

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

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

PETITION FOR RECONSIDERATION

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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 reconsider portions of the *Order*, DA-2569, released November 19, 1999 of the Deputy Chief, Wireless Telecommunications Bureau (WTB), which denied *in toto* the Petition for Rule Making filed by the League on February 7, 1996. The Petition requested that the Commission clarify and modify certain of the Commission's 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. The League now requests that the Commission reconsider its refusal to issue a notice of proposed rule making looking toward the amendment of Section 97.15(b) of the Commission's Rules [47 C.F.R. §97.15(b)] to clarify the Commission's preemptive intent in certain respects relative to state and local regulation of amateur radio antennas.

The League requests that the Commission 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 in an area regulated solely by zoning ordinance. The Commission must clarify that it intends that the same limited preemption policy applicable to municipal regulation of amateur antennas is applicable as well to private land use regulations. The Amateur antenna preemption order, twice, specifically disclaimed any "concern" on the part of the Commission with private land use restrictions whether or not they happened to preclude or otherwise fail to reasonably accommodate amateur communications. The theory behind these disclaimers was that the covenants were purely a matter of private contractual agreement and not subject to preemption. That is no longer a valid premise, and no longer an accurate statement of the Commission's jurisdiction over private land use regulations.

Another issue raised in the League's petition which received inadequate review, but which clearly justified either rulemaking or clarification of policy, was that the imposition on radio amateurs of excessive costs for local land use approvals, or the imposition of overly burdensome conditions in land use authorizations such as vegetative screening, where the cost of compliance approaches the cost of the antenna installation, are preempted. This is no more than a reasonable definitional clarification of the "reasonable accommodation" and "minimum practicable regulation" provisions of existing Commission policy, but is nonetheless urgently necessary in order for the Commission to protect its licensees.

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To: The Commission

PETITION FOR RECONSIDERATION

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 1.429 of the Commission's Rules (47 C.F.R. §1.429), hereby respectfully requests that the Commission reconsider portions of the *Order*, DA-2569, released November 19, 1999 (the Order) of the Deputy Chief, Wireless Telecommunications Bureau (WTB), in the captioned rulemaking proceeding, which denied *in toto* the above-captioned Petition for Rule Making filed by the League on February 7, 1996. Said Petition requested that the Commission clarify and modify certain of the Commission's 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. The League now requests that the Commission reconsider its refusal to issue a notice of proposed rule making looking toward the amendment of Section 97.15(b) of the Commission's Rules [47 C.F.R. §97.15(b)] to clarify the Commission's preemptive intent in certain

respects relative to state and local regulation of amateur radio antennas. As good cause for this Petition for Reconsideration, the League states as follows:

I. Introduction

1. The League understands that the WTB's staff workload is substantial, and that rulemaking affecting the various radio services administered by WTB takes time due to the press of other business. This proceeding, however, took almost four years to adjudicate, which is inordinately long. Having awaited action on the Petition for that long, it was surprising that the analysis provided by the Bureau of the issues in the Petition was not more substantial. The delay in resolving the issues raised in the League's Petition has resulted in expenditure of large amounts of money in litigation over land use issues; confusion on the part of, and unnecessary conflicts with, well-intentioned land use regulators; and the inability of many licensed radio amateurs to conduct their public service avocation due to their inability to install and maintain reasonable antenna systems in residential areas. The Commission has not had occasion to revisit or "fine-tune" its policy regarding amateur radio antenna preemption for fifteen years, since the issuance of its pioneering amateur radio antenna preemption policy in 1985. Amateur Radio Preemption, FCC 85-506, 101 FCC 2d 952 (1985) (commonly known as "PRB-1").

