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

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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(e) of the Rules)
Governing the Amateur Radio Service)

RM- _____

To: The Commission

PETITION FOR RULE MAKING

The American Radio Relay
League, Incorporated

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SUMMARY

The American Radio Relay League, Incorporated (the League), the national association of Amateur Radio operators in the United States, requests that the Commission review and modify its policies and procedures governing preemption of state and local regulation of the siting and maintenance of antennas and antenna support structures for use by licensees in the Amateur Radio Service.

It is requested further that the Commission issue a notice of proposed rule making, looking toward the amendment of Section 97.15(e) of the Commission's Rules [47 C.F.R. §97.15(e)] to clarify the Commission's preemptive intent with respect to state and local regulation of amateur radio antennas, consistent with the attached appendix.

Specifically, the League requests that the Commission:

- (1) specify that it has no less interest in the effective performance of an amateur radio station simply because it is located in an area regulated by deed restrictions, covenants, CC&Rs, or condominium regulations, rather than by zoning ordinances;
- (2) clarify that the role of local governments and municipalities in applying the FCC's preemption policies regarding amateur radio antennas is to make a reasonable accommodation for radio amateurs, rather than to "balance" their own local interests against the Federal interest in effective public service amateur communications;
- (3) delineate an antenna height, on the order of 60 to 70 feet, as the minimum that could be construed as a "reasonable accommodation" for amateur communications;
- (4) clarify that the imposition on radio amateurs of excessive costs for local approvals, or the imposition of overly burdensome conditions in land use authorizations, where the cost of compliance approaches the cost of the antenna installation, are preempted;
- (5) clarify that the denial of a particular use permit or special exception does not relieve a municipality of the basic obligation to make reasonable accommodation for amateur communications;
- (6) determine that conditional use permit procedures are valid means of regulation of amateur antenna support structures, but only as an adjunct to a basic, minimum permitted height which is reasonable; and
- (7) specify that safety-related land use restrictions which have the effect of significantly limiting overall height of antennas, or which determine by lot size whether a functional amateur antenna can be installed at all, are invalid unless there is no less-burdensome alternative which would accomplish the same purpose.

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To: The Commission

PETITION FOR RULE MAKING

The American Radio Relay League, Incorporated (the League), the national association of Amateur Radio operators in the United States, by and through counsel and pursuant to Section 1.401 of the Commission's Rules (47 C.F.R. §1.401), hereby respectfully requests that the Commission review and modify its policies and procedures governing preemption of state and local regulation of the siting and maintenance of antennas and antenna support structures for use by licensees in the Amateur Radio Service. It is requested further that the Commission issue a notice of proposed rule making at an early date looking toward the amendment of Section 97.15(e) of the Commission's Rules [47 C.F.R. §97.15(e)] to clarify the Commission's preemptive intent with respect to state and local regulation of amateur radio antennas, consistent with the attached appendix. Specifically, the League requests that the Commission:

(1) specify that it has no less interest in the effective performance of an amateur radio station simply because it is

located in an area regulated by deed restrictions, covenants, CC&Rs, or condominium regulations, rather than by zoning ordinances; (2) clarify that the role of local governments and municipalities in applying the FCC's preemption policies regarding amateur radio antennas is to make a reasonable accommodation for radio amateurs, rather than to "balance" their own local interests against the Federal interest in effective public service amateur communications; (3) delineate an antenna height, on the order of 60 to 70 feet, as the minimum that could be construed as a "reasonable accommodation" for amateur communications; (4) clarify that the imposition on radio amateurs of excessive costs for local approvals, or the imposition of overly burdensome conditions in land use authorizations, where the cost of compliance approaches the cost of the antenna installation, are preempted; (5) clarify that the denial of a particular use permit or special exception does not relieve a municipality of the basic obligation to make reasonable accommodation for amateur communications; (6) determine that conditional use permit procedures are valid means of regulation of amateur antenna support structures, but only as an adjunct to a basic, minimum permitted height which is reasonable; and (7) specify that safety-related land use restrictions which have the effect of significantly limiting overall height of antennas, or which determine by lot size whether a functional amateur antenna can be installed at all, are invalid unless there is no less-burdensome alternative which would accomplish the same purpose. In support of its petition, the League states as follows:

I. Introduction

1. The League was the proponent, in 1984, of a Commission declaratory ruling limiting local regulatory control of amateur radio antennas. At the time, it was established that local building codes, zoning regulations and judicially-enforced private deed restrictions significantly inhibited the accomplishment of the Commission's expectations for the Amateur Radio Service, by limiting the communications ability of its licensees. An outdoor antenna of particular dimensions is a necessary component for most types of amateur radio communications. At the time, municipalities and local land use regulatory authorities regulated antenna heights, placement, and dimensions of amateur antennas with impunity, to the extent that in many areas, amateur radio was prohibited on a de facto basis. Often, these regulations were unnecessary to accomplishment of legitimate land use and safety goals of the regulatory authority. Radio amateurs were left to fend for themselves after licensing, to pursue a public service avocation that was of unquestionable benefit to the public and which serves a number of important Federal communications policy goals.¹ In doing so, they had to, and did, use post-tax dollars to

¹ See, 47 C.F.R. §97.1:

§97.1 Basis and Purpose.--The rules and regulations in this part are designed to provide an amateur radio service having a fundamental purpose as expressed in the following principles:

(a) Recognition and enhancement of the value of the amateur service to the public as a voluntary non-commercial 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 radio 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.

(e) Continuation and extension of the amateur's unique ability to enhance international good will.

The Commission in late December, 1983, described the Amateur Radio Service as "a service that is a model of public responsiveness in times of emergency and distress and a service that is a model of self-enforcement and volunteerism." Report and Order, FCC Docket 83-28, released December 23, 1983.

The U.S. Congress has repeatedly spoken of the benefits of a healthy, efficient Amateur Radio Service. In the Conference Report to the Communications Amendments Act of 1982, Pub. Law #97-259 (1982), as follows:

A. Amateur radio service-- The amateur radio service is as old as radio itself. Every single one of the early radio pioneers, experimenters, and inventors was an amateur--commercial, military, and government radio was unknown. The zeal and dedication to the service of mankind of those early pioneers has provided the spiritual foundation for amateur radio over the years. The contributions of amateur radio operators to our present day communication techniques, facilities, and emergency communications have been invaluable.

* * * *

Amateurs are pioneering still today. Space or satellite communications are a most important part of amateur radio. Through Program OSCAR (Orbiting Satellite Carrying Amateur Radio), amateurs have been utilizing advanced technology from their relatively simple, inexpensive ground stations. Seven amateur satellites have been built to date by amateurs at their expense. The amateur space activities are playing an important role in attracting the young people of America to scientific

fields.

Almost every nation has amateurs who communicate each day with fellow amateurs in other countries and on other continents passing vital emergency message traffic and acting as ambassadors of international goodwill. The modes of communication include Morse code telegraphy, telephone or teleprinters, television and facsimile. Equipment ranges from home-built transmitters and receivers using parts from discarded radio and television receiver and costing only a few dollars, to the most sophisticated equipment manufactured for commercial, government, and military use costing many hundreds of dollars.

There are approximately 400,000 amateurs in the United States and almost 900,000 throughout the world. At any time of every day, thousands of amateurs scattered throughout the world are listening to and communicating with fellow amateurs over distances varying from only a few miles within a city to thousands of miles across the world. It is the large number of amateurs dispersed around the world operating the five high frequency bands that has made it possible to provide the first, and for some time thereafter, the only communication links between areas devastated by natural disasters--earthquakes, tidal waves, hurricanes, tornadoes, blizzards and floods--and the outside world.

* * * *

Every amateur has earned his license by having demonstrated his knowledge of radio theory and application, International Morse Code, the Communications Act, and the regulations of the Federal Communications Commission. Entry into amateur radio usually is through the Novice Class. Amateurs are encouraged to increase their knowledge and skills by a series of five classes or grades of license, all but one with limited operating privileges.

The Amateur Radio Service has been praised for being self-regulated. The Commission has reported that less time has been devoted to the monitoring and regulating the Amateur Service than to any other service because of its self-policing discipline.

One primary purpose of the Conference Substitute is to provide the Federal Communications

defend their ability to erect and maintain reasonable antennas.

Commission with the authority to implement various programs which will result in improvements in administration, requiring even less expenditure of government time and effort than in the past.

