

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Preemption of Local Zoning)
Regulation of Satellite)
Earth Stations)

IB Docket No. 95-59
DA 91-577
45-DSS-MISC-93

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FEDERAL COMMUNICATIONS COMMISSION
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COMMENTS OF HUGHES NETWORK SYSTEMS, INC.

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SUMMARY

The commenting municipalities offer myriad reasons why the Commission should not adopt the proposed rule. Each and every argument, however, is clearly rebutted by the record that has been compiled in this proceeding. The Commission should swiftly adopt the proposed rule, with the changes suggested by Hughes Network Systems, Inc. ("HNS") in its initial comments.

First, the local jurisdictions assert that there is no problem with the current state of local satellite antenna regulation. The Commission, however, has before it overwhelming evidence that local regulations are imposing severe burdens upon satellite communications, restricting both access to signals and competition in the marketplace.

Second, the municipalities contend that they are able to accommodate federal interests while regulating at the local level. Both the comments they have submitted and the regulations they enforce belie this claim. Local officials do not understand either the technology or the competitive demands of the industry they are regulating. Most commenters -- like the regulations they enforce -- fail to distinguish between 10-foot C-band dishes and small VSAT antennas.

Third, the commenting localities make emotional appeals to the Commission, predicting that the proposed rule would eliminate all local safety regulation and endanger the lives of the citizenry. But satellite antennas are safe. During its 228,000 "antenna years" of VSAT experience, HNS has had only two reports of antennas moving from their installed sites, and neither case resulted in injury. Moreover, the proposed rule will allow local communities to enact and enforce safety regulations; they will be prevented only from maintaining excessive and costly procedures. One provision in Proposed Section 25.104,

however, has the ability to frustrate the entire rule: the exemption for local regulation of radio frequency radiation. Through this exemption, local officials will be able to enforce regulations that severely limit or even prohibit the use of satellite transmitting antennas. This loophole must be tightened to allow no such escape from the requirements of the preemption rule.

Despite the assertions of the local communities, the Commission will not become a "national zoning board" after adopting the proposed rule. Instead, local regulators will no longer be required to "balance" federal and local interests, but will operate under a clear set of guidelines tailored to the size and location of the satellite antennas being regulated.

The Commission has the authority to issue this rule of limited preemption, the record before it to justify its action, and the responsibility to promote access to satellite communications and competition within the marketplace. HNS respectfully requests that the Commission adopt Proposed Section 25.104 with the changes proposed by HNS in its initial comments.

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)	IB Docket No. 95-59
Preemption of Local Zoning)	DA 91-577
Regulation of Satellite)	45-DSS-MISC-983
Earth Stations)	
)	

REPLY COMMENTS OF HUGHES NETWORK SYSTEMS, INC.

The municipalities commenting in this proceeding decry the Commission's proposed rule as unnecessary and overly broad, claiming that the current rule allows local regulators to balance fairly their local zoning interests with the federal interest in satellite communications. The overwhelming weight of the evidence before the Commission contradicts this claim: local regulations have unreasonably burdened satellite communications and competition in the industry to the point where a new rule is required.

At present, a business seeking to use a nationwide VSAT network must learn the codes of 10,000 municipalities and deal with 10,000 regulators, most of whom -- as one of the commenters concedes -- are not even aware of the Commission's current preemption rule. Without a new preemption rule, local officials will continue to enact and enforce unreasonable ordinances, as they have demonstrated a lack of comprehension either of the technology or the competitive forces in the industry they are regulating. The proposed rule will provide the municipalities with ample direction, enabling them to promulgate rules that protect local interests without substantially burdening satellite antenna users.

The commenting localities make emotional appeals to the Commission, predicting that the proposed rule would eliminate all local safety regulation and endanger the lives of the citizenry. But satellite antennas are safe. During its 228,000 "antenna years" of VSAT experience, HNS has had only two reports of antennas moving from their installed sites, and neither case resulted in injury. Moreover, the proposed rule will allow local communities to enact and enforce safety regulations; they will be prevented only from maintaining excessive and costly procedures. One provision in Proposed Section 25.104, however, has the ability to frustrate the entire rule: the exemption for local regulation of radio frequency radiation. Through this exemption, local officials will be able to enforce regulations that severely limit or even prohibit the use of satellite transmitting antennas. This loophole must be tightened to allow no such escape from the requirements of the preemption rule.