2. The League's petition did not request the adoption of substantially new policy. Rather, for the most part, it sought only clarifications to an extremely generalized policy statement. These clarifications were occasioned, and necessitated, by the substantial body of case law established by radio amateurs during the intervening period, pursuant to which the Commission's policy was applied and defined. In some instances, land use regulators struggled with the application of PRB-1, and complained of the lack of utility of the generalized statements of policy set forth therein, and the need for clarification. In other cases, there were (and are) circumstances in which land use

regulators applied the PRB-1 policies in such a way as to circumvent and frustrate the Commission's clear intent. The League's Petition for Rule Making, born of extensive experience with the PRB-1 policies and the League's direct participation in each and all of the reported cases applying and interpreting it, asked only for reasonable interpretational modifications and clarifications.

3. Nonetheless, after almost four years of inaction, the Bureau, in its terse and superficial Order, concluded that the modifications and clarifications suggested by the League "would not serve the public interest, convenience and necessity", and denied the multiple-issue Petition completely. The League suggests that the Commission has failed to adequately evaluate the request, and has given insubstantial attention to it. Therefore, in only two respects at this time, the League asks that the matter be reconsidered and substantively evaluated. At the very least, the Commission must address these two items by either notice of inquiry or notice of proposed rule making. No other outcome is fair to the more than 650,000 licensees of the Commission in the Amateur Service.¹

II. Preemption Policy Regarding Covenant Regulations and Amateur Radio Antennas

4. In its Petition, *inter alia*, the League requested that the Commission 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 in an area regulated solely by zoning ordinance. This was not equivalent to a request that the Commission simply preempt all private land use restrictions. Rather, the League merely sought a statement from the Commission that it intended that the same limited preemption policy applicable

¹ The League firmly believes that its petition provided ample justification for each of the issues raised in the Petition, and that it provided a complete explanation of the unique land use problems that the Petition sought to address. Nonetheless, if the Bureau, or the Commission, believes that additional information is required in order to adequately address these matters, League representatives would appreciate the opportunity to address them in an oral *ex parte* presentation at the convenience of the Commission's staff.

to municipal regulation of amateur antennas be applicable alike to private land use regulations. The problem was, and is, that the PRB-1 preemption order, twice, specifically disclaimed any "concern" on the part of the Commission with deed restrictions and covenants (often known as "CC&Rs", or covenants, conditions and restrictions) whether or not they happened to preclude or otherwise fail to reasonably accommodate amateur communications. The theory behind these disclaimers was that the covenants were purely a matter of private contractual agreement and not subject to preemption.² *That is no longer a valid premise, and no longer an accurate statement of the Commission's jurisdiction over private land use regulations.*

5. Paragraph 6 of the WTB's Order holds that the Commission's policy with respect to restrictive covenants is "clearly stated" in the PRB-1 preemption order, and that such policy is that restrictive covenants in private contractual agreements are "outside the reach of [FCC's] limited preemption." Nonetheless, WTB states that it "strongly encourage[s] 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." Having offered what it refers to as "encouragement"³, the WTB nevertheless claims it is not persuaded by

² 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." 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).

³ The WTB's statement of "encouragement" can only be interpreted to mean that the Commission does have an equivalent interest in protecting amateur communications, whether located by happenstance in an area of overly restrictive ordinances or overly restrictive covenants. Indeed, it would be impossible for the Commission to deny that it does, given the strong Federal interest in promoting Amateur communications.

the Petition or the comments in support of it that "specific rule provisions bringing the private restrictive covenants within the ambit of PRB-1 are necessary or appropriate at this time". It claims that, having reached this conclusion,⁴ it "need not resolve the issue of whether, or under what circumstances, judicial enforcement of private covenants would constitute "state action."

6. The League disagrees entirely with the WTB's premises, and its illogical conclusions. In PRB-1, the Commission clearly 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.⁵ It has also been the express

⁴ Why or how WTB reached this conclusion the Amateur community is not told.

