

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Compliance With Applicable Voluntary) **RM-9259**
Band Plans in the Amateur Radio Service)

**To: The Chief, Private Wireless Division
Wireless Telecommunications Bureau**

COMMENTS OF THE AMERICAN RADIO RELAY LEAGUE, INCORPORATED

The American Radio Relay League, Incorporated (the League), the national association of amateur radio operators in the United States, by counsel and pursuant to the *Public Notice*, Report No. 2269, released April 21, 1998, hereby submits its comments on its *Request for Declaratory Ruling* filed on or about April 3, 1998. For its comments, the League states as follows:

I. Introduction

1. The procedural treatment of the League's Declaratory Ruling Request since its filing on April 3, 1998 has been extraordinary. What was submitted to the Private Wireless Division was a straightforward request, asking the Commission to confirm that which the then-Chief, Private Radio Bureau had affirmatively stated in correspondence,¹ and which the Commission has clearly and consistently supported as policy: that voluntary band plans, adopted cooperatively in the Amateur Service in a fair and open manner and by consensus, should be supported and adhered to as an element of "good amateur practice" and spectrum efficiency. The Commission has, to date, procedurally mishandled this request. Furthermore, the comments that have been filed to date reflect significant

¹See, McKinney, James C., letter to Stephen Mendelsohn dated April 27, 1983, as cited in FCC Rule Book, ARRL, 10th Ed., at p. 6-11

misunderstanding of the League's intent, and the content of the Request. As a result, it is unclear that the comments filed to date offer a fair appraisal of the proposal. In fact, with but few exceptions, it is unclear that the comments filed to date reflect even a cursory reading of the proposal itself.

II. The Commission Has Misidentified The League's

Declaratory Ruling Request

2. The League's filing that initiated this proceeding was captioned a "Request for Declaratory Ruling". It was plainly stated to have been filed pursuant to section 1.2 of the Commission's Rules, and it was not, and could not have been reasonably construed to be a Petition for Rulemaking. In fact, in filing the request, the League had no intention of proposing any change in the rules. The issue, rather, was and is the interpretation and clarification of an existing rule, to-wit: the interpretation of the scope of "good amateur practice", as that term is used in Section 97.101(a) of the Commission's rules. The League was entitled to have its filing treated procedurally as, and considered substantively as, a declaratory ruling request. Where a petition essentially asks the Commission to determine in detail the meaning and scope of a particular rule or condition, the document is to be treated as a petition for declaratory ruling. *Omnipoint Communications, Inc.*, 4 CR 653 (1996).

3. Instead, the Commission (without any advance notice to the League or its counsel, and without offering the League an opportunity to object) elected unilaterally to treat the request as a Petition for Rulemaking, and issued the public notice referenced above, identifying the League's request as a Petition for Rulemaking. This, of course, inevitably caused readers to perceive the request as a proposal for substantive rule changes. A member of the Commission's staff, after the decision had been made, stated to counsel for the League that the characterization of the request as a petition for rule making was to afford an opportunity for public comment thereon. That explanation is difficult to

accept, however, since the Commission regularly affords the public an opportunity to comment on declaratory ruling requests, by issuing a simple public notice of the filing of a declaratory ruling request, and inviting comment thereon by a particular date. Contrary to the argument made in several of the comments filed to date, there was no intent whatsoever on the part of the League to stifle comment by filing a Declaratory Ruling Request pursuant to Section 1.2 of the Commission's rules. The intent, rather, was to seek clarification of the scope of an existing rule, thus to terminate controversy or remove uncertainty.

4. Whether or not intentionally, the staff of the Private Wireless Division has created a significant misperception among those who might comment on the petition as to the nature and the scope of it, and whether or not it proposes a substantive rule change necessitating notice and comment rulemaking under the Administrative Procedure Act². The League requests that the Commission immediately, and prior to the reply comment date in this proceeding, clarify by public notice that the Commission misidentified the League's request in the April 21, 1998 Public Notice, and that the League's request proposed no substantive rule changes whatsoever. It was not and is not the League's intent that this proceeding be considered a rulemaking proceeding because rulemaking is not proper in this context. If the Commission intends to proceed with rulemaking relative to the subjects contained herein, it should dismiss the League's

Declaratory Ruling request and initiate rulemaking on its own motion.³

² For example, the Comments of Ed Mitchell, KF7VY, state, at 2: "The ARRL's approach to this request would have avoided the public comment that this proposal deserves. The Commission is to be commended for recognizing that this issue deserves wider public discussion and for turning this request into a rulemaking proposal."

³ Though the Commission is not required to issue a Declaratory Ruling simply because it is asked for one, it is within the discretion of the Commission to issue such order upon a proposal from one who notes a controversy or uncertainty sufficiently crystallized to support such. *Fox Television Stations, Inc.* 73 RR 2d 697 (1993); *Yale Broadcasting Company v. FCC*, 478 F. 2d 594, 602 (D.C. Cir. 1973).

III. Voluntary Band Plans Are Indispensable in the Amateur Service

And Proper Adherence Thereto Requires the Commission's Support

5. The Commission's rules now require, and have long required, the cooperation of each station licensee and each control operator in the selection of transmitting "channels" and in making the most effective use of any station [47 C.F.R. §97.101(b)]. This is a requirement that, by its very nature, presumes cooperative planning among the varied, and potentially conflicting, uses of amateur bands and shared-frequency operation. Amateurs generally have responded, as the Commission has anticipated, by the *cooperative* development of voluntary band plans for High Frequency, Very High Frequency, Ultra-High Frequency and Microwave bands. These plans are developed not by any League-dictated methods, nor are they the "League's plans". They are plans developed variously: (1) internationally, by international amateur radio societies working cooperatively, and adhered to internationally by agreement of amateurs; (2) on a national basis through the League's democratic procedures, working cooperatively with other amateur groups and individuals, including those not associated with the League; and (3) regionally and locally by groups of amateurs in those areas who are interested in activities on the band(s) in question. The plans are developed cooperatively and adhered to voluntarily, but they are necessary in order to assure the accommodation of all amateurs, in all of the varied on-air activities involved.

