

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

In the Matter of)
)
Amendment of Part 15 of the Commission's) ET Docket No. 98-156
Rules to Allow Certification of Equipment) RM-9189
in the 24.05 — 24.25 GHz Band at Field Strengths)
Up to 2500 mV/m)

OPPOSITION TO ARRL'S PETITION FOR RECONSIDERATION

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SUMMARY

In its Petition for Reconsideration, the American Radio Relay League (“ARRL”) challenges the Commission’s legal authority to allow consumers and others to use the spectrum without an individual license. In so doing, ARRL has attacked a method of spectrum regulation that has a long, accepted, and successful history.

The Commission has allowed use of the spectrum without an individual license since 1938. In so doing, it has allowed industries that have reshaped our economy and our lives to flourish. Personal computers, cordless telephones, garage door openers, and broadband wireless networks are just a few of the devices used by consumers and businesses without individual licenses. This is what the ARRL says must change. It says, in effect, that the Commission has been acting unlawfully for the past sixty-four years.

But the Commission has not been acting unlawfully. Part 15 of the Commission’s rules, which permits the use of devices that emit RF energy without individual licensing, is based on a sound legal foundation. The plain language of Title III of the Communications Act requires only that spectrum use be licensed – not that it be “individually” licensed as ARRL asserts. Licensing by rule under Part 15 (or Part 18 or Part 90) is perfectly permissible under the Communications Act. Moreover, Congress has long been aware of, and has accepted, such licensing by rule. This is compelling proof that the Commission has acted lawfully. Indeed, the courts have specifically approved a similar licensing scheme adopted by the Commission under Title II of the Communications Act. The bottom line is that ARRL’s petition can – and should – be promptly dismissed.

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In its Petition for Reconsideration, the American Radio Relay League (“ARRL”) challenges the Commission’s authority to allow the use of the radiofrequency spectrum without an individual license. This challenge, if successful, would cause a major disruption to the United States economy and to the day-to-day lives of most Americans. It would also create a bureaucratic nightmare of unimaginable proportions. Fortunately, the ARRL petition is so lacking in legal support that it can – and should – be promptly dismissed.

In making its challenge, ARRL attacks a method of spectrum regulation that has a long and accepted history. *The Commission first allowed use of the spectrum without an individual license in 1938*, making this method of spectrum regulation nearly as old as the Communications Act itself. And this method of regulation is not merely venerable; it is spectacularly successful. Entire industries have been built upon the Commission’s conclusion that it was not required to issue individual licenses for the use of the spectrum – industries that have reshaped our economy and the way we live. Devices as disparate and important as personal computers, cordless telephones, garage door openers, microwave ovens, and wireless local area networks (LANs) all use the

spectrum without their owners obtaining individual licenses from the FCC. This is what ARRL says must change.

Obviously, the implications of ARRL's position are staggering. Potentially every user of any device that radiates radiofrequency energy, whether intentionally, unintentionally, or incidentally, would be required to obtain an individual license from the Commission. The Commission would needlessly be subjected to a deluge of paperwork, while all the industries that rely on the current regulatory regime would collapse from the disruptions and uncertainties that would result if ARRL's position were to be adopted. However, there is no statutory justification for concluding that the most successful, forward-thinking and least bureaucratic method of spectrum regulation must now be abandoned, and ARRL's Reconsideration Petition can easily be dismissed.

Agere Systems, Inc. ("Agere"), Apple Computer, Inc. ("Apple"), the Bluetooth Special Interest Group ("Bluetooth"), Cisco Systems, Inc. ("Cisco"), Microsoft, Inc. ("Microsoft"), and VoiceStream Wireless Corporation ("VoiceStream") hereby oppose the Petition for Reconsideration filed by ARRL. Section 301 of the Communications Act does not require an individual license for every radiofrequency device. Instead, because Section 301 does not specify any procedural requirements for making licensing determinations, the Commission is authorized to allow use of the spectrum without an individual license – precisely as provided for in Part 15 of its rules. Additional support for the Commission's Part 15 regime is found in the statutory language of Section 302 of the Communications Act, and even in the legislative history of Section 302 relied upon by ARRL in its Reconsideration Petition.

I. THE COMMISSION MAY AUTHORIZE SPECTRUM USE BY RULE UNDER SECTION 301 OF THE COMMUNICATIONS ACT.

In its Reconsideration Petition, ARRL repeatedly argues that Section 301 requires every user of the radiofrequency spectrum to be *individually* licensed by the Commission. But that is not what the statute says. Rather, Section 301 says “[n]o person shall use or operate any apparatus for the transmission of energy or communications or signals by radio ... except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.” In short, ARRL wants to insert into the statute a word – “*individual*” – that Congress did not write.

