

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

In the Matter of)	
)	
CARRIER CURRENT SYSTEMS)	ET Docket No. 03-104
INCLUDING BROADBAND OVER POWER)	
LINE SYSTEMS)	
)	
AMENDMENT OF PART 15 REGARDING)	ET Docket No. 04-37
NEW REQUIREMENTS AND)	
MEASUREMENT GUIDELINES FOR)	
ACCESS BROADBAND OVER POWER LINE)	
SYSTEMS)	

To: The Commission

MOTION FOR RECUSAL OF CHAIRMAN MICHAEL K. POWELL

ARRL, the National Association for Amateur Radio, also known as the American Radio Relay League, Incorporated (ARRL), by counsel, hereby respectfully moves that Commission Chairman Michael K. Powell recuse himself from further participation in the captioned proceeding, and specifically from any participation in the Commission's deliberations concerning a draft Report and Order in the proceeding, scheduled for consideration on October 14, 2004 at the Commission's Open Meeting. As good cause therefor, ARRL submits as follows:

1. This proceeding is now the subject of a *Notice of Proposed Rule Making* (the Notice), FCC 04-29, released February 23, 2004, 69 Fed. Reg.12612 *et seq.* The Notice proposes to amend Part 15 of the Commission's rules governing unlicensed radio frequency (RF) devices to adopt new requirements and measurement guidelines for carrier current systems that provide access to broadband services using electric utilities'

power lines, known as Broadband Over Power Line (BPL) technology. The Notice states, at paragraph 52 thereof, as follows:

52. This is a permit-but-disclose notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's Rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.2306(a).

Section 1.1203 of the Commission's Rules, 47 C.F.R. § 1.1203, prohibits all presentations to decisionmakers concerning matters listed on a Sunshine Act Agenda. Whether *ex parte* or not, during the period from the release of the public notice that a matter has been placed on the Sunshine Act agenda until the Commission releases the text of a decision or order relating to the matter, or until the Commission releases an order deleting that item from the Sunshine Act Agenda.

2. The Commission, on Thursday, October 7, 2004, released a Sunshine Act Agenda for its Open Meeting. The first item on that agenda is the instant docket proceeding. At the Open Commission Meeting, the Commission will consider a Report and Order addressing the issues in the Notice in this proceeding. Therefore, from Thursday, October 7, 2004 until the release of the text of any Report and Order adopted at the Open Meeting on October 14, 2004, or until this docket proceeding is removed from the Open Meeting Agenda, any presentation to decisionmakers concerning this proceeding, or the subject matter thereof, is prohibited.

3. 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, undersigned counsel 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 (See Exhibit A, attached). 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 are prohibited. The e-mail complaint was addressed to Chairman Powell; his legal assistant Sheryl Wilkerson, Esquire; FCC Office of Engineering and Technology Chief Edmond Thomas; FCC Office of Engineering and Technology Deputy Chief Bruce Franca; FCC Inspector General H. Walker Feaster; and FCC General Counsel John Rogovin, Esquire. To date, no response

from any of these addressees has been received.¹ Telephone 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, have gone unanswered. It was, until late today, 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, Sheryl Wilkerson, Esquire.

4. Notwithstanding the complete absence of any cooperation from any of the addressees of the attached E-mail complaint, 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 this morning at the BPL demonstration at the City of Manassas, and that video of his participation is available. On information and belief, 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).

5. 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, the Commission's consideration of a Report and Order in this proceeding is irrevocably tainted. ARRL therefore respectfully requests that Commission Chairman Michael K. Powell 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 cannot be cured by a public

¹ A subsequent telephone call from undersigned counsel to the Inspector General resulted in a referral to the Office of the General Counsel, and specifically to Patrick Carney, Esquire, who did not return a telephone call to undersigned counsel.

notice pursuant to the provisions of Section 1.1212 of the Commission's Rules, given that the presentation was not written, and involved innumerable and unidentified advocates, and because the interested parties in the instant proceeding were not present at the prohibited presentation in Manassas today. Other appropriate sanctions should be investigated and pursued by the Commission's General Counsel in connection with this matter, pursuant to Section 1.1216 and Part 19 of the Commission's rules. However, in any event, the Chairman must recuse himself from any further participation in this proceeding immediately.

Therefore, the foregoing considered, ARRL, the National Association for Amateur Radio, respectfully requests that Commission Chairman Michael K. Powell recuse himself from participating in the captioned proceeding, both generally and specifically with respect to consideration of any Report and Order at an Open Meeting scheduled to occur October 12, 2004, dealing with rules governing Broadband Over Power Line systems. Because of the short interval between the filing of this Motion and the Commission's Open Meeting agenda, this Motion is being filed on an emergency basis, and will be served on Commission staff by e-mail.

Respectfully submitted,

**ARRL, THE NATIONAL ASSOCIATION FOR
AMATEUR RADIO**

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By: Christopher D.
Imlay
Christopher D. Imlay
Its General Counsel

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October 12, 2004

EXHIBIT A

Subj: **Complaint of Violation of Ex Parte Rules Concerning ET Docket 04-37**
Date: 10/8/2004 5:20:17 PM Eastern Standard Time
From:
[W3KD](#)
To: Michael.Powell@fcc.gov, Sheryl.Wilkerson@fcc.gov, Edmond.Thomas@fcc.gov,
Bruce.Franca@fcc.gov
CC: Walker.Feaster@fcc.gov, John.Rogovin@fcc.gov, arri-odv@arri.org

Greetings.

The following announcement was noted on the TV Technology web site, having been posted today, October 8, 2004. Assuming that this notice is accurate, ARRL, the National Association for Amateur Radio, protests in the strongest possible terms the attendance of the Chairman of the Commission at a demonstration of Broadband over Power Line (BPL) technology a mere two days prior to the Commission's consideration of a Report and Order in ET Docket 04-37. The Commission's Open Meeting Agenda was released October 7, 2004 and includes the BPL item.

Section 1.1203 of the Commission's Rules, 47 C.F.R. § 1.1203, prohibits all presentations to decisionmakers concerning matters listed on a Sunshine Act Agenda. Whether ex parte or not, during the period from the release of the public notice that a matter has been placed on the Sunshine Act agenda until the Commission releases the text of a decision or order relating to the matter, or until the Commission releases an order deleting that item from the Sunshine Act agenda.

The Chairman's attendance at any BPL demonstration in Manassas or elsewhere would be so clear a violation of the ex parte rules that ARRL is constrained to strenuously object. ARRL urges the Chairman in the strongest possible terms not to attend this demonstration. If the demonstration goes forward and the Chairman attends, the Docket 04-37 proceeding would be fatally tainted, and, among other things, the Chairman will be asked by ARRL to recuse himself from any deliberation thereon. A copy of this e-mail will be forwarded to the Inspector General. Please inform the undersigned of the status of this matter, and the accuracy of the above-quoted excerpt.

Respectfully submitted,

Christopher D. Imlay
General Counsel, ARRL

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CERTIFICATE OF SERVICE

I, Christopher D. Imlay, do hereby certify under penalty of perjury that I caused to be served on the following, by e-mail, a complete copy of the foregoing *Motion for Recusal of Chairman Michael K. Powell*, this 12th day of October, 2004:

John A. Rogovin, Esquire
General Counsel
Federal Communications Commission
445-12th Street, S.W.
Washington, D.C. 20554

Patrick J. Carney, Esquire
Office of the General Counsel
Administrative Law Division
Federal Communications Commission
445-12th Street, S.W.
Washington, D.C. 20554

H. Walker Feaster, III
Inspector General
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All Commissioners

Christopher D. Imlay