

Crews Are Scarce for TV's High-Danger Task

By JOEL BRINKLEY

In Austin, Tex., construction had to be halted for several months during the nesting season of the golden-cheeked warbler.

In Dallas, a construction accident killed three people because workers had not been properly trained.

And in New York, even the city's tallest skyscrapers may not be up to the task.

For the few companies in the business of building television towers, the prospect of bizarre complications, bureaucratic delays and even fatal mistakes only serve to compound the extraordinary challenge now facing them. Under a federally mandated schedule to usher in digital high-definition television — a timetable that the construction industry says may be impossible to meet — the tower builders are embarking on a crash program across the country to build hundreds of new television towers, at heights up to 2,049 feet, taller than the world's tallest buildings.

The trouble is, across the United States only about a half-dozen crews have the experience and training to put up these towers that can reach nearly a half-mile into the sky.

Together, all of the nation's tower building teams may be able to put up as many as 20 towers a year. But each year for the next four or five years, the broadcast industry is going to call on them to build 100 or more. Broadcasters and tower builders call it a Sisyphean mission. And if they do not succeed, many of the new digital stations will be years late going on the air.

"I don't see how we can get it

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Mark Perlestein for The New York Times

Television stations are in a rush to accommodate antennas for digital service. In a Dallas suburb, a tower is being built for KXAS-TV.

Television Embarks on a High-Stakes, High-Danger Chore

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done," said J. C. Kline, president of Kline Towers, one of only three companies in the United States that build television towers. "We just don't have the capacity for this."

Scores of engineers, politicians, lobbyists and bureaucrats spent more than a decade in a tortured, Government-run program to devise the standard for the new generation of television. Now that the standard is set, and the Federal Communications Commission has lent every television station a second channel for the transition to this new service, 1,800 stations have to find places for the antennas that will beam the new programming to their viewers.

Nearly all of them had chosen to defer even thinking about this problem until now, in part because a new tower costs at least \$1,000 a foot, or \$2 million for a 2,000-foot structure.

Digital television does not demand a tower any different from what conventional broadcasting requires. So in many cases, existing towers may suffice. But as many as one-third of the nation's television stations may have to put up new towers because

A deadline makes the problems of digital television more pronounced.

their existing ones are loaded to capacity with antennas for television and radio stations, cellular phone providers and other communications systems. For these fully loaded towers, even one more antenna — along with up to 2,000 feet of fat copper cable leading to it — would add more weight than the tower could bear.

Different stations have different height requirements for their towers, depending on terrain and the distance to the city's farthest suburbs. The higher the tower, the farther the signal's reach. But 2,049 feet is the tallest tower allowed by Federal law.

The National Association of Broadcasters and Tom Vaughan, an industry consultant who specializes in towers, say their recent surveys of the nation's television stations indicate that 500 to 700 of them will need new towers. And while some broadcast executives think those numbers may be a bit too high, most of the stations have hired engineering firms to determine whether their existing towers can be reinforced or modified or whether entirely new structures are necessary.

But whatever the final number of new towers turns out to be, broadcast executives know the sheer national scope of the task will be daunting.

"It's something the world has never had to face up to before," said Bob O. Niles, who is in charge of the tower-building program for ABC, which owns 10 stations and expects to erect new spires for two of them.

"It's a serious problem."

One of the ABC stations, in Philadelphia, is joining forces with the CBS station there to build a tower on land that has already been set aside for television towers.

But in most other metropolitan areas, site selection will not be as easy. In New York, for example, executives for the region's 12 television stations know there is no room to add more antennas to the existing towers atop the World Trade Center. And so they are exploring several possible solutions: persuading the Port Authority to let them build a shorter, third tower beside those already on the World Trade Center; sharing CBS's auxiliary tower on top of the Empire State Building; finding other tall buildings in New York that can support towers, or building a 2,000-foot freestanding tower somewhere near Manhattan.

But each of these ideas faces its own formidable engineering and bureaucratic problems.

"Nobody is really sure yet which way we are going to go," said Lev Pope, who is running an intra-industry committee that is trying to solve New York City's tower problem.

Until early last month, the tall-tower industry had been a sleepy little business that had been depressed since the early 1980's, when growth in the television industry slowed. In recent years, Kline along with its two friendly rivals — LeBlanc Communications Inc. and Stainless Inc. — have together been called upon to build maybe 10 or 15 tall towers a year, as new stations have gone on the air and existing stations have occasionally replaced towers.

Building towers is rugged, skilled, dangerous work, and "right now I would be surprised if even a dozen crews in all of North America have the training to do it," said John Miller, president of LeBlanc.

And that is just one of the problems.

The challenge begins when a station tries to find suitable land. Most television towers in use today were built in the 1950's or 60's. Some were placed right next to the stations; others were put up in corn fields or pastures on the edge of town.

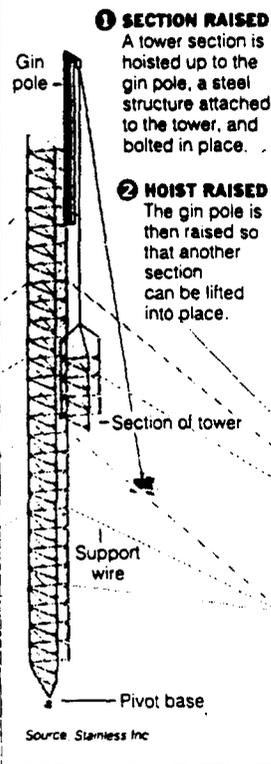
In the years since, insurance companies have begun to require television stations building towers to use land large enough that the tower can fall in any direction without hitting anything — meaning that in some cases a circular plot with a diameter of 4,000 feet is needed. Towers do in fact fall on occasion. Seven of them collapsed during a storm in Minnesota and North Dakota last month. No one was injured.

