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January 7, 2002

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Rm-8763

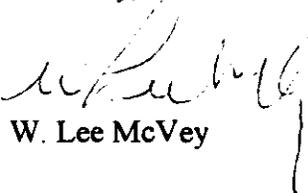
Subject: Withdrawal of Petition For Reconsideration Dated December 31, 2001 and Filing of Petition For Reconsideration of January 7, 2002

Dear Ms. Salas:

Enclosed is a Petition for Reconsideration of FCC-01-372 dated today, January 7, 2002. Due to apparent mailing delays, my Petition for Reconsideration dated December 31, 2001 has not yet arrived at your office or was somehow lost. It was sent Priority Mail with Delivery Confirmation requested early December 31 to the above address. In order to ensure timely filing of this Petition, I am sending it once again as a subsequent filing, via Messenger.

At any rate, please withdraw the Petition dated December 31, 2001 should it ever arrive and replace it with the enclosed Petition for Reconsideration dated January 7, 2002. I have included the original and four copies as per your filing instructions.

Sincerely,



W. Lee McVey

Enclosure

presented by the ARRL. My Petition was not considered by the Commission *en-banc* in preparing its *Memorandum Opinion and Order* FCC 01-372. Further, material included as part of this Petition and my original Petition for Rulemaking relates to the extension of preemption in 47 CFR § 1.4000 to two-way, wireless internet service antennas, which occurred well after the ARRL Application for Review had been filed. Inasmuch as this Petition covers and expands upon identical material from my original Petition, if it is accepted for consideration and not dismissed, I request withdrawal of my May 7, 2001 Petition.

4. Based on the above, I request that the Commission allow this Petition for Reconsideration, submitted under 47 CFR § 1.106 b(2)i, and in accordance with 47 CFR § 1.106b(1), 1.106d(1) and 1.106d(2). It is my belief that the additional material will present sufficient additional evidence to warrant reconsideration by the Commission of the instant *Order* and its decision with respect to preemption of private land use Conditions Covenants and Restrictions (CC&Rs) as they impact the installation of antennas in the Amateur Radio Service.

II. Goals for the Amateur Service Cannot Be Met

5. In its findings in 01-372, the Commission considers the Amateur Service to be functional in spite of the inability to construct antennas at homes and residences, relying instead upon use of portable, remote and vehicular installations. Although one of the stated purposes of Amateur Radio is "continuation and extension of the amateur's proven ability to contribute to the advancement of the radio art," such advancement cannot easily occur by simply operating manufactured hand held or mobile appliance radios. Especially since most experimental work requires a comfortable workspace, test equipment and means to construct, modify or 'bread board' electronic circuitry. Not something easily done on

some remote mountaintop (not available in Florida) or inside a car or truck. Radio experimentation and furtherance of the art cannot easily be done without some form of conveniently available, properly adjusted antenna to test or evaluate systems or concepts in communication with other amateurs.

6. Yet another stated purpose of amateur radio is the "continuation and extension of the amateur's unique ability to enhance international goodwill." With just hand held or mobile operation, amateurs cannot reliably and frequently make contact with international stations, making this goal unattainable as well.

7. Contrary to the conclusions reached by the Commission in 01-372, without the ability to install external antennas at homes of Amateur licensees, Commission goals for the Amateur Service as paraphrased above and codified at 47 CFR § 97.1(b) and § 97.1(e), cannot effectively be met.

III. Promotion of New Technologies

8. The *Order* also references preemption of antenna restrictions for so-called Over The Air Receiving Device (OTARD) antennas and attempts to differentiate between the commercial, two-way wireless services which are described as 'new telecommunications technologies' and the Amateur Service. The Telecommunications Act of 1996 was cited as a basis for the promotion of new telecommunications technologies and the justification for applying preemptive authority only to antenna installations for commercial, two-way internet services. Ironically, the very medium used by this new technology, packetized digital communication, was itself invented about 15 years ago by the Tucson (AZ) Amateur Packet Radio community. If TAPR's membership at that time had to cope with the extensive antenna restrictions now in place across the US and the Commission's

conclusion that mobile or portable operation is sufficient, the technology probably would not have been conceived and fully developed to the extent now enjoyed by millions on a daily basis.

IV. Equal Protection

9. The Fourteenth Amendment to the United States Constitution guarantees equal protection under law. The Commission has clearly not applied the protections of law, with which it is empowered, fairly and equitably to all licensed wireless services. To argue that competitive and new technological interests justify preemption of private contractual agreements and at the same time that the local, regional and national objectives of the Amateur Radio Service do not, clearly establishes cause for closer examination.

