> United States that build television towers. 'We just don't have the capacity for this.'" *New York Times*, Exhibit C.

Petitioners generally agree with the preceding, and note that it typically takes six months to build a new tower. NAB Petition, at 7-8.

These stark statements make clear that if there are delays in the construction of new broadcast towers they will overwhelmingly be caused by lack of enough construction crews, not by State and local delays.

F. Weather: As the NAB has cited, weather is a major impediment to construction, typically in northern portions of the United States. Work cannot occur on tall towers in inclement weather, such as high winds or ice for obvious safety reasons. This essentially shuts down much tower construction in the northern U.S. for roughly half the year.

G. Few Towers Affected Before Year 2000: Under the Commission's orders, relatively few towers will have to be built before the year 2000. This shows that if there is a problem with obtaining necessary State and local approvals, the problem is transitory (and will disappear in 12 to 24 months) and the number of towers affected is extremely small. Both facts show that there is no need for the Commission's proposed rule which would cover 14,000 radio and TV stations indefinitely.

Specifically, the Commission's rollout of HDTV requires the following:

-- 26 stations in the top 10 markets to convert by late 1998.

-- 40 stations to convert by late 1999.

Other stations must convert to HDTV after the year 2000. *Wall Street Journal*, "Waiting for HDTV? Don't Go Dumping Your Old Set Just Yet", September 12, 1997, at p. A10.

There is clearly more than enough time for broadcasters to apply for necessary approvals for towers that must be built in 1999 and thereafter. Problems may occur (if at all) for the maximum of 26 towers that must be built in 1998 (the actual number may be less, if broadcasters share towers). Delays, if any, that occur thereafter, will be squarely attributable to broadcasters not applying for such approvals in time.

H. Poor Planning: Another source of delay which the NAB has not mentioned is poor planning by broadcasters: Construction projects can be complicated, particularly where they involve securing financing, negotiating for scarce construction crews, coping with inclement weather and the like.

Fortunately these are the kinds of issues that are routinely dealt with by engineers and construction companies all the time so as to meet deadlines for construction of major projects. And computerized software, such as project management and project scheduling software, greatly aids in this task.

Broadcast towers are relatively simple compared to complex construction projects such as power plants or major office buildings. It is thus simple for a broadcaster or its consultant or engineering firm to develop a schedule putting in the times needed for planning, design and construction as well as obtaining all necessary permits. Such planning is a routine part of significant construction projects. One reason such planning is used is to identify how

soon permits need to be applied for to make sure that they are in hand in time to meet the construction completion date.

All other businesses are able to use such project management techniques to ensure that their buildings are completed on time. The Commission has every basis to believe that broadcasters can and will use such appropriate management techniques here. If, for some reason through error a broadcaster does not use these techniques and is late, the Commission should consider whether an appropriate waiver is necessary for that broadcaster, not an "off with your head" approach of preempting State and local regulations nationwide for the occasional broadcaster that errs in its management techniques.

I. Conclusion: The result of the preceding is clear: Over the past 75 years State and local regulations have not impaired the delivery of radio and TV services by 14,000 broadcast stations. State and local governments have every incentive to move promptly in granting permits necessary for HDTV. This is adequate time to obtain State and local approvals for towers to be built in 1999 and thereafter. And the critical lack of construction crews and weather delays make it extremely unlikely that state and local permits will delay the roll-out of HDTV.

IV. ENVIRONMENTAL IMPACT STATEMENT REQUIRED

A. Introduction and Summary: The National Environmental Policy Act, 42 USC § 4321 et. seq. ("NEPA") requires, among other things, that the Commission and all other Federal agencies must conduct an environmental impact statement analysis for all major Federal actions affecting the environment. 42 USC § 4332. The Commission's rule meets

this requirement because it preempts State and local environmental laws and regulations affecting broadcast towers. The proposed rule or any variant of it cannot be adopted until an environmental impact analysis is conducted by the Commission.

