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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

To: The Commission

APPLICATION FOR REVIEW

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TABLE OF CONTENTS

Summary		i
Application for Review		1
I.	Statement of the Case	2
II.	The Application of the PRB-1 Policy to Private Land Use Regulations Does Not Constitute New Policy	9
III.	The Commission Has Jurisdiction to Apply Existing Preemption Policies to Private Land Use Regulations	16
IV.	Conclusions	19

Appendices A-D

SUMMARY

ARRL, The National Association for Amateur Radio, also known as the American Radio Relay League, Incorporated (ARRL), respectfully requests that the Commission review and reverse a portion of the *Order on Reconsideration*, DA 00-2468, released November 15, 1999 (the *Order on Reconsideration*) of the Deputy Chief, Wireless Telecommunications Bureau (WTB), issued under delegated authority. That action reaffirmed a prior *Order*, DA 99-2569, 14 FCC Rcd. 19413, released November 19, 1999 by the Wireless Telecommunications Bureau (WTB) which denied *in toto* the Petition for Rule Making filed by ARRL on February 7, 1996.

The ARRL Petition had requested that the Commission clarify and modify in certain minor respects the Commission's policies and procedures governing the limited 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. See, Section 97.15(b) of the Commission's Rules [47 C.F.R. §97.15(b)]. ARRL now requests that the full Commission review one single portion of the *Order on Reconsideration*, thus to clarify the Commission's intent relative to private land use regulation of amateur radio antennas.

An outdoor antenna of some type is a necessary component for most types of Amateur Service communications. The Commission has acknowledged that private land use regulations are often used as a means of precluding the use of outdoor antennas. Private land use regulations which preclude or fail to reasonably accommodate Amateur communications, or which do not constitute the minimum practicable regulation to accomplish the private land use authority's legitimate goal, are *just as inconsistent* with the strong Federal interest in Amateur Radio communications as are zoning regulations of those same facilities which do not meet the same test. It would be illogical to assert that the Commission has any less interest in unreasonable covenant regulation of amateur antennas than it has with respect to unreasonable zoning regulation of those same antennas. Given the foregoing, it can only be the case that WTB's reliance on the private contractual character of private land use regulations in disclaiming application of the PRB-1 policy to them, *vice* municipal land use regulations, is due solely to the issue of jurisdiction. The Commission, however, has clarified that it does have jurisdiction to preempt private land use regulations. While that may have been a matter of dispute in 1985, it is not a matter of dispute now. Thus, the Commission's policy being clear, it remains for the Commission to apply that existing policy evenly, rather than on a discriminatory basis.

In that case, the obligation of private land use administrators will merely be similar to that of municipal land use officials, which is no more than to allow Amateur communications; to make reasonable accommodation for such; and to enact the minimum practicable restrictions consistent with its own legitimate concerns. There would be no obligation to approve large amateur antenna arrays or support structures on small residential lots in urban or suburban areas. Reasonable accommodation is an extremely flexible standard, and leaves private land use administrators extensive discretion in determining what accommodation for radio amateurs is reasonable in individual cases: a far less intrusive policy than what was imposed by the OTARD proceeding.

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Governing the Amateur Radio Service	)	

To: The Commission

APPLICATION FOR REVIEW

ARRL, The National Association for Amateur Radio, also known as the American Radio Relay League, Incorporated (ARRL), by and through counsel and pursuant to Section 1.115(a) of the Commission's Rules [47 C.F.R. §1.115(a)], hereby respectfully requests that the Commission review and reverse a portion of the *Order on Reconsideration*, DA 00-2468, released November 15, 1999 (the *Order on Reconsideration*) of the Deputy Chief, Wireless Telecommunications Bureau (WTB), in the captioned rulemaking proceeding. That *Order on Reconsideration*, issued under delegated authority, reaffirmed a prior *Order*, DA 99-2569, 14 FCC Rcd. 19413, released November 19, 1999 by the Wireless Telecommunications Bureau (WTB). The prior *Order* denied *in toto* the above-captioned Petition for Rule Making filed by ARRL on February 7, 1996. Said Petition had requested that the Commission clarify and modify in certain minor respects the Commission's policies and procedures governing the limited 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. See, Section 97.15(b) of the Commission's Rules [47 C.F.R. §97.15(b)]. ARRL now requests that the full Commission review one single portion of the *Order on Reconsideration*, thus to clarify the Commission's intent relative to private land use regulation of amateur radio antennas. As good cause for this Application for Review, ARRL states as follows:

I. Statement of the Case

1. More than fifteen years ago, the Commission issued a Declaratory Ruling,[1] subsequently codified, which addressed occasional conflicts between local land use regulations and outdoor Amateur Radio antennas in residential areas. Outdoor antennas are necessary to the effective performance of Amateur Radio stations licensed by the Commission. That Declaratory Ruling enunciated an eminently workable, limited preemption policy of "reasonable accommodation", by which the Commission struck a balance between legitimate local land use regulations and the important Federal interest in promoting and protecting Amateur Radio public service and emergency communications.

2. The policy, both as stated in the Declaratory Ruling and as codified later, is reducible to three basic elements: (1) State and local regulations that operate to preclude amateur communications in their communities are in direct conflict with Federal objectives and must be preempted; (2) local regulations which involve placement, screening, or height of antennas based

[1] A Memorandum Opinion and Order constituting a declaratory ruling was released by the Commission September 19, 1985 in a notice and comment proceeding styled "PRB-1", standing for "Private Radio Bureau proceeding number one". The document number was FCC 85-506; See, 50 Fed. Reg. 38813, 101 FCC 2d 952 (1985). The declaratory ruling, though subsequently codified as 47 C.F.R. §97.15(e), and currently 47 C.F.R. §97.15(b), is popularly referred to as "PRB-1".

on health, safety, or aesthetic considerations must be crafted to accommodate reasonably amateur communications; and (3) those regulations must represent the minimum practicable regulation to accomplish the local authority's legitimate purpose. 101 FCC 2d at 960.

3. The Commission's policy has worked well since that time, in the circumstances in which it applies. It does not entitle a radio amateur to install in residential areas any antenna he or she wishes. **Far from it**: the three-part test for local regulations leaves wide leeway for municipal land use regulators acting in good faith. The flexibility of the "no preclusion", "reasonable accommodation", and "least practicable restriction" tests for local land use regulations provide a means for Amateur Radio licensees and municipal land use regulators to work together to reach compromise or agreement, in the structuring of ordinances, special use permits, and building code restrictions. It is a good, effective policy overall, as applied to municipal land use regulations.

4. The Commission has not, however, in the intervening fifteen years, revisited the limited preemption policy, although several Federal court decisions have interpreted and applied the policy[2] relative to municipal land use regulations. These decisions were the result, in a few cases, of the inability of municipal land use officials and radio amateurs to reach agreement on

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[2] See. e.g. 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); 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); Bulchis v. City of Edmonds, 671 F. Supp. 1270 (W.D. Wash, 1987); Izzo v. Borough of River Edge, et al., 843 F.2d 765 (3d Cir., 1988); Evans v. Board of Commissioners, 752 F. Supp. 973, (D. Colo. 1990), 994 F.2d 755 (10th Cir. 1993); MacMillan v. City of Rocky River, 748 F. Supp. 1241 (N.D. Ohio, 1990); Pentel v. City of Mendota Heights, 13 F. 3d 1261 (8th Cir., 1994); 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).

the proper application of the Commission's policy. For the most part, however, the policy has triggered good-faith dialogue between radio amateurs and land use officials, and the required "reasonable accommodation" for amateur antennas.

5. ARRL filed on February 7, 1996 a Petition for Rule Making, subsequently designated RM-8763, which sought miscellaneous clarifications[3] from the Commission regarding the PRB-1 policy.[4] Most of these addressed repeated instances of misunderstandings on the part of land use officials relative to applications of the policy, leading to the preclusion of Amateur Radio communications.[5] One of the clarifications requested in the Petition, however, related to the scope of the PRB-1 policy as initially enunciated by the Commission. In the most urgent and important portion of the Petition, ARRL sought a clarification that the Commission has no less interest in the effective performance of an amateur radio station, and in the promotion of Amateur communications, merely because the licensee's residential property is regulated by private land use restrictions rather than by State or local government restrictions. These private land use restrictions include deed restrictions, CC&Rs (covenants, conditions and restrictions), condominium regulations and HOA or ACC rules.

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[3] ARRL has extensive experience with the PRB-1 policy and its application. ARRL has directly participated in each and all of the reported cases applying and interpreting it. The interpretational modifications and clarifications sought in the Petition were the result of that extensive experience.