In the "Federal Communications Authorization Act of 1988, Public Law 100-594, Congress established its policy regarding protection of amateur radio communications:

SENSE OF CONGRESS

Sec. 10. (a) The Congress finds that -

(1) More than four hundred and thirty-five thousand four hundred radio amateurs in the United States are licensed by the Federal Communications Commission upon examination in radio regulations, technical principles, and the international Morse Code;

(2) by international treaty and the Federal Communications Commission regulation, the amateur is authorized to operate his or her station in a radio service of intercommunications and technical investigations solely with a personal aim and without pecuniary interest;

(3) among the basic purposes for the Amateur Radio Service is the provision of voluntary, noncommercial radio service, particularly emergency communications; and

(4) volunteer emergency communications services have consistently and reliably been provided before, during and after floods, tornadoes, forest fires, earthquakes, blizzards, train wrecks, chemical spills, and other disasters.

(b) It is the sense of the Congress that -

(1) it strongly encourages and supports the Amateur Radio Service and its emergency communications efforts; and

(2) Government agencies shall take into account the valuable contributions made by amateur radio operators when considering actions affecting the Amateur Radio Service.

These cases were almost always resolved in favor of the municipality or local land use regulation entity, regardless of the effect on the radio amateur. Variances and conditional use permits were routinely arbitrarily denied, without substantive recourse.

2. In 1985, the Commission issued what is popularly known as "PRB-1", a declaratory ruling which enunciated Federal Communications policy toward state and local regulatory restrictions on amateur radio facilities. Though not at all a precise delineation of the limits of state and local land use jurisdiction over amateur radio antennas, it was of tremendous benefit to radio amateurs in the negotiation of land use ordinances that, for the first time, took into account the communication needs of licensed radio amateurs.

3. The early cases applying PRB-1, discussed below, established principally that the Commission properly exercised its jurisdiction in establishing its limited preemption policy.² It was

² It is clear that the United States Congress supports the Commission's policy regarding amateur radio facilities as well. Recently, Congress passed Public Law 103-408, a Joint Resolution to recognize the achievements of radio amateurs, and to establish support for such amateurs as national policy:

Congress finds and declares that -

(1) radio amateurs are hereby commended for their contributions to technical progress in electronics, and for their emergency radio communications in times of disaster;

(2) the Federal Communications Commission is urged to continue and enhance the development of the Amateur Radio Service as a public benefit by adopting rules and regulations which encourage the use of new technologies within the amateur radio service; and

also made clear early on in the cases that amateur antennas could not be prohibited outright. The extent that they could be locally regulated, however, has not been consistently addressed in the case law. There are relatively few reported cases applying PRB-1 in the ten years since it was issued, principally because, again, radio amateurs are left to bear the very substantial cost of litigation in attempting to apply the preemption policy to a specific land use situation.

4. As the case law developed, however, municipalities and land use regulators began to seize on the lack of specificity of the PRB-1 policy, and to take advantage of the often prohibitive cost to the individual of challenging land use decisions for the defense of an avocational, public service interest. Some municipalities, encouraged by language taken out-of-context in certain court decisions, have blatantly and repeatedly circumvented the Commission's intent in PRB-1. Examples of this, discussed in detail below, are found in the denial of conditional use permits, which leave the radio amateur with the ability to erect an antenna only of minimal, ineffective, height or dimensions, or in some cases, no antenna at all. This is done through a variety of mechanisms, each of which subverts the intention of the Commission as expressed in PRB-1.

(3) reasonable accommodation should be made for the effective operation of amateur radio from residences, private vehicles and public areas, and that regulation at all levels of government should facilitate and encourage amateur radio operation as a public benefit.

(emphasis added).

5. Neither is the imprecision of the PRB-1 policy satisfactory to the municipal land use authorities who are called upon to apply it. Most of these land use regulators are acting in utmost good faith, but admittedly lack the technical understanding of radio communications necessary to appreciate the impact of their actions on licensed amateurs. They are caught between residents concerned with a particular perception of aesthetics on the one hand, and the interests of radio amateurs in pursuing their public service avocation on the other. They could use some additional guidance as well.³

6. Thus, the purpose of this petition is to seek the Commission's assistance in "fine tuning" its amateur antenna

³ The perspective of the land use regulator in applying PRB-1 was perhaps best explained by the City of Foster City, California, a planned suburban community just south of San Francisco. In a letter dated April 29, 1993 to Senator Diane Feinstein asking for assistance in addressing ambiguity in the present PRB-1 policy, the Mayor of Foster City stated, in part, as follows:

The vagueness of PRB-1 makes development and implementation of antenna regulations by cities very difficult. PRB-1 offers very little direction to cities regarding what constitutes "reasonable accommodation." The FCC has essentially required that such a definition be established via the courts. This is expensive to taxpayers and often not helpful to cities in applying a decision to another jurisdiction and another set of circumstances. The matter of "reasonable accommodation" has been litigated at least eight times in federal courts (that we know of) including a case involving the City of Burlingame, and still no clear definition that cities may rely on has emerged. The ambiguity of PRB-1 has created serious political problems for cities as each side of the issue feels very strongly about the matter, leaving city decisionmakers caught in the middle between amateur radio operators and concerned citizens, attempting to define and agree on "reasonable accommodation" on very technical issues for which they and their staffs have very little training or expertise.

preemption policy, in order to resolve some of the generalizations in it, and to provide some guidelines as to what is presumptively invalid in local land use regulation and what is not. Without embroiling the Commission in local land use issues, the requested clarification will help both land use regulators and radio amateurs in arriving at reasonable antenna policies which address both local interests and the communications needs of the Commission's most public-service-oriented licensees. It will also obviate the expensive and divisive litigation that frankly, radio amateurs are not equipped financially to sustain.

II. Background

7. The League, in July of 1984, petitioned the Commission to delineate, by issuance of Declaratory Ruling, the limitations of local zoning, land use and other local and state regulatory authority over Federally-licensed radio facilities, and specifically, amateur radio facilities.⁴ The Commission responded by issuance of a Public Notice in September of 1984⁵ providing an opportunity for notice and comment by the public on the subject, which occurred during December of 1984 and January of 1985. More than sixteen hundred comments were filed in that proceeding. They addressed both zoning authority of municipal entities and covenant,

⁴ Amateur radio stations are almost exclusively located in residential areas, due to the avocational nature of the Service. It is principally residential land use regulations which confront a Commission licensee in the Amateur Radio Service. Such considerations are quite different from those confronting commercial or industrial antenna installations.

⁵ See the Public Notice, 49 Fed. Reg. 36113, released September 14, 1984.

or deed restrictions which are judicially enforced. Without exception, the amateur radio licensees who commented expressed an almost desperate need for assistance from the Commission in dealing with local land use officials. Amateurs were confronted by land use regulations which were enacted regularly without appreciation for the public service communications provided by amateurs and which were rigorously applied. These restrictions routinely precluded amateur communications through denial of authority to install even marginally effective antenna systems. Amateurs in metropolitan areas were forced to choose between living in an outlying area and enduring two- to three-hour commutes to their workplace, or to be precluded entirely from pursuing amateur radio.

8. The Commission, in 1985, upon a thorough analysis of the large record, and a review of its own, previously latent jurisdiction to preempt state and local land use regulations in favor of Federal communications policy, adopted a Memorandum Opinion and Order delineating, by declaratory ruling, a limited preemption of state and local regulations governing amateur radio antennas and support structures.⁶ The Commission held therein that there is a strong federal interest in promoting amateur communications, and that state and local regulations that preclude amateur communications are in direct conflict with Federal objectives and must be preempted.

⁶ Amateur Radio Preemption, FCC 85-506, 101 FCC 2d 952 (1985), commonly known as "PRB-1". The reference is to "Private Radio Bureau number one", delineating that it was a notice and comment proceeding, conducted by the Private Radio Bureau, but not a formal rule making proceeding.

9. PRB-1 preempted unreasonable local regulation of amateur antennas and support structures to the extent that they constitute de facto or de jure prohibitions, and further held that any land use ordinance or regulation must make "reasonable accommodation" for amateur communications, and must "constitute the minimum practicable restriction" on amateur antennas, necessary to accomplish a local authority's legitimate purpose (i.e. health and safety concerns of the municipality). Amateur Radio Preemption, supra, 101 FCC 2d 960 (1985). Amateur Radio Preemption stated, in relevant part:

* * * * *

(W)e recognize here that there are certain general state and local interests which may, in their even-handed applications, legitimately affect amateur radio facilities. Nonetheless, there is also a strong federal interest in promoting amateur communications. Evidence of the interest may be found in the comprehensive set of rules that the Commission has adopted to regulate the amateur service. 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 that others if they are to provide the amateur operators with the communications 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...[L]ocal 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.

