

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

PR Docket No. 91-36

In the Matter of

Federal Preemption of State
and Local Laws Concerning
Local Laws Concerning Amateur
Operator Use of Transceivers
Capable of Reception Beyond
Amateur Service Frequency
Allocations

MEMORANDUM OPINION AND ORDER

Adopted: August 20, 1993; Released: September 3, 1993

By the Commission:

I. INTRODUCTION

1. On November 14, 1989, the American Radio Relay League, Incorporated (ARRL), filed a *Motion for a Declaratory Ruling*¹ requesting that the Commission preempt certain state statutes and local ordinances affecting transceivers² used by Amateur Radio Service licensees. The laws referenced by the ARRL prohibit the possession of such transceivers if they are capable of the reception of communications on certain frequencies other than amateur service frequencies. On March 15, 1990, we released a public notice³ inviting comment on ARRL's request. In addition, on February 28, 1991, we released a *Notice of Inquiry*⁴ that solicited additional comment to assist us in making a decision in this matter. This *Memorandum Opinion and Order* grants the request to the extent indicated herein.

¹ The American Radio Relay League, Inc., Request for Declaratory Ruling Concerning the Possession of Radio Receivers Capable of Reception of Police or Other Public Safety Communications (November 13, 1989) (ARRL motion).

² Transceivers are radio equipment capable of both transmission and reception.

³ Public Notice, 5 FCC Rcd 1981 (1990), 55 Fed. Reg. 10805 (March 23, 1990). Comments were due by May 16, 1990, and reply comments by May 31, 1990.

⁴ 6 FCC Rcd 1305 (1991) (*Inquiry*).

⁵ The scanner laws appear to be aimed at promoting the health, safety, and general welfare of the citizenry.

⁶ See generally ARRL motion (citing N.J. Stat. Ann. § 2A:127-4 (West 1985) (noting that a person is guilty of a misdemeanor for possessing or installing a short-wave radio in an automobile capable of receiving, *inter alia*, frequencies assigned for police use unless a permit has been issued therefor by the chief of the county or municipal police wherein such person resides) and Ky. Rev. Stat. Ann. § 432.570 (Michie/Bobbs-Merrill 1985) (noting that any person who possesses a mobile short-wave radio capable of receiving frequencies assigned for police

II. BACKGROUND

2. The ARRL motion discusses state statutes and local ordinances commonly known as "scanner laws," the violation of which may be a criminal misdemeanor with the possibility of equipment confiscation.⁵ Specifically, ARRL notes that state statutes in New Jersey and Kentucky (which have subsequently been changed — see paragraph 3, *infra*) prohibit the possession of a mobile short-wave radio capable of receiving frequencies assigned by the Commission for, *inter alia*, police use.⁶ In addition, ARRL states that local ordinances exist throughout the United States that similarly prohibit the possession of such mobile short-wave radios without a locally-issued permit.⁷ Therefore, ARRL explains, scanner laws can, *inter alia*, render amateur radio licensees traveling interstate by automobile vulnerable to arrest and to the seizure of their radio equipment by state or local police.⁸

3. Since the ARRL motion was filed with the Commission New Jersey repealed its statute and substituted a new, narrowly tailored scanner law that only applies in the criminal context.⁹ In addition, Kentucky amended its statute by adding an exemption applying to amateur radio licensees.¹⁰ As a result, there no longer appears to be any state scanner law with a deleterious effect on the legitimate operations of amateur radio service licensees. Nonetheless, the preemption issue raised by the ARRL motion remains timely because it appears that some local scanning ordinances remain in effect without safeguards to protect the legitimate use of such radios by our licensees.¹¹

III. MOTION, INQUIRY AND COMMENTS

A. The ARRL Motion.

4. ARRL makes two arguments in support of preemption. First, it states that the receiver sections of the majority of commercially available amateur station transceivers can be tuned slightly past the edges of the amateur service bands to facilitate adequate reception up to the end of amateur service bands. ARRL seeks a preemption ruling that would permit amateur operators to install in vehicles transceivers that are capable of this "incidental" reception.¹² Although ARRL's formal request is couched in terms of this first, technical point, the request focuses almost entirely on a second, broader issue of whether state

use is guilty of a misdemeanor, except that certain users such as radio and television stations, sellers of the "scanner" radios, disaster and emergency personnel, and those using the weather radio service of the National Oceanic and Atmospheric Administration are exempt, while amateur radio licensees are not exempt).

