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

In the matter of	)	
	)	
Informal Request for Certification	)	
To Coordinate the Power Radio Service	)	RM 10687
Railroad Radio Service,	)	
And Automobile Emergency Radio	)	
Service Under Part 90 of the	)	
Commission's Rules	)	

To: Consumer and Governmental Affairs Bureau

COMMENTS OF
THE UNITED TELECOM COUNCIL

Respectfully submitted,

United Telecom Council

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Summary

The United Telecom Council (UTC) opposes strongly the Informal Request of the Industrial Telecommunications Association (ITA) to be certified to coordinate former Power, Railroad and Auto Emergency pool channels in the private land mobile radio bands below 512 MHz. ITA demonstrates no representation or understanding in its request of the unique, quasi-public safety uses of critical infrastructure (CI) communications systems or the needs of CI entities. It offers no substantive reason on which the FCC could rely in changing current rules offering limited protection to licensees on these frequencies that would override the important public welfare basis on which the Commission decided to retain exclusive coordination by dedicated coordinators. Further, ITA and its customers have not been harmed by UTC's coordination of former Power frequencies.

The factors underlying the Commission's earlier decision to provide, and expand, limited protection to systems on these frequencies through careful spectrum management by qualified coordinators has not diminished. In fact, it has become more important than before given national attention to the need to protect critical infrastructure systems. The communications systems of electric, gas and water utilities are used for voice and data applications that provide emergency power restoration, support of traditional Public Safety operations and control of the vital systems that provide basic services across the country; further, they operate to ensure compliance with a wide variety of federal and state regulations. ITA's request offers no understanding of these facts, but dismisses all private land mobile systems as basically identical.

UTC is extremely concerned about the impact of ITA's possible actions on mission-critical systems should its request be granted. UTC urges the Commission against competition for its own sake, when balanced against the potential impact on the public welfare that is likely to occur, and urges the FCC to deny ITA's request.

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COMMENTS OF THE UNITED TELECOM COUNCIL

Pursuant to Section 1.415 of the Federal Communications Commission ("FCC") Rules, 47 C.F.R. § 1.415, the United Telecom Council ("UTC") hereby submits its comments on the Informal Request of the Industrial Telecommunications Association (ITA) in the above-referenced docket.[1] UTC opposes the Request strongly because it threatens to frustrate Commission policy to protect critical infrastructure communications systems that rely on the former exclusive and shared Power, Railroad and Auto Emergency frequencies. UTC urges the FCC to deny ITA's request.[2]

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[1] Informal Request for Certification of the Industrial Telecommunications Association, Inc. to Coordinate the Power Radio Service, Railroad Radio Service, and Automobile Emergency Radio Service Under Part 90 of the Commission's Rules, RM-10687 (filed Jan. 27, 2003)(the "Request"). UTC notes that the Commission has re-characterized the Request as a Petition for Rulemaking in launching the instant proceeding. *See,* Report No. 2601, March 26, 2003.

[2] UTC also refers the Bureau to the Joint Opposition of AAA, AAR, UTC and API filed in this matter and incorporates that filing herein by reference.

I. Introduction

Since 1948, UTC has been the national representative on communications matters for the nation's electric, gas, and water utilities and natural gas pipelines. Nearly 1,000 such entities are members of UTC, ranging in size from large combination electric-gas-water utilities that serve millions of customers, to smaller, rural electric cooperatives and water districts that serve only a few thousand customers each. UTC also is a member of the Critical Infrastructure Communications Coalition (CICC), and together with other CICC members represents the telecom and IT interests of virtually every utility and other critical infrastructure industry in the country.[3] UTC was one of the original FCC-certified coordinators, specifically responsible for the former Power Radio Service due to its representation of these industries; however, prior to the FCC's certification proceeding, UTC had been coordinating electrical, gas and water utility communications systems for decades.

II. Background

After the Commission instituted competitive coordination in the bands below 512 MHz, it decided expressly to retain exclusive coordination for the channels formerly allocated to the Power, Petroleum, Railroad and Automobile

[3] The CICC represents industries that operate telecommunications systems to maintain and protect the nation's critical infrastructure, and includes representatives of the electric, gas, water, railroad and petroleum industries including: American Gas Association, American Petroleum Institute (API), American Public Power Association, American Water Works Association, Association of American Railroads, Association of Oil Pipe Lines, Edison Electric Institute, Interstate Natural Gas Association of America, National Association of Water Companies, National Rural Electric Cooperative Association, and United Telecom Council.

