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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

October 30, 1997

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

Re: Comments in MM Docket No. 97-182, Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement, and Construction of Broadcast Station Transmission Facilities.

Dear Mr. Caton:

Enclosed for filing you will find an original and four copies of the comments of Arlington County, Virginia, Henrico County, Virginia, and the City of Alexandria, Virginia, in the above-referenced docket.

Please contact the undersigned with any questions.

Very truly yours,

Miller & Van Eaton, P.L.L.C.

By Matthew C. Ames

cc: Hon. John W. Warner
Hon. Charles S. Robb
Hon. Herbert H. Bateman
Hon. Owen B. Pickett
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Preemption of State and Local Zoning and Land Use Restrictions On the Siting, Placement and Construction of Broadcast Station Transmission Facilities	)	MM Docket No. 97-182

COMMENTS OF
ARLINGTON COUNTY, VIRGINIA,
HENRICO COUNTY, VIRGINIA, AND
THE CITY OF ALEXANDRIA, VIRGINIA

Summary

Arlington County, Henrico County, and the City of Alexandria, Virginia (the "Counties and the City"), strongly oppose the proposed preemption of local authority over the siting and construction of broadcast transmission facilities. There are currently seven television and FM radio broadcast towers in the Counties and the City.

The Counties and the City reject the assertion in the Notice of Proposed Rulemaking that the Commission has the authority to preempt local zoning and building codes. The only authority the Commission has over antenna towers is that expressly granted in Section 303(q) of the Communications Act, referring to the painting and lighting of towers. Nothing in the Act gives the Commission general authority to preempt local zoning authority or building codes. That the Commission was given specific authority in Sections 207 and 704 of the Telecommunications Act of 1996 illustrates this point.

In particular, Section 336(c) of the Communications Act does not justify preemption of local zoning authority. That section says nothing about preemption or about a Congressional policy of speedy recovery of licenses.

Even if the Commission had the authority to preempt, such an action is completely unwarranted and would be arbitrary and capricious, because the proposed preemption is an irrational means of achieving the Commission's ostensible goal. The proposed rules go far beyond merely requiring prompt action on zoning requests; they essentially preempt all local authority. In addition, the proposed rules will not achieve their intended aim because they do not and cannot address the Federal Aviation Administration's separate approval process. The FAA process can take as long or longer than local zoning rules, so even if the Commission does preempt all local zoning authority, its actions will not advance the deployment of DTV. In fact, when all the factors that can affect the construction of a tower are considered, it is clear that the Commission's schedule will not be met in a substantial number of cases, regardless of local zoning procedures.

Furthermore, the proposed deadlines to be imposed on local governments are unrealistically short. Local governments cannot protect the due process rights of their residents and also comply with the deadlines. In addition, the Commission itself does not generally move that quickly. By the time this very proceeding is completed, for example, nearly a year will have passed from the date the National Association of Broadcasters filed its petition.

Local zoning and building codes are matters of purely local concern. Commission involvement would be counterproductive and interfere with accomplishment of basic state and local policy decisions, which are just as important as federal policy. The Commission does not

have the expertise to address the issues, and by preempting local laws it manages only to increase frustration and cynicism among the general public.

Virginia law imposes notice and hearing requirements for zoning actions. Those requirements cannot be met under the Commission's proposed deadlines in most cases. Thus, the proposed rules ignore state policy and raise Constitutional due process concerns.

Finally, the Commission has no authority to preempt local regulation of radio frequency emissions produced by *broadcast* antennas. The Commission clearly has no express authority, and any argument that it has implied authority is belied by the fact that Congress specifically authorized the Commission to preempt local regulation of radio frequency emissions produced by personal wireless facilities. In practice, the Commission's procedures are ineffective. Many residents of both Counties and the City are concerned with the health effects of radio frequency emissions, but the Commission does not inspect facilities or otherwise actively enforce its standards. Federal preemption would leave the public unprotected, so local governments must be allowed to address the issue as they see fit.

