

Commodity	Parts per million
* * *	* *
Pea and bean, succulent shelled, subgroup 6B ..	0.05 *
* * *	* *
Rhubarb	0.05 *
* * *	* *
Vegetable, tuberous and corm, subgroup 1C	0.05
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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 97

[WP Docket No. 10-72, WP Docket No. 10-54; FCC 10-124]

Amendment of the Commission's Rules Regarding Amateur Radio Service Communications During Government Disaster Drills

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) amends its rules to permit amateur radio operators to transmit messages, under certain limited circumstances, during either government-sponsored or non-government sponsored emergency and disaster preparedness drills, regardless of whether the operators are employees of entities participating in the drill.

DATES: Effective September 3, 2010.

FOR FURTHER INFORMATION CONTACT: Thomas Beers, Policy Division, Public Safety and Homeland Security Bureau, (202) 418-1170, or TTY (202) 418-7233.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order (R&O)* in WP Docket No. 10-72; WP Docket No. 10-54; FCC 10-124, adopted July 14, 2010, and released July 14, 2010. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, Room CY-A257, 445 12th Street, SW., Washington, DC 20554. This document may also be obtained from the Commission's duplicating contractor, Best Copy and Printing, Inc., in person at 445 12th Street, SW., Room CY-B402, Washington, DC 20554, via telephone at (202) 488-5300, via facsimile at (202) 488-5563, or via

e-mail at FCC@BCPIWEB.COM. Alternative formats (computer diskette, large print, audio cassette, and Braille) are available to persons with disabilities by sending an e-mail to FCC504@fcc.gov or calling the Consumer and Governmental Affairs Bureau at (202) 418-0530, TTY (202) 418-0432. This document is also available on the Commission's Web site at <http://www.fcc.gov>.

Summary of the Report and Order

1. 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, tests and exercises in preparation for such emergency situations and transmit messages on behalf of their employers during such drills and tests. Accordingly, the Commission amends its rules to provide that, under certain limited conditions, amateur radio operators may transmit messages during emergency and disaster preparedness drills and exercises, limited to the duration of such drills and exercises, regardless of whether the operators are employees of entities participating in the drills or exercises.

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 noncommercial communication service, particularly with respect to providing emergency communications." 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." 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. 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 were no other means of communicating and also provided other technical aid to the communities affected by Hurricane Katrina.

3. Since amateur radio is often an essential element of emergency preparedness and response, many state and local governments, public safety agencies, and hospitals 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.

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," the rules expressly prohibit amateur stations from transmitting communications "in which the station licensee or control operator has a pecuniary interest, including communications on behalf of an employer." Accordingly, public safety and public health entities seeking to have employees operate amateur stations during government-sponsored emergency preparedness and disaster drills presently must request a waiver. In this connection, Commission staff has granted several waivers on a case-by-case basis.

5. On February 17, 2010, the American Hospital Association (AHA) filed a request for a blanket waiver of Section 97.113(a)(3) of the Commission's rules to permit hospitals seeking accreditation to use amateur radio operators who are hospital employees to transmit communications on behalf of the hospital as part of emergency preparedness drills. On March 3, 2010, the Wireless Telecommunications and Public Safety

and Homeland Security Bureaus jointly issued a Public Notice seeking comment on the foregoing request.

6. On March 18, 2010, the Commission adopted a *Notice of Proposed Rulemaking (NPRM)* seeking 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 Commission also invited comment on whether there were circumstances in which amateur operators should be allowed to participate on their employer's behalf in non-government-sponsored tests or drills. Comments were due May 24, 2010, and reply comments were due June 7, 2010.

Government-sponsored Emergency Drills

7. In the *NPRM*, the Commission tentatively concluded 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. In reaching this tentative conclusion, the Commission stated that employee status should not preclude or prevent participation in government-sponsored emergency and disaster tests and drills. The Commission also tentatively concluded that extending authority to operate amateur stations during such drills will enhance emergency preparedness and thus serve the public interest.

