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July 25, 2014

Via Hand Delivery

Josh Baggett, Esquire
Legislative Director
Office of the Honorable Adam Kinzinger
1221 Longworth House Office Building
Washington, D.C. 20515

Re: Associa, Inc. Letter to Representative Kinzinger re H.R. 4969

Dear Mr. Baggett:

As General Counsel for ARRL, the national association for Amateur Radio, I have seen a copy of a letter to Mr. Kinzinger from Associa, Inc., a management firm based in Texas, dated July 16, 2014. In the letter, Associa makes certain representations about H.R. 4969 that are either untrue or substantially misleading. I would like to take this opportunity to clarify these misstatements. Please forgive me if you are already aware of the following.

The letter postulates that the Bill is an "unwarranted and unneeded intrusion into the contractual rights on (sic) residents of community associations." The Bill is nothing of the sort. All rights of homeowner's associations (HOAs) are preserved under the Bill. The only obligation that would be imposed is to not prohibit, but to make reasonable accommodation for some effective outdoor antenna for Amateur Radio use and to impose the least practicable restriction to accomplish the HOA's (aesthetic) purpose. *All HOAs are already obligated to permit outdoor antennas*, of potentially far greater size than an Amateur Radio antenna, pursuant to 47 C.F.R. § 1.4000. This rule permits large, rotatable rooftop- mounted outdoor antennas for broadcast television reception without *any prior HOA approval at all*. H.R. 4969 would require far less of an HOA with respect to Amateur Radio antennas, and the Bill does *not* deprive the HOA of prior approval jurisdiction. It simply requires reasonable accommodation, which is a flexible concept.

Associa claims that at ARRL's request, FCC studied the application of its flexible policy to private land use regulations in "1985, 1999, 200, 2001 and most recently in 2012", and that FCC found "no compelling reason to override private neighborhood covenants on radio antennas." That is substantially misleading. FCC assumed in 1985 when it created the policy that it did not have an interest in private land use regulations *on a jurisdictional basis*. That is why it did not, despite its very specific finding at the time of a "strong Federal interest in promoting Amateur Radio communications", apply its flexible policy to all types of land use regulations. After the 1996 Telecommunications Act required FCC to preempt all regulation of over-the-air video reception devices (OTARD) by municipal or private land use authorities, FCC found that it

did have jurisdiction to preempt private land use regulations and it created a strong preemption policy for those antenna facilities. In fact, FCC stated that, because "nongovernmental restrictions appear to be related primarily to aesthetic concerns" it "concluded that it was therefore appropriate to accord them *less deference than local governmental regulations* that can be based on health and safety considerations…"

ARRL, noting that FCC had determined that it did have jurisdiction to extend its Amateur Radio policy to private land use regulations, asked FCC in 1999 to apply the 1985 Amateur Radio policy to all types of land use regulations. FCC, in response, said in 1999 (and on reconsideration, again in 2000 and 2001) that it required guidance from Congress in order to do that. However, *FCC said that "strongly encouraged" HOAs to apply the FCC Amateur Radio policy to all types of regulation of Amateur Radio stations*:

> …we nevertheless strongly encourage associations of homeowners and private contracting parties to follow the principle of reasonable accommodation and to apply it to any and all instances of amateur service communications where they may be involved.[1]

At *no time* did FCC ever conclude that there was "no compelling reason to override private neighborhood covenants on radio antennas." It did find in 2012 that, *absent guidance from Congress*, there was "no compelling reason" to "revisit the Commission's previous determinations that preemption should not be expanded to CC&Rs" (covenants, conditions and restrictions). But FCC reiterated in 2012 that should Congress provide such guidance, it would do so immediately.

The FCC's Report to Congress, DA 12-1342, released August 20, 2012 reflected no conclusions of the Commission at all; it merely summarized the comments of the public on the subject. *An objective review of the record in the docket proceeding reveals overwhelming evidence that the exponential increase of private land use regulations throughout subdivisions and entire planned cities increasingly precludes Amateur Radio operation completely.* There are two types of covenant language that apply typically to Amateur Radio antennas: CC&Rs either (1) preclude outdoor antennas entirely, or else (2) require prior approval of the HOA or an architectural control committee of the HOA, without any standards at all to guide the decision. Either way, there is no contractual element in these restrictions whatsoever. They are just restrictions on the use of land before the Buyer ever comes to the table. Neither are there options in most urbanized areas of the country.

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[1] *Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antenna and Support Structures, and Amendment of Section 97.15 of the Commission's Rules Governing the Amateur Radio Service,* DA 99-2569 at ¶ 6 (WTB rel. November 19, 1999); *affirmed with modifications by Order on Reconsideration,* 15 FCC Rcd. 22151 (Deputy Chief, WTB, 2000*); review denied by Memorandum Opinion and Order*, FCC 01-372 (December 26, 2001).

The ultimate conclusion of the FCC, however, was that, should Congress request that the Commission extend its Amateur Radio policy equally to all types of land use regulations, it would do so (consistent with its prior urging that HOAs apply the policy on their own). Congress, in Public Law 103-408 in 1994, declared that Amateurs are to be "commended for their contributions to technical progress in electronics, and for their emergency radio communications in times of disaster;" and that the FCC is "urged to make "reasonable accommodation for the effective operation of Amateur Radio from residences, private vehicles and public areas;" and to "facilitate and encourage amateur radio operation as a public benefit." Congressional policy and FCC policy are therefore clear: the "no preclusion, reasonable accommodation and least practicable regulation" policy should apply to all types of land use regulation of Amateur Radio facilities.

Associa cannot assert that HOAs provide reasonable accommodation to Amateur Radio operators now. FCC has asked for Congressional direction; and Congress should enact H.R. 4969 as the guidance that FCC has asked for.

I have previously provided you with the comments that ARRL filed in FCC Docket 12-91 which provides all citations for the foregoing and exhibits detailing the level of overregulation of Amateur Radio communications by HOAs. If you need another copy, I will have it delivered to you prior to Monday.

Kind personal regards,

Christopher D. Imlay

Cc: Frank McCarthy