

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Amendment of Part 97 of the Commission's Rules
Regarding Amateur Radio Service
Communications During Government Disaster
Drills
WP Docket No. 10-72

NOTICE OF PROPOSED RULEMAKING

Adopted: March 18, 2010

Released: March 24, 2010

Comment Date: (30 days after publication in the Federal Register).
Reply Comment Date: (45 days after publication in the Federal Register).

By the Commission:

I. INTRODUCTION

1. In this Notice of Proposed Rulemaking, we propose to amend the Commission's amateur radio service rules with respect to amateur radio operations during government-sponsored emergency preparedness and disaster readiness drills and tests. Although public safety land mobile radio systems are the primary means of radio-based communications for emergency responders, experience has shown that amateur radio has played an important role in preparation for, during, and in the aftermath of, natural and man-made emergencies and disasters. Current rules provide for amateur radio use during emergencies. At the same time, the rules prohibit communications in which the station licensee or control operator has a pecuniary interest, including communications on behalf of an employer. While there are some exceptions to this prohibition, there is none that would permit amateur station control operators who are employees of public safety agencies and other entities, such as hospitals, to participate in drills and tests in preparation for such emergency situations and transmit messages on behalf of their employers during such drills and tests. Accordingly, we propose to amend the rules to provide that, under certain limited conditions, amateur radio operators may transmit messages during emergency and disaster preparedness drills, regardless of whether the operators are employees of entities participating in the drill.

II. BACKGROUND

2. One of the fundamental principles underlying the amateur radio service is the "[r]ecognition and enhancement of the value of the amateur service to the public as a voluntary

1 See 47 C.F.R. Part 97.

2 In this regard, Bureau staff recently issued a Public Notice providing guidance for requesting waiver relief to facilitate government-sponsored emergency preparedness and disaster drills. See Amateur Service Communications During Government Disaster Drills, Public Notice, DA 09-2259 (WTB, PSHSB, EB rel. Oct. 20, 2009) (Disaster Drills Public Notice). The waiver process outlined in this Public Notice remains available throughout this rulemaking proceeding.

noncommercial communication service, particularly with respect to providing emergency communications.”³ Further, the rules state that “[n]o provision of these rules prevents the use by an amateur station of any means of radio communication at its disposal to provide essential communication needs in connection with the immediate safety of human life and immediate protection of property when normal communication systems are not available.”⁴ Indeed, amateur radio operators provide essential communications links and facilitate relief actions in disaster situations. While land mobile radio services are the primary means of conducting emergency communications, amateur radio plays a unique and critical role when these primary facilities are damaged, overloaded, or destroyed.⁵ For example, during Hurricane Katrina, amateur radio operators volunteered to support many agencies, such as the Federal Emergency Management Agency, the National Weather Service, and the American Red Cross. Amateur radio stations provided urgently needed wireless communications in many locations where there was no other means of communicating and also provided other technical aid to the communities affected by Hurricane Katrina.⁶

3. Since amateur radio is often an essential element of emergency preparedness and response, many state and local governments and public safety agencies incorporate amateur radio operators and the communication capabilities of the amateur service into their emergency planning. In this regard, some entities, such as hospitals, emergency operations centers, and police, fire, and emergency medical service stations, have emphasized the participation of their employees who are amateur station operators in emergency and disaster drills and tests. For example, a representative of the New Orleans Urban Area Security Initiative recently emphasized the importance of conducting emergency drills and the need for amateur participation.⁷

4. The Commission’s rules expressly permit operation of amateur stations for public service communications during emergencies, and on a voluntary basis during drills and exercises in preparation for such emergencies. Given, however, that the Amateur Radio Service is primarily designated for “amateurs, that is, duly authorized persons interested in radio technique solely with a personal aim and without pecuniary interest,”⁸ the rules expressly prohibit amateur stations from transmitting

³ 47 C.F.R. § 97.1(a).

⁴ 47 C.F.R. § 97.403.

⁵ See Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, *Order*, EB Docket No. 06-119; WC Docket No. 06-63, 22 FCC Rcd 10541, 10576 ¶ 111 (2007) (noting that the amateur radio community played an important role in the aftermath of Hurricane Katrina and other disasters).

⁶ See Letter from Kenneth Hughes, Communications Planner, New Orleans Region Urban Area Security Initiative, to Jamie A. Barnett, Chief, Public Safety and Homeland Security Bureau, Federal Communications Commission, dated November 13, 2009, WP Docket No. 09-XX (*Hughes Letter*) (noting that although Hurricane Katrina rendered local land mobile radio systems inoperative, amateur radios became the “only functioning life-line within the greater New Orleans area,” for example by use at hospitals to “arrange for emergency airlifts for critical patients”).

