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Memorandum - Via Hand Delivery

Date: October 26, 2004

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To: D.C. Board of Zoning Adjustment

From: Edward Donohue, Holland & Knight LLP
Rebecca Duke, Holland & Knight LLP

Cc: Advisory Neighborhood Commission 3E (via Hand Delivery)
Advisory Neighborhood Commission 3C (via Hand Delivery)
Jennifer Steingasser, Office of Planning (via Hand Delivery)
Karen Thomas, Office of Planning (via Hand Delivery)
Alan Bergstein, Office of the Attorney General (via Hand Delivery)

Re: The Federal Communications Commission's Exclusive Authority to Regulate Radiofrequency Emission and Interference

Board of Zoning Adjustment Application No. 17211 of NBC to Continue Use of a Broadcast Tower at 4001 Nebraska Ave., N.W. (Square 1722, Lot 1)

This memorandum delineates the lack of legal authority, pursuant to federal law, for the District of Columbia has under federal law to regulate any level of broadcast tower radio frequency ("RF") interference ("RFI") and radio frequency emission ("RFE"). This issue arises from the position taken by Advisory Neighborhood Commission (ANC) 3C in its submission to the Board dated October 19, 2004, and the resolution adopted by the ANC at its meeting of October 18, 2004. As a basis for its opposition, the ANC states that it has "urged NBC...to conduct studies and evaluations of the electromagnetic field exposure in the residential area surrounding the towers." The ANC appears to advocate that as a condition of the relief requested, the Board impose a requirement on NBC to test RF signal and levels in an area of approximately 532 acres, or .83 square miles and containing approximately 2,700 dwelling units. The ANC takes this position despite the fact that the applicant has certified to the Federal Communications Commission ("FCC"), as recently as June 2004, that it is in full compliance with the FCC's RF exposure limitations. Moreover, the applicant has introduced a [illegible]endent RF analysis that

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concludes that the RF levels are substantially below the applicable, federal requirements, and of most significance, that federal law preempts the Commission's imposition of any such condition, as outlined below.

The FCC has exclusive jurisdiction to regulate interstate radio and TV communications, including the regulation of technical matters such as RFI and RFE. The FCC's regulatory authority preempts local government regulation of technical matters. Exclusive jurisdiction is based upon federal statutes as well as Supreme Court decisions, as explained more fully below. As stated by Congress, a primary purpose of the Communications Act of 1934, as amended ("the Communication Act"), "is to make available, so far as possible . . . a rapid, efficient, nation-wide and world-wide wire and radio communication service with adequate facilities. . . ." 47 U.S.C. §151. Section 301 of the Communications Act gives the FCC jurisdiction over all interstate communications by wire or radio. 47 U.S.C. §301. More specifically, the FCC has exclusive jurisdiction to resolve interference questions. *See*, 47 U.S.C. §§152(a), 301, 303(c), (d), (e) and (f). The Supreme Court has stated that the FCC's jurisdiction "over technical matters" associated with the transmission of broadcast signals "is clearly exclusive." Head v. New Mexico Board of Examiners, 374 U.S. 424, 430 n.6 (1963). In the face of both federal legislation and established case precedent, local government regulation cannot extend impermissibly beyond traditional areas of zoning functions into regulation of technical matters relating to radio transmission such as RFI. *See*, In re Matter of Cingular Wireless, LLC, 18 FCC Rcd 13226, para. 19, 22 (2003)(by asserting authority to prohibit operation that it determines causes RFI, County is impermissibly regulating federally licensed operations).

I. The FCC's Regulation of RF

Part 1 of the FCC Rules and Regulations contains provisions implementing the National Environmental Policy Act of 1969 ("NEPA").[1] NEPA requires all federal agencies to evaluate the potential environmental significance of an agency action. Exposure to RF energy has been identified by the FCC as a potential environmental factor which must be considered before a facility, operation or

[1] 47 C.F.R. §1.1301, *et. seq.*

transmitter can be authorized or licensed. The FCC's requirements dealing with RF exposure are found in Part 1 of the FCC Rules, at 47 C.F.R. §1.1307(b). The exposure limits are specified in 47 C.F.R. §1.1310, which provides signal frequency, field strength, power density and averaging time. Facilities and transmitters licensed and authorized by the FCC must either comply with these guidelines or else an applicant must file an Environmental Assessment ("EA") with the FCC as specified in 47 C.F.R. §1.1301, *et. seq.* Compliance with the FCC's RF guidelines constitutes a *de facto* threshold to obtaining FCC approval to construct or operate a station or transmitter. In this instance, the licensee of WRC-TV obtained a permit approved by the FCC to construct a tower, thus demonstrating compliance with the FCC's RF standards. The FCC regulations require a TV station licensee to apply for renewal of its FCC license every eight years and, in each such renewal application, the TV station again must certify whether it complies with FCC RF regulations. On June 1, 2004, WRC-TV filed a renewal application wherein the licensee again certified its operations comply with the FCC RF requirements. *See*, File No. BRCT-20040601BDX.[2] (Copy attached).