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Before the
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In the Matter of	)	
Preemption of State and Local Zoning and Land Use Restrictions On the Siting, Placement and Construction of Broadcast Station Transmission Facilities	)	MM Docket No. 97-182

COMMENTS OF
ARLINGTON COUNTY, VIRGINIA,
HENRICO COUNTY, VIRGINIA, AND
THE CITY OF ALEXANDRIA, VIRGINIA

Introduction

Arlington County, Henrico County, and the City of Alexandria, Virginia (jointly, the "Counties and the City"),[1] urge the Commission not to adopt rules purporting to preempt local authority over the placement, construction and modification of broadcast transmission facilities. The rules put forth in the Notice of Proposed Rulemaking released August 19, 1997 (the "NPRM"), are unreasonable, unnecessary and unlawful. The Commission lacks statutory authority to preempt local zoning and building codes, and preemption would be arbitrary and capricious because it is not a rational solution to the alleged problem. The Commission's

[1] The Counties and the City are three of the largest jurisdictions in the Commonwealth of Virginia. Arlington County is located outside of Washington, D.C., and has a population of 186,400. There are currently three television and FM radio transmission facilities in the County. Henrico County is located outside Richmond, Virginia, and has a population of 243,273. There are currently four television and FM radio transmission facilities in Henrico County. The City of Alexandria is also located outside of Washington, D.C., and has a population of 117,300. There are currently no broadcast transmission facilities in the City.

proposal to essentially by-pass local authority would leave federal interests in avoiding aeronautical hazards and dangerous radio frequency emissions unprotected in practice. Finally, preemption would not properly weigh the importance of the affected state and local policy judgments. In short, the Commission should close this proceeding without further action.

I. THE COMMISSION HAS NO AUTHORITY TO PREEMPT LOCAL ZONING LAWS GOVERNING THE PLACEMENT OF ANTENNA TOWERS.

The Commission cannot lawfully adopt the proposed rules, notwithstanding the analysis of the Commission's authority in the NPRM. See NPRM at ¶¶ 12-15. The fact is that the Commission's authority over broadcast transmission towers is limited to that granted in Section 303(q) of the Communications Act of 1934 (the "Communications Act" or the "Act") and that authority does not extend to the preemption of local zoning laws.

A. The Commission Has No Express Authority to Preempt Local Zoning Power Over the Siting of Antenna Towers.

The first source to be examined in determining the scope of the Commission's authority is always the express language of the Communications Act. The NPRM ignores this point, thereby implicitly acknowledging that the Commission has no express authority to preempt local zoning laws governing the siting of broadcast transmission facilities.[2] The Act does not say that the Commission may preempt local zoning laws, nor does it say that it has the authority to address issues related to the siting of broadcast transmission antennas. The Act is silent on the subject of local zoning, and its only reference to broadcast towers in Section 303(q) refers merely to their painting and illumination. Thus, the Commission has no express authority in this area.

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[2] Nor is this an area in which there is a conflict between federal and state or local law. *See Florida Lime and Avocado Growers v. Paul,* 373 U.S. 132 (1963). There is no inherent conflict between local zoning laws and Commission regulation of broadcasting or deployment of digital television ("DTV"). In fact, practical enforcement of federal aeronautical and health interests falls upon the local authorities.

B. The Commission Has No Implied Authority to Preempt Local Zoning Power Over the Siting of Antenna Towers.

If the Commission has no express authority to preempt state or local law, it may still have implied authority to do so – but only if preemption is necessary to accomplish Congressional objectives. "The critical question in any preemption analysis is always whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 369 (1986). Congressional objectives can only be determined by referring to the language of the Communications Act.[3] The NPRM attempts to argue that preemption is necessary to meet an ostensible goal of speedy recovery of spectrum, but that goal is purely a creature of the Commission, without any statutory underpinning.

