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INTRODUCTION

The proliferation of new technologies for the transmission of radio signals has revolutionized the ways the American public receives information. In addition to broadcast television and radio, Americans may now obtain information over coaxial cable (cable TV), Master Antenna Television (MATV), Satellite Master Antenna Television (SMATV), and Direct Broadcast Satellites (DBS). This proliferation in methods of delivery has resulted in an enormous increase in capacity that is quickly being filled by additional programming. However, in order to receive programming via new radio technologies, individual residences or small clusters of residences require some form of antenna other than the conventional broadcast devices that sprouted on chimneys and rooftops in the 1950s and 1960s.

Localities, in the exercise of their police powers, often have adopted restrictions on the size and/or placement of these antennas. Restrictions are enacted for various health, safety, or aesthetic reasons. Unfortunately, the restrictions may significantly hinder or completely block the reception of radio signals. Consequently, these restrictions have created a substantial controversy between those asserting a right to receive signals and those who believe communities have a right to regulate land use in the public interest.

The Federal Communications Commission (FCC or Commission) attempted to balance these competing interests on several occasions.[1] It recognized legitimate reasons for local restrictions

1. *See, e.g., In re* Federal Preemption of State and Local Regs. Pertaining to Amateur Radio Facils., *Memorandum Opinion and Order*, 101 F.C.C.2d 952, para. 25

on antenna size and location, but it also recognized statutory objectives supporting rights reasonably necessary to receive unhindered interstate communications.[2] As a result, the Commission adopted rules that partially preempt local regulations. Through these rules, the Commission sought to guarantee the reception of communications signals while allowing municipalities to regulate when there are justifiable and articulated local objectives.

One such rule that applies to home satellite dishes (HSDs) is 47 C.F.R. § 25.104.[3] Hundreds of thousands of these HSDs, which are saucers that vary from six to twelve feet in diameter and have a distinctive, highly visible shape, are believed to be in operation.[4] When the regulation was adopted in 1986, the FCC cautioned local communities not to discriminate against HSDs in favor of other types of radio antennas. If municipal ordinances did single out HSDs for special treatment, they were required to have clearly articulated health, safety, or aesthetic objectives.[5] Furthermore, such ordinances could not unduly impede the reception of satellite signals in terms of cost or other burdens of compliance.[6]

Because the Commission's HSD rule only partially preempts local regulations, there have been numerous court challenges to the legitimacy of local zoning regulations.[7] Having anticipated this

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(1985) (local regulation of amateur, or ham, radio was confined to the "minimum practicable" to accomplish the local authority's legitimate purpose); *see also infra* notes 18-19 and accompanying text (discussing preemptive actions concerning MATV and SMATV).

2. *Memorandum Opinion and Order*, 101 F.C.C.2d 952, para. 1.

3. Preemption of Local Zoning of Earth Station Antennas, 47 C.F.R. § 25.104 (1993).

4. Direct Testimony and Exhibits of G. Todd Hardy at 11, *In re* 1991 Satellite Carrier Rate Adjustment Proceeding (Copyright Royalty Trib. Feb. 6, 1992) (CRT Dkt. No. 91-3-SCRA); James R. Hobson, *Home Satellite Dishes and Other Antennas: The Local Zoning Threat of "Equal Treatment,"* COMM. LAWYER, Summer 1992, at 3, 3.

5. *In re* Local Zoning or Other Reg. of Receive-Only Satellite Earth Stations, *Report and Order*, 59 Rad. Reg. 2d (P & F) 1073, paras. 32-34 (1986) [hereinafter *Local Zoning Report and Order*].

6. *Id.* paras. 36-37.

7. *See, e.g.*, Cawley v. City of Port Jervis, 753 F. Supp. 128 (S.D.N.Y. 1990); Hunter v. City of Whittier, 257 Cal. Rptr. 559 (Ct. App. 1989); Olsen v. City of Baltimore, 582 A.2d 1225 (Md. 1990); Breeling v. Churchill, 423 N.W.2d 469 (Neb. 1988); Nationwide Satellite Co. v. Zoning Bd. of Adjustment, 578 A.2d 389 (N.J. Super. Ct. App. Div. 1990); Alsar Tech., Inc. v. Zoning Bd. of Adjustment, 563 A.2d 83 (N.J.

problem in its rulemaking, the Commission noted that it did not intend to become a national zoning board reviewing every complaint that comes before it.[8] Rather, it left the construction and enforcement of its rules to local institutions and the courts. Presumably, the Commission envisioned itself as a forum of last resort if local relief were wrongly denied.[9]

The Commission's authority to decide cases in the last resort, however, has recently been called into question by the decision of the United States Court of Appeals for the Second Circuit in *Town of Deerfield v. FCC*.[10] The Second Circuit held that the Commission could not place itself in the position of reviewing the decision of a federal court.[11] Although narrowly applied in *Deerfield*, the same reasoning potentially could be expanded to prohibit the FCC's review of any state or federal court decision.

This Article will evaluate the Second Circuit's decision in *Deerfield* and address the options available to the FCC in order to balance the competing federal and state regulatory interests. Part I will establish the background leading up to the *Deerfield* decision, including FCC and court decisions. Part II will evaluate *Deerfield*'s reasoning and briefly examine various legal concepts implicated by this case. Part III will address and evaluate the remaining FCC options after *Deerfield*. The conclusion will recommend the best means available to the Commission to balance the competing federal and state interests.

Super. Ct. Law Div. 1989); L.I.M.A. Partners v. Borough of Northvale, 530 A.2d 839 (N.J. Super. Ct. App. Div. 1987); Minars v. Rose, 507 N.Y.S.2d 241 (App. Div. 1986); Cincinnati v. Billing, 558 N.E.2d 85 (Ohio Ct. App.), *appeal dismissed*, 534 N.E.2d 843 (Ohio 1988).

8. *Local Zoning Report and Order*, *supra* note 5, para. 39.
9. *See id.* para. 40.
10. *Deerfield*, 992 F.2d 420 (2d Cir. 1993).
11. *Id.* at 429-30.

I. BACKGROUND

A. *The FCC's Rulemaking*

On April 9, 1985, the FCC adopted a Notice of Proposed Rulemaking (NPRM) in response to a petition filed by United Satellite Communications, Inc., for a declaratory ruling preempting local zoning of satellite receive-only earth stations.[12] The petition cited a Chicago ordinance, allegedly enacted for the purpose of protecting the local cable franchise. The ordinance required the approval of three agencies, a public hearing, and a one hundred dollar application fee in order to install an HSD.[13] These requirements were challenged as undue burdens upon the installation of HSDs. The Commission granted the petition and sought comment on what authority it possessed to preempt zoning regulations and what types of regulations should be preempted.[14]

The Commission tentatively concluded that it possessed preemptive authority because local regulation stood as an obstacle to accomplishing a legitimate congressional purpose.[15] Specifically, the Commission observed that without satellite antennas the domestic satellite services licensed by the Commission were useless.[16] In addition, the Commission concluded that recent amendments to the Communications Act reflected a congressional intent to ensure that Americans without access to cable programming would be able to obtain it.[17] Finally, the Commission observed that it had previously preempted state regulation that

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12. *In re* Preemption of Local Zoning Regs. of Receive-Only Satellite Earth Stations, *Notice of Proposed Rulemaking*, 100 F.C.C.2d 846 (1985) [hereinafter *Local Zoning Notice of Proposed Rulemaking*], *adopted sub nom. In re* Local Zoning or Other Reg. of Receive-Only Satellite Earth Stations, *Report and Order*, *supra* note 5.

13. *Id.* para. 3.

14. *Id.* para. 1.

15. *Id.* para. 9. For examples of constitutional preemption analyses, see Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984); Michigan Canners & Freezers Ass'n v. Agricultural Marketing and Bargaining Board, 467 U.S. 461 (1984); Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963); and Hines v. Davidowitz, 312 U.S. 52 (1941).

16. *Local Zoning Notice of Proposed Rulemaking*, *supra* note 12, para. 10.