II. Federal RF Regulations Preempt Local Government RF Regulation

The FCC has exclusive jurisdiction to resolve questions of RFI pursuant to the Communications Act. Pursuant to the doctrine of federal preemption, neither a local nor state government or agency has the authority to resolve questions of RFI, nor to implement RF regulations or restrictions that conflict with the standards already enacted by the federal government.[3] *See*, 47 U.S.C. §§152(a), 301, 303(c), (d), (e) and (f); In re Cingular Wireless, LLC, 18 FCC Rcd 13126 (2003); 960 Radio, Inc., FCC 85-578

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[2] The licensee certified that the facility "complies with the maximum permissible radiofrequency electromagnetic exposure limits for controlled and uncontrolled environments" and that it "will reduce power or cease operation as necessary to protect persons having access to the site, tower or antenna from radiofrequency electromagnetic exposure in excess of FCC guidelines." File No. BRCT-20040601BDX, Section IV, Question 15.

[3] The Supreme Court has recognized three ways in which Congress or a federal agency acting under statutory authority may preempt actions by a state or local government pursuant to the Supremacy Clause, U.S. Const. Art. VI, cl.2. *See* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699 (1984). First, Congress may explicitly preempt the power of the states to regulate a certain area by the use of specific preemptive language in the statute. Id. Second, Congress may implicitly preempt the power over a particular subject when it legislates in such a manner as to show clearly that it intends to occupy an entire field of regulation. Id. Finally, even where Congress is silent on the question of preemption or has not authorized federal occupation of an entire field of regulation, state and local regulation may be preempted when such regulation would frustrate Congressional policies, or when "compliance with both state and federal law is impossible." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

(1985); Mobilecomm of New York, Inc., 2 FCC Rcd. 5519 (1987); Freeman v. Burlington, 204 F.3d 311 (2nd Cir. 2000); Fetterman v. Green, 455 Pa. Super. 639, 689 A.2d 289 (1997).

In 960 Radio Inc., FCC 85-578 (1985), the FCC concluded that certain portions of a conditional use permit issued by a local zoning board were void and unenforceable. Specifically, the FCC stated that the Communications Act regulates RFI, and, therefore, Congress intended federal regulation to completely occupy the regulation of RFI to the exclusion of local and state governments. Accordingly, the Commission, citing to sections 2(a), 301, 303(c), (d), (e) and (f) of the Communications Act, held that exclusive jurisdiction to resolve questions of RFI is solely assigned to it. 960 Radio, para. 5.

Relying upon decisions of the Supreme Court and the legislative history of the Communications Act, the FCC then provided a thorough explanation of its conclusion that it had exclusive jurisdiction over RFI. In an opinion cited by the FCC, Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424 (1963), the Supreme Court stated that the Commission's jurisdiction "over technical matters" associated with the transmission of broadcast signals "is clearly exclusive." 374 U.S. at 430, n.6. Further, the Supreme Court stated in National Broadcasting Co. v. U.S., 319 U.S. 190 (1963), the Commission has "comprehensive powers to promote and realize the vast potentialities of radio." 319 U.S. at 217.

The Commission then noted that Congress removed any doubt regarding its jurisdiction to regulate interference in amending the Communications Act in 1982 when it stated:

> The Conference Substitute is further intended to clarify the reservation of exclusive jurisdiction to the Federal Communications Commission over matters involving RFI [radio frequency interference]. Such matters shall not be regulated by local or state law, nor shall radio transmitting apparatus be subject to local or state regulation as part of any effort to resolve RFI complaints . . . . The Conferees intend that regulation of RFI phenomena shall be imposed only by the [FCC].

H.R. Report No. 765, 97th Cong., 2d Sess. 33 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 2277.

The Commission not only recognized that the FCC is the sole authority to regulate RFI and that all local and state governments lack such authority, but the Commission also held that a second additional basis existed for preempting the local zoning regulation. Specifically, the FCC stated that even assuming that Congress had not intended to occupy the field completely, the specific local regulations at issue conflicted with established federal policy and rules lawfully promulgated by the Commission governing RFI. 960 Radio, para. 7. This in turn not only violates the clear mandate of Congress that the FCC is the sole regulating authority, but actually frustrates the intent of Congress.

