

that looks reasonable on its face, but is arbitrarily applied to satellite antennas and not objects of similar size and visibility, which vitiates its reasonableness. For example, the Commission should preempt as unreasonable an ordinance that requires screening of satellite antennas, but not of dumpsters, air conditioning units and other equipment of similar girth.<sup>14/</sup>

**c. The Balancing Test Must Consider All Federal Communications Policy Interests**

Proposed Subparagraph (a)(2) identifies a single federal interest that should not be unduly burdened by local satellite antenna regulation: "the federal interest in fair and effective competition among competing communications service providers." While this interest is a central one and one that may bring many other communications policies into its sweep, there is no reason that the other federal policies articulated by the Communications Act should not be considered. Hughes therefore recommends that the proposed rule identify the breadth of federal communications policies that are part of the balancing test. Specific reference to competition among service providers is a good idea, given the particular interest in the satellite arena in ensuring intermodal competition. At the same time, the Commission should not slight the other significant federal policy in the satellite area: that of ensuring access to satellite communications, *see Notice* at ¶ 57, and Hughes recommends inclusion of those interests as well. Therefore, paragraph (a)(2) should provide, in part:

the federal interest in making available to all the people of the United States a rapid, efficient, Nation-wide, and world-wide radio communications service, including the federal interest in ensuring access to satellite-delivered communications services and to promoting fair and effective competition among competing communications service providers.

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<sup>14</sup> The Commission has already recognized that two-meter antennas are no more unsightly than equipment of like size. *Notice* at ¶ 62.

**B. Sections 25.104(b) and (c)—Small Satellite Antennas**

**1. The Commission Should Adopt a Per Se Preemption of Regulation of Small Satellite Antennas**

From Hughes's perspective, automatic preemption of regulations affecting small earth stations is the single most important element of the Commission's proposal. Automatic treatment of small earth station restrictions was central to Hughes's 1993 Petition, when it requested *per se* preemption of such restrictions.<sup>15/</sup> The Commission has instead proposed a rule with a system of presumptions and rebuttals for regulations that affect small satellite antennas. In Hughes's view, such a mechanism will not provide satellite users with the relief they need.

The sorry experience of the last nine years shows that too many municipalities have no compunction in disregarding the Commission's rules, imposing complicated and confusing rules and requirements on satellite users, and generally impeding access to satellite communications. If a presumption is rebuttable, far too many users will find themselves tied up in proceedings defending their right to avail themselves of satellite services, proceedings that users of terrestrial systems never have to experience. Prospective VSAT purchasers will be unable to predict in advance what the cost of their VSAT system is going to be, not knowing whether they might be required much later to submit to screening requirements, permit fees, variance procedures, and professional fees, let alone the risk of having to take the VSAT down entirely. Substantial restrictions on small satellite antennas should be preempted *per se*, with a waiver procedure as the safety valve for the truly extra-ordinary and unique situation.

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<sup>15</sup> See Notice at ¶ 60.

## **2. The Presumption and Rebuttal System**

If the Commission insists on adopting a rebuttable, not a *per se*, presumption, it must take pains to make clear beyond doubt in both the rule and the accompanying text that the presumption is automatically applied, and an offending rule is automatically preempted by virtue of the existence of Section 25.104, until the FCC (or a court) has taken action to rule that the promulgating authority has satisfied its burden. Moreover, as drafted, paragraph (b) does not quite work as the Commission intended, and requires adjustment.

### **a. 25.104(b)—Presumptions**

#### **(1) Antenna Users Must be Able to Operate Until the Commission has Found That the Presumption has Been Rebutted**

A careful review of the proposed rule's system of presumptions and rebuttals makes it clear that users of small antennas are able to rely on the presumptions and install, operate, and maintain such antennas without substantial restriction, unless and until the promulgating authority has rebutted the presumption before the Commission. If they were unable to rely on the presumption, however, satellite antenna users would be subject to local administrative enforcement actions, would suffer fines or even confiscation, and would therefore burden the Commission resources with a multitude of requests for preemption. During all of this time they would be without access to satellite communications, obviously an unsatisfactory result and the very reason that the Commission has proposed to use presumptions.

