

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

In the Matter of

Lake Cedar Group L.L.C.)	DA 00-764
Petition for Expedited Special Relief)	
and Declaratory Ruling)	

**COMMENTS OF MUNICIPALITIES AND MUNICIPAL ORGANIZATIONS CONSISTING
OF:**

- National:** National Association of Counties, National League of Cities
- Colorado:** City and County of Denver and Greater Metro Telecommunications Consortium consisting of Adams County, City of Arvada, City of Aurora, City of Brighton, City of Castle Rock, City of Cherry Hills Village, City of Commerce City, Douglas County, City of Englewood, City of Edgewater, City of Glendale, City of Golden, City of Greenwood Village, City of Lafayette, City of Lakewood, City of Littleton, City of Northglenn, City of Parker, City of Sheridan, Town of Superior, City of Thornton, City of Westminster, City of Wheat Ridge
- Illinois:** City of Marshall, Town of Downers Grove and the Illinois Chapter of NATOA consisting of the City of Chicago, Cook County, and approximately 50 other Illinois municipalities (See full list attached as Exhibit A)
- Michigan:** City of Detroit, Ada Township, Bloomfield Township, City of Belding, City of Cadillac, City of Gladwin, City of Livonia, City of Marquette, City of Monroe, City of Tecumseh, City of Walker, City of Westland, City of Wyoming, Gaines Charter Township, Grand Rapids Charter Township, Holland Charter Township, Laketown Township, Robinson Township, Tallmadge Charter Township, Zeeland Charter Township
- Texas:** Town of Addison, City of Arlington, City of Duncanville, City of Fort Worth, City of Grand Prairie, City of Irving, City of Plano, City of Rockwall, City of Schertz and TCCFUI (Texas Coalition of Cities on Franchised Utility Issues)
- Virginia:** City of Chesapeake
- Wisconsin:** City of Brookfield

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May 9, 2000

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SUMMARY

Broadcast towers are the highest structures known to man. Forty percent of them are over 1,000 feet tall. Many are in the 2,000 foot range, roughly 50% taller than the tallest buildings in the world. Some towers have collapsed. Those that do can kill people and damage property within a wide radius of the tower (exceeding its height) when they fall. Towers are also a major threat to aviation. However, for most airports in the United States -- approximately 13,000 -- Federal Aviation Administration ("FAA") rules governing the location and height of towers near airports do not apply. Instead, zoning rules and other State and local regulations are what prevent towers from being placed in unsafe locations or unsafe heights near airports.

Factual records show that State and local laws affecting broadcast towers will not delay the rollout of HDTV. Municipalities have not impaired radio and television service by 14,000 radio and television stations in the U.S. over the past 75 years. Municipalities generally support HDTV due to the competition it will bring in video delivery and in freeing up spectrum for public safety purposes. In many areas, appropriate zoning for broadcast towers is already in place (in many instances towers can be put in certain districts as of right without local zoning approval).

The record is clear that the real cause for any delays will likely be the lack of adequate numbers of skilled construction crews to erect towers or inclement weather (which prevents tower construction).

There is no need for the FCC to take the extraordinary measures that Petitioner requests in the present case. If Petitioner is even partially correct in its zoning analysis, then the Colorado Courts will rule against Jefferson County and Petitioner will be allowed to construct the proposed tower. Even if the Colorado Courts uphold the zoning denial, then Petitioners will have received guidance concerning the additional due diligence that must be conducted and data that must be provided in their next rezoning application. Moreover, if the State Courts affirm the zoning denial, that would likely indicate that alternative sites are available for Petitioners to construct their tower.

Petitioners' analogies to Section 704 of the Communications Act are incorrect. Section 704 imposes the same standard that the Colorado courts will use in reviewing the zoning denial. The Jefferson County decision goes well beyond the minimum requirements of a "written decision" as the Courts of Appeal have interpreted that provision of Section 704. The substantial evidence standard of Section 704 is simply duplicative of the standard used by the Colorado courts. A recent Court of Appeals rejected a Section 704 challenge to a case similar to the current one.

The requested relief would rule violate the Tenth Amendment to the Constitution. Under the Tenth Amendment, zoning is a traditional function of State and local government reserved solely to them. Attempts by the Federal government to "commandeer" local governments are fundamentally incompatible with our constitutional system of dual sovereignty.

For the proceeding reasons, the Petition should be dismissed without the Commission granting the expedited special relief or issuing the declaratory ruling sought by Petitioners.

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COMMENTS OF MUNICIPALITIES AND MUNICIPAL ORGANIZATIONS

1. INTRODUCTION

Municipalities and Municipal Organizations (“MMO”), by their attorneys, hereby file comments in the above-captioned proceeding pursuant to the Notice of Petition for Expedited Special Relief and Declaratory Ruling, DA 00-764 (released April 10, 2000). MMO is composed of 39 municipalities and organizations representing approximately 225 million Americans, as follows:

At the national level the National Association of Counties and the National League of Cities. The National Association of Counties is the only national organization that represents county governments in the United States. Its membership totals over 1,800 counties representing approximately 210 million Americans. The National League of Cities represents cities and villages nationwide. It is the country’s oldest and largest organization serving municipal governments and represents more than 17,000 municipalities across the country.

