ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF HUGHES NETWORK SYSTEMS, INC.

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SUMMARY

Since the Commission first preempted zoning local regulations which unreasonably restrict the use of satellite antennas, the problems for satellite antenna users have become worse, not better. The Commission has recognized that local restrictions are currently placing satellite services at a competitive disadvantage vis a vis other modes of communication, and has proposed a rule designed to remedy many of the problems.

Hughes Network Systems, Inc. ("Hughes"), the manufacturer of very small aperture terminal ("VSAT") antennas, typically measuring between one and two meters in diameter, has been contending with unreasonable local regulations for many years. These restrictions run the gamut, from large fees and long permit processes to expensive landscaping and extreme location requirements. Under the current rule, VSAT users must either challenge these type of restrictions or comply, both costly options.

Hughes's customers simply do not have the time for lengthy administrative wrangling, much less for a court challenge. Typically, a VSAT system must fit within a 30-day business plan—from the decision to open the new location to opening day—and if it cannot do so, the customer will seek other communications alternatives. A permit process of any substantial length is enough to eliminate the VSAT system from inclusion in this plan. Costly regulations are also a serious threat to Hughes's ability to compete with other communications technologies.

The Commission must ensure that local regulation does not price VSATs out of the market or make the VSAT an option only for the slothful. Hughes reiterates its steadfast belief that the only appropriate preemption rule is a *per se* ban on local regulation of smaller satellite antennas.

If, however, the Commission decides to adopt the system of presumptions and rebuttals it has proposed, modifications are needed to make clear that small antenna users can rely on such a presumption and install and operate such antennas without interference or delay. If local authorities believe that the regulation can rebut the presumption, they will be required to make such a showing to the Commission before enforcing the regulation. The Commission must also make certain that all other provisions in the rule are clear, for it will be relied upon both by unversed satellite antenna users and by uninterested local officials.

The Commission should also fulfill its responsibility as an expert agency to determine what restrictions will be permissible based upon radio frequency radiation. Leaving the decision to local authorities, most of whom have at most a passing knowledge of the issue, creates a gaping hole in the preemption rule. This is an issue uniquely suited to federal decisionmaking, as it does not differ from community to community, and should be addressed at the federal level.

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COMMENTS OF HUGHES NETWORK SYSTEMS, INC.

I. VSATS: A NATIONAL SOLUTION RUNNING INTO A LOCAL PROBLEM

A. VSATS Are an Essential Part of Modern American Communications

The last fifteen years have witnessed a quiet revolution in the way that business, education, government and industry solve their communications needs. For years reliant on the monopoly position of local telephone companies to provide the "last mile" to link each of their sites, hundreds of businesses have turned to satellite technology to provide fast, reliable, and cost-effective communications among numerous far-flung sites, whether they be retail operations, factories, suppliers, or customers. These satellite networks use small antennas—referred to as "VSATs" (very small aperture terminals)—that are low-cost, easy to produce and ship, quick to install, reliable, and inexpensive to operate. Indeed, with each passing year, advances in technology make VSAT antennas smaller and less expensive.

Companies can use VSATs to solve all of their communications needs. An early and successful pioneer in the use of VSAT technology is Wal-Mart Stores, which uses its VSAT system for a variety of purposes. The system tracks inventory: as an item is loaded off the truck and into a store, it is scanned into the system and relayed to Wal-Mart's headquarters in

Bentonville, Arkansas; when an item is scanned at the register at the time of sale, the inventory count is also sent to headquarters over the VSAT system, and Wal-Mart can then direct its supplier to deliver just-in-time inventory to the store that needs it. Indeed, many of Wal-Mart's suppliers are themselves now on the Wal-Mart VSAT network, able to access the inventory count and arrange for timely inventory delivery without the need for involvement by Wal-Mart. Wal-Mart can also perform credit-card verification through the VSAT system. One of its most famous uses was Sam Walton's weekly videoconference with all Wal-Mart employees in all the stores, conducted via the VSAT network.

