STATE OF MAINE
SAGADAHOC, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-20-19

FRIENDS OF MERRYMEETING BAY, KATHLEEN MCGEE, ED FRIEDMAN, and COLLEEN MOORE Plaintiffs v. CENTRAL MAINE POWER COMPANY Defendant	)	**DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT**

Pursuant to M.R. Civ. P. 12(b)(6), Defendant Central Maine Power Company ("CMP") hereby moves to dismiss Plaintiffs' Complaint for failure to state a claim upon which relief can be granted. In support of this motion, CMP states as follows.

INTRODUCTION

In this case, Plaintiffs seek to contradict the determinations of not one, but two federal agencies. They say that the Federal Aviation Administration ("FAA") was too cautious when it found that CMP should help prevent plane crashes by placing lights on two towers carrying power lines across Merrymeeting Bay. At the same time, Plaintiffs contend that the Federal Communications Commission ("FCC") was too lax in determining, after years of study and a formal rulemaking process, that radiofrequency exposure below a certain level (such as that created by the light's radar system) is safe. Plaintiffs ask this Court to rebalance the relevant safety and other considerations and determine that CMP's lighting and radar system constitutes a nuisance, resulting in a state court order that CMP remove the system approved by the FAA and FCC and leave the towers with no real safety warning system.

Because these state law claims would interfere with the FAA's and FCC's comprehensive regulation of air space and radio transmissions, they are preempted by federal law. 49 U.S.C. § 40103. ("The United States Government has exclusive sovereignty of airspace of the United States."); *Airline Pilots Ass'n, Int'l v. Quesada*, 276 F.2d 892, 894 (2d Cir. 1960) (the Federal Aviation Act "was passed by Congress for the purpose of centralizing in a single authority—indeed, in one administrator—the power to frame rules for the safe and efficient use of the nation's airspace."); *Robbins v. New Cingular Wireless PCS, LLC*, 854 F.3d 315, 320 (6th Cir. 2017) (holding state law tort claims based on light and noise emissions from cellular tower were subject to obstacle preemption, explaining, "[a]llowing radiofrequency emissions-based tort suits would . . . impair the federal government's ability to promote the TCA's goals.") Plaintiffs' Complaint should be dismissed.

FACTUAL BACKGROUND

A. CMP has constructed two tall towers marked by safety lights that use a radar system to activate only when aircraft are present.

In 2019, CMP replaced two utility towers that support power lines across the Chops Passage of the Kennebec River as the river flows into Merrymeeting Bay. (Comp. ¶ 3) The old towers were 195-feet-tall, and the new towers are approximately 240-feet-tall. (Comp. ¶¶ 29, 39) The towers are outfitted with safety lights that flash to alert aircraft of the presence of the towers. (Comp. ¶¶ 40-42) Given concerns raised by Plaintiffs and others that the lights might be intrusive if they flashed constantly, the towers will include an Active Aircraft Detection Lighting System (the "Radar System") that uses radar to trigger the lighting only when aircraft are detected within approximately 3.5 miles of the towers. (Comp. ¶ 145 & Ex. 4)

B. The FAA and the FCC approved the radar-activated lighting system.

On March 12, 2018, the FAA issued a "determination of no hazard to air navigation" with respect to the towers. (Comp. ¶ 45; Ex. A[1]) The no hazard determination explained that the FAA had conducted an aeronautical study, which "revealed that the structure does not exceed obstruction standards and would not be a hazard to air navigation provided the following condition(s) are met: As a condition to this Determination, the structure is to be marked/lighted in accordance with FAA Advisory Circular 70/746001 L Change 1, Obstruction Marking and Lighting, a med-dual system – Chapters 4, 8,(M-Dual),&12" (the "FAA Safety Lighting Standards").[2] (Comp. ¶ 46; Ex. A (emphasis added))

On March 25, 2020, in response to a revised submission by CMP to cover the use of the Radar System, the FAA issued a new determination of no hazard, again explaining that it had conducted an aeronautical study and concluded that there would be no air hazard "provided the following condition(s) are met: As a condition to this Determination, the structure should continue to be marked/lighted utilizing a med-dual system." (Comp. ¶ 48; Ex. B) In issuing its determination, the FAA expressly provided that the towers are "subject to the licensing authority of the Federal Communications Commission." (Ex. B at 2)

On July 21, 2020, the FCC issued CMP a radio station authorization permitting the towers to broadcast using frequencies of 9.2-9.5 GHz. (Comp. ¶ 143 & Ex. C) In response to a request by Plaintiffs, the FCC declined to conduct an environmental assessment (Comp. ¶ 141;

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[1] While courts may generally consider only the pleadings in deciding a motion to dismiss pursuant to Rule 12(b)(6), an exception to this rule permits courts to review "official public documents, documents that are central to the plaintiff's claim, and documents referred to in the complaint." *Estate of Robbins v. Chebeague & Cumberland Land Tr.*, 2017 ME 17 ¶ 2 n.2, 154 A.3d 1185. The documents attached to this motion as Exhibits A-D fall into one or more of those categories.

[2] The FAA Safety Lighting Standards are available at https://www.faa.gov/documentLibrary/media/Advisory_Circular/AC_70_7460-1L_with_chg_1.pdf.

Ex. D), necessarily finding that the Radar System did not cause RF exposure exceeding the FCC's safety standards. *See* 47 C.F.R. § 1.1306(c)(2) & 1.1307.

C. Plaintiffs advance nuisance claims based on the effects of the system approved by the FAA and FCC.

Plaintiffs are three individuals who reside in the vicinity of the towers, plus a non-profit conservation group. In this action, Plaintiffs advance nuisance claims, alleging that the lighting system interferes with their use and enjoyment of their land and that the radar system poses health risks to them. (Comp. ¶¶ 110, 119, 132, 146) Plaintiffs seek damages and injunctive relief requiring CMP to cease operation of both the radar and the safety lights, apparently leaving the towers unmarked in violation of the FAA's safety determination. (Comp. ¶ 178)

STANDARD OF REVIEW

In order to survive a motion to dismiss, a complaint must "set[] forth elements of a cause of action or allege[] facts that would entitle the plaintiff to relief pursuant to some legal theory." *Bonney v. Stephens Mem'l Hosp.*, 2011 ME 46, ¶ 16, 17 A.3d 123, 127 (quoting *Saunders v. Tisher*, 2006 ME 94, ¶ 8, 902 A.2d 830, 832). While the "material allegations of the complaint" must be accepted for purposes of this motion, "the court is not obliged to accept conclusory allegations and legal conclusions that are bereft of any supporting factual allegations." *Courtois v. Me. Pub. Emps. Ret. Sys.*, No. AP-11-26, 2012 WL 609567, at *1 (Me. Super. Jan. 17, 2012); *see Ramsey v. Baxter Title Co.*, 2012 ME 113, ¶ 6, 54 A.3d 710 (stating that a complaint which "merely recited in conclusory fashion the elements" of a cause of action is insufficient to survive a motion to dismiss). "Dismissal is warranted when it appears beyond a doubt that the plaintiff is not entitled to relief under any set of facts that he might prove in support of his claim." *Bonney*, 2011 ME 46, ¶ 16, 17 A.3d at 127 (quoting *Saunders*, 2006 ME 94, ¶ 8, 902 A.2d at 832).

ARGUMENT

The Supremacy Clause of the United States Constitution provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. From this constitutional precept, it follows that "Congress has the power to preempt state law." *Arizona v. United States,* 567 U.S. 387, 399 (2012). Preemption applies equally to all forms of state law, including civil actions based on state tort law. *See, e.g., Buckman v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 351 (2001) ("As a practical matter, complying with the FDA's detailed regulatory regime in the shadow of 50 states' tort regimes will dramatically increase the burdens facing potential applicants."). Federal law can preempt state law in three ways: (1) express preemption, (2) field preemption, and (3) conflict or obstacle preemption. *Hillsborough Cnty. v. Automated Med. Labs., Inc.,* 471 U.S. 707, 713 (1985).

The doctrine of field preemption applies where a framework of federal regulation is "so pervasive that Congress left no room for the States to supplement it or where there is a federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Wood v. United States*, 1:14-cv-00399-JDL, 2016 WL 11580579 at *10 (D. Me. Feb. 2, 2016) (quoting *Arizona v. United States*, 567 U.S. 387, 399 (2012). Courts may infer Congress's intent to occupy a field to the exclusion of state law "where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where "the object sought to be obtained by the federal law and the character of obligations imposed by it ... reveal the same purpose." *French v. Pan Am Exp., Inc.*, 869 F.2d 1, 2 (1st Cir. 1989) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Conflict preemption occurs "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of congress." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995); *see also Weaver's Cove Energy, LLC v. R.I. Coastal Res. Mgmt.*, 589 F.3d 458, 472-73 (1st Cir 2009) (holding that Federal Energy Regulatory Commission authorization of dredging project preempted local zoning authority from delaying authorization for project). In considering this "obstacle" preemption, courts must examine "the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Jones v. Rath Packing Co.*, 430 U.S. 519, 527 (1977). This analysis "is essentially a two-step process of first ascertaining the construction of the [state and federal laws] and then determining the constitutional question whether they are in conflict." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (quoting *Perez v. Campbell*, 420 U.S. 637, 644 (1971). "[A] court's concern is necessarily with 'the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted.'" *Id.* (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959).

