

Completed applications are reviewed by County staff and a staff report is prepared for the planning commission within a thirty day time frame. During the review period, notice of the application and public hearing is sent to all adjacent property owners. Also, public notice of the request and the date, time and place of the public hearing are required to be advertised in the city newspaper.

At the public hearing, the planning commission reviews the application and hears presentations on the request from staff, the applicant and any other interested parties. Upon hearing all of the evidence, the planning commission can recommend that the Board of Supervisors approve or deny the request, or, if additional time is required to make a decision on the application, the request may be deferred by the planning commission. Deferrals are generally for a thirty-day period or until the planning commission's next scheduled zoning meeting.

Requests are forwarded to the Board of Supervisors for final action after the planning commission's recommendation is complete. The Board of Supervisors' public hearing typically is one month after the planning commission meeting. During this thirty-day period, the staff makes any necessary revisions to the staff report and public notices are again sent to adjoining property owners and to the newspaper. At its public hearing, the Board of Supervisors hears presentations from the staff, the applicant and any other interested party. The Board also may either act to approve the request, deny it or defer the request to a later meeting.

The minimum time for approval of a provisional use permit for towers is 10 weeks from the application filing to approval of the request by the Board of Supervisors. Should either the applicant, the planning commission or the Board of Supervisors defer action on the application, such deferral will generally add four additional weeks to the process for each deferral.

- **City of Alexandria**

In the City of Alexandria, a landowner wishing to construct an antenna tower greater than 65 feet in height must first obtain a special use permit ("SUP"). A SUP for such a tower can be applied for and, if approved, obtained in any zoning district in the city. City of Alexandria Zoning Ordinance, § 7-1202. After the landowner or antenna owner submits an SUP application to the city's department of planning and zoning, the staff reviews the application and issues a recommendation as to whether the SUP should be granted. Zoning Ordinance, § 11-503(A-B). The director of planning and zoning then schedules the matter for public hearing before the planning commission. Zoning Ordinance, § 11-503(C). The planning commission holds a public hearing, at which it reviews the application and issues a recommendation to the City Council that the application be either approved, disapproved or approved with conditions. Zoning Ordinance, § 11-503(D). Finally, the City Council considers the application at a public hearing and acts by approving it, disapproving it, or approving it with conditions. Zoning Ordinance, § 11-503(E).

The shortest possible time for completing the process described above (from filing the SUP application to obtaining City Council approval) is 45 days, and the average time required to do so is between 45 and 60 days.

As the foregoing discussion shows, the time frames in the proposed rules would force the Counties and the City to violate notice and hearing requirements that have been incorporated into their zoning laws to ensure the protection of residents and their property rights. The proposal that applications be deemed granted if the deadlines are not met would preclude our citizens from protecting their legitimate interests through the zoning process, and would expose the Counties and the City to claims that they have violated citizens' due process and equal protection

rights. The Commission would in effect be forcing the Counties and the City to violate the constitutional and statutory rights of their citizens and to bear the cost of the resulting litigation.

The Commission would do well to be guided by the wisdom of Congress in this regard. When Congress added Section 332(c)(7)(B)(ii) to the Act, establishing standards for local governments to follow in reviewing siting requests for personal wireless facilities, it specifically stated that action should be taken in a “reasonable” time. NPRM at n. 6. As the NPRM notes, *Id.* at nn. 7, 8, the proposed rules are modeled in many respects on Section 332(c)(7). The model provided by Section 332(c)(7), however, has been revised in several key areas, so that the proposed rules favor broadcasters and tower operators. Although we oppose preemption entirely, the proposed deadlines are particularly troublesome, because they show a complete lack of understanding of and respect for local processes. At the very least, if the Commission is to be guided by the example of Section 332(c)(7), it should not deviate from the model.

In addition, we must note that the Commission itself operates in a deliberate fashion. Just as one example, the NAB Petition was filed on May 30, 1997. The NPRM was released 81 days later, on August 19, 1997. The comment period does not close until December 1, six months after filing of the NAB Petition. And it will be some time thereafter – presumably several months, if not longer, based on past precedent – before the Commission acts. It could easily be a year from the initiation of this proceeding until the effective date of any final rules. Let us emphasize that we do not believe the Commission is moving too slowly in this matter. This is an important public policy matter, and the Counties and the City appreciate the opportunity to comment. But we too are engaged in important public policy matters, and our citizens are entitled to the same opportunity for comment and debate on the issues. Therefore, simply as a matter of comity, the Commission should refrain from preempting any local deadlines for action.