10. For example, wireless, two-way internet service can be obtained satisfactorily without the necessity of preemption of CC&Rs by using portable, mobile or otherwise remote locations as opposed to fixed, residential antenna systems. The wireless *Ricochet* two-way internet service offered by Metrocom Inc., does not require the installation of an outside antenna on one's residence to utilize the service. Thus, by applying preemptive authority in the former case when not absolutely essential for two-way wireless internet operation, and yet denying its application to the Amateur Service by asserting that the Service can function without such preemption establishes a reasonable Fourteenth Amendment claim.

11. In so doing, the Commission has written 47 C.F.R. § 1.4000, and the instant *Memorandum Opinion and Order* contrary to the intent of the Fourteenth Amendment to the United States Constitution.

V. Reasonable Antenna Accommodation

12. Also rejected was the concept of reasonable size, type or orientation of Amateur Radio antennas. Something which is uniquely included in the OTARD preemption. For example, the size of OTARD antennas are limited to one meter or less in diameter or diagonal measure. A height, width, orientation or other limitation could have been promulgated, but the Commission opined that this would be too complicated for Homeowner Associations (HOAs) and Architectural Review Committees (ARCs) to consider. If HOAs and ARCs can be expected to understand maximum dimensional requirements, safety considerations and orientations for OTARD antennas, then it follows that similar limitation requirements for basic Amateur Service antenna size and orientation could be specified by the Commission and accepted and understood by HOAs and ARCs.

VI. Significant Additional Commission Expense for Waiver and Declaratory Ruling Process

13. It is reasonable to anticipate significant expense and burden to the Commission and its staff to hear Petitions for Waiver and Declaratory Ruling under the limited scope of preemption of end user antenna restrictions contained in 47 C.F.R. § 1.4000, owing in part to the possible combinations of dual/common use of a single antenna by more than one service, multiple antennas for multiple, permitted and non-permitted wireless services on common support structures, non-dish antennas, and other uniquely complex and confusing situations.

14. Local homeowner associations, boards, and landlords would not normally be expected to be capable in and of themselves of clearly discerning what would be permitted and

non permitted antennas other than simply by their size, dimensions, orientation, and general appearance. And, as such, their actions may result in excessive and perhaps even frivolous use of Commission staff resources in the Commission's Declaratory Ruling and Waiver processes at 47 C.F.R. § 1.4000(c and d). It would be far simpler and more cost effective for all involved to simply designate a maximum size, height or orientation for all antennas, irrespective of wireless service, in preemptive language at 47 C.F.R. § 1.4000.

VII. Amateur Radio and Other Services May Be Unfairly Targeted in CC&R Language

15. 47 C.F.R. § 1.4000(d) includes provisions for seeking Declaratory Ruling by the Commission to challenge CC&R property or premise use restrictions, private covenants and rules insofar as they impact the fixed wireless services covered by the regulation. Rulings under this section will undoubtedly result in new or revised CC&R language written to exclude permitted services from restrictions and to more specifically restrict other regulated, Commission authorized, end user telecommunications services such as the Amateur Radio Service and the General Mobile Radio Service.

16. Unless Amateur Service antennas are also included in preemptive language, at least on some limited basis, it follows that cleverly written, targeted property use restrictions may eventually result in the complete demise of the Amateur Radio Service, contrary to the Commission's goal of "Expansion of the existing reservoir within the Amateur Service of trained radio operators, technicians and electronic experts" at 47 CFR § 97.1(d).

17. Language has already been devised, as in the case of the Conditions Covenants and Restrictions on our property, which goes far beyond antenna restrictions to intimidate Amateur

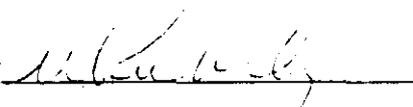
operators or prospective operators. For example, "No such device is permitted under any circumstances if it sends, contributes to or creates interference with any radio, television or other communications reception or interferes with the operation of other visual or sound equipment located within any part of the Subdivision."

18. Clearly, such language serves to intimidate any user of Amateur Radio equipment, exclusive of whether the interference was the result of improper emissions from the Amateur transmitter or improper design, installation or use of the equipment being interfered with.

IX. Conclusion

19. Based on the foregoing, it is requested that the Commission set aside and reconsider its *Memorandum Opinion and Order*, FCC-01-372, and find instead that its preemptive authority granted under the Communications Act of 1934 should be applied to Conditions, Covenants and Restrictions and other private land use restrictions where they impair, discourage or prohibit altogether the installation or operation of antennas and other facilities necessary to the proper and satisfactory function of stations in the Amateur Radio Service.

Dated this 7th day of January, 2002
In Bradenton, Florida

By 

W. Lee McVey, P.E.

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