STATEMENT OF KEITH POTTS, CHIEF OF THE AIRSPACE OBSTRUCTION AND AIRPORTS BRANCH, AIR TRAFFIC SERVICE, FEDERAL AVIATION ADMINISTRATION, BEFORE THE COMMITTEE ON GOVERNMENT OPERATIONS, SUBCOMMITTEE ON GOVERNMENT ACTIVITIES AND TRANSPORTATION, REGARDING FAA PROCEDURES FOR MAKING PART 77 DETERMINATIONS, SEPTEMBER 10, 1976

Mr. Chairman and Members of the Subcommittee:

I am Keith Potts, Chief of the Airspace Obstruction and Airports Branch in the FAA's Air Traffic Service. With me today is Albert B. Randall from the FAA's Office of the Chief Counsel. I am pleased to appear before you today to discuss the procedures which the FAA follows in determining the impact of proposed structures on navigable airspace.

At the outset, I would like to describe in brief FAA's implementation of Part 77 of the Federal Aviation Regulations relating to "Objects Affecting Navigable Airspace." Part 77 provides the regulatory means through which the FAA Administrator implements §1101 of the Federal Aviation Act of 1958 (49 U.S.C. 1501). This statutory provision directs the Administrator to require adequate public notice of construction or alteration of any structure where notice would promote safety in air commerce.

Subpart B of Part 77 requires that notice of construction or alteration be provided to the director of the FAA region wherein construction is proposed. It further sets forth the circumstances under which notice is required as well as the time and form in which the notice must be provided.

When notice is filed with a regional office as prescribed by Subpart B, an air traffic specialist screens the form to determine if the notice was in fact required for the proposed construction, and acknowledges its receipt.

Upon determining that notice was in fact required under Part 77, the specialist then considers the proposed construction in light of the obstruction standards of Subpart C of Part 77. If the construction does not meet those criteria, the construction proponent is advised his structure is not an obstruction. If the construction meets or exceeds the screening requirements of Subpart C, but would clearly not pose a hazard to air navigation, the specialist advises the proponent accordingly. However, if the construction could constitute a hazard to air navigation, the proponent is advised that further aeronautical study is necessary. The criterion used is fundamentally height of the structure and the consequent interference into the airspace used by navigating aircraft.

Normally when an aeronautical study is conducted, the Notice of Proposed Construction is circularized to other FAA regional elements responsible for flight safety in order to solicit their views and comments regarding the potential impact of the proposed structure on air navigation. Concurrently, a Notice of Aeronautical Study, containing the Notice of Proposed Construction, is circularized to known interested persons who are invited to offer their aeronautical comments to the FAA regarding the proposal. However, the FAA does not solicit nor can it consider comments on the proposed construction except those based on the aeronautical impact. We are not empowered by the FAAct to consider other factors (such as zoning, aesthetics, construction quality) in our obstruction determinations.

If the comments which are received set forth substantial reasons why the proposed construction could have an adverse effect on air navigation,

then it is determined whether an informal airspace meeting would assist in resolving the issue. When such a meeting is held, among others, those persons who initially provided comments are invited to attend. This affords the opportunity for further discussion of the matter and provides an informal forum in which differences may often be resolved. The purpose of this entire procedure is to assure that the impacted persons as well as aeronautical experts are given a meaningful opportunity to participate in the FAA decision-making. Subsequently, all comments are evaluated and a determination is made by the agency as to whether the proposed construction would have a substantial adverse effect on air navigation. If it is determined to have such an effect, a Determination of Hazard is made; otherwise, a Determination of No Hazard is made. The determination is then issued to the proponent as well as to the other persons who participated in the aeronautical study. This determination becomes final 30 days after issuance unless a Petition for Discretionary Review is filed with the Administrator. Except in the case of FCC building permits for towers, the determination expires 18 months after its effective date.

The proponent or any person who presents a substantial aeronautical objection concerning the determination, is authorized to request the Administrator, through his delegate, the Director, Air Traffic Service, to review the regional determination. The petition for review is examined by the Director, Air Traffic Service, and a decision made whether to grant the review and the basis on which the review will be conducted. If the review is granted,

the petition and the record previously developed during the regional aeronautical study may form the basis for review or it may be augmented by additional written submissions. Further, a hearing may be held pursuant to Subpart E of Part 77 in lieu of reviewing the regional record. A determination rendered after discretionary review is administratively final.

Another means is available for persons to seek administrative review of the regional determination. If actual construction has not commenced, an interested person may, no later than 15 days before the expiration of the final determination, petition the FAA official who issued the determination to revise the determination based on new facts that change the basis on which the determination was made.

I would like to underscore at this time, that the FAA's determination under Part 77 does not approve, permit or prohibit construction of any proposed structure. Neither does it waive, suspend, or otherwise affect local rules, statutes, ordinances or other such requirements. The FAA has no legal basis with which to prevent construction of a structure, even one determined to be a hazard to air navigation. Authorization for construction is a matter which rests with others and is totally outside the scope of FAA's legal authority. Thus, the FAA determination serves merely as an advisory opinion regarding the anticipated effect of the proposed structure on aeronautical operations and the safe and efficient use of navigable airspace. Our responsibility is to assure that a structure

will not be a hazard in actual terms - even if we term it a "hazard" administratively. The determination of hazard is merely an administrative announcement prior to altering the flight paths or use of an airport to keep aircraft away from the structure.

