

into compliance without any litigation ever occurring. Even if such action was not forthcoming, it would then be a fairly simple task for the FCC's staff, on delegated authority, to issue a ruling based on prior precedent (in this example, the FCC's Deerfield ruling).

In short, it has become exceedingly clear that the Commission's limited 1986 preemption rule must be revised, both procedurally and substantively, if would-be satellite consumers are to have a chance to obtain satellite antennas and if the DTH industry is to have a fair chance to compete in the video marketplace.

4. Clarification Provided by NPRM

The NPRM appropriately proposes to revise the substance of the preemption rule in light of the evidence that "many local zoning restrictions are [still] creating unreasonable barriers to the growth of satellite-based services."³⁸ The NPRM also proposes to amend the procedural mechanisms so that the Commission can interpret its preemption rule prior to judicial review.³⁹

SBCA supports the NPRM because implementation of a revised rule could provide major impetus in resolving the disparate treatment afforded satellite dishes nationwide.

38 NPRM at ¶ 11.

39 Id. at ¶¶ 48-50.

And SBCA commends the Commission for recognizing the continuing problems that satellite owners and potential satellite owners have faced -- and continue to face. As set forth more fully below, SBCA also makes several suggestions for ways in which the Commission should clarify and/or modify its new proposed rule in order to make the final rule as clear and as easy to apply as possible, and thus to minimize the number of individual disputes in which the Commission will need to become involved.

B. Advances in C-Band Technology

In its NPRM, the Commission requested comment on information regarding the technological development of C-Band antennas that might bear on the interests being weighed in this proceeding.⁴⁰ Since 1986, when the current Preemption Order was adopted, the average size of C-Band antennas sold in the United States has been significantly reduced. As a result, many local ordinances and zoning rules that placed great burdens on purchasers of C-Band antennas based on the older average size may no longer be justified. The new rule adopted in this proceeding should force localities to reconsider these regulations in light of the reduced "aesthetic" impact and structural effects of the new, smaller C-Band dishes.

⁴⁰ See id. at ¶ 12.

Because today's more powerful C-Band satellites broadcast stronger signals, the C-Band antenna gain⁴¹ need not be so great in order to develop the signal strength necessary to generate a useable television picture. That decrease in required gain has resulted in a fairly significant reduction in the size of C-Band antennas.

Specifically, in 1986, the typical C-Band antenna for residential use measured ten to twelve feet in diameter and weighed over 1300 pounds. These dishes were typically constructed of solid white fiberglass. By 1994, 90 percent of the C-Band antennas sold in the United States were 7.5 feet in diameter and weighed ninety pounds. The 7.5-foot dish represents approximately a 38 percent reduction in diameter from the old 12-foot antenna. This smaller diameter also translates into a 61 percent reduction in total surface area. Further, wind resistance is reduced by use of mesh rather than solid materials, and the visibility of the antennas is limited due to the use of black mesh rather than white construction materials. At present, C-Band antennas as small as six feet in diameter may be used in some cases.⁴²

41 Antenna gain denotes the ratio of signal strength at the antenna output to signal strength at the surface of the antenna.

42 Further reductions in the size of C-Band antennas probably cannot be achieved due to factors related to the orbital separation of C-Band satellites. Antennas smaller
(Footnote 42 Continued)

In addition, C-Band antennas, because of their smaller size, can now lend themselves to being "disguised" as other objects typically found in homeowners' yards, e.g., patio umbrellas or rocks. These designs render many of these antennas virtually indistinguishable from the ordinary objects they are designed to mimic. (Photographs of both umbrella and rock antennas are attached at Exhibit B.)⁴³ Many local ordinances nonetheless sweep these umbrella and rock dishes into their regulations.

III. CLARIFICATIONS TO THE PROPOSED RULE

As stated above, SBCA generally supports the Commission's approach to tightening the preemption rule and believes that the proposed changes are a significant step in the right direction. It is important, however, that the actual language of the final rule itself be as clear and complete as possible in order to facilitate compliance by local authorities and, accordingly, to minimize the number

(Footnote 42 Continued)

than six feet in diameter experience cross-channel interference between satellites separated by two degrees transmitting on similar frequencies. As a consequence, further inexpensive reductions in the size of C-Band antennas to diameters less than six feet cannot be anticipated within the near future.

