

# BOOTH, FRERET, IMLAY & TEPPER, P.C.

ATTORNEYS AT LAW

ROBERT M. BOOTH, JR. (1911-1981)  
JULIAN P. FRERET (1918-1999)  
CHRISTOPHER D. IMLAY  
CARY S. TEPPER

BETHESDA OFFICE:  
7900 WISCONSIN AVENUE, SUITE 304  
BETHESDA, MD 20814-3628

TELEPHONE: (301) 718-1818  
FACSIMILE: (301) 718-1820  
TEPPERLAW@AOL.COM

SILVER SPRING OFFICE: ✓  
14356 CAPE MAY ROAD  
SILVER SPRING, MD 20904-6011

TELEPHONE: (301) 384-5525  
FACSIMILE: (301) 384-6384  
BFTTPC@AOL.COM

November 6, 2009

Via U.S. Mail and E-mail  
mrutledge@cityofmustang.org  
jemyukonlaw@swbell.net

Mr. Mike Rutledge,  
Interim City Manager  
City of Mustang  
1501 N. Mustang Road  
Mustang, OK 73064

Jon Miller, Esquire  
City Attorney  
501 W. Main  
Yukon, OK 73099

Re: Municipal Regulation of Amateur Radio Transmitting  
Facilities and Communications; Mr. John Ripley; Proposed  
Municipal Ordinance 1030 pertaining to Amateur Radio "Towers"

Greetings:

The undersigned serves as General Counsel for ARRL, the National Association for Amateur Radio, formally known as the American Radio Relay League, Incorporated. ARRL is a Connecticut not-for-profit corporation, and is the advocate for Amateur Radio operators in the United States. ARRL has been made aware of the pendency of the above-referenced proposed ordinance amending Chapter 122, Section 122-886 of the City of Mustang, now under consideration. We have been provided by local Amateur Radio operators a copy of this proposed Ordinance in its entirety. We have also been provided with a copy of a letter dated October 30, 2009 addressed to Mr. John Ripley, a resident of Mustang and a member of ARRL, from Ms. Melissa Helsel, the Interim Director of Community Development for Mustang. Both the Proposed Ordinance and the October 30 letter reference radio frequency interference as proper subjects for municipal regulation by the City of Mustang. This is an error, and we would like to offer some clarification on this point.

It is our understanding that the proposed ordinance has been postponed for consideration pending some rethinking of the ordinance and negotiation with local Amateur Radio operators. It is hoped therefore that the information provided herein will facilitate these negotiations and that a reasonable ordinance can be firmed up, which in fact complies

with the preemption policies of the Federal Communications Commission, at 47 C.F.R. §97.15(b) governing Amateur Radio communications. It is our suggestion that the ordinance in its present form does not in numerous respects comply with the FCC's preemption policy. It is not our intention to interfere with the negotiations, however.

For the moment, we will address only the issue of municipal jurisdiction over radio frequency interference. The proposed ordinance includes, at Section 122.892(e) among the requirements for issuance of a conditional use permit, the obligation to "demonstrate that the planned amateur radio tower will not cause radio frequency interference with other existing equipment. Such interference is prohibited." As well, the October 30, 2009 letter from Ms. Helsel to Mr. Ripley states that the City has "received several complaints from residents in your neighborhood" with "personal electronic devices" including "home phones, cellular phones and computers." The letter alleges that under current Mustang ordinances, Amateur antennas can be erected at heights up to 70 feet without a permit only if they are "receive only" towers.

The letter alleges that the Federal Communications Commission has informed the City of Mustang that there is "no mechanism for over-riding (sic) municipal ordinances and that the zoning regulations of the local government must always be adhered to when erecting a tower." Therefore, the letter asks Mr. Ripley to "stop transmitting" from his tower immediately "to avoid interfering with neighbors' electronic devices."

Essentially, *nothing* about this letter is accurate. The City of Mustang in fact has absolutely no jurisdiction whatsoever over radio frequency interference, and no authority to limit, once an antenna support structure is erected in accordance with land use regulations in place at the time, whether the antenna is used for radio transmission or reception. Such regulation is exclusively within the jurisdiction of the Federal Communications Commission, and all regulation of radio transmission and interference phenomena is preempted by Federal law. As well, the conditional use permit condition in the proposed ordinance is void as preempted by Federal law and is not enforceable.

