

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

In the Matter of )
)
Modification and Clarification of Policies and )
Procedures Governing Siting and Maintenance of ) RM-8763
Amateur Radio Antennas and Support Structures, )
and Amendment of Section 97.15 of the )
Commission's Rules Governing the Amateur Radio )
Service )

MEMORANDUM OPINION AND ORDER

Adopted: December 18, 2001

Released: December 26, 2001

By the Commission:

I. INTRODUCTION

1. The Commission has before it an Application for Review filed on December 15, 2000, by the American Radio Relay League (ARRL). ARRL requests review of the November 13, 2000, decision 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. 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.

II. 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

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.

station facilities, including antennas and support structures.<sup>4</sup> 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 “[s]uch agreements are voluntarily entered into by the buyer or tenant when the agreement is executed and do not usually concern the Commission.”<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup> 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*.<sup>8</sup>

### III. DISCUSSION

4. ARRL believes that the Commission policy set forth in *PRB-1* is discriminatory because it does not encompass private covenants.<sup>9</sup> 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 . . .”<sup>10</sup> 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.<sup>11</sup> 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.”<sup>12</sup>

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

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<sup>4</sup> 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*).

<sup>5</sup> *Id.* at 960 n.6.

<sup>6</sup> ARRL Petition for Rule Making, filed Feb. 7, 1996.

<sup>7</sup> 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).

<sup>8</sup> *Recon Order* at 5 ¶ 11.

<sup>9</sup> ARRL AFR at 5.

<sup>10</sup> *Id.* at 11 (emphasis in original).

<sup>11</sup> *Id.* at 7-8.

<sup>12</sup> *Id.* at 10.

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.<sup>13</sup> 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,<sup>14</sup> 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."<sup>15</sup> While we agree that the voluntary nature of CC&Rs do not always preclude preemption,<sup>16</sup> 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.<sup>17</sup> 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."<sup>18</sup> 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,<sup>19</sup> and employs this power only as necessary to carry out the provisions of the

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<sup>13</sup> *Id.* at 9.

<sup>14</sup> *PRB-1*, 101 FCC 2d at 959-60 ¶¶ 23-24.

<sup>15</sup> ARRL AFR at 15.

<sup>16</sup> See In the Matter of Promotion of Competitive Networks in Local Telecommunications, *First Report and Order and Further Notice of Proposed Rule Making 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*).

<sup>17</sup> See *infra* n.23.

<sup>18</sup> *Id.* at 19.

<sup>19</sup> 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).

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.”<sup>20</sup> 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.<sup>21</sup> In contrast, none of these objectives applies to the Amateur Radio Service, which is a voluntary noncommercial service.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> 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.”<sup>26</sup> 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.<sup>27</sup> Nonetheless, given the great variance in the size and

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<sup>20</sup> 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).

<sup>21</sup> See *Competitive Networks Fixed Wireless Order*, 15 FCC Rcd at 23028.

<sup>22</sup> See 47 C.F.R. § 97.1(a).

<sup>23</sup> 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.

<sup>24</sup> ARRL AFR at 11-12.

<sup>25</sup> *Id.* at 12.

<sup>26</sup> See *PRB-1* at 955 ¶ 9.

<sup>27</sup> ARRL AFR at 11-12.

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.

#### IV. 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