1. The Commission Has Implied Authority Only if Congress Intended Federal Regulation to Supersede State or Local Law.

The Commission cannot find Congressional intent where none exists.[4] There is absolutely no reason to believe that Congress ever intended the Commission to preempt local zoning authority over the siting of broadcast transmission facilities. The Commission has never claimed to have such authority in the past, and the NPRM itself notes that "historically we have sought to avoid becoming unnecessarily involved in local zoning disputes regarding tower placement." NPRM at ¶ 15. We are unaware of any case in which the Commission has even

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[3] The NPRM cites *City of New York v. FCC*, 486 U.S. 57, 63 (1988), for the proposition that the Commission may preempt state or local law if preemption is necessary to achieve the Commission's purposes "within the scope of our delegated authority." NPRM at n. 19. This is not a separate ground for preemption, however, because the Commission's purposes are limited by the Congressional purpose expressed in the statute. The Commission is always limited by the intent of Congress and never free to embark on frolics of its own.

[4] "[W]e simply cannot accept an argument that the Commission may nevertheless take action which it thinks will best effectuate a federal policy. An agency may not confer power upon itself." *Louisiana Public Service Comm'n*, 476 U.S. at 374.

addressed the effects of local zoning laws on broadcast tower siting, much less attempted to preempt any such laws.

Furthermore, the Supreme Court has repeatedly warned against the casual preemption of state or local law, both by federal statutes and by administrative regulations. As the Court stated in *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), "we must assume Congress does not exercise [the power to preempt] lightly." Congress must make its intention "clear and manifest" if it intends to preempt the traditional powers of the States, or to authorize an agency to preempt those powers. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990). Local zoning authority is such a traditional power.

Indeed, the statutory scheme gives every indication that Congress never intended to confer general authority to preempt local zoning laws on the Commission. For example, the Telecommunications Act of 1996 (the "1996 Act") contained two provisions dealing directly with local zoning issues. In the first, Section 207, Congress authorized the Commission to preempt certain restrictions on the placement of satellite receiving antennas and other receiving devices. If Congress had believed that the Communications Act already conferred preemption authority, Section 207 would not have been necessary. The authority it conferred was limited to PCS antennas.

In the second provision, Section 704 of the 1996 Act, which became Section 332(c)(7) of the Communications Act, Congress restricted local zoning authority over the placement of personal wireless facility transmission antennas. Once again, if Congress had believed that the Commission already had the authority to preempt local zoning laws, a section expressly permitting preemption under certain circumstances would not have been necessary.

Thus, it appears that Congress never intended to give the Commission general authority to preempt local zoning rules under the Act.[5]

The courts and Commission itself have discussed the outer limits of the Commission's authority in terms that indicate that it is far less expansive than the NPRM implies. In *Illinois Citizens Committee for Broadcasting v. Sears Roebuck & Co.*, 35 FCC 2d 237 (1972), the Commission concluded that it had no jurisdiction over the construction of the Sears Tower in Chicago, even though the petitioners claimed that construction of the building would interfere with their television reception. The Seventh Circuit affirmed, holding that the Commission does not have jurisdiction over an activity merely because it might substantially affect communications. *Illinois Citizens Committee for Broadcasting v. FCC*, 467 F.2d 1397 (7th Cir.

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[5] The NPRM asserts that the Commission has preempted local zoning ordinances when those ordinances "were inhibiting the implementation of Congressional or Commission objectives, including with regard to satellite 'dish' antennas and amateur radio towers." NPRM at ¶ 15. We note, however, that the Commission's authority to preempt zoning rules governing the placement of large satellite dishes has never been reviewed by the courts. Numerous cases have applied the rules without contesting their validity. The one court of which we are aware that raised the issue expressly declined to rule on it. *Van Meter v. Township of Maplewood*, 696 F.Supp. 1024 (D.N.J. 1988). In addition, the Commission's statutory authority for the preemption was weak; the Commission relied on Section 705 of the Act, 47 U.S.C. § 605, which established penalties for violating the privacy rights of persons receiving satellite programming, alleging that the provision created a right to receive signals without interference from any local regulation. *Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations,* Report and Order, 59 RR2d 1073 (1986). We fail to see how the penal provision of Section 705 can be legitimately stretched to preclude local zoning.

