

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

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

MEMORANDUM OPINION AND ORDER

Adopted: September 30, 2002

Released: October 8, 2002

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us a Petition for Reconsideration filed on January 7, 2002, by W. Lee McVey (McVey).¹ McVey requests review of the Commission's December 18, 2001 decision² denying the American Radio Relay League, Inc.'s (ARRL) Application for Review.³ For the reasons discussed below, we dismiss the Petition.⁴

II. BACKGROUND

2. On September 16, 1985, the Commission adopted a *Memorandum Opinion and Order*, establishing a policy of limited preemption of state and local regulation of amateur station facilities, including antennas and support structures.⁵ This limited preemption policy, which was later codified at Section 97.15(b) of the Commission's rules, requires state and local regulations be crafted to reasonably

¹ Petition for Reconsideration (filed Jan. 7, 2002) (Petition).

² Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antenna and Support Structures, and Amendment of Section 97.15 of the Commission's Rules Governing the Amateur Radio Service, *Memorandum Opinion and Order*, 17 FCC Rcd 333 (2001) (*AFR Order*).

³ Application for Review (filed Dec. 15, 2000) (ARRL AFR).

⁴ See Public Notice, *Petition for Reconsideration of Action in Rulemaking Proceeding*, Report No. 2551, May 6, 2002; See also Correction to Public Notice, *Petition for Reconsideration of Action in Rulemaking Proceeding*, Report No. 2551, May 10, 2002. The Commission received three comments to McVey's petition. See James A. Cour Comments to Petition for Reconsideration, filed May 24, 2002; Gerald E. Abbott Comments to Petition for Reconsideration, filed June 7, 2002; Alan Dixon Reply Comments to Petition for Reconsideration, filed June 7, 2002.

⁵ See Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, *Memorandum Opinion and Order*, PRB-1, 101 FCC 2d 952 (1985) (*PRB-1*).

accommodate amateur station antenna structures.⁶ In *PRB-I*, the Commission expressly decided not to extend its limited preemption policy to covenants, conditions and restrictions (CC&Rs) contained in deeds or bylaws of homeowner and condominium associations (HOAs), reasoning that “[s]uch agreements are voluntarily entered into by the buyer or tenant when the agreement is executed and do not usually concern the Commission.”⁷ The Commission further stressed that “[p]urchasers or lessees are free to choose whether they wish to reside where such restrictions on amateur antennas are in effect or settle elsewhere.”⁸

3. On February 7, 1996, ARRL filed a petition for rule making seeking a review of the Commission’s limited preemption policy and an expansion thereof to include CC&Rs in private covenants.⁹ On November 19, 1999, the Deputy Chief, Wireless Telecommunications Bureau (Bureau), denied the ARRL Petition on the grounds that specific rule provisions bringing private restrictive covenants within the scope of *PRB-I* were neither necessary nor appropriate.¹⁰ On December 20, 1999, ARRL requested reconsideration of the Bureau’s decision.¹¹ On November 13, 2000, the Bureau denied the petition, averring that ARRL had not “demonstrated that there has been a significant change in the underlying rationale of the *PRB-I* decision, or that the facts and circumstances in support thereof ... would necessitate revisiting the issue.”¹²

4. On December 15, 2000, ARRL filed an Application for Review of the Bureau’s decision. Therein, the ARRL argued that the Commission possessed the jurisdiction to expand the limited preemption policy to include CC&Rs in private covenants.¹³ ARRL further argued that because the Commission had preempted CC&Rs from restricting the installation of over the air reception devices (OTARDs), yet had not preempted such restrictions in the context of amateur radio station antenna structures, its decision was discriminatory.¹⁴

5. The Commission dismissed the ARRL’s AFR on December 18, 2001, reiterating that *PRB-I* adequately protects the predominant federal interest in promoting amateur communications from regulations that would frustrate the important purposes thereof.¹⁵ While the Commission acknowledged

⁶ 47 C.F.R. § 97.15(b).

⁷ *PRB-I*, 101 FCC 2d at 960 n.6.

⁸ *Id.* at 955 ¶ 9.

⁹ ARRL Petition for Rule Making (filed Feb. 7, 1996) (ARRL Petition).

¹⁰ Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antennas and Support Structures, and Amendment of Section 97.15 of the Commission’s Rules Governing the Amateur Radio Service, *Order*, 14 FCC Rcd 19413, 19415 ¶ 6, 19417 ¶ 11 (1999) (*ARRL Order*).

¹¹ ARRL Petition for Reconsideration (filed Dec. 20, 1999).

