The 2003 Florida Statutes

Title XI
COUNTY ORGANIZATION AND INTERGOVERNMENTAL RELATIONS Chapter 125
COUNTY GOVERNMENT

125.561 Amateur radio antennas; construction in conformance with federal requirements.--

(1) No county shall enact or enforce any ordinance or regulation which fails to conform to the limited preemption entitled "Amateur Radio Preemption, 101 FCC 2d 952 (1985)" as issued by the Federal Communications Commission. Any ordinance or regulation adopted by a county with respect to amateur radio antennas shall conform to the above-cited limited preemption, which states that local regulations which involve placement, screening, or height of antennas based on health, safety, or aesthetic considerations must be crafted to reasonably accommodate amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose.

(2) Nothing in this section shall affect any applicable provisions of chapter 333.

Title XII
MUNICIPALITIES Chapter 166

166.0435 Amateur radio antennas; construction in conformance with federal requirements.--

(1) No municipality shall enact or enforce any ordinance or regulation which fails to conform to the limited preemption entitled "Amateur Radio Preemption, 101 FCC 2d 952 (1985)" as issued by the Federal Communications Commission. Any ordinance or regulation adopted by a municipality with respect to amateur radio antennas shall conform to the above cited limited preemption, which states that local regulations which involve placement, screening, or height of antennas based on health, safety, or aesthetic considerations must be crafted to reasonably accommodate amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose.

(2) Nothing in this section shall effect any applicable provisions of chapter 333.

History.--s. 2, ch. 91-28.

PRB-1 (1985)

PRBs: 1985 | 1999 | 2000 | 2001

Adopted 9/16/1985
Released 9/19/1985
MEMORANDUM OPINION AND ORDER (FCC 85-506)
Federal preemption of state and Local Regulations Pertaining to Amateur Radio Facilities

Before the Federal Communications Commission Washington, D.C. 20554 36149

Background

1. On July 16, 1984, the American Radio Relay League, Inc. (ARRL) filed a Request for Issuance of a Declaratory Ruling asking us to delineate the limitations of local zoning and other local and state regulatory authority over Federally-licensed radio facilities. Specifically, the ARRL wanted an explicit statement that would preempt all local ordinances which provably preclude or significantly inhibit effective, reliable amateur radio communications. The ARRL acknowledges that local authorities can regulate amateur installations to insure the safety and health of persons in the community, but believes that those regulations cannot be so restrictive that they preclude effective amateur communications.

2. Interested parties were advised that they could file comments in the matter.[1] With extension, comments were due on or before December 26, 1984[2], with reply comments due on or before January 25, 1985[3]. Over sixteen hundred comments were filed.

Local Ordinances

3. Conflicts between amateur operators regarding radio antennas and local authorities regarding restrictive ordinances are common. The amateur operator is governed by the regulations contained in Part 97 of our rules. Those rules do not limit the height of an amateur antenna but they require, for aviation safety reasons, that certain FAA notification and FCC approval procedures must be followed for antennas which exceed 200 feet in height above ground level or antennas which are to be erected near airports. Thus, under FCC rules some amateur antenna support structures require obstruction marking and lighting. On the other hand, local municipalities or governing bodies frequently enact regulations limiting antennas and their support structures in height and locations, e.g. to side or rear yards, for health, safety or aesthetic considerations. These limiting regulations can result in conflict because the effectiveness of the communications that emanate from an amateur radio station are directly dependent upon the location and the height of the antenna. Amateur operators maintain that they are precluded from operating in certain bands allocated for their use if the height of their antennas is limited by a local ordinance.

4. Examples of restrictive local ordinances were submitted by several amateur operators in this proceeding. Stanley J. Cichy, San Diego, California, noted that in San Diego, amateur radio antennas come under a structures ruling which limits building heights to 30 feet. Thus, antennas there are also limited to 30 feet. Alexander Vrenlos, Mundelein, Illinois wrote that an ordinance of the Village of Mundelein provides that an antenna must be a distance from the property line that is equal to one and one-half times its height. In his case, he is limited to an antenna tower for his amateur station just over 53 feet in height.

