

**REPRESENTATIVE PATRICK O. CONNELL, WA7PDC
TALKING POINTS MEMO RE AMATEUR RADIO LEGISLATION**

► This Bill would add a new Section to the Montana Code Annotated in two respects: it would incorporate and apply the provisions of existing Federal Law which limit municipal jurisdiction over the installation and maintenance of Amateur Radio antennas; and it would insure that counties, cities and towns are not inadvertently deprived of the valuable volunteer, uncompensated emergency and disaster relief communications provided by Amateur Radio operators by restricting Amateur Radio communications from motor vehicles.

Amateur Radio Antenna Regulation

► This legislation is necessary so that municipalities in Montana may be made aware of the Federal regulation and their obligations stemming from it, before they enact ordinances which might otherwise be preempted. A Montana municipality should not be obligated to test their ordinances judicially. Instead, they should be alerted by the State, from which they derive their police power jurisdiction to enact ordinances, to limitations on that police power jurisdiction.

► The Federal Communications Commission, twenty-seven years ago, declared a limited preemption policy over the municipal regulation of amateur radio antennas. That policy addresses prohibitions, procedural or structural limitations imposed unreasonably by non-federal entities. Amateur Radio Preemption, 101 FCC 2d 952 (1985); codified at 47 C.F.R. Section 97.15(b). The codification of the FCC policy, now a Federal regulation, reads as follows:

(b) Except as otherwise provided herein, a station antenna structure may be erected at heights and dimensions sufficient to accommodate amateur service communications. [State and local regulation of a station antenna structure must not preclude amateur service communications. Rather, it must reasonably accommodate such communications and must constitute the minimum practicable regulation to accomplish the state or local authority's legitimate purpose. See, PRB-1, 101 FCC 2d 952 (1985) for details.]

► The FCC declaratory ruling established a *three-part test* for determining whether or not an antenna ordinance, on its face or as applied, is valid or whether it is preempted by Federal law and regulation. The three parts of this test are as follows:

1. State and local regulations that *operate to preclude* amateur communications are preempted.

2. Local regulations which involve placement, screening, or height of antennas based on health, safety, or aesthetic considerations *must be crafted to accommodate reasonably amateur communications.*

3. Local regulations which involve placement, screening, or height of 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's legitimate purpose.*

▶ The FCC imposed this policy in 1985 because it found that there is a “strong federal interest in promoting amateur communications” and that it “recognize(d) the Amateur Radio service as a voluntary, noncommercial communication service, particularly with respect to providing emergency communications.” The FCC held that the Amateur Radio Service provides a reservoir of trained operators, technicians and electronic experts who can be called on in times of national, state or local emergencies. By its nature, the Amateur Radio Service also provides the opportunity for individual operators to further international goodwill. Because of these findings, the FCC balanced the legitimate municipal interests in regulating the siting of antennas and support structures with the strong Federal interest in promoting Amateur Radio communications. The preemption policy is the law of the land and all Montana municipalities are bound by it and are bound to apply it.

▶ However, Montana municipalities are not typically aware of these esoteric Federal regulations and often enact zoning and other land use regulations and ordinances which unintentionally conflict with the Federal regulation. There has been extensive litigation over ordinances which overregulate Amateur Radio antennas.

▶ As of today, 28 states have enacted statutes which either incorporate this existing Federal regulation in their state statutes, or expand upon it so as to provide further incentives to municipalities in their state to promote the emergency communications capabilities of trained Amateur Radio operators. They adopt similar provisions to those which appear in the FCC regulation because municipalities look to the State for policy guidance and the incorporation of the Federal regulation in the State statutes brings this policy to the attention of municipalities at the time they enact land use regulations that might affect Amateur Radio antennas.

▶ This Bill does not expand on the existing Federal preemption regulation. It does, however, set a reasonable minimum antenna height for Amateur Radio antennas, below which the performance and reliability of such antennas would suffer, as would the emergency and public service communications provided by licensed radio Amateurs. Montana municipalities are not surrendering any jurisdiction or authority they have now. What they gain, however, is a clear understanding of the existing regulatory landscape by reference to state law, and can enact ordinances that comply with the policy. They are also facilitating the strong sense of volunteerism and the commitment that Amateur Radio operators have shown every time they are called upon to provide communications in the aftermath of a hurricane, tornado, forest fire, or other disaster.