Courts in the First Circuit take a "functional approach" to preemption, focusing not on "pigeonholing" the flavor of preemption, but "on the effect which the challenged enactment will have on the federal plan." *French,* 869 F.2d at 2. Under this functional approach, all of Plaintiffs' claims should be dismissed as preempted because, at core, Plaintiffs in this suit seek to have the Court rebalance the safety and other considerations in a manner at odds with the balancing already conducted by the FAA and the FCC as part of their comprehensive regulation of their respective fields.

I. All claims based on the contention that the Radar System is not safe are preempted by the FCC's express determination of the safe level of RF exposure.

A. Pursuant to the broad delegation of authority from Congress to regulate radio transmissions, the FCC has for decades established the standards for radiofrequency exposure.

As Congress expressly noted in the Federal Communications Act ("FCA"), the United States has for over a century maintained control "over all the channels of radio transmission." 47 U.S.C. § 301. Pursuant to this authority, any person seeking to transmit signals by radio must first obtain a license from the FCC. *See id.* The FCA directs the FCC to regulate, among other things, the "kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein." *Id.* § 303(e). Congress also gave the FCC broad authority to develop regulations as needed to implement the FCA. *Id.* §§ 154(i), 201(b), 303(r).

Pursuant to its authority under the FCA and its obligations under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-35, the FCC began evaluating the potential biological effects of radiofrequency ("RF") emissions in the early 1980s and adopted standards for RF exposure in 1985. *See In re Responsibility of the FCC to Consider Bio. Effects of Radiofrequency Radiation*, 100 F.C.C.2d 543, ¶¶ 2-3, 24 (1985).

In April 1993, the FCC began a formal rulemaking process to determine whether it should revise its standards in light of a revision to the RF exposure guidelines published by the American National Standards Institute. *In re Guidelines for Evaluating the Envtl. Effects of Radiofrequency Radiation*, 11 F.C.C.R. 15123, 15127, ¶ 10 (1996) ("FCC First Order"). In 1996, Congress directed the FCC to complete that rulemaking within 180 days. Telecommunications Act of 1996, Pub. L. No. 104-104, § 704(C)(b), 110 Stat. 56 (1996). The FCC responded to Congress's mandate by adopting RF testing, certification, and emission

standards to "protect public health with respect to RF radiation from FCC-regulated transmitters." *FCC First Order* ¶ 169. The standards "represent a consensus view of the federal agencies responsible for matters relating to the public safety and health." *Id.* at ¶ 2.

The FCC publishes its limits on the permissible absorption rate of RF emissions at 47 C.F.R. § 1.1310, which section falls under the subpart "Procedures for Implementing the National Environmental Policy Act of 1969." In December 2019, the FCC completed a review of the standards it promulgates at section 1.310 and determined that no changes are necessary in light of the existing science. The FCC explained its determination as follows:

> Upon review of the record, we find no appropriate basis for and thus decline to initiate a rulemaking to reevaluate the existing RF exposure limits. This decision is supported by our expert sister agencies, and the lack of data in the record to support modifying our existing exposure limits. Specifically, no expert health agency expressed concern about the Commission's RF exposure limits. Rather, agencies' public statements continue to support the current limits. The Director of FDA's Center for Devices and Radiological Health advised the Commission, as recently as April 2019, that "no changes to the current standards are warranted at this time." The record does not demonstrate that the science underpinning the current RF exposure limits is outdated or insufficient to protect human safety. Nor does the record include actionable alternatives or modifications to the current RF limits supported by scientifically rigorous data or analysis. For all these reasons, we terminate the inquiry, but will continue to study and review publicly available science and collaborate with other federal agencies and the international community to ensure our limits continue to reflect the latest science.

In the Matter of Proposed Changes in the Commission's Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields Reassessment of Fed. Commc'ns Comm'n Radiofrequency Exposure Limits, No. ET03-13713-8419-226, 2019 WL 6681944, at *4 (Dec. 4, 2019).[3]

[3] In passing the Telecommunications Act of 1996, Congress expressly provided that state and local authorities may not "regulate the construction of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [FCC's] regulations concerning such emissions." 47 U.S.C. § 332(c)(7)(B)(iv).

The FCC requires a person obtaining a license to operate a radio transmitter to complete an environmental assessment unless the absorption standards of Section 1.1310 are met. *See* 47 C.F.R. § 1.1307.

B. Courts across the country have consistently found that this determination by the FCC of the safe level of RF exposure precludes any state efforts to supplement or contradict it.

Nearly every court in the country to have considered the issue has determined that state law efforts to regulate health and environmental effects of RF emissions are preempted because the regulations promulgated by the FCC under the express authority of Congress occupy the field. *E.g., Robbins v. New Cingular Wireless PCS, LLC*, 854 F.3d 315, 320 (6th Cir. 2017) (affirming dismissal of state law tort claims based on light and noise emissions from cellular tower, explaining, "[a]llowing radiofrequency emissions-based tort suits would . . . impair the federal government's ability to promote the TCA's goals."); *Fontana v. Apple Inc.*, 321 F. Supp. 3d 850, 852 (M.D. Tenn. Aug. 3, 2018) ("Radiofrequency emissions-based tort suits . . . would impair the goals of the TCA."); *Bennett v. T-Mobile USA, Inc.*, 597 F. Supp. 2d 1050, 1053 (C.D. Cal. 2008) (dismissing on conflict preemption grounds complaint alleging hearing loss resulting from radiofrequency emissions from cellular phone); *Stanley v. Amalithone Realty, Inc.*, 94 A.D.3d 140, 145. 940 N.Y.S.2d 65 (2012) (affirming dismissal of state law tort claims alleging harmful effects of radiofrequency emissions).

The Third Circuit's decision in *Farina* is representative. *Farina v. Nokia, Inc.*, 625 F.3d 97, 126 (3d Cir. 2010). In that case, the court held that conflict preemption applied after conducting a thorough review of the history of the FCC and its regulation of radiofrequency emissions. *Id.* at 126-27. The court explained that the FCC's regulations occupy the field with respect to the safety and environmental impacts of RF emissions:

> Allowing juries to impose liability on cell phone companies for claims like Farina's would conflict with the FCC's regulations. A jury determination that cell phones in compliance with the FCC's SAR guidelines were still unreasonably dangerous would, in essence, permit a jury to second guess the FCC's conclusion on how to balance its objectives. Were the FCC's standards to constitute only a regulatory floor upon which state law can build, juries could re-balance the FCC's statutory objectives and inhibit the provision of quality nationwide service. Because the intensity of RF emission levels and the strength and range of cell phone signals are positively correlated, allowing additional state-law restrictions on these levels could impair the efficiency of the wireless market. But given the current state of the science, the FCC considers all phones in compliance with its standards to be safe. *See FCC First Order,* 11 F.C.C.R. at 15184 ("We believe that the regulations ... represent the best scientific thought and are sufficient to protect the public health."). These standards represent a "consensus view" of the agencies with jurisdiction over RF emissions and incorporate the views of numerous expert organizations and interested parties. *Id.* at 15124. As an agency engaged in rulemaking, the FCC is well positioned to solicit expert opinions and marshal the scientific data to ensure its standards both protect the public and provide for an efficient wireless network. Allowing juries to perform their own risk-utility analysis and second-guess the FCC's conclusion would disrupt the expert balancing underlying the federal scheme.

Id. at 127.

The approach of the *Farina* court is nearly identical to that taken by the 6th Circuit in *Robbins v. New Cingular Wireless PCS, LLC*, 854 F.3d 315 (6th Cir. 2017). In *Robbins*, the plaintiffs sought to enjoin the construction of "a 125-foot cell-phone tower" by filing suit against a cell-phone-service provider on the basis of state law torts. *Id.* at 318. Plaintiffs claimed that the cell tower would "endanger public health and safety." *Id.* The trial court dismissed the state-law tort claims because federal law "impliedly preempts claims based on RF emissions that comply with Federal Communications Commission ('FCC') standards." *Id.* at 319. The Sixth Circuit surveyed the law of conflict preemption and determined that permitting "RF-emissions based torts suits" would create an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.*

C. Plaintiffs' claims based on the assertion that the FCC-compliant Radar System is unsafe are preempted because they would interfere with the FCC's regulation of RF exposure.