⁷ See *Hughes Letter* at 1 (citing to the “importance of having amateur radio operators not only available during emergencies, but intimately engaged in establishing governance and other standard operating procedures, and, most importantly, in training and exercises, all in accordance with the National Emergency Communications Plan”). We are also in receipt of a related Petition for Rulemaking submitted by the Amateur Radio Policy Committee (ARPC). See Petition for Rule Making, WP Docket No. 09-XX (filed Oct. 15, 2009) (seeking to amend the rules to permit amateur transmissions “necessary for disaster relief or emergency response, including training exercises, planning, drills or tests, without regard to whether the amateur operator has related employment, where the transmissions are for the exclusive use of amateur radio operators for noncommercial purposes.”). We have incorporated the ARPC Petition into the docket of this proceeding.

⁸ See 47 C.F.R. § 97.3(a)(4).

communications “in which the station licensee or control operator has a pecuniary interest, including communications on behalf of an employer.”⁹ Accordingly, public safety entities seeking to have employees operate amateur stations during government-sponsored emergency preparedness and disaster drills presently must request a waiver.¹⁰

III. DISCUSSION

5. We seek comment on whether to amend the rules to permit amateur radio operators to participate in government-sponsored emergency and disaster preparedness drills and tests, regardless of whether the operators are employees of the entities participating in the drill or test. The rules already recognize the importance of amateur radio in emergencies, and permit participation in such drills and tests by volunteers (*i.e.*, non-employees of participating entities).¹¹ As noted above, experience has shown that amateur operations can and have played an essential role in protecting the safety of life and property during emergency situations and disasters. And as evidenced by recent waiver requests, state and local government public safety agencies and other entities often conduct disaster and emergency preparedness drills to be best-prepared for such eventualities.¹² The proposed rule would obviate the need for a waiver in such instances by allowing employees of public safety agencies and other entities to operate amateur stations for testing and drilling of emergency communications preparedness. We thus tentatively conclude that employee status should not preclude or prevent participation in government-sponsored emergency and disaster tests and drills. Further, we tentatively conclude that extending authority to operate amateur stations during such drills will enhance emergency preparedness and thus serve the public interest.

6. In reaching these tentative conclusions, we do not disturb the core principle of the amateur radio service as a voluntary, non-commercial communication service carried out by duly authorized persons interested in radio technique with a personal aim and without pecuniary interest.¹³ Rather, we believe that the public interest will be served by a narrow exception to the prohibition on transmitting amateur communications in which the station control operator has a pecuniary interest or employment relationship, and that such an exception is consistent with the intent of the amateur radio service rules.¹⁴ Accordingly, we propose that amateur operations in connection with emergency drills be limited to the duration and scope of the drill, test or exercise being conducted, and operational testing immediately prior to the drill, test or exercise.

⁹ See 47 C.F.R. § 97.113(a)(3). The prohibition was adopted in its current form in 1993. See Amendment of Part 97 of the Commission’s Rules to Relax Restrictions on the Scope of Permissible Communications in the Amateur Service, *Report and Order*, PR Docket No. 92-136, 8 FCC Rcd 5072 (1993).

¹⁰ See *Disaster Drills Public Notice*.

¹¹ See 47 C.F.R. §§ 97.1, 97.111(a)(2), 97.401-407.

¹² See, *e.g.*, the following letters from the Deputy Chief, Mobility Division, Wireless Telecommunications Bureau, granting waiver requests: Letter to Frederick A. Zacher, DeWitt County Emergency Services and Disaster Agency, DA 09-2420 (Nov. 16, 2009); Letter to Matt May, Assistant Director, Johnson County Emergency Management and Homeland Security, DA 09-2377 (Nov. 4, 2009); Letter to Dale D. Rowley, Director, Waldo County Emergency Management Agency, DA 09-2332 (Oct. 28, 2009); Letter to Robert L. Stephens, Emergency Communications Supervisor, Kentucky Department of Military Affairs, DA 09-2302 (Oct. 27, 2009).

¹³ See 47 C.F.R. §§ 97.1, 97.3(a)(4).

¹⁴ We note that the Commission has carved out other narrow exceptions to the prohibition on transmission of amateur communications in which the station control operator has a pecuniary interest. See 47 C.F.R. § 97.113(c) (permitting control operators who are employed in teaching positions to transmit amateur communications as part of classroom instruction at an educational institution), (d) (permitting the control operator of a club station to accept compensation for transmitting telegraphy practice or informational bulletins under certain conditions).

7. Furthermore, we propose that the emergency tests and drills must be sponsored by Federal, state, or local governments or agencies, in order to limit the narrow exception to ensure that drills further public safety. We note, however, that there may be circumstances where conducting emergency drills for disaster planning purposes, even if not government-sponsored, would serve the public interest.¹⁵ Accordingly, we seek comment on whether we should permit employee operation of amateur stations during non-government-sponsored emergency drills, if the purpose of the drill is to assess communications capabilities, including amateur radio, in order to improve emergency preparedness and response.

8. A large number of agencies and organizations at the state and local levels coordinate with their local volunteer amateur radio operators to conduct drills and exercises in concert with other modes of communication. This joint activity is essential to allow for a practiced response on the part of the first responder community. Because some of those drills and exercises include transmission of amateur communications by employees of participating entities, we believe the proposed rule changes would be in the public interest, consistent with ongoing national emergency preparedness and response priorities. We therefore seek comment on the tentative conclusions contained herein.