MMO, in addition, consists of an additional 37 municipalities and municipal groups from six states as set forth in the footnote below.¹

¹**Colorado:** City and County of Denver and Greater Metro Telecommunications Consortium consisting of Adams County, City of Arvada, City of Aurora, City of Brighton, City of Castle Rock, City of Cherry Hills Village, City of

For the reasons stated herein, MMO oppose the Petition for Expedited Special Relief and Declaratory Ruling (“Petition”) filed by Lake Cedar Group LLC (“LCG”) and each of its members (“Broadcasters”) (collectively “Petitioners”). This proceeding should be dismissed without the Commission granting the expedited special relief or making a declaratory ruling.

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- Commerce City, Douglas County, City of Englewood, City of Edgewater, City of Glendale, City of Golden, City of Greenwood Village, City of Lafayette, City of Lakewood, City of Littleton, City of Northglenn, City of Parker, City of Sheridan, Town of Superior, City of Thornton, City of Westminster, City of Wheat Ridge
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- Texas:** Town of Addison, City of Arlington, City of Duncanville, City of Fort Worth, City of Grand Prairie, City of Irving, City of Plano, City of Rockwall, City of Schertz and TCCFUI (Texas Coalition of Cities on Franchised Utility Issues with approximately 100 municipalities as members)
- Virginia:** City of Chesapeake
- Wisconsin:** City of Brookfield

2. BROADCAST TOWERS AND THEIR IMPACT

1. Towers and Buildings: The Petitioners' request relates to television towers. These towers are some of the tallest structures known to man with heights equal to or greater than such well-known structures as the Empire State Building, Sears Tower or Eiffel Tower.

Such towers are constructed of tons of steel and can be viewed from literally miles away. In many areas they are the dominant feature in the landscape and can be seen from ten, twenty or thirty miles away.

Some broadcast towers are self-supporting, in which case they are quite large at the base and taper at the top. Others are guyed with large guy wires running off in several directions to concrete piers located in the ground.

2. Size: The large size of broadcast towers, compared to other structures in the landscape, is best set forth by comparison with the tallest buildings in the world. Attached in this regard as Exhibit B is a listing of the tallest structures in the nation and world from the 1994 World Almanac.

As shown therein the Sears Tower (the world largest structure) is 1,454' tall. New York's World Trade Center is 1,368' high and the Empire State Building (including its TV tower) is 1,414' tall. The Eiffel Tower, by comparison comes just under 1,000', at 984'.

The heights of all these buildings pale by comparison with broadcast towers. According to the National Association of Broadcasters ("NAB"), 40% of broadcast towers are over 1,000' high -- taller than the Empire State Building and taller than all but a handful of the largest buildings in North America. *In the matter of Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities*, MM Docket No. 97-182, NAB Petition, at 7.

And broadcast towers can easily be over 2,000' feet high and approach one-half mile in height. This is 50% taller than the world's tallest building, the Sears Tower. Due to their large size broadcast towers can have major impacts on communities, their residents, property values, and aesthetics.

3. Safety: Broadcast towers can and do collapse. In 1996 there was a major television tower collapse in the Dallas-Fort Worth area that killed several people. This collapse is partially described in *New York Times*, infra and in an article attached as Exhibit C (Chiles, James "Building Towers to the Sky" *Smithsonian Magazine* (July, 1997) at 44).

There have been other tower collapses since radio stations first went on the air in the 1920's. According to the *New York Times*, in 1997 seven towers collapsed in Minnesota and North Dakota in a storm. Exhibit D, attached hereto ("Crews are Scarce for TV's High Danger Task" *New York Times*, Section 4, p. 1 (May 4, 1997)).

The recent collapses illustrate the need for a "setback requirement" from adjacent property lines equal to the height of the tower plus an additional safety factor such that if a tower does fall it will not impact adjacent property owners. Apparently insurance companies now mandate such "setback" or "fall radius" requirements for all new broadcast towers. *Id.* This concern is particularly the case in the event of high winds (such as occur with hurricanes and tornados) when towers can be shifted laterally significant distances when they fall due to the strong wind patterns that occur in such storms. And even in calm weather collapsing towers can eject items further than their height. When a 1,551 foot tower collapsed last year in Texas, one worker was thrown 1,800 feet from the base of the tower "by the enormous stresses of the collapse." Exhibit B, *Smithsonian Magazine, supra*, at 50.

As is apparent, if such towers are placed in an inappropriate location there is significant potential for harm to life or property from such towers being blown over by strong winds or otherwise collapsing.