The Commission has both the authority to adopt the proposed rule and the record to demonstrate its necessity. With the few minor changes suggested by Hughes Network Systems, Inc. ("Hughes" or "HNS") in its initial comments,^{1/} the Commission should quickly adopt the revisions to Section 25.104 of its rules.

I. THE RECORD DEMONSTRATES THAT RESTRICTIVE LOCAL REGULATIONS ARE IMPEDING SATELLITE COMMUNICATIONS

1. *Comments of Hughes Network Systems, Inc.*, filed July 14, 1995.

The commenting municipalities claim that there is no problem with the current state of local regulation of satellite antennas, that there are only "stray" cases of overreaching.^{2/} The voluminous record before the Commission indicates otherwise.

First, even before comments were filed in this case, the Commission had already accumulated a substantial body of evidence that the current rule is not preventing municipalities from enacting and enforcing unreasonable satellite antenna zoning ordinances.^{3/} The Commission cited evidence of unreasonable height, location and lot size restrictions, expensive variance procedures, and screening and landscaping requirements, all of which burden satellite communications.^{4/}

Second, the Commission has before it three petitions for declaratory ruling filed by HNS, which detail the restrictive zoning ordinances of Coconut Creek, Florida; Greenburgh, New York; and Coral Gables, Florida. It is only the cost that has kept HNS from filing more petitions: HNS has been required to engage counsel to resolve zoning disputes across the country, from Cerritos, California, to Hamilton Township, New Jersey; from Town & Country, Missouri, to Bala Cynwyd, Pennsylvania.

2. *See, e.g., Comments of Farmington Hills, Mich.*, filed July 19, 1995; *Comments of the City of Dallas, Denton, Houston, Austin, Hillsboro, Plano, Cedar Hill, Fort Worth, Farmers Branch, Waco, Grand Prairie, Richardson, Grapevine, Irving, and Greenville, Texas; the National League of Cities, the National Association of Counties, and the United States Conference of Mayors*, filed July 14, 1995, at 7-9 (hereafter referred to as the "Local Communities"); *Comments of Duncan, Weinberg, Miller & Pembroke, P.C.*, filed July 14, 1995, at ¶ 4 ("We submit that any evidence of municipalities inhibiting access to satellite services is isolated and aberrational."). Unfortunately, in HNS's experience this type of behavior on the part of municipalities is in fact widespread.

3. *Notice of Proposed Rulemaking, FCC 95-180, 45-DSS-MISC-93* (May 15, 1995 at ¶¶ 11-25 (the "Notice") ("The petitioners and commenters offer substantial, detailed evidence that many local zoning restrictions are creating unreasonable barriers to the growth of satellite-based services.")).

4. *Id.*

Third, the comments are replete with examples of zoning ordinances that have burdened -- or even prevented -- satellite communications, many of which have no corresponding aesthetic, health or safety benefits. Consumers,^{5/} business users,^{6/} manufacturers,^{7/} installers,^{8/} and service providers^{9/} have all reported the unreasonable burdens of local regulations. United States Satellite Broadcasting Co. provided the Commission with copies of two illegal ordinances, one enacted very recently in Palos Verdes, California.^{10/} Midwest Star Satellite catalogued a host of problems it has encountered in the Chicago area.^{11/} HNS included in its comments several more examples of restrictive zoning ordinances; the list was limited only by space, not actual experience.^{12/}