B. Statutory Requirements: Federal statutes require an environmental impact analysis for all major Federal actions affecting the environment. This requirement has been construed so as to mandate the filing of an environmental impact statement by federal agencies, where a federal agency proposes to take a "leading role in activity affecting the environment." State of Alaska v. Andrews, 591 F.2d 537 (9th Cir. 1979). The Commission's rule will have an adverse effect on the environment and, therefore, prior to adoption of the rule, the FCC must prepare an environmental impact statement to comply with NEPA.[5]

C. Proposed Rule Meets the Standard: The Commission's proposed rule meets the statutory standard for requiring an environmental impact statement. This is apparent from the fact that the rule:

-- Affects 14,000 radio and TV stations nationwide

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[5]The FCC may be required to conduct and prepare environmental impact statements on a case-by-case basis under federal case law. For example, in National Resources Defense Council, Inc. v. Morton, 388 F.Supp. 829 (D.D.C. 1974), aff'd mem., 1974 U.S. App. D.C. 77,527 F.2d 1386 (D.C. Cir.), cert. denied, 427 U.S. 913, 96 S.Ct. 3201, 49 L.Ed. 2d 1204 (1976), the Federal Bureau of Land Management was required to file an environmental impact statement under NEPA for each State in the Bureau's livestock grazing program, instead of one statement covering all participating states. In this situation, the proposed Rule contemplates Federal action on a more widespread scale and, therefore, the FCC may be required under NEPA to conduct and prepare environmental impact statements for each proposed tower under the rationale in Morton.

-- Indefinitely, and

-- Preempts any state or local statute or regulation (other than health or safety regulations) that impair broadcasters from building towers and related facilities.

In addition, the Commission's rule would require each State and local government to demonstrate that the applicable health or safety objective has been "clearly defined and expressly stated" and is "reasonable in relation to" certain Federal interests in allowing broadcasters to construct towers and of the Federal interest in "fair and effective competition among competing electronic media."

So in other words, any environmental statutes and regulations are preempted unless:

-- They can be considered to obtain a "health or safety objective"

-- The objective has been "clearly defined and expressly stated"[6], and

-- The objective is reasonable in relation to the two Federal interests just

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[6]As is discussed further below, this aspect of the Commission's rule should be modified to be the same as the Commission's latest over-the-air reception device rule. That rule requires that local rules accomplish a "clearly defined safety objective that is either stated in the text, preamble or legislative history of the restriction or described as applying to that restriction in a document that is readily available to antenna users. . . ." 47 CFR § 1.4000(B)(1). As to this restriction, the Commission said "we do not intend, however, that local authorities be required to rewrite their regulations. Our rule also requires that a restriction covered by this exemption must state, in the text, preamble or legislative history that it has a clearly defined safety objective. Alternatively, local governments or private associations can comply with this section by describing the restriction and the clearly defined health or safety objective it is intended to promote, in a document that is readily available to antenna users." In re Preemption of Local Zoning Regulation of Satellite Earth Stations, FCC 96-326, at ¶ 25 (released August 6, 1996).

described.

In addition, from a timing standpoint, under the Commission's proposed rule all State and local permissions relating to the "authorization to place, construct or modify broadcast transmission facilities" will automatically be deemed granted if a State or local government does not act on them within 21 to 45 days of application having been made for such approval. These deadlines apply whether or not an application is deficient on its face or whether studies are necessary to determine whether and to what extent the tower in question can be built without violating applicable environmentally oriented laws. As the Commission should be aware, the more environmentally sensitive the site, the longer it will take to conduct the necessary studies and analyses. The 21 to 45 day time period set forth by the Commission is flatly inadequate for such review and analysis. Despite this, under the Commission's proposed rule, all local approvals and permits will apparently be deemed granted if such time limits are exceeded.

Assuming arguendo that the Commission has constitutional and statutory authority for this rule (which it does not), the preceding rule is breathtaking in its scope. Apparently this Commission -- and any other Federal agency -- can preempt all State and local environmentally oriented regulations to obtain some Federal objective, even though Congress nowhere mentioned such preemption.

D. Environmental Impacts of Towers: The environmental impacts of broadcast towers have been discussed extensively above and will not be repeated here. Suffice to say that broadcasters often have placed -- and will continue to want to place -- towers in

environmentally sensitive areas, specifically in or near wetlands and wet areas or on mountaintops or alpine environments which are environmentally fragile, often to the point where they may be parks or wilderness areas.

E. Environmental Laws Preempted: As has been set forth extensively above, the Commission's proposed rule and any variant of it would directly preempt State and local laws, rules and regulations whose intent and effect is specifically to protect the environment.