At present, the language is not as clear as it should be. It states that a regulation "shall be presumed unreasonable." In order to effectuate and strengthen the presumption, Proposed Paragraph (b) should state that any regulation of smaller satellite antennas "is hereby

presumed unreasonable and is therefore preempted . . ."<sup>16/</sup> Only by adding this language will the presumption have its intended effect of notifying local authorities that they must come to the Commission to justify their regulations.

**(2) The Presumption Applies to All Regulations that Affect Smaller Satellite Antennas**

Paragraph (b) of the proposed rule includes within its scope any regulation that "affects the installation, maintenance, or use" of such antennas. The Commission should make clear that all regulations that impose any requirements upon users of such antennas are subject to this presumption, whether the ordinance explicitly addresses satellite antennas or whether the local jurisdiction simply applies the regulation to satellite antennas. For example, some jurisdictions currently use general construction or building codes to regulate the installation of satellite antennas, even though such ordinances do not mention satellite antennas. Such regulations would be encompassed within the presumption of the new rule.

**(3) Regulations to Which the Presumption Applies**

Proposed Paragraph (b) should also be modified to clarify to which regulations it applies; this holds true whether the Commission adopts a *per se* approach or retains the presumption—rebuttal system. At present, it refers somewhat imprecisely to "any regulation covered by paragraph (a)," leaving vague exactly what is meant—does it include all regulations that impose substantial restrictions or costs, or only those for which the promulgating authority has not demonstrated reasonableness? While the Commission surely intended that paragraph (b) would apply to any regulation that passes the low burden threshold, Hughes has some

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<sup>16</sup> See Exhibit B, the text of a proposed Rule 25.104 incorporating Hughes's changes to the presumption—rebuttal system proposed by the Commission.

concern that a municipality could strain to read paragraph (b) as giving it the ability to determine that its own regulation is reasonable on aesthetic grounds and therefore not "covered" by paragraph (a).

So that there is no confusion, Paragraph (b) should be amended accordingly. The solution is simply to repeat the operative words from paragraph (a). Although it makes it longer, it is then quite clear:

(b) Any state or local land-use, building, or similar regulation that substantially limits transmission or reception by satellite antennas, or imposes substantial restrictions, procedures, or costs on users of such antennas . . .

**b. Section 25.104(c)—Rebuttals**

Once a presumption has come into play, the proposed rule properly imposes a strict burden before it can be overcome: it requires that local authorities make three separate showings to rebut the presumption. These elements properly place the burden squarely where it ought to be, although each of the elements must be fine-tuned to further the Commission's objectives, as discussed below. In addition, because the Commission has properly determined that the aesthetic impact of smaller antennas is less than for larger antennas, as discussed above, the test of paragraph (a) does not apply to smaller satellite antennas. Because of that, a fourth element—the burden on federal interests—must also be added to the rebuttal test.

**(1) All Aesthetic-based Regulation of Smaller Satellite Antennas is Preempted**

The first element of the rebuttal test requires the local regulator to show that the regulation "is necessary to accomplish a clearly defined and expressly stated health or safety objective." The proposed rule eliminates what is currently a significant burden upon satellite installation by preempting all regulations that impose screening or other aesthetic requirements

on small satellite antennas; as the Commission has recognized, these smaller antennas have a "diminished aesthetic impact," *Notice* at ¶ 64, and as a result, aesthetic concerns cannot trump federal communications goals (in the absence of unique circumstances that would warrant a waiver). Local regulators will no longer be able to justify regulations that substantially limit reception or impose substantial costs simply by pointing to an aesthetic objective, no matter how clearly defined.

