FILED

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA OCT 18 1982

HERBERT T. HOPE
CLERK, U. S. DISTRICT COURT
BY _____ DEPUTY

CHARLES M. GUSCHKE,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	No. CIV-81-787-R
	)	
CITY OF OKLAHOMA CITY, a Municipal Corporation,	)	
	)	
Defendant.	)	

PLAINTIFF'S PROPOSED CONCLUSIONS OF LAW AND ARGUMENT

Plaintiff CHARLES M. GUSCHKE comes before the Court and herewith submits Argument in Support of Plaintiff's Proposed Conclusions of Law.

I. GENERAL PROPOSED CONCLUSIONS OF LAW REGARDING JURISDICTION

1. This Court has jurisdiction pursuant to 28 U.S.C. Section 1343 for suits authorized under 42 U.S.C. Section 1983 involving civil rights regarding Freedom of Speech, Due Process, Equal Protection and Right of Privacy and the Plaintiff has properly raised justiciable issues involving an alleged deprivation of these rights before this Court.

Plaintiff makes reference to the Brief in Support of Plaintiff's Response to Defendant's Motion to Dismiss (hereinafter referred to as Plaintiff's Brief in Response) and this Court's Order filed June 25, 1982.

2. This Court has jurisdiction pursuant to 28 U.S.C. Section 1331 for suits involving Federal Questions including Article I, Section 8 of the Constitution of the United States providing for the power of Congress to regulate Commerce among the several states; Article VI, Clause 2 of the Constitution of the United States providing for the supremecy of the Constitution and the laws of the United States made in pursuance thereof and all treaties made under the authority of the United States, anything in the Constitution or laws of any state to the contrary notwithstanding; the Communications Act of 1934, Title U.S.C. Section 151 et. seq. providing for the regulating of interstate and foreign Commerce in communications by wire and radio; Title 47 of the Code of Federal Regulations as promulgated by the Federal Communication Commission.

As authority, Plaintiff makes reference to the Plaintiff's Brief in Response and this Court's order filed June 25, 1982.

3. This Court has jurisdiction pursuant to 28 U.S.C. Section 1331 for suits involving federal questions including Amendment I of the Constitution of the United States

RAWDON & SALEM
SUITE 112 WEST OAKS OFFICE PARK / 2215 WEST LINDSEY / NORMAN, OKLA. 73069
AREA CODE 405 / OFFICE 360-1302

> providing that no law shall be made abridging the Freedom of Speech; Amendment V of the Constitution *providing* that no person shall be deprived of life, liberty or property without due process of law nor shall private property be taken for public use without just compensation; Amendment XIV of the Constitution which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of the citizen of the United States, nor deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law; the right of privacy as provided within the penumbra of the First, Third, Fourth, Fifth and Fourteenth Amendments of the Constitution.

Plaintiff also asserts jurisdiction involving the above Federal civil questions directly under the jurisdiction of 28 U.S.C. Section 1331. It is clear that jurisdiction is also available to the Plaintiff under 28 U.S.C. Section 1343 for a cause of action involving civil rights arising out of 42 U.S.C. Section 1983. Under Section 1331, the claims of the Plaintiff are directly asserted under the Constitution without any intervening statutory language creating a cause of action. The enforcement of constitutional rights under Section 1331 gives rise to a right to damages, declaratory and injunctive relief although an argument exists that no cause of action exists for damages when a claim is directly asserted under the Constitution since the Constitution provides only for the guarantee of the right and makes no provision for damages. McKnight v. South-eastern Pennsylvania Transportation Authority, 438 F. Supp. 813, 816 (D.C.E.D. PA., 1977). Plaintiff has waived any right to damages in this matter leaving his request for declaratory and injunctive relief and attorneys fees.

> 4. This Court has jurisdiction pursuant to 28 U.S.C. Section 1337 for suits arising under any act of Congress regulating commerce. Plaintiff's cause of action arises under the Communications Act of 1934, 47 U.S.C. Section 151 et. seq. and the Federal Regulations of Title 47 C.F.R. all promulgated pursuant to the Commerce Clause of the United States Constitution.

The Plaintiff has asserted a right involving Federal interests under the Communications Act of 1934 and the Regulations promulgated thereto by the Federal Communications Commission

which were enacted pursuant to the Commerce Clause of the United States Constitution and the statutory grant under 47 U.S.C. Section 151 et. seq. The Plaintiff's federal amateur radio license was granted pursuant to the Communications Act and the appropriate Federal Regulations promulgated under that Act. Massachusetts Universalist Convention v. Hildreth and Rogers 87 F. Supp. 822 (D. C. Mass., 1949) Aff'd 183 F. 2d 497 (1st Cir., 1950). This is a matter that affects a wide variety of situations as the Commerce Clause is considered to have broad application and jurisdictional grants under Section 1337 and has been broadly interpreted to reach any federal statute for which the Commerce Clause furnishes a predicate. Network Project v. Corporation for Public Broadcasting, 461 F. 2d 963 (C.A. D.C., 1977). The Plaintiff has asserted a claim that the ordinance of the City burdens interstate commerce and is preempted by Federal Statute and Regulation. Dominant and important federal interests in the field of radio communications are asserted herein and the Defendant's challenged ordinance impinges upon that those federal interests in establishing reliable, efficient and rapid methods of communications.

II. PROPOSED CONCLUSIONS OF LAW INVOLVING SUPREMACY OF INTERNATIONAL TREATIES, FEDERAL STATUTES AND REGULATIONS REGARDING PLAINTIFF FEDERALLY GRANTED RADIO PRIVILEGES OVER CITY ORDINANCE WHICH PROVIDES FOR BLANKET HEIGHT RESTRICTION OVER INSTRUMENTALITY OF PLAINTIFF'S EXERCISE OF THOSE FEDERALLY GRANTED PRIVILEGES.

1. The Federal Government has acted to preempt and preclude state regulation of radio and its instrumentalities. The Federal Communications Commission under the authority of the Communication Act of 1934 is the exclusive federal agency regarding radio and wire communications.

2. The FCC, pursuant to the Communications Act of 1934 has promulgated specific height limitations for amateur radio stations which supercede local restrictions on height. Local interests dictate that cities may regulate matters related to their interests in health, safety, morals and general welfare, but may not regulate matters that impinge upon federal interests.

3. The Federal government has preempted the field of radio and wire communications to provide uniform regulation of interstate and foreign communications by wire and radio so as to make available to all the people of the United States

a rapid, efficient, and reliable nationwide and worldwide wire and radio communications service with adequate facilities for the purpose of national defense, promoting safety of life and property and to centralize authority with respect to interstate and foreign commerce.

4. The FCC is authorized to make such distribution of licenses, frequencies, hours of operation and power among the several states and communities as to provide a fair efficient and equitable distribution of radio service to each of them.