⁷ See generally ARRL motion (regarding, *inter alia*, a Kansas City, Missouri, scanner law). See also note 24, *infra*.

⁸ *Id.*

⁹ N.J. Stat. Ann. § 2C:33-22 (West 1992).

¹⁰ Ky. Rev. Stat. Ann. § 432.570(4)(c) (Baldwin 1992).

¹¹ See note 22, *infra*.

¹² ARRL Motion at 1, 3 and 5. "Most commercial amateur radio VHF and UHF transceivers ... are incidentally capable of reception (but not transmission) on frequencies additional to those allocated to the Amateur Radio Service. These frequencies are adjacent to amateur allocations. This is true even though the equipment is primarily designed for amateur bands, and results from the intentional effort to insure proper operation of the transceiver throughout the entire amateur band in question." *Id.* at 3.

and local authorities should be permitted, via the scanner laws, to prohibit the capability of radio reception by amateur operators on public safety and special emergency frequencies that are well outside the amateur service bands.

5. Concerning the broader issue, ARRL argues that amateur operators have special needs for broadscale "out-of-band" reception, and that the marketplace has long recognized these needs by offering accommodating transceivers. According to ARRL,¹³ all commercially manufactured amateur service HF transceivers and the majority of such VHF and UHF transceivers have non-amateur service frequency reception capability well beyond the "incidental" -- they can receive across a broad spectrum of frequencies, including the police and other public safety and special emergency frequencies here at issue. This additional capability, argues ARRL, permits amateur operators to participate in a variety of safety activities, some in conjunction with the military or the National Weather Service. In both cases, reception on non-amateur frequencies is necessary. Such activities benefit the public, according to ARRL, especially in times of emergency,¹⁴ and some require the mobile use of the amateur stations.¹⁵ ARRL states that, in addition, the vast majority of amateur operators take part in these mobile activities, and that the widespread enforcement of scanner laws would render illegal the possession of virtually all modern amateur mobile equipment.¹⁶ ARRL states that, as a result of scanner laws, "several dozen instances of radio seizure and criminal arrest [have been] suffered by licensed amateurs."¹⁷

B. The Inquiry and Comments.

6. The Commission's February 28, 1991 *Inquiry* solicited additional information concerning the technical and financial feasibility of modifying existing amateur service mobile transceivers to render them incapable of receiving police or other public safety channels. We also asked for information concerning the current and future marketplace availability of mobile equipment meeting the restrictions of the laws

and whether there is value in having an available pool of wide-band, mobile amateur equipment in the United States to meet emergency needs.

7. In response to the *Inquiry*, we received 115 comments and reply comments, of which the great majority are from individual amateurs who support preemption.¹⁸ One commenter, the Michigan Department of State Police, states that although it cooperates with the amateur service during emergencies, it is concerned about isolated incidents of apparently unlawful actions taken by amateur licensees upon receipt of public safety communications outside of the amateur radio band.¹⁹ Therefore, it concludes that "there can be no beneficial need for amateur radio equipment to tune in public safety channels."²⁰ Of the remaining comments received, only a few address the technical and marketplace questions described above. These comments are from individual amateur operators²¹ who state that existing wide-band transceivers cannot be modified to meet the restrictions of the scanner laws without substantial expense and that this situation will continue as new equipment becomes available. Despite our specific request in the *Inquiry* that manufacturers comment on these technical and financial questions, no manufacturer chose to respond on these points. We also received a few comments describing the prevalence of scanner laws nationwide.²² Finally, the National Communications System (NCS), of the Department of Defense, states in its comment that the federal government utilizes amateur operators in a number of programs requiring mobile, wide-band transceivers.²³

IV. DISCUSSION

8. There are three ways state and local laws may be preempted. First, Congress may expressly preempt the state or local law. Second, Congress may, through legislation, clearly indicate its intent to occupy the field of regulation, leaving "no room for the States to supplement."²⁴ Last, and most important for this discussion,

¹³ *Id.* at 12.