This includes wetlands permits and State regulations such as those of the California Coastal Commission.

In addition, as it has been described extensively above, zoning and land use rules and regulations often have a strong environmental component. Zoning laws and regulations directly reflect the terrain and environment of the community in question. They frequently have special requirements for proposed land uses in or near sensitive areas such as in or near rivers, lakes, wetlands, sand dunes, flood plains and mountainous areas to prevent inappropriate uses and to impose appropriate restrictions on the uses that are allowed. As described above, the Commission's proposed rule (and variants of it) would directly preempt such statutes by substantively restricting them and by providing that all permissions are "automatically deemed granted" within 21 to 45 days with consequent severe effects on the environment.

F. Environmental Impact Statement Required: As is apparent, the Commission's proposed rule -- or any variant of it -- meets the standard for requiring an environmental impact statement. Any substantive or procedural restriction imposed by this Commission on

State or local laws, rules or regulations that have the effect of protecting the environment requires an environmental impact statement. Failure to prepare such a statement will render invalid any rule adopted by this Commission.

V. ANY PREEMPTION ACTION BY THE COMMISSION OF STATE AND LOCAL ZONING AND LAND USE ORDINANCES VIOLATES THE COMMISSION'S AUTHORITY AND THE TENTH AMENDMENT OF THE U.S. CONSTITUTION BY IMPERMISSIBLY PREEMPTING LOCAL LEGISLATIVE AUTHORITY

A. No Explicit Preemption Statement by Congress: The Supremacy and the Necessary and Proper Clauses of the U.S. Constitution allow preemption of State and local legislation and regulations only where Congress intended Federal law to cover the entire "field" of regulation. The Federal preemption doctrine is succinctly articulated as follows:

> "Federal law may preempt State or municipal law when Congress so states in explicit terms on the face of a statute, if federal legislation is so comprehensive in a given case so as to leave no room for supplemental state or local legislation, or if local law actually conflicts with federal law or congressional purposes or goals." North Haven Planning & Zoning Commission v. Upjohn Co., 735 F. Supp. 423 (D.C. Conn. 1990), aff'd 921, F.2d 27, cert. den. 500 U.S. 918, 111 S.Ct. 2016, 114 L.Ed.2d 102 (1990).

Absent an explicit statement by Congress that Federal law is to preempt local law, there is no authority for a Federal agency to preempt State or local law. In this instance there is on such explicit statement by Congress, and therefore, the Commission lacks authority to preempt local zoning authority as NAB has requested.

Although the language within the Communications Act of 1934, 47 USC § 141 et. seq. (the "Act") is broad with regard to the Commission's regulatory authority over the broadcast

industry, nowhere does the Act expressly authorize the Commission to preempt local zoning regulations. If there is no express preemption, then under the Federal preemption doctrine, as articulated in North Haven Planning & Zoning, *supra*, only where Federal law is so comprehensive so as to leave no room for supplemental State or local legislation, or where the local law conflicts with Federal law, may the Federal law preempt the local law.

Here, it is clear from the 75 year history of broadcasting in the U.S. that there is room for supplementing Federal legislation through the use of local zoning measures. Such measures do not conflict with the Act, as the Act and local zoning ordinances have as a common purpose the "promotion of the safety of life and property." 47 USC § 151. In fact, the proposed rule will actually frustrate the Commission's statutory mandate to promote the safety of life and property through wire and radio communications. This is because under the NPR and proposed rule, States and municipalities could be forced to make rash decisions, which as discussed below, are unsound or could violate citizens' Constitutional rights. If municipalities do not act fast enough, requests for tower sitings will be deemed automatically approved.

Once automatically approved, the rule specifies no standards by which the broadcast tower is to be constructed or modified. The proposed rule, taken to its logical conclusion, would result in the location of a 2,000 foot tower in a residential district with guy wires extending from the tower interfering with the life and safety of neighboring residents.

Thus, the Commission lacks authority to adopt the proposed rule: There is no congressional authorization for preemption of local ordinances; there is no attempt in the rule

to create a framework by which the FCC can assure that tower construction and modification will not harm residents or their property. In short, it is the proposed rule (and not local ordinances) which conflicts with the Act because the proposed rule would not adequately protect Americans' safety, life and property.