For example, in Mobilecomm the town of Wilton, Connecticut argued that its town code provision regulating RFI was a matter of local public health, safety and welfare, rather than a regulation of frequencies or power transmission. The FCC disagreed, concluding that a town code provision regulating RFI was preempted and the city's procedures for monitoring, detecting and resolving interference were unenforceable. Further, the FCC stated that the town code directly conflicted with federal regulations and policies by holding Mobilecomm to an independent standard for radio interference.

In yet another FCC case, In re Cingular Wireless, 18 FCC Rcd 13126 (2003), the Commission again relied upon the holdings of 960 Radio and Mobilecomm, wherein the Commission concluded that provisions of an Anne Arundel County, Maryland zoning ordinance regulating RFI infringed on the FCC's exclusive jurisdiction over RFI and were preempted under the doctrine of field preemption.

Recent federal court decisions are consistent with the Commission's decisions in 960 Radio and Mobilecomm. For instance, in Freeman v Burlington, 204 F.3d 311 (2nd Cir. 2000), the Second Circuit held that federal law preempted the field of RFI regulation. The action arose when the town of Charlotte, Vermont alleged that a radio facility caused RFI in violation of a permit condition. The Second Circuit stated that "allowing local zoning authorities to condition construction and use permits or any requirement to eliminate or remedy RF interference stands as an obstacle to the accomplishments and execution of the full purpose and objectives of Congress." 204 F.3d at 325. In addition, several statutory provisions indicate the extent of the FCC's authority to regulate radio broadcasting (47 U.S.C. §§151, 301, 307(b),

302a(a), 303(d), (e), (f), (h)), [4] as well as federal regulations that have the same preemptive force as federal statutes. The Court discounted an argument that Section 332(c)(7)(A) gives the town the authority to regulate RF interference. Section 332(c)(7)(A) provides that local government has authority regarding the placement, construction and modification of personal wireless services facilities. The court noted that local government did have some authority over the placement of wireless transmitters, but that "Congress did not intend by this provision to repeal the FCC's exclusive jurisdiction over RF interference complaints." 204 F.3d at 323. *See also*, Southwestern Bell Wireless, Inc. v. Johnson County, 199 F.3d 1185 (10th Cir. 1999)(federal regulation of RFI occupies the field and local regulation void under the doctrine of field preemption).

As with RF interference, the FCC has enacted standards and limits on RF emissions standards for federally-licensed antennas. *See* 47 C.F.R. §1.1301, *et. seq.* The FCC regulations for RFE have withstood judicial scrutiny. *See* Cellular Phone Taskforce, et. al. v. FCC, 217 F.3d 72 (2d Cir. 2000). Moreover, a long line of cases have held that local governments cannot regulate personal wireless facilities on the basis of RF emissions or environmental effects as they are preempted pursuant to 47 U.S.C. Section 332(c)(7). *See*, Telespectrum v. PSC of Kentucky, 227 F.3d 414 (6th Cir. 2000); Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d 490 (2nd Cir. 1999); AT&T Wireless PCS, Inc. v. City of Virginia Beach, 155 F.3d 423 (4th Cir. 1998); SBA Communications, Inc. v. Town of Brookfield, 112 F. Supp.2d 233 (D. Conn. 2000). These cases stand for the proposition that, provided RF emissions from the proposed tower comply with FCC guidelines, a local government cannot deny a zoning application based on RF emission health concerns. The FCC stated that should local governments adopt non-federal RF radiation standards on the basis of health and safety matters, it will take appropriate action to protect a licensee's ability to engage in FCC-authorized services. *See*, Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, 11 FCC Rcd 15123, para. 164-66 (1996).

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[4] Of particular relevance to this proceeding is Section 302a(a)(1), which states that the FCC has power "to make reasonable regulations . . . governing the interference potential of devices which in their operation are capable of emitting radio frequency energy by radiation, conduction, or other means in sufficient degree to cause harmful interference to radio communications", and Section 303, which grants extensive powers to the FCC to regulate radio RF interference phenomena.

Although the applicant is aware that the local government wants to address citizen concerns over RF, the FCC has already recognized such community concerns and implemented appropriate regulations. These federal regulations assure local governments and citizens freedom from RF interference and safety concerns, and are the appropriate means to address concerns, rather than the adoption and implementation of contrary local regulations. In conclusion, the local government must rely upon the federal standards and refuse to impose conflicting standards on the applicant, so long as the applicant establishes that its operations will comply with the FCC standards.

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