17. *Id.*

interfered with the distribution of interstate communications by MATV systems carrying terrestrial microwave Multipoint Distribution Service (MDS) programming.[18] The Commission also preempted state attempts to apply cable regulation to SMATV.[19] Thus, the Commission concluded that "excessive state and local regulation of satellite antennas interferes with a conditional right to receive programming via home earth stations. When state regulations are unreasonably interfering with or frustrating this right or the provisions of the Communications Act or Commission rules . . . preemption is warranted."[20]

In determining the proper scope of its preemption, the Commission observed that, "Although the proper focus in a preemption action is not the relative importance to the states of their own laws, it is incumbent on this Commission to take note of the traditionally local character of zoning regulation."[21] Thus, the Commission concluded that it "should not unduly interfere with the legitimate affairs of local governments when they do not frustrate federal objectives."[22] Consistent with this conclusion, the Commission determined that a complete preemption would be an unwarranted federal intrusion into legitimate state and local matters.[23]

In adopting its final rule, the Commission restated its conclusions from the *Notice of Proposed Rulemaking*. It found that the broad mandates of Section 1 of the Communications Act[24] and a recent amendment to the Communications Act[25] "create[d] certain rights to receive unscrambled and unmarketed satellite

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18. *Id.* para. 11 & n.10 (citing *In re* Orth-O-Vision, Inc. Petition for a Declaratory Ruling, 69 F.C.C.2d 657 (1978), *aff'd sub nom.* New York State Comm'n on Cable TV v. FCC, 669 F.2d 58 (2d Cir. 1982)).

19. *Id.* para. 12 (citing *In re* Earth Satellite Comm., Inc. Petition for Expedited Special Relief and Declaratory Ruling, *Memorandum Opinion, Declaratory Ruling and Order*, 95 F.C.C.2d 1223 (1983), *aff'd sub nom.* New York State Comm'n on Cable TV v. FCC, 749 F.2d 804 (D.C. Cir. 1984)).

20. *Id.* para. 10 (footnote omitted).

21. *Id.*

22. *Id.* para. 21.

23. *Id.* para. 10.

24. 47 U.S.C. § 151 (1988).

25. 47 U.S.C. § 705 (1988).

signals. These 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."[26] However, the Commission also expressed an intent to accommodate local interests by only partially preempting local zoning regulations.[27]

The regulation adopted by the Commission states:

> Preemption of local zoning of earth stations.
>
> State and local zoning or other regulations that differentiate between satellite receive-only antennas and other types of antenna facilities are preempted unless such regulations:
>
> (a) Have a reasonable and clearly defined health, safety or aesthetic objective; and
>
> (b) Do not operate to impose unreasonable limitations on, or prevent, reception of satellite delivered signals by receive-only antennas or to impose costs on the users of such antennas that are excessive in light of the purchase and installation cost of the equipment.
>
> Regulation of satellite transmitting antennas is preempted in the same manner except that state and local health and safety regulation is not preempted.[28]

The Commission clearly warned that, in adopting this regulation, it did not intend to operate as a national zoning board.[29] It reached this conclusion after finding that there had been increased interest and publicity surrounding this issue and that the large number of cases that might be presented for individual review would place a severe burden on the administrative process.[30] The Commission did, however, leave open the prospect that it "would entertain requests for further action if it appears that local authorities are generally failing to abide by our standards."[31] The Commission required any party requesting review to demonstrate that it had exhausted all other remedies.[32]

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26. *Local Zoning Report and Order*, *supra* note 5, para. 23.
27. *Id.* paras. 32, 34, 43.
28. 47 C.F.R. § 25.104 (1993).
29. *Local Zoning Report and Order*, *supra* note 5, para. 39.
30. *Id.*
31. *Id.* para. 40.
32. *Id.*

B. The Exhausting Carino Saga

In 1987 the town of Deerfield, New York, attempted to enforce its zoning regulations against Joseph Carino, a resident whose lot was less than one-half acre.[33] The regulations restricted the placement of satellite antennas, providing:

> B. Dish or Tower Type Antennae:
>
> General Regulations:
>
> a. In R-1 or R-2 District no dish or tower type antennae shall be erected on any lot less than one-half (1/2) acre.
>
> b. No dish or tower type antennae shall be located in a front yard or corner lot fronting on more than one street.
>
> c. No dish or tower type antennae shall be erected on any lot without the issuance of a building permit by the enforcement officer(s) and subject to the following so as to be cosmetically acceptable for all adjoining landowners:
>
> 1. All towers and antennae shall have setbacks from any lot line equal to or greater than the height of the proposed structure, but in any case not less than thirty (30) feet.
>
> 2. Only one such structure shall exist at any one time on any lot or parcel.
>
> 3. The applicant shall present documentation of the possession of any required federal or state license.
>
> 4. The owner of such a structure shall assume complete liability in case of personal or property damage.
>
> d. Dish Type—special regulations:
>
> 1. No part twelve (12) feet above ground level.
>
> 2. Projected area:
>
> Solid type—51 square feet
>
> Mesh type—80 square feet.[34]

After the Deerfield Zoning Board of Appeals announced its intention to enforce this regulation against Carino, he wrote the FCC asking for help.[35] The Commission responded in a letter, which directed Carino's attention to the Commission's regulation codified at 47 C.F.R. § 25.104 and further advised him to use the rule to "pursue legal remedies on a local level."[36] In addition, the

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33. Town of Deerfield v. FCC, 992 F.2d 420, 424 (2d Cir. 1993).

34. *Id.* at 423-24 (quoting DEERFIELD, N.Y., ZONING ORDINANCE § 17(B) (1986)).

35. *Id.* at 424 (citing Letter from Joseph A. Carino to Chief, Satellite Radio Branch, FCC (Feb. 28, 1987)).

36. Letter from Chief, Satellite Radio Branch, FCC, to Joseph A. Carino (Mar. 20, 1987), *quoted in Deerfield*, 992 F.2d at 424.

Commission restated its intention not to function as a national zoning board that would "offer legal opinions with respect to individual problems."[37] While recognizing that "communities are generally failing to abide by our standards,"[38] the Commission declared that "[r]equests for relief under the Commission's rule must demonstrate that *all other remedies including legal action with the assistance of private counsel have been pursued and exhausted.*"[39]

Carino accepted the Commission at its word and embarked on a five-year journey that eventually brought him full circle back to the Commission. The journey began when Carino appealed the zoning board's decision to the New York state courts, where he raised several arguments including preemption of the zoning regulation pursuant to 47 C.F.R. § 25.104.[40] The New York State Supreme Court denied Carino's petition in its entirety. With respect to the preemption claim, the court found that the regulation "does not differentiate between satellite receive-only facilities and other antennas, it applies to both dish and tower type antennas."[41] Thus, the court concluded that the zoning ordinance was not preempted because it did not discriminate against satellite-dish antennas.[42] This decision was affirmed by the Appellate Division for substantially the same reasons.[43] The New York state court decisions are hereinafter collectively referred to as *Carino I.*

In a last-ditch effort to obtain relief, Carino took his case to the federal courts.[44] There, the Town of Deerfield asserted that Carino was collaterally estopped from arguing preemption because the issue had been fully and fairly litigated and necessarily decided in the state court actions. The district court agreed and

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37. *Id.*
38. *Id.*
39. *Id.* (*Deerfield*'s emphasis).
40. *Deerfield*, 992 F.2d at 425.
41. *Id.* (quoting state supreme court's memorandum denying Carino's petition).
42. *Id.* (citing state supreme court's memorandum denying Carino's petition).
43. Carino v. Pilon, 530 N.Y.S.2d 1022 (App. Div.), *appeal dismissed*, 531 N.E.2d 655 (N.Y. 1988). Carino did not petition the United States Supreme Court for review.
44. Carino v. Town of Deerfield, 750 F. Supp. 1156 (N.D.N.Y. 1990), *aff'd*, 940 F.2d 649 (2d Cir. 1991).

held that it was required to honor the state court decisions under the Full Faith and Credit Clause of the U.S. Constitution.[45] This determination was upheld by the United States Court of Appeals for the Second Circuit.[46] The first round of federal court decisions is hereinafter collectively referred to as *Carino II.*

Having exhausted his local remedies, Carino returned to the Commission in January 1991 to seek a declaratory ruling that the Deerfield zoning ordinance was preempted by 47 C.F.R. § 25.104.[47] The Commission noted that Carino had done everything required in pursuit of local relief.[48]

Deerfield once again raised the defense of collateral estoppel. It argued:

> Although the F.C.C. has discretion in determining issues within its jurisdiction, it is still bound by the law and it must respect final decisions of competent courts, at least as the decisions apply to the original parties to judicial proceedings. It is not within the power of the F.C.C. to act as a court of last resort to review judicial determinations. . . . Merely by retaining jurisdiction in this matter the Commission has placed itself in the position of reviewing the decision of a higher court. Such a power has obviously not been granted to the Commission by Congress.[49]

The Commission accepted jurisdiction and determined that the ordinance was indeed overly restrictive and thus preempted.[50] The Commission refused to give collateral estoppel or res judicata effect to the federal court decisions because there had been no federal court ruling on the merits, nor had the prior federal court decisions addressed whether Carino was estopped from "bringing the Deerfield ordinance to the FCC's attention."[51] Furthermore,

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45. *Id.* at 1162 (citing Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81 (1984)); *see also* U.S. CONST. art. IV, § 1.