4. Airports: Broadcast towers are a threat to aviation, and thus to life and property. As the Commission is aware, when airplanes crash into broadcast towers or their guy wires, three things happen: The airplane crashes and its occupants are killed; people on the ground who are in the way are killed and structures are burned (such as if the airplane crashes into a house or school); and the broadcast tower collapses due to either being hit by the airplane directly or due to the guy wires on one side snapping and the remaining ones immediately pulling it over. This is the reason towers are painted with highly visible colors and typically are illuminated at night.

The Commission should be aware that, as discussed below, only 29% of the airports in the United States are regulated by the FAA on tower placement. The balance of the airports -- some 12,900 at last count -- are not subject to the jurisdiction of the FAA and, in fact, come under the jurisdiction of both State government (for example, state aeronautic commissions such as the Michigan Aeronautics Commission) and local government, especially the zoning powers of the latter.

This is set forth in the FAA rules applicable to aviation. See, in particular 14 CFR Part 77 - Objects Affecting Navigable Airspace. Subpart C of Part 77 entitled "Obstruction Standards" is the substantive section which "establishes standards for determining obstructions to air navigation". 14 CFR § 77.22(a). It provides that

"The standards in this subpart apply to the effect of [tower and other] construction or alteration proposals upon an airport if at the time of filing of the notice required by Section 77.13(a), that airport is -- (1) Available for

public use and is [listed in certain airport directories].” 14 CFR § 77.21(c)
(emphasis supplied).

The FAA reports that as of December 31, 1996 there were 5,389 “public use airports” in the United States and 12,903 “private use airports” for a total of 18,292 “total airports”. *1997 FAA Administrators Fact Book - Airports* (as of Dec. 31, 1996) <<http://www.tc.faa.gov/ZTV/FAA/administrator/airports.html#10>>. A copy of this webpage is attached as Exhibit D. Data with essentially the same result (although two years older) from the FAA is set forth in the 1996 Statistical Abstract of the United States at 649 (as of 1994, 5,137 public airports and 13,206 private airports for a total of 18,343).

This Commission thus must recognize that approximately 13,000 airports in the United States are not subject to the FAA’s rules on whether, where and how high a tower may be near an airport. The key is that it is State and local governments -- and often the latter -- who through their zoning powers in particular, and other police powers, regulate the placement of towers near these airports. Such regulation may encompass whether a tower can be built at all near an airport or how high it can be given its distance from the airport and orientation relative to landing patterns.

As one example of how the zoning power is used to regulate the placement and height of towers near private airports, Rives Township, Jackson County, Michigan is a good example: In mid-1996, a cellular tower company proposed to put a 409 foot tower in the Township. The proposed tower would have been located in line with, and near the end of the runway of a private airport in the Township. Because it was a private airport, towers near it were not subject to FAA regulations, but zoning approval from the Township was required.

The airport operator and residents brought airport-related safety concerns to the attention of the Township during the zoning approval process for the tower. These related to the height of the tower and its location in relation to the airport. As a result, the Township, under its zoning powers, approved the tower for a different site and at a lower height (334 feet), specifically due to safety concerns just described. Without the action by the Township the cellular operator would have built the tower in a location and at a height which was a safety hazard to aviation.

5. Aesthetics: Broadcast towers are not things of beauty. Under zoning ordinances they are not appropriate for certain areas, such as parks, residential areas or natural or historic areas. As the Commission should appreciate, towers are particularly inappropriate for high ground that has been designated a wilderness area or is part of a State or local park or is subject to zoning restrictions that have a similar effect.

Zoning ordinances commonly address such matters in a number of ways. For example, some cities limit the height of structures so as not to detract from public monuments or the beauty of an area. Washington D.C. provides a good example of this where, as the Commission is well aware, buildings are specifically limited in height so as to, among other things, not compete with, obscure or detract from major public monuments such as the Washington Monument. These are clearly legitimate goals which the Petitioners' requested special relief places in jeopardy (without explanation).

Zoning ordinances similarly can address aesthetics by limiting development to less obtrusive structures and, for example, by designating certain areas as "view corridors" where construction cannot inhibit the view of natural objects. Again it appears that the Petitioners' requested special relief, without

explanation, would attempt to preempt such requirements. And as is discussed next, the negative aesthetics of broadcast towers by themselves can depress property values in the area.

6. Property Values: Broadcast towers can have a major impact on property values if they are not appropriately situated, such as in accordance with local land use and zoning controls. The reason for the impact on property values is fairly obvious -- who wants to have their house located next door to a structure 50% taller than the Empire State Building? Although experts can argue that television towers are “safe” and will not kill anybody outside the setback zone (described above) the simple hard fact is that such towers can appreciably harm property values if they are not located in an appropriate area, such as in accordance with municipal land use and zoning controls.

7. Conclusion: The preceding gives a brief description of broadcast towers, their nature and potential impacts. As can be seen, the impacts are substantial, as can be expected from some of the tallest structures known to man. For this reason State and local regulation of them is entirely appropriate -- and absolutely necessary to protect the public health, safety and welfare, and attempts by this Commission to remove such regulation by preempting it is inappropriate.