[4] A copy of the Petition as originally filed in 1996 is attached hereto as **Appendix A**.

[5] In some instances in ARRL's experience, land use regulators struggled with the application of PRB-1, and complained of the lack of specificity in the statement of policy set forth therein. In other cases, there were (and still are) circumstances in which land use regulators applied the PRB-1 policies in such a way as to intentionally circumvent and frustrate the Commission's intent, in an effort to preclude the installation of outdoor amateur antennas.

6. ARRL's petition did not request the adoption of new policy regarding land use regulation of amateur antennas at all, nor any expansion of the three-part, "no preclusion", "reasonable accommodation", "least practicable restriction" test for land use restrictions. Rather, in the context of private land use regulations, it sought only to apply that Commission balanced policy equally to all types of land use regulations. This was necessary because the 1985 Declaratory Ruling, twice, on what must of necessity have been jurisdictional grounds, disclaimed any application of the policy to private land use regulations.

7. The PRB-1 order twice stated that such private land use regulations were in nature of private contractual agreements and therefore did not "concern" the Commission.[6] This was apparently true whether or not such restrictions precluded Amateur communications entirely; failed to reasonably accommodate Amateur communications; or constituted restrictions more severe than necessary to protect the (typically aesthetic) concerns of the homeowner's association, architectural control committee, or condominium board. The theory behind the disclaimers set forth in the PRB-1 declaratory ruling was, apparently, that covenants were purely a matter of private contractual agreement and therefore not subject to the Commission's jurisdiction to preempt. ***That, ARRL urges, is no longer a valid premise.***

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[6] In PRB-1, at paragraph 7, the Commission stated: "Since these restrictive covenants are contractual agreements between private parties, they are not generally a matter of concern to the Commission." Footnote 6 to paragraph 25 of the PRB-1 order stated: "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." 101 FCC 2d at 954, 960.

At paragraph 3 of the WTB's November 19, 1999 Order, the Deputy Chief, WTB stated that "...the Commission did not extend the limited preemption to covenants, conditions and restrictions (CC&Rs) in deeds and in condominium by-laws *because they are contractual agreements between private parties.*" (italics added). 14 FCC Rcd. at 19414.

8. Almost four years after the filing of ARRL's February 7, 1996 Petition for Rule Making, the WTB, by its Deputy Chief, in its *Order* of November 19, 1999,[7] concluded that the modifications and clarifications requested by ARRL "would not serve the public interest, convenience and necessity", and denied the Petition completely. Of the application of the Commission's existing policy to private land use regulations, the Order, at paragraph 6, stated as follows:

> The Commission's policy with respect to restrictive covenants is clearly stated in the *MO&O* establishing a limited preemption of state and local regulations. In the *MO&O*, the Commission stated that *PRB-1* does not reach restrictive covenants in private contractual agreements (footnote omitted). The Petitioner argues that enforcement of a court constitutes "state action", thus converting what otherwise would be a private matter into a matter of state regulation and, thus, subject to the Commission's limited preemption policy (footnote omitted). Notwithstanding the clear policy statement that was set forth in PRB-1 excluding restrictive covenants in private contractual agreements as being outside the reach of our limited preemption, (footnote omitted) we nevertheless strongly encourage associations of homeowners and private contracting parties to follow the principle of reasonable accommodation and to apply it to any and all instances of amateur service communications where they may be involved. Although we do not hesitate to offer such encouragement, we are not persuaded by the Petition or the comments in support thereof that specific rule provisions bringing the private restrictive covenants within the ambit of PRB-1 are necessary or appropriate at this time. Having reached this conclusion, we need not resolve the issue of whether, or under what circumstances, judicial enforcement of private covenants would constitute "state action."
>
> 14 FCC Rcd. at 19415

9. ARRL timely filed on December 19, 1999 a Petition for Reconsideration[8] with respect to this and one other clarification issue. In it, ARRL took issue with both the characterization by the Deputy Chief, WTB, of the ARRL's Petition, and with the logic by which WTB refused to apply the Commission's existing policy evenly to all types of land use regulation. The *Order*

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[7] A copy of the WTB's November 19, 1999 *Order* is attached hereto as **Appendix B**.

