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Office of the Secretary
 Federal Communications Commission
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Federal Communications Commission (FCC)
Notice of Proposed Rule Making(NPRM) - MM Docket No. 97-182

The California Department of Transportation, Aeronautics Program, submits its comments on the FCC Proposed Rule Making, MM Docket No. 97-182 regarding the preemption of state and local zoning and land use restrictions on the siting of broadcast station transmission facilities. This department is the State's aviation agency responsible for the permitting of its public-use airports. The State Aeronautics Act also mandates the protection of the public interest in aeronautics and aeronautical progress through its roles and responsibilities, as defined in the Act. Accordingly, the Aeronautics Program has the following concerns with the proposed NPRM:

1. The FCC's NPRM should include provisions for specifically **not** preempting State and local laws that apply Federal Aviation Regulations (FAR) Part 77 criteria.

FAR Part 77, "Objects Affecting Navigable Airspace," among other things, establishes standards for determining obstructions in navigable airspace and it provides for aeronautical studies of obstructions to determine their effect on the "safe and efficient use of airspace" (FAR Part 77.1). The FAA requires that it be notified, via FAA Form 7460-1, of any construction that may affect navigable airspace. The FAA's aeronautical analysis will result in one of the three following determinations regarding a proposed project:

- (1) The proposed project would **not** exceed any standard in FAR Part 77 and would **not** be a hazard; or
- (2) The proposed project **would** exceed a standard in FAR Part 77, but **would not** be a hazard; or
- (3) The proposed project **would** exceed a standard in FAR Part 77, and it **would** be a hazard to air navigation.

If an FAA aeronautical study determines that a proposed project **would be a hazard** to air navigation, the FAA does **not** have the authority to prohibit the construction of that hazard. **Only State and local laws and zoning can prevent the creation of that hazard.** For example, California Public Utilities Code (PUC) Section 21659 states, in effect, that no person may construct or alter any structure or permit anything that the FAA has determined

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to be a hazard to air navigation without first getting a permit from the Aeronautics Program. This has not been tested in recent history, however, the Department would probably not issue a permit for any construction that the FAA has determined will be a hazard. Therefore, this concern and others are summarized below. We suggest, at a minimum, that items (a)-(c) be incorporated into the NPRM:

- (a) If an FAA aeronautical study is required per FAR Part 77, then the FCC's "reasonable period of time" clock should start only after the FAA has produced their final determination regarding the project's effect on navigable airspace;
 - (b) If the result of an aeronautical study is that the project would exceed a standard in FAR Part 77, but **would not** be a hazard to air navigation **and** the project is approved at the appropriate State or local level, the project should be required to include marking and lighting in accordance with the FAA Advisory Circular 70/7460-1, Obstruction Marking and Lighting;
 - (c) The NPRM should specifically disapprove any proposed facility for which the FAA has determined that the project would either create a hazard to air navigation or would interfere with any existing **or planned** radio/electronic navigation aid;
 - (d) In the State of California, oftentimes a "no hazard" determination by the FAA is misinterpreted to mean that it is an acceptable land use. In fact, a proposed facility may or may not be an acceptable land use in accordance with the local land use zoning even though a "no hazard" determination may have been made by the FAA. Once again, it is the local zoning ordinances that must enforce the airport compatibility of a tower siting regardless of the hazard determination.
2. The Runway Protection Zones (RPZ) are located directly off the ends of a runway. It is recommended by the FAA that these zones be kept free of any structures. If the airport does not own the RPZ, the airport depends upon local zoning and the airport land use plan to protect the RPZ as well as the flight paths associated with the operations of the airport.
 3. If any state or local government decision denies a request under this rule, it must be made in writing, supported by substantial evidence, and delivered to all applicants within *five* days. This is a most unreasonable time frame. Many local government bodies meet once a month for the reviews and decision-making rulings. All time frames for reviews and decisions should be within the scope of reasonableness for the promulgating authority.
 4. The State of California has statutes which require counties to prepare airport comprehensive land use plans (CLUPs) for each of the county's public-use airports and to form an Airport Land Use Commission (ALUC). The ALUC must review projects which are deemed inconsistent with the City/County General and/or Specific Plan(s) which are located within the CLUP's planning boundary. Thus, the review is required **only** if the proposed project conflicts with the current or planned zoning. If this process were circumvented, the safety of the airport environs would be compromised as well as the safety of the flying public. Also, an improperly sited tower/facility could potentially close an airport or impede its future growth.

