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

In the Matter of	)	
	)	
INTERSTATE CONSOLIDATION, INC.	)	
	)	
Application for Authorization to Operate	)	File Nos. 294011 & 293756
on Frequency Pairs 452.850/457.850 MHz	)	
and 452.825/457.825 MHz in the Former	)	
Motor Carrier Radio Service, Stations KNIC418	)	
and WNZR986, Los Angeles, California	)	

MEMORANDUM OPINION AND ORDER

Adopted: February 10, 2000 **Released: February 17, 2000**

By the Commission:

I. INTRODUCTION

1. We have before us an Application for Review filed by the Los Angeles County Transportation Cooperative (Coop), seeking review of a licensing action by the Licensing Division of the former Private Radio Bureau (Bureau).[1] Specifically, the Coop seeks reversal of the Division's grant of licenses to Interstate Consolidation, Inc. (Interstate) to operate on frequencies 452.850/457.850 and 452.825 and 457.825 MHz. For the reasons set forth herein, we find that the Coop has not established grounds for denying Interstate's licenses and the Coop's Application for Review is therefore denied.

II. BACKGROUND

2. On January 15, 1992, and February 18, 1992, the Commission received completed applications from Interstate, owner of a large fleet of trucks, for licenses to operate stations in the former Motor Carrier Radio Service[2] on frequency pairs 452.825/457.825 MHz and 452.850/457.850 MHz,

[1] Subsequent to the subject action the Private Radio Bureau was integrated into the Wireless Telecommunications Bureau. *See* News Release No. 50909 (Dec. 1, 1994); *see also* Changes in the Delegated Authority of Various Bureaus, 60 Fed. Reg. 35503 (1995) ("the Wireless Telecommunications Bureau assumes the functions and delegated authority that had been granted to the Private Radio Bureau"). Administration of the licensing of private radio services is now the responsibility of the Licensing and Technical Analysis Branch of the Public Safety and Private Wireless Division. Because the subject Division was known as the Licensing Division at the time relevant to this proceeding, we refer to the former Licensing Division throughout this Memorandum Opinion and Order.

[2] 47 C.F.R. § 90.89 (1993). In February 1997, the Commission adopted a Second Report and Order which consolidated the twenty private land mobile radio services into two pools: the Public Safety Pool and the Industrial/Business Pool. *See In re* 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, *Second Report and Order*, 12 FCC Rcd. 14,307 (1997) (*Refarming Second R&O*). The *Refarming Second R&O* merged the Motor Carrier Radio Service into the Industrial/Business Pool. *Id.* Under the rules prior to the *Refarming Second R&O*, motor carriers

respectively.[3] The application for frequency pair 452.825/457.825 MHz, was in the form of an application for a modification of Station KNIC418, a call sign covered by a former Motor Carrier Radio Service license held by Interstate.[4] Prior to filing its application, Interstate leased access to private land mobile radio (PLMR) facilities from the Coop. However, Interstate subsequently determined that its communications requirements would be best met by owning and operating its own facilities.[5]

3. On February 13, 1992, the Coop filed a pleading seeking denial of Interstate's January 15, 1992, application seeking authority to operate on frequency pair 452.825/457.825 MHz.[6] The Coop argued that the proposed system would cause harmful interference to the Coop's shared systems[7] and that the American Trucking Association Inc. (ATA) abused its discretion as frequency coordinator when it recommended assigning the subject frequency pairs to Interstate.[8] On March 20, 1992, the Coop filed an additional request to deny Interstate's February 18, 1992, application to operate on frequency pair 452.850/457.850 MHz citing similar grounds for denial.[9]

4. On June 18, 1992, the Licensing Division granted Interstate's applications for the 452.825/457.825 MHz and 452.850/457.850 MHz licenses.[10] On June 29, 1992, the Licensing Division denied the Coop's two requests.[11] On July 2, 1992, the Coop filed a petition for reconsideration of grant of the subject Interstate applications, again arguing that Interstate's stations were causing harmful interference to the Coop's co-channel operation, that the Commission abused its discretion during its review of the frequency coordinator's decisions, and that the bias of the frequency coordinator created an unconstitutional delegation of Commission authority to a private organization.[12]

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were defined as either carriers of property, such as moving vans, or common carriers of people, such as city buses. 47 C.F.R. § 90.89(a) (1993).

