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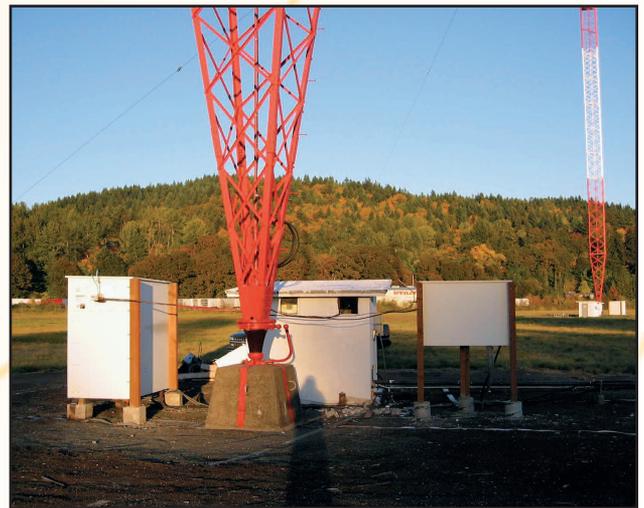
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Broadcasters look at reviving AM rules project

BY **Benjamin F. Dawson III**
*President/Managing Partner,
Hatfield & Dawson Consulting Engineers*

In March 2001, the FCC issued a long awaited Report and Order (R&O) in MM Docket 93-177, the AM antenna performance verification rulemaking. This rulemaking Order was the outgrowth of a Petition for Inquiry that had been filed 12 years previously by five consulting engineering firms. The R&O made significant changes in the details of directional antenna proof of performance procedures, significantly reducing the level of effort and volume of paperwork required, but did not alter the basic methodology or analysis



Broadcasters seek rules changes that would affect AM antenna arrays like the one shown here.

See **AM RULES** on page 18

Awards Dinner highlights National Meeting



SBE members and guests attend the 2006 SBE National Awards Dinner, the highlight event of the SBE National Meeting. This annual event was held at Turning Stone Resort Casino in Verona, N.Y., in conjunction with the 34th Annual SBE22 Broadcast & Technology Expo, September 26-27.

NATIONAL MEETING PHOTO SPREAD
on pages 12-13

Broadcast towers and local control: Time for a change

BY **Chris Imlay, CBT**
SBE General Counsel

Bob Vinikoor had it right, actually, four years ago, but the FCC still hasn't figured it out. Bob, you will recall, was faced with a zoning ordinance in the town of Lebanon, N.H., that did not permit antennas above a nominal height. The height limit was an absolute one that would not allow construction of any AM broadcast towers at all, anywhere in the town. Bob successfully challenged that ordinance, using a really creative argument that had not been tried before. And he did it with no help at all from the FCC. Bob, a radio amateur as well as a broadcaster, retained Amateur tower law specialist Fred Hopengarten, K1VR, to help him in the case. SBE filed a friend-of-the court brief in the case, which went to the Supreme Court of New Hampshire.

Fred, Bob and SBE collaborated on the argument, of which we were rather proud. We admitted, as we had to do, that the FCC had not, despite being asked repeatedly by broadcasters, exercised its authority (which, under the Communications Act, it clearly has) to preempt certain overly restrictive land use ordinances that preclude or inhibit the ability of broadcasters to serve their audiences or construct the facilities that the FCC authorizes in a construction permit. Past efforts on the part of NAB and others to achieve a modest, reasonable national policy that would at least require local zoning officials, and city or county councils, to work with broadcasters to "come to the table" had failed.

But the failure of those good efforts isn't the end of the issue. Just because FCC has not declared a national preemption policy with respect to broadcast towers and antennas does *not* mean that there is no federal preemption. Not by a long shot. There are two other circumstances in constitutional law in which the federal law trumps the state or local law. The first is where an entire field of regulation is reserved to federal government regulation. The other is where a state or local regulation actively conflicts with the federal law, or the objectives sought to be achieved by the federal law.