[8] A copy of the Petition for Reconsideration is attached hereto as **Appendix C**.

accepted as a premise that an outdoor antenna of some type is a necessary component for most types of Amateur Service communications.[9] The Commission has acknowledged that private land use regulations are often used as a means of precluding the use of outdoor antennas.[10] It is true *a priori* that private land use regulations which preclude or fail to reasonably accommodate Amateur communications, or which do not constitute the minimum practicable regulation to accomplish the private land use authority's legitimate goal, are *just as inconsistent* with the strong Federal interest in Amateur Radio communications as are zoning regulations of those same facilities which do not meet the same test. It would be illogical to assert that the Commission has any less interest in unreasonable covenant regulation of amateur antennas than it has with respect to unreasonable zoning regulation of those same antennas. Given the foregoing, ARRL argued, it could only be the case that the Commission's reliance on the private contractual character of CC&Rs in disclaiming application of the PRB-1 policy to them, *vice* municipal land use regulations, was due solely to the issue of jurisdiction. That is, that the Commission, in 1985, believed that it did not have the authority to preempt private land use regulations, which it termed "contractual agreements". While that may have been a matter of dispute in 1985, it is not a matter of dispute now, and the ARRL's Petition for Reconsideration clarified that. The Commission has determined affirmatively that it does in fact have the jurisdiction to preempt private land use regulations,[11] and Congress has expressly ordered the

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[9] See the *Order*, at paragraph 2; 14 FCC Rcd. at 19413.

[10] *Preemption of Local Zoning Regulation of Satellite Earth Stations*, 11 FCC Rcd. 19276 (1996).

[11] See, *In re Preemption of Local Zoning Regulation of Satellite Earth Stations,* and *In re Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-The-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution*

Commission to exercise such jurisdiction in the context of over-the-air video reception devices in residential areas.[12]

10. A year after the filing by ARRL of its Petition for Reconsideration, the Deputy Chief, WTB, affirmed her own prior *Order* in the *Order on Reconsideration*, released November 15, 2000.[13] In addressing therein the issue of private land use regulations and the request for even-handed application of the PRB-1 policy to all types of land use regulations, the Deputy Chief, WTB stated, at paragraph 6, as follows:

> Assuming, without deciding, that the Commission has the authority to address CC&R's in the context of amateur radio facilities, this alone does not necessarily warrant revisiting the exclusion of CC&Rs from the Commission's limited preemption policy in this context. Unlike over-the-air reception devices (OTARDS), which are very limited in size in residential areas (footnote omitted), amateur station antenna configurations depend on a variety of parameters, including the types of communications that the amateur operator desires to engage in, the intended distance of the communications, and the frequency band. Amateur station antennas, in order to achieve the particular objectives of the amateur radio operator, can be a whip attached to an automobile, mounted on a structure hundreds of feet in height, or a wire hundreds (or even more than a thousand) of feet in length. They can be constructed of materials occupying completely an area the size of a typical backyard (footnote omitted). In addition, there can be an array of different types of antennas. Regardless of the extent of our discretion with respect to CC&Rs generally, we are not persuaded by ARRL's arguments that there has been a significant change in the underlying rationale of the PRB-1 decision, or that the facts and circumstances in support thereof, that would necessitate revisiting the issue. In the absence of such showing, we believe that the PRB-1 ruling correctly reflects the Commission's preemption policy in the amateur radio context.

Service, 11 FCC Rcd. 19276, 19303-4 (1996).

[12] Section 207 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996).

[13] A copy of the *Order on Reconsideration* is attached hereto as **Appendix D**.

It is this holding that the Commission must review and reverse. The action taken pursuant to delegated authority is in conflict with the Commission's existing policy and precedent; it involves a precedent which should be revised; and it is premised on an erroneous finding as to the nature of the request contained in the ARRL Petition, and in the Petition for Reconsideration.

II. The Application of the PRB-1 Policy to Private Land Use Regulations Does Not Constitute New Policy

11. In its 1985 Declaratory Ruling, PRB-1, the Commission held that it has 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.[14] It has also been the express determination of Congress that "reasonable

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[14] Though PRB-1 itself more than adequately justified this "strong federal interest", the United States Congress, on several occasions, has stated the same policy in support of the effective performance of amateur radio stations, and has repeatedly spoken of the benefits of a healthy, efficient Amateur Radio Service.