[3] FCC File Nos. 294011, 293756. Interstate also filed an application for frequency pair 452/457.375 MHz (FCC File No. 293764); however, that application was later denied because Interstate had not shown loading to justify licensing on three channel pairs. Such denial is now a final action and thus not a subject of dispute in this proceeding. Letter from W. Riley Hollingsworth, Deputy Chief, Licensing Division, to Alan M. Lurya (June 29, 1992) (Hollingsworth Letter).

[4] FCC File No. 293756.

[5] Letter from Elizabeth R. Sachs and Bob J. Goldberg to Terry L. Fishel, Chief, Land Mobile Branch, Licensing Division, Requesting Reconsideration of Termination of Conditional Authorization at 1 (June 4, 1992).

[6] Coop Request to Dismiss or Deny and/or Set Aside (filed February 13, 1992) at 2 - 5 (February Request to Deny).

[7] The Coop shares its licensed facilities pursuant to 47 C.F.R. § 90.179.

[8] *Id.*

[9] Coop Request to Dismiss or Deny and/or Set Aside (filed March 20, 1992) (March Request to Deny).

[10] Hollingsworth Letter, *supra* note 3.

[11] *Id.*

[12] Coop Emergency Petition for Reconsideration of the Act of the Chief, Licensing Section, Land Mobile Branch, Private Radio Bureau, Granting a License to Interstate Consolidation and Denying the Petition of the Los Angeles County Transportation Communications Cooperative to Dismiss or Deny and/or Set Aside at 2-3 (dated July 2, 1992) (Petition for Reconsideration).

5. On December 4, 1992, the Licensing Division denied the petition for reconsideration pointing out that the Coop had not supported its claims of harmful interference with an affidavit from a qualified radio engineer as required by Section 1.106(e) of the Commission's Rules.[13] In its denial letter, the Licensing Division required the parties to meet, pursuant to Section 90.173(b) of the Commission's Rules,[14] so that the parties could make mutually satisfactory arrangements to mitigate congestion resulting from their use of the shared channels.[15]

6. On January 4, 1993, the Coop filed the subject Application for Review of the Licensing Division's denial of its petition for reconsideration.[16] Specifically, the Coop requests that we either dismiss Interstate's licenses on frequency pairs 452.850/457.850 MHz and 452.825/457.825 MHz, or conduct a hearing to determine whether Interstate's licenses should be set aside.[17] In its Application for Review, the Coop argues that grant of these licenses was improper for the following reasons: 1) Interstate's applications were defective, 2) Interstate's operation on the shared channels harmfully interferes with the Coop's operations, and 3) the frequency coordinator did not choose the most appropriate channels for Interstate.

III. DISCUSSION

7. When the Coop's Application for Review was filed the channels at issue in this matter were shared Motor Carrier Radio Service channels available in the Los Angeles metropolitan area.[18] Both Interstate and the Coop were eligible to be licensed on the channels under the Commission's Rules.[19] The current dispute arose when Interstate applied for licenses to operate on frequency pairs 452/457.825 MHz and 452/457.850 MHz, which already were being used by the Coop.[20] Pursuant to Section 90.175 of the Commission's Rules, the ATA, the FCC-designated frequency coordinating entity for the former Motor Carrier Service, coordinated Interstate onto these frequencies and then forwarded their recommendation to the Commission for final approval.[21]

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[13] 47 C.F.R. § 1.106(e); Letter from W. Riley Hollingsworth, Deputy Chief, Licensing and Technical Analysis Division, to Alan M. Lurya, Esquire (dated December 4, 1992) (Notice of Denial).

[14] 47 C.F.R. § 90.173(b) (requires licensees to cooperate and resolve harmful interference problems by reaching mutually satisfactory arrangements, otherwise the Commission may impose restrictions).

[15] Notice of Denial.

[16] Los Angeles County Transportation Communications Cooperative Application for Review (filed January 4, 1993) (Application for Review).

[17] *Id.* at 1-2.

[18] *See* 47 C.F.R. § 90.89 (1993) (governing the former Motor Carrier Radio Services frequencies).

[19] 47 C.F.R. § 90.89(a) (1993).

[20] Hollingsworth Letter. The third channel pair, 452/457.375 MHz, is no longer a subject of this dispute. *See* note 3, *supra*.

[21] *See* In the Matter of Frequency Coordination in the Private Land Mobile Radio Services, *Report and Order*, PR Docket No. 83-737, 103 FCC Rcd. 1093, 1126, Appendix B (1986) (outlining the frequency coordinator selection process and listing the selected coordinators) *(1986 Report and Orde*r); 47 C.F.R. § 90.175(a) (requires that the applicable frequency coordinator recommend the most appropriate frequency for requests between 25 and 470 MHz).