The VSAT network is by definition a nationwide network. Thanks to the physics of satellite communications, no point in the United States is any more remote than any other. The small-town Missouri resident who patronizes the Edward D. Jones brokerage firm can have access to the same immediate information and trading efficiencies as a resident of Wall Street. The Federal Aviation Administration can access information on lightening ground strikes to alert pilots. The Federal Emergency Management Agency can be assured of communications during an emergency by using a VSAT network to backup phone lines. The motorist filling up at the Amoco station can have his card read at the pump in Miami or Sandy Spring. These enterprises would be cost-prohibitive, however, if the companies involved were able to hook up only some of their sites by VSAT, and needed to link others by telephone lines.

B. Businesses Demand Inexpensive and Timely Access to Their VSAT Networks

When a customer selects a VSAT system to replace its terrestrial communications system, there are several factors that motivate that decision: cost, reliability, customer service, and speed and ease of installation. Hughes Network Systems, Inc., ("Hughes"), the leading

VSAT supplier in the country today, believes that it can beat its terrestrial competition on both reliability and customer service, matters that are within its control. Cost and speed, however, are areas in which governmental intrusion can make a vast difference.

Cost. VSAT systems are intensely cost-competitive with terrestrial systems. The average all-in cost of a VSAT system—hardware, normal installation, and operating and maintenance costs—is generally in the range of $300 per site per month, amortizing the equipment over a five-year useful life. The difference in price between a VSAT system and its competition is frequently a matter of a few dollars per site per month. If a city adds $3,000 to the cost of a VSAT installation through fees, surveys, screening, professional services, or otherwise, that creates a cost disadvantage of $50 per month; if the government-imposed costs are $6,000, the disadvantage is $100 per month. Those numbers are typically far beyond the amounts needed to knock the VSAT system from competition. Thus, it is crucial that municipalities not impose costs on VSAT systems that are not truly essential to the health or safety of the citizenry.

Delay. Cost is important; so is speed. VSAT installation is generally not complex. A VSAT antenna needs to have a clear line of sight to the satellite, and it needs to be mounted securely in place. Local installation contractors hired by Hughes can usually determine the optimum siting within an hour of being on-site. Mounting of a VSAT antenna is typically done without any construction: the VSAT is either "ballasted" by the loading of heavy weight on the bottom of the antenna,[1/] or by clamping the VSAT onto a structural beam, with

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[1] The amount of the ballast is calculated by a computer program in light of the situation of the antenna and the velocity of winds that might come through the area. For example, Hughes VSAT antennas located in South Florida are ballasted to withstand hurricane-

no actual construction. This entire process can be done within several hours—if there is no governmental intrusion into the process.

VSAT installation is such a quick and routine process that when Hughes schedules the installation program for a new VSAT network, it typically schedules two installations per day for each installation contractor. The installations are grouped in geographic areas, so that an installation contractor can spend as little time traveling as possible. If one installation is delayed because of local government regulation, the installation contractor will need to return to that area when work is proceeding elsewhere, slowing down the entire roll-out of the system and adding to the cost of all the installations.

When a company decides to open up a new place of business, competitive factors typically set the date that the business needs to open. If businesses had the leisure of several months of lead time, it might not matter if local governmental approval processes were to take a few months. Unfortunately, it is a rare event indeed when a business has the luxury of that amount of time.

For example, the regional broker-dealer Edward D. Jones & Company, with offices in hundreds of smaller cities and towns, requires that a new office open for business within thirty days from the date that the decision is made to locate an office in a given town. If the brokerage office does not have its VSAT system in place and operational, it cannot open for business, and the company may not be able to staff its office properly if it cannot tell

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velocity winds. After Hurricane Andrew swept through South Florida, leveling thousands of buildings, the VSAT antennas located atop structures whose roofs were still intact were still stable, pointing at the designated antennas within the required tight tolerances, and fully operational.

prospective new hires on what date employment might begin. This timing is not unique to the brokerage industry, but applies to almost any situation in which a VSAT user decides to open a facility in a new town and to hire employees from established businesses.

