

**Before the
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
Washington, D.C. 20590**

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In the Matter of)	
)	
Safe, Efficient Use and Preservation of the)	Docket No. FAA-2006-25002
Navigable Airspace)	Notice No. 06-06
_____)	

**COMMENTS OF THE
ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.**

The Association for Maximum Service Television, Inc. (“MSTV”)¹ submits these comments to request that the FAA withdraw the proposed amendments to Part 77 of the FAA’s Rules described in the FAA’s Notice of Proposed Rulemaking, particularly as they apply to users of the VHF television spectrum.² The proposal would provide no benefit to air safety, while unnecessarily imposing dramatic costs on broadcasters and other users of radio spectrum and interfering with the Federal Communications Commission’s (“FCC”) ability to discharge its responsibility to regulate the use of the broadcast spectrum in the public interest.

I. EXISTING RULES AND THE STRUCTURE OF DIGITAL TELEVISION BROADCASTING ADEQUATELY PROTECT AIR SAFETY.

The FAA has long been successful in regulating the aviation industry to promote “safety in air commerce” and “the efficient use and preservation of the navigable

¹ MSTV is the non-profit trade association representing local broadcast television stations committed to preserving the technical integrity of the public’s broadcast television service.

² Notice of Proposed Rulemaking, *Safe, Efficient Use & Preservation of the Navigable Airspace*, Docket No. FAA-2006-25002, 71 Fed. Reg. 34028 (2006) (“NPRM”).

airspace.”³ In this regard, it is notable that the FAA’s NPRM does not identify any situation in which the FAA’s inability to obtain information about FCC licensees’ use of VHF broadcast spectrum has contributed to an air safety incident. Indeed, MSTV’s review of air crash data published by the National Transportation Safety Board did not reveal even one incident attributable to radio frequency interference.⁴ The results of the existing partnership between the FCC and the FAA speak for themselves. The current rules have worked – flawlessly – and the NPRM offers no compelling reason to change them.

In particular, to the extent that any changes to the FAA’s notice and no-hazard rules must be made, there is no air safety justification for including VHF television licensees in any enhanced obligations.⁵ VHF television stations exist for decades at one location, and information about their equipment and operations is readily available. Moreover, the impending digital television transition – which Congress required the FCC to complete by February 2009⁶ – may reduce radio frequency emissions in this band. First, the number of full power stations will decline after the transition because analog stations will cease operation in early 2009. Second, due to technical concerns associated with impulse noise, many stations will not use the low VHF band (channels 2-6) for digital broadcasting.⁷ Finally, to the extent that such users

³ 49 U.S.C. § 44718(a).

⁴ See Nat’l Transp. Safety Board, “Aviation Accident Database & Synopses,” available at <http://www.nts.gov/nts/query.asp> (last visited Aug. 29, 2006).

⁵ The FAA correctly excluded UHF broadcast facilities from its proposed EMI notice requirements.

⁶ See 47 U.S.C. § 309(j)(14).

⁷ Some of the newly returned spectrum in the VHF band will be used by LPTV, Class A and TV translator stations.

remain in the band, the FCC rules for DTV require them to operate at a lower power and under more stringent out-of-band-emissions requirements.⁸ For these reasons, the VHF television spectrum poses a particularly low risk with respect to the FAA's air safety concerns, which are in any case adequately protected by the existing procedures of the FAA and FCC.

II. THE PROPOSED RULES WOULD UNDULY BURDEN VHF BROADCASTERS AND WOULD LIMIT THE FCC'S ABILITY TO REGULATE THE USE OF THE BROADCAST SPECTRUM.

The rules proposed by the FAA would represent a drastic and unprecedented expansion of the FAA's authority over FCC licensees. Although they are framed as an attempt to facilitate the "study" of electromagnetic interference, the proposed changes would substantially interfere with VHF licensees' ability to efficiently discharge their regulatory obligations. The rules would also unnecessarily and improperly interfere with the FCC's efforts to regulate the use of VHF spectrum. These changes would be particularly disruptive at a time when the FCC and broadcasters are taking the critical steps to bring about a successful end of the DTV transition.