8. As an initial matter, neither the Communications Act of 1934, as amended, (Act) nor the Commission's rules provide for the filing of petitions to deny against PLMR applications.[22] We therefore find that the Division was not required to consider the Coop's request in the same fashion as it addressed petitions to deny. Nevertheless, we will consider the arguments presented in the Coop's Application for Review as part of our own public interest inquiry, treating the Coop's request as an informal objection.[23] Further, because petitions to deny do not lie against PLMR applications, most of the provisions of Section 309 of the Communications Act[24] and the associated case law do not control in this case.[25] Even assuming, *arguendo*, that these standards did apply, as discussed herein we find that the Coop did not establish sufficient grounds to warrant setting aside Interstate's licenses or designating the applications for hearing.[26] The Coop challenges the grant of Interstate's applications on three general grounds: 1) that there are procedural defects in Interstate's applications, 2) that Interstate is interfering with the Coop's use of the shared channels, and 3) that the frequency assignment was improper and the coordination process was unconstitutionally tainted by bias.

9. *The Coop's Claims of Defects in Interstate's Applications*. The first category of objections made by the Coop involve alleged defects in Interstate's modification application based on Section 90.157 of the Commission's Rules.[27] Specifically, the Coop alleges that Interstate's license for Station KNIC418 (frequency pair 452.825/457.825 MHz) cancelled automatically within the meaning of Section 90.157. Interstate was first licensed for Station KNIC418 in the 1980s and it operated this station for several years before it joined the Coop in 1990. The Coop, which is also licensed for

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[22] *See generally* 47 U.S.C. §§ 309(b), 309(d)(1); 47 C.F.R. §§ 1.901-1.981; *see also* In the Matter of Michael McDermott, FCC 96-16, *Memorandum Opinion and Order*, 11 FCC Rcd. 5750, ¶ 6 (1996) (*Michael McDermott*).

[23] 47 U.S.C. §§ 154(j), 309(a); 47 C.F.R. § 1.41.

[24] 47 U.S.C. § 309.

[25] *See Michael McDermott*, 11 FCC Rcd. at 5753 ¶ 9.

[26] Typically, in order for the Commission to deny an application for authorization, the petitioner must make allegations of fact sufficient to show that the grant of the application is, *prima facie*, inconsistent with the public interest. 47 U.S.C. § 309(d)(1); In re Applications of Missouri RSA No. 7 Limited Partnership, File No. 02306-CL-MP-97, *Memorandum Opinion and Order,* 1998 WL 461471, ¶ 12 (1998) (*citing Astroline Communications v. FCC*, 857 F.2d 1556, 1561 (D.C.Cir. 1988)) (*Missouri RSA No. 7*); In the Matter of B.F. Investments, *Memorandum Opinion and Order*, 7 FCC Rcd. 5311, ¶ 4 (1992); *see also Michael McDermott*, 11 FCC Rcd. 5750, ¶ 6; *In re* Application of North Idaho Broadcasting Company for Transfer of Control of KVNI (AM), *Memorandum Opinion and Order*, FCC Docket No. 93-102, 8 FCC Rcd 1637, ¶ 8 (1993) (*North Idaho Broadcasting*). If a *prima facie* case is established, the Commission must then determine whether a material question of fact is presented, in which case a hearing is required. *North Idaho Broadcasting*, 8 FCC Rcd 1637, ¶ 8 (citing 47 U.S.C. § 309(d)(2)). The allegations must be supported by an affidavit of a person or persons with personal knowledge of the facts alleged. 47 U.S.C. § 309(d)(1). Allegations consisting of conclusory facts, or general allegations on information and belief, are insufficient to establish a *prima facie* case. *Missouri RSA No. 7*, 1998 WL 461471, ¶ 12; *see also Gencom v. FCC*, 832 F.2d 171, n. 11 (1987). If the Commission finds that the petitioner has made a *prima facie* case, it then must determine whether the petitioner has presented a substantial and material question of fact as to issues upon which relief may be granted. 47 U.S.C. § 309(d)(1); *Missouri RSA No. 7*, 1998 WL 461471, ¶ 12. If no material question is raised, the Commission denies the petition and grants the application if it otherwise serves the pubic interest. *Missouri RSA No. 7*, 1998 WL 461471, ¶ 12.

[27] 47 C.F.R. § 90.157. Section 90.157 provides that the license for a station shall cancel automatically upon permanent discontinuance of operations and that a station not operated for one year or more is considered to have been permanently discontinued.