8. In response to the *NPRM*, public safety agencies and other emergency first responder entities voiced general support for the proposal. These commenters note that public safety agencies frequently incorporate amateur radio and indeed are encouraged to do so as a part of Commission policy. Several amateur groups and clubs also support the rule amendment, because it will improve the skills of employees who may be called upon to use their expertise in times of emergency or disaster. Other commenters suggest that the rule amendment would likely increase the usefulness of existing national-level programs such as the Radio Amateur Civil Emergency Service (RACES), the Amateur Radio Relay League's Amateur Radio Emergency Service (ARES®), or the US Department of Defense's Military Auxiliary Radio System (MARS).

9. On the other hand, several commenters state that the proposal would erode the amateur status of the service, which is an essential

characteristic of amateur radio. Nickolaus E. Legget argues that this "would lead to a 'backdoor' de facto reallocation of some frequencies to hospitals and related operations." Other commenters maintain that this proposal would exacerbate the tendency of some hospitals or other public safety agencies to replace commercially available CMRS equipment with less expensive amateur radio equipment, intending to rely on amateur radio and employee licenses for communications. One commenter, James T. Philopen, states that the Commission lacks authority to amend the existing rule under Article 1, Section II Radio Service, subpart 56 of the International Telecommunications Treaty, which defines the Amateur Radio service as one "without pecuniary interest." Another commenter objects to the proposed amendment, stating that such a rule would lead to employees being coerced into using their amateur privileges, including using their amateur privileges in ways prohibited by our rules. Finally, a handful of commenters suggest alternative language or request additional definitions to the proposed rule, or recommend alternative regulatory treatment.

10. As the Commission noted in the *NPRM*, 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 disaster situations. Moreover, the current amateur radio service rules, which permit participation in such drills and tests by volunteers (*i.e.*, non-employees of participating entities), reflect the critical role amateur radio serves in such situations. However, as evidenced by recent waiver requests, state and local government public safety agencies, hospitals, and other entities concerned with the health and safety of citizens appear to be limited in their ability to conduct disaster and emergency preparedness drills, because of the employee status of amateur radio licensees involved in the training exercises. The Commission therefore amends its 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 Commission finds that extending authority to operate amateur stations during such drills will enhance emergency preparedness and response and thus serve the public interest.

11. In reaching this decision, the Commission did not find persuasive those comments stating that this

decision will erode the amateur radio service. The exception the Commission provides is 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. Further, when such operations are conducted in these limited circumstances, the amateur communications are only one component of the overall and more extensive communications activities that are involved with emergency drills and tests. Thus, the Commission does not foresee the use authorized herein to be extensive enough to amount to an erosion of the amateur radio service. Moreover, under existing rules, licensed employees may use amateur radio privileges when an emergency has rendered other communications unavailable. The Commission's decision reflects the practical reality that a large number of agencies and organizations at the state and local levels coordinate with their local volunteer amateur radio operators to conduct emergency drills and exercises in concert with other modes of communication, such as land mobile radio. This integrative activity is essential to allow for a practiced response on the part of the first responder community in the event of an emergency. Because some of those drills and exercises include transmission of amateur communications by employees of participating entities, this rule amendment will support the Commission's ongoing emergency preparedness and response priorities and is therefore consistent with the public interest.

12. The Commission also rejects the comments claiming that we lack the authority to amend our amateur rules because it conflicts with the Communications Act and the prohibition on "pecuniary interest" in the ITU treaty. The Commission's authority under the Communications Act to propose, promulgate and amend rules for the purpose of promoting safety of life and property through the use of wire and radio communication is well-established. Moreover, the limited action the Commission is taking here does not violate the ITU treaty. The ITU Radio Regulations specifically state that "[a]dministrations are encouraged to take the necessary steps to allow amateur stations to prepare for and meet communication needs in support of disaster relief." The rule amendments the Commission adopts do not undermine the "pecuniary interest" limitation. Rather, the amended rules provide a discrete exception to the existing rule that prohibits any

pecuniary interest attributable to the operator including communications on behalf of an employer. The Commission also finds unpersuasive comments that suggest that the amended rules either will cause employees to be coerced to transmit amateur radio messages or would cause entities to use amateur radio privileges in any way that would violate the Commission's rules. The flexibility of amateur operators will remain limited by the requirements of the Communications Act and the Commission's rules, including the rule amendments we adopt herein. The Commission's action today does not alter the responsibilities of these operators, and, as was the case under the prior rules, amateur licensees are obliged to operate their radio stations in compliance with the terms of their licenses, notwithstanding any conflicting instruction from their employers. In any event, the Commission does not expect that employer overreaching is likely to be a problem, given that the amended rules reflect a spirit of cooperation recognized by both the public safety community and the amateur radio community as necessary for preparing for times of emergency or disaster.

