

# Comments

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MAY 15 2000

Common Carrier Bureau  
Network Service Division  
Office of the Chief

2058 Crestme Circle  
Golden CO. 80401

This letter is in support  
of the Lake Cedar Group  
application for a consolidated  
multi-use tower that  
would reduce the number of  
existing towers on Hookout  
Mountain.

Mrs. D.G. Angell

Golden resident since 1949

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May 2, 2000

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Federal Communications Commission  
445 Twelfth Street  
Washington, DC 20554  
FCC Reference DA 00-764

Office of the Secretary,

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2000 MAY 25 A 11:52

CONSUMER INFORMATION BUREAU

In July of 1999, Jefferson County Commissioners denied the application of the Lake Cedar Group to rezone the current Lookout Mountain broadcast site. Lake Cedar proposed the construction of a new consolidated multi-user tower that would remove four of the current towers and reduce Radio Frequency emissions on the mountain. The proposal was consistent with the 1987 Jefferson County Telecommunications plan that called for the reduction of both hardware and emissions for any new development.

Significant pressure against the proposal was brought to bear by a group called the Canyon Area Residents for the Environment (CARE). Fears were primarily based upon misinformation and "fringe science", contradicting the predominant body of research that indicated that the new proposed tower posed no health risks to residents in the area.

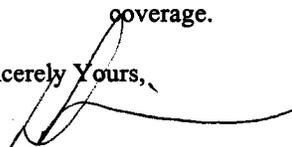
The Lake Cedar Group (representing Rocky Mountain PBS and other commercial broadcasters) has filed a petition for expedited special relief and declaratory ruling, requesting that the FCC issue an order preempting the decision by Jefferson County. While some may consider this an extreme measure, it is the only course of action remaining if the Metropolitan Denver Area is to continue to receive free, over-the-air television in the manner in which it is accustomed.

Alternative sites have been investigated and run afoul of Federal Communications Commission policy, Federal Aviation Administration Policy, Jefferson County zoning policy or the interests of homeowners in the areas. The best and most viable site for the transmission of television signals is the one that Denver has used for the past 50 years; Lookout Mountain. This is, what amounts to, the Stapleton/DIA issue all over again.

IF THIS PETITION IS DENIED, HERE IS WHAT IT MEANS TO YOU:

- Free, over-the-air television is in jeopardy. Citizens without the ability to pay for cable TV, satellite TV or other sources of television would be denied service. Public safety, public information and other issues of citizenship would be affected by the loss of free, over-the-air television.
- The Federally mandated conversion to digital television would be stalled in Denver. When the FCC takes away Channel 6 from KRMA in 2006, there would no longer be a KRMA serving the entire Denver Metropolitan Area.
- The reduced coverage area would significantly curtail the educational services of Rocky Mountain PBS. Teachers and students of all ages would no longer have the educational support that Rocky Mountain PBS provides.
- With a reduced service area, KRMA would suffer from reduced public financial support. Fewer viewers mean fewer donors. Boulder, El Paso, and Larimer Counties will lose coverage.

Sincerely Yours,

  
David Mills  
6564 Willow Broom Trail  
Littleton, CO 80125-9070

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2000 MAY 17 P 3:51

CONSUMER INFORMATION BUREAU

# **Reply Comments**



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Stanley F. Leach**

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2nd Ward  
Pat O'Brien  
624 10 Street  
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3rd Ward  
Todd Franzen  
2130 15 Street  
797-4934

4th Ward  
Bruce Peterson  
2913 28 Ave. A  
762-0393

5th Ward  
Bill Adams  
2937 16 Avenue  
762-1811

6th Ward  
Jeffrey Stulir  
2335 47 Street  
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7th Ward  
Dick Parsons  
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Alderman at Large  
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797-5064

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**JUN 7 2000**

May 31, 2000

**FCC MAIL ROOM**

Magalie Roman Sales, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street S.W.  
Washington, D.C. 20554

Dear Ms. Salas:

***Lake Cedar Group's Petition for Expedited Special Relief  
and Declaratory Ruling, FCC (Docket Number DA 00-764)***

On behalf of the City of Moline, Illinois, I am writing to support the Comments of Jefferson County, Colorado in Docket Number DA 00-764.

