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July 20, 1998

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Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

RECEIVED

JUL 21 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Ex Parte Filing in Cases FO 91-171 / FO 91-301

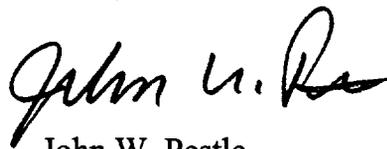
Dear Ms. Salas:

Enclosed for filing are four copies of an *ex parte* communication in the preceding two dockets.

With best wishes,

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT^{LLP}



John W. Pestle

JWP/nk

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July 20, 1998

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**Chairman William Kennard
Federal Communications Commission
1919 M Street, NW, Room 814
Washington, DC 20554**

Re: Cases FO 91-171; FO 91-301 - Emergency Alert Systems

Dear Chairman Kennard:

On behalf of the National League of Cities and municipalities and municipal organizations in seven states¹ we have examined the Commission's March 9, 1997 Second Further Notice of Proposed Rulemaking ("NOPR") in these dockets seeking comment on whether it should amend its Emergency Alert System rules as well as reviewed the comments and reply comments received in response. The proposed changes would generally prevent cable systems from interrupting local broadcast stations with either Federal Emergency Alert System announcements or local emergency notifications (required under franchises).

Serious constitutional, statutory and policy defects in the proposed changes that have not been addressed (or addressed only in part) in filings to date are apparent. This letter is submitted to correct such deficiencies.

¹ Described below, collectively referred to as "National League of Cities, et al."

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Introduction and Summary

Franchise provisions requiring all channel Local Emergency Notification Systems² necessary to meet community needs are specifically allowed under the refranchising provisions of Section 626 of the Cable Act. A municipality's determination of what constitutes community needs is conclusive, subject only to a review by the Federal courts (as set forth in Section 626), not by this Commission. A rule preempting a municipality's determination that a Local Emergency Notification System is necessary to meet community needs is outside this Commission's jurisdiction and would be a violation of Section 626.

In addition, the Commission's authority with respect to Emergency Alert Systems for cable operators derives from Section 624(g) of the Cable Act. This section only gives the Commission authority to see that cable system viewers receive the same types of emergency information as is provided by the Emergency Broadcast System. It does not allow the preemption of franchise requirements for Local Emergency Notification Systems, such as those contemplated by Section 626. Section 624(g) at most prevents conflicts between the two systems, which is a technical issue easily resolved.

This letter describes Local Emergency Notification Systems and their use by local public safety officials to communicate directly with their residents about local emergencies (which typically are not covered by TV stations which, due to their wide coverage area, are regional in focus).

Federal attempts to preempt or prevent such local public safety communications is constitutionally impermissible as an infringement on the powers reserved to the states and their subordinate bodies, particularly those relating to core public safety functions of state and local government. The suggestion in the NOPR to, in effect, turn this important local public safety function over to a private party (local TV stations) with no public safety training, authority or knowledge is constitutionally and statutorily impermissible.

Municipalities/Organizations

This letter is submitted on behalf of the National League of Cities, which represents cities and villages nationwide. It is this country's oldest, largest and most representative organization serving municipal governments and currently represents more than 17,000 municipalities. In addition, this

²To ensure clarity, this letter uses the term "Local Emergency Notification Systems" or "Local ENS" solely to refer to those local emergency notification or alert systems provided for by a franchise. This nomenclature is used to specifically distinguish such franchise mandated emergency notification systems from the Federal Emergency Alert System (Federal EAS or EAS) which the Commission has created and revised pursuant to its several orders in these dockets.

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letter is submitted on behalf of municipalities and municipal organizations in the following seven states, representing over 13 million people, as follows:

From California, this letter is submitted on behalf of the City and County of San Francisco with a population of over 725,000.

From Colorado, this letter is submitted on behalf of the City and County of Denver and the Greater Metro Telecommunications Consortium (GMTC). The GMTC includes essentially all municipalities in the Denver Metropolitan area, totaling approximately 1.7 million people.

