

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

| | | |
|---|---|----------------------|
| In the Matter of |) | |
| |) | |
| Replacement of Part 90 by Part 88 to Revise |) | PR Docket No. 92-235 |
| 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 Services |) | |

FOURTH MEMORANDUM OPINION AND ORDER

Adopted: August 4, 1999

Released: August 5, 1999

By the Commission:

I. INTRODUCTION

1. On July 7 and 9, 1999, respectively, MRFAC, Inc. (MRFAC) and Forest Industries Telecommunications (FIT) requested that the Commission stay the effective date of recent amendments to Sections 90.35 and 90.175 of the Commission's Rules¹ until the issues raised in their petitions for reconsideration are addressed.² For the reasons stated herein, the requests are granted.

II. BACKGROUND

2. Formerly, the Private Land Mobile Radio service frequencies in the bands below 512 MHz were divided into twenty separate radio services, including the Power, Petroleum, Forest Products, Manufacturers, and Railroad Radio Services.³ For each service (with one exception not at issue here),

¹47 C.F.R. §§ 90.35, 90.175.

²MRFAC Motion for Expedited Partial Stay (filed July 7, 1999) (MRFAC Motion); FIT Petition for Partial Stay (filed July 9, 1999) (FIT Petition).

³Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, *Second Report and Order*, PR Docket No. 92-235, 14 FCC Rcd 14307, 14310-11 (1997) (*Second Report and Order*).

the Commission certified one frequency coordinator⁴ to make frequency recommendations.⁵ The certified frequency coordinators for the services mentioned above were, respectively, UTC, the Telecommunications Association (UTC),⁶ the American Petroleum Institute (API), FIT, MRFAC, and the American Association of Railroads (AAR).⁷ Coordination of a frequency that was shared by more than one service required the concurrence of the frequency coordinator(s) of the other service(s).⁸

3. In the *Second Report and Order* in this proceeding, released March 12, 1997, the Commission consolidated the twenty radio services into two broad frequency pools, Public Safety and Industrial/Business.⁹ All of the services listed above were consolidated into the Industrial/Business Pool.¹⁰ Generally, the Commission allowed coordination of any Industrial/Business frequency by any of the coordinators of the services that were consolidated into that pool, who would then notify the other in-pool frequency coordinators within one business day.¹¹ The introduction of competition into the frequency coordination process was expected to result in lower coordination costs and better service to the public.¹² The Commission provided, however, that frequencies formerly allocated *solely* to the Power, Petroleum, or Railroad Radio Service could be coordinated only by the relevant frequency coordinator.¹³ The Commission made this exception in order to ensure that licensees in those services, who sometimes use radio as a critical tool for responding to emergencies that could be extremely dangerous to the general public, not incur harmful interference from other licensees.¹⁴

4. API sought reconsideration of the *Second Report and Order*, on the grounds that this exception did not provide sufficient protection to incumbent petroleum operations because most of the frequencies formerly allocated to the Petroleum Radio Service were shared with other services.¹⁵ API

⁴Frequency coordinators analyze applications before they are submitted to the Commission to select a frequency that will meet the applicant's needs while minimizing interference to licensees already using the frequency band. The frequency coordinator makes a recommendation to the Commission regarding the best available frequency for the applicant's proposed operations. Implementation of Sections 309(j) and 332 of the Communications Act of 1934 as Amended, *Notice of Proposed Rule Making*, WT Docket No. 99-87, 14 FCC Rcd 5206, 5217 (1999).

⁵*Second Report and Order*, 12 FCC Rcd at 14324.

⁶UTC is now known as the United Telecom Council.

⁷*Second Report and Order*, 12 FCC Rcd at 14325.

⁸*See* 47 C.F.R. § 90.175 introductory paragraph (1996).

⁹*Second Report and Order*, 12 FCC Rcd at 14317.

¹⁰*Id.* at 14318.

¹¹*See id.* at 14328, 14333.

¹²*Id.* at 14328.

¹³*Id.* at 14330.

¹⁴*Id.* at 14329.

¹⁵Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies

suggested that the Commission require API's concurrence when another Industrial/Business Pool frequency coordinator sought to coordinate a frequency that formerly was shared by the Petroleum Radio Service, and the applicant's interference contour would overlap an existing co-channel station's service contour.¹⁶

5. In the *Second Memorandum Opinion and Order* in this proceeding, released April 13, 1999, the Commission rejected API's proposal, because, *inter alia*, the issue of whether to provide protected contours to Part 90 licensees is the subject of another aspect of this proceeding, and thus was beyond the scope of the *Second Memorandum Opinion and Order*.¹⁷ The Commission believed that API had raised a legitimate issue concerning the frequencies that formerly were allocated to the Petroleum Radio Service on a shared basis, however, and that the issue also related to frequencies formerly shared by the Power and Railroad Radio Services.¹⁸ Consequently, the Commission amended the rules to require that frequencies formerly allocated to those services on an exclusive *or shared* basis be coordinated only by the frequency coordinator of the relevant service, or, at the relevant frequency coordinator's discretion, with its written concurrence.¹⁹ The *Second Memorandum Opinion and Order* was published in the Federal Register on July 6, 1999, so the rule changes are set to take effect on August 5, 1999.²⁰