Under existing law, broadcasters are subject to substantial and effective regulation by the FCC, which has adopted detailed procedures to ensure that use of the broadcast spectrum does not interfere with other spectrum uses or cause safety or other concerns. A licensee must file an application with the FCC for a license to operate,⁹ and it must apply for a modification to its license in order to make any significant change to

⁸ *In re Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Mem. Op. & Order, 13 FCC Rcd. 7418, ¶¶ 91-94 (1998).

⁹ *See* 47 C.F.R. § 73.3572(a).

its facilities.¹⁰ Every broadcast application is open to comment from any member of the public, including the FAA, and such comments are routinely considered when the FCC acts on pending applications. These applications are available in the FCC’s licensing database, and the FAA could easily coordinate with FCC to ensure that it receives any information that it needs without the need for a rule change.

The FAA’s key justification for the advance notice requirements is the need for it to have information about the status of changes to broadcast facilities, yet it has not offered even one example of a situation in which the lack of this information has caused either a safety problem or even a regulatory burden on another party regulated by the FAA. It has also not explained why interagency coordination is not a more efficient – and more reliable – method of achieving its stated goals.

A. Expansion of Notice Requirements

The proposed rule changes would require notice of construction of any new VHF broadcast tower, as well as notification of any changes to the tower, the facility’s authorized frequency or power, or antenna specifications. The advance notification period would also be expanded from 30 days to 60 days. The NPRM would exempt from these requirements changes in effective radiated power less than 3 dB or antenna height increases of less than 100 feet on the theory that changes at such low levels are not measurable and any additional interference would be insignificant.¹¹

¹⁰ See 47 C.F.R. § 73.3573(a).

¹¹ *NPRM* at 34033.

The proposed amendment to Section 77.9 of the FAA’s rules could be read to have an effect even broader than was anticipated by the NPRM. Specifically, proposed Section 77.9(e)(2) would require notification for “[a]ny changes or modifications to a system operating on a [covered frequency], including” certain listed changes. See *NPRM* at 34041. The use of the word “including” could be read to make the listed items

The proposed rules fail to clearly define the circumstances under which notice is or is not required, raising the concern that the rules could be read to subject some stations to notice requirements, while exempting others that are similarly situated. For example, the proposed rules could be read to require notice for changes in antenna specifications or radiating pattern that do not result in power increases of greater than 3 dB in any azimuth. Likewise, there is no stated clarification that licensees would not need to file notices for a change from a frequency subject to FAA notification under the proposed rules to a frequency not subject to notification. For example, the proposed rules do not clarify that a television broadcaster switching from a VHF channel to a UHF channel should not be required to file a frequency change notice because there is no risk that any interference in the UHF band would impact aviation-related radio frequency uses. Thus, even if the rule changes described in the NPRM were appropriate, these deficiencies call into question the practical feasibility of the proposed rules.

MSTV altogether opposes the proposed expansion of the notice rules because the change would impose upon broadcasters a duplicative regulatory burden to provide similar information to two government agencies, using two distinct sets of procedures. As described above, it would be substantially more efficient for FAA to obtain this information from the FCC directly than for it to require thousands of FCC licensees across the country to make repetitive filings.

In addition to the burden this requirement would impose on FCC licensees, the proposed rules would in practice interfere substantially with licensees' ability to operate and would directly and materially conflict with currently existing FCC

illustrative, not exclusive, and thereby to require licensees to notify the FAA of *any* change to their broadcast facilities, no matter how inconsequential.

regulations. For instance, it is common for broadcasters to make unexpected but minor broadcast facility changes, such as changes to repair or replace defective equipment that is not effectively transmitting the station's signal, or that threatens to cause harmful interference or exceed RF emissions limitations. Under various circumstances, FCC rules permit licensees to operate using temporary facilities with no notice, or with far less than the 60 days' notice that the FAA's NPRM would require.¹² But if they were required to notify the FAA 60 days in advance, broadcasters would generally be required to wait for two months before making critical changes to their facilities, or even to go off the air during this waiting period.

