

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

In the Matter of)	
)	
John P. Stokes)	Facility ID No. 60575
)	
Petition for Declaratory Ruling)	

MEMORANDUM OPINION AND ORDER

Adopted: October 24, 2007

Released: October 25, 2007

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. We have before us the November 15, 2006, “Emergency Petition for Declaratory Ruling” (“Petition”) filed by John Stokes (“Stokes”) on behalf of Station KGEZ(AM), Kalispell, Montana, seeking preemption of the jurisdiction of the Eleventh Judicial District Court, Flathead County, Montana, regarding zoning decisions impacting the property on which the KGEZ(AM) transmission facilities are located.¹ For the reasons discussed below, we deny the Petition.

II. BACKGROUND

2. Skyline Broadcasters, Inc. (“Skyline”) is the licensee of KGEZ(AM). Stokes is the owner and President of Skyline. The KGEZ(AM) transmission facilities are located on U.S. Highway 93, south of Kalispell, Montana. The station operates with a two-tower daytime and nighttime directional antenna array.² The 120 ground radials for each tower extend approximately 500 feet from the towers. Douglas G. Anderson, Ruth M. Anderson (as trustee of The Ruth M. Anderson Living Trust), Davar Gardner and Todd Gardner (collectively, “the Andersons”) are owners of the property (“the Anderson Property”) on which the KGEZ(AM) transmission facilities have been constructed.³

3. The Anderson Property is encumbered by an easement which was granted by the Andersons’ predecessors in interest, J.R. Anderson and Anna G. Anderson (“J.R. and Anna Anderson”), to Stokes’ predecessor in interest and then-owner of KGEZ(AM), Donald C. Treloar (“Treloar”).⁴ The easement was executed October 11, 1949, and was never amended in writing by the parties.⁵ Treloar’s easement allowed him to select a site for the radio towers, provided that he bury “all wires and conduits capable of such burial to a depth of not less than 12 inches so that the same will not unduly interfere with the cultivation of said premises, and to fence all towers and or guy wires for their protection against

¹ Stokes filed a Supplement to his Petition on July 27, 2007. KGEZ operates with 5 kW daytime and 1 kW nighttime facilities.

² See BL-19810915AD, granted on January 28, 1982.

³ See *Anderson v. Stokes*, 2007 MT 166U (2007), ¶4.

⁴ *Id.*

⁵ See *Stokes v. Montana*, No. CDV-2004-320, 2006 Mont. Dist. LEXIS 255 (1st Jud. Dist. Ct. of Mont., Lewis and Clark County Apr. 27, 2006), ¶ 2.

livestock.”⁶ Treloar subsequently built two towers, a ground system, and associated transmission components in the early 1950s. The towers and ground radial antennas have remained at that location since their construction.⁷ The easement relates to a parcel approximately 160 acres in size which has been owned and farmed by the Anderson family for more than 50 years.⁸ Neither Stokes nor any of his predecessors in interest have expanded the radio facility beyond its original location on the Anderson Property.⁹

4. Stokes purchased KGEZ in April 2000.¹⁰ Shortly thereafter, he advised the Andersons that he intended to enlarge or relocate the radio towers. In Stokes' view, the easement granted by J.R. and Anna Anderson covered all of the land described in the grant (160 acres). By contrast, the Andersons believed that the easement covered only the specific portion of land that on which the radio towers ultimately were built (roughly 31 of the 160 acres). In addition to this disagreement as to the location and scope of the easement, the Andersons requested that Stokes bury the existing wires and conduits to a depth of at least 12 inches, fence the towers and guy wires that were not currently fenced, and repair the existing fences that were in disrepair.¹¹ Until January 12, 2001, the easement had never been subjected to judicial interpretation.

5. On January 12, 2001, the Andersons filed an action, Cause DV-01-023(C), Montana Eleventh Judicial District Court, Flathead County (the “Eleventh District Court”), seeking to extinguish the easement due to Stokes’ alleged failure to comply with the easement; alternatively, they requested that the court clarify and interpret the location and scope of the KGEZ(AM) easement.¹² The Eleventh District Court entered its final judgment in the proceeding on December 27, 2005, specifying that the easement is limited in size and location to the historical location of the present towers.¹³ The court held that KGEZ must perform the necessary repairs to the improvements located upon the easement so as to be in compliance with the terms of the easement. This includes burying all wires, ground radials, conduits and transmission lines to a minimum depth of 12 inches.¹⁴ Stokes appealed the District Court’s order and final judgment.¹⁵ The Supreme Court of Montana affirmed on July 11, 2007.¹⁶

⁶ See Easement dated October 11, 1949 at 3.