Here, Plaintiffs seek to bring this tort action premised on the notion that RF exposure from the Radar System poses an untenable risk to humans and wildlife even though the FCC has found the level to be safe. (Comp. ¶¶ 147-161) That claim would interfere with the federal regulatory scheme in a most direct way – it would necessarily involve a determination that levels of RF exposure that the FCC, after extensive investigation, has concluded are safe are actually unsafe. The FCC's balancing of safety against convenience, efficiency, and all the other relevant factors in setting allowable levels of RF exposure would be undermined. Radio stations could be ordered to stop broadcasting, cell phone towers could be moved, and technologies like the one at issue here could be prohibited, all by the actions of a single judge in adjudicating the state law claims of a single person without any notice to or input from the myriad members of the public affected by the decision. That sort of disruption of a comprehensive federal regulatory regime is exactly what preemption prohibits. This Court should dismiss Plaintiffs' claims and avoid upsetting the careful balancing of the expert agency charged with overseeing aspects of radio transmissions.

II. All claims based on the safety lighting are preempted because they would interfere with the FAA's exclusive jurisdiction over air safety.

A. Congress delegated to the FAA exclusive jurisdiction over the airspace, including airspace safety, and the FAA has exercised that authority to develop a system for determining whether structures such as towers interfere with air safety.

The Federal Aviation Act ("FAA") declares that the "United States Government has exclusive sovereignty of airspace of the United States." 49 U.S.C. § 40103. The Secretary of

Transportation[4] is authorized to review "structures interfering with air commerce." 49 U.S.C. § 44718. To facilitate this review, the Secretary "shall require a person to give adequate public notice, in the form and way the Secretary prescribes, of the . . . proposed construction . . . of a structure" when the notice will promote "(1) safety in air commerce; and (2) the efficient use and preservation of the navigable airspace." *Id.* § 44718(a).

If the Secretary determines that a proposed structure "may result in an obstruction of the navigable airspace or an interference with air navigation facilities and equipment or the navigable airspace," he must "conduct an aeronautical study to decide the extent of any adverse impact on the safe and efficient use of the airspace, facilities, or equipment." *Id.* § 44718(b)(1). In an aeronautical study conducted under section 44718(b), the Secretary is required to "consider factors relevant to the efficient and effective use of the navigable airspace." *Id.* The Secretary must thereafter issue a report disclosing any "adverse impact on the safe and efficient use of the navigable airspace that the Secretary finds will result from constructing or altering the structure" subject to the aeronautical study. *Id.* § 44718(b)(2). The Federal Aviation Act does not express any limitation on the Secretary's discretion to determine when a structure "may result in an obstruction of the navigable airspace," and has left entirely to the FAA the discretion to determine what constitutes an "adverse impact" on the safe and efficient use of the navigable airspace.

The FAA has promulgated regulations to implement these requirements, divided into subparts. 14 C.F.R. §77.1, *et seq.* As is pertinent here, Subpart B requires notice to the FAA of certain intended construction, Subpart C sets forth standards by which the FAA is to determine whether such construction would create an obstruction to "the use of navigable airspace by

[4] The FAA is an administration in the Department of Transportation. 49 U.S.C. § 106.

aircraft and to existing air navigation facilities," and Subpart D describes how "aeronautical studies" are to be conducted for construction of which the FAA is given notice. *Id.*

The obstruction standards of Subpart C "are supplemented by other manuals and directives used in determining the effect on the navigable airspace of a proposed construction or alteration." 14 C.F.R. § 77.25(c). One such supplementation is the FAA Safety Lighting Standards, which set "forth standards for marking and lighting obstructions that have been deemed to be a hazard to air navigation." *See* FAA Safety Lighting Standards at i. After noting that "[c]onsiderable effort and research was expended to determine the minimum marking and lighting systems or quality of material that will produce an acceptable level of aviation safety," the FAA Safety Lighting Standards "recommend[s] minimum standards in the interest of safety, economy, and related concerns." (*Id.* § 2.3) Among other things, any structure exceeding 200 feet in height "should be marked and/or lighted" unless an aeronautical study concludes otherwise. (*Id.* § 2.1) Specifically, "to provide an adequate level of safety, obstruction lighting systems should be installed, operated, and maintained in accordance with the recommended standards" set forth therein. (*Id.*) The remainder of the 91-page document then sets forth these standards in detail.

Under these regulations, any construction that will be more than 200 feet AGL requires notice to the FAA and an aeronautical study. 14 CFR § 77.9(a) & 77.25(a). "The purpose of an aeronautical study is to determine whether the aeronautical effects of the specific proposal and, where appropriate, the cumulative impact resulting from the proposed construction or alteration when combined with the effects of other existing or proposed structures, would constitute a hazard to air navigation." 14 C.F.R. § 77.25(b). In conducting an aeronautical study, FAA personnel must follow the FAA Procedures for Handling Airspace Matters (the "FAA

handbook").[5] Following the study, the FAA is to determine whether the construction would present a hazard to air navigation. *Id.* § 77.31(a). The FAA may make this no hazard determination conditional. *Id.* § 77.31(d)(1).

B. Courts have consistently determined that efforts by states to conduct a re-balancing of the considerations inherent in FAA safety determinations are preempted.

Congress expressly recognized that "[t]he United States Government has exclusive sovereignty of airspace of the United States." 49 U.S.C. § 40103. Grounded in this express grant of exclusive authority, courts that have considered the issue have consistently held that the Federal Aviation Act preempts the field of airspace safety. *E.g., City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 633 (1973) (holding that municipal ordinance assigning curfew to airplane takeoffs and landings was preempted by the Federal Aviation Act because it had an impact on airspace congestion and therefore safety); *U.S. Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1327 (10th Cir. 2010) (collecting cases and concluding "that the comprehensive regulatory scheme promulgated pursuant to the FAA evidences the intent for federal law to occupy the field of aviation safety exclusively"); *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 795 (6th Cir. 2005) ("We agree . . . that federal law establishes the standards of care in the field of aviation safety and thus preempts the field from state regulation."); *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 371 (3d Cir. 1999) ("Because the legislative history of the FAA and its judicial interpretation indicate that Congress's intent was to federally regulate aviation safety, we find that *any* state or territorial standards of care relating to aviation safety are federally preempted."); *Airline Pilots Ass'n, Int'l v. Quesada*, 276 F.2d 892, 894 (2d Cir. 1960) (explaining that the Federal Aviation Act "was passed by Congress for the purpose of

[5] FAA Order JO 7400.2G, available at https://www.faa.gov/documentLibrary/media/Order/7400.2G.pdf.

centralizing in a single authority—indeed, in one administrator—the power to frame rules for the safe and efficient use of the nation's airspace."); 8A Am. Jur. 2d Aviation § 25 (collecting cases and explaining: "Due to concerns for safety, efficiency and protection of people on the ground, aviation requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled."); *see also French v. Pan Am Express, Inc.*, 869 F.2d 1, 3 (1st Cir. 1989) ("We therefore conclude, without serious question, that preemption is implied by the comprehensive legal scheme which imposes on the Secretary of Transportation the duty of qualifying pilots for air service.").

The Supreme Court's holding in *City of Burbank* is instructive with respect to the extensive regulatory scheme at issue here. There, the Court held that the City of Burbank could not enact an ordinance prohibiting certain airplanes from taking off between 11 p.m. in the evening and 7 a.m. the following morning. The Court explained that "the Administrator of the [FAA] has been given broad authority to regulate the use of the navigable airspace," and concluded that the noise regulations at issue implicated airspace safety because the limitations would cause increased traffic during times outside of the curfew. *Id.* at 627. The Court emphasized that the FAA is required to coordinate with the Environmental Protection Agency in a "comprehensive scheme of federal control of the aircraft noise problem." *Id.* at 629. Reviewing this dual scheme, the Court concluded, the "Federal Aviation Act requires a delicate balance between safety and efficiency, 49 U.S.C. § 1348(a), and the protection of persons on the ground. . . . The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled." *Id.* at 638.

C. Plaintiffs' claims here are preempted because they encroach on the FAA's exclusive regulatory authority, and in fact directly conflict with the FAA's safety determination.

Here, Plaintiffs seek to have this Court order that CMP stop using the FAA-approved safety lighting. This encroaches on the FAA's exclusive regulatory scheme in the most obvious way: the relief Plaintiffs seek directly conflicts with the FAA's safety determination. On one hand, the FAA made the precise study and determination assigned to it by the comprehensive regulatory scheme, finding that the towers were not hazards to aviation but expressly conditioning that finding on CMP's compliance with the FAA's lighting standards. *See* 49 U.S.C. § 44718(b); 14 C.F.R. § 77.31. On the other hand, Plaintiffs ask this Court to order CMP not to use the very lighting that is necessary to the FAA's no hazard determination. That is, Plaintiffs ask this Court to directly overrule the FAA's safety determination, leaving the towers without any safety lighting at all.

