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

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

CANYON AREA RESIDENTS FOR THE ENVIRONMENT PUBLIC
COMMENTS
IN OPPOSITION TO LAKE CEDAR GROUP'S PETITION
FOR EXPEDITED SPECIAL RELIEF AND
DECLARATORY RULING

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

CARE EXHIBITS

VOLUME 1-PETITION AGAINST SUPERTOWER

Appendix A – Petition with 3000 signatures opposing the tower

VOLUME II-APPENDICES B-Q

Appendix B – Letters in opposition to tower

Appendix C – Colorado Senate Joint Resolution 00-031

Appendix D – Chronology of Radio Frequency Radiation Measurements and Reports

Appendix E – Zoning Resolution of Jefferson County, Colorado October 1998

Appendix F – An Investigation of Radiofrequency Radiation Levels on Lookout Mountain

Appendix G – Letter from University of Colorado Health Sciences Center Department of Radiation Oncology opposing the tower

Appendix H – Letter from Rocky Mountain PBS

Appendix I – Affidavit of Ted Votaw

Appendix J – Rocky Mountain News article, 12/15/93 Channel 20 Sold for \$7/5 million as station pulls out of Chapter 11

Appendix K – Denver Post article, 12/16/93 Chicago Broadcaster bails out Channel 20

Appendix L – Waiver of Section 73/1125

Appendix M – Combined Communications Corp Opposition to Petition to Deny

Appendix N – Jeffco BCC CC83-1089

Appendix O – Jeffco BCC CC99-427

Appendix P – Jefferson County Telecommunications Land Use Plan

Appendix Q – FCC Broadcast Permits Issued for Lookout Mountain

III. VOLUME III JEFFERSON COUNTY ZONING HEARING TRANSCRIPT

In order by page number with exhibits used by that witness attached
5938 Tim Carl Jefferson County Case Manger/Planner
5946

6062 Bryan Starling City Councilor for City of Golden
6066

Letter of Golden City Council to Jefferson County Board of County Commissioners
Golden City Council Resolution No. 975
6232

6024 Dr. Richard Hoffman Chief Medical Officer Colorado Department of Health
6030
Resume of Dr. Hoffman

6058 Dr. John Witwer Colorado State Representative
6060
Letter of Dr. Witwer dated 2/17/99

6060 Jon deStefano President Jefferson County Board of Education
6062

6077 Dr. Gary Olhoeft Professor of Geophysics at Colorado School of Mines
6081

6099 Dr. John Reif Professor and Chairman in Department of
Environmental Health at Colorado State University
6108

6110 Bob Barrett Registered Professional Engineer/Certified Consulting
Engineer

6124
Proposed Tower Violates Jefferson County Zoning Resolution
Analysis of Debris Radius for Proposed LCG Tower

6126 Ronald Selstad Registered Appraiser
6130
Impact on Real Estate Values and Tax Bse in Area of Influence of Proposed Tower

6130 Dr. Roger Hutchison Ph.D. Engineering and Economics
6139

6140 Basil Katsaros Real Estate appraiser
6142

6176 Roger Mattson Expert in Radiation Standards
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2 – Applewood Shopping Center
3 – Days Inn Motel
4 – Description
5 – Central Mountains Community Plan
Resume

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Front Range Mountain Backdrop Project

6294 Robert Narracci Jefferson County Planner/Case Manger
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6361 James MacDermott General Manger LCG
6365

8734 Tim Carl Jefferson County Planner/Case Manager
8742

8934 Dr. Robert Cleveland FCC

Squaw Mountain Communications is a viable option for the Denver Broadcasters

IV. VOLUME IV- FCC RECORDS ON LOOKOUT MOUNTAIN-in Bates numer order

ERRATUM

**APPENDIX Q CAN BE FOUND BETWEEN
APPENDIX F AND APPENDIX G**

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INTRODUCTION

Canyon Area Residents for the Environment (C.A.R.E.) filed Initial Comments In Opposition to Lake Cedar Group's Petition for Expedited Special Relief and Declaratory Ruling on December 7, 1999. Jefferson County's initial response correctly set forth that the Federal Communications Commission lacks the jurisdiction to rule on this matter because, among other reasons, Lake Cedar Group ("LCG") has appealed the Jefferson County zoning decision to the Jefferson County District Court. The matter is pending judicial review and decision in that Court.

C.A.R.E. joins the Colorado legislature and Jefferson County in contesting the jurisdiction of the FCC to take any action on this petition for preemption, other than immediately dismissing it. On April 27, 2000, the Colorado legislature passed Senate Joint Resolution 00-031 and urged the FCC to reject LCG's petition. (See Volume 2, Appendix C).

The words of the Colorado legislature clearly enunciate the rationale for rejection of the Broadcasters' request for preemption:

Jefferson County's denial of the supertower was a quasi-adjudicative decision based on factual evidence presented to the Jefferson County Board of County Commissioners and application of applicable legal standards and as such can be appealed judicially to Jefferson County District Court, which court is fully empowered to grant full and appropriate relief to the appellant if appropriate under the facts of the case;

In the United States, control over individual land use decisions is firmly vested in local governments, through statutory delegation from state governments; The FCC is barred by the 10th Amendment to the United States Constitution from attempting to preempt decisions made by local governments on individual land use applications because the United States Congress has not directed or authorized the FCC to preempt such local decisions;

The FCC lacks not only the authority, but also the expertise and any adopted standards to second-guess and invalidate local government land use decisions; Any attempt by the FCC to preempt local government land use decision-making in this manner would represent an illegal, unauthorized, and unjustified attack on state- and local- government land use authority; . . . (See Volume 2, Appendix C.)

By filing these comments, C.A.R.E. is not consenting to the jurisdiction of the FCC or acknowledging that this is the proper forum for this action. Preemption in this case would be a usurpation of the exclusive jurisdiction of the Colorado District Court to review the rezoning decision pursuant to C.R.C.P. 106(a)(4). For the FCC to grant LCG's request and preempt Jefferson County's zoning decision would be also constitute federal administrative usurpation of the powers vested in locally elected commissioners to legislate zoning classifications and adjudicate applications for rezoning. "There can be little doubt zoning regulations bear a substantial relationship to the general welfare of the residents of Jefferson County." Messiah Baptist Church v Jefferson County, 859 F.2d 820, 824 (10th Cir., 1988), Cert denied 490 U.S. 1005, 109 S.Ct. 1639, 104 L.Ed.2d 154. The Tenth Circuit

upheld Jefferson County's decision that a church was not a compatible use in an agricultural zone and characterized such zoning classifications as legislative. Id. at 823. The FCC has no authority to pass judgment on the adequacy of the Jefferson County zoning regulations or the rezoning decision in this case. That matter is before the court.

Quite simply, the members of the FCC were not appointed to make local land use decisions, and that power has not been delegated to them. Nor has the FCC been granted the power to take over the review of a case from the judicial branch and ignore the required rules of procedure and evidence. The power over the local land use entitlement process rests exclusively with state and local governments and is not a federal power.

PREEMPTION WOULD VIOLATE CONSTITUTIONAL RIGHTS

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. See U.S. Const. Am. 10. The United States Constitution established a system of dual sovereignty between the individual states and the federal government. In doing so, boundaries and limits had to be set on the powers of each sovereign. Therefore, the Tenth Amendment was created. This amendment limits federal power. Where Congress has not plainly said that power should be held in the trust of the federal government, the power reposes in the states. Colorado recognizes in the Colorado Constitution that this power begins with the will of the people. All political power is vested in and derived from the people; all government, or right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole. Colo. Const. Bill of Rights Art. II Sec. 1. Congress does not take the power to tip the federal/state balance, as designed by the Constitution, lightly. Gregory v.

Ashcroft, 501 U.S. 452, 460, 111 S.Ct. 2395, 2400 (1991). North Haven Planning and Zoning Comm'n v. Upjohn Co., 753 F.Supp 423, 429 (D. Conn, 1990); Aff'd 921 F.2d 27; cert denied 500 U.S. 918, 11 S.Ct. 2016, 114 L.Ed.2d 102 (1990). Congress has never stated that the FCC is authorized to preempt local zoning decisions. Should the FCC attempt to preempt this local zoning decision and order placement of this LCG tower and transmission building on Lookout Mountain over the objections of thousands of citizens who stand to lose millions of dollars in the value of their property, the due process rights of these citizens would be violated.

. . . nor shall any person be deprived of life, liberty, or property,
without due process of law: nor shall private property be taken
for public use, without just compensation.
U. S. Const. Am. 5

The FCC administrative procedures do not afford these citizens due process of law. Those procedures do not contemplate that the FCC will consider or make local land use decisions and do not provide the parties interested in local land use decision making the opportunity for a full and impartial hearing with sworn testimony in the fashion provided for by local zoning ordinances and resolutions.