43 SBCA is aware of cases in which local restrictions have frustrated consumers wishing to receive DTH satellite service using these unobtrusive antennas. One such case, involving a homeowners' association covenant enforced against Douglas Irvin of Waldorf, Maryland, is described in Section V., infra.

of disputes in which the Commission will need to become involved. To this end, SBCA makes the following suggestions for modification and clarification of the proposed rule.⁴⁴

A. Basic Rule

SBCA supports the proposed rule but proposes several suggested clarifications of section (a), which establishes the basic preemption standard. Proposed section (a) currently reads:

Any state or local land-use, building, or similar regulation that substantially limits reception by receive-only antennas, or imposes substantial costs on users of such antennas, is preempted unless the promulgating authority can demonstrate that such regulation is reasonable in relation to: (1) a clearly defined and expressly stated health, safety, or aesthetic objective; and (2) the federal interest in fair and effective competition among competing communications service providers.

First, SBCA recommends that the Commission clarify that the phrase "similar regulation" covers not only zoning regulations but also regulations regarding permitting and compliance, which, as some of the examples above indicate, can pose equally insurmountable problems for prospective satellite antenna owners. Obviously, it would directly undermine the Commission's policy, as well as the underlying

⁴⁴ For the Commission's convenience, SBCA has attached as Exhibit C proposed rule language that incorporates all of the changes discussed below.

federal interests, if local authorities could effectively circumvent preemption by restricting satellites in non-traditional ways. SBCA suggests that this clarification can be made by adding the phrase "including regulations regarding permitting and other requirements of compliance" after the phrase "similar regulation" in the proposed rule.

Second, the phrase "substantial costs" is imprecise and will invite abuse. Accordingly, SBCA proposes that the Commission substitute the phrase "costs that exceed a de minimis amount." Although the Commission attempts to define "substantial costs" more precisely in the NPRM, by describing such costs as "not insignificant," that phrase is misleading and too permissive in certain circumstances. In any event, the rule itself needs to be clear. To achieve this end, the Commission should change the text of the proposed rule to preempt regulations imposing costs that "exceed a de minimis amount." The Commission should further clarify that the costs to be measured include the costs of compliance (e.g., the costs for surveying, engineering, architectural plans, etc.).

Third, SBCA proposes removing the "health" objective in subsection (a) with respect to receive-only antennas. SBCA cannot conceive of a reasonable health objective with respect to receive-only antennas because such antennas do not emit any radio frequency radiation. SBCA is

not aware of any even arguable scientific evidence of health risk. The Commission should not encourage local authorities to attempt to prohibit satellite antennas on such dubious grounds. The Commission should therefore clarify that a health objective is potentially demonstrable only with respect to transmitting antennas.⁴⁵ Accordingly, the Commission should insert the following language at the end of section (a)(1) before the semi-colon: "with respect to transmitting antennas, or a safety or aesthetic objective that is clearly defined and expressly stated in the text of the regulation itself with respect to receive-only antennas."

Fourth, the Commission should clarify precisely what could be deemed a reasonable "aesthetic" objective. SBCA submits that local regulation should only be deemed to protect a reasonable "aesthetic" objective if the local authority uniformly applies the regulation at issue to all structures in the area -- not only satellite antennas. If, for example, the local authority permits residents to keep

45 As discussed below in Section III.D, SBCA suggests that section (a) be modified to cover both receive-only and transmitting antennas. As also discussed in more detail below, the FCC should carefully monitor the use of alleged health objectives by local authorities to ensure that they do not use unfounded objectives to circumvent the rules the Commission adopts in this proceeding. SBCA is aware that the Commission is examining RF radiation issues in another proceeding, Guidelines for Evaluation of the Environmental Effects of Radio Frequency Radiation, ET Docket No. 93-62, and SBCA will follow these developments.

wrecked cars up on blocks in their driveways or permits ramshackle woodsheds in their yards or permits cable system equipment to be haphazardly placed within a neighborhood, any restrictions the local authority places on satellite antennas for allegedly "aesthetic" reasons cannot be deemed reasonable. (See Exhibit D for sample photographs of cable boxes.) Preemption is clearly warranted when local authorities do nothing to regulate eyesores yet ban satellite dishes for purportedly "aesthetic" reasons.

Fifth, SBCA agrees that the local authorities' reasonable objectives should be "expressly stated," but urges the Commission to require those objectives to be "expressly stated in the text of the regulation." The Commission presumably does not intend to permit local authorities to state their objectives only orally or in other parts of a record that might be not easily accessible to potential satellite owners.