The situation is no better, and often worse, if new construction is involved. Although new construction will invariably require a permit, construction contractors are typically unwilling to include the VSAT antenna in the application for the original building permit, because it will hold up the grant of the permit and hence the entire construction schedule. They continue to be unwilling to allow the permit to be amended later on, or for a separate permit to be applied for, because the certificate of occupancy may not be granted in timely fashion. Consequently, the VSAT permit process typically cannot begin until construction is complete and the certificate of occupancy has been issued. At that time, of course, the pressure to install the VSAT antenna is the greatest, because the company is waiting to unload the inventory into the store and to open the store for business.

When a modern store is opened today, the first piece of equipment installed is the computer system, because inventory control is so critical. If the computers are networked, the communications system must be operational before the business can open. If a business is changing technologies—from leased telephone lines to VSAT—and has installed its new in-store processing but cannot deliver the communications to the new site, the new store or office cannot open. For example, Wal-Mart typically requires installation of the VSAT system one to two weeks before the planned opening of the store, and will not unload inventory off its trucks until its VSAT antenna is installed.

As a result of these real-world business demands, regulatory delay of more than a week or so can be the death knell for a VSAT supplier and its customers. Terrestrial competitors do not face these kinds of requirements. If the Commission permits these kinds of delays, it creates a nearly insurmountable competitive disadvantage to satellite technology.

C. VSAT Installations Face Local Problems That Demand National Solutions

Hughes has been able to provide efficient, low-cost communications networks to the businesses mentioned above, and scores of others ranging from General Motors to T.J. Maxx, from Circuit City to Amoco Oil Company, from CVS to the American Cancer Society, from Toys-R-Us to Holiday Inn, but it has faced a continual problem where the theory of national, satellite-based communications technology runs into the practice of local government. As a rule, local zoning and permitting officials do not know about VSAT technology.[2/] They do not care about national concerns. And whether they are motivated by well-intentioned concerns to maintain the "city beautiful" or by base desires to assert the power of their fiefdoms, they often impose requirements and procedures on the installation of VSAT antennas that are slow, costly, irrational, arbitrary, and just plain foolish.

A few illustrations are in order:

Juno Beach. In the Town of Juno Beach, Florida (the "Town"), Hughes and its customer A.G. Edwards, a national securities broker-dealer, spent over 32 months and approximately $13,000 before the Town finally recognized that its ordinance had been preempted

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[2] Hughes representatives seeking to obtain the required permits have been asked by local government officials, "But why does CVS need to watch HBO?"

by the Commission's rules, and stopped threatening to take action against the VSAT antenna installation.

A.G. Edwards first requested the installation in Juno Beach in October 1992, needing a VSAT antenna atop its commercial office building on U.S. Highway 1 to link that office to its national VSAT network. Hughes, working with a local installer, examined the site and determined that a permit would be required for the installation. The delay then began. The Town would not place the permit application on the Planning and Zoning Board agenda for over three months. Soon after the Planning and Zoning Board approved the application in February 1993, Hughes submitted the required site drawings.

The Town reviewed the site drawings, then notified Hughes that screening would be required *because the antenna could be viewed from U.S. Highway 1!* Hughes commissioned a sailmaker to design the screen, and posted a bond with the Town equal to ten percent of the screen's cost so it could install the antenna while waiting for the screen to be finished. The installation was completed in April 1993, over six months after A.G. Edwards had contacted Hughes.

The Town finally approved the screen in June 1993, after requiring Hughes to submit two sets of drawings. The screen was erected in September 1993. In addition to the nearly one-year delay, Hughes and A.G. Edwards had incurred substantial costs: $3,460 for the screening and an additional $1,105 for permit fees, surveys and multiple drawings.