¹² Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antenna and Support Structures, and Amendment of Section 97.15 of the Commission’s Rules Governing the Amateur Radio Service, *Order on Reconsideration*, 15 FCC Rcd 22151 ¶ 6 (2000) (*ARRL Recon Order*).

¹³ ARRL AFR at 16-18 ¶¶ 19-20.

¹⁴ *Id.* at 19 ¶ 21. See Preemption of Local Zoning Regulation of Satellite Earth Stations, *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 19276, 19281 ¶ 6 (1996).

¹⁵ *AFR Order*, 17 FCC Rcd at 335 ¶ 5.

its preemption jurisdiction and the fact that the voluntary nature of CC&Rs did not always preclude preemption,¹⁶ it nonetheless stated that the decision to preempt restrictions on OTARDs was based upon significant policy objectives that were not applicable to the amateur radio service, and which could not be adequately accomplished without its intervention.¹⁷ For example, the Commission noted that there was a strong statutory policy against restrictions that impaired a viewer's ability to receive over the air video services.¹⁸ In contrast, because there are other available methods to transmit amateur service communications that do not require an antenna installation at a residence, there was no sufficient showing that CC&Rs prevent amateur radio operators from pursuing the basis and purpose of the amateur service.¹⁹ Finally, while acknowledging that the distinctions in antenna sizes between OTARDs and amateur service installations would not result in a decisional difference, the Commission reiterated its concern originally articulated in *PRB-1*, that given the great variance in the size and configuration of amateur antennas, a limited preemption policy would be considerably more complicated for HOAs to administer.²⁰ On January 7, 2002, McVey filed the instant Petition.²¹ McVey alleges that his petition presents sufficient additional evidence to warrant reconsideration of the Commission's decision with respect to preemption of private land use CC&Rs as they impact the installation of antennas in the Amateur Radio Service.

III. DISCUSSION

6. Section 1.106(b)(2) of the Commission's Rules²² provides:

Where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances are present: (i) The

¹⁶ See Promotion of Competitive Networks in Local Telecommunications, *First Report and Order and Further Notice of Proposed Rule Making in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57*, FCC 00-366, 15 FCC Rcd 22983 (2000) (*Competitive Networks Fixed Wireless Order*).

¹⁷ *AFR Order*, 17 FCC Rcd at 335 ¶¶ 5-6. The Commission also noted that it had extended the OTARD protections to antennas used to transmit or receive fixed wireless signals to further one of the primary goals of the 1996 Communications Act, which is to promote telecommunications competition and encourage the commercial deployment of new telecommunications technologies. See *Competitive Networks Fixed Wireless Order*, 15 FCC Rcd at 23028.

¹⁸ *Id.* at 335 ¶ 6.

¹⁹ *Id.*

²⁰ *Id.* at 336 ¶ 8.

²¹ We note that while the AFR was pending, McVey filed a Petition for Rulemaking, which was substantially the same as the ARRL petition. McVey sought amendment of Section 97.15(b) of the Commission's Rules to include the prohibition of any state or local law or regulation, or CC&R that impairs the installation or use of antennas or antenna structures utilized in the Amateur Radio Service.²¹ On February 1, 2002, the Bureau dismissed McVey's Petition for Rule Making, reasoning that McVey's request was substantially the same as those addressed in the *ARRL Order*.²¹ McVey did not appeal or otherwise challenge that decision.

²² 47 C.F.R. § 1.106(b)(2). See *S&L Teen Hospital Shuttle, Order on Reconsideration*, 17 FCC Rcd 7899 (2002).

petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or (ii) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

A petition for reconsideration that fails to rely upon changed facts or new circumstances may be dismissed pursuant to delegated authority as repetitious.²³

7. McVey argues that his Petition complies with Section 1.106(b)(2)(i) of the Commission's rules²⁴ because it contains substantially different, relevant material which was not presented by the ARRL in its February 7, 1996 rule making petition.²⁵ We reject McVey's contention. McVey fails to explain why he could not have made his arguments by commenting on ARRL's petition for rulemaking. In this regard, we note that McVey did not attempt to participate in this proceeding prior to filing the instant petition for reconsideration.²⁶ While he filed his own petition for rulemaking during the pendency of ARRL's AFR, he did not appeal the dismissal of that petition for rulemaking. Accordingly, we conclude that McVey could have presented his arguments earlier by filing comments responsive to ARRL's petition for rulemaking.