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5. *See, e.g., Comments of John Alfe*, filed June 28, 1995 ("satellite dish owners should not have to be up against such harsh conditions as presently exist").
 6. *See, e.g., Comments of The Gap, Inc.*, filed July 19, 1995 (local regulations are "not only extremely time consuming . . . but also prohibitively expensive").
 7. *See, e.g., Comments of GE American Communications, Inc.*, filed July 14, 1995, at 2 ("overzealous local zoning authorities frequently single out satellite antennas for excessive regulation that, if not banning small antennas altogether, significantly reduces their value to end-users").
 8. *See, e.g., Comments of Microwave, Dish & Cable, Inc.*, filed July 20, 1995 ("Currently, MDC is encumbered by a laborious permitting process in a number of jurisdictions . . . municipalities requiring extensive, cumbersome permits impede timely installations.").
 9. *See, e.g., Comments of DirecTv, Inc.*, filed July 14, 1995, at 2 (the proposed rule is necessary to ensure that the development of satellite services "will not be needlessly hamstrung by inconsistent and often irrational state and local zoning regulations")
 10. *See generally Comments of United States Satellite Broadcasting Co.*, filed July 14, 1995.
 11. *See generally Comments of Midwest Star Satellite*, filed July 13, 1995.
 12. *See generally Comments of HNS.*

II. MUNICIPALITIES ARE UNABLE TO BALANCE THE FEDERAL AND LOCAL INTERESTS AS REQUIRED BY THE CURRENT RULE

The commenting municipalities assert that the proposed preemption rule is unnecessary, as they have been able to balance fairly the federal and local interests as required by the current rule.^{13/} Unfortunately, the overwhelming evidence before the Commission demonstrates that local officials are unable to strike an appropriate balance, and continue to enact and enforce burdensome satellite antenna regulations.

Local regulators lack the ability to strike this balance, as they do not understand either the competitive demands or the technology of the satellite industry. In addition, many municipalities do not even realize that they *should* be considering anything but their own local interests when regulating satellite antennas. The statement of the Local Communities is a telling admission: "most of the 10,000 local jurisdictions are unaware that their land use regulations and safety codes are subject to preemption by a federal agency."^{14/} A revision to the preemption rule that provides explicit guidelines for local officials is therefore warranted.

A. Local Jurisdictions Do Not Understand What They are Regulating

Many commenters assumed that all satellite antennas are used for reception of television signals, and framed the debate around the eight-foot C-band dishes that were

13. See, e.g., *Comments of the City of Muskegon, Michigan*, filed July 14, 1995, at 2 ("[T]he citizens of a community, acting through their elected representatives, are competent to determine how best to accommodate the community's interests in property values and aesthetic considerations with the right to access satellite signals. It should not be assumed . . . that local governments will act improperly in achieving that balance.").

14. *Comments of the Local Communities* at 11.

commonly installed in residential areas in the 1980s for television reception.^{15/} But VSATs are an entirely different animal: most generally less than two meters in diameter, they are used in commercial and industrial areas for business communications, including data and video transmission. Even residential antennas are vastly different from what the municipalities envision: Services such as DirecTv are offering direct-to-home satellite broadcast service using antennas as small as 18 inches in diameter.

The regulations resulting from local regulators' misapprehensions are typically "one size fits all," applicable to all types and sizes of antennas in all zoning districts. As a result, screening requirements enacted with 10-foot dishes in residential areas in mind are being applied to small VSAT antennas located atop gasoline station roofs. This misapprehension has also led municipalities to characterize satellite antennas as "structures" and to apply general building codes to their installation.^{16/} Thus, a lightweight satellite antenna sitting atop a gasoline station is treated in the same manner as the construction of the gasoline station itself.^{17/}

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15. *See, e.g., Comments of Michigan and Texas Communities*, filed July 14, 1995, at 12 ("It is ludicrous to presume, with approximately four million satellite dish customers currently in the United States and broad cable access in most communities, that citizens are being deprived of access to communications access [sic] due to the enforcement of local zoning ordinances.").
 16. *See Comments of Maine Municipal Ass'n*, filed July 13, 1995, at 1 (characterizing a satellite antenna as a "structure"); *Comments of Michigan and Texas Communities* at 24 ("The proposed rule appears to exempt satellite dish antenna installation from the application of local building and construction codes.").
 17. *See City of Town & Country Code*, § 12120 (listing conditional uses as satellite antennas up to 72 feet in height, automobile car washes, gasoline service stations, etc.), attached hereto as Exhibit A. The same permit process is applied to each of these "conditional uses." *Id.* at §§ 6000-6003.

B. Local Regulators Do Not Understand the Marketplace

1. The Marketplace Requires Inexpensive and Efficient Local Procedures

By focusing solely on residential television reception satellite antennas, the commenting municipalities have demonstrated a fundamental ignorance of an entire segment of the satellite industry -- business communications. Their satellite antenna regulations reflect this unawareness, providing for procedures that are too slow and expenses that are too great to allow satellite technologies to compete in the marketplace.

In today's marketplace, a business deciding to implement a nationwide private communications network generally has two options: satellite networks or terrestrial landline systems. Unless a site is to be located in a building that is to be constructed, a business will typically want to start operations, and will therefore demand that it be connected to its network, within 30 days from the time the site is identified.

Terrestrial landline systems, as a matter of industry practice, provide network connection within thirty days -- fifteen days if expedited service is requested. It is in large part because of this longstanding industry practice that businesses allot only thirty days for communications installation. Because, in general, existing sites are already connected to the phone system, the landline timetable to install facilities is unaffected by local building, zoning or permitting requirements, giving terrestrial systems an advantage on cost and speed of installation, two of the most important factors to customers.

Nevertheless, HNS can compete against landline communications systems on the basis of time and cost of installation, unless prevented from doing so by local regulation. HNS can install its one to two meter VSAT antennas within two weeks, and sometimes even sooner. The installations themselves usually take less than one day, unless the site itself

poses unusual difficulties, such as an obstructed line of sight. HNS's installation costs are so low that it is still able to compete on a cost basis with terrestrial providers. However, when local regulations require screening, or a variance, or a hearing, or landscaping, or an extensive or expensive permit process, the timetable lengthens, costs increase, and suddenly HNS cannot compete on an equal footing with terrestrial providers.^{18/}

2. Local Processes are Too Slow

The national interests in proliferation of communications technologies must be guided by the requirements of the marketplace in which they compete, not measured against the pace of local regulators. The commenting municipalities have made clear that their satellite antenna regulation is not created with a view to the marketplace. They commonly condemn a ninety-day deadline for local regulatory processes as unreasonably short. In the marketplace, however, ninety days - a calendar quarter - is an eternity.

Local administrative procedures, including permit processes, variance procedures, and other application requirements typically involve notices, hearings, and several layers of review. The Local Communities described, with striking obliviousness to the marketplace, the typical local process of satellite antenna regulation:

Typically, the process begins with input received at meetings held in the local community. Public hearings are then held at which interested parties formally present their position. The decision making body then reaches a decision^{19/}

18. See Declaration of Steven P. d'Adolf, dated August 15 1995, at ¶ 5 ("d'Adolf Dec."), attached hereto as Exhibit B.

19. *Comments of the Local Communities* at 4. The Local Communities also described the appeal process (all too familiar to satellite antenna users), which involves both administrative and court review. *Id.*

The Local Communities further stated that "it is unlikely that all administrative procedures will be completed in ninety days," characterizing a shorter timetable for satellite antenna regulation as "special treatment."^{20/} The Local Communities further suggested that obligatory variance procedures be substituted for the broader preemption of the proposed rule, arguing that variance hearings pose "no burden" to satellite users.^{21/} Not only does this contradict HNS's experience, but in at least two cases, the courts have ruled that such variance procedures are preempted under the current rule.^{22/}

The "conditional use" process employed by the City of Town & Country, Missouri, is typical of local administrative procedures. All satellite dish antennas up to 72 feet in height are subject to the process, defined as "conditional uses" along with gasoline stations, restaurants, and public utility facilities. As a result of this definition, a satellite antenna user must submit an application to the Board of Aldermen, with a fee and a Site Plan Review. The application is first reviewed by the Planning Commission, which delivers a report to the Board within 90 days. The Board then holds a public hearing, giving 15 days' notice through publication in the local newspaper and through posting of a sign on the

20. *Comments of the Local Communities* at 19-20. These statements echo the Comments of the City of St. Louis filed in response to Hughes's Petition for Declaratory Ruling Clarifying the Commission's Preemption of Local Zoning Ordinances: "The City of St. Louis has a very effective means of reviewing waiver requests [from its screening, permitting, hearing or insurance requirements that takes] . . . a few months to go through the required procedures." *Comments of the City of St. Louis*, filed August 13, 1993, at 4-5 (emphasis added).

21. *Comments of the Local Communities* at 9, 15.

22. *See, e.g., Cawley v. City of Port Jervis*, 753 F. Supp. 131, 132-33 (S.D.N.Y. 1990) (preempting variance procedure that involved three meetings with the Zoning Board of Appeals, a \$100 fee, and twelve copies of a survey map); *Van Meter v. Township of Maplewood*, 696 F. Supp. 1024, 1031-32 (D.N.J. 1988) (variance procedure preempted as an "unreasonable limitation on reception").

applicant's property. After the hearing (which can occur well over three months after the application is filed), the Board then determines whether to grant the application.^{23/}

Responsible local regulation need not involve such processes. Inspection or permitting of smaller satellite antennas, particularly in the case of VSATs, which are installed by professional installers, need not be expensive or lengthy. It is not uncommon, in HNS's experience, for a local official to advise the installer on the day of inspection whether the antenna installation meets with the local requirements. The seven-day period that HNS has proposed as the threshold for "substantial" should be sufficient for local regulators to achieve their goals. The proposed rule will force the municipalities to discard unnecessary formal processes of approval in favor of more efficient procedures.

3. Local Regulations are Too Expensive

Local satellite antenna regulations commonly impose requirements of screening, landscaping and placement, often in ignorance of the marketplace and the technology. The comments of the Seattle Department of Construction and Land Use illustrate this misconception: "it is highly conceivable that an antenna might be . . . a real eyesore and can only be remedied by more costly screening" that exceeds the value of the antenna itself.^{24/}

23. See Exhibit A, at §§ 12120, 6002. This type of procedure is not at all unusual. Even without a ninety-day review period, many local boards meet only once per month, and, given the common notice requirements, the first meeting after the application is filed is usually over a month away. In some cases, several local boards must review the application. Many localities require the building owner to attend the meeting, even when it is the tenant who is the satellite antenna user. Other communities have required that HNS's Assistant Vice President of Installation Services, resident in San Diego, California, fly cross-country to attend the hearings. See d'Adolf Dec. at ¶ 7.

24. *Comments of the Seattle Department of Construction and Land Use*, filed July 18, 1995, at 2.

Screening requirements are usually applied across the board, regardless of the size of the antenna or its location on the property. No such requirements are imposed on terrestrial providers; these requirements and other costly regulations can price smaller antennas such as VSATs out of competition. Again, the commenting local localities and the regulations they enforce envision large C-band dishes, not the VSATs and Ku-band DBS satellite dishes that will be exempt from aesthetic regulation under the proposed rule. Without the proposed rule, however, the municipalities have made clear that they will continue to impose these burdensome requirements on all antennas.^{25/} As the Commission has found, these objects have little aesthetic impact, and certainly no more impact than other items of similar size that are unregulated.^{26/}

Other excessive requirements inapposite to small antenna dishes also drive up costs. Many municipalities require professionally-prepared materials in support of antenna installations. In Brookline, Massachusetts, for instance, HNS has been required to spend \$1,500 per site to supply the town with site elevation drawings for presentation at a hearing.^{27/}

The inability of the municipalities to understand even the most fundamental aspects of the industry they are regulating belies their contention that no new rule is necessary. Without a new rule, the costs and delays imposed by local satellite antenna regulation will continue to impede competition and delay access to satellite communications.

25. *See, e.g., Comments of the Local Communities* at 15, 19 (recommending variance procedures be used to excuse satellite antennas from screening requirements and asking for an exemption for screening in commercial areas adjacent to non-commercial areas)

26. *Notice* at ¶ 62 (a two-meter antenna is no more unsightly than dumpsters, signs and rooftop air conditioners commonly found in commercial areas).

27. *See d'Adolf Dec.* at ¶ 7.