452.825/457.825 MHz contends that Interstate permanently discontinued operating Station KNIC418[28] when it joined the Coop. As such, according to the Coop, Interstate's application to modify Station KNIC418 was fatally defective because it sought to modify a nonexistent license. In its Application for Review, the Coop assigns error to the Licensing Division's conclusion that the record did not persuade it that Station KNIC418 cancelled automatically.[29] Moreover, because it contends that Station KNIC418 cancelled automatically, the Coop also avers that the Licensing Division's granting of the modification application was *prima facie* inconsistent with the public interest.[30] Interstate counters that the Licensing Division correctly found that the record did not establish the Coop's allegation that Station KNIC418 cancelled automatically.[31] Additionally, Interstate avers that the Coop's Application for Review raises no new issues and presents no new facts which were not addressed at earlier stages of this proceeding.[32]

10. We agree with Interstate that the instant Application for Review offers no evidence or arguments that would support a finding of error below. Specifically, we find no error in connection with the former Licensing Division's determination that "the evidence provided does not demonstrate that all facilities [authorized under Station KNIC418] have failed to meet the construction/operational requirements or have discontinued operation pursuant to Rule 90.157."[33] Nor does the Application for Review support a finding that the Licensing Division erred by concluding that the Coop failed to establish specific allegations of fact sufficient to show that granting the modification application was *prima facie* inconsistent with the public interest.[34] Accordingly, we affirm the Licensing Division's grant of Interstate's captioned application to modify Station KNIC418.

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[28] *See* February Request to Dismiss at 2; Coop Reply to Interstate Consolidation's Opposition to Request to Dismiss or Deny at 12-13 (Coop Reply to Opposition to Request to Dismiss); Application for Review at 7. *See also* Application for Review, Exhibit F, Declaration of Charles R. Wells (dated June 5, 1992) (briefly states Mr. Wells' knowledge as to two of three transmitter sites, Oil Derrick/BC 64 and Santiago Peak, but is silent as to Interstate's third site, Flint Peak); Coop Reply to Opposition to Request to Dismiss, Declaration of M. A. Hoffman (dated May 1, 1992) at 1-2 (stating that Flint Peak site was shut down to two way traffic by the owner and that Interstate only operated at Coop's site at San Rafael Hills). *Compare* February Request to Dismiss, Declaration of M. A. Hoffman (dated March 19, 1992) (affiant states, *inter alia*, that Interstate's applications are "fraudulent" and that "[Interstate] is a spectrally inefficient licensee" but this affidavit is silent as to the Coop's "Section 90.157 claim.").

[29] Application for Review at 7.

[30] *See, e.g., id.* The Coop adds that Interstate's application to modify Station KNIC418 raises an obvious question: "If Interstate has a license for 452/457.825 MHz, why did it apply for the frequency again? We suggest that it is because they know this license is void." Coop Reply to Interstate Consolidated's Opposition to Request to Dismiss or Deny at 13.

[31] *See* Opposition to Application for Review at 2-4; *see also* Opposition to Request to Dismiss or Deny and/or Set Aside, at 4 n.5; *see also* attached Declaration of Art L. Tol (dated April 20, 1992) (declaring under penalty of perjury that the foregoing Opposition to Request to Dismiss or Deny and/or Set Aside is true and correct). According to Interstate, "If [the Coop's] Mr. Hoffman has terminated Interstate's use of [its Flint Peak] facility in favor of the Coop site identified as San Rafael Hills, some .7 of a mile from Flint Peak, that change was made without Interstate's knowledge or consent. Thus, Interstate's authorization remains in full force and effect." *Id.*

[32] *Id.* at 2.

[33] Hollingsworth Letter (denying both the February Request to Deny and the March Request to Deny).

[34] *See Missouri RSA No. 7,* 1998 WL 461471, ¶ 12; In the Matter of B.F. Investments Inc., File No. 1486-CM-P-83, *Memorandum Opinion and Order*, 7 FCC Rcd. 5311, ¶ 4 (1992) (*B.F. Investments*); *see also Michael McDermott*, 11 FCC Rcd. 5750, ¶ 6. The Coop makes a number of seemingly unrelated accusations and