The due process rights of the C.A.R.E. citizens would be violated by a decision to preempt because, among other things, recognized rules of procedure and evidence are not followed in this public comment proceeding. By its very posting, the FCC invites comments from anyone, ungoverned by rules of evidence and civil procedure. Hearsay letters should not supplant the rules of evidence and the official findings of the County Commissioners in a proceeding that is already before the Colorado court.

An example of the potential unfairness of this process is demonstrated by the solicitation of public comments sent out by LCG member, Channel 6 KRMA, "Public" Television. It has sent out a letter to its thousands of supporters urging them to file comments in support of preemption, representing:

alternative sites have been investigated and run afoul of FCC policy, FAA policy, Jefferson County zoning policy or the interests of homeowners in other areas.

(Preemption) 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. (See Appendix H).

Thus, people not even at the hearings, who have not read the record and with no knowledge of the evidence presented, may be filing public comments urging preemption based on the misrepresentations of a "public" and partially tax-supported television station that free television will cease in Denver, absent preemption. Public television members were not informed that Jefferson County expressly found that LCG failed to show that alternative sites do not exist, or of other factors supporting the County's decision.

Incompetent evidence, repeated many times by many people, is still incompetent. Federal Rules of Evidence Rule 601 require that state law be applied to determine the competency of witnesses. Colorado Rules of Evidence Rule 602 require that the evidence from the witness be based upon that person's personal knowledge. Rule 603 requires sworn testimony. If a million Channel 6 supporters wrote to the FCC that the FCC must preempt, those letters would only be evidence that those people believe what Channel 6 told them, not competent evidence that free television will cease unless the FCC preempts.

The submission of the Year 2000 Browne report to Jefferson County and the FCC is another example of violation of due process. Waiting until long after the hearing and time for rebuttal to submit a more detailed report from LCG's expert to the finder of fact is not allowed under the law. The Browne report is self-serving, unsworn evidence outside of the rezoning record. Eight months after the rezoning testimony closed and the Commissioners issued their denial, LCG submits the Browne engineering report to provide cumulative evidence of its assertion made during the rezoning hearing that there is no alternative site available for the deployment of DTV. This is an extraordinary violation of both Colorado and federal laws on the timing of submission of new evidence after a decision has been reached. LCG is asking the FCC to review the zoning decision and grant the extraordinary relief of preemption of the zoning decision based on evidence not even presented to Jefferson County.

LCG's filing of this Browne report is analogous to asking for a new trial on the ground of newly discovered evidence. Procedural rules require such a motion to be made within ten days after the entry of the judgment. C.R.C.P. 59(b) and F.R.C.P. 59(b). These rules also require that the party could not, with reasonable diligence, have discovered and produced the evidence at trial. Colo.R.Civ.P. 59(a)(4). Dubois v. Myers 684 P.2d 940, 943 (1984). Relief allowing submission of this evidence could not be granted in Court unless LCG could show that (1) it made a good faith effort to locate the evidence before the final decision, (2) it did not engage in dilatory tactics and (3) the opponent will not be exposed to substantial prejudice. Id. at 943. None of these conditions are met by LCG.

Relief from a final judgment is not granted by the Colorado or federal courts unless the proponent can show that the evidence could not have been discovered earlier through the exercise of reasonable diligence. C.R.C.P. 60(b)(5) and F.R.C.P. 60(b)(2). LCG must show that their failure to supply this version of the Browne report before the case closed was due to mistake, inadvertence, surprise or excusable neglect. Southeastern Colorado Water Conservancy District v. O'Neill, 817 P. 2d 500, 504. (Colo. 1991). The purpose of the rule is to strike a balance between the preferred rule of finality of judgments and the need to provide relief in the interests of justice in exceptional circumstances. Cavanaugh v State, 644 P.2d 1, 5 (Colo. 1982), appeal dismissed, 459 U.S. 1011, 103 S.Ct. 367, 74 L.Ed. 504 (1982), reh'r'g den'd, 460 U.S. 1104, 103 S.Ct. 1806, 76 L.Ed.2d 369 (1983). Only under extraordinary circumstances and extreme situations will a judgment be reopened. Canton Oil Corp. v District Court, 731 P.2d 687, 694 (Colo. 1987). Colorado does not allow such a motion more than six months after the decision is rendered. Id. at 693.

The year 2000 Browne Report is not newly discovered evidence, and the failure to submit it before the close of the evidence is not excusable neglect. Even before the rezoning hearing, LCG already knew that it had the burden of proving that it could not locate its equipment on an alternative existing site and submitted letters purporting to demonstrate that it had checked with the alternative sites. F.X. Browne was not someone that LCG could not locate before the hearing. F.X. Browne testified and presented his written report at the rezoning hearing as an expert for LCG. Under Colorado law, LCG should have asked for a continuance in order to file a supplemental report. Colo.R.Civ.P. Rule 59(a)(4), Dubois at 940.

The requirement of reasonable diligence is grounded in the principle of finality. A party is expected to gather all available evidence prior to hearing or trial and evaluate and submit such evidence as is consistent with a party's theory of the case. Reasonable diligence is established with a showing that, not only was the evidence unknown prior to the hearing but that it could not have been timely discovered through reasonable efforts. Aspen Skiing Co. v. Peer, 804 P.2d 166, 172.

NO LEGAL GROUNDS TO PREEMPT

No Plain Statement that Congress Intended to Preempt Broadcast Tower Zoning

Congress may preempt by stating in plain language within a statute that state or local law will be preempted by federal law. North Haven, at 423. There has been no plain statement by Congress that it intends to usurp local regulation in these types of cases. The word "preemption" in sections relating to television broadcasting is not used anywhere in the Telecommunications Act. When Congress wrote the Telecommunications Act, Congress explicitly articulated very limited areas of federal preemption. These explicit statements of preemption are limited to the following sections of 47 USC: Part 73 § 152 Application of chapter; § 543 Regulation of rate; § 332 Mobile services; § 276 Provision of payphone service; § 253 Removal of barriers to entry; § 228 Regulation of carrier offering of pay-per-call services; and § 224. Pole attachments.

Explicit language on preemption is set forth on the section dealing with cable television but even this preemption states:

47 USC Sec. 556. Coordination of Federal, State, and local authority:

(a) Regulation by States, political subdivisions, State and local agencies, and franchising authorities. Nothing in this subchapter shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this subchapter.

(b) State jurisdiction with regard to cable services. Nothing in this subchapter shall be construed to restrict a State from exercising jurisdiction with regard to cable services consistent with this subchapter.

(c) Preemption. Except as provided in section 557 of this title, any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded.

§ 332 (c) (7) makes it clear that even in cell tower cases Congress intended to preserve local zoning authority.

None of these sections has anything to do with preempting local zoning decisions on towers.

No Preemption By Clear Intent

In the absence of express Congressional language authorizing preemption, preemption authority is very limited. The federal courts must find that Congress had a clear intent and a statement of such intent, before they find that the desire of Congress will be born out by federal preemption of state law. Gregory, 501 U.S. at 460-461, 111 S.Ct. at 2401 (citing Atascadero State Hospital v. Scanlon 473 U.S. 234, 242, 105 S.Ct. 3142, 3147, 87 L.Ed.2d 171 (1985), Rice v. Santa Fe Elevator Corp, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)). No such clear intent is shown here.

Preemption When No State or Local Law to Supplant-Not Applicable Here

Where Congress has not made an explicit statement regarding it, preemption may be implied where federal law is comprehensive on a subject to the extent that there is no basis for state or local law to supplement or supercede. North Haven, 753 F.Supp. at 429. Zoning is an area traditionally regulated by the States rather than by Congress and is peculiarly within the province of State and local legislative authorities. Warth v. Seldin, 422 U.S. 490, 508 n. 18, 95 S.Ct. 2197, 2210 n. 18, 45 L.Ed.2d 343 (1975). In this instance, there are substantial Colorado and Jefferson County laws and regulations that would be supplanted by federal preemption. Municipal, county and state land use decisions have been consistently held by the courts to be matters of local concern. North Haven, 753 F.Supp. at 427; Northeast Mines, Inc. v. Smithtown, 584 F.Supp. 112, 114-15 (E.D.N.Y 1984); Lake Country Estates, Inc. v. Tahoe 440 U.S. 391, 402, 99 S.Ct. 1171, 1177, 50 L.Ed.2d 401 (1979). Federal law is not comprehensive on the topic of land use planning, which is why the courts continually say that it is matter to be addressed at the state and local level. No part of Jefferson County's Central Mountain's Community Plan, Telecommunications Land Use Plan or the County Zoning Resolutions, upon which the Jefferson County Board of County Commissioners (sometimes referred to as the BCC) based their ruling, are in contravention of federal law. All three have as their common purpose the promotion of health and safety of both persons and property, a purpose which is the primary concern of local governments. Federal law recognizes that promotion of health and safety is a commonly asserted and upheld local goal. See Sprint Spectrum, L.P. v. Board of County Commissioners of Jefferson County 59 F.Supp.1101 (D. Colo., 1999).