3. STATE AND LOCAL REGULATION OF TOWERS IS NOT A PROBLEM

1. Historically No Problem: As the Commission correctly pointed out in its Notice of Proposed Rulemaking in MM Docket No. 97-182 (“NPR”), there is no evidence of a historical problem with State and local zoning or other regulations impairing the spread of radio and television service. NPR, at ¶16. To recapitulate, this Commission stated in its 1997 NPR there are currently slightly over 12,000 radio

stations in the U.S. and approximately 1,600 television stations, for a total number of broadcasters (in round numbers) of 14,000. NPR, Appendix A, at footnotes 42 and 52.

Radio broadcasting in the United States dates back 75 years to the early 1920's. Television broadcasting mainly dates from the post-World War II era.

So the historical record is clear. For three quarters of a century -- 75 years -- State and local regulation has not impaired radio and TV broadcasting. This is true despite the massive changes that have occurred during this period of time, including a world war, two regional conflicts and the expansion of radio and television stations such that 14,000 separate stations are now operating throughout the United States and its possessions.

The historical record thus shows no basis for the Federal preemption which the Petitioners request. In fact, the historical record is so massive and overwhelming -- 14,000 stations over three-quarters of a century not impaired in their delivery of service by State or local regulation -- that it effectively settles the matter that there is no problem to be addressed.

2. Zoning Already In Place: In many municipalities the site or sites desired for broadcast towers are already zoned such that towers are permitted uses -- no additional zoning approval is needed. This is particularly true for most areas zoned for industrial and many areas zoned for agricultural uses.

This Commission should be aware that the zoning laws of many municipalities (including Jefferson County) address towers -- of all kinds -- by encouraging their location where they will have the least adverse impact. Thus, in many municipalities there is a phased in increase in the

amount of zoning review and approval needed for a tower depending on the sensitivity of the area in question.

In a common zoning approach, towers are generally allowed as of right in industrial areas and in some agricultural areas.² By contrast, a high level of zoning review and approval may be required for a broadcast tower to be constructed in areas zoned for residential use, or with zoning restrictions due to environmental, historical or similar concerns. Towers proposed for intermediate areas may require an intermediate level of zoning approval -- such as only administrative approval.

It is presumably in large part the fact that many municipalities allow broadcast towers to be located in some zoning districts without any additional approval that has prevented zoning from impairing broadcasting for the last 75 years. The fact that such zoning continues means that local zoning is unlikely to be an issue for many of the new broadcast towers resulting from HDTV.

This fact -- combined with the fact that other factors are the prime cause for any delays in the construction of broadcast towers -- make clear that there has been no showing sufficient for special Commission action that State and local zoning and other approvals will delay the construction of towers for HDTV. In fact, the delays will come from other sources, as is discussed next.

² Subject perhaps to "fall radius" setback requirements from adjacent properties or from any remaining residences in such areas.

3. Lack of Tower Construction Crews: It appears that the major cause of delays in tower construction will be the fact that there is an extreme shortage of the crews who specialize in their construction.

A good summary of the problem was given by the *New York Times* which said in a lead article:

“The trouble is, across the United States only about a half-dozen crews have the experience and training to put up these towers that can reach nearly a half-mile into the sky.

“Together, all of the nation’s tower building teams may be able to put up as many as 20 towers a year. But each year for the next four or five years, the broadcast industry is going to call on them to build 100 or more. Broadcasters and tower builder’s call it a Sisyphean mission. . . .

“‘I don’t see how we can get it done.’ said J. C. Kline, president of Kline Towers, one of only three companies in the United States that build television towers. ‘We just don’t have the capacity for this.’”

New York Times, Exhibit C.

The National Association of Broadcasters has generally agreed with the preceding, and notes that it typically takes six months to build a new tower. NAB Petition, *Supra* at 7-8.0

These stark statements make clear that if there are delays in the construction of new broadcast towers they will overwhelmingly be caused by lack of enough construction crews, not by State and local delays.

4. Weather: Weather is a major impediment to construction, typically in northern portions of the United States. Work cannot occur on tall towers in inclement weather, such as high winds or ice for obvious safety reasons. This essentially shuts down much tower construction in the northern U.S. for roughly half the year.

5. Conclusion: The result of the preceding is clear: Over the past 75 years State and local regulations have not impaired the delivery of radio and TV services. State and local governments have every incentive to move promptly in granting permits necessary for HDTV. The critical lack of construction crews and weather delays make it extremely unlikely that state and local permits will delay the roll-out of HDTV.

4. NO NEED FOR COMMISSION TO ACT

1. State Courts Can Provide Petitioner with the Relief Requested: Petitioners set forth at length the reasons Jefferson County's actions lack any rational basis. The short answer to these claims is that if petitioner is even partially correct, the Colorado courts will summarily rule against the County and allow the proposed tower to proceed. Action by the Commission will not be necessary. It is thus unclear why Petitioners have filed this action with the Commission, and the Commission should decline the invitation to become involved.

