BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of	**)**	
	)	
Informal Request For Certification	**)**	**RM-10687**
of the Industrial Telecommunications	**)**	
Association, Inc.	**)**	

To: The Commission

<u>OPPOSITION OF CINERGY CORPORATION</u>

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Dated: April 25, 2003

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To: The Commission

OPPOSITION OF CINERGY CORPORATION

Cinergy Corporation ("Cinergy"), by and through its undersigned counsel and pursuant to FCC Rule Section 1.405, hereby files this Opposition in the above-referenced proceeding.[1] In this proceeding, the Federal Communications Commission ("FCC" or "Commission") issued a *Public Notice* requesting comments on the Informal Request for Certification of the Industrial Telecommunications Association, Inc. ("ITA") filed January 27, 2003.[2] The Commission is treating the Informal Request as a petition for rulemaking, which is correct because the relief requested by ITA would require a modification to the rules.

Cinergy opposes ITA's Informal Request. ITA styles its pleading as a request for certification as a frequency coordinator of the Industrial/Business Pool ("I/B") frequencies below 512 MHz that were allocated exclusively to the Power, Railroad, and Automobile Emergency

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1 Consumer and Governmental Affairs Bureau Reference Information Center Petition for Rulemaking Filed: Informal Request For Certification of the Industrial Telecommunications Association, RM-10687, *Public Notice* (Mar. 26, 2003).

2 Informal Request for Certification of the Industrial Telecommunications Association, Inc., RM-10687 (filed Jan. 27, 2003).

Radio Services prior to being opened to all I/B eligibles in the rulemaking to "refarm" the Private Land Mobile Radio Services. This request is fundamentally misguided, however, because ITA already has authority to coordinate those frequencies. Specifically, pursuant to FCC Rule Section 90.35(b)(2), ITA is permitted to coordinate them so long as it obtains concurrence from the Commission-designated primary coordinator for each type of frequency.[3] Therefore, what ITA is really seeking is a modification of Section 90.35(b)(2) that would enable it to coordinate the former Power, Railroad, and Automobile Emergency Radio Service frequencies without having to obtain the concurrence of their primary coordinators.

As explained below, ITA provides no compelling reasons for the Commission to change Section 90.35(b)(2). Additionally, the rule was finalized less than two and one-half years ago as part of the Refarming Rulemaking, in which the rule was subject to vigorous debate and several petitions for reconsideration.[4] Although Section 90.35(b)(2) went through several iterations in the course of the Refarming Rulemaking, at no point did ITA contest it. In fact, ITA *expressly supported* the rule in a formal pleading.[5]

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[3] 47 C.F.R. § 90.35(b)(2) (2002). The primary coordinators for the former Power, Railroad, and Automobile Emergency Radio Service frequencies are the United Telecom Council, the Association of American Railroads, and the American Automobile Association, respectively.

[4] *See, e.g.*, 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, *Fifth Memorandum Opinion and Order*, 16 FCC Rcd. 416, 418-19 (2000) ("*Fifth Memorandum Opinion and Order*"); Petition for Partial Reconsideration of MRFAC (filed July 8, 1999); Petition for Partial Reconsideration of Forest Industries Telecommunications (filed July 16, 1999).

[5] 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, Petition for Clarification and/or Reconsideration of ITA, pp. 3-4 (filed May 19, 1997).

I. STATEMENT OF INTERST

Cinergy Corporation has a direct interest in this proceeding because it operates extensive private land mobile radio systems in connection with its provision of electricity and gas to approximately 1.8 million customers.[6] Cinergy's radio systems operate in the 150, 450, and 800 MHz bands, including the frequencies that were previously allocated exclusively to the Power Radio Service.[7] Its radio systems are an integral aspect of its energy generation, transmission, and distribution systems and, hence, need to be protected from interference that could occur as the result of faulty, careless, or overly aggressive frequency coordination. Cinergy depends upon the United Telecom Council ("UTC"), the FCC-designated primary coordinator for the channels previously exclusive to the Power Radio Service, to either coordinate them itself or review the work of other frequency coordinators before issuing a concurrence.

