

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
Lake Cedar Group LLC's	)	DA 00-764
Petition for Expedited Special Relief	)	
And Declaratory Ruling Seeking	)	
Preempting of a Resolution by	)	
the Board of County Commissioners of	)	
Jefferson County, Colorado	)	

COMMENTS OF  
THE COUNTY OF JEFFERSON, COLORADO  
IN OPPOSITION TO LAKE CEDAR GROUP'S PETITION  
FOR EXPEDITED SPECIAL RELIEF AND  
DECLARATORY RULING

Lake Cedar Group LLC and each of its members have filed a petition for expedited special relief and declaratory ruling in which they request that the Federal Communications Commission ("the Commission") preempt the zoning decision of the Board of County Commissioners of Jefferson County, Colorado. Jefferson County responds by requesting that the Commission deny the petition for the reasons set forth below.

INTRODUCTION

The Lake Cedar Group petition seeks preemption of a quasi-judicial decision of the Board of County Commissioners of Jefferson County in which the County Commissioners denied an application to rezone land for Lake Cedar Group's digital television tower.

The State of Colorado delegated authority over zoning and land use in unincorporated areas to county commissioners in Article 28, Title 30 of the Colorado

Revised Statutes. See 30-28-113, C.R.S.; Famularo v. Board of County Commissioners, 190 Colo. 333, 505 P.2d 958 (1973). The county commissioners may amend a zoning map after holding a public hearing, and after receiving the recommendation of the planning commission. 30-28-116, C.R.S. Rezoning decisions are made by applying the criteria in the zoning resolution to the specific facts before the county commissions, and are considered to be quasi-judicial decisions. Snyder v. Lakewood, 189 Colo. 421, 542 P.2d 371 (1975).

County planning commissions are required to make and adopt a master plan for the physical development of the unincorporated territory of the county. Section 30-28-106, C.R.S. The purpose of the county master plan is to guide and accomplish coordinated, adjusted, and harmonious development of the county, which will promote

the health, safety, morals, order, convenience, prosperity, or general welfare of the inhabitants, as well as efficiency and economy in the process of development, including such distribution of population and of the uses of land for urbanization, trade, industry, habitation, recreation, agriculture, forestry, and other purposes as will tend to create conditions favorable to health, safety, energy conservation, transportation, prosperity, civic activities, and recreational, educational, and cultural opportunities; will tend to reduce the wastes of physical, financial, or human resources which result from either excessive congestion or excessive scattering of population; and will tend toward an efficient and economic utilization, conservation, and production of the supply of food and water and of drainage, sanitary, and other facilities and resources.

Section 30-28-107, C.R.S.

Pursuant to its delegated land use authority, Jefferson County adopted the Telecommunications Land Use Plan (“the TLUP”) as a component of its master plan. The TLUP, as amended in 1993, includes visual and noise policies, engineering and economic policies, health policies, tower policies, and residential interference policies. (Appendix

1) These policies include specific recommendations such as the following:

- Telecommunication facilities should result in a minimal visual impact for those residents in the immediate area and for those in the large community who view these facilities from a distance.
- Implement, where possible, measures to minimize visual impact of new telecommunications towers, including: avoid tower heights and locations which necessitate FAA coloring and lighting; tower and antenna consolidation; and locating away from key public viewpoints.
- Equipment buildings should blend in with the surrounding area by considering coloring, texture, topography and scale of buildings.
- Towers and other structures should be located in the area of least visual impact within the site that will allow the facility to function consistent with its purpose.
- The applicant must show their proposed equipment cannot be accommodated and function as required by its construction permit or license without unreasonable modifications on any other existing facility.
- New towers on Lookout Mountain should be located on the eastern slope.
- New towers should be permitted only when an equal face area of existing towers can be removed.
- Multiplexing and other methods should be used whenever possible and practicable to maximize the capacity of towers.

Jefferson County also adopted application requirements and criteria for rezoning land to Planned Development for telecommunications towers. These regulations are found at Section 15 of the Jefferson County Zoning Resolution. (Appendix 2) They require the applicant to submit evidence that the equipment for which the proposed tower is being constructed cannot be accommodated on an existing or approved tower. The approval criteria require the county commissioners to consider compatibility with existing and allowed land uses in the surrounding area. The county commissioners must consider the community plan and the TLUP. And, the county commissioners must consider applicable statutory provisions. Section 15.E.2.a.(1). These criteria are

discretionary criteria, that allow the county commissioners to use its judgment concerning whether a rezoning proposal satisfies county policies, and whether the proposal is compatible with the existing land uses in the surrounding area.

Section 15 also includes certain minimum standards that a proposal must meet. The applicant must demonstrate to the satisfaction of the board of county commissioners that no existing telecommunications site is available to accommodate the equipment. Section 15.E.2.b.(1). The regulation requires the tower to be set back from the property line far enough to prevent all ice-fall materials and debris from tower failure from falling onto occupied dwellings. Section 15.E.2.b.(2).

In addition to certain other minimum standards, and the regulation states explicitly that “[s]atisfaction of the minimum standards set forth above shall not entitle an applicant to approval of the rezoning if the Board of County Commissioners determines that rezoning should not be allowed pursuant to the General criteria for review.” Section 15.E.2.b.(6). This paragraph makes it clear that the land use policies in the TLUP and general considerations of health, safety, and welfare take precedence over satisfying minimum criteria.

After a general zoning ordinance is passed, those with property in the zoned districts have the right to assume the zoning will not be changed unless the change will be required for the public good. Holly Development, Inc. v. Board of County Commissioners, 140 Colo. 95, 342 P.2d 1032 (1959). The Lake Cedar Group submitted an application to rezone land that was zoned Mountain Residential and Agricultural. Under Holly Development v. County Commissioners, there is a presumption that this

zoning is the appropriate zoning for the land, and it should only be changed if changed conditions require the zoning map to be amended.

The rezoning hearings included substantial evidence on the number of homes in the immediate vicinity of the proposed tower; significant tourist and cultural attractions nearby, including Buffalo Bill's grave and the Boettcher Mansion; the issue of setbacks; the design of the equipment building; and many other issues, including health issues associated with radio frequency emissions. The hearings also included evidence on the suitability of Squaw Mountain and Eldorado Mountain as alternative locations.

The county commissioners denied the rezoning request after finding that the proposal was not compatible with the residential uses in the surrounding area; it did not conform with the Central Mountains Community Plan policies associated with visual resources, public services and mountain site design; it did not conform with the tower siting policies in the TLUP; and it did not meet the minimum standards for rezoning regarding whether alternative sites exist, setbacks, and conformance with the standards for non-ionizing electromagnetic radiation.

The Jefferson County Zoning Resolution includes a provision allowing an applicant to seek a rehearing upon a showing that it has made a substantial change in its application. Having been denied rezoning of its site for the particular proposal that was presented, Lake Cedar Group could have revised its proposal and requested a rehearing, or it could have sought rezoning authority for another site. In addition, each broadcaster that is a member of Lake Cedar Group could have filed separate rezoning requests for individual facilities.

Lake Cedar Group appealed this decision to the district court in Jefferson County. Before receiving a decision from the district court on whether the decision was arbitrary and capricious, Lake Cedar Group filed its petition with the Federal Communications Commission for declaratory order and special relief.

### ARGUMENT

#### I. JEFFERSON COUNTY INCORPORATES ITS COMMENTS DATED DECEMBER 3, 1999.

Jefferson County submitted Initial Comments to the Federal Communications Commission (“the Commission”) on December 3, 1999. In those Initial Comments, Jefferson County requested that the Commission not act on Lake Cedar Group’s petition. The Initial Comments included the following points, all of which are still applicable and are fully incorporated herein by reference:

- Federal agencies do not have authority to intervene in local decision-making processes for the purpose of correcting allegedly incorrect results.
- The Lake Cedar Group petition requests the Commission to review whether the Board of County Commissioner of Jefferson County made the correct decision based on the evidence before it. This review function is the sole province of the district courts of Colorado.
- The Telecommunications Act does not give the Commission either express or implied authority to preempt local land use authority over high-powered broadcast towers.
- The Lake Cedar Group petition does not provide a reasonable and consistent basis upon which the Commission should act. It would not provide any

enforceable standards or criteria for constructing and maintaining the proposed tower.

- Lake Cedar Group requested federal action based on the legal standard that applies to decisions affecting wireless communication facilities. This standard does not apply to local zoning decisions regarding major broadcast towers.
- Lake Cedar Group’s petition was only necessary because of its own delay in seeking zoning approval for a DTV site.
- Federal preemption is not necessary to assure that DTV service is available to the Denver Metropolitan Area. The Board of County Commissioners denied approval for the zoning proposal contained in the Lake Cedar Group Official Development Plan. Other antenna locations and other tower configurations, including different height, different location on Lookout Mountain, and different antenna patterns, have not been presented to Jefferson County for rezoning consideration.

Jefferson County incorporates herein the comments and legal authority in its December 3, 1999 Initial Comments.

II. THE SUPREMACY CLAUSE DOES NOT ALLOW FEDERAL INTERVENTION IN LOCAL LAND USE DECISIONS.

A. The Telecommunications Act Does Not Authorize Any Federal Preemption of Land Use Authority for Television Broadcast Towers.<sup>1</sup>

The Telecommunications Act of 1996 (“the Act”), Section 201, authorized the Commission to issue licenses for advanced television services. That authority is codified at 47 U.S.C. §336. Section 201 authorized the Commission to issue additional licenses

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<sup>1</sup> The argument in this section supplement the legal argument on preemption in Jefferson County’s Initial Comments filed in December, 1999.

for advanced television services; adopt regulations regarding ancillary services; and require surrender of the original license of a television broadcaster as a condition of holding an advanced television service license. The authority to implement advanced television service did not include any authority to interfere with the sovereign functions of state and local governments.

Other provisions of the Act contained express preemptive authority. Section 704 of the Act authorizes limited preemption of land use regulations that prohibit wireless communications services or discriminate among providers of wireless communications service. This preemption was authorized within carefully proscribed limits and only after extensive debate. Section 253 of the Act authorizes preemption of state or local government laws that prohibit an entity from providing interstate or intrastate telecommunications service. In contrast to this explicit preemption, Section 201 of the Act is silent on preemption.

In City of Abilene v. Federal Communications Commission, 164 F.3d 49 (D.C. Cir. 1999), the court upheld the refusal of the Federal Communications Commission to preempt a provision of Texas law that prohibited a local government from offering telecommunications services to the public. The Commission had denied a petition for declaratory ruling on the grounds that Congress had not expressed itself with sufficient clarity in Section 253 to warrant federal interference with a State's regulation of its political subdivisions. The Court upheld the Commission based on Gregory v. Ashcroft, 111 S.Ct. 2395, 501 U.S. 452, 115 L. Ed. 2d 410 (1991). Gregory v. Ashcroft, 501 U.S. at 460, held that courts should not infer congressional intrusion into a state's governmental structure. Federal law may not be interpreted to reach into areas of state

sovereignty unless Congress has manifested its intention with unmistakable clarity. Id. Accordingly, even though Congress had manifested its intent in Section 253 of the Act to authorize preemption of some state and local statutes, the court in City of Abilene v. FCC gave that provision a limited construction. The court upheld the Commission's refusal to preempt a state law that controlled the authority of local governments.

The Tenth Amendment to the United States Constitution states that “[t]he powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” The United States Constitution, Article IV, section 3(2) delegates to congress the power to dispose of and make all needful rules and regulations respecting property belonging to the United States. Sections 8, 9, and 10 of the Enabling Act authorizing the formation of the State of Colorado mandated a certain disposition of public lands in the territory that was to become Colorado. Regarding all other land, there is no explicit federal authority. Authority over those lands was conferred on the State of Colorado when it became a state.