6. The process works with a varying degree of success from time to time, and no one suggests that the bandplanning processes in each locality, or even at the national and international level, are perfect. If a band plan is not generally accepted in a particular region or locality by amateurs in that area; if it fails to accommodate a particular type of amateur use or group of amateurs; or if a plan is not

generally adhered to on a national or international basis, no one would expect that compliance with it would be considered "good amateur practice". However, *the process is indispensable to any self-regulated radio service with shared allocations, and it is absolutely critical that the Commission understand and restate the importance of band plans, and compliance with band plans generally, as an element of "good amateur practice"*, as indeed Section 97.101(b) of the rules dictates. Indeed, the Commission has monitored the success of amateur band plans (described as "voluntary spectrum management"), and has found that the process "functions with considerable effectiveness in most instances." *Deregulation of Part 97 of the Commission's Rules*, 66 FCC 2d 207, 211-12 (1977).

7. The comments filed to date suffer the same flaw: they assume that the League, volunteer repeater coordinators, or some other entity, is or are attempting to either (1) make specific bandplans mandatory; or (2) accommodate certain uses to the exclusion or disaccommodation of others in amateur bands. Exactly the opposite is intended. Voluntary band plans should be voluntary, and adherence to them should remain voluntary. What the League intended in its Request, and what it requests now, is that the Commission note, as did the Chief, Private Radio Bureau, in 1983, that, given the widespread acceptance of band plans in the Amateur Service, operation not in harmony with those plans, which results in interference to other amateur uses, is not good amateur practice.

8. This does not require that any band plan become "mandatory" rather than voluntary. The League does not intend, and its Request does not require, that the requested declaratory ruling place any traveling amateur, perhaps unaware of specific repeater channelization in a region, or the local use of a particular FM frequency for packet radio rather than FM voice in a particular area, in a position of strict liability for an instance of transmitting at variance with an established band plan, even if a single instance results in interference. Some unintentional interference is to be expected in the Amateur

Service, and no one can expect interference-free operation in any band at all times, given the shared nature of the bands and diverse uses. However, if a traveling amateur is alerted that his or her operation in a given locality is (1) causing interference to established operations, and (2) at substantial variance from band plans agreed upon and adhered to by amateurs in that locality; and if that amateur repeatedly persists in such operation, no reasonable person could suggest that the operation is in accordance with "good amateur practice".

9. It is not unfair to criticize the procedures used by some regional or local band planning activities. Neither are band plans, be they international, national, regional or local, always adhered to by the majority of amateurs affected by them. That is a self-correcting problem, however. If a particular plan is not accepted generally by those affected, compliance with it cannot be reasonably considered to be good amateur practice. Amateurs dissatisfied with the procedures used in adopting or amending a band plan, or the with the substance of a particular plan, are not going to accept or adhere to it generally. Neither is the League's Request aimed at validating, or etching in stone, any band plan, or legitimizing any plan developed on a dictatorial basis by any entity. It is, rather, aimed at encouraging increased compliance with those band plans which are widely adhered to, and which have been developed cooperatively within the amateur community. If a particular plan does not fit those criteria, or if it becomes outdated, compliance with it cannot necessarily be construed to be "good amateur practice". Conversely, however, if a plan is generally accepted and adhered to, and if an individual repeatedly operates at substantial variance therefrom, which operation results in interference, that operation cannot be considered "good amateur practice", and the former Chief, Private Radio Bureau, so held.

10. Though the comments to date seem to characterize the matter as involving complex issues of due process and a change in the character of voluntary band plans, the declaratory ruling sought by the League involves no such issues or complexities. Nor does this bode ill for amateurs who might, from time to time, innocently operate at variance from voluntary band plans without knowledge of a local variation thereon. The League has no motive in this proceeding other than to encourage compliance with accepted, agreed-upon and cooperatively-established band plans by confirming that such operation is "good amateur practice." The need for confirming the Commission's previously stated policy in this regard is due to increased instances of interference caused by certain individuals who choose to operate outside generally accepted band plans. The League seeks to promote self-regulation in the Amateur Service, and believes that confirmation of previously stated Commission policy as requested will facilitate such.

IV. Conclusions

11. The Commission has caused confusion in the amateur community by its handling of the League's Request for Declaratory Ruling. At the same time, the comments filed to date in this proceeding, some of which predated the League's request, and thus were based only on presumptions of what the request might contain, reflect a misunderstanding of what is being requested. This misunderstanding has led commenters to presume that to grant the request would provide absolute authority on the part of the League, or volunteer repeater coordinators, to determine band plans which have the force of Commission regulations. Not so; nothing gives voluntary band plans any more force or effect than is afforded by the amateur community that accepts, rejects or modifies them. No repeater coordinator, coordination group, or other amateur group, including the League, dictates the structure of band plans. However, once a band plan is adopted internationally, nationally, regionally or locally by

the amateur community, and once operating patterns in accordance with those plans are established, individual compliance with those plans must be considered "good amateur practice." The Commission has so stated in the past under delegated authority, and the confirmation thereof by the Commission will remove uncertainty.

Therefore, the foregoing considered, the American Radio Relay League, Incorporated, respectfully requests that the Commission issue, at an early date, a Declaratory Ruling stating that "good amateur practice" anticipates compliance with the accepted voluntary international, national, and regional band plans adopted by cooperation and coordination among individuals and licensees in the Amateur Radio Service.

Respectfully submitted,

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