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

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." Pub. L. 103-408 (Joint Resolution to recognize the achievements of radio amateurs, and to establish support for Amateur Radio as national policy). As discussed above, it is undisputed that an outdoor antenna is necessary for most types of Amateur Service communications, and the Commission has noted repeatedly that private land use regulations are often used as a means to preclude outdoor antennas. Private land use restrictions which preclude or fail to reasonably accommodate amateur communications, or which are not the minimum practicable regulation to accomplish the private land use authority's goal (the PRB-1 preemption test), and zoning regulations of the same facilities which do not meet that test, are equally inconsistent with the strong Federal interest in Amateur Radio communications. Why, therefore, would the Commission differentiate between the two?

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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.

12. ARRL has argued to WTB that the only reason for the distinction was a matter of jurisdiction: that because the Commission believed it did not have the authority to preempt private agreements, it did not extend its limited preemption policy to land use regulations that had exactly the same effect on Amateur Service communications as those the Commission did preempt. There appears to be no other reason. However, WTB seems to have created in the *Order on Reconsideration* two other arguments, neither enunciated theretofore. The first seems to be that, because there are many different varieties and configurations of amateur radio antennas, (*some* of which differ from OTARD antennas in size) it would be inappropriate to intrude on the workings of homeowner's associations and their regulation of amateur antennas in residential areas (though it is perfectly appropriate to preclude municipal regulation of those same antennas) no matter how unreasonable or preclusive the private regulation might be. The second argument is that nothing has changed since 1985 that would cause the Commission to modify its policy of excluding private land use regulations from the PRB-1 test, and that neither the ARRL Petition nor the Petition for Reconsideration demonstrated such "changed circumstances". With respect to this latter argument, WTB has never stated any rationale other than perceived jurisdictional limitations, for the differing treatment of similarly situated amateur radio antennas.

13. As to the first argument, WTB misconstrued the nature of the PRB-1 policy, and misunderstood what the obligation of a homeowner's association (HOA) or architectural control committee (ACC) would be if the PRB-1 policy were to be applied evenly. It is important to understand at the outset that ARRL is not urging that the Commission apply OTARD principles, or the OTARD preemption rule, 47 C.F.R. §1.4000, to amateur radio antennas, and so any

comparison of Amateur Radio antennas to OTARD antennas is not relevant here. It would not be the case, if FCC applied PRB-1 principles to private land use regulations, that an HOA or ACC would have to accept a radio amateur's proposal to install whatever the amateur wants by way of an antenna. It would be entirely consistent with PRB-1, for example, for an HOA to permit only a relatively small antenna in a planned community, such as a backyard, ground-mounted vertical antenna or one of small Yagi configuration similar to an outdoor television broadcast antenna. It certainly is not the case that an antenna on a support structure "hundreds of feet in height" or a wire "hundreds (or even more than a thousand) of feet in length"[15] would be required to be accommodated, any more than a zoning authority would have to allow such in small-lot residential areas pursuant to PRB-1. The WTB's incendiary references to what are, after all, exceptional amateur antenna types[16] simply does not reflect what would be required to be permitted by PRB-1 in densely populated residential areas.

14. Make no mistake: PRB-1 has always been, and continues to be, a far less restrictive policy relative to land use regulation than is the OTARD rule, 47 C.F.R. §1.4000. The latter intrudes significantly on both municipal and private land use jurisdiction, and does so pursuant to a clearly enunciated Congressional goal, which is the protection of competition among competing commercial video delivery systems and services. The Commission's handling of the OTARD policy establishes beyond doubt that the Commission has the jurisdiction to preempt

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[15] See the *Order on Reconsideration*, at paragraph 6.

[16] Particularly unfair was the contextually gratuitous reference to antennas constructed of materials "occupying completely an area the size of a typical backyard". The reference was to a single, exceptional moonbounce array located in a rural area in south Texas on property consisting of hundreds of acres, not regulated by CC&Rs, which has absolutely no relevance to this proceeding whatsoever.

private land use regulations. Other than that, however, *the OTARD rule is not a premise for an interpretation of, or a comparable policy to, PRB-1.* PRB-1 intrudes far less on the land use jurisdiction of a municipality, and it would similarly intrude far less on the jurisdiction of an HOA or ACC. PRB-1 merely brings the parties to the table to establish an accommodation for Amateur Radio communications. As would be established in the record, if the Commission were to issue a Notice of Proposed Rule Making or a Notice of Inquiry in response to the ARRL's Petition, HOAs and ACCs presently have absolutely no incentive to make any accommodation for amateur radio communications. Their decisions can be, and typically are, made without any consideration at all of the Federal interest in Amateur communications. The result is that Amateur communications are almost always precluded in subdivisions subject to CC&Rs. It is rare indeed now to find a suburban subdivision without preclusive antenna restrictions, or, just as often, HOA approval requirements that are applied without standards. ARRL's premise in arriving at an even application of existing Commission policy is the same as that of the Commission in 1985 in adopting the policy in the first place: that there is "a reasonable accommodation to be made between the two sides". 101 FCC 2d at 959.