As was pointed out in AT&T Wireless PCS, Inc. v. City Council of the City of Virginia Beach 155 F.3d 423, 430 (4th Cir., 1998), a legislative body, in this case the Jefferson County Board of County Commissioners, is not a federal administrative agency, and as such will consider the minds of their constituents in zoning cases to be primary. "The 'reasonable mind' of a legislator is not necessarily the same as the 'reasonable mind' of a bureaucrat, and one should keep the distinction in mind.... [T]he views of their constituents...if widely shared, will often trump those of bureaucrats or experts in the minds of reasonable legislators." The local governing body did in Jefferson County, just as the legislators did in Virginia Beach, that which the courts would expect: they treated the case as a local land use decision, without turning an eye to federal law, as it is traditionally a matter for only local governments to explore and decide.

Preemption When Federal Scheme Contravened By Local Law

The only remaining situation in which preemption may occur is in cases where state or local law is either in direct conflict with federal law, or is in contravention of federal law thereby frustrating a federal scheme. Florida Lime and Avocado Growers, Inc. v. Paul 373 U.S. 132, 142, 83 S.Ct. 1210, 1217-18, 10 L.Ed.2d 248 (1963). LCG asserts digital television cannot be made available to the Denver market and therefore, the mandate for digital television set forth in the Telecommunications Act cannot be carried out because of the decision of Jefferson County denying a rezoning to permit the supertower at the one specific location desired by and most convenient to LCG. This entire argument hinges on the implausible premise that there is no other possible location in the Rocky Mountains or on the plains for the digital antennas of Denver Channels 4, 6, 7, 9 or 20 (Twenver). This

premise is not only illogical but technically false as demonstrated in *An Alternative Analysis of DTV Tower Sites to Serve the Denver Area*, the record in the rezoning case, the comments of an alternative site near Sedalia known as @ Contact LLC in this proceeding, the past admissions of these broadcasters and previous decisions by the FCC. These will be set out in detail in later sections.

State Court Jurisdiction for Review bars Preemption

The FCC has no authority to preempt the jurisdiction of a court. The FCC is barred from preemption because the decision of the County Commissioners is presently being reviewed by the Jefferson County District Court. Where there is an ongoing state judicial proceeding considering matters that are of local issue and concern, the federal courts have held that the state courts are in the best position to construe state law, and therefore, leave the state courts to examine the issues and the law. North Haven 753 F. Supp at 427; see also, Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982); Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). Lake Cedar Group, in an effort to overturn the ruling of the Jefferson County Board of Commissioners, has properly filed a motion under Colo.R.Civ.P. 106(a)(4) in the Jefferson County District Court, the record before the County Commissioners has been filed with the Court, LCG's Opening Brief is due May 31, 2000, and briefing will be completed and the case will be ripe for decision by approximately July 15, 2000.

Jefferson County Commissioners are not Required to Issue Findings of Fact and Conclusions of Law Supported by Substantial Evidence

The Telecommunications Act does not impose the requirement that decisions on broadcast towers be in writing and supported by substantial evidence as required on cell tower zoning decisions. The Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 332(c)(7), requires that local zoning authorities make their decisions on cell towers in writing, supported by substantial evidence in a written record. Yet, even Courts reviewing cell tower cases have upheld the cell tower zoning decision of the local government based upon far less evidence than was presented to the Jefferson County Commissioners.

In AT&T Wireless 155 F.3d 423, the city council of Virginia Beach unanimously voted to deny an application for construction of two cell towers, despite the recommendation of the planning commission to approve the application. At the public hearing before the planning commission, numerous citizens spoke against the erection of the towers. A petition with ninety signatures opposing the towers was submitted. The city council held a further hearing upon their consideration of the matter. They incorporated the prior testimony from the planning commission hearings with additional testimony from concerned citizens and a petition with seven hundred signatures in opposition to the towers. The city council's ultimate decision in the matter was to deny the application. As was their customary practice, a two-page summary of the minutes, including the names of those who testified and their positions, a description of the application, and the votes of each council member, was prepared. It was stamped with the word "Denied." There were no further written

findings of fact.

The Fourth Circuit upheld the city council's decision even though it only stamped the word "Denied" on a summary of the session. The Fourth Circuit Court held that the Act's requirement that a cell tower decision be in writing was followed by the Virginia Beach City Council. It was not required that the writing also include findings of fact and conclusions of law with the basis for those conclusions. The Jefferson County Commissioners findings were substantially more extensive.

The Fourth Circuit also found that there was substantial evidence in the record to support the finding of the Virginia Beach city council. The Court said:

"...[T]he repeated and widespread opposition of a majority of the citizens of Virginia Beach who voiced their views-at the Planning Commission hearing, through petitions, through letters, and at the City Council meeting-amounts to far more than a 'mere scintilla' of evidence to persuade a reasonable mind to oppose the application. Indeed, we should wonder at a legislator who ignored such opposition."
Id. at 431.

LCG's representation to the FCC that this tower zoning was opposed by a "minority," "small" and "strident" (LCG Petition at ii, iii, 2, 9, 31, and 32) is not true. More than 3,000 petition signers, most of whom live in Jefferson County, executed a petition directed to the Board of County Commissioners opposing the rezoning request. (See Appendix A.) The Golden City Council, elected representatives of all of the 15,259 residents of the City of Golden (V.3 at 6062-68 Starling), State Representative John Witwer, elected State Representative representing approximately 75,000 citizen, (V.3 at 6058-60), Jon D. deStefano, President of the Jefferson County R-1 School Board representing 501,591

residents in and 92,000 students of the District (V.3 at 6060-62), ten professors from the University of Colorado, Colorado State University, (V.3 at 6099-6108), and Colorado School of Mines (V.3 at 6077-81, Olhoeft) the three most recognized public universities in the State of Colorado (V.3 Reif 6099)(V. 2, Appendix G) with combined student populations in excess of 60,000 students, opposed the request, Dr. Richard Hoffman, Chief Medical Officer of the Colorado Department of Health, a health official of the entire State of Colorado and its 3,970,971 citizens, opposed the request, by suggesting that no additional devices should be approved until further studies had been completed, and all alternatives fully explored. (V.3 6024-31). At the BCC hearings, seventy-nine witnesses testified. Sixty-four witnesses expressed opposition to the tower. The fifteen witnesses who supported the proposal were the employees and experts for LCG. Of those testifying for the project, it appears that the only Jefferson County resident was the architect hired by LCG. Jefferson County received over 300 letters in opposition. (Tr. of Planning Comm'n Hr'gs at 8737, Carl). (See Appendix B for letters in opposition.)

Under the standards applied by the Fourth Circuit, this meets the substantial evidence requirement even though there is not such a requirement for broadcast tower decisions. It is "proper" and "expected" that the views of constituents should be considered by local governments as "particularly compelling forms of evidence" in zoning and other legislative matters. "[Constituents'] views, if widely shared, will often trump those of bureaucrats or experts in the minds of reasonable legislators." AT&T Wireless, 155 F.3d at 431. "To demand that we interpret the Act so as always to thwart average, nonexpert citizens...is to thwart democracy." Id., at 431.

The federal courts have already specifically found Jefferson County's method of setting forth its decision in cell tower cases is sufficient under the standards of the Telecommunications Act of 1996 (again recognizing that the "hurdles" established by these standards are not applicable in broadcast tower land use decisions). See Sprint Spectrum v. Jefferson County Comm'rs, 59 F.Supp.2d 1101 (D. Colo. 1999) citing 47 USC Sec. 332(c)(7)(A) (upholding Jefferson County's denial of a cell tower on agricultural land next to existing cell towers and within three miles of the LCG proposal). In the Sprint Spectrum case, the written findings of the Jefferson County Board of County Commissioners, as well as the substantial evidence requirement, were upheld. The written record for the purposes of the Telecommunications Act cell tower requirement of substantial evidence includes the transcripts, exhibits and other matters considered by the board. AT&T Wireless 155 F.3d at 439. The Colorado District Court found, just as the Virginia Beach court did, that the writing requirement of the Telecommunications Act does not require extensive findings of fact and conclusions of law. The Jefferson County Board of County Commissioners used the same practice in adopting summary written findings via resolution in the Sprint Spectrum case, as in the LCG case. This practice has already been upheld by the court.