As the Commission expressly recognized in the Refarming Rulemaking, power utilities have a strong interest in protecting the integrity of the former Power Radio Service frequencies.[8] Those channels are still heavily utilized by power utilities, which are responsible for providing power to homes, businesses, industrial operations, and government institutions, as well as critical facilities such as hospitals and public safety entities. In providing this essential resource, utilities must, for example, ensure the safety of their crews working on power lines, where a single

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6 Cinergy Corporation is the parent company of Cincinnati Gas & Electric Company in Ohio and PSI Energy, Inc. in Indiana. Together, these operating companies serve 1.4 million electric and 455,000 gas customers in Ohio, Indiana, and Kentucky.

7 Combined, Cinergy and its operating companies hold three licenses on former Power Radio Service frequencies in the 150 MHz band and twenty-six licenses on former Power Radio Service frequencies in the 450 MHz band.

8 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, *Second Report and Order*, 12 FCC Rcd. 14307, 14329-30 (1997) ("*Second Report and Order*").

misstep can be fatal to crew members and deprive entire areas of power. Utilities thus have crucial requirements for reliable, interference-free communications.

II. ITA DOES NOT PROVIDE ANY COMPELLING REASONS TO MODIFY RULE SECTION 90.35(b)(2)

ITA is seeking a modification of Rule Section 90.35(b)(2) that would enable it to coordinate the formerly exclusive Power, Railroad, and Automobile Emergency Radio Service frequencies without having to obtain concurrence from the primary coordinators of those frequencies. However, it provides no compelling reasons for such a change. Instead, it simply explains why it believes it is capable of coordinating these frequencies and extols the virtues of competition.

ITA misses the point. Section 90.35(b)(2) is not directly concerned with whether a particular entity is merely competent to coordinate users on the former Power, Railroad, and Automobile Emergency Radio Service frequencies, nor is it directly concerned with competition. Indeed, ITA and all other I/B coordinators are already permitted to coordinate these channels so long as they receive concurrence from the appropriate primary coordinator. Rather, Section 90.35(b)(2) is designed to ensure that the coordinator that is most experienced with and knowledgeable of the highly sensitive operations with which those channels are associated (*i.e.*, power utility operations for the former Power Radio Service channels) maintains an appropriate degree of oversight in order to prevent interference.[9]

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[9] 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, *Second Report and Order*, 12 FCC Rcd. 14307, 14329-30 (1997); *Second Memorandum Opinion and Order*, 14 FCC Rcd. 8642, 8646-48 (1999); *Fifth Memorandum Opinion and Order*, 16 FCC Rcd. 416, 418-19 (2000).

Section 90.35(b)(2) was promulgated through the Refarming Rulemaking, in which the Private Land Mobile Radio Service was thoroughly overhauled. The coordination issues were exhaustively aired and reviewed, as the proceeding ran from October 1992 through May 2001 and resulted in over 2,500 comments, reply comments, petitions, and other submissions. Section 90.35(b)(2) went through no less than three iterations, issued in February 1997, April 1999, and December 2000.[10]

Throughout the evolution of Section 90.35(b)(2), its underlying policy and general purpose remained constant. Specifically, the Commission recognized that "some types of radio users 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."[11] The Commission determined that "maintaining the integrity of spectrum used for such public safety purposes is extremely important and using coordinators who are knowledgeable with such special communications needs is the best way to protect these systems."[12] Accordingly, the Commission initially drafted Section 90.35(b)(2) to provide that only the existing coordinators for such services (Power, Railroad, and Petroleum Radio Services) would be permitted to coordinate the frequencies previously allocated exclusively to those services. The reasoning was that the existing coordinators had the most experience with and knowledge of the services. Later versions of Section 90.35(b)(2) added the Automobile Emergency Radio Service and relaxed the rule to permit other coordinators (including ITA) to coordinate the frequencies so long as they obtained concurrence from the primary coordinators.