5. John C. Chapman, an amateur living in Bloomington, Minnesota, commented that he was not able to obtain a building permit to install an amateur radio antenna exceeding 35 feet in height because the Bloomington city ordinance restricted "structures" heights to 35 feet. Mr. Chapman said that the ordinance, when written, undoubtedly applied to buildings but was now being applied to antennas in the absence of a specific ordinance regulating them. There were two options open to him if he wanted to engage in amateur communications. He could request a variance to the ordinance by way of a hearing before the City Council, or he could obtain affidavits from his neighbors swearing that they had no objection to the proposed antenna

installation. He got the building permit after obtaining the cooperation of his neighbors. His concern, however, is that he had to get permission from several people before he could effectively engage in radio communications for which he had a valid FCC amateur license.

6. In addition to height restrictions, other limits are enacted by local jurisdictions -- anti-climb devices on towers or fences around them; minimum distances from high voltage power lines; minimum distances of towers from property lines; and regulations pertaining to the structural soundness of the antenna installation. By and large, amateurs do not find these safety precautions objectionable. What they do object to are the sometime prohibitive, non-refundable application filing fees to obtain a permit to erect an antenna installation and those provisions in ordinances which regulate antennas for purely aesthetic reasons. The amateurs contend, almost universally, that "beauty is in the eye of the beholder." They assert that an antenna installation is not more aesthetically displeasing than other objects that people keep on their property, e.g. motor homes, trailers, pick-up trucks, solar collectors and gardening equipment.

Restrictive Comments

7. Amateur operators also oppose restrictions on their amateur operations which are contained in the deeds for their homes or in their apartment leases. Since these restrictive covenants are contractual agreements between private parties, they are not generally a matter of concern to the Commission. However, since some amateurs who commented in this proceeding provided us with examples of restrictive covenants, they are included for information. Mr. Eugene O. Thomas of Hollister, California included in his comments an extract of the Declaration of Covenants and Restrictions for Ridgemark Estates, County of San Benito, State of California. It provides:

"No antenna for transmission or reception of radio signals shall be erected outdoors for use by any dwelling unit except upon approval of the Directors. No radio or television signals or any other form of electromagnetic radiation shall be permitted to originate from any lot which may unreasonably interfere with the reception of television or radio signals upon any other lot."

Marshall Wilson, Jr. provided a copy of the restrictive covenant contained in deeds for the Bell Martin Addition #2, Irving, Texas. It is binding upon all of the owners or purchasers of the lots in the said addition, his or their heirs, executors, administrators or assigns. It reads:

"No antenna or tower shall be erected upon any lot for the purpose of radio operations. William J. Hamilton resides in an apartment building in Gladstone, Missouri. He cites a clause in his lease prohibiting the erection of an antenna. He states that he has been forced to give up operating amateur radio equipment except a hand-held 2 meter (144-148 MHz) radio transceiver. He maintains that he should not be penalized just because he lives in an apartment."

Other restrictive covenants are less global in scope than those cited above. For example, Robert Webb purchased a home in Houston, Texas. His deed restriction prohibited "transmitting or receiving antennas extending above the roof line."

8. Amateur operators generally opposes restrictive covenants for several reasons. They

maintain that such restrictions limit the places that they can reside if they want to pursue their hobby of amateur radio. Some state that they impinge on First Amendment rights of free speech. Others believe that a constitutional right is being abridged because, in their view, everyone has a right to access the airwaves regardless of where they live.

9. The contrary belief held by housing subdivision communities and condominium or homeowner's associations is that amateur radio installations constitute safety hazards, cause interference to other electronic equipment which may be operated in the home (televisions, radio, stereos) or are eyesores that detract from the aesthetic and tasteful appearance of the housing development or apartment complex. To counteract these negative consequences, the subdivisions and associations include in their deeds, leases or by -laws restrictions and limitations on the location and height of antennas or, in some cases, prohibit them altogether. The restrictive covenants are contained in the contractual agreement entered into at the time of the sale or lease of the property. Purchasers or lessees are free to choose whether they wish to reside where such restrictions on amateur antennas are in effect or settle elsewhere.

