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ROBERT J. ABBOTT
414 JACKSON AVENUE
CAPE CANAVERAL, FL.
32920

28 June, 1995

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FCC MAIL ROOM

OFFICE OF THE SECRETARY
William F. Canton, Acting Secretary
FEDERAL COMMUNICATIONS COMMISSION
1919 M Street, N.W.
Washington, D.C. 20554

Re: COMMENT TO NOTICE OF PROPOSED RULEMAKING, 27 April,
1995, FCC 95-180, IB Docket 95-59, DA 91-577, 45-DSS-MISC- 93.
Preemption of Local Zoning or Other Regulation of Receive Only Satellite
Earth Stations.

PLEASE REPLACE THE LETTER REGARDING
THE PROPOSED RULEMAKING DATE 15 JUNE
WITH THE FOLLOWING 28 JUNE LETTER.
THERE ARE 9 COPIES AND ONE ORIGINAL

Thank you
Robert A. Lutz

✓ ORIGINAL

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The Undersigned respectfully submits the following comments in support
of the above Notice.

1. The modifications to 47 CFR 25.104 in paragraphs (a) through (f)
present a great improvement over the 1986 Order. However, a weakness still
exists, as this revision does not dissuade litigation or encourage competition.
The Commission should consider a punitive enforcement mechanism of punitive
fines to dissuade local governments from ignoring the 1995 Order, as has
occurred with the 1986 order. A noncompliance penalty is unspecified in the
proposed 1995 Order .

2. I was a City Councilman-elect for the City of Cape Canaveral in
1992 and 1993 and I can speak from a perspective of sitting beside my "city
officials" as an elected official, and standing before them as a private citizen;

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because they are insured. they demonstrate no fear in ignoring this Order.

3. As in my case, and others before me, when fines and penalties are assessed against citizens for violations of local Satellite Antenna Ordinances, the accused citizen (herein referred to as "the victims") of my City must spend \$1000 for legal representation before a City Board and an additional \$3000 to \$5000 to file a Petition for Writ of Certiorari in the Circuit Court. If one does not know enough "information" and record it in the Code Enforcement or Land Use Board minutes, the official record will be weak and the case will be lost. I am an electrical engineer with NASA, I do understand the technology requirements, many victims do not and the courts are unwilling to appreciate the requirements.

4. In the Circuit Courts of this County (Brevard) it is *presumed* that local governments are representatives of their people and therefore, even when the law appears favorable to the victim, the Courts will rule in favor of the City. The burden of proof and attorney fees and costs still rest upon the shoulders of the victim. In the rare event the victim does prevail, there is no entitlement to recover their legal fees. **The City depends upon these financial burdens as their enforcement tool.** When I presented the 1986 Preemption Order and case law to my Board, they advised me "If you disagree with our decision, go into the federal court." So I did. Their insurance company advised them to settle, (see exhibit) they ignored the advise, hid behind the city's \$100,000 insurance policy and the insurer (Florida League of Cities) paid all their legal fees, defending these city officials in federal court, and they won the lawsuit.

5. With the City of Cape Canaveral facing a Civil Rights lawsuit under 42 U.S.C. 1983 and 1988, with no usable rear yard on my lot and with the physical impossibility of placing the 12 foot antenna in an 18 foot wide yard with a 15 foot side setback prohibition, the City's Building Official, James E. Morgan testified, at trial, that the "side" yard, as depicted on the city's official survey (1981) with the words "15 foot side setback" scribed within the side yard area was now declared by Morgan (1993), to be rear yard. Not coincidentally, the city antenna ordinance **does not require rear yard setback compliance**.

6. U.S. District Judge, G. Kendall Sharp asked one question during the trial; ("What's a Ku Band?"), accepted city building official Morgan's opinions, and the opinions of the City's antenna "expert", who testified that the antenna **could** "operate while obstructed up to 50%", and testified as to the "wide" range of reception while it was located in the setbacks of the side yard; all hypothetical testimony, because it is not a lawful installation at this location. Additionally, five satellites (from 122W through 137W degrees) are obstructed from a line of sight due to an 11 foot duplex to the west of this location and a maximum antenna height restriction of 7 feet (see photos), and all the INTELSAT satellites are blocked to the east.

7. These are the absurd realities of what "litigation" means to those of us who have lost in the court system against a local government. The courts do not appear to have an interest in clarifying the technical rationale on this satellite technology or the **unspecified intent and objectives** of these Orders.

8. To this day, I am at a total loss to understand how a sitting federal

judge can accept the City's characterization of a "rear" and a "side" yard.

9. When I challenged the absence of the health safety and aesthetic objectives in the Cape Canaveral ordinance, the City found an earlier version that did have the verbiage but without defining intent or motive, and the District Court still accepted it. The City has no historical districts or planned communities regarding "aesthetics". The City used "hurricanes" for their "health & safety" motive and retained Dr. Ron Cook, a structural engineer commissioned by the State of Florida to assess the damage from Hurricane Andrew and recommend improvements to building codes to minimize future damage. However, the City did not use his testimony because he opined:

"from a structural perspective I could design you an adequate support system for a satellite dish on top of your building, on the side of your building. But in fact, from a structural perspective, it can be done, there is no reason to preclude that from a structural perspective." (see exhibit p 49-50)

10. The Commission should consider the local government's interest in protecting their cable franchise commissions over a citizens "right to receive" or a free and open competition in satellite programming. (Cape Canaveral receives \$120,000/yr in franchise fees.)

11. Additionally, apartment owners, as a large class of citizens who are unable to afford a single family home, (or an attorney) may desire to utilize this technology. There is a purpose of viewing television but also the capability to interface the satellite dish to the computer, such as the Direct PC application.

12. The Commission should consider a **complaint form** specifying

WHO, WHAT, HOW, WHEN, WHY etc., in that the general public need not be attorneys, zoning, land use or communication experts to assert their rights and again, it should consider a punitive tool to defer enforcement costs.

13. Finally, The Commission should consider some type of monetary consideration for those of us who sought the Commissions intervention (1600B3) but were advised by the Commission, to "exhaust" our local remedies, and according to the courts, are now forever "estopped" from our right to use this technology. I spent twice what my house was worth on legal fees and still lost.

14. In an imperfect world, the citizens under these local governments are defending their right to use this technology against the resources of the municipalities and their insurance companies. This is the reality of the situation.

Enclosed are my exhibits. Thank you for this opportunity to comment.

Sincerely,



Robert J. Abbott

Exhibits:

- 1) Photo's, 1984 and 1993 Satellite Antenna installations
- 2) Florida League of Cities Settlement Opinion
- 3) Testimony of James E. Morgan, (p267-281)
- 4) City Survey: 414 Jackson : Exhibit #33
- 5) Deposition of Dr. Ron Clark (p49-50)
- 6) 11th Circuit Court of Appeals: # 94-2135/D.C.#92-1113
- 7) Affidavit of attorney fees.

*This revised letter replaces the 15 June, 1995 comment letter.