(Id., at 959-60; citations omitted; emphasis added)

This policy was, in its essence, codified at 47 C.F.R. §97.15(e) (1990) when the Commission rewrote the Amateur Radio Service rules in 1989 and 1990. The codification of the preemption order included a summary obligation on the part of the municipality: "Except as otherwise provided herein (i.e. in the Commission's Part 97 rules) a station antenna structure may be erected at heights and dimensions sufficient to accommodate amateur service communications." It continued as follows:

(e)... [State and local regulation of a station antenna structure must not preclude amateur service communications. Rather, it must reasonably accommodate such communications and must constitute the minimum practicable regulation to accomplish the state or local authority's legitimate purpose. See, PRB-1, 101 FCC 2d 952 (1985) for details.]

10. Before the codification of PRB-1, but following its release in 1985, the question which immediately faced the courts was whether such preemption, albeit limited, was within the Commission's authority, and whether it was reasonably exercised. A series of cases following Amateur Radio Preemption uniformly held

that the preemption order was a proper exercise of the Commission's authority.

11. The first of these cases is Thernes v. City of Lakeside Park, Kentucky, et al., 779 F. 2d 1187, 59 Pike and Fischer Radio Regulation 2nd Series 1306 (6th Circuit, 1986); on remand, 62 Pike and Fischer Radio Regulation 2nd Series 284 (E.D. Kentucky, 1986). In that case, an amateur was denied a building permit for an antenna support structure and associated antenna. The ordinance permitted no antennas, although the city had informally agreed to suffer the continuation of a twenty-foot-high wire antenna, erected as a temporary measure by the amateur, which was indisputably inadequate. The amateur had proposed a 73-foot support structure, atop which were to be located eight feet of rotatable, directional antennas. The United States District Court (E.D. KY) had found, prior to issuance of the Amateur Radio Preemption order, no apparent federal preemption of local regulation of amateur radio antennas. Pending appeal in the Sixth Circuit, however, the Commission issued its preemption order. Upon consideration by the Sixth Circuit Court of Appeals of the FCC's legitimate "exercise of its... preemptive powers," the action by the city was declared unlawful, and the case was remanded to the District Court for action consistent therewith. On remand, the District Court held that:

...the defendants shall allow the plaintiff to erect, maintain and use an amateur radio antenna system (at 73 feet as proposed)...unaffected by any present or future ordinances of the city to the contrary, and shall issue to plaintiff all permits therefor.

12. Following Thernes, in Bodony v. Incorporated Village of Sands Point, et al., 681 F. Supp. 1009, 64 Pike and Fischer Radio Regulation 2nd Series 307 (E.D. NY, 1987), the United States District Court for the Eastern District of New York invalidated a 25-foot height limitation in a municipal ordinance, which interfered with the amateur's "right to the full use of his amateur extra class license and the license to use his property as an amateur radio station issued by the FCC." The Court based its ruling on Amateur Radio Preemption, supra, and permitted an antenna 85 feet in height.

13. Immediately after Bodony, another Federal court issued a decision in Bulchis v. City of Edmonds, 671 F. Supp. 1270 (W.D. Wash, 1987), which held that although the City's zoning ordinance governing the height of radio antennas was not invalid on its face (because the ordinance permitted, through a conditional use permit process, greater antenna height than that permitted as a matter of right), the application of the ordinance to the amateur's communications needs (i.e., the denial of a conditional use permit) did frustrate federal goals in regulating amateur radio communications. In short, the Court found that, as the ordinance was applied, "it did not provide for the reasonable accommodation of amateur radio communication," as required by Amateur Radio Preemption, supra.

14. Another case supporting the Amateur Radio Preemption order is Izzo v. Borough of River Edge, et al., 843 F.2d 765 (3d Cir., 1988) which held that the preemption order "infuses

into the proceeding a federal concern, a factor which distinguishes the case from a routine land use dispute having no such dimension." The Court recognized that "(b)ecause the effectiveness of radio communication depends on the height of antennas, local regulation of those structures could pose a direct conflict with federal objectives." The matter was remanded to the District Court, and subsequently the municipality issued the requested antenna permit.