Moreover, since the Commission has not proposed construction and modification standards, if the Commission preempts local zoning, the FCC will be required to become the "Federal Zoning, Environment and Construction Code Commission" reviewing hundreds upon hundreds of applications for the siting of broadcast towers, in order to fulfill its Congressional mandate. However, such a review will prohibit the Commission from fulfilling its Congressional mandate for an accelerated roll-out of HDTV.

B. Zoning is a Traditional Function of State and Local Government: The proposed rule violates not only the terms of the Act, but also violates the Tenth Amendment of the U.S. Constitution by intruding on an area of peculiarly local concern.

Under the proposed rule all zoning and land use ordinances relating to the placement, construction, and modification of broadcast towers will be prohibited altogether or limited in their duration according to arbitrary requirements. This is an unconstitutional infringement on a traditional attribute of State sovereignty, namely land use regulation. The U.S. Supreme Court has stated that the regulation of land use is a function "traditionally performed by local government." Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 115 S.Ct. 395, 130 L.Ed.2d 245 (1994). Other opinions of the Supreme Court have supported this general proposition. For example, in City of Edmonds v. Oxford House, Inc.,

514 U.S. 725, 115 S.Ct. 1776 at 1786, 131 L.Ed. 2d 801 (1995), Justice Thomas summarized the law as follows:

> "It is obvious that land use -- the subject of petitioner's zoning code -- is an area traditionally regulated by the States than by Congress, and that land use regulation is one of the historic powers of the States. As we have stated, 'zoning laws and their provisions are peculiarly within the province of State and local legislative authorities.'" *Citing* Warth v. Seldin, 422 U.S. 490 508 n. 18, 95 S.Ct. 2197, 2210 n. 18, 45 L.Ed. 2d 343 (1975); *see also* Hess, *supra*; FERC v. Mississippi, 456 U.S. 742, 768 n. 30, 102 S.Ct. 2126, 2142 n. 30, 72 L.Ed. 2d 532 (1982) ("Regulation of land use is perhaps the quintessential state activity"); Village of Belle Terre v. Boraas, 416 U.S. 1, 13, 94 S.Ct. 1537, 1543, 39 L.Ed. 2d 797 (1974) (Marshall, J. dissenting. "I am in full agreement with the majority that zoning...may indeed be the most essential function performed by local government").

A municipality's consideration of the public health, safety and welfare of its residents in the placement, construction, and modification of broadcast towers is a clear example of a municipality engaged in a "quintessential state activity" of zoning which is considered the "most essential function performed by local government." The FCC may not preempt local zoning and land use ordinances when such ordinances are used by municipalities to formulate and implement local legislative policy for the protection of the public health, safety and welfare of its residents. Thus the Commission's proposed rule or any variant of it is unconstitutional.

C. The Pre-emption Contemplated by the Commission Violates the Tenth Amendment to the U.S. Constitution and Notions of Federalism: NAB's attempt to have the FCC preempt local authority broadcast tower zoning is in direct violation of the Tenth

Amendment of the U.S. Constitution. The Tenth Amendment of the Constitution provides that, "The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amend. X. In New York v. U.S., 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed. 2d 120 (1992), the U.S. Supreme Court stated that:

> "If the power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of State sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." Id., at 156, 112 S.Ct. at 2417.

Thus, where there is clearly an action committed to a state as an exercise of a State's sovereignty, such as legislative enactments concerning zoning, Congress may not command a State to act. The Supreme Court has affirmed this holding most recently in Printz v. U.S., ___ U.S. ___, 117 S.Ct. 2365, 138 L.Ed. 2d 914 (1997). In Printz, the Supreme Court overturned provisions of the Brady Handgun Violence Prevention Act which required state and local law enforcement officers to conduct mandatory background checks on prospective handgun purchasers and to perform certain related tasks. In overturning portions of the federal statute, the Court stated that, consistent with New York v. U.S., *supra*, "State legislatures are not subject to federal direction." The Court wrote:

> "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer and enforce a federal regulatory program. It matters not whether policy making is involved, and no case by case weighing of the burdens or benefits is necessary; such

> commands are fundamentally incompatible with our constitutional system of dual sovereignty." Printz, at ___, 117 S.Ct. 2384.