5. The Doctrine of Federal preemption is predicated upon either a finding that
(1) the nature of the subject matter regulated and the pervasiveness of the federal statutory scheme indicates a congressional intent to occupy the entire field;
(2) nonfederal regulations impair or impede the execution and accomplishments of the full objectives of Congress;
(3) a dominant federal interest is present.
If any of the three tests are answered in the affirmative, the local regulation may be preempted.

6. The federal interests involved in amateur radio include (1) emergency communications; (2) advancement of the radio art, (3) international communications and foreign relations; (4) FCC policies and procedures.

7. Defendant's height limitation on antennas impinges on each of the federal interests in that height is related to reliability and effectiveness of communication. Hence, Defendant's ordinance directly affects the effectiveness of communication which in turn impinges upon the ability of the amateur radio operator to achieve federal objectives.

8. Defendant may properly promulgate regulations relating to safety of the erected structure, but not insofar as height is concerned. There is no direct correlation between height and safety or aesthetics. As such, Defendant's regulation is overly broad in its application, attempts to regulate in a field pervasively legislated in by Congress; impairs federal objectives and attempts to limit a matter of dominant federal interest.

9. Full accomplishments of federal objectives regarding amateur radio requires that the Amateur Radio Service have available to it the means of achieving reliable, efficient and rapid methods of communications unimpeded by local regulations that unnecessarily burden federal objectives.

Plaintiff references Plaintiff's Brief in Response, p. 15 in support of this proposition. It is clear by the adoption of the Communications Act of 1934 that Congress intended to preempt the field of radio communications exclusively. One need only reference the Congressional findings of fact in Section 151 of Title 47 to know that Congress intended to take the power of regulation of radio away from the states and centralize the

control of both interstate and foreign communications in the Federal Communications Commission, a federal regulatory body:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide and worldwide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communications, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided and which shall execute and enforce the provisions of this Act. (Emphasis added).
>
> Title 47 U.S.C. Section 151
> Communications Act of 1934

One of the more important purposes of the Communication Act of 1934 was to provide uniform rules and regulations between the states and communities as stated in 47 U.S.C. Section 307(b):

> In considering applications for licenses and modifications and renewals thereof, when and insofar as there is demand for the share, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.
>
> 47 U.S.C. Section 307(b)

The powers of the Commission under Section 303 are quite explicit and broad in their terms, especially as to topics that impinge upon the regulation of amateur radio. The Commission is given the power to:

> Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein
>
> 47 U.S.C. Section 303(e)

Under this section, the Commission no doubt has the right to control and regulate the instrumentalities of radio transmissions.

The United States Supreme Court has expressly declared that the exclusive jurisdiction and regulatory authority by the

Federal Government over radio transmissions and communications includes all instrumentalities, facilities, apparatus used in conjunction therewith. In United States v. Southwestern Cable Co., 392 U.S. 157, 88 S.Ct. 994 (1968), the Court observed:

> The Act's provisions are explicitly applicable to all interstate and foreign communication by wire or radio . . . 47 U.S.C. Section 152(a). Indeed, such communications are defined by the Act so as to encompass the transmission of . . . signals, pictures, and sounds of all kinds, whether by radio, or cable, including all instrumentalities, facilities, apparatus, and service. (Emphasis added)
>
> 392 U.S. 157, at 167, 168.

The Plaintiff's antenna support structure and antennae are indeed instrumentalities and apparati used in his interstate and world wide radio transmissions and communications, without which radio transmissions and communications are impossible.

The federal interest in amateur radio is pervasive. The FCC is given broad powers with regard to its control over radio and wire communications including the advancement of the radio art. Section 303(g) provides that FCC is empowered to:

> Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest.
>
> 47 U.S. Section 303(g)

In this instance the interest of the amateur radio operator is predominant because the amateur radio operator provides much new information in supplying or studying new uses of radio and finding techniques that provide more effective use of radio in the public interest.

In addition Title 47 U.S.C. Section 303(l)(3) emphasizes the importance of the amateur radio operator as an instrument of foreign policy by providing for the licensing of foreign amateur radio operators on a reciprocal basis assuming that there is a treaty to that effect between the United States and the applicable foreign country.

Further control of the instrumentalities (equipment) associated with radio transmissions are found under 303(n) which provides:

> Have authority to inspect all radio installations associated with stations required to be licensed by any Act or which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in construction, installation, and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated.
>
> 47 U.S.C. Section 303(n)

Subsection n contemplates the logical result of inspecting and licensing radio stations knowing that the nature of their transmissions may be national and international in scope.

Congress even intended the Commission to preempt certain types of activities relating to the painting and marking of towers insofar as they affect the safety of the structure including a continuing grant of FCC jurisdiction over the tower even after all radio transmissions from the tower may have ceased 47 U.S.C. Section 303(q).

Federal regulations authorized under federal law have the same preemptive effect on state or local laws as federal laws themselves. Grover City v. United States Postal Service, 391 F. Supp. 982, 987 (C.D. Cal., 1975).

The Federal Communications Commission has placed a general limitation on amateur radio antenna height of 200 feet and has also extensively regulated amateur radio antenna height near airports. 47 C.F.R. Section 97.45.

A Court of law is the final arbiter of constitutional questions and a determination that local regulation in a field has been preempted by Congress presents a constitutional question. Head v. New Mexico 374 U.S. 424, 427-30 (1963). The

doctrine of federal preemption may be predicated upon either a finding that:

> (1) the nature of the subject matter regulated and the pervasiveness of the federal statutory scheme indicate a congressional intent to occupy the entire field. (See Note, The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court, 75 Columbia L. Rev. 623, 625 (1975)
>
> (2) Nonfederal regulations impair or impede the execution and accomplishment of the full objectives of Congress. Ray v. Atlantic Richfield Co. 98 S.Ct. 988, 994 (1978); 374 U.S. 424, 432 (1963).
>
> (3) a dominant federal interest is present. Ray, Supra. 98 S.Ct. at 994. See generally Engdahl, Preemptive Capability of Federal Power, 45 U. Colo L. Rev. 51 (1973); Note: the Preemption Doctrine, Supra 75 Columbia L. Rev. 623 (1975)

The focus on federal preemption and determining when it occurs focuses on (1) the pervasiveness of federal regulations; (2) whether nonfederal regulations impair or impede the attainment of federal objectives; and (3) the federal objectives and interest involved. If the local regulation runs afoul of any element of the test, it is infirmed.

The federal interest in amateur communication reflects an awareness of the public service provided by amateur operators. These are implicit in the basis and purpose of the amateur service found at 47 C.F.R. Section 97.1. (See Proposed Findings of Facts) As a practical matter, amateurs have often been the only means of communication available during disasters.