Such a direct conflict with a safety determination made by an expert federal agency pursuant to a specific regulatory requirement is a quintessential example of the circumstances where federal preemption applies. The reasoning of *City of Burbank* applies with force in this case. While *City of Burbank* involved an attenuated threat to airspace safety resulting from the crowding of certain flights, regulations for lighting of obstructions to aircraft in flight is squarely within the realm of airspace safety. Indeed, the only purpose of the lights is for safety.

The legislative history of the Federal Aviation Act further supports such a conclusion. Congress relied, in passing the Act, upon the Senate Report, which explained that "aviation is . . . the only [industry] whose operations are conducted almost wholly within federal jurisdiction, and are subject to little or no regulation by States or local authorities." S.Rep. No. 1811, 85th Cong., 2d Sess. 5 (1958). The House likewise explained in passing the Act that it intended to

give "[t]he Administrator of the new [FAA] ... full responsibility and authority for the advancement and promulgation of civil aeronautics generally, including promulgation and enforcement of safety regulations." H.R. Rep. No. 2360, 1958 U.S.C.C.A.N. 3741.

In 2001, the District of South Dakota relied on this legislative history and the Supreme Court's reasoning in *City of Burbank* in enjoining a state aeronautics commission from acting to prohibit construction of broadcast towers after the FAA had issued a notice of determination of no hazard. *Big Stone Broadcasting, Inc. v. Lindbloom*, 161 F. Supp. 2d 1009. The court summarized its reasoning as follows:

> [B]ecause of the broad legislative scheme, the detailed regulations adopted pursuant to that scheme, the required cooperation and coordination of the FAA and FCC, the legislative history, and the FAA's own interpretation, the court concludes that the Act and the regulations promulgated in connection with the Act, preempt the field of air traffic and safety as to radio broadcast towers.

Id. at 1020. Although the court in *Big Stone* explained that it would have come to the same conclusion even without input from the FAA itself, *see id.* at 1020, the court found persuasive an amicus brief the FAA filed in that action, in which the FAA explained, "it is the position of the FAA that the Federal Aviation Act occupies the field regarding the question whether a proposed broadcast tower would constitute a navigable hazard." Ex. E. This Court should defer to the FAA's "fair and reasoned judgment" concerning its statutory mandate and the regulations promulgated thereunder, as expressed in *Big Stone Broadcasting*. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 838 (1984); *see also Auer v. Robbins*, 519 U.S. 452, 462-63 (1997) (explaining that courts generally should defer to an agency's interpretation of its own ambiguous regulations where expressed in an amicus brief).

As with *City of Burbank*, the relationship between state and federal law in *Big Stone Broadcasting* is anodyne compared to the relationship here: that case involved local regulations

that were aligned with, but more stringent than, the federal scheme. Here, state tort liability would directly contradict the determinations made by the FAA pursuant to an express statutory requirement.

D. That the FAA is not empowered to sue to enforce non-compliance with its determinations does not change the outcome.

Presumably anticipating the preemption argument, the Complaint says that the notices of determination of no hazard, and the Safety Lighting Standards on which the determination is grounded, constitute "recommendations" only because the FAA has no enforcement mechanism, *i.e.* it could not file suit to require CMP to place the lighting if CMP chose to ignore the determination. (Comp. ¶¶ 73-76) This argument misses the key point – CMP is not ignoring the FAA's conclusions, and the requested state court order would interfere with the regulatory scheme that requires the FAA to make this sort of safety determination regardless of whether Congress chose to allow FAA to file enforcement actions.

The comprehensive regulatory scheme that Congress and the FAA have created vests exclusive authority in the FAA to make hazard determinations in the exact manner that it has done here, including by making that determination conditioned on things like the use of certain safety lights. 14 C.F.R. § 77.31(d)(1). Congress and/or the FAA could have chosen all manner of ways to give teeth to this regulatory regime – fines to be issued by FAA, private rights of action for individuals harmed by non-compliance, and so forth. What it chose to do was use "moral suasion" and the preservation of common law liability for <u>failures</u> to comply with its determinations. *See Air Line Pilots Ass'n Int'l v. Dep't of Transp., Fed. Aviation Admin.*, 446 F.2d 236, 241 (5th Cir. 1971) (holding that FAA determinations of no hazard are subject to judicial review under the APA, observing, "[t]o say . . . that the FAA's determination on the question of hazard is either practically, administratively, or legally insignificant is to ignore

reality."). The fact that Congress and the FAA chose this path for enforcement rather than another does not authorize state tort actions to contradict, rather than enforce, those standards.

To drive this point home, consider the situation CMP would be in if it erected the towers without the very safety requirements specified by the expert regulators. One can easily imagine what Exhibit A would be in the wrongful death case brought by the next-of-kin of the passengers in a plane that crashed into the unmarked tower. *Cf., e.g., Smith v. Tennessee Valley Auth.*, 699 F.2d 1043, 1045 (11th Cir. 1983) (vacating dismissal of action against utility premised on utility's failure to properly mark power lines, resulting in injuries to the pilot of a low-flying aircraft); *McCauley v. United States*, 470 F.2d 137, 138 (9th Cir. 1972) (affirming trial court determination that failure to mark power lines constituted negligence).

This is the exact concern that the Supreme Court articulated in *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 875 (2000). There, plaintiff, who had been injured in a car accident, sought to hold the car manufacturer liable for failing to equip his vehicle with an airbag. The National Transportation Safety Board had promulgated standards permitting, but not requiring, airbags in vehicles manufactured prior to 1987, as part of a broad policy approach that accounted for the balancing of industry, safety, and economy. *Id.* The Court explained that the policy of preemption is necessary even where Congress had not expressly preempted state tort suits. *Id.* at 871. Utilizing a standard concerning windshields as an example, the Court emphasized that in the absence of preemption, "state law could impose legal duties that would conflict directly with federal regulatory mandates, say, by premising liability upon the presence of the very windshield . . . that federal law requires." *Id.* This is precisely what Plaintiffs would ask this Court to permit here: they would "premis[e] liability upon the presence of the very [lighting system] that federal law requires." *Id.*

CONCLUSION

State tort actions by a few private individuals are not an avenue to challenge the safety determinations of the FAA and the FCC reached after extensive analysis and consideration. The Complaint's attempt to do so here should be dismissed in its entirety.

Dated at Portland, Maine this 15th day of September 2020

Gavin G. McCarthy, Bar No. 9540
Matthew Altieri, Bar No. 6000
Pierce Atwood LLP
Merrill's Wharf
254 Commercial Street
Portland, ME 04101
Tel: 207-791-1100

Attorneys for Defendant Central Maine Power

NOTICE

Matters in opposition to this Motion pursuant to M.R. Civ. P. 7(c) must be filed not later than 21 days after the filing of this motion unless another time is provided by the Maine Rules of Civil Procedure or by the Court. Failure to file timely opposition will be deemed a waiver of all objections to the motion, which may be granted without further notice or hearing.

EXHIBIT A

Mail Processing Center
Federal Aviation Administration
Southwest Regional Office
Obstruction Evaluation Group
10101 Hillwood Parkway
Fort Worth, TX 76177

Aeronautical Study No.
2018-ANE-1642-OE
Prior Study No.
2016-ANE-708-OE

Issued Date: 03/12/2018

Benjamin Shepard
Central Maine Power Company
83 Edison Drive
Augusta, ME 04336

**** DETERMINATION OF NO HAZARD TO AIR NAVIGATION ****

The Federal Aviation Administration has conducted an aeronautical study under the provisions of 49 U.S.C., Section 44718 and if applicable Title 14 of the Code of Federal Regulations, part 77, concerning:

Structure:	Tower Sections 77 & 207
Location:	Bath, ME
Latitude:	43-58-46.15N NAD 83
Longitude:	69-49-56.07W
Heights:	47 feet site elevation (SE)
	240 feet above ground level (AGL)
	287 feet above mean sea level (AMSL)

This aeronautical study revealed that the structure does not exceed obstruction standards and would not be a hazard to air navigation provided the following condition(s), if any, is(are) met:

As a condition to this Determination, the structure is to be marked/lighted in accordance with FAA Advisory circular 70/7460-1 L Change 1, Obstruction Marking and Lighting, a med-dual system - Chapters 4,8(M-Dual),&12.

Any failure or malfunction that lasts more than thirty (30) minutes and affects a top light or flashing obstruction light, regardless of its position, should be reported immediately to (877) 487-6867 so a Notice to Airmen (NOTAM) can be issued. As soon as the normal operation is restored, notify the same number.

It is required that FAA Form 7460-2, Notice of Actual Construction or Alteration, be e-filed any time the project is abandoned or:

_____ At least 10 days prior to start of construction (7460-2, Part 1)
__X__ Within 5 days after the construction reaches its greatest height (7460-2, Part 2)

See attachment for additional condition(s) or information.
This determination expires on 09/12/2019 unless:

(a) the construction is started (not necessarily completed) and FAA Form 7460-2, Notice of Actual Construction or Alteration, is received by this office.
(b) extended, revised, or terminated by the issuing office.

