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FCC LOCAL AND STATE GOVERNMENT ADVISORY COMMITTEE

October 29, 1997

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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 N. Street, N.W., Room 222
Washington, D.C. 20554

Re: MM Docket No. 97-182

Dear Mr. Caton:

Please find enclosed an original and nine copies of the LSGAC's Advisory Recommendation No. 8 for filing in the above referenced proceeding.

Thank you for your attention to this matter. Please feel free to contact me at (303) 320-6100 if you have any questions regarding this filing.

Very truly yours,

Kenneth S. Fellman
Chairman, LSGAC

KSF/eaj
Enclosure
cc: Commissioners (w/ encl.)
William E. Kennard, Esq. (w/ encl.)
Susan Fox, Esq. (w/ encl.)
Sheryl Wilkerson, Esq. (w/ encl.)
LSGAC Committee Members (w/ encl.)
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FCC Local and State Government Advisory Committee

Advisory Recommendation Number 8:

Notice of Proposed Rulemaking, MM Docket No. 97-182

At its meeting on September 26, 1997, the LSGAC considered the issues raised in the Notice of Proposed Rulemaking, MM Docket No. 97-182. In preparation for this meeting, the Committee invited representatives of the jurisdictions who are home to the broadcast transmission facilities in the ten largest television markets, to participate in a discussion on September 25th about the siting of broadcast facilities, the federal regulatory structure, and the specific activity that is occurring in these communities concerning digital television. The LSGAC sincerely appreciates the participation of FCC staff in these meetings and the assistance staff has provided to these local officials.

Representatives of the National Association of Broadcasters were also invited to participate in an effort to listen to local government concerns, educate local officials as to the needs of the industry, and engage in a dialogue to consider possible ways to narrow the areas of disagreement before the Commission. As the Commission is aware, the NAB rejected this invitation.

Based upon the following findings, the Committee respectfully suggests that the Commission abandon the approach suggested in the proposed rulemaking, and implement the collaborative approach described in this Recommendation.

1. Given that broadcasters face the first deadline for provision of digital television in the ten largest markets in May, 1999, and given that the Petition alleges that 66% of all existing television broadcasters will require new or upgraded towers in order to support digital television services, it is remarkable that broadcasters have presented their proposals to almost none of the potentially affected local governments. Tower construction or modification permits are not sitting in stacks on the desks of local officials. To the extent that the Commission is concerned about whether Broadcasters will meet the timelines for digital television rollout in the Commission's orders, the Commission may wish to investigate the status of broadcasters' plans and proposals in each affected jurisdiction. The LSGAC believes the record would reflect remarkably little activity. Where state and local officials have not even been asked to consider specific proposals, there is hardly a record supporting broad preemption.

2. State and local governments have a strong incentive to facilitate the timely conversion to digital television, in order to receive spectrum for public safety purposes. Some local officials may not understand the connection Congress established between digital television and the availability of spectrum for public safety uses. The Commission should help educate local officials about this linkage.

3. Some broadcasters have voluntarily chosen to commence broadcasting a digital signal prior to the May, 1999 deadline. While local governments intend to work reasonably with any related land use applications, the goal to meet a voluntarily imposed earlier deadline does not justify impairing local governments' ability to consider serious health, safety and welfare issues, including aesthetics, in the normal zoning review process.

4. The LSGAC is concerned with the broad scope of the proposed rule. If digital television is the "problem", there is no need for the rule to address radio facilities. The proposed rule is written so broadly that it can be interpreted to cover a broadcaster's rezoning application for an office building.

5. The LSGAC recognizes that in broadcast tower siting proceedings in the past, much of the delay has been attributable to the time taken by the Federal Aviation Administration (FAA) in its consideration of the location of the tower and its relation to air traffic safety. The time taken by local governments in the zoning process likewise addresses safety concerns, including structural safety, and impacts of the local environment on the facility (i.e., winds, hurricanes, earthquakes, tornados, ice, etc.). The LSGAC respectfully suggests that the Commission would not dictate to the FAA that if it did not complete its safety reviews in 21 to 45 days, the application would be deemed granted. This proposed requirement upon zoning authorities is equally inappropriate. The NAB has asserted in its Petition that skilled crews to build these towers are very limited, suggesting that in the rush to build towers, inexperienced and less than adequately trained workers may be added to the workforce. Real safety issues exist, and adequate time must be taken to assure citizens that construction of towers will not jeopardize public safety. As an example, a 1550 foot broadcast transmission tower in the Dallas-Fort Worth area collapsed during the installation of an antenna in October, 1996, killing three people. Just last week (October 23, 1997), three workers died in Mississippi when a broadcast tower of almost 2,000 feet collapsed. A rule requiring local authorities to complete all safety reviews for what could be a 2,000 foot structure in 21 to 45 days is patently unreasonable.

6. Based upon the meeting with representatives of the largest market jurisdictions, the LSGAC has learned that in the past, the federal regulatory process has resulted in situations where after obtaining license approval a broadcast applicant would represent to a local zoning authority that the FCC has *REQUIRED* that a facility be constructed at a specific site. As described in the collaborative review process we suggest below, the LSGAC believes that the applicant submit the site location to be considered by the local authority *prior to or concurrent with* the federal regulatory approval for that site, and that the applicant should be required to serve a copy of its federal application on the local zoning authority.