15. Finally on this subject, the WTB lost sight of the fact that the ARRL Petition for Rule Making was just that: it was not necessary for the Petition to contain enough of a record to itself justify the issuance of a Report and Order. The Petition did, however, contain more than enough justification to commence a rulemaking or inquiry proceeding. The stifling of the Petition by WTB for four years, followed by the terse dismissal Order, and the reaffirmation thereof, was not justified by WTB in either the *Order* or the *Order on Reconsideration.*

16. The other WTB argument is that nothing has changed in the underlying rationale of the PRB-1 decision, or the facts and circumstances in support of it, that would necessitate revisiting the issue relative to its application to CC&Rs. Assuming for the moment that there is some rationale (other than the issue of the Commission's jurisdiction) for the disparate treatment of identical, and identically situated, residential antenna systems premised solely on what type of land use regulation applies to a particular parcel of land, the Commission has never articulated it. In PRB-1, the Commission merely stated that "Since these restrictive covenants are contractual agreements between private parties, they are not generally a matter of concern to the Commission" 101 FCC 2d at 954, and "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." 101 FCC 2d at 960. These are the only references in PRB-1 to the justification for excluding covenants. WTB may have correctly assumed that those characterizations of covenants have not changed since 1985 (though a notice and comment proceeding would clearly establish that the prevalence of private antenna restrictions and the means by which HOAs and ACCs regulate antennas is far worse than in 1985).[17] The "voluntariness" argument,

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[17] If WTB was of the unstated view that the voluntary character of CC&Rs makes it unnecessary to apply the Commission's PRB-1 policy to private land use restrictions because Amateurs agree to them when purchasing property, then WTB was obligated to say so, and to address the arguments to the contrary squarely made by both ARRL and another reconsideration petitioner, Barry N. Gorodetzer and Kathy Conard-Gorodetzer. Both parties asserted, without contradiction, that in modern land transactions, there is no element of voluntariness in CC&Rs due to (1) their prevalence and (2) the virtually unfettered jurisdiction of HOAs and ACCs in land use decisionmaking. As ARRL stated in its Petition for Reconsideration:

> ... private land use regulation of amateur antennas in residential areas...is the most serious impediment to amateur radio operation that exists today. The nature

furthermore, is no more applicable to private land use regulations than it is to governmental land use regulations. A buyer of property can choose whichever subdivision, or whichever municipality, he or she wishes. That is irrelevant, however, to whether or not the municipality or the HOA is violating Federal communications policy. In any event, nothing has changed with respect to the "strong Federal interest in promoting Amateur communications", the essential premise of PRB-1, which the WTB reiterated in the *Order on Reconsideration*, at paragraph 8.

17. What has changed, however, since the 1985 Declaratory Ruling, is the fact that the Commission has held that, notwithstanding the private character of covenants, it has the authority to preempt them where there is a conflict with Federal communications policy. Because the limited PRB-1 policy favoring the protection of Amateur communications is clear; because the Commission's jurisdiction is now clear, and because there is no reason other than jurisdiction why the established policy should be arbitrarily restricted to municipal land use regulations only,

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> of these restrictions, as a matter of fact, is that they have never been the equivalent of private contracts. The buyer of land, in modern land transactions, never actually agrees, and very seldom even understands when he or she buys property subject to deed restrictions that amateur antennas are not permitted. Most often, the covenant regulations, which are filed with the subdivision plats at the recorder of deeds office in the county or municipality, specify that all accessory structures on a parcel must be approved in advance by the architectural control committee or homeowner's association (or the developer, at the outset). Some instead flatly preclude outdoor antennas, transmitting antennas, or some variation on that theme. The decisions made by homeowner's associations or architectural control committees are arbitrary by definition, as there are no conditions specified in the documents for approval or disapproval. There is no meeting of the minds, and no contractual element involved in modern day deed restrictions. *Petition for Reconsideration, at 10.*

If this justification was relied on by WTB, the Commission must remand this matter to the WTB to establish an opportunity for public comment and a record concerning the voluntary nature of CC&Rs today, and the extent to which radio amateurs are able to avoid them by purchasing residences elsewhere.

the non-discriminatory application of that existing policy to all land use regulation of Amateur antennas is logically mandated. There is no other way that the Commission could be said to effectuate the Federal goals enunciated in PRB-1.