The case for Commission action is also weak if petitioner loses in the Colorado courts. This would occur, for example, if the Colorado courts rule that Petitioners have failed to meet the legal requirement of showing that there is no alternate site available to meet Petitioners' needs.

At that point Petitioners would be bound (under principles of collateral estoppel and res judicata) by a ruling that there is an alternate site available. Given that judicially incontestable fact, there would be no need for the Commission to act.

A zoning denial is often not the end of a project. The zoning process provides feedback as to changes that are needed or additional documentation or data that is required. In a zoning

preemption case involving amateur radio towers, the Court of Appeals in upholding a zoning ordinance's height restriction, noted:

Moreover, the ABA's rejection of Williams' previous application for a special exception does not preclude him from now filing an application for a smaller structure or for an antenna which would only be fully extended during nighttime hours.

Williams v City of Columbia, 906 F2d 994, 997 (4th Cir 1990).

Petitioners have taken the proper course of action, which is afforded to any unsuccessful zoning applicant, by appealing to the courts. Given this appeal, the Commission cannot and should not act.

2. Section 704 Analogies Incorrect: Petitioner makes several arguments by analogy to Section 704 of the Communications Act, added by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act") to preserve local zoning over cellular towers. The arguments are incorrect.

First, petitioner argues that Section 704 confirms Commission zoning authority, in effect the authority to be the national zoning board on any communications related matter. Petition at 26. To the contrary, Section 704 (with its express preservation of local zoning authority, provision for Federal Court appeals under Section 704, and denial of any zoning role for the Commission under Section 704) and the express direction to the Commission in the Conference Committee Report to "terminate" a then "pending Commission rulemaking concerning the preemption of local

zoning authority over the placement, construction or modification” of cellular towers³ is more consistent with Congress reining in an agency which was acting outside its authority.

Second, although Petitioners recognize that Section 704 contains a “substantial evidence” standard for cell tower zoning decisions (see Petition at 30 and following), it cites to irrelevant decisions and matters, not to the legislative history of Section 704 or the several Court of Appeals decisions under Section 704.

³H.R. Rep. No. 458, 104th Cong., 2d Sess., at 208 (1996) (“Conference Committee Report”).
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The legislative history of Section 704 states that the “substantial evidence” standard “is the traditional standard used for judicial review of agency actions”. Conference Committee Report at 208. Federal Courts of Appeal have upheld the “substantial evidence” standard in Section 704. See *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Board of Adjustment*, 172 F.3d 307, at 313-314 (4th Cir. 1999) (“*Winston-Salem*”); *AT&T Wireless PCS v City Council of Virginia Beach* 155 F.3d 423, 430 (4th Cir. 1998) (“*Virginia Beach*”).⁴ In particular the substantial evidence standard is the standard used by many state courts to review local zoning decisions. Thus, under the Section 704 standard petitioner is simply inviting the Commission to duplicate the review of Jefferson County’s actions currently being performed by the Colorado courts. There is no need for such duplication, even without the substantial Constitutional and other matters demonstrated by MMO’s comments of and others, and the Commission should decline the invitation.

⁴The standard U.S. Supreme Court definition of substantial evidence applies—less than a preponderance of the evidence but more than a mere scintilla, See *Cellular Telephone Company v. Town of Oyster Bay* 166 F.3d 490 (2d Cir. 1999); *Sprint Spectrum v Willoth*, F. 3d, 1999 WL 326062, No. 98-7442, (2d Cir. May 24, 1999); *Aegerter v City of Delafield* 174 F. 3d 886 (7th Cir. 1999) (“*Delafield*”); *Omnipoint v Pine Grove Township* 1999 U.S. App. LEXIS 14610, at 8-9, footnote 5 (3rd Cir, June 25, 1999). Other decisions under Section 704 use a slightly different formulation, that “substantial evidence” also means “such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion.” *Virginia Beach*, (quoting *Universal Camera v. NLRB*, 340 U.S. 474, 488 (1951)); *Cellular Telephone Company v. Zoning Board of Adjustment of Borough of Ho-Ho-Kus* 1999 U.S. App. Lexis 30,093, No. 98-6484 at 6 (3rd Cir. 1999); *APT Pittsburgh v. Penn Township* 1999 U.S. App. Lexis 29, 314, Nos. 98-3519, 98-3546 at 4-5 (3rd Cir. November 8, 1999).

Third, Petitioners also incorrectly state that under Section 704 a municipality “must make findings that support its decision”. Petition at 30. The Courts of Appeal that have considered such a claim under Section 704 have rejected it. No Court of Appeals has required such findings.