Counties are created by Article XIV of the Colorado Constitution. Authority to control land use and development within counties is delegated by the state to counties in several statutes, including Article 28, Title 30 of the Colorado Revised Statutes, Article 20, Title 29 of the Colorado Revised States and Article 65.1, Title 24 of the Colorado Revised Statutes. Ordering preemption of the land use authority conferred by the state on Jefferson County would interfere with the relationship between a state and its political subdivisions, and intrude on state sovereignty. There is no language in the Act granting that authority. Therefore, under Gregory v. Ashcroft, 501 U.S. 452, and City of Abilene

v. Federal Communications Commission, 164 F.3d 49, the Commission may not preempt the land use power given to counties by the State of Colorado.

B. The Federal Communications Commission Has No Authority to Preempt Particular Land Use Decisions.

In those instances in which the Telecommunications Act has granted preemptive authority, it has not authorized the Federal Communications Commission to substitute its judgment for the judgment of locally elected officials concerning appropriate land uses.

Section 704 of the Act creates specific limitations on the regulatory authority of local governments with regard to wireless communications facilities. 47 U.S.C. §332(c)(7). It describes the extent of permissible regulations, and limits direct Commission intervention to regulations based on the environmental effects of radio frequency emissions. 47 U.S.C. §332(c)(7)(B)(v). Section 253 of the Act also describes the type of local statute or regulation that is prohibited and authorizes preemption of the enforcement of a statute that violates that section. 47 U.S.C. §253(a). Both sections include a specific statement of policy that narrowly focuses preemption to the particular type of regulation that would interfere with that policy. Neither section authorizes unfettered case by case interference with local policy decisions.

In those instances in which the Federal Communications Commission has exercised preemptive authority by rule-making, it has promulgated policies that give direction to local governments on the type of land use regulations that are prohibited. 47 C.F.R. 1.4000 prohibits local laws or regulations applicable to direct broadcast satellite antennae and other similar antennae of one meter or less in diameter that impair installation, maintenance or use. It does not preempt all land use regulations related to those antennae. The regulation recognizes local interests in safety objectives and in

historic preservation, and allows local governments to apply for a waiver of the rule based on special local concerns. The Commission issued a declaratory ruling in relation to Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities. The ruling required regulations that involve placement, screening, or height of antennae based on local concerns to be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose. Vol. 50 Fed. Reg. No. 186, p. 38813.

The Lake Cedar Group petition proposes a single act of preemption without any guidelines on what land use regulations are allowed. It offers no guidance on the extent of preemption that would be accomplished. For example, would the Commission's action nullify completely the Jefferson County TLUP and zoning regulations applicable to television broadcast facilities or only certain portions of them? Would Jefferson County retain authority over building permits? Would the resulting action apply to other local government decisions in other jurisdictions or only to Jefferson County, Colorado? Would the TLUP and zoning regulations apply to a modified rezoning application by Lake Cedar Group or to subsequent rezoning applications by other entities for different facilities?

If the Official Development Plan ("the ODP") were approved through normal land use processes, the conditions in the ODP would be enforceable by Jefferson County. If the Commission preempts Jefferson County's rezoning decision, the ODP will be unenforceable. It would place the Federal Communications Commission in charge of tower construction and all of the myriad issues that are currently addressed by local building codes, the ODP, and other land use regulations.

There is no authority or precedent for preemption of an individual land use decision of one local government without express legislative authorization such as in 47 U.S.C. §332 and §253, or without an adopted rule that specifies the scope of preemption.

III. JEFFERSON COUNTY LAND USE PLANS AND ZONING CRITERIA  
IMPLEMENT IMPORTANT LAND USE POLICIES.

The Lake Cedar Group Petition focuses on two aspects of the County Commissioners' decision. It focuses on the issue of whether other sites are available and on whether the proposal complies with limits for non-ionizing electromagnetic radiation. This narrow focus ignores the other important interests that are addressed by Jefferson County's land use policies and rezoning criteria.

The land on which Lake Cedar Group seeks to construct its facilities has been zoned for mountain residential and agricultural uses for many decades. Surrounding landowners have a legal right to rely on that zoning unless circumstances have changed to the extent that that zoning designation is no longer appropriate. Holly Development Corp. v. County Commissioners, *supra*. Lake Cedar Group's decision to purchase that land and construct a tower on it was made with full knowledge of the existing zoning, the existing surrounding land uses, and the rezoning criteria. Any other applicant seeking to rezone land must demonstrate that the proposal conforms to the applicable land use plan and is compatible with existing and allowable land uses in the surrounding area. The business interests of Lake Cedar Group and its technological broadcasting constraints should not allow it to override these criteria.

