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

In the Matter of:	)	
	)	
Preemption of Local Zoning Regulation of Satellite Earth Stations	)	IB Docket No. 95-59

To: The Commission

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COMMENTS

The law firm of Duncan, Weinberg, Miller & Pembroke, P.C. represents about one hundred state and local governmental entities across the United States in more than a dozen states. The firm has represented municipal interests primarily, for almost twenty-five years. We herewith submit these comments, in response to the "Notice of Proposed Rulemaking", FCC 95-180 (Released May 15, 1995) ("NPRM"). In support, the following is shown:

1. The Commission proposes to amend Section 25.104 of its Rules and Regulations regarding federal preemption of state and local regulations concerning the use of satellite earth stations.

2. The Commission is compelled to amend its rule, in light of the decision of the U.S. Court of Appeals in Town of Deerfield, New York v. F.C.C., 992 F.2d 420 (2d Cir. 1992), to address the issues of Article III Federal Courts and of the exhaustion of

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remedies that concerned the Court of Appeals.

3. However, the Commission has proposed to go further and to substantially revise the rule in its entirety. The Commission has tentatively concluded that a major revision is required because:

> the evidence compiled in this record indicates that local zoning restrictions have inhibited access to satellite services for a substantial number of users, widely dispersed throughout the country. The obstacles faced by these users appear to have hampered the development of existing satellite services and impeded the growth of related industries such as programming and antenna manufacturing. Moreover, the record suggests that local restrictions currently in force are likely to have a similar effect on new satellite services as they are developed. We see no evidence that the petitioners and commenters have exaggerated the extent of the difficulties. It appears that adjustments to our preemption rule are necessary to minimize the inhibitory effect of state and local zoning regulations and to advance the important federal interest in the widest practicable access to satellite signals.

NPRM, ¶ 43.

4. We submit that any evidence of municipalities inhibiting access to satellite services is isolated and aberrational. Any inhibitions to the development of the technology resulted primarily from the bulky nature of the technology itself. The Commission recognizes that the presence in the marketplace of small compact satellite reception antennae is a recent development. NPRM, ¶¶ 60-66.

5. We recommend that this proceeding focus on rapidly deploying new technologies without unduly infringing upon and preempting rights that have traditionally and successfully been exercised at the state and local levels. The sixty-one year history of the Communications Act of 1934 reflects general harmony between the Commission and state and local jurisdictions. Over this period of time, numerous technologies have successfully emerged. There is extraordinary little history of state and local authorities impeding the development of these emerged technologies.

6. The Commission has rejected the per se approach suggested by the satellite industry. We commend the FCC for its conclusion to "decline to propose a per se approach at this time." NPRM, ¶ 64. We also commend the FCC for its strong concurrence with the principle that "the Commission cannot and should not become a national board of zoning appeals." NPRM, ¶ 42.

7. The FCC is in the business of advancing new communications technologies and services. The agency is therefore properly concerned with any actions or conditions that inhibit development of these technologies and services. Municipalities, likewise, have an interest in the development of new technologies

and services and in the advancement of competition in their communities. For example, satellite-delivered programming offers a very real possibility of providing competition to cable television, which can only benefit the public. Local jurisdictions are excited about the prospects and opportunities offered by emerging communications technologies, such as LMDS and Fixed Satellite Service systems. [1] Municipalities anticipate numerous, yet unforeseen, opportunities for their residents, their school systems, and their local businesses, as well as for the delivery of municipal services. Thus, municipalities have an equally strong interest in "fair and effective competition among competing communications service providers" because, after all, that competition ultimately takes place at the local level in municipalities.

8. However, the direction of this proposal is to take away from municipalities, through federal preemption, the long-standing and critical right to control rights of way and zoning standards. Fortunately, in this NPRM, the Commission has taken the very positive step of setting forth the full text of a proposed rule, so that interested parties can focus on

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[1] The FCC adopted a further notice of proposed rulemaking in CC Docket No. 92-297 at its July 13, 1995, open meeting and expressed strong support and encouragement for expeditious development of these new technologies.

the meaning and operation of very specific regulatory language.

9. As an initial matter, the Commission's proposed rule differentiates receive-only earth stations from transmit earth stations. With regard to transmit stations, Subsection (d) of the proposed rule would **not** preempt any state or local "health and safety regulations relating to radio frequency radiation of transmitting antennas". [2] Presumably state and local application, interpretation and enforcement of their radiation regulations would **not** be subject to any type of Commission review. Administrative or judicial review would be limited to whatever processes and procedures are provided for by state and local law.