Amateurs have also operated in the public interest to enhance international relations. As previously argued the Federal government has gone to great lengths to secure frequencies for amateurs in the international forum. This exercise of the foreign affairs powers comprises the relationship between the United States with foreign governments and is based upon the execution of treaties and international agreements.

In both of these instances, amateurs must have access to rapid, efficient and reliable methods of communications to

achieve those federal objectives intended by Congress and the FCC. Blanket antenna height restrictions of less than optimum height for antennas provide less than efficient methods of communications, affect reliability both in transmitting and receiving radio signals and lessen the speed by which radio operators can communicate. (It may be necessary to relay messages under less than optimum heights. This is how the American Radio Relay League started)

An excellent and exhaustive analysis on the subject of preemption is found at 9 Pacific L. Journal 1041 in an article by Jan Lawrence Zegarac entitled "Local Regulation of Amateur Radio Antennae and the Doctrine of Federal Preemption: The Reaches of Federalism."

The argument is made quite persuasively by Zegarac that Federal interests dominate local interests on several basis and that local interests are more properly limited to those factors involving safety of the structure. Since height is one factor of the antenna that is directly related to the reliability and distance of transmission, it should be protected as a federal interest from domination by local control because, it directly affects the federal interests. Matters regarding health, safety and public welfare that do not affect the effectiveness, reliability or range of the communication are nonfederal in nature and may be controlled to some extent (although 47 U.S.C. Section 303(g) regarding tower marking preempts the safety issue from local control to some extent.)

III. PROPOSED CONCLUSIONS OF LAW INVOLVING DEFENDANT'S BLANKET HEIGHT RESTRICTIONS AS A BURDEN ON INTERSTATE COMMERCE

1. Amateur radio transmissions and receptions are interstate commerce within the meaning of Article I, Section 8 of the Constitution of the United States providing for the power of Congress to regulate commerce among the several states.

2. Defendant's blanket height restrictions impose limitations on radio transmissions and receptions so as to burden their use in interstate commerce in that there is a

direct correlation between height and reliability and range of transmission and as such, such blanket height restrictions frustrate federal purposes in matters regarding amateur radio.

3. Blanket height restrictions unduly burden the rapidity, reliability and efficiency of communication by restricting the amateur radio operators ability to communicate.

4. Defendant's governmental powers are limited in nature and cannot be imposed if they do not bear a substantial relation to the public health, safety, morals, or the general welfare.

5. The test as to whether a regulation imposed by a local governmental unit burdens interstate commerce is to find if a rational basis exists to support an exercise of the police powers of a local government and the regulation is nondiscriminatory. In the absence of conflicting federal legislation or objectives, matters of purely local concern may be dealt with by local governments even though they might involve some regulation of interstate on foreign commerce.

6. There is an additional test in weighing the burden on Interstate Commerce. The Commerce Clause has been interpreted not only as an authorization for congressional action, but, even in the absence of a conflicting federal statute, as a restriction on permissable state regulation.

7. Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

8. If a legitimate local purpose is found, then the question of the burden on interstate congress becomes one of decree. The extent of the burden that will be tolerated will depend upon the nature of the local interest involved, and whether it could be promoted as well with a lesser impact on interstate activities.

9. Blanket height restrictions insofar as they affect federal interests by the limitations that they impose upon the amateur radio service have no rational basis, are discriminatory, are overly broad in scope and local governments can protect their interests by a lesser restrictive alternative.

10. Full accomplishment of federal objectives in interstate regulation of radio regarding Amateur Radio requires that the Amateur Radio Service have available to it the means of achieving reliable, efficient and rapid methods of communications unimpeded by local regulations that unnecessarily burden those federal objectives.

Radio signals are interstate commerce. This is obvious. The Federal Communications Commission was created in such a manner as to preempt state control of radio transmissions. As argued in the previous propositions the Communications Act of 1934 (with

subsequent amendments) was enacted pursuant to the congressional power of Congress to regulate "commerce among the several states."

Amateur radio transmissions can also be broken down into two essential categories: local (line of sight transmissions characterized by straight line propagation usually associated with VHF and UHF frequencies and above) and long distance (radio transmissions of an interstate or international nature usually associated with ionospheric propagation). Every frequency authorized to Amateurs is unique and is affected differently by propagation characteristics and ionospheric conditions. As indicated, local and long distance transmissions are usually associated with whether or not they propagate through the ionosphere by "bouncing" back to earth. As a general rule, VHF and UHF radio signals will not propagate except in a straight line fashion, i.e. they will not reflect off the ionosphere. High frequency (HF) signals do propagate in straight line fashion (known as ground wave) but also will reflect off the ionosphere in the "bounce" method previously discussed. See Proposed Findings of Facts.

At VHF and UHF frequencies, transmission distance is directly correlated to height above the ground, i.e. the taller the tower the greater the radius that can be communicated within. This is referred to as "line of sight" propagation. Even though these distances may not travel outside of the state, they are interstate in nature. The mere occurrence that they originate, travel, and are received within the state does not mean that they are not interstate.

A very recent enactment by Congress has upheld this definition of jurisdiction of the Federal Communications Commission over <u>all</u> radio transmissions. Public Law 97-259. (Signed by President Reagan September 13, 1982)

The Communications Amendments Act of 1982 was published in the August 19, 1982 issue of the Congressional Record - House at H6529 - 6547. Section 107 of the Act (shown at H6530) amended 47 U.S.C. Section 301 to extend the control of the United States "over all the channels of radio transmission."

The Conference Report attached to H. R. 3239 is quite explicit in clearing any ambiguity with regard to the Commission Jurisdiction over all radio transmissions. Congressional Record, August 19, 1982, H6537. The Amendment makes "Section 301 consistent with judicial decisions holdings that all radio signals are interstate by their very nature. See, e.g. Fisher's Blend Station v. Tax Commission of Washington State, 297 U.S. 650, 655 (1936)." Also see Whitehurst v. Grimes, 21 F.2d 787 (E.D., Ky., 1927) and Federal Radio Comm'n v. Nelson Brothers 289 U.S. 266, 279 (1933).

BURDEN ON INTERSTATE COMMERCE

The FCC has been given broad regulatory control over numerous aspects of radio communications. The exclusive and pervasive way in which the Federal Government has preempted the field of radio broadcasting is proof of that.

The intent of the framers in providing for federal, rather than state, regulations of interstate and foreign commerce was to promote commerce and avoid economic trade barriers between the States. McLeod v. Dilworth Co., 322 U.S. 327, 330-31 (1944); Gibbons v. Ogden, 22 U.S. 1, 84-90 (1824). State and local governments are therefore prohibited from imposing direct and undue burdens upon such commerce. See Buck v. KuyKendall, 267 U.S. 307, 315 (1925).