Just last month in Condon v. Reno, 972 F. Supp. 977 (D.S.C. 1997), the U.S. District Court in the District of South Carolina invalidated a Federal statute regulating a State's right to sell or disclose driver information conveyed to the States by applicants for driver's licenses and vehicle registration. In finding the statute unconstitutional, the Court relied on the holdings of New York and Printz for the proposition that the Federal government may not command states and their political subdivisions to administer or enforce a Federal regulatory scheme.

D. Accountability: Allowing the Federal government to command state and local governments in areas of traditional sovereignty, such as zoning, unconstitutionality diminishes the accountability of Federal and state officials. New York v. U.S., 505 U.S. 44, 168, 112 S.Ct. 2408, 2424, 120 L.Ed.2d 120 (1992). As Justice O'Connor wrote in invalidating the Federal government's directive to have States take title to radioactive waste:

> " . . . [W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral complications of their decision. Accountability is thus diminished when, due to federal coercion, elected State officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation. [citations omitted]." New York, 505 U.S. 169; 112 S.Ct. 2424

However, the NPR is such a commandment: NAB proposes that the FCC tread upon an area of traditional state sovereignty by forcing municipalities to make decisions of a local

nature (1) -- according to a federally-crafted timetable without regard to the specific needs of a municipality; (2) -- limiting the substantive grounds on which a decision may be made, only to "health or safety" and even then only to the extent reasonable given certain Federal concerns; and (3) -- imposing procedural requirements that the health or safety objective be "clearly defined and expressly stated".[7]

The federally-crafted 21 to 45 day timetable in which municipalities would be required to make decisions regarding broadcast towers prevents a municipality from conducting the necessary review prior to making decisions which directly affect the municipalities' residents. Such a commandment violates the notion of federalism or "dual sovereignty" that is expressly manifested in the Tenth Amendment and establishes the relation of the Federal government to the States. Erosion of this dual sovereignty through policy timetables mandated by the FCC will disrupt the, "healthy balance of power between the states and the federal government [which] reduce[s] the risk of tyranny and abuse from either front." Gregory v. Ashcroft, 501 U.S. 452, 458, 111 S.Ct. 2395, 115 L.Ed. 2d 410 (1991).

VI. THE PROPOSED RULE ABRIDGES CONSTITUTIONAL RIGHTS OF LOCAL LEGISLATORS AND RESIDENTS

A. First Amendment Violations: The proposed rule will infringe upon local legislators' and residents' First Amendment rights to freedom of speech. The proposed

[7]As noted above and *infra*, the Commission in the past has narrowly interpreted similar "clearly defined and expressly stated" requirements to the effect that the relevant sections of a state or local regulation must state the objective in question.

timetable in which a State or municipality will be required to act on a broadcast tower request and the automatic approval process proposed in the NPR will suppress public comment on issues which directly affect communities and residents.

Under the NPR, residents and legislators will not be permitted to express concerns at public meetings that broadcast towers adversely affect the environment, public health, and aesthetics. See Petitioner's Proposed Preemption Rule, p. 2. The Rule provides in pertinent part that:

> "No State or local government or instrumentality thereof may deny a request to place, construct or modify a broadcast facility on the basis of: (i) the environment or health effects . . .; (ii) interference effects or existing or potential telecommunication providers . . .; (iii) lighting, painting, and marking requirements. . . ." Id.

Based on this language, if a local city council member or a concerned citizen comments on any of the above concerns at a public meeting, and the municipality denies the request to place, construct, or modify a broadcast tower, the broadcaster may seek review of the denial with the FCC. The FCC may overturn the denial and grant the siting request if a legislator or resident opposes the broadcast tower for health, safety or welfare reasons. Under the NPR, it is in the legislator's or resident's best interest not to express their otherwise valid concerns because such comments will result in the FCC's approval of the placement, construction, or modification request. The end result of the rule will be a "chilling effect" on the right of a free people to engage in a public discourse on issues that directly affect people's daily lives. Such a chilling effect runs directly counter to the First Amendment. As

the U.S. Supreme Court noted in Turner Broadcasting System, Inc. v. FCC:

> "At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal. See Leathers v. Medlock, 499 U.S., at 449, 111 S.Ct., at 1444-1445 (*citing* Cohen v. California, 403 U.S. 15, 24, 91 S.Ct. 1780, 1787-1788, 29 L.Ed.2d 284 (1971)); West Virginia Board of Education v. Barnette, 319 U.S. 624, 638, 640-642, 63 S.Ct. 1178, 1185, 1186-1187, 87 L.Ed.2d 1628 (1943). Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. These restrictions "rais[e] the specter that Government may effectively drive certain ideas or viewpoints from the marketplace." Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 502 U.S. 105, 112 S.Ct. 501, 508, 116 L.Ed.2d 476 (1991)." 512 U.S. 622, 114 S.Ct. 2445 at 2458, 129 L.Ed.2d 497 (1994).