Supporting Comments

10. The Department of Defense (DOD) supported the ARRL and emphasized in its comments that continued success of existing national security and emergency preparedness telecommunications plans involving amateur stations would be severely diminished if state and local ordinances were allowed to prohibit the construction and usage of effective amateur transmission facilities. DOD utilizes volunteers in the Military Affiliate Radio Service (MARS)[4], Civil Air Patrol (CAP) and the Radio Amateur Civil Emergency Service (RACES). It points out that these volunteer communicators are operating radio equipment installed in their homes and that undue restrictions on antennas by local authorities adversely affected their efforts. DOD states that the responsiveness of these volunteer systems would be impaired if local ordinances interfere with the effectiveness of these important national telecommunication resources. DOD favors the issuance of a ruling that would set limits for local and state regulatory bodies when they are dealing with amateur stations.

11. Various chapters of the American Red Cross also came forward to support the ARRL's request for a preemptive ruling. The Red Cross works closely with amateur radio volunteers. It believes that without amateurs' dedicated support, disaster relief operations would significantly suffer and that its ability to serve disaster victims would be hampered. It feels that antenna height limitations that might be imposed by local bodies will negatively affect the service now rendered by the volunteers.

12. Cities and counties from various parts of the United States filed comments in support of the ARRL's request for a Federal preemption ruling. The comments from the Director of Civil Defense, Port Arthur, Texas are representative: The Amateur Radio Service plays a vital role with our Civil Defense program here in Port Arthur and the design of these antennas and towers lends greatly to our ability to communicate during times of disaster. We do not believe that there should be any restrictions on the antennas and towers except for reasonable safety precautions. Tropical storms, hurricanes and tornadoes are a way of life here on the Texas Gulf Coast and good communications are absolutely essential when preparing for a hurricane and even more so during recovery operations after the hurricane has past.

13. The Quarter Century Wireless Association took a strong stand in favor of the issuance of a declaratory ruling. It believes that Federal preemption is necessary so that there will be uniformity for all Amateur radio installations on private property throughout the United States.

14. In its comments, the ARRL argued that the Commission has the jurisdiction to preempt certain local land use regulations which frustrate or prohibit amateur communications. It said that the appropriate standard in preemption cases is not the extent of state and local interest in a given regulation, but rather the impact of that regulation on Federal goals. Its position is that Federal preemption is warranted whenever local governmental regulations relate adversely to the operational aspects of amateur communication. The ARRL maintains that localities routinely employ a variety of land use devices to preclude the installation of effective amateur antennas, including height restrictions, conditional use permits, building setbacks and dimensional limitations on antennas. It sees a declaratory ruling of Federal preemption as necessary to cause municipalities to accommodate amateur operator needs in land use planning efforts.

15. James C. O'Connell, an attorney who has represented several amateurs before local zoning authorities, said that requiring amateurs to seek variances or special use approval to erect reasonable antennas unduly restricts the operation of amateur stations. He suggested that the Commission preempt zoning ordinances which impose antenna height limits of less than 65 feet. He said that this height would represent a reasonable accommodation of the communication needs of most amateurs and the legitimate concerns of local zoning authorities.

Opposing Comments

16. The City of La Mesa, California has a zoning regulation which controls amateur antennas. Its comments reflected an attempt to reach a balanced view. This regulation has neither the intent, nor the effect, of precluding or inhibiting effective and reliable communications. Such antennas may be built as long as their construction does not unreasonably block views or constitute eyesores. The reasonable assumption is that there are always alternatives at a given site for different placement, and/or methods for aesthetic treatment. Thus, both public objectives of controlling land use for the public health, safety, and convenience, and providing an effective communications network, can be satisfied. A blanket ruling to completely set aside local control, or a ruling which recognizes control only for the purpose of safety of antenna construction, would be contrary to . . . legitimate local control.