Concurrent with such responsibility is the limitation imposed on local government. The Defendant may legitimately exercise only those powers granted to it by the State Constitution or by statute and only in some substantial

relationship to the public health, safety, morals, or general welfare.

> The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare. (Emphasis added)
>
> City of Tulsa v. Swanson, 366 P. 2d 629, 633 (Okla., 1961)

The Court in Tulsa v. Swanson further stated:

> We must be ever mindful that, inasmuch as the inevitable effect of ordinances, such as the one here involved, is to limit private rights in the interest of public welfare, the exercise of the municipal power must be carefully guarded and be permitted only when the conditions and circumstances as shown disclose a need for the proper exercise of police power (citing Oklahoma City v. Barclay, 359 P.2d 237 (Okla., 1961)).
>
> City of Tulsa, Supra.

The use of an amateur radio station (as a hobby) is an incidental use of residential property. Pirtle v. Wade, 593 P.2d 1098 (Okla app., 1979) (See also Amicus Brief of American Radio Relay League, p. 7. et. seq.) Yet, the Plaintiff, along with thousands of amateur radio operators have in past and continue to stand ready to perform valuable emergency and disaster communication public services.

Inasmuch as the Defendant's limitation on a normal and incidental hobby use of residential property may in and of itself be limited because of state law, such limitations are overly broad when the Federal interests of an amateur radio station are analyzed. These Federal interests have been more explicitly defined elsewhere, but in brief they are (1) the "recognition and enhancement of the value of the amateur service to the public as a voluntary noncommercial communications service, particularly with respect to emergency and public service communications; (2) the continuation and extension of the amateur's proven ability to contribute to the advancement of the radio art; (3) the

enhancement of international relations (4) FCC policies and procedures and the effect local regulation has on those policies.

Congress has recognized the role that the amateur radio service has played in all of these federal interests (see Proposed Conclusions of Law dealing with Congressional Findings for the Communications Amendments Act of 1982). The Defendant fails to appreciate those federal interests and objectives and by their limitations the Defendant blindly denies itself of a useful adjunct communications service rather than fostering encouragement for such resources. Indeed, the Defendant seeks to criminally punish with substantial penalties public service minded citizens such as the Plaintiff.

Knowing the limitations imposed on the City by state statute, we turn to the test for burden on interstate commerce. Such determinations are left to the Courts. Great Atlanta & Pacific Tea Co. v. Cottrell, 424 U.S. 366, 371 (1976). If a rational basis exists to support an exercise of the police powers of a local government and the regulation is nondiscriminatory, in the absence of conflicting federal legislation and objectives, matters of purely local concern may be dealt with by local governments even though they might involve some regulation of interstate or foreign commerce. Great Atlanta, Supra. at 424 U.S. 379-80; South Carolina State Highway Dep't v. Barnwell Bros. 303 U.S. 177, 185 (1938).

This analysis is predicated upon the existence of a concurrent or at least overlapping power to regulate in the absence of conflict. It does not envision local regulation where the power to exercise such regulation has been excluded. Great Atlanta, Supra. 424 U.S. 370-71.

The Federal preemption argument has already been advanced as a basis for excluding blanket height restrictions from enforcement. If we take the Defendant's true concerns of safety

and aesthetics (as its local interest), it is logical to assume that safety can be advanced by the promulgation and enforcement of Building Codes, not blanket height restrictions. The issue of aesthetic can be similarly challenged in that towers to 50 feet are already permitted. Such a tower although "ugly" to some, would be entirely legal. Aesthetic standards are a question of taste and obviously not of universal appeal. Thus, if the protection of property values (related to aesthetics) and housing stability (related to aesthetics or not related to tower height at all) are goals to be achieved, they cannot be reached by blanket height restrictions. They can be reached by different alternatives that less restrictively limit Plaintiff's use of his property and radio equipment.

When we impose a balancing test to measure the burden on interstate commerce from blanket height restrictions for amateur radio towers, there is an imposition on interstate commerce based on falacious interests claimed by the Defendant. One of the more recent Supreme Court cases to deal with such a test is that of Hughes v. Oklahoma, 441 U.S. 322, 60 L. Ed. 2d 250, 99 S.Ct. 1727 (1979), on remand 595 P.2d 1349 (Okla. Cr., 1979). The Court struck down as burdensome on the Commerce Clause an Oklahoma Statute that prohibited the transportation or shipping outside the state for sale minnows seined or procured from waters within the state. Mr. Justice Brennan wrote:

> the few simple words of the Commerce Clause - "The Congress shall have power . . . to regulate Commerce . . . among the several states . . ." - reflected a central concern of the framers that was an immediate reason for calling the Constitutional Convention: The conviction that in order to succeed, the new union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.
>
> The Commerce Clause has accordingly been interpreted by this Court not only as an authorization for Congressional action, but, even in the absence of a conflicting federal statute, as a restriction on permissable state regulation.

* * * * *

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. (Emphasis Added)
>
> Huges v. Okla., Supra.

The test discussed by Mr. Justice Brennan is an additional burden on interstate commerce "test even in the absence of an explicit conflicting federal statute. Here is a test for all interstate commerce. Local versus federal commerce interests are examined and if a legitimate local purpose is found, then the local interest is judged on its nature and whether the local interest could be promoted with a lesser impact on interstate commerce. This is true even though no federal statute may speak directly to the conflict. The city in the presence of a conflict may be required to seek a lesser restrictive alternative.

If every city went to the lengths to limit legitimate public service activity as the Defendant has done, the efforts of the Federal government to "make available . . . a rapid efficient nationwide and world wide wire and radio communications service . . . for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications" would be severely hampered.

This electronic "Balkanization" is surely as burdensome as removing minnows from the state. The state should not be punishing the Plaintiff and other amateur radio operators, but seeking to encourage their activities.

The state's interest (if indeed the state has a legitimate interest besides safety in these circumstances) can be reached with a less restrictive ordinance designed to promote the safety of the structure rather than a blanket height restriction. When

such an ordinance acts to frustrate express federal interests (and interests that would be beneficial to the Defendant) they are infirmed.

IV. FEDERAL INTERESTS INVOLVING AMATEUR RADIO ARE SUBSTANTIAL. AMATEUR RADIO OPERATIONS ALSO INVOLVE SUBSTANTIAL BENEFITS TO LOCAL AND STATE GOVERNMENTAL ENTITIES. CONGRESS HAS EXPLICITLY RECOGNIZED THE BENEFITS OF AMATEUR RADIO BY STATUTE AND TREATY.

1. Federal interests affect both "preemption" and "burden on interstate commerce." As such, the intense federal interest in amateur radio should be given great latitude in measuring that interest against local restrictions.

2. The use of an amateur radio station and its accompanying antenna and antenna support structure is an incidental use of the Plaintiff's residential property.