Specifically, the Courts of Appeal do not require a municipality’s “written decision” under Section 704 to contain a statement of the municipality’s findings or rationales. *Winston-Salem, supra*. In *Winston-Salem* and *Virginia Beach* the court found that merely stamping “DENIED” in the appropriate blank on the cover page of a special use permit application was sufficient to constitute a “written decision” under Section 704. *Id.*; *Virginia Beach* at 429. The courts refused to entertain the argument that the decision was insufficient because it failed to include the reasoning behind the decision and the evidence relied upon to reach the decision. Quoting *Virginia Beach*, the *Winston-Salem* court found that “[t]he simple requirement of a decision. . . in writing cannot reasonably be inflated into a requirement of a statement of findings and conclusions, and the reasons or basis thereof.” *Id.* at 313 (quoting *Virginia Beach*, 155 F.3d at 430).

Fourth, the Seventh Circuit has rejected a Section 704 challenge to a case very similar to the current one. Specifically, in *Delafield, Supra*, a City based in part on citizen opposition, denied a request to slightly expand a communications tower. Air Page had built the tower in a residential area a number of years ago, after which the area had been rezoned to a higher category such that the tower was a grandfathered non-conforming use. *Delafield*, 174 F. 3d at 888-889. Air

Page applied for a conditional use zoning permit to replace the old tower with a new one meeting current engineering and safety standards (which the old tower did not), increasing the tower's height by 40 feet (from 360 feet) and expanding its width at the base by two feet. *Id.* The new tower would provide improved paging service throughout the area. *Id.* The City staff recommended that Air Page's application be granted and the City's Common Council twice denied the application, mainly due to concerns about expanding a commercial use in a residential neighborhood and related aesthetics. *Id.* There was significant citizen opposition to the application. Id at 890. Air Page appealed to Federal Court under Section 704 contending that because the marginal negative impacts of the proposed change were so small, that there was no substantial evidence to support the City's decision. *Id.* The Seventh Circuit ruled for the City and against Air Page, stating that:

“Nothing in the Telecommunications Act forbids local authorities from applying general and nondiscriminatory standards derived from their zoning codes, and we note that aesthetic harmony is a prominent goal underlying almost every such code. By leaving most of the substantive authority to approve the location of personal wireless service facilities in the hands of state or local governments, Congress must have known that exactly the kind of decision the City of Delafield reached would occur from time to time.”

Id at 891.

3. Granting the Special Relief Requested Would Promote Inefficiency and Gamesmanship:

Petitioners have filed thousands of pages of documents with the Commission concerning the appropriateness of the location of its proposed tower. Hundreds of pages of these documents were never filed with the

zoning officials of Jefferson County. If the Commission grants the special relief requested and preempts the Jefferson County zoning regulations, this will not encourage applicants for local approvals for tower construction to make their best case initially at the local level. The Commission would become the national board of zoning appeals which is certainly outside of its expertise or, more than likely, its interest.

5. ANY PREEMPTION ACTION BY THE COMMISSION OF STATE AND LOCAL ZONING AND LAND USE ORDINANCES VIOLATES THE COMMISSION'S AUTHORITY AND THE TENTH AMENDMENT OF THE U.S. CONSTITUTION BY IMPERMISSIBLY PREEMPTING LOCAL LEGISLATIVE AUTHORITY

1. No Explicit Preemption Statement by Congress: The Supremacy and the Necessary and Proper Clauses of the U.S. Constitution allow preemption of State and local legislation and regulations only where Congress intended Federal law to cover the entire "field" of regulation. The Federal preemption doctrine is succinctly articulated as follows:

Federal law may preempt State or municipal law when Congress so states in explicit terms on the face of a statute, if federal legislation is so comprehensive in a given case so as to leave no room for supplemental state or local legislation, or if local law actually conflicts with federal law or congressional purposes or goals.

North Haven Planning & Zoning Commission v. Upjohn Co., 735 F. Supp. 423 (D.C. Conn. 1990), aff'd 921 F.2d 27 (1990).

Absent an explicit statement by Congress that Federal law is to preempt local law, there is no authority for a Federal agency to preempt State or local law. The U.S. Supreme "Court is generally reluctant to infer pre-emption." *Exxon Corp. v Governor of Maryland*, 437 U.S. 117, 132, (1978). In this instance there is no such explicit statement by Congress, and therefore, the Commission lacks authority to preempt local zoning authority as Petitioners here has requested.

Although the language within the Communications Act of 1934, 47 USC § 141 et. seq. (the “Act”) is broad with regard to the Commission’s regulatory authority over the broadcast industry, nowhere does the Act expressly authorize the Commission to preempt local zoning regulations. If there is no express preemption, then under the Federal preemption doctrine, as articulated in *North Haven Planning & Zoning, supra*, only where Federal law is so comprehensive so as to leave no room for supplemental State or local legislation, or where the local law conflicts with Federal law, may the Federal law preempt the local law.

