

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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| In the Matter of  | ) |                      |
|   | ) |                      |
| Carrier Current Systems, including Broadband<br>over Power Line Systems   | ) | ET Docket No. 03-104 |
|   | ) |                      |
| Amendment of Part 15 regarding new requirements<br>and measurement guidelines for Access Broadband<br>over Power Line Systems | ) | ET Docket No. 04-37  |
|   | ) |                      |

**OPPOSITION OF THE ACADEMY OF MODEL AERONAUTICS TO  
PETITIONS FOR RECONSIDERATION**

To: The Commission

The Academy of Model Aeronautics (“AMA”) respectfully submits its Opposition to the Petitions for Reconsideration of the Commission’s Report and Order in the above-captioned proceeding filed by Amperion, Inc., Current Technologies, LLC and the United Power Line Council (“UPLC”).<sup>1</sup>

**Introduction**

AMA, the national member association representing one hundred seventy thousand individuals interested in aeromodeling activities, has participated throughout the course of this proceeding, from the initiating Notice of Inquiry through the submission of comments and reply comments, in response to the Notice of Proposed Rule Making (“NPRM”) phase of the proceeding. As previously detailed to the Commission, the interests of AMA relate to the operations conducted by its members at approximately five thousand (5000) permanent sites throughout the United States utilized for the flying of radio controlled aircraft. Model aircraft

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<sup>1</sup> Public notice of the petitions for reconsideration was given at 70 Fed. Reg. 11244 (Mar. 8, 2003).

may weight fifty or more pounds and travel at speeds in excess of one hundred miles per hour. Harmful interference experienced by radio controlled aircraft during operations can cause the loss of control and the potential for injury to onlookers as well as damage to third-party property and the damage to or destruction of the aircraft itself, the latter resulting in loss of an investment of several thousand dollars or more.

### **The Advance Notice of Initiation of BPL Operations Must be Preserved**

Amperion, Current and UPLC all argue for rescission of the requirement that operators of Broadband over Power Line Systems (“BPL”) post information to the BPL database at least thirty days prior to initiation of service. Current and UPLC argue that the prior notification requirement should be rescinded due to competitive considerations, and Amperion argues that the thirty day advance notice requirement is impractical in that the BPL operator may change the contemplated operating frequencies. In addition, Amperion and Current argue that the imposition of the thirty day advance notice requirement violates the Administrative Procedure Act (“APA”) in that said requirement was not proposed in the NPRM.

In its comments and reply comments in response to the NPRM, AMA explained why advance notification is required. The argument by Current that advance notice “does nothing to further the purpose of the database—*i.e.*, it does not help a licensee to determine whether BPL can be the source of particular interference (inasmuch as BPL cannot be an interference source before it commences operations)”<sup>2</sup> is facetious. By Current’s disingenuous position, aeromodeling enthusiasts arriving at a flying field on a Saturday morning should not have the opportunity to determine whether BPL operations established as late as the previous day in the

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<sup>2</sup> Petition for Reconsideration of Current Technologies, LLC at p. 2 (Feb. 7, 2005).

neighborhood adjacent to the flying field may be operating on the same frequencies as used by the radio-controlled aircraft operators and therefore may pose a risk to their flight operations. The argument by Current not only defies rational analysis but also is in conflict with the NPRM. There the Commission explained that the purpose of the advance notice requirement not only is to identify and resolve interference after it has occurred, but also is to avoid harmful interference *ab initio*, where possible and where that is critical to the protection of other users of the RF spectrum.<sup>3</sup>

Concerning competitive considerations, as discussed in AMA's comments and reply comments, BPL operators prior to service initiation will be marketing their services. The concept that BPL operators will establish a network prior to determining market interest simply defies logic. Once the target market is solicited, the information is publicly available to the competitive service providers. Moreover, as noted by Amperion, BPL providers also are required to provide thirty days advance notice to public safety agencies.<sup>4</sup> Accordingly, the desired "secrecy" with regard to planned-but-not-implemented BPL operations simply does not exist.

As to the practicality argument of Amperion, the database notice could state the contemplated frequency range, and later be amended when actual operating channels are identified. Certainly, BPL operators will know the equipment they intend to operate 30 days in advance of the contemplated start up and therefore should know the frequency limits of that equipment. At the very least, aeromodeling enthusiasts and other spectrum users will know of

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<sup>3</sup> NPRM at ¶ 43 ("... to facilitate interference . . . avoidance measures").

<sup>4</sup> Petition for Reconsideration Amperion, Inc. at 3-4 (Feb. 7, 2005); *see also* 47 C.F.R. § 15.615 (e).

the geographic area of the contemplated operations and will have a point of contact to discuss frequency selection to facilitate avoidance of harmful interference if the operating areas overlap.