All radio stations operate, and all telecommunications are regulated pursuant to the Communications Act of 1934, as amended, 47 U.S.C. §151 et seq. The Federal Communications Commission has exclusive jurisdiction over radio frequency interference (RFI) matters, and all technical matters associated with radio communications. It was held long ago that all radio communications matters are interstate commerce. *Pulitzer Publishing Co. v. FCC*, 94 F.2d 249, 251 (D.C.Cir.1937). See *WOKO, Inc. v. FCC*, 153 F.2d 623, 628 (D.C.Cir.), *rev'd on other grounds*, 329 U.S. 223, 67 S.Ct. 213, 91 L.Ed. 204 (1946). In *Fry v. United States*, 421 U.S. 542, 95 S.Ct. 1792, 1795, 44 L.Ed.2d 363 (1975) it was held by the Supreme Court that "even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations." In *Fisher's Blend Station v. Tax Commission of the State of Washington*, 56 S.Ct. 608 (U.S. 1936), a case that invalidated a state occupation tax imposed on radio licensees because it placed an unconstitutional burden on interstate commerce, the Supreme Court held that "By its very nature broadcasting transcends state lines and is

national in its scope and importance – characteristics which bring it within the purpose and protection, and subject to the control, of the commerce clause.” In *Federal Radio Comm’n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933) the Supreme Court held that “No question is presented as to the power of the Congress, in its regulation of interstate commerce to regulate radio communications. No state lines divide the radio waves and national regulation is not only appropriate but essential to the efficient use of radio facilities.” In *National Broadcasting Company, Inc., et al., v. United States et al.*, 63 S. Ct. 997, 319 U. S. 190 (1943), the Supreme Court set forth the legal history of radio and showed the necessity and justification for enactment of the Communications Act of 1934 by the Congress of the United States, under the "Commerce Clause" of the Constitution and the quantum and scope of the powers by the Act granted or delegated to the Federal Communications Commission. Given that, there cannot now be any question that the regulation of radio communications is a federal function, with consequent preclusion of any right by a State or State Court to interfere therewith. Section 301 of the Communications Act of 1934 states: 'It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.' The Communications Amendments Act of 1982, Public Law 97-259, which amended the 1934 Communications Act in numerous respects clarified the exclusive jurisdiction of the Federal Communications Commission. In the Joint Conference Report on this legislation, H.R. Conf. Report No. 765, 97<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1982), reprinted in *1982 U.S. Code Cong. And Admin News* 2267,

The legislative history of the Communications Amendments Act of 1982 demonstrates that Congress intended to completely preempt the regulation of RFI:

The Conference Substitute [§302a] is further intended to clarify the reservation of exclusive jurisdiction to the Federal Communications Commission over matters involving RFI. Such matters shall not be regulated by local or state law, nor shall radio transmitting apparatus be subject to local or state regulation as part of any effort to resolve an RFI complaint. The Conferees believe that radio transmitter operators should not be subject to fines, forfeitures, or other liability imposed by any local or state authority as a result of interference appearing in home electronic equipment or systems. Rather, the Conferees intend that regulation of RFI phenomena shall be imposed only by the Commission.

H.R. Conf. Rpt., *Id.*, 1982 U.S.C.C.A.N. at 2277.

The Conference report also clarified that “the exclusive jurisdiction over RFI incidents (including preemption of state and local regulation of such phenomena) lies with the FCC.” *Id.*, at 2267. Obviously, state statutes or local regulations based on

interference from one radio service to another would directly frustrate the intention and goals of the Communications Act of 1934, as amended.

In *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 430 n.6 (1963), the Supreme Court held that the FCC's jurisdiction over "technical matters" associated with the transmission of radio signals was "clearly exclusive". It is clear that an agency's duly promulgated regulations and rules can preempt state law. In *Capital Cities v. Crisp*, 467 U.S.691 (1984) the Court held that FCC regulations preempted Oklahoma's requirement that cable systems delete all advertisements for alcoholic beverages. The Court explained that an agency's statutorily authorized regulations preempt any state or local law that conflicts with them or frustrates their purpose. Beyond that, in proper circumstances, the agency may determine that its authority is exclusive and preempts any state effort to regulate in the forbidden area. *City of New York v. FCC*, 486 U.S. 57, 64 (1988).