Sixth, while SBCA agrees that a local regulation must be reasonable in relation to the federal interests at issue, SBCA believes that the Commission has defined the federal interest too narrowly. Specifically, there are federal interests not only in competition among competing video providers (which is stated in the proposed rule), but also more broadly (as discussed in Section I.B. above) in the availability of communications services to everyone in

the United States, the establishment of a unified communications system, and the specific right to receive satellite signals.⁴⁶ The Commission should therefore broaden the scope of the federal interest it enunciates to include these other interests in weighing them against the local objectives.

Seventh, the Commission should clarify that this section applies only to those regulations not covered by section (b) below. This can readily be done by inserting at the beginning of section (a) the following: "Except as provided in section (b) below,"

Thus, SBCA's proposed section (a) would read:

(a) Except as provided in section (b) below, any state or local zoning, land-use, building, or similar regulation (including any permitting or other compliance-related regulation) that substantially limits transmission or reception by satellite antennas, or imposes costs (including any costs of compliance with such regulation) that exceed a de minimis amount on users of such antennas, is preempted unless the promulgating authority can demonstrate that such regulation is reasonable in relation to:

(1) a health, safety, or aesthetic objective that is clearly defined and expressly stated in the text of the regulation itself with respect to transmitting antennas, or a safety or aesthetic objective that is clearly defined and expressly stated in the text of the regulation itself with respect to receive-only antennas; and

(2) the federal interest in making available to all people of the United States a rapid,

46 47 U.S.C. §§ 151, 605.

efficient, nationwide and worldwide radio communication service, including the federal interest in ensuring access to satellite-delivered communications services and in promoting fair and effective competition among competing communications service providers.

B. Presumptions

SBCA also strongly supports the Commission's approach to significantly strengthening the preemption of local regulations that apply to certain types of satellite antennas. SBCA does, however, suggest some important modifications to this section. Proposed section (b) currently reads as follows:

Any regulation covered by paragraph (a) of this section shall be presumed unreasonable if it affects the installation, maintenance, or use of: (1) a satellite receive-only antenna that is two meters or less in diameter and is 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.

We propose that the regulations covered by this section should simply be preempted, not subject to a rebuttable presumption. SBCA believes that the federal interests (described in section (a) of the rule) are so strong with respect to the small category of antennas covered by this section (b) that this stronger action -- i.e., flat preemption -- is warranted. (These regulations would, of course, still be subject to the waiver procedure

the Commission creates in section (f).) The Commission should therefore delete the words "presumed unreasonable" and replace them with the words "deemed unreasonable and is therefore preempted."

In addition to this preemption for one- and two-meter dishes in the specified zoning areas, SBCA would suggest that the Commission establish a third subsection that would cover those larger satellite antennas that are "disguised" to look like items that are unregulated, e.g., patio umbrellas and rocks. While such antennas are larger than the one- and two-meter dishes covered in the proposed section (b), they deserve comparable preemption because they do not (or at least should not) contravene any "aesthetic objective" that could be deemed reasonable in relation to the federal interests at stake here. Sample photographs of such satellite antennas are attached as Exhibit B. Similarly, because they are placed on the ground these umbrella and rock antennas do not pose the type of safety concerns that might be raised by C-Band antennas that are mounted on poles or rooftops.

Accordingly, SBCA's proposed section (b) would read:

(b) Any state or local zoning, land-use, building or similar regulation including any permitting or other compliance-related regulation that substantially limits transmission or reception by satellite antennas, or imposes costs (including any costs of compliance with such regulation) that

exceed a de minimis amount on users of such antennas, shall be deemed unreasonable and is therefore preempted if the regulation affects the installation, maintenance, or use of:

(1) a satellite antenna that is two meters or less in diameter 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 regardless of its zoning designation; or

(3) a satellite antenna of any size that is "disguised" to look like an item that is unregulated, e.g., a rock or an umbrella, in any area regardless of its zoning designation.

C. Rebutting Presumptions

As explained above, SBCA thus proposes the deletion of section (c), which establishes the showing that a local authority must make to rebut a presumption established in section (b). Proposed section (c) currently reads as follows:

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 than is necessary to achieve the health or safety objective; and (3) is specifically applicable to antennas of the class mentioned in paragraph (b).

Because SBCA suggests that section (b) be changed from rebuttable preemptions to simple preemption, this section (c) is no longer necessary.

D. Transmitting Antennas

SBCA disagrees with the Commission's proposed approach to transmitting antennas, which is set forth in section (d) as follows:

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.