3. The Plaintiff's use of amateur radio involves a purely noncommercial use of his residential property.

4. Amateur radio operators and their radio stations, antennas and antenna support structures are an important resource to local, state and federal government in emergency and other disaster conditions. The Plaintiff's amateur radio station is available for local, state, national and international emergency and disaster use.

5. Amateur radio operators and their radio stations, antennas and antenna support structures of optimum height are necessary instrumentalities related to the amateur's proven abilities to contribute to the advancement of the radio art.

6. Amateur radio operators and their radio station, antennas and antenna support structures of optimum height are necessary instrumentalities related to the amateur's proven ability to enhance international relations.

7. Defendant's ordinance which requires the placement of amateur radio antennas at heights no greater than 35 feet (50 feet with special use permit) contribute to the proliferation of Radio Frequency Interference (RFI) because the lower a radio antenna is to the ground, the greater the potential for interference. The Congress has acted to grant the FCC exclusive jurisdiction over interference control. The blanket height restrictions of the Defendant acts to increase the burden of interference control by the FCC by creating a situation that increases interference potential.

8. Defendant's ordinance which requires the placement of amateur radio antennas at heights no greater than 35 feet (50 feet with special use permit) has the effect of modifying federal regulations that establish the maximum power usage in the amateur service in that lower height for antennas decreases the effectiveness of the transmission and it would be necessary for Plaintiff to use more power to recover the height advantage lost.

9. Amateur radio operators are required by Federal Statute and Regulations to use the minimum power to achieve the communications desired. Blanket height restrictions require additional power to be used to maintain reliable

> communications that would require less power at a greater antenna height. Such a requirement of additional power is not efficient use of the radio spectrum and may contribute unnecessarily to interference.

No other "recreational" type activity enjoys as much attention and time from the federal government as the Amateur Radio Service. Few groups of citizens directly interfaced to a Federal Agency are permitted the latitudes of the radio experimenter. This confidence and attention is well founded. The amateur's interest in his hobby is without monetary gain. 47 C.F.R., Section 97.112. They form a valuable resource in times of disaster and emergency and in other not so dire circumstances. The amateur, as with all station licensees, must operate to serve the "public convenience, interest or necessity." 47 U.S.C. Section 307. This is the person the city seeks to punish.

The congressional findings of the Preamble to the Communications Act of 1934 have already been recited. 47 U.S.C. Section 151. In addition, the findings of FCC in establishing the Amateur Radio Service have been listed. 47 C.F.R. Section 97.1. This section will focus on the most recent pronouncement of Federal interest in amateur radio as found in the Congressional Conference Report of the Communications Amendments of 1982. Public Law 97-259. The findings are found in the Congressional Record for August 19, 1982 beginning at H6529 (H.R. 3239). At page H6533, the conference report offers a descriptive background on the Amateur Radio Service:

> Amateur radio service - The amateur radio service is as old as radio itself. Every single one of the early radio pioneers, experimenters, and inventors was an amateur: commercial, military, and government radio was unknown. The zeal and dedication to the service of mankind of those early pioneers has provided the spiritual foundation for amateur radio over the years. The contributions of amateur radio operators to our present day communication techniques, facilities, and emergency communications have been invaluable.
>
> In the early 1920s, amateurs were relegated to the portion of the radio frequency spectrum that was considered at that time to be virtually useless: the short-waves below 200

meters. These short-waves that once were considered useless are now occupied by marine and aviation, police and public safety, television and FM broadcast, international broadcast, and amateur services, to name a few.

Amateurs are pioneering still today. Space or satellite communications are a most important part of amateur radio. Through Program OSCAR (Orbiting Satellite Carrying Amateur Radio), amateurs have been utilizing advanced technology from their relatively simple, inexpensive ground stations. Seven amateur satellites have been built to date by amateurs at their expense. The amateur space activities are playing an important role in attracting the young people of America to scientific fields.

Almost every nation has amateurs who communicate each day with fellow amateurs in other countries and on other continents passing vital emergency message traffic and acting as ambassadors of international goodwill. The modes of communication include Morse code telegraphy, telephone, teletype or teleprinter, television and facsimile. Equipment ranges from home-built transmitters and receivers using parts from discarded radio and television receivers and costing only a few dollars to the most sophisticated equipment manufactured for commercial, government, and military use costing many hundreds of dollars.

There are approximately 400,000 amateurs in the United States and almost 900,000 throughout the world. At any time of every day, thousands of amateurs scattered throughout the world are listening to and communicating with fellow amateurs over distances varying from only a few miles within a city to thousands of miles across the world. It is the large number of amateurs dispersed around the world operating in the five high frequency bands that has made it possible to provide the first, and for some time thereafter, the only communication links between areas devastated by natural disasters-earthquakes, tidal waves, hurricanes, tornadoes, blizzards and floods-and the outside world.

Every amateur has earned his license by having demonstrated his knowledge of radio theory and application, International Morse Code, the Communications Act, and the regulations of the Federal Communications Commission. Entry into amateur radio usually is through the Novice Class. Amateurs are encouraged to increase their knowledge and skills by a series of five classes or grades of license, all but one with limited operating privileges.

August 19, 1982
Congressional Record H6533

The Communications Amendments also recognized problems that have arisen in the field of Radio Frequency Interference (RFI) and granted the exclusive jurisdiction for setting RFI standards for commercial and consumer equipment exclusively with the FCC. The role of amateur radio operators in this important aspect of radio is recognized:

Radio frequency interference rejection standards. - Radio frequency interference (RFI) arises when a signal radiated by a transmitter is picked up by an electronic device in such a manner that it prevents the clear reception of another and desired signal or causes malfunction of some other electronic device (not simply a radio or television receiver). While almost any transmitter of any service is a potential interference source, Amateur or Citizens Band (CB) stations are very often associated with RFI problems involving electronic devices in the home.

Particularly since the advent of commercial television immediately following World War II, amateur radio operators have been active in interference control and elimination. The amateurs learned very early that the incorporation of good engineering practices in their transmitter construction, such as electrostatic shielding and filtering, minimized the possibility of interference by preventing the radiation of spurious signals. Such practices and techniques are well understood and are universally incorporated in transmitters manufactured and in use today, irrespective of the service. Appropriate rules of the Federal Communications Commission require all transmitters of all services, including the transmitting sections of transceivers, to suppress spurious radiation.

It has become evident that many interference problems involving home electronic equipment and systems are not fully resolvable through taking protective steps with the transmitting equipment, but that resolution of some interference problems may require action with respect to receivers and other electronic devices picking up unwanted signals.