III. THE PROPOSED PREEMPTION FAILS TO RESPECT FUNDAMENTAL STATE AND LOCAL POLICY DECISIONS.

A. Zoning is a Local Matter and There Is No Role for the Commission.

The proposed rules are the latest in a string of efforts by the Commission to impose federal communications policy on local communities. An important element in these efforts has been preemption of local zoning rules. We believe this trend is harmful. Members of the public increasingly feel that they can no longer control the most basic aspects of their daily lives. Federal mandates, which the average citizen can say or do nothing to alter, merely strengthen this feeling. No matter how beneficial a particular Commission policy may be or how desirable a particular new service, local governments must be allowed to do their jobs: weigh competing interests and reach compromises for the good of the entire community.

Under Virginia law, zoning statutes "strike a deliberate balance between private property rights and public interests." *Board of Supervisors of Fairfax Co. v. Snell Const. Corp.*, 214 Va. 655, 657 (1974). They also "recognize that public power over private property rights should be exercised judiciously and equitably." *Id.* Furthermore, "[a] zoning ordinance must not arbitrarily discriminate, either in terms or application." *City of Manassas v. Rosson*, 224 Va. 12, 18 (1982).

The Commission is ill-equipped to perform this function. The Commission can establish overall telecommunications policy, within the confines of its statutory authority, but it cannot effectively substitute its judgment for that of on-the-spot local officials. If the policies the Commission seeks to promote are truly in the public interest, they will prevail. The residents of the Counties and the City will let their elected officials know that they want new services. Businesses will inform us of the economic benefits of advancing federal policy. We will respond, and the result will be a better informed, less skeptical public.

Thus, we urge the Commission to respect local authority and local processes. We can help the Commission meet its goals, but we must be allowed to address the concerns of our residents as well. The NPRM acknowledges the role of local governments in zoning and land use matters, and the Commission's historical efforts to avoid becoming involved in local zoning matters. NPRM at ¶¶ 11, 15. The proposed rules, however, address only the Commission's concerns, and make no effort at all to consider the needs of individual communities or their residents.

The proposed preemption is particularly troublesome because the towers in question are likely to be the tallest structures of any kind in the Counties and the City. Thus, the proposed rules would entirely deprive the Counties and the City of the ability to regulate those structures that, of all the telecommunications facilities expected to proliferate as a result of the Telecommunications Act of 1996, have the greatest potential for negative effects on the Counties and the City and their residents. This is unreasonable and inappropriate. It is we who would have to live with the consequences of the Commission's actions. Inappropriate siting of a single broadcast antenna could have lasting deleterious effects on the Counties and the City and their residents, yet the NPRM would eliminate local control over this area. There is no role for the Commission in local zoning and the Commission must not attempt to impose its will.

B. The Proposed Rules Would Nullify the Public Hearing and Notice Requirements of Virginia Law.

The Virginia Code specifies the general procedures and time frames by which the Counties and the City and other Virginia localities must abide in processing zoning applications. Unless construction of a tower is permitted as of right in a particular zoning district, a person

wishing to build, move, or substantially modify a tower would have to obtain a special exception or, in some cases, request rezoning.¹¹

No special exception may be granted except after public notice and a hearing. VA. CODE ANN. § 15.1-496. Special exceptions must be approved by either the governing body of the jurisdiction, or another authorized local body. VA. CODE ANN. § 15.1-491(c). Notices must be published in a newspaper of general circulation once a week for two successive weeks, and the hearing must be held not less than six days or more than 21 days after the second publication of the notice. VA. CODE ANN. § 15.1-431. If a matter is of particular importance or a source of public concern, more than one public hearing may be held. This is especially the case in larger, more populous jurisdictions, including both the Counties and the City. In fact, as a matter of local practice, Arlington County routinely holds two hearings for special exceptions; separate notices must be published for each hearing.

Section 15.1-431 of the Virginia Code also requires that separate written notice be provided to affected landowners at least five days before a hearing. In practice, Arlington County also gives notice to other parties who might be interested or affected.

In the case of a rezoning, the request must be approved by the local planning commission before it goes to the local governing body. This means that two rounds of hearings are required, one before the planning commission, and a second before the governing body.