11. Assuming *arguendo* that Station KNIC418 cancelled automatically, we disagree with the Coop's claim that the decision below granting Interstate authority to operate on 452/457.825 MHz, as requested in the modification application, was inimical to the public interest. We have no quarrel with the logic that a nonexisting license cannot be modified, but the Coop does not consider that the Licensing Division was not required to dismiss all defective applications[35] or that the Commission's Rules can be waived *sua sponte* for good cause shown.[36] In this connection, whether Interstate checked "new" or "modification" on the application form, the request for authority to use 452/457.825 MHz would have been reviewed under the same substantive rules. Specifically, although styled as a modification application, Interstate completed the same frequency coordination process,[37] filed the same application form,[38] and paid the same filing fee[39] applicable to a new application for the same frequencies. Moreover, the Coop's rights as a licensee and Interstate's rights as an applicant were not effected by whether Interstate was an applicant for a new license[40] or an incumbent modifying an existing license. In this connection, we further note that even if the Licensing Division had dismissed the modification application, instead of processing it[41] and thereby requiring Interstate to refile an essentially identical application, under the circumstances such an approach would have been proper as a matter of administrative efficiency and convenience.[42]

12. Next, we find that the Coop has not presented sufficient, specific allegations of fact supporting its claims of fraud and anticompetitive, conspiratorial behavior to establish that a grant of the application would be *prima facie* inconsistent with the public interest.[43] In its pleadings the Coop makes several claims that Interstate inflated the number of mobiles it had available to operate on the channels assigned to it.[44] Interstate denies these charges.[45] The Coop's bald accusations and conclusory statements

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conclusory statements, the types of which have long been held insufficient to establish a *prima facie* case that an application is inconsistent with the public interest. *See generally* February Request to Deny; *see also* March Request to Deny; *see North Idaho Broadcasting*, 8 FCC Rcd 1637, ¶ 8 (stating that allegations within petitions and supporting affidavits which "consist of ultimate, conclusory facts or more general allegations on information and belief, supported by general affidavits . . are not sufficient." (quoting *Gencom v. FCC*, 823 F.2d 171, n.11).

[35] *See* 47 C.F.R. § 90.139(c) (1992) (Commission processing of applications).

[36] *See* 47 C.F.R. § 1.3 (Suspension, amendment or waiver of rules).

[37] *See* 47 C.F.R. § 90.175 (1992) (Frequency coordination requirements).

[38] *See* 47 C.F.R. §§ 90.119(a)(1), 90.119(a)(3) (1992) (FCC Form 574 shall be used to apply for new station authorizations and for modification of an existing authorization).

[39] *See* 47 C.F.R. § 1.1102(6) (Schedule of charges for private radio service, Land Mobile Stations: (a) New, Reinstatement, Modification and/or Renewal (per call sign).

[40] As noted above, Interstate's request also was in all events exempt from the public notice, waiting period, and petition to deny provisions of Section 309 of the Act.

[41] We note that any dismissal of the modification application, as defective, would have been without prejudice to Interstate's right to file a "new" application for the shared PLMR channel in question.

[42] *See generally* 47 U.S.C. § 154(j) (Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice).

[43] 47 U.S.C. § 309(d)(1), requires a two step analysis for judging the sufficiency of a petition to deny. *See North Idaho Broadcasting*, 8 FCC Rcd 1637, ¶ 8.

[44] Application for Review at 8; February Request to Deny at 2.

do not establish a *prima facie* case or provide a basis for the denial of an application for a shared use license.[46] If the Coop contends that Interstate is not sharing the channels in accordance with the rules, its avenue of recourse is to bring a complaint to the Commission pursuant to Section 90.173(b) of the Commission's Rules.[47] However, based on the record of this proceeding, we do not believe that the Coop has provided sufficient evidence to support its claims of fraudulent behavior on the part of Interstate to warrant designation of these applications for hearing on whether Interstate has the requisite character qualifications to be a Commission licensee.

13. *"Interference" Complaints*. The Coop's second contention is that Interstate is interfering with its operations on the shared channel. We believe that the Licensing Division properly dismissed the Coop's harmful interference claim based on the Coop's failure to provide an engineering report as required by Section 1.106(e) of the Commission's Rules.[48] Failure to support a claim of harmful interference with an affidavit of a qualified radio engineer, under prescribed procedures, is grounds for dismissal of a complaint of harmful interference.[49] In its Petition for Reconsideration, the Coop argues that Interstate's assignment to channels on which the Coop is licensed to operate amounts to harmful interference as defined under the Rules.[50] We believe that the mere addition of a user to a congested, shared channel does not, in and of itself, present grounds for denying an application. Moreover, frequency coordinators are authorized and expected to recommend to the Commission the assignment of particular frequencies to qualified applicants.[51] The Commission's Rules generally do not make provisions for denying eligible applicants a shared private land mobile frequency simply because the available channels are congested.[52]

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[45] Opposition at 10-11.

