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OCT 30 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

October 30, 1997

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Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, NW - Room 222  
Washington, DC 20554

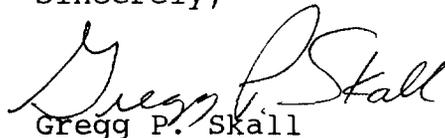
**RE: Comments of Children's Broadcasting Corporation**  
**MM Docket No 97-182**

Dear Mr. Caton:

Transmitted herewith is an original and nine (9) copies of the Comments of Children's Broadcasting Corporation in the above-reference proceeding.

Should you have any questions, please contact undersigned counsel.

Sincerely,



Gregg P. Skall  
Counsel for Children's Broadcasting  
Corporation

Enclosures

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OCT 30 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

To: The Commission

**COMMENTS OF**  
**CHILDREN'S BROADCASTING CORPORATION**

I. INTRODUCTION

Children's Broadcasting Corporation ("Children's"), by and through its attorney, hereby submit the following comments in support of the Notice of Proposed Rulemaking (FCC 97-296) adopted by the Federal Communications Commission ("FCC" or "Commission") on August 18, 1997.

The NPRM requested comment on proposed rules that would limit the discretion of state and local zoning boards in reviewing proposed construction of broadcast facilities. Specifically, the new rules would place time restrictions on the reviewing board's consideration of proposed construction, and would prohibit a local board's review of RF emissions, interference caused to other devices, and tower marking and lighting, so long as it complied with FCC and FAA regulations.

In light of its long and painful history with local zoning boards, as discussed below, Children's fully supports the rules as

proposed. Further, Children's requests that the Commission makes clear that the proposed rules apply to all broadcast transmission facilities. As shown below, the Commission has authority to implement the proposed rules, and Children's urges the Commission to exercise this power.

## II. BACKGROUND

Over the past three years, Children's has learned first-hand of the troubles faced by broadcast licensees when attempting to construct new transmission facilities. One such incident serves to illustrate the overall problems that the NPRM is intended to redress.

In 1994, Children's began working with the staff of Riverside County to locate an appropriate site to relocate its transmission facilities for Station KPLS(AM). The site from which it was authorized to operate barely served the station's designated community of license. The proposed site would have allowed Station KPLS(AM) to operate with a much stronger signal, and serve a large part of the surrounding community.

Through this relationship with the County, Children's became aware of the established requirements for building a transmission facility in the county. To comply with these requirements, Children's expended over \$240,000 to prepare the necessary engineering, biological, and environmental reports, option fees, filing fees with the County, local consulting fees, and outside legal fees.

These efforts resulted in the preliminarily approval of Childrens' proposal. This approval confirmed that the proposed construction would meet all of the state and local regulatory requirements. The final step was to hold a public hearing. At that hearing, the Riverside County Board entertained comments and petitions, which in fact were filed. However, these comments were not even made by those who lived in the county, but rather from citizens who lived in an adjacent community with no jurisdiction over the matter. The sole basis for their complaints was that they would be able see the antenna system from the opposite side of a river valley.

As a result of these comments, the County of Riverside reversed its recommendation. In turn, the County staff placed new, highly expensive requirements on any future placement of the facilities at that site. Faced with the potential of even greater expenses, Children's had little choice but to withdraw its application, lose its investment, and abandon the project. As such, Station KPLS(AM) was forced to seek authorization to operate from a temporary site, which precludes the Station from serving a greater portion of the surrounding community. Additionally, Children's must now begin the arduous task of finding a new site, complying with the County's regulations, and again, gambling that it will be approved.

Therefore, despite clear indications that the transmission facilities conformed with all state and local regulations, Children's lost over three years of time, and over \$240,000. The ultimate loser, though, was the public, which has been denied the

improved service which Station KPLS(AM) would have rendered. While Childrens' case may seem extraordinary, these types of decisions are made frequently. As such, the FCC must adopt uniform regulations which limit a local board's examination of proposed facilities.

### III. DISCUSSION OF PROPOSED RULE

In light of its experience in Riverside, Children's firmly supports the rules proposed in the NPRM. The proposed rules would establish a specific and limited period for consideration of new proposals, and limit the scope of the consideration to only those matters outside the power of federal agencies.

Specifically, the proposed rules establish time periods for local and state government agencies to review proposals to construct transmission facilities. These time limits are reasonable. The type and extent of construction required for any broadcasting tower is well established. Tower construction is a mature industry and all of the information required for a determination should be readily available. There is little reason for a planning commission to require more than an initial request for information or more time than the period that would be allowed under the proposed rule.