From Florida, this letter is submitted on behalf of the City of Fort Lauderdale with a population of 148,800.

From Illinois, this letter is submitted on behalf of the City of Batavia, the Village of Lisle and the Illinois Chapter of NATOA. Collectively these entities represent approximately 65 communities with over 4.8 million people.

From Michigan, this letter is submitted on behalf of the City of Detroit, the City of Grand Rapids, Ada Township, Byron Township, City of Battle Creek, City of Gladwin, Grand Haven Charter Township, Grand Rapids Charter Township, City of Livonia, City of Marquette, Robinson Township, City of Walker, City of Wyoming and Zeeland Charter Township. Collectively these communities total represent a population of more than over 1.5 million people.

From Missouri, this letter is submitted on behalf of the City of Gladstone with a population of 26,243.

From Texas, this letter is submitted on behalf of the Texas Coalition of Cities on Franchised Utilities Issues (TCCFUI) which represents essentially all major metropolitan areas in the state on telecommunications issues. In addition, it is submitted individually on behalf of the City of Denton, City of Grand Prairie, City of Irving, City of Plano, City of Rockwall, City of Rosenberg, and the City of Schertz. Collectively, TCCFUI and the individual cities represent a population of more than 3.8 million people.

This broad national municipal participation reflects the substantial concern municipalities have with the change described in the NOPR due to the harm it could cause municipalities and their residents as is set forth below.

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Notice of Proposed Rulemaking - Background

The Commission, by prior order in this docket, has created a Federal Emergency Alert System ("Federal EAS") which applies (inter alia) to video and TV stations and cable stations. It is a successor to the former Emergency Broadcast System.

Local cable franchises typically provide for Local Emergency Notification Systems. Such franchise provisions typically allow a city, county or other local public safety authority to place on all cable channels emergency announcements relating to local conditions.

The NOPR requests comment on a rule change sought by the National Association of Broadcasters (NAB). See NOPR ¶¶ 4-8. The NAB requests and proposes that the Commission's EAS rules be modified so that a TV station carried on a cable system would never be interrupted with emergency announcements (either Federal EAS or Local ENS) if the TV station meets four requirements:

- (1) -- "Originate[s] local news programs at the studio facility"
- (2) -- "Have weather equipment at the studio facility to support the station's weather department"
- (3) -- "Have the ability to run video crawls over network or local programming to advise the public of weather conditions or other public emergencies", and
- (4) -- "The station's master control center is manned at all times when the station is on the air." NOPR ¶ 6, fn 13.

The only examples (and TV station expertise) cited by the NAB in support of its proposed rule relate solely to weather. As discussed below, emergencies come in forms other than weather.

The four proposed requirements are vague, presumably so that essentially all TV broadcasters can argue that they meet them. For example, what does "originate local news programs at the studio facility" mean? One minute of local news programming per day? "Weather equipment" is similarly undefined. Does simply having a thermometer and barometer suffice? Even though the NAB uses weather as its example of emergencies, its proposal lacks any requirement for TV stations to employ the trained meteorologists necessary to interpret the information from the "weather equipment." Nor is there a requirement for staffing by such personnel 24 hours per day, 7 days a week, including vacations and holidays.

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And the proposal has no monitoring or enforcement mechanism, even though it is dealing with vital public safety matters.

The NAB's comments in response to the NOPR make clear that its proposal applies to both the Federal Emergency Alert System and to all channel Local ENS requirements in local cable television franchises. The NAB contends that such Local ENS systems are "outdated", "barely informative" and that in essentially all instances then coverage of local emergencies by TV stations is superior to that of duly constituted local public safety authorities. NAB Comments, pp. 19-20.

The NAB's comments set forth no statutory authority for this Commission to preempt Local ENS requirements in cable franchises, but refer for legal authority to its Petition for Partial Reconsideration in this docket dated January 27, 1995.

