

factual determination applicable only to the area in question, based on preexisting facts. Under these circumstances, the administrative requirements discussed above might not apply. However, EPA is taking this approach under consideration, it is not today proposing this approach.

List of Subjects in 40 CFR Part 81

Environmental protection, Air pollution control, National parks, Ozone, Wilderness areas.

Dated: August 25, 1997.

Jerry Clifford,

Acting Regional Administrator.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[FCC 97-296]

Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Transmission Facilities

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission issues this Notice of Proposed Rule Making 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. Having found that the accelerated roll-out is essential to the success of over-the-air DTV, the Commission set out an accelerated construction schedule for DTV facilities. To the extent that state and local restrictions stand as an obstacle to the achievement of its purposes the Commission has the authority to preempt state or local law. In this Notice of Proposed Rule Making, the Commission seeks comment on whether and in what circumstances it should preempt state or local action or inaction that interferes with the rapid roll-out of DTV.

DATES: Comments are due on or before October 30, 1997 and reply comments are due on or before December 1, 1997.

FOR FURTHER INFORMATION CONTACT: Keith Larson, Assistant Bureau Chief for Engineering or Susanna Zwerling, Policy and Rules Division, Mass Media Bureau (202) 418-2140.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Notice of*

Proposed Rule Making, FCC 97-296 adopted August 18, 1997 and released August 19, 1997. The full text of this Commission Notice is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 239), 1919 M Street NW, Washington, DC. The complete text of this Notice may also be purchased from the Commission's copy contractor, International Transcription Services (202) 857-3800 2100 M Street, NW., Suite 140, Washington, DC 20037.

Synopsis of Notice

I. Introduction

1. The Commission is undertaking this rule making to consider whether and in what circumstances to preempt certain state and local zoning and land use ordinances that present obstacles to the rapid implementation of DTV. Such ordinances may inhibit the resiting of antennas made necessary by the implementation of DTV. This issue was brought before the Commission in a "Petition for Further Notice of Proposed Rule Making" filed jointly by the National Association of Broadcasters and the Association for Maximum Service Television ("Petitioners").¹

II. Background

2. In its *Fifth Report and Order* in the DTV proceeding, the Commission adopted an accelerated schedule for construction of DTV transmission facilities. The construction schedule requires affiliates of the top four networks to be on the air with digital signals by May 1, 1999 in the top ten markets and by November 1, 1999 in markets 11-30. All other commercial stations must construct their DTV facilities by May 1, 2002, and noncommercial stations by May 1, 2003. Subject to biennial review and statutory exceptions, all stations are to return their analog spectrum by 2006.²

3. The accelerated DTV transition schedule will require extensive tower modification and construction. Petitioners state that local regulation presents obstacles to this construction schedule in that the levels of review

required in the administration of such restrictions can last several months.

4. To facilitate compliance with the DTV construction schedule, Petitioners ask the Commission to adopt a rule allowing the Commission to preempt state and local zoning and other land use regulations to the extent they unreasonably delay the DTV roll-out and other ongoing broadcast transmission facilities construction. The proposed rule 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 Petitioners' proposed rule would require action within 21 days with respect to modifications of existing broadcast transmission facilities where no change in location or height is proposed; within 30 days with respect to the relocation of an existing broadcast transmission facility from a currently approved location to another location within 300 feet, or the consolidation of two or more broadcast transmission facilities, or the increase in the height of an existing tower; and within 45 days for all other requests. Failure to act within these time limits would cause the request to be deemed granted. The Petitioners propose that a broadcaster receiving an adverse decision 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. The Petitioners' proposed rule would remove from local consideration (1) regulations based on the environmental or health effects of radio frequency ("RF") emissions; and (2) interference with other telecommunications signals and consumer electronics devices to the extent that the facility complies with Commission regulations. It would also remove from local consideration regulations concerning tower marking and lighting provided that the facility complies with applicable Commission or Federal Aviation Administration regulations. The Petitioners' proposed rule would preempt all state and local regulations that impair the ability of licensed broadcasters construct or modify their facilities unless the state or local authority can demonstrate that the regulation is related to health or safety objectives.

III. Discussion

5. In its *Fifth Report and Order* the Commission set out the rationale for an accelerated roll-out of DTV. The Commission found that first, absent a speedy roll-out, other DTV services might achieve levels of penetration that

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 FR 26966 (May 16, 1997). The Commission will, however, treat the Petition as one filed pursuant to 47 CFR 1.401 seeking the institution of a new rule making proceeding.