As noted in the Comments of Jefferson County, federal agencies do not have the authority to intervene in local zoning decisions, and the Telecommunications Act of 1996 does not give the Commission authority to preempt local land use authority over broadcast towers. See Comments of Jefferson County at 6.

Section 332(c), 47 U.S.C. § 332(c), generally preserves local zoning authority and only preempts this authority under a limited set of circumstances for wireless facilities. It does not include television broadcast towers. The Commission does not have the authority to preempt the zoning authority of the Jefferson County Board and the Commission should not grant the Cedar Lake Group's request.

In addition, local zoning decisions must weigh important local interests. Land use decisions are a core function of local government. This principle is well-rooted and should not be disturbed absent strong Congressional intent, which does not exist here. Respectfully, the Commission is not in a position to be able to weigh these local interests. There are no guidelines or criteria for the Commission to make these decisions. Without the authority, or experience, to make this local decision, the Commission should not attempt to do so.

Respectfully Submitted,

CITY OF MOLINE, ILLINOIS

  
\_\_\_\_\_  
Stanley F. Leach  
Mayor

:ysk

# Opposition

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June 22, 2000

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JUN 22 2000

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
The Portals, Room TW-A325  
445 Twelfth Street, S. W.  
Washington, D. C. 20554

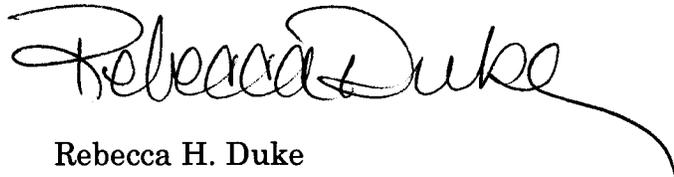
Re: In the Matter of Canyon Area Residents for the Environment  
Request for Review of Action Taken Under Delegated  
Authority on a Petition for an Environmental Impact  
Statement  
DA 00-764

Dear Ms. Salas:

Transmitted herewith, on behalf of Lake Cedar Group LLC, are an original and four copies of its opposition in the above referenced proceeding.

If you have any questions, please contact the undersigned.

Very truly yours,



Rebecca H. Duke

Courtesy Copy: Bruce Romano, Esquire  
Roy J. Stewart

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

**RECEIVED**  
JUN 22 2000  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
Canyon Area Residents for the Environment ) DA 00-764  
Request for Review of Action Taken Under )  
Delegated Authority on a Petition for )  
An Environmental Impact Statement )

To the Commission:

**OPPOSITION TO PETITION**  
**FOR ENVIRONMENTAL IMPACT STATEMENT FILED BY**  
**NATIONAL ASSOCIATION OF COUNTIES,**  
**NATIONAL LEAGUE OF CITIES AND**  
**TEXAS COALITION OF CITIES ON FRANCHISED UTILITY ISSUES**

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June 22, 2000

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## SUMMARY

In an effort to construct their digital television facilities as mandated by the FCC, the members of Lake Cedar Group LLC (“LCG”) attempted to secure zoning approval for a consolidated, multi-user telecommunications facility on property owned by LCG in the Lookout Mountain Antenna Farm, Jefferson County, Colorado. The zoning request was denied by the County, ostensibly for the failure of the proposed tower to comply with RF limits and setbacks and the availability of alternate sites, even though scientific evidence produced by LCG had demonstrated that these bases were invalid.

Faced with a statutory deadline for constructing their DTV facilities and essentially bound to one another by an FCC allotment scheme that makes relocating to alternative sites virtually impossible, the members of LCG *as a last resort* filed a petition on November 2, 1999, asking that the FCC preempt Jefferson County’s decision. LCG clearly demonstrated the aggregate uniqueness of the facts presented—*i.e.*, broadcasters located in a top 10 market, proposing to locate a multi-user tower in an existing antenna farm, in an area where topography, unique technical constraints, and the FCC’s allotment scheme essentially render impossible the provision of an acceptable level of service from alternate sites.