Furthermore, the alleged preemption of zoning rules affecting the placement of amateur radio antennas is quite limited. The Commission was careful not to formally preempt; instead, the rules only require that local ordinances reasonably accommodate the federal interests. This may have been because the Commission knew it was on shaky ground. Indeed, the Commission's Memorandum Opinion and Order, 58 R.R.2d 1952, cites no statutory authority whatsoever for the Commission's action. Reviewing courts have noted that the amateur radio antenna rules do not effect a true preemption, because they only authorize the courts to independently review the merits of each case and weigh the local interests against the federal interests. *See, e.g., Evans v. Board of County Commissioners of Boulder County, Colorado,* 994 F.2d 755 (10th Cir. 1993); *Williams v. City of Columbia,* 906 F.2d 994 (4th Cir. 1990).

1972). The court also stated that "to so find ... would be to enmesh the Commission in a variety of local considerations and an often complex local regulatory scheme." Id. at 1400. Finally, the court noted that a member of the Commission once noted that the Commission has no authority "to regulate in any way the construction of buildings ... and that this matter is presently strictly one of local concern and regulation." *Id.* The standards for construction of antenna towers remain just as much a matter of local regulation as those for construction of office buildings. AOPA Docket 97-182 Comments at 4 (filed Oct. 14, 1997).

In another case, a state court addressed the limits of the Commission's authority over radio frequency interference. The court in *Bynum v. Twp. of Winslow,* 181 N.J. Super 2, 236 A.2d 532 (NJAD 1981) upheld a local ordinance prohibiting interference by radio transmitters, including amateur transmitters. The court found that the Commission did not have exclusive control over radio transmissions, and that local governments had valid reasons for regulating interference.

This case is significant because the Communications Act was amended the following year to give the Commission exclusive jurisdiction over radio frequency interference, as the NPRM notes. NPRM at ¶ 12. That the Communications Act did not give the Commission exclusive authority in an area so close to the heart of its jurisdiction indicates that the powers of the Commission are limited and defined by the express provisions of the Act. As we have noted, the Act's only reference to antenna towers is limited to standards for illuminating and painting. Thus, unless Congress amends the Act to give the Commission plenary authority over antenna towers, the Commission cannot adopt the proposed rules.

The Commission relied on *Illinois Citizens Committee* when it acknowledged the limits of its authority over pole attachments in *California Water and Tel. Co., et al.,* Memorandum

Opinion and Order, 40 RR2d 419 (1977). There the Commission determined that it had no jurisdiction over the terms at which electric companies made their poles and conduits available to cable operators, even though use of the poles and conduits was essential to the provision of cable service. The Commission reached this decision because the nature of such contracts was "too remote from cable television service" to be properly considered within the Commission's authority over wire communications. The Commission correctly recognized that assertion of jurisdiction in that case "would bring under the Act activities never intended by Congress to be regulated." *Id.* at ¶ 15. Furthermore, although the Commission now regulates the terms and conditions of pole attachment agreements, it does so only under the authority of Section 224 of the Act, added by the Communications Act Amendments of 1978, Pub. L. No. 95-234, and amended by the 1996 Act. The same is true in this case: Congress never intended the Commission to regulate local zoning of antenna towers, even though siting of a tower is essential to delivery of broadcast signals. Local zoning of towers is at least as remote from the Commission's authority as the terms of pole attachment agreements.

2. Federal Policy Under the Communications Act Is to Respect State and Local Prerogatives, Unless Congress Directs Otherwise.

The NPRM correctly observes that the Commission has an obligation to reach a fair accommodation between federal and nonfederal interests. NPRM at ¶ 15. In fact, the Communications Act reflects a clear policy decision on the part of Congress to respect state and local interests in many areas. For example, Title II of the Act recognizes the authority of states to regulate intrastate communications. Title VI of the Act recognizes the authority of local governments over cable franchising. Although the subject matter of Title III does not lend itself to a similar system of dual sovereignty, Congress did not entirely occupy the field when it enacted Title III. Title III reserves control and licensing of radio frequencies in the federal

government (Section 301); authorizes the Commission to regulate radio frequency interference (Section 302); and defines the powers of the Commission (Section 303). Nowhere does the Act say that any and all matters impinging in any way on radio and television broadcasting are preempted. *See Illinois Citizens Commission for Broadcasting v. FCC*, 467 F.2d 1397, 1400 (7th Cir. 1972). Therefore, given that by its own admission the Commission is required to consider nonfederal interests, that the Act demonstrates a general Congressional sensitivity to the rights and prerogatives of state and local governments, and that the Act does not claim exclusive federal authority, the Commission cannot claim that it has the power to unilaterally override local zoning procedures, building codes, or similar laws. *Cf. Regents v. Carroll,* 338 U.S. 586 (1950); *Radio Station WOW v. Johnson,* 326 U.S. 120 (1945).