Lake Cedar Group's petition assumes that the only relevant issue is whether it can broadcast digital television from the most convenient and technically simple site

available. The petition ignores the issue of the visual impact of the proposed large tower on the immediately surrounding community and on the larger metropolitan area. It ignores the issue of whether a mountain top that is the home of several thousand people is the appropriate location for an antenna farm. It ignores the issue of whether television broadcasters must respect existing zoning regulations on the same footing as other commercial or industrial interests. Preemption according to Lake Cedar Group's petition would elevate broadcasting interests over all other local interests that are considered and balanced in the rezoning process.

#### IV. THE LAKE CEDAR GROUP PETITION REQUIRES THE FEDERAL COMMUNICATIONS COMMISSION TO SIT AS A LOCAL ZONING BOARD.

The Lake Cedar Group requests the Commission to preempt the Board of County Commissioners' decision denying zoning approval for the tower proposed in the Official Development Plan submitted in its rezoning application. The petition provides no criteria or parameters for the Commission to use to determine whether the proposed location, size, configuration, and development conditions are appropriate. It provides no criteria or parameters for the Commission to use to determine whether another site would be preferable. The Petition essentially requests carte blanche approval of whatever request is made.

Preempting the County Commissioners' land use decision would effectively nullify the Telecommunications Land Use Plan and the Planned Development Zone District criteria and conditions. The petition would place the power to approve the location, design, conditions of construction, and construction in the hands of the federal government without any guidelines. The Commission would have no guidance on

whether to allow the facilities to be moved to a different location; on whether to adopt, amend or delete any of the consolidation requirements; or on whether to alter the particular details of design. No criteria would control the siting of a telecommunications tower in the absence of these policies and regulations. The Commission would have to make these important policy decisions on an ad hoc basis.

The petition requests preemption because the zoning decision was allegedly “not the product of reasoned decision making.” Petition p. 29. Even if that allegation were correct, an unreasonable decision would not ipso facto render the pending zoning proposal reasonable and appropriate for the area. Granting the petition would require a federal agency to approve a major land use change contrary to the decision of the local government without any criteria for whether or not it should be granted.

The petition attempts to demonstrate that the rezoning application met the requirements of the Telecommunications Land Use Plan and the Planned Development approval criteria. The petition touts the development conditions and restrictions that are included in the ODP as evidence that the proposal would be beneficial to Lookout Mountain. Whether the proposal furthers the general welfare of residents of Jefferson County is a judgment that is within the discretion of the County Commissioners to make. These are not judgments that the Commission is equipped to make.

The Commission has no authority to determine that the proposal is in the best interests of Jefferson County. Moreover, the Commission has no background or experience in considering land use plans and zoning criteria. Nor does it have the means to make a zoning decision. Compatibility of the proposal with the existing land uses is an important criterion for a rezoning decision. The Commission would have to review the

administrative record, listen to the tapes of the testimony, take public comment from all interested parties, and study the land use plans and zoning requirements before it can be in a position to determine whether to approve a change in zoning from agricultural and mountain residential. Approving construction based on the Commissioners' assessment of the guiding land use criteria would put it in the position of implementing locally made land use plans.

#### IV. THE FACTUAL ALLEGATIONS REGARDING ALTERNATIVE SITES DO NOT REQUIRE PREEMPTION OF JEFFERSON COUNTY'S DECISION.

The petition reviews several alternative sites and discusses why each of them does not meet the needs of Lake Cedar Group. The underlying theory in the petition is that the Federal Communications Commission should determine the best broadcasting site in Jefferson County. This result allows optimal broadcasting conditions to override local land use concerns. It allows the particular broadcasting needs of this business entity to override concerns about compatibility, visual impact and appropriate long-range land use patterns. The Telecommunications Act of 1996 does not mandate that local governments provide broadcasters with optimal broadcasting conditions.