► The concept of “reasonable accommodation” in terms of antennas and antenna height does not mean that an FCC-licensed Amateur Radio operator can install any antenna he or she wants. Local zoning jurisdiction is protected as long as the aesthetic, safety or public health goals sought to be advanced by a zoning ordinance are clearly articulated by the municipality in a given case. Reasonable accommodation, as it has been defined in this context by Federal case law since 1985, means that a municipal ordinance that regulates these antennas must not prohibit the antennas or regulate them to the point of inefficiency or unreliability. Blanket height limitations are disfavored, but general specifications to insure safety, with the availability of special use permits for those licensees whose communications require a particular antenna configuration have been held to be consistent with the FCC regulation.

Mobile Amateur Radio Operation

► In the course of preparing for and conducting emergency, disaster and other public service communications, Amateur Radio operators routinely equip their motor vehicles with two-way radios, operated most often with hand-held microphones. The radios are typically installed in the vehicles and utilize fixed mounted speakers. Unlike cellular telephones, the speakers are not held to the face; the radios remain in the receive mode most of the time; the voice transmissions typically are brief and infrequent. The microphone is held only when a transmission is being made or is imminent, and otherwise is stowed in a position where the operator can reach it without removing his or her eyes from the road.

► Amateur operators often conduct mobile communications as participants in networks of stations, controlled often by a fixed station, not unlike commercial dispatch mobile radio systems. Radio amateurs have regularly used mobile two-way radio systems for the past 70 years. There is no evidence that such operation contributes to driver inattention. Quite the contrary: radio amateurs are public service-minded individuals who utilize their radio-equipped motor vehicles to assist others, and they are focused on driving in the execution of that function.

► The States encourage mobile amateur radio operation as a public benefit. Every State issues license plates to motor vehicles of licensed radio amateurs showing their FCC-assigned call letters, in order to identify a particular vehicle as a mobile-radio equipped vehicle. The United States Congress, in 1994, in a Joint Resolution (S.J. Res. 90/H.J. Res. 199 (1994)), in “recognizing the achievements of radio amateurs, and to establish support for such amateurs as national policy” found and declared, among other things, that: “reasonable accommodation should be made for the effective operation of amateur radio from residences, private vehicles and public areas, and that regulation at all levels of government should facilitate and encourage amateur radio operation as a public benefit.”

▶ There are numerous and increasing instances of municipal ordinance proposals in Montana to curb the use of cellular telephones or sending text messages from smart phones while operating motor vehicles. These range from prohibitions on hand-held telephones to prohibitions on operation of all forms of electronic devices. These ordinances supplement the more generalized motor vehicle code requirements that exist in various forms in virtually all States, which require operators of motor vehicles to pay full time and attention to the operation of the vehicle while driving.

▶ Whether or not intentionally, some of these proposed ordinances would in fact, or could be interpreted to prohibit the operation of Amateur Radio equipment by drivers of motor vehicles. Often, there are exemptions to the general prohibition of mobile electronic or communication devices while driving. Some specifically exempt licensed Amateur Radio mobile operation; some does not.

▶ Amateur Radio mobile operation is ubiquitous, and Amateur Radio emergency and public service communications, and other organized Amateur Radio communications activities and networks necessitate operation of equipment while some licensees are driving motor vehicles. Two-way radio use is dissimilar from full-duplex cellular telephone communications because the operator spends little time actually transmitting; the time spent listening is more similar to, and arguably less distracting than, listening to a broadcast radio, CD or MP3 player.

▶ Given the necessity of unrestricted mobile Amateur Radio communications in order for the benefits of Amateur Radio to the public to continue to be realized, this legislation would preclude municipal ordinances that would, in the context of placing restrictions on mobile cellular telephone operation or text messaging, exempt from such regulation restrictions the operation of a mobile Amateur Radio station by a licensee of the Federal Communications Commission in the Amateur Radio Service.