Nor should preemption “be presumed absent a clear manifestation of federal intent to exclude state law provisions.” *Guschke v City of Oklahoma City*, 763 F. 2d 379, 383 (9th Cir 1985). *Guschke* is one of numerous cases involving the issue of federal preemption of zoning regulations impacting the height of amateur radio towers. It is also one of the final cases decided before an FCC declaratory ruling in *Amateur Radio Preemption*, 101 F.C.C. 2d 952, (1985) (“PRB-1”). The Court of Appeals noted that the FCC had not taken any explicit action concerning the height limitations of amateur radio antennas. *Id.* It also held that “general statements of legislative or regulatory intent to encourage the use and development of amateur radios are insufficient to imply intent to preempt state laws which inhibit amateur radio development. *Guschke*, 763 F. 2d at 384. The Court upheld Oklahoma City’s zoning restrictions which limited the height of Plaintiff’s radio antenna in a residential district.

Even after the Commission adopted declaratory rulings on zoning preemption in the amateur radio tower area, it chose a “policy of limited rather than complete federal preemption of local zoning laws which affect amateur radio communications.” *Williams*, 906 F. 2d 996. PRB-1 prohibited local regulations that completely preclude amateur communications towers but left placement, screening and height issues for such

antennas to local regulation based on health, safety or aesthetic considerations. *Id.* at 997. There are many decisions interpreting PRB-1 in connection with local zoning ordinances. Some ordinances have been found to be unreasonable. *See, for ex Pentel v City of Mendota Heights*, 13 F. 3d 1261 (8th Cir 1994). Other ordinances have been upheld as not being preempted by PRB-1. *See, for ex, Evans v Board of County Commissioners of the County of Boulder, Colorado*, 994 F. 2d 755 (10th Cir 1993); *Williams, supra*. As the Court in *Williams* stated, “absent a full federal preemption in this area, the law cannot be that municipalities have no power to restrict antennas to heights below that desired by radio licensees.” *Id.* at 998.

Here too, it is clear from the 75 year history of broadcasting in the U.S. that there is room for supplementing Federal legislation through the use of local zoning measures. Such measures do not conflict with the Act, as the Act and local zoning ordinances have as a common purpose the “promotion of the safety of life and property.” 47 USC § 151.

Thus, the Commission lacks authority to grant the requested special relief: There is no congressional authorization for preemption of local ordinances; there is no attempt in the relief to create a framework by which the FCC can assure that tower construction and modification will not harm residents or their property. In short, it is the requested relief (and not local ordinances) which conflicts with the Act because the it would not adequately protect Americans’ safety, life and property.

Moreover, since the Commission has not proposed construction and modification standards, if the Commission preempts local zoning, the FCC will be required to become the “Federal Zoning, Environment and Construction Code Commission” reviewing hundreds upon hundreds of applications for the siting of

broadcast towers, in order to fulfill its Congressional mandate. However, such a review will prohibit the Commission from fulfilling its Congressional mandate for an accelerated roll-out of HDTV.

2. Zoning is a Traditional Function of State and Local Government: The requested special relief violates not only the terms of the Act, but also violates the Tenth Amendment of the U.S. Constitution by intruding on an area of peculiarly local concern. Under the requested relief, all zoning and land use ordinances relating to the placement, construction, and modification of broadcast towers would be at risk. This is an unconstitutional infringement on a traditional attribute of State sovereignty, namely land use regulation. The U.S. Supreme Court has stated that the regulation of land use is a function “traditionally performed by local government.” *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, (1994). Other opinions of the Supreme Court have supported this general proposition. For example, in *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, (1995), Justice Thomas summarized the law as follows:

“It is obvious that land use -- the subject of petitioner’s zoning code -- is an area traditionally regulated by the States than by Congress, and that land use regulation is one of the historic powers of the States. As we have stated, ‘zoning laws and their provisions are peculiarly within the province of State and local legislative authorities.’” *Citing Warth v. Seldin*, 422 U.S. 490 508 n. 18, 95 S.Ct. 2197, 2210 n. 18, 45 L.Ed. 2d 343 (1975); *see also Hess, supra; FERC v. Mississippi*, 456 U.S. 742, 768 n. 30, 102 S.Ct. 2126, 2142 n. 30, 72 L.Ed. 2d 532 (1982) (“Regulation of land use is perhaps the quintessential state activity”); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13, 94 S.Ct. 1537, 1543, 39 L.Ed. 2d 797 (1974) (Marshall, J. dissenting. “I am in full agreement with the majority that zoning...may indeed be the most essential function performed by local government”).

A municipality’s consideration of the public health, safety and welfare of its residents in the placement, construction, and modification of broadcast towers is a clear example of a municipality engaged in a “quintessential state activity” of zoning which is considered the “most essential function performed by

local government.” The FCC may not preempt local zoning and land use ordinances when such ordinances are used by municipalities to formulate and implement local legislative policy for the protection of the public health, safety and welfare of its residents. Thus the Petitioners’ requested special relief is unconstitutional.