17. Comments from the County of San Diego state: While we are aware of the benefits provided by amateur operators, we oppose the issuance of a preemption ruling which would elevate 'antenna effectiveness' to a position above all other considerations. We must, however, argue that the local government must have the ability to place reasonable limitations upon the placement and configuration of amateur radio transmitting and receiving antennas. Such ability is necessary to assure that the local decision-makers have the authority to protect the public health, safety and welfare of all citizens. In conclusion, I would like to emphasize an important difference between your regulatory powers and that of local governments. Your Commission's approval of the preemptive requests would establish a 'national policy'. However, any regulation adopted by a local jurisdiction could be overturned by your Commission or a court if such regulation was determined to be unreasonable.

18. The City of Anderson, Indiana, summarized some of the problems that face local communities: I am sympathetic to the concerns of these antenna owners and I understand that to gain the maximum reception from their devices, optimal location is necessary. However, the preservation of residential zoning districts as 'liveable neighborhoods is jeopardized by placing these antennas in front yards of homes. Major problems of public safety have been encountered, particularly vision blockage for auto and pedestrian access. In addition, all communities are faced with various building lot sizes. Many building lots are so small that established setback requirements (in order to preserve adequate air and light) are vulnerable to the unregulated placement of these antennas. . . . the exercise of preemptive authority by the FCC in granting this request would not be in the best interest of the general public.

19. The National Association of Counties (NACO), the American Planning Association (APA) and the National League of Cities (NLC) all opposed the issuance of an antenna preemption ruling. NACO emphasized that federal and state power must be viewed in harmony and warns that Federal intrusion into local concerns of health, safety and welfare could weaken the traditional police power exercised by the state and unduly interfere with the legitimate activities of the states. NLC believed that both Federal and local interests can be accommodated without preempting local authority to regulate the installation of amateur radio antennas. The APA said that the FCC should continue to leave the issue of regulating amateur antennas with the local government and with the state and Federal courts.

Discussion

20. When considering preemption, we must begin with two constitutional provisions. The tenth amendment provides that any powers which the constitution does not delegate to the United States or does not prohibit the states from exercising are reserved to the states. These are the police powers of the states. The Supremacy Clause, however, provides that the constitution and the laws of the United States shall supersede any state law to the contrary. Article III, Section 2. Given these basic premises, state laws may be preempted in three ways: First, Congress may expressly preempt the state law. See Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). Or, Congress may indicate its intent to completely occupy a given field so that any state law encompassed within that field would implicitly be preempted. Such intent to preempt could be found in a congressional regulatory scheme that was so pervasive that it would be reasonable to assume that Congress did not intend to permit the states to supplement it. See Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982). Finally, preemption may be warranted when state law conflicts with federal law. Such conflicts may occur when "compliance with both Federal and state regulations is a physical impossibility," Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142, 143 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Hines v. Davidowitz, 312 U.S. 52, 67 (1941). Furthermore, federal regulations have the same preemptive effect as federal statutes. Fidelity Federal Savings & Loan Association v. de la Cuesta, supra.

21. The situation before us requires us to determine the extent to which state and local zoning regulations may conflict with federal policies concerning amateur radio operators.

22. Few matters coming before us present such a clear dichotomy of viewpoint as does the instant issue. The cities, counties, and local communities and housing associations see an

obligation to all of their citizens and try to address their concerns. This is accomplished through regulations, ordinances or covenants oriented toward the health, safety and general welfare of those they regulate. At the opposite pole are the individual amateur operators and their support groups who are troubled by local regulations which may inhibit the use of amateur stations or, in some instances, totally preclude amateur communications. Aligned with the operators are such entities as the Department of Defense, the American Red Cross and local civil defense and emergency organizations who have found in Amateur Radio a pool of skilled radio operators and a readily available backup network. In this situation, we believe it is appropriate to strike a balance between the federal interest in promoting amateur operations and the legitimate interests of local governments in regulating local zoning matters. The cornerstone on which we will predicate our decision is that a reasonable accommodation may be made between the two sides.