The Federal district court in Sprint Spectrum went on to analyze the requirements before the BCC when voting on a zoning resolution. Some of those elements include impacts on property surrounding the area proposed for rezoning, feasibility of mitigating the impacts to the surrounding area, compatibility with current and permissible land uses in the area, and conformance of the proposal to land use plans. Under Colorado law, exercise of police power through zoning regulation for the protection of mountain views is

a legitimate governmental concern. Sprint Spectrum 59 F.Supp.2d at 1109. The court cited the Telecommunication Land Use Plan (TLUP) and the Central Mountain's Community Plan (Community Plan) as appropriate considerations for the BCC when making a zoning decision. The BCC in Sprint Spectrum found that the proposal was not in conformance with the TLUP or the Community Plan and that the proposal was not compatible with existing and allowable land uses in the area. Non-conformance with the TLUP and the Community Plan included the proposed towers visual impact, which was evidenced by photos, testimony, and photos submitted by residents. The court found that a reasonable mind could vote to deny the proposal on those grounds.

In this case, the Board of County Commissioners has also cited non-conformance with both the Community Plan and the TLUP in its written findings and resolution, in addition to six other factors, as supporting the denial of LCG's rezoning request. The U.S. district court in Colorado has already found this to be sufficient. LCG would have to establish, to a court with jurisdiction, that there was no competent evidence in the record to support the BCC's decision, in order for a different conclusion to be reached on judicial review. The required judicial review of the record is not a task the FCC should undertake; indeed, the rezoning record is not before the FCC for review.

**THE FCC PLACES GREAT WEIGHT ON AND HAS HISTORICALLY DEFERRED TO
DETERMINATIONS OF LOCAL LAND USE AUTHORITIES**

Before the BCC hearings commenced, in response to LCG's threat of seeking preemption of Jefferson County in the event of an unfavorable decision, the Honorable Tom Tancredo, U.S. House of Representatives, and the Honorable Wayne Allard, United States

Senate, directed a letter to William Kennard, Chairman of the FCC. The letter inquired as to the continuing authority of local zoning authorities, such as the BCC, to make local zoning decisions relative to tower and antennae siting.

In response, Chairman Kennard directed letters dated March 3, 1999 to Representative Tancredo and Senator Allard. Chairman Kennard's letters state:

"As for the local permitting process, the FCC traditionally does not involve itself in local land use matters. The FCC has long held that zoning questions should be left to local zoning authorities who, the FCC believes, are best situated to resolve such questions."

Chairman Kennard's letter further states:

"The Commission . . . defers to the decision of the Jefferson County Commissioners on the remaining local land use matters."

In 1988, the FCC Mass Media Bureau stated in a published decision in a tower siting challenge in Jefferson County:

"[W]e place great weight on the determinations of local land use authorities, especially in matters of aesthetics and when the record demonstrates that environmental issues have been given full and fair consideration. Here, the Board (Jefferson County Commissioners) has found that the proposed construction complies with the County's telecommunications land use plan and that the potential concerns as to the impact on the environment raised by Genesee were considered and addressed by the Board." Roy Stewart, Chief of the Video Services Division of the Mass Media Bureau. *In re Application of Twenver, Inc. for modification of construction permit of Station KTVD(TV), Denver*. 3 FCC Rcd No. 20 at 5908. (1988) DA 88-1533

In the 1988 matter, the FCC approved Twenver's application for a tower on Mt. Morrison, but had earlier approved a Twenver application for locating on Squaw Mountain.

After receiving FCC approval for the Squaw site, Twenver then applied to change the location to Mount Pence, four miles east, and then again changed to Mt. Morrison. Mt. Morrison is in the C.A.R.E. area and only a few miles south of Lookout Mountain. Twenver is one of the five TV stations comprising Lake Cedar Group. The County Commissioners approved Twenver's application for a special use permit authorizing construction on June 22, 1988 after extensive public hearings. In the above proceeding, Genesee Foundation, a homeowner association member of C.A.R.E., challenged the Mt. Morrison permitting based upon a number of aesthetic related concerns. Twenver successfully argued to the FCC that the issues raised by Genesee fell within the province of the Jefferson County local land use authorities. Id. at 5907. Genesee had argued that Twenver's construction on the mountain would have an adverse environmental impact on the area. As set forth in the above quote, the FCC deferred to the County Commissioners' determination on these issues. A similar "hands off" approach and result is mandated here.

In 1993, many of the members of LCG told the FCC that Lookout Mountain was not a unique site. The issue before the FCC was a filing by Mr. Hummers on behalf of Boulder TV station, Channel 14, KTVJ. Channel 14 filed applications to deny the relicensing of all the major television broadcasters on Lookout Mountain because the other broadcasters would not allow Channel 14 on their towers. (V.4 Bates, 060658.) Mr. Hummers argued to the FCC that Lookout Mountain was a unique site after his client, also known as Mountain Contours, lost 2 hearings before the Jefferson County Commissioners seeking to rezone the Lookout Mountain land owned by them for a tower. (V.2 Appendix N CC83-1089 and Appendix CC90-592.) The owner of Channel 14 KTVJ purchased Twenver (Channel 20) in

Bankruptcy Court. (V.2 Appendices J and K; V.4 Bates, 060878.) This same Lookout Mountain land is now part of the Lake Cedar Group land.

Channel 9(KUSA) is also a member of Lake Cedar Group. On March 29, 1993, in response to the Channel 14 Application for denial of relicensing, KUSA told the FCC that broadcasters had no business involving the FCC in a local zoning matter on Lookout Mountain. “KTVJ has become obstructed by local zoning limitations, and it has unwisely decided to invoke FCC procedures to address what are really zoning concerns.” Footnote 1. Combined Communications Corporation Opposition to Petition to Deny, In re Application of Combined Communications Corporation For Renewal of License of Television Station KUSA-TV Denver, Colorado. File BRCT-921201LD (V.2, Appendix M) “Any decision regarding tower amortization, tower consolidation and allocations for future users on Lookout Mountain is exclusively that of the County Board, not of the Working Group (Lake Cedar Group).” Id. at page 6.

In summary, the FCC has previously decided formal applications in deference to Jefferson County land use authorities, the Chairman has advised the Colorado Congressional delegation that deference would occur in this specific case, and LCG members have historically argued in favor of such deference.

THE RATIONALE FOR AND EVIDENCE SUPPORTING THE REZONING DECISION

In its preliminary comments, C.A.R.E. has already summarized the rationale for the County Commissioners’ denial of the rezoning and cited the evidence supporting that rationale. Now that the record of the rezoning hearing has been transcribed, copied, and is publicly available, a more detailed summary can be provided. The record documents the

many local land use factors taken into account by the BCC which the FCC has no provision for evaluating as a “rezoning board.” For the FCC to pass judgment on the “adequacy” of the Jefferson County Commissioner’s decision would be for the FCC to usurp the role of the judicial branch of the Colorado state government.

I. Aesthetics

The Jefferson County Commissioners found that the LCG proposal:

“does not substantially conform with the Central Mountains Community Plan because it does not conform to the policy recommendations associated with visual resources, public services/facilities and mountain site design criteria.”

(Board of County Comm’ns, Jefferson County, Colorado, Res. No. CC99-427, August 3, 1999.) (V.2, Appendix O.)

Architect Andy Beck restored the Old Faithful Inn at Yellowstone and has devoted his entire professional career to designing buildings to fit with the environment of the National Park Service. The LCG tower and transmitter building architecture does not blend with the unique natural surroundings as required by Jefferson County’s Central Mountain Community Plan. Architect Beck visually demonstrated that the architecture of this transmitter building is “strip mall” and “budget motel” architecture by showing photographs documenting the similarity between the proposal, a Days Inn Motel, and a retail strip mall:

These photographs show the same materials and details that have been proposed for the transmitter building. These materials and this configuration will not blend in at all.

The whole objective of malls and hotels is to draw your attention, to make buildings visible. This is really the antithesis of what the Mountain Site Design Criteria call for. We already know that the tower itself will be taller than the tallest buildings in downtown Denver, but a close look at the drawings that we’ve seen will reveal that the building itself does not stand alone. The building coupled with its retaining walls will

create a façade that is almost as tall as this Jefferson County Courthouse and the bridge structure that's attached to it will also increase the visual effect of the size of that building. The square footage alone is roughly between a King Soopers and a Walmart, hardly fitting into the environment. (Tr. of Hr'g before the Jefferson County Board of County Comm'ns at V.3, 6201].