[46] *North Idaho Broadcasting*, 8 FCC Rcd 1637, ¶ 8.

[47] *See* Application for Review at 4; 47 C.F.R. § 90.173(b).

[48] According to the Coop, the Licensing Division misunderstood its interference complaint, which asserts only that Interstate's usage of air time is oppressive, not that Interstate's radios are functioning improperly. Application for Review at 4-5. Thus, it appears that the Coop has abandoned the claims of electrical interference made in their Request to Dismiss and in their Emergency Application for Reconsideration. *See* March Request to Deny at 2; Petition for Reconsideration at 2. As a result, the issue of whether an engineer's report is necessary for proving electrical interference has been rendered moot. Nevertheless, we believe that the staff properly dismissed the interference complaints made in the affidavits accompanying the Coop's Emergency Application for Reconsideration in accordance with 47 C.F.R. § 1.106(e).

[49] *In re* Application of C.L. Tadlock, D.B.A. Tadlock's Radio Dispatch, *Memorandum Opinion and Order*, FCC Docket No. 67-588, 8 FCC Rcd 197 (1967) (Commission is not required to give consideration to a petition which does not comply with the requirements of Section § 1.106(e) of the Commission's Rules, 47 C.F.R. § 1.106(e)).

[50] Petition for Reconsideration at 1-2.

[51] *See* 47 C.F.R. § 90.175.

[52] The Commission is acutely aware of the increasing congestion faced by those operating on shared frequencies. The use of shared channels continues to grow faster than the increase in the efficiency of their use. We hope that the recent changes made to the frequency allocation system implemented in the "refarming" rulemaking will go some distance toward creating a more efficient spectrum allocation system. *See Refarming Second R&O*, 12 FCC Rcd 14,307. *But see* 47 C.F.R. §§ 90.313, 90.621, 625, 90.631 (in the 470-512 MHz band and above 800 MHz, PLMR channels are assigned on an exclusive basis, or no additional licenses are granted, if the channel in question is loaded to prescribed levels).

Instead, the coordinators must recommend assignment of a shared frequency to every qualified applicant.[53]

14. Furthermore, the Rules do not provide that a first-in-time preference would be given to current users of shared channels as the Coop suggests, and we will not create one here.[54] We believe that recognizing standing to challenge a frequency coordinator's allocation recommendations based on frequency congestion will diminish the efficiency of the coordination system, contrary to the public interest. We are also concerned that the delays and uncertainty that would result from allowing such wholesale challenges would lead to the creation of a *de facto*, first-in-time preferential right to the use the shared frequencies. Further, we believe that such an approach would consume substantial scarce Commission resources without significant concomitant public interest benefits.

15. The Coop's Petition for Reconsideration did not contain an engineering report verifying its claim of harmful interference and as such did not establish facts sufficient to show that the grant of Interstate's applications was, *prima facie,* inconsistent with the public interest. Nor did the Coop in its Application for Review offer any additional evidence of interference. Instead, the Coop stated that it is actually arguing that the increased traffic it is experiencing on its shared channels is tantamount to the "harmful interference" encompassed within Section 90.403(e) of the Commission's Rules.[55] Intensive use of a shared channel is not "harmful interference" within the meaning of Section 90.403(e) of the Commission's Rules.[56] As discussed above, claims of interference, even those made pursuant to Section 90.403(e) of the Commission's Rules, require some manner of tangible evidence to support them. If the Coop believes that Interstate has failed to cooperate in its use of the shared frequency, intentionally or otherwise, it should have sought the remedies set forth in Section 90.173(b) of the Commission's Rules, to resolve any difficulties they experienced.[57] Despite the guidance of the former Licensing Division, to date, the Coop has chosen not to pursue these remedies.[58] Thus, for these reasons, we believe that the former Licensing Division's dismissal of the claim of harmful interference made in the Coop's Petition for Reconsideration was warranted.

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[53] *1986 Report and Orde*r, 103 FCC Rcd 1093, 1126, at ¶ 5(g).

[54] *See In re* Petition for Review and Supplement to the Petition for Review of Delegated Authority Which Denied Action on a Complaint Filed By Lee Richter, FCC 91-412, *Memorandum Opinion and Order*, 6 FCC Rcd 7565, ¶ 7 (1991) (*Lee Richter*).

