

FCC Local and State Government Advisory Committee

Advisory Recommendation Number 3:

National Association of Broadcasters / Association for Maximum Service Television **Petition for Further Notice of Proposed Rulemaking** **MM Docket No. 87-286; Filed May 30, 1997**

1. The National Association of Broadcasters (NAB) and the Association for Maximum Service Television (AMST) have filed a Petition ("the Petition") asking the Commission to adopt a rule providing for preemption of state and local laws that affect the siting and construction of broadcast transmission facilities. Assuming, for the sake of argument, that the Commission has authority to adopt the proposed rule, the rule far exceeds the scope of any problem the NAB and AMST allege and is based on "facts" that are misleading. The LSGAC recognizes that the Commission has established a rigorous timeline for rollout of advanced television. In light of this timeline, the LSGAC urges the Commission to initiate a dialogue between the petitioners, the LSGAC and the Commission. If the Commission takes any formal action in response to the Petition, the LSGAC urges the Commission to issue a Notice of Inquiry rather than a Notice of Proposed Rulemaking.

2. The rule proposed by the NAB and AMST is modeled on Section 704 of the Telecommunications Act of 1996 regarding the placement of personal wireless service facilities (47 U.S.C. §332(c)(7), "Preservation of Local Zoning Authority"). However, significant differences between personal wireless service facilities and broadcast transmission facilities limit the usefulness of Section 704 as a model:

a. Unlike personal wireless service facilities, broadcast transmission facilities can be immense. In many communities, the broadcast transmission facilities are the largest and most conspicuous structures for many miles. For example, the LSGAC has been advised that some towers for advanced television will be as high as 2000 feet. These will rival the height of Chicago's Sears Tower.

b. Because each individual facility serves only a small area, personal wireless service facilities must be widely dispersed throughout a community. In contrast, broadcast transmission facilities are not likely to be widely dispersed throughout a community. Rather, a single facility may serve many communities.

c. The number of personal wireless service facilities is expected to increase exponentially in the next several years. Local siting policies must reflect this likelihood. In contrast, the number of broadcast transmission facilities is not expected to increase at an exponential rate.

3. Just as there are significant differences between personal wireless services facilities and broadcast transmission facilities, there are significant differences between Section 704 of the Telecommunications Act of 1996 and the proposed NAB/AMST rule. Despite the absence of any specific legislative authority, the NAB/AMST has proposed a rule that would have a dramatically broader preemptive effect than Section 704:

a. Although it is justified by concerns about the Commission's schedule for rollout of advanced television services, the NAB/AMST rule would apply to *all* broadcast facilities, including radio facilities.

b. Contrary to the philosophical underpinnings of Section 704, the proposed rule starts from the assumption that local siting and building requirements are invalid. Congress adopted Section 704 as a *preservation* of local authority. It subjects local zoning authority to only minimal substantive limitations. Congress recognized that local officials will balance safety and aesthetic concerns with the desire of citizens to receive new services. The NAB/AMST rule would preempt any state or local land use, building or similar law that "impairs the ability of federally authorized radio or television operators to place, construct or modify broadcast transmission facilities" unless the law is justified according to prescribed purposes. The

Commission should not presume that local siting and building requirements will obstruct the roll-out of advanced television.

c. Although Congress required local jurisdictions to act on personal wireless service permit applications within a reasonable period of time, the Conference Report accompanying the Act (H.Rept. 104-458) states that Congress did not intend to give preferential treatment to such permit applications. Rather, under Section 704, a reasonable period of time is defined by local practice, taking into account the nature and scope of each request. In contrast, the NAB/AMST rule proposes ridiculously short time for local action. In some cases, the proposed deadlines would require a decision from a body before a single meeting of the body is scheduled. The NAB/AMST rule would enforce preferential treatment for broadcasters by providing that whenever a local government fails to meet the prescribed time for action, the permit application is deemed granted. There is no precedent for a Commission rule that permit applications for broadcast facilities should get preferential treatment over other kinds of pending applications, such as applications related to office towers, housing developments or sports stadiums.

d. Section 704 provides that most disputes between permit applicants and local entities should be resolved by courts. It authorizes the Commission to preempt land use decisions only in very limited circumstances involving decisions based on the health effects of radiofrequency emissions. In contrast, the NAB/AMST rule would bypass the courts entirely and deliver ALL disputes over siting and construction of broadcast transmission facilities to the Commission. This proposal would be equally paralyzing for both local governments, for whom the Commission is an expensive, distant and unfamiliar forum, and the Commission.