The Commission is the acknowledged expert regarding radio frequency ("RF") radiation,⁴⁷ and thus the Commission that should affirm its authority to preempt any local health and safety regulations with respect to RF radiation that are not bona fide, are not based on scientific studies that have attracted widespread acceptance within the relevant scientific community,⁴⁸ or are not narrowly tailored. SBCA therefore suggests that proposed section (d) be eliminated in its entirety and that section (a) (which sets forth the

47 More specifically, the FCC should use the same standard that federal courts apply in determining whether to accept scientific evidence. That standard is "whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate, and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community." Daubert v. Merrell Dow Pharmaceuticals, 113B S.Ct. 2786, 2790 (1993).

48 See Guidelines for Evaluation of Environmental Effects of Radiofrequency Radiation, ET Dkt. No. 93-62.

general preemption rule) should be modified to cover both receive-only and transmitting antennas.

E. Procedures for FCC Review

As explained above, it is essential that the Commission change its current procedures for petitioners to obtain Commission review of potentially non-compliant local zoning ordinances. SBCA therefore supports the proposed changes, particularly elimination of the requirement that petitioners must exhaust judicial remedies before petitioning the Commission. Based upon the large number of court rulings that are inconsistent with one another and (as evidenced by the Deerfield case) often inconsistent with the Commission's interpretation of its own policy, eliminating the requirement of exhausting judicial remedies before approaching the Commission is clearly needed and long overdue.

At the same time, SBCA agrees that it is reasonable to require petitioners to complete local administrative procedures before filing a petition at the Commission -- but only so long as these procedures are reasonable and of finite duration. To this end, the Commission should (as it has proposed) allow petitioners to circumvent the local administrative process if it becomes clear that the process will impose facially unreasonable conditions on the

prospective satellite owner or will not be completed in a reasonable time frame.

Proposed section (e) currently reads:

Any person aggrieved by the application or potential application of 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 application for a permit or other authorization required by the state or local authority has been pending with that authority for ninety days; (3) the petitioner has been informed that a permit or other authorization required by the state or local authority will be conditioned upon 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 civil or criminal action in a court of law and there are no more nonfederal administrative steps to be taken.

So that the various indicia of exhaustion capture all necessary situations, we propose the following modifications or clarifications. First, with respect to the determination of exhaustion for any application that has been pending for more than 90 days, SBCA recommends that this time be set for 30 days instead. When weighed against the important federal

interests at stake, a local administrative proceeding that lasts more than 30 days would lead to an unreasonably long delay for prospective owners attempting to install a satellite antenna.

Second, the Commission should clarify that the time to be counted runs from the date of the petitioner's initial filing. Without this clarification, local authorities could simply create a multi-step process and argue that each step would trigger an additional 30 (or 90) days. Given the onerous review process that Mr. Hutchins was forced to undertake to comply with the Prince Georges County permitting process, it is hardly inconceivable that some authorities might create numerous levels of review or multiple review procedures, e.g., one for the zoning approval, then one for permits necessary for compliance, etc.

Third, the use of the phrase "pending" may not capture all situations in which a local authority has not yet taken decisive action. SBCA suggests that a clearer way to gauge exhaustion for this purpose is simply that the petitioner's initial application was filed more than 30 days prior to petitioning the Commission.

Fourth, with respect to a determination of exhaustion in a case in which an approval is "conditioned" upon the expenditure of a certain amount of money, SBCA urges the Commission to clarify that this would include not

only any express condition, but also any aspect of the local authorization process that would result in such an expenditure being necessary.

Fifth, as SBCA suggested with respect to section (a) of the proposed rule, "expenditure" should be clarified to indicate that it includes those costs related to obtaining permits as well as other compliance-related costs (e.g., engineering and legal fees, costs of complying with screening requirements, etc.). SBCA also proposes that this "expenditure" standard should be changed to the same standard that SBCA suggested above for section (a) of the proposed rule. Specifically, local administrative remedies should be deemed to be exhausted if a permit or other authorization is conditioned upon the expenditure by the petitioner of "an amount of money greater than a de minimis amount". Conforming the "cost" and "expenditure" standards in sections (a) and (e) is supported for at least three reasons: (1) it eliminates possible confusion regarding the different cost standards to be applied in different circumstances; (2) it does not give local authorities license to impose costs of the aggregate cost of purchasing and installing an antenna minus one dollar in every case; and (3) if a local authority is imposing costs during the course of a proceeding that clearly exceed those allowed by

the general preemption rule, it does not require a prospective antenna owner to await final local action.

