground water protection requirements which had not been part of the proposed rule, despite EPA arguments that the final rule was a "logical outgrowth." 824 F.2d at 1284. The Court noted that EPA had at no point suggested that a ground water protection rule was being contemplated and that, given a new opportunity to

comment, parties would have their first opportunity to offer constructive comments. Ibid. In so holding the Court also observed:

> The essential inquiry is whether the commenters have had a fair opportunity to present their views on the contents of the final plan. We must be satisfied, in other words, that given a new opportunity to comment, commenters would not have their first occasion to offer new and different criticisms which the Agency might find convincing.

Id. quoting from BASF Wyandotte Corp. v. Costle, 598 F.2d 642 (1st Cir. 1979), cert. denied 444 U.S. 1096 (1980).

In Natural Resources Defense Council, like here, the agency announced a rule after the fact. Like here, interested parties did not have a fair opportunity to comment. And like here, the law required that the issue be considered anew.

Insofar as API's Petition for Reconsideration is concerned, there is nothing in the Order on Reconsideration which suggests that the new rule was a "logical outgrowth" of API's request for protected contours for incumbent petroleum radio systems, and for good reason. Had the Petition even remotely sought relief a la the new rule, MRFAC would have objected. Instead, MRFAC filed a qualified support for API's Petition. The "surprise" factor so palpable here underscores the lack of proper notice. See Air Transport Assn. v. FAA, 169 F.2d 1, 7 (D.C. Cir. 1999)(agency action overturned where it was found to constitute "more surprise than notice").[2] In this light, the fact that the agency extended the new rule to include utilities and railroads as well, is irrelevant. Finally, the requisite notice must be based on what the agency proposes, not a petition for reconsideration. See Motion at 11-12.

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[2] The lack of basis to the Opposition's notice argument is perhaps best illustrated by asking what proposal MRFAC should have anticipated the Commission might hit upon instead of API's: Is a party supposed to erect a range of scenarios and then proceed to comment on each one? Of course not.

UTC/API next argue that the new rule is not arbitrary or capricious inasmuch as, post-consolidation and post-ULS, there is no way to assure coordination by compatible users. Id. at 7. However, the opponents agree that coordination relations with MRFAC have been historically harmonious (a state of affairs that MRFAC trusts can continue, the current difficulties notwithstanding). Id. Moreover, MRFAC is not insensitive to the petitioners' concerns -- concerns which it shares due to the inherently dangerous operations which many of its members and customers are engaged in, and for which MRFAC has coordinated many OSHA-required radio systems.[3]

For these reasons the new rule remains utterly arbitrary and capricious as to MRFAC. There is no suggestion, much less evidence, that MRFAC has or would jeopardize utility or pipeline safety. Given this, it is grossly arbitrary to favor one group of coordinators as against another. The Commission could easily have avoided this, had it only taken the time to solicit comments and suggestions on the new rule. The agency's failure to secure input on this issue underscores the capriciousness of the result.

The Opposition next argues that MRFAC has not shown irreparable injury inasmuch as it has more frequencies to coordinate post-consolidation; that its customers "may continue to work with MRFAC"; and that customers will not be confused since the channels were subject to concurrence by UTC and API prior to consolidation. Id. at 8.

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[3] The Opposition refers obliquely to the fact that the subject frequencies were shared "with a few other radio services" prior to consolidation. Id. at 3, 6, 8. What the Opposition omits to say is that the frequencies in question were shared with manufacturers for decades.

What the opponents overlook is that for the 45-plus years that MRFAC and its predecessor, the Communications Committee of the National Association of Manufacturers, have coordinated frequencies for manufacturers, most of the applications (many thousands of them) were for one or another of the frequencies at issue here. Under normal circumstances MRFAC could expect to coordinate new and modification applications for these customers. But how can MRFAC hope to retain this business (much less attract new business) when the new rule penalizes applicants who would use MRFAC's services as opposed to UTC's or API's? In short, the premise for the Opposition's argument flies in the face of business realities.[4]

The Opposition's customer confusion point is equally unavailing. It would make sense only if UTC and API were required to obtain MRFAC's concurrence as they were prior to consolidation. Instead, the new rule is a one-way street requiring actual coordination (or concurrence) by them alone. Customers not understanding this will understandably be confused as to who must coordinate which frequencies. Again, the premise for the Opposition's argument is missing.

Finally, UTC and API argue that the new rule is not viewed by them as a "coordination business opportunity." Id. at 9. However, at the same time UTC/API seek to defend the new rule (and press their case for a separate pool stocked with frequencies historically used by manufacturers), aggressive efforts are being made to expand their market share. In a

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[4] UTC/API cite cases for the proposition that the injury to a movant for stay must be "certain and great." Id. at note 20. However, this statement of the law is seriously incomplete. Both Commission and judicial precedent have recognized that a particularly strong showing on one of the four elements for a stay lessens the showing required on other elements. See Universal Licensing System in the Wireless Telecommunications Services, FCC 9-129, WT Docket No. 98-20, released June 9, 1999, at ¶ 4, and WMATA v. Holiday Tours, Inc. 559 F.2d 841 (D.C. Cir. 1977)(stay may be granted with either a high probability of success and some injury, or vice versa). In any event, there is nothing "theoretical" or "[un]certain" about the injury to a competitor who has been told that -- as a result of government edict -- his competitors now get to control much of his stock in trade.

remarkable bit of timing, just last Friday Telecommunications Reports carried an article on UTC and its new name. Id., July 16, 1999 (electronic version). According to that article UTC has said the change is intended to "expand the concept embodied in our name" to embrace the group's three key constituencies: "critical infrastructure companies"; "technology partners"; and "its newest constituency group which includes large financial service companies, health care providers, and multinational manufacturing companies." (emphasis added).

UTC (and API) are entitled to seek new business wherever they can find it. What they are not entitled to is government-sanctioned favoritism as against MRFAC when the notification rule already provides a competitively neutral solution to their interference concerns.

MRFAC remains open to working with the Commission and UTC/API should additional safety measures be desired (although we question their necessity) -- as long as such measures do not prejudice manufacturers as a user class, or subvert elementary principles of fair competition. In the meantime, however, a compelling case is presented for a stay of the new rule as to MRFAC.

Respectfully submitted,

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July 20, 1999

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CERTIFICATE OF SERVICE

I, Joseph C. Fezie, hereby certify that a true copy of the attached "Reply to Opposition to Motion for Expedited Partial Stay" has been sent first-class, U.S. mail, to the following, this 20th day of July, 1999:

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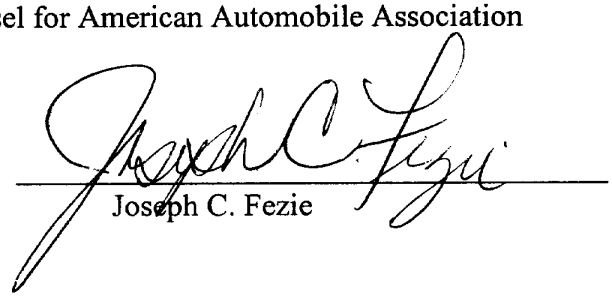

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