10. Moreover, we believe that the clear, indeed obvious, reading of the proposed rule is that the presumption of unreasonableness for small dishes, set forth in Subsection (b) of the proposed rule, is limited to receive-only antennae and would **not** apply to transmission antennae. To the extent small (for example, 1-meter or less) satellite earth station transmit antennae are perfected, there would be no presumption of unreasonableness for regulations

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[2] State and local regulations, other than radiation regulations, that impose certain specified burdens on transmit stations must, however, satisfy the two-part test of reasonableness to avoid preemption.

concerning the installation, maintenance or use of such small transmission antennae.

11. The ability to transmit signals via satellite all over the world is something very different from the passive reception of information available via satellite. Widespread transmission capability could have significant consequences at the local level, different from mere reception capability. This issue appears to be beyond the scope of this proceeding. However, it might be desirable for the Commission to begin to address the issue of transmission at this time, but it would require the satellite industry to provide information on the likely technological future of earth-based transmission facilities and discussion about the impact of a widespread, commercial, readily-available earth station transmit technology.

12. Subsection (a) of the proposed rule sets forth the general rule, applicable to receive-only earth stations. The Commission proposes to abandon the design of its current rule, which preempts state and local regulations that "differentiate" satellite receive-only antennae from other types of antennae. Instead, the Commission proposes a rule that focuses on two matters -- (i) state and local regulations that substantially limit reception by receive-only antennae,

and (ii) state and local regulations that impose substantial costs on users. If the proposed rule were adopted, then we could anticipate litigation over, among other things, whether or not a regulation does in fact limit reception; what does it mean to "limit" reception; how much of a "limit" is and is not "substantial"; what are "costs"; what are "substantial" costs; when does a regulation "impose" costs; who are "users"; when does a regulation impose costs on users.

13. If a regulation did **not** substantially limit reception and did **not** impose substantial costs, then it could not be preempted. There would be no need to reach the separate issue of the "reasonableness" of the regulation, set forth in the second part of Subsection (a) of the proposed rule.

14. However, if a regulation did substantially limit reception or did impose substantial costs, then, under the proposed rule, one would have to reach the issue of the reasonableness of the regulation. The proposed rule imposes the burden on the "promulgating authority" (which may not be the enforcing authority) to "demonstrate" the reasonableness of the regulation under a two-part test. However, because state and local regulations concerning the larger dishes, addressed by Subsection (a) of the proposed rule, are not presumed to be unreasonable, the

state and local regulations are accordingly entitled to the presumption of reasonableness.

15. Moreover, the word "demonstrate" suggests that there is no particular burden of proof and no particular procedure to follow in making such a demonstration of reasonableness. It certainly does not suggest that the state or local authority must satisfy a standard equivalent to that of judicial appellate review of FCC regulations. We are nevertheless concerned that state and local authorities have a fair and realistic opportunity to "demonstrate" the reasonableness of their regulations. They should not be subjected to a procedure that is so complicated or a standard of review that is so high that they could never satisfy the "demonstrate" requirement of Subsection (a) of the proposed rule.

16. As to the two-part reasonableness test itself, set forth in Subsection (a)(1)-(2) of the proposed rule, the Commission limits reasonableness to three specific objectives -- health, safety and aesthetics. We direct the Commission's attention to important language contained in Section 201 of S.652 recently passed by the United States Senate. That bill would add Section 254 to the Communications Act, which would permit States to impose "requirements necessary to preserve and advance universal service, protect the

public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers." Furthermore, Section 254 would allow state and local governments to continue to "manage the public rights-of-way". While the Communications Act has admittedly not yet been amended to include this language, we submit that the Senate Bill identifies additional objectives that could be included in the proposed rule.

17. This proceeding may identify other objectives that could also be included in this list. Nevertheless, as a practical matter, whatever objectives the FCC ultimately includes in the text of its rule, state and local regulations will have to be drafted to use the terminology and address the objectives identified by the FCC. Therefore, whatever objectives the Commission uses, it would be helpful to know what the Commission means by those terms.

18. The second part of the reasonableness test concerns the "federal interest". In many respects this may be the most amorphous and inchoate part of the test. How can a local government draft a tight regulation that must take into consideration something that has not been articulated explicitly or at all? State and local government might find themselves guessing about the precise nature of the "federal

interest", only to find out later that they guessed wrong.

19. State and local authorities should be given a reasonable amount of time to revise their regulations to conform with any new federal standards before the FCC's amended rule becomes effective. We suggest a minimum of 120 days, which was the amount of time accorded local authorities to adopt rules to regulate cable TV rates. See Section 76.910 of the FCC Rules and Regulations. Adoption of local rules to implement the FCC's cable rate regulation rules was a much simpler matter than what would be required by the proposed rule. In order to "clearly define" and "expressly state" certain objectives, public proceedings must take place and certain procedures must be followed under state and local law before a regulation can become effective.

20. In Subsection (b) of the proposed rule, the FCC sets forth a presumption of unreasonableness for state and local regulations concerning small earth stations of one-meter (about 3.3 feet) or less in "any area", which would include residential areas. Regulations concerning larger receive-only earth stations of two-meters (about 6.5 feet) or less would be presumed unreasonable in "commercial and industrial"

areas only. [3]

21. This is the section of the proposed rule where the Commission attempts to incorporate the cutting edge of industry technology, so that modern small reception dishes are essentially exempt from most state and local regulation, and so that the communications technologies that make use of these small reception dishes can develop quickly.

22. The Commission's approach is commendable, practical and reasonable. The fundamental issue is whether two-meters (for commercial and industrial areas) and one-meter (for everywhere else) are realistic and acceptable sizes.

23. The trend in satellite dishes is toward increasingly smaller pieces of equipment. The current generation of DBS reception antennae are quite small, less than one meter. The Commission should have the industry identify how small a dish they realistically intend to use. Then that should be the size set forth in Section 25.104 of the Rules. There is no need to preempt state and local regulation of satellite dishes that are larger than the industry would use.

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[3] Subsection (b)(1) refers to commercial and industrial uses "generally permitted by local land use regulation." One could interpret this language, and thus Subsection (b)(1), as intending to exclude land areas covered by <u>state</u> land use regulations.

24. The Commission could also take this opportunity to articulate appropriate appearance standards for these preempted dishes. Valid local concerns -- the use of garish colors and the use of the dishes as an advertising medium -- could readily be dealt with by the FCC.

25. The use of the phrase "commercial or industrial uses", in Subsection (b)(1) of the proposed rule, runs the risk of vagueness, and perhaps meaninglessness, given the diverse and complex terminology used in local zoning. Moreover, the use of the phrase "generally permitted" will create a great of legal mischief because of its imprecision.

26. In Subsection (b) of the proposed rule, the presumption of unreasonableness can be rebutted only by a very specific three-part showing. Notably excluded from that showing are aesthetic objectives. By excluding aesthetic considerations in such small-dish situations, the Commission has effectively said that there could be no aesthetic objection to something as big as 6.5 feet in diameter in commercial or industrial areas, or as big as 3.3 feet in diameter in all other areas, including residential areas. While the aesthetic case against small dishes might be more difficult to make than against huge dishes, that does not mean that there are no aesthetic considerations

whatsoever to small dishes. Oftentimes, historical neighborhoods, planned communities, redevelopment projects, and even some commercial and industrial developments, have architectural guidelines to establish and maintain a certain appearance. These guidelines would not necessarily preclude installation of an antenna, but might simply impose some reasonable restrictions applied consistently throughout the area. The Commission has not given any explanation why aesthetic considerations are totally irrelevant as to small dishes.

27. Subsections (e) and (f) of the proposed rule provide for a Commission ruling based on the request of any aggrieved person and on a waiver request by the state or local authority. The Commission should make clear precisely what special procedures it expects the parties to follow, including filing of pleadings, service, etc.

28. We note that the proposed rule does not provide for a process whereby a state or local authority can request a declaration that its regulations do not substantially limit reception and do not impose substantial costs and, therefore, that its regulations cannot be preempted. Such a procedure could save the Commission from having to review numerous petitions filed by persons claiming to be

aggrieved. A state or local authority might want to include a waiver request in its filing, in case it is unable to convince the Commission that its regulation does not substantially limit reception or impose substantial costs. Nevertheless, a state or local authority would benefit from an advance ruling concerning the non-preemptability of its regulations. Such a ruling might be desirable for local satellite dish distributors as well -- it could pave the way for marketing the product in the community and the rapid expansion of service.

29. As to the four tests for exhaustion of nonfederal administrative remedies set forth in Subsection (e)(1)-(4) of the proposed rule, we have two observations. First, in Subsection (e)(2), ninety (90) days may be too short a period of time. The FCC should, in this proceeding, try to obtain realistic information on how long it takes to process an application for a permit. Second, as to Subsection (e)(3), the Commission recognizes (NPRM, ¶ 55) that there may be no costs, or only minimal costs, associated with the purchase and installation of the receive-only antenna. It may be that, like the current marketing of cellular radio services, the cost of acquisition of the hardware will be "waived" or nominal in consideration for a long-term contractual commitment

to use the service. Therefore, even modest expenditures of money could satisfy the exhaustion test set forth in Subsection (e)(3) as currently drafted. We submit that the language, as proposed, could produce undesirable results.

30. WHEREFORE, we generally support the action proposed by the Commission. However, we recommend certain changes in the language of the proposed rule and clarifications, as set forth above.

Respectfully submitted,

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