RM-7895

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January 6, 1992

Via Hand Delivery

Mr. Ralph A. Haller, Chief
Private Radio Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20555

RM-7895

Re: Amateur Radio Business Communications;
Proposed Restatement of Section 97.113
of the Amateur Radio Service Rules.

Dear Mr. Haller:

Representatives of the American Radio Relay League, Incorporated have recently held discussions with you and your staff concerning the Prohibited Transmissions section of Part 97 of the Commission's Rules, specifically those governing business and other prohibited communications, currently set forth at Section 97.113. The insights gained from these discussions have been useful in determining the League's thoughts on that rule, its effect on public service communications in the Amateur Radio Service, and some possible revisions to the rule.

We appreciate the opportunity to have had these meetings, and hope to participate in similar discussions with your staff on other amateur regulatory matters in the future. Perhaps, as a result of our meetings, the Commission's attention might be better focused on this issue than it otherwise might have been.

As a result of our discussions, a review of the history of the regulations, and the further deliberations of the League's Board of Directors, we have concluded that some expansion of the public service capabilities of the Amateur Radio Service should be realized by a restatement and

revision of Section 97.113. This can be done without, in any respect, compromising the basic non-commercial character of the Service. Neither, despite recent misdirected commentary by third parties, need any restatement of the business communications rule reflect adversely on the efficiency or overall use of amateur frequency allocations.

As the Commission is presently reviewing certain petitions for rule making which bear, at least partially, on this issue, the League's input seemed timely. Please, to the extent that this letter is useful in your analysis of the proper limits of the business communications rule, feel free to associate it as you see fit with any relevant docket proceeding. Should the Commission issue a notice of proposed rule making or notice of inquiry on the subject, the League may submit comments at that time as well.

A review of the history of regulation of the content of communications in the Amateur Radio Service, and recent interpretational difficulties involving the business communications rule, led the League to conclude that a restatement of Section 97.113 of the Rules might, as suggested in a recent QST editorial, allow the Amateur Radio Service to better provide public service communications. An ancillary goal was to avoid the administrative difficulty of detailed situational interpretations of the rule that plague both amateurs and Commission administrative staff. The principle espoused in the League's proposed restatement, attached, is that, with respect to the content of transmissions, amateur-to-amateur communications should be permitted unless specifically prohibited; and that, in general, unless amateur communications are done for compensation, or for the pecuniary benefit of the amateur or his or her employer, they are permissible.

I. Background of the Rule

Prior to 1983, there was no general, express prohibition of business communications in the Amateur Radio Service. Until 1972, Section 97.39 of the Rules prohibited the licensing of an amateur radio station to a "school, company, corporation, association or other organization, nor for its use...". The only exception to that rule was an amateur radio organization or society, which could be licensed. The rule was a licensing provision, and it did not appear to amateurs that the "nor for its use" proscription applied to message content, but only to licensing for the use of one of the proscribed entities, as discussed below.

Section 12.102 of the Commission's Rules, in the 1950s, provided that an amateur radio station "shall not be used to transmit or receive messages for hire, nor for communication for material compensation, direct or indirect, paid or promised". That limitation, now essentially the same as it appears at Section 97.113(b), was first placed on amateurs by the Federal Radio Commission in a rule effective April 5, 1930,[1] and was carried over into the Federal Communications Commission Rules. The current definition of an amateur as a person "interested in radio technique solely with a personal aim and without pecuniary interest" was adopted by the International Radiotelegraph Conference held in Washington in 1927.

It has thus been understood all along that amateurs should not derive any benefit or compensation in exchange for providing communications via their amateur stations. There has not been much debate about that issue, by amateur radio licensees or anyone else. The problem arises when regulations attempted to address the fact that others, besides the licensee and the general public, may benefit from amateur communications. That is not, of course, an a priori evil, but it can become one if the benefitted third parties attempt to exploit the Amateur Radio Service, for private benefit.

In 1928, the Federal Radio Commission enacted rules prohibiting amateurs from transmitting "news, music, lectures, sermons, or any form of entertainment or to conduct any form of commercial correspondence". That general prohibition was clarified in 1929 by the General Counsel of the Federal Radio Commission in correspondence to the League, which established that the rule was not intended to regulate the content of message traffic that was being transmitted by amateurs. Nor was the concern of the Commission any benefit that might incidentally accrue to others besides the amateur licensee:

> Thus, both as a matter of statutory construction and sound public policy, it is apparent that the prohibition on amateur stations from conducting any form of 'commercial correspondence' should be construed to mean that any amateur operator may

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[1] See, Part IV, Section 373, of the Rules of the Federal Radio Commission (1930).