18. WTB certainly cannot deny that the Commission's intention is that the PRB-1 "no preclusion", "reasonable accommodation", "least practicable restriction" test apply to private land use restrictions. In the November 19, 1999 *Order*, WTB stated the Commission's "encouragement" to HOAs and ACCs to follow the policy and apply it. This can only be interpreted to mean that the Commission has an interest in protecting amateur communications, whether located by happenstance in an area of overly restrictive ordinances or in an area of overly restrictive covenants. Thus, whether or not the Commission "should" apply its policy across the board is answered simply. The only remaining issue, given the strong Federal interest in promoting Amateur communications, is whether the Commission "can" exercise even limited preemptive jurisdiction over private land use regulations, a subject that WTB, twice, chose not to address. However, that question has been firmly answered by the Commission heretofore in the affirmative.

III. The Commission Has Jurisdiction to Apply Existing Preemption Policies to Private Land Use Regulations

19. Congress and the Commission have, in the intervening period between the filing of the League's Petition in February of 1996 and the present time, adopted and implemented Section 207 of the Telecommunications Act of 1996[18] In the process, the Commission squarely

[18] Pub. L. 104-104, 110 Stat.56 (1996) §207. That section, titled "Restrictions on Over-The-Air Reception Devices", states as follows:

determined that it has jurisdiction to preempt enforcement of private contractual agreements if necessary to further an important Federal interest. This jurisdiction is accorded by the Commerce Clause of the United States Constitution. After finding specifically in the OTARD proceeding, 11 FCC Rcd. at 19301, Footnote 112, that "(r)estrictive covenants are sometimes used by homeowner's associations to prevent property owners within the association from installing antennas", the Commission held as follows:

> The government may abrogate restrictive covenants that interfere with federal objectives enunciated in a regulation. In *Seniors Civil Liberties Association v. Kemp* [citation omitted], the District Court found no taking in an implementation of the Fair Housing Amendments Act (FHAA) that declared unlawful age-based restrictive covenants, thereby abrogating the homeowners' association's rules requiring that at least one resident of each home be at least 55 years of age. The court found that the FHAA provisions nullifying the restrictive covenants constituted a "public program" adjusting the benefits and burdens of economic life to promote the common good" and not a taking subject to compensation [footnote omitted]. Similarly, the Commission's rule implementing Section 207 promotes the common good by advancing a legitimate federal interest in ensuring access to communications [footnote omitted] and therefore justifies prohibition of nongovernmental restrictions that impair such access.

11 FCC Rcd at 19303.

The Commission in that same proceeding affirmed its jurisdiction to preempt covenants under the Commerce Clause of the United States Constitution (Art. I, §8, cl.3). Citing *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), the Commission held that the Federal government can not only supersede local regulation, but also can change contractual relationships

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> Within 180 days after the date of enactment of this Act, the Commission shall, pursuant to Section 303 of the Communications Act, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.

between private parties through the exercise of its Constitutional powers, including the Commerce Clause. In that case, the Supreme Court held, in part, and the Commission recited, as follows:

> Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights in property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.
>
> If a regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights, does not always transform the regulation into an illegal taking.
>
> 11 FCC Rcd. at 19303-19304.

20. The Commission cited *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987) for the premise that the Commission may invalidate certain terms of private contracts relating to property rights in the area of pole attachments. It also held that what it termed "homeowner covenants" do not enjoy special immunity from federal power, citing *Shelley v. Kraemer*, 334 U.S. 1 (1948) and *Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972, per curiam). Finally, the Commission's OTARD order noted that, notwithstanding the strict preemption policy without a rebuttal or waiver provision, "nongovernmental restrictions appear to be related primarily to aesthetic concerns", and it was therefore appropriate to accord them "less deference than local governmental regulations that can be based on health and safety considerations." 11 FCC Rcd. at 19304. *Therefore, the Commission has taken the position that private land use regulations are entitled to <u>less</u>, not more, deference than municipal land use regulations.* In its handling of PRB-1, a far less intrusive policy, exactly the opposite has been the case for fifteen years.