The new insurance requirement makes it unlikely that many stations will be able to build towers next to their offices. And sites outside town have their own problems. Since the 50's, the suburbs have grown up around the towers — and beyond.

In Denver, for example, where one or more new towers for digital antennas will be needed, "all the broadcasters put their towers up on a mountain outside town 35 years ago," said Robert J. Ross, the CBS

Taller TV Towers

Within the next four to five years, several hundred television towers must be built as part of the conversion to new, digital broadcasting. Each tower, up to 2,049 feet tall, will cost at least \$1,000 a foot and take three to nine months to build. Here is how they are constructed:



The New York Times

vice president who is running the network's tower-building program.

"Back then it was just pine trees and dirt roads with lots of switchbacks. But now there are a lot of million-dollar homes out there."

As a result, the area's zoning has changed, "and we can barely touch the existing towers without lawyers and variance hearings," Mr. Ross added.

"I don't know how we're going to get a new one up," he said.

Once a station does find a large plot of land for a tower, the next set of challenges will begin: winning permission to build it. Nobody, it seems, wants a tower in the backyard.

"It's easier to get permission to build a prison," quipped Joseph Flaherty, a senior vice president for CBS.

David Brozman, administrator of the National Association of Tower Erectors, said a recent project in Blooming Prairie, Minn., had had to be relocated at the last minute when environmentalists complained that it was going up in the migratory flight

path of a certain breed of duck.

And in San Francisco, residents complain about the suspected ill effects of the radio waves emanating from the antennas — though there is no proof that television signals, digital or otherwise, are hazardous.

San Francisco's 10 local stations plan to add antennas for digital broadcasts to an existing tower at the Sutro tower complex atop a ridge just above the city's Twin Peaks neighborhood. "But I guarantee it will be held up," Mr. Ross said.

"A few years ago, we wanted to build just an addition to the building there, and residents came out of the woodwork talking about all kinds of cancers, all kinds of headaches," he added. The project was scrapped.

There has been little public discussion of the plan to add antennas at Sutro, and at ABC, Mr. Niles said, "We don't know what will happen when the public finds out about this."

Assuming residents can be calmed and other Government agencies, including the Federal Aviation Administration, grant approval (another trouble-fraught process) the station then faces its greatest challenge: building the tower.

Mr. Miller of the LeBlanc tower company estimates that "there are maybe 400 tower erector crews in the U.S." But nearly all of those, he added, are trained only to put up cellular-telephone towers that are usually just a couple of hundred feet tall. Many can be raised with a standard construction crane.

"There's a world of difference between that and putting up tall towers," Mr. Miller said. The task is easy to describe, but dangerously difficult to execute. Tower building crews are led by two people — the "top man," who works atop the tower as it goes up, and the crew chief, who runs the operation from the ground. New pieces of the structure are hoisted to the top with winches and pulleys that are fastened to the uppermost part of the structure, and the top man supervises the workers who bolt each beam into place.

"To train a new top man takes a couple of years," Mr. Miller said.

Once trained, "the top man and the crew chief have to be a closely coupled, experienced team," said Art Allison, the tower expert at the National Association of Broadcasters, "because if they're not and something goes wrong, somebody's going to die."

And in fact, in Dallas last October three people did die while working on a 1,550-foot tower. The structure collapsed when a boom in use at the top broke loose. A Federal Occupational Safety and Health Administration investigation found that the workers were not properly trained.

Mr. Miller said two of the workers had recently moved from working on cell-phone towers. "What this points out loud and clear," he said, "is that you just can't take somebody off short towers and put him on tall towers."

"I'm just afraid, with all this new business, there will be an attempt to speed up this work by putting people in it who don't have the proper foundation."

Exhibit D

**Jefferson County, Colorado Ordinance,
Planned Development for Telecommunications Towers**

F. PLANNED DEVELOPMENT FOR TELECOMMUNICATION TOWERS:

The purpose of the Planned Development is to minimize adverse visual effects of towers through careful design, siting, and vegetative screening; to maximize the use of any transmission tower in order to reduce the total number of towers needed to serve the telecommunications needs of the area; and to site and design towers so that electromagnetic radiation emissions to which the public will be exposed do not exceed safe levels. (orig. 5-11-93)

1. Application Requirements:

All rezoning applications must contain the following materials, however failure to submit a complete application shall not deprive the Planning Commission or the Board of County Commissioners of jurisdiction to consider the application. These application requirements are not intended to specify criteria for decision. (orig. 5-11-93)

- a. Site plan(s) drawn to scale identifying the site boundary; tower(s); guy wire anchors; existing and proposed structures, including accessory structures; existing and proposed ground-mounted equipment; vehicular parking and access; and uses, structures, and land use designations on the site and abutting parcels. (orig. 5-11-93)**
- b. A landscape plan drawn to scale generally showing proposed landscaping, including species type, size, spacing, other landscape features, and existing vegetation to be retained, removed or replaced. (orig. 5-11-93)**