7. Local governments should have the ability to reject new tower applications upon findings of adequate existing facilities. The LSGAC has also learned that at times, space on existing towers or buildings may be available for broadcast facilities, but new tower applications may be filed nonetheless, due to unreasonably high rental charges for existing facilities. The citizens of our cities, towns and counties should not bear the burden of solving the problems

caused by unreasonable business practices. If the Commission continues to seek ways to eliminate the obstacles to digital television rollout, it should consider rules requiring reasonable rent for existing facilities.

8. In the LSGAC's September 25 and 26, 1997 meetings with local government representatives and FCC staff, it became clear that there is no real overlap in the federal and local review and regulatory processes for broadcast facilities. The local review process addresses important, legitimate concerns which are not addressed at the federal level. Preemption of local authority should not be considered, especially when the proposal does not include a mechanism for the federal government to assume responsibility for, and adequately address these concerns.

9. The timing issues imposed by the proposed rule are unreasonable. Due process requires that we provide notice to our citizens of land use applications. Many communities have planning and zoning commissions which review applications and make recommendations to the local governing bodies. At each step in the proceedings, a time period is provided, after publication and posting of notice, for citizen input to the local authorities. As the Commission is well aware, its deliberations often involve situations where, after review of initial comments and reply comments, the complexity of an issue causes the Commission to seek *further* comments in order to become sufficiently informed to render a decision. It unreasonable to require local governments to address substantial land use issues impacting their communities in any less careful and comprehensive a manner.

10. The LSGAC is uncomfortable with the Commission's proposal to change the long standing burden of proof on the applicant seeking local government approval. It is not appropriate to single out the broadcast industry as beneficiary of a "special treatment" rule, which shifts the burden of proof in land use matters to the local governing body.

11. The proposed rule unreasonably prohibits local authorities from considering aesthetics as part of the approval process. Current federal statutes and Commission regulations permit consideration of aesthetic issues when siting satellite dishes larger than one meter, and for placement of wireless telecommunications facilities. Towers for wireless facilities generally range from forty to one hundred fifty feet in height. Television transmission towers are often the *largest single structure* in a community. A proposed tower in Chicago would equal or exceed the height of the Sears Tower. Local governments must be allowed to continue to consider all public health, safety and welfare issues, including aesthetics, in deliberations over zoning for television towers, as they are permitted to do with respect to all other structures, including smaller telecommunications facilities.

RECOMMENDATIONS: Based upon the foregoing, the LSGAC respectfully recommends as follows:

(1) The construction or modification of broadcast facilities for digital television transmission may require review and approval by several jurisdictions, including local authorities

and the Commission. Historically, the review process by different jurisdictions has been conducted completely independently. Although the review process by different jurisdictions is directed at protection of different public interests, greater communication between reviewing jurisdictions may facilitate and expedite local review. A higher degree of communication and collaboration may help local and federal authorities avoid working at cross purposes, and may provide each reviewing authority with access to information that can expedite the decision process. The LSGAC recommends that the Commission facilitate greater communication and collaboration between local and federal authorities, and between governmental authorities and in the broadcast applicant, in three ways:

(a) The Commission should require digital broadcast permit applicants to serve applications filed with the Commission on the affected local authority so that information in the permit application is available to the local authority.

(b) The Commission should make its staff available to work closely with local reviewing authorities. This availability should include designating specific staff from the Mass Media Bureau and from the Office of Engineering and Technology to be available to work with local officials by telephone and in person.

(c) The designated Commission staff should facilitate communication between the local reviewing authorities, and any federal agency that may have information that would facilitate the local review process, including, for example, the Federal Aviation Administration, the Environmental Protection Agency and the Army Corps of Engineers. These communications should also include any other affected jurisdiction such as Native American Tribal Governments or an international jurisdiction bordering the site of a proposed facility.

Note: LSGAC uses the term "broadcast facilities for digital television" narrowly. This term refer only to transmission towers and antennas and facilities on the same lot as a transmission tower or antenna. It does not include transmission towers and antennas for radio or analog television transmission. It does not include any other broadcast facilities, such as production and office facilities or transmission lines.

(2) In any adversary proceeding to review a local government decision, the burden of proof should be, as it has traditionally been in American jurisprudence, upon the party challenging the decision.

(3) While the Commission may continue to set national standards for radio frequency exposure standards, LSGAC and other state and local entities should work together with industry and the Commission, to reach consensus on reasonable steps that can be taken by local governments to ensure that the standards are met over time. For example, at the LSGAC's September 26, 1997 meeting, representatives of the Cellular Telephone Industry Association

agreed to work together with local governments to reach consensus on this issue as it relates to their facilities. *See,* LSGAC Advisory Recommendation No. 7.

(4) In order to better educate local and state government officials regarding the federal regulatory process for broadcast transmissions facilities, the LSGAC strongly urges the Commission to issue fact sheets describing this process, as the Commission has done with wireless telecommunications facilities.

Respectfully submitted on this 29th day of October, 1997.

LOCAL AND STATE GOVERNMENT
ADVISORY COMMITTEE

By: _____
Kenneth S. Fellman, Chair