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10 *Id.*

11 *Second Report and Order* at 14329-30.

12 *Second Report and Order* at 14329-30.

The foregoing demonstrates that Section 90.35(b)(2) evolved over several years, with multiple opportunities for ITA to contest it. Other parties took those opportunities and the Commission clearly gave due consideration to their concerns.[13] ITA, in contrast, never registered any dissent to the rule. In fact, ITA filed a pleading *expressly supporting* the initial version of Section 90.35(b)(2), which did not even contain the concurrence option and hence would have prohibited ITA from coordinating the previously exclusive channels at all.

Now, less than two and one-half years after Section 90.35(b)(2) was finalized and implemented, ITA contends that it should be changed such that non-primary coordinators should be permitted to coordinate the previously exclusive frequencies without obtaining concurrence from the primary coordinators. ITA's proposal would gut the rule: without the concurrence requirement, the primary coordinators would have no way to protect incumbent users on the frequencies. However, ITA fails to explain what aspects of the rule's underlying policy or its application have so dramatically changed since it was implemented so as to warrant a major modification. Rather, ITA simply discusses its qualifications to be a frequency coordinator and extols the benefits of competition.

ITA's arguments do nothing to establish that Section 90.35(b)(2) is ripe to be modified. ITA's qualifications are irrelevant to the continuing need for the rule and, in any event, ITA is already deemed qualified to coordinate the frequencies at issue so long as it obtains concurrence. Its arguments with regard to competition are similarly irrelevant, as the Commission expressly stated in the *Second Report and Order* that the need to protect the highly sensitive

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[13] *See, e.g.*, 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, Petition for Partial Reconsideration of MRFAC (filed July 8, 1999); Petition for Partial Reconsideration of Forest Industries Telecommunications (filed July 16, 1999).

communications that take place on the previously exclusive channels supercede concerns with fostering competition.[14] Nonetheless, there *is* competition for this coordination work: Section 90.35(b)(2) allows non-primary coordinators to perform the work so long as they obtain concurrence. Moreover, all of ITA's arguments could have been made years ago through petitions for reconsideration or review of the orders promulgating Section 90.35(b)(2). The Commission should not permit it to advance an exceedingly belated petition for reconsideration under the guide of a petition for rulemaking.

Additionally, at least for power utilities, the need for Section 90.35(b)(2) has not changed since its implementation in December 2000. Nothing has occurred to suggest that the importance of maintaining the integrity of utilities' communications systems has decreased. In fact, the importance of maintaining their integrity has increased in light of nationwide efforts to increase emergency preparedness and prevent terrorism. For example, in a report published by the National Telecommunications and Information Administration ("NTIA") in January 2002, the NTIA cautioned that a disruption in a power generating station's control computer could be "just as devastating" to the Nation's economy as the September 11, 2001 terrorist attacks on the World Trade Center.[15] Also, the Homeland Security Act of 2002 provides that the Department of Homeland Security shall, among other things, develop a comprehensive national plan for securing the key resources and critical infrastructure of the United States, including power production, generation, and distribution systems.[16]

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14 *Second Report and Order* at 14330.

15 Marshall W. Ross and Jeng F. Mao, *Current and Future Spectrum Use by the Energy, Water, and Railroad Industries*, U.S. Department of Commerce, National Telecommunications and Information Administration at 3-3 (Jan. 30, 2002).

16 Homeland Security Act of 2002, Pub. L. No. 107-296, § 201(d) (2002).

Further, Cinergy is concerned that modifying Section 90.35(b)(2) to give ITA unfettered authority to coordinate applicants on the channels previously exclusive to the Power Radio Service, without the concurrence oversight of UTC, could lead to ITA placing many non-utility licensees on those channels without due concern for the integrity of the spectrum. To that end, ITA's primary experience lies with non-utility licensees.[17] ITA's experience in coordinating utilities on 800 and 900 MHz channels is largely irrelevant because ITA is constrained by fixed mileage separations mandated in the Commission's Rules. However, because of the "shared" nature of channels below 800 MHz, coordinators have considerable discretion in making frequency recommendations, and it is for this reason that the Commission has required UTC's concurrence for coordinations on the formerly exclusive Power Radio Service channels. Cinergy depends on UTC to carefully oversee coordination of the previously exclusive frequencies and to block coordinations by non-primary coordinators that do not appropriately protect utilities' systems.[18]