The story of Juno Beach does not end there. Once the screen had been installed, the Town claimed that it had approved a canvas, not mesh, material for the screen, and demanded that the mesh screen be painted. The installer advised the Town that the sailmaker

had determined that unpainted mesh would be the only suitable fabric for the screen, as a more solid or painted material would catch the wind like a sail and weaken the moorings. The Town would not relent, however, and the screen was painted.

In December 1993, as predicted, the screen was torn by the wind. Later that month, after the installer had repaired the torn material, the screen frame gave way. The installer then repaired the frame, but was unable to stabilize it, and eventually the screen had to be removed.

The Town was not satisfied, and demanded that a new screen be erected to shield the view from the highway. Hughes hired a structural engineer and spent another $1,054 to design a lightweight aluminum screen, but the Town insisted that a heavier galvanized steel material be used instead. In July 1994, shortly after plans for this new screen were approved, the Town threatened to fine A.G. Edwards for not having a proper screen. A.G. Edwards and Hughes balked at spending the additional $17,000 for the new screen, and counsel for Hughes wrote to the Town Attorney in December 1994, notifying him that the Town's satellite antenna ordinance was preempted by Section 25.104.

Hughes received no response from the Town attorney, and, with the Town and Hughes at a stalemate, A.G. Edwards notified its landlord, Loggerhead Associates, that it would not renew its lease and would move its offices in May 1996 if the Town continued to demand the expensive screening. While Hughes was preparing to petition the Commission for a declaratory ruling regarding the Town's ordinance, Loggerhead Associates notified the Town that A.G. Edwards was prepared to leave Juno Beach rather than install a new screen. Just as

Hughes was finishing the certificate of service for the petition, the Town notified A.G. Edwards that it would not require a new screen.

The Town Manager ultimately apologized to A.G. Edwards and Loggerhead Associates for interposing such difficulties and for not responding to counsel's arguments about the FCC's preemption rule. The Town's swift and complete response in the face of the perceived economic consequences of its intransigence stand in sharp and sorry contrast to its utter failure even to acknowledge, let alone respond to, Hughes's arguments about the effect of the Commission's preemption rule.

Unfortunately, Juno Beach is just one of many localities where Hughes and its customers must challenge the zoning regulations, comply with costly requirements, or, as a last resort, seek other communications solutions. The following is a sample of such regulations, spanning the country:

- The Town of Greenburgh, New York, has imposed a moratorium on all transmitting antennas. Several Hughes customers have been forced to try to use terrestrial landline communications to link their operations in Greenburgh to their VSAT networks.

- The Town of Jupiter, Florida, demands that Amoco Oil Company screen a 1.8 meter VSAT antenna atop the canopy at its gasoline station. The canopy is not strong enough to support the screening without $50,000 in structural alterations, and ground mounting does not provide a line of sight to the satellite from this site.

- In Tempe, Arizona, the antenna must be screened from a roof-level view of 100 miles, regardless of the line-of-sight requirements.

- A West Caldwell, New Jersey, ordinance requires the *landlord* of the satellite antenna user to attend a meeting with the City.

- San Juan Capistrano, California, requires a deposit of over $3,000 for the City to draw upon at a rate of $55 per hour to review the drawings of the

antenna. When the account reaches 25% of its initial amount, it must be replenished.

- The zoning board in the Town of Hempstead, New York, told Hughes that its senior management would need to present the installation plans, accompanied by a lawyer who was said to be a "friend of the board."

- In Oradell, New Jersey, the entire zoning board must visit the satellite antenna installation site to view a mock-up.