The National Association of Counties, National League of Cities, and the Texas Coalition of Cities on Franchised Utility Issues (“Petitioners”) request that the Commission require an Environmental Assessment (“EA”) and Environmental Impact Statement (“EIS”) on the request for preemption under the National Environmental Policy Act (“NEPA”). Petitioners argue that an EIS should be required because of the potential precedential effect of an FCC order preempting the Jefferson County decision and the effect on the environment of future preemptions.

If the Commission grants the LCG request for preemption, the effect (or lack thereof) of the Commission's decision on the environment will be precisely the same as the effect of the proposed LCG tower, as LCG simply wishes to construct the tower that has been the subject of these interminable proceedings. Petitioners' arguments regarding the precedential value of LCG's request rely on potential environmental effects that are too remote and speculative to possibly be the subject of an EA or EIS, and clearly misconstrue the narrow scope of LCG's request. Moreover, Petitioners completely ignore the fact that the Commission has already upheld a finding by the Mass Media Bureau that no EA is warranted for the Lookout Mountain site, and offer no logical explanation why the effect of a decision to preempt would have any effect on the environment different from the effect of the tower itself. Most importantly, the Petitioners offer no reasoned explanation why the Bureau should revisit an issue that has been decided in a final Commission order. Accordingly, the Bureau should deny Petitioners' unwarranted request.

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of )  
 )  
Canyon Area Residents for the Environment ) DA 00-764  
Request for Review of Action Taken Under )  
Delegated Authority on a Petition for )  
An Environmental Impact Statement )

To the Commission:

**OPPOSITION TO PETITION**  
**FOR ENVIRONMENTAL IMPACT STATEMENT FILED BY**  
**NATIONAL ASSOCIATION OF COUNTIES,**  
**NATIONAL LEAGUE OF CITIES AND**  
**TEXAS COALITION OF CITIES ON FRANCHISED UTILITY ISSUES**

Lake Cedar Group LLC ("LCG") and each of its members, Group W/CBS Television Stations Partners, licensee of KCNC-TV; McGraw-Hill Broadcasting Company, Inc., licensee of KMGH-TV; Rocky Mountain Public Broadcasting Network, Inc., licensee of KRMA-TV; Twenver Broadcast, Inc., licensee of KTVD; and Multimedia Holdings Corporation, licensee of KUSA-TV, collectively ("Broadcasters") and individually, hereby oppose the Petition for Environmental Impact Statement ("Petition") filed by National League of Cities ("NLC"), National Association of Counties ("NACO") and Texas Coalition of Cities on Franchised Utility Issues ("Texas Coalition") (collectively, "Petitioners"). Broadcasters previously filed a petition for expedited special relief and declaratory ruling on November 2, 1999, asking that the Federal Communications Commission ("FCC" or

“Commission”) issue an order declaring that Resolution No. CC99-427 of the Jefferson County Board of County Commissioners, which denied the application of LCG to rezone certain property located at the Lookout Mountain Antenna Farm in Jefferson County, Colorado, be preempted. The Petitioners now file a request that the FCC have an Environmental Impact Statement (“EIS”) prepared in accordance with the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et. seq.*, and the Council on Environmental Quality (“CEQ”) regulations promulgated thereunder, *see* 40 C.F.R. §§ 1500.1 *et. seq.*, should the FCC enter an order on LCG’s petition preempting the denial of zoning by the Jefferson County Board of County Commissioners.