Causes for interference to television reception, for example, can be divided into the following categories. First, although least common, is the pickup of a spurious (unwanted) signal having a frequency within or close to the band of frequencies occupied by the television signal. Such interference usually is caused by an interfering transmitter. In many instances, there is what is termed an harmonic relationship between the transmitter frequency and the television channel. That is particularly the case with the 27 Megahertz CB service: the second and the third harmonics (multiples) of the 27 Megahertz CB signal fall in TV channels 2 and 5, respectively. It is generally recognized that no TV design can eliminate susceptibility to harmonic interference. Second is the overloading of the input circuit of the television receiver by an undesired signal so strong that overloading, i.e. malfunctioning, of the circuits generates spurious signals within the television receiver that interferes with the desired signal. Such interference usually is more severe with transistorized receivers and may result from poor circuit design in the receiver. Third is the pickup of an undesired signal by circuits within the set or wiring leading to the set. Poor shielding or poor circuit design in the receiver is usually the culprit.

Interference to other electronic devices such as record players, hi-fi amplifiers, home burglar alarm and security systems, automatic garage door openers, electronic organs, and public address systems usually arises from the pick-up of a relatively strong signal by the external wiring, such

as the wires leading to the speakers or to the power source, followed by the rectification of the signal by a circuit, contact or component within the device.

The cures for most such interference have been well known for many years. Often an inexpensive filter in the lead from the antenna to the television receiver will reduce the interference to an acceptable level or eliminate it entirely. For the other electronic devices, the judicious installation of inexpensive capacitors (devices which prevent wiring from picking up undesired signals) may suffice.

Even though the causes and cures of radio and television interference have been known for many years, the number of complaints received by the Commission has grown steadily each year. With the rapid and indeed explosive, growth of the 27 MHz CB service in the mid-1970s, the probability of a home electronic device being located near a transmitter of some sort has increased substantially. The public's use of home electronic devices has grown, and continues to grow, at an exponential rate.

Many manufacturers of home electronic equipment and systems have been willing to provide, often free of charge, filters for electronic equipment when a particular interference problem is brought to their attention. However, their efforts to voluntarily address the root problem by incorporating such RFI suppression techniques in the design and assembly-line stage have been less than adequate. This is true even though such filtering mechanisms and anti-interference design may only cost a few cents per unit.

Many believe that the Commission does not now have authority to compel the use of protective devices in equipment which does not emit radio frequency energy sufficient in degree to cause harmful interference to radio communications. Manufacturers and retailers also believe that the Commission cannot require a label on equipment or the supplying of a pamphlet of the possibility of interference and outlining corrective measures. The Commission has thus far acted in consonance with this belief. The Conference Substitute would thus give the FCC the authority to require that home electronic equipment and systems to be so designed and constructed as to meet minimum standards for protection against unwanted radio signals and energy. Extensive amateur and Commission experience over the years with interference investigation and elimination supports the conclusion that, in most instances, satisfactory corrective measures can be simple and inexpensive. The Conferees by no means intends for major modifications and redesigns of equipment to be required, or that the Commission require steps to be taken which impose substantial additional costs or unnecessary burdens on equipment manufacturers. We do not believe that elaborate procedures will be necessary in order to achieve the desired result. Existing equipment and that manufactured prior to the date of enactment of this legislation will be exempt from any such standards as might be established by the FCC.

The millions of purchasers of television and radio receivers and other home electronic equipment and systems each year deserve protection from interference. Significant reduction of interference from the multitude of complaints received each year by the Commission would result from enactment of

> this provision as should lawsuits against amateur and other radio operators in local jurisdictions based upon interference. Section 7 of the Conference Substitute is viewed by the Conferees as necessary to address adequately this increasing problem, which plagues so many of the nation's consumers. Moreover, by virtue of this section, the Conferees wishes to clarify that the exclusive jurisdiction over RFI incidents (including pre-emption of state and local regulation of such phenomena) lies with the FCC.
>
> August 19, 1982
> Congressional Record, H6534-35

The Defendants and other local governments inadvertently contribute to the increase of RFI by requiring that antennas be placed closer to the ground thus increasing the susceptibility of consumer electronic equipment to interference. Also see 42 F.C.C. 2d at 511, 513 (1973) and Proposed Findings of Facts. As such, the Defendant directly burdens the duties now congressionally delegated to the FCC for RFI control.

The Conference Report also recognized the self-regulation method of the amateur radio service and enacted provisions that would allow additional self-regulation responsibility including the eventual delegation of licensing responsibility for new amateurs to volunteer amateur radio operators. The Report also discussed enactments that would grant permission to amateur operators to assist the Commission in the self-regulatory aspects of the amateur radio service by the appointment of "observers" to assist the Commission's monitoring functions. August 19, 1982 Cong. Rec H6536, H6537-8, H6545. No other radio service enjoys such self-regulatory freedom.

The Federal government's interests in encouraging amateur radio was also evidenced by its participation at the World Administrative Radio Conference (WARC-79) in Geneva, Switzerland. These conferences are held roughly every 20 years and involve consideration of changes in the Radio Regulations Treaty of the International Telecommunications Union (ITU). The conference, with the stronger urging of the United States adopted three

additional High Frequency Bands for the Amateur Radio Service (used for long range international and national communications). See 64 QST 52 (Feb., 1980). The justification for the three new bands (10.0 MHZ, 18.0 MHZ, and 24.0 MHZ) was that amateur communications could be made much more reliable with their addition. Also, the ability of amateurs to provide emergency communications would be greatly enhanced. QST., Supra.

Additional recognition of the amateur service as a resource in the event of natural disaster is also found in Resolution 640 which was accepted by the WARC Assembly without reservation. (See attached Exhibit A from the October 1982 issue of QST p.48-9).

When a local regulation acts to impose limitations on emergency communications and directly affect the transmission distance and reliability of communications that can be maintained it impinges on this important Federal interest in international disaster relief. Such myopic actions may be inadvertant, but still detrimental. The City cannot frustrate such principles by a blanket claim of right. Additionally, when a local regulation acts to further burden the job of the FCC by creating a situation that inadvertantly increases the possibility of Radio Frequency Interference, it directly burdens interstate commerce. Lower antenna heights will cause more radio interference.

V. CITY ORDINANCE THAT PROVIDES FOR BLANKET HEIGHT RESTRICTION FOR AMATEUR RADIO ANTENNAS IS A PERVASIVE REGULATORY SCHEME THAT LIMITS THE INSTRUMENTALITY OF PLAINTIFF'S SPEECH AND IS UNCONSTITUTIONAL AS A VIOLATION OF PLAINTIFF'S RIGHT OF FREE SPEECH AS GUARANTEED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

1. Free speech is related to communicative aspects and noncommunicative aspects of speech instrumentalities. The extent to which Defendant may impinge on noncommunicative aspects is related to a precise appraisal of the character of the ordinance as it affects communications.