- c. A report from a qualified individual(s) containing the following, which report shall not limit the tower height or design or the number and type of antennas that shall be permitted unless expressly so stated in the official Development plan (ODP) or special use approval. (orig. 5-11-93)
- (1) A description of the tower and the technical and other reasons for the tower design. (orig. 5-11-93)
 - (2) Documentation to establish that the tower has sufficient structural integrity for the proposed uses at the proposed location and meets the minimum safety requirements and margins in EIA-RS222 in its current adopted revision. (orig. 5-11-93)
 - (3) The general capacity of the tower in terms of the number and type of antennas it is designed to accommodate. (orig. 5-11-93)
 - (4) Calculations, maps or such other information as is necessary to demonstrate that the cumulative effect of proposed sources of NIER when added to existing NIER sources will comply with the standard set forth in OST-65 and ANSI C95.1 or any revision thereto, or any other adopted County standard. Any facility that will operate at less than 1000 watts of radio frequency power per transmitter is exempt from this requirement unless its NIER emission, when added to existing ambient NIER sources, will exceed the levels set forth in the above standard. (orig. 5-11-93)
- d. A letter of intent stating whether the applicant intends to lease excess space on the tower to other potential users at reasonable rental rates and on reasonable terms. The letter of intent and the Official Development Plan shall be recorded without the County Clerk and Recorder prior to issuance of a building permit. The letter shall commit the tower owner and successors in interest to do the following. (orig. 5-11-93)
- (1) Respond in a timely, comprehensive manner to a request for information. (orig. 5-11-93)
 - (2) Negotiate in good faith for shared use by third parties. An owner may negotiate with a party who has received an FCC license or construction permit before doing so with other parties. (orig. 5-11-93)
 - (3) Allow shared use if an applicant agrees in writing to pay reasonable rental charges or other consideration and to pay all costs of adapting the tower or existing users' equipment to accommodate a shared user without causing uneconomically correctable electromagnetic interference or causing NIER emissions in excess of levels set forth in OST-65 and ANSI C-95.1, and can otherwise agree on reasonable business terms and conditions for shared use of the tower. (orig. 5-11-93)
 - (4) Make no more than a reasonable charge for shared use based on generally accepted accounting principles. (orig. 5-11-93)
 - (5) Respond to inquiries for shared use with the information required herein. (orig. 5-11-93)
- e. Proof of ownership of the proposed site or authorization to rezone the parcel from the owner of the proposed site. (orig. 5-11-93)

- f. **Copies of any easements necessary for access, guy wire anchors or other off-site uses. (orig. 5-11-93)**

- g. **Applications for towers intended for transmitters that will broadcast at a power in excess of 1000 watts of radio frequency power per transmitter must include evidence that the applicant has contacted owners of all existing or approved towers and that the equipment for which the proposed tower is being constructed cannot be technologically or structurally accommodated on an existing or approved tower. Applicants for FM radio and high power UHF and VHF television station antennas shall only be required to contact the owners of towers whose height is 200 feet or greater, or whose towers can reasonably satisfy the requirements for height above average terrain (HAAT) and geographic location as set forth in their application and/or grant of construction authority from the FCC. Such evidence shall include the following. (orig. 5-11-93)**
 - (1) **A list of contacts. (orig. 5-11-93)**
 - (2) **The antenna specifications including, but not limited, to weight and wind loading requirements; length, width and height; and transmitter space requirements provided to the tower owner(s) or representative(s). (orig. 5-11-93)**
 - (3) **Responses from each tower owner or representative setting forth the structural, technological or general business limitations on shared use of the existing tower, a statement as to whether the structural or technological impediment could be eliminated by strengthening the tower or enlarging the transmitter building, whether existing equipment could be protected from electromagnetic interference, and the projected cost of such alterations. Once this information has been submitted to the County, it will be available for use in future applications by other parties. (orig. 5-11-93)**

- h. **A visual study containing, at a minimum, a viewshed map depicting where within a three mile radius any portion of the proposed tower could be seen, and a graphic simulation showing the appearance of the proposed tower and accessory structures from five points within the view shed, such points to be mutually agreed upon by the Planning Department and applicant. (orig. 5-11-93)**

- i. **An analysis of the area to be rezoned containing the following. (orig. 5-11-93)**
 - (1) **Existing topographical contours based on the best available existing maps. (orig. 5-11-93)**
 - (2) **Bodies of water and intermittent or perennial streams. (orig. 5-11-93)**
 - (3) **Rock outcropping and major ridgelines. (orig. 5-11-93)**
 - (4) **Major vegetation masses. (orig. 5-11-93)**
 - (5) **Existing roads and structures. (orig. 5-11-93).**
 - (6) **Existing easements or rights-of-way (e.g., utility, irrigation, access, etc.) on or contiguous to the site. (orig. 5-11-93)**
 - (7) **Identified mineral resource areas. (orig. 5-11-93)**

- (8) Where the area in which construction will occur contains slopes greater than 10 percent, a slope analysis of the area affected by construction depicting locations and direction of slope faces for slopes within the following categories: 0-8 percent, 8-15 percent, 15-22 percent, 22-30 percent, greater than 30 percent. (orig. 5-11-93)
- (9) Floodplains, as designated by the Urban Drainage and Flood Control District or other agency, and overlay zoned floodplain (FPS) areas. (orig. 5-11-93)
- (10) Areas within the Geologic Hazard (GH) Overlay Zone. (orig. 5-11-93)
- (11) Location of other potential hazards such as wildfire, geologic, airport or radiological hazards. (orig. 5-11-93)
- (12) Location of special resources such as wildlife, historic structures, and archaeologically significant remains. (orig. 5-11-93)
- j. Elevations of the proposed tower and accessory building generally depicting all proposed antennas, platforms, finish materials, and all other accessory equipment. (orig. 5-11-93)
- k. The Board of County Commissioners and/or the Planning Commission may require the applicant to submit funds in escrow up to a maximum of \$10,000 to pay for expert review of technical submissions by the applicant, including expert review of engineering data and financial data concerning costs of modifying existing towers and costs of ameliorating interference. The Planning Department shall recommend the amount of funds to be deposited up to \$10,000 based on the nature of the application and the anticipated complexity of review. Selection of the expert(s) shall be within the sole discretion of the County, however the applicant and interested parties shall have an opportunity to comment on the proposed expert(s). Any funds not utilized for expert review shall be returned to the applicant at the completion of the rezoning case. (orig. 5-11-93).