## ARGUMENT

### **I. THE FCC HAS PREVIOUSLY REVIEWED AND REJECTED THE REQUIREMENT OF AN ENVIRONMENTAL STUDY FOR THE LCG TOWER AT THE LOOKOUT MOUNTAIN ANTENNA FARM.**

Both NEPA and the CEQ regulations generally require agencies subject to NEPA that are about to commit resources in a federally significant action, including rulemaking, to consider the environmental effects of their actions by preparing either an Environmental Impact Statement (“EIS”), or an Environmental Assessment (“EA”) followed by a finding of no significant impact or an EIS as appropriate. The FCC’s regulations regarding environmental studies are set forth in 47 C.F.R. § 1.1301, *et. seq.* Although any FCC action deemed to have a significant effect upon the environment requires the preparation of an EIS, the

FCC has found that no common pattern exists in its actions which would enable it to automatically require the preparation of an EIS. 47 C.F.R. § 1.1305. The FCC does identify certain actions which may have an effect on the environment in § 1.1307<sup>1</sup> and identifies actions which are categorically excluded from environmental processing in § 1.1306.<sup>2</sup>

The issue of whether an EA or EIS is required for the construction of the proposed LCG tower at the Lookout Mountain Antenna Farm has been fully briefed and reviewed by the FCC, and is the subject of a final decision by the FCC. The following summary of the procedural history (pertaining solely to the issue of whether an EA or EIS is required for construction of the LCG tower at the Lookout Mountain Antenna Farm) demonstrates that this issue need not be reconsidered:

#### 1. CARE Petition of March 26, 1998.

In this Petition, CARE requested that the FCC adopt a new RF limit for transmitters in residential areas. In a supplemental May 18, 1998 letter, CARE

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<sup>1</sup> Commission actions for the following types of facilities may affect the environment and thus require the preparation of an EIS: facilities to be located in an officially designated wilderness area or wildlife preserve; facilities that may affect or jeopardize threatened or endangered species or designated critical habitats, facilities that may affect structures or sites listed, or eligible for listing, in the National Register of Historic Places; facilities that may affect Indian religious sites; facilities to be located in a flood plain; facilities whose construction will involve significant change in surface features; antenna towers and/or supporting structures that are to be equipped with high intensity white lights which are to be located in residential neighborhoods; a facility that would cause human exposure to RF radiation in excess of FCC limits. 47 C.F.R. §1.1307.

<sup>2</sup> Any FCC action will be categorically excluded from environmental processing unless it involves a site location specified under 47 C.F.R. §1.1307(a), high intensity lighting under 47 C.F.R.

asked the FCC to require all broadcasters on Lookout Mountain to perform “an environmental impact study pursuant to the National Environmental Policy Act.” CARE’s request was based on concerns that the antennas were exposing residents to unsafe levels of RF energy.

2. FCC letter ruling by the Chief of the Office of Engineering and Technology, October 9, 1998 (“Ruling”).

The FCC Ruling was in response to the March 26, 1998 Petition filed by CARE, as well as to additional letters from CARE dated April 30, 1998, May 18, 1998, August 25, 1998 and September 10, 1998. In responding to various CARE requests, the Ruling denied the request that all broadcasters perform an EIS. The Ruling noted that “CARE’s original petition did not demonstrate that the [RF] guidelines have been exceeded, which would warrant further environmental evaluation of Lookout Mountain licensees.” The ruling did require the LCG applicants to provide a study of the RF environment “before applications for new broadcast facilities can be approved . . . . [A]pplicants are not required to perform a formal Environmental Assessment unless there is definitive evidence that facilities are not in compliance with these or other environmental guidelines.” Ruling at 4 – 5 (emphasis added).

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§1.1307(a), or result in human exposure to RF radiation in excess of the standards. 47 C.F.R. § 1.1306.

3. CARE “Application for Commission Review of an FCC Staff Action, Taken October 9, 1998 by Dale Hatfield, in Response to Canyon Area Residents for the Environment’s Petitions and Request for an Environmental Assessment and/or an Environmental Impact Statement”, November 6, 1998.<sup>3</sup>

CARE sought review of the FCC Ruling denying the request for an EIS, arguing that the Commission had violated NEPA and that an EIS or EA for Lookout Mountain was required and “overdue.” CARE argued that an EIS was required due to excessive RF emissions, and that an EA was required because Lookout Mountain is surrounded by a wildlife preserve and owing to the potential effect on threatened or endangered species and on nearby sites listed on the National Register of Historic Places (specifically, the Boettcher Mansion and the Buffalo Bill grave and museum).<sup>4</sup> In a supplemental filing dated March 9, 1999, CARE argued as an additional basis for an environmental study that LCG’s alleged proposal for high-intensity lighting on an LCG tower support structure justified an EA, and that the proposed tower could have an effect on the Preble’s meadow jumping mouse, a threatened species.