[55] 47 C.F.R. § 403(e). We will give the Coop the benefit of the doubt that this issue was the same one presented to the staff in it's Petition for Reconsideration, otherwise this claim would be dismissed under Rule Section 1.115(c).

[56] In the Matter of Imposition of a Forfeiture Against Capitol Radiotelephone, PR Docket No. 93-231, *Memorandum Opinion and Orde*r, 11 FCC Rcd 8232, ¶ 16 (1996).

[57] 47 C.F.R. § 90.173; *see Lee Richter*, 6 FCC Rcd 7565; In the Matter of Applications of Capitol Radiotelephone, PR Docket No. 93-231, *Hearing Designation Order, Order to Show Cause and Notice of Opportunity for Hearing*, 8 FCC Rcd 6300, ¶ 4 (1993) (*Capitol Radiotelephone*).

[58] *See* Notice of Denial; Letter from William H. Kellett, Attorney, Licensing Division, Federal Communications Commission, to Alan M. Lurya, Esq., and Elizabeth Sachs, Esq. (dated March 18, 1994) (seeking description of results of any meetings held subsequent to Notice of Denial); Letter from Elizabeth R. Sachs to William H. Kellett, Esq., Attorney, Licensing Division, Federal Communications Commission, (dated April 4, 1994) (stating that Interstate had not been contacted by the Coop and had not had any complaints of co-channel licensee interference); Letter from Alan M. Lurya, Attorney at Law, to William H. Kellett, Esq., Attorney, Licensing Division, Federal Communications Commission, (dated April 11, 1994) (stating that a meeting "as proposed, would be worthless."); *see also* Application for Review at 1-6.

16. *Challenge to the Frequency Assignment and Coordination Process.* The Coop also claims that the ATA did not recommend the most appropriate channel for Interstate.[59] In support of this claim, it presents an affidavit from M. A. Hoffman in which Mr. Hoffman states that the channels assigned are not the most appropriate ones for Interstate.[60] We find the Coop's claim unpersuasive because it rests on the bare statement of an employee of the Coop – unsupported by any independent engineering data. We also note that the Coop's claim that ATA did not recommend the most appropriate channel for Interstate fails to overcome *Interstate's* acceptance of ATA's recommendation. Moreover, considered along with the balance of the record of this proceeding, we conclude that the Coop's claim lacks sufficient credibility and weight to warrant further inquiry by the Commission.[61] Absent tangible evidence of erroneous coordination, we are predisposed to support the recommendation of a duly authorized frequency coordinator.[62] Moreover, in this instance the Coop argues that it should be allowed to add loading to the very channels which it claims are too congested to accommodate Interstate.[63] Such a request by the Coop is inconsistent with its contentions that the subject channels should not be made available to additional PLMR traffic. Based on the record in this proceeding, we conclude that the Coop has failed to substantiate its claim that ATA did not recommend the most appropriate channels for Interstate. In this connection, we note that the Coop's assertion that "cooperatives should be given special consideration by coordinators, because cooperatives are spectrally efficient"[64] is beyond the scope of the instant application proceeding.

17. Finally, the Coop challenges the frequency coordination process involved in Interstate's ultimate assignment to frequency pairs at 452.850/457.850 MHz and 452.825/457.825 MHz.[65] As a preliminary matter, we note that a "petition to deny" a PLMR license is not the proper vehicle for raising these claims. First, as stated above, the channels at issue are shared channels without loading standards.[66]

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[59] Application for Review at 8-9.

[60] Declaration of M. A. Hoffman at 1-3.

[61] Recognizing the assistance that frequency advisory committees provide to the Commission, Congress specifically authorized the Commission to utilize the services of such committees. *See* "The Communications Amendments Act of 1982," P.L. 97-259, 96 Stat. 1087, September 13, 1982 (codified at 47 U.S.C. § 332(b)). The Conference Report accompanying this legislation noted that:

> Frequency coordinating committees not only provide for more efficient use of the congested land mobile spectrum, but also enable all users, large and small, to obtain the coordination necessary to place their stations on the air. Without such frequency coordinating activity, some of these applicants would not be able to afford the engineering required in the application process. Thus, by essentially equalizing the frequency selection process for all applicants, the applicants are placed on a competitive parity, with no one applicant operating on a better or more commercially advantageous frequency than his or her competitor.

Conference Report No. 97-765, 97th Cong. 2nd Sess., August 19, 1982, at 53, reprinted in 1982 U.S.Code Cong. & Ad.News 2237.