In light of the inflexible nature of the proposed rules, it would in many cases be impossible for broadcasters to comply with both FCC rules and the FAA's new sixty-day notice requirement for even minor changes, as, for instance, when a change to facilities is required to avoid signal bleed or to continue transmitting at all. This inconsistency is contrary to the public interest, and it imposes a completely unnecessary burden on licensees who seek only to conduct their businesses while remaining compliant with applicable regulations.

B. No Hazard Determinations

The NPRM's proposed changes to the procedures for granting and extending the applicability of Determinations of No Hazard to Air Navigation are similarly problematic. Under existing law, an FAA Determination of No Hazard concerning an FCC-regulated facility generally lasts for the duration of the FCC's

¹² See, e.g., 47 C.F.R. § 73.1615 (procedures for temporary operation during modification of broadcast facilities); 47 C.F.R. § 73.1690(c) (modifications permitted for program test operations).

consideration of the licensee’s application.¹³ Under the proposal, the Determination would expire “18 months after the effective date of the determination, or on the date the proposed construction or alteration is abandoned, whichever is earlier.”¹⁴ The change fails to take into account the fact that it is difficult for licensees or the FCC to predict how quickly a modification application can be acted upon. If it takes the FCC longer than 18 months to act, the proposed rule would compromise the application. The only way to cure that deficiency, under the proposed rule, is for the licensee to return to the FAA every twelve months to extend the life of the No Hazard Determination, even if there has been no change to the circumstances surrounding the FAA’s original decision to find that the proposal posed no hazard to aviation operations.

Under existing law, a No Hazard Determination is automatically extended when the FCC grants an extension to a construction permit. But the NPRM proposes to change this procedure to require licensees to return to the FAA to seek an extension of the No Hazard Determination as well. That procedure puts the FAA, not the FCC, in control of construction permit extensions, since the FAA could essentially override an FCC decision on a construction permit simply by refusing to grant an extension or delaying a grant. It is inappropriate for an agency which enjoys at most an ancillary regulatory role with respect to broadcast television spectrum to have the ability to override or undercut the decisions of the agency that has both the necessary expertise and the required Congressional authority.

The only rationale offered by the NPRM for these drastic changes is that “there have been cases in the past where air traffic operations or flight procedures have

¹³ *NPRM* at 34036.

¹⁴ *NPRM* at 34044.

been delayed or adjusted . . . to accommodate a proposed structure that was never built.”¹⁵ But that problem does not support the expansion procedures proposed by the NRPM. The appropriate response to FAA’s concern – essentially, that it should be informed when FCC construction permits are extended or withdrawn – is that the FAA should coordinate with the FCC to obtain the relevant information,¹⁶ not that FAA should impose on licensees another schedule of regulatory obligations with which they must comply to maintain their authorizations.

III. IN CONTRAST, UNLICENSED OPERATIONS WOULD POSE A SUBSTANTIAL EMI RISK.

The FAA’s proposed rules are also deficient because, while focusing attention on the VHF band and other licensed radio frequency users that do not seriously threaten air safety and aviation radio operations and as to which a far less intrusive but equally effective remedy is available, they ignore the much more critical EMI risks associated with unlicensed radio operations proposed to operate in these same television frequencies. In contrast to licensed frequency users, however, unlicensed operators would be subject to sparse, inadequate regulation and are not required to register their technical and operating parameters with the FCC.¹⁷

¹⁵ *NPRM* at 34036.

¹⁶ As the National Association of Broadcasters observes in its Paperwork Reduction Act comments, the FCC’s Wireless Telecommunications Bureau and the National Geospatial-Intelligence Agency access each others’ databases on a quarterly basis to ensure antenna structure owners’ compliance with FCC and FAA rules. Paperwork Reduction Act Comments of NAB, Docket No. FAA-2006-25002 (filed Aug. 11, 2006) (citing *Wireless Telecomms. Bureau Announces 60-Day Amnesty for Structures Identified in Initial Quarterly Audit of Antenna Structures*, Public Notice, 18 FCC Rcd. 15,340 (2003)).

¹⁷ Moreover, while it is possible for the FCC to require a licensed operator to cease or modify its operations, it will be nearly impossible to stop interference from unlicensed devices once they are manufactured and distributed to consumers.