⁵ 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 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.

determination of Congress that "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." Pub. L. 103-408 (Joint Resolution to recognize the achievements of radio amateurs, and to establish support for Amateur Radio as national policy). It is admitted in the WTB's Order, at paragraph 2, that an outdoor antenna is a necessary component for most types of amateur service communications, and the Commission has noted repeatedly that private land use regulations are often used as a means of precluding the use of outdoor antennas.⁶ Furthermore, it is obvious that 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), are just as inconsistent with the strong Federal interest in Amateur Radio communications as are zoning regulations of the same facilities which do not meet that test. It would be illogical to the point of absurdity to contend 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. Therefore, the different treatment of those two types of land use regulations was solely due to the fact that the Commission, in 1985, believed

(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.

⁶ *In re Preemption of Local Zoning Regulation of Satellite Earth Stations, Report and Order and Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd. 19276 (1996).

that it did not have any jurisdiction to preempt private land use regulations, which it termed contractual agreements. It so stated (twice) in PRB-1.⁷

7. There are several reasons why the Commission must reevaluate its jurisdictional conclusion with respect to the application of its existing preemption policy to private land use restrictions at this time. The first is that the 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 1996⁸ and in the process, squarely determined that the Commission clearly has jurisdiction to preempt enforcement of private contractual agreements if necessary to further an important Federal interest.

8. In *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 Service*, 11 FCC Rcd. 19276 (1996), the Commission made it clear beyond any reasonable doubt that it has the authority from Congress, pursuant to the Commerce Clause of the United States Constitution, to prohibit nongovernmental restrictions such as restrictive covenants on communications antenna facilities. After finding specifically, at Footnote 112 thereof that

⁷ The same assumption was made by the Commission in its 1986 Satellite Earth Station preemption policy. *Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations*, 59 RR 2d 1073 (1986).

⁸ Pub. L. 104-104, 110 Stat.56 (1996) §207. That section, titled "Restrictions on Over-The-Air Reception Devices", states as follows:

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.

"Restrictive covenants are sometimes used by homeowner's associations to prevent property owners within the association from installing antennas" and noting Congress' mandate to invalidate restrictions applicable to over-the-air video reception devices, 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.

9. The Commission in that same proceeding affirmed that the Commission also has 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 Congress can not only supersede local regulation, but also can change contractual relationships 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.

10. 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).

11. Finally, the Commission's video delivery services preemption order noted that, though the Commission proposed in that proceeding, relative to video delivery service antennas, a 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. What the League seeks here is far more modest: it merely calls on the Commission to clarify its intent that its existing limited preemption policy, PRB-1, applies to private land use regulations to the extent that it has the jurisdiction to do so. This much the Commission can clearly do, and it must do so in order to protect the established, strong Federal interest in Amateur communications in the public interest. The preemption policy is already firmly established in the case law. It simply must be stated that it applies evenly, rather than in an arbitrary, discriminatory fashion. The Commission cannot, having created the policy, leave the many thousands of radio amateurs subject to private land use regulations without the same tools available to other amateurs regulated only by ordinances and building codes, to protect their ability to utilize their Amateur licenses and to provide public service and emergency communications therewith.

12. 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", and thus subjects otherwise purely private conduct to the Constitutional limitations applicable to government action. It surely was not under any circumstances "unnecessary" for the Commission to make that determination. In fact, the WTB could not have dismissed the League's Petition without making that determination, since its premise for the dismissal of the Petition was that covenant regulation of antennas was a matter of purely private agreement⁹.

13. The Commission has, since the filing of the League's Petition in 1996, clarified that it has ample jurisdiction to preempt private land use regulations. Therefore PRB-1, being a statement of Federal policy preempting unreasonable antenna regulations, would thus apply to covenant regulation by inference, if not by definition. Even aside from that intervening determinative holding, however, the Bureau cannot simultaneously claim now that (1) private land use regulations are outside the scope of its purview because they are private agreements and not governmental regulations; and (2) that it is "unnecessary" to determine whether or not the law subjects those private land use regulations, if judicially enforced, to the same limitations applicable to the

⁹ The League has extensive experience with private land use regulation of amateur antennas in residential areas. It is the most serious impediment to amateur radio operation that exists today. The nature 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.

governmental action that the Commission has proscribed. The Commission **must** make that determination. However, the Commission need not visit the issue in a vacuum: it has been held that judicial enforcement of covenants constitutes "state action", and thus any judicial enforcement of covenants subjects those covenants to the same constitutional limitations and conditions that are applied to municipal ordinances. 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).