Emergency Services.[4] It did so in order to ensure that the integrity of these "quasi-public safety" bands was not impaired.[5] The Commission recognized that "any failure in their ability to communicate by radio could have severe consequences on the public welfare." Thus the risk to the public welfare, "outweigh[ed] any potential benefits that may be gained through a competitive frequency coordination process."[6]

UTC's exclusive coordination authority over the former Power Radio Service is quite restricted. It is important to note that *all* PLMR Industrial/Business eligibles may be licensed on the former Power, Railroad and Auto Emergency frequencies; eligibility is not limited.[7] Moreover, the FCC's Rules do allow other I/B coordinators to coordinate these frequencies, provided that those coordinators obtain the concurrence of the certified coordinator for the

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[4] *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, 12 FCC Rcd. 14307, 14329 (1997).("*Refarming R&O*") (retaining UTC's, AAR's and API's exclusive coordination of frequencies formerly allocated to the Power, Railroad and Petroleum Radio Services). *See also 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 Memorandum Opinion and Order, 14 FCC Rcd. 8642, 8650-52 (1999) ("*Refarming Second MO&O*")(according AAA exclusive coordination over frequencies formerly allocated to Automobile Emergency Radio Services).

[5] *Refarming Second Report & Order* at 14309, *and Refarming Second Memorandum Opinion & Order* at 8651.

[6] *Refarming Second Report and* Order, at 14330.

[7] ITA apparently misunderstands this portion of the Part 90 Rules; its Request states that it believes "these channels should retain exclusive-use *(sic)* by their current eligibility groups." Request at 9. A lack of knowledge concerning basic rules would seem further to call ITA's qualifications into question.

respective former pool.[8] This option permits competitive coordination without jeopardizing critical infrastructure communications systems that represent the predominant use of these frequencies.

The Commission has consistently affirmed and *expanded* the level of protection afforded to the frequencies that were allocated to the former Power, Petroleum, Railroad and Automobile Emergency Radio Services, as well as others. In response to an *Emergency Request* jointly filed by UTC and API, the Commission decided to protect the frequencies that formerly were allocated to these services on a *shared* as well as exclusive basis.[9] The *Emergency Request* documented interference to utility communications resulting from the coordination of a new private carrier communications system immediately after the Commission consolidated the service pools and permitted other coordinators to coordinate the shared frequencies.[10] Realizing the threat to critical infrastructure communications created by competitive coordination of the shared channels, the Commission decided to require concurrence when the interference contour of a proposed station would overlap the service contour of an existing facility that used the same shared channel.[11] As an additional measure, the Commission also sought to protect these frequencies from interference from

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[8] 47 C.F.R. §90.35(b)(ii); 47 C.F.R. §90.175.

[9] Emergency Request for Limited Licensing Freeze filed by UTC, The Telecommunications Association and the American Petroleum Institute in WT Docket No. 92-235 (filed June 26, 1998).

[10] *Id.* at 5.

[11] *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*

adjacent channel operations.[12] Thus, the Commission has repeatedly affirmed its commitment to protecting critical infrastructure communications on the channels that were formerly allocated to the Power, Petroleum, Railroad and Automobile Emergency Radio Services.

III. Discussion

A. ITA offers no substantive basis for competitive coordination of Power Railroad and Automobile Emergency Services.

Implicit in the Request is that there is some compelling reason to dismantle the Commission's rules offering limited protection to critical infrastructure communications on the channels formerly allocated to the Power, Railroad and Automobile Emergency Radio Services. The reality is that as a practical matter, ITA may, and does, already coordinate these frequencies, provided that it obtains the concurrence of UTC, AAA or AAR. Over the past two years, UTC has received approximately ten requests for coordinations from ITA on former Power Radio Service frequencies; after reviewing the proposed application, UTC has concurred with the requests on *every* occasion. Thus, ITA and its coordination business have not been hampered or harmed by UTC's

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of the Private Land Mobile Services, Fifth Memorandum Opinion and Order, 16 FCC Rcd. 416 at ¶ 7 (2000). ("*Refarming Fifth MO&O*").

[12] *Id.* at ¶ 15. In this decision, the Commission expanded the protection to include channels formerly shared by the Mahufacturers Radio Service, Forest Products Radio Service and Motor Carrer Radio Service.

limited authority over these frequencies, and there has been no anti-competitive effect from the FCC's Rules in this area.[13]

Moreover UTC, AAR and AAA themselves continue to provide superior coordination services that are truly representative of the predominant use of these channels by utilities, railroads and auto emergency entities. For its part, UTC prides itself on the quality of its coordination services, and is particularly sensitive to the communications needs of the utility operations that are licensed on the frequencies formerly allocated to the Power Radio Service. UTC understands the unique needs of utilities for high-quality, highly reliable communications for both routine maintenance and emergency response. Moreover, as the FCC has recognized,

> UTC has been providing frequency coordination services for over thirty-five years, predating its formal certification as a frequency coordinator. In that time, we have received no significant complaints about UTC's performance. In this connection, we note that several commenters attest to UTC's qualifications.[14]

Whether the same can be said for ITA is a question. UTC remains representative and continues to possess the expertise and qualifications to coordinate these frequencies specifically, as well as non-Public Safety PLMR frequencies generally.