Finally, Amperion and Current also argue that the thirty day notice requirement was illegally promulgated in violation of Section 3 of the APA.<sup>5</sup> They argue that the advance notice requirement was not proposed in the NPRM, but only was raised in comments from NTIA.<sup>6</sup> Perhaps the specific thirty day notification requirement was mentioned only by NTIA, but both the NPRM and the comments of AMA specifically referenced the provision of advance notification. AMA discussed the need for BPL operators “to post their information on the database prior to commencement of operations,” so that the information may be available to all interested parties in order to afford AMA members the opportunity “to check for BPL operations before engaging in model aircraft flying activities at a particular location.”<sup>7</sup>

Moreover, the NPRM clearly set forth the consideration of a prior notification requirement. In the NPRM, the Commission stated that it proposed “to subject Access BPL systems to a notification requirement similar to the notification requirement in our rules for power line carrier (PLC) systems.”<sup>8</sup> The quoted passage was footnoted to reference the Commission’s Part 15 and Part 90 requirements. Part 90 provides, in pertinent part, “In an agreed upon format, the industry-operated entity shall inform the NTIA and the FCC of these system characteristics prior to implementation of any proposed PLC system and shall provide

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<sup>5</sup> 5 U.S.C. § 553.

<sup>6</sup> Amperion at 3; Current at 7, N.14.

<sup>7</sup> Comments of the Academy of Model Aeronautics at p. 7 (May 3, 2004). *See also* Reply Comments of AMA (“aeromodeling users must have a predictive capability to anticipate BPL interference”) at p. 3 (June 22, 2004).

<sup>8</sup> NPRM at ¶ 43.

monthly or periodic lists with supplements of PLC systems.”<sup>9</sup> In addition, as previously discussed, the NPRM described the objective underlying the database as not only to identify and facilitate the mitigation of harmful interference, but also to facilitate “avoidance measures.”<sup>10</sup> Avoidance measures are effective only if undertaken in advance of the opportunity for the interference to occur. Whatever Amperion and Current understood of the NPRM, other utility interests—namely Cinergy and PLL Telecom—argued that the public database requirement would allow BPL competitors to gain knowledge of “BPL growth plans and strategies.”<sup>11</sup> These parties clearly understood that notification prior to commencement of operations was contemplated. Accordingly prior notification has been on the table since the inception of this proceeding.

Whether the NPRM specifically delineated a 30-day prior notification provision or not, the APA only requires that the notice of proposed rule making contain “the substance of the proposed rule or a description of the subjects and issues involved.”<sup>12</sup> The specific terms may, but need not, be specifically identified. The Commission was in full compliance with the APA notice requirement. The approach of Amperion and Current would strip the Commission of flexibility to adapt rules to the information and views secured during the rule making process. The governing standard is whether the rule adopted is a “logical outgrowth” of the proposal.<sup>13</sup>

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<sup>9</sup> 47 C.F.R. § 90.35 (g) (emphasis added).

<sup>10</sup> NPRM at ¶ 43.

<sup>11</sup> Report and Order at ¶ 79.

<sup>12</sup> 5 U.S.C. § 553 (b) (3).

<sup>13</sup> *Aeronautical Radio, Inc. v. F.C.C.*, 928 F.2d 428, 445-446. (D.C. Cir. 1991).

That is plainly the case here, taking into account the objective of avoiding harmful interference and the reference to the power line carrier rules which contain an advance notice requirement.<sup>14</sup>

Finally, parties such as Amperion, Current and UPLC had full opportunity to address their market and other substantive concerns in response to the NPRM and prior to adoption of the Report and Order. In the NPRM, the Commission specifically solicited “input on any resulting burdens that the proposed notification requirement may place on entities operating access BPL systems . . . .”<sup>15</sup> These issues clearly were ripe at the comment stage and were addressed by other parties. This clearly belies the argument that petitioners lacked notice. Section 1.106 of the Commission’s rules bars parties from “sandbagging” and raising issues present at the time of the comment period for the first time in a petition for reconsideration.<sup>16</sup>

WHEREFORE, THE PREMISES CONSIDERED, the Academy of Model Aeronautics respectfully submits that the notification procedures adopted for BPL operations not only are appropriate, but also are necessary, and that the Commission’s procedure in adopting the assailed provision fully complied with the Administrative Procedure Act.

Respectfully submitted,

ACADEMY OF MODEL AERONAUTICS

*/s/ Martin W. Bercovici*

Martin W. Bercovici  
Its Attorney

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<sup>14</sup> This case is directly analogous to *Aeronautical Radio, Inc. supra*, where the court in addressing a challenge to a requirement which was not quantified in the NPRM refers to the Commission’s described policy goals and to its reference to an earlier proceeding and found that petitioners should have anticipated the type of outcome which occurred. *Id.* at 446.

<sup>15</sup> NPRM at ¶ 43.

<sup>16</sup> 47 C.F.R. § 1.106 (c) (1).

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