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

47. *In re* Preemption of Satellite Antenna Zoning Ordinance of Town of Deerfield, *Memorandum Opinion and Order*, 7 FCC Rcd. 2172 (1992) [hereinafter *Deerfield Memorandum Opinion and Order*].

48. *Id.* para. 8 n.16.

49. Motion to Accept Late Filed Comments by Town of Deerfield para. 4, *In re* Petition of Joseph A. Carino for a Declaratory Ruling Preempting the Satellite Dish Antenna Zoning Ordinance of the Town of Deerfield, N.Y. (July 24, 1991) (FCC Dkt. No. DA 91-145).

50. *Deerfield Memorandum Opinion and Order*, *supra* note 47, para. 8.

51. *Id.* para. 20.

even if collateral estoppel would ordinarily apply, the Commission concluded that its application in this case would be unfair to Carino since he was only following the Commission's instructions.[52]

The Town of Deerfield appealed the FCC's order to the Second Circuit, arguing that the Commission's failure to give collateral estoppel effect to the prior state and federal court judgments was in error.[53] The FCC defended its order on the grounds that (1) it had discretion to disregard the prior judgments, (2) collateral estoppel was not applicable because this was an issue of law rather than fact, (3) application of collateral estoppel would be unfair to Carino, and (4) the FCC should make the final determination of preemption because of its particular expertise.[54] The Second Circuit reversed the Commission, but on grounds somewhat different from those briefed or argued by either party.[55] The FCC elected not to appeal this decision.[56]

II. THE SECOND CIRCUIT'S DECISION REVERSING THE FCC

A. The Ruling in Brief

Rather than agreeing with the Town of Deerfield's argument that the Commission was collaterally estopped from deciding the

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52. *Id.* paras. 21-23. The Commission did not specifically address the collateral estoppel effect of the state court determinations. The question of whether a state court decision can have res judicata or collateral estoppel effect in a subsequent proceeding before an administrative agency is unsettled. This issue is discussed in more detail *infra* part II.C.1.

53. Town of Deerfield v. FCC, 992 F.2d 420, 426-27 (2d Cir. 1993).

54. *Id.* at 427.

55. *Id.* at 428 (focusing on separation of powers doctrine rather than res judicata issues argued by the parties).

56. Three weeks after the court's opinion, however, the Commission called for public comment on three related matters: (1) the effect of the Second Circuit opinion on the FCC's HSD rules and practice; (2) a Hughes Network Systems petition for complete preemption of local zoning restrictions on satellite dishes of two meters or smaller in commercial and industrial zones; and (3) an earlier petition of the Satellite Broadcasting and Communications Association, where the record stood in need of updating. Comments Sought on Preemption of Local Zoning Reg. of Satellite Antennas, *Public Notice*, 8 FCC Rcd. 3576 (1993). This tripartite proceeding had not been resolved as of April 1994.

Carino case, the Second Circuit ruled that the FCC's decision rendered the prior federal court decisions merely advisory, in violation of the Case or Controversy Clause of Article III of the Constitution.[57]

The Second Circuit discussed at length the allocation of judicial power under the Constitution. Citing cases from the earliest days of the United States, the court focused upon the Case or Controversy Clause, which prohibits Congress from requiring an Article III court to "express an opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties."[58] The court held:

> A judgment entered by an Article III court having jurisdiction to enter that judgment is not subject to review by a different branch of government, for if a decision of the judicial branch were subject to direct revision by the executive or legislative branch, the court's decision would in effect be merely advisory.[59]

Next, the court determined that an administrative agency may not simply choose to ignore federal court judgments.[60] Finally, the court concluded that federal courts are required by statute to accord state court judgments "the same full faith and credit . . . as they have by law or usage in the courts of such State . . . from which they are taken."[61]

Applying these principles to the facts and procedural history of the *Carino* case, the Second Circuit concluded that the FCC erred by refusing to recognize the conclusive effect of the prior federal court judgment that gave collateral estoppel effect to the state court judgment.[62] "By incorporating in its regulation a policy of requiring 'exhaust[ion]' of judicial remedies, the Commission in effect sought to modify the jurisdiction of Article

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57. *Deerfield*, 992 F.2d at 427-28 (citing U.S. CONST. art. III, § 2).

58. Gordon v. United States, 117 U.S. 697, 702 (1865), *quoted in Deerfield*, 992 F.2d at 427-28.

59. *Deerfield*, 992 F.2d at 428; *see also* United States v. Ferreira, 54 U.S. (13 How.) 40, 49-52 (1851).

60. *Deerfield*, 992 F.2d at 428.

61. *Id.* (quoting 28 U.S.C. § 1738 (1988)).

62. *Id.* at 429.

III courts, with respect to any issue of the preemptive effect of § 25.104, to deprive them of the power to render anything but advisory opinions."[63]

The court found the decision was not unfair to Carino because he had an opportunity to fully litigate his claim in the state courts.[64] Furthermore, the Commission's decision to eschew immediate agency action could not "alter the constitutional principle that an agency has no power to review, alter, or prevent enforcement of the judgment of an Article III court."[65] Thus, the Second Circuit finally concluded that:

> by declining to become involved in the controversy over whether § 25.104 preempted the Deerfield Ordinance until after the Article III court proceedings had been completed and insisting that it is entitled to decide anew questions decided by the courts, the FCC has in effect attempted (1) to impose on the courts the obligation to give no opinion on preemption other than one that would be purely advisory, and/or (2) to arrogate to itself the power to (a) review or (b) ignore the judgments of the courts. In light of the principles discussed above, all of these attempts are impermissible as a matter of law.[66]

The Second Circuit's conclusions appear to be based upon sound legal principles that are supported by extensive case law dating back to the birth of the United States as a nation.

B. The Historical Foundation

In *Hayburn's Case*,[67] the Supreme Court first indicated that it would apply the case or controversy requirement in circumstances where another branch of government places itself in a position to review decisions of the judicial branch. The Supreme Court never actually decided such a case. Rather, a majority of five Justices, in their capacity as circuit judges, expressed a uniform opinion that a judicial declaration subject to discretionary

63. *Id.* (alteration in original).
64. *Id.*
65. *Id.* at 430.
66. *Id.*
67. Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).

suspension by another branch of government constituted an impermissible advisory opinion.[68]

At issue in *Hayburn's Case* was a congressional act providing pensions to Revolutionary War veterans and their families.[69] The Act called for the federal circuit courts to make the initial determination of a veteran's eligibility to receive benefits under the Act. The courts would certify their decisions to place an individual on the pension list to the Secretary of War. The Secretary, however, had authority to withhold a name from the list if the Secretary suspected "imposition or mistake."[70] A final decision would then be made by Congress.[71] The circuit courts, in unanimously refusing to enforce the Act, concluded that the Act required courts merely to give advice, which was beyond the scope of the courts' constitutional authority.[72]

Nearly eighty years later, the Supreme Court decided a similar case for the same reasons in *United States v. Ferreira*.[73] Congress, pursuant to a treaty with Spain, established a forum in the District Court for the Northern District of Florida to hear claims for losses by Spanish citizens in Florida.[74] Decisions favorable to the claimants were to be reported to the Secretary of the Treasury, who would pay the award only if satisfied that it was just and equitable.[75] In *Ferreira*, an appeal was taken to the Supreme Court rather than directly to the Secretary. Unlike *Hayburn's Case*, the Supreme Court did not hold that the federal courts lacked jurisdiction, but only that they were not exercising