The Commission ruled on and rejected the NAB's Petition for Partial Reconsideration three years ago in its October, 1995 Memorandum Opinion and Order in this docket. Memorandum Opinion and Order, FCC 95-420, 10 FCC Rcd 11,494 (1995). ("Memorandum Opinion and Order"). In that order the Commission decisively rejected the NAB's argument that interrupting broadcasters' programming with Federal EAS or Local ENS announcements was a violation of either the Federal Copyright Act or must-carry provisions of the Cable Act. Memorandum Opinion and Order, ¶ 15-25. Reaffirming its prior decisions, the Commission said that it had already "ruled that it was not the intent of the must-carry rules to prohibit such emergency transmissions . . ." and readopted its prior analysis that:

"We conclude that the public benefit of ensuring an operational emergency alert system outweighs the possible harm done by momentarily interrupting the broadcast signals carried by the cable television system." *Id.* ¶ 24 [Quoting *Total Television of Amarillo*, 65 FCC 2d, 242 at 242-243 (1977)].

The Commission similarly rejected the NAB's copyright claim, stating that the requirements of Emergency Alert Systems "for interruption of the broadcast retransmission is consistent with the Copyright Act. Nothing in the EAS rules would permit changes, deletions, or additions to the broadcast signal being transmitted for the commercial advantage of the cable system. Rather, the sole purpose is to further public safety." Memorandum Opinion and Order, at ¶ 22.

The NAB did not appeal the Commission's decision in the Memorandum Opinion and Order although it apparently has continued to submit filings to the Commission setting forth its position.

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The Commission is correct in its decision in the Memorandum Opinion and Order. It should reject that proposed rule change both for the reasons set forth therein and for the additional reasons set forth in this letter.³

Federal Emergency Alert Systems

The principal focus of this letter on behalf of the National League of Cities, et al. is on Local Emergency Notification Systems. However, the National League of Cities, et al. oppose the proposed change regarding the Federal EAS system as well.

The arguments of parties opposing the change will not be repeated here except to say that the NAB's copyright, must-carry and other statutory arguments are incorrect for reasons the Commission has already set forth. The NAB's proposed rule would insure a significant reduction in the number of emergency alerts which citizens receive. From a public safety standpoint it is better to have occasional duplication (or even overriding) of emergency announcements rather than guarantee that significant numbers of subscribers will never receive Federal EAS messages which are pertinent to them.

Local Emergency Notification Systems

Vital Public Safety Function: Public safety is an essential function of local government. The federal government -- and even the states -- lack the ability to address the public safety functions that are provided at the local level. Thus, essentially all local jurisdictions in the United States (city, county, township, parish, village) provide such essential public safety functions as police, fire and emergency services.

One vital local public safety function (in addition to keeping the peace, apprehending criminals, and putting out fires) is immediate notification to the public of local emergencies. To this end, most cities, counties and other local jurisdictions have trained personnel and formalized procedures for emergency notification (as well as mobilization and response). Typically these functions provide for:

³ The only significant non-NAB development relating to Emergency Alert Systems appears to be a 1997 letter by Congressman Tauzin to the Commission. Congressman Tauzin is Chair of the House Subcommittee on Telecommunications of the Commerce Committee. According to cable trade press reports, the Congressman apparently was upset when he once saw a television station's emergency weather announcement overridden by an emergency announcement from a cable television system. Suffice to say that even though Congressman Tauzin may head an important subcommittee, his views cannot override legislation, the Constitution or sound policy judgments by this Commission.

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- Trained public safety officers on duty 24 hours a day, seven days a week, 365 days a year
- A public safety official with the designated responsibility for public notification.
- Training and procedures on how to respond to varying situations with clear lines of authority
- Differing types of responses for different types of emergencies (fire, floods, chemical leak, and so on)
- Tailoring of the preceding to local conditions and circumstances

As the Commission can appreciate, immediate public notification is vital to emergency plans to prevent injury, loss of life and destruction of property.

Cable television systems are often a prime (if not the principal) means for local public safety officials to notify residents of an emergency. They are the only media which give local public safety officials (1) -- the immediate means of (2) -- notifying the residents of a specific municipality (3) -- by a system which the local municipal controls (does not omit some emergency notifications because a media outlet elects not to run the notice). For this reason, for decades cable franchises have commonly contained Local Emergency Notification System provisions. As is discussed below, TV stations, because of their regional or statewide coverage, do not provide emergency notifications that affect only one or a handful of municipalities in their viewing area.

Cable Franchises: To operate, cable systems must have a franchise with each municipality they serve. The franchise is tailored to meet local community needs.

For example, Section 626 of the 1984 Cable Act sets forth the procedures for cable franchise renewals. This Section recognizes the principal of localism -- that a cable franchise renewal must be carefully tailored to meet the cable-related needs of the community being served. Thus, a major element of the cable franchise renewal process is the ascertainment of community needs (Section 616(a)(1)(A) -- the community shall commence a proceeding for "identifying future cable-related community needs and interests) and requiring the cable operator's franchise renewal proposal to meet such needs (Section 616(b)(2) -- ". . . shall contain such material as the franchising authority shall require"). In fact, the failure to meet community needs is one of only four grounds set forth in the Cable Act on which a community can deny renewal of a cable franchise. *See* Section 626(d), first sentence.

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The courts have vigorously upheld the community's right to determine what is and is not sufficient to meet its community needs. *See Union CATV, Inc. v. City of Sturgis, KY*, 107 F.3d 434, 441 (6th Cir. 1997) where the court held "[T]hat judicial review of a municipality's identification of its cable-related needs and interests is very limited . . . similar to the review of a jury verdict [where] a court must not substitute its judgment for that of the jury, but instead must view [the] evidence in [the] light most favorable to [the] non-moving party, giving that party the benefit of all reasonable inferences."⁴

Cable franchise renewals typically provide for Local Emergency Notification Systems. They do so for a simple reason -- because they meet community needs (typically not met by a TV station) by providing an assured means of immediate notification of community residents.

Communities tailor such systems to meet local needs and circumstances: This includes the type of technology used (see below) and exact procedures appropriate to that specific cable operator's organization and system -- and that of the municipality in question -- for testing and triggering of the Local Emergency Notification System. Costs are taken into account as well, both under Section 626(c)(1)(D) of the Cable Act ("taking into account the cost of meeting such [community] needs and interests"), and because cable operators typically contend that under the Commission's rate regulation rules any increase in costs due to franchise requirements is a dollar-for-dollar pass through to customers⁵ (so called external cost pass through).

As the Commission can appreciate, local municipalities thus can determine the need for a Local Emergency Notification System in a franchise, taking into account whether the emergency notifications from TV stations (among other mass media) are adequate. Local officials are in a direct feedback loop where they can evaluate the local Emergency Notification System's performance and balance the resulting benefit to public safety against any costs that may be incurred.

Local Emergencies: Local Emergency Notification Systems are used by public safety authorities for local emergencies. By definition these are matters of importance for a single municipality (or at most a few municipalities). This local nature of the matters addressed by Local

⁴ Some franchises pre-date the 1984 Cable Act. The 1984 Act grandfathers non-rate regulation provisions of such franchises to avoid the constitutional problems presented if Congress attempted to abrogate existing contractual commitments. Attempts to preempt Local Emergency Notification Provisions in any pre-1984 Act franchises would have similar constitutional problems.

⁵ *See, e.g.* 47 C.F.R. § 76.922 defining external costs to include, among other things, "costs of complying with franchise requirements". Cable operators may adjust their rates for external costs. *See* § 76.922(c)(3); § 76.922(e)(2)(ii).

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Emergency Notification Systems leads to their not being covered by TV stations, which are necessarily regional in nature.

The preceding result is aided by the fact that local emergencies typically are not big enough or dramatic enough to attract the interest of area TV stations. At minimum, local public safety authorities cannot be assured that area TV stations will broadcast a notification of a local emergency.

Examples of local emergencies for which Local Emergency Notification Systems are used include:

- Toxic chemical spills or discharges
- Closure of local roads or bridges (due to accidents or for other reasons)
- Local water or sewer problems (e.g. loss of water pressure, overloading of sewer system) due to utility problems (water or sewer main breaks, pump failures) within a specific municipality
- Local road restrictions such as imposing alternate side of the street parking (for snow plowing) or road closures

The Commission will note that many of these examples (as well as others that have been brought to the Commission's attention) do not relate to the weather. But weather emergencies were essentially the only ones addressed by the NOPR (or which broadcasters addressed in their comments).

Even weather-related emergencies are often similarly local in nature such that they are unlikely to be covered by an area TV station. This is particularly the case for communities on or adjacent to a body of water (the ocean, Great Lakes) or where there are significant altitude variations. For example, communities adjacent to a large lake may receive large amounts of snowfall while those further inland receive little or none. Snow and precipitation patterns also vary significantly with altitude.

Local Emergency Alert Systems are used for all the preceding types of situations (plus others) with the nature of the notice being appropriate to the situation. The Commission should be aware that thousands of lives will be lost if Local Emergency Notification Systems cannot be used in these situations.

For example, any delay in the response time for emergency personnel costs lives: Fires double in size within two to four minutes; local fire departments respond to approximately two million fires per year, according to the National Fire Protection Association. Similarly, one of the factors

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significantly affecting the survival of heart attack and stroke victims is immediate response and treatment of the victims. According to the American Heart Association, coronary heart disease is the single largest killer of Americans with a new "coronary event" every 29 seconds, or around 1.1 million heart attacks per year.

Emergency alerts are used to help keep the streets and highways clear so that emergency personnel will not be delayed in responding to urgent situations such as fires, heart attacks and strokes. For example, in Northern Illinois, some communities near Lake Michigan use Local Emergency Alert Systems to notify their residents of alternate side of the street parking when snowfalls occur. Because these communities are located near Lake Michigan they often receive snow when communities inland do not. Particularly for those communities with older, narrow streets, if residents do not adhere to alternate side of the street parking, snowplows cannot get through (due to the obstruction from cars being parked on both sides of the street). And if the snowplows cannot get through, fire trucks and emergency units will be delayed in responding to fires or heart attacks in that area.⁶

Other emergency notifications related to roadway problems obviously have much the same effect. Notifications of other local emergencies can have similar life-saving effects (notification of water system problems so as to prevent water pressure drops that affect fire-fighting capability; notice of local flooding, thus saving lives; and the like).

Regional Versus Local Focus: A graphic example of how TV stations simply cannot realistically cover emergencies of significant local importance is shown by the next two pages. The first page shows the coverage pattern (Grade A contour, Grade B contour) for WGN-TV in Chicago. The second page shows some of the municipalities in Illinois (but none in Indiana) that are within the Grade A contour.

As these pages show, there are over 170 individual municipalities in just a portion of WGN-TV's Grade A signal area in Illinois alone.

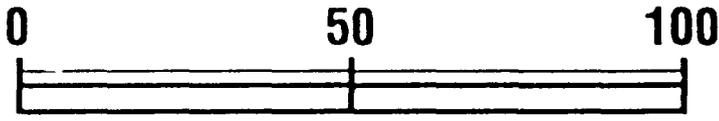
WGN-TV's Grade B contour includes two to three times as many municipalities in four states (Wisconsin, Illinois, Indiana and Michigan). Each of these municipalities is served by a cable system, each with its own franchise which can have a local Emergency Notification System tailored to its needs.

These pages illustrate how Local Emergency Notification Systems can provide municipalities with assured, immediate notification to their residents on local emergencies where it is simply not possible for TV stations to do so (due to the large number of municipalities a TV station covers).

⁶ As the Commission may be aware, heart attacks are often associated with snowfalls due to the exertion from shoveling snow.



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Technology: The technology used for local emergency notification systems varies. Such variation reflects community needs and interests, such as the technologies available, capabilities of the cable television system, cost, the nature and frequency of usage and overall effectiveness. Some of the different types of systems that have been used include:

- Each converter box contains an emergency alarm. The municipality can trigger the alarm even if the TV set is not on.
- Audio override on all channels.
- Video blanking with audio override on all channels. Typically the audio announcement is a brief announcement of the emergency and directs subscribers to a specific channel (typically the government channel) for further information.
- An all-channel video channel crawl superimposed on existing programming. Typically the crawl contains a brief description of the emergency and directs viewers to the local government channel for additional information. Ameritech New Media, which is currently franchised to serve approximately 10 percent of the households in four Midwestern states, uses this system, as do other cable operators. This technology works well where multiple communities are served from a single head-in (the crawl can direct residents of the City of X to tune to their government channel for a local emergency announcement) with minimal disturbance in other communities receiving the crawl, and it reaches the hearing impaired.

No Statutory Authority

The Commission lacks any statutory authority to preempt cable franchise provisions requiring all channel Local Emergency Notification Systems.

As has been set forth above, franchise renewals are governed by Section 626 of the Cable Act. A community's determination under that section that an all-channel Local Emergency Notification System is necessary to meet community needs and interests is dispositive unless appealed to the local courts, as set forth in Section 626.

Congress, appropriately, has made each municipality the paramount decisionmaker as to what is necessary to meet its needs. The Commission has no role or authority in this area.

In addition, the Commission was correct in its 1995 Memorandum Opinion and Order in rejecting broadcasters' claims that interrupting programming was a violation of either the Federal

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Copyright Act or must-carry provisions of the Cable Act. In fact, far from Local Emergency Notification System announcement “materially degrading” TV signals under must-carry, such notifications enhance these signals because (as discussed above) they provide viewers with notification of local emergencies which are not covered by area TV stations.

The Tenth Amendment to the U.S. Constitution Prohibits Preemption of
Local Emergency Notification Provisions

Historical Background and Recent U.S. Supreme Court Opinions: Over two centuries ago, the United States Constitution was adopted creating a dual system of government for our nation. One of the strengths of that Constitution was that it created a central government of limited powers, reserving the balance of sovereign authority to the individual states. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const., 10th Am. James Madison expressed it this way:

“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State government are numerous and indefinite . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.”

Gregory v. Ashcroft, 501 U.S. 452, 111 S.Ct. 2395, 2399, 115 L.Ed.2d 410 (1991) (citing The Federalist Papers No. 45, pp. 292-293). The Court went on to explain the significant advantages to this dual system of governance:

“This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic process; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.” [Supporting citations omitted].

“Perhaps the principal benefit of the federalist system is a check on abuses of government power. “The ‘constitutionally mandated balance of power’ between the States and the Federal Government was adopted by our Framers to ensure the protection of ‘our fundamental liberties’ . . . Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”

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Gregory, *supra*, at 2399-2400 (supporting authority omitted).

Although acknowledging the limits of this dual system of government, the Court nevertheless affirmed the importance of federalism to the preservation of our civil liberties:

“One can fairly dispute whether our federalist system has been quite as successful in checking government abuse as Hamilton promised, but there is no doubt about the design. If this ‘double security’ is to effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty.”

Gregory, *supra*, at 2400 (emphasis added).

One year after the Gregory opinion, the Supreme Court again underscored the continuing viability of the Tenth Amendment. In New York v. United States, 505 U.S. 144, 112 S. Ct. 2408, 120 L.Ed.2d 120 (1992), the Court invalidated a Federal statute, the Low-Level Radioactive Waste Policy Act, as being inconsistent with the Tenth Amendment. In that opinion, the Court acknowledged the tautological nature of the Tenth Amendment, but nevertheless reaffirmed its significance to constitutional jurisprudence:

“The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.”

New York, *supra*, at 2418 (emphasis added). This was consistent with what the Court had earlier said, when it stated:

“This has been the Court’s consistent understanding: ‘The States unquestionably do retain a significant measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.’”

Id. [citing Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 549, 105 S.Ct. 1005, 1017 (1985)]. It is for that reason, said the Court, that neither the Federal government nor a state government may “curtail in any substantial manner the exercise of [the other’s] powers.” New York, *supra*, at 2421. “[U]nder our Federal system, the States possess sovereignty concurrent with that of

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the Federal Government.” *Id.* [citing Tafflin v. Levitt, 493 U.S. 455, 458, 110 S. Ct. 972, 975, 102 L. Ed.2d 887 (1990)] (emphasis added).

Three years later, the Supreme Court again addressed the scope of Federal power under the Commerce Clause in connection with the Federal Gun Free School Zones Act, a Federal statute that would have made it a federal offense for any individual to knowingly possess a firearm within 1,000 feet of a school. In U.S. v. Lopez, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), the Court again affirmed the principle of limited Federal powers, citing from some of our earliest and most respected jurists:

“As Chief Justice Marshall stated in McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579 (1819):

‘The [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.’ *Id.*, at 405.

See also Gibbons v. Ogden, 9 Wheat., at 195 (“The enumeration presupposes something not enumerated”). The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation. See U.S. Const., Art. I, § 8. Congress has operated within this framework of legal uncertainty ever since this Court determined that it was the judiciary’s duty “to say what the law is.” Marbury v. Madison, 1 Cranch. 137, 177, 2 L. Ed. 60 (1803) (Marshall, C.J.). Any possible benefit from eliminating this “legal uncertainty” would be at the expense of the Constitution’s system of enumerated powers.”

U.S. v. Lopez, *supra*, at 1633.

The Supreme Court’s concern is similar to that of the National League of Cities, et al. in the present case, i.e., that the Federal government will attempt to usurp the general police powers ordinarily reserved to the states. The Court was very concerned that it not:

“. . . convert Congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. . . . The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated.

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cf Gibbons v Ogden, supra, at 195, and that there never will be a distinction between what is truly national and what is truly local, cf Jones & Laughlin Steel, supra, at 30, 57 S. Ct., at 621. This we are unwilling to do.”

Id. at 1634 (emphasis added).

This emphasis on what is national and what is local was once again underscored in the very recent opinion of Printz v. U.S., 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997). After briefly discussing the historical background to our dual system of government, the Court in Printz wanted to emphasize its conclusion:

“It suffices to repeat the conclusion: ‘The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. . . . The great innovation of this design was that ‘our citizens would have two political capacities, one state and one federal, each protected from an incursion by the other’ -- ‘a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it’ . . . As Madison expressed it: ‘[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.’”

Printz, supra, at 2377 (extensive list of supporting authorities omitted) (emphasis supplied). The issues in this present case must be viewed in the context of this resurgent interest in the integrity of state rights.

The Unique Nature of the Local Public Safety Interest: As has been described above, Local Emergency Notification Systems address matters of uniquely local concern: Public safety, and in particular notification to a municipality’s residents of local public safety emergencies that are not adequately covered by other media. The emergency notifications have substantial implications: The loss of critical minutes in responding to a fire or to medical emergencies; notification of toxic chemical spills; unique local weather conditions or the like.

These are not idle concerns. They are part of the fundamental public safety (police, fire, emergency) services that local units of government provide their residents.

These functions, moreover, are uniquely suited to local units of government. When the courts speak of “traditional police powers,” this is what they are talking about. This is why we don’t see Federal Fire Departments, or a National Police Force. As constitutional scholars and respected jurists

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alike have long recognized, the traditional police powers are functions which local units of government perform best.

The National League of Cities, et al. is mindful of the reach of Federal power under the Commerce Clause. The National League of Cities, et al. is also familiar with Garcia v. San Antonio Metropolitan Transit Authority, *supra*, where the Supreme Court expressed a reluctance to review limitations placed on the Commerce Clause.

Nevertheless, it is also clear that the recent Supreme Court opinions cited above have confirmed and in fact reinvigorated the limitations on Federal power expressed in the Tenth Amendment. Further, it remains a well established principle of law that the presumption is that “the historic police powers of the States are not displaced by a Federal statute ‘unless that was a clear and manifest purpose of Congress.’” U.S. v. Lopez, *supra*, at 1640, [citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146, 83 S.Ct. 1210, 1219, 10 L.Ed.2d 248 (1963)]. Not only is there a presumption against preemption, but that presumption is even stronger where the local regulation pertains to matters of health and public safety. Abbot v. American Cyanamid Co., 844 F.2d 1108, 1112 (4th Cir. 1988). The Second Circuit relied on that same principle in Environmental Encapsulating Corp. v. New York City, 855 F.2d 48 (2nd Cir. 1988), where the court upheld provisions of OSHA which preempted certain aspects of the City’s ordinance, but refused to preempt local requirements which (as here) protected the public health:

“There is a ‘presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause.’ . . . The historic police powers of the States are not to be found preempted ‘unless that was a clear and manifest purpose of Congress.’”

Id., at 53 (emphasis added).

Both the Fourth Circuit and the Second Circuit cited to Hillsdale County, Fla. v. Automated Medical Laboratories, Inc., 471 U.S. 707, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985) as additional authority. It was there that the Supreme Court stated:

“Where . . . the field that Congress was said to have preempted has been traditionally occupied by the States: ‘We start with the assumption that the historical police powers of the States were not to be superseded by the Federal Act unless it was a clear and manifest purpose of Congress.’ Jones v. Rath Packing Co., 430 U.S. 525, 97 S.Ct. 1309 (quoting Rice v. Santa Fe Elevator Co., 331 U.S. 230, 67 S.Ct. 1152) (citations omitted). *cf* Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 670, 101 S.Ct. 1309, 1316, 67 L.Ed.2d. 580 (1981) (deference to State regulation of safety under the dormant Commerce Clause); Id., at 681, n. 1, 101 S.Ct. 1321 (Brennan, J. concurring

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in judgment) (same); *Id.*, at 691, 101 S.Ct. 1326 (Rehnquist, J. dissenting) (same). ‘Of course, the same principles apply where, as here, the field is said to have been preempted by an agency, acting pursuant Congressional delegation. Appellee must thus present a showing of implicit preemption of the whole field, or of a conflict between a particular local provision and the Federal scheme, that is strong enough to overcome the presumption that State and local regulation of health and safety matters can constitutionally coexist with Federal regulation.’”

Hillsboro, *supra*, at 2396 (emphasis added).

Broadcasters supporting the proposed rule change have made no such showing. Federal preemption is therefore not allowed.

In *Printz v. U.S.*, *supra* the Supreme Court stressed the harm to Federalism and the Tenth Amendment which comes from “blurring the lines of political accountability.” As the Court said:

“[E]ven when the States are not forced to absorb the costs of implementing a Federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects. Under the [Brady Bill] law, for example, it will be the [local chief law enforcement officer] and not some Federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the [local chief law enforcement officer], not some federal official who will be blamed for any error . . .”

Printz, *supra*, at 2382 (internal citations omitted).

The proposed rule suffers from the same defect: It will be local officials -- mayors, city councils, commissions, city managers -- who will be blamed when residents die or property is harmed because local emergency notifications are not carried on all cable channels. By blurring the lines of political accountability, residents would be denied this portion of the fundamental benefits of democracy under our Constitution. For this reason as well, Federal preemption of Local Emergency Notification Systems is unconstitutional.

Conclusion

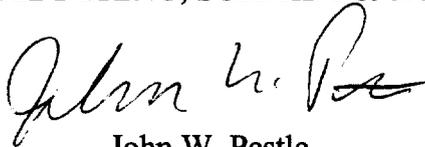
This letter has shown why the changes set forth in the NOPR in these dockets is defective on constitutional, statutory and policy grounds. On behalf of the National League of Cities and its 17,000 member municipalities, and on behalf of local units of government in seven states representing over 13 million people, we urge you to reject the changes set forth in the NOPR.

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Very truly yours,

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John W. Pestle

JWP/nk

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