These rules are necessary in light of the often burdensome requests for information by local and state zoning boards. In the Riverside situation, the County requested biological, engineering and environmental impact reports. However, the ultimate disposition of the application did not rest on adverse findings relating to these subjects or other health or safety concerns. Rather, the

application was denied solely because citizens beyond the territorial limits of Riverside objected to the proposal.

If the proposed rules had been in effect, Riverside County's focus would have been limited to clearly defined criteria, and would have been required to respond much sooner. As such, under these rules, all broadcasters could reasonably predict the chances of their application's compliance with local standards before tendering an application, and would learn of the ultimate disposition of the proposals in a reasonable, timely manner.

Some comments already filed by state and local governments question the authority of the FCC to regulate local siting issues.<sup>1/</sup> The discussion below demonstrates, however, that the FCC retains authority to preempt local zoning boards, and such action is supported by clear precedent.

#### IV. FCC AUTHORITY TO PREEMPT LOCAL AND STATE REGULATIONS

The Supremacy Clause of the U.S. Constitution<sup>2/</sup> establishes federal law as the supreme law of the land. It is invoked where

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<sup>1/</sup> See Comments of the Office of the Attorney General, State of Connecticut; Comments of the Cable Communications Agency of the City of Indianapolis, IN; Comments of the Department of Transportation, State of Michigan.

<sup>2/</sup> Article VI, Clause 2 of the Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art VI, cl. 2.

both the federal government, either through Congress or a federal agency acting with appropriate authority, and a state or local government both attempt to regulate a particular matter.

Traditionally, state and local zoning boards have retained jurisdiction over proposals to construct transmission facilities within their respective territorial limits. The proposed rules would remove particular subject matters from their future consideration, and would enforce specific timelines for reviewing construction proposals. Since these subjects historically have been local and state issues, several petitioners have claimed that the proposed rules would be an illegal preemption of local authority. As noted below, they are not.

A. Standards Of Federal Preemption

Federal law may preempt regulation to the extent that it conflicts with federal law when the state law in question "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Mich. Canners & Freezers v. Agr. Marketing & Barg. Board, 467 U.S. 461, 469 (1984) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

The rule proposed in the Further Petition for Rulemaking would create a uniform regulatory structure for broadcast transmission facilities that will be in conflict with many current state and local zoning laws. Therefore, it will be necessary to show that these zoning laws will obstruct the proposed rules, and that the proposed rules are effectuating the purposes and objectives of Congress.

B. Past FCC Preemption of Local and State Laws.

The Communications Act of 1934 vested the FCC with the authority to promote the "rapid, efficient, nationwide and worldwide wire and radio communications service." 47 U.S.C. § 151 (1996). In order to effectuate this directive, Section 303(r) of the Communications Act gives the Commission the power to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter." 47 U.S.C. § 303(r) (1994). Congress gave the FCC this power, it has been noted, in order to "maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." FCC v. Pottsville Broadcasting, Co., 309 U.S. 134, 138 (1940).

In light of this broad authority over radio and wire communications, the FCC has repeatedly preempted state and local laws when deemed necessary. In New York State Commission on Cable Television v. FCC, 669 F.2d 58 (1982), the court reviewed the FCC's preemption of state regulations relating to MDS systems. In response to the New York State Commission's regulations that treated an MDS system as a cable system, which could have reduced the number of MDS systems that operated in the New York area, the FCC cited its policy in developing alternatives to wire-line cable systems, and preempted the regulations as an obstruction to the effectuation of this goal. The court affirmed the FCC's decision, finding that New York's policy would be an obstacle to the effectuation of the Commission's policy. Id. at 66.

Further, in Capital Cities Cable, Inc. v. Oklahoma Alcoholic Beverage Control Board, 467 U.S. 691 (1984), the Supreme Court upheld the FCC's preemption of an Oklahoma law requiring cable operators to block alcoholic beverage commercials on their systems. The Court made clear that FCC regulations have an effect equal to that of federal statutes, and determined that the state law was in direct conflict with federal statutes prohibiting the delineation of cable signals on the basis of content. 467 U.S. at 705.

Finally, in City of New York v. FCC, 486 U.S. 57 (1988), the Supreme Court upheld FCC rules which restricted local franchise authorities from enacting more stringent technical specifications than those set by the Commission.