2. Review and Approval:

a. General Criteria:

- (1) In reviewing a proposal under this Section, the Planning Commission and the Board of County Commissioners shall consider the compatibility of the proposal with existing and allowed land uses in the surrounding area; the County's Comprehensive Plan including but not limited to the applicable community plan or the General Land Use Plan and the Telecommunications Land Use Plan, according to the priorities set forth in the plans; the Local Government Land Use Control Enabling Act; the provisions of section 30-28-115, C.R.S., and any other applicable law, adopted public policies or plans, or studies presented as part of the zoning case. The Board has the sole discretion to determine what weight, if any, to give each of these factors. (orig. 5-11-93)
- (2) If the Board of County Commissioners approves a rezoning to Planned Development pursuant to this Section, the Board may impose such conditions on access, accessory structures, landscaping, tower coloring, lighting, design, size and siting as it deems necessary to render the proposal compatible with existing and allowed land uses in the surrounding area, to comply with the

policies in the Jefferson County Comprehensive Plan or applicable land use plan, the telecommunications Land Use Plan, its land use enabling authority, the laws, policies, plans and studies referenced above, except where such conditions are preempted by and conflict with regulations promulgated by the Federal Communications Commission or the Federal Aviation Administration, or where the Board of County Commissioners determines, based on evidence presented at the hearing, that such conditions would contravene sound engineering practices. (orig. 5-11-93)

b. Minimum Standards:

- (1) The applicant must provide expert testimony that demonstrates to the satisfaction of the Board of County Commissioners that no existing telecommunications site is available to accommodate the equipment or purpose for which the tower or increase in height is proposed at a reasonable cost or other business terms. The need for structural or equipment modifications shall not alone be sufficient to demonstrate nonavailability. Any one or more of the following shall be considered to demonstrate nonavailability. (orig. 5-11-93)**

 - (a) Evidence with reference to EIA-RS 222, in its then current adopted revision, that the structural capacity of existing and approved towers cannot accommodate the planned equipment and cannot be reinforced to accommodate the planned equipment at a reasonable costs, or the owner of the site is unwilling to rezone if necessary to accommodate a new user. The applicant shall be required to calculate the capacity of existing or approved towers based on information on file with the County or requested from the tower owner, if supplied. (orig. 5-11-93)**
 - (b) Evidence that the planned equipment may or will cause objectionable radio frequency interference with other existing or planned equipment on that tower, which cannot be ameliorated at a reasonable cost. (orig. 5-11-93)**
 - (c) Evidence that existing or approved towers do not have space to locate the planned equipment where it can function effectively and at the strength of signal required by the FCC. (orig. 5-11-93)**
 - (d) Evidence that the addition of the planned equipment to existing or approved towers would result in NIER levels in excess of those permitted by OST-65 and ANSI C95.1 or any revisions thereto, or any adopted local standard. (orig. 5-11-93)**
 - (e) Evidence that the fees and/or costs for shared use, including the cost to adapt existing facilities to the proposed use, exceed the cost of the proposed tower, or that the parties have not been able to reach agreement on reasonable business terms or other issues associated with locating on the tower. (orig. 5-11-93)**

- (2) All new structures must be set back from the property line sufficient to prevent all ice-fall materials and debris from tower failure or collapse from falling onto occupied dwellings other than those occupied by the tower owner, and protect the public from NIER in excess of that allowed herein. Where more than one tower is located on a site, the set back between such towers shall be sufficient to prevent multiple failures in the event one tower fails. (orig. 5-11-83)
- (3) The tower must be designed to accommodate structurally multiple antennas if recommended by the Telecommunications Plan. (orig. 5-11-83)
- (4) NIER emissions from the tower facility, when operating with maximum power output from all proposed antennas and transmitting facilities, may not exceed the level set forth in this Zoning Resolution, as measured in accordance with methods published by the United States Office of Science and Technology or any other applicable federal agency by qualified experts. (orig. 5-11-83)
- (5) The written restrictions must state that at such time as there have not been any antennas on a tower or the use of the tower has been abandoned for 6 consecutive months, it will be removed within 180 days of the end of said six month period. (orig. 5-11-83)
- (6) Satisfaction of the minimum standards set forth above shall not entitle an applicant to approval of the rezoning if the Board of County Commissioners determines that rezoning should not be allowed pursuant to the General criteria for review. (orig. 5-11-83)

Exhibit E

Butters v. Hauser, 125 Idaho 79, 867 P.2d 953 (1993)

Mary J. BUTTERS and James S. MacDonald,
Petitioners-Respondents on Appeal,
v.
Robert G. HAUSER, Respondent-Appellant on
Appeal,
and
James E. and Sheron L. Givan, and Latah
County, acting by and through the Board
of Latah County Commissioners, and County
Commissioners Dana Magnuson, Thomas
Spangler and Nancy Johansen, Respondents.
Mary J. BUTTERS and James S. MacDonald,
Petitioners-Respondents on Appeal,

v.
Robert G. HAUSER and James E. and Sheron L.
Givan and Latah County acting by
and through the Board of Latah County
Commissioners Dana Magnuson, Mark
Solomon, and Nancy Johansen, Respondents,
and
Board Of Latah County Commissioners,
Respondent-Appellant on Appeal.

Nos. 20078, 20087.