4. LCG “Opposition to Application for Commission Review of an FCC Staff Action, Taken October 9, 1998 by Dale Hatfield, in Response to Canyon Area Residents

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<sup>3</sup> CARE subsequently submitted related or supplemental materials on April 30, 1998, May 18, 1998, August 25, 1998, September 10, 1998, November 27, 1998, November 30, 1998, January 13, 1999, March 9, 1999 and March 19, 1999. The FCC’s Order considered these subsequent materials as part of the overall application for review as no new issues were raised that had not been raised before. Memorandum Opinion and Order in the Matter of Canyon Area Residents for the Environment for Review of Action Taken Under Delegated Authority on a Petition for EIS (“MO&O”), Footnote 1.

<sup>4</sup> The FCC found in the MO&O that CARE raised “for the first time the questions of historical preservation, endangered species and blanketing interference” in the Application. Although these issues were not raised in a timely manner, the FCC agreed to examine the new matters raised by CARE and found that “CARE has failed to present any relevant evidence or law demonstrating that we should not have granted the DTV applications.” MO&O, Para. 7.

for the Environment's Petitions and Request for an Environmental Assessment and/or an Environmental Impact Statement," November 23, 1998 and December 31, 1998, as supplemented March 25, 1999.

In Opposition Comments dated December 31, 1998, pages 6 – 16, LCG set forth the following reasons why an EA or EIS is not required for the proposed tower: 47 C.F.R. § 1.1307 sets forth those actions that may have a significant environmental effect for which EAs must be prepared.<sup>5</sup> Pursuant to 47 C.F.R. §1.1306, however, Commission actions not covered under § 1.1307(a) or (b) are “deemed individually and cumulatively to have no significant effect on the quality of the human environment and are categorically excluded from environmental processing.” Note 3 to § 1.1306 specifically provides that “the construction of an antenna tower or supporting structure in an established “antenna farm” . . . will be categorically excluded unless one or more of the antennas to be mounted on the tower or structure are subject to the provisions of § 1.1307(b) [exposure to levels of RFR in excess of the limits] and the additional radiofrequency radiation from the antenna(s) on the new tower or structure would cause human exposure in excess of the applicable health and safety guidelines . . . .” (emphasis added). A grant of the pending LCG application would be categorically excluded under § 1.1306 as it does not involve a ground for environmental study specified in 47 C.F.R. § 1.1307, because construction of the LCG tower in the Lookout Mountain Antenna Farm is categorically excluded from studies, and because the tower proposal complied with the RF limitations. (On the basis of subsequent actions taken by the Broadcasters

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<sup>5</sup> See, *infra*, footnote 1.

and the licensees of certain FM stations, the Commission has affirmatively determined that the site is in compliance with RF guidelines.)

LCG noted that even if the proposed antenna farm was not categorically excluded from environmental processing, LCG would have been required to file an EA only if the proposed tower fell within certain categories set forth in 47 C.F.R. § 1.1307(a). The proposed tower did not fall within any of the exclusions of § 1.1307, such as construction in a wildlife preserve, a threat to endangered species, and does not have an effect on facilities listed on the National Register of Historic Places. In further Opposition Comments dated March 25, 1999, LCG asserted that high-intensity lighting would not be used for the proposed tower<sup>6</sup> and demonstrated that Lookout Mountain was not included on an official list of Mouse Protection Areas or Potential Mouse Protection Areas for the Preble's meadow jumping mouse.