The FCC has done that, in *960 Radio, Inc.*, FCC 85-578, 1985 WL 193883 (released November 4, 1985). The FCC stated that the "federal power in the area of radio frequency interference is exclusive; to the extent that any state or local government attempts to regulate in this area, [its] regulations are preempted." The FCC concluded that the Federal regulatory scheme is so pervasive that it is reasonable to assume that Congress did not intend to permit states to supplement it.

Courts have likewise refused to allow private lawsuits against FCC licensees to abate RFI problems. In *Broyde v. Gotham Tower, Inc.*, 13 F. 3d 994, 998 (6<sup>th</sup> Cir. 1994), relying on prior cases dismissing common-law nuisance claims against an amateur radio operator, the Court of Appeals held that a nuisance action against broadcast licensees whose signals allegedly interfered with the operation of home electronic equipment could not be maintained. The defendant's motion to dismiss for failure to state a claim on which relief may be granted was sustained. The Court of Appeals affirmed, stating that since the Congress had explicitly pronounced that RFI incidents were to be preempted, the case could not proceed, and the plaintiff's remedy was at the FCC and nowhere else. The same holding appeared in *Blackburn v. Doubleday Broadcasting Co.*, 353 N.W. 2d 550 (Minn. 1984) and in *Smith v. Calvary Educational Broadcasting Network*, 783 S.W. 2d 533 (Mo. App. 1990).

No private civil action for common law damages or injunctive relief can lie against licensed amateur radio operators for causing RFI. *Still v. Michaels*, 803 P.2d 124 (Ariz. App. 1990). In that case, the Stills sued Michaels, alleging that his radio transmissions caused RFI to television and radio reception. The Court dismissed the complaint and the appellate court affirmed, citing 47 U.S.C. §302a, concluding that the FCC's regulation is exclusive in the area of amateur radio operations. *Id.*, at 125. See also *Still v. Michaels*, 791 F. Supp. 248, 250 (D. Ariz. 1992).

In *Southwestern Bell Wireless v. Johnson County Board of Commissioners*, 199 F. 3d 1185 (10<sup>th</sup> Cir. 1999), Southwestern Bell sued for a declaration that federal communications law preempted a county zoning regulation prohibiting communication

towers and antennas from interfering with public safety communications. Discussing the foregoing cases and the preemption doctrine, the court concluded that "Congress intended federal regulation of RFI issues to be so pervasive as to occupy the field". Thus, the regulation was held "void as preempted." *Id.*, at 1193. The Court noted that adequate administrative remedies were available from the FCC. In *Freeman v. Burlington Broadcasters*, 204 F. 3d 311 (2d Cir. 2000), cert. denied, 531 U.S. 917 (2000) the 2d Circuit found that, "given the FCC's pervasive regulation in this area", allowing local zoning authorities to condition construction and use permits on any requirement to eliminate or remedy RF interference 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

In *In the Matter of Petition of Cingular Wireless L.L.C. for a Declaratory Ruling that Provisions of the Anne Arundel County Zoning Ordinance are Preempted as Impermissible Regulation of Radio Frequency Interference Reserved Exclusively to the Federal Communications Commission*, Memorandum Opinion and Order, DA 03-2196, released July 7, 2003, the FCC preempted a local land use provision requiring that, prior to receiving a County zoning certificate, owners and users of telecommunications facilities must show that their facilities will not degrade or interfere with the County's public safety communications systems. The Ordinance provisions also permitted the County to revoke a zoning certificate where degradation or interference was found. The FCC said: "(W)e find that the challenged provisions of the County's Ordinance regulate RFI, not traditional zoning functions, and therefore are preempted by federal law." The FCC also in this case recited the unbroken history of Congressional, judicial and agency findings that all regulation of RFI incidents are preempted by Federal law and that any remedy for an instance of RFI is with the FCC exclusively. Finally, see generally "The Ghost in the Computer: Radio Frequency Interference and the Doctrine of Federal Preemption." Brock, Ralph H.; 1999 Computer L. Rev. & Tech. J. 17 (Fall 1998-Spring 1999).

