

INITIAL VERSION

ORAL ARGUMENT NOT YET SCHEDULED

No. 06-1343

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE AMERICAN RADIO RELAY LEAGUE, INC., PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF FOR PETITIONER AMERICAN RADIO RELAY LEAGUE, INC.

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GLOSSARY

Access BPL: Access Broadband over Power Lines, a carrier current system that provides data communications over the electricity distribution grid by sending RF energy at frequencies between 1.705 MHz and 80 MHz over an electric utility's medium- or low-voltage lines. 47 C.F.R. § 15.3(ff).

Access BPL Order: Report and Order, *Amendment of Part 15 regarding new requirements and measurement guidelines for Access Broadband over Power Line Systems; Carrier Current Systems, including Broadband over Power Line Systems*, 19 FCC Rcd 21,265 (2004).

ARRL: American Radio Relay League, Inc., the national membership association for amateur radio operators. See <http://www.arrl.org>.

APA: Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*

Carrier current system: A system “that transmits radio frequency energy by conduction over the electric power lines. A carrier current system can be designed such that the signals are received by conduction directly from connection to the electric power lines (unintentional radiator) or the signals are received over-the-air due to radiation of the radio frequency signals from the electric power lines (intentional radiator).” 47 C.F.R. § 15.3(f).

dB: Decibel, a measure of signal strength.

dB per decade: Decibels per decade, a measure of the rate at which signal strength decays as distance increases from the source. See *Access BPL Order* ¶ 90 n.181. A “decade” refers to a ten-fold increase in distance.

FCC or Commission: Federal Communications Commission.

FOIA: Freedom of Information Act, 5 U.S.C. § 552.

HF: High Frequency, the band of frequencies between 3 and 30 MHz. See 47 C.F.R. § 2.101 table. In this brief, for purposes of convenience, BPL transmissions below 3 MHz are grouped together with the HF band. See n.9 *infra*.

JA: Joint Appendix

kHz: Kilohertz. One kilohertz equals a frequency of 1,000 cycles per second.

Low Voltage Line: A low voltage power line carries 120 or 240 volts from a distribution transformer to a customer's premises. 47 C.F.R. § 15.603(e).

Medium Voltage Line: A medium voltage power line carries between 1,000 to 40,000 volts from a power substation to neighborhoods. Medium voltage lines may be overhead or underground, depending on the power grid network topology. 47 C.F.R. § 15.603(f).

MHz: Megahertz. One megahertz equals a frequency of 1,000,000 cycles per second.

NTIA: National Telecommunications and Information Administration, an agency within the Department of Commerce. See <http://www.ntia.doc.gov>.

OFCOM: Office of Communications, the independent regulator and competition authority for the United Kingdom communications industries. See <http://www.ofcom.org.uk>.

Reconsideration Order: Memorandum Opinion and Order, *Amendment of Part 15 regarding new requirements and measurement guidelines for Access Broadband over Power Line Systems; Carrier Current Systems, including Broadband over Power Line Systems*, 21 FCC Rcd 9308 (2006).

RF: Radio Frequency energy, electromagnetic energy at any frequency in the radio spectrum between 9 kHz and 3,000,000 MHz. 47 C.F.R. § 15.3(u).

PERTINENT STATUTES AND REGULATIONS

See attached addendum, along with the addendum in the principal brief.

SUMMARY OF ARGUMENT

I. The briefs in opposition fail to join ARRL's statutory arguments. ARRL established that the *Orders* under review depart from the FCC's longstanding reading of section 301 of the Communications Act without acknowledgement or justification. In response, the FCC and its intervenors engage in misdirection — rebutting hyperbolic arguments ARRL never made, refusing to address the precedents ARRL cited, and attempting to rewrite the *Orders* as if they made factual rather than legal determinations.

A. For decades, the FCC has read section 301 to mandate two restrictions on would-be unlicensed users of spectrum: an *ex ante* determination that the proposed operations will not have a significant potential for causing harmful interference to licensed users, and an *ex post* requirement that, if any harmful interference *does* arise, the unlicensed operations cease immediately. For the first time ever, the *Orders* eliminate the second protection for a class of licensees: mobile stations. The FCC's brief does not even acknowledge the passage in the *Reconsideration Order* that does this. Instead, the FCC and intervenors invent a nonexistent dispute over the *ex ante* standard for authorizing unlicensed operations.

The FCC and intervenors also suggest that the *Orders* embody a technical finding that BPL emissions will *never* cause harmful interference to licensed mobile users. But no such finding exists. The briefs ignore the express acknowledgement in the *Reconsideration Order* that “harmful interference ... may occur” even where BPL systems meet the FCC's technical standards and that when it occurs “we will not provide further protection to mobile operations.” *Reconsideration Order* ¶ 3 (JA ___).

The FCC and intervenors also suggest that licensed mobile users do not need the protection of the cease-operations rule because mobile users suffering interference can move

elsewhere. But the FCC has never before put the burden on the *license-holder* to move away from an unlicensed interferor; to the contrary, its rules require the interferor to cease interfering immediately. Moreover, BPL systems are not singular, easily avoidable devices. A BPL system deploys radiation-emitting devices *ubiquitously* throughout a service area, making it difficult to avoid harmful interference and impossible to conclude that harmful interference will “never” occur.

B. The FCC’s brief fails to defend the *Reconsideration Order*’s holding that unintentional radiators like BPL devices “as such” are outside the scope of section 301’s license requirement. The brief actually admits the contrary — that unintentional radiators *are* within section 301. (The intervenors do defend the *Reconsideration Order*’s erroneous holding but cite nothing to support their argument.) The FCC’s brief talks about section 302 but fails to acknowledge that section 302, which extended the FCC’s authority to cover the *manufacture and sale* of interfering devices, is irrelevant to the scope of section 301.

II. The FCC fails to justify its nondisclosure of significant portions of the technical studies on which the *Orders* rely. Instead, the FCC attacks a straw man, suggesting that ARRL is after “every internal document in its entirety that the agency’s staff prepares relating to a rule making proceeding.” FCC Br. 45. To the contrary, ARRL merely seeks access to the *full* texts of the studies the FCC identified and cited as the basis for its conclusions. An agency may not cherry-pick the pages of the studies on which it relies, disclosing the ones that support its conclusions and redacting the others.

III. The FCC’s brief requests deference to the agency’s technical judgment in adopting an extrapolation factor to measure interference. But the agency is not entitled to

deference where it refuses to consider substantial evidence submitted to it — in this instance, at the agency's invitation — and fails to consider a responsible alternative proposal. Three studies by the FCC's UK counterpart, all reaching a conclusion opposite the FCC's, plainly were significant enough to warrant consideration. And ARRL's proposed sliding-scale extrapolation factor was an alternative entitled to consideration and a reasoned explanation for its rejection. Yet the *Orders* ignore both, and, remarkably, so does the FCC's brief.

IV. None of these departures from FCC precedent and from proper administrative procedure were necessary to allow BPL to prove itself in the marketplace. ARRL and its supporting broadcast intervenors proposed a win-win solution: to authorize BPL but confine it to a generous frequency band that does not present these interference problems. The largest BPL operator has chosen to design its operations that way and others could adopt the same configuration. Yet the *Reconsideration Order* brushes this alternative aside with two conclusory sentences. When the *Orders* are remanded, the Court should direct the FCC to give this alternative the consideration the law requires.