(c) the construction is subject to the licensing authority of the Federal Communications Commission (FCC) and an application for a construction permit has been filed, as required by the FCC, within 6 months of the date of this determination. In such case, the determination expires on the date prescribed by the FCC for completion of construction, or the date the FCC denies the application.

NOTE: REQUEST FOR EXTENSION OF THE EFFECTIVE PERIOD OF THIS DETERMINATION MUST BE E-FILED AT LEAST 15 DAYS PRIOR TO THE EXPIRATION DATE. AFTER RE-EVALUATION OF CURRENT OPERATIONS IN THE AREA OF THE STRUCTURE TO DETERMINE THAT NO SIGNIFICANT AERONAUTICAL CHANGES HAVE OCCURRED, YOUR DETERMINATION MAY BE ELIGIBLE FOR ONE EXTENSION OF THE EFFECTIVE PERIOD.

This determination is based, in part, on the foregoing description which includes specific coordinates, heights, frequency(ies) and power. Any changes in coordinates, heights, and frequencies or use of greater power, except those frequencies specified in the Colo Void Clause Coalition; Antenna System Co-Location; Voluntary Best Practices, effective 21 Nov 2007, will void this determination. Any future construction or alteration, including increase to heights, power, or the addition of other transmitters, requires separate notice to the FAA.This determination includes all previously filed frequencies and power for this structure.

If construction or alteration is dismantled or destroyed, you must submit notice to the FAA within 5 days after the construction or alteration is dismantled or destroyed.

This determination does include temporary construction equipment such as cranes, derricks, etc., which may be used during actual construction of the structure. However, this equipment shall not exceed the overall heights as indicated above. Equipment which has a height greater than the studied structure requires separate notice to the FAA.

This determination concerns the effect of this structure on the safe and efficient use of navigable airspace by aircraft and does not relieve the sponsor of compliance responsibilities relating to any law, ordinance, or regulation of any Federal, State, or local government body.

A copy of this determination will be forwarded to the Federal Communications Commission (FCC) because the structure is subject to their licensing authority.

If we can be of further assistance, please contact our office at (202) 267-4525, or david.maddox@faa.gov. On any future correspondence concerning this matter, please refer to Aeronautical Study Number 2018-ANE-1642-OE.

Signature Control No: 357417091-359354168 (DNE)
David Maddox
Specialist

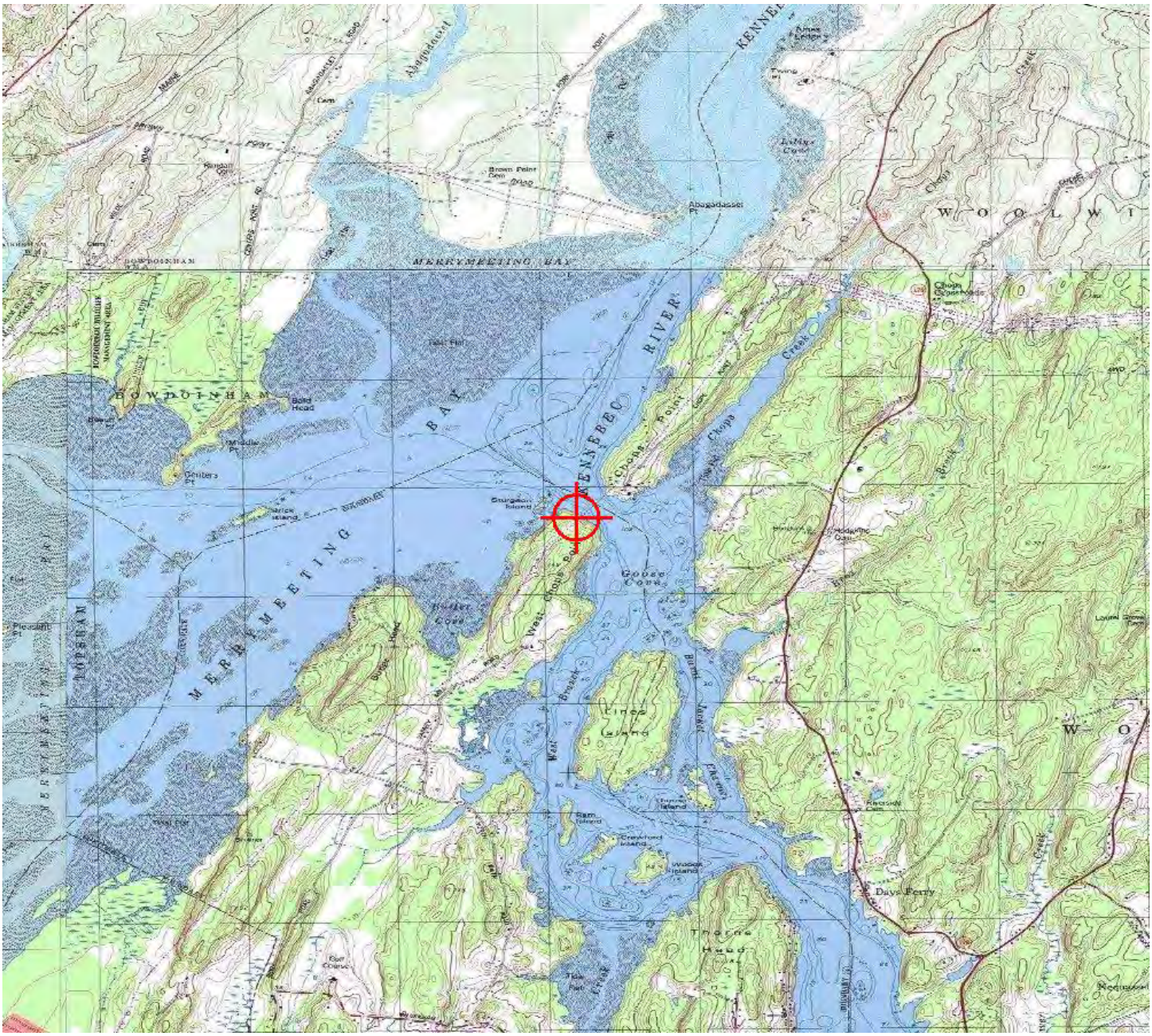
Attachment(s)
Additional Information
Case Description
Map(s)

cc: FCC

In addition to the above marking and lighting condition, use of marker spheres is approved.

Replace existing electrical transmission tower immediately adjacent to existing tower with new tower, 240'

TOPO Map for ASN 2018-ANE-1642-OE



Mail Processing Center
Federal Aviation Administration
Southwest Regional Office
Obstruction Evaluation Group
10101 Hillwood Parkway
Fort Worth, TX 76177

Aeronautical Study No.
2018-ANE-1643-OE
Prior Study No.
2016-ANE-707-OE

Issued Date: 03/12/2018

Benjamin Shepard
Central Maine Power Company
83 Edison Drive
Augusta, ME 04336

**** DETERMINATION OF NO HAZARD TO AIR NAVIGATION ****

The Federal Aviation Administration has conducted an aeronautical study under the provisions of 49 U.S.C., Section 44718 and if applicable Title 14 of the Code of Federal Regulations, part 77, concerning:

Structure:	Tower Section 77 & 277
Location:	Woolwich, ME
Latitude:	43-58-59.59N NAD 83
Longitude:	69-49-41.33W
Heights:	47 feet site elevation (SE)
	240 feet above ground level (AGL)
	287 feet above mean sea level (AMSL)

This aeronautical study revealed that the structure does not exceed obstruction standards and would not be a hazard to air navigation provided the following condition(s), if any, is(are) met:

As a condition to this Determination, the structure is to be marked/lighted in accordance with FAA Advisory circular 70/7460-1 L Change 1, Obstruction Marking and Lighting, a med-dual system - Chapters 4,8(M-Dual),&12.

Any failure or malfunction that lasts more than thirty (30) minutes and affects a top light or flashing obstruction light, regardless of its position, should be reported immediately to (877) 487-6867 so a Notice to Airmen (NOTAM) can be issued. As soon as the normal operation is restored, notify the same number.

It is required that FAA Form 7460-2, Notice of Actual Construction or Alteration, be e-filed any time the project is abandoned or:

_____ At least 10 days prior to start of construction (7460-2, Part 1)
__X__ Within 5 days after the construction reaches its greatest height (7460-2, Part 2)

See attachment for additional condition(s) or information.
This determination expires on 09/12/2019 unless:

(a) the construction is started (not necessarily completed) and FAA Form 7460-2, Notice of Actual Construction or Alteration, is received by this office.
(b) extended, revised, or terminated by the issuing office.

(c) the construction is subject to the licensing authority of the Federal Communications Commission (FCC) and an application for a construction permit has been filed, as required by the FCC, within 6 months of the date of this determination. In such case, the determination expires on the date prescribed by the FCC for completion of construction, or the date the FCC denies the application.