23. Preemption is primarily a function of the extent of the conflict between federal and state and local regulation. Thus, in considering whether our regulations or policies can tolerate a state regulation, we may consider such factors as the severity of the conflict and the reasons underlying the state's regulations. In this regard, we have previously recognized the legitimate and important state interests reflected in local zoning regulations. For example, in Earth Satellite Communications, Inc., 95 FCC 2d 1223 (1983), we recognized that . . . countervailing state interests inhere in the present situation . . . For example, we do not wish to preclude a state or locality from exercising jurisdiction over certain elements of an SMATV operation that properly may fall within its authority, such as zoning or public safety and health, provided the regulation in question is not undertaken as a pretext for the actual purpose of frustrating achievement of the preeminent federal objective and so long as the non-federal regulation is applied in a nondiscriminatory manner.

24. Similarly, we recognize here that there are certain general state and local interests which may, in their even-handed application, legitimately affect amateur radio facilities. Nonetheless, there is also a strong federal interest in promoting amateur communications. Evidence of this interest may be found in the comprehensive set of rules that the Commission has adopted to regulate the amateur service.[5] Those rules set forth procedures for the licensing of stations and operators, frequency allocations, technical standards which amateur radio equipment must meet and operating practices which amateur operators must follow. We recognize the Amateur radio service as a voluntary, noncommercial communication service, particularly with respect to providing emergency communications. Moreover, the amateur radio service provides a reservoir of trained operators, technicians and electronic experts who can be called on in times of national or local emergencies. By its nature, the Amateur Radio Service also provides the opportunity for individual operators to further international goodwill. Upon weighing these interests, we believe a limited preemption policy is warranted. State and local regulations that operate to preclude amateur communications in their communities are in direct conflict with federal objectives and must be preempted.

25. Because amateur station communications are only as effective as the antennas employed, antenna height restrictions directly affect the effectiveness of amateur communications. Some amateur antenna configurations require more substantial installations than others if they are to provide the amateur operator with the communications that he/she desires to engage in. For example, an antenna array for International amateur communications will differ from an antenna used to contact other amateur operators at shorter distances. We will not, however,

specify any particular height limitation below which a local government may not regulate, nor will we suggest the precise language that must be contained in local ordinances, such as mechanisms for special exceptions, variances, or conditional use permits. Nevertheless, local regulations which involve placement, screening, or height of antennas based on health, safety, or aesthetic considerations must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose.[6]

26. Obviously, we do not have the staff or financial resources to review all state and local laws that affect amateur operations. We are confident, however, that state and local governments will endeavor to legislate in a manner that affords appropriate recognition to the important federal interest at stake here and thereby avoid unnecessary conflict with federal policy, as well as time-consuming and expensive litigation in this area. Amateur operators who believe that local or state governments have been overreaching and thereby have precluded accomplishment of their legitimate communications goals, may, in addition, use this document to bring our policies to the attention of local tribunals and forums.

27. Accordingly, the Request for Declaratory Ruling filed July 16, 1984, by the American Radio Relay League, Inc., IS GRANTED to the extent indicated herein and, in all other respects, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Footnotes

[1] Public Notice, August 30, 1984, Mimeo. No. 6299, 49 F.R. 36113, September 14, 1984.

[2] Public Notice, December 19, 1984, Mimeo No. 1498.

[3] Order, November 8, 1984, Mimeo. No. 770.

[4] MARS is solely under the auspices of the military which recruits volunteer amateur operators to render assistance to it. The Commission is not involved in the MARS program.

[5] 47 CFR Part 97.

[6] We reiterate that our ruling herein does not reach restrictive covenants in private contractual agreements. Such agreements are voluntarily entered into by the buyer or tenant when the agreement is executed and do not usually concern this Commission.