As the FAA considers the risk of EMI from other radio frequency users, it should be aware of the FCC's proposal to permit unlicensed operation in all of the television broadcast bands, including the VHF bands.¹⁸ If adopted, the FCC's proposed rules would permit millions of unlicensed devices with power levels of up to 4 watts EIRP to operate on any unused VHF TV channel, including in or near airports and other critical aviation facilities. Because these devices would be unlicensed, there would be no control over, or even detection of, where, when or how these devices would operate.

MSTV asks the FAA to withdraw its proposal to impose additional notice requirements on licensed VHF users, particularly since uses of that band have never presented any EMI challenges and use of the band will only decrease as the digital television transition is completed. The only legitimate cause for FAA concern about EMI in the VHF TV bands is instead from the new, uncontrolled, and unlicensed devices that the FCC proposes to permit in the VHF band.

IV. THE FAA HAS NO AUTHORITY TO ADOPT THE PROPOSED RULES.

Apart from the fact that the proposed rules would seriously interfere with the FCC's longstanding and effective regulatory scheme, and apart from the ability of VHF broadcasters to operate efficiently, the FAA cannot adopt them because it lacks the necessary statutory authority. In order to find any authority at all for the proposed rules, the NPRM offers a detailed analysis of twenty-year old legislative history.¹⁹ Read fairly,

¹⁸ See *In re Unlicensed Operation in the TV Broadcast Bands*, Notice of Proposed Rulemaking, ET Docket No. 04-186, FCC 04-113 (rel. May 25, 2004).

¹⁹ The FAA also relies on a fifteen-year old Eleventh Circuit decision. See *NPRM* at 34030 (citing *Greater Orlando Aviation Authority v. FAA*, 939 F.2d 954 (11th Cir. 1991)). Since the FAA can cite no incident over this extended period that would have been avoided by the proposed rules, it is curious that the FAA now finds that it has, and should exercise, the authority to adopt them.

however, the Federal Aviation Act of 1958, as amended, provides no support for the proposal.

In 1987, Congress authorized the FAA, “if [it] decides that constructing or altering a [particular] structure may result in an obstruction of the navigable airspace or an interference with air navigation facilities and equipment or the navigable airspace,” to conduct an aeronautical study on “the extent of any adverse impact on the safe and efficient use of the airspace, facilities, or equipment.”²⁰ The result of such a study is “a report disclosing completely the extent of the adverse impact on the safe and efficient use of the navigable airspace,”²¹ not the issuance of regulations or the taking of any other steps with binding authority.

The NPRM claims that “interference with air navigation facilities” was defined in a House Report accompanying the bill to “include[] both physical and electromagnetic effects,”²² and that this legislative statement therefore gives the FAA authority to impose expanded notice and “advanced study” requirements on FCC licensees, the effect of which is to greatly expand the FAA’s authority to make decisions concerning radio facilities independent of the FCC.

But the directive to undertake a study is not a grant of authority to promulgate rules, particularly when they tread on another agency’s well-established and successfully functioning regulatory regime. Moreover, Congress specified the FAA’s role in spectrum use decisions:

²⁰ 49 U.S.C. § 44718(b)(1).

²¹ 49 U.S.C. § 44718(b)(2).

²² *NRPM* at 34030.

In carrying out laws related to a broadcast application and conducting an aeronautical study related to broadcast towers, the Administrator of the Federal Aviation Administration and the Federal Communications Commission shall take action necessary to coordinate efficiently—

(1) the receipt and consideration of, and action on, the application; and

(2) the completion of any associated aeronautical study.²³

Congress intended that the FAA would *coordinate with the FCC* to ensure that the FAA received the information necessary to discharge its responsibility to protect air safety and the navigable airspace. Pursuant to that directive, it is entirely appropriate for the FCC to share with the FAA public information concerning applications for broadcast construction permits and modifications, and for the FCC to receive comment from the FAA wherever the FAA believes that an application implicates air safety concerns. Indeed, the FAA has frequently and appropriately involved itself in FCC proceedings in cases in which the FCC decisions would have such an impact.²⁴ The FAA's history of participation in FCC proceedings has been successful and effective. The FAA has offered no reason now why it cannot continue to follow this approach.

²³ 49 U.S.C. § 44718(c).