NOTE: REQUEST FOR EXTENSION OF THE EFFECTIVE PERIOD OF THIS DETERMINATION MUST BE E-FILED AT LEAST 15 DAYS PRIOR TO THE EXPIRATION DATE. AFTER RE-EVALUATION OF CURRENT OPERATIONS IN THE AREA OF THE STRUCTURE TO DETERMINE THAT NO SIGNIFICANT AERONAUTICAL CHANGES HAVE OCCURRED, YOUR DETERMINATION MAY BE ELIGIBLE FOR ONE EXTENSION OF THE EFFECTIVE PERIOD.

This determination is based, in part, on the foregoing description which includes specific coordinates, heights, frequency(ies) and power. Any changes in coordinates, heights, and frequencies or use of greater power, except those frequencies specified in the Colo Void Clause Coalition; Antenna System Co-Location; Voluntary Best Practices, effective 21 Nov 2007, will void this determination. Any future construction or alteration, including increase to heights, power, or the addition of other transmitters, requires separate notice to the FAA.This determination includes all previously filed frequencies and power for this structure.

If construction or alteration is dismantled or destroyed, you must submit notice to the FAA within 5 days after the construction or alteration is dismantled or destroyed.

This determination does include temporary construction equipment such as cranes, derricks, etc., which may be used during actual construction of the structure. However, this equipment shall not exceed the overall heights as indicated above. Equipment which has a height greater than the studied structure requires separate notice to the FAA.

This determination concerns the effect of this structure on the safe and efficient use of navigable airspace by aircraft and does not relieve the sponsor of compliance responsibilities relating to any law, ordinance, or regulation of any Federal, State, or local government body.

A copy of this determination will be forwarded to the Federal Communications Commission (FCC) because the structure is subject to their licensing authority.

If we can be of further assistance, please contact our office at (202) 267-4525, or david.maddox@faa.gov. On any future correspondence concerning this matter, please refer to Aeronautical Study Number 2018-ANE-1643-OE.

Signature Control No: 357417092-359408333 (DNE)
David Maddox
Specialist

Attachment(s)
Additional Information
Case Description
Map(s)

cc: FCC

Additional information for ASN 2018-ANE-1643-OE

In addition to marking and lighting condition above, Spherical markers approved.

Case Description for ASN 2018-ANE-1643-OE

Replace existing electrical transmission tower, adjacent to the existing tower with a new lattice tower 240' tall.

TOPO Map for ASN 2018-ANE-1643-OE

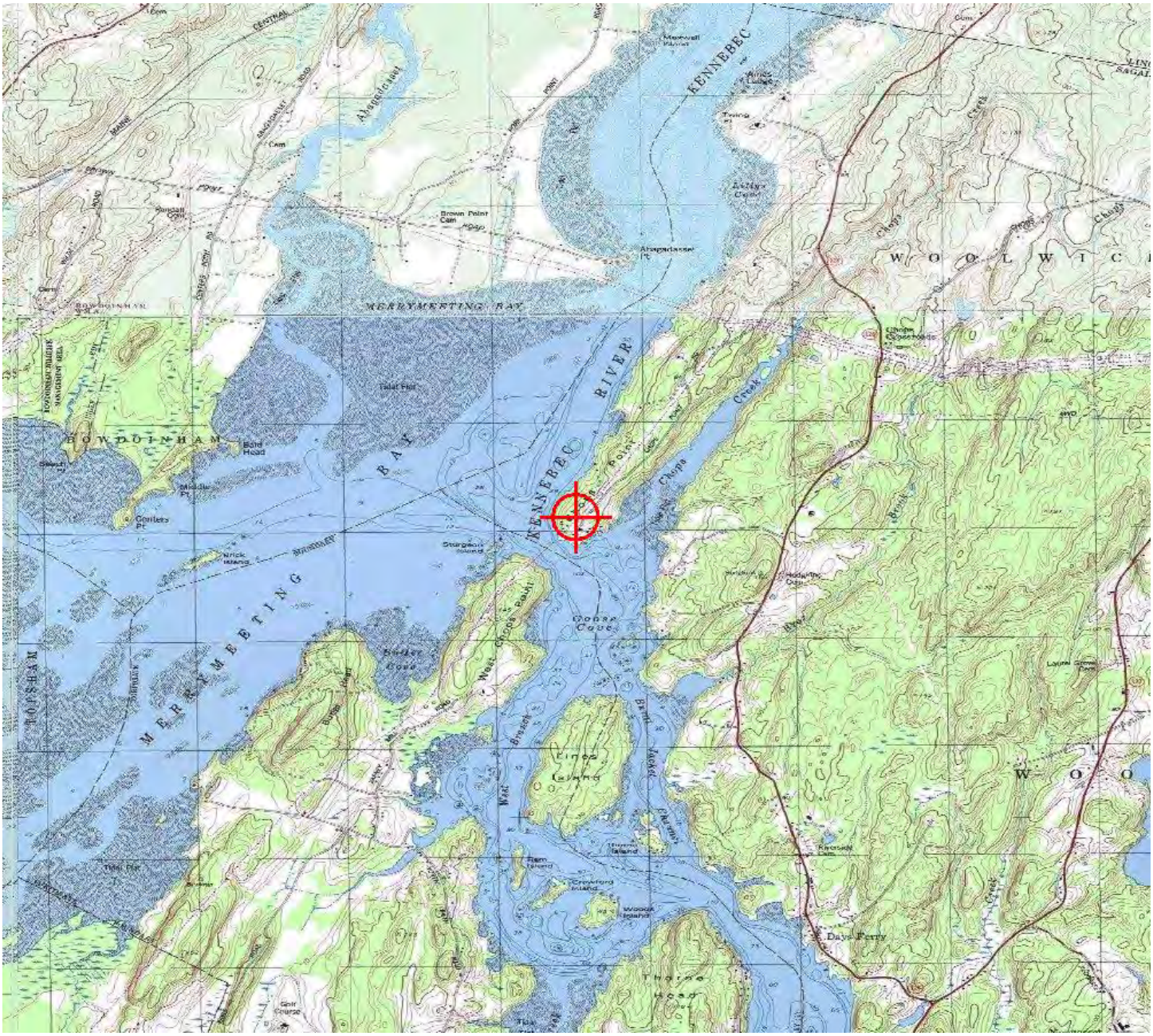


EXHIBIT B

Mail Processing Center
Federal Aviation Administration
Southwest Regional Office
Obstruction Evaluation Group
10101 Hillwood Parkway
Fort Worth, TX 76177

Aeronautical Study No.
2020-ANE-1540-OE
Prior Study No.
2018-ANE-1643-OE

Issued Date: 03/25/2020

Jenna Muzzy
Central Maine Power Company
83 Edison Drive
August, ME 04336

**** DETERMINATION OF NO HAZARD TO AIR NAVIGATION ****

The Federal Aviation Administration has conducted an aeronautical study under the provisions of 49 U.S.C., Section 44718 and if applicable Title 14 of the Code of Federal Regulations, part 77, concerning:

Structure:	Lighting Study Tower Section 77 & 277
Location:	Woolwich, ME
Latitude:	43-58-59.59N NAD 83
Longitude:	69-49-41.33W
Heights:	47 feet site elevation (SE)
	244 feet above ground level (AGL)
	291 feet above mean sea level (AMSL)

This aeronautical study revealed that the structure does not exceed obstruction standards and would not be a hazard to air navigation provided the following condition(s), if any, is(are) met:

As a condition to this Determination, the structure should continue to be marked/lighted utilizing a med-dual system.

Any failure or malfunction that lasts more than thirty (30) minutes and affects a top light or flashing obstruction light, regardless of its position, should be reported immediately to (877) 487-6867 so a Notice to Airmen (NOTAM) can be issued. As soon as the normal operation is restored, notify the same number.

It is required that FAA Form 7460-2, Notice of Actual Construction or Alteration, be e-filed any time the project is abandoned or:

_____ At least 10 days prior to start of construction (7460-2, Part 1)
__X__ Within 5 days after the construction reaches its greatest height (7460-2, Part 2)

Your request for consideration to utilize an Aircraft Detection Lighting System to operate the recommended lighting is approved provided that the equipment meets established technical standards.

This determination expires on 09/25/2021 unless:

(a) the construction is started (not necessarily completed) and FAA Form 7460-2, Notice of Actual Construction or Alteration, is received by this office.

(b) extended, revised, or terminated by the issuing office.

(c) the construction is subject to the licensing authority of the Federal Communications Commission (FCC) and an application for a construction permit has been filed, as required by the FCC, within 6 months of the date of this determination. In such case, the determination expires on the date prescribed by the FCC for completion of construction, or the date the FCC denies the application.