Therefore, in a best case scenario in which a broadcaster's application was received and immediately processed, an application for a special exception could conceivably be acted upon in about 21 days, assuming it took seven days for internal processing and arranging for publication,

¹¹ Rezoning would not be required in the Counties or the City, but it might be in other Virginia jurisdictions, depending on the desired site and the requirements of the comprehensive plan.

seven days for publication of notice, and another seven days before the public hearing was held. But we must emphasize that in practice this theoretical scenario would never hold true. It takes far more than a few days to process a request because the staff must prepare a staff report explaining the nature and purpose of the request, its effects on the surrounding area, and its compliance with local law. As the Commission knows, good staff work is critical to good policy-making, and good staff work takes time. Failure to lay a proper foundation can leave otherwise sound decisions open to due process and other challenges.

Furthermore, if it were forced to meet the 21-day deadline in the proposed rules, the governing body would not be able to hold the matter over for a second hearing or for further discussion. Indeed, it could not meet the thirty-day deadline for a relocation of an existing facility if a second hearing were required, because of the need for at least two more weeks for a second notice and hearing. To comply with the proposed deadlines, the local government would probably have to make the request a priority item, meaning that other requests filed earlier would be held up. This would open the community to claims of discrimination or violation of equal protection. In fact, there is no mechanism in either County or the City for making a particular request a priority. All applications are processed individually, in turn.

If the request were for a rezoning, the entire process could -- theoretically -- take just under 45 days. Once again, however, there would be no margin for error and the community would be subject to claims that it was favoring tower owners.

In reality, as noted above, the best case scenarios would never occur. As a practical matter, under the proposed rules most applications would be deemed granted before a public hearing could be held. The processing time required to review applications would almost surely be more than seven days, especially if items were to be taken up in turn, without giving any

applicant preferential treatment. In addition, because of holidays, weekends, and regular meeting schedules, it would be nearly impossible to ensure that the public hearings were held only six or seven days after the publication of notice. In most jurisdictions, planning commissions and governing bodies do not necessarily meet every week, thus imposing an additional burden on them. Furthermore, for reasons of administrative efficiency, governing bodies often do not take up zoning matters at each meeting. They may handle all zoning matters at one meeting a month, for example.

Therefore, if the proposed rules were adopted, Virginia residents would be deprived of their statutory right to be heard on antenna siting matters. If a zoning change were to affect the value of a person's property, the lack of a hearing could raise Constitutional due process issues. To avoid this kind of unfairness, the Commission should not adopt the proposed rules.

IV. ANY PREEMPTION OF LOCAL REGULATION OF RADIO FREQUENCY EMISSIONS PRODUCED BY BROADCAST ANTENNAS WOULD LEAVE THE PUBLIC UNPROTECTED IN PRACTICE.

As with the preemption of local zoning authority, the Commission has neither express nor implied authority to preempt local laws that consider the effects of radio frequency emissions in tower siting decisions. In addition, the Counties and the City and other jurisdictions are concerned with any attempt to preempt such authority because it is apparent that the Commission's radio frequency emissions practices do not adequately protect public health and safety.

A. The Commission Has No Authority To Preempt Local Laws that Consider the Effects of Radio Frequency Emissions in Making Siting Decisions.

The standard for reviewing the Commissions' proposed preemption of radio frequency emissions standards is the same as that for local zoning authority in general: the Commission must demonstrate that it has either express or implied authority. Once again, it has neither.

1. **The Commission Has No Express Authority to Preempt Local Health and Safety Regulations Governing Radio Frequency Emissions.**

The NPRM points to the Commission's statutory authority over the regulation of radio frequency interference and the related legislative history. NPRM at ¶ 12. At the same time, the NPRM implicitly notes that the Commission has no parallel authority over zoning restrictions on broadcast towers based on radio frequency emissions. Indeed, the Commission has no such express authority.

2. **By Expressly Addressing Local Regulation of Radio Frequency Emissions of Personal Wireless Facilities in Section 332(c)(7), Congress Indicated that the Commission Has No Implied Authority to Preempt Local Regulation of Radio Frequency Emissions Generally.**

Again, if the Commission has no express authority, it may still regulate in an area if it has implied authority. There is nothing in the Communications Act, however, that indicates a Congressional policy of preempting local laws aimed at preserving the health and safety of residents of a particular community. Indeed, we would find it hard to believe that the United States Congress would ever intend for the Commission to stand in the way of local police power regulation of this type without clear, unequivocal evidence that the matter was being adequately addressed in some other fashion.