- In its comments to Hughes's petition for declaratory ruling two years ago, the City of St. Louis exhibited its utter naivete about the demands of business by commenting that it "is not unreasonable to hold a public hearing" on satellite antenna applications. Comments of the City of St. Louis (August 15, 1993) at ¶ 4. As an example of its "reasonableness," St. Louis cited an application that took only "a few months" to gain approval. *Id.*

These problems cry out for substantial revisions to the current rule, revisions that will be clear and uniform, and will lift the burden of enforcing federal law from the backs of satellite antenna users.

II. THE VSAT INDUSTRY NEEDS CLEAR AND UNIFORM PREEMPTION OF BURDENSOME LOCAL REGULATIONS

The problems described above illustrate the scope and nature of problems that Hughes has had in attempting to install VSAT systems for its customers around the country. These problems abound, and have consumed an enormous amount of resources from Hughes and its customers, notwithstanding the existence of the Commission's current rule, preempting certain restrictive local regulations, for a variety of reasons:

First, as the Commission has recognized in the Notice, the current rule is simply not broad enough; for example, it requires "differentiation" between satellite antennas and other antennas, but many ordinances do not even identify satellite antennas. Instead, local officials often apply provisions that by their own terms do not apply to VSAT antennas or even to

satellite antennas, sometimes adopting the "everybody knows" school of regulation: Hughes has been told that even though no section of a municipal code requires a building permit, "everybody knows that you need a building permit to install a satellite dish." Thus, we need a rule that is substantively strong and broad enough to cover the gamut of problems that arise.

Second, the burden is currently on the user or installer of a VSAT to obtain relief from an onerous rule. What this means in practice is that Hughes is forced to try to interpret a staggering array of municipal land-use regulations to determine what they provide, how they might be interpreted, and what procedures are available to comply or to seek relief. Sometimes the municipality will not even make its regulations available upon request, or will add unwritten, ad hoc requirements. Sometimes the municipality imposes costs, whether for regulatory fees or for installation requirements, that approach or exceed the cost of the VSAT antenna. Sometimes the municipality imposes procedures, which it may or may not apply to other kinds of rooftop appurtenances, that are almost invariably slow—too slow for a new store or business to tolerate—and are often costly and unpredictable. The cost burden alone can put satellite communications at a competitive disadvantage to its terrestrial counterparts, and the delay is even more intolerable for a business waiting to open its doors.

Therefore, we need a rule that will, at least in the class of small antennas, shift the burden from the user attempting to vindicate the federal interest in satellite communications to the local municipality seeking to assert the primacy of local land-use policies. The rule should make clear that a company that wants to install a small earth station may lawfully do so, regardless of what the local ordinance says, or what "everybody knows" about the local regulations, without compliance with any local requirements. The only way to ensure that small

satellite antenna users are protected from burdensome local regulation is to adopt a *per se* preemption; short of that, the presumption and rebuttal system proposed by the Commission must be modified, to clarify that an antenna user can install now, fight later.

Third, most local government officials simply do not know and, regrettably, many do not care about federal interests and the FCC's current preemption. The lack of knowledge is understandable, if unfortunate: as mentioned above, VSATs are a "quiet revolution," frequently unknown to the general public. Land-use matters are typically the province of local authorities, and it is unusual for a local zoning or permitting decision to have a national impact. Local authorities are not accustomed to recognizing that their local, individual decisions may in fact thwart a national policy in furthering telecommunications availability, efficiency, and competition.

When presented with an argument that their regulation is preempted by federal law, local officials are at best unenthusiastic and frequently entirely unreceptive. Hughes has suffered through scores of situations in which it has set out, orally or in writing, the existence and applicability of Section 25.104 to a particular ordinance and received *absolutely no acknowledgement* from the municipality that Hughes has raised the issue or even that the section exists, let alone an analysis on the merits. Therefore, in addition to the shifting of the burden onto the municipality, as mentioned above, it is important that the rule also be clear, crisp, and unambiguously understandable to an uninterested or even hostile reader.