2. The speech carried on by the Plaintiff in the privacy of his own home is pure noncommercial private speech which is constitutionally entitled to more protection than commercial speech.

3. Defendant's ordinance permit higher antenna heights in commercial property than in noncommercial property. As such commercial speech is accorded more protection under Defendant's regulatory scheme than Plaintiff's private noncommercial speech. Such permissory attitude toward commercial speech is unconstitutional in that noncommercial speech constitutionally is afforded more protection than commercial speech. As such Defendant's ordinance is unconstitutional. Metromedia v. San Diego, 49 L.W. 4925 (1981)

4. Plaintiff's contention that Defendant's preference for commercial speech over noncommercial speech is not dependent upon the actual height limitations imposed (although commercial interests may under some circumstances construct antennas of unlimited height while most noncommercial residential uses are limited to 50 feet), but are dependent solely upon the fact that noncommunicative aspects of commercial speech are afforded greater protection than the noncommunicative aspects of noncommercial speech and as such the actual height limitations are irrelevant.

5. Reasonable restrictions on speech regarding "time, place, and manner" do not apply in this instance since such cannot be maintained without reference to the content of the regulated speech.

6. Defendant's height restrictions that permit an antenna height of 50 feet which is less than the optimum height of 100 feet and the minimum optimum height of 80 feet limit Plaintiff's ability to rapidly, reliably and efficiently communicate over necessary distances desired and hence infringe upon Plaintiff's right of free speech.

7. Defendant has at its disposal lesser restrictive alternatives with which to accomplish its purposes that do not burden Plaintiff's use of his antenna and antenna support structure and not burden his right of free speech.

The Defendant's ordinance imposes an absolute ban on antennas above the height of 50 feet. That actually is illusory. The actual height restriction after reference to the ordinance is 15 feet above the applicable height restriction for the property. To obtain even the 15 additional feet above the applicable height restriction for R1 zoned land, it is necessary to petition the city for a Special Use Permit.

It has already been advanced that Plaintiff's use of his amateur radio station is an incidental use of his residential property. It involves the instrumentality of Plaintiff listening on his radio receiver and broadcasting on his radio transmitter.

These two devices have in common an antenna support structure and antenna, an absolute necessity to Plaintiff's use of his radio. Fifty feet is not an optimum height for use of the Plaintiff's radio station antenna. The evidence adduced at trial will show that the normal optimum height is 100 foot with the minimum optimum height at 80 feet. This is, of course, dependent upon the radio frequency of transmission and propagation, but the values given herein are for the most popular long distance "DX" Bands. For VHF and UHF transmissions, there is a direct correlation between range and antenna height since radio waves of these frequencies tend to propagate in a straight line without the signals "bouncing" on the ionosphere back to earth.

The Defendant has enacted an ordinance which limits the ability of the Plaintiff to communicate and hence, limits his freedom of speech. Such limitations constitute an infringement upon the Plaintiff's rights of free speech guaranteed by the First and Fourteenth Amendments of the United States Constitution. The limitations that the Defendant can place on those rights of free speech are nominal. In challenging Plaintiff's right of Free Speech, the Defendant assumes the heaviest burden imposed upon any government litigant. Indeed there is a presumption against constitutional validity. The United States Supreme Court declared in New York Times v. United States, 403 U.S. 713, 91 S.Ct. 2140 (1971):

> Any system of prior restraints of expression comes to this Court hearing a heavy presumption against its constitutional validity. (Emphasis added).

The test is not that of a "rational basis" between the Defendant's ordinance and the objective it seeks versus the right impaired. When a fundamental liberty is infringed, the test becomes more stringent, requiring the governmental litigant to overcome a presumption against constitutional validity and prove a "compelling state interest" to justify its impairment.

In this context, content cannot be regulated except under the most notable of exceptions, such as obscenity. Nor is the reasonable limitations of "time, place and manner" as would be permitted in a public place appropriate because the speech protected here occurs not in a public place as in Cox v. New Hampshire, but in the private inner dwellings of the confines of Plaintiff's home. Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762 (1940).

Limitations as would occur with regard to commercial speech are also inappropriate since the amateur radio operator is not permitted to utilize his radio privileges for pecuniary gain. The intermediate level of protection for commercial speech is thus inappropriate. Bates v. State Bar, 433 U.S. 350 (1979)

We are dealing with pure protected speech in the privacy of Plaintiff's own home and the instrumentality used in achieving statewide or worldwide distribution of that speech. That instrumentality is offered protection even in light of strong local governmental interest. In a recent decision in this Court, Judge West struck down certain Oklahoma statutory and constitutional provisions prohibiting the advertising of liquor on radio, TV, and cable communications. The Plaintiffs raised their objections under free speech protection for commercial speech (allowed only intermediate protection). In the case, Judge West found the ban violative of the First Amendment in that it imposed unreasonable burdens on the Plaintiffs' rights of free speech even though they were only carriers of the "speech" that emanated from out of state. Cable-Com General, Inc., et al., v. Crisp No. CIV-81-290-W, (Memorandum Opinion and Order Filed February 10, 1982). The Plaintiff's use of its cable system instrumentality of Free Speech was being infringed upon in an unconstitutional manner.

In this context, content cannot be regulated except under the most notable of exceptions, such as obscenity. Nor is the reasonable limitations of "time, place and manner" as would be permitted in a public place appropriate because the speech protected here occurs not in a public place as in Cox v. New Hampshire, but in the private inner dwellings of the confines of Plaintiff's home. Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762 (1940).

Limitations as would occur with regard to commercial speech are also inappropriate since the amateur radio operator is not permitted to utilize his radio privileges for pecuniary gain. The intermediate level of protection for commercial speech is thus inappropriate. Bates v. State Bar, 433 U.S. 350 (1979)

We are dealing with pure protected speech in the privacy of Plaintiff's own home and the instrumentality used in achieving statewide or worldwide distribution of that speech. That instrumentality is offered protection even in light of strong local governmental interest. In a recent decision in this Court, Judge West struck down certain Oklahoma statutory and constitutional provisions prohibiting the advertising of liquor on radio, TV, and cable communications. The Plaintiffs raised their objections under free speech protection for commercial speech (allowed only intermediate protection). In the case, Judge West found the ban violative of the First Amendment in that it imposed unreasonable burdens on the Plaintiffs' rights of free speech even though they were only carriers of the "speech" that emanated from out of state. Cable-Com General, Inc., et al., v. Crisp No. CIV-81-290-W, (Memorandum Opinion and Order Filed February 10, 1982). The Plaintiff's use of its cable system instrumentality of Free Speech was being infringed upon in an unconstitutional manner.

Judge West cited Metromedia Inc., et al. v. City of San Diego, 49 L.W. 4925 (1981) with reference to the protection of commercial speech in the form of billboards.