Finally, the Commission should not require that a petitioner be officially "informed" that such an expenditure will be required in order for the petitioner to prove exhaustion. In such a situation, a local authority could decide not to officially "inform" a prospective satellite owner of this fact. Therefore, the Commission should simply delete the introductory phrase of subsection (3), i.e., "the petitioner has been informed that." As a result, when it becomes apparent (with or without being officially "informed") that such an expenditure will be required, the petitioner can proceed to the Commission.

Thus, SBCA's proposed section (c) would read:

(c) Any person aggrieved by the application or potential application of 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) thirty days have passed since the petitioner's initial application for a permit or other authorization required by the state or local authority was filed with that authority;

(3) a permit or other authorization required by the state or local authority will require or necessarily result in the petitioner's expenditure of an amount of money greater than a de minimis amount (including any costs of compliance with such requirements); or

(4) a state or local authority has notified the petitioner of impending civil or criminal action in a court of law and there are no more nonfederal administrative steps to be taken.

F. Waiver Procedure

Finally, SBCA has suggested a few important clarifications regarding section (f) of the proposed rule, which establishes waiver procedures for local authorities. That section currently reads as follows:

Any state or local authority that wishes to maintain and enforce 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.

While SBCA does not at present recommend any changes to the text of this rule, we do believe that the Commission should clarify several points in its order. First, it is important to clarify that the standard for

receiving a waiver is a high hurdle to overcome. While this is perhaps implicit in the Commission's proposed rule, which refers to local concerns of a "highly specialized or unusual nature," further clarification of this point would be helpful. Second, the Commission should indicate that this waiver procedure is intended to be used sparingly so as not to undercut the strength of the general preemption rule. Finally, the Commission should emphasize that the "necessity" showing established by this section will be variable and that the hurdle is higher when requesting a full waiver as compared to a partial waiver.⁴⁹

Thus, SBCA's proposed section (d) would read identically to the proposed rule.

IV. THE LIMITATIONS OF AND PROBLEMS CREATED BY BOCA

The NPRM recommends two possible voluntary, cooperative approaches to addressing the issues raised in this proceeding. One approach would utilize a model building construction code published by Building Official & Code Administrators International, Inc. ("BOCA") to resolve antenna regulation problems. While the NPRM correctly concludes that use of the BOCA model code cannot supplant

⁴⁹ The Commission may also choose to clarify that the waiver contained in section (f) is no different from nor is it in addition to the general waiver contained in 47 C.F.R. § 1.3. See NPRM ¶ 68, n.79.

federal preemption because its use is not mandatory, the NPRM does note that a model code could be helpful to provide more certainty for satellite antenna users and to promote "cooperation and communication among all those involved."⁵⁰

First and foremost, SBCA agrees with the Commission that federal preemption must occur regardless of whether a satisfactory BOCA code is ever adopted. We cannot overstate how strongly we feel on this issue. Second, SBCA agrees, however, that a lawful model code promulgated by BOCA or a similar organization would indeed prove helpful in providing certainty for satellite antenna users.⁵¹ As the NPRM cogently suggests, however, such a model code must be the result of "cooperation and communication" among all interested parties. Only by incorporating the concerns of all interested parties, including the satellite industry and its customers, can a fair and equitable model code be drafted. Recent experience leads us to caution the Commission that such a result is not likely to occur in the near future.

50 NPRM at ¶ 77.

51 Drafting a lawful, well-balanced model code is even more important when one considers the fact that 40 percent of local governments nationwide (covering approximately 60 percent of the population) have adopted BOCA's model code. Angela M. Duff, Standards Group Next Zoning Target, TVRO Dealer, Feb. 1994, at 26; Paul DeMark, Optimism Prevails on ZCC&R Battleground, TVRO Dealer, Mar. 1995, at 41-42.

Prior to the adoption of this NPRM, SBCA unsuccessfully attempted to provide input to the current version of BOCA's model code. SBCA finds two aspects of BOCA's model code to be objectionable and likely a violation of the 1986 Preemption Order. First, the model code provides that roof mounted antennas less than 12 feet in height are exempt from the permitting process.⁵² If the antenna is a dish antenna less than 12 feet in height but larger than two feet in diameter, however, a permit is required.⁵³ Second, in addition to being subject to permit requirements, dish antennas greater than two feet in diameter must comply with the snow load and wind load requirements imposed by other sections of the model code.⁵⁴ Other antennas, even those that require permits, are not subject to the model code's wind and snow load requirements.⁵⁵

In 1994, SBCA wrote to BOCA, explaining SBCA's concerns with the model code⁵⁶ -- including the fact that, if adopted by local governments (which occurs in 40 percent

52 1993 BOCA National Building Code § 3109.1.