Supreme Court of Idaho,

North Idaho, October 1993 Term.

Dec. 29, 1993.

Property owners appealed decision of county planning and zoning commission granting conditional use permit for erection of radio transmission tower. County board confirmed grant of permit, and property owners appealed. The District Court of the Second Judicial District, Latah County, John H. Bengston, J., reversed, and applicant and board appealed. The Supreme Court, Bistline, J., held that evidence did not establish that proposed tower would serve local and regional economic needs or would enhance surrounding area.

Affirmed.

[1] ZONING AND PLANNING ⇔ 747
414k747

On appeal of decision by district court in zoning case, Supreme Court independently examined whether findings and conclusions of county board were supported by substantial, competent evidence.

I.C. § 67-5215(g).

[2] ZONING AND PLANNING ⇔ 435
414k435

Evidence did not support finding and conclusion by county board that proposed radio transmission tower would serve local and regional economic needs or would enhance surrounding area; although tower would enable radio station to emit stronger signal, there was no evidence that stronger signal would in any way stimulate local economy; moreover, rather than evidence that tower would enhance surrounding area, there was in fact evidence concerning potential health problems caused by transmission towers.

[3] ZONING AND PLANNING ⇔ 572
414k572

Constitutional argument not raised before county board by applicant for conditional use permit would not be addressed by state Supreme Court on appeal.

[4] ZONING AND PLANNING ⇔ 726
414k726

After reversing decision to grant conditional use permit, trial court was justified in remanding matter to county planning and zoning commission for sole purpose of allowing commission to deny permit and in staying any further proceedings before commission; although court could remand for further fact-finding, it was not required to do so, and applicant and county board had their day in court and were not entitled to present additional evidence at subsequent hearing.

****954 *80 Bielenberg, Anderson & Walker, Moscow, for appellant Hauser. John W. Walker, argued.**

Douglas W. Whitney, Deputy Pros. Atty., Moscow, argued, for appellant Bd. of Latah County Com'rs.

John H. Bradbury, Kamiah, for respondents.

BISTLINE, Justice.

BACKGROUND AND PRIOR PROCEEDINGS

In 1990 Robert Hauser applied for a conditional use permit to erect a radio transmission tower on a ridge top southeast of Moscow, Idaho, in Latah County. The Latah County Planning and Zoning

Commission granted the permit. Thereafter, two nearby property owners, Mary Butters and James MacDonald, on their own behalf, and also on behalf of other nearby property owners who had signed a petition (hereinafter Butters), appealed that decision to the Board of Latah County Commissioners (hereinafter the Board). The Board confirmed the grant of the permit; the property owners appealed to the district court. The district court reversed the Board, concluding that the evidence was insufficient to support the Board's finding that the radio tower would provide an essential service to the community and would enhance the surrounding area. Recognizing that the Board could not issue a conditional use permit, the district court remanded the case to the Board for action consistent with its order. Hauser and the Board of Commissioners (hereinafter Hauser) have appealed from the district court's order, and they raise the following issues on appeal:

1) Did the district court err in ruling that the evidence was insufficient to support the Board's finding that the development would provide an essential service to the community or region, thus enhancing the surrounding area in its basic community functions?

2) Is the district court decision and Section 13.10.04D of the Latah County zoning ordinance preempted by the Supremacy Clause of Article VI of the United States Constitution and do they violate Hauser's and the public's rights guaranteed by the First Amendment to the United States Constitution and the Communications Act of 1934?

3) Did the district court err by staying and refusing to remand proceedings before the Board of Commissioners?

**955 *81 4) Did Butters fail to properly serve all interested and indispensable parties?

ANALYSIS Standard of Review

[1] The standard this Court applies in reviewing agency decisions is set forth in I.C. § 67-5215(g). In short, this Court independently examines whether the Board's findings and conclusions were supported by substantial, competent evidence.

I. THERE IS SUBSTANTIAL COMPETENT EVIDENCE TO SUPPORT THE DISTRICT COURT'S DETERMINATION THAT THE BOARD'S FINDING 5 AND CONCLUSION 4 WERE CLEARLY ERRONEOUS

[2] At the heart of this case are factual matters: whether Hauser's proposed transmission tower would serve local and regional economic needs, and whether it would enhance basic community functions or provide an essential service. The district court held that the Board's Finding 5 and Conclusion 4, regarding these matters, were clearly erroneous. We now turn to an examination of the district court's opinion to determine whether it is supported by the record.

Latah County Zoning Ordinance Section 3.03 et. seq. authorizes the issuance of conditional use permits. Section 13.10.04 sets forth with particularity the criteria which must be met before a conditional use permit may be authorized. Among these conditions is the requirement of Criterion D:

That the proposed development will enhance the successful operation of the surrounding area in its basic community functions or will provide an essential service to the community or region.

Thus, an applicant must demonstrate either enhancement of community functions or provision of essential services.

The Board's Finding 5 reads:

The proposed use will serve local and regional economic needs by adding an additional vehicle for commercial advertising, employment for construction and operation of the station, and programming which includes agricultural news and market information and public service broadcasts, as required by the F.C.C., thus providing beneficial radio broadcast services to the community and the region.

Finding 5, stating that the facility will provide a beneficial service to the community, is insufficient to support the requirement of Criterion D, i.e., that the facility provide an essential service. We find no evidence in the record to support the Board's statement in Finding 5 that the facility would serve local and regional economic needs.

(Cite as: 125 Idaho 79, *81, 867 P.2d 953, **955)

We agree with the district court that the Board's Conclusion 4 is not supported by any evidence. Conclusion 4 reads:

The proposed use will enhance the successful operation of the surrounding area in its basic community functions or will provide an essential service to the community or region.