The proposed rule will thus curb the exercise of free speech by legislators and property owners in violation of the First Amendment by dictating to free citizens what speech can and cannot be expressed in public discussion.

The proposed rule additionally violates the First and Tenth Amendments due to the fact that by State statute, local charter or established practice many municipalities are required to allow citizens to speak at public meetings on any issue the citizen chooses. Such "public comment periods" often apply to all meetings of public bodies, including planning commissions, zoning boards and city councils. Municipalities typically cannot restrict the subject matter of the comments.

Such unrestricted ability of citizens to speak directly to their legislators and officials is a fundamental attribute of sovereignty and of local government. The Federal government is unusual in not having such a requirement.

The Commission's rule violates (1) -- the Tenth Amendment (by requiring municipalities to stifle free speech on subjects the Commission considers undesirable, such as the effects of RF radiation), or (2) -- the First Amendment by its "chilling effect" on citizens and legislators by giving this Commission authority to reverse local decisions if free speech is allowed, and comments are received on topics the rule proscribes (and the requested local approval is denied).

B. Fifth and Fourteenth Amendment Violations: As a result the timetable in the proposed rule potentially infringes on a citizen's procedural due process rights embodied in the U.S. Constitution.

The timetable proposed by NAB is insufficient and unresponsive to the needs of municipalities who must consider, in order to fulfill other constitutional and statutory mandates, the public health, safety, and welfare when making zoning decisions. Imposing a timetable that requires a municipality to approve the construction of a new broadcast tower within 21-45 days may not provide a municipality enough time to provide statutorily mandated notice of hearing dates to the general public and adjoining property owners. Nor does the timetable provide sufficient time to comply with many states' statutorily required planning commission review and recommendation process or laws relating to the procedure for a municipality to consider proposed zoning ordinance changes for a tower siting.

The relevant portions of the Fifth Amendment of the U.S. Constitution restricts the Federal government, including this Commission, by providing that, "Nor shall any person be deprived of life, liberty, or property without due process of law. . . ." U.S. Const., Amend V. Federal courts have held that the due process clause of the Fourteenth Amendment requires that the government provide a citizen with notice and an opportunity to be heard prior to, or immediately following a deprivation of life, liberty, or property. Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1978). Analogous requirements are imposed on States and local governments by the Fourteenth Amendment. Because the proposed rule is a Federal rule, imposed on States and local governments, it must satisfy both Amendments.

Under the proposed rule, if a property owner feels that his property is threatened by the potential siting of a 2,000 foot broadcast tower on adjoining property, and that siting the tower so close to his property may constitute a taking of his property, the municipality may be unable to provide the necessary notice and hearing opportunities to the property owner within 21 to 45 days to comply with the Fourteenth Amendment's due process requirements. Specifically, the 21 to 45 day response period proposed by the Commission may be insufficient to comply with procedural due process requirements, leading to takings claims against the Federal government by affected property owners. As the Commission is aware, such takings claims would be paid by the U.S. taxpayer, not by the responsible broadcaster, thus extending more "corporate HDTV welfare" to broadcasters.

The proposed rule is thus invalid on First, Fifth and Fourteenth Amendment grounds.

VII. ASSUMING ARGUENDO THE COMMISSION CAN ACT, THERE ARE MAJOR PROBLEMS WITH THE PROPOSED RULE

A. General: The preceding sections of these comments have shown how the Commission lacks constitutional or statutory authority for any proposed rule and how it has failed to comply with applicable procedures, such as an environmental impact statement analysis under NEPA. They have also shown how there is unlikely to be a problem with State and local governments granting the approvals needed for HDTV towers, or that if there are such problems they will be minimal (26 stations) and disappear before the year 2000.