Hughes strongly supports the Commission's determination in this regard. In its experience, many jurisdictions assert vague, ill-formulated aesthetic concerns, often based on the specter of large C-Band earth stations located in residential front yards. That fear has little relation to modern technology, even for backyard dish video reception, and has absolutely no bearing on the placement of a small VSAT antenna in a commercial district.

Imposing on small satellite antennas screening regulations originally intended for larger antennas can be not only expensive, but silly. In the case of Juno Beach, discussed at pages \_\_ above, Hughes and its customer were forced to spend nearly \$7,000 to screen a VSAT antenna atop a commercial building, after the Town ignored Hughes's arguments that such a requirement was preempted by federal regulation. The Town relented only after the building's owner, who objected to the screening as unsightly in the first place, notified the Town that its tenant would move rather than spend the additional funds to re-screen the antenna.

As in Proposed Paragraph (a) above, this language, similar to that of the current rule, should be supplemented to ensure that health and safety objectives are contained within the text of the regulation itself and are not the product of post-hoc explanation.<sup>17/</sup>

**(2) The Promulgating Authority Must Show that All Burdens Imposed are No Greater than Necessary**

Second, local regulators, under the proposed rule, must show that a small satellite antenna regulation is "no more burdensome than necessary to achieve the health or safety objective." This requirement, too, is amply justified by history. Satellite antenna users often face substantial costs for permits and other authorizations imposed by local regulation that have little or no relation to furthering any health or safety concern.

In many jurisdictions, the installation of satellite antennas is treated as "construction," and subject to the same expensive permit requirements as are applicable to construction of a gas station, shoe factory, or apartment complex. Even local regulation that is specific to satellite antennas contains overly burdensome requirements. For example, in the City of Coral Gables, Florida, a satellite antenna user cannot obtain a permit without providing a current engineering survey of the entire lot. If the applicant does not have such a survey on hand, he must spend approximately \$5,000 and delay the installation to complete such a survey. This is nothing but wasteful; a local inspector could easily determine if the installation meets the locality's safety standards by performing a site inspection. In addition, the Coral Gables permit

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<sup>17</sup> Paragraph (c)(1) should therefore require that the local jurisdiction show that the regulation "is necessary to accomplish a health or safety objective that is clearly defined and expressly stated within the text of the regulation itself."

process can take several months, involving a public hearing and review by at least three administrative bodies. Such regulation is excessive and unnecessary.

Under the proposed rule, local regulators will be required to show that their regulations do not require that satellite antenna users provide unnecessary information or endure excessive procedures or restrictions. Furthermore, satellite antenna users should not be required to hire outside professionals—lawyers, engineers, surveyors—to assist with or provide certifications for the permitting process.

Paragraph (c)(2) should also relieve satellite antenna users of the burden of applying for variances, which can be an expensive and time-consuming process. Local regulations must be flexible enough to account for unique reception requirements of individual lots within their boundaries, without requiring a "variance" or other special process.<sup>18/</sup>

### **(3) General Building and Construction Codes Can No Longer Be Applied to Smaller Satellite Antennas**

Third, local officials will be required to prove that the regulation "is specifically applicable to antennas of the class mentioned in paragraph (b)." This requirement will ensure that general building and construction codes are not used to restrict the installation of satellite antennas, and will shut down the "everybody knows" school of local zoning administration.

As the Commission has recognized, much local regulation is not specific to satellite antennas at all. Local ordinances that do not specify satellite antennas at all leave users

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<sup>18</sup> Several courts have interpreted the current rule to preempt overly burdensome variance processes. *See, e.g., Van Meter v. Township of Maplewood*, 696 F. Supp. 1024, 1032 (D.N.J. 1988) (local satellite antenna regulation can survive federal preemption only if it is "flexible enough to account for the unique reception requirements of the individual lots within their boundaries" without the need to submit to a variance process).

in the dark, in some cases to be fined later for not applying for a "construction" permit. But satellite antenna installation, much of which is done by using clamps or ballast to hold the antenna, does not fit within any common meaning of "construction" or "building."

