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

In the Matter of	**)**
	)
FLORIDA STATUTE REGULATING	**)**
RADIO TRANSMISSIONS AND	**)**
PROHIBITING INTERFERENCE WITH	**)**
FCC-LICENSED PUBLIC OR COMMERCIAL	**)**
RADIO STATIONS; Title XLVI, Chapter 877,	**)**
Section 877.27, Florida Statutes	**)**

To: The Commission

REQUEST FOR DECLARATORY RULING

ARRL, the National Association for Amateur Radio, also known as the American Radio Relay League, Incorporated (ARRL), by counsel, hereby respectfully requests, pursuant to Section 1.2 of the Commission's Rules (47 C.F.R. §1.2) that the Commission issue a Declaratory Ruling concerning the jurisdiction of the State of Florida to enact or enforce Section 877.27 of the Florida Criminal Statutes (Chapter 877, Miscellaneous Crimes). That section makes it unlawful in the State of Florida to make a radio transmission without a license or an exemption (from the Commission) or to interfere with a licensed public or commercial radio station. It also authorizes the Office of Statewide Prosecution to investigate and prosecute these crimes. ARRL requests a declaratory ruling that this Statute exceeds the jurisdiction of the State of Florida and intrudes on the exclusive jurisdiction afforded the Commission by the Communications Act of 1934, as amended, to regulate radio stations and to address interference phenomena. In support of its request,[1] ARRL states as follows:

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[1] ARRL is the nationwide advocate of the interests of the more than 650,000 licensees of the Commission in the Amateur Radio Service. There are 38,029 radio amateurs licensed by the Commission residing in

1. In 2004, the State legislature of the State of Florida enacted the referenced Statute, which took effect July 1, 2004. It reads as follows:

> **877.27 Unauthorized transmissions to, or interference with, a public or commercial radio station licensed by the Federal Communications Commission prohibited; penalties.--**
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> (1) A person may not:
>
> (a) Make, or cause to be made, a radio transmission in this state unless the person obtains a license or an exemption from licensure from the Federal Communications Commission under 47 U.S.C. s. 301, or other applicable federal law or regulation; or
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> (b) Do any act, whether direct or indirect, to cause an unlicensed radio transmission to, or interference with, a public or commercial radio station licensed by the Federal Communications Commission or to enable the radio transmission or interference to occur.
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> (2) A person who violates this section commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

2. This Statute, apparently enacted to address unlicensed, "pirate" broadcasting facilities located in and transmitting from the State of Florida, nonetheless on its face prohibits any person from causing interference with a public or commercial radio station licensed by the Commission or to enable such interference to occur. According to the March 12, 2004 "Senate Staff Analysis and Economic Impact Statement" issued with respect to the Florida Senate Bill that led to this legislation, the effect of the legislation is to make it a crime in the State of Florida to make, or cause to be made, a radio transmission in the State of Florida unless the person obtains a license "or an exemption" (sic) from licensure from the Commission under 47 U.S.C. §301, or other applicable law

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Florida. ARRL's membership includes more than 8,760 licensees located in the State of Florida who stand to be substantially adversely affected by the enforcement of this Statute. Therefore, ARRL has standing to request this Declaratory Ruling, so as to remove uncertainty and to determine the validity of this Statute.

or regulation; or to do any act, whether direct or indirect, to cause an unlicensed radio transmission to, or interference with, a public or commercial radio station licensed by the Federal Communications Commission or to enable the radio transmission or interference to occur. According to the Senate Staff analysis, “licensed radio stations will benefit from the prohibition on interference, and those persons interfering with licensed radio stations will face fines.”

3. It is unclear whether this Statute was intended to be as broad in its application as it reads, but it is clear that the Statute would create a third degree felony for the first offense of causing interference to licensed “public or commercial” radio stations. The Statute is not limited to broadcast stations, though broadcast radio stations appear to be the focus of the protected class under this Statute. Nor is it clear what constitutes “interference.” What is clear is that no radio transmissions, licensed or not, are permitted if they result in interference to public or commercial radio stations licensed by the Commission. Thus, it would appear that Commission-licensed Amateur Radio stations in Florida are subject to felony prosecution if their transmissions interfere with interference-susceptible broadcast or other radio receivers used in public or commercial radio stations. It would also appear that interference to broadcast or some other types of radio transmissions by unlicensed intentional radiators regulated under Part 15 would subject the operator of the device, whether or not a consumer, to a third degree felony prosecution. Since the Commission neither issues licenses nor “exemptions from

licensure…under 47 U.S.C. §301 ” to operators of Part 15 intentional radiators, the Statute could be interpreted to prohibit operation of Part 15 devices entirely.[2]

4. Even aside from the interpretational difficulties of this Statute, the subject matter of the Statute is well within the Commission's exclusive jurisdiction. It has been held in a long series of cases that the Commission has exclusive jurisdiction over radio frequency interference (RFI) matters, and technical matters involving radio communications specifically. 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 &*

[2] There are exceptions to the licensing requirement of Section 301 of the Communications Act of 1934, as amended. These include Citizen's Radio Service and Radio Control Radio Service stations. See, 47 U.S.C. §307(e). However, those are specific statutory exceptions. The Commission has no jurisdiction, of course, to waive a statutory provision of the Communications Act of 1934, and has not created any exemptions from Section 301 other than those enumerated in Section 307(e).