14. 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. And they can effectuate firmly entrenched, judicially justified Commission preemption policy unfettered by the legally, logically and factually incorrect disclaimer in the current PRB-1 statement that the Commission has no "concern" with private land use regulations. As stated in the League's Petition, if the Commission does **nothing else** to protect the Amateur Service, it must provide this requested relief. It provides absolutely no burden at all on the agency; it is no more than an accurate statement of Federal policy; and it is critical to the ability of the Amateur Radio Service in the United States to provide efficient, effective public service and emergency communications in the long term.

III. Land Use Regulations Which Impose Unreasonable Costs on Amateur Radio Antenna Installations Are Preempted

15. Another issue raised in the League's petition which received inadequate review, but which clearly justified either rulemaking or clarification of policy, was that the imposition on radio amateurs of excessive costs for local land use approvals, or the imposition of overly burdensome conditions in land use authorizations such as vegetative screening, where the cost of compliance approaches the cost of the antenna installation, are preempted. This, again, is no more than a reasonable definitional clarification of the "reasonable accommodation" and "minimum practicable regulation" provisions of PRB-1 itself. The Commission has long used the issue of excessive costs as a yardstick for determining the validity or invalidity of land use regulations relative to other antenna facilities.

16. As discussed above, PRB-1 requires 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. Amateur Radio Preemption, *supra*, 101 FCC 2d 960 (1985). The Commission stated, in relevant part:

* * * * *

State and local regulations that operate to preclude amateur communications in their communities are in direct conflict with federal objectives and must be preempted.

25. Because amateur station communications are only as effective as the antennas employed, antenna height restrictions directly affect the effectiveness of amateur communications. Some amateur antenna configurations require more substantial installations than others if they are to provide the amateur 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)

17. The League's Petition noted that, notwithstanding the above language, radio amateurs are routinely plagued by numerous instances of the assessment of prohibitive and excessive fees in applying for either basic building permits or conditional use permits, or in the assessment of hearing fees by municipalities. In northern California, for example, a municipality requires a conditional use permit applicant for an amateur antenna to present his case at an administrative hearing, and imposes on the amateur the entire cost of the investigatory work of the municipality's engineering consultant, who is selected by the municipality without any participation on the part of the amateur, and without any maximum fee determined in advance. Excessive costs associated with burdensome screening requirements are also often imposed by municipalities seeking a mechanism to preclude amateur antennas notwithstanding the PRB-1 policy. These costs, to the extent that they substantially exceed the cost of the antenna and support structure, are the functional equivalent of a prohibition of amateur communications. Without at least a statement that excessive costs associated with land use approvals fail the "reasonable accommodation" and minimum practicable restriction" tests of PRB-1, these types of municipal abuses are impossible, as a practical matter, for radio amateurs to address. They simply cannot sustain the financial burden of a challenge to the local regulations, and the Commission's intent in PRB-1 is thwarted.

18. Of this, the WTB stated that "the standards of 'reasonable accommodation' and 'minimum practicable regulation' are sufficiently efficacious as guideposts for state, local and municipal authorities". In fact, those standards are not sufficiently detailed to provide the requisite guidance, and the issue of excessive costs requires further exposition to prevent municipal abuses of the Commission's intent. While it is helpful that the WTB at least stated, in *dicta*, that "the very least

regulation necessary for the welfare of the community must be the aim of its regulations so that such regulations will not impinge on the needs of amateur operators to engage in amateur communications", a specific clarification relative to imposition of excessive costs is urgent and necessary. Prohibitive costs, in the form of permit fees or in overly costly vegetative screening requirements are, for the radio amateur who pays to participate in his or her public service avocation in post-tax dollars, a means of preventing any amateur antenna from being installed, and of preventing amateur radio communications from taking place.