⁷ See *Anderson v. Stokes*, 2007 MT 166U (2007), ¶ 5.

⁸ See *Stokes v. Montana*, 2006 Mont. Dist. LEXIS 255, ¶ 2.

⁹ See *Stokes v. Montana*, 2007 MT 169U (2007) ¶ 3.

¹⁰ See File No. BTC-19991012AAU, granted on December 2, 1999 (transfer of control of Skyline Broadcasters, Inc. from Ambrose G. Measure *et al.* to Z-600, Inc., of which Stokes is President, Director, and 100% shareholder). The transaction was consummated on April 27, 2000.

¹¹ See *Anderson v. Stokes*, 2007 MT 166U (2007) ¶ 7.

¹² *Id.* at ¶ 8.

¹³ *Anderson v. Stokes*, No. DV-01-23(C), 2005 Mont. Dist. LEXIS 1804 (11th Jud. Dist. Ct. of Mont., Flathead County Dec. 27, 2005), at ¶ 2.

¹⁴ *Id.* at ¶ 3.

¹⁵ *Id.*

¹⁶ *Anderson v. Stokes*, 2007 MT 166U (2007). It appears that Stokes refused to comply with the order to bury the ground radials and has been subject to contempt proceedings in Minnesota state court. In the July 27, 2007 supplement to the Petition, Stokes states that the Montana District Court “has now allowed developers to cut 90 feet off the length of all ground radial systems.” Supplement, at 3. We have no confirmation that the KGEZ(AM) ground radials have in fact been severed.

6. In the Petition, Stokes argues that the judicial interpretation of the easement forces KGEZ to alter its transmission broadcast equipment and that local governments “have absolutely no jurisdiction to order an alteration, change, modify, remove, deny construction, deny placement, or restrict use of any approved FCC radio station facilities.”¹⁷ In his Petition, Stokes therefore requests “an immediate emergency intervention and FCC federal preemption and declaratory ruling denying jurisdiction to Flathead County District Court Eleventh District for the State of Montana.”¹⁸

III. DISCUSSION

7. Under Section 1.2 of the Commission's Rules (the “Rules”), the Commission “may . . . issue a declaratory ruling terminating a controversy or removing uncertainty.”¹⁹ The Commission has broad discretion whether to issue such a ruling.²⁰ We conclude that no declaratory ruling is warranted in this case, because there is no legal controversy or uncertainty regarding the issue presented.

8. Under Section 151 of the Communications Act of 1934, as amended, (the “Act”), the Federal Communications Commission was created for the purpose of regulating communication by wire and radio.²¹ Although by virtue of the Act, Congress has preempted local regulation of radio transmission, including assignment of frequencies to the states and communities.²² The Act does not purport to regulate local land use issues relating to the location of broadcast transmission facilities.²³ Thus, for example, the Commission has adopted no rules preempting local zoning requirements affecting the construction of broadcast towers.²⁴ The Montana court rulings interpreting the terms of the easement encumbering the Anderson Property do not conflict with any federal law or regulation.

¹⁷ *Petition* at 3. *But see Anderson v. Stokes*, 2005 Mont. Dist. LEXIS 1796 (The court held that it was satisfied that it did have subject matter jurisdiction over the issues presented in the lawsuit and had the power to conclusively adjudicate this easement dispute, a matter of state law. The court stated that the power to regulate the broadcast license was not before the court and was not subject to any ruling by the court, and the issues involving the real property which the towers and antennae field may occupy is separate and distinct from the authority of FCC to regulate radio broadcasting.)

¹⁸ *Id.*

¹⁹ 47 C.F.R. § 1.2.

²⁰ *Telephone Number Portability*, Order, CC Docket No. 95-116, 19 FCC Rcd 6800, 6810 20 (2004). *See also Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (1973).

²¹ *See* 47 U.S.C. § 151.

²² *See, e.g., Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963); *960 Radio, Inc.*, Memorandum Opinion and Order, 1895 WL 193883 (Nov. 4, 1985). *See also* 47 U.S.C. § 307(b).

²³ *See, e.g., Sleeper v. Old King's Highway Regional Historic Dist. Com.* (1981) 11 Mass App 571, 417 NE2d 987 (citations omitted). *See also Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963).

²⁴ *See Letter to Barry A. Friedman, Esq.*, 21 FCC Rcd 10747 (MB 2006).

IV. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED that the November 15, 2006, “Emergency Petition for Declaratory Ruling” filed by John P. Stokes IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau