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

In the Matter of	)	
	)	IB Docket No. 95-59
Preemption of Local Zoning	)	DA 91-577
Regulation of Satellite	)	45-DSS-MISC-93
Earth Stations	)	

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COMMENTS OF THE SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION OF AMERICA

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SUMMARY

SBCA strongly supports the Commission's NPRM as an important step in strengthening the 1986 preemption rule and correcting the unanticipated procedural problems raised by the Carino case. The NPRM shows that the Commission has recognized the continuing egregious problems that satellite owners and potential satellite owners in many areas have faced -- problems such as those faced by the residents of Prince Georges County, Maryland, where the county imposes a burdensome permitting process on prospective satellite antenna owners. Attached to these comments is the declaration of one such consumer, Art Hutchins; he and his satellite dealer spent more than 10 months and $23,000 in their efforts to comply with Prince Georges County's permitting requirements to install a $5,000 satellite dish. Such blatant displays of bad faith in complying with the Commission's 1986 preemption rule are strong proof that further Commission action -- such as that now proposed -- is absolutely necessary.

For these reasons, SBCA applauds the Commission's proposal to clarify and strengthen its 1986 preemption policy. Indeed, such action is not only commendable, it is absolutely essential. Unless the Commission proceeds apace, the direct-to-home satellite industry will, in many

communities, never have the opportunity to develop as a competitive provider of video services.

In these Comments, SBCA both demonstrates the need to strengthen the 1986 policy and suggests some clarifications and modifications of the proposed rule. SBCA's proposed changes are designed to make the final rule as clear and as easy to apply as possible, thereby minimizing the number of individual disputes that the Commission will need to resolve. They also will enable the new rule to balance fairly the legitimate objectives of local authorities and the important federally recognized rights of the public to receive communication signals, including their receipt over satellite antennas.

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COMMENTS OF THE SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION OF AMERICA

Pursuant to the Notice of Propose Rulemaking ("NPRM") released by the Commission on May 15, 1995, in the above-captioned proceeding, the Satellite Broadcasting and Communications Association of America ("SBCA") hereby submits these Comments.

I. INTRODUCTION

A. Interests Represented by SBCA

SBCA is a national trade association with approximately 110 corporate member companies representing all segments of the direct-to-home ("DTH")[1] satellite television industry. These segments are:

* Ku-Band service providers (e.g., DIRECTV, USSB, PRIMESTAR, EchoStar and AlphaStar) that deliver packages of program services to subscribers on a national basis;

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1 SBCA uses the term "DTH" satellite service to refer collectively to C-Band and Ku-Band television broadcasting from satellites directly to the homes of consumers (i.e., dishes of all sizes). C-Band uses satellite dishes six to eight feet in diameter. Medium powered Ku-Band uses one meter dishes and high power Ku-Band uses 18-inch dishes.

* manufacturers of satellite reception equipment (e.g., Zenith, Toshiba, Chaparral, California Amplifier, and General Instrument);

* satellite programmers (e.g., Home Box Office, Turner (CNN, TNT, and WTBS) and ESPN) that offer news, entertainment, movies and sports to DTH subscribers;

* satellite systems operators (e.g., GE Americom and AT&T) that manufacture and launch satellites and lease transponder space to programmers;

* satellite carriers (e.g., Superstar Satellite Entertainment, Liberty Media, Eastern Microwave and Primetime 24) that uplink broadcast signals for retransmission to DTH satellite dish subscribers; and

* local, regional and national distributors, program packagers and more than 2,000 retailers of satellite hardware and program services (e.g., Consumer Satellite Services, Warren Supply and NRTC) that deal directly with consumers at "point of sale."

Together, therefore, SBCA's members manufacture and sell the equipment, as well as create, package, deliver, and sell the program services that comprise the DTH service. To the extent local zoning ordinances or regulations prevent or frustrate consumers' ability to install satellite antennas to receive these services, all members of SBCA -- and the industry -- are hurt. Ultimately, of course, the public is also harmed.

B. The Strong Federal Interest in Satellite Reception

The overarching principle that must guide the Commission in this rulemaking is the well-established federal interest in facilitating the distribution of satellite services. Indeed, Section 1 of Title 1 of the Communications Act[2] established the Commission precisely for the purpose of making communications services available, so far as possible, to everyone in the United States. When coupled with Title III of the Act, the purpose of which is to establish a unified communications system, it is clear that Congress intended the Commission to facilitate the distribution of satellite services.[3] After all, satellite services expand both the reach of communications services and the diversity of programming services available, thereby making these services available "so far as possible."[4]

These general mandates are reinforced and augmented by recent amendments to the Communications Act that create specific rights to receive satellite signals.[5] As a direct

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2 47 U.S.C. § 151.

3 Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, 51 Fed. Reg. 5519, ¶ 23 (Feb. 14, 1986) ("Preemption Order").

4 47 U.S.C. § 151.

5 47 U.S.C. § 605. Section 605 provides:

> The provisions of subsection (a) of this section shall not apply to the interception

(Footnote 5 Continued)

consequence, the Commission has appropriately recognized that, collectively, "[t]hese statutory provisions establish a federal interest in assuring that the right to construct and use antennas to receive satellite delivered signals is not unreasonably restricted by local regulation."[6] The Commission has further recognized a strong federal interest in competition itself, so that consumers will have a broader range of programming choices.[7]

(Footnote 5 Continued)

> or receipt by any individual, or the assisting (including the manufacture or sale) of such interception or receipt, of any satellite cable programming for private viewing if--
>
> (1) the programming involved is not encrypted; and
>
> (2)(A) a marketing system is not established under which--
>
> (i) an agent or agents have been lawfully designated for the purpose of authorizing private viewing by individuals, and
>
> (ii) such authorization is available to the individual involved from the appropriate agent or agents; or
>
> (B) a marketing system described in subparagraph (A) is established and the individuals receiving such programming has [sic] obtained authorization for private viewing under that system.

6 Preemption Order at ¶ 23.

7 NPRM at ¶ 3; Preemption Order at ¶ 26.

C. The Importance of DTH Satellite as a Strong Competitor to Cable

Even beyond this general interest in maximizing the programming choices available to consumers, Congress and the Commission have recently expressed a strong desire to facilitate competition to cable services. Both Congress and the Commission have explicitly singled out DTH satellite services as a potentially strong competitor to cable. In enacting the Cable Television Consumer Protection and Competition Act of 1992, Congress explicitly acknowledged the importance of satellite-delivered television as a competitive counter to cable services.

The Commission, like the Congress, has also explicitly recognized satellite's competitive potential. For example, in a proceeding to amend satellite orbital spacing regulations, the Commission could not be clearer, stating: "[W]e recognize the public interest potential of satellite delivered video programming services as a competitive alternative to cable."[8]

In another context -- specifically, the annual report on competition in the cable television industry -- the Commission has chronicled the advances made by DTH services since 1990, when the Commission found that such

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8 See Amendment of C-Band Satellite Orbital Spacing Policies, 7 FCC Rcd 456, 460 (1992).

services had the potential to compete with cable television operators.[9]

In its 1994 Cable Report, the Commission noted:

> Congress specifically articulated as a central and critical goal of the [1992 Act] a "[p]reference for competition" as opposed to rate regulation of cable systems . . . . [T]he . . . Act's regulatory scheme serves as a "transitional mechanism until competition develops and consumers have adequate multichannel video programming alternatives." Moreover, promotion of the emergence of effective competition through the entry of alternative distribution technologies is a critical element of the regulatory framework mandated by Congress.[10]

The Commission's findings in this regard have been supported by DTH market developments for both C-Band and Ku-Band services. C-Band service officially began in 1980. Today, roughly 4.5 million C-Band dishes are in use nationwide,[11] although the competition between C-Band and Ku-Band systems has played a part in slowing the growth of the C-Band industry.

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9 See Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, 75 Rad. Reg. 2d (P & F) (1994) 1415, 1430-34 ("1994 Cable Report").

10 Id. at 1419 (emphasis supplied) (footnotes omitted).

11 SkyTRENDS, DTH Annual Report, April 1995, at 4 ("SkyTRENDS"). Of these 4.5 million, roughly half subscribe to C-Band services. Id. at 2. Most of the other C-Band dish-owners rely on unscrambled signals for their video offerings.

Medium-power Ku-Band services were first offered in 1991, while high power Ku-Band services entered the market in 1994. Ku-Band services have demonstrated remarkable growth since the release of the 1994 Cable Report. On June 9, 1995, DIRECTV successfully launched its third satellite.[12] The three operating Ku-Band services, DIRECTV, USSB and PRIMESTAR, together offer over 240 channels, with DIRECTV offering over 150 channels, USSB offering 20 channels and PRIMESTAR offering over 70 channels. The availability of home equipment is expected to continue to grow through 1995, as Sony begins offering its own home equipment packages for receipt of DIRECTV and USSB service in competition with Thomson RCA, Inc.[13] The Sony system, already available on a limited basis, will ultimately be distributed through more than 4,000 retail outlets in the United States.[14] In addition, Thomson RCA, which produced close to 600,000 sets of home equipment for the DIRECTV and USSB services in 1994, expects to expand production by opening a third assembly line to meet 1995 manufacturing

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12 See DIRECTV Successfully Launches Third Direct Broadcast Satellite, PR Newswire, June 9, 1995. Although DIRECTV operates three satellites, DBS-1, 2, and 3, USSB owns 5 transponders on the first satellite and the remainder are owned by DIRECTV. USSB transmits approximately 20 channels of programming from DBS-1.

13 See Sony DSS Effort Emphasizes Multiroom Capabilities, Consumer Electronics, May 15, 1995, at 15.

14 Id.

goals of over 1.2 million units.[15] In the first quarter of calendar 1995, roughly 200,000 units of the Thomson RCA high power Ku-Band equipment package were sold. Through June 1995, Ku-Band subscriptions totalled almost 1.2 million. (DIRECTV and USSB had approximately 700,000 subscriptions and PRIMESTAR had approximately 500,000 subscriptions.)[16]

It is noteworthy, in projecting continued growth, that DIRECTV and USSB have not been limited to non-cabled areas of the country. To the contrary, roughly half of current DIRECTV and USSB subscribers reside in locations served by a cable television operator. Approximately 15 percent of PRIMESTAR subscribers are passed by cable.[17]

As further evidence of the competitive force that the DTH industry brings to bear on cable, the Commission need look only to industry statistics and growth projections regarding the number of DTH subscribers. For example, in only the first quarter of 1995, high power Ku-Band services expanded their number of subscribers by roughly 34 percent, and many industry observers expect a manifold increase by the end of 1995.[18]

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15 See Kent Gibbons, DBS: We're Walking the Walk; Direct-Broadcast Satellite TV, Multichannel News, Jan. 16, 1995, at 3 ("Gibbons").

16 SkyTRENDS at 2.

17 See Gibbons at 3.

18 SkyTRENDS at 2-5.

Although the rapid growth of high power Ku-Band subscriptions and the continued popularity of C-Band service do not alone prove the competitive potential of high power Ku-Band service as an alternative to cable, they clearly suggest that DTH service, as it grows and the equipment becomes less expensive, has the potential to constrain the rates charged for certain cable service tiers. While DTH has made advances, it has hardly reached its pinnacle as a competitor in the video marketplace. As noteworthy as DTH's growth has been, its quest has been impeded by restrictive zoning ordinances that violate the 1986 preemption policy. Commission action is therefore essential if DTH is to be given a fair opportunity to reach its full competitive potential. <u>That potential can only be realized if the initial costs faced by consumers of DTH services are not unreasonably increased by arduous local zoning and permitting processes that violate the Commission's Preemption Order.</u>

II. FACTUAL BACKGROUND

A. History of FCC Preemption

1. 1986 Limited Preemption

In 1986, the Commission adopted a rule preempting some local regulation of satellite antennas. Specifically, the rule preempted regulations that differentiate between

facilities unless the regulations (a) have a reasonable and clearly defined health, safety, or aesthetic objective, and (b) do not put unreasonable limitations on (or prevent) reception or impose unreasonable costs on users.[19]

The Commission's rule, however, did not contain a provision for initial Commission enforcement in the hope that local authorities would conform their regulations to be in accord with the federal policy.[20] Instead, the Commission required petitioners to exhaust other remedies before seeking Commission action. The Commission did, however, acknowledge that it would consider requests to change this procedure if it turned out that "local authorities are generally failing to abide by our standards."[21] As explained more fully below, the time is ripe for the procedures to be changed, both because of the prevalence of noncompliance and because of the Second Circuit ruling in the Deerfield case.[22]

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19 47 C.F.R. § 25.104. The rule also preempted local regulation of satellite transmitting antennas in much the same manner except that health and safety regulation was not preempted.

20 Preemption Order at ¶ 39.

21 Id. at ¶ 40.

22 See discussion infra at Section II.A.3.

2. Continuing Problems with Local Governments

Despite the Commission's optimistic hope that local authorities would conform their regulations to comply with the Commission's rule, many local authorities have not done so and still consistently discriminate against satellite antennas -- some, perhaps, due to lack of familiarity with the federal rule, but many in what can only be characterized as outright defiance.[23] What follows are but a few examples of such blatant non-compliance, illustrating the inconsistent and often irrational local zoning ordinances and bureaucracies that homeowners who choose to erect satellite antennas face.

a. Prince Georges County, Maryland[24]

In 1989, Art Hutchins, then a resident of Prince Georges County, decided to install a satellite antenna in his side yard. After the antenna was partially installed and before it was connected, a Prince Georges County building inspector, responding to a complaint from one of Mr. Hutchins' neighbors, placed a "Stop Work" order on the antenna installation and informed Mr. Hutchins that both a

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23 Monica Hogan, If You Can't Beat Em, Join 'Em, Satellite Retailer, May 1995, at 31.

24 See Declaration of Arthur A. Hutchins attached hereto as Exhibit A ("Declaration").

building permit and an electrical permit were required to install the antenna.[25] Until the county issued such permits to Mr. Hutchins, he would be unable to complete the installation of his satellite antenna. In addition, Mr. Hutchins was informed that he might be subject to criminal penalties.

Attempting to comply with the building inspector's directive, Mr. Hutchins and the owner of the business that sold and installed Mr. Hutchins' satellite antenna investigated the possibility of obtaining both of the required permits. What they discovered, however, was that they could not receive a building permit unless they had a building license and that they could not receive a building license unless they intended to build homes, not just install antennas. Similarly, they could not receive an electrical permit unless they were licensed master electricians.

In the face of this "Catch-22," Mr. Hutchins and the dealer had no choice but to hire a licensed electrician and a licensed builder, both of whom were wholly unnecessary for the installation of Mr. Hutchins' satellite antenna, to apply for the necessary permits. In order to shepherd the two permit applications through the 11 separate county

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25 1987 BOCA National Building Code § 615.3 (as amended by Prince Georges County Code § 4.125-1(a)(3)); Prince Georges County Code § 9-112.

offices with approval responsibility for the permits, they also needed to hire a permit expediter. In addition, they had to hire a structural engineer to perform an engineering study of Mr. Hutchins' property and create a foundation plan for the antenna as required by one of the county offices.[26]

When they were partially through the process, however, one of the county offices determined that the antenna needed to be placed on a 30-foot pole for "aesthetic" reasons. This decision required a second set of foundation drawings and a second permit expediter to again marshall the permits through the 11-office process. Mr. Hutchins also had to agree, among other things, to "screen" his antenna -- which ultimately led to his planting over 30 eight- to ten-foot pine trees at a cost of $75 to $100 per tree.

During the permitting process, Mr. Hutchins also had numerous conversations with county inspectors and other county officials regarding the possibility of criminal charges and related fines.[27]

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26 The dealer also contacted SBCA, which, in turn, drafted a letter to the county alleging violation of the Commission's 1986 Preemption Order.

27 Interestingly, during the course of these conversations, various county officials often suggested to Mr. Hutchins that he could resolve all of his problems by subscribing to cable television. Declaration at ¶ 5.

Three months later and after spending more than $23,000 in the permitting process alone,[28] Mr. Hutchins and the dealer received the necessary permits to install Mr. Hutchins' satellite antenna. Two weeks later, however, a second "Stop Work" notice was placed on Mr. Hutchins' satellite antenna and he was re-subjected to criminal penalties. He was informed by the county that his permits had been issued in error, although he never received a specific explanation for the revocation. At that point, Mr. Hutchins' dealer had SBCA recontact the county to reiterate the points made in its earlier letter. It took an additional seven months before Mr. Hutchins' permits were finally reissued.

In sum, it took more than 10 months and cost more than $28,000 for Mr. Hutchins to obtain the "necessary" approvals to install his $5,000 satellite dish -- on a 30-foot pole surrounded by over 30 pine trees.[29]

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28 The lion's share of these costs were incurred by the dealer because the dealer knew this was not an isolated incident and, therefore, he recognized that his ability to earn a living in his profession depended on counties like this not being allowed to continue to flaunt the FCC's rule. Had the dealer not agreed to incur those costs, Mr. Hutchins could not have afforded to fight the battle with the county and would have been compelled, quite simply, to remove the satellite antenna.

29 Mr. Hutchins has since moved out of Prince Georges County.

b. Margate, New Jersey

Similarly irrational local zoning ordinances existed in Margate, New Jersey. In 1994 Adrian Jacquet, the owner of Satellite Systems Inc., attempted to install a satellite dish for a customer in Margate who wanted to watch international channels for news on his father who was running for election in Greece. As Mr. Jacquet was installing the antenna, however, he was stopped by a local housing inspector who informed him that a building permit was necessary to undertake such construction. Mr. Jacquet reasoned that he did not need a building permit because he was not building anything, but his argument fell on deaf ears. Moreover, although the housing inspector acknowledged that a permit was unnecessary to cement a flag pole into the ground, the inspector told Mr. Jacquet that a permit was necessary to cement a shorter antenna pole in the ground.

When Mr. Jacquet's customer attempted to obtain a permit, he was told to appear before the local zoning board. The customer, in turn, decided that he did not want any trouble from the city and therefore returned the dish to Mr. Jacquet.

Although the antenna was never installed, Mr. Jacquet subsequently received two summonses from Margate -- one for the installation of a satellite system without

proper approval and one for failing to obtain a proper construction permit.[30]

c. East Dearborn, Michigan

In 1988, Martin Garcia of East Dearborn, Michigan, applied for and received approval from his local zoning board to install a satellite dish. He did not attempt to install the antenna until 1991, three years later, at which time he reappeared before the zoning board to renew his approval. Despite the fact that Mr. Garcia had all of the necessary information, including measurements of his house, the size of the satellite dish, the location of installation and approval from all of his neighbors, the board denied approval.

The basis for the denial, however, was neither "aesthetic" reasons nor incomplete information. Rather, the board deemed inadequate Mr. Garcia's basic reasons for wanting a satellite antenna in the first place. Mr. Garcia wanted the satellite antenna so that he and his family could watch Spanish-language programming.[31] He was told by the board, however, that he did not "need" a satellite antenna

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30 Angela M. Duff, Foreigners Find Freedom Doesn't Include Satellites, TVRO Dealer, Nov. 1994, at 22.

31 Mr. Garcia even attempted to obtain Spanish-language programming through the local cable company, but was told that such programming would not be offered unless a sufficient number of subscribers requested it.

because he and his family could all speak English.[32] At last report, Mr. Garcia intended to try to get approval for his satellite dish one last time.[33]

* * *

These examples are merely illustrative of the egregious violations of the Commission's current preemption rule that are occurring in many places around the country. In 1994 and the first half of 1995, SBCA received over 1000 inquiries from individual homeowners, satellite dealers and their attorneys who contacted SBCA for information and/or assistance in their own battles with local zoning boards and local Homeowners Associations ("HOAs"). This is, of course, undoubtedly only a fraction of the current instances in which satellite antenna owners are fighting to protect their federally recognized interests, and it is impossible to discern how many thousands of similar circumstances exist of which SBCA is not aware. These often highly publicized local battles severely impact the competitiveness of DTH satellite services both by creating a negative consumer perception that installing a satellite antenna will cause trouble in a local community and, when these local battles

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32 One zoning board member, however, evidently believed that Mr. Garcia's denial was due to the size of his dish. Angela M. Duff, Foreigners Find Freedom Doesn't Include Satellites, TVRO Dealer, Nov. 1994, at 22.

33 Id.

ripen into litigation, by increasing the costs faced by consumers of DTH services. In many cases the local zoning processes causing this result are clearly and intentionally in violation of the Commission's Preemption Order.

3. Procedural Difficulties with the 1986 Preemption Order

In addition to these clear examples of substantive non-compliance with the current rule, the Commission's requirement that parties exhaust all other remedies -- including judicial remedies -- before seeking further Commission action has only exacerbated the problem of obtaining relief from noncomplying zoning ordinances at a reasonable cost and within a reasonable time frame. This problem is best illustrated by the case that arose in Deerfield, New York -- the remand of which helped to trigger this proceeding. In that case, Joseph Carino was seeking federal preemption of the Deerfield zoning ordinance governing satellite antenna installations.

After having no luck with the local administrative process, and after being turned away by the Commission until he exhausted his judicial remedies, Mr. Carino filed an action in the New York state trial court and appealed his losses up to the state supreme court. The court ruled that the zoning ordinance did not violate the 1986 Preemption Order. Mr. Carino then filed an action in federal district

court in New York, but that court ruled that he was collaterally estopped from relitigating the issues raised.[34] The court therefore never reached the merits. Its collateral estoppel ruling was affirmed by the federal court of appeals.[35]

At this point, having sufficiently exhausted all other remedies, Mr. Carino came back to the Commission, in accordance with the procedures established in the 1986 Preemption Order. The Commission then found that the Deerfield ordinance did, in fact, unreasonably restrict Mr. Carino's right to receive satellite signals and therefore was preempted under the Commission's rule.[36] On appeal, the Commission's ruling came too late, however. The Second Circuit ruled that the Commission had no authority to issue rulings after a federal court determination; the court emphasized that FCC review must precede court review.[37]

The Deerfield case demonstrates unequivocally that the procedures adopted in 1986 are in dire need of change. Mr. Carino spent more than $25,000 and more than four years

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34 Carino v. Town of Deerfield, 750 F. Supp. 1156 (N.D.N.Y. 1990).

35 Carino v. Town of Deerfield, 940 F. 2d 649 (2d Cir., 1991).

36 Preemption of Satellite Antenna Zoning Ordinance of Town of Deerfield, New York, 7 FCC Rcd 2172 (1992).

37 Town of Deerfield v. FCC, 992 F.2d 420 (2d Cir. 1992).

litigating an issue that should properly have been decided by the Commission. After all, it was the FCC's rule that was being interpreted. And, as the Commission's ruling in that case showed, a court's interpretation of the FCC's rule can be 180 degrees different from what the Commission intended.

In addition, the court rulings in cases across the country span the spectrum of interpretation. Thus, the requirement that would-be consumers exhaust their legal remedies has resulted in almost as many different rulings and interpretations of the FCC's rule as there have been cases filed. And because a court's ruling is not binding in other jurisdictions, the same issues are being litigated and relitigated all over the country.

Consolidating interpretation of these rulings in the expert agency -- the FCC -- will effectively and efficiently solve these procedural problems. There will be a single, consistent set of rulings applying and interpreting the new preemption rule. And much duplicative litigation will be avoided altogether. Once the Commission has ruled, for example (as it did in Deerfield), that an ordinance that discriminates on the basis of size is preempted, consumers will be able to present that ruling to a local zoning board that has an offending regulation. The zoning board, in turn, might (hopefully) bring its ordinance