> transmit or deliver from any amateur radio station a message of any kind - subject, of course, to any other provision of the Radio Act restricting communication over the air - regardless of the source or text, provided that no pecuniary or other consideration is directly or indirectly paid or promised him.[2]

In 1938, the Commission attempted to stop certain abuses by corporations and groups using the amateur bands for the business use of those organizations by amending then section 152.02 of the Rules to read as follows:

> Eligibility of corporations or organizations to hold license. An amateur station license will not be issued to a school, company, corporation, association, or other organization; nor for their use; provided, however, that in the case of a bona fide amateur radio society a station license may be issued in accordance with Section 152.01 to a licensed amateur radio operator as trustee for such society.

The phrase "nor for their use" was intended to limit the subterfuge of having a company license an individual employee solely to provide a means for the company to use the amateur radio station commercially. Section 152.02, changed slightly to read "nor for its use", later became Section 97.39, which read the same.

In a Notice of Inquiry in Docket 19245, released May 5, 1971 (FCC 71-453), the Commission strictly interpreted the licensing provision of then Section 97.39, which prohibited the licensing of an amateur station to a "school, company, corporation, association or organization, nor for its use..." to prohibit amateur communications, by individual amateur licensees not otherwise connected with the organization, on behalf of such organizations (other than amateur radio organizations and societies). It noted in that Notice of Inquiry that:

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[2] See the Comments of the League, Appendix A, in Docket 19245, filed August 31, 1971, for a copy of the entire text of the letter of the General Counsel of the Federal Radio Commission on this subject. That text was also contained at pages 83-85 of QST, November, 1971.

> There is evidence of a considerable proliferation of non-amateur organizations with an interest in the use of amateur frequencies and amateur stations for purposes which may well lack the universal acceptability of Red Cross and Eye Bank objectives. Unlimited operation in behalf of such organizations could generate large numbers of new networks and the use of amateur radio as a medium for the organized advocacy of social, political or economic views could pre-empt amateur frequencies to the exclusion of the individual amateur for whom the service was intended.
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> The current rule is clear and unambiguous. It permits no such operation other than as previously noted. Therefore, while the Commission essentially agrees with those amateurs who believe that limited communications in behalf of the Red Cross, Eye Bank Association, March of Dimes, National Cystic Fibrosis Foundation, and similarly oriented organizations are meritorious, we conclude that they are not permissible under Sections 97.39 and 97.107 as they now read...
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> (Id, at paragraphs 3-4)

The Notice of Inquiry warned that, while there is general recognition of the public benefit of the Red Cross and the Eye Bank, similar recognition may not exist with respect to other non-profit, public service organizations such as political parties, student organizations, various churches and missionary societies, and other, "more controversial" groups. It appeared from this that the source of the Commission's concern was the use of amateur radio as a means of organizing and staging student demonstrations on college campuses, and the like. Thus, the Commission sought to determine the proper limits of amateur non-emergency communications on behalf of non-amateur organizations.

The League's comments in Docket 19245 suggested that no limitations should be placed on message content, as such were not necessary. It was suggested that "the self-policing of amateur radio remains as the best and most effective control over improper and unlawful use of amateur stations"; and that because amateurs have complete control over what is transmitted, and there are a sufficient number of amateurs interested in preservation of the non-commercial nature of the service as to address abuses, self-policing is sufficient.

The Commission adopted a Report and Order[3] in Docket 19245 in October of 1972, which deleted the "nor for its use" reference in Section 97.39, thus making it clear that the rule applied only to who may hold an amateur license. At the same time, however, it enacted new third party traffic rules (then Section 97.114), to prohibit commercial third party traffic, not previously prohibited specifically. The Report and Order stated that:

> A basic principle permeating our rules and the international radio regulations is that amateur radio shall not be used for any pecuniary interest to any party or for commercial communications. The international rules specifically provide that amateur radiocommunications must be of a technical nature or remarks of a personal character for which, by reason of their unimportance, recourse to a public telecommunications service is not justified. There can be no legitimate reason for an amateur station to carry message traffic of a commercial nature. Radio communications, the sole purpose of which is to facilitate regular business or commercial activities, do not enhance the intended purpose of the Amateur Service and should not be allowed except for an emergency communication as defined in our rules.
> (25 RR 2d at 1714)

The new rule prohibited third party business communications, defined as "any transmission or communication the purpose of which is to facilitate the regular business or commercial affairs of any party". As the Report and Order was interpreted by the United States Court of Appeals for the Second Circuit, the rules adopted in Docket 19245 struck a compromise relative to third party traffic: "As a result of the rule change, public service organizations such as the Eye Bank and American Red Cross are able to use ARS facilities except for communications which facilitate the regular business or commercial affairs of those organizations. [4] The

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[3] See, 25 RR 2d 1713 (1972); affirmed sub nom. Herman Gross and Reuben Gross v. Federal Communications Commission and United States, 27 RR 2d 1202 (2nd Cir. 1973).

[4] The challenge to the rules adopted in that docket proceeding was initiated by two individuals, who alleged that the rules violated their Constitutionally-protected freedom of speech by restricting, without sufficient justification, the content of transmissions from amateur stations. The challenge was rejected by the United States Court of Appeals for the Second Circuit. Id. 27 RR 2d 1202.

Court also distinguished occasional public service amateur communications from commercial use of the Service on behalf of organizations:

> And while the regulations permit the use of the ARS for non-commercial public service communications on behalf of such organizations as the Red Cross, there can be no serious doubt that such use has a higher social value than commercial use. Moreover, commercial use was certain to occupy an undue amount of time available on the limited frequencies of the ARS, while public service use will be merely occasional.
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> (27 RR 2d at 1208)

In 1983, without prior notice and comment rule making, the Commission issued an Order, (FCC 83-298, released July 12, 1983) the intent of which purportedly was to clarify the prohibition of the transmission of business communications in the Amateur Radio Service. Therein, it was noted that the rules at the time [Section 97.114(c)] established the non-pecuniary nature of amateur communications, but that there was no explicit prohibition of business communications. Section 97.114(c) applied only to third party traffic.

The 1983 Order prohibited business communications generally, and moved the definition of business communications out of the section on third party traffic regulations. The Commission noted that the Order was merely an interpretive rule amendment, not intended to be a substantive change. Business communications were already prohibited, it stated, and the Commission had consistently so advised those who inquired. The Order contained anecdotal examples of prohibited business communications, such as calling one's office via amateur radio to receive business messages, providing a regular communications service for an employer, a local government, or other entity. Using an amateur station to call in a routine medical prescription, or for non-emergency law enforcement communications such as normal police patrols were stated to be prohibited. In short, the Order stated, the Amateur Radio Service should not be used as an alternative to the land mobile, broadcast, maritime, or common carrier radio services, all of which have been established by appropriate regulatory processes.

The Order also provided an interpretation of the term "business communications" which was far more broad than had been enunciated in the Amateur Radio Service rules ever before:

> The term "business communications", in this instance, is used in the broadest context. It includes all types of communications which are intended to facilitate the regular business or commercial affairs of any party, whether individual or organization, whether for profit or not-for-profit, whether charitable or commercial, and whether government or non-government.
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> (Id., at paragraph 3).

This interpretation would disallow, for example, virtually all communications in support of Red Cross efforts, since the regular business of the Red Cross involves relief work, regularly coordinated by amateurs. The League, upon review of that Order, and in response to a multitude of complaints from public-service-minded amateurs, concerned that they could no longer perform the services that they had been providing, immediately sought clarification of the intent of the Order from James C. McKinney, then Chief of the Private Radio Bureau. Five days later, on July 19, 1983, Mr. McKinney wrote back, stating that the Order was not as clear as it might have been, and that:

> We want to emphasize that the Order does not prohibit amateur radio operators from participating in the routine events of traditional public service activities. For example, amateur radio operators may provide communications for municipal parades, marathons, walkathons, Eye Bank activities and the like. Although they may incidentally "benefit" the sponsor, their main purpose is to provide a service to the public, which is the real beneficiary...we do want to assure you that we concur in all of the examples that you mention in your letter, including the permissibility of public service communications for neighborhood bike races, fireworks displays, and the Olympic Games. We agree that an amateur licensee's providing public service communications enhances any event which a particular organization offers as a part of its normal functions.
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> The Order was not intended to impose any new restrictions or to cut back on what amateur operators have legitimately been doing all along. What was intended was to alert the amateur community to the fact that the Amateur Radio Service should not be used in lieu of other radio services for the transmission of business messages. I think we can all agree that a businessman, who also happens to be an amateur radio operator, should not use amateur radio facilities to call his office about details that surround his business transactions. On the other hand, that same businessman should feel free to use his amateur radio station if a member of his family becomes ill, if there is a safety factor in travelling on the highway, such as the need for a tow truck, etc.
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> (Emphasis in original)

Historically, then, the Commission has been concerned, properly, about exploitation of the Amateur Radio Service by non-amateur licensees for private benefit. Nonetheless, however, one of the most basic purposes of the Amateur Radio Service, in addition to providing emergency communications, has been the provision of public service communications, at events sponsored by private and governmental organizations. The inherent conflict in these two goals has led to differing interpretations of what limits should be placed on communications that benefit others. League has always supported minimal content regulation in this area, and continues to do so.

II. Section 97.113 Is Currently Interpreted Too Narrowly

Perhaps, in clarifying the intent of the Commission's 1983 Order, the then Chief of the Private Radio Bureau did not go quite far enough. Rule interpretations from the Private Radio Bureau since that time have relied, not on Mr. McKinney's interpretation letter, which enunciates a much more reasonable, flexible standard than did the 1983 Order, but on the overly strict words of the Order itself. A situation in point is a recent inquiry by some amateurs interested in assisting a Boy Scout troop. The troop was conducting a canned food drive, to provide food for poor people, and asked the local amateur radio club for assistance in coordinating the pickup and delivery of the food using amateur radio. According to the 1983 Order, considered in the "broadest sense", this would constitute facilitation of the regular business affairs of the Boy Scout troop. It could

hardly be said, however, that the requested assistance would constitute commercial exploitation of the Amateur Radio Service. Amateur assistance clearly should have been allowed in that context. The proximate beneficiary of the effort was the public, and not the Scout Troop.

Similar recent interpretations, based on the 1983 Order, have given rise to a great deal of uncertainty in the Amateur Service. Recently, amateurs were concerned about providing communications for a town parade, because some of the participants in the parade were commercial enterprises, or commercially-sponsored participants. Even though the amateur communications would have been limited to those intended to coordinate safe public observation of the parade, the participants were hesitant to participate for fear of violation of present Section 97.113.

While there is occasionally only a fine line between proper use of amateur radio for public service communications and improper exploitation of amateurs by non-licensees, the League continues to believe that the rules should err in favor of flexibility, recognizing that the self-regulating character of the radio amateur is a reasonable means of providing the proper balance.

III. The League's Proposed Restatement

Based on our discussions with you and your staff, we have developed a proposed restatement of Section 97.113 of the Rules, which is based on four basic principles. In addition to those, there are several "corollary" principles applicable to certain circumstances, taken primarily from the existing rule, which should be preserved.

The restated rule constitutes a middle ground between removal of all rules governing business communications, and the present interpretational status of Section 97.113. It provides the flexibility, we believe, to allow an amateur to better determine for himself or herself whether a particular public service project is reasonable or not than is possible under the present rules, as long as certain basic prohibitions are observed.

First, communications in exchange for compensation are prohibited. This has been understood and followed without much controversy since the beginning of Amateur Radio.

Second, communications for the benefit of one's employer are prohibited. This is self-explanatory, as communications which are for the benefit of an employer are commercial by definition.

Third, communications in which the control operator or licensee have a pecuniary interest are prohibited. This would prohibit the businessman, for example, from calling his office for messages via amateur radio. It would not, however, prohibit that same businessman from calling a tow truck to assist him on the road.

Fourth, the Amateur Radio Service shall not be regularly substituted for other licensed radio services. Thus, for example, an amateur can provide volunteer communications for the Rose Bowl Parade, an occasional event, even though land mobile radios or cellular telephones could be used instead. However, amateurs could not, routinely, operate their stations while riding with police on patrol, as the police radio service was intended for such application, not the Amateur Radio Service.