IV. Conclusions

21. ARRL's Petition relative to the application of its PRB-1 policy to private land use regulations has not, to date, been afforded a thorough review or a fair analysis. The Deputy Chief, WTB, has twice stated, essentially, that the 1985 Declaratory Ruling was clear, and that there has not been shown any need to change the policy. That, however, begs the question, because the clarity of the disclaimer relative to PRB-1 and covenants belies the fact that there has never been any justification stated for it, other than the terse identification of covenants as private contractual agreements.[19] 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.

22. The Commission has established a limited, and workable policy balancing and accommodating both the important local land use considerations and the strong Federal interest in effective Amateur Radio communications. The justification for it, the protection of the strong

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[19] ARRL noted in its Petition for Reconsideration that in the November 19, 1999 *Order*, The Deputy Chief, WTB claimed that, since the Commission's policy on private land use regulations was "clear", it was unnecessary for WTB to determine whether or not judicial enforcement of covenants constitutes "state action". Such a finding, which has been made in certain judicial decisions, e.g. Shelley v. Kraemer, 334 U.S. 1 (1948); Park Redlands Covenant Control Committee v. Simon, 181 Cal.App. 3d 87 (1986); Cf., Ross v. Hatfield, 640 F. Supp. 708 (D.C. Kansas, 1986); would subject otherwise purely private conduct to the Constitutional limitations applicable to government action. WTB never addressed that issue, claiming it to be unnecessary in view of the decision not to pursue the matter. However, as argued by ARRL, it was not "unnecessary" for the Commission to make that determination. In fact, WTB could not reasonably have dismissed ARRL's Petition at the outset without making that determination, since its premise for the dismissal of the Petition was that covenant regulation of antennas remains a matter of purely private agreement.

Federal interest in Amateur Radio communications, can only be understood to apply equally to municipal and private land use regulations which preclude, fail to reasonably accommodate, or do not constitute the minimum practicable regulation consistent with the local authority's legitimate purpose. The fact that private land use regulations are premised on a notion of private contract, which can no longer be understood to defeat Commission jurisdiction, does not justify disparate treatment of Commission licensees and unequal application of policy. Since the Commission has the jurisdiction to apply its limited preemption policy to all types of land use regulation, and since it is willing to "encourage" private land use authorities to apply the PRB-1 test to private land use regulations, there is no legal or policy reason for continuing the distinction.

23. What the WTB seems to have misunderstood is that the Commission's policy favoring reasonable accommodation of Amateur communications is already in place and requires no modification or expansion. There is no pending request to change the policy, or to expand it, or to analogize it to the OTARD policy. The only question is the proper scope of its application. If the Commission clarifies that the PRB-1 policy applies to all land use regulations, the obligation of HOAs and ACCs will merely be similar to that of municipal land use officials, which is no more than to allow Amateur communications; to make reasonable accommodation for such; and to enact the minimum practicable restrictions consistent with its own legitimate concerns. There would be no obligation on the part of HOAs or ACCs to approve large amateur antenna arrays or support structures on small residential lots in urban or suburban areas. Reasonable accommodation is an extremely flexible standard, and leaves the HOAs with extensive discretion in determining what accommodation for radio amateurs is reasonable in

individual cases. The relief requested leaves administrators of private land use regulations with greater residual jurisdiction over antennas than what was imposed on them by the OTARD proceeding.

24. The Commission need only clarify that which it has already established in other contexts, in order to avoid arbitrary, and discriminatory treatment of similarly-situated licensees: that it intends for its existing amateur radio preemption policy, limited just as it is in the case of governmental restrictions, to apply equally to amateur antennas regulated by covenant. Radio Amateurs can then negotiate reasonable accommodation provisions with homeowner's associations just as they have been able to do since 1985 with governmental land use regulators. Such clarification is consistent with Commission policy and precedent, and is necessary in order to apply that policy to similarly situated licensees.

Therefore, the foregoing considered, ARRL, the National Association for Amateur Radio, respectfully requests that the Commission review and reverse the action of the Wireless

Telecommunications Bureau, taken under delegated authority, which denied the League's Petition for Rule Making and provide the relief requested herein.

Respectfully submitted,

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