5. The State of California has a streamlined permitting process instituted through the California Government Code Sections 65920 to 65957.1 as the Permit Streamlining Act regarding the review and approval of development projects. Thus, properly sited facilities should not impede the needed progress toward a timely roll-out of digital TV (DTV).
6. The petitioners' proposed preemption rule places the burden of proof on the zoning entity relative to any and *all* state or local land-use, building, or similar law, rule or regulation that would (*allegedly*) impair the ability of federally authorized television *or radio* operators to place, construct, or modify broadcast transmission facilities. Who, then, holds the responsibility to preserve, protect and maintain the safety of an airport and its environs? In California law (PUC Section 21675.1(f)), the airport operator becomes immune from liability for damages to property or personal injury if a local agency overrules a decision by the Airport Land Use Commission (ALUC) on a proposed project. In the case of a preemptive ruling, would the liability be transferred to the owner/operator of the broadcast transmission facility? The liability aspects to this ruling are not discussed and should be made clear to the reviewing agencies prior to any final ruling on this docket.
7. The term "broadcast transmission facilities" has a larger meaning than seems to be necessary: it includes broadcast antennas, *associated buildings*, hardware and cables in addition to the tower itself. Thus, the siting of a particular "tower" may incorporate a much larger area than the tower alone.
8. Why are radio operators to be included in the ruling? And why are noncommercial stations included as well? How will noncommercial usage be administered? Will the preemptive ruling include amateur radio operators and/or those using the "experimental authorization" or "special temporary authorization?" These appear to be included in the definition of "broadcast operator." The veil of an accelerated schedule for the roll-out of DTV is used as the basis of the preemption request. However, the proposal does **not** appear to preclude any one entity from the opportunity to circumvent state and local laws and zoning regulations. We object to the all-encompassing aspects of this proposed preemption. We believe that the petitioners' request should be limited *only* to new DTV construction including the aforementioned caveats. Furthermore, it should not include facility relocation, radio operators, amateur or non-commercial broadcast operators, or those with experimental or temporary authority as outlined in the proposed NPRM.
9. The preemption of state and local zoning and other land use regulations, to the extent that "they unreasonably prohibit or delay the DTV roll-out (*and other ongoing broadcast transmission facilities construction*)," is based upon the petitioners' claim that the Commission has the legal authority to engage in such preemption where it is within the scope of its Congressional delegated authority. Is it to assume, then, that the legal authority equates with the right to ignore the safety of the public? We disagree with the notion that the proper siting of broadcast facilities will be unnecessarily delayed, especially when the local land use zoning ordinances are followed by the petitioning entity.

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10. It appears that the FCC would have overruling authority as the arbitrator in a dispute resolution process. Thus, the Commission can issue an order vacating the decision of the state or local government, thereby granting the request to place, construct or modify a broadcast antenna facility. In California, the mediation of disputes in accordance with Government Code Section 66031, which allows the parties to select a mutually acceptable mediator, should be considered. Thus, the FCC may or may not act as mediator.
11. Within the California Environmental Quality Act (CEQA), some type of environmental review is undertaken for all projects including towers. These reviews are vital to the planning process. However, it appears that the process would preempt most, if not all, of the CEQA review/comment. Not only would the potential impacts of the proposed development be unknown, it would deprive the public of the opportunity to provide input into projects which may affect their lives, health, and the welfare of a community.
12. Item No. 11 of the FCC's NPRM defines "circumstances beyond a broadcaster's control" as "difficulties in obtaining zoning and other approvals" which may "interfere with its ability to meet construction schedule requirements." Further, it defines these reasons of "countervailing importance" to "important state and local roles in zoning and land use matters and their long-standing interest in the protection and welfare of their citizenry". In essence, the petitioners are noting the importance that the states and local governments place on zoning and land use regulations, yet the proposed NPRM, in effect, makes these efforts inconsequential. This preemption would provide broadcasters with virtual carte blanche to circumvent laws, reviews, and any form of public scrutiny. We do not agree that digital TV is of such countervailing importance that it should override the safety and welfare of our citizenry.

In summary, the broad-brush nature of the proposed preemption has the potential to undo years of work and effort at both the state and local level relative to zoning and (airport) land use. Instead of receiving preemptive authority, the broadcast operators of DTV (and others who may be included in the ruling) should be required to site/relocate or reconstruct their facilities in strict compliance with the local General and/or Specific Plans. This will provide the broadcast operator with the most effective means of meeting an accelerated roll-out schedule for DTV.

Sincerely,


MARLIN BECKWITH, Program Manager
Aeronautics Program

c: National Association of State Aviation Officials
SWAAE, Mr. Randy Berg, Deputy Director,
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