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68. *Id.* at 410.
69. Invalid Pensions Act, Act of Mar. 23, 1792, ch. 11, 1 Stat. 243.
70. *Hayburn's Case*, 2 U.S. (2 Dall.) at 413.
71. *Id.*
72. *Id.* at 410.
73. *Ferreira*, 54 U.S. (13 How.) 40 (1851).
74. When Congress first set up this forum, the court that was later to decide *Ferreira* was a territorial court. Soon thereafter, Florida was admitted to the Union and the jurisdiction of the territorial court was continued in the new United States district court. At the time of *Ferreira*, the court was a United States district court. This difference in courts, however, would not have altered the holding of the Supreme Court. *Id.* at 48-49.
75. *Id.* at 42.

judicial power.[76] The Court deemed Congress to be within its treaty powers in establishing the district court as a tribunal for the resolution of claims.[77] However, when sitting as such a tribunal, the district court was not exercising judicial power and thus an appeal to the Supreme Court was not available.[78]

The FCC's satellite preemption rulemaking and its subsequent decision in the *Deerfield Memorandum Opinion and Order* similarly placed the FCC in a position to review federal court decisions. Although the FCC did not expressly state that it would review federal court decisions, as occurred in *Hayburn's Case* and *Ferreira*, such a conclusion was inescapable.[79] By concluding that Carino's claim was not collaterally estopped, the Commission effectively reversed federal and state court decisions. To the extent that the FCC was indeed reviewing a federal court's decision, it violated long-recognized judicial principles.

C. *Alternative Theories Available to the Second Circuit*

In resolving *Deerfield* upon the case or controversy ground sua sponte, the Second Circuit did not give extensive consideration to other issues deserving discussion. First and foremost among these issues is the collateral estoppel argument raised by the Town of Deerfield. Nor did the court discuss Full Faith and Credit, primary jurisdiction, and exhaustion of administrative remedies. This section of the Article addresses the role these issues could have played in *Deerfield*.

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76. *Id.* at 51.

77. *Id.* at 46.

78. *Id.* at 51. The Court drew a distinction between imposing certain duties upon the courts, as opposed to judges. *Id.* at 50-51. A duty otherwise impermissible if imposed on the courts would be permissible if imposed upon a judge. This position was consistent with the views expressed by a majority of Justices in *Hayburn's Case*. *See also* Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693 (1927) (holding Supreme Court lacked jurisdiction to hear appeal from D.C. Circuit because the decision of the D.C. Circuit was not a judicial action but a mere administrative decision).

79. *See* Chicago & S. Air Lines v. Waterman Steamship Corp., 333 U.S. 103 (1948); Muskrat v. United States, 219 U.S. 346 (1911); Gordon v. United States, 117 U.S. 697 (1865).

1. Collateral Estoppel

Collateral estoppel was the centerpiece of Deerfield's challenge to the Commission's decision preempting the Deerfield ordinance. Deerfield prevailed with that argument earlier in the federal courts before it was rejected by the Commission in the *Deerfield Memorandum Opinion and Order*. The Second Circuit did not reject collateral estoppel as a basis for its decision. Rather, it chose to rely principally on case or controversy as the grounds for its decision.[80] It implicitly drew upon collateral estoppel to the extent the FCC's decision rendered advisory the prior federal court decision based upon collateral estoppel.

Deerfield had a strong argument for collateral estoppel. The issues raised in the state court proceedings and the FCC proceedings were precisely the same. The issue was litigated in the first action before the state courts; the parties were identical; and the issue was necessarily decided in the state courts by a final judgment on the merits. Thus, the key elements for invoking issue preclusion were met.[81]

The FCC first declared that collateral estoppel was not implicated because neither of the prior federal court decisions addressed whether Carino would be estopped from bringing his action to the Commission. Technically, the Commission was correct in arguing that *Carino II* did not address the application of collateral estoppel in a case before the Commission. This point was important because the collateral estoppel effect of a state court judgment in a subsequent federal administrative proceeding is an open question. The Second Circuit took the position, however, that its prior application of collateral estoppel in *Carino II* "conclusively resolved the dispute between Carino and Deerfield."[82] The Commission thus erred by not recognizing this conclusiveness and thereby rendering *Carino II* advisory.

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80. Town of Deerfield v. FCC, 992 F.2d 420, 427 (2d Cir. 1993).

81. *See* 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4416 (1981 & Supp. 1993); RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

82. *Deerfield*, 992 F.2d at 429.

Second, the FCC declared that even if collateral estoppel would ordinarily apply, it should not be employed in this case because of the unfairness exception. The doctrine of collateral estoppel does not apply when its application would be fundamentally unfair to a party.[83] According to the Commission, applying collateral estoppel would have been unfair to Carino, who was only following the Commission's directions when he pursued his judicial remedies before petitioning the Commission.[84] The Second Circuit rejected this argument because Carino had adequate opportunity to litigate the issue in the state courts and, regardless, no unfairness could "alter the constitutional principle that an agency has no power to review, alter, or prevent enforcement of the judgment of an Article III court."[85]

The Commission could also have relied upon the public interest exception to the collateral estoppel doctrine.[86] A final decision that the Deerfield ordinance was not preempted would have had effects far beyond the Carino backyard. Deerfield would be free to apply the ordinance to all current and future HSD owners within its jurisdiction. A separate suit by or against these other individuals would not be barred by collateral estoppel because these individuals would not have been in privity with Carino.[87] A non-preemptive outcome of the *Deerfield Memorandum Opinion and Order*, however, might have emboldened Deerfield's enforcement of its ordinance and cast a chilling effect upon potential HSD purchasers. Thus, the same interests the Commission invoked in enacting 47 C.F.R. § 25.104 could also have formed a basis for not applying collateral estoppel in the *Deerfield* case.[88] It is questionable, however, whether the Second Circuit would have recognized this exception in light of the previous discussion.

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83. 18 WRIGHT ET AL., *supra* note 81, § 4426.

84. *Deerfield*, 992 F.2d at 426-27.

85. *Id.* at 429-30.

86. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28(5)(a) (1982).

87. *See generally* Federated Dep't Stores v. Moitie, 452 U.S. 394, 398 (1981); RESTATEMENT (SECOND) OF JUDGMENTS § 48 (1982).

88. *See supra* part I.A.

The Second Circuit in *Deerfield* thus did not ignore the collateral estoppel issue. Rather, it relegated the issue to a supporting role in the case or controversy argument. The court did not say that the Commission should have relied on collateral estoppel but rather that, in failing to give preclusive effect to prior federal court decisions applying collateral estoppel, the Commission rendered those earlier decisions merely advisory.[89] The court then proceeded to review and reject the exceptions the Commission found for not applying collateral estoppel.[90]

2. Full Faith and Credit

In Carino's original federal court action (*Carino II*), both the district court and the Second Circuit held that Carino's suit was barred by collateral estoppel and the Constitution's Full Faith and Credit Clause.[91] Without the constitutional clause, the collateral estoppel effect of the earlier state court ruling in the federal court proceeding would have been less certain.

The courts have never fully resolved whether full faith and credit applies to federal courts or, instead, is limited to the full faith and credit of one state to another state's judgments. Although there are federal cases that could be construed to support both points of view, the more recent decisions seem to hold that the constitutional doctrine does not apply to federal courts.[92] The issue has never really been decided, however, because Congress, early in our nation's history, resolved this question by enacting a statutory full faith and credit provision expressly applicable to federal courts.[93]

Thus, when Carino took his case to the federal courts after fully litigating and losing in New York state court, the federal

89. *Deerfield*, 992 F.2d at 429.

90. *Id.* at 429-30.

91. U.S. CONST. art. IV, § 1.

92. *See, e.g.*, University of Tenn. v. Elliot, 478 U.S. 788, 799 (1986); Kremer v. Chemical Constr. Corp., 456 U.S. 461, 483-84 n.24 (1982); Ultracashmere House, Ltd. v. Meyer, 664 F.2d 1176, 1183 (11th Cir. 1983). *But see* American Sur. Co. v. Baldwin, 287 U.S. 156, 166 (1932). *See generally* 18 WRIGHT ET AL., *supra* note 81, § 4469.