A. SECTION 301 PERMITS THE COMMISSION TO AUTHORIZE SPECTRUM USE WITHOUT AN INDIVIDUAL LICENSE.

The licensing requirement in Section 301 of the Communications Act does not impose any procedural requirements on the Commission in how it chooses to allow use of the radiofrequency spectrum. It is left to the Commission’s sound discretion whether to grant such licenses individually or by rule to an entire class of users. In short, Section 301 grants the Commission authority to do what it always has done – allow use of the spectrum without an *individually* granted license where the Commission’s rules are otherwise obeyed. That is the basis of Part 15, which “sets out the regulations under which an intentional, unintentional, or incidental radiator may be operated without an *individual* license.”¹

The Commission has long recognized that Section 301 grants it the authority to allow spectrum use without an individual license. More than three decades ago, the Commission observed that:

¹ 47 C.F.R. § 15.1(a) (emphasis added).

[S]ection 301 of the Communications Act . . . prohibits the use or operation of any apparatus for the transmission of energy or communications by radio except in accordance with a Commission authorization therefor. As a concomitant of this authority, the Commission has for many years prescribed radiation levels and related technical standards for various types of radio frequency devices, the use of which by any person or company has been authorized by the Commission *by individual license or general rule.*²

Section 301, thus, provides the statutory basis for Part 15, which sets forth the requirements for users to be authorized by general rule rather than individually. The Commission succinctly described its approach to Part 15, also more than three decades ago: “For some years, the Commission has authorized, by general rule, the use and operation of low power communication devices, without individual license, subject to the restrictions and conditions set forth in Part 15 of our rules.”³ In sum, ARRL’s challenge to the Commission’s authority rests upon adding the word “individual” to Section 301’s licensing requirement – although the Commission long ago recognized that such individual licensing is not required.

B. SECTION 301 DOES NOT RECOGNIZE A LICENSING REQUIREMENT BASED UPON “SIGNIFICANT POTENTIAL FOR INTERFERENCE.”

Since ARRL’s legal argument requires rewriting Section 301, ARRL not surprisingly runs into trouble trying to explain the extent to which its reworded version of the provision limits the authority of the Commission. At times, ARRL takes an absolutist approach, concluding that “there is no exception” from ARRL’s belief that every user of

² Notice of Proposed Rulemaking, Sale or Import or Shipment for Sale, of Devices Which Cause Harmful Interference to Radio Communications, 34 Fed. Reg. 1057, 1057 (1969) (emphasis added); see also Report and Order, Amendment of Part 2 of the Commission’s Rules to Prescribe Regulations Governing the Sale or Import or Shipment for Sale, of Devices Which Cause Harmful Interference to Radio Communications, 23 F.C.C.2d 79, 80-81 (1970).

³ Memorandum Opinion and Order, Petition of HC Electronics, Inc. for Special Relief, 29 F.C.C.2d 485, 485 (1971).

the radiofrequency spectrum must be individually licensed.⁴ Yet, ARRL elsewhere contends that Section 301 only requires an individual license where there is a “significant potential for interference to licensed radio services.”⁵

ARRL’s arguments about the scope of Section 301 are incompatible and contradictory. Either Section 301 requires an individual application for license in every instance (which it clearly does not), or the Commission has the discretion to determine whether an individual license or blanket authorization by rule is appropriate. There is manifestly no statutory basis in Section 301 – and ARRL does not point to one elsewhere in the Communications Act – for concluding that the FCC *must* impose an individual license requirement where there is some “potential for interference.” The Commission has adopted extensive rules to protect licensed radio services such as those of interest to ARRL. But the Commission need not – and should not – read into the Communications Act a special, individual licensing requirement where there is, in ARRL’s formulation, a “significant potential for interference to licensed radio services.” ARRL’s limited position, like its absolutist position, has no foundation in the statute.

II. SECTION 302 ALSO PERMITS THE COMMISSION TO ALLOW RADIO DEVICES WITHOUT INDIVIDUAL LICENSING.

Although Section 301 provides sufficient authority in its own right, Section 302 provides additional statutory authority for the Commission to allow radio devices without individual licensing. ARRL correctly states that Section 302 was enacted in order to address the manufacture of devices that interfere with radio reception. But Section 302 addresses the problem broadly, and by its plain meaning gives the Commission

⁴ ARRL Petition for Reconsideration at i.