What is missing from the above principles is a prohibition on communications which might incidentally benefit entities other than the licensee: "any communication the purpose of which is to facilitate the regular commercial affairs of any party", as current Section 97.113 reads. Thus, an amateur need not be concerned about calling a tow truck to assist him, even though the tow truck company's business affairs are facilitated by the call. The yardstick is the business implication for the licensee or control operator, not the recipient of the communication.

Truly enough, a rule containing the above principles is sufficiently flexible that even commercial entities, not themselves licensees in some other radio service, could attempt to exploit amateurs for the benefit of the commercial enterprise. However, the League is satisfied that amateurs, not themselves benefitting from providing the communications, would not allow such exploitation to continue for long.

Nothing in the foregoing analysis has the slightest bearing whatsoever on the current degree of loading of amateur frequency allocations, or the efficiency thereof. There is always room in amateur frequency allocations for the

conduct of communications, such as public service communications, which are inherent in the basis and purposes of the Amateur Radio Service. To alleviate overly harsh past interpretations of the business communications rules, thus to clarify the permissibility of what amateurs have been doing all along for the public's benefit, without fear of receiving a Commission citation, is a good idea. It would be a good idea no matter what the degree of band loading of amateur allocations is or might be. The implications of the restatement of the business communications rule have unfortunately, through no fault of yours, been erroneously linked with issues of frequency allocations and band occupancy. That link is a non-sequitur and does not exist. The League is not here suggesting any new uses for Amateur Radio, and it does not anticipate any arising from the adoption of the restated rule. It is merely suggesting a more appropriately aimed view of content regulation in the Amateur Radio Service.

The proposed restated Section 97.113 is attached for your consideration. We would be pleased to discuss the matter further if any aspect of it remains unclear. Otherwise, we commend the attached for your consideration, in connection with pending petitions for rule making on the subject or otherwise. Again, we appreciate your interest in this matter, and the time that you and your staff have invested in discussions with the League on this subject.

Yours very truly,

Christopher D. Imlay
General Counsel

enc.

Section 97.113 **Prohibited Transmissions**

(a) An amateur station shall not transmit:

(1) Communications for hire or for material compensation, direct or indirect, paid or promised, except as otherwise provided in these rules;

(2) Communications in which the station licensee or control operator have a pecuniary interest, including communications on behalf of an employer. Amateur operators may, however, notify other amateurs of the availability for sale or trade, of apparatus normally used in an amateur station, provided that such activity is not conducted on a regular basis;

(3) Music; Communications intended to facilitate a criminal act; Messages in codes or ciphers intended to obscure the meaning thereof, except as otherwise provided herein; Obscene, indecent or profane words or language; or false or deceptive messages, signals or identification;

(4) Communications, on a regular basis, which could reasonably be furnished alternatively through other radio services.

(b) An amateur station shall not engage in any form of broadcasting, nor may an amateur station transmit one-way communication except as specifically provided in these rules; nor shall an amateur station engage in any activity related to program production or newsgathering for broadcasting purposes, except that communications directly related to the immediate safety of human life or the protection of property may be provided by amateur stations to broadcasters for dissemination to the public where no other means of communication is reasonably available before or at the time of the event.

(c) A control operator may accept compensation as an incident of a teaching position during periods of time when an amateur station is used by that teacher as a part of classroom instruction at an educational institution.

(d) The control operator of a club station may accept compensation for the periods of time when the station is transmitting telegraphy practice or information bulletins, provided that the station transmits such telegraphy practice and bulletins for at least 40 hours per week; schedules operations on at least six amateur service MF and HF bands using reasonable measures to maximize coverage; where the schedule of normal operating times and frequencies is published at least 30 days in advance of the actual

transmissions; and where the control operator does not accept any direct or indirect compensation for any other service as a control operator.

(e) No amateur station shall retransmit programs or signals emanating from any type of radio station other than an amateur station, except propagation and weather forecast information originating from United States Government stations, and communications originating on United States Government frequencies between a space shuttle and its associated Earth stations. Prior approval for shuttle retransmission must be obtained from the National Aeronautics and Space Administration. Such retransmissions must be for the exclusive use of amateur operators. Propagation, weather forecast, and shuttle retransmissions may not be conducted on a regular basis, but only occasionally, as an incident of normal amateur radio communications.

(f) No amateur station, except in auxiliary, repeater or space operation, may automatically retransmit the radio signals of other amateur stations.