Assuming arguendo that the Commission overcomes the preceding obstacles, its proposed rule is woefully deficient. The following are general comments on the proposed rule which in part also shows the lack of any constitutional, statutory or policy support for action by the Commission in this proceeding. For simplicity's sake, the following comments simply go in order through the proposed rule and are not in order of importance.

B. Siting Procedures Encourage Sloth by Broadcasters: Subsection (a) of the Commission's rule requires action within a reasonable period of time "after a written request is filed with" a State or local government for any required permit or authorization. It is obvious that broadcasters will argue that they merely need to file a letter stating their request and need not comply with the substantive or procedural filing requirements of a State or local government in requesting the authorization or permit in question.

The rule will thus encourage sloth or malfeasance by broadcasters because they know that by filing defective applications they enhance the chance of "running out the clock" such

that permission is automatically deemed granted under this section of the proposed rule.

This obvious problem illustrates why the Commission's proposed rule is an unconstitutional infringement on State and local rights.

The Commission should consider how it would feel if a similar rule applied to it -- for example, that any broadcaster will automatically be deemed to have been granted a license by this Commission within 21 days after filing a written request with it for a commercial TV license without any requirement that the Commission's rules be complied with, such as those relating to filling out the appropriate application, attaching all the required documents, paying the appropriate fees, submitting the requisite number of copies and the like.

Thus, if any rule is adopted it has to be clarified to only apply to written requests "which are submitted in complete compliance with applicable State and local laws, regulations and policies" and that the clock will not start to run until a complete application is submitted.

C. Modify Must Be Defined: Subsection (a) imposes a 21 day time requirement for action on requests for "modification" of broadcast transmission facilities. But this key term is undefined.

Apparently a broadcaster could propose a switch from a guyed tower to a self-supporting tower or vice versa, or switch from a steel tower to one made of wood (or for that matter, paper maché) and the 21 day time limit would still apply. In addition, the 21 day time period (the shortest time proposed in the rule) does not take into account construction factors -- will there have to be additional construction roads bulldozed to allow the transport of

additional tower parts to the area; will the construction intrude on protected habitats; will the tower (or associated buildings, see definition of "broadcast transmission facilities") be "modified" in location or height or otherwise be altered such as to be more obtrusive, harmful or unsafe? For example, will the building be changed to a different color, the landscaping changed and illuminated at night with garish lights which are very disruptive to people (or to protected wildlife)?

For the preceding reasons section (a)(1)(i) of the new rule needs to be deleted or clarified and greatly narrowed.

D. Strengthen or Replace: Subsection (a)(1)(ii) of the Commission's proposed rule also imposes a 21-day time limit on requests to "strengthen or replace" existing broadcast transmission facilities. Many of the comments set forth in the preceding paragraphs apply here: What will the existing "broadcast transmission facilities" (which, as set forth below, include certain buildings) be replaced with? Apparently there is no limit on their size, height, color, illumination, landscaping or the like.

As mentioned above, a State or local government would have 21 days to act on a proposal to "replace" a steel tower with another steel tower, but also 21 days in which to act if it were to be "replaced" with a wooden tower of unsound design.

Similarly, zoning laws and environmental laws often impose strict requirements on the nature and size of land uses in protected areas. But those requirements are effectively tossed out the window by the proposed rule which imposes the shortest time limit in that rule (21 days) if the tower, building or other item is being "replaced" regardless of whether the

replacement structure is in any way similar to the original structure.

Petitioners have given no justification for this requirement, and there is none. The language in question either needs to be stricken or greatly narrowed, for example, to indicate that "replacement" means replacement with a structure which, for the purpose of the applicable State or local law, rule or regulation in question, is identical to and indistinguishable from the original structure.

E. Safety Analyses: Of particular concern with any of the time periods in question -- particularly those related to the 21 day time period for "modifications", "strengthenings" or "replacements" -- is the time necessary for safety analyses.

As has been demonstrated above, towers are serious risks to safety, to people working on them, to airplanes and to people and structures on the ground. The fundamental rule for all agencies, governments and legislative bodies is "safety first". But the Commission has proposed an unsafe "straightjacket" rule that deems any State or local safety related authorization for a structure to have been automatically deemed granted within 21 days, even if it is being "replaced" with a structure that is demonstrably unsafe or on which there are major unresolved questions.