When satellite antennas are mentioned, the regulation is often applicable only to certain types of antennas (typically, receive-only). The Commission should require that a local regulation must specify both the size and type of satellite antennas to which it applies. Even when a regulation mentions "satellite antennas," it is often unclear to which type of satellite antennas it is applied.

For example, the City of Coral Gables Zoning Code regulates, in different ways in different sections, the following antennas: (i) "satellite earth stations," defined as antennas "restricted to the sole purpose of receiving and amplifying microwave signals for television reception"; (ii) "microwave antennas," defined as antennas "restricted to the sole purpose of receiving and/or transmitting and amplifying microwave signals"; and (iii) "miscellaneous antennas," including those "intended for the transmission or reception of radar, radio, television, or telephone communications." A VSAT antenna, receives and transmits business data, and does not meet the definition of "satellite earth stations." Perhaps it fits within the definition of "microwave antennas," but the City of Coral Gables has decided to take action against a VSAT user acting as if the definition of "satellite earth station" could include a VSAT. Other jurisdictions make no distinction between ten-meter satellite dishes and much smaller VSAT antennas, imposing identical screening, permitting and installation requirements for both, regardless of the size, cost, or impact of the antenna.

The proposed rule should force local jurisdictions to enact *and* enforce regulations designed specifically for small satellite antennas. In this vein, proposed subparagraph (c)(3) is too vague in terms of how regulations are sometimes interpreted, and should be modified to read:

(3) is specifically applicable, both in application and on its face, to antennas of the class mentioned in paragraph (b).

**(4) Federal Interests Must Also Be Weighed Before the Presumption is Rebutted**

Under the Commission's proposed rule, if the locality can prove that its regulation satisfies each of these three tests, it will rebut the presumption of unreasonableness. What is still vague under the proposed rule, however, is whether after a jurisdiction has satisfied these three tests, its regulation is then deemed to be not subject to preemption or whether the balancing test is then to take place. As the Commission stated in the *Notice*, Small Satellite Antenna regulation will still be subject to a "basic reasonableness test." ¶ 64.

The Commission's statement in the *Notice* is surely right. Imagine a jurisdiction that adopts a regulation that decrees that all small satellite antennas must be made of foam rubber, because it is softer if it hits someone on the head, and must be inspected by the foam-rubber inspector at a fee of \$10,000. The municipality attempts to justify the regulation on the basis that (i) the safety objective is clearly stated in the ordinance; (ii) it is no more burdensome than necessary to achieve the objective of soft head-hitting and to cover the inspector's salary, since the jurisdiction is small and he inspects only three or four antennas a year; and (iii) the regulation specifically applies to small earth stations. It would be nonsensical to think that this capricious reasoning should be allowed to let the regulation be enforced. Instead, if the

regulation satisfies the three tests, its benefits must then be weighed against the burdens placed on the federal interest in satellite communications.

Therefore, to ensure that the preemption analysis still considers the federal interest, a fourth element should be added to the rebuttal: "(4) produces health or safety benefits that are not outweighed by the federal interest described in paragraph (a)(2) above."<sup>19/</sup>

### **C. 25.104(d)—Transmit Antennas and RF radiation**

#### **1. Transmit Antennas Generally**

Proposed Section 25.104(d) provides that regulations governing transmit antennas are subject to the same preemption as receive-only antennas, except that health and safety regulations "relating to radio frequency radiation of transmitting antennas" are not preempted. As explained in part \_\_ above, however, the structure employed in the proposed rule really does not work to afford transmit antennas the same protection as receive-only antennas.<sup>20/</sup> Regardless of what the Commission may do about RF radiation regulation, the rule needs to be restructured as identified above to make sure that transmit antennas are fully protected from unduly burdensome local regulation.

