

permittee's authority. Citing, among other things, the potential interference of the AM tower to local television reception, the zoning board denied the permittee's application to construct the tower. *Comments of Richard L. Harvey, WBHX*, at 3.

7. Burdensome environmental review and requirements

- * Station KRPQ(FM), Rohnert Park, California, reports that in connection with its application to relocate its existing tower, it was forced to conduct numerous environmental studies involving the impact of the proposed facilities on wildlife, including non-endangered and non-protected plants and animals. *Comments of Ronald E. Castro and Jack W. Fritz II, d/b/a Results Radio of Sonoma, L.P.*, at 15-16.
- * Fant Broadcasting's land use attorneys report that an Environmental Impact Study is often necessary in New York in connection the construction of broadcast towers. Such studies often cost between \$100,000 and \$250,000, and the process takes approximately 6 to 9 months to complete. *Comments of Anthony J. Fant, Fant Broadcasting Company of Ohio, and Fant Broadcasting Company of Massachusetts*, at 3-4.
- * The City of Huntsville, Alabama, has detailed landscaping requirements in its newly adopted telecommunications ordinance. *Comments of Alabama Broadcasters' Association*, at 3.

8. Special use or rezoning requirements applied to existing facilities

- * Station KDOC-TV, Anaheim, California, reports that it was denied a special use permit to modify an existing wooden tower. It took four years for the city to deny the application. *Comments of Golden Orange Broadcasting Co., Inc., Appendix 1*, at 2.
- * Station WHNT-TV, Huntsville, Alabama, has had its broadcast facilities at the present site since 1969. Huntsville has recently enacted an ordinance which resulted in making the WHNT-TV tower a "non-conforming" use of the land on which it is situated. This use has been grandfathered, but

modifications are prohibited, thereby preventing the station from placing a DTV antenna upon the same tower. In order to obtain a variance from the local ordinance to allow the addition of the DTV transmitter, the licensee's local counsel estimates that the process could take up to four years (including appeals), thereby hindering WHNT-TV's efforts to comply with the Commissions' DTV transition schedule. *Comments of The New York Times Broadcasting Service, Inc.*, at 2-4.

- * Station WAWZ(FM), Zarepheth, New Jersey, reports that it has been denied a variance to replace its existing tower. The existing tower is located in the Watchung Mountain Range in an area that has been zoned for residential use. No homes were built in the area for twenty years after station WAWZ(FM) obtained a use variance and built a 226-foot tower on the property. The station seeks to replace the tower with a higher tower to be placed within 100 feet of the existing tower in order to better serve the area. The new proposed single tower would take the place of two towers, and experts say values of surrounding property will not be adversely affected. *Comments of Pillar of Fire*, at 1-2.

- * Station WBUX(AM), Doylestown, Pennsylvania, reports that it is seeking to increase the height of its broadcast tower. It was granted approval for this modification by the FCC in March 1992, and, since that time, has sought a conditional use permit from the local Board of Supervisors. Despite the informal approval of the Board before the application was submitted, a well-organized citizens group has caused the Board to hold hearing after hearing seeking new information. The station is currently pursuing an appeal from the Board's effective rejection of the application and, as of this point, has spent approximately \$100,000 in legal and consulting fees in pursuing its application. *Joint Comments of Named State Broadcast Associations*, at 5-6.

- * The Council for Public Television, Channel 6 Inc., licensee of station KRMA-TV, Denver, Colorado has reported that its current transmission facilities have recently been classified by county officials as a "non-conforming use," thereby prohibiting any modifications to the tower, including the mounting of DTV equipment. As a result, KRMA-TV will

have to find another location for its DTV tower. *Comments of Association of America's Public Television Stations and the Public Broadcasting Service*, at 7.

- * The tower of station KMGH-TV, Denver, Colorado, is located, along with towers of other stations, upon Lookout Mountain in Jefferson County, Colorado. KMGH-TV's tower has been located on this mountain since the 1950s. However, the County recently adopted new ordinances and regulations which have had the effect of rendering the placement of towers on the mountain as a "non-conforming use," thereby prohibiting any modification to the towers. As a result, the station will be unable to locate its DTV antenna upon its tower as it desires without undergoing a lengthy and expensive zoning variance proceeding. *Comments of McGraw-Hill Broadcasting Company, Inc.*, at 2-3.
- * Communications Facilities, Inc. ("CFI") owns and maintains a tower atop Price Mountain in Montgomery County, Virginia. The tower currently supports FM translators, an STL, and commercial wireless services. CFI reports that the tower is in need of replacement because of its age. However, the County has rezoned the area as residential and replacing the tower in the same location would not comply with local zoning rules. *Comments of Communications Facilities, Inc.*, at 2
- * Florida SportsTalk, licensee of WMOP, Ocala, Florida, is in the process of purchasing station WGGG, Gainesville, Florida. Florida SportsTalk reports that a moratorium on new tower construction and tower modification has been enacted by the city of Gainesville, thereby delaying the closing on the purchase. Even though the tower has been on its current site since 1985, the city has imposed certain conditions in order to allow the tower to remain at the present site since the site has recently been zoned as residential. The conditions are that the "tower be converted to a monopole," and that a cellular operator be placed on the tower. *Comments of Florida SportsTalk, Inc.*, at 1-2.

9. **Ordinances requiring co-location**

- * Shenandoah Valley ETV Corp. licensee of station WVPT.

Staunton, Virginia reports that the local county has recently adopted a new telecommunications ordinance that will require all new or modified broadcast towers to be capable of holding three antennas. *Comments of Association of America's Public Television Stations and the Public Broadcasting Service*, at 7-8.

- * The City of Huntsville, Alabama has adopted an ordinance requiring tower applicants to negotiate with third parties about future co-location on the tower. Also, the Huntsville Ordinance requires that broadcast towers be capable of supporting a minimum of two UHF antennae and one FM antenna in addition to other radio services and microwave dishes. Further, the ordinance states that there may never be any more antennas than there are television licensees in the city. *Comments of Alabama Broadcasters' Association*, at 3.
- * The licensee of 6 AM and 14 FM stations reports of an ordinance adopted recently in Cedar Hill, Texas, which is located in the Dallas/Fort Worth market. Cedar Hill is home to more than a dozen towers over 1,000 feet in height. The ordinance requires that towers be capable of supporting a minimum number of TV and FM transmitters, that additional building permits be obtained for any addition or replacement of antennas or transmission lines, and that certain inspections and maintenance requirements be observed by the owners of new and existing towers. Coincidentally, the ordinance was adopted in September 1997. *Comments of Susquehanna Radio Corp.*, at 3-4.
- * A telecommunications ordinance recently adopted by the City of Huntsville, Alabama, requires that broadcast towers be capable of supporting a minimum of two UHF and one FM antenna in addition to other radio services and microwave dishes. Further, the ordinance states that there may never be any more antennas than there are television licensees in the city. *Comments of Alabama Broadcasters' Association*, at 3.

10. Multiple layers of review (and opportunity for endless appeals) relating to aviation concerns

- * The permittee Station WMMF-TV, Fond du Lac, Wisconsin, reports that its construction of its FCC-authorized facilities

has been delayed for eleven years largely because of the opposition of state and local aviation advocacy groups. These groups have litigated the tower application before the FAA and the state's Bureau of Aeronautics. *Comments of Harry J. Pappas, Stella Pappas, and Skycom, Inc.*, at 3.

- * The licensee of WLEX-TV reports that tower proposals in Lexington, Kentucky, are often opposed by aviation interests, despite approval of the tower construction by the FAA. Most tower proposals must be approved separately by the Kentucky Airport Zoning Commission. *Comments of WLEX-TV, Inc.*, at 2-3.
- * *See Comments of Cosmos Broadcasting Corporation*, at 2 (six years, including appeals to Kentucky Supreme Court).
- * The Growing Christian Foundation has received a construction permit to construct station KYPL-FM, Yakima, Washington, on a site currently occupied by a tower owned by Butterfield Broadcasting. The Growing Christian Foundation applied for a Special Use Permit from the Yakima County Planning Department. Normally, such an application is handled by the department's staff, but the Washington State Department of Transportation, Aviation Division, despite FAA approval, intervened in the proceeding, necessitating a public hearing. The hearing was set for November 20, 1997. Because of time limits for appeals of any decision, the earliest that approval can be obtained is January 1998. Because of winter weather, the tower cannot be built until March or April 1998. Without the intervention of the State's aviation authorities, the tower could have been built in October 1997. The purpose of the Aviation Division's interest in the hearing is to determine if the tower would be an obstruction to aviation. *Comments of Butterfield Broadcasting and the Growing Christian Foundation*, at 2.
- * Licensee Paul Hedberg reports of his attempts to site a 300-foot FM tower in Spirit Lake, Iowa in 1984. Hedberg had selected a site near a road and had received the approval of the FAA, the County Supervisors, and the Zoning Board of Dickinson County. The last step in the local approval process was a meeting before the Dickinson County Board of Review. The Board, in a 3 to 2 vote, denied permission to place the

tower in the site selected. The only objection at the hearing was from a pilot who argued that the tower was a hazard to air navigation. His reasoning was that during bad weather, he navigates by following the road by which the tower was to be located. Using the road was necessary to the pilot because he was not rated to navigate by instruments alone. To avoid the expense of an appeal to state court, Hedberg was forced to find another site. *Comments of Paul C Hedberg, Hedberg Broadcasting Group*, at 1.

11. Setback limits; “Fall radius”

- * A station owned by the commenter, (the station and location are not named), has been attempting, since 1991 to increase the height of its 600 foot tower to 750 feet. Under the local zoning ordinance, tower construction will not be approved unless the owner can prove that the fall radius of the tower will not overlap neighboring property. The neighboring property owner has indicated that he will agree to withdraw his objections to the constructions for a \$100,000 payment. Negotiations are still under way. *Comments of The Cromwell Group, Inc.*, at 1-2.

12. Diminishment of property values

- * Station WAWZ(FM), Zarephath, New Jersey, reports that concerns regarding diminution of property values were cited as one of the reasons for prohibiting the construction of a new tower to be located within 100 feet of the old tower. *Comments of Pillar of Fire*, at 2.
- * Station WNVR(AM), Vernon Hills, Illinois, reports concerning its effort to relocate its transmission facilities. Objections were entered by local residents, a corporation owning nearby property and the Village of Lakewood. One of the concerns asserted by the parties was that the towers would diminish the value of neighboring property. *Comments of Polnet Communications, Ltd* at 3.
- * *See Comments of Wisconsin Board of Regents, Attachment 1*, at 3.

13. **Disregard for federal interests and other impediments**

- * Station WBHX(FM), Tuckerton, New Jersey, reports its unsuccessful efforts to site an FM broadcast tower. During an appeal to Superior Court, the court held: “Just because a distant federal agency for largely technical reasons focuses attention on a tiny spot of land it deems suitable for a broadcast antenna is no reasons to conclude under state zoning and environmental policy, a township characterized by extensive pinelands should bear the burden it imposes or the detriment it foists on the public.” *Comments of Richard L. Harvey, WBHX*, at 4.
- * The permittee of WSUM(FM), Madison, Wisconsin, reports that it received a construction permit from the Commission in October 1996, and is still trying to get permission from local authorities to construct the tower. The attitude of the local town board chairman is summarized by the quote, “I never owned a car, why do you need a new radio station?” He is personally opposed to the construction refuses to consider the facts of the case. *Comments of Board of Regents of the University of Wisconsin System*. Attachment 1 at 1.
- * A newspaper article, attached to Pillar of Fire’s comments, quotes a member of the Bridgewater Board of Adjustment as saying, “Just because the FCC says something, I place no credence in that locally.” *See Comments of Pillar of Fire*, at Exhibit 2.
- * Station WZID(FM), Manchester, New Hampshire, reports that in connection with its application for a zoning exception to relocate its tower across the street from the existing location, it was asked to “contribute” \$15,000 to the local zoning authority to “help fund” a telecommunications study that the authority was to undertake. *Joint Comments of Named Broadcast Associations*, at 6.
- * Capitol Broadcasting Company, permittee of experimental DTV station WRAL-HD, reports that the City of Raleigh refused to act on its application to move its studio-transmitter-link tower (necessary for HDTV operation) from one side of the building to the other because of an unrelated civil action against the City Council involving Capitol’s news operations.

(The council has subsequently approved the application.)
Joint Comments of the North Carolina and Virginia Broadcasters Associations, at 5.

- * North Texas Public Broadcasting, Inc., licensee of station KERA, Dallas/Fort Worth Texas, and station KDTN, Denton, Texas, has been stymied by local officials in its attempts to begin construction of a DTV tower. As a result of its attempt to have land rezoned to allow the tower, the municipal council denied the licensee's rezoning request, imposed a 120-day moratorium on all tower-related zoning applications and building permits, and then adopted, for the first time ever, broadcast facility construction regulations. *Comments of Association of America's Public Television Stations and the Public Broadcasting Service* at 6-7.
- * Two licensees report that local officials have severely limited the potential sites for radio towers in Akron and Youngstown, Ohio and Las Vegas, Nevada. These restrictions, reported by the licensee of stations WNEO, Akron and WEAO, Youngstown, Ohio, and the licensee of station KLVX, Las Vegas, have resulted in overly inflated rental prices for the land. *Comments of Association of America's Public Television Stations and the Public Broadcasting Service*, at 7.
- * Station KDOC-TV, Anaheim, California, reports that it has encountered significant difficulty in obtaining local permits from the City of Irvine to construct a necessary microwave tower for signal relay to the station's transmitter site. After being assured, by letter from city planning officials, that a conditional use permit was unnecessary, the station invested in equipment and engineering. However, from December 1993 through January 1995, KDOC-TV struggled to obtain a simple building permit because the staff personnel responsible for issuing such permits refused to issue the permit because no conditional use permit had been issued. Public hearings were held, and KDOC-TV was eventually forced to comply with 26 conditions on the use of the site. *See Comments of Golden Orange Broadcasting Co., Inc., Appendix 1*, at 2-3.
- * Sunburst Media reports that local authorities in Springfield, Missouri, have made it "virtually impossible" to construct a tower over 50 feet. Because of political pressure, the county

commission, which must approve such structures, generally dismisses any application if any objection to the construction is received. *Comments of Sunburst Media*, at 1.

- * The permittee of WFFF(TV), Burlington, Vermont, reports on its considerable difficulties in constructing a new antenna to serve as the Burlington, Vermont/Plattsburgh, New York market's first over-the-air Fox affiliate. As a result of over three years of failed efforts to locate its transmitter on Mt. Mansfield — where the CBS and ABC affiliates have their transmission facilities — WFFF was forced to locate in an area where it serves 32% fewer people than it would be able to serve at its authorized site on Mt. Mansfield.

After being thwarted in its effort to locate its transmitter on Mt. Mansfield, Champlain Valley Telecasting, Inc. decided to locate its tower on Terry Mountain where it had to obtain the approval of the Adirondack Park Authority. The permittee reports that substantial resources were expended obtaining this approval, and that it had to invest approximately \$500,000 in costs to upgrade the tower of station WPTZ with which WFFF was collocating its transmitter. If WFFF is eventually able to move its transmitter to the superior Mt. Mansfield site, it will be unable to recoup these costs.

A Vermont Legislator sympathetic to CVTI's concerns introduced a bill to abolish the local Mt. Mansfield siting board. As a result, CVTI was admitted to the board. However, other problems continue to arise. Local environmentalists are concerned that the construction of a new tower will disturb the nesting habits of a local bird, and the need for a construction permit from the Town of Stowe, Vermont will be challenged. Further, an extensive application must be submitted to the state's District Environmental Commission. *See Comments of Champlain Valley Telecasting, Inc.*

B. The State And Local Obstacles Identified In The Comments Will Unnecessarily Impede The Implementation Of DTV And Broadcast Construction Generally

1. Delay and expense

The comments filed by broadcasters in this proceeding describe the extraordinary length of time that broadcast siting applications can take to be processed by local authorities and, if necessary, reviewed by the courts. Particularly striking are the comments reflecting (i) drawn out local proceedings which finally result in denials of construction applications;¹⁵ and (ii) FCC-authorized facilities and improvements which are never constructed because of local opposition.¹⁶ To say the least, the comments express a high degree of frustration with local procedures. *See, e.g., Comments of New Jersey Broadcasters Association*, at 3 (“Because local citizens are often emotionally charged and unreasonable when it comes to broadcast transmission facilities, it is virtually impossible for broadcasters to obtain approval to site, construct, and/or modify broadcast transmission facilities, regardless of the time, monies, and effort expended by broadcasters to address local/state concerns. It is common practice for local/state authorities to defeat broadcasters’ requests for no other reason than the illogical attitude of ‘not in my back yard.’”); *Comments of Thomas H. Moffit, Sr. and WVCH Communications, Inc.*, at 9 (“After this horrendous lengthy experience that was financially costly and consuming critical years of a life, it should be apparent that AM radio station and other broadcast facilities are going to be in peril due to the eventual need to move and construct

¹⁵ *See, e.g.,* Comments of Michael B. Levine, President, Glickon Broadcasting, Inc. and Group M Communications; Freedom Communications; Silver King Broadcasting of Massachusetts.

¹⁶ *See, e.g.,* Comments of Silver King Broadcasting of Massachusetts; Comments of Goetz Broadcasting Corporation.

transmission facilities throughout the nation. There must be supervisory control by a continuing agency such as the FCC who has the technical knowledge and understanding of the need for the service to the public”); *Comments of Ronald E. Castro and Jack W. Fritz II, d/b/a Results Radio of Sonoma, L.P.*, at 6 (“It is the strong opinion of these commenters that indeed, state and local regulations, including an avalanche of recently enacted ordinances prompted by the proliferation of cellular telephone tower facilities, have caused ‘insuperable obstacles’ to existing and emerging broadcasters, and are severely frustrating their attempts to serve their communities.”); *Comments of Golden Orange Broadcasting Company, Inc.*, App. I at 4 (“With a lack of federal guidelines or preemption of control, our experience suggests that a city can always find new ways to frustrate an otherwise straight-forward process.”); *Comments of Goetz Broadcasting Corporation*, at 1 (“The current absence of federal preemption of local restrictions is causing havoc with the ability to obtain reasonable land for tower construction.”); *Comments of Polnet Communications, Ltd.*, at 4 (“[S]trong opposition to *any* new or expanded tower site can persuade a local zoning authority to overstep its regulatory authority to make zoning decision for reasons other than the traditional public health and safety reasons.”).

This is not to imply that the examples of delay set forth in the comments are all attributable to obstructive local governments. To the contrary in many cases, local governments are simply dealing the best they can with local citizens who raise a laundry list of objections — including technical issues, such as potential health effects of human exposure to RF energy, which are outside the technical expertise of the local government. As a result, applications are delayed for months and months while studies are performed and further comment is received on issues which, at least with respect to RF emissions, are within the jurisdiction of this Commission.

Necessarily associated with such delays is extraordinary expense. The comments in the record again plainly demonstrate that it is not uncommon for an FCC licensee or permittee to spend hundreds of thousands of dollars in connection with a broadcast siting application that is opposed by aggressive and organized community interests.¹⁷ In the context of conversion to DTV, these costs may be prohibitive.¹⁸ Even without local siting proceedings, television broadcasters are already faced with tremendous start-up costs in purchasing and installing DTV facilities. If forced to spend hundreds of thousands of dollars in local land use and zoning proceedings in addition to their DTV capital expenditures, not only the rapid conversion to DTV but also the very provision of the service will be threatened.

Time and again, the comments give examples of FCC-approved facilities that are subjected to inordinate delays and attendant expense. Taken at face value, the broadcasters' actual experiences demonstrate that local construction applications can — and often do — take years to resolve. In the context of an aggressive DTV build-out, such processes are inconsistent with the federally mandated implementation schedule. To the extent that this Commission can truncate this process by removing from local discussion issues that are within the exclusive jurisdiction of the Commission (or collateral federal agencies), the Commission should do so. Likewise, to the extent that the Commission can ensure that prompt and efficient state and local decisions are reached by adopting

¹⁷ See, e.g., *supra* Section III.A.2.

¹⁸ See Comments of Association of America's Public Television Stations and the Public Broadcasting Service (noting that it will be hard enough to raise sufficient funds for transition to DTV without the uncertainty and costs associated with unreasonable state and local regulations; funds are needed for construction not litigation); Comments of Paxson Communications Corporation, Cox Broadcasting, Inc., and Media General, Inc. (noting that impact of local regulatory impediments will be most troublesome in small markets where broadcasters are faced with limited budgets for DTV conversion).

procedural guidelines for local action, again the Commission should do so.

2. Consideration of factors which are within jurisdiction of the federal government

The broadcasters' comments give many examples of state and local government decision making intruding upon issues which are subject to comprehensive federal regulation.

Perhaps the most egregious example of such local "second-guessing" of federal regulatory determinations is a requirement that broadcasters demonstrate that their proposed facilities are in the "public interest."¹⁹ *See also Butters v. Hauser*, 125 Idaho 79, 867 P.2d 953 (1993) (affirming denial of construction permit on grounds that there was no evidence that the improved facilities would benefit the local economy). Broadcasters are subjected to a public interest determination by the Commission when filing construction permit applications. The grant of such an application is *prima facie* evidence that the proposed facilities are in the public interest and, therefore, should not be subject to further review on the state or local level in connection with this determination.

The most commonly cited example of duplicative local proceedings concerns allegations of potential harmful health effects of exposure to RF energy.²⁰ As pointed out by NCAB/VAB in their comments, "As a practical matter, no elected public official can afford to be perceived as insensitive to a constituent's concern about a health or safety issue, even if the concern is plainly without any

¹⁹ *See, e.g.*, Comments of Harry J. Pappas, Stella A. Pappas, and Skycom, Inc., at 6; Comments of Polnet Communications, Ltd., at 4, n. 3, 5.

²⁰ *See, e.g.*, Comments of WLNE(TV), New Bedford., Mass.; Comments of Thomas H. Moffit, Sr.; Comments of Freedom Communications, Inc.; Comments of Ronald E. Castro and Jack W. Fritz II, d/b/a Results Radio of Sonoma, L.P. In addition to the referenced comments, NAB/MSTV are informed that some local jurisdictions have adopted RF standards which differ from the standards adopted by the FCC. To the extent that these standards subject broadcasters to differing regulatory requirements, the local standards should be preempted.

factual basis.”²¹ As a result of this practical political constraint, broadcasters often find themselves embroiled in local disputes concerning proposed RF-emitting facilities. As noted by one commenter with extensive experience in local land use matters, due to the inequitable political position between a broadcast applicant and local citizens, “the [local] board will often prefer a court to order issuance of a permit rather than taking the political ‘heat’ that would result from issuing the permit themselves.”²² While concerns over RF emissions should not be trivialized, they are the subject of explicit and comprehensive federal regulation and therefore are beyond the scope of legitimate local regulation.²³

Similarly, broadcasters are sometimes subjected to local regulation concerning RF interference issues and tower marking, painting and lighting issues.²⁴ Again, these are issues which are comprehensively regulated at the federal level and are, therefore, inappropriate for local regulation.²⁵

It should be expected that opponents of tower construction will continue to raise objections to towers based on these factors unless preempted by the Commission.²⁶ These areas, which are

²¹ Comments of North Carolina Association of Broadcasters and Virginia Association of Broadcasters, at 6.

²² Comments of Anthony J. Fant, Fant Broadcasting Company of Ohio, and Fant Broadcasting of Massachusetts, at 3.

²³ See *infra* Section IV.C.1.

²⁴ See, e.g., Comments of Richard L. Harvey, WBHX, at 3.

²⁵ See *infra* Section IV.C.2.

²⁶ The attitude of these local opponents of tower construction is well-demonstrated by the comments filed in this proceeding expressing unfounded RF radiation objections. See, e.g., Comments of Ergotec Assoc., Inc., at 2; Comments of Hardwick Action Committee, at 3-4; Comments of the City and County of San Francisco, Declaration of Richard J. Lee.

regulated by the federal government, should not be an opportunity for “NIMBY” proponents to delay and unnecessarily complicate local proceedings. *See Comments of Ronald E. Castro and Jack W. Fritz II, d/b/a Results Radio of Sonoma, L.P.*, at 13 (“Thus, local and state governments have taken over as the *de facto* regulators of broadcast service allocation, with the practical effect of preempting the FCC and frustrating its laudable goals of providing a competitive, reliable and effective commercial broadcast service.”).

3. Other Obstacles

The comments also demonstrate other obstacles to the construction of broadcast facilities. For example, many local governments utilize “aesthetic” considerations in connection with their processing of broadcast applications.²⁷ For example, WFLI-TV, Cleveland, Tennessee, was denied permission to construct its television tower at its proposed location based on “aesthetic” concerns, despite the fact that the proposed site was surrounded by six pre-existing towers.²⁸ *See also Comments of Concerned Communities and Organizations*, at 15 (“Broadcast towers are not a thing of beauty.”). When utilized by itself without reference to other objective factors such as compatible adjoining uses and zoning districts, “aesthetic” considerations appear to become open ended and largely standardless inquiries. After all, there is no objective measurement of pure aesthetics.

Further, some local governments appear to blatantly disregard the federal interests inherent in broadcast facility siting as well as the public interest that will be served by the facility. Demonstrative of such an attitude are comments such as “I never owned a car, why do we need a

²⁷ *See, e.g.*, Comments of Fordham University; Comments of Ying Hua Bennis, President, Station WFLI, Inc.; Comments of Pillar of Fire; Comments of Ronald E. Castro and Jack W. Fritz II, d/b/a Results Radio of Sonoma, L.P.

²⁸ Comments of Ying Hua Bennis, President, Station WFLI, Inc.

new radio station?”²⁹; “Just because the FCC says something, I place no credence in that locally”³⁰; “Just because a distant federal agency . . . focuses attention on a tiny spot of land it deems suitable for a broadcast antenna is no reason to conclude that . . . a township . . . should bear the burden it imposes or the detriment it foists on the public.”³¹ This sort of attitude by state and local governments leads to delay of broadcast facility construction and, ultimately, arbitrary denials of broadcast construction applications.

Other local governments impose particular regulatory requirements on broadcast applications. These obstacles include tower height limits, co-location requirements, landscaping requirements, fall radius requirements, and burdensome and duplicative environmental review requirements.³² Such requirements can serve to inhibit broadcast construction or to delay the processing of broadcast applications. Environmental review requirements, in particular, often result in considerable administrative delay and can be manipulated by local authorities to arbitrarily deny or discourage otherwise permissible applications. One commenter notes this problem in the context of its experience with the local administration of New York’s State Environmental Quality Review Act (“SEQRA”): “[R]ather than being useful planning tools, zoning laws and SEQRA are often used by municipalities and local citizens as tools to further NIMBY goals. Because each municipality is a separate jurisdiction and there is no higher governmental body with the authority to override local opposition to siting, towns often feel emboldened to place many obstacles in front of an

²⁹ Comments of Board of Regents of the University of Wisconsin System, Attachment 1, at 1.

³⁰ Comments of Pillar of Fire, at Exhibit 2.

³¹ Comments of Richard L. Harvey, WBHX, at 4.

³² See, e.g., *supra* Section III.A.7. through 13.

applicant in the hope that they will move somewhere else.”³³ Co-location requirements are also particularly onerous. Co-location requirements can encourage state and local governments to become involved in the engineering of a station’s broadcast signal, a matter in which they have no expertise and which is comprehensively regulated by the Commission.

C. A Rule To Address State And Local Obstacles Is Necessary

As shown above through the comments of the individual broadcasters in this proceeding, limited preemption of state and local authority over broadcast facility siting is necessary to address state and local impediments to broadcast facility construction. However, state and local government commenters opposing preemption raise several non-jurisdictional arguments on the question whether preemption is necessary to address obstacles to broadcast facility construction and siting. None of these arguments is persuasive.

First, opponents of Commission action argue that there is no evidence that broadcasters have been unable to construct broadcast facilities, particularly DTV facilities.³⁴ Similarly, some state and local government commenters argue that any delay in DTV implementation will be the result of poor planning on the part of broadcasters as well as the Commission and Congress.³⁵ Such comments reflect a lack of understanding of the DTV authorization and implementation process. The

³³ Comments of Anthony J. Fant, Fant Broadcasting Company of Ohio, and Fant Broadcasting of Massachusetts, at 3. *But see* Comments of Comments of Silver King Broadcasting of Massachusetts (broadcaster unable to construct FCC-approved facility because of local objections). *Accord* Comments of Goetz Broadcasting Corporation.

³⁴ *See, e.g.*, Comments of Concerned Communities and Organizations, at 17, 19 (“there is no evidence of a historical problem with State and local zoning or other regulations impairing the spread of radio and television service”) (“... State and local regulation and permitting has not been a problem during the 75-year history of broadcasting in the U.S.”).

Commission has only recently announced its DTV frequency allocation. Prior to this allocation, there was no way for a television broadcaster to anticipate with any degree of accuracy what its construction needs would be. Until the DTV allotment table is finally settled (numerous petitions for reconsideration are pending and the Commission's staff has indicated that a decision on these petitions is expected in the first quarter of 1998), many television broadcasters will not be able to finalize plans for DTV construction. As this picture clears up and DTV allocations become settled, broadcasters will move forward with DTV construction on what would be expected to be a massive scale.

As to the construction of broadcast facilities generally, the Commission now has before it numerous examples of construction delays and impediments imposed on broadcasters in connection with the construction of federally-authorized facilities. Through other dockets, the Commission is well aware of other restrictions that state and local governments have placed on communications facility siting and construction.³⁶ Not only has local regulation been a continual problem during the "75-year history of broadcasting in the U.S.," this problem is well-documented in various FCC proceedings.

Second, opponents of Commission action argue, in essence, that factors such as bad weather and lack of trained tower crews will delay DTV construction so it does not matter if DTV is delayed

⁴⁵ See, e.g., Comments of CCO, at 23; Comments of the City of Philadelphia, at 12-13.

³⁶ In this regard, NAB and MSTV request that the Commission take official notice of the record which has been established in the following dockets: FCC 97-264 (Comments regarding Petition for Declaratory Ruling of the Cellular Telecommunications Industry Association); RM-8577 (Amendment of the Commission's Rules to Preempt State and Local Regulation of Tower Siting for Commercial Mobile Radio Service Providers); CC Docket No. 85-87 (Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations); IB Docket No. 95-59 (Preemption of Local Zoning Regulation of Satellite Earth Stations); ET Docket 93-62 (Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation).

by state and local governments too.³⁷ As NAB/MSTV have pointed out, it is true that broadcasters face obstacles other than those created by state and local governments in the conversion to DTV. However, this does not justify inappropriate state and local review of broadcast siting applications or in any way lessen the need for Commission action. Instead, because factors such as weather and the availability of tower crews are in no one's control, the Commission would be well-advised to facilitate DTV conversion using the means that are under its control.

Third, opponents of Commission action argue that only a few towers will be affected before the year 2000, so there is ample time to construct new towers and modify existing towers.³⁸ Again, this argument does not show an appreciation of the task confronting television broadcasters. Even stations that do not have to comply with the DTV conversion deadlines until May 1, 2002, must begin preparations for such conversion now. For example, the first DTV license was granted to Station KHVO(TV), Hilo, Hawaii³⁹, a station located in the 69th ranked television market.⁴⁰

Fourth, opponents of Commission action argue that the nature of this service — which necessarily will involve the construction of new or modification of existing tall towers — implicates safety issues which require local involvement.⁴¹ The proposed rule, however, will not compromise

³⁷ See, e.g., Comments of CCO, at 24 (“[T]he critical lack of construction crews and weather delays make it extremely unlikely that state and local permits will delay the roll-out of HDTV”); Comments of City of Philadelphia, at 12-13.

³⁸ See, e.g., CCO, at 22 (“relatively few towers will have to be built before the year 2000.”)

³⁹ First DTV Construction Permit Application Granted to Station KHVO(TV), Hilo, Hawaii, *News Release*, Report No. MM97-14 (Released: Sept. 3, 1997).

⁴⁰ Nielsen Media Research Company, New York, NY (1996-97 TV Season).

⁴¹ See, e.g., Comments of CCO, at 7; City of Dallas, at 4-9; National League of Cities and the National Association of Telecommunications Officers and Advisors, at 25-29.

state and local safety review. As discussed *infra* in Section IV.B.1., local decisions should be required to be made in a “reasonable” amount of time, which is defined with reference to the typical time that it takes state and local governments to render a decision in response to land use and zoning applications. Moreover, the proposed rule will not preempt any state or local authority over safety issues, other than with respect to human exposure to RF radiation. Therefore, the concern of some state and local government commenters that the proposed rule will preclude or inhibit state and local safety review is ill-founded.

IV. THE SOLUTION

To address the problem described above in Section III, the Commission should adopt a narrowly tailored rule that will facilitate the prompt delivery of broadcast services. The contours of such a rule are discussed below in section IV.A. Section IV.B. discusses procedural aspects of the proposed rule, and Section IV.C addresses substantive aspects of the proposed rule. Sections IV.D. through G discuss other aspects of the proposed rule.

A. The Proposed Rule

In its *Notice*, the Commission sought comment on a proposed rule which would do the following: (i) establish time frames for state and local decisions concerning the placement, construction and modification of broadcast transmission facilities; (ii) preempt state and local regulation of tower lighting, painting and marking; (iii) preempt state and local regulation of radio frequency (“RF”) interference; (iv) preempt state and local regulation concerning environmental or health effects of exposure to RF emissions; (v) preempt other state and local regulations which are

not reasonably related to a clearly defined and expressly stated health or safety objective; (vi) require written decisions; and (vii) establish alternative dispute resolution and other review procedures for the resolution of tower siting issues.⁴²

The voluminous comments submitted in this proceeding can be divided into two camps. Uniformly, the broadcasters submitting comments agreed that limited preemption of state and local government land use and zoning authority is essential to the roll-out of DTV and the advancement of broadcast service generally.⁴³ State and local government commenters generally oppose broad preemption of state and local authority, although individual commenters express agreement with limited preemption of local authority. Viewed as a whole, state and local government parties are nearly uniform in espousing the following concerns:

- (i) The proposed time limits for state and local action are not feasible and, therefore, should be expanded or made more flexible.
- (ii) Traditional land use and zoning powers, and authority over environmental issues, should be reserved to state and local governments.
- (iii) The Commission does not have authority to mandate alternative dispute resolution procedures.

As discussed below, in light of the near consensus on these issues, NAB/MSTV believe that the proposed rule should be revised appropriately. Otherwise, as supported by the comments filed

⁴² See Notice, Appendix B.

⁴³ The analysis of the proposed rule which is set forth below does not attempt to recount these comments. See, e.g., Comments of ABC, Inc., at 2 (“In our view, the preemption rule proposed in the petition . . . strikes a reasonable balance between implementing national broadcast policy and accommodating local land use, zoning and safety interests.”). Suffice it to say that the numerous comments filed by individual broadcasters and broadcast associations express widespread agreement with the proposed rule.

by the broadcasters in this proceeding, NAB/MSTV continue to believe that the proposed rule represents a reasonable accommodation of local and federal interests.

B. Procedural Constraints

1. Time limits

A principal focus of the proposed rule is on providing procedural constraints on state and local government action -- that is, ensuring that state or local governments act on broadcast construction requests in an expeditious manner. The comments submitted by broadcasters bear out the concern that it often takes an extraordinary length of time to navigate state and local procedural hurdles and to obtain a decision on a particular application.⁴⁴

Thus, the proposed rule would require state and local governments to act on broadcast facility siting and construction requests within a “reasonable period” of time after requests are made. The proposed rule defines “reasonable period of time” with reference to the potential complexity of the request and sets out a sliding scale of between 21 and 45 days for state and local action on siting requests. Requests would be “deemed granted” if they were not acted on within these time frames.

These time frames were the subject of considerable negative comment by state and local governments. These commenters were uniform in their belief that the proposed time frames were too short. Many such commenters proposed alternate time frames which they contended were

⁴⁴ See, e.g., Comments of Thomas H. Moffit, Sr. and WVCH Communications, Inc.; Comments of Ronald E. Castro and Jack W. Fritz II, d/b/a Results Radio of Sonoma, L.P.; Richard L. Harvey, WBHX; Comments of Fordham University; Joint Comments of Named State Broadcasters Associations.

“reasonable” periods within which state and/or local action should be expected. For example, Prince William County, Virginia suggests that the local process usually takes 4-6 months (p. 9); the Connecticut Attorney General suggests that applications for modifications can be acted on within 60 days and that applications for new towers can be acted on within 180 days (p. 8); Will County, Illinois, and the Will County, Illinois Land Use Department separately suggest that 90 days is an appropriate time frame for local decisions (p. 2); Clackamas County, Oregon, suggests that 120 days is an acceptable time period (p. 2); Jefferson Parish, Louisiana, states that special use permits are generally acted on within 180 days (p. 1); Loudon County, Virginia, suggests that 120 days is appropriate (p. 2); Halifax County, Virginia, states that 90 days is the typical processing time for special use applications (p. 1); Arlington County, Henrico County, and Alexandria, Virginia, state that 90-120 days is the typical processing time for special use applications (pages 16-21); College Park, Georgia, states that a minimum of 90 days is necessary (p. 1); the City of Suffolk, Virginia, states that 85-180 days is needed to process tower applications (p. 2); Orange County, Florida, recommends 120 days (p. 4); Transylvania County, North Carolina, recommends 90-180 days (p. 1); Palm Beach County, Florida, suggests 140-215 days (page 6); the Seattle City Council recommends 120 days (p. 1); Bonner County, Idaho, states that the conditional use permit process usually takes 90 days (p. 2); Pinellas County, Florida, states that 90 days is more practical (p. 1); and San Luis Obispo, California, states that 90-165 days is typical (p. 1). Conversely, many broadcasters state in their comments that the proposed time limits are reasonable.⁴⁵

⁴⁵ See, e.g., Comments of Silver King Broadcasting of Massachusetts, Inc.; Comments of Paxson Communications Corporation, Cox Broadcasting, Inc., and Media General, Inc.

Some procedural constraints on local action are clearly needed.⁴⁶ Based on the comments of the local government entities, however, it appears that 30 to 215 days is the typical time it takes to process a broadcast facility construction application. It appears that the time limits set out in the proposed rule may not be feasible for some municipalities. Many commenters have pointed out practical limitations — including infrequent board meetings⁴⁷ and public notice requirements⁴⁸ — to application review within the proposed deadlines. Other commenters argue that overly restrictive deadlines will preclude serious review of broadcast applications⁴⁹ and will cause otherwise acceptable applications to be denied because of the lack of time to properly evaluate the applications.⁵⁰ In view of these concerns, it would appear appropriate that the Commission adopt a definition of “reasonable period of time” which is based on the most commonly-expressed review periods described by the state and local government commenters.

Several state and local government commenters question the categorization of applications in the proposed rule. For example, the Concerned Communities and Organizations (“CCO”) argues that the terms “modification” and “strengthen or replace” must be defined and reasonable constraints placed on the term “replaced.” In view of these concerns, and in view of the need for greater time

⁴⁶ *See, e.g.*, Comments of Town of Cabot, Vermont (frankly stating that tower issues should be handled by a “slow democratic process”); Comments of Hulett, Wyoming (arguing that obstacles to construction are important aspects of the land use and zoning authority).

⁴⁷ *See* Comments of City of Dallas, at 22.

⁴⁸ *See, e.g.*, Comments of the City and County of San Francisco, at 12; Comments of Jefferson County, Colorado, at 8; Comments of the City of Philadelphia, at 10; Comments of the City of Dallas, at 18.

⁴⁹ *See, e.g.*, Comments of City of Dallas, at 18; Comments of the City and County of San Francisco, at 14; Comments of the City of Philadelphia, at 10.

⁵⁰ *See, e.g.*, Comments of the City and County of San Francisco, at 14; Comments of the City of Dallas, at 23.

in general, NAB/MSTV believe that the better approach is to adopt one time limit which would apply to all types of facility construction applications.

The Named State Broadcasters Associations (NSBA) recommend certain modifications to the proposed rule to clarify its intent. Specifically, NSBA recommends that state and local governments be required to “grant or deny,” rather than simply “act on,” broadcast applications within the applicable deadlines. Further, NSBA recommends that the rule be clarified to provide that the applicable time limit begins to run as “of filing.” NAB/MSTV believe that these proposals are sound and should be adopted.

Similarly, the CCO argues that the failure to define “written request” will encourage “sloth” by broadcasters seeking to avoid compliance with substantive or procedural filing requirements. CCO argues that the rule should be clarified to apply only to written requests “which are submitted in complete compliance with applicable state and local laws, regulations and policies.”⁵¹ Although NAB/MSTV do not share CCO’s concern over “sloth” by broadcasters, the modifications proposed by CCO are consistent with the intent of the proposed rule. Accordingly, the proposed rule should be clarified to provide that the procedural deadlines begin to run only upon the submission of a “complete” application.

2. “Deemed granted”

Several state and local government commenters raise particular objection to the “deemed granted” provision of the proposed rule.⁵² Under this provision, broadcast construction applications

⁵¹ Comments of CCO, at 40. *See also* Comments of Orange County, Florida, at 2 (urging clarification that “review times begin to run when a complete and appropriate application is submitted to a local government.”).

⁵² For example, the City and County of San Francisco argues that this provision will violate constitutional requirements that affected landowners be notified in advance of government land use decisions. Comments, at 14-15.