15. There have been no cases declaring Amateur Radio Preemption, supra an unlawful exercise of FCC authority, or which even questioned the application of the ruling to limit municipal regulation of individual amateur radio stations through police power zoning authority. Those most recent cases on the subject uniformly have held that local restrictions on amateur antennas that constitute effective prohibitions on communications, and which involve fixed maximum height limitations are facially void as preempted. See, Evans v. Board of Commissioners, 752 F. Supp. 973, (D. Colo. 1990); MacMillan v. City of Rocky River, 748 F. Supp. 1241 (N.D. Ohio, 1990). The Eighth Circuit United States Court of Appeals has tracked the history and provided a reasonable interpretation of the Commission's preemption policy for amateur radio antennas in Pentel v. City of Mendota Heights, 13 F. 3d 1261 (8th Cir., 1994), a case in which an amateur who had two small, ineffective amateur antennas was denied authority to install a proposed 68-foot antenna in her yard. The Court, in reversing

a District Court summary judgment to the City, held, in part, as follows:

Courts applying PRB-1 have discerned two means by which PRB-1 may preempt a local ordinance. First, the local regulation may be preempted on its face. The city's zoning ordinance does not conflict on its face with PRB-1 because it neither bans nor imposes an unvarying height restriction on amateur radio antennas. (citations omitted).

Second, PRB-1 also preempts a zoning ordinance that a city has not applied in a manner that reasonably accommodates amateur communications. (citations omitted). The FCC refused to specify a height below which local governments could not regulate, and instead declared that "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." PRB-1, para. 25.

16. Some recent cases have held that, where a zoning conditional use permit process exists, local authorities may "balance" the communications needs of the radio amateur against whatever legitimate land use needs exist in considering a particular conditional use permit application. See, e.g. Howard v. City of Burlingame, 726 F. Supp. 770 (N.D. Cal. 1989), affirmed, 937 F. 2d 1376 (9th Cir., 1991); Williams v. City of Columbia, 707 F. Supp. 207 (D. SC 1989), affirmed, 906 F. 2d 994 (4th Cir., 1990). These cases are almost always resolved in favor of the municipality's denial of the use permit sought and a preclusion of the radio amateur licensee's ability to install a functional antenna and support structure.

17. The more thorough analysis of the matter, however, provided by the Eighth Circuit in Pentel v. City of Mendota

Heights, Minnesota, supra, recognized that, in fact, the Commission did the balancing **itself**, and the Courts should only determine whether or not a municipality has made a reasonable accommodation for the amateur communications, which is the absolute obligation of the municipality. It is apparent that the essence of the FCC's preemptive intent as expressed in Amateur Radio Preemption was to insure at least a basic guarantee that each amateur radio operator could install functional antennas at the licensee's residence. This was made clear in September of 1989, when FCC revised its amateur radio rules to codify the essential holding of Amateur Radio Preemption.

18. The Commission has purposely placed few specific restrictions on the height of amateur radio antennas. See 47 C.F.R. §97.15. Only if the radio amateur is near an airport or requires an antenna higher than 200 feet in order to communicate effectively must he or she get special FAA or Commission approval. Because of the relationship between antenna height, terrain obstacles, and the susceptibility of home electronic equipment to interference from antennas in the same horizontal plane, the Commission has allowed amateur radio operators discretion in ascertaining proper antenna height up to 200 feet.⁷ The topography of the site, the presence of

⁷ The Commission has, however, offered some guidelines for appropriate antenna height. It has, for example, determined that CB antennas, used for communications up to only 150 miles, may be erected at heights up to 60 feet:

geographic obstacles such as hills or mountains, the frequency bands used, the eleven-year sunspot cycle, and many other technical factors must all be considered when a radio amateur decides how high to place his or her antenna. Arbitrarily fixed, unreasonably low maximum height limits contained in local restrictions on amateur antennas preclude effective, reliable antenna systems and amateur communications, and take away this important discretion. As Thernes and Bodony each recognized, without specific and substantiated concerns for public health, safety or other compelling purposes (and except to the extent that amateur radio communications are "reasonably

"to enable licensees to erect antennas above nearby obstacles which may absorb radiated energy and thus decrease ability to communicate. The Commission believes that the 60-foot maximum proposal of this Notice represents a reasonable antenna height which will accomplish this purpose. Moreover, this increase in permissible height may tend to decrease television interference problems since it will allow increased height differential between (CB) antennas and television antennas."