Released 12/26/2001
ORDER ON RECONSIDERATION (RM 8763)
In the Matter of Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antennas and Support Structures, and Amendment of Section 97.15 of the Commission's Rules Governing the Amateur Radio Service

Introduction

1. The Commission has before it an Application for Review filed on December 15, 2000, by the American Radio Relay League (ARRL).[1] ARRL requests review of the November 13, 2000, decision[2] of the Deputy Chief, Wireless Telecommunications Bureau (Bureau), which partially granted ARRL's petition for clarification of the Commission's limited preemption policy of state and local regulation of the siting and maintenance of antennas and antenna support structures used by licensees in the Amateur Radio Service, but denied it in all other respects.[3] Specifically, ARRL requests that we expand the Commission's limited preemption policy for antennas and antenna support structures used in the Amateur Radio Service to include covenants, conditions and restrictions (CC&Rs) contained in deeds, bylaws of homeowner associations (HOA) or regulations of an architectural control committee (ACC). Based on the record in this proceeding, we find no basis to reverse the Bureau's decision. Accordingly, ARRL's Application for Review is denied.

Background

2. In a Memorandum Opinion and Order, adopted September 16, 1985 (PRB-1), the Commission established a policy of limited preemption of state and local regulations governing amateur station facilities, including antennas and support structures.[4] In that proceeding, the Commission expressly decided not to extend its limited preemption policy to CC&Rs in home ownership deeds and in condominium bylaws because "such agreements are voluntarily entered into by the buyer or tenant when the agreement is executed and do not usually concern the Commission."[5]

3. On February 7, 1996, ARRL filed a petition for rule making seeking a review of the Commission's limited preemption policy and an expansion of the policy to include CC&Rs in private covenants.[6] In an Order, released November 19, 1999, the Deputy Chief, Wireless Telecommunications Bureau, denied the petition for rule making on the grounds that specific rule provisions bringing private restrictive covenants within the scope of PRB-1 were neither necessary nor appropriate.[7] On December 20, 1999, ARRL filed a petition for reconsideration of the Bureau's decision; the Gorodetzers filed a petition for reconsideration on December 17, 1999. On November 13, 2000, the Bureau denied both petitions insofar as they had requested bringing CC&Rs within the scope of PRB-1.[8]

Discussion

4. ARRL believes that the Commission policy set forth in PRB-1 is discriminatory because it does not encompass private covenants.[9] Further, it appears that ARRL assumes that the only reason the Commission did not extend PRB-1 to CC&Rs in 1985 was that "the Commission believed it did not have the authority to preempt private agreements . . ."[10] ARRL goes on to argue, based upon the Commission's actions with respect to over the air reception devices

(OTARDs) that the Commission in fact has jurisdiction to preempt CC&Rs.[11] As a result, it asks the Commission to require that private covenants found in deeds, HOA bylaws and ACC regulations state that amateur communications and antennas are subject to the Commission's limited preemption policy, as expressed in the contexts of "reasonable accommodation" and "minimum practicable regulation of amateur antennas and support structures.[12]

5. We recognize that the Amateur Radio service is a voluntary, noncommercial communication service that plays an important role in providing emergency communications. Moreover, the amateur radio service provides a reservoir of trained operators, technicians and electronic experts who can be called on in times of national or local emergencies. By its nature, the Amateur Radio Service also provides the opportunity for individual operators to further international goodwill. Accordingly, we agree with ARRL that there is a strong federal interest in promoting amateur radio communications.[13] However, we believe that PRB-1 adequately protects that predominant federal interest from regulations that would frustrate the important purposes of the Amateur Radio Service,[14] by preempting state and local regulations that preclude amateur communications in their communities.

6. We disagree with ARRL's analysis in that PRB-1 did not base the decision to exclude CC&Rs from the Commission's preemption policy upon the Commission's jurisdiction, or lack thereof. Rather, the Commission's decision was premised upon the fundamental difference between state and local regulations, with which an amateur operator must comply, and CC&Rs, which are the product of a voluntary agreement involving the amateur operator. ARRL argues that whether CC&Rs are "voluntary" is "irrelevant . . . to whether the municipality is violating Federal communications policy."[15] While we agree that the voluntary nature of CC&Rs do not always preclude preemption,[16] we believe it is a relevant factor in preemption analysis. In OTARD, for example, there was a strong statutory policy against restrictions that impaired a viewer's ability to receive over the air video services. Here, there has not been a sufficient showing that CC&Rs prevent amateur radio operators from pursuing the basis and purpose of the amateur service.[17] In this regard, we note that there are other methods amateur radio operators can use to transmit amateur service communications that do not require an antenna installation at their residence. These methods include, among other things, operation of the station at a location other than their residence, mobile operations, and use of a club station.