I would like to turn now to a brief discussion of several areas of concern brought to our attention by the Subcommittee staff.

The first area I will address relates to the notice provided by the FAA to interested persons regarding aeronautical studies conducted to determine whether a proposed structure represents a hazard or no hazard. In this connection, the Subcommittee has noted that FAA maintains lists of persons who have expressed an interest in being advised of impending aeronautical studies. These lists are maintained on a regional basis and consist of those persons who have advised a region of their interest in being notified of airspace matters, including Notices of Proposed Construction, that take place within that region. When a Notice of Aeronautical Study is circularized, these persons are provided a copy. Additionally, this list is augmented on a case by case basis to include other persons known to have an aeronautical interest in the matter under consideration. Proposed guidelines for determining interested persons were issued to regional offices in January 1974. These guidelines are generally applied by the regions when aeronautical studies are conducted. However, because of the Subcommitee's expressed concern that, in some instances, the lists of interested persons are being mechanically used

without supplementation of additional known interested persons, the Director, Air Traffic Service has now reminded regional officials to ensure that notification lists are actually being augmented, as necessary, on a case by case basis.

The Subcommittee staff has also expressed their view that inadequate records of informal airspace meetings are maintained by the FAA. As they note, the number of these meetings conducted annually would make the expense of transcription prohibitively high. Apart from the significant expense of obtaining such records, it is the FAA's view that detailed, official records of such informal meetings are not necessary. We do not believe that there is a need to retain for record purposes those matters raised at these meetings which have previously been transmitted to the FAA in the form of written comments to our Notice of Aeronautical Study. However, we do recognize the benefit of requesting those persons who raise new issues and concerns at these meetings, to subsequently provide this information in written form for inclusion with the written comments previously received. We believe that this should adequately address the situation. We intend to formally adopt such a procedure after consultation with our regional offices, absent any compelling reasons they might advance which would persuade us to do otherwise. We appreciate the Subcommittee's focusing our attention on this matter.

Regarding the Subcommittee's concern about FAA dealings with the public under Part 77, we can assure the Subcommittee that the FAA considers it a fundamental responsibility to be responsive to public

concerns. In our proposed guidelines which set forth those persons who should normally be informed of aeronautical studies, we specifically provided for circularization of these notices outside the aeronautical community to the non-aeronautical public when there is known controversy regarding the proposed construction.

We also recognize, as the Subcommittee has pointed out, that at times FAA actions under Part 77 may be confusing to members of the public at large due to the inherently technical aspects of the aeronautical study process and narrowly defined FAA role. While the use of technical terms facilitates communication among knowledgeable members of the aviation community, we will review the problem as stated by the Subcommittee to determine what actions may be appropriate to improve the general public's understanding. Further, we will continue, as we have in the past, to attempt to improve public understanding of actions we take and the FAA role under Part 77 when problems or concerns are brought to our attention.

The Subcommittee has indicated concern regarding the consideration of environmental consequences which might arise from changes in flight procedures precipitated by the construction of towers issued Federal Communications Commission (FCC) construction permits. We recognize that current practice may not completely address--prior to actual tower construction--all potential adverse environmental impact of these resultant changes in flight procedures. However, we do not believe that it is either desirable or practicable for these considerations to enter into the Part 77 determination process by the FAA.

It is not desirable for environmental considerations to be addressed within the Part 77 determination process because, in our view, Part 77 is not an appropriate forum for environmental assessments. The determination process is merely concerned with the impact of a structure, if constructed as proposed, upon the navigable airspace. Further, even if we were able to predict at the time the determination was issued that necessary changes in flight procedure could have adverse environmental impacts, the FAA has no authority to prohibit the construction. As stated earlier, a Part 77 determination is merely an advisory opinion.

Performing environmental assessments within the scope of the Part 77 process is not generally practicable for the following reasons. Normally, when a determination of no hazard is issued, we do not know the specifics of changes in flight procedure that may ultimately be implemented. The determination may signify only that a change in flight procedure would be necessary and safe to make. There may exist a number of alternative changes which could be made. It is ordinarily not feasible to specifically identify what changes in flight procedure will be subsequently effected because of the uncertainties inherent in these situations. Construction may not take place for a significant period of time after issuance of the determination. During this intervening time, the anticipated impact of a proposed flight change may be substantially altered by reason of changes in flight procedure unrelated to the proposed construction, or by modification in the proposed structure, itself. Consequently,

we believe that the difficulties associated with environmental assessments during the Part 77 determination process would not only be burdensome but in many instances would result in an environmental assessment which would not reflect the actual environmental impact at the time of construction.

However, we can offer one possible suggestion. As noted by the Subcommittee, the FCC already reviews the environmental considerations which result from the tower construction itself. It has been recommended that this environmental assessment be expanded to include consideration of environmental changes resultant from alterations in aircraft operations. The FAA believes that, when possible, we should identify for the FCC prospective alternative operational changes that might be called for, in order for the FCC to determine if there has been adequate assessment of their environmental impact. While we are willing to provide this information to the FCC, we defer to them on the merits of their reviewing this additional environmental information from the standpoint of their available resources and other similar considerations.

Mr. Chairman, that concludes my prepared statement. I am prepared to answer any questions you or Members of the Subcommittee may have.