5. FCC "Memorandum Opinion and Order in the Matter of Canyon Area Residents for the Environment for Review of Action Taken Under Delegated Authority on a Petition for an Environmental Impact Statement" ("MO&O"), FCC 99-123, May 27, 1999.

The MO&O affirmed the letter ruling dated October 9, 1998 by the Chief of the Office of Engineering & Technology, which had found that the communications facilities on Lookout Mountain complied with the FCC radiofrequency ("RF") standards and, *inter alia*, had rejected arguments that the communications transmission tower proposed by LCG may significantly affect the environment.

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<sup>6</sup> LCG advised Jefferson County that it would light the tower in the method the County preferred. See, LCG Opposition to Application for Commission Review of FCC Staff Action, March 25, 1999, page 4.

The MO&O ruled that “extensive FCC studies and follow-up activities” and corrective actions to bring the site into compliance with RF guidelines obviate the need to prepare an EA or EIS. MO&O, ¶ 11. The MO&O noted that the “record established that the threshold requirement for NEPA analysis – effect on the physical environment – has not been met.” MO&O, ¶ 13 (emphasis added). The MO&O characterized Lookout Mountain as an established “antenna farm,” and explained that under the FCC’s environmental rules, the “location of new antennas in antenna farms or on existing towers or structures, has been environmentally preferable to new construction, has been encouraged, and has been categorically excluded from the environmental processing requirements.” MO&O, ¶ 25. MO&O, ¶ 26. Additionally, the MO&O noted that:

CARE has not shown, and the record does not establish, that the proposed LCG tower “may significantly affect the environment”, given that the LCG tower will be located in an established antenna farm, an area in which similar towers already exist and have existed for many years. Specifically, the record does not support CARE’s contention that the antenna farm portion of Lookout Mountain is an officially designated wildlife area. . . . As for endangered species, the record does not demonstrate that the Lookout Mountain area is the critical habitat for such animals as the Preble’s meadow jumping mouse, or that such animals even can be found in the Lookout Mountain area. . . . In addition, with respect to historic preservation, the record does not establish that the construction of the LCG tower would adversely affect either of the two historic sites cited by CARE. . . . Therefore, CARE has not demonstrated, and the record does not establish, that the otherwise categorically excluded location for the proposed LCG tower may have a significant environmental effect under section 1.1307(c), which would necessitate the preparation of an EA by the

applicants and further environmental review by the Commission.

MO&O, ¶ 26 (emphasis added). Thus, the FCC found that the record did not establish that the location of the proposed transmission tower in an established antenna farm, which ordinarily would be categorically excluded from environmental processing requirements, would significantly affect the environment under § 1.1307.<sup>7</sup>

6. CARE "Motion to Reconsider FCC Decision of May 27, 1999", June 22, 1999.<sup>8</sup>

CARE alleged that the FCC erred in failing to require an EA in light of the alleged potential impact of the proposed LCG tower on historic structures and endangered species and because of the RF levels on Lookout Mountain.<sup>9</sup>

7. Letter from Advisory Council on Historic Preservation and FCC Public Notice (DA 99-1211) of June 25, 1999.

The Advisory Council on Historic Preservation (the "Council") filed a letter on June 3, 1999 in which it asked the FCC to investigate whether the Lookout Mountain proposal requires solicitation of comments from the Council. The Commission treated the Council's letter as a petition for reconsideration of the portion of the MO&O addressing historic preservation concerns and issued a Public

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<sup>7</sup> CARE appealed the MO&O to the U.S. Court of Appeals for the D.C. Circuit by *Petition for Review of FCC Order* on or about June 24, 1999. Para. 5 of the *Petition* states that "[t]he FCC Order [MO&O] violates . . . the National Environmental Policy Act, the Historic Preservation Act, [and the] Endangered Species Act . . . ." After filing for reconsideration, CARE later withdrew this *Petition*. The Motion to Reconsider remains pending before the Commission.

<sup>8</sup> CARE filed a Supplement to this request on July 8, 1999.

<sup>9</sup> LCG filed its "Opposition to CARE's Motion to Reconsider FCC Decision of May 27, 1999" on July 7, 1999.