¹⁴ For example, amateur radio licensees were widely recognized as serving a vital role in providing communications from devastated areas of South Florida during Hurricane Andrew and its aftermath in 1992.

¹⁵ See generally House Comm. on the Judiciary, Electronic Communications Privacy Act of 1986, H.R. Rep. No. 647, 99th Cong., 2d Sess. 42.

¹⁶ ARRL motion at 2 and 12. As of February 28, 1993, the Commission's licensing database indicates that there are 598,656 amateur stations in the United States and its territories and possessions.

¹⁷ *Id.* at 11.

¹⁸ A list of commenters is provided in the Appendix. Further, we have accepted a comment from Communications Electronics, Inc., which was filed one day late. See generally 47 C.F.R. § 1.46(b). We also have considered 45 comments filed previously in this proceeding. See *Inquiry*, 6 FCC Rcd at 1306-1308 (noting that all of the filed comments support the ARRL motion). In addition, we received comments from scanner (receive-only equipment) users, who are not federal licensees and whose interests have not been at issue in this proceeding.

¹⁹ Comment of State of Michigan, Department of State Police, at 2-3 (June 3, 1991). *But see* Reply Comments of Personal Radio Steering Group of Ann Arbor, Michigan (July 8, 1991) (noting that ARRL has not requested the preemption of

state and local laws that proscribe unlawful actions taken by amateur licensees).

²⁰ Comment of State of Michigan, *supra*, at 2-3. *But see* paragraph 12, n. 40, *infra* (noting the comments supporting preemption filed previously in this proceeding by the Associated Public Safety Communications Officers (APCO)).

²¹ See, e.g., Comment of John F. Fuhrman at 4 (April 29, 1991), Comment of Joseph Reymann at 9, 14 (May 24, 1991), and Comment of Mark D. Tavaglioni at 3 (July 5, 1991).

²² See, e.g., Comment of ARRL at 12 & n.6, 14 (June 7, 1991); Comment of Association of North American Radio Clubs at 5 (April 30, 1990); Comment of Radio Communications Monitoring Association at 5 (June 6, 1991). With respect to scanner laws at the local level, ARRL has notes that it is difficult to determine the precise number of such ordinances. See Comment of ARRL at 12 (June 7, 1991); See also Letter from ARRL to the Chief Private Radio Bureau, Federal Communications Commission, Washington, D.C. (May 26, 1993) (noting local scanner laws in effect in Newton and Overland Park, Kansas, Jersey City, New Jersey, and Kansas City, Missouri).

²³ Comment of National Communications System at 2-4 (June 7, 1991).

²⁴ *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699-705 (1984) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

[e]ven where Congress has not completely displaced state regulation in a specific area, state law [may be] nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," ... or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."²⁵

Furthermore, "[f]ederal regulations have no less preemptive effect than federal statutes."²⁶

9. The amateur service is regulated extensively under Part 97 of the Commission's Rules, 47 C.F.R. Part 97. As we have stated in the past:

[T]here is ... a strong federal interest in promoting amateur communications. Evidence of this interest may be found in the comprehensive set of rules that the Commission has adopted to regulate the amateur service. Those rules set forth procedures for the licensing of stations and operators, frequency allocations, technical standards which amateur radio equipment must meet and operating practices which amateur operators must follow. We recognize the Amateur Radio Service as a voluntary, noncommercial communication service, particularly with respect to providing emergency communications. Moreover, the Amateur Radio Service provides a reservoir of trained operators, technicians and electronic experts who can be called on in times of national or local emergencies. By its nature, the

