

*From ARRL Headquarters
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To all radio amateurs.*

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ARLB008 Court Finds FCC Violated Administrative Procedure Act in BPL Decision.

The US Court of Appeals for the District of Columbia Circuit today released its decision on the ARRL's Petition for Review of the FCC's Orders adopting rules governing broadband over power line (BPL) systems. The Court agreed with the ARRL on two major points and remanded the rules to the Commission. Writing for the three-judge panel of Circuit Judges Rogers, Tatel and Kavanaugh, Judge Rogers summarized: "The Commission failed to satisfy the notice and comment requirements of the Administrative Procedure Act ('APA') by redacting studies on which it relied in promulgating the rule and failed to provide a reasoned explanation for its choice of the extrapolation factor for measuring Access BPL emissions."

The Court agreed with the ARRL that the FCC had failed to comply with the APA by not fully disclosing for public comment the staff studies on which it relied. The Court also agreed with the ARRL that the Commission erred in not providing a reasoned justification for its choice of an extrapolation factor of 40 dB per decade for Access BPL systems and in offering "no reasoned explanation for its dismissal of empirical data that was submitted at its invitation."

The Court was not persuaded by the ARRL's arguments on two other points, on which it found that the Commission had acted within its discretion.

The conclusion that the FCC violated the APA hinges on case law. "It would appear to be a fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment," the Court said, adding that "there is no APA precedent allowing an agency to cherry-pick a study on which it has chosen to rely in part."

The Court continued, "The League has met its burden to demonstrate prejudice by showing that it 'has something useful to

say' regarding the unredacted studies citation omitted that may allow it to 'mount a credible challenge' if given the opportunity to comment."

Information withheld by the Commission included material under the headings "New Information Arguing for Caution on HF BPL" and "BPL Spectrum Tradeoffs." The Court concluded that "no precedent sanctions such a 'hide and seek' application of the APA's notice and comment requirements."

With regard to the extrapolation factor, the Court ordered: "On remand, the Commission shall either provide a reasoned justification for retaining an extrapolation factor of 40 dB per decade for Access BPL systems sufficient to indicate that it has grappled with the 2005 studies, or adopt another factor and provide a reasoned explanation for it." The studies in question were conducted by the Office of Communications, the FCC's counterpart in the United Kingdom, and were submitted by the ARRL, along with the League's own analysis showing that an extrapolation factor closer to 20 dB per decade was more appropriate, as part of the record in its petition for reconsideration of the FCC's BPL Order. The Court said that the FCC "summarily dismissed" this data in a manner that "cannot substitute for a reasoned explanation." The Court also noted that the record in the FCC proceeding included a study by the National Telecommunications and Information Administration that "itself casts doubt on the Commission's decision."

The briefs for the ARRL were prepared by a team of attorneys at WilmerHale, a firm with extensive appellate experience, with assistance from ARRL General Counsel Christopher D. Imlay, W3KD.

Oral argument for the ARRL was conducted by Jonathan J. Frankel of WilmerHale. Oral argument was heard on October 23, 2007; the Court's decision was released more than six months later.

After reading the decision, General Counsel Imlay observed, "The decision of the Court of Appeals, though long in coming, was well worth the wait. It is obvious that the FCC was overzealous in its advocacy of BPL, and that resulted in a rather blatant cover-up of the technical facts surrounding its interference potential. Both BPL and Amateur Radio would be better off had the FCC dealt with the interference potential in an honest and forthright manner at the outset. Now there is an opportunity to finally establish some rules that will allow BPL to proceed, if it can in configurations that don't

expose licensed radio services to preclusive interference in the HF bands."

ARRL Chief Executive Officer David Sumner, K1ZZ, added: "We are gratified that the Court decided to hold the FCC's feet to the fire on such a technical issue as the 40 dB per decade extrapolation factor. It is also gratifying to read the Court's strong support for the principles underlying the Administrative Procedure Act. Now that the Commission has been ordered to do what it should have done in the first place, we look forward to participating in the proceedings on remand, and to helping to craft rules that will provide licensed radio services with the interference protection they are entitled to under law."

ARRL President Joel Harrison, W5ZN, concluded: "I am very pleased that the Court saw through the FCC's smoke screen and its withholding of valid engineering data that may contradict their position that the interference potential of BPL to Amateur Radio and public safety communications is minimal. The remand back to the FCC regarding their use of an inappropriate extrapolation factor validates the technical competence of Amateur Radio operators and especially of the ARRL Lab under the direction of Ed Hare, W1RFI. We are grateful for the work of our legal team and especially for the unflagging support of the ARRL membership as we fought the odds in pursuing this appeal."

Nota

Este comunicado de la ARRL se ha puesto en su lengua original y no se ha traducido para evitar errores tipográficos.

U.R.V.