53 Id. § 3109.3 et seq.

54 Id. § 3109.3.1.

55 See id. § 3109.2.

56 See Letter from Andrew R. Paul, Senior Vice President, SBCA, to Robert McCluer, BOCA (Dec. 2, 1994) (attached hereto in Exhibit E).

of all communities), it violates 47 C.F.R. § 25.104. SBCA proposed that BOCA amend its model code to allow a permit exemption for all antennas less than nine feet in overall height.⁵⁷ In response, BOCA requested that SBCA draft its proposed amendment to the model code and present its amendment at the next BOCA public hearing on proposed code changes in April 1995.⁵⁸

As requested, SBCA presented its proposed amendment at the public hearing. Among other things, SBCA noted that, as a practical matter, the 9 foot height limitation would effectively limit a dish antenna to 7.5 to 8 feet in diameter. In addition, SBCA pointed out that the model rules would allow 20 and 40 meter "ham" radio antennas without a permit, while simultaneously requiring a permit for a 25-inch satellite antenna mounted on a chimney. What SBCA sought was not merely equal treatment for satellite antennas, which was not currently provided by the model code; it also sought compliance with the Commission's Preemption Order.

57 Id. SBCA did not, however, propose a change to the existing structural requirements imposed upon satellite antennas, but it did bring to BOCA's attention the fact that similar requirements did not appear to be required of other (non-dish) types of antennas.

58 See Letter from Robert McCluer, Manager, Codes, BOCA to Andrew R. Paul, Senior Vice President, SBCA (Feb. 6, 1995) (attached hereto in Exhibit E).

Despite the unfair and differential treatment for satellite antennas, the BOCA Code Development Committee unanimously voted against SBCA's amendment. The BOCA committee provided only a brief explanation of its denial, indicating that the denial was based on its concern with the wind loads that might be created by larger dish antennas.⁵⁹

It is far from clear precisely what BOCA's thinking and motives were when it summarily denied the SBCA amendment despite the obvious disparate treatment afforded satellite antennas and non-satellite antennas in the model code. Accordingly, the voluntary cooperation envisioned in the NPRM in drafting a model code that conforms to the Commission's rules may be a laudable, but elusive, goal. Quite frankly, SBCA's experience to date leaves it skeptical that there will ever be a model BOCA code that embodies "cooperation and communication among all those involved."⁶⁰ At the same time, however, SBCA is willing to engage in a good faith effort to achieve such an end. We therefore ask the FCC to strongly encourage BOCA to engage in a meaningful, cooperative effort with all interested parties, including the satellite industry, in revising its model code to comply with the rules ultimately adopted in this proceeding.

59 1995 Proposed Changes to the BOCA National Codes, Committee Recommendations, No. B209-95 D, at 33.

60 NPRM at ¶ 77 (emphasis supplied).

Unless the FCC promotes such a dialogue, any attempts by members of the satellite industry to have a material impact upon revisions to BOCA's model code may very well meet the same reception as previously experienced by SBCA.

V. QUASI-PUBLIC RESTRICTIONS ON SATELLITE TV ACCESS

Although the present rulemaking proceeding does not address the impediments to access to satellite communications created by quasi-public entities such as HOAs, the Commission recognized in its NPRM the potential that restrictive real estate conditions, covenants, and restrictions ("CC&Rs") and homeowner association rules have to restrict unduly the reception of interstate satellite signals.⁶¹

The Commission's recognition of the impact of CC&Rs and HOAs could not be more on point. Indeed, these sorts of quasi-public restrictions have already resulted in the de facto prohibition of access to certain types of satellite signals. The proliferation of HOAs with such restrictions in their bylaws threatens to significantly erode the rights of consumers to receive information and entertainment from diverse and competitive distribution channels -- important

⁶¹ See id. at ¶ 8 n.14. Because these kinds of restrictions on access arise from quasi-public rules, issues of jurisdiction may arise. Because CC&Rs are not explicitly part of this proceeding, however, SBCA does not analyze these jurisdictional issues here.