Amateur Radio Service also provides the opportunity for individual operators to further international goodwill.²⁷

This federal interest in the amateur service is also reflected in Section 97.1 of our rules, 47 C.F.R. § 97.1, which provides that the amateur service exists to "continu[e] and exten[d] ... the amateur's proven ability to contribute to the advancement of the radio art."²⁸ This regulatory purpose is consistent with the Communications Act requirement that "[i]t shall be the policy of the United States to encourage the provision of new technologies to the public."²⁹

10. The strong federal interest in the preservation and advancement of the amateur service is also demonstrated by Congress's recent recognition of the goals of the amateur service in a "Sense of Congress" provision in which Congress strongly encouraged and supported the amateur service.³⁰ Congress therein directed all Government agencies to take into account the valuable contribution of amateurs when considering actions affecting the amateur radio service.³¹ We believe that the strong federal interest in supporting the emergency services provided by amateurs cannot be fully accomplished unless amateur operators are free to own and operate their stations to the fullest extent permitted by their licenses and are not unreasonably hampered in their ability to transport their radio transmitting stations across state and local boundaries for purposes of transmitting and receiving on authorized frequencies. Indeed, as a result of advances in technology making smaller, lighter weight radios commercially available, the Commission has expressly amended its rules to facilitate and en-

²⁵ *Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); see *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. at 705-09.

²⁶ *Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. at 153.

²⁷ *Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities*, 101 FCC 2d 952, 959-60 (1985) (concerning amateur radio antenna restrictions) (*Amateur Preemption Order*). See 47 C.F.R. § 97.1. See also Note, *Federal Preemption of Amateur Radio Antenna Height Regulation: Should the Sky Be the Limit?*, 9 *Cardozo L. Rev.* 1501, 1517-19 (1988), Note, *Local Regulation of Amateur Radio Antennae and the Doctrine of Federal Preemption: The Reaches of Federalism*, 9 *Pac. L.J.* 1041, 1055-60 (1978).

²⁸ 47 C.F.R. § 97.1(b).

²⁹ 47 U.S.C. § 157(a).

³⁰ SENSE OF CONGRESS

Sec. 10

(a) The Congress finds that --

(1) more than four hundred and thirty-five thousand four hundred radio amateurs in the United States are licensed by the Federal Communications Commission upon examination in radio regulations, technical principles, and the international Morse code;

(2) by international treaty and the Federal Communications Commission regulation, the amateur is authorized to operate his or her station in a radio service of intercommunications and technical investigations solely with a personal aim and without pecuniary interest;

(3) among the basic purposes for the Amateur Radio Service is the provision of voluntary, noncommercial radio service, particularly emergency communications; and

(4) volunteer amateur radio emergency communications services have consistently and reliably been provided before, during, and after floods, tornadoes, forest fires, earthquakes, blizzards, train wrecks, chemical spills, and other disasters.

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

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

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

Federal Communications Commission Authorization Act of 1988, Pub. L. No. 100-594, 102 Stat. 3021, 3025 (November 3, 1988); see also Joint Explanatory Statement of the Committee of Conference on H.R. Conf. Rep. No. 386, 101st Cong., 1st Sess. 415, 433 (November 21, 1989), reprinted in 1990 U.S. Code Cong. & Admin. News 3018, 3037 (amateur licensees exempted from new Commission-wide fees program because "[t]he Conferees recognize that amateur licensees do not operate for profit and can play an important public safety role in times of disaster or emergency"). Joint Explanatory Statement of the Committee of Conference on H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 18-19 (August 19, 1982), reprinted in 1982 U.S. Code Cong. & Admin. News 2261, 2262-63.