7. ARRL argues, "The private contractual nature of covenants was, however, shown not to be a limiting factor in the OTARD decision. It cannot, therefore, in the context of PRB-1 serve as a justification for the arbitrary and disparate treatment of radio amateurs similarly situated, save for the source of the land use regulations applicable to their residential station locations."[18] We believe the OTARD decision does not support ARRL's request because the decision to preempt restrictions on OTARDs was based upon significant policy objectives that are not present in this case, and which could not be adequately accomplished without the Commission's intervention. Indeed, the Commission does not exercise its preemption power lightly,[19] and employs this power only as necessary to carry out the provisions of the Communications Act. The OTARD rule "[was] designed to promote two complementary federal objectives: (a) to ensure that consumers have access to a broad range of video programming services, and (b) to foster full and fair competition among different types of video programming services.[20] The Commission concluded that preemption was necessary in order to meet those objectives. Thereafter, the Commission extended the OTARD protections to antennas used to

transmit or receive fixed wireless signals to further one of the primary goals of the 1996 Communications Act, which is to promote telecommunications competition and encourage the commercial deployment of new telecommunications technologies.[21] In contrast, none of these objectives applies to the Amateur Radio Service, which is a voluntary noncommercial service.[22] Furthermore, ARRL has not demonstrated that private covenants have a substantial impact on the ability of amateurs to fulfill the fundamental purposes of the Amateur Radio Service set forth in Section 97.1 of the Commission's Rules.[23] Thus, we conclude that, in the instant case, while preemption is appropriate with respect to state and local regulations, it is not similarly appropriate with respect to CC&Rs.

8. ARRL also objects to the Bureau's reliance upon the fact that some amateur antennas can be much larger than OTARDs.[24] ARRL characterizes the examples of different types of antennas given in the Bureau's Recon Order as 'incendiary references' to exceptional types of amateur antennas that do not reflect what would be permitted by PRB-1 in densely-populated residential areas.[25] While we do not believe that the size of the antennas is a decisional difference, in our view, the Bureau's reliance upon the distinctions in antenna size between amateur antennas and OTARDs was reasonably based on legitimate policy considerations. In PRB-1, the Commission explicitly discussed the interests HOAs and ACCs had in imposing "restrictions and limitations on the location and height of antennas."[26] We believe that in using examples of antenna configurations and arrays, the Bureau merely amplified what was already alluded to in PRB-1, as originally adopted. Thus, we find that no new ground was broken in the Bureau's Recon Order. We note that ARRL is proposing a policy of reasonable accommodation, as opposed to the total preemption imposed in the OTARD proceeding.[27] Nonetheless, given the great variance in the size and configuration of amateur antennas, we are concerned that such a policy would be considerably more complicated for HOAs and ACCs to administer. Finally, we note that ARRL has submitted no specific evidence that would persuade us to abandon our long-standing policy of excluding CC&Rs in private covenants from our ruling in PRB-1. We recognize the importance of preserving the integrity of contractual relations. We are therefore reluctant to pre-empt private parties' freedom of contract unless it is shown that private agreements will seriously disrupt the federal regulatory scheme or unless there is another strong countervailing reason to do so, a showing that has not been made here. However, should Congress see fit to enact a statutory directive mandating the expansion of our reasonable accommodation policy, the Commission would expeditiously act to fulfill its obligation thereunder.