6. MRFAC filed a Motion for Expedited Partial Stay on July 7, 1999, and a Petition for Partial Reconsideration on July 8, 1999. FIT filed both a Petition for Partial Stay and a Petition for Partial Reconsideration on July 9, 1999.²¹ MRFAC and FIT seek a stay of the requirement that frequencies formerly allocated on a shared basis to the Power, Petroleum, or Railroad Radio Services be coordinated by UTC, API, or AAR, respectively (or, at their discretion, with their written concurrence). UTC and API filed joint oppositions to the stay requests.²² MRFAC and FIT filed replies.²³ In addition, four entities using former Forest Products Radio Service frequencies submitted comments supporting FIT's Petition for Partial Stay and Petition for Partial Reconsideration.²⁴

Governing Them, *Second Memorandum Opinion and Order*, PR Docket No. 92-235, 64 Fed. Reg. 36528, FCC 99-68, ¶ 7 (rel. Apr. 13, 1999).

¹⁶*Id.*, ¶ 8.

¹⁷*Id.*

¹⁸*Id.*, ¶ 9.

¹⁹*Id.*

²⁰*See* 64 Fed. Reg. 36528, 36528 (1999).

²¹This *Third Memorandum Opinion and Order* addresses only the stay requests. The petitions for reconsideration will be considered subsequently.

²²UTC/API Opposition to Motion for Expedited Stay Filed by MRFAC, Inc. (filed July 14, 1999) (Opposition); UTC/API Opposition to Petition for Partial Stay Filed by Forest Industries Telecommunications (filed July 16, 1999) (incorporating by reference the arguments set forth in the Opposition).

²³MRFAC Reply to Opposition to Motion for Expedited Partial Stay (filed July 20, 1999) (MRFAC Reply); FIT Reply to Opposition to Petition for Partial Stay (filed July 23, 1999) (FIT Reply).

²⁴Associated Oregon Loggers, Inc. Comments (filed July 20, 1999); Britton Lumber Company Comments (filed July

III. DISCUSSION

7. Although the Commission has declined to adopt a single standard for requests for injunctive relief, we generally consider four criteria: (1) a likelihood of success on the merits, (2) the threat of irreparable harm absent the grant of preliminary relief, (3) the degree of injury to other parties if relief is granted, and (4) that a stay will be in the public interest.²⁵ These factors are balanced on a case-by-case basis; a stay may be warranted if there is a particularly strong showing as to at least one of the factors, even if there is no showing regarding another.²⁶ MRFAC and FIT argue that their petitions for reconsideration are likely to prevail on the merits, that they will suffer irreparable harm if a stay is not granted, that other interested parties will not be harmed by a stay, and that the public interest favors grant of a stay. We find that they have made a showing that a stay is appropriate.

8. *Success on the merits.* MRFAC and FIT contend that the *Second Memorandum Opinion and Order* was unlawful in that the Commission did not provide notice of, and an opportunity to comment on, the possibility that the exception for exclusive power, petroleum, and railroad frequencies would be extended to shared frequencies,²⁷ as required by the Administrative Procedure Act.²⁸ UTC and API argue that the amendment was permissible because it was a "logical outgrowth" of the actions taken in the *Second Report and Order*.²⁹ MRFAC and FIT reply that nothing prior to the *Second Memorandum Opinion and Order* gave adequate notice of the rule adopted therein.³⁰

9. MRFAC and FIT also contend that the new requirement is arbitrary and capricious, because, *inter alia*, MRFAC and FIT have successfully coordinated those frequencies for years with no interference complaints from API, UTC, or AAR.³¹ UTC and API maintain that the *Second Report and Order*, by allowing any in-pool frequency coordinator to coordinate the shared frequencies, increased the potential for the licensing of incompatible systems.³²

19, 1999); Champion Pacific Timberlands Inc. (CPTI) Comments (filed July 19, 1999); Washington Contract Loggers Association (WCLA) Comments (filed July 19, 1999).

²⁵Biennial Regulatory Review -- Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Memorandum Opinion and Order*, WT Docket No. 98-20, FCC 99-129, ¶ 4 (rel. June 9, 1999).

²⁶*Id.*

²⁷MRFAC Motion at 10-13; FIT Petition at 6-7.

²⁸5 U.S.C. § 553.

²⁹Opposition at 4-6.

³⁰MRFAC Reply at 2; FIT Reply at 3-4.

³¹MRFAC Motion at 13; MRFAC Reply at 4; FIT Petition at 8; FIT Reply at 6.

³²Opposition at 7.