#### **2. RF Radiation.**

The Commission, in the *Notice*, did not address the topic of local regulation of radio frequency radiation, but the proposed rule completely exempts such regulation from any

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<sup>19</sup> One option that does not work would be for the Commission to cross-reference the balancing test in (a). That test contains the element of aesthetics in the balancing test, an element that does not enter the justification for a restriction on a small satellite antenna.

<sup>20</sup> For example, the rule as proposed is murky at best whether small transmit antennas are entitled to the presumptions of paragraph (b). See Section III.A.1. above.

federal preemption. In Hughes's view, the Commission has it completely backwards. The issue of RF Radiation is perhaps the most compelling case for preemption. It presents no genuine issues of fact, no local variation, and it therefore demands no tests of reasonableness or balancing. Given the political pressures this issue often engenders, this is the place where the potential for mischief is the greatest and the Commission should most vigorously assert its preemptive powers.

Concern about exposure to RF radiation is a legitimate issue, one that is appropriate for governmental regulation. Many governmental bodies have now addressed the issue. One of the governmental bodies that considers it a part of its responsibility to ensure the safety of its citizens from excessive exposure to RF radiation<sup>21/</sup> is the Federal Communications Commission. The Commission fulfills its responsibility through Section 1.1307(b) of its rules, and the Note thereto, which specifically requires that satellite earth stations not

cause exposure of workers or the general public to levels of radiofrequency radiation in excess of the "Radio Frequency Protection Guides" recommended in "American National Standard Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 300 kHz to 100 GHz,"<sup>22/</sup>

or else the applicant must prepare a full environmental assessment of the proposed facility.

The Commission has utilized the best available scientific evidence from the nation's most respected standard-setting body, the American National Standards Institute, to establish

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<sup>21</sup> The Commission is charged with that responsibility by law. National Environmental Policy Act of 1969, as amended, 42 U.S.C. §§ 4321-4335.

<sup>22</sup> 47 C.F.R. § 1.1307(b)(citing (ANSI C95.1-1982), issued by the American National Standards Institute (ANSI), 1430 Broadway, New York, New York 10018, Copyright 1982 by the Institute of Electrical and Electronics Engineers, Inc., 345 East 47th Street, New York, New York 10017).

appropriate levels of RF radiation for communications antennas. Local jurisdictions may not be so scientific. Some have reacted to the fear of RF radiation with calls for an outright ban on all satellite antennas within their jurisdictions. For example, the Town Greenburgh, New York just renewed its six-month moratorium of transmitting antennas for a second six-month period.

Like every scientific endeavor, not everything is now known about exposure to RF radiation that may ever be known, to be sure. But one thing is known beyond peradventure: the effects of RF exposure are not different in New Jersey and New Mexico; they are no worse to citizens of The Bronx than to citizens of The Dallas; no more benign to residents of historic Annapolis than to residents of ultra-modern Las Colinas. In short, there is absolutely no basis for anything other than uniform national standards to address the question of RF radiation.

That fact places RF radiation in stark contrast to land-use issues, where local customs, climate, topography, history, culture, and other factors may lead to different regulatory approaches to similar problems. The Commission is generally balancing the needs and interests of local land-use issues against the federal need to implement communications policy. But when it comes to RF radiation, the Commission has it entirely backwards. There is nothing to be balanced locally; the Commission has already done the balancing. The Commission should not be carving RF radiation regulation out of the preemption rule; the Commission should instead be absolutely preempting state and local governments from adopting any regulation concerning the RF radiation of satellite transmit (or receive)<sup>23/</sup> antennas.

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<sup>23</sup> After all, if the Commission were to let local jurisdictions adopt their own views of science, why not let them adopt prohibitions on receive-only antennas, based on a concern that receive-only antennas might "draw" more RF radiation into their communities? The Town of Greensburgh justified its moratorium on the basis of fear, even asserting that it is empowered to act on the basis of public "perception alone."