Mr. Beck also raised issues of future expansion, outbuildings for fuel tanks, garages, generators, storage, night lighting, satellite dishes, transmission devices and microwaves mounted all around the site, as well as the noise from the generators and coolers. These factors make the building highly visible, not in harmony with mountain architecture, and violate the Mountain Site Design Criteria of the Jefferson County Central Community Plan. (V.3 at 6200-6201.) (Resume, photos and exhibit provided to BCC, also attached behind 6201.)

Margot Zallen, Esq., chairwoman of Plan Jeffco, described the several-year history of the Front Range Mountain Backdrop (a five-county joint preservation effort) that is the visual anchor for millions of residents of Colorado's front range, as well as thousands of visitors. Plan Jeffco launched Jefferson County's award winning Open Space Program in 1972 and reflects the views of tens of thousands of County voters who overwhelmingly voted to preserve Jefferson County's scenic vistas. The foothills rising out of the plains are a defining image for Colorado and defines this community.

Ms. Zallen testified to Jefferson County's commitment, together with all the other counties of the extended Denver Metro area: Boulder, Douglas, El Paso, and Larimar Counties, to safeguard the majestic views of the Front Range Mountain Backdrop. This area is:

“where the plains rise to meet the mountains and where the ecosystems and land-use patterns of the plains and foothills merge. It is the most visible landmark that greets visitors from the east and is a symbol of Colorado’s natural beauty.” (V.3 at 6277.)

“Residents of the front range look towards the mountain backdrop for beauty and a sense of place. This is a resource the people hold precious and the County’s goal is to maintain the backdrop as a valuable asset for present and future generations.” (V.3 at 6278.)

Ms. Zallen emphasized the enormity of the impact of the proposed tower and huge building against this popular and unique natural landmark:

The sensitive development described in the mountain backdrop project is the essence of the County Commissioner approved Central Mountain Community Plan, which is to guide this zoning process. The proposed massive structures are clearly inconsistent with the plan’s direction to avoid locating structures so that they are the dominant silhouette on the ridge line. (V.3 at 6279).

The tower and massive building planned for the ridge top and face of Lookout Mountain would be by far the largest structures anywhere along the Mountain Backdrop. (Copy of Mountain Backdrop documents attached behind 6280).

Many other witnesses testified to the fact that the proposed 850 foot tower topped with massive starmount antennae and the 26,000 square-foot support building would constitute an aesthetic and visual blight to the community. The record is replete with testimony and exhibits corroborating the BCC’s finding of non-conformance with the Central Mountains Community Plan.

II. Alternative Sites

A zoning regulation and a Telecommunications Land Use Plan Standard were violated by the LCG application. The Commissioners found that this proposal . . .does not

meet minimum standards for telecommunications facilities contained in the Jefferson County Zoning Resolution. The proposal fails to meet these standards because it does not demonstrate: that no alternative existing site is available to accommodate the equipment at a reasonable cost or other business terms.

The BCC also found that the proposal does not substantially conform with the Telecommunications Land Use Plan (TLUP) because it does not conform to the policy recommendations associated with tower siting. Under the TLUP, the applicant must show that their proposed equipment cannot be accommodated and function as required without unreasonable modifications on any other existing facility. (V.2, Appendix P.) The County Planning staff found that Squaw Mountain, at 10,800 feet in Clear Creek County, can accommodate facilities such as these and is already zoned as a planned development zone district. (V.3 at 5946 and last page.) El Dorado is a site that currently accommodates an FM station as well as two-way radio. With some modifications, El Dorado could accommodate the site. (V.3 at 5946.)

- **Alternative Sites for Digital Television Are Available/ Lookout Not a Unique Site**

Past admissions of the Broadcasters, engineering reports, FCC records and cases document that despite Broadcasters' current claims that Lookout Mountain is the only possible site, alternative sites are available and feasible.

In 1988, Twenver, Channel 20, one of the LCG members, applied for a FCC license to locate its broadcasting facilities on Squaw Mountain, obviously taking the position that Squaw Mountain was a viable location for Channel 20. The FCC authorized Twenver to build its Channel 20 tower on Squaw Mountain. *In re Application of Twenver, Inc. for*

modification of construction permit of Station KTVD(TV), Denver. 3 FCC Rcd No. 20 at 5908. (1988) DA 88-1533 As a result, Twenver is estopped from now arguing that Squaw Mountain is not a viable alternative site for Channel 20. LCG member, Channel 6 stated to the FCC in 1993:

“It is well-established that FCC licensing proceedings are adjudications subject to the principle of collateral estoppel, or issue preclusion. (citing, RKO General, Inc., 82 F.C.C. 2d 292, 313(1980), see also, Gordon County Broadcasting Co. v. F.C.C. 446 F. 2d 1228, 1335 (D.C. Cir. 1971) (FCC invocation of collateral estoppel in licensing proceeding upheld)). Page 6 March 31, 1993 Opposition to Petition to Deny In re Application of Council for Public Television, Channel 6, Inc. For Renewal of License of Television Station KRMA-TV Denver, Colorado. File BRET-921127KS (pleading attached as Exhibit.) (V.4 Bates, 060812 - 060814.)

LCG’s arguments that Lookout Mountain is the sole location to provide broadcast television service to the Denver area should be a déjà vu experience to the FCC. Three separate Jefferson County rezoning hearings were lost between 1983 and 1990, involving the land now part of LCG’s application. CC83-1089 on 12/27/83, CC85-669 on 6/24/85, CC90-592 on 7/10/90. Mountain Contours appealed the last denial to District Court and lost; Mountain Contours v , Jefferson County Comm’rs, 90CV3042; appealed to the Colorado Court of Appeals, which affirmed the County Commissioners on Nov. 8, 1993, Mountain Contours v Jefferson County Comm’rs 92CA0591 and certiorari was denied by the Colorado Supreme Court. Mountain Contours v Jefferson County Comm’rs, 93SC337 on October 23, 1993. (See V2, Appendix N).

After losing these three efforts to rezone their land on Lookout Mountain, Channel 14 turned to the FCC and represented to the FCC that Lookout Mountain was the only possible site for Channel 14 (see the discussion of Channel 14's Application for Denial of

Relicensing on pages 19 and 20, V.4, 060662, 060674, 060677 above). Channel 14 was represented by Mr. Hummers, who now represents Lake Cedar Group. Channel 14, the Boulder station which then insisted that Lookout was the only possible site, is now broadcasting from a different site, Mt. Morrison, not Lookout.

When Channel 14 filed petitions to deny the relicensing of all the broadcasters on Lookout Mountain because they would not allow Channel 14 on any of their towers, the Lookout Mountain broadcasters argued as follows:

LCG member, Channel 4

“After 10 years of real and insurmountable zoning opposition, the Lookout Mt. site cannot be considered preferable to other technically suitable sites, such as Bighorn Mountain, where serious zoning opposition was merely anticipated.” p. 14 Opposition to Petition to Deny, In re Application of NBC Subsidiary (KCNC-TV), Inc. For Renewal of License of Television Station KCNC-TV, Denver, Colorado File No. BRCT-921127KM. (V.4, Bates 041136, page 14.)

“El Dorado Peak has been developed as a communications site since 1979 and KBCO(FM) has broadcast from El Dorado since 1984. The site is zoned for this special use and contains a 180 ft. multi-purpose communications tower that supports the antenna for KBCO(FM). The site could accommodate additional towers if necessary. The access road can be traversed with a flat bed truck and the site manager keeps the access road plowed in winter to ensure year-round access. See Attachment 6 (Declaration of David Layne) p. 15 (V.4, Bates 041136, 041137 and 041170).

“Its [Channel 14's] decade of dogged pursuit of Lookout Mt. to the exclusion of all other sites, defies sound business judgment. Page 15 (V.4., Bates 041137-041138).
[Emphasis added].

LCG member, Channel 6

“The Commission has twice before rejected Newsweb’s [Channel 14’s] invocation of the “unique site” rule, and nothing has changed to support Newsweb’s argument that it should be applied to the present case. In two rulings on the merits of Newsweb’s Section 73.653 argument, the Commission found that Lookout Mountain is not a “unique site,” (V.4, Bates 060814) 3/31/93-Channel 6 Opposition to Petition to Deny - BRET-921127KS Newsweb fails to demonstrate that Lookout Mountain is unique pg. 10,11.

The Broadcasters have, like chameleons, now “changed colors.” Now the Broadcasters state that Lookout Mountain is the only site suitable for a new DTV supertower and antennae. But, the prior inconsistent statements of the Broadcasters provide the acid test and belie their current assertions. The Broadcasters “. . . dogged pursuit of Lookout Mountain to the exclusion of all other sites defies sound business judgment,” as well as the truth of their past admissions to the contrary.