III. SECTION-BY-SECTION ANALYSIS AND RECOMMENDATIONS

The Commission has proposed a new rule that goes a long way toward addressing the concerns identified above, but not enough. While it strengthens the substantive reach of the

preemption to cover more of the situations that currently frustrate the federal objective, it creates a presumption and rebuttal system for small earth stations that leaves room for local officials to thwart the objectives of the rule. *Per se* preemption of regulations that "substantially" burden such antennas is the only way to guarantee that access to satellite communications will not continue to be significantly hindered. This section addresses each section of the Commission's proposal and explains what changes Hughes recommends to advance the Commission's goals.

A. Section 25.104(a)—the General Rule

1. The Rule Should Not Differentiate Between Receive-only and Transmitting Antennas

As a threshold matter, the Commission must ensure that users of receive-only antennas and users of transmitting antennas are accorded the same protections under the proposed rule. With the exception of radio frequency ("RF") radiation regulations, the Commission explicitly intended to grant precisely the same benefits: "Satellite transmitting antennas would receive the same degree of federal protection, except that health and safety regulations related to radio frequency radiation would not be preempted." Notice at n.75.[3/] As written, however, the proposed rule does not quite achieve this goal.

As proposed, Section 25.104 does not apply a general preemption rule to all satellite antennas, with restrictions for transmit antennas. Instead, Section 25.104(a), which establishes the general rule, applies only to receive-only antennas; section (d) then attempts to bring transmit-receive antennas back into the purview of the general rule of (a). This dichotomy presents several unfortunate and unintended problems in the analysis under the proposed rule.

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[3] Hughes disagrees that RF radiation regulations should be subject to local deference. See Section III.C below.

First, this structure creates an ambiguity whether regulations affecting smaller transmitting antennas are presumed unreasonable, like those regulating smaller receive-only antennas.[4/] Paragraph (a) mentions only receive-only antennas, and paragraph (b) (which sets up the presumptions) applies only to "those regulations covered by paragraph (a),"[5/] the structure might appear to exclude transmitting antennas from the presumptions of paragraph (b). Presumably, the Commission intends that the language of paragraph (d), bringing transmit antennas into the ambit of paragraph (a), also subjects transmit-antenna regulations to the presumptions of paragraph (b). But this is a strained and awkward reading. If the Commission adopts this presumption system, Hughes would hate to have to explain to an unreceptive local zoning official that regulations restricting VSAT antennas are entitled to the presumption of unreasonableness by virtue of paragraph (d)'s incorporation by reference into paragraph (a) for the purposes of paragraph (b).

Second, this structure creates an ambiguity whether regulations that substantially limit transmission, but not reception, are subject to federal preemption. The *Notice* states that the proposed rule applies only to those ordinances that "substantially limit reception or impose substantial costs on users." *Notice* at ¶ 58. The Commission certainly did not intend that ordinances which limit transmission would be exempt from examination, but this structure does

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[4] For convenience, Hughes refers to those antennas identified in paragraph (b) of the proposed rules as "small satellite antennas," and to all other satellite antennas as "larger satellite antennas."

[5] Hughes suggests that this language be removed in favor of a more explicit definition. *See* Section III.B.2, below.

just that. Interference with transmission should therefore be explicitly identified as a basis for preemption in the proposed rule.

In order to avoid the problems presented by this structure that differentiates between receive-only and transmitting antennas, Hughes suggests that all references to "receive-only" antennas should be substituted with the word "satellite," and references to "reception" should be accompanied by "transmission." Thus, paragraph (a) should read in pertinent part as follows:[6]

> Any state or local land-use, building, or similar regulation that substantially limits transmission or reception by satellite antennas . . . ;

2. Any Regulation Imposing More than a *De Minimis* Burden on Satellite Communications Must be Subject to Preemption Analysis