93. Act of May 26, 1790, ch. 11, 1 Stat. 122 (codified as amended at 28 U.S.C. § 1738 (1988)).

courts were compelled to find that he was collaterally estopped by giving full faith and credit to the prior New York state court judgments. That result, however, was certainly not a foregone conclusion when the same case was presented to the FCC.

Congress enacted Section 1738 long before the proliferation of federal agencies, and thus Congress did not intend for the provision to apply specifically to agencies.[94] This omission raises the question of whether collateral estoppel would have applied if Carino had gone to the FCC directly from state court without having also sought relief from the federal courts.

The Second Circuit's reliance on case or controversy rather than collateral estoppel might suggest that the answer to this question is far from certain. Deerfield argued that the prior state court decisions should collaterally estop Carino from bringing his complaint to the Commission.[95] The Second Circuit, however, did not address collateral estoppel in this context. Rather, its opinion was concerned exclusively with the prior federal court decisions, which never reached the merits of Carino's complaint. The case or controversy rationale would not have been applicable to the prior state court decisions because that provision of the Constitution solely applies to Article III federal courts.[96] Only by applying full faith and credit to federal agencies would collateral estoppel compel the FCC to honor the prior state court judgments.

The Second Circuit thus may have sought deliberately to avoid this issue by raising case or controversy sua sponte. The point is critical here because this factual scenario, where a complainant comes to the Commission directly from state court, could very easily arise again and lead to an outcome different from that reached by the Second Circuit in *Deerfield*.

3. Primary Jurisdiction

Primary jurisdiction was not directly implicated in *Deerfield* but was implicit in the FCC's defense. The FCC argued that it

94. *Elliot*, 478 U.S. at 794-95.
95. Town of Deerfield v. FCC, 992 F.2d 420, 426-27 (2d Cir. 1993).
96. *Id.* at 427-28.

should make the final determination of whether a particular ordinance is preempted since it has the special expertise in satellite antenna regulation and a unique understanding of its own regulations.[97] Construing and applying Section 25.104 would be arguably within the FCC's primary jurisdiction. The Commission promulgated the rule to foster the development of satellite-transmitted programming.[98] However, the FCC had clearly indicated, by requiring exhaustion of local remedies, that it did not want primary jurisdiction of these proceedings.[99]

Primary jurisdiction arises when a case is originally cognizable in the courts but involves factual determinations that require, or should be resolved according to, agency expertise.[100] In such a case, a court may defer action on an issue within the agency's primary jurisdiction while allowing the appropriate agency to dispose of the matter.[101] The decision of the agency is then subject to judicial review under normal appellate standards.[102]

When the plaintiff lacks an assured ability to initiate an agency action, a court may be reluctant to apply primary jurisdiction.[103] If an agency refused to institute proceedings, a court would be free to resume determination of the case.[104] Thus, the FCC effectively waived any primary jurisdiction it may have had to decide Carino's petition.

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97. *Id.* at 427.
98. *Id.* at 423.
99. *See id.*
100. *See* 5 JACOB A. STEIN ET AL., ADMINISTRATIVE LAW § 47.01 (1993).
101. 5 *id.*
102. *See* 5 *id.* § 47.03. The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend, or determine the validity of all final orders of the FCC made reviewable by 47 U.S.C. § 402(a) (1988). 28 U.S.C. § 2342 (1988).
103. 5 STEIN ET AL., *supra* note 100, § 47.03.
104. Atchison, T. & S.F. Ry. v. Aircoach Transp. Ass'n, 253 F.2d 877, 886 (D.C. Cir. 1958); *see also* Chicago Mercantile Exch. v. Deaktor, 414 U.S. 113, 115 (1973); Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 304-05 n.14, 306 (1973). While the Supreme Court held that certain issues should have been referred to the agency under its primary jurisdiction, on referral, the agency declined to decide the *Ricci* case. *See* Doctrine of Primary Jurisdiction, Statement Concerning Referrals of Private Litig., *Notice*, 41 Fed. Reg. 18,471 (Commodity Futures Trading Comm'n, 1976).

4. Exhaustion of Administrative Remedies

The FCC also precluded the operation of the judicial doctrine of exhaustion of administrative remedies when it refused to hear Carino's petition in the first instance. The FCC's policy of requiring the exhaustion of local remedies effectively blocked one of the means by which courts defer to agencies.

Exhaustion is most often employed as a prerequisite to judicial review of agency actions.[105] Its purpose is to permit an agency to determine a case without court interference, thus giving the court the benefit of agency expertise as well as judicial economy.[106] When a plaintiff seeks a declaratory judgment in the courts *prior to* agency action, however, exhaustion does not apply.[107]

The purposes of the doctrine of exhaustion of administrative remedies include (1) promoting judicial economy by requiring parties to pursue all administrative solutions before seeking judicial relief, (2) preventing judicial interference in the administrative process, and (3) allowing courts to benefit from agency expertise by permitting agencies both to develop a complete factual record and to render a decision.[108]

Exhaustion is equivalent to the rule against interlocutory appeals.[109] Accordingly, another rationale for the doctrine is to prevent regulated parties from delaying or obstructing the agency's ability to conduct an orderly proceeding.[110] Exhaustion also

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105. *See* 2 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §§ 15.1-.2 (3d ed. 1994).

106. 2 *id.* § 15.2; *see also* McKart v. United States, 395 U.S. 185, 193-95 (1969).

107. Nehring v. First DeKalb Bancshares, Inc., 692 F.2d 1138, 1142 (7th Cir. 1982).

108. 5 STEIN ET AL., *supra* note 100, § 49.01.

109. *McKart*, 395 U.S. at 194.

110. *Cf.* Public Citizen Health Research Group v. FDA, 740 F.2d 21, 29 (D.C. Cir.), *overruled on other grounds*, Telecommunications Research & Action Ctr. v. FCC, 750 F.2d 70, 75 (D.C. Cir. 1984), *quoted in* 5 STEIN ET AL., *supra* note 100, § 49.01 n.8 (The exhaustion doctrine "ensures that persons do not flout established administrative processes and thereby advances Congress' intent in establishing the processes; it protects the autonomy of agency decisionmaking; . . . and it serves judicial economy by avoiding the necessity . . . of any judicial involvement if the parties successfully vindicate their claims before the agency.").

prevents conflicting resolution of issues by the courts and agencies,[111] precisely the problem encountered in the *Carino* cases.

Unless restricted or mandated by statute, a court has discretion to apply the exhaustion principle to a case.[112] Usually an agency's enabling legislation vests it with exclusive initial responsibility for interpreting and enforcing the statutory provisions pertaining to its jurisdictional subject matter.[113] There are exceptions to exhaustion, however, and the courts and agencies may waive the principle.[114] Immediate court review is available if the party establishes that the agency clearly exceeded its authority.[115]

In the *Carino* cases, exhaustion would not have been applicable for at least two reasons. First, no administrative cases were pending for the courts to defer to in requiring exhaustion of administrative remedies. Second, the FCC effectively waived the exhaustion requirement by refusing to hear the case in the first instance.

III. OPTIONS REMAINING TO THE FCC

Although the Commission's preemption policy received a setback from the Second Circuit decision in *Deerfield*, the Commission is not without options in the continued pursuit of its goals. To varying degrees, however, these options require trade-offs between and among the Commission's three goals: (1) ensuring satellite transmission availability; (2) conserving local regulations with legitimate health, safety, or aesthetic objectives; and (3) preserving valuable agency resources. This section surveys the options, including one that may allow the Commission to balance effectively all three goals in much the same manner it had sought prior to the Second Circuit's *Deerfield* decision.

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111. 5 STEIN ET AL., *supra* note 100, § 49.01.
112. 5 *id.*
113. 5 *id.*
114. 5 *id.*
115. Leedom v. Kyne, 358 U.S. 184, 188-89 (1958).

A. *Totally Preempt Local Regulations*

The easiest and most straightforward response to the Second Circuit decision is for the FCC to preempt totally all local regulation of HSDs. This approach would further the federal policy of making satellite transmissions available to the general public without involving the Commission in an extensive nationwide review of local zoning ordinances.