²⁴ See, e.g., Comments of the FAA, *Review of Part 87 of the Commission's Rules Concerning the Aviation Radio Service*, WT Docket No. 01-289, FCC (filed Apr. 26, 2002); FAA, Petition for Rulemaking, *Petition For Amendment of Part 87 of the Commission's Rules Concerning the Allocation of the 136-137 MHz Segment of the Aeronautical Mobile (Route) Service Band*, File No. RM-9462, FCC (filed Nov. 19, 2006) (requesting allocation of a 1 MHz sideband to address concerns about interference with FAA radiofrequency operations); Comments of the FAA, *Petition for Rulemaking to Allocate the 5.1-5.35 GHz Band and Adopt Service Rules for a Shared Unlicensed Personal Radio Network*, File Nos. RM-8648 & RM-8653, FCC (filed Jul. 11, 1995) (opposing allocation of spectrum for use as an unlicensed wireless network).

There is no evidence, however, that Congress envisioned that the FAA would, rather than “coordinat[ing]” with the FCC to obtain information and complete a study, independently impose new and overlapping advance reporting requirements on FCC licensees and to exercise authority to block the FCC’s decisions to authorize radio frequency use.²⁵ Indeed, the courts have been clear that Congress’s decision to give an agency *limited* jurisdiction over a particular matter cannot be read to give that agency plenary authority to regulate in the area.²⁶ The FAA is authorized only to conduct a study, not to impose its own separate and burdensome requirements on the FCC’s licensees.

Congress’s decision was consistent with a long history of dedicating regulatory decisions to the agencies with the necessary expertise to handle them. While the FAA undoubtedly is the expert agency with respect to aviation and air traffic, it is the FCC that has the staffing and expertise to properly evaluate the thousands of changes to spectrum uses that occur annually, and to ensure that the spectrum is being used in the public interest. For this reason, Congress did not authorize the FAA to take an active or controlling role in the FCC’s spectrum management decisions, and the FAA has no

²⁵ In one limited context, Congress has legislated a more substantial role for the FAA in FCC proceedings. Specifically, “the [Federal Communications] Commission may require the owner [of a radio tower] to dismantle and remove the tower when the Administrator of the Federal Aviation Agency determines that there is a reasonable possibility that it may constitute a menace to air navigation.” 47 U.S.C. § 303(q). Even here, Congress uses the word “may” to make clear that the FAA has authority to raise these concerns, but that the decision whether to act on them is committed exclusively to the FCC’s discretion.

²⁶ *Am. Library Ass’n v. FCC*, 406 F.3d 689, 708 (D.C. Cir. 2005).

authority to override Congress's specification of the relationship it is to have with the FCC simply because the FAA believes that its approach might be better policy.²⁷

The FAA cannot meet the high standard set by the D.C. Circuit for adoption of the proposed rules because there are many alternatives available for the FAA to discharge its responsibilities to protect air safety and the navigable airspace, that do not severely interfere with the FCC's discharge of its duties. To adopt the proposed rules, the FAA would have to explain why the rules will minimize, to the extent possible, its intrusion into policies that are properly the province of the FCC.²⁸ The FAA cannot make that showing.

As described above, VHF broadcasters are already subject to myriad regulatory requirements imposed by the FCC, which has primary authority to make decisions concerning the allocation and use of the VHF spectrum. The proposed rules would put the FAA in the position of exercising substantive authority over the spectrum management decisions of the FCC. Under established principles of interagency authority and statutory construction, that result cannot stand.

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²⁷ See *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996).

²⁸ See *Yukon-Kuskokwim Health Corp. v. NLRB*, 234 F.3d 714, 718 (D.C. Cir. 2000) (quoting *N.Y. Shipping v. Fed. Maritime Comm'n*, 854 F.2d 1338, 1370 (D.C. Cir. 1988)).

MSTV and the broadcast industry are committed to ensuring the safety of the American public. MSTV urges, however, that the rule changes proposed in the NPRM would do nothing to improve air safety or the efficiency of air travel, and would instead create substantial burdens on both broadcasters and regulators. For these reasons, MSTV respectfully requests that the FAA withdraw the proposed rule changes.

Respectfully submitted,

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