NOTE: REQUEST FOR EXTENSION OF THE EFFECTIVE PERIOD OF THIS DETERMINATION MUST BE E-FILED AT LEAST 15 DAYS PRIOR TO THE EXPIRATION DATE. AFTER RE-EVALUATION OF CURRENT OPERATIONS IN THE AREA OF THE STRUCTURE TO DETERMINE THAT NO SIGNIFICANT AERONAUTICAL CHANGES HAVE OCCURRED, YOUR DETERMINATION MAY BE ELIGIBLE FOR ONE EXTENSION OF THE EFFECTIVE PERIOD.

This determination is based, in part, on the foregoing description which includes specific coordinates, heights, frequency(ies) and power. Any changes in coordinates, heights, and frequencies or use of greater power, except those frequencies specified in the Colo Void Clause Coalition; Antenna System Co-Location; Voluntary Best Practices, effective 21 Nov 2007, will void this determination. Any future construction or alteration, including increase to heights, power, or the addition of other transmitters, requires separate notice to the FAA.This determination includes all previously filed frequencies and power for this structure.

If construction or alteration is dismantled or destroyed, you must submit notice to the FAA within 5 days after the construction or alteration is dismantled or destroyed.

This determination does include temporary construction equipment such as cranes, derricks, etc., which may be used during actual construction of the structure. However, this equipment shall not exceed the overall heights as indicated above. Equipment which has a height greater than the studied structure requires separate notice to the FAA.

This determination concerns the effect of this structure on the safe and efficient use of navigable airspace by aircraft and does not relieve the sponsor of compliance responsibilities relating to any law, ordinance, or regulation of any Federal, State, or local government body.

A copy of this determination will be forwarded to the Federal Communications Commission (FCC) because the structure is subject to their licensing authority.

If we can be of further assistance, please contact our office at (202) 267-0105, or j.garver@faa.gov. On any future correspondence concerning this matter, please refer to Aeronautical Study Number 2020-ANE-1540-OE.

Signature Control No: 432927659-434549431 (DNE)
Jay Garver
Specialist

Attachment(s)
Frequency Data
Map(s)

cc: FCC

Frequency Data for ASN 2020-ANE-1540-OE

LOW FREQUENCY	HIGH FREQUENCY	FREQUENCY UNIT	ERP	ERP UNIT
9.2	9.5	GHz	181618	W

Sectional Map for ASN 2020-ANE-1540-OE

EXHIBIT C

Federal Communications Commission

Wireless Telecommunications Bureau

RADIO STATION AUTHORIZATION

LICENSEE: CENTRAL MAINE POWER CO

CENTRAL MAINE POWER CO
83 EDISON DRIVE
AUGUSTA, ME 04336

Call Sign	File Number
WRHZ402	0009070583

Radio Service
RS - Land Mobile Radiolocation

Regulatory Status
PMRS

Frequency Coordination Number

FCC Registration Number (FRN): 0003687464

Grant Date	Effective Date	Expiration Date	Print Date
07-20-2020	07-20-2020	07-20-2030	07-21-2020

STATION TECHNICAL SPECIFICATIONS

Fixed Location Address or Mobile Area of Operation

Loc. 1 **Address:** 425 Chops Point Rd
City: Woolwich **County:** SAGADAHOC **State:** ME
Lat (NAD83): 43-58-59.6 N **Long (NAD83):** 069-49-41.3 W **ASR No.:** **Ground Elev:** 14.3

Antennas

Loc No.	Ant No.	Frequencies (MHz)	Sta. Cls.	No. Units	No. Pagers	Emission Designator	Output Power (watts)	ERP (watts)	Ant. Ht./Tp meters	Ant. AAT meters	Construct Deadline Date
1	1	009220.00000000-009480.00000000	LR	1		45M0P0N	188.000	181618.000	74.4		07-20-2021

Control Points

Control Pt. No. 1

Address: 83 Edison Drive

City: Augusta **County: KENNEBEC** **State: ME** **Telephone Number: (207)629-9535**

Associated Call Signs

Conditions:
Pursuant to §309(h) of the Communications Act of 1934, as amended, 47 U.S.C. §309(h), this license is subject to the following conditions: This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized herein. Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934, as amended. See 47 U.S.C. § 310(d). This license is subject in terms to the right of use or control conferred by §706 of the Communications Act of 1934, as amended. See 47 U.S.C. §606.

Licensee Name: CENTRAL MAINE POWER CO

Call Sign: WRHZ402 **File Number:** 0009070583 **Print Date:** 07-21-2020

Waivers/Conditions:

NONE

.

EXHIBIT D

Denise Plourde

From: William Most <williammost@gmail.com>
Sent: Friday, July 17, 2020 7:50 PM
To: Farber, Kenneth W.
Subject: EXTERNAL: Fwd: ASR Application No. A1161872

[redacted]

---------- Forwarded message ---------
From: **Jennifer Flynn** <Jennifer.Flynn@fcc.gov>
Date: Fri, Jul 17, 2020 at 11:13 AM
Subject: RE: ASR Application No. A1161872
To: williammost@gmail.com <williammost@gmail.com>, fomb@comcast.net <fomb@comcast.net>, steven.faulhaber@cmpco.com <steven.faulhaber@cmpco.com>

Good afternoon,

Applicant Central Maine Power Company proposes in ASR Application No. A1161872 to add aircraft detection lighting system (ADLS) to an existing utility pole in a right-of-way in Woolwich, ME. The subject utility pole is categorically excluded from environmental processing under the Commission's rules. *See* 47 CFR § 1.1306(c)(1)(i). The requests for further environmental processing are therefore dismissed. We also note that antenna structure registration is not required for this utility pole under the Commission's rules. *See* 47 CFR §§ 17.2(a), 17.4(a).

Jennifer Flynn

Attorney-Advisor

FCC/WTB/CIPD

From: Jennifer Flynn
Sent: Monday, May 18, 2020 4:52 PM
To: 'williammost@gmail.com' <williammost@gmail.com>; 'fomb@comcast.net' <fomb@comcast.net>;

steven.faulhaber@cmpco.com
Subject: RE: ASR Application No. A1161872

Attempting to add applicant contact to email chain again.

From: Jennifer Flynn
Sent: Monday, May 18, 2020 4:40 PM
To: williammost@gmail.com; fomb@comcast.net; steven.faulhaber@cmpco.com
Subject: ASR Application No. A1161872

Good afternoon,

I am contacting you to let you know that requests for further environmental processing have been submitted with respect to the above-referenced application. Under the FCC's rules, the applicant may file an opposition to the request within 10 days after the expiration of the time for filing requests, which expires 30 days after the national notice date you set, and is required to serve its response on the requester. The requester may file a reply to your response within 5 business days after the expiration of the time for filing oppositions. Because of the delay in commencing this pleadings email chain, the pleading cycle is adjusted as follows: The applicant's opposition will be due by Friday, May 29, 2020, and the requesters' reply (replies) will be due by Friday, June 5, 2020.

The requester is copied on this email. All parties should be aware that proceedings under ASR Application No. A1161872 are restricted proceedings under the rules of the Federal Communications Commission. Thus, under those rules, you may not make a written presentation on the merits of the case without serving it on the other parties to the proceeding (the applicant and any requesters). In addition, you may not make an oral presentation on the merits of the proceeding without inviting the other parties to participate.

Please submit any filings into the application on the Commission's ASR website as well as serving them on the other parties by way of replying to all on this e-mail chain.

Additionally, please notify all parties by way of replying to all on this email chain immediately if you change the national notice date.

Thank you,

Jennifer Flynn

Attorney-Advisor

FCC/WTB/CIPD

EXHIBIT E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

BIG STONE BROADCASTING, INC., Plaintiff, v. DR. BURON LINDBLOOM, in his official capacity as Chairman of the South Dakota Aeronautics Commission, et al., Defendants.	Civ. No. 00-1012

BRIEF OF AMICUS CURIAE
OF THE FEDERAL AVIATION ADMINISTRATION

Pursuant to the Court's Memorandum and Opinion of September 22, 2000, the Federal Aviation Administration ("FAA") hereby submits this brief of amicus curiae regarding the question of federal preemption.

BACKGROUND

Big Stone Broadcasting, Inc., a South Dakota corporation, is seeking to build an 875-foot radio transmission tower in Codington County, South Dakota. Big Stone Broadcasting successfully sought and received permission from the FAA, pursuant to 14 C.F.R. Part 77, to build the tower. Big Stone Broadcasting was unsuccessful, however, in seeking approval from the South Dakota Aeronautics Commission ("SDAC"), which concluded that the tower would violate the "protected visual flight rule routes" and would be a hazard to air navigation.

Big Stone Broadcasting appealed the SDAC's decision to a South Dakota state court in Codington County. At the same time, Big Stone Broadcasting filed an action in federal court alleging that the South Dakota statutes and regulations upon which the SDAC based its decision are preempted by federal law, and that these statutes violate the Commerce Clause. South Dakota moved to dismiss Big Stone Broadcasting's federal case, asserting that the action violated the State's Eleventh Amendment immunity.