It is this last circumstance that Bob, Fred and SBE applied to zoning regulations that preclude broadcast tower installation. We argued

that, pursuant to its authority under Section 307(b) of the Communications Act of 1934, (which requires that the FCC allocate frequencies, powers and times of operation of radio stations among the several states and communities so as to achieve a fair, efficient and equitable allocation), the FCC had granted Bob's construction permit for a new AM station at Lebanon. This represented a specific decision by FCC that Lebanon, in particular, needed radio service on the specific frequency and operating parameters that were specified in the permit. Having done so, we argued, the city of Lebanon could not preclude the installation of an antenna everywhere in the community without irreconcilably conflicting with the implementation of federal law.

Lebanon fought valiantly for the proposition that Bob could install the antenna in some other community, or that he could use a shortened antenna. The problem with the first argument was that, if Lebanon could prohibit broadcast antennas by means of an antenna height limit throughout its own community, so could any other surrounding municipality. And the problem with the second argument is that the construction permit specified an antenna of a particular height, and any antennas that would meet the Lebanon zoning ordinance height limit would be well below the minimum efficiency limit specified in the FCC rules. So Lebanon had saddled Bob with a complete prohibition.

The Supreme Court of New Hampshire agreed with us. It held that, while some limits could be placed on antenna siting in Lebanon, the city could not prohibit antennas outright in all zones in the city. *This is the only citable precedent that deals directly with the subject of federal preemption of state or local land use regulation of broadcast antennas.* It is a good, well-reasoned precedent, though, and it has been used in several other situations where the local land use regulations act as a complete bar to antenna installations.

A recent case, also in New Hampshire, citing the Koor v. Lebanon decision, resulted in a remand to municipal land use authorities. The zoning ordinance would otherwise have precluded an antenna entirely in a municipality which represented the only site that would meet FCC spacing requirements. Recently in

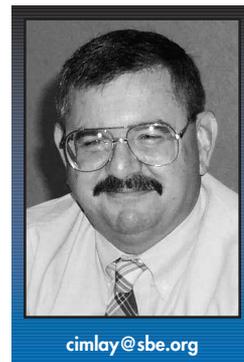
Florida, a county ordinance would have precluded the installation of two additional

towers to permit a daytime-only AM station to add nighttime service pursuant to a granted FCC construction permit. The municipality, after being presented with the Koor decision, was forced to back down and to permit the two additional towers. So far, so good.

Where has the FCC been in these cases? Nowhere in sight. FCC hasn't said much about broadcast antenna preemption ever since broadcasters told the FCC that if the digital television transition was to proceed on schedule, the FCC would have to preempt local land use restrictions on building new towers or modifying existing towers. FCC refused to do that and instead infamously urged broadcasters to "reach out" to land use officials, who they said would surely accommodate them. How incredibly naive!

On Sept. 26, 2006, the chief of the Media Bureau responded to a request for the issuance of a declaratory ruling filed one year earlier to the day. It was filed by a communications attorney representing a non-profit citizen's group. The group was participating in the preparation of a revised zoning ordinance in some unspecified community. The declaratory ruling requested by this group would apply to preemption of local zoning regulations applicable to broadcast towers. The group was urging that local government officials in their municipality adopt an ordinance that would restrict construction of broadcast towers in rural areas and impose height restrictions in new areas where new towers would be permitted. The proposed new ordinance would, they said, be premised on land preservation goals, including preservation of agriculturally zoned land and "scenic vistas." This is the usual aesthetic justification for restriction of antennas. Apparently, this non-profit group wanted to fire a preemptive strike against the application of the Koor case in their backyard.

It was an interesting pitch, since growth and urban sprawl in most metropolitan areas makes new AM broadcast station construction (if not FM and television) a virtual impossibility. Now, the group was urging that "agricultural land"



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and rural areas need protection against antenna construction as well. What these folks asked FCC to do was to state that, "under the current policy of the FCC, local zoning rules which are predicated on land use preservation, including preservation of agriculturally zoned land and scenic vistas, would not be preempted by the Commission" with respect to the construction of "new broadcast towers in certain rural areas and... height restrictions in other" areas. Pretty broad relief, if they could get it.