19. While a municipality should be allowed to pass on reasonable expenses in issuing antenna permits to radio amateurs, if not different from those applied to permits for other structures, such costs should not be used as a means of discouraging or prohibiting indirectly the installation of amateur antennas. This applies to use permit hearing fees, engineering certifications, and cost of compliance with conditions attached to the local authorization. The Commission could easily address this by applying the same language to the PRB-1 codification in Section 97.15(b) of the Commission's Rules as that specified in Section 1.4000 of the Rules, which governs video delivery service antennas. That section, in relevant part, precludes land use regulations which unreasonably increases the cost of installation, maintenance or use of the antenna, and states: "Any fee or cost imposed on a viewer by a rule, law, regulation or restriction must be reasonable in light of the cost of the equipment or services and the rule, law, regulation or restriction's treatment of comparable devices."

20. The League also notes that the issue of excessive costs was used as a yardstick for the Commission's 1986 preemption policy regarding satellite earth stations. Section 25.104 of the Commission's Rules, which codified that policy, conditionally preempts local land use regulations when, *inter alia*, the regulation "imposes more than minimal costs on users of such antennas, unless

the promulgating authority can demonstrate that such regulation is reasonable...". The Commission provides in that same rule section its own review authority of local land use regulations when, in part: "(t)he petitioner has received a permit or other authorization required by the state or local authority that is conditioned upon the petitioner's expenditure of a sum of money, including costs required to screen, pole-mount, or otherwise specially install the antenna, greater than the aggregate purchase or total lease cost of the equipment as normally installed..." 47 C.F.R. §25.104(d)(3). Again, what the League seeks here is far more modest: it seeks no opportunity for Commission adjudication of such local restrictions; it seeks no presumptive invalidity of local ordinances or regulations; it merely seeks a statement that imposition of unreasonable or excessive costs on either obtaining a land use permit, or fulfilling the conditions appended to such a permit for an Amateur Radio antenna, causes the municipality to violate the provisions of the PRB-1 preemption test.

IV. Conclusions

21. What was sought to be avoided or minimized by the League's Petition, to date unsuccessfully, is the prohibitively expensive and highly divisive litigation between the Commission licensee and the very municipality or private land use authority that the radio amateur seeks, by his or her communications, to serve. The Wireless Telecommunications Bureau, after a long delay in adjudication of the League's petition, failed to provide a reasoned analysis of the arguments therein or a reasonable justification for its conclusions. The Petition sought no more, at least in the two respects addressed herein, than incidental clarifications of the Commission's established Amateur Radio antenna preemption policy, which flow as a matter of law and logic from other events that have occurred in the fifteen years since the adoption of that policy. It should not be necessary in every case for the amateur licensee to burden the courts with expensive litigation when the Commission could assist, without direct involvement in any such land use

decisionmaking, by minor clarifications of its policy. The Amateur Radio community deserved a more thorough and helpful response than was provided by the Bureau in this instance, and it is necessary now for the Commission to reconsider the decision and to modify it in accordance with the foregoing. Thus, the League urges that the Commission revise and restate its preemption policy, and that it issue a Notice of Proposed Rule Making without delay, looking toward amendment of Section 97.15(b) of the Amateur Service rules, or alternatively issue a clarifying Order relative to the PRB-1 preemption policy, to provide the relief relative to private land use restrictions, and on the subject of excessive and unreasonable costs imposed by land use regulators, as set forth herein.

Therefore, the foregoing considered, the American Radio Relay League respectfully requests that the Commission reconsider its denial of the League's Petition for Rule Making and provide the relief requested herein.

Respectfully submitted,

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