While it is a mystery what Ms. Helsel was referring to in her October 30 letter to Mr. Ripley when she indicated that the FCC had "informed the City" that there is "no mechanism" for invalidating municipal ordinances, that is absolutely incorrect in any case. It is hoped that it will not be necessary to submit the RFI provision of the City's proposed ordinance, or the October 30, 2009 letter addressed to Mr. Ripley, to the FCC by way of a request for a declaratory ruling (See 47 C.F.R. § 1.2), but that would be our planned course of action unless the October letter is rescinded without delay (in writing, addressed to Mr. Ripley with a copy to undersigned counsel), and unless Section 122.892(e) of the proposed ordinance is removed from any final version thereof.

Finally, speaking now to the entirety of the proposed antenna ordinance draft, ARRL has some substantial experience with antenna ordinances, and with the FCC's preemption policies regarding antenna regulation. We would offer to assist the City in any respect in redrafting the proposed ordinance in the near term prior to its adoption. As it stands, there is a virtual certainty that the provisions currently included in the draft ordinance are subject to successful challenge. Certain provisions, such as the 125 percent-of-height setback requirement; the requirement of a conditional use permit for all Amateur antenna support

structures, the cost of the conditional use permit (which I am informed is higher than other conditional use permit fees); and the vegetative screening requirement (which stands to impose costs approximating those of the antenna installation itself), both individually and in the aggregate, constitute neither a reasonable accommodation for Amateur Radio communications nor the least practicable regulation to accomplish the legitimate purposes of the City of Mustang. They are therefore not compliant with the preemption policies of the FCC. The provisions for antennas as drafted in our view are, in several specific respects, preempted on their face by Federal law and regulation.

Please understand that the United States' policy is to promote, not to unreasonably restrict Amateur Radio. The U.S. Congress has repeatedly spoken of the benefits of a healthy, efficient Amateur Radio Service, such as in the Conference Report to the Communications Amendments Act of 1982, Pub. Law #97-259 (1982). In the "Federal Communications Authorization Act of 1988, Public Law 100-594, Congress established its policy regarding protection of amateur radio communications:

### **SENSE OF CONGRESS**

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

- (1) More than four hundred and thirty-five thousand four hundred radio amateurs in the United States are licensed by the Federal Communications Commission upon examination in radio regulations, technical principles, and the international Morse Code;
- (2) by international treaty and the Federal Communications Commission regulation, the amateur is authorized to operate his or her station in a radio service of intercommunications and technical investigations solely with a personal aim and without pecuniary interest;
- (3) among the basic purposes for the Amateur Radio Service is the provision of voluntary, noncommercial radio service, particularly emergency communications; and
- (4) volunteer emergency communications services have consistently and reliably been provided before, during and after floods, tornadoes, forest fires, earthquakes, blizzards, train wrecks, chemical spills, and other disasters.

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

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

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

Recently, Congress passed Public Law 103-408, a Joint Resolution to recognize the achievements of radio amateurs, and to establish support for such amateurs as national policy:

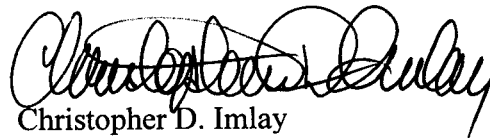
Congress finds and declares that -

- (1) radio amateurs are hereby commended for their contributions to technical progress in electronics, and for their emergency radio communications in times of disaster;
- (2) the Federal Communications Commission is urged to continue and enhance the development of the Amateur Radio Service as a public benefit by adopting rules and regulations which encourage the use of new technologies within the amateur radio service; and
- (3) **reasonable accommodation should be made for the effective operation of amateur radio from residences, private vehicles and public areas, and that regulation at all levels of government should facilitate and encourage amateur radio operation as a public benefit.**

(emphasis added).

Thank you for your review of this correspondence. We hope to be of assistance to the City in arriving at a reasonable antenna ordinance that preserves the benefits of the Amateur Radio service to the citizens of Mustang. I look forward to hearing from you.

Yours very truly,



Christopher D. Imlay  
General Counsel, ARRL

Cc (by e-mail only):

Mr. John Ripley  
Mayor Jeff Landrith  
Mr. John Thomason, WB5SYT  
(ARRL Section Manager, Oklahoma)  
Mr. David Woolweaver  
(ARRL Division Director, West Gulf Division)