For example, in Section 332(c)(7)(B)(iv), the Act prohibits local governments from basing decisions on the siting of personal wireless facilities on concerns about radio frequency emissions. This is relevant for two reasons. First, Congress made it plain that the Commission was to establish standards governing radio frequency emissions in Section 704 of the 1996 Act. Thus, Congress at least attempted to address the public safety issue raised by such emissions. Second, by adopting Section 332(c)(7)(B)(iv), Congress also made it plain that the Commission did not have general authority to preempt local rules addressing the same topic. Prior to the 1996

Act the Commission may have had the authority to set federal standards to be complied with by licensees, but this did not mean it had authority to preempt local police power regulation. By restricting local authority over personal wireless facilities siting, the 1996 Act made it clear that the Commission had exclusive authority to set standards related to personal wireless facilities, but at the same time made it clear that it had no such exclusive authority over other areas. Thus, the Commission has no authority to preempt local antenna siting decisions that are based on the effects of radio frequency emissions.

B. The Commission's Standards and Procedures Governing Radio Frequency Emissions Do Not Adequately Protect the Public Interest Generally.

In addition, the Commission should not preempt local decisions regarding radio frequency emissions because the Commission's own standards and procedures do not adequately address the concerns of the residents of the Counties and the City. One of the primary roles of local governments is to enact health and safety legislation deemed necessary to preserve the health, safety and welfare of the public. This is not one of the primary roles of the Commission, however. The Commission is primarily concerned with the efficient functioning of telecommunications markets and facilities, and its radio frequency emissions standards and policies reflect that focus.

For example, the Commission neither conducts itself nor requires measurement of radiation from new facilities to ensure that they meet its radio frequency emissions standards. Instead, it relies on self-certification. Furthermore, the Commission does not conduct periodic monitoring of sites or facilities to ensure continued compliance with its standards. Thus, unless a licensee reports its own noncompliance, or a third party happens to notice a problem, the Commission has no way of knowing whether its standards are being met. This creates a danger to the public safety for which there would be no recourse if the authority of local governments in

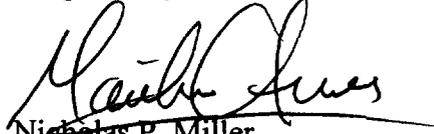
this area were to be preempted. Moreover, in a recent reorganization of the Field Engineering Bureau, the Commission closed numerous field offices and decimated the remainder.

This is unacceptable to many of our residents. If residents are concerned about radio frequency emissions, they expect to be able to have their concerns addressed, and the traditional forum for redressing such grievances is through local legislation. Federal preemption would leave the public entirely exposed, both psychologically and physiologically. The Commission's standards may be perfectly adequate from a scientific point of view, but so long as they are not policed they neither protect the public nor address the concerns of the public. In the absence of effective federal enforcement, the Counties and the City must be allowed to adopt and police their own standards, as they see fit.

Conclusion

The Commission should recognize that far more harm than good will come of any preemption of local regulation of broadcast antenna tower placement. In any event, the Commission has no authority to adopt the proposed rules. We urge the Commission to close this proceeding without further action.

Respectfully submitted,



Nicholas P. Miller
William Malone
Matthew C. Ames

MILLER & VAN EATON, P.L.L.C.
1155 Connecticut Avenue, Suite 1000
Washington, D.C. 20036-4306
Telephone: (202) 785-0600
Fax: (202) 785-1234

October 30, 1997

Attorneys for Arlington County, Virginia; Henrico County, Virginia; and the City of Alexandria, Virginia

Of Counsel:

Barbara S. Drake, Esquire
County Attorney
Arlington County, Virginia
#1 Courthouse Plaza, Suite 403
2100 Clarendon Boulevard
Arlington, VA 22201

Joseph P. Rapisarda, Esquire
County Attorney
Henrico County, Virginia
P.O. Box 27032
Richmond, VA 23273

Philip G. Sunderland, Esquire
City Attorney
City of Alexandria
City Hall, 301 King Street
Alexandria, VA 22314

GAclient\106776\01\DTV Comments-v2.doc