The district court determined that there was no evidence demonstrating that the proposed radio tower would serve local and regional economic needs. Hauser was seeking a conditional use permit in order to be able to emit a stronger signal from his already existing radio station in Colfax, Washington, yet the district court found that he presented absolutely no evidence that a stronger signal would in any way stimulate the local economy. The district court also found that Hauser did not present evidence establishing that the employment opportunities, or the advertising services which he could offer, would serve local or regional needs. On the contrary, the evidence shows that the region is already saturated with radio coverage and advertising availability, and that very few people, if any, would gain employment through this radio tower except temporarily during its construction.

We also agree with the district court's conclusion that there was not substantial and competent evidence that the proposed tower would enhance the surrounding area. Instead, there was a great deal of evidence presented by Butters concerning potential health problems caused by transmission towers. Because of its increased transmitting **956 *82 capacity, if anything, the tower might provide additional service to faraway areas, but there was no evidence that it will offer any additional broadcast services to nearby residents since they are already hearing the programs which will be broadcast. One commissioner concluded that the tower would "basically serve Colfax and Whitman counties" and create a "hazard" in Latah County.

The absence of sufficient evidence showing that the proposed radio tower will provide an essential service to the community, or, that it will enhance the surrounding area in its basic community functions establishes the verity of the district court's conclusion that the Board's findings to the contrary are clearly erroneous.

II.

THE ADDITIONAL ISSUES RAISED ON APPEAL ARE WITHOUT MERIT

Taking in turn the issues which Hauser raises for the first time on appeal, we conclude that they are all without merit.

A. The Constitutional Argument

[3] Because Hauser did not raise his constitutional argument before the Board of Commissioners, we decline to address this argument on appeal. It is axiomatic that an issue not raised below will not be considered for the first time by this Court. *Balsler v. Kootenai Cty. Bd. of Com'rs.*, 110 Idaho 37, 714 P.2d 6 (1986).

B. The District Court's Stay

[4] Because no procedural errors were alleged in the hearings below, the district court properly stayed further proceedings before the Commission. As the district court correctly noted, its memorandum opinion and order reversed the Commission's decision to grant Hauser a conditional use permit. The court's order remanded the matter to the Commission only so that it could deny the CPU since a court may not. Although a court may remand a matter to an agency for further fact-finding, it is not required to do so. Hauser and the Board of County Commissioners had their day in court and are not entitled to present additional evidence at a subsequent hearing before the Board. In spite of Hauser's contention, neither I.C. § 67-6519 nor I.C. § 67-5215 operate to mandate such a result.

C. Service of Process

Hauser's contention that Butters failed to serve all interested and indispensable parties is incorrect. All parties were properly served under I.R.C.P. 83(c) and I.A.R. 20.

III. CONCLUSION

For all the above reasons, we affirm the decision of the district court in its entirety. This matter is remanded to the Board of Latah County Commissioners as per the order of the district court. No attorney fees; costs on appeal to Butters.

867 P.2d 953

(Cite as: 125 Idaho 79, *82, 867 P.2d 953, **956)

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McDEVITT, C.J., and JOHNSON, TROUT and
SILAK, JJ. concur.

END OF DOCUMENT

Exhibit F

**Letter from Robert L. Pettit, General Counsel, FCC,
to Edward W. Hummers, Jr., dated June 18, 1991**

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

June 18, 1991

IN REPLY REFER TO:

Edward W. Hummers, Jr., Esquire
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036

Dear Mr. Hummers:

This is in response to your June 14, 1991 letter regarding an effort by Upper Providence Township to regulate radiofrequency interference (RFI) in connection with station WVCH(AM), Chester, Pennsylvania.

Based on the facts set forth in your letter, it is my interpretation of applicable law that the effort by Upper Providence Township to regulate RFI in connection with WVCH(AM) is preempted by the Communications Act of 1934, as amended. The FCC has exclusive jurisdiction over RFI matters. See, e.g., 47 U.S.C. §§ 152(a), 301, 302(a), 303(f); Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424, 430 n. 6 (1963); 960 Radio, Inc., FCC 85-578 (1985); Blackburn v. Doubleday Broadcasting Co., 353 N.W. 2d 550, 551, 555-56 (Minn. 1984). Congress has recognized

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 be subject to local or state regulation as part of any effort to resolve an RFI complaint.

H.R. Rep. No. 765, 97th Cong., 2d Sess. 33 (1982), reprinted in 1982 U.S. Code Cong. & Ad. News 2277.

Sincerely,



Robert L. Pettit
General Counsel

Exhibit G

**Letter from Reed E. Hundt, Chairman, FCC to
Honorable Susan Golding, Mayor, City of San Diego,
dated March 15, 1996**

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

March 15, 1996

Honorable Susan Golding
Mayor
City of San Diego
202 C Street
San Diego, California 92101

Dear Mayor Golding:

This is in response to your February 28 letter concerning digital wireless telephones. As you and I discussed when we spoke, the FCC is very much involved in the creation of a competitive market for wireless telephony, which will bring enormous benefits to the American public and the economy. We have broken previous FCC records for licensing to make the benefits of broadband personal communications services (PCS) available to all Americans as soon as possible. Important among our goals is the accessibility of this new technology to Americans with hearing and speech disabilities. We therefore have taken very seriously the public health and safety claims of which you write. I hope the information provided by the FCC staff your office has contacted, and the additional information set forth below, will assist the City Council in its deliberations in this area.

1. What are the types and severity of problems the FCC is aware of with respect to interference with hearing aids, electric wheelchairs, pacemakers, automobile brakes, automobile airbags, or other consumer devices, from the use of GSM handsets?