Total preemption, however, ignores potentially valid health, safety, or aesthetic objectives underlying many local regulations, raising questions concerning the validity of total preemption. The state interest in these issues would have to be weighed against the competing federal interest.

If total preemption were permissible, the town of Deerfield's victory in court would indeed have been a Pyrrhic one. In so vigorously fighting to defend its local ordinance against preemption rather than attempting to recraft it in a nondiscriminatory fashion, Deerfield may have forced the FCC to preempt totally a town's right to place any zoning restrictions upon antennas.

B. *Establish Early Precedents for Applying Section 25.104*

Taking a compromise approach, the Commission could quickly accept a number of preemption disputes for determination and use those cases to establish a line of precedent to guide state and federal courts in their application of Section 25.104. As cases with new facts arise, the Commission could accept jurisdiction to establish additional precedent. Once the Commission believed it had provided sufficient guidance, it could reimpose its requirement that petitioners seek relief from local tribunals. This approach's principal advantage is that it would minimize many courts' improper application of Section 25.104. Furthermore, local regulations with legitimate purposes would not be preempted.

The compromise in this approach centers upon the Commission's role. Instead of preserving for itself the final right to decide these cases, the Commission would have to decide a number of cases in the first instance. Thus, the FCC would become a national zoning board in the early stages of implemen-

tation. Once it had laid down sufficient precedent, however, the Commission could significantly reduce, if not eliminate, the cases it accepts, and return to its policy of exhaustion.

For all this added security, the option would not ensure against the recurrence of a *Carino*-type situation. Once the Commission forgoes its right to decide a case in the first instance, either by turning away a petition for relief or refusing primary jurisdiction, it may lose all control over the case. Thus, a decision of a court, although wrong, would be final and would not be subject to Commission review.

C. Initiate an Independent Enforcement Proceeding

A third available alternative would allow the Commission to continue balancing federal and state interests while minimizing the administrative burdens placed upon the agency. This alternative would, in effect, retain the requirement that petitioners exhaust their local remedies while the FCC retains jurisdiction, enabling the agency to rectify incorrect decisions of federal and state courts without confronting the case or controversy and collateral estoppel issues. The approach, explained below, is based on Sections 312(b)[116] and 403[117] of the Communications Act.

1. A Section 312(b) Proceeding

Section 312(b) provides that:

> Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this chapter, . . . or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.[118]

Under subpart (3), the FCC is given the express authority to issue cease and desist orders for violations of its regulations. This would include violations of 47 C.F.R. § 25.104.

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116. 47 U.S.C. § 312(b) (1988).
117. 47 U.S.C. § 403 (1988).
118. 47 U.S.C. § 312(b) (1988).

It could be argued, however, that because Section 312(b) is located in Title III of the Act, which deals with radio regulations, and because Section 312 as a whole is concerned with station licenses, its application to unlicensed satellite antennas is improper. The legislative history of Section 312(b), however, does not indicate an express intent to limit its effect to licenses.[119]

In addition, at least one circuit court has expressly held that Section 312(b) is *not limited* to licenses under Title III. In *General Telephone Co. v. FCC*,[120] the D.C. Circuit squarely faced this issue. The appellants, various telephone common carriers, challenged the FCC's issuance of cease and desist orders under Section 312(b) "as a means of arresting the continued construction and operation of certain channel distribution systems."[121] The FCC had issued cease and desist orders under Section 312(b) to prohibit the telephone companies from constructing what amounted to cable television systems.[122] The phone companies argued that, as common carriers regulated under Title II of the Act, Section 312(b) was not applicable to them.[123] The court rejected this argument by looking directly to the language of Section 312(b). The court observed:

> Initially, Section 312(b) makes clear that it is directed at "*any person* . . . [who] has violated or failed to observe *any of the provisions of this Act* . . . [or] *any rule or regulation of the Commission authorized by this Act* . . . ." The pervasive application of the language employed in Sections 312(b)(2) and 312(b)(3) is suggested by Section 312(b)(1)'s narrower reference to "any person [who] has failed to operate substantially *as set forth in a license* . . . ." It seems that when the drafters intended to focus on licensees, they had no problem doing so.[124]

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119. H.R. REP. NO. 1750, 82d Cong., 2d Sess. § 10 (1952), *reprinted in* 1952 U.S.C.C.A.N. 2234, 2246-47.

120. *General Tel.*, 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

121. *Id.* at 403-04.

122. *Id.* at 392-93.

123. *Id.* at 404.

124. *Id.* (alterations in original) (court's emphasis) (quoting 47 U.S.C. § 312(b) (1988)).

No other court has decided to the contrary. Furthermore, the D.C. Circuit has exclusive jurisdiction to review FCC cease and desist orders.[125]

Thus, under Section 312(b), the Commission could, upon its own initiative, issue a cease and desist order against any community whose zoning regulations violated 47 C.F.R. § 25.104. Such an order would have a broad effect by prohibiting enforcement against *any* person and would not be tailored or addressed to a specific individual.

2. A Section 403 Proceeding

In conjunction with or independently of Section 312(b), the FCC may also use Section 403 of the Communications Act to institute enforcement proceedings against communities violating 47 C.F.R. § 25.104.[126] Section 403 authorizes the FCC to:

> institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money.[127]

The plain language clearly contemplates an agency-initiated enforcement proceeding.[128] Such a proceeding was also common under Section 13(2) of the Interstate Commerce Act, from which Section 403 is derived.[129] Section 403 further enhances the

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125. 47 U.S.C. § 402(b)(7) (1988).

126. 47 U.S.C. § 403 (1988).

127. *Id.*

128. *See* National Ass'n of Motor Bus Owners v. FCC, 460 F.2d 561, 565 (2d Cir. 1972); Building Material Teamsters Local 282 v. NLRB, 275 F.2d 909, 913 n.2 (2d Cir. 1960).

129. Interstate Commerce Act of 1887, ch. 104, § 13, 24 Stat. 379, 383-84, *repealed by* Act of Oct. 17, 1978, Pub. L. No. 95-473, § 4(b), 92 Stat. 1337, 1466-70; *see In re* Alleged Excessive Freight Rates on Food Products, 4 I.C.C. 116 (In the absence of

FCC's powers under Section 312(b) and permits the FCC to bring any action that could have been brought by complaint.[130]

Section 403 would thus appear to give the FCC sufficient authority to take virtually any action sua sponte that it could take anywhere else in the Communications Act pursuant to petition or complaint. This would encompass a petition such as that filed by Carino and would also provide the necessary statutory authority to initiate a Section 312(b) cease and desist action on its own motion. Such action would be in the broad public interest rather than tailored to the circumstances of an individual complainant.

3. Avoidance of Case or Controversy and Collateral Estoppel

A proceeding to enforce 47 C.F.R. § 25.104 initiated sua sponte by the FCC, under Section 312(b) or 403 of the Communications Act, would not encounter the case or controversy and collateral estoppel problems raised in the *Carino* cases because such a proceeding would involve different parties and thus would be a distinct and independent proceeding.[131] Furthermore, collateral estoppel should not apply because the FCC would not have been a party in the earlier court proceedings and because the government's interest is broader than that of a single individual.

Application of collateral estoppel requires (1) a final judgment on the merits in the prior case in which the issues were actually litigated and necessarily resolved, (2) that the parties be identical to or in privity with the parties in the prior case, and (3) that the issue be the same in both actions.[132] A set of facts similar to those in the *Carino* cases would implicate the first and third elements of collateral estoppel. However, if the Commission were to initiate, on its own motion, a proceeding under Sections

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complaint by others the Commission must, if it is to enforce the law, proceed on its own motion.).

130. 47 U.S.C. § 403 (1988).

131. *See* Carino v. Town of Deerfield, 750 F. Supp. 1156 (N.D.N.Y. 1990), *aff'd*, 940 F.2d 649 (2d Cir. 1991); Carino v. Pilon, 530 N.Y.S.2d 1022 (App. Div.), *appeal dismissed*, 531 N.E.2d 655 (N.Y. 1988); *Deerfield Memorandum Opinion and Order*, *supra* note 47. However, a relevant federal or state court ruling against an HSD owner would still be in force and unaffected.