- The Browne Report and Rebuttal

LCG filed the Browne Report with the FCC and Jefferson County on March 23, 2000. The Browne Report purports to be a technical analysis comparing Lookout Mountain with certain selected alternative sites; however, even a cursory reading of the Browne Report reflects its almost total subjectivity. Notwithstanding, the Browne Report does not even conclude that Lookout is the only site available for DTV in Denver. Rather, the Browne Report merely concludes, with his opinion, based on his self-created criteria, that Lookout Mountain is the “best site.” Deferring to this opinion, for purposes of argument, does not mandate location of the supertower on Lookout. The Broadcasters have no legal entitlement or right to use of what their paid expert states is the “best” site. By analogy, if the “best” site

for broadcast antennae in the Washington D.C. area were atop the Washington Monument, it is doubtful local zoning authorities (or the FCC) would permit that site selection.

The contents of the Browne Report are thoroughly discussed and rebutted in the report, *An Alternative Analysis of DTV Tower Sites to Serve the Denver Area*, by Alfred Hislop, James Martin and Dr. Ronal Larson. This alternative analysis of sites is incorporated by reference into this filing.

Alternative sites such as El Dorado, Squaw Mountain and others clearly are available. Lookout Mountain rates lower than these locations when all the economic and community-related issues are considered. This is true even before factoring in the transaction costs to LCG of repeatedly seeking to rezone to construct a tower in the same location which has been rejected for a new tower by the BCC three times before with the denial affirmed by the Colorado Court of Appeals.

- **History Proves That the FCC Waives Requirements**

The “need” for a short spacing waiver should not preclude an alternative tower site. In order to bring digital TV to Denver from Squaw Mountain, only Channel 4 TV would need a short spacing waiver. Channels 6, 7, 9 and 20 have no need for such waivers and the FCC already granted Channel 20’s application for Squaw Mountain twelve years ago. The Commission is required to consider all aspects of the public interest. See Simmons v. FCC, 145 F.2d 578 (D.C.Cir.1944), WTCN Televison, Inc. et. al. FCC 68R-426. The FCC requires the broadcasters to submit the request for waiver. What efforts has Lake Cedar Group or Channel 4 taken to try to see if they could get a short spacing waiver for Channel 4 on Squaw Mountain? The records produced to C.A.R.E. by International Transcription Service,

the FCC's document contractor, reveal that the broadcasters have made no efforts. The Rocky Mountains and the Continental Divide would provide formidable protection from Channel 4's signal to the Grand Junction station. Apparently, until a broadcaster asks for a short spacing waiver, the FCC will not decide whether or not a waiver will be granted. This allows LCG to raise this "specter" as a seemingly insurmountable obstacle to alternative sites.

It is not extremely difficult to get short spacing waivers from the FCC. The FCC has already granted a number of short spacing waivers to broadcasters on Lookout Mountain and has already acknowledged the validity of terrain shielding. LCG's own expert in the hearings before Jefferson County, Jules Cohen, has first hand experience with obtaining such short spacing waivers from the FCC. In 1971, Jules Cohen petitioned the FCC to allow KOSI to move to Lookout Mountain and to waive Section 73.207 on behalf of KOSI FM because KOSI was shortspaced to Steamboat Springs and Vail. (V.4, Bates 000108-000161.) The FCC waived the shortspacing rules for KOSI and allowed KOSI to relocate to Lookout Mountain in 1971. The FCC also granted such waivers to K43DK television and Channel 57 TV. (V.2, Appendix L) (V.4, Bates 360021-360148; 360178-360181; 500081-560092; 570064-570117).

III. Other Violations of Zoning Standards

The BCC resolution denying the rezoning further found that the proposal:

“...does not meet minimum standards for telecommunications facilities contained in the Jefferson County Zoning Resolution. The proposal fails to meet these standards because it does not demonstrate:

- A. because the proposal does not contain sufficient setbacks, and
- B. because the proposal does not demonstrate that the NIER emission levels set forth in the Zoning Resolution are met.”

- **Insufficient Set Backs for Tower Fall**

The LCG proposal violates the County regulations on tower fall. Jefferson County’s Zoning Resolution sec.15, para. F.2.b requires:

All new structures must be set back from the property line sufficient to prevent all ice-fall materials and debris from tower failure or collapse from falling onto occupied dwellings other than those occupied by the tower owner. Where more than one tower is located on a site, the set back between such towers shall be sufficient to prevent multiple failures in the event one tower falls. (V.2, Appendix E.)

The LCG proposal for an 854 foot tall guyed tower with a starmount in a residential neighborhood is only 235 feet from the nearest dwelling not owned by LCG and 350 feet from the nearest neighbor that will not give LCG an option on their property. (See V.2, Appendix I-Votaw Affidavit) (V.3, Barrett 6110-6124).

LCG member, Channel 4, has lost 2 towers due to lateral falls in high winds on Lookout Mountain within a 110 feet of this very proposal. (V.4 040098, 040107, 040113). LCG’s own tower expert, Kline Tower, estimates 420 total tower collapses since 1959. Kline towers admitted in their Feb, 99 report that the set back needed for the worst case scenario of the tower failure was 110% of the tower height. Using the calculations of Kline Towers, the LCG tower would need to be set back 930 feet from the nearest structure not owned by LCG and is at least 695 feet short of meeting that requirement.

Bob Barrett, a registered professional engineer and a certified consulting engineer, demonstrated the different possible modes of failure of this tower using a scale model of the tower with guy wires placed on a scale map of the residential area near the tower. He demonstrated that in a lateral fall, the 1000 foot guy wire cables attached to the tower at 715 feet could whip out to 1800 feet. There are at least 21 other dwellings, 3 businesses, and high tension transmission lines within the 1800 feet that a worst case scenario tower fall would impact. (V.3 at 6110-6112). Mr. Barrett also presented a detailed report on tower falls around the country. Guyed towers “fail at an alarming rate compared to other structures. It is estimated that 1 in 10 guyed towers fail before their useful life is over.” (V.3, Barrett 6110-6124 and the 2 reports that follow.)

Jefferson County Planning staff concluded that the zoning regulations on set back were violated by the LCG proposal.

The tower does not meet the intent of the zoning resolution, which makes no distinction on fall radius, but rather concludes that a sufficient set back must be met. Sufficient in this case, must meet the worst case scenario” (pg 21 of Carl’s Zoning analysis).

This proposal fails to meet the minimum standard associated with tower failure or collapse identified within the Jefferson County zoning Resolution” (pg 23 of Carl’s Zoning analysis).

Jefferson County expressed particular concern with the danger of multiple tower collapse during construction of the LCG tower next to the existing guyed Channel 4 tower.

With regard to the inability of the proposal to meet the minimum standards of the zoning resolution, staff believes that the interlaced guyed wires ensure that a failure of either tower will most likely result in the failure of both towers. Most tower failures occur because of either climatic conditions such as ice

or wind or by human error. Human error is most likely to occur when working on a tower thus the most critical period will be during the erection or removal of a tower. These towers will be within 110 feet of each other and if failure occurred could result in a collapse onto nearby occupied structures which are not owned by the Lake Cedar Group LLC. (V.3 at 6294-6295). (summary of current staff comments by Richard Narracci of the Jefferson County Planning Dept.).

The LCG proposal fails to comply with the County regulations on required set backs. This, in and of itself, is more than an adequate rationale for denial of LCG's rezoning request.

- **NIER Emission Levels Set Forth in the Zoning Resolution Are Not Met**

Jefferson County found that the proposal does not demonstrate that the NIER emission levels set forth in the Zoning Resolution are met. Jefferson County zoning regulations require that these radiation levels be in compliance with the ANSI standard, just as the FCC does. Events before and after the FCC announcement that the site was "in compliance" document Jefferson County's finding.

The FCC relies on broadcasters to monitor their RF levels and report violations. This system of enforcement to keep Lookout Mountain within the FCC limits has repeatedly failed on Lookout Mountain because of the broadcasters' failure to monitor and accurately report. Agencies of the federal government have only measured at Lookout Mountain three times since broadcasting began here. Every time, these agencies found that areas of Lookout Mountain were over the limits.