FCC did nothing for a year, and then issued the letter decision. The essence of the decision on this was exactly one sentence. It read as follows: "It is true that, to date, the Commission has not adopted any rules or regulations that preempt local zoning rules affecting construction of broadcast towers." After making that one pronouncement, the Media Bureau chief said that therefore, the declaratory ruling request was "granted, to the extent described (in the letter)."

Well, where's the beef? The Media Bureau made a true statement of fact, but it provides no guidance whatsoever, either for land use officials or for broadcasters. I suppose we should be happy for small favors, since nothing that the Commission has said undoes any of the Koor case rationale, but where do we go from here?

Suppose I am an FM broadcaster wanting to bid in for one of the expensive construction permits available at the recently announced FM auction. What am I paying for there if there is no guarantee of my ability to construct a new station due to local land use regulations?

Where is the FCC's concern about competition that led to the preemption policy with respect to preemption of local regulation of personal wireless service antennas and of over-the-air video (and now broadband data) reception services? Does it really take an act of Congress to get the FCC off the dime here?

In an Amateur Radio antenna case I worked on in California not too long ago, a municipality wrote to a United States senator there, complaining that the FCC policy on Amateur Radio antennas was too vague. They complained very legitimately that the FCC has to be clear in its antenna policies, because otherwise, municipalities have to do their best and hope they get it right, because all of their antenna ordinances have to be tested in court. Not an efficient method at all. Broadcasters and municipalities alike need some articulation of policy, and some guidance. Kudos to Bob Vinikoor, Fred Hopengarten, SBE members and to the Supreme Court of New Hampshire for obtaining some. No kudos to the FCC, which can and should do better than this. ¹

Make nominations now for 2006 SBE Awards

Some SBE Members go above and beyond the call of duty to do their jobs and serve SBE and the broadcast industry, and some local SBE chapters do an absolutely excellent job of serving their members. But often these efforts can go unrecognized. Don't let that happen this year. Pull out a pen or pencil, turn to page 21 of this issue and make your nominations now for the 2006 SBE Chapter and Individual Awards.

There are five chapter and five individual award categories from which to choose when making a nomination. Three chapter awards are determined by using statistical information on record at the SBE National Office. In addition, five of the chapter awards are divided into two classes so that chapters with vastly different membership sizes are not competing with each other. This means that up to 18 awards could be presented.

Award winners will be notified in July and invited to attend the 2007 SBE National Meet-

ing in the fall. Winners will be presented with either a certificate or a plaque at the SBE National Awards Dinner.

Nominations are due to the SBE National Office no later than May 31, 2007. For additional information, please contact John Poray at jporay@sbe.org or (317) 846-9000 or Larry Wilkins, Awards Committee Chair, at larry.wilkins@cumulus.com or (334) 240-9274.

LIFETIME ACHIEVEMENT AWARD

If you know someone who deserves extra recognition, you can use the 2006 Awards form to make a Lifetime Achievement Award nomination. Nominations for this award can be made any time in accordance with the rules listed on the form on page 21, but no more than one award will be presented in a given year. ¹

NOMINATION FORM on page 21

New SBE chapter forms in Oregon

SBE sends a warm welcome to its newest local chapter – Medford, Ore., #141. Special thanks to Chapter Chairman Michael Gary for his role in organizing the chapter and to SBE Member Larry Bloomfield for his role in encouraging area members to start a chapter in the southwest corner of Oregon. ¹

What's the fastest way to join SBE?

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MARK YOUR CALENDAR

February 24 Sacramento Ennes Workshop

Hosted by: Sacramento Chapter 43
Information: SBE National Office at (317) 846-9000 or visit www.sbe.org

March 13-14, 2007 Great Lakes Broadcasting Conference & EXPO

The Lansing Center, Lansing, Mich.
Hosted by: Michigan Association of Broadcasters, in cooperation with SBE Chapter 91 and the Michigan Association of Public Broadcasters **Contact for conference:** Call (800) 968-7622, e-mail mab@michmab.com or visit www.michmab.com/conferences/glbc_main.html **Contact for trade show:** Call Robin Smith at (800) 878-5131 or e-mail mab@michmab.com