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 Commission. Given that, there cannot now be any question that the regulation of radio communications is a purely Federal function, with consequent preclusion of any right by a State to interfere therewith.

5. Justice Frankfurter delivered the opinion of the Court in *National Broadcasting*. The following quotations are excerpts therefrom (319 U.S. at 214): "Section 1 of the Communications Act states its '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, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.' Section 301 particularizes this general purpose with respect to radio: '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.'

6. Lest there be any doubt that all telecommunications are interstate, rather than intrastate commerce, and subject to exclusive regulation by the Commission, and not by the States, the Congress specifically clarified this issue in the Communications Amendments Act of 1982, Public Law 97-259, which amended the 1934 Communications Act in numerous respects. Among these was a clarification of the jurisdiction of the Commission. In the Joint Conference Report on this legislation, H.R. Conf. Report No. 765, 97th Cong., 2nd Sess. (1982), reprinted in *1982 U.S. Code Cong. And Admin News* 2267, Congress stated as follows:

> **Jurisdiction of Commission.** House Bill. The House Bill contained no provision. Senate amendment. The Senate amended Section 301 of the Communications Act of 1934 to make it clear that the Commission's jurisdiction over radio communications extends to intrastate as well as interstate transmissions.
>
> Conference Substitute.
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> The conference substitute adopts the Senate provision. The present statutory ambiguity imposes wasteful burdens on the Commission and various United States Attorneys, particularly with regard to prosecution of Citizen's Band (CB) radio operators transmitting in violation of FCC rules. Typically in such a case, the defendants concede the violation, but challenge the Federal government's jurisdiction on the grounds that the CB transmission did not cross state lines. To refute this argument, the commission invariably is asked to furnish engineering data and expert witnesses, often at considerable expense. In most instances, once the expert evidence is made available, the defendants plead guilty and the case terminated.
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> The provision would end these wasteful proceedings. Further, it would make Section 301 consistent with judicial decisions holding that all radio

> signals are interstate by their very nature. See, *e.g. Fisher's Blend Station Inc. v. Tax Commission of Washington State, 297 U.S. 650, 655 (1936).*

7. Nothing specifically appears in the Communications Act of 1934, as amended which states that the Act preempts state regulation of RFI matters, and there is in the Act a standard verbiage savings clause. However, the legislative history of the Communications Amendments Act of 1982 cited above, 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.
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> H.R. Conf. Rpt., *Id.*, 1982 U.S.C.C.A.N. at 2277.

8. 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 tort law civil claims based on interference from one radio service to another would directly frustrate the intention and goals of the Communications Act of 1934, as amended.

9. In *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 430 n.6 (1963), the Supreme Court held that the Commission'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).

10. The Commission has done that, in *960 Radio, Inc.*, FCC 85-578, 1985 Lexis 2342 (released October 29, 1985). The Commission 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.

11. Courts have likewise refused to allow private lawsuits against commercial broadcasters to abate RFI problems. In *Broyde v. Gotham Tower, Inc.*, 13 F. 3d 994, 998 (6^{th} Cir. 1994), relying on prior cases dismissing common-law nuisance claims against amateur radio operators, 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 defendants below had removed the case to federal district court, and their 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).

12. In *Southwestern Bell Wireless v. Johnson County Board of Commissioners*, 199 F. 3d 1185 (10th 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.

13. Most recently, in *Anne Arundel County, Maryland*, DA-03-2196, released July 7, 2003, the Commission, citing favorably its *960 Radio, Inc*. decision, held clearly that all attempts by States and municipalities to regulate RFI are void as preempted by the Supremacy Clause of the Constitution:

> The Commission and the federal courts have consistently found that the Commission's authority in the area of RFI is exclusive and any attempt by State or local governments to regulate in the area of RFI is preempted. The Commission addressed this issue almost 20 years ago in *960 Radio.* In that proceeding, a local zoning board issued a conditional use permit to an FM radio facility subject to a restriction that the applicant "not operate the new facility so as to produce electronic interference to existing facilities" or to TV translators. In a petition for declaratory ruling, the owner of the FM facility sought to void the requirement on the ground that "jurisdiction to control interference over the airwaves rests exclusively with the [Commission]." The Commission found that sections 2, 301, and 303(c)-(f) of the Communications Act, taken together, "comprehensively regulate interference, [and therefore] Congress undoubtedly intended federal regulation to completely occupy that field to the exclusion of local and state governments." The Commission noted that Supreme Court and

> Commission precedent supported this conclusion. The Commission further found that "any doubt about [the Commission's] jurisdiction to regulate interference was removed" with Congress' statement in the House Conference Report to the 1982 provisions of section 302 of the Act…

Anne Arundel County, at ¶ 13

Given the above, the Commission cannot reasonably draw the contrary conclusion with respect to the instant Florida statute.

Therefore, the foregoing considered, ARRL, the National Association for Amateur Radio, hereby respectfully requests that the Commission issue a Declaratory Ruling declaring that the subject Florida statute is void as preempted by Federal communications law.

Respectfully submitted,

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