3. Section 336(c) Does Not Justify the Proposed Preemption of Local Zoning Authority.

The NPRM, by pointing to Section 336(c) of the Communications Act, implicitly acknowledges that the Commission must be able to show that it has specific statutory authority to justify the proposed preemption. According to the NPRM, Congress used that section to "indicate[] its objective of a speedy recovery of spectrum . . . ." This is a weak attempt by the Commission to grant itself authority. The key word here is "speedy." Section 336(c) reads, in its entirety:

> If the Commission grants a license for advanced television services to a person that, as of the date of such issuance, is licensed to operate a television broadcast station or holds a permit to construct such a station (or both), the Commission shall, as a condition of such license, require that either the additional license or the original license held by the licensee be surrendered to the Commission for reallocation or reassignment (or both) pursuant to Commission regulation.

The NPRM's attempt at bootstrapping aside, this section says absolutely nothing about a Congressional policy requiring "speedy recovery" of licenses. Nor does the section say anything

about the time period in which licenses must be returned. In addition, we can find no reference in the legislative history of Section 336(c) to support such a policy, and we note that neither the NPRM nor the NAB's Petition for Further Notice of Proposed Rulemaking (the "NAB Petition") cite any other authority to that effect. In truth, both the NPRM and the NAB Petition make it plain that what is at stake here is a Commission policy unsupported by Congressional directive or grant of any kind. The only specific provisions that the Commission can point to are Sections 1 and 7 of the Act, which contain general policy statements to the effect that the Commission should promote the development of telecommunications technology in general, but without referring to any specific technology.[6]

Thus, the Commission cannot point to a Congressional policy mandating rapid development of DTV that might justify the massive preemption proposed by the NPRM. Nor can it point to any specific provision of the Act that would justify the proposed preemption. Without such authority, the Commission cannot preempt local zoning authority. The Commission may have the authority to promote the development of DTV, but it must respect local authority and set up a regulatory structure that does not interfere with the operations of local zoning laws.

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[6] As the D.C. Circuit noted in *NARUC v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) at n.77, Section 1 of the Act "sets forth worthy aims toward which the Commission should strive, [but] it has not heretofore been read as a general grant of power to take any action necessary and proper to those ends." Similarly, Section 7 sets forth a general policy and directs the Commission to take certain specific steps to implement that policy, but it is not a broad grant of power.

II. EVEN IF THE COMMISSION HAD THE AUTHORITY, PREEMPTION OF LOCAL ZONING LAWS WOULD BE ARBITRARY AND CAPRICIOUS, BOTH BECAUSE THE PROPOSED RULES ARE BROADER THAN NECESSARY TO ACHIEVE THE COMMISSION'S GOALS, AND BECAUSE THEY FAIL TO CONSIDER FACTORS THAT WILL PREVENT ACHIEVEMENT OF THOSE GOALS.

The proposed rules are unreasonable by any standard. There is no rational relationship between the alleged purpose of the rules – ensuring the rapid deployment of DTV – and the Commission's means of achieving that goal.[7] The proposed rules would affect matters ranging far beyond just the deadlines for local government action on siting requests. In fact, they amount to a complete preemption of local authority to regulate the placement and construction of antenna towers. Putting aside the Commission's lack of authority, the proposed rules use a shotgun to kill a gnat: they are likely to miss the gnat and cause a great deal of needless collateral damage.