8. Further, we find that McVey's Petition is not based on new facts or changed circumstances. Indeed, McVey's arguments are substantially the same as those presented by the ARRL and addressed by the Commission throughout this proceeding. McVey first argues that the goals for the Amateur Radio Service cannot be met without the ability to install external antennas at homes of amateur licensees, and that Amateur Radio Services may be unfairly targeted in CC&R language.²⁷ The Commission determined that the limited preemption policy adequately protects the ability of amateur service licensees to pursue the purposes of the Amateur Radio Service.²⁸ McVey goes on to assert that the Commission has not clearly applied the protections of law fairly and equitably to all licensed wireless services, in violation of the equal protection clause of the Fourteenth Amendment.²⁹ We disagree. The Commission discussed the distinctions it draws between preemption for OTARDs and Amateur Radio Service station antennas, reiterating that the policy objectives for exercising the extraordinary remedy of preemption in the context of OTARDs are simply not present in the case of amateur radio communications.³⁰ Additionally, McVey argues that the Commission can set reasonable limitation requirements for amateur service antennas.³¹ The Commission reiterated its concern that the variety of

²³ 47 C.F.R. § 1.106(b)(3). See Long Distance/USA, INC., et. al., *Order*, 11 FCC Rcd 1835 (1996).

²⁴ 47 C.F.R. § 1.106(b)(2)(i).

²⁵ Petition at 1-2 ¶ 4.

²⁶ McVey's Petition therefore also fails to comply with 47 C.F.R. § 1.106(b)(1).

²⁷ Petition at 2-6.

²⁸ *AFR Order*, 17 FCC Rcd at 335 ¶ 5; See *ARRL Order*, 14 FCC Rcd at 19416-7 ¶¶ 8-9; *ARRL Recon Order*, 15 FCC Rcd at 22151-2 ¶ 7

²⁹ Petition at 4.

³⁰ *AFR Order*, 17 FCC Rcd at 335-6 ¶ 7.

³¹ Petition at 5.

antenna installations and structures employed for amateur communications would result in a very complicated task for HOAs to administer.³²

9. McVey's final argument is that the Commission's refusal to extend the limited preemption policy to CC&Rs in the context of amateur radio antenna installations will result in significant expense and burden to the Commission to hear Petitions for Waiver and Declaratory Ruling pursuant to Section 1.4000 of our rules.³³ We conclude that this argument is speculative, at best, and does not relate to any new facts or changed circumstances. In this regard, we note that Section 1.4000 was codified in 1996, long before the Commission's denial of the ARRL's AFR.³⁴ Therefore, we find that this argument does not relate to any new facts or changed circumstances requiring reconsideration of the Commission's order denying the ARRL's AFR.

IV. CONCLUSION AND ORDERING CLAUSES

10. McVey's Petition fails to explain why he did not present his arguments earlier and fails to present new facts or circumstances. Accordingly, we will dismiss his Petition as repetitious because it fails to comply with Section 1.106(b)(2) of the Commission's Rules.³⁵

11. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.106(b)(3) of the Commission's Rules, 47 C.F.R. § 1.106(b)(3), the Petition for Reconsideration filed by W. Lee McVey on January 7, 2002 IS DISMISSED.

12. This action is taken under delegated authority pursuant to Sections 0.131 and 1.106(b)(3) of the Commission's Rules, 47 C.F.R. §§ 0.131, 1.106(b)(3).

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division

³² *AFR Order*, 17 FCC Rcd at 336 ¶ 8; *See also ARRL Order*, 14 FCC Rcd at 19416 ¶ 8; *ARRL Recon Order*, 15 FCC Rcd at 22151 ¶ 6.

³³ Petition at 5-6 ¶¶ 13-14. Section 1.4000 is the codification of the Commission's preemption policy for OTARDS. This rule is also applicable to antennas used to transmit or receive fixed wireless signals. *See* note 17 *supra*.

³⁴ We further note that since its enactment, the Commission has only published approximately twelve declaratory rulings that were sought pursuant to Section 1.4000. *See e.g.*, CS Wireless Systems, Inc., Petition for Declaratory Ruling Under 47 C.F.R. § 1.4000, *Memorandum Opinion and Order*, 13 FCC Rcd 4826 (1997); Victor Frankfurt, Vernon Hill, Illinois, Petition for Declaratory Ruling Under 47 C.F.R. § 1.4000, *Memorandum Opinion and Order*, 12 FCC Rcd 17631 (1997); Jay Lubliner and Deborah Galvin, Potomac, Maryland, Petition for Declaratory Ruling Under 47 C.F.R. § 1.4000, *Memorandum Opinion and Order*, 13 FCC Rcd 4834 (1997); Michael J. MacDonald, Petition for Declaratory Ruling Under 47 C.F.R. § 1.4000, *Memorandum Opinion and Order*, 13 FCC Rcd 4844 (1997).

³⁵ 47 C.F.R. § 1.106(b)(2).

Wireless Telecommunications Bureau