Antenna Height Restrictions, 42 F.C.C. 2d 511, at 513 (1973).

Because the Citizen's Radio Service operates on a frequency adjacent to the highest HF amateur frequency band, antennas for the Amateur Radio Service must, assuming many other favorable factors and ideal ionospheric conditions, be at least that high in order to be even minimally effective, even on that one band. Antennas for other bands should be higher. As stated in Bodony, supra, "Testimony of experts indicates that a height of 60 to 70 feet is necessary for good reception under ideal atmospheric conditions." Such height represents compromise between maximum antenna effectiveness and the realities of residential antenna installations, such as protection of aesthetics in urban and suburban environments, but would be overly restrictive in rural environments.

accommodated"), restrictions on antennas violate the Commission's preemption policies.

19. In summary, the Commission intended to preempt unreasonable local regulation of amateur antennas. The limited preemption policy preempts land use regulations as applied to amateur radio antennas to the extent that they constitute de facto or de jure prohibitions. Any ordinance must make reasonable accommodation for amateur communications, and must constitute the minimum practicable restriction on amateur antennas. The summary obligation on the part of the municipality included in the codification of the preemption order that a station antenna structure "may be erected at heights and dimensions sufficient to accommodate amateur service communications" is not at all specific, however. The application of this policy has proven difficult in certain circumstances, and clarification is required.

III. Specific PRB-1 Clarifications Are Necessary

20. The problems that exist in the application of the Commission's preemption policies relative to regulation of amateur radio antennas by municipal and other land use authorities are in translating the Commission's intent to the specifics of land use situations, most often in the area of height, other dimensional, and property line setback limitations. In these respects, amateur radio antenna requirements differ from those applicable to residential satellite earth station antennas, which do not normally have a

height requirement. For the benefit of both municipal governments and radio amateurs, the League urges that the Commission offer guidance in a few specific areas of land use regulation of amateur antennas. Some clarification of the "reasonable accommodation" and "minimum practicable restriction" language of 47 C.F.R. Section 97.15(e) would prevent municipalities from having to attempt to legislate these issues by litigation. It would also offer amateurs some assistance, because the preemption order as currently stated leaves enough room for interpretation that a municipality can effectively frustrate the Commission's intent in issuing the order. This, in turn, has necessitated expensive litigation on the part of individual amateurs, using post-tax dollars to protect what is, after all, a public service avocation.

21. Given the case law which has been created since the issuance of Amateur Radio Preemption, the required clarification is not extensive. Nor is it desirable or necessary to undo any of the protections for radio amateurs that have been built up by amateurs in the courts over the past ten years. It is equally clear that the radio amateur cannot necessarily install whatever antenna he or she may ideally like to have. The realities of land use regulation and living in metropolitan areas necessitate a balanced approach. The Commission's policy, however, should be the cornerstone of the "balancing" of the occasionally competing elements of land use regulations and amateur communications, and the Commission

(which, unlike municipal land use regulators, has the requisite expertise, unlike local land use authorities) should be the entity that does the balancing. The following are routinely encountered situations in which municipalities and other land use authorities continue to unreasonably regulate or preclude amateur radio antennas. Though this is done indirectly in some cases, such restrictions are the effective equivalent of preclusions of amateur radio communications.

22. The PRB-1 preemption order, twice, specifically disclaims application of the Commission's preemption policy to deed restrictions and covenants, often known as "CC&Rs" (covenants, conditions and restrictions). The theory of the disclaimer is that the amateur has alternatives to purchasing a residence subject to deed restrictions, and can, if he or she chooses, live in an area which is not subject to deed restrictions; thus, the acquisition of property in subdivisions regulated by covenants is a voluntary act, and a matter of private contractual agreement. That is an invalid theory in most metropolitan areas of the United States at the present time. Accordingly, the first clarification of the present policies should be as follows:

Point 1. The Commission should specify that it has no less interest in the effective performance of an amateur radio station simply because it is located in an area regulated by deed restrictions, covenants, CC&Rs, or condominium regulations, rather than by zoning ordinances.

There is a reasonable legal argument to the effect that any judicial enforcement of covenants constitutes "state action",