According to the Commission's Compliance and Information Bureau, Wireless Telecommunications Bureau and Office of Engineering and Technology, the FCC has not received any specific complaints about interference from GSM handsets to medical or safety devices, or other consumer products.

2. What steps is the FCC (or any other federal agency) taking to address perceptions that PCS technologies may have negative impacts to hearing aids, electric wheelchairs, pacemakers, automobile brakes, automobile airbags or other consumer devices?

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a. What studies are planned or underway and what are the timelines?

b. What organizations are involved in these studies?

c. When will study results be available?

d. Will the FCC or any other Federal Agency be making a determination of the existence or non-existence of these problems based on the results of the studies?

In accordance with federal law, it is the FCC's policy as to both PCS antenna installations and digital wireless telephone handsets to establish guidelines to address harmful interference while allowing the market to determine what technologies will succeed and what new products will be made available to

consumers. The FCC also takes very seriously its obligations under the Americans with Disabilities Act ("ADA"), and the Telecommunications Act of 1996 (the "1996 Act"), to ensure that telecommunications services, equipment and customer-premises equipment ("CPE") are accessible to consumers with disabilities, and compatible with devices commonly used by consumers with disabilities.

The FCC has conducted extensive rulemaking proceedings on hearing aid compatibility of wireline telephones, pursuant to the Hearing Aid Compatibility Act of 1988 ("HAC Act"). We have rules in place implementing the HAC Act and have proposed additional rules for wireline telephones which would largely implement solutions arrived at by the industry and groups representing individuals with hearing disabilities in a negotiated rulemaking last year. The Commission is considering those proposed rules right now, and I expect some version of them to be adopted in the near future. We deferred consideration of hearing aid compatibility of wireless telephones under the HAC Act pending further study of this issue.

The FCC was made aware of concerns that wireless technologies may cause interference to hearing aids and other medical devices last year, when we were presented with a petition asking us to mandate that wireless telephone technologies be made compatible with such devices. We decided first to see whether solutions to this problem could be reached by discussions among members of the affected industries and consumer groups. Members of the wireless industry, together with representatives of the hearing aid manufacturing industry, hearing aid users, and health care professionals, initiated a process to resolve issues of compatibility and user and bystander interference, which commenced with a Summit Meeting in Washington, D.C., on January 3 and 4, 1996. The Summit group's efforts are continuing through three Working Groups comprised of experts charged with developing recommendations on solutions to interference and compatibility problems. We expect their recommendations to be made public this month.

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I anticipate that this group will reach and implement solutions in a timely manner so that all Americans can have access to digital wireless communications. The Commission may ultimately review all solutions to ensure that they uphold the spirit and the letter of all legal obligations to Americans with disabilities. The digital devices which are the subject of these discussions represent a multi-billion dollar investment in our economy by a new, innovative industry serving real needs of American consumers. Should these groups not arrive at standards voluntarily, it is likely that the Commission will shortly initiate a rulemaking to consider mandatory rules.

The FCC will neither endorse nor mandate a particular technology for PCS. Selecting a single technology could stifle innovation and restrict competition in the rapidly advancing new field of digital wireless communications. We prefer instead to encourage innovation and let the marketplace determine which technologies will become the new standards. One of the first achievements of the Summit process was to clarify for all of us that each of the competing digital wireless technologies currently being promoted causes some interference with other devices (including medical devices) that use radio frequencies.

In conjunction with the Summit process, the Center for the Study of Wireless Electromagnetic Compatibility (EMC) at the University of Oklahoma is currently investigating the extent to which digital wireless transmissions interfere with hearing aids, and their use by both digital phone users and bystanders, and I understand that initial findings should be available in April. In addition, the University EMC Center has been conducting laboratory studies on the interaction between wireless phones and pacemakers; clinical studies to explore such pacemaker interactions have been funded by another group, Wireless Technology Research, L.L.C., and I understand that results should be available by July of this year. Finally, the University of Oklahoma EMC Center will explore possible interactions between wireless phones and other electronic devices.

The U.S. Food and Drug Administration Center for Devices and Radiological Health (CDRH) is responsible for approving the manufacture and sale of consumer medical devices. CDRH provides guidelines for electromagnetic compatibility to the medical device industry and has the authority to disapprove the marketing of medical devices that fail to comply with its guidelines. Thus, CDRH is very much aware of concerns about electromagnetic compatibility of medical devices, and the FCC has been sharing information informally with the CDRH for several years in an effort to assist CDRH in its efforts.

3. Section 704 of the [1996 Act] appears to prohibit any local government from regulating the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

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Do the emissions of Pacific Bell Mobile Services for a proposed PCS network using the GSM technology "comply with the Commission's regulations concerning such emissions"?

PCS transmitters must be type-accepted by the FCC to ensure compliance with technical standards that limit the frequencies used, output power, emissions, spurious radio noise, and other technical parameters. To date we have type-accepted eleven broadband PCS transmitters, ten of which employ GSM technology.

PacBell is required to use type-accepted equipment by Section 24.51 of the Commission's rules. Section 24.813(b) of the Commission's rules directs each applicant for a broadband PCS license to:

- (1) submit the information required by the Commission's rules, requests and application forms;
- (2) be maintained by the applicant substantially accurate and complete in all significant respects in accordance with the provisions of 1.65 of the Commission's rules and;
- (3) show compliance with and make all special showings that may be applicable.