4. The Petition recounts examples from several jurisdictions to suggest that broadcast towers are subject to extraordinary, illogical and obstructionist local requirements. In some cases, the Commission could easily respond to these examples by producing the same kind of educational materials it has developed to assist local governments handling permit applications for personal wireless service facilities. In other cases, the Petition seeks preemption of laws of general application and cites as obstacles procedures that the applicant undertook voluntarily or without complaint to local officials. For example:

a. The Petition complains that the San Francisco Zoning Administrator required Sutro Tower to construct a model of proposed tower modifications to help the Zoning Administrator evaluate the visual effects of the modifications. The construction of models to evaluate visual impacts is a common practice. Sutro Tower raised no objection to this request to San Francisco officials.

b. The Petition complains that San Francisco required Sutro Tower to obtain a building permit for tower modifications. Building or modifying *any* structure in San Francisco -- including a deck on a single family dwelling -- requires a building permit. The San Francisco Building Code is not unusual. Like most cities, San Francisco has derived its code from the Uniform Building Code adopted by the International Conference of Building Officials. Requiring assurance that an 800 foot tall structure will be structurally sound reflects the local duty to protect public safety.

c. The Petition complains that the requirement of a building permit triggered review of the Sutro Tower modifications under the California Environmental Quality Act (CEQA). CEQA requires environmental review of all projects causing a physical impact on the environment. Sutro Tower volunteered to prepare an environmental impact report without complaint to local officials.

5. Few local officials have had an opportunity to consider how the Commission's timetable for advanced television may affect local proceedings. Likewise, it appears that the Commission has not considered how necessary local approvals may affect the Commission's timeline. The Commission's three-stage process for rollout of advanced television services, with different deadlines for the top ten, next twenty, and remaining television markets, lends itself to a collaborative intergovernmental process. Rather than issuing a notice of proposed rulemaking that seeks to preempt every local government throughout the nation, the LSGAC urges the Commission to work with local governments in the top 10 markets and with the television

broadcast industry to identify problems and develop solutions that accommodate both the Commission's deadlines and the need for local review of projects involving very large structures.

6. The LSGAC is already planning to initiate such a process. At its July 25 meeting, the LSGAC decided to invite representatives from jurisdictions in which broadcast transmission facilities serving the top ten television markets are located to its September meeting. The purpose of this session will be to discuss methods for expediting local review of advanced television services transmission facilities. In addition, the LSGAC decided to invite representatives of the NAB to its September meeting.

RECOMMENDATION: For the reasons discussed above, the LSGAC recommends that the Commission take the following steps:

- 1) Assign appropriate technical staff to assist the LSGAC in preparing for its meeting with representatives of jurisdictions affected by the deployment of advanced television services in the top ten markets;
- 2) Participate in discussions with the LSGAC in conjunction with this meeting;
- 3) Participate in the LSGAC's meeting with representatives of the National Association of Broadcasters;
- 4) Issue, if anything, a Notice of Inquiry rather than a Notice of Proposed Rulemaking. The Notice of Inquiry should ask comments to:
 - a. Identify specific laws or practices that are likely to affect the siting and construction of facilities for advanced television services in the top ten markets;
 - b. Identify specific construction plans affected by these laws and practices; and
 - c. Identify what broadcasters have done to bring their construction plans and concerns about local requirements to the attention of local officials.

Approved by the LSGAC on July 25, 1997

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