132. Montana v. United States, 440 U.S. 147, 153 (1979).

312(b) or 403 of the Communications Act, there would be no identity of parties and probably no privity. It would be very difficult to argue that the FCC is in privity with individual plaintiffs in earlier court proceedings, especially if the FCC does not participate in any way in the prior cases. Additionally, because the FCC represents the broader public interest, its position cannot adequately be represented by individual complainants who reflect only their own interests. Thus, the second prerequisite for the application of collateral estoppel would not be satisfied.

To be sure, identity of parties or privity is not an absolute requirement of collateral estoppel;[133] the Supreme Court has upheld the application of a type of collateral estoppel known as non-mutual collateral estoppel.[134] Nevertheless, the Court has also recognized that non-mutual collateral estoppel should not usually be applied against the government[135] because "'the Government is not in a position identical to that of a private litigant,' both because of the geographic breadth of Government litigation and also, most importantly, because of the nature of the issues the Government litigates."[136]

As a corollary to this rule, it is well-settled that the United States will not be barred from independent litigation by the failure of a private plaintiff.[137] This rule emerged most prominently in two contexts, the Voting Rights Act of 1965[138] and Equal Employment Opportunity Commission (EEOC) complaints, but has not been limited to these areas.

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133. Wilder v. Thomas, 854 F.2d 605, 617 (2d Cir. 1988), *cert. denied*, 489 U.S. 1053 (1989).

134. *See* Blonder-Tongue Lab. v. University of Ill. Found., 402 U.S. 313 (1971).

135. *See* United States v. Mendoza, 464 U.S. 154, 158-60 (1984). *But see Montana*, 440 U.S. at 155 (finding privity where the United States essentially controlled the prior litigation even though it was not a party).

136. *Mendoza*, 464 U.S. at 159 (quoting INS v. Hibi, 414 U.S. 5, 8 (1973) (per curiam) (citation omitted)).

137. *See* United States v. East Baton Rouge Parish Sch. Bd., 594 F.2d 56, 58-59 & n.6 (5th Cir. 1979); *see also* City of Richmond v. United States, 422 U.S. 358 (1975); Durfee v. Duke, 375 U.S. 106 (1963); RESTATEMENT (SECOND) OF JUDGMENTS § 41 cmt. d (1982).

138. 47 U.S.C. § 1973c (1988).

In *City of Richmond v. United States*, the federal government, under the Voting Rights Act of 1965, challenged the annexation of certain surrounding communities by the City of Richmond, Virginia.[139] The Voting Rights Act of 1965 prohibited such action unless either (1) approved by the Attorney General or the Attorney General failed to act within sixty days, or (2) the U.S. District Court for the District of Columbia had issued a declaratory judgment that the action "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[140]

Pending review by the Attorney General, Curtis Holt, a private plaintiff, commenced a suit in the Eastern District of Virginia challenging the annexation under the Fifteenth Amendment.[141] The district court held that the annexation had an illegal racial purpose.[142] The Fourth Circuit reversed the lower court, however, and found that Richmond had valid reasons for the annexation.[143] The City of Richmond subsequently filed suit in the U.S. District Court for the District of Columbia seeking a declaratory judgment approving the annexation.[144] That suit eventually came before the Supreme Court.[145]

Richmond contended before the district court that the Fourth Circuit's prior finding of no unlawful purpose should be given estoppel effect on the question of the purpose behind the annexation.[146] The district court refused, citing various grounds, and instead concluded that the annexation was adopted by Richmond with a discriminatory racial purpose.[147] On appeal, the Supreme Court upheld the district court's conclusion and further stated,

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139. *City of Richmond*, 422 U.S. 358, 362 (1975).

140. *Id.* at 361-62 (quoting Voting Rights Act of 1965, 42 U.S.C. § 1973c (1965)).

141. Holt v. City of Richmond, 334 F. Supp. 228 (E.D. Va. 1971), *rev'd*, 459 F.2d 1093 (4th Cir.), *cert. denied*, 408 U.S. 931 (1972).

142. *Id.* at 237.

143. Holt v. City of Richmond, 459 F.2d 1093, 1099-100 (4th Cir.), *cert. denied*, 408 U.S. 931 (1972).

144. City of Richmond v. United States, 376 F. Supp. 1344 (D.D.C. 1974), *vacated*, 422 U.S. 358 (1975).

145. City of Richmond v. United States, 422 U.S. 358 (1975).

146. *City of Richmond*, 376 F. Supp. at 1352 n.43.

147. *Id.*

"Whatever the merits of the District Court's position on this collateral-estoppel issue, we find controlling the nonparticipation of the United States and the Attorney General in the *Holt I* case."[148]

City of Richmond formed the basis for an even stronger opinion by the Fifth Circuit in *United States v. East Baton Rouge Parish School Board.*[149] This case, also arising under the Voting Rights Act of 1965, followed an earlier challenge in 1975 by black residents of the parish asserting violations of their voting rights. Their case was dismissed for failure to state a claim and the dismissal was affirmed by the Fifth Circuit.[150]

In the suit brought by the United States, the district court held that the United States was barred by the unsuccessful prior litigation of the private plaintiffs and by the failure of the Attorney General to object to the plan when submitted for his approval under 42 U.S.C. § 1973c.[151]

The Fifth Circuit, in a brief and pointed opinion, reversed the district court's conclusion, finding it to be

> directly contrary to the general principle of law that the United States will not be barred from independent litigation by the failure of a private plaintiff. This principle is based primarily upon the recognition that the United States has an interest in enforcing federal law that is independent of any claims of private citizens .... Also, any contrary rule would impose an onerous and extensive burden upon the United States to monitor private litigation in order to ensure that possible mishandling of a claim by a private plaintiff could be corrected by intervention.[152]

A similar case arose in *United States v. Texas.*[153] The government challenged voter registration procedures that had successfully withstood challenges by private plaintiffs in two prior

148. *City of Richmond*, 422 U.S. at 373 n.6; *see also* City of Port Arthur v. United States, 517 F. Supp. 987, 1004 n.119 (D.D.C. 1981) (holding that the non-participation of United States in prior case was fatal to operation of estoppel), *aff'd*, 459 U.S. 159 (1982).

149. *East Baton Rouge Parish Sch. Bd.*, 594 F.2d 56 (5th Cir. 1979).

150. Bryant v. East Baton Rouge Parish Sch. Bd., 471 F.2d 651 (5th Cir. 1973).

151. *See East Baton Rouge Parish Sch. Bd.*, 594 F.2d at 59-60.

152. *Id.* at 58 (citations omitted).

153. *Texas*, 430 F. Supp. 920 (S.D. Tex. 1977).

suits.[154] The district court refused to apply res judicata, finding that the United States was not in privity with the two prior plaintiffs.[155] The court found that the government had a broader interest than the private plaintiffs because it represented the voting rights of all persons who were required to adhere to the challenged voter registration procedures.[156]

In a case similar to *Carino*, the Sixth Circuit held that the Equal Employment Opportunity Commission was not barred from relitigating issues resolved in prior litigation by a private party.[157] Based on charges filed by Allen Brown, Jr., against his employer, McLean Trucking, the EEOC commenced a suit in U.S. district court to enforce Title VII of the Civil Rights Act of 1964.[158] Subsequently, Brown filed a separate action against McLean, which was later dismissed in connection with a compromise settlement between the parties.[159] The EEOC suit was then dismissed by the district court, which concluded that the case was barred by resolution and dismissal of Brown's separate suit against his employer.[160] The Sixth Circuit reversed, holding that the EEOC sued to vindicate a public interest that is broader than the interests of the complaining parties.[161]

The public interest represented by the government extends beyond the Voting Rights Act and the Civil Rights Act. The Seventh Circuit made this quite clear in *Secretary of Labor v. Fitzsimmons*.[162] After citing many of the same cases discussed

