

EXHIBIT A
ARRL PETITION FOR RECONSIDERATION

**CIRCUMSTANCES AND CASE LAW SURROUNDING FCC
CHAIRMAN POWELL'S VISIT TO MANASSAS,
VIRGINIA ON OCTOBER 12, 2004**

On or about Friday, October 8, 2004, the following was discovered by ARRL on a TV Technology web site:

Date posted: 2004-10-08

FCC Chairman to Attend BPL Demo in Manassas, Va.

Two chief regulators will attend a demonstration of Broadband over Power Lines (BPL) technology, Tuesday, Oct. 12, at 9:30 a.m.

FCC Chairman Michael Powell and Federal Energy Regulatory Commission Chairman Pat Wood, III will view first-hand the BPL services offered by the City of Manassas, Va.

Manassas is one the first cities to offer high-speed Internet service over power lines.

There is concern in the broadcast community about interference from BPL, and the difficulties of getting it mitigated. Industry experts have said that while the law enjoins BPL providers from interfering with TV signals, enforcement has been lacking.

The event will begin at 9:30 a.m. at the Manassas Public Works building, 8500 Public Works Drive, Manassas, Va., and last approximately 90 minutes. The two chairmen will see the capabilities of BPL for Internet service, VoIP and utility and public works functions.

Directions to the Manassas Public Works Building can be obtained by contacting Meribeth McCarrick at the FCC at 202-418-0654 or Meribeth.Mccarrick@fcc.gov.

On that date, time being short due to the fact that Monday, October 11, 2004 was a Federal Holiday, and because the presentation was to have occurred early on October 12, 2004, counsel for ARRL sent a complaint via E-mail concerning the apparent, planned participation of Commission Chairman Michael K. Powell in a prohibited *ex parte* presentation on BPL. The presentation was to occur only two days prior to the scheduled Sunshine Act Agenda meeting, and clearly within the period in which presentations to decisionmaking personnel were prohibited. The E-mail complaint in advance of the *ex parte* presentation was addressed to Chairman Powell; his legal assistant; the FCC Office of Engineering and Technology Chief; the FCC Office of Engineering and Technology Deputy Chief; the FCC Inspector General; and the FCC General Counsel. No response from any of those addressees was received.¹ Telephone

¹ A subsequent telephone call from ARRL Counsel to the Inspector General resulted in a referral to the Office of the General Counsel, and specifically to an attorney there who did not return a telephone call to ARRL Counsel.

calls to the Office of the Chairman, to the Office of the General Counsel, to the Office of Engineering and Technology, and to the Media Office at FCC, went unanswered. It was, until late on Tuesday, October 12, 2004, impossible to verify from FCC offices, despite repeated efforts, that the Chairman did in fact attend the BPL demonstration in Manassas, Virginia, together with unspecified other Commission staff, including his Legal Assistant.

It was verified by staff of the City of Manassas, Virginia, and via certain print and broadcast network reporters, that the Chairman was in fact in attendance at the BPL demonstration at the City of Manassas, and that video of his participation was available. The presentation included a discussion by the Chairman concerning interference from BPL to licensed radio services (one of the main issues for resolution in the instant proceeding).

Because Commission Chairman Powell intentionally participated in the BPL presentation by the City of Manassas, Virginia, and because he either knew or should have known that his participation in that presentation is in clear violation of Section 1.1203 of the Commission's Rules, ARRL asserted in a motion filed October 12, 2004, asking the Chairman to recuse himself from consideration of a Report and Order in this proceeding, that the proceeding would otherwise be irrevocably tainted. ARRL thus requested that the Chairman recuse himself from any further participation in this proceeding, and that he not participate in the deliberations concerning this matter at the Open Meeting on October 14, 2004. This violation could not be cured by a public notice pursuant to the provisions of Section 1.1212 of the Commission's Rules, given that the totality of the presentation was not written; it involved innumerable and unidentified advocates; and because the interested parties in the instant proceeding were not present at the prohibited presentation in Manassas that day.

Late on October 13, 2004 (too late to seek any judicial relief prior to the Commission's Open Meeting), the Commission's General Counsel sent by facsimile to the office of Counsel for ARRL a letter denying both the October 8, 2004 complaint of violation of the *ex parte* rules by FCC Chairman Powell and the October 12, 2004 *Motion for Recusal of Chairman Michael K. Powell*.

The applicable rule, Section 1.1203(a), states as follows:

§ 1.1203 Sunshine period prohibition.

(a) With respect to any Commission proceeding, all presentations to decision-makers concerning matters listed on a Sunshine Agenda, whether *ex parte* or not, are prohibited during the period prescribed in paragraph (b) of this section unless:

(1) the presentation is exempt under § 1.1204(a)...

The remainder of the exceptions in this section are not relevant in this instance, nor did the Commission's General Counsel claim them to be. No portion of Section 1.1204(a) applied to the Chairman's attendance at the BPL demonstration in Manassas during the prohibited period.

This demonstration, hosted by the City of Manassas, included a press conference touting BPL, and a question and answer session involving Chairman Powell and FERC Chairman Pat Wood, at which the interference potential of BPL was discussed. It is unclear what oral information was provided to Powell at the Manassas meeting on October 12th or by whom. It is further impossible to determine what information was presented to Powell by FERC Chairman Wood or by members of the Manassas City Government. Press reports ARRL has obtained indicate that Powell discussed lowering uncertainty about regulation so as to spur development of BPL. According to a news release from The City of Manassas Director of Utilities, Alan Todd, the purpose of the demonstration was to "showcase BPL for utility and public works functions, and to show Chairman Powell "the benefits our residents and businesses have enjoyed and will continue to reap with BPL technology." Powell also reportedly commented on FCC testing of interference parameters and the potential of BPL for interference.