⁵ *Id.* at 1.

considerable authority and discretion to regulate such devices. Section 302(a) provides, in relevant part, that:

The Commission may, consistent with the public interest, convenience, and necessity, make reasonable regulations (1) governing the interference potential of devices which in their operation are capable of emitting radio frequency energy by radiation, conduction, or other means in sufficient degree to cause harmful interference to radio communications⁶

This is a grant of authority to an expert agency sufficiently broad to support the whole of the Commission's Part 15 regulations. And the Commission has also understood it that way. The Commission has described its implementation of Section 302 through Part 15 as follows:

The Commission carries out its responsibilities under Section 302 in two ways. First, the Commission establishes technical regulations for transmitters and other equipment to minimize their potential for causing interference to radio services. Second, the Commission administers an authorization program to ensure that equipment reaching the market complies with the technical requirements.⁷

Without going beyond the statutory text, it is apparent that Congress has given the Commission authority to regulate devices that emit radiofrequency energy and address problems potentially associated therewith in any reasonable fashion. Part 15 is surely a reasonable way in which to regulate such devices.⁸

⁶ 47 U.S.C. § 302(a).

⁷ Report and Order, Amendment of Parts 2, 15, 18 and Other Parts of the Commission's Rules to Simplify and Streamline the Equipment Authorization Process for Radio Frequency Equipment, 13 FCC Rcd. 11415, 11416 (1998).

⁸ ARRL has often agreed. ARRL has frequently participated in proceedings affecting Part 15, but has never challenged the Commission's authority to license by rule under Part 15. Indeed, ARRL has shown solicitude for the users of Part 15 devices. For example, ARRL has stated that "the primary concern of amateurs is not so much interference from Part 15 devices to amateur receivers, but rather the often severe susceptibility of certain Part 15 devices, especially home electronic equipment, to malfunction in the face of transmitted signals from amateur stations in residential areas." Comments of ARRL at 8-9, filed Mar. 7, 1988, in Revision of Part 15 of the

III. CONGRESS HAS BEEN AWARE OF – AND NOT OBJECTED TO – LICENSING BY RULE UNDER PART 15.

Congress has long known of the Commission’s conclusion that Section 301 does not require individual licensing, and the Commission’s application of that conclusion to create Part 15. Indeed, the legislative history of Section 302, relied upon so heavily by ARRL, demonstrates that Congress was aware that the Commission was allowing certain devices to emit radiofrequency energy without requiring an individual license.

In its report on Section 302, the Senate Commerce Committee observed that the Commission, pursuant to Section 301 of the Communications Act, had established technical standards applicable to the use of various radiation devices.⁹ The Committee further noted that those standards were being applied to “low-power devices such as electronic garage door openers” as well as to devices such as “high-powered electronic heaters, diathermy machines, and welders” – all of which, self-evidently, had not been individually licensed by the Commission.¹⁰ Yet Congress did not object. Rather, as ARRL concedes, Congress passed Section 302 to *extend* Commission authority to the manufacturers of these devices that were being used without individual authorization. Congress concluded that since the Commission was allowing the devices to be used without the individual licensing of users, the Commission might find it useful to have additional authority over the manufacturers. Section 302, therefore, can only be understood as Congressional affirmation of Part 15 and the Commission’s decision to license the use of such devices by rule.

Rules Regarding the Operation of Radio Frequency Devices Without an Individual License, Gen. Docket No. 87-389.

⁹ S. Rep. No. 90-1276 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2486, 2487.

¹⁰ Id. at 2488.

Moreover, it is well established that congressional acquiescence in agency policy is proof that an agency was acting within its statutory authority. As the Supreme Court has held, inaction by Congress may be interpreted as legislative ratification of or acquiescence to an agency's position.¹¹ Similarly, the Ninth Circuit has held that Congress may be deemed to have acquiesced in agency interpretations of which it is aware when it amends the statute in question and does not prohibit those interpretations.¹² As the Tenth Circuit put it, "[W]hen an agency has followed a notorious, consistent, and long-standing interpretation, it may be presumed that Congress' silence denotes acquiescence."¹³ The bottom line is that the legislative history and the enactment of Section 302 constitute clear proof that the Commission has properly understood Section 301 – and that Section 301 permits licensing by rule under Part 15.

IV. THE COMMISSION'S APPROACH TO SECTION 301 SIMPLY MIRRORS ITS APPROACH TO SECTION 214.

The Commission has opted to issue authorizations by rule in a variety of contexts, and its decisions to do so have been approved by the courts. Under the Communications Act, a variety of activities can be undertaken only with Commission approval. Operating a radio facility under Section 301 is one example. Constructing and operating a telephone line under Section 214 is another. The Commission's approach to blanket authorization under Section 214 – and the courts' response – is instructive, as it is precisely analogous to the Commission's longstanding approach under Section 301.

¹¹ Bob Jones Univ. v. United States, 461 U.S. 574, 601 (1983).

¹² Wilshire Westwood Assocs. v. Atlantic Richfield Corp., 881 F.2d 801, 808 (9th Cir. 1989).