In this regard there is no requirement that the "replacement" tower be the same height as the existing tower. Conceivably a 400 foot tower could be "replaced" with a 2,000 foot tower with the broadcaster arguing that subsection (a)(1)(ii) applies and that it cannot be required to have a greater "setback" or "fall radius" requirement and that at minimum any action must be completed in 21 days.

F. 300 Foot Requirement: Subsection (a)(2) of the proposed rule imposes a 30 day requirement for action on requests to move broadcast facilities to another location within 300 feet of the existing tower.

The proposed rule ignores the fact that often zoning or other approvals are very sensitive to the precise location for which the authorization is given. This is particularly true in mountainous areas, on or near steep slopes, or in or near rivers or wetlands where there can be major impacts if a structure is shifted 300 feet in one direction or another. For example, relocating AM broadcast towers or other towers which require an extensive ground field (with thousands of feet of trenches cut in the soil) can lead to substantial problems, particularly in mountainous terrains or near rivers or wetlands.

Subsection (a)(2) should therefore be deleted.

G. Consolidation: Section (a)(2) of the Commission's proposed rule also provides a 30 day time period for local action on proposals to consolidate "two or more broadcast transmission facilities on a common tower [or] other structure whether the tower or other structure is preexisting or new." This raises major issues of what is meant by "other structure." The Commission has studiously left this undefined. It cannot do so. Apparently it could be any other structure and the Commission would then be preempting State and local laws for any other structure, no matter what it is. This is clearly unacceptable. The offending language should be stricken.

As this Commission is aware, one of the major factors leading to the need for new towers is not that the existing towers aren't high enough, but simply that the combined

weight limit of all the antennas and other structures which the principal broadcasters have allowed to be placed on them is now at the total load limit for the tower. *New York Times*, *supra*, Exhibit C.

The 30 day time limit set forth here appears to be inadequate for safety reviews at the state or local level to ensure that when two towers (or other structures, whatever that may mean) are consolidated, that applicable weight and load limits are not excluded.

H. Consolidation/Location: CCO note that the "consolidation" provisions of subsection (a)(2) contains no restriction on where the new tower or other structure may be. It thus seems to apply to new towers, which it would appear the rule intends come under the 45-day time limit discussed below. This problem must be corrected.

I. Increased Height: The rule also sets forth a 30-day time limit for State and local action on increases in the height of towers. The comments set forth above on there not being adequate time for safety and other analyses are directly applicable here as well.

J. 45 Day Limit: Subsection (a)(3) of the Commission's proposed rule requires action in all other cases within 45 days. At a minimum, the Commission should make clear that the 45 day time limit applies to all new towers, whether they are being modified, replaced, relocated or otherwise.

However, for the reasons set forth above, the 45-day time limit, in many instances, may be inadequate for state or local action for such reasons as not requiring a complete and adequate filing to trigger the 45-day requirement; additional time being needed to appropriately analyze and response to the request and the like.

K. Notice to Municipalities: If the "Siting Procedures" section of the Commission's proposed rule is adopted -- or anything remotely resembling it -- the Commission must adopt a rule requiring any broadcaster attempting to take advantage of such rule to notify each State and local government of the rule. Such notice must be given when the broadcaster seeks an authorization or permission which the broadcaster contends is covered by the time periods in the rule. The reasons for this are to make the rule effective.

If it is the Commission's intent that State and local governments act within a certain period of time, it should make every effort to make sure that they are, in fact, notified and aware of such time periods. Relying on any kind of "constructive notice" from the Federal Register is obviously inadequate in this regard -- the Commission should not expect 38,000 local governments in the United States and a multitude of departments and entities within the 50 State governments to have every section of the voluminous Federal Register or Code of Federal Regulations in mind.

Thus, from the standpoint of making its rule effective, the Commission must require all broadcasters attempting to take advantage of this rule (or any variant of it) to state in the cover letter accompanying any application or request (1) -- that they contend it is covered by the rule, (2) -- state the time period which they contend applies, and (3) -- attach a copy of the Commission's rule.

In addition to stating that the State or local government has X days to act, the letter (4) -- should also state what happens if they do not act in X days (for example, that the request will automatically be deemed granted).