What is there to distinguish the City of San Diego's attempts to legislate away unsightly billboards and the Defendant City of Oklahoma City's efforts to do away with the Plaintiff's radio tower under the guise of their "police power?"

> This Court has often faced the problem of applying broad principles of the First Amendment to unique forums of expression (citations omitted). Even a cursory reading of these opinions reveals that at times First Amendment values must yield to other societal interests. These cases support the cogency of Justice Jackson's remark . . . "Each method of communicating ideas is "a law unto itself" and that law must reflect the "differing natures, values, abuses and dangers of each method. We deal here with the law of billboards.
>
> Billboards . . . like other media of communication, combine communicative and noncommunicative aspects. As with other media, the government has legitimate interests in controlling the noncommunicative aspects of the medium . . . but the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects. Because regulation of the noncommunicative aspects of a medium often impinge to some degree on the communicative aspects, it has been necessary for the Courts to reconcile the government's regulatory interests with the individual's right to expression. "(A) Court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation . . . Performance of this task requires a particularized inquiry into the nature of the conflicting interests at stake here, beginning with a precise appraisal of the character of the ordinance as it affects communications.
>
> Metromedia v. San Diego,
> Supra., at L. W. 4928-9

The Court proceeded to develop the historical dichotomy between commercial and noncommercial speech. After analysis, the Court concluded that under commercial speech interests, the city ordinance was constitutional, but that in its application to noncommercial speech, its application was unconstitutional. Metromedia, supra at L. W. 4931-2.

In the instant case, the four-part test for commercial speech of Central Hudson v. Public Service Commission 447 U.S. 557 (1980) is not applicable as we are dealing with noncommercial

speech. The Metromedia Court's analysis of noncommercial speech protection leaves no doubt of the greater degree of protection afforded to noncommercial speech:

> It does not follow, however, that San Diego's general ban on signs carrying noncommercial advertising is also valid under the First and Fourteenth Amendments. . . . As indicated above, our recent commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech.
>
> Metromedia, Supra. at L.W. 4931.

The Court discussed various aspects of the San Diego ordinance under which commercial speech would be permitted, but noncommercial speech would be prohibited and observed.

> San Diego effectively inverts this judgment by affording a greater degree of protection to commercial than to noncommercial speech.
>
> Although the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech. To evaluate the strength of, or distinguish between various communicative interests. See Carey v. Brown, 447 U.S. 455, 462 (1980); Police Department of Chicago v. Mosely, 408 U.S. 92, 96 (1980).
>
> Finally, we reject appellee's suggestion that the ordinance may be appropriately characterized as a reasonable "time, place and manner" restriction. . . . We have observed that time, place and matter restrictions are permissible if "they are justified without reference to the content of the regulated speech . . . serve a significant government interest, and . . . leave open ample alternative channels for communication of the information.
>
> Metromedia, supra. at L. W. 4932

There is much analogy between the Metromedia facts and the instant case. San Diego did not impose a total ban on billboards, just certain billboards. The City of Oklahoma City did not impose limitations on all antennas, just those over 35 feet (and those over 50 feet with a special use permit).

The Defendant City also inverts the protection allowed commercial speech and noncommercial speech. By reference to Exhibit A, Proposed Findings of Facts Maximum Use Heights, it can be seen that towers erected to particular heights in certain commercial areas are afforded greater opportunities of protection

for speech instrumentalities than Plaintiff's private speech use on residential property. In fact, only R-4 General Residential District use would afford the Plaintiff unlimited height for antenna placement (provided he could persuade the owner of a multifamily apartment to allow placement of his antenna atop the building).

As in Metromedia, reasonable "time, place and manner" restrictions do not apply. There is a differentiation in the City's ordinance between commercial and noncommercial speech. There is no significant government interest served by limitations on amateur use (to the contrary, it is a hindrance to government use) and there are no open alternatives of communications available.

When this factor is coupled with the Federal interest in the purposes of amateur radio, the Defendant City's ability to control noncommunicative aspects of Plaintiff's hobby is forestalled. This First Amendment Speech argument has been upheld by a Federal Court in Oelkers v. City of Placentia, _____F. Supp. _____, No. CV-78-1801-RMT (C.D. Calif., 1980). In Oelkers, (copies of the Court's decision are attached to Amicus Curiae Brief of the American Radio Relay League, Incorporated as Exhibit A). The Court held invalid two ordinances, one which restricted antenna heights to 30 feet and another which, restricted antenna height to 25 feet, as unconstitutional violations of the Plaintiff's right of Free Speech. It should be noted that in Oelkers, the Modification of the Order to a Permanent Injunction deleted all references to height leaving the maximum height in Placentia at 200 feet as established by the Federal Communications Commission. Defendant cannot distinguish the case because of the heights involved.

Upon consideration of the evidence herein, it will be shown that the height of 50 feet is inadequate for proper operation of

Plaintiff's amateur radio station. Further, the presence of topographical objects and other structures affect the proper operation of the antenna. Defendant can promote its interests with lesser alternatives except where those interests impinge upon federally protected rights. Further, Defendant contributes to additional RF Interference. The Plaintiff's Free Speech is impinged upon.

In Cablecom, Judge West weighed the state's right to regulate alcohol advertising against the Free Speech interest. He concluded that under the Central Hudson Gas and Electric Corp. v. Public Service Commission, supra. test, the state's interest in alcohol regulation was substantial (p.13). It was an exercise of police power. But the Court found that the state's attempted regulation was more extensive than necessary to serve the state's interest (p.15). A mean less restrictive than blanket suppression had not been tried. Judge West dealt with commercial speech. The context of the instant case is noncommercial speech. As such there is an even more compelling reason to apply a lesser restrictive alternative. Cable-Com General, Inc. et al. v. Crisp. No. CIV-81-290-W, USDC WD Okla (Order filed February 10, 1982).

Defendant should chose a less restrictive alternative to protect their interests in height regulations. Plaintiff does not assert that Defendant has no right to regulate height, only height related to amateur radio antennas. The federal interest may not even be as intense for the Citizens Radio Service, for example, since the FCC limits the distance of communications that the CB service is permitted. Two methods by which the Commission limits the range of the CB service is by power output and height on CB antennas. Neither of these factors are present to any great degree in the Amateur Radio Service.

Respectfully submitted,

MICHEAL SALEM
Rawdon and Salem
2215 W. Lindsey, Suite 112
Norman, Oklahoma 73069

ATTORNEY FOR PLAINTIFF
CHARLES M. GUSCHKE

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing instrument to which this certification is attached was mailed or served on:

Page P. Morgan
Assistant Municipal Counselor
309 Municipal Building
200 North Walker
Oklahoma City, Oklahoma 73102

this 18th day of October, 1982.

MICHEAL SALEM