Thus, the FCC has clear authority to preempt those state regulations which conflict with its regulations. As shown below, the Commission has exercised that authority specifically to regulate local zoning regulations relating to antenna facilities.

#### C. FCC Preemption of Local Zoning Laws

Over the past twelve years, the Commission has continuously been required to address local zoning laws and the restrictions placed on antenna systems. In several cases it has already preempted local zoning regulations.

In 1985, the FCC released a Memorandum Opinion and Order, responding to a request for declaratory ruling relating to the restrictions on the siting of amateur radio towers. The Commission declined to preempt local zoning law directly; rather, it reminded local zoning boards that they must reasonably accommodate amateur

radio operators' requests for authority to construct a tower, and to consider "the minimum practicable regulation to accomplish the local authority's legitimate purpose." Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, Memorandum Opinion and Order, 101 FCC 2d 952, 960 (1985).

Within a year, though, the Commission was required to re-address the preemption issue. Then at issue were restrictions on the siting of receive-only satellite earth stations. In re Preemption of Local Zoning or Other Regulation of Receive-only Satellite Earth Stations, Report and Order, 59 Rad. Reg. 2d (P&F) 1073 (1986). The Commission adopted a new rule, 47 C.F.R. §25.104 which, for the first time, established criteria for local zoning boards reviewing proposed construction projects. The rule preempted those regulations that differentiated between satellite and other antenna systems, unless the regulation contained a "reasonable and clearly defined health, safety or aesthetic objective; and d[id] not operate to impose unreasonable limitations on, or prevent, reception of satellite delivered signals." Id. at 1074

This rule was replaced in 1996 by new, more restrictive standards, which preempted local boards from prohibiting the placement of satellite dishes with a diameter less than two meters in industrial or commercial areas, and otherwise preempted all restrictions on dishes less than one meter. It further established procedures for the review of local zoning board decisions. In re Preemption of Local Zoning Regulation of Satellite Earth Stations, Report and Order, Further Notice of Proposed Rulemaking, 11 FCC Rcd

5809, 5814-15 (1996). Section 25.104 was amended again in August 1996, resulting in the preemption of those state or local regulations that resulted in unreasonable delays, costs, or signal quality. See In re Preemption of Local Zoning Regulations of Satellite Earth Stations, Report and Order, Memorandum Opinion & Order and Further Notice of Proposed Rule Making, 11 FCC Rcd 19276 (1996).

Not only has the FCC taken steps to preempt local regulations relating to reception antennas, but Congress also gave authority to the Commission to preempt state and local government restrictions which outright prohibit, or policies which create the effect of prohibiting, the placement of personal wireless service transmission facilities. Recognizing the need for the speedy roll-out of competition in the personal wireless services, Congress granted the FCC authority to preempt those regulations that would obstruct this goal. Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, §704 (1996) (codified at 47 U.S.C. § 332(c)(7) (1996)).

It is clear, then, that the Commission has the authority to preempt those state and local laws and regulations that obstruct or frustrate its authorized goals in connection with radio transmission and reception towers and antennas and in fact has consistently exercised that authority over the past decade. This power, though, is effective only if the FCC can show that obstacles are currently restricting the realization of the goals underlying the federal law. See New York State Commission of Cable Television and Capital Cities Cable, Inc., supra.

D. Necessity for FCC Preemption

In the Fifth Report and Order in DTV rulemaking proceeding, the Commission noted the necessity for a quick roll-out of the digital television service.<sup>3/</sup> Additionally, it noted that "[o]ne of the most significant issues in converting to digital broadcasting is the construction of new towers or the upgrade of existing towers." Id. ¶ 92. Further displaying the need for the quick implementation of digital television is the recent passage of the Balanced Budget Act of 1997, which requires that a portion of the current analog television spectrum be auctioned off in 2002, and reclaimed by the FCC in 2006.<sup>4/</sup>

As such, the FCC established ambitious construction periods for the transition to digital, requiring those network-affiliated stations in the Top 10 markets to complete construction by May 1, 1999, and those network-affiliated stations in the Top 30 markets by November 1, 1999. The remaining stations must complete

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<sup>3/</sup> In re Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Fifth Report and Order, 7 Comm. Reg. (P&F) 863 (1997). The Commission cited four reasons for the necessity of the accelerated roll-out of DTV:

1. To ensure the success of a free, universally available digital service,
2. To promote the strength of DTV service internationally, and to spur the American economy,
3. To reduce the disincentives to begin digital transmissions quickly, and
4. To quicken the recovery of spectrum for public safety, and future auctions.