Not every local satellite regulation will be subject to preemption; local authorities will be required to justify only those regulations that either "substantially limit" use of satellite antennas or impose "substantial costs" upon users of such antennas. While this first clause of the proposed rule acts as a gateway to preemption analysis, the Commission has made clear that it is "a rather low threshold," and includes within its scope all local regulations that place "*any* significant burden on a citizen's access to satellite communications."[7]

Despite the Commission's efforts to demonstrate this "low threshold," two points still must be clarified so that the bar is not raised to allow burdensome regulations to escape review. First, "*costs*" must be defined to include any kind of burden—direct or indirect—placed

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[6] Exhibit A shows the changes that Hughes proposes to Section 25.104, including a version that is marked to show Hughes's changes from that proposed by the Commission.

[7] *Notice* at ¶ 57 (emphasis supplied).

upon satellite antenna users, and the concept should be expanded to include delay as well as purely financial costs. Second, the Commission should provide bright-line rules defining the types of costs and delays that will be deemed "substantial."

a. Costs and Delays.

Local satellite antenna regulations impose myriad burdens upon antenna users, all of which should be included within the term "costs" in the proposed rule. Local regulations directly burden satellite users through the imposition of permit fees, demands for surveys and plans, and screening requirements, for example. Sometimes these requirements lead to additional, indirect costs: a screening requirement may compel new construction so that a rooftop will support the weight of a screen; relocation may require surveys or compliance with environmental regulations.

Nonfinancial burdens can be just as devastating to satellite communications as financial costs. Some regulations require long waiting periods by their own terms, or are slow because governmental bodies do not meet frequently enough, or because an approval must be obtained first from one body before the request is sent to another body, or because the permit office simply refuses to calendar the application for a long period of time. Other regulations require the entire membership of a board to view a site, causing delay until the members can find a mutually convenient date, while still others require the preparation of materials, typically unnecessary, that take a long time to prepare.

As illustrated above, delay is just as damaging to the effectiveness of satellite communications as cost. In order to compete, businesses need their new sites linked to their communications networks in a matter of days, not months. If VSATs cannot provide that speed,

they will lose out to terrestrial solutions. By limiting the effectiveness, desirability, and competitiveness of VSAT systems, delay frustrates federal policy just as much as financial costs. Therefore, the threshold qualification for preemption examination should not be limited merely to "substantial costs" but should explicitly include "substantial costs and delays."[8/]

b. Bright-line tests.

By its terms, the proposed preemption rule will apply only to those regulations that "substantially limit" use of satellite antennas or impose "substantial costs" (which, as set out above, should be expanded to include delay). If a cost or delay is deemed to be not substantial, then it may be imposed, regardless of whether or not it is reasonable. For example, a requirement that a VSAT applicant pay a 25¢ fee to the zoning board retirement fund would not be subject to preemption. Hughes has no quarrel with the Commission's leaving intact restrictions that are not "substantial," so long as "substantial" is kept at a truly *de minimis* level. Disputes over whether a regulation's burden is "substantial" could vitiate the goals of preemption; in particular, it could undermine entirely the automatic presumptions set out in 25.104(b) if a municipality could dispute whether the regulation was even "substantial."

Therefore, the Commission should provide a bright-line test to define what costs and delays are "substantial." Such a test will enable all interested parties to understand the boundaries of the FCC's preemption regulation without resorting to self-interested interpretation of vague language, and will lead to quicker resolution of disputes.[9/] The Commission should

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[8] See Exhibit A at Paragraph (a).

[9] The addition of a bright-line test will also help ensure that the definition of "substantial costs" is not confused with, nor increased to meet, the level of costs required for exhaustion of local administrative remedies (*i.e.*, "costs greater than the aggregate price

add a new section to the rule to make clear that as to antennas for business use, the following burdens are "substantial":[10]

i. imposition of more than $50 in costs, including governmental fees, engineering or legal fees, and the cost of any construction or alteration necessitated by the regulation;

ii. being required to wait more than seven days for a permit or other authorization before installation is allowed; and

iii. being required to attend a hearing or meeting of any kind.