None of the members of LCG told the FCC, Jefferson County, or the public that areas of Lookout Mountain were over the FCC limits. Lookout Mountain was in fact over the limits when LCG applied for FCC permits. CARE had filed a petition for the FCC to stop

licensing and relicensing the Lookout Mountain antennas and alleged that the FCC limits were exceeded. The FCC did not stop licensing and did not monitor. Not until a private citizen purchased a \$7000 NARDA meter and submitted the measurements showing the violations did the FCC take the citizens complaints of violations seriously. (Hislop submission of May 4, 1998). Months later, on October 29, 1998, FCC engineer, Dr. Robert Cleveland, visited Lookout Mountain to resolve the dispute between C.A.R.E. and LCG's expert as to whether parts of Lookout Mountain were over the radiation limits. Dr. Cleveland told C.A.R.E members, Stacy Olton, a reporter for the Denver Post, Russell Clark with the Jefferson County Planning Department and other eyewitnesses:

We don't have the funding or the resources to go out and routinely make these measurements. We don't have a lot of money...As far as routine monitoring, I can't guarantee that there is going to be any... If the County wanted to, they could....

Basically, we don't have the resources to come out and do routine monitoring. [Emphasis added.]

This conversation took place in a public area on Cedar Lake Road, near the site of the proposed supertower. The reporter for the Denver Post, Stacy Olton, asked if it was safe for her to be there since she was five months pregnant. Dr. Cleveland replied:

If we are over the limit here, you shouldn't be here longer than 30 minutes....according to the standards.

Measurements taken that day confirmed that not only was that very place over the FCC limits, but so were four other publicly accessible areas on Lookout Mountain.

When Jefferson County learned first hand from the FCC that the FCC could not afford to perform any type of routine monitoring on the radiation in this residential area, Jefferson

County took the suggested action of Dr. Cleveland and the responsible action to protect the health, safety and welfare of its residents by purchasing an RF meter. Jefferson County began taking RF measurements.

On December 16, 1998, Dr. Cleveland and Jerry Ulcek of the FCC came back to Lookout expecting to find that Lookout was within the RF limits after broadcasters had told the FCC that they had followed the recommendations set forth by the FCC in the November 12, 1998 report. As the measurements began, it became clear that, once again, Lookout Mountain was over the radiation limits. The FCC representatives found that only by requiring further fence extensions, fencing the public out of open space and road rights of way, and power reductions of broadcasting FM stations were they able to declare Lookout Mountain in compliance at the end of the testing. (FCC report of 1/4/99 at 3, 4).

The FCC recommended November 12, 1998 that:

“There is a need for overall coordination between all the various licensees at the site, including TV and FM broadcast and non-broadcast licensees concerning issues of mutual interest such as RF exposure. At many other antenna sites around the country, site tower owners’ associations have been formed to coordinate such issues, and such an association is needed for Lookout Mountain.”

Almost a year and one half have passed since the FCC recommendation. The only action the Lookout Mountain licensee group has taken is to choose a name.

Almost half a year after the FCC declared that Lookout Mountain was “in compliance,” other antennae were added, and Jefferson County discovered that the RF levels had again gone up. (V.2, Appendix D and V.4 Narracci 6295.) Using the expertise of an independent RF engineer, Jefferson County projected that the RF contribution of the

proposed supertower when added to the existing RF levels would exceed County standards. (V.3 at 6295). This finding was not meaningfully rebutted by LCG, nor should it have come as a surprise to anyone involved in RF measurements on Lookout.

When the FCC came to Lookout, C.A.R.E. and Jefferson County witnessed how easily the broadcasters could instantly turn their power levels up or down at the FCC's request. Power levels seem to be similar to the speeds cars are driven, able to be increased and decreased rapidly. This fact, coupled with the addition of more antennas into an environment already at the limit of RF levels, may have led to amounts of radiation recorded by the Jefferson County during the measurements, both before the supertower hearings ended and since. These measurements indicate that areas of residential Lookout Mountain were already at or above the FCC and ANSI safety standards. (V.2, Appendix D).

By analogy, if a highway patrolman conducted speed measurements in December of 1998, and then left that area unpatrolled for a year and one half, one would not be surprised to find that speed limits were being violated. This is particularly true in a place where the record shows that the violators never received any punishment for either failing to accurately self report or exceeding the limits.

FCC National Environmental Protection Act rules require that when an application is filed, an evaluation of the radiation contributions of all RF emitters is required. The applicant must certify that the site is now in compliance, or will be in compliance, once the new antenna is operational. The FCC is not supposed to act on an application until RF concerns are resolved. (Letter from H. John Morgan FCC Mass Media to members of LCG

of 10/23/98) V.4 041326-8. The FCC relies on the broadcasters to self-report infractions of the RF limits to prevent the public from being exposed to excess RF.

The first recorded instance of the FCC actually participating in measuring Lookout Mountain occurred 14 years ago and should have put the broadcasters on notice that calculations of RF could be very misleading due to the complexity of the terrain and number of antennae. On September 22, 1986, the EPA and the FCC conducted extensive measurements on Lookout Mountain and documented areas over ANSI standards in a public area. The 12-page report was published five months later as “An Investigation of Radiofrequency Radiation Levels on Lookout Mountain, Jefferson County, Co.” Electromagnetics Branch, U.S. Environmental Protection Agency, Las Vegas, NV 89114, February 1987. (V.2 Appendix F). Findings included:

Publicly accessible areas near KYGO had electromagnetic radiation as high as 10,000 microwatts per centimeter squared. (Id. at 11)

“The KYGO tower is located in a complex of buildings where some people live throughout the year and where seasonal, residential workshops are held to teach square dancing.” (Id. at 7).

“...in a mountainous area, one cannot rely on such a rapid reduction in power density with distance because the measurement locations may be moving up into the main-beam of radiation. Additional data collected near KYGO actually show an increasing power density with distance from the antenna as the measurement location moves closer to the main beam of radiation.” (Id. at 10).

“...it is interesting to note the effect of different elevations (in mountainous areas) on the power densities...” Usually, tripling the distance from an antenna...would reduce the power density by a factor of 9. In this case however, the effect of greater

distance was overcome by moving higher into the main beam of radiation....These data illustrate the need to consider the relative elevations of areas surrounding a station in the overall RF exposure evaluation.” (Id. at 8).

“...this area presented a complex electromagnetic environment...” (Id. at 2).

Radar, FM, TV, two-way radio and other types of antenna are present. But, “broadcasters dominate the spectrum on Lookout Mountain” (Id. at 5, see also, Tables 1 and 2.)

“The number of stations and their close proximity to one another and to residential areas make the Lookout Mountain antenna farms unusual.” (Id. at 1).

(“An Investigation of Radiofrequency Radiation Levels on Lookout Mountain, Jefferson County, Co.” Electromagnetics Branch, U.S. Environmental Protection Agency, Las Vegas, NV 89114, February 1987.)

Prior to these measurements, the broadcasters were supposed to be self-reporting the RF levels. C.A.R.E. has invested thousands of dollars in obtaining copies of the FCC records regarding most of the broadcasters on Lookout Mountain. Combing through these thousands of pages of documents, C.A.R.E. found no broadcaster to have reported to the FCC that areas of Lookout were over the limits before the EPA/FCC measurements in 1987. These EPA measurements documented that the RF limits were exceeded. Clearly, self-reporting by broadcasters did not work to keep radiation limits within federal limits in 1987, but C.A.R.E. found no indication that any broadcaster was punished for either failing to report the overage or causing the overage.

The EPA stopped working, researching, and measuring RF radiation, and the EPA program died six years ago (V.3, Mattson 6184). Broadcasters continued to “self-report” the RF situation on Lookout in their applications. C.A.R.E. found only one broadcaster

report that told the FCC that part of Lookout Mountain was over the RF limits. On October 21, 1997, Robert Weller of Hammett & Edison, RF engineer for Lake Cedar Group (LCG), measured RF exposure levels on Lookout Mountain. (V.4 060900-060901) He found “ground level areas that exceed the public limits” in the vicinity of the Channel 6 tower, and reported this to the FCC on October 28, 1997. (V.4 document 060900) Strangely, there is no evidence that the FCC took any action to bring this public area by the Jefferson County Boetcher Mansion and Nature Center, near the Channel 6 tower, into compliance with the radiation limits until a year after this broadcaster’s self-report. This was months after C.A.R.E. alerted the FCC that public areas on Lookout Mountain were over the FCC limits.

Numerous broadcasters continued submitting applications, self-reporting that RF levels were not out of compliance, and the FCC continued granting applications that increased the radiation on Lookout Mountain and beyond. (V.2, Appendix Q.) These cumulative radiation increases are depicted in the attached chart. The chart was created by reviewing thousands of pages of FCC records on the Lookout Mountain broadcasters. These color charts are the last two documents in Volume 2.

This FCC limited system of “protecting” the life and property of citizens has failed in practice because it relies on broadcasters like LCG who have not accurately reported that the RF levels were over the federal limits. The very nature of the FCC as the required promoter of the entities producing this radiation without independent oversight by a separate agency limits the effectiveness of FCC enforcement of RF hazards.