Local politicians are less immune to political pressures than federal regulators in independent agencies. If the Commission abdicates its responsibility to exercise its judgment concerning the proper balance between RF radiation concerns and communications policy, it can rest assured that local regulators will be quick to pick up the slack to use real or supposed RF radiation concerns to preclude transmit antennas for any reason. A local government will always be able to cite to a study that has "determined" RF radiation to be a problem, and create a *per se* preclusion of transmit antennas that FCC will be unable to preempt if this rule is adopted as proposed.

The exception in current paragraph (d) is a terrifying prospect to the VSAT industry. If adopted, it has the potential to undermine completely all the good work done by the rest of the Commission's proposal, allowing local governments to avoid preemption—on the one basis for which there is neither a local justification nor local expertise. The Commission should instead provide precisely the opposite: it should specify that the kinds of health and safety regulations that will be considered in the balancing test will *not* include any regulations that relate to RF radiation.

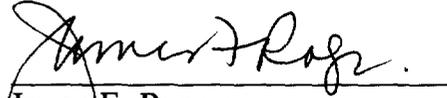
#### **IV. CONCLUSION**

The Commission has perceived the problems facing satellite antenna users, and has proposed a solution. Hughes applauds these efforts. In order for its goals to be realized, however, the rule must clearly prohibit "substantial" burdens on small satellite antennas, and other changes must be made to provide clear guidelines and enable greater and efficient access to satellite communications. Hughes urges the Commission to adopt the rule as revised in Exhibit A.

Respectfully submitted,

HUGHES NETWORK SYSTEMS, INC.

BY:



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July 14, 1995

## CERTIFICATE OF SERVICE

I certify that I have this 14th day of July, 1995 delivered by hand the foregoing Comments of Hughes Network Systems, Inc. for preemption of local zoning regulation of satellite earth stations in IB Docket No. 95-59 to the following:

Chairman Reed E. Hundt  
Federal Communications Commission  
1919 M Street, NW, Room 814  
Washington, DC 20554

Commissioner James H. Quello  
Federal Communications Commission  
1919 M Street, NW, Room 802  
Washington, DC 20554

Commissioner Andrew C. Barrett  
Federal Communications Commission  
1919 M Street, NW, Room 826  
Washington, DC 20554

Commissioner Rachelle B. Chong  
Federal Communications Commission  
1919 M Street, NW, Room 844  
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Commissioner Susan Ness  
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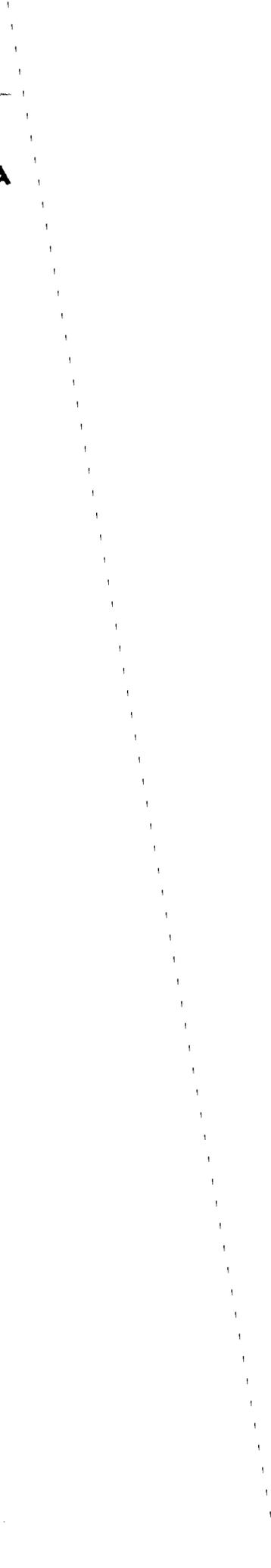
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**A**



## **PER SE RULE**

Section 25.104 is revised to read as follows:

(a) Any state or local land-use, building, or similar regulation that substantially limits transmission or reception by satellite antennas, or imposes substantial costs or delays on users of such antennas, 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 that is clearly defined and expressly stated within the text of the regulation itself are not outweighed by
- (2) the burdens imposed by the regulation on the federal interest in making available to all the people of the United States a rapid, efficient, Nation-wide, and world-wide radio communication service, including the federal interest in ensuring access to satellite-delivered communications services and to promoting fair and effective competition among competing communications service providers.