The Commission's General Counsel's letter cites only one subsection of Section 1.1204(a) that allegedly applies to this matter. Section 1.1204(a)(10) exempts presentations that "are requested by (or made with the advance approval of) the Commission or staff for the clarification or adduction of evidence, or for resolution of issues, including possible settlement, subject to the following limitations..." Among the limitations regarding oral presentations is a disclosure requirement, including a detailed summary of the presentation filed in the proceeding, with an opportunity to respond by other parties.

According to the Commission's General Counsel, "[a]ny presentations made pursuant to Chairman Powell's voluntary attendance at the demonstration were authorized by him and therefore fall within the exception." On this basis, then, the Chairman can determine whether or not he wishes to comply with Section 1.1203 by either asking for or refraining from asking for the presentation. This renders Section 1.1203 effectively meaningless, and encourages collusion, if it can be manipulated by the Chairman to suit his own views or personal interest in a given proceeding. Section 1.1204(a)(10) was formerly Section 1.1204(b)(7). According to *Comcast Cable Communications, Inc.*, 11 FCC Rcd. 4029 (1995), the purpose of the former iteration of that same exception is to permit the staff to seek the narrowing of issues in a proceeding, to attempt to settle a case, or to supplement the record, or so that the proceeding could be resolved on the basis of a more complete record, or through more expeditious procedures. A note to that section clarifies that if any such contact elicits new information, that information must be served on all parties to the proceeding. The purpose of this provision is to ensure that interested parties have fair notice of the substance of the new information that has been provided and thus have a fair opportunity to provide their own views on the information. From that case decision, two arguments suggest themselves. First, the purpose of the exception is not to allow the FCC Chairman to have a news conference, or

to receive *ex parte* arguments from innumerable persons associated with a local government and its BPL provider whose interests are in touting an unlicensed technology and discounting interference concerns of incumbent licensees. Rather, the purpose is to obtain missing or needed information before a decision is reached concerning an evidentiary or informational item (apparently principally in adjudicatory matters, which this proceeding is not). Second, the disclosure requirement would have necessitated a far different circumstance than the Chairman's attendance at a demonstration involving other Federal agencies and advocates of one side of an issue. No time existed prior to the FCC Open Meeting to make any disclosure of the oral presentations made, the arguments offered, or the assertions concerning interference, and the parties to this docket proceeding, numbering over 5,000, including ARRL, were not given any opportunity to respond to the presentations made.

According to *In the Matter of New York Telephone Company*, 69 RR 2d 428, 6 FCC Rcd. 3303 (1991), the purpose of the exception under (former) Section 1.1204(b)(7) was to "avoid constraints upon agency staff in...attempting to reach settlement agreements...." or resolving issues. This case too reiterated that any new information offered during an oral presentation under the exception must be disclosed. "New information" in this context means only new facts or arguments not already reflected in the pleadings. However, in the context of the Chairman's attendance at this meeting, it is impossible to determine what arguments, points or allegations were made by innumerable presenters, and of course no summary of the presentation was made in the record, and no opportunity existed for any of the thousands of interested parties to rebut any claim or argument made. The Chairman did not list all persons with whom he spoke during his visit, nor those presentations made to his Legal Assistant, who accompanied him. Whether there was other Commission staff in attendance is unclear.

The same discussion of the basis for the exception which is now Section 1.1204(a)(10) is in *In the Matter of Cox Communications, Inc. and Times Mirror Cable Television, Inc.*, 11 FCC Rcd. 4029 (1995). The Commission held that the purpose of the exception is to permit the staff to seek the narrowing of issues in a proceeding, to attempt to settle a case or to supplement the record, so that the proceeding can be resolved on the basis of a more complete record, or through more expeditious procedures. If any such contact elicits new information (which in this case it obviously did, since some of that information was alluded to by the Chairman at the Open Meeting, which ARRL representatives heard for the first time there) that information must be served on all parties to the proceeding. That was not done in this case. However, where it is burdensome to do so (as in this case where there are more than 5,000 commenters) the Commission has the option of releasing a public notice notifying the public that new information was received and placing it in the record, available for public inspection. That of course was not done here, nor could it have been on a practical basis, since the information to the Chairman was from a multitude of sources. At the very least, the Commission could have forestalled the proceeding, pending an opportunity for interested parties to examine the new information and comment on it. That did not happen either.

The legality of the Section 1.1204(b)(7), now 1.1204(a)(10) procedures were upheld in *New York State Department of Law v. FCC*, 984 F. 2d 1209 (D.C. Cir. 1993). In that case, the Court cited FCC rules and held that an oral contact is *ex parte* if the agency fails to provide “the parties to the proceeding” with “advance notice and an opportunity to be present”. The Commission violates its *ex parte* rules only if the proceeding is restricted and if the agency fails properly to communicate with a “party” to the proceeding. The exception is for the purpose of achieving settlement in disputed (typically adjudicatory) proceedings. There is nothing in FCC jurisprudence which would indicate that the cited exception is applicable to rulemaking where the Chairman elects to participate in a demonstration at a municipality before innumerable presenters two days prior to an FCC open meeting which includes on the agenda the very issue about which the Chairman was receiving open-ended oral input. Even if the exception applied, and even if the Chairman can thwart Section 1.1203(a) by his own fiat (a highly dubious interpretation which ARRL rejects) the application of the exception is premised upon public disclosure of new information adduced. No public notice was issued of the presentations made, and the parties to this docket proceeding were not provided with a notice of any information that was adduced, all of which was arguably relevant to the parties which filed comments in the docket proceeding, including ARRL. It is therefore urged that (1) the exception is not applicable, and (2) even if it was, the very specific disclosure requirements that are triggered by the exception were not complied with in this case.