13. The Commission also finds it unnecessary to adopt alternative language or specify additional definitions. The Commission finds its proposed language is sufficiently clear. The purpose of the rule amendment is to promote the effectiveness and usefulness of emergency operations by permitting licensed employees to practice the skills they would use in an actual emergency as a last resort, *i.e.*, should other means of communications fail or be unavailable. The Commission finds that the amended language is narrowly tailored to achieve these ends.

14. In amending the amateur radio rules, the Commission reiterates that it does not intend to 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. Rather, the Commission believes that the public interest will be served by establishing 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.

Accordingly, the Commission limits the amateur operations in connection with emergency drills to the duration and scope of the drill, test or exercise being

conducted, and to operational testing immediately prior to the drill, test or exercise.

15. Some commenters request more specific limits on the duration of the use of amateur radio services to prevent continuous drills and the bandwidth from becoming *de facto* emergency service spectrum. The Commission declines to adopt specific time restrictions other than a limit tied to the duration of the exercise. The Commission finds that such matters should be left to the discretion of the sponsoring agencies. The Commission emphasizes, however, that the amendment does not permit communications unrelated to the drill or exercise being conducted. Other commenters suggest that the rules should specifically provide for more expansive operational testing. Boeing suggests that testing be permitted thirty days prior to a scheduled government sponsored drill. The Commission declines to specify the timing or duration of emergency drills. As evidenced by the waiver requests that have been submitted, the Commission expects that agencies will schedule emergency drills or exercises at appropriate times and for appropriate durations.

Non-Government-sponsored Emergency Drills

16. In the *NPRM*, the Commission proposed 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. The Commission noted, however, that there may be circumstances where conducting emergency drills for disaster planning purposes, even if not government-sponsored, would serve the public interest. Accordingly, we sought 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.

17. Most of the commenters who support permitting employee operation of amateur stations during government sponsored drills also support such operation during non-government-sponsored emergency drills, if the purpose of the drill is to assess communications capabilities to further public safety. However, a few commenters opposed expansion of the rule to include non-government sponsored emergency drills. For example, Holtz states that this would

“open the door for significant commercial abuse and exploitation of the amateur service;” that in the “absence of government sponsorship, there is ambiguity about whether any particular drill by a commercial entity is primarily for its own benefit, or for the public benefit;” and that this would create “an incentive for employers to pressure employees to get amateur licenses, and to pressure licensed amateurs to engage in questionable or prohibited practices,” *i.e.*, to use “amateur radio as a lower-cost substitute for Part 90 systems.” In relation to such concerns, Sheppard suggests limiting this expansion to those operations “when the emergency drill or test is sponsored by an agency or organization which supports public safety or public health.” And Traynor suggests limiting such expansion to “organizations defined by FEMA as providing the nation with Critical Infrastructure and Key Resources (CIKR) as described in the National Infrastructure Protection Plan (NIPP).” Earlier, in response to the AHA Petition, ARRL asked that AHA’s requested waiver be limited to radio transmissions made by hospital employees that are “necessary to participation in emergency preparedness and disaster drills that include Amateur operations for the purpose of emergency response, disaster relief or the testing and maintenance of equipment used for that purpose.”

18. In addition to Federal, state and local authorities, other non-government entities, such as private hospitals, have a direct interest in the health and welfare of citizens, especially during times of emergency or disaster. During those times, emergency communications serve a critical purpose to both governmental and non-governmental entities as well as to the constituencies they serve. As we determined above, familiarization, planning, and training are required for effective use of amateur radio in an emergency. The Commission therefore finds that the public interest would be served by permitting amateur radio operators to participate in non-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.