(b) Any state or local land-use, building, or similar regulation that substantially limits transmission or reception by satellite antennas, or imposes substantial costs or delays on users of such antennas, is conclusively presumed unreasonable and is hereby preempted if it affects the installation, maintenance, or use of:

- (1) a satellite antenna that is two meters or less and is located or proposed to be located in any area where commercial or industrial uses are generally permitted by local land-use regulation; or
- (2) a satellite antenna that is one meter or less in diameter in any area.

For purposes of this paragraph (b), the following costs and delays shall be deemed "substantial":

- (i) If the antenna is for business use:
  1. imposition of more than \$50 in direct or indirect costs, including governmental fees, engineering or legal fees, and the cost of any construction or alteration necessitated by the regulation;
  2. being required to wait more than seven days for a permit or

other authorization before installation is allowed; or

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

(ii) If the antenna is for consumer use:

1. imposition of any costs or fees;

2. being required to obtain any permit or other authorization; or

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

(c) Any person aggrieved by the application or potential application a state or local zoning or other regulation in violation of paragraph (a) of this section may, after exhausting nonfederal administrative remedies, file a petition with the Commission requesting a declaration that the state or local regulation in question is preempted by this section. Nonfederal administrative remedies, which do not include judicial appeals of administrative determinations, shall be deemed exhausted when

(1) the petitioner's application for a permit or other authorization required by the state or local authority has been denied and any administrative appeal has been exhausted;

(2) thirty days have passed since the petitioner filed its application for a permit or authorization with the state or local authority;

(3) the petitioner has been informed, or otherwise has a good-faith belief, that obtaining a permit or other authorization required by the state or local authority will require the petitioner's expenditure of an amount greater than the aggregate purchase and installation costs of the antenna; or

(4) a state or local authority has notified the petitioner that fines will be levied against petitioner if it does not comply with the challenged regulations, or petitioner has a good-faith belief that administrative or judicial enforcement, including fines, confiscation, or civil or criminal action, is imminent.

(d) Any state or local authority that wishes to maintain and enforce zoning or other regulations inconsistent with this section may apply to the Commission for a full or partial waiver of this section. Such waivers may be granted by the Commission in its sole discretion, upon a showing by the applicant that local concerns of a highly specialized or unusual nature create an overwhelming necessity for regulation inconsistent with this section. No application for

waiver shall be considered unless it includes the particular regulation for which waiver is sought. Waivers granted according to this rule shall not apply to later-enacted or amended regulations by the local authority unless the Commission expressly orders otherwise.

## PER SE RULE

Section 25.104 is revised to read as follows:

(a) Any state or local land-use, building, or similar regulation that substantially limits transmission or reception by ~~receive-only~~ satellite antennas, or imposes substantial costs or delays on users of such antennas, is preempted unless the promulgating authority can demonstrate that such regulation is reasonable ~~in relation to:~~

For purposes of this paragraph (a), "reasonable" means that:

- (1) ~~the benefits to be derived from the regulation in achieving a clearly defined, and expressly stated health, safety, or aesthetic objective that is clearly defined and expressly stated within the text of the regulation itself are not outweighed by;~~ and
- (2) ~~the burdens imposed by the regulation on the federal interest in making available to all the people of the United States a rapid, efficient, Nation-wide, and world-wide radio communication service, including the federal interest in ensuring access to satellite-delivered communications services and to promoting fair and effective competition among competing communications service providers.~~