[62] *See, e.g.,* 47 C.F.R. § 90.175(a) (applicants bear the burden of proceeding and burden of proof in requesting the Commission to overturn a coordinator's recommendation); *see also id.*

[63] *See* Application for Review at 11; Petition for Reconsideration at 3-4.

[64] Application for Review at 6-7.

[65] Application for Review at 2-6.

[66] *See* 47 C.F.R. § 90.89 (1993).

There is no first-in-time preference given to current users of shared channels.[67] Second, the denial of an application will not remedy alleged defects in the assignment and coordination process. If the Coop believed that the frequency coordinator was biased then it should have filed a petition to institute an inquiry into the coordinator's performance.[68] Furthermore, if the Coop believed that there were strong policy reasons why it, a first in-time- user, should be given preferential rights to the shared frequencies, it should file a petition for a rulemaking to obtain those rights, rather than challenge other applicants seeking coordination onto those channels.[69]

18. The Coop alleges bias on the part of the ATA but has not presented any evidence to support this claim.[70] The Coop further alleges that this same bias has resulted in an unconstitutional delegation of authority from the Commission to the ATA in this instance.[71] In support of this argument the Coop cites "*Schecter vs. Nira."*[72] While we believe that the Coop's intended reference was to *Schecter Poultry Corp. v. United States*,[73] we do not believe that this case is on point with the circumstances presented here. *Schecter* and its progeny support the "non-delegation doctrine" which applies to statutory delegations of legislative power to the Executive Branch.[74] The Coop argues that the alleged bias on the part of the frequency coordinator regarding Interstate's request for frequency assignment resulted in an unconstitutional delegation of Commission authority to a private organization, namely ATA, not from the U.S. Congress to the Executive Branch as in *Schecter*.[75] With regard to the delegation of authority from the Congress to the Commission, the Communications Act of 1934 specifically grants the Commission the authority to "utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government." 47 U.S.C. § 332(b)(1) (1997) (as amended). Furthermore, it is not clear from the pleadings how any bias on the part of the frequency coordinator, even if it were substantiated, would result in a constitutional harm to the Coop. Nor does it follow that the revocation of Interstate's license would remedy any such constitutional violation. In any event, the Coop has not supported it's claim of bias, let alone presented a cogent theory as to how that bias amounts to a violation of the constitution. We therefore find that this allegation does not merit the grant of the Coop's request.

IV. CONCLUSION AND ORDERING CLAUSE

19. Based on the foregoing, we affirm the former Licensing Division's finding that the grant of these licenses to Interstate was proper. In sum, we conclude that the Licensing Division's decision in

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[67] *See Lee Richter*, 6 FCC Rcd 7565, ¶ 7.

[68] *See 1986 Report and Order,* 103 FCC 2d at 1156.

[69] *See* 47 C.F.R. § 1.401 (governing petition for rulemakings); *see* Application for Review at 6-7; *see* Petition for Reconsideration at 3-4. We reiterate that there is no *per se* right to challenge the grant of a PLMR license and we are addressing this petition only as part of our own public interest inquiry. *See, e.g., supra* note 23.

[70] Application for Review at 7.

[71] Application for Review at 9-10.

[72] *Id.* at 10.

[73] 295 U.S. 495, 55 S.Ct. 837 (1935) (holding invalid the standardless delegation of legislative power to the President made in section 3 of the National Industrial Recovery Act). Application for Review at 10.

[74] *See generally Schecter Poultry Corp. v. United States*, 295 U.S. 495.

[75] *See* Application for Review at 9-10.

this matter is consistent with our Part 90 rules, which provide that all PLMR frequencies in the 450-470 MHz band are licensed on a shared, nonexclusive basis, and without maximum loading levels.[76]

20. Accordingly, IT IS ORDERED that pursuant to Sections 4(i) and 309(d)(2) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(d)(2), and Section 1.115(g) of the Commission's Rules, 47 C.F.R. § 1.115(g), the Application for Review filed by Los Angeles County Transportation Communications Cooperative IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

[76] The difficulties encountered by the Coop appear to be operational in nature. Our rules mandate that the parties cooperate with each other to resolve their difficulties. The Deputy Chief of the former Licensing Division by letter dated December 4, 1992, directed the parties to meet and attempt to resolve their differences. It appears from the record that the Coop failed to comply with this directive. As a result, we believe that it would be premature for us to take further action at this time. If both parties are unable to resolve their difficulties through cooperation, then under Section 90.173(b) of the Commission's Rules, the Commission may cure the problem by imposing operating restrictions on one or both parties.