The Administrative Procedure Act directs reviewing courts to set aside agency actions that are arbitrary, capricious, and an abuse of discretion. 5 U.S.C. § 706(2)(A). It is ordinarily difficult to overturn an agency decision under this standard, because the court may not substitute its judgment for the agency's. *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). The proposed rules are so irrational, however, that if the Commission adopts the proposed rules, they will be found to be arbitrary and capricious. *See, e.g., Petroleum Communications, Inc. v. FCC,* 22 F.3d 1164 (D.C. Cir. 1994) (court will intervene to ensure agency has examined relevant data and

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[7] According to the NPRM and the NAB Petition, local zoning rules must be preempted because they will prevent the deployment of DTV in accordance with the schedule announced by the Commission in its *Fifth Report and Order* in MM Docket No. 87-268, FCC 97-116 (April 22, 1997).

articulated a satisfactory explanation); *Telephone and Data Systems, Inc. v. FCC,* 19 F.3d 655 (D.C. Cir. 1994) (picking and choosing of relevant criteria is not reasoned decision-making).

A. The Ostensible Rationale for the Proposed Rules Is the Need for Rapid Implementation, but the Proposed Preemption Goes Far Beyond the Deadlines for Zoning Decisions.

The proposed rules are not a rational solution of the alleged problem because they go much farther than necessary to simply provide for rapid deployment of DTV. The rules are overbroad in at least seven respects:

1. The proposed rules would apply not only to DTV facilities, or facilities to be relocated to accommodate DTV facilities, but to all television and radio transmission facilities. According to the NAB Petition, there are currently about 1400 television towers in the United States, of which about 100 will be affected by the deployment of DTV. This means that about 29% of existing towers will not be affected, yet their owners would receive the same exemption from local zoning rules as those that are affected. Similarly, only 18% of FM antennas are likely to be affected by the roll-out of DTV, but all such antennas would receive the benefit of the rules. Finally, the proposed rule is broad enough to encompass all other broadcast transmission facilities, including AM antennas, which are not at all affected by DTV.
2. The definition of "broadcast transmission facilities" includes "associated buildings." Under this definition, the owner of a broadcast tower apparently could choose to site a tower within a zoning classification which does not allow commercial entities, and locate its entire production facility on the same site as "associated buildings ... used for the purpose of or in connection with

radio or television transmissions." In such an instance, the site could then contain one or more large buildings, parking facilities, exterior lighting, and other characteristics. Local governments would not be able to require mitigating actions such as screening, privacy fencing, landscaping, stormwater control, egress to the property, or other generally accepted methods of lessening the impact of the facility on the adjoining landowners and community.

3. The proposed rules do not only establish timelines for local action. They would also preempt any local law that might "impair" the placement, construction or modification of broadcast facilities. This is far broader than needed merely to expedite the approval process.
4. The proposed preemption permits local governments to enforce certain provisions related to safety and health concerns, but implicitly excludes all other bases for legislation. Virginia law authorizes local zoning for a variety of purposes not necessarily directly related to health and safety, including aesthetics, historic preservation, encouraging economic development, developing affordable housing, delivery of public services, and environmental preservation. *See* VA. CODE ANN. § 15.1-489. Thus, the proposed rule threatens to interfere with a number of state and County policies for reasons that seem to having nothing to do with speeding up deployment of DTV.
5. In addition to land use and zoning regulations, the proposed rule would also preempt any "building, or similar law, rule or regulation." This provision is not only unreasonable, but dangerous. The very purpose of building codes is

to impair the construction of unsafe structures. Preemption of building codes might speed deployment of DTV by eliminating permitting and inspection requirements, as well as allowing unsafe construction practices, but this merely emphasizes the irrationality of the proposed rules.

6. The proposed rule would completely preempt any local ordinance addressing the health effects of radio frequency emissions, radio frequency interference or the lighting and marking of towers. Regardless of the Commission's authority to preempt in those areas or the wisdom of the policy behind any preemption, none of these three subjects is related to the rapid deployment of DTV.

7. Finally, the proposed rules would impose the burden of proving the validity of any allegedly preempted ordinance on the local government. This reverses the usual standard, since local legislative enactments are normally given great deference, and has no apparent connection to the speed of deployment.