154. *Id.* at 923.
155. *Id.* at 926.
156. *Id.* at 925.
157. EEOC v. McLean Trucking Co., 525 F.2d 1007 (6th Cir. 1975).
158. *Id.* at 1008; *see also* 42 U.S.C. § 2000e (1988).
159. *McLean Trucking*, 525 F.2d at 1008.
160. *Id.* at 1009.
161. *Id.* at 1010; *See* EEOC v. Kimberly-Clark Corp., 511 F.2d 1352 (6th Cir. 1977), (principles of collateral estoppel or res judicata did not render charges alleging presettlement events unavailable as basis for EEOC suit), *cert. denied*, 423 U.S. 994 (1975). *But see* EEOC v. Continental Oil Co., 548 F.2d 884 (10th Cir. 1977) (rejecting EEOC's right to sue despite previous private action); Johnson v. Nekoosa-Edwards Paper Co., 558 F.2d 841 (8th Cir. 1977) (holding that court must consider EEOC's obligation to attempt conciliation).
162. *Fitzsimmons*, 805 F.2d 682 (7th Cir. 1986).

herein, the court stated that "the government's special status in enforcing the public interest extends beyond those statutes that implicate underlying constitutional concerns as in the Voting Rights Act and Title VII."[163] The court cited antitrust cases as one example, before proceeding to recognize another such interest in enforcement of ERISA.[164] In *Donovan v. Cunningham*,[165] the Fifth Circuit held that the rule that separate, private litigation does not preclude government actions seeking judicial enforcement of federal statutes "is based primarily upon the recognition that the United States has an interest in enforcing federal law that is independent of any claims of private citizens."[166] Thus, the court recognized a difference in those cases where a plaintiff seeks relief only for himself and those where the government seeks to determine the legality of specific conduct and prevent this conduct from causing any future loss.

The FCC, by instituting a Section 312(b) or Section 403 action, would be pursuing the broad public interest. It would be issuing a declaratory judgment preempting enforcement of the cited ordinance against any individual—not just prior unsuccessful plaintiffs. The Commission need not have an actual complainant because, as an administrative agency, it is not bound by the Constitution's Case or Controversy Clause.[167] The FCC would

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163. *Id.* at 692.

164. *Id.* (citing Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961)).

165. *Donovan*, 716 F.2d 1455 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).

166. *Id.* at 1462; *see also* Beck v. Levering, 947 F.2d 639 (2d Cir. 1991) (holding judgment in prior case does not establish claim preclusion for related action by Secretary of Labor seeking public relief), *cert. denied sub nom.* Levy v. Martin, 112 S. Ct. 1937 (1992); FTC v. AMREP Corp., 705 F. Supp. 119 (S.D.N.Y. 1988) (holding res judicata applied to prior plaintiffs who settled, but FTC could still maintain suit on behalf of plaintiffs who opted out of class and in the general public interest); Loving v. Alexander, 548 F. Supp. 1079 (W.D. Va. 1982) (holding federal government not bound by determination, made in state court litigation by private parties, that a river is not navigable), *aff'd*, 745 F.2d 861 (4th Cir. 1984).

167. 4 STEIN ET AL., *supra* note 100, § 33.04 n.3 (citing Tennessee Gas Pipeline Co. v. Federal Power Comm'n, 606 F.2d 1373, 1380 (D.C. Cir. 1979) ("The subject matter of agencies' jurisdiction naturally is not confined to cases and controversies inasmuch as agencies are creatures of article I. . . . Thus, the Commission correctly observes that an agency may, if authorized by statute, issue an advisory opinion or abstract declaration without regard to the existence of an actual controversy.")).

not be collaterally estopped by prior unsuccessful private litigants because it represents the broad public interest. Furthermore, because a suit by the FCC would be a different case with different parties, prior federal court judgments to the contrary would not be merely advisory.[168]

The fact that the FCC's determination would also benefit prior unsuccessful private plaintiffs, such as Carino, is irrelevant. In *EEOC v. McLean Trucking Co.*, the EEOC was barred from relitigating a suit on behalf of an individual complainant who had entered into a final settlement with a defendant in a prior suit.[169] The EEOC was permitted, however, to litigate against the defendant in the public interest.[170] The court recognized that

> [w]hile under our holding Brown [plaintiff in the prior suit] is not to recover any "private benefit", such as back pay, not granted to him under the compromise settlement of the separate action, . . . Brown should not and cannot practically be prevented from enjoying the benefits inuring generally to all McLean employees as the result of the eradication of any unlawful practices which may be proved to exist or the benefit of improvements in working conditions.[171]

Thus, the fact that an unsuccessful court complainant, like Carino, would benefit from a favorable FCC decision does not prohibit the FCC from taking action in the public interest.

Furthermore, the FCC's refusal to decide a case initially should not bar it from becoming involved at a later time. This can be inferred from *United States v. East Baton Rouge Parish School Board*, in which the United States was not estopped from initiating a subsequent action after an unsuccessful private action, even after the Attorney General's failure to exercise a statutory right to object to the challenged action.[172]

This result also occurred when the government had opportunity and notice to intervene in a case. In *Kerr-McGee Chemical*

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168. Prior contrary federal court judgments would be no more advisory than are conflicting decisions of other courts—federal or state.

169. *McLean Trucking*, 525 F.2d 1007, 1010 (6th Cir. 1975).

170. *Id.*

171. *Id.* at 1011 (citation omitted).

172. *East Baton Rouge Parish Sch. Bd.*, 594 F.2d 56, 58 (5th Cir. 1979).

Corp. v. Hartigan,[173] the state of Illinois, despite its appearance as an amicus curiae in the prior litigation, was not estopped "from litigating an issue on behalf of the people merely because the issue has previously been litigated by private parties in an action to which the state was not a party."[174]

One factor in particular distinguishes the *Carino* cases from the cases in this section. The cases discussed in this section involved judicial suits filed by the United States or an agency after an adverse resolution against, or a settlement by, private plaintiffs. These cases did not involve a proceeding initiated by an agency sua sponte after deliberately passing up the opportunity to decide the issue for itself. Many of the cases, however, are analogous in that the government passed up an opportunity to intervene in the earlier judicial proceeding.

Nevertheless, this distinction should not be significant. No rational basis exists for refusing to apply the enunciated standards regarding the public interest. Furthermore, part of the standard litany in these cases is that the government has limited resources and cannot be expected to monitor private litigation in order to intervene to correct a private plaintiff's mishandling of a claim.[175] This concern closely parallels the FCC's concern that it not become a national zoning board.[176] Just as the government does not abandon the public's interest by not intervening in every judicial case, the FCC should not be held to have abandoned the public interest by refusing jurisdiction, in the first instance, of a case involving a private plaintiff.

CONCLUSION

After the *Deerfield* decision, the Federal Communications Commission might seem to be on the horns of a dilemma. If the Commission is to pursue its statutory goal of protecting the rights of Americans to receive satellite-delivered signals, must it totally

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173. *Kerr-McGee*, 816 F.2d 1177 (7th Cir. 1987).
174. *Id.* at 1181.
175. *See East Baton Rouge Parish Sch. Bd.*, 594 F.2d at 58.
176. *See supra* notes 7-9 and accompanying text.

preempt all local regulation of satellite antennas? Or, at the other extreme, will the FCC become a national zoning board overseeing the implementation of local ordinances and regulations? The former option would override even narrowly tailored restrictions with legitimate health, safety, or aesthetic objectives, while the latter would significantly strain Commission resources.

In a perfect world, the FCC could hope to apply a short form of the second option: intervene early and often in local disputes and trust that their resolution, according to correct interpretations of the partial preemption in Section 25.104, would thereafter be followed as precedent by local forums. In our less-than-perfect world, however, there are no guarantees against repetition of the *Carino* travails.

The *Deerfield* decision, nevertheless, may not be irreconcilable with the Commission's preference for local resolution of antenna zoning disputes. The federal agency may simply need to restructure its procedures to accomplish the same goals sought under the former policy of exhaustion of local remedies. Rather than decide precisely the same case previously resolved by a state or federal court, the Commission could issue a cease and desist order pursuant to Section 312(b) of the Communications Act or institute its own investigation or complaint proceeding under Section 403. Such proceedings would be instituted in the broad public interest, rather than through a fixed set of facts reflecting private or parochial aims.

Thus, the FCC should not hastily conclude that it can only enforce Section 25.104 through the extreme measures of total preemption or national zoning enforcement. There is another alternative that recognizes the legitimate objectives of municipal zoning regulations while allowing the Commission to correct local administrative or judicial misinterpretations of Section 25.104.