Thus, if the PCS network proposed by Pacific Bell Mobile Services is in compliance with our rules, as it is required to be under the terms of its license, then the emissions of that network do "comply with the Commission's regulations concerning such emissions." In the event of a complaint of interference or of other concerns about the emissions from a PCS transmitter, FCC compliance staff could be contacted, and could take measurements at the transmitter site to determine if the PCS transmitter was the source of interference and whether the system parameters are in compliance with our rules.

It might be helpful for you to have the address of our San Diego field office: 4542 Ruffner Street, Room 370, San Diego, California 92111-2216. The District Director is Mr. William H. (Hal) Grigsby, and he can be reached at (619) 467-0549. In addition, the FCC maintains a Communications and Crisis Management Center which is staffed 24 hours a day, seven days a week. The telephone number there is (202) 632-6975. The Watch Officer who answers the phone at that number can contact any of our compliance personnel at any time in the event of an emergency, such as a threat to public health or safety, and dispatch personnel to the scene, typically within a few hours, if necessary.

4. Does the FCC believe that any prohibitions enacted under 47 U.S.C. 332(c)(7)(B)(iv) apply to modulation interference as well as radio interference?

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Neither the Communications Act nor the FCC Rules use the term "modulation interference." Different technologies use different modulation schemes, and we are not mandating a modulation scheme for PCS. We do consider modulation part of the "emission" over which we have authority under the Communications Act. Therefore, we would not agree with a statement that "Section 704(a) does not preempt states and cities from regulating antenna placement on the grounds of radio frequency modulation."

5. To what extent has the Congress and FCC preempted the City of San Diego from regulating the placement, construction and modification of PCS facilities on the basis of alleged interference to hearing aids, electric wheelchairs, pacemakers, automobile brakes, automobile brakes, automobile airbags, and other devices?

Section 704 of the 1996 Act expressly preempts local governmental regulation of the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions. 47 U.S.C. 332(c)(7)(B)(iv). We already have guidelines in place for evaluating the environmental effects of radiofrequency radiation from FCC-regulated transmitters and facilities and specific limits on PCS emissions, power and field strength. See 47 C.F.R. Part 1, Subpart I, and 47 C.F.R. Part 24, Subpart E. The PCS rules that protect against rf hazards are based on a standard adopted in 1992 by the American National Standards Institute ("ANSI"). See Second Report & Order, GEN Docket No. 90-314, 8 FCC Rcd 7700, 7780 191-92 (1993); 47 C.F.R. 24.52.

Section 704 of the 1996 Act also states that the regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof shall not unreasonably discriminate among providers of functionally equivalent services and shall not prohibit or have the effect of prohibiting the provision of personal wireless services. 47 U.S.C. 332(c)(7)(B)(i). This section establishes procedures for action (and appeal of such action) on requests for authorization to place, construct, or modify personal wireless service facilities. Id. 332(c)(7)(B)(ii), (iii), (iv).

6. Do Federal Agencies have sole jurisdiction to regulate wireless communications technologies with respect to:

a. radio frequency interference

b. modulation interference

c. low frequency electromagnetic field interference which occur as a result of the use of equipment type-accepted for use in the PCS spectrum?

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The Communications Act of 1934, as amended, provides the FCC exclusive jurisdiction over radio frequency interference ("RFI"). See 47 U.S.C. 152(a), 301, 302(a), 303(f). The legislative history of Section 302(a) states explicitly that the Commission has exclusive authority to regulate RFI:

The Conference Substitute 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 be subject to local or state regulation as part of any effort to resolve an RFI complaint.

H.R. Rep. No. 765, 97th Cong., 2d Sess. 33 (1982), reprinted at 1982 U.S. Code Cong. & Ad. News 2277. See also Broyde v. Gotham Tower, Inc., 13 F.3d 994, 997-98 (6th Cir. 1993); Still v. Michaels, 791 F.Supp. 248, 252 (D.Az. 1992); 960 Radio, Inc., FCC 85-578 at 4, 1985 WL 193883, 1985 FCC Lexis 2342 (released No. 4, 1985); Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, 101 F.C.C. 2d 952, 960 (1985).

Neither the Communications Act nor the FCC Rules use the term "modulation interference" or the term "low frequency electromagnetic field interference." These terms appear to describe particular types of radio frequency interference. For example, if a radio signal causes interference, I believe it would be immaterial to our jurisdiction whether the signal is modulated in a particular way or what might be the frequency of the signal (provided the signal is above 9 kHz, which is internationally recognized as the start of the rf spectrum). However, I am not prepared to say definitively whether the Commission would distinguish between these terms and rf interference, as a legal matter, without development of a record on the subject.

The Commission also has exclusive jurisdiction with respect to any complaint under the new statutory provisions mandating access to telecommunications services and equipment by persons with disabilities. Specifically, Section 255 of the Communications Act (added by the 1996 Act) states that manufacturers of telecommunications equipment shall ensure that equipment is designed, developed, and fabricated to be accessible to and usable by individuals with disabilities, if readily achievable. In addition, providers of telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable. Whenever these requirements are not readily achievable, manufacturers and service providers shall ensure that their equipment or service is compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access, if readily achievable.

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While the Commission will do everything necessary to fulfill its mandate under the ADA and the 1996 Act, we have also made clear that the FCC will not delay deployment of PCS services while we work to solve the interference and compatibility issues. It is important that decisions over siting of PCS facilities not have the effect of prohibiting or delaying the offering of PCS services.

I appreciate the opportunity to answer your very good questions. The FCC will not be able to send a representative to the City Council hearing on March 19, but I will be happy to keep you informed as we proceed. In addition, I expect that any information provided by the Summit group to the Commission on hearing aid compatibility and interference will be available to the public.

Sincerely,

Reed E. Hundt