Thus, the proposed rules are unnecessarily broad if their true aim is to speed up the development of DTV. In reality, they appear to be designed to give broadcasters unique exemptions in perpetuity, using DTV deployment as a Trojan horse.

B. The Proposed Rules Will Have No Effect on the Timeliness of the Federal Aviation Administration's Review Process.

The proposed rules are also unreasonably broad because even if local authority is completely preempted, there is another obstacle to speedy DTV roll-out that the NPRM does not address. The Federal Aviation Administration has the authority to determine whether a proposed tower will constitute a hazard to air navigation. This process can easily take longer than the local

zoning process, and according to the FAA's own rules will generally take longer than the deadlines imposed on local governments by the proposed rules.

14 C.F.R. § 77.13(a)(1) provides that any person intending to construct or alter a structure over 200 feet high must notify the FAA. Notices relating to facilities subject to licensing by the Commission may be submitted at the same time as an application for construction is submitted to the Commission. 14 C.F.R. § 77.17(b). Other notices must be submitted at least 30 days in advance of beginning construction.[8] The FAA must determine whether the proposed construction or alteration would constitute a hazard and there is no time limit on the FAA's review process. The process includes soliciting comments and examining objections and options. This review can take many months – indeed, it can take many times longer than most zoning authorities take to review requests.[9] Furthermore, after the FAA issues a determination, any party may appeal the decision within 30 days. 14 C.F.R. § 77.37. The appeal process can also take several months.

In other words, preempting local zoning authority will have little effect on deploying DTV. It will take many months with or without local zoning rules, simply because of the FAA review process, which the Commission has no authority to alter. It would be arbitrary and capricious for the Commission to disregard local policy concerns for no real benefit.

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8 *Id.* The Commission's rules also address this issue. Section 17.7 provides that alteration or construction of any structure over 200 feet tall requires notification to the FAA. In addition, the DTV application process requires that the Commission be informed that the FAA has made a "no-hazard" determination. *See* Form 301, Section V-D; 47 C.F.R. § 17.4(b)(d). If the FAA has not determined that the tower will not pose a hazard to air navigation, issuance of a construction permit will be delayed and may be denied.

9 For example, in *City of Rochester v. Bond*, 603 F.2d 927 (D.C. Cir. 1979), the court addressed issues arising out of the construction of a 600 foot radio antenna tower near the Rochester-Monroe County Airport. The FAA's review in that case began on May 8, 1973, and was completed on September 16, 1974, a period of over 16 months.

C. The Pressure on Broadcasters To Obtain Site Approvals Is Entirely the Result of Arbitrary Commission Action, and Local Governments Should Not Be Punished Because the Commission Has Established an Unreasonable Construction Schedule.

The Commission's schedule for DTV deployment was set by the Commission for its own purposes, originally over the objection of the broadcasting industry. NAB Docket 87-268 Comments at 6-8 (filed Nov. 20, 1995). The schedule does not represent the will of Congress. Indeed, as we will discuss further below, the Commission's references to statutory authority for rapid deployment are completely unfounded.

In addition, as far as we can tell, the record leading up to the *Fifth Report and Order* does not take local zoning rules and local decision-making time-frames into account. The first time this issue was raised was in the NAB Petition. Therefore, it would be unreasonable for the Commission to now declare that local zoning and building codes frustrate federal policy, when the Commission did not consider the issue in setting the policy. Furthermore, if local zoning laws were such an obstacle that they must be preempted, we find it hard to believe that none of the Commission, the NAB, or any other interested party mentioned the problem when the schedule was being developed. While the Counties and the City and other communities did not participate in that proceeding, the Commission has considered the effects of local zoning laws on its policies in the past and did not need to be told that the issue might be a factor.

This proceeding is not really about accelerated deployment of DTV. It is really about two things: a federal agency that would rather run roughshod over the prerogatives of state and local governments than consult with them or admit error, and a broadcasting industry intent on pursuing its own narrow self-interest rather than a balanced solution. No rational regulatory system should permit this kind of situation, in which the only option is massive federal intervention, to arise.

D. Preemption Is Unnecessary Because the Industry Will Be Unable To Comply with the Commission's Schedule, Regardless of Local Zoning Constraints.