³¹ *Id.*

courage unrestricted mobile amateur operations. As we noted in a recent rule making proceeding to modify the rules governing the amateur radio service,

[I]n the age of the microprocessor and the integrated circuit [amateur] equipment is highly portable. It is common for amateur operators to carry hand-held transceivers capable of accessing many local repeaters in urban areas and also capable of reasonably good line-of-sight communication. It appears that the concept of fixed station operation no longer carries with it the same connotation it did previously. For this reason, we propose to delete current rules that relate to station operation away from the authorized fixed station location.³²

As a consequence of these changes, the rules now expressly authorize amateur service operation "at points where the amateur service is regulated by the FCC," that is, at fixed and mobile locations throughout the United States. Furthermore, the Commission's Rules do not in any way prohibit an amateur service transceiver from having out-of-band reception capability.³³

11. Against this background, we conclude that certain state and local laws, as described below, conflict with the Commission's regulatory scheme designed to promote a strong amateur radio service. Scanner laws that prohibit the use of transceivers that transmit and receive amateur frequencies because they also receive public safety, special emergency or other radio service frequencies frustrate most legitimate amateur service mobile operations through the threat of penalties such as fines and the confiscation of equipment. As noted by ARRL, virtually all modern amateur service equipment in use today can receive transmissions on the public safety and special emergency frequencies at issue, and the majority of amateur stations³⁴ are operated in a mobile fashion. Consequently, the mobile operations of the vast majority of amateurs are affected by such laws. In addition, the record statements by amateurs that the costs would be substantial to modify existing transceivers are unchallenged. The scanner laws, then, essentially place the amateur operator in the position of either foregoing mobile operations by simply avoiding all use of the equipment in vehicles or other locations speci-

fied in the laws, or risking fines, or equipment confiscation. This very significant limitation on amateurs operating rights runs counter to the express policies of both Congress and the Commission to encourage and support amateur service operations, including mobile operations, and impermissibly encroaches on federal authority over amateur operators.³⁵ It conflicts directly with the federal interest in amateur operators being able to transmit and receive on authorized amateur service frequencies.³⁶

12. For these reasons, we find it necessary to preempt state and local laws that effectively preclude the possession in vehicles or elsewhere of amateur service transceivers by amateur operators merely on the basis that the transceivers are capable of reception on public safety, special emergency, or other radio service frequencies, the reception of which is not prohibited by federal law.³⁷ We find that, under current conditions and given the types of equipment available in the market today, such laws prevent amateur operators from using their mobile stations to the full extent permitted under the Commission's Rules and thus are in clear conflict with federal objectives of facilitating and promoting the Amateur Radio Service. We recognize the state law enforcement interest present here, and we do not suggest that state regulation in this area that reasonably attempts to accommodate amateur communications is preempted.³⁸ This decision does not pertain to scanner laws narrowly tailored to the use of such radios, for example, for criminal ends such as to assist flight from law enforcement personnel. We will not, however, suggest the precise language that must be contained in state and local laws. We do find that state and local laws must not restrict the possession of amateur transceivers simply because they are capable of reception of public safety, special emergency or other radio service frequencies, the reception of which is not prohibited by federal law, and that a state or local permit scheme will not save from preemption an otherwise objectionable law.³⁹ Finally, we note, as stated by AFPCO in comments filed previously in this proceeding, that any

³² *Reorganization and Deregulation of Part 97 of the Rules Governing the Amateur Radio Services, Notice of Proposed Rule Making*, 3 FCC Rcd 2076, 2077, (1988), final rules adopted in *Report and Order*, 4 FCC Rcd 4719 (1989), aff'd in *Memorandum Opinion and Order*, 5 FCC Rcd 4614 (1990).

³³ The rules, however, do prohibit amateur service transmissions outside of the allocated amateur service bands. 47 C.F.R. § 97.307(b); Public Notice, *Extended Coverage Transceivers in the Amateur Radio Service*, mimeo no. 4114 (July 21, 1987) (noting that "[i]t is a violation of the Commission's regulations to ... transmit on a frequency allocated to a licensed service without the appropriate Commission-issued station license").