3. The Pre-emption Contemplated by the Commission Violates the Tenth Amendment to the U.S. Constitution and Notions of Federalism: Petitioners attempt to have the FCC preempt local authority broadcast tower zoning is in direct violation of the Tenth Amendment of the U.S. Constitution. The Tenth Amendment of the Constitution provides that, “The 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.” U.S. Const., Amend. X. In *New York v. U.S.*, 505 U.S. 144, the U.S. Supreme Court stated that:

“If the power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of State sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.”

Id., at 156.

Thus, where there is clearly an action committed to a state as an exercise of a State’s sovereignty, such as legislative enactments concerning zoning, Congress may not command a State to act. The Supreme Court has affirmed this holding most recently in *Printz v. U.S.*, ___ U.S. ___, 117 S.Ct. 2365 (1997). In *Printz*, the Supreme Court overturned provisions of the Brady Handgun Violence Prevention Act which required state and local law enforcement officers to conduct mandatory background checks on prospective handgun purchasers and to perform certain related tasks. In overturning portions of the federal statute, the

Court stated that, consistent with *New York v. U.S.*, *supra*, “State legislatures are not subject to federal direction.” The Court wrote:

“The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer and enforce a federal regulatory program. It matters not whether policy making is involved, and no case by case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.”

Printz, 117 S.Ct. 2384.

In *Condon v. Reno*, 972 F. Supp. 977 (D.S.C. 1997), the U.S. District Court in the District of South Carolina invalidated a Federal statute regulating a State’s right to sell or disclose driver information conveyed to the States by applicants for driver’s licenses and vehicle registration. In finding the statute unconstitutional, the Court relied on the holdings of *New York* and *Printz* for the proposition that the Federal government may not command states and their political subdivisions to administer or enforce a Federal regulatory scheme.

These rules apply particularly in regard to local zoning ordinances. Zoning is typically a function reserved for local regulation. “Land use policy customarily has been considered a feature of local government and an area in which tenets of federalism are particularly strong.” *Evans*, 994 F.2d at 761 (citing *Izzo v Borough of River Edge*, 843 F2d 765, 769 (3rd Cir 1988)).

6. CONCLUSION

For the reasons set forth above, MMO respectfully request that this Commission terminate this proceeding without granting the requested special relief.

Respectfully submitted,

MUNICIPALITIES AND MUNICIPAL ORGANIZATIONS

Dated: May 9, 2000

By: _____

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Village of Hoffman Estates
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City of Marshall
Village of Carol Stream
Village of Orland Park
of Maywood
City of Waukegan
Village of Glen Ellyn
City of Wheaton
Village of Oak Brook
Village of Oak Park
Village of South Elgin
Village of Grayslake
Northbrook
Village of Mundelein
Village of Schaumburg
South Suburban Mayors & Managers Association
Village of Lombard
City of Flora
Village of Flossmoor
City of Galesburg
Village of Homewood
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City of Aurora
Village of Arlington Heights
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of Downers Grove
City of Darien
Village of Schiller
Town of Munster
Village of

Park
Conference

West
City of Lake Forest

Central

Municipal

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Village of Woodridge

Village of Savoy

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Village of Niles
City of Rockford
Village of Libertyville

Village of Carpentersville

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Moline

Village of Minooka
City of Rochelle
Village of Schiller Park
Village of Deerfield
Village of Rantoul
County of Lake
Village of Morton Grove

Village of Homewood

Village

of Barrington

City of Springfield

City of Rolling Meadows

City of Evanston

Village of Elk Grove

Village of Riverside

Village of Park

Forest

Village of Glenview

City of North Chicago

Village of Morton Grove

City of Greenville

Village of Mount Prospect

Village of Northfield

Village of

Schaumburg

Village of Skokie

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City of Urbana

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of Glencoe

Village of Glen Ellyn

City of Aurora

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Village of Schaumburg

Village of Round Lake Park

City of

Greenville

Village of Wheeling
Village of Glencoe
Village of Deerfield
Village of Niles
Village of Antioch
City of Rockford
Village of Buffalo Grove
of Homewood
Barrington
Village of Glenview
Village of Riverwoods
City of Oak Forest
City of Wheaton
Village of

EXHIBIT B

THE WORLD ALMANAC AND BOOK OF FACTS 1999

EXHIBIT C

SMITHSONIAN MAGAZINE, JULY 1997 ARTICLE

“BUILDING TOWERS TO THE SKY”

EXHIBIT D

NEW YORK TIMES, MAY 4, 1997 ARTICLE

“CREWS ARE SCARCE FOR TV’S HIGH-DANGER TASK”

EXHIBIT E
FAA WEBPAGE

CERTIFICATE OF SERVICE

I, Kim Van Dyke, a secretary at the law firm of Varnum, Riddering, Schmidt & Howlett ^{LLP}, hereby certify that on this 9th day of May, 2000, I sent by first class mail, postage prepaid, a copy of the foregoing comments to the persons listed below.

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