19. While the Commission recognizes commenters’ concerns regarding the potential for improper use of amateur radio in conducting emergency drills and tests, the Commission finds that the public interest in permitting non-government-sponsored entities to utilize, on a limited basis, amateur radio as part of emergency preparedness and response drills outweighs such

concerns. As with government-sponsored emergency drills, the Commission limits the amateur operations in connection with non-government sponsored emergency drills to the duration and scope of the drill, test or exercise being conducted, and operational testing immediately prior to the drill, test or exercise. Moreover, in light of the concerns raised by some commenters, the Commission requires that non-government sponsored drills and tests be limited to no more than one hour per week; except that no more than twice in any calendar year, they may be conducted for a period not to exceed 72 hours. This time limitation, which is consistent with the timeframes contained in the waiver requests filed with the Commission, should serve to further ensure the use of amateur radio for bona fide emergency testing. The Commission emphasizes that the purpose for any drills it authorizes herein must be related to emergency and disaster preparedness. By limiting the purpose in this manner, the Commission further ensures that such drills will be appropriately limited.

ARPC Petition and AHA Petition

20. ARPC requested we amend § 97.113(a)(3) in order to permit amateur radio licensees employed by public safety agencies to participate in drills conducted by their employer. Similarly in its request, AHA emphasized the need to allow hospital employees with amateur radio licenses to participate in emergency preparedness and disaster readiness tests and drills. The Commission appreciates both of these filings, and, as discussed herein, supports the requested rule changes. Because the Commission amends the rules in a manner that addresses the concerns raised by both petitioners, it dismisses both petitions as moot.

I. Procedural Matters

A. Paperwork Reduction Act Analysis

21. The *R&O* does not contain proposed information collection(s), subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, the *R&O* 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).

B. Congressional Review Act

22. The Commission will send a copy of the *R&O* in a report to be sent to Congress and the Government

Accountability Office pursuant to the Congressional Review Act (“CRA”), see 5 U.S.C. 801(a)(1)(A).

II. Final Regulatory Flexibility Certification

23. The Regulatory Flexibility Act (RFA) 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.” The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act. 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).

24. 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. Moreover, the rule being adopted is so narrow that no nexus exists between the regulated amateur licensees who may be employed, and costs to be born by employers (e.g. overtime pay). Therefore, if there were any costs imposed on employers, that is a matter outside the scope of the rule and thus the impact of the rule cannot be said to involve the imposition of any economic burden on those individual persons who are the only entities regulated and impacted by the rule adopted in the *R&O*. Finally, no commenters addressed our conclusion in the *NPRM* and small entities which filed comments uniformly supported the proposed rule changes. Therefore, the Commission certifies that the proposals in the *R&O* will not have a significant economic impact on a substantial number of small entities.

25. *Report to Congress:* The Commission will send a copy of the *R&O*, including this Final Regulatory Flexibility Certification, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. In addition, The Commission will send a copy of the *R&O*, including a copy of this Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the SBA. This final certification will also be

published in the Federal Register. A copy of the *R&O* and Final Regulatory Flexibility Certification (or summaries thereof) will also be published in the **Federal Register**.

III. Ordering Clauses

26. Accordingly, *it is ordered*, pursuant to §§ 1, 2, 4(i), 4(o), 301, 303(r), 303(v), 307, 309, 335, 403, 624(g), 706 and 715 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i) and (o), 301, 303(r), 303(v), 307, 309, 335, 403, 544(g), 606, and 615, that the Report and Order in WP Docket No. 10–72 and WP Docket No. 10–54 is adopted, and that part 97 of the Commission’s rules, 47 CFR part 97, is amended. The R&O shall become effective September 3, 2010.

27. It is further ordered that the Commission’s Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of the Report and Order, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 97

Amateur radio service.
Federal Communications Commission.
Bulah P. Wheeler,
Deputy Manager.

Final Rules

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 97 as follows:

PART 97—AMATEUR RADIO SERVICE

■ 1. 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.

■ 2. Section 97.113 is amended by revising paragraph (a)(3), 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 station licensee or control station operator may participate on behalf of an employer in an 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.

Tests or drills that are not government-sponsored are limited to a total time of one hour per week; except that no more than twice in any calendar year, they may be conducted for a period not to exceed 72 hours.

(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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