3. The Reasonableness Test

After establishing the threshold for preemption analysis, proposed paragraph (a) sets forth a reasonableness test for determining whether the regulation in question is in fact preempted. While the proposed rule reduces the complexity of the preemption analysis by eliminating the three determinations of reasonableness required under the current rule,[11] it does not clearly establish an analytical framework for the new balancing test. As set out below, several points need to be clarified: First, the balancing test itself should be made explicit; the present language only vaguely implies that the interests will be weighed against each other. Second, the Commission should reiterate, for clarity's sake, that the burden will be on the local authority to demonstrate that its regulation is reasonable under this test, even if the regulation

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of purchase and installation").

[10] For a consumer-oriented, mass marketed service like DBS, the threshold should be far lower. *See* comments of DIRECTV and SPACEWAY also filed today.

[11] *See Notice* at ¶¶ 57-58.

is not one subject to a presumption.[12/] Third, the rule should make clear that the local objective sought to be satisfied must be one that is contained within the text of the regulation itself. Fourth, the federal interests against which the local interests are to be balanced are in fact broader than the current proposal identifies.

Before discussing the clarifications to the Commission's proposed paragraph (a), it is worth making clear that this paragraph in fact applies only to larger satellite antennas. The proposed rule presumes that restrictions on smaller satellite antennas are unreasonable and hence preempted. The rebuttal criteria make clear that aesthetic objectives are not to be taken into account in applying the reasonableness test to regulations affecting smaller antennas, unlike larger antennas. The Commission should reaffirm that the basic reasonableness test of paragraph (a), with its inclusion of aesthetic policies, applies only to larger satellite antennas, and, as discussed below, should add a new subparagraph (c)(4) that will apply the correct balancing test (*i.e.*, without consideration of aesthetics) to small satellite antennas.

a. Clarification of the Balancing Test

The current proposal states rather vaguely that the promulgating authority must demonstrate that the regulation is reasonable "in relation to" both the local goals and the federal policy. It appears that the Commission has a balancing test in mind, one that takes into account the local benefits and the federal injury. Absent a notion of balancing, all regulations that are not wholly arbitrary would be reasonable "in relation to" the local objective; at the same time, they would almost always be unreasonable "in relation to" federal communications policies,

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[12] *See Notice* at ¶ 67 ("the burden of demonstrating that a regulation complies with section 25.104 is on the governmental entity that promulgates the regulation").

which favor the most widespread dissemination of communications services. Thus, the latter part of proposed paragraph (a) should read:

> . . . is preempted unless the promulgating authority can demonstrate that such regulation is reasonable. For purposes of this paragraph (a), "reasonable" means that:
>
> > (1) the benefits to be derived from the regulation in achieving a . . . health, safety, or aesthetic objective . . . are not outweighed by
> >
> > (2) the burdens imposed by the regulation on the federal interest . . .

b. Objectives Must Be Defined in the Ordinance

Regulation of larger antennas may include health, safety or aesthetic objectives, but these must be clearly defined and expressly stated within the text of the regulation itself. Even under the current version of the rule, most courts have already required such explicit definition;[13] continuation of this requirement will provide clear guidelines for both local officials and satellite antenna users.

Aesthetic objectives, however, must be examined with heightened scrutiny. If an aesthetic requirement is applied solely to satellite dish antennas, the regulation should contain a specific statement of why the regulation is not imposed on other equipment of similar size placed in similar locations. Because satellite antennas are of a different shape and size than other communications equipment, an aesthetic regulation that appears service-neutral on its face may be affect only satellite antennas. Local authorities may be able to provide a justification

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[13] "[C]ourts that have carefully considered the language and history of the FCC regulation on this point have concluded that the regulation requires the ordinance to define its objective explicitly." *Cawley v City of Port Jervis,* 753 F.Supp. 128, 132 (S.D.N.Y. 1990).