

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Preemption of State and Local Zoning and) MM Docket No. 97-182
Land Use Restrictions on the Siting,)
Placement and Construction of Broadcast)
Station Transmission Facilities)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 18, 1997

Released: August 19, 1997

Comment Date: October 30, 1997

Reply Comment Date: December 1, 1997

By the Commission:

I. Introduction

1. The Commission is undertaking this proceeding to consider whether and in what circumstances to preempt certain state and local zoning and land use ordinances which present an obstacle to the rapid implementation of digital television ("DTV") service. Such ordinances may also serve to unduly inhibit the resiting of antennas made necessary by the implementation of DTV or stand as an obstacle to the institution and improvement of radio and television broadcast service generally. This issue has been brought before the Commission in a "Petition for Further Notice of Proposed Rule Making" filed jointly by the National Association of Broadcasters ("NAB") and the Association for Maximum Service Television ("Petitioners").¹ While that Petition raises a number of issues crucial to the successful roll-out of digital television, it also raises a number of questions concerning the scope of any preemption of state and local laws and ordinances and the need to exercise that authority.

¹ This petition was filed in the Commission's Digital Television proceeding Fifth Report and Order in MM Docket No. 87-268, FCC 97-116 (April 22, 1997)("Fifth Report and Order"), 62 F.R. 26996 (May 16, 1997). The Commission will, however, treat the Petition as one filed pursuant to 47 C.F.R. § 1.401 seeking the institution of a new rule making proceeding.

II. Background

2. In our Fifth Report and Order in the DTV proceeding, we adopted an accelerated schedule for construction of DTV transmission facilities to ensure the preservation of a universally available, free local broadcasting service and the swift recovery of broadcast spectrum. Under the construction schedule set forth in the Fifth Report and Order, affiliates of the top four networks in the top 10 markets are required to be on the air with digital signals by May 1, 1999. Affiliates of the top four networks in markets 11 - 30 must be on the air by November 1, 1999. Under this schedule, more than half of all television households will have access to multiple channels of digital broadcast television programming by November 1, 1999. All other commercial stations are required to construct their DTV facilities by May 1, 2002, and all noncommercial stations must construct their DTV facilities by May 1, 2003.² Subject to biennial review, and certain statutory exceptions, the current target date for all stations' return of their analog spectrum is 2006.³

3. Petitioners state that this accelerated DTV transition schedule will require extensive and concentrated tower construction. They estimate that 66 percent of existing television broadcasters will require new or upgraded towers to support DTV service, involving an estimated 1000 television towers. Moreover, they state, as a result of the increased weight and windloading of DTV facilities and other tower constraints, a number of FM broadcast stations which have collocated their FM antennas on television towers will be forced to relocate to other existing towers or to construct new transmission facilities.

4. In addition to the logistical problems of modifying and constructing a significant number of towers (e.g., scarcity of construction crews, weather delays, supply shortages), Petitioners state that there "is an array of obstacles arising from state and local regulation of tower siting and construction" including environmental assessments, "fall radius," collocation and marking/lighting requirements, and concerns with interference to other electronic devices.⁴ Petitioners are particularly concerned with the delays resulting from the administration of such restrictions, noting that multiple levels of review can last for several months, and that when appeals are involved, the process can take several years.⁵

5. In order to meet the Commission's DTV construction schedule, Petitioners ask the Commission to adopt a rule that would permit the Commission to preempt state and local

² Fifth Report and Order, *supra* at ¶ 76. Twenty-four television stations have voluntarily agreed to an 18-month schedule for the construction of their DTV facilities.

³ Fifth Report and Order, *supra* at ¶¶ 99, 100. See Also Balanced Budget Act of 1997 ("BBA"), Pub. L. 105-33, 111 Stat. 251 (1997) (codified at 47 U.S.C. § 309(j)(14)(A)-(B))(establishing statutory target date for return of the analog spectrum and setting out exceptions to that deadline).

⁴ Petition at pages 7-15.

⁵ The Petition describes several instances in which local zoning regulations and related appeals have resulted in lengthy delays in the construction of broadcast facilities. *Id.* at pages 10-15.

zoning and other land use regulations to the extent they unreasonably prohibit or delay the DTV roll-out and other ongoing broadcast transmission facilities construction. They argue that the Commission has the legal authority to engage in such preemption where it is pursuing an objective within the scope of its Congressionally delegated authority and non-federal regulation stands as an obstacle to the accomplishment and execution of that objective. Both criteria, Petitioners assert, are present in the instant matter.

6. Petitioners propose a rule which provides specific time limits for state and local government action in response to requests for approval of the placement, construction or modification of broadcast transmission facilities. The rule proposed by the Petitioners, attached as Appendix B, would require action within 21 days with respect to requests to modify existing broadcast transmission facilities where no change in location or overall height is proposed or to strengthen or replace an existing broadcast transmission facility. Action would be required within 30 days with respect to requests to relocate existing broadcast transmission facilities from a currently approved location to another location within 300 feet, to consolidate two or more broadcast transmission facilities at a common tower or other structure or to increase the height of an existing tower. All other requests would have to be acted upon within 45 days.⁶ Failure to act within these time limits would cause the request to be deemed granted.

7. Additionally, the requested rule would remove from local consideration certain types of restrictions on the siting and construction of transmission facilities. Petitioners would categorically preempt regulations based on the environmental or health effects of radio frequency ("RF") emissions to the extent a broadcast facility has been determined by the Commission to comply with its regulations and policies concerning emissions; interference with other telecommunications signals and consumer electronics devices as long as the broadcast antenna facility has been determined by the Commission to comply with its applicable regulations and/or policies concerning interference; and tower marking and lighting requirements provided that the facility has been determined by the Commission or the Federal Aviation Administration to comply with applicable tower lighting, painting and marking regulations or policies.

8. Further, the rule would preempt all state and local land use, building, and similar laws, rules or regulations that impair the ability of licensed broadcasters to place, construct or modify their transmission facilities unless the promulgating authority can demonstrate that the regulation is reasonable in relation to a clearly defined and expressly stated health or safety objective other than the categorical preemptions described above.

⁶ Congress addressed the overlap between state and local and federal regulatory authority over tower siting in the context of personal wireless services facilities in the Telecommunications Act of 1996, P.L. No. 104-104, 110 Stat 56 (1996), codified at 47 U.S.C. § 151 et seq. ("1996 Telecommunications Act"). The statute does not, however, set out a specific time frame within which a state or local government must act on a request, rather, it requires that the state or local authority act within a reasonable time. 47 U.S.C. § 332(c)(7)(B)(ii) ("A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.")

9. To provide for expeditious review, the Petitioners' proposed rule requires that any state or local government decision denying a request be in writing, supported by substantial evidence, and delivered to all applicants within 5 days.⁷ Any broadcaster adversely affected by any such action could, within 30 days of the decision, petition the Commission for a declaratory ruling on which the Commission, in turn, would have 30 days in which to act.⁸ The rule would also authorize the Commission to administer dispute resolution.

III. Discussion

10. In the Fifth Report and Order, we found that an accelerated roll-out of digital television was essential for four reasons. We found that absent a speedy roll-out, other digital television services might achieve levels of penetration that could preclude the success of over-the-air digital television, leaving viewers without a free, universally available digital programming service.⁹ Second, we determined that a rapid construction period would promote DTV's competitive strength internationally, spurring the American economy in terms of manufacturing, trade, technological development, international investment, and job growth.¹⁰ Third, we stated that "an aggressive construction schedule helps to offset possible disincentives that any individual broadcaster may have to begin digital transmissions quickly."¹¹ Finally, we found that a rapid build-out would work to ensure that the recovery of broadcast spectrum occurs as quickly as possible.¹² This will enable the federal government to reallocate some of the recovered spectrum for public safety purposes, and to eventually auction the rest.¹³

⁷ This portion of the proposed rule generally tracks the procedures by which a state or local authority may deny a request to construct personal wireless services facilities as outlined in the 1996 Telecommunications Act. 47 U.S.C. § 332(c)(7)(B)(iii) ("Any decision by a state or local government or any instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.")

⁸ While the 1996 Telecommunications Act contains procedures for the appeal of a State or local government decision in the context of the construction and placement of personal wireless service facilities, these procedures differ from the procedures proposed by the Petitioners. 47 U.S.C. § 332(c)(7)(B)(v) ("Any person adversely affected by any final action or failure to act by a state or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.")

⁹ Fifth Report and Order, supra at ¶ 80.

¹⁰ Id. at ¶ 81.

¹¹ Id. at ¶ 82.

¹² Id. at ¶ 83.

¹³ See Notice of Proposed Rule Making in ET Docket No. 97-157, FCC 97-245, Reallocation of Television Channels 60-69, the 746-806 MHz Band (July 9, 1997). See Also BBA, supra note 3, (codified at 47 U.S.C. § 337) (providing for the allocation of 24 megahertz of returned spectrum to be allocated for public safety services and 36 megahertz of that spectrum to be auctioned for commercial use)

11. To achieve these purposes, we instituted an "aggressive but reasonable" construction schedule, aimed at exposing as many homes to DTV as early as possible.¹⁴ In the Fifth Report and Order, we noted that circumstances beyond a broadcaster's control, such as difficulties in obtaining zoning and other approvals, may interfere with its ability to meet construction schedule requirements.¹⁵ We are, however, also sensitive to the important state and local roles in zoning and land use matters and their longstanding interest in the protection and welfare of their citizenry. Given the countervailing importance of accelerated construction of DTV transmission facilities, however, we seek to define those circumstances in which it may be necessary to preempt state and local regulations in order to achieve the benefits of a rapid roll-out of DTV.

12. As a preliminary matter, we note that it is well settled that the Communications Act of 1934, as amended ("Communications Act"), comprehensively provides for regulation of radio frequency interference and that the FCC has exclusive jurisdiction to resolve such questions.¹⁶ With regard to interference affecting home consumer equipment in particular, Congress plainly stated in the 1982 amendments to the Communications Act that it intended federal regulation to completely occupy the field to the exclusion of local and state governments.¹⁷ Thus, a rule preempting state and local zoning regulations based on electromagnetic interference would simply codify the existing state of the law. With respect to other aspects of the proposed rule --- preemption of state and local zoning restrictions based on environmental or health effects of RF emissions, tower lighting, painting and marking, and health, safety and traditional land use powers -- we have authority to preempt where state or local law, among other things, stands as an obstacle to the accomplishment and execution of the full objectives of Congress¹⁸ or where we find preemption is "necessary to achieve [our] purposes" within the scope of our delegated authority.¹⁹

¹⁴ Fifth Report and Order, *supra* at ¶¶ 2, 7.

¹⁵ *Id.* at ¶ 77.

¹⁶ See e.g., 47 U.S.C. §§ 152(a), 301, 303(c), (d), (e), and especially (f); Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424, 430 n.6 (1963)(the FCC's "jurisdiction over technical matters" associated with the transmission of broadcast signals is clearly exclusive); 960 Radio, Inc., FCC 85-578 (released November 4, 1985)(preempts local zoning authority regulation of interference caused by an FM station); Mobilecom of New York, Inc., 2 FCC Rcd 5519 (Com. Car. Bur. 1987)

¹⁷ H.R. Report No. 765, 97th Cong. 2d Sess. 33 (1982), reprinted in 1982 U.S. Code Cong. & Ad. News 2277 (amendment to Section 302(a) of Act)("The Conference substitute is further intended to clarify the reservation of exclusive jurisdiction to the Federal Communications Commission over matters involving RFI. Such matters shall not be regulated by local or state law, nor shall radio transmitting be subject to local or state regulation as part of any effort to resolve an RFI complaint.")

¹⁸ Hines v. Davidowitz, 312 U.S. 52, 68 (1941).

¹⁹ City of New York v. FCC, 486 U.S. 57, 63 (1988). See generally Louisiana Public Service Commission v. FCC, 476 U.S. 355, 368-69 (1986) and cases cited therein.

13. Congress explicitly indicated its objective of a speedy recovery of spectrum in Section 336(c) of the 1996 Telecommunications Act, "Recovery of License."²⁰ That section requires that the Commission establish as a condition of granting a DTV license the return of either that license or the original license held by the licensee "for reallocation or reassignment (or both) pursuant to Commission regulation." As indicated above, the Commission found that a speedy conversion would enhance the likelihood of success for the DTV roll-out and allow for the rapid recovery of spectrum. The Commission determined that a lethargic conversion would, to the contrary, undermine the potential for a successful conversion and thereby undermine the potential for such a recovery, as sought by Congress. The Commission also determined that the prompt, broad availability of DTV to the American public was an important public interest goal.²¹

14. Delays in local zoning and land use decisions would hold up the construction of an essential part of the DTV transmission system and make it impossible for a licensee to satisfy the construction requirement to transmit "a DTV signal strong enough to encompass the community of license," by the required deadline.²² This could leave broadcasters unable to "give a great number of viewers access to a DTV signal in a very short period."²³ To the extent that state and local ordinances result in delays that make it impossible for broadcasters to meet our construction schedule and provide DTV service to the public, important Congressional and FCC objectives regarding prompt availability of this service to the public and prompt recovery of spectrum would be frustrated.

15. At the same time, we are sensitive to the rights of states and localities to protect the legitimate interests of their citizens and we do not seek to unnecessarily infringe these rights. The Commission recognizes its obligation to "reach a fair accommodation between federal and nonfederal interests."²⁴ Thus, it is incumbent upon the Commission not to "unduly interfere with the legitimate affairs of local governments when they do not frustrate federal objectives."²⁵ These include not only certain health and safety regulations, which the Petitioners' proposed rule recognizes, but also the right of localities to maintain their aesthetic

²⁰ 47 U.S.C. § 336(c). See generally 47 U.S.C. § 151 (purpose of the Act includes "to make available, so far as possible...a rapid, efficient Nation-wide and world-wide radio communication service with adequate facilities"); 47 U.S.C. § 157 ("It shall be the policy of the United States to encourage the provision of new technologies and services to the public.").

²¹ Fifth Report and Order, *supra* at ¶ 5.

²² Fifth Report and Order, *supra* at ¶ 91.

²³ *Id.* at ¶ 76. See also *id.* at ¶¶ 84-85 and 87.

²⁴ *Arecibo Radio Corporation*, 101 FCC 2d 545, 550 (1985); see *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (Commission exercise of preemption power must represent reasonable accommodation of conflicting policies.)

²⁵ *Notice of Proposed Rule Making, In the Matter of Preemption of Local Zoning Regulations of Receive-Only Satellite Earth Stations*, 100 FCC 2d 846, 853 (1985). See also *Preemption of Local Zoning Regulations of Satellite Earth Stations*, IB Docket No 95-59, 11 FCC Rcd 5809 (1996).

qualities.²⁶ Indeed, historically we have sought to avoid becoming unnecessarily involved in local zoning disputes regarding tower placement. Nevertheless, we have adopted rules preempting local zoning ordinances where the record established that such ordinances were inhibiting the implementation of Congressional or FCC objectives, including with regard to locating satellite "dish" antennas and amateur radio towers.²⁷

16. The Petitioners' proposed rule would cover siting of all broadcast transmission facilities construction. That is, petitioners have not limited their preemption rule to DTV-related construction, including the involuntary relocation of FM antennas now collocated on television towers. It is less clear that preemption will be needed where broadcasters do not face exigencies such as DTV construction deadlines. There are now over 12,000 radio and 1,500 television station licenses outstanding, totals which suggest that generally compliance with state and federal laws relating to broadcast station construction and operation has been possible and that state regulation has not been an insuperable obstacle to the exercise of the Commission's "powers to promote and realize the vast potentialities of radio."²⁸ In these circumstances, we seek information on whether any preemption rule should be limited to DTV construction and to radio station transmission facility relocations resulting from such construction.²⁹ We also seek additional information on Petitioners' assertion that local zoning regulation "stands as an obstacle to the implementation of the DTV conversion and to the institution and improvement of broadcast service generally."³⁰

IV. Request for Comments

17. In order to determine whether preemption is necessary and desirable and the scope of any preemption rule, we seek comment on a number of issues. This will enable the Commission to determine whether and how extensively it should exercise its authority to preempt state and local zoning and land use laws and ordinances.

18. As an initial matter, we generally invite comment on the Petitioners' proposals for the preemption of state and local laws, regulations and restrictions on the siting of broadcast transmission facilities. We seek comment on the Petitioners' proposed preemption rule.

²⁶ See Preemption of Local Zoning Regulations of Receive-Only Satellite Earth Stations, 100 FCC 2d 846 at ¶ 21; Amendment of Part 73 of the Commission's Rules to More Effectively Resolve Broadcast Blanketing Interference, 11 FCC Rcd 4750, 4754 (1996) (localities best situated to resolve local land use and related aesthetic questions).

²⁷ E.g., Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, CC Docket No. 85-87, 59 RR 2d 1073 (Released Feb. 5, 1986); Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, PRB -1 50 Fed. Reg. 38813 (Sept. 25, 1985).

²⁸ National Broadcasting Company v. United States, 319 U.S. 190, 217 (1943).

²⁹ But see paragraph 21, infra.

³⁰ Petition at page 22.

Alternatively, we request comment on whether any rule we adopt should focus on actions state and local governments would be preempted from taking or what state or local authority would be preempted by failure to act within a specified time period.³¹

19. We seek a detailed record of the nature and scope of broadcast tower siting issues, including delays and related matters encountered by broadcasters, tower owners and local government officials. Although Petitioners provide anecdotal evidence regarding difficulties encountered by several broadcasters in attempting to meet local ordinances in connection with tower siting and construction, we have no basis on which to determine the extent to which such difficulties are representative of radio and television broadcast industry tower siting experiences generally. So that we might have a factual basis upon which to determine the nature and extent of the problem, we ask commenters to provide us with information on their experiences, both positive and negative, with state and local zoning and land use approvals, and with the application of other laws and ordinances in connection with their efforts to site, construct and operate radio and television transmission towers. Particularly relevant would be comments on the duration of local permitting processes tied to such laws and ordinances. We are also particularly interested in receiving information about experiences related to obstacles and time constraints or delays encountered by broadcasters and tower owners in the top 30 markets.³²

20. We are especially interested in the extent to which commenters believe any such difficulties are representative of difficulties that are now being faced or will be faced in the context of DTV build-out. Also, we request comments on whether existing laws, ordinances and procedures are likely to impede adherence to our accelerated DTV build-out schedule.

21. We seek comment on the scope of the preemption proposed by Petitioners, on the range of facilities to which the rule should apply and on the state and local laws, regulations, and other restrictions which federal law might preempt. Should we preempt local regulation for all broadcast facilities? Should the preemption be limited to construction of DTV transmission facilities and the relocation of those FM radio facilities displaced by DTV? Should the preemption be limited to the top markets in which the DTV roll-out schedule is more aggressive?

22. Should the Commission preempt state and local restrictions regarding exposure to RF emissions from broadcast transmission facilities? Are there other circumstances in which it is appropriate for the Commission to preempt state and local regulation of the siting or

³¹ See, e.g., 47 C.F.R. § 25.104.

³² The top thirty television markets, as ranked by Nielsen Media Research as of April 3, 1997 are: New York, Los Angeles, Chicago, Philadelphia, San Francisco, Boston, Washington, D.C., Dallas-Fort Worth, Detroit Atlanta, Houston, Seattle-Tacoma, Cleveland, Minneapolis-St. Paul, Tampa-St.Petersburg, Miami, Phoenix, Denver, Pittsburgh, Sacramento-Stockton, St. Louis, Orlando-Daytona Beach, Baltimore, Portland, OR, Indianapolis, San Diego, Hartford-New Haven, Charlotte, Raleigh-Durham, and Cincinnati.

construction of transmission facilities? Should federal regulation preempt local regulation intended for aesthetic purposes?

23. We seek comment on the procedural framework proposed by Petitioners. Are the time frames proposed by Petitioners reasonable? Specifically, should we preempt state and local government authority where they fail to act within certain time periods? If so, what should be those time periods? Is 45 days appropriate, or would 90 days be more realistic for broadcast tower applications? Can the DTV construction schedule in the Fifth Report and Order be reconciled with the procedures of states and localities? In the event that we preempt as to procedural aspects of zoning and land use regulation, what constraints, if any, are there on the ability of state and local governments to meet the expedited procedures sought by Petitioners? We specifically ask states and localities to comment on their current procedures, their need to use these procedures, the possibility of using expedited procedures to assure our DTV construction schedule is met, and the nature of such expedited procedures. Is there an appropriate role for the Commission in resolving disputes between localities and licensees with respect to tower siting issues? What is the nature of that role -- arbitrator, mediator or simply the provider of a forum to which parties can turn for suggestions on resolving local disputes? Is outside arbitration, administered by the Commission, an appropriate forum for alternative dispute resolution?

24. We note that we recently received an Advisory Recommendation on the Petitioner's proposal from the Commission's Local and State Government Advisory Committee.³³ This recommendation will be incorporated into the public record of this proceeding, and we will consider the issues raised by the Committee in this and any future filing.

V. Administrative Matters

25. Comments and Reply Comments. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before October 30, 1997, and reply comments on or before December 1, 1997. To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. 20554.

³³ Local and State Government Advisory Committee Recommendation No. 3, NAB Petition for Further Notice of Proposed Rule Making, MM Docket 87-286, August 1, 1997.

26. Initial Paperwork Reduction Act of 1995 Analysis. We have not proposed in this proceeding any proposed or modified information collection requirement.

27. Ex Parte Rules. This is a non-restricted notice and comment rule making proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission Rules. See generally 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

28. Initial Regulatory Flexibility Analysis. With respect to this Notice, an Initial Regulatory Flexibility Analysis ("IRFA") is contained in Appendix A. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an IRFA of the expected impact on small entities of the proposals contained in this Notice. Written public comments are requested on the IRFA. In order to fulfill the mandate of the Contract with America Advancement Act of 1996 regarding the Final Regulatory Flexibility Analysis, we ask a number of questions in our IRFA regarding the prevalence of small businesses in the industries covered by this Notice. Comments on the IRFA must be filed in accordance with the same filing deadlines as comments on the Notice, but they must have a distinct heading designating them as responses to the IRFA. The Secretary shall send a copy of this Notice, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 et seq. (1981), as amended.

29. Authority. This Notice is issued pursuant to authority contained in Sections 4(i), 303, and 336 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, 307 and 336.

30. Additional Information. For additional information on this proceeding, please contact Keith Larson, Assistant Bureau Chief for Engineering or Susanna Zwerling, Policy and Rules Division, Mass Media Bureau (202) 418-2140.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Initial Regulatory Flexibility Analysis

As required by Section 603 of the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 603, the Commission is incorporating an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the policies and proposals in this Notice of Proposed Rule Making ("Notice"). Written public comments concerning the effect of the proposals in the Notice, including the IRFA, on small businesses are requested. Comments must be identified as responses to the IRFA and must be filed by the deadlines for the submission of comments in this proceeding. The Secretary shall send a copy of this Notice, including the IRA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act.³⁴

Reasons Why Agency Action is Being Considered: In its Fifth Report and Order in its digital television proceeding (MM Docket No. 87-268) the Commission adopted an accelerated roll-out schedule for digital television stations. That schedule requires the top four network affiliates in the top ten television markets to construct their digital television facility and begin emitting signals by May 1, 1999. Affiliates of these four networks in markets 11 - 30 must be on the air by November 1, 1999. All other commercial stations will have to construct their DTV facilities by May 1, 2002, and noncommercial stations by May 1, 2003. The Commission found this accelerated schedule necessary to promote the success of DTV and allow for spectrum recovery, a goal shared by Congress. In a rule making petition filed by the National Association of Broadcasters and the Association of Maximum Service Television the Petitioners claim that state and local zoning and land use laws, ordinances, and procedures may have a delaying effect on the siting, placement and construction of new television towers that will be needed for DTV. Additionally, they contend, the antennas of many FM radio stations will need to be displaced from existing towers to enable them to support new DTV antenna arrays and these FM stations will have to build new towers to enable them to continue to serve the public. Accordingly, they ask the Commission to adopt a rule preempting state and local laws, ordinances and procedures that could work to delay the inauguration of DTV service. The Commission believes the prompt deployment of DTV is essential to several goals, and that compliance with such local requirements may, at least in some cases, both make compliance with both these procedures and the roll-out schedule impossible. Additionally, it believes that some of these state and local regulations may stand as obstacles to the accomplishment of the rapid transition to DTV service and the spectrum recovery that it will permit. This recovery is also an important congressional purpose as evidenced by its 1996 adoption of 47 U.S.C. § 336.

³⁴ Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 et seq. (1981), as amended.

Need For and Objectives of the Proposed Rule Changes: Petitioners have demonstrated that at least some state and local zoning and land use laws, ordinances and procedures may, unless preempted by the Commission, prevent television broadcasters from meeting the construction schedule for DTV stations established by the Commission, retarding the recovery of frequency spectrum by the government for reallocation and delaying digital service to the public. Additionally, in some cases they may result in discontinuation of FM radio service to the public should displaced FM antennas be unable to relocate to new antenna towers.

Legal Basis: Authority for the actions proposed in this Notice may be found in Sections 4(i), 303(r), and 336 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 336.

Recording, Recordkeeping, and Other Compliance Requirements: The Commission is not proposing any new or modified recordkeeping or information collection requirements in this proceeding.

Federal Rules that Overlap, Duplicate, or Conflict with the Proposed Rules: The initiatives and proposed rules raised in this proceeding do not overlap, duplicate or conflict with any other rules.

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply: Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions. 5 U.S.C. § 601(6). The RFA, 5 U.S.C. § 601(3), generally defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act, 15 U.S.C. § 632. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA"). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."³⁵

The proposed rules and policies will apply to television broadcasting licensees, radio broadcasting licensees and potential licensees of either service. The Small Business

³⁵ While we tentatively believe that the SBA's definition of "small business" greatly overstates the number of radio and television broadcast stations that are small businesses and is not suitable for purposes of determining the impact of the proposals on small television and radio stations, for purposes of this Notice, we utilize the SBA's definition in determining the number of small businesses to which the proposed rules would apply, but we reserve the right to adopt a more suitable definition of "small business" as applied to radio and television broadcast stations or other entities subject to the proposed rules in this Notice and to consider further the issue of the number of small entities that are radio and television broadcasters or other small media entities in the future. See Report and Order in MM Docket No. 93-48 (Children's Television Programming), 11 FCC Rcd 10660, 10737-38 (1996), citing 5 U.S.C. § 601(3).

Administration defines a television broadcasting station that has no more than \$10.5 million in annual receipts as a small business.³⁶ Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.³⁷ Included in this industry are commercial, religious, educational, and other television stations.³⁸ Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials.³⁹ Separate establishments primarily engaged in producing taped television program materials are classified under another SIC number.⁴⁰ There were 1,509 television stations operating in the nation in 1992.⁴¹ That number has remained fairly constant as indicated by the approximately 1,558 operating television broadcasting stations in the nation as of May 31, 1997.⁴² For 1992⁴³ the number of television stations that produced less than \$10.0 million in revenue was 1,155 establishments.⁴⁴

Additionally, the Small Business Administration defines a radio broadcasting station that has no more than \$5 million in annual receipts as a small business.⁴⁵ A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs

³⁶ 13 C.F.R. § 121.201, Standard Industrial Code (SIC) 4833 (1996).

³⁷ Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 CENSUS OF TRANSPORTATION, COMMUNICATIONS AND UTILITIES, ESTABLISHMENT AND FIRM SIZE, Series UC92-S-1, Appendix A-9 (1995).

³⁸ *Id.* See Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987), at 283, which describes "Television Broadcasting Stations (SIC Code 4833) as:

Establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Included in this industry are commercial, religious, educational and other television stations. Also included here are establishments primarily engaged in television broadcasting and which produce taped television program materials.

³⁹ Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 CENSUS OF TRANSPORTATION, COMMUNICATIONS AND UTILITIES, ESTABLISHMENT AND FIRM SIZE, Series UC92-S-1, Appendix A-9 (1995).

⁴⁰ *Id.* SIC 7812 (Motion Picture and Video Tape Production); SIC 7922 (Theatrical Producers and Miscellaneous Theatrical Services (producers of live radio and television programs).

⁴¹ FCC News Release No. 31327, Jan. 13, 1993; Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, *supra* note 78, Appendix A-9.

⁴² FCC News Release "Broadcast Station Totals as of May 31, 1997.

⁴³ Census for Communications' establishments are performed every five years ending with a "2" or "7". See Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, *supra* note 78, III.

⁴⁴ The amount of \$10 million was used to estimate the number of small business establishments because the relevant Census categories stopped at \$9,999,999 and began at \$10,000,000. No category for \$10.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

⁴⁵ 13 C.F.R. § 121.201, SIC 4832.

by radio to the public.⁴⁶ Included in this industry are commercial religious, educational, and other radio stations.⁴⁷ Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.⁴⁸ However, radio stations which are separate establishments and are primarily engaged in producing radio program material are classified under another SIC number.⁴⁹ The 1992 Census indicates that 96 percent (5,861 of 6,127) radio station establishments produced less than \$5 million in revenue in 1992.⁵⁰ Official Commission records indicate that 11,334 individual radio stations were operating in 1992.⁵¹ As of May 31, 1997, official Commission records indicate that 12,156 radio stations were operating, of which 7,342 were FM stations.⁵²

Thus, the proposed rules will affect many of the approximately 1,558 television stations; approximately 1,200 of those stations are considered small businesses.⁵³ Additionally, the proposed rules will affect some of the 12,156 radio stations, approximately 11,670 of which are small businesses.⁵⁴ These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-television or non-radio affiliated companies.

In addition to owners of operating radio and television stations, any entity who seeks or desires to obtain a television or radio broadcast license may be affected by the proposals contained in this item. The number of entities that may seek to obtain a television or radio broadcast license is unknown. We invite comment as to such number.

Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives: This Notice solicits comment on a variety of

⁴⁶ Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, supra note 78, Appendix A-9.

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ The Census Bureau counts radio stations located at the same facility as one establishment. Therefore, each co-located AM/FM combination counts as one establishment.

⁵¹ FCC News Release No. 31327, Jan. 13, 1993.

⁵² FCC News Release "Broadcast Station Totals as of May 31, 1997."

⁵³ We use the 77 percent figure of TV stations operating at less than \$10 million for 1992 and apply it to the 1997 total of 1558 TV stations to arrive at 1,200 stations categorized as small businesses.

⁵⁴ We use the 96% figure of radio station establishments with less than \$5 million revenue from the Census data and apply it to the 12,156 individual station count to arrive at 11,670 individual stations as small businesses.

alternatives discussed herein. Any significant alternatives presented in the comments will be considered. The Commission believes that the proposed rules and policies may be necessary to promote the speedy deployment of digital television service and the prompt recovery of broadcast frequency spectrum for reallocation. We seek comment on this belief.

Report to Small Business Administration: The Commission shall send a copy of this Initial Regulatory Flexibility Analysis along with this Notice to the Small Business Administration pursuant to the RFA 5 U.S.C. § 603(a). A copy of this IRFA will also be published in the Federal Register.

APPENDIX B**Petitioners' Proposed Preemption Rule**

In order to facilitate the rapid deployment of Digital Television ("DTV") services, as authorized by the Commission in MM Docket No. 87-268, and in recognition of the need to facilitate the siting and construction of broadcast transmission facilities generally, the following procedures and rules shall apply to the siting of new broadcast transmission facilities or the alteration or relocation of existing broadcast transmission facilities by television and radio stations whose operations have been authorized by the Commission.

(a) ***Siting Procedures.*** A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify broadcast transmission facilities within a reasonable period of time after a written request is filed with such government or instrumentality for any required permit or other authorization. For purposes of this subsection, a "reasonable period of time" shall mean:

(1) within twenty-one (21) days, with respect to requests to (i) modify existing broadcast transmission facilities where no change in location or overall height is proposed, and (ii) strengthen or replace an existing broadcast transmission facility;

(2) within thirty (30) days, with respect to requests to (i) relocate existing broadcast transmission facilities from a currently approved location to another location within 300 feet; (ii) consolidate two or more broadcast transmission facilities on a common tower other structure, whether the tower or other structure is pre-existing or new; or (iii) increase the height of an existing tower;

(3) in all other cases, within forty-five (45) days.

The failure of a state or local government or instrumentality thereof to act on any request within a reasonable period of time will result in the request being deemed granted.

(b) ***Preemption.***

(1) No state or local government or instrumentality thereof may deny a request to place, construct or modify a broadcast antenna facility on the basis of:

(i) the environmental or health effects of radio frequency emissions to the extent that such facility has been determined by the Commission to comply with the Commission's regulations and/or policies concerning such emissions;

- (ii) interference effects on existing or potential telecommunications providers, end users, broadcasters or third parties, to the extent that the broadcast antenna facility has been determined by the Commission to comply with applicable Commission regulations and/or policies concerning interference;
 - (iii) lighting, painting, and marking requirements, to the extent that the facility has been determined by the Federal Aviation Administration ("FAA") or the Commission to comply with applicable FAA and Commission regulations and/or policies regarding tower lighting, painting and marking;
- (2) Any state or local land-use, building, or similar law, rule or regulation that impairs the ability of federally authorized radio or television operators to place, construct or modify broadcast transmission facilities, is preempted unless the promulgating authority can demonstrate that such regulation is reasonable in relation to:
- (i) a clearly defined and expressly stated health or safety objective other than one related to those set forth in Section (1)(i)-(iii) above; and
 - (ii) the federal interests in (i) allowing federally authorized broadcast operators to construct broadcast transmission facilities in order to render their service to the public; and (ii) fair and effective competition among competing electronic media.
- (c) **Written decision.** Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify a broadcast antenna facility shall be in writing and supported by substantial evidence contained in a written record. Such written decisions shall be delivered to all applicants within five (5) days.
- (d) **Alternative Dispute Resolution.** In the event that an applicant is denied approval to place, construct, or modify a broadcast antenna facility, the applicant may elect to have its request submitted to an alternate dispute resolution process which shall be administered by the Commission. An Applicant whose request has been denied may elect arbitration by filing a written notice of election, including a copy of the written decision of the state or local government or instrumentality thereof, with the Commission within ten (10) days of receipt of the decision of the state or local government or instrumentality thereof. The Commission shall select an arbitrator to hear and resolve the dispute within five (5) days of receipt of the notice. The Commission shall conduct and complete the arbitration within fifteen (15) days of receipt of the applicants' written request for arbitration. If it is determined that the decision of the state or local government or instrumentality thereof is unsupported by the evidence in the record and would, if allowed to stand, frustrate the federal

interests set forth above in paragraph (b)(2)(ii), the Commission shall issue an order vacating the decision of the state or local government or instrumentality thereof and granting the applicant's request to place, construct, or modify its broadcast antenna facility.

- (e) ***Declaratory Relief.*** Any radio or television operator adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this rule may, within 30 days after such action or failure to act, petition the Commission for a declaratory ruling requesting relief. The Commission shall act on such petitions within thirty (30) days

- (f) ***Definitions.*** For purpose of this section:
 - (i) "Broadcast transmission facilities" shall mean towers, broadcast antennas, associated buildings, and all equipment cables and hardware used for the purpose of or in connection with federally authorized radio or television broadcast transmissions.

 - (ii) "Broadcast operator" shall mean a person, firm, corporation or other form of business organization which has been issued a construction permit, license, experimental authorization, special temporary authorization, or other authority from the Federal Communications Commission.