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[13] A search of the Commission's PLMR database shows that ITA currently is the largest-volume coordinator of PLMR frequencies, coordinating substantially more applications than UTC or any other coordinator with exclusive authority over frequencies; thus, ITA can claim no anti-competitive effect from this restriction.

[14] *See United Telecom Council*, Order, DA 01-944, 16 FCC Rcd. 8436 at 8442, ¶12 (2000)(approving UTC's ability to address the complex engineering questions in coordinating frequencies below 512 MHz and rejecting ITA's suggestion that coordinating 800/900 frequencies would be more complex.)

If anything, the rationale for exclusive coordination is stronger now than it has ever been before. There is a heightened concern for security and reliability of critical infrastructure systems as part of national Homeland Security efforts,[15] and the government must work through public-private partnerships with utilities and other critical infrastructure industries to take action to minimize disruption of the critical infrastructure.[16] In addition, the FCC's Spectrum Policy Task Force has recommended licensing technically compatible uses together in order to mitigate the potential for interference.[17] UTC agrees that critical infrastructure communications should be licensed together with compatible users.[18] Thus, it would defy reason and policy to remove rules designed to protect these frequencies at this time by instituting competitive coordination for these channels.

B. Consideration of the Request requires a rulemaking proceeding.

Yet the gravity of its own request appears completely lost on ITA. It proffers that its request does not call new or novel questions of law into play, and that the Commission may certify it to coordinate these channels without a

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[15] *See* Homeland Security Act of 2002, P.L. 107-296 (establishing as part of the basic structure of the Department of Homeland Security an Information Analysis and Infrastructure Protection Directorate).

[16] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, § 1016 (2001).

[17] Spectrum Policy Task Force, Report, ET Docket 02-135, at 22 (released Nov. 15, 2002).

[18] *See* Comments of UTC in WT Docket No. 02-135 at 8 (filed Jan. 27, 2003).

rulemaking.[19] Apparently ITA does not consider it any different from previous Commission decisions that certified other coordinators to coordinate 800/900 MHz frequencies, which remained exclusively coordinated after refarming largely as a matter of administrative oversight rather than as a conscious policy.[20] Nor does it consider it any different from certifying a coordinator for the Wireless Medical Telemetry Service, which actually occurred in conjunction with a rulemaking establishing that service.[21] But, this casual attitude is not surprising, considering ITA has already overreached – making similar arguments in *comments* that ask the Commission to certify them to coordinate frequencies in the Public Safety pool, clearly beyond the scope of a proceeding considering competitive coordination only among currently certified Public Safety coordinators.[22]

ITA's assertion that this is a simple matter that can be handled under delegated authority shows a misunderstanding or deliberate ignoring of FCC procedure. ITA's Request seeks to overturn existing FCC Rules that have been in place, and affirmed, for years. Since the FCC has not dismissed the Request due to its procedural deficiencies, it must be dealt with in a formal rulemaking

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[19] Informal Request of ITA at 5.

[20] Informal Request of ITA at 6 (stating that because ITA met all the requirements to coordinate SIRS and the 800 MHz I/LT pool, it believes it should be able to coordinate the power, railroad and automobile emergency radio service channels).

[21] Informal Request of ITA at 5 (asserting that a rulemaking is not necessary here, because none was needed to certify a coordinator for the Wireless Medical Telemetry Service.)

proceeding. As it explained herein and along with AAR, AAA and API, UTC believes that certifying ITA is expressly contrary to current rules.[23] Whereas the FCC has in the past granted certification requests by Order, this request is significantly different.[24] Here, ITA is asking the Commission to institute competitive coordination of frequencies that the Commission has affirmatively stated should be exclusively coordinated in order to protect the incumbent users – and the quasi-public safety purposes of their wireless systems -- of those frequencies. Although ITA is driven by self-interest, the public interest is affected if the essential services that are supported by communications using these frequencies are made less reliable or secure due to the relief that ITA requests.