Even if the availability of alternative sites should determine the outcome of this rezoning application, the analysis in the petition should not be persuasive. Unnecessary assumptions were built into the analysis of alternative sites, which in turn served to defeat each site as a possibility. The analysis assumed that the members of Lake Cedar Group, which was formed for the purpose of erecting a tower on Lookout Mountain, would necessarily move together to a new site. The analysis assumed that digital and analog antennas would have to be in the same location. It also assumed that FCC regulations, for which there are provisions for waivers and variances, could not be varied or waived.

Sites were rejected because the FM stations would lose their grandfathered status with respect to the Table Mountain Radio Receiving Zone. This was based on many layers of unnecessary assumptions. Lake Cedar Group assumed that the Channel 6 analog antenna would relocate along with its corresponding digital antenna, which would then require relocation of FM stations KCFR and KUVO. Based on these assumptions, among others, Squaw Mountain was rejected. Similar concerns were expressed for Eldorado Mountain. There is no requirement that the analog antennas move.

Sites were rejected because of possible permitting difficulties without ever seeking the necessary permits or waivers. For example, Lake Cedar Group cited the difficulty in covering Boulder from Squaw Mountain, without examining or seeking the frequencies necessary for repeaters or translators. The analysis assumed that the Channel 4 analog antenna would move to Squaw Mountain, which would create short-spacing conflicts. Whether this conflict could be ameliorated was not considered. Protection of the Table Mountain Radio Receiving Zone was cited as another basis for rejecting Eldorado Mountain. There was no discussion of the possibility of a waiver on the power limits, even though radio stations with wide coverage areas currently transmit from Eldorado Mountain.

Even if there are logistical difficulties with other sites, those difficulties do not mandate approval of the current Lookout Mountain proposal. Lake Cedar Group has a strong financial interest in relocating to the land it purchased on Lookout Mountain. It also has an interest in maintaining its current membership of television stations. Had no land been available on Lookout Mountain on which to locate a new tower, or had there been no mountain in the location of Lookout Mountain, another broadcasting site or sites

would have been found that would suffice. Similarly, had Lake Cedar Group not organized itself into a business entity, each member station would have pursued alternatives separately. All of these alternatives should still be considered before reaching the conclusion that digital television will not be available to the Denver market.

V. THE DENVER DTV SITE INVESTIGATION REPORT SHOULD NOT BE CONSIDERED.

Lake Cedar Group has now submitted for the record a study entitled “Denver DTV Site Investigations.” This document was produced in December of 1999, some five months after the County Commissioners made their decision. Since the basis of the petition for preemption is the absence of factual support for the County Commissioners’ decision, facts submitted to the FCC that were not available to the County Commissioners should not be considered in support of the petition.

Even if the Commission chooses to consider the Site Investigation report, its content does not support the extraordinary step of preemption. The report relies on the same unnecessary assumptions as do the allegations in the petition. The Lake Cedar Group states as an objective in analyzing alternative sites that all digital antennae will be consolidated on one facility. Consolidation may be an objective of the Lake Cedar Group as it is currently constituted, but it is only one of many competing factors in the Telecommunications Land Use Plan.

The Site Investigation report acknowledges that the Department of Commerce was willing to negotiate over grandfathering power levels for FM stations and new digital antennae on Lookout Mountain, but dismisses the possibility of such negotiations for other sites. The Site Investigation Report cites the difficulties with interference between or among adjacent stations, but ignores the fact that if a single site such as Lookout

Mountain were not available or did not exist, those difficulties would have to be resolved some other way.

The Site Investigation explores several alternative sites, many of which have already been discussed. In discussing possible sites on the plains, the Site Investigation assumes, without providing supporting data, that the full 2,900 feet above terrain provided by an 800 foot tall tower on Lookout Mountain would be needed to provide equivalent coverage from the plains. The Site Investigation provides detailed information on the constraints in broadcasting from the former site of Stapleton airport, but this site would not be a likely candidate any way due to its proximity to the new Denver International Airport and reuse plans for that land. By giving detailed analysis of the Stapleton site, the report erects a straw man for the purpose of knocking it down.