10. *Irreparable harm.* MRFAC and FIT contend that they will be irreparably harmed if a stay is denied, because a significant portion of their frequency coordination business relates to frequencies that formerly were allocated on a shared basis to the Power, Petroleum, or Railroad Radio Services.³³ They suggest that they will lose not only this business, but also other coordination business, for licensees will use other frequency coordinators (*i.e.*, API and UTC) rather than try to keep track of which frequencies MRFAC and FIT may coordinate, and which ones they may not.³⁴ They also state that their customers will be harmed because API, UTC, and AAR will not make the same effort to find spectrum for them that MRFAC and FIT will.³⁵ Associated Oregon Loggers notes that radio systems used by the forestry industry also protect safety, and argues that preempting FIT's ability to coordinate modifications to existing systems could impair their effectiveness.³⁶

11. UTC and API respond that allegations of lost business are speculative, because the rules provide that MRFAC and FIT may still coordinate these shared frequencies if they agree with UTC, API, and AAR regarding a concurrence procedure.³⁷ They also point out that, even after the *Second Memorandum Opinion and Order*, MRFAC and FIT can coordinate more frequencies than they could before the *Second Report and Order* was adopted; and that any confusion among coordination customers already exists, since there already are frequencies that can be coordinated by UTC, API, and AAR, but not MRFAC or FIT.³⁸

12. *Injury to other parties.* MRFAC contends that no other parties will be harmed by a stay, because it demonstrated for years that it can coordinate these frequencies so as to prevent interference to power, petroleum, and railroad operations.³⁹ FIT states that the current notification scheme is sufficient to prevent the authorization of potentially incompatible systems.⁴⁰ UTC and API agree that MRFAC and FIT have caused no problems, but contend that the notification requirement is nonetheless not sufficient, and has resulted in some instances of interference to existing power and petroleum operations from licensees coordinated by other frequency coordinators.⁴¹

13. *Public interest.* Finally, MRFAC and FIT contend that a stay will be in the public interest, because it will preserve the pro-competitive benefits the Commission desired when it decided to permit all Industrial/Business frequency coordinators to coordinate all Industrial/Business frequencies, except

³³MRFAC states that nearly one-third of its coordinations relate to the shared frequencies. MRFAC Petition at 14. FIT states that most of its coordinations involve these frequencies. FIT Petition at 10.

³⁴MRFAC Motion at 14-15; MRFAC Reply at 5; FIT Petition at 10-11.

³⁵MRFAC Motion at 15-16; FIT Petition at 11; *see also* WCLA Comments at 1.

³⁶Associated Oregon Loggers Comments at 1.

³⁷Opposition at 8. They do not, however, propose any procedure, or any course for agreeing on one.

³⁸*Id.*

³⁹MRFAC Motion at 16; MRFAC Reply at 4.

⁴⁰FIT Petition at 12; FIT Reply at 5.

⁴¹Opposition at 7.

for the exclusive power, petroleum, and railroad frequencies, and that maintaining this choice will spare coordination customers confusion, delays, and added costs.⁴² UTC and API argue that the public interest would not be served by a stay that could increase the potential for interference to power, petroleum, or railroad radio operations.⁴³

IV. CONCLUSION

14. MRFAC and FIT have raised substantial issues regarding the propriety and utility of the rule changes adopted in the *Second Memorandum Opinion and Order*. It is likely that they will incur much greater harm if the rules are permitted to take effect than might accrue to UTC and API if they are stayed. We conclude, therefore, on balance, that MRFAC and FIT have shown that it is in the public interest to grant the requested stay while the Commission examines these issues, in order to permit frequency coordinators to continue coordinating frequencies they have coordinated for years, and preserve coordination customers' options. We also find that limiting the stay to certain frequency coordinators or certain frequencies would engender greater confusion than it would avoid. Therefore, we shall stay in their entirety the changes to Sections 90.35 and 90.175 of the Commission's Rules requiring that frequencies formerly allocated on a shared basis to the Power, Petroleum, or Railroad Radio Services be coordinated by UTC, API, or AAR, respectively (or, at their discretion, with their written concurrence).

V. ORDERING CLAUSE

15. IT IS ORDERED that, pursuant to Sections 4(i), 11, 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 161, 303(g), 303(r), and Section 1.429(k) of the Commission's Rules, 47 C.F.R. § 1.429(k), the Motion for Expedited Partial Stay filed by MRFAC, Inc. on July 7, 1999 and the Petition for Partial Stay filed by Forest Industries Telecommunications on July 9, 1999 ARE GRANTED, and the stay will be in effect until the Commission resolves their Petitions for Reconsideration of the *Second Memorandum and Order* in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

⁴²MRFAC Motion at 14; FIT Petition at 11- 12; *see also* Associated Oregon Loggers Comments at 1; Britton Lumber Company Comments at 1; CPTI Comments at 1; WCLA Comments at 2.

⁴³Opposition at 9.