Although the Commission has certified coordinators under delegated authority in the past, that has been the exception rather than the rule. Moreover, "the choice made between proceeding by general rule or by individual,

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[22] In response to the comments by ITA, UTC filed reply comments opposing any such expansion of competitive coordination beyond the currently certified public safety coordinators. *See* Comments of UTC in WT Docket No. 02-285 (filed Jan. 21, 2003).

[23] *See,* Joint Opposition of AAA, AAR, UTC and API UTC notes that this filing has not been included in the record for the instant proceeding and respectfully requests that this filing and any others filed prior to the issuance of the Public Notice be included in the record. UTC understands that at least one other filing has been made prior to the issuance of the Public Notice. *See* Letter from Progress Energy to John Muleta Regarding Industrial Telecommunications Association Informal Request for Certification to Coordinate and Certify Services under Part 90 (filed Mar. 26, 2003).

[24] *See United Telecom Council*, Order, DA 01-944, 16 FCC Rcd. at 8442; *Wireless Telecommunications Bureau Announces that Forest Industries Telecommunications is Certified as a Frequency Coordinator for 800/900 MHz Business and Industrial Transportation Frequencies,* Public Notice, DA 01-1474 (rel. Jun. 22, 2001); *and Wireless Telecommunications Bureau Announces that American Mobile Telecommunications Association, Inc. is Certified as a Frequency Coordinator for 800/900 MHz Business and Industrial Transportation Frequencies,* Public Notice, DA 01-1537 (rel. Jun. 29, 2001).

ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."[25] UTC submits that this is not as simple as ITA would lead the Commission to believe, and that there are important public policy issues at stake, affecting the public at large, due to the essential services provided over critical infrastructure that is supported by the systems operated on these channels. Thus, UTC urges the Commission to deny ITA's Request, or in the alternative, carefully consider the implications of the Request as part of a formal rulemaking proceeding.

C. ITA has failed to demonstrate that it meets the criteria for certification.

If the FCC reaches the merits of ITA's Request, it should reject it. ITA has failed to demonstrate that it meets the criteria – representation, expertise and experience -- to become certified to coordinate these frequencies. Although ITA asserts that it "*believes* it now meets the criteria for FAC certification for the power, railroad and automobile emergency radio services channels," it does not identify any specific companies that it "represents," nor does it explain how its database or its experience in coordinating channels in the I/B pool, including the former Petroleum Radio frequencies, bears on its qualifications to coordinate these frequencies.[26] UTC asserts that membership by a few companies in order to gain coordination discounts hardly constitutes representation of an industry.

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[25] *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

[26] UTC further questions ITA's claim to "represent" critical infrastructure, in that it has filed comments strongly opposing critical infrastructure needs in the FCC's recent proceedings concerning both NTIA's study of spectrum use by critical infrastructure industries, and service

Nowhere in its Request does ITA provide a showing of any understanding of the special needs of utility, railroad or auto emergency communications systems; indeed, it claims as support for its Request: "[c]ompetition in frequency coordination could be introduced when a majority of communications systems in the radio services 'are used in a similar fashion – for support of day-to-day business activities.'"[27] The Commission should take such a statement as proof of the limitations of ITA's qualifications: the purpose of critical infrastructure's quasi-public safety systems in the 150-512 MHz bands is far from support of day-to-day business. As the FCC is well aware, these systems provide both voice and data communications for emergency power restoration in every type of natural and manmade disaster, support of Public Safety efforts in the same emergencies and control of the vital systems that provide basic electric, gas and water service to every community in the country. Railroads and auto emergency systems have quite different, but equally important, uses that cannot be dismissed as "support of day-to-day business." Such systems are made necessary by a variety of federal and state regulations; in the case of UTC members, these include regulations established by the Federal Energy Regulatory Commission, the Department of Transportation's Office of Pipeline Safety, and the Environmental Protection Agency, on the federal level alone. ITA claims that "[m]any of the communications systems used by the power, railroad and automobile emergency entities are identical to the systems that ITA has and continues to coordinate for

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rules for 4.9 GHz spectrum allocated in support of public safety. *See,* Comments of ITA, DA 02-361 and WT Docket No. 00-32.

[27] Request at 10, quoting Refarming 2nd R&O at ¶ 40.

our members and clients."[28] As demonstrated above, nothing could be further from the truth. Critical infrastructure communications needs are unique, and the public welfare would be placed at risk if the Commission were to rubber-stamp offhand requests to coordinate the channels they use, as ITA essentially asks here.

IV. Conclu

V. sion

WHEREFORE, THE PREMISES CONSIDERED, the United Telecom Council respectfully requests that the Commission deny the Informal Request of ITA consistent with UTC's comments in this matter.

Respectfully submitted,

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[28] Request at 7.