~~(b) Any regulation covered by paragraph (a) of this section shall be state or local land-use, building, or similar regulation that substantially limits transmission or reception by satellite antennas, or imposes substantial costs or delays on users of such antennas, is conclusively presumed unreasonable and is hereby preempted if it affects the installation, maintenance, or use of:~~

- (1) a satellite ~~receive-only~~ antenna that is two meters or less and is located or proposed to be located in any area where commercial or industrial uses are generally permitted by local land-use regulation~~;~~ or
- (2) a satellite ~~receive-only~~ antenna that is one meter or less in diameter in any area.

~~(c) Any presumption arising from paragraph (b) of this section may be rebutted upon a showing that the regulation in question~~

~~(1) is necessary to accomplish a clearly defined and expressly stated health or safety objective;~~

~~(2) is no more burdensome to satellite users that is necessary achieve the health or safety objective;~~

~~(3) is specifically applicable to antennas of the class mentioned in paragraph (b).~~

~~(d) Regulation of satellite transmitting antennas is preempted to the same extent as provided in paragraph (a) of this rule, except that state and local health and safety regulations relating to radio frequency radiation of transmitting antennas are not preempted by this rule. For purposes of this paragraph (b), the following costs and delays shall be deemed "substantial":~~

~~(i) If the antenna is for business use:~~

- ~~1. imposition of more than \$50 in direct or indirect costs, including governmental fees, engineering or legal fees, and the cost of any construction or alteration necessitated by the regulation;~~
- ~~2. being required to wait more than seven days for a permit or other authorization before installation is allowed; or~~
- ~~3. being required to attend a hearing or meeting of any kind.~~

~~(ii) If the antenna is for consumer use:~~

- ~~1. imposition of any costs or fees;~~
- ~~2. being required to obtain any permit or other authorization ; or~~
- ~~3. being required to attend a hearing or meeting of any kind.~~

~~(e) (c) Any person aggrieved by the application or potential application a state or local zoning or other regulation in violation of paragraph (a) of this section may, after exhausting ~~all~~ nonfederal administrative remedies, file a petition with the Commission requesting a declaration that the state or local regulation in question is preempted by this section. Nonfederal administrative remedies, which do not include judicial appeals of administrative determinations, shall be deemed exhausted when~~

~~(1) the petitioner's application for a permit or other authorization required by the state or local authority has been denied and any administrative appeal has been exhausted;~~

~~(2) ~~the petitioner's~~ thirty days have passed since the petitioner filed its application for a permit or ~~other~~ authorization ~~required by~~ with the state or local authority ~~has been pending with that authority for ninety days ;~~~~

(3) the petitioner has been informed, or otherwise has a good-faith belief, that obtaining a permit or other authorization required by the state or local authority will ~~be conditioned upon~~ require the petitioner's expenditure of an amount greater than the aggregate purchase and installation costs of the antenna; or

(4) a state or local authority has notified the petitioner ~~of impending~~ that fines will be levied against petitioner if it does not comply with the challenged regulations, or petitioner has a good-faith belief that administrative or judicial enforcement, including fines, confiscation, or civil or criminal action ~~in a court of law and there are no more nonfederal administrative steps to be taken~~, is imminent.

~~(f)~~ (d) Any state or local authority that wishes to maintain and enforce zoning or other regulations inconsistent with this section may apply to the Commission for a full or partial waiver of this section. Such waivers may be granted by the Commission in its sole discretion, upon a showing by the applicant that local concerns of a highly specialized or unusual nature create an overwhelming necessity for regulation inconsistent with this section. No application for waiver shall be considered unless it includes the particular regulation for which waiver is sought. Waivers granted according to this rule shall not apply to later-enacted or amended regulations by the local authority unless the Commission expressly orders otherwise.

B