³⁴ See para. 5, n.16, *supra*.

³⁵ *Cf. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. at 711 (state ban on alcoholic beverages commercials preempted where compliance by cable companies might result in deletion of out-of-state programming, thereby frustrating federal goal of promoting programming variety).

³⁶ See *Amateur Preemption Order*, 101 FCC2d at 960 (ordinances that "operate to preclude amateur operations in their communities are in direct conflict with federal objectives and must be preempted").

³⁷ We note that federal law prohibits unauthorized reception on frequencies of certain radio services, e.g., cellular radio. See *Electronic Communications Privacy Act of 1986*, §§ 101(a)(1), 101(a)(6), 101(c), 18 U.S.C. §§ 2510(1), 2510(10), 2510(16)(D), 2511(1). House Comm. on the Judiciary, *Electronic Communications Privacy Act of 1986*, H.R. Rep. No. 647, 99th Cong., 2d Sess. 31-33, 37.

³⁸ See *Amateur Preemption Order*, 101 FCC2d at 960 (state and local regulations regarding amateur antennas based on health, safety or aesthetic considerations "must be crafted to accommodate reasonably amateur communications and to represent the minimum practicable regulation to accomplish the local authority legitimate purpose").

³⁹ The possibility that an affected licensee might obtain an additional authorization or permit to operate under the state or local law does not ameliorate the conflict, because the state or local issuing authority might choose to deny the amateur operator the permit, or charge a fee for the permit, or require the permit even of a non-resident.

public safety agency that desires to protect the confidentiality of its communications can do so through the use of technology such as scrambling or encryption.⁴⁰

V. CONCLUSION

13. We hold that state and local laws that preclude the possession in vehicles or elsewhere of amateur radio service transceivers by amateur operators merely on the basis that the transceivers are capable of the reception of public safety, special emergency, or other radio service frequencies, the reception of which is not prohibited by federal law, are inconsistent with the federal objectives of facilitating and promoting the amateur radio service and, more fundamentally, with the federal interest in amateur operators' being able to transmit and receive on authorized amateur service frequencies. We therefore hold that such state and local laws are preempted by federal law.

14. Accordingly, IT IS ORDERED that the request for a declaratory ruling filed by the ARRL IS GRANTED to the extent indicated herein and in all other respects IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Comments or reply comments to the *Inquiry* were submitted by the following parties:

- 70 individual amateur operators, some of whom also operate GMRS equipment or use scanning receivers
- 2 individual General Mobile Radio Service (GMRS) operators
- 13 individual scanning receiver users

American Radio Relay League, Inc. (ARRL)
Associated Public-Safety Communications Officers, Inc. (APCO)
Bellcore Pioneers Amateur Radio Association
Big Spring/Howard County, Texas; Hal Boyd, Emergency Coordinator
C. Crane Company
Capital Cities/ABC, Inc.
City of Martinez, California; Gerald W. Boyd, Chief of Police
Communications Electronics, Inc.

County of Sussex, New Jersey; John Ouweleen, Emergency Management Coordinator
CO Communications, Inc.
Egyptian Radio Club, Inc.
Grove Enterprises, Inc.
Jessamine Amateur Radio Society
National Communications System (NCS), Department of Defense
Pasco County, Florida; Edith L. Sanders, Disaster Preparedness Coordinator
Personal Radio Steering Group, Inc. (PRSG)
Radio Communications Monitoring Association (RCMA)
Riverside County R.E.A.C.T.
Seminole County, Florida; Kenneth M. Roberts, Emergency Management Coordinator
State of Michigan, Department of State Police; David H. Held, Director, Communications Section
Tandy Corporation

⁴⁰ See Comments of APCO at 2-3 (May 16, 1990)(summarized in *Inquiry*, 6 FCC Rcd at 1306.