NPRM, ¶ 10.

<sup>4/</sup> Balanced Budget Act of 1997, Pub. L. 105-33, 111 Stat. 251 (1997) (codified at 47 U.S.C. § 307(j)(14)(A)).

construction by May 1, 2002. Fifth Report and Order, 7 Comm. Reg. (P&F) ¶ 76.

Thus, it is clear that there are statutory and regulatory deadlines requiring broadcasters to begin constructing their digital facilities quickly. As discussed below, however, state and local zoning boards serve as consistent obstacles to the timely construction of new facilities.

E. The Obstacles

There is substantial evidence that Childrens' problems with the County of Riverside typify a situation that is endemic across the country. In the Further Petition for Rulemaking, the petitioners cited several specific situations where the local and state zoning boards have created long-term, expensive delays, over routine matters.<sup>5/</sup>

In addition, there is evidence of future, substantial delays in the construction of new broadcast facilities due to the scarce number of qualified construction crews. It is anticipated that over 500 towers will need to be built or modified to facilitate the transition to DTV.<sup>6/</sup> Many FM licensees will be permanently removed from their current tower sites as a result. Further, the facilities for DTV are required to be "tall" towers, i.e. over 1000 feet, and only a small number of construction crews are currently qualified

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<sup>5/</sup> See Further Petition for Rulemaking, pgs. 10-15.

<sup>6/</sup> See Joel Brinkley, "Crews are Scarce for TV's High-Danger Task", New York Times (May 4, 1997).

to construct such towers.<sup>2/</sup> The clear underlying scarcity of construction crews will make it essential that tower construction be accurately scheduled, without delays that could result in crew downtime, or result in the inability to reschedule crews in time for meeting FCC deadlines and station financing commitments.

Local and state zoning boards will serve to only exacerbate these delays. As shown in the Further Petition for Rulemaking, these boards request burdensome reports, and respond slowly to proposals. In Childrens' case, despite the fact that after a three year review the governing administrative body found that the proposed facility conformed with all regulations, it ultimately denied the application. As the examples in the Further Petition for Rulemaking showed, Children's is hardly the only licensee to suffer a similar fate. The transition to DTV will only heighten and further exacerbate the impact of the obstacles caused by local boards. Ultimately, these obstacles will harm the public interest in receiving local programming.

Clearly, the FCC must adopt national rules establishing strict time periods to avoid the continuation of such time consuming and futile exercise. Congress created the urgency for the DTV transition to be completed quickly, and local and state zoning laws have been shown to be substantial obstacles, not only for DTV facilities, but for the construction of all broadcast facilities. Congress has mandated the FCC to create a nationwide efficient radio

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<sup>2/</sup> See Engineering Statement of Lynn Claudy, ¶ 10 (contained in the NAB/AMSTV Further Petition for Rulemaking (filed on May 30, 1997)).

communication service. That service must also be maintained and modernized or it will lose its competitive edge and ultimately become unable to serve evolving public needs. Our era of rapidly changing and developing technology requires the construction of new transmission facilities and the modernization and rebuilding of others efficiently and expeditiously. The FCC cannot allow irrational concerns and local regulatory delay to frustrate congressional policy and its efforts to implement it. For these reasons, and those listed in the Petition for Rulemaking, Children's Broadcasting Corporation firmly supports the proposed rules.

V. CONCLUSIONS

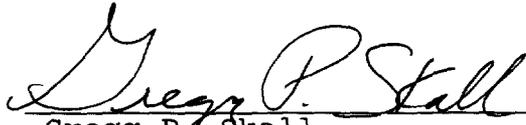
Clearly, then, there is a definite need for federal preemption of state and local zoning laws insofar as they relate to the construction of broadcast facilities. As shown above, the Commission retains well-established authority to preempt those state and local laws which obstruct its authorized goals and purposes. Further, Congress has consistently called for the prompt transition to digital television service. Because of the effect of DTV construction on the need for construction of all broadcast stations, and because of the separate needs of radio broadcasters to upgrade and modernize their stations, federal preemption should extend to all broadcasting services.

Therefore, in light of the obstacles that state and local zoning regulations imposed upon in the construction of broadcast

facilities, Children's Broadcasting Corporation urges the Commission to adopt the proposed rules.

Respectfully submitted,

**Children's Broadcasting Corporation**

By   
Gregg P. Skall  
Its Attorney

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