Notice soliciting comments from interested parties on the historic preservation issue and establishing comment deadlines.<sup>10</sup> These deadlines have long passed, without any of the present Petitioners (NACO, NLC, or the Texas Coalition) filing comments.

#### 8. Other Filings.

CARE filed numerous other pleadings concerning its claim that environmental studies are required and rehashing the issues set forth in its previous pleadings. These pleadings raise no new issues of fact and, accordingly, neither the pleadings nor LCG's responses to them are addressed further in this Reply.

In sum, the FCC has examined the issue raised by Petitioners of whether an EA and/or an EIS is required at the Lookout Mountain Antenna Farm on multiple occasions and made findings that such studies are not required. The FCC found that an environmental study is not necessary on the basis of RF issues, the effect on a wilderness area, threats to an endangered species or the effect on historic sites listed on the National Register of Historic Places.<sup>11</sup> Although the Petitioners did

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<sup>10</sup> LCG filed its "Opposition of LCG to the Petition for Reconsideration Filed by the Advisory Council on Historic Preservation" on August 23, 1999.

<sup>11</sup> See Ruling of October 9, 1998 and MO&O of May 27, 1999. Pursuant to 45 C.F.R. § 1.106(b)(1), any party to a proceeding or other party whose interests are adversely affected by any action taken by the FCC, may file a petition requesting reconsideration of the action taken. If the petition is filed by a person who is not a party, it shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible to participate in the earlier stages of the proceeding. The Petitioners failed to file comments in the proceedings on environmental studies and have shown no good reason why they were not able to earlier participate in these proceedings. The FCC decision has been rendered on the

not file comments or participate in these prior proceedings regarding environmental studies, their new filing fails to present a basis for reopening the proceedings. Indeed, NACO, NLC and the Texas Coalition could have filed comments at a much earlier stage in this proceeding but chose not to do so.<sup>12</sup> The issue of whether environmental studies are required should therefore not be revisited.

## II. PREEMPTION OF THE JEFFERSON COUNTY ZONING DENIAL DOES NOT RAISE A NEW ISSUE REQUIRING A REVIEW OF FCC DECISIONS ON ENVIRONMENTAL STUDIES.

The Petitioners argue that the effect of the possible FCC preemption of the zoning denial - - subsequent construction of a tower on Lookout Mountain - - requires an EIS. This is no different than the issue previously decided by the FCC - - whether construction of the tower on Lookout Mountain would require an EIS. Whether the construction occurs due to a rezoning by the Jefferson County Board of County Commissioners or via a preemption by the FCC of a denial of zoning, the net effect will be the same -- construction of the proposed tower at the Lookout Mountain Antenna Farm. The FCC has already made findings that the construction of the tower at the Lookout Mountain Antenna Farm has no environmental effects requiring environmental studies. These findings do not differ

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merits, save for the limited issue of effects on historic sites, for which the commenting period has been long closed. The Petitioners cannot now attempt to participate or request action on issues which are no longer open for comment. *Springfield Television Broadcasting Corp. v. FCC*, 328 F.2d 186 (D.C. Cir. 1964).

<sup>12</sup> NACO and NLC did file Comments in response to LCG's Petition for Preemption. See, Comments of Municipalities and Municipal Organizations.

based upon the vehicle for approving the construction – zoning approval by the County or preemption by the FCC.

**III. LCG HAS NOT REQUESTED PREEMPTION OF ALL ZONING DENIALS FOR TOWERS AND THE EFFECTS OF SUCH A RULING BY THE FCC ARE TOO SPECULATIVE AND REMOTE FOR AN ENVIRONMENTAL IMPACT STATEMENT.**