² *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).

could preclude the success of over-the-air DTV; second, an expedited construction schedule would promote DTV's competitive strength internationally and spur the American economy; third, an accelerated schedule would offset any individual broadcaster's disincentives to begin digital transmissions quickly; and finally, a rapid roll-out would ensure the swift recovery of broadcast spectrum. In order to achieve these goals, the Commission instituted an aggressive but reasonable construction schedule, aimed at exposing as many homes to DTV as early as possible. The *Fifth Report and Order* acknowledged that difficulties in obtaining zoning and other approvals may interfere with a broadcaster's ability to meet construction schedule requirements. At the same time, the Commission is 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, the Commission seeks 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.

6. 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.³ 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.⁴ 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, the Commission has authority to preempt where state or local law stands as an obstacle to the accomplishment and execution of the full objectives of Congress⁵ or where the Commission finds preemption is necessary to achieve its purposes within the scope of its delegated authority.⁶

7. Congress explicitly indicated its objective of a speedy recovery of spectrum in the 1996 Telecommunications Act, requiring the Commission to condition the grant of a DTV license on the return of either that license or the original license for reallocation or reassignment.⁷ As indicated above, the Commission found that a speedy conversion would increase the likelihood of success of the DTV roll-out and allow for the rapid recovery of spectrum, while a slower conversion would undermine the success of DTV, and thereby impede the recovery of spectrum. The Commission also determined that the prompt, broad availability of DTV to the American public was an important public interest goal.⁸

8. Local zoning and land use decisions that delay construction of the DTV transmission facilities may make it impossible for a licensee to meet the DTV construction schedule.⁹ To the extent that state and local ordinances make it impossible for broadcasters to meet the 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. At the same time, the Commission is sensitive to the rights of states and localities to protect the legitimate interests of their citizens and does not seek to unnecessarily infringe these rights. The Commission recognizes its obligation to "reach a fair accommodation between federal and nonfederal interests."¹⁰ Thus, it is

incumbent upon the Commission not to "unduly interfere with the legitimate affairs of local governments including certain health, safety and aesthetic regulations, when they do not frustrate federal objectives."¹¹ Historically the Commission has sought to avoid becoming unnecessarily involved in local zoning disputes regarding tower placement, however, where such ordinances have inhibited the implementation of Congressional or FCC objectives, the Commission has adopted rules preempting local zoning ordinances.¹²

9. The Petitioners' proposed rule is not limited to DTV-related construction, including the involuntary relocation of FM antennas now collocated on television towers. It is less clear to the Commission that preemption will be needed where broadcasters do not face exigencies such as DTV construction deadlines. The Commission seeks comment as to whether a preemption rule should cover the construction of all broadcast facilities or be limited to DTV construction and to FM radio station transmission facility relocations resulting from such construction.¹³

IV. Request for Comments

10. The Commission generally invites comment on the Petitioners' proposals for the preemption of state and local law regulations on the siting of broadcast transmission facilities and on the Petitioners' proposed rule.

Alternatively, the Commission seeks comment on whether any rule adopted 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.¹⁴

11. The Commission seeks a detailed record of the nature and scope of

power must represent reasonable accommodation of conflicting policies.)

¹¹ *Notice of Proposed Rule Making*, In the Matter of Preemption of Local Zoning Regulations of Receive-Only Satellite Earth Stations, CC Docket No. 85-89, 50 FR 13986 (April 9, 1985). See also Preemption of Local Zoning Regulations of Satellite Earth Stations, IB Docket No. 95-59, 61 FR 10896 (March 18, 1996); Preemption of Local Zoning Regulations of Receive-Only Satellite Earth Stations, 50 FR 13986, 13989; 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).

¹² *E.g.*, Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, CC Docket No. 85-87, 59 FR 2d 1073 (released February 5, 1986); Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, PRB-1, 50 FR 38813 (September 25, 1985).

¹³ But see paragraph 21, *infra*.

¹⁴ See, *e.g.*, 47 CFR § 25.104.

³ 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).

⁴ 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.")

⁵ *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941).

⁶ *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.

⁷ 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.").

⁸ *Fifth Report and Order*, *supra* at ¶ 5.

⁹ *Fifth Report and Order*, *supra* at ¶ 91.

