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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

July 14, 1995

Office of the Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

RE: Comments in IB Docket No. 95-59

Ladies and Gentlemen:

Enclosed please find an original and four copies of Comments being filed by the City of Plantation in response to the Commission's Notice of Proposed Rulemaking in the above referenced docket.

If you should have any questions concerning this filing, please contact me.

Sincerely yours,

Karsten Amlie
Counsel for City of Plantation

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C.

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

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Comments on behalf of the City of Plantation

1. The Commission in its Notice of Proposed Rulemaking, in the above referenced docket, sought comments with respect to its proposed modification of 47 C.F.R. § 25.104 and its current policies regarding the preemption of local regulation of satellite earth stations. The City of Plantation, its undersigned counsel submits the following comments.

2. In the Commission's 1986 Order adopting the rule partially preempting local zoning regulations, it clearly stated that it did "not intend to operate as a national zoning board." [1] In so stating, however, the Commission declared that it would not give up its responsibility for protecting access to satellite communications.[2] Since 1986, however, the Commission has not intervened in disputes between local governments and their residents in matters of satellite antenna installation. Rather, residents have been afforded a right to pursue their claims of unreasonableness and discrimination in the state and federal courts of this country.

3. The City of Plantation strongly urges the Commission to retain the existing rule and allow local governments to engage in their own balancing analysis when deciding upon how satellite antennas should be installed in their communities. The present rule affords the proper deference to cities and municipalities which have considered the health and safety of their residents,

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[1] In re Local Zoning or other reg. of Receive Only Satellite Earth Stations, Report and Order, 59 R.R. 2d (P&F) 1073, para. 39 (1986) [hereinafter Local Zoning Report and Order].

[2] Id. at para.40.

as well as the aesthetic nature of their communities, while analyzing the information needs and overall economic benefits of competition in the video marketplace.

4. The Commission's current proposal is preemptive and as such must withstand scrutiny under the Supremacy Clause, U.S. Const., Art. VI, cl. 2. Accordingly, a local regulation can only be pre-empted by a federal statute if there is either a clear intent to pre-empt the local law,[3] when it is clear that Congress meant to occupy an entire field of regulation,[4] and when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[5]" It is this final basis, upon which the Commission relies. However, the Commission's Report and Order falls short factually in demonstrating how the cities and municipalities of this government have significantly hindered the congressional objective of promoting satellite communications.

5. Pursuant to the Commission's current rule, local regulations must have a clearly defined and valid "police power" objective and not unreasonably prevent residents, whether commercial or residential, from receiving satellite signals. If the ordinance cannot successfully balance these interests, it is preempted. Under the Commission's proposed rule, the Commission has set aside as unreasonable a city's authority to regulate satellite dish antennas less than two meters in diameter in commercial areas and one meter in residential areas. Certainly Congress never intended for the Commission to preempt a locality's health or safety regulation simply because it would cause an inconvenience to a few residents wishing to receive cheaper television service.

6. The City of Plantation avers that local health and safety regulations should always be presumed reasonable when balanced against an individual's ability to watch television. Nevertheless, the City of Plantation appreciates those interests involved in establishing a

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[3]Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S.Ct. 1305, 1309 (1997).

[4]Rice v. Santa Fe Elevator Corp. 331 U.S. 218, 230, 67 S. Ct. 1146, 1152 (1947).

[5]Hines v. Davidowitz, 312 U.S. 52,67,61 S.Ct. 399,404 (1941).

competitive video marketplace and feels that cities and other local municipalities should allow satellite antenna installations. However, it should be between the local governments and those residents who desire to receive satellite communications to settle upon what installation limitations are necessary and which should be relaxed. As has been said repeatedly throughout the course of this proceeding, the FCC "should not become a national board of zoning appeals."[6] And the reason it should be is because it does not have the resources or the knowledge available to settle these difficult, but entirely local issues.

7. According to the Commission's proposed rule, a presumption of unreasonableness can be rebutted by a municipality by proving three factors: [t]hat 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 (less than 2 meters in commercial areas or less than 1 meter in residential areas).

This standard is overly burdensome and coupled with the fact that the initial presumption of proving an ordinance's reasonableness is also upon the shoulders of the "promulgating authority" it is substantially unfair. Although the Commission argues that this rebuttable presumption criteria is different from a per se approach, having to prove all three criteria is a substantial hurdle for any city to cross. Moreover, the rule is in contravention with a line of case law which asserts that there is a "presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause.[7]" These presumptions effectively preclude a local authority's health

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[6]Notice of Proposed Rulemaking, FCC 95-180 para.42.

[7]Hillsborough Country v. Automated Medical Laboratories, Inc. 471 U.S. 707, 715, 105 S.Ct. 2371, 2376.

and safety regulations which seek to regulate rooftop installations. Although two meters may seem small, in a tropical storm force wind, a substantial amount of property damage can result. Since the proposed rule would preclude even those regulations regarding how dishes are anchored, the federal government is making a decision that the residents of cities like Plantation are willing to accept the risk of two meter dishes falling from rooftops during high-force winds. Such a preemption is invalid and overly broad. The historic police powers of counties and local governments should never be preempted unless that is the clear and manifest purpose of Congress.[8] Such an intent can not be found in this instance.

8. The City of Plantation is located in South-East Florida. This area of the country is extremely susceptible to the high-force winds accompanying tropical storms and hurricanes. Each year during hurricane season, the residents of Dade and Broward counties watch and listen to weathercasts intensely while awaiting the next "Andrew". During Hurricane Andrew, hundreds of homes were ruined, millions of dollars in other property damage resulted and individuals were killed in South Florida. It should, then, be of no surprise to the Commission that the City of Plantation and other South Florida communities are so intent on strictly regulating how and where satellite antennas are installed, even those dishes which are one meter in diameter. However, under the proposed rule, it is possible that the City of Plantations's efforts at regulating the rooftop installation of dishes would be pre-empted. Such a result violates the theory of federalism upon which this country was found. Local concerns, such as hurricane and tropical storm damage, should be addressed by local bodies and not the FCC. Accordingly, unless the Commission's proposed "waiver" policy, as set forth under the newly proposed subsection (f), is to be construed by the Commission so as to allow local governments, such as the City of Plantation, to legislate regulations of satellite antenna installations for purposes of protecting their residents during hurricanes, the rule is overly preemptive and fails to achieve the balance between video competition and the safety, health and aesthetic objectives of local governments.

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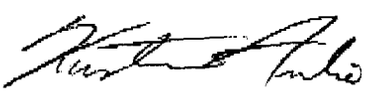
[8] Jones v. Rath Packing Co., 430 US 519, 525, 97 S.Ct. 1305, 1349.

9. In conclusion, due to an absence of factual justification, its invalid level of pre-emption, a failure to recognize the significant importance of allowing cities and municipalities to conduct their own "balancing" test, and its overly burdensome nature, the City of Plantation respectfully requests that the Commission not adopt the proposed rule. Nevertheless, if the Commission's proposed rule is adopted, the City of Plantation and other municipalities in South Florida should receive a waiver of the rule due to the frequency of tropical storms and constant threat of hurricanes to the area.

Respectfully submitted,



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