On September 22, 2000, the Court denied in part and granted in part South Dakota's motion to dismiss on Eleventh Amendment grounds. In particular, the Court ruled that Big Stone Broadcasting's cause of action for prospective relief against state officials named in their official capacity could be maintained under the doctrine of Ex parte Young, 209 U.S. 233 (1908). The Court granted South Dakota's motion to dismiss, however, as to the South Dakota Department of Transportation and the South Dakota Aeronautics Commission.

The Court also *sua sponte* raised the question whether, in view of the state court action pending in Codington County, the doctrine established in Younger v. Harris, 401 U.S. 37 (1971), should be applied in the case. The Court noted that, under the Younger doctrine, it is appropriate for a federal court to abstain from hearing a case when there are pending state judicial proceedings absent extraordinary circumstances. The Court found that extraordinary circumstances were present in this case, including the fact that, "if given proper notice, the FAA may wish to intervene or at least file an *amicus curiae* brief * * * *." Memorandum Opinion and Order at 8.

The Court therefore ordered that Big Stone Broadcasting was to furnish a copy of the complaint, the answer, and the court's Memorandum Opinion and Order to the FAA, advising

the agency that it has 60 days from the date of mailing the documents in question in which to make a decision whether to seek to intervene or file an *amicus curiae* brief. On November 28, 2000, the Court granted the motion for an enlargement of time of ten days, or until December 7, 2000, in which to make a decision whether to seek to intervene or file an *amicus curiae* brief.

ARGUMENT

The doctrine of preemption is based on the Supremacy Clause of the Constitution, which provides that "[t]he Constitution and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land." U.S. Const. art. VI, cl.2. As Chief Justice Marshall explained, "in every case, the act of Congress, or the treaty is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824).

A federal statute may preempt state and local laws in one of three ways. First, Congress, in enacting a statute, may express a clear intent to preempt state law. Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190, 203 (1983). Second, absent express preemption, federal law may have an implied preemptive effect if Congress revealed this intent by "occupying the field" of regulation, when there is a "scheme of federal regulation * * * so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" or "because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982). Stated differently, field preemption will be inferred when "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of

state laws on the same subject." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Finally, there is federal preemption when "compliance with both federal and state regulations is a physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

The relevant statutory scheme at issue in this case, the Federal Aviation Act of 1958 (the "Act"), 49 U.S.C. §§ 1301-1542, does not contain an express preemption clause. Hence, federal preemption will apply only if an intent to preempt is "implicitly contained in the [Federal Aviation Act's] structure and purpose," Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); in other words, if there exists field or conflict preemption.

The Federal Aviation Act authorizes the FAA to promote air safety and to regulate the use of navigable air space. The Act provides, in pertinent part, that: In particular, the Act provides, in pertinent part, that:

> (a)(1) The United States Government has exclusive sovereignty of [the] airspace of the United States.
>
> * * *
>
> (b)(2) The Administrator [of the FAA] shall prescribe air traffic regulations on the flight of aircraft (including regulations on safe altitudes) for --
>
> (A) navigating, protecting, and identifying aircraft;
>
> (B) protecting individuals and property on the ground;
>
> (C) using the navigable airspace efficiently; and
>
> (D) preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

49 U.S.C. § 40103.

In addition, the Act specifically recognizes the threat that tall structures may pose to air safety and provides that the FAA:

> shall, by rules and regulations, or by order where necessary, require all persons to give adequate public notice, in the form and manner prescribed by the (Administrator), of the construction or alteration, or of the proposed construction or alteration, of any structure where notice will promote safety in air commerce.

49 U.S.C. § 1501. Congress also has explicitly addressed the role of the FAA (together with the FCC) in determining when broadcast towers will be built and the exclusive role of the FAA in determining the circumstances in which a tower, or other construction, might pose a hazard to air navigation. See 49 U.S.C. § 44718.

Pursuant to these statutory powers, the FAA promulgated Part 77 of the Federal Aviation Regulations governing "Objects Affecting Navigable Airspace," 14 C.F.R. § 77. The pertinent provisions of these regulations require each person who proposes construction or alteration of structures of particular dimensions and within specific proximity to airports to notify the FAA. See 14 C.F.R. §§ 77.11, 77.13, 77.15. The FAA uses this information to make "(d)eterminations of the possible hazardous effect of the proposed construction or alteration on air navigation." Id. § 77.11(b)(2). The FAA Administrator's determination is a "final disposition," judicially reviewable in the courts of appeals under 49 U.S.C. § 1486.

In view of this statutory and regulatory background, it is the position of the FAA that the Federal Aviation Act occupies the field regarding the question whether a proposed broadcast tower would constitute a navigable hazard. Here, pursuant to the Part 77 process, the FAA considered Big Stone Broadcasting's request to build the broadcast tower in question and

determined that no navigable hazard would be created. Hence, any contrary ruling by a state or local authority is preempted by federal law.[1] Such questions are for the FAA to determine, and the proper course for a state or local authority to follow to ensure its views are being considered regarding this important issue is to participate in the Part 77 process. Indeed, the legislative history of section 44718 of the Federal Aviation Act specifically provides that "[t]he FAA should coordinate * * * evaluations with state and local aviation officials" House Conf. Rep. No. 100-484, reprinted in 1987 U.S. Code Cong. & Admin. News 2533, 2630, 2660.

Moreover, the federal courts have consistently held that Congress, through its passage of the Federal Aviation Act, has largely preempted the field of airspace safety and management. The leading case is City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973), in which the Supreme Court held that the Federal Aviation Act preempted a city ordinance regarding aircraft noise. In pertinent part, the Supreme Court adopted the Solicitor General's argument that, "as respects 'air management' there is pre-emption," id. at 627, and held that, "[i]t is the pervasive nature of federal regulation of aircraft noise that leads us to conclude that there is pre-emption." Id. at 633. The Supreme Court further found that:

> The Federal Aviation Act requires a delicate balance between safety and efficiency, and the protection of persons on the ground. Any regulations adopted by the Administrator to control noise pollution must be consistent with the 'highest degree of safety.' The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.

Id. at 639 (internal citations omitted).

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[1] A state or local authority could, of course, determine that a proposed broadcast tower should not be built on separate and independent grounds; i.e., on a ground that did not involve the question whether the broadcast tower constitutes a navigable hazard, or that would otherwise be impermissible under federal law.

Following the Supreme Court's decision in City of Burbank, the federal courts have uniformly held that the Federal Aviation Act preempts the regulation of aircraft and airspace, with the sole exception being for the regulation of noise levels at airports by local aircraft proprietors. See, e.g., National Helicopter Corp. v. City of New York, 137 F.3d 81, 88 (2d Cir. 1998) ("[F]ederal courts have recognized federal preemption over the regulation of aircraft and airspace, subject to a complementary though more limited role for local aircraft proprietors in regulating noise levels at their airports." (internal quotation omitted)); Burbank-Glendale-Pasadena Airport Auth. v. City of Los Angeles, 979 F.2d 1338, 1340 (9th Cir. 1992) ("It is settled law that non-proprietor municipalities are preempted from regulating airports in any manner that directly interferes with aircraft operations."); Pirolo v. City of Clearwater, 711 F.2d 1006, 1008-09 (11th Cir. 1983) (holding that city airport ordinances regulating night operations and prescribing air traffic patterns were preempted by federal law); Price v. Charter Township of Fenton, 909 F. Supp. 498, 501-05 (E.D. Mich. 1995) (holding that township ordinance limiting frequency of flights was preempted by Federal Aviation Act); United States v. City of Berkeley, 735 F. Supp. 937, 940 (E.D. Mo. 1990) (holding that "the comprehensive federal regulation of air naviation facilities and air safety would permit the Court to conclude that local regulation of the construction of air navigation facilities is preempted."); Blue Sky Entertainment v. Town of Gardiner, 711 F. Supp. 678, 682 (N.D.N.Y. 1989) (finding that town law regulating parachute jumping was pre-empted and stating that "[i]t is well-settled that FAA has been delegated exclusive responsibility by Congress for the safe and efficient management of the navigable airspace of the United States"). See also Air Line Pilots Ass'n v. Quesada, 276 F.2d 892, 894 (2d Cir. 1960) ("The Federal Aviation Act was passed by Congress for the purpose of

centralizing in a single authority – indeed, in one administrator – the power to frame rules for the safe and efficient use of the nation's airspace.").

Accordingly, based on a consideration of both the statutory and regulatory background of the Federal Aviation Act, as well as relevant authority, it is the position of the FAA that the Federal Aviation Act occupies the field and, consequently, preempts the SDAC's determination to disapprove the broadcasting tower at issue based on the SDAC's conclusion that the tower would constitute a hazard to air navigation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December 2000, I caused true and accurate copies of the foregoing to be deposited in first-class mail, postage-prepaid, addressed to the following counsel for the parties:

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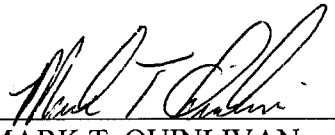

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