Among the other obstacles broadcasters face are finding a suitable site; obtaining Federal Aviation Administration "approval" for the antenna; complying with all the requirements for a Commission construction permit; performing all of the engineering studies and work needed to design both a tower and an antenna; and obtaining sufficient specialty steel to construct the tower. None of these tasks is simple. Although many can be performed simultaneously, a significant delay in any one of them can throw the whole schedule off.

In other words, even with the proposed preemption, there is no guarantee that the Commission's goals will be met.

In addition, the broadcast industry itself has done little to address the problem. To date, no siting request has been submitted to either County or to the City. We understand that only one jurisdiction in the top ten market areas has received such a request, even though the NAB Petition was filed five months ago and the *Fifth Report and Order* released six months ago.[10] This is hardly a sign of the imminent demise of the broadcasting industry.

E. The Proposed Deadlines Are Unrealistically Short By Any Reasonable Standard, Including the Commission's Own Decision-Making Time Frames.

In any case, the deadlines for action on siting requests in the proposed rules are simply impossible to meet. Even substantially longer ones would be unworkable, as the following descriptions of zoning procedures in the Counties and the City illustrate.

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[10] The Initial Regulatory Flexibility Analysis accompanying the NPRM states that the Commission believes compliance with local requirements may hinder DTV deployment. We believe there is no credible evidence that this is a significant problem.

- **Arlington County**

Under Section 5.A.6.h of the Arlington County Zoning Ordinance, television and radio transmission towers are classified as conditional uses. Section 31.A.B.2 of the Arlington County Zoning Ordinance permits radio and other commercial communications equipment towers to be erected up to 23 feet above the height limit in the zoning district in which it is or is proposed to be located. Noncommercial towers may exceed the height limit by no more than 25 feet. Therefore, siting a tower requires the issuance of a special use permit. In order to obtain a use permit, an applicant must submit five copies of a completed application. The application elements are: the application form; a statement of support detailing the proposal (type of equipment, purpose of the equipment, maintenance schedule); a disclosure of interest statement listing the ownership of the property; a site plan showing the location of the proposed structure on the site, access to the equipment, and equipment cabinets or service buildings; and any screening or landscaping. The application also must include an elevation of the structure with the height of the tower noted. This information is similar to that which is required for other conditional use permits.

The process for obtaining a special use permit runs a minimum of 55 days from the filing of the application through a public hearing by the County Board. This timeframe results from the operation of both state statutes and local procedures designed to ensure public notice and participation. Notice to the public includes advertising the use permit request twice in a newspaper of general circulation no less than six days before each public hearing, posting the affected property and its vicinity with placards, and sending letters by first class mail to affected and abutting property owners, and owners across the street.

Both the planning commission and the County Board would hear a request for a new tower or substantial modifications to an existing tower. The planning commission hearing is held approximately 45 days after the filing deadline. By this point in the review process, the staff has developed a recommendation that takes into account the operational needs of the applicant as well as comments from the community. The planning commission makes an advisory recommendation to the County Board which is developed following public testimony and discussion by the planning commission members. The County Board hears the case approximately 10 days later. If a case is deferred it may be returned to the planning commission. This 55-day timeline assumes a best-case scenario. If there are any problems or concerns with an application, the case might be deferred to the next County Board meeting at which zoning matters are to be addressed, and could even be deferred again. Thus, a more typical process would last 90 to 120 days. We emphasize that this timeframe is the result of a desire to allow all views to be heard and considered. This process cannot be rushed.

- **Henrico County**

In Henrico County, towers are limited to a maximum height of 100 feet, unless authorized pursuant to a provisional use permit. Henrico County Code § 24-95(a)(2). Towers within the Airport Safety Overlay district in the vicinity of Richmond International Airport are subject to additional regulations. Henrico County Code § 24-92.2.

To receive a provisional use permit, an applicant must submit a site plan showing the location of the tower, guy anchors, buildings, vehicular access, zoning, and a variety of other information. The plan must be accompanied by a report showing that applicable building and safety codes will be complied with.