FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

MAR 24 1986

IN REPLY REFER TO:

Christopher D. Imlay, Esquire
American Radio Relay League, Inc.
Office of Legal Counsel
1920 N Street, N.W.
Suite 520
Washington, D.C. 20036

Re: Ordinance Regulating Radio Frequency Interference, Township of Ewing, Mercer County, New Jersey.

Dear Mr. Imlay:

I am writing in response to your letter of March 11, 1986, concerning the recent enactment by the Township of Ewing, New Jersey of an ordinance prohibiting radio transmissions that interfere with home-electronic equipment. According to your letter, the town ordinance generally provides that it shall be unlawful for any person to transmit any radio signals which interfere with the operation of televisions, phonographs, or other such household entertainment devices in such a manner as to disturb the peace, comfort, enjoyment, or general well being of others. You indicate that the local police have attempted to enforce this ordinance against some amateur radio operators in the township. Your letter further suggests that because the question of interference is completely preempted by federal regulation, the Township's ordinance is invalid. You request our opinion on this issue.

Based upon the facts before us, the subject ordinance appears to regulate a matter that is exclusively within the FCC's jurisdiction pursuant to the Communications Act of 1934, as amended. Congress may demonstrate its intent to preempt state law in three ways. First, it may, of course, expressly indicate in a statute its intention to preempt. Second, even in the absence of explicit preemptive language, Congress may implicitly indicate its intent to occupy a field. Such intent could be found in a congressional regulatory scheme that is so pervasive that it would be reasonable to assume that Congress did not intend to permit the states to supplement it. See Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982). Finally, in other instances, state laws may be preempted to the extent that they actually conflict with federal law. Such conflict may occur when "compliance with both Federal and State regulations is a physical impossibility." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-3 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). For reasons similar to those

set forth in 960 Radio, Inc., FCC 85-578, released November 4, 1985, we believe that the Township ordinance is unlawful under both the second and third test.

With regard to the second test, the provisions of the Communications Act governing interference are so pervasive that Congress obviously intended to completely preempt any concurrent state regulation. Section 303(f) authorizes the Commission to "make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations ..." 47 U.S.C. § 303(f). Furthermore, recently enacted Section 302(a)(2) provides that we may establish "... minimum performance standards for home electronic equipment and systems to reduce their susceptibility to interference from radio frequency energy." Thus, under these provisions, we may regulate both interference between two radio transmitting stations or between a radio transmitting station and home entertainment equipment. Furthermore, the legislative history of Section 302(a) expressly indicates that Congress intended these two provisions to be exclusive of all state or local regulation of radio frequency interference (RFI). In Conference Report No. 97-765, Congress noted:

> The Conference Substitute 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.

H.R. Report No. 765, 97th Cong., 2d Sess. 33 (1982), reprinted in 1982 U.S. Code Cong. & Ad News, 2277. Finally, the Courts have also concluded that Congress intended the Commission's jurisdiction to regulate radio interference to be exclusive. Blackburn v. Doubleday Broadcasting Co., 353 N.W. 2d 550, 556 (Minn. 1984). Thus, state regulation of radio interference is not permitted.

Finally, the Township's ordinance also fails under the third basis for preemption. Under Part 97 of the Rules, the Commission has crafted a regulatory system for the Amateur Radio Service. Those rules establish who may operate as an amateur, what frequencies may be used, and what practices are permitted. More importantly, these rules delineate the technical standards for operating amateur radio stations. State and local laws that either require amateurs to cease operation or pay fines when interference occurs conflict with our regulatory scheme. This is especially true when amateurs, who are fully complying with our rules, must cease operation or operate at technical levels below those established in our rules in order to avoid state or local sanctions. Such conflicts with our federal regulations are

subject to the same preemptive effect as conflicts with a federal statute. Fidelity Federal Savings & Loan Association v. de la Cuesta, 458 U.S. 141, 153 (1983).

In closing, I would also note that the citizens of the Township of Ewing may, of course, seek our assistance in resolving any interference they may have. The Commission's Field Operations Bureau frequently investigates these kinds of problems and has prepared a pamphlet advising all interested parties on various actions they can take to reduce interference.

I hope the foregoing is responsive to your inquiry.

Sincerely yours,

Jack D. Smith
General Counsel

JMcBride:OGC
cc: File, Reading File, GC, Joe McBride, Larry Schaffner, Sheldon Guttmann, Attorney File Copy