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[17] For example, in 1986, prior to the Refarming Rulemaking, the Commission selected one coordinator (with limited exceptions) for each of the eighteen radio services. ITA (then known as the Special Industrial Radio Service Association, Inc.) was chosen for the Special Industrial Radio Service. ITA did not even apply to be the coordinator for the Power Radio Service. In the Matter of Frequency Coordination in the Private Land Mobile Radio Services, PR Docket No. 83-737, *Report and Order*, 103 FCC 2d 1093, 1132, 1135 (1986).

[18] It is questionable whether ITA would protect utilities' radio systems given its previously expressed views on utility use of spectrum. *See* In the Matter of Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, Joint Reply Comments of ITA, Nextel Communications, et al. (filed Aug. 7, 2002) (in which ITA is advancing a rebanding plan that is uniformly opposed by utilities); In the Matter of the 4.9 GHz Band Transferred From Federal Government Use, WT Docket No. 00-32, Reply Comments of ITA (filed Aug. 7, 2002) (in which ITA has opposed utilities gaining access to additional spectrum in the 4.9 GHz band.)

III. ITA'S STATEMENT THAT CERTAIN FREQUENCIES ARE STILL EXCLUSIVE IS INCORRECT

ITA states that the frequencies that were previously exclusive to power utilities, railroads, and automobile emergency services "should retain exclusive-use by their current eligibility groups."[19] It goes on to claim that it "simply requests the authority to coordinate" applications for those eligible users.[20] These statements are wrong and misguided.

The channels that were previously exclusive to power utilities, railroads, and automobile emergency services were opened to all I/B eligibles in the Refarming Rulemaking.[21] Also, ITA already has authority to coordinate license applications for utilities, railroads, and automobile emergency services, just as it has authority to coordinate applications for any other I/B eligible.[22] To the extent it is requesting authority to coordinate such applications on the previously exclusive frequencies, it can do that, too, so long as it obtains concurrence from the appropriate primary coordinator.[23] Thus, ITA has misstated the law and requested something which it already has.

ITA's misunderstanding of the law reflects poorly on its understanding of the coordination process. As such, allowing it to coordinate I/B eligibles on the previously exclusive frequencies without obtaining concurrence from the appropriate primary coordinator could lead to overly aggressive or otherwise imprudent coordinations, resulting in the congestion and interference that Section 90.35(b)(2) was designed to prevent.

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19 Informal Request for Certification of the Industrial Telecommunications Association, Inc., RM-10687, p. 9 (filed Jan. 27, 2003).

20 *Id.*

21 47 C.F.R. 90.35 (2002); *Second Report and Order* at 14317-18.

22 47 C.F.R. 90.35(b)(2).

23 47 C.F.R. 90.35(b)(2).

IV. CONCLUSION

The FCC-designated primary coordinators represent the front line for protecting the integrity of frequencies that were previously exclusive to power utilities, railroads, and automobile emergency services. The Commission determined through an extensive rulemaking that those frequencies are still heavily used by such entities and thus warrant special protection, which was issued in the form of Section 90.35(b)(2). ITA has presented no compelling reasons for modifying the rule and upsetting this protection. Therefore, its petition for rulemaking must be denied.

WHEREFORE, THE PREMISES CONSIDERED, Cinergy respectfully requests that the Commission consider this Opposition and proceed in a manner consistent with the views expressed herein.

Respectfully submitted,

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Dated: April 25, 2003

CERTIFICATE OF SERVICE

I, Gloria Smith, do hereby certify that on this 25th day of April 2003, a copy of the foregoing "Opposition of Cinergy Corporation" was mailed, via U.S. Mail, postage prepaid to each of the following:

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