¹³ Sierra Club v. Hodel, 848 F.2d 1068, 1080 (10th Cir. 1988).

Section 214 provides that “[n]o carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, *unless and until there shall first have been obtained from the Commission a certificate* that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line.”¹⁴ In sum, Section 214 imposes an affirmative obligation upon the carrier to obtain from the Commission a certificate of public convenience and necessity.

Historically, a carrier was required to apply to the Commission and be granted, on an individual basis, that certificate of public convenience and necessity. But in order to spur new technologies and enhance consumer welfare, the Commission altered its approach to Section 214 for domestic carriers. The Commission, beginning in the 1980s, granted blanket construction and operation authority to carriers by rule.¹⁵ No longer would individual application be necessary; the Commission instead judged that the construction and operation of domestic lines would, for purposes of fulfilling the statutory requirements, always be for the public convenience and necessity. The Commission reasoned that, legally, it could grant blanket authority because Section 214 does not impose detailed procedural requirements, or specify the amount or type of

¹⁴ 47 U.S.C. § 214(a) (emphasis added).

¹⁵ See First Report & Order, Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 85 F.C.C.2d 1 (1980) [“First Competitive Carrier Order”]; Fifth Report & Order, Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 98 F.C.C.2d 1191 (1984); Report & Order, Second Memorandum Opinion & Order, Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996, Petition for Forbearance of the Independent Telephone & Telecommunications Alliance, 14 FCC Rcd. 11364, 11373-74 (1999).

information to be obtained from applicants, in making a determination of public convenience and necessity.¹⁶

This approach has been upheld as consistent with the statutory language. As the United States Court of Appeals for the D.C. Circuit ruled, “Section 214(a) does not specify any particular procedure for making public interest determinations. And by not specifying the procedure to be employed, Congress allowed the Commission flexibility to mold its procedures to the needs of the situation.”¹⁷ And the D.C. Circuit is not alone. In another case, the Commission had received almost 1700 applications seeking to compete with existing telephone companies. Rather than assess each of these applications individually under Section 214, the Commission made general findings about the likely effects on the telecommunications industry if these competing applicants were allowed to commence service. The Commission then made the findings required by Section 214 in the form of a broad policy of general applicability to all entrants within the class. The Ninth Circuit upheld the adequacy of the Commission’s authority in making its findings in this manner.¹⁸

The Commission’s approach to fulfilling the statutory mandates of Section 214 is functionally identical to its approach under Part 15 to fulfilling the similar statutory mandates of Section 301. While a carrier must have a certificate of convenience and necessity under Section 214, the Commission can give such authority to a class of carriers by rule and without individual application or individual authorization. Likewise, while a user of the radiofrequency spectrum must have Commission consent under

¹⁶ See First Competitive Carrier Order, 85 F.C.C.2d at 41.

¹⁷ Lincoln Tel. & Tel. v. FCC, 659 F.2d 1092, 1101 (D.C. Cir. 1981).

¹⁸ Washington Utils. & Transp. Comm’n v. FCC, 513 F.2d 1142, 1160-65 (9th Cir.), cert. denied, 423 U.S. 836 (1975); see also First Competitive Carrier Order, 85 F.C.C.2d at 41-42.

Section 301, the Commission can give such authority to a class of users or devices by rule and without individual application or license. *That is because Section 301, like Section 214, does not set forth procedural requirements with respect to licensing.*

Accordingly, what the Commission has done through its Part 15 rules is entirely consistent with Section 301, and the Commission's authority under Section 154(i), of the Communications Act.¹⁹ Provided that a device complies with the Commission's extensive technical and other regulations, the Commission may (and does) permit its use without the burden of an individual application.²⁰ In the final analysis, ARRL takes a very restrictive and overly proscriptive view of what Title III requires – and it is able to do so only by inserting into the text words and concepts that the Commission has recognized are simply not there.

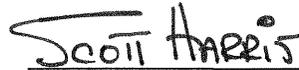
¹⁹ Section 154(i) of the Communications Act provides that “[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”

²⁰ See 47 C.F.R. § 15.1.

CONCLUSION

For sixty-four years the Commission has exercised the authority contained in Section 301 to authorize use of the radio spectrum by rule as well as by individual license, and the Congress has concurred – and, by enacting Section 302, even assisted. The novel suggestion that Section 301 mandates *individual* licensing in all circumstances – or even when there is the “significant potential for interference” – is manifestly baseless, and would fatally undermine a policy that has been spectacularly successful for U.S. consumers. The Commission and the Congress have gotten it right. ARRL has gotten it wrong. Agere, Apple, Bluetooth, Cisco Systems, Microsoft, and VoiceStream respectfully request that the Commission deny and dismiss the Reconsideration Petition filed by ARRL.

Respectfully submitted,



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