Petitioners also argue that an EIS is required because the effect of any FCC preemption will be to establish a precedent for future preemptions which may, cumulatively, have an environmental impact. For example, the Petitioners argue that the FCC's "granting the relief requested by LCG would result in both a significant effect on the quality of the human environment for residents on and around Lookout Mountain and on the residents in counties, cities and townships throughout the country as a result of the precedential impact of such action." Petition at 27-28 (emphasis added). An EIS is not required for such remote or speculative possibilities. *National Citizens Committee for Broadcasting v. FCC*, 567 F.2d 1095 (D.C. Cir. 1977). LCG's filing is thus far the only specific preemption request filed in a DTV tower case, and a future preemption request will obviously need to be evaluated on its own specific facts. Petitioner's argument that preemption in this case requires an EIS because of the effect "throughout the country" is analogous to the issue faced by the court in *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 95 (2<sup>nd</sup> Cir. 2000). In *Cellular Phone Taskforce*, the Court held that the FCC was not required to consider the environmental effects of RF interference on medical devices when setting guidelines for RF radiation. "Only

when individual RF facilities are constructed and operated will the circumstances arise with sufficient specificity to permit meaningful evaluation.” *Id.* at 95. Even if the FCC were to read the LCG request as having broad precedential value that might lead to additional preemption decisions -- a reading that LCG has not advocated and does not support -- the FCC would still not be required to prepare an EA or EIS based on the comprehensive impact of all such decisions. In *Kleppe v. Sierra Club*, the Supreme Court held that a federal agency considering comprehensive action need not prepare a comprehensive impact statement before proceeding to approve specific pending applications. *Kleppe*, 427 U.S. 390, 414-15 (1976). The agency need only consider the environmental impact of the specific action under consideration. As the Commission has already determined that no EA is warranted with respect to the proposed LCG tower, the impact of any hypothetical, future decisions to preempt local authority may be addressed on a case-by-case basis if and when such decisions are reached.

LCG has requested that the FCC preempt only this particular zoning denial based upon the unique circumstances of this case. *See*, LCG Reply Comments at 40. LCG has not asked the FCC to preempt local zoning in general or even to preempt future zoning rulings concerning Lookout Mountain. The only “effect” of FCC preemption of the zoning denial will be the construction of the single proposed LCG tower (and the removal of four others). There will be no further “effect” from this proceeding.

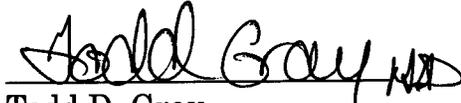
## CONCLUSION

For the reasons set forth herein, and for the reasons set forth in the previous pleadings filed with the FCC on the issue of environmental studies, LCG asks the FCC to deny the Petition for Environmental Impact Statement.

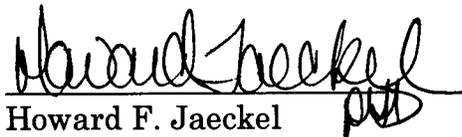
Respectfully submitted,

  
Edward W. Hummers, Jr. *EDW*

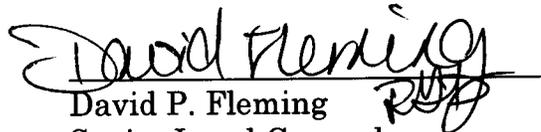
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June 22, 2000

## CERTIFICATE OF SERVICE

I, Joseph C. Fezie, a secretary in the law firm of Holland & Knight, LLP, do hereby certify that on June 22, 2000, a copy of the foregoing OPPOSITION TO PETITION FOR ENVIRONMENTAL IMPACT STATEMENT FILED BY NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES AND TEXAS COALITION OF CITIES ON FRANCHISED UTILITY ISSUES was delivered by first class United States mail, postage prepaid to the following:

John W. Pestle  
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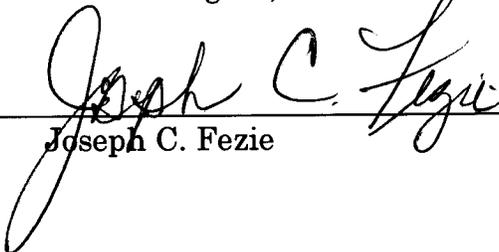
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The Honorable Harold Furchtgott-Roth  
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Joseph C. Fezie