Every other hazard that we are used to dealing with...has an independent oversight of the promotional agency. What we have with the FCC is much like what we had with the Atomic

Energy Commission prior to 1975, when the Congress split up the promotional and regulatory activities of the Atomic Energy Commission. (V.3 at 6177) (testimony of Dr. Roger Mattson, expert in radiation standards, Director of EPA's non-ionizing radiation standards activities in 1980 and 1981).

Large numbers of antennas were permitted by the FCC for increasing amounts of radiation during the last three years, with no environmental impact despite documentation that Lookout was over the RF limit and suffering from the cumulative effects of all these FCC antenna permits.

IV. Incompatibility

The proposed continuation, expansion, and proliferation of telecommunication uses on Lookout Mountain is, as determined by the Board of County Commissioners, incompatible with the surrounding neighborhood and its residential land uses. Evidence demonstrating the incompatibility of telecommunication land uses and residential land uses included significant testimony of the adverse affects on residential property, which would be caused by construction of the proposed behemoth telecommunication facilities.

The BCC properly considered evidence relating to "property values" in their determination of compatibility of the Lake Cedar Group rezoning request with existing land uses in the neighborhood. The Colorado Constitution, Colorado state statutes, Jefferson County Master Planning documents, and long-standing Colorado case law recognize the propriety of taking the effect on property values into consideration as one of the issues of compatibility.

Jefferson County is a political subdivision of the state. As such, counties in Colorado have only those powers specifically delegated to them by the state. Among the powers

delegated to counties, pursuant to specific state statutes, are the power and duty to make Master Plans, enact and enforce zoning regulations, and enact and enforce subdivision regulations. Colorado Revised Statutes 30-28-115 specifically deals with the enactment of zoning regulations. It states:

Such regulations shall be designed and enacted for the purpose of promoting the health, safety, morals, convenience, order, prosperity, or welfare of the present and future inhabitants of the state, including lessening the congestion on streets or roads or reducing the waste of excessive amounts of roads, promoting energy conservation, securing safety from fire, flood waters, and other dangers, providing adequate light and air, classifying land uses and distributing land development and utilization, protecting the tax base, securing economy and governmental expenditures, fostering the state's agricultural and other industries, and promoting both urban and nonurban development. [Emphasis added.]

Colorado Revised Statutes 30-28-116 authorizes the County Commissioners to amend the shape, boundaries, or area of any zoning district (i.e., grant rezonings). The same underlying purposes of adopting regulations in the first instance governs the amendment to those regulations, including promoting the amendment to those regulations, to promote “prosperity,” and “welfare,” and “protecting the tax base.”

The Jefferson County Telecommunications Land Use Plan makes certain findings relative to property values. Those findings have determined that “towers adversely affect property values,” and that the negative impact on property values is caused by various factors including “visual impact,” “interference,” and “concern over possible health effects.” The fact that the TLUP explicitly recognizes the impact of telecommunication facilities on property values suggests that evidence concerning impacts on property values is certainly

relevant to determination on whether to permit a particular telecommunication facility. In Nopro Co. v. Town of Cherry Hills Village, 180 Co.o. 217, 504 P.2d 344 (1972), the Colorado Supreme Court considered whether a land owner in Cherry Hills Village was entitled to have its property rezoned to increase the permitted density of development from one unit per 2.5 acres to one unit per 1.3 acres. Cherry Hills Village denied the rezoning application and the district court reversed that denial. The Colorado Supreme Court reversed the district court and reinstated the original zoning decision of Cherry Hills Village. In its decision, the Colorado Supreme Court stated:

“Additionally, the owners of the adjoining R-1 zoned properties protested against the proposed zoning change by Nopro. Maintenance of stability in zoning and resulting conservation of property values based upon existing zoning regulations are prime considerations in denying applications for zoning changes.” [Emphasis added.]

In Rodo Land, Inc. v. Board of County Comm’rs, Boulder County, 517 P.2d 873 (Colo. App. 1974), the Court was considering a request for rezoning from rural residential to multi-family suburban with a simultaneous site plan for approval of a mobile home park. In affirming the denial of the rezoning, the Court noted:

“The Board [of County Commissioners] must weigh the alleged need for rezoning against the desirability of maintaining “stability in zoning and resulting conservation of property values based upon existing zoning regulations.”

Consideration of the stability of zoning and property values within the rezoning process is placed in perspective in Rathkopf’s The Law of Zoning and Planning, at Section 26 A.04 [2] {a} which states:

“in light of public policy favoring zoning stability and the maintenance of property expectation as to the maintenance of current zoning is legally recognized as deserving of some consideration. In this sense, it is appropriate to view such an expectation not as a legal right, but as one legally cognizable interest among many, to be considered and weighed in the balance.”

Evidence concerning a decline in property values or instability of property values resulting from a rezoning is not the only factor to be considered in approving or denying a rezoning request; but, it is one of the factors which requires consideration. Evidence addressing the issue is clearly relevant.

Sworn testimony in the LCG rezoning hearings from certified appraisers, real estate experts, and an economist documented the tremendous negative impact on property values from the proposed supertower. Jefferson County would lose millions of dollars a year in real estate taxes.

Ron Selstad is a registered appraiser and the owner of Metro Brokers, a brokerage firm which lists 200-400 residential properties a year. Mr. Selstad testified that this proposal would cause a 10% decline in property values to thousands of homes. The proposed tower would lead to a loss in property value of millions of dollars. The concerns with this proposal of visual blight, electronic interference and health would cause property within a mile and one half to lose \$25 million of its total value (10 %) of 240 million dollars if this supertower were approved. (V.3 at 6126-30).

There are 7000 to 7500 homes within three and one-half miles of the proposed supertower worth \$1.35 billion that pay annual property taxes of \$14 to 15 million. The value of property within one and one half miles of the tower is \$240-265 million and the

annual property tax payments are three million dollars. The properties that are one and one-half to three and one-half miles from proposed tower are worth \$1.1 billion dollars with yearly property tax payments of 11 to 12 million dollars. The County School District gets 60% and the County gets 30% of the property tax revenue. (V.3 at 6128).

On June 28, 1999, Ron Selstad filed a supplemental affidavit that further documented this loss in property value. These statistics of actual home sales show that since the tower proposal has been a matter of public concern, sales have dropped dramatically in both Lookout Mountain and Genesee/Riva Chase areas, in sharp contrast to the ongoing boom the rest of the Denver market has experienced. Sales in these areas are taking longer and are only about 50% of the volume of what would be expected but for the tower proposal. Buyers are not buying and sellers are "holding their breath," waiting for the decision on the tower. Area housing demand is up and strong, but sales of properties in the affected areas are down significantly. (V.3, attached immediately behind page 6129.)

Dr. Roger Hutchinson who is trained in engineering and has a Ph.D. in Economics testified that his 200 hours of research led him to conclude that if the tower rezoning were granted, in the first ten years, Jefferson County would lose \$70.3 million in taxes. This study only includes the loss to single family homes and does not include duplexes, offices, or County facilities. (V.3 at 6130-40).

The 1280 homes within one and one-half miles of the proposed tower and the 11,629 homes within 5 miles generate \$28 million a year in property taxes. As Mr. Selstad stated, the annual real estate taxes paid by the owners closest to the towers is \$3 million. Dr. Hutchinson projects that the average loss in equity value to a home in the area closest to the

proposal would be \$62,000 should the rezoning be allowed. The average loss to the homes one and one-half to five miles from the proposal would be \$ 54,300.

Basil Katsaros, real estate appraiser, echoed these assessments. (V.3 at 6140-43). Detrimental imposed conditions such as location near a supertower affect property values. The proposed tower would impose a stigma on many properties. Stigma causes market resistance. This leads to discounted value and extended marketing time. Appraisers are required to comment on the condition or status of the property, if known. Should the buying public perceive a health problem, real or not, there will be an impact on value.

In addition to the evidence on property values supporting the BCC's finding of incompatibility, it is virtually a zoning/land use oxymoron that residential and industrial uses of property, such as telecommunication uses, are incompatible. Telecommunication towers and antennae are eyesores. Towers fall and setbacks for towers are more difficult to establish and maintain in residential areas. The required vigilance to assure compliance with RF limits is more acute, and it is more difficult to deal with violations of those limits, in populated, residential areas. The testimony and exhibits supporting the BCC's finding of incompatibility ran the gamut of these concerns.

V. Interference

LCG largely ignored the residential interference policies of the Jefferson County Telecommunications Land Use Plan (TLUP).

The local zoning order challenged here concluded, among other findings, that the LCG proposal "does not substantially conform with the TLUP because it does not conform to the policy recommendations associated with tower siting." Among these policy