Difficulties associated with a hypothetical site farther east are identified on pages 26 and 27. No data are provided to support the difficulties, and the analysis still assumes that FM facilities would have to be located at the site as well.

The Site Investigation refers to seven unidentified sites on page 19, generally located west of Lookout Mountain, but only provides analysis of "Site D." The review criteria used in the report on page 33 include relocation of analog TV and FM antennae. This unnecessarily complicates the analysis since analog TV and FM antennae do not have to move. The review criteria also include zoning issues, without discussing how this issue was addressed or factored into the rejection of each site. Since there are zoning issues on Lookout Mountain, zoning issues associated with the undeveloped sites should not constitute any greater hurdle than currently exists.

The coverage analysis for “Site D” extrapolates from 1990 census data to conclude that unserved people in Boulder County will increase by the same factor as the increase in population since 1990. This analysis does not consider the location of the population increase in Boulder County, which has been in the eastern part of the county away from the shadowing effects of the intervening foothills.

The Site Investigation simply repeats many of the assertions that have previously been made. It relies on the same restrictive parameters and assumptions as have been used to reject the sites before. The Report does not constitute an objective, exhaustive analysis of other ways to provide digital television to the Denver metropolitan area.

VI. THE FEDERAL COMMUNICATIONS COMMISSION SHOULD  
ALLOW LOCAL GOVERNMENTS TO IMPLEMENT THEIR LOCAL  
LAND USE PLANS AND ZONING REGULATIONS.

The land use plans and regulations of Jefferson County do not prohibit Lake Cedar Group from complying with federal regulations. Jefferson County’s telecommunications regulations allow major broadcast facilities provided certain conditions are met, subject to rezoning by the County Commissioners. Lake Cedar Group has not argued in its petition that these regulations are unlawful or that they violate any adopted federal standards. Instead, Lake Cedar Group’s petition is founded on a disagreement over how those regulations have been applied in a particular case. It is not the regulations they seek to preempt, but a specific rezoning decision. The Federal Communications Commission was not created for the purpose of making individual land use decisions. The Board of County Commissioners has been delegated this responsibility, and the Federal Communications Commission should respect the County Commissioners’ decision.

## CONCLUSION

Preemption of the zoning decision by the County Commissioners is not authorized by law and is not warranted by the facts in this case. The Telecommunications Act of 1996 does not authorize federal preemption of local zoning decisions that affect broadcast towers. There is no principled basis on which the Commission can render a decision. Therefore, Jefferson County, Colorado requests that the Federal Communications Commission deny the Lake Cedar Group petition.

Respectfully submitted,

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Claire B. Levy, Esq.  
Claire B. Levy, LLC  
3172 Redstone Road  
Boulder, Colorado 80303  
Counsel for Board of County  
Commissioners of  
Jefferson County and Jefferson County,  
Colorado

May 9, 2000

CERTIFICATE OF SERVICE

I, \_\_\_\_\_, hereby certify that on May 9, 2000 I mailed copies of the foregoing Comments Of the County Of Jefferson In Opposition To Lake Cedar Group's Petition For Expedited Special Relief And Declaratory Ruling by first-class postage prepaid mail to the following:

Edward W. Hummers, Jr.  
Holland & Knight. LLP  
Suite 400  
2100 Pennsylvania Avenue NW  
Washington, DC 20037-3202

Arthur Goodkind  
Koteen & Naftalin, LLP  
1150 Connecticut Avenue, NW  
Washington, DC 20036

Todd D. Gray  
Dow, Lohnes & Albertson, PLLC  
1200 New Hampshire Ave., NW  
Washington, DC 20036-6802

Howard F. Jaeckel  
CBS, Inc.  
51 West 52<sup>nd</sup> Avenue  
New York, NY 10019-6119

David P. Fleming  
Gannett Co., Inc.  
1100 Wilson Blvd., 29<sup>th</sup> Floor  
Arlington, VA 22234

Scott Albertson  
Holley, Albertson & Polk  
1667 Cole Blvd., Bldg 19, Suite 100  
Golden, Colorado 80401

Henry L. Baumann  
National Association of Broadcasters  
1771 N Street, NW  
Washington, DC 20036