¹⁰ *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

broadcast tower siting issues, including delays and related matters encountered by broadcasters, tower owners and local government officials. The Commission is particularly interested in receiving information about experiences related to time constraints, delays or other obstacles encountered by broadcasters and tower owners in the top 30 markets.¹⁵ The Commission is also interested in the extent to which commenters believe such difficulties are representative of difficulties that will be faced in the context of DTV build-out and whether existing laws, ordinances and procedures are likely to impede adherence to our accelerated DTV build-out schedule. The Commission also seeks comment on whether it should preempt state and local restrictions regarding RF emissions from broadcast transmission facilities or local regulation intended for aesthetic purposes?

12. The Commission also seeks comment on the procedural framework proposed by Petitioners. Specifically, should the Commission preempt state and local government authority where they fail to act within certain time periods? The Commission asks states and localities to comment on their current procedures, their need to use these procedures, the possibility of using expedited procedures to meet the DTV construction schedule, 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?

List of Subjects in 47 CFR Part 1

Television broadcasting, Radio broadcasting.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

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¹⁵ 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.

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 80

[PR Docket No. 92-257; DA 97-1806]

Maritime Communications

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; extension of comment period.

SUMMARY: On August 21, 1997, the Public Safety and Private Wireless Division adopted an order extending the comment and reply comment period in PR Docket No. 92-257. The extension was requested to allow interested parties more time to evaluate the issues and develop an industry consensus. The comment period is extended from August 25, 1997 to September 15, 1997, and the reply comment period is extended from September 9, 1997 to September 30, 1997.

DATES: Comments are to be filed on or before September 15, 1997, and reply comments on or before September 30, 1997.

ADDRESSES: Federal Communications Commission, 1919 M St., N.W., Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Scot Stone, Wireless Telecommunications Bureau, Public Safety & Private Wireless Division, (202) 418-0680 or via E-mail to "sstone@fcc.gov".

SUPPLEMENTARY INFORMATION:

Adopted: August 21, 1997.

Released: August 21, 1997.

1. On August 15, 1997, Ross Engineering (Ross) requested that the time for filing comments in response to the *Second Further Notice of Proposed Rule Making (Second Further NPRM)* in the above-captioned proceeding released by the Commission on June 26, 1997,¹ be extended from August 25, 1997, to September 15, 1997, and that the time for filing reply comments be

¹ Amendment of the Commission's Rules Concerning Maritime Communications, *Second Further Notice of Proposed Rule Making*, PR Docket No. 92-257, FCC 97-217 (released June 26, 1996) (*Second Further NPRM*); see Maritime Communications, 62 FR 37533 (July 14, 1997).

extended from September 9, 1997 to October 16, 1997.

2. Ross states that it needs additional time to submit comments in order to fully address the substantive effect of the issues raised in the *Second Further NPRM*, consider the impact of a related Petition for Rulemaking filed by the United States Coast Guard,² and complete the work of coordinating and developing an industry consensus on these issues. Ross also states that Mobile Marine Radio, MARITEL, and the Coast Guard concur in its request for an extension of time.

3. The Commission does not routinely grant extensions of time. In this instance, however, it is desirable that the record be as complete as possible and that it include the views of as large a cross section of the maritime radio community as possible. This interest must be balanced, however, against the fact that the filing and process freeze enacted to allow the development of new rules for maritime services expires on March 17, 1998, and the Commission's intent to adopt final rules before the freeze expires.³ We believe an extension of twenty-one (21) days to be adequate to give the maritime community sufficient time to respond to the above-captioned proceeding. We therefore extend the period of time for filing comments to and including September 15, 1997, and we extend the period for filing reply comments to and including September 30, 1997.

4. *It Is Hereby Ordered* that pursuant to § 1.46 of the Commission's Rules, 47 CFR § 1.46, Ross's request to extend the deadline for filing comments and reply comments in this proceeding is granted in part to the extent indicated herein, and otherwise denied.

Federal Communications Commission.

Lisa M. Higginbotham,

Acting Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau.

[FR Doc. 97-23191 Filed 8-29-97; 8:45 am]

BILLING CODE 6712-01-P

² United States Coast Guard Petition for Rulemaking to Amend Part 80 of the FCC Rules to Designate Maritime Channels and Allow Operation of Automatic Identification Systems and Related Safety Systems (filed August 4, 1997).

³ *Second Further NPRM* at ¶132.