Conclusion and Ordering Clauses

9. Accordingly, for the reasons discussed above, we conclude that the Bureau's denial of the subject petitions for reconsideration, insofar as they pertain to inclusion of CC&Rs in private covenants, was correct and should be affirmed. Therefore, the scope of the limited preemption policy of PRB-1 for amateur radio stations remains applicable only to regulations of state, county, municipal and other local governing bodies, and is not applicable to HOA bylaws and ACC regulations.

10. ACCORDINGLY, IT IS ORDERED that, pursuant to the authority of Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, that the Application for Review filed by The American Radio Relay League on December 15, 2000, IS DENIED.

11. IT IS ORDERED that, pursuant to the authority of Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, that the Application for Review filed by Barry Gorodetzer and Kathy Conard-Gorodetzer on January 3, 2001, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas, Secretary

Footnotes

[1] Application for Review (filed Dec. 15, 2000) (ARRL AFR).

[2] Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antenna and Support Structures, and Amendment of Section 97.15 of the Commission's Rules Governing the Amateur Radio Service, Order on Reconsideration, 15 FCC Rcd 22151 (2000) (Recon Order). In a related matter, on January 3, 2001, Barry Gorodetzer and Kathy Conard-Gorodetzer filed a letter seeking Commission review of the Recon Order (Gorodetzer AFR). Section 1.115(d) of the Commission's Rules requires that applications for review of actions pursuant to delegated authority be filed within 30 days of public notice of the action. In this case, public notice of the Recon Order was given on November 13, 2000, the release date. See 47 C.F.R. § 1.4(b)(2). The Gorodetzer AFR is untimely because it was filed more than 30 days after public notice of the Recon Order was given. The Gorodetzers also failed to seek a waiver or extension of the deadline to file an application for review. Accordingly, we will dismiss the Gorodetzer AFR.

[3] Recon Order at 5 ¶ 11. Federal Communications Commission FCC 01-372

[4] See Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, Memorandum Opinion and Order, PRB-1, 101 FCC 2d 952 (1985) (PRB-1).

[5] Id. at 960 n.6.

[6] ARRL Petition for Rule Making, filed Feb. 7, 1996.

[7] Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antennas and Support Structures, and Amendment of Section 97.15 of the Commission's Rules Governing the Amateur Radio Service, Order, 14 FCC Rcd 19413, 19415 ¶ 6, 19417 ¶ 11 (1999).

[8] Recon Order at 5 ¶ 11.

[9] ARRL AFR at 5.

[10] Id. at 11 (emphasis in original).

[11] Id. at 7-8.

[12] Id. at 10. Federal Communications Commission FCC 01-372

[13] Id. at 9.

[14] PRB-1, 101 FCC 2d at 959-60 ¶¶ 23-24.

[15] ARRL AFR at 15.

[16] See In the Matter of Promotion of Competitive Networks in Local Telecommunications, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, FCC 00-366, 15 FCC Rcd 22983 (2000) (Competitive Networks Fixed Wireless Order).

[17] See infra n.23.

[18] Id. at 19.

[19] See Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (opining that courts must assume that Congress does not exercise the power to preempt lightly).Federal Communications Commission FCC 01-372

[20] Preemption of Local Zoning Regulation of Satellite Earth Stations, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 11 FCC Rcd 19276, 19281 ¶ 6 (1996).

[21] See Competitive Networks Fixed Wireless Order, 15 FCC Rcd at 23028.

[22] See 47 C.F.R. § 97.1(a)

[23] The fundamental purposes of the Amateur Radio Service are expressed in the following principles: (a) Recognition 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; (b) Continuation and extension of the amateur's proven ability to contribute to the advancement of the radio art; (c) Encouragement and improvement of the amateur service through rules which provide for advancing skills in both the communication and technical phases of the art; (d) Expansion of the existing reservoir within the amateur radio service of trained operators, technicians, and electronics experts; and (e) Continuation and extension of the amateur's unique ability to enhance international goodwill. See 47 C.F.R. § 97.1.

[24] ARRL AFR at 11-12.

[25] Id. at 12.

[26] See PRB-1 at 955 ¶ 9.

[27] ARRL AFR at 11-12.Federal Communications Commission FCC 01-372