III. PROCEDURAL MATTERS

9. *Initial Regulatory Flexibility Certification.* The Regulatory Flexibility Act (RFA)¹⁶ requires an initial regulatory flexibility analysis to be prepared for notice and comment rulemaking proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”¹⁷ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”¹⁸ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.¹⁹ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).²⁰

10. Because “small entities,” as defined in the RFA, are not persons eligible for licensing in the amateur service, this proposed rule does not apply to “small entities.” Rather, it applies exclusively to individuals who are the control operators of amateur radio stations. Therefore, we certify that the proposals in this *Notice of Proposed Rulemaking*, if adopted, will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the *Notice of Proposed*

¹⁵ For example, we understand that the accrediting standards for health care organizations require hospitals and organizations that offer emergency services (or are community-designated disaster receiving stations) to annually conduct emergency preparedness drills for mass casualty scenarios. While such drills may be conducted for accreditation purposes rather than as part of a government-sponsored activity, they arguably serve similar purposes in terms of enhancing emergency preparedness and response.

¹⁶ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

¹⁷ See 5 U.S.C. § 605(b).

¹⁸ See 5 U.S.C. § 601(6).

¹⁹ See 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

²⁰ See 15 U.S.C. § 632.

Rulemaking, including a copy of this Initial Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the SBA.²¹ This initial certification will also be published in the Federal Register.²²

11. The rulemaking shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.²³ Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented generally is required.²⁴ Other requirements pertaining to oral and written presentations are set forth in Section 1.1206(b) of the Commission’s rules.²⁵

12. *Comment and Reply Comment Filing Instructions.* Pursuant to sections 1.415 and 1.419 of the Commission’s Rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the front page of this document. Comments may be filed using: (1) the Commission’s Electronic Comment Filing System (ECFS), (2) the Federal Government’s eRulemaking Portal, or (3) by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments.
 - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message “get form.” A sample form and directions will be sent in response.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission’s Secretary, Federal Communications Commission.

- The Commission’s contractor will receive hand-delivered or messenger-delivered paper filings for the Commission’s Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington DC 20002. The filing hours at this location are 8:00 am to

²¹ See 5 U.S.C. § 605(b).

²² See *id.*

²³ 47 C.F.R. §§ 1.200 *et. seq.*

²⁴ See 47 C.F.R. § 1.1206(b)(2).

²⁵ 47 C.F.R. § 1.1206(b).

7:00 pm. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in alternative formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Government Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (tty).

13. Interested parties may view documents filed in this proceeding on the Commission's Electronic Comment Filing System (ECFS) using the following steps: (1) Access ECFS at <http://www.fcc.gov/cgb/ecfs>. (2) In the introductory screen, click on "Search for Filed Comments." (3) In the "Proceeding" box, enter the numerals in the docket number. (4) Click on the box marked "Retrieve Document List." A link to each document is provided in the document list. Filings and comments are also available for public inspection and copying during regular business hours at the FCC Reference Information Center, 445 12th Street, SW, Room CY-A257, Washington, DC 20554. Filings and comments also may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC 20554, telephone 1-800-378-3160, or via e-mail to fcc@bcpiweb.com. This *Notice of Proposed Rulemaking* also may be downloaded from the Commission's web site at <http://www.fcc.gov/>.

14. *Congressional Review Act.* The Commission will send a copy of this *Notice of Proposed Rulemaking* to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(4).

15. *Paperwork Reduction Act Analysis.* This *Notice of Proposed Rulemaking* does not contain proposed information collection(s), subject to the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, therefore, the *Notice of Proposed Rulemaking* does not contain any proposed new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

16. *Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules.* None.

17. For further information, contact Jeffrey Cohen, Senior Legal Counsel, Public Safety and Homeland Security Bureau, (202) 418-0799, or via e-mail at Jeff.Cohen@fcc.gov.

IV. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 303(r), and 403 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 303(r), and 403, that this *Notice of Proposed Rulemaking* is HEREBY ADOPTED.

19. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Center, SHALL SEND a copy of this *Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analyses, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

Proposed Rules

Part 97 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

The authority citation for part 97 continues to read as follows:

AUTHORITY: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609, unless otherwise noted.

1. Section 97.113 is amended by revising paragraph (a)(3), adding new paragraphs (a)(3)(i) and (a)(3)(ii), redesignating paragraphs (c) and (d) as new paragraphs (a)(3)(iii) and (a)(3)(iv) respectively, and redesignating paragraphs (e) and (f) as (c) and (d) respectively, to read as follows:

§ 97.113 Prohibited transmissions.

(a) ***

(3) Communications in which the station licensee or control operator has a pecuniary interest, including communications on behalf of an employer, with the following exceptions:

(i) A control station operator may participate on behalf of an employer in a government-sponsored emergency preparedness or disaster readiness test or drill, limited to the duration and scope of such test or drill, and operational testing immediately prior to such test or drill.

(ii) An amateur operator may notify other amateur operators of the availability for sale or trade of apparatus normally used in an amateur station, provided that such activity is not conducted on a regular basis.

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