III. SATELLITE ANTENNAS ARE SAFE, AND MUNICIPALITIES CAN CONTINUE TO ENSURE THEIR SAFETY UNDER THE PROPOSED RULE

The commenting municipalities expressed the fear that the proposed rule will eviscerate their power to enact any satellite antenna regulations, particularly with respect to safety.^{28/} Their comments were filled with emotional appeals decrying the hazards of unregulated satellite antenna installations,^{29/} but were noticeably devoid of any concrete examples of safety problems with satellite antennas. The reason is simple: satellite antennas are demonstrably safe.

A. Satellite Antennas are Safe

Satellite antenna installations are safe. Over the past five years, HNS has installed over 70,000 VSAT antennas, now comprising 228,000 "antenna years" of experience.^{30/} During those 228,000 antenna years, on only two occasions have antennas been moved by wind or other forces of nature from their installed locations -- except, of course, for cases in which the entire building was destroyed.^{31/} In both cases -- one of which involved isolated wind gust over 200 miles per hour that moved a 727 jetliner on a runway -- the antennas remained on the roof, causing no harm to any people.^{32/}

28. See, e.g., *Comments of Michigan and Texas Communities* at 4-7.

29. See, e.g., *Comments of Michigan and Texas Communities* at 17 ("the proposed rule will kill people"); *Comments of the Local Communities* at 4 ("disorder and danger would rule our cities").

30. See d'Adolf Dec. at ¶¶ 1-2.

31. *Id.*

32. *Id.*

Hurricane Andrew, cited by the City of Plantation as a justification for its "strict" satellite antenna regulation,^{33/} actually demonstrates the safety of HNS VSAT antennas. Every HNS VSAT antenna in Andrew's path stayed in place, save for the cases where the building itself was destroyed. HNS customer Builder's Square, with eight buildings in the hurricane region, continued to use its VSAT without a problem. At one location, the VSAT antenna remained on the roof even though the air conditioning unit was ripped away.^{34/}

Satellite antennas withstand these forces not only for safety reasons, but also because *they must not move at all, or else they cannot function*. Satellite antennas must remain pointed at a satellite in order to maintain the line of sight, a tolerance far smaller than allowing an antenna to slide or move from its installed location. Therefore, a satellite installation, in general, is subject to more rigorous mounting requirements than any safety code would require. Experience has shown that these requirements are effective ensuring the safety and reliability of satellite antenna installation.

B. Municipalities Retain their Zoning and other Local Regulatory Powers Under the Proposed Rule

The proposed rule accords municipalities ample latitude to exercise their legitimate and reasonable police powers to ensure safety. The Commission has proposed nothing that would affect the fundamental right of localities to determine the appropriate zoning classification for each area within their borders. Local officials will retain the power

33. *Comments of the City of Plantation* at ¶ 8.

34. *See d'Adolf Dec.* at ¶ 3.

to determine which areas are to be zoned for residential uses, and which areas are more suitable for commercial and industrial uses.

Having made this zoning determination, local regulators will then be free to enact satellite antenna regulations appropriate to those zones. In residential areas, satellite antennas one meter or less in diameter, and commercial/industrial satellite antennas two meters or less, can be regulated so long as the requirements are no more burdensome than necessary to accomplish a clearly defined and expressly stated health or safety objective.^{35/} Larger antennas can also be regulated to the extent that regulations are reasonable in light of the federal interest in satellite communications.^{36/}

Local officials can determine the safety of VSAT installations within the parameters of these rules. Moreover, not all local regulations will even be subject to preemption analysis. A regulation that does not impose a "substantial" burden or substantially limit reception cannot even be challenged by a satellite antenna user.^{37/} As discussed above, local officials can often advise HNS as to the safety of an installation.^{38/} In light of its extensive experience, HNS has recommended that the Commission define "substantial" as any regulation that requires that the applicant attend hearings, spend over \$50 or wait more than seven days for the authorization. At an average rate of \$35 per hour, the rate generally paid to HNS installers,^{39/} a local official would

35. See Proposed Section 25.104(c).

36. See Proposed Section 25.104(a).

37. See Proposed Section 25.104(a).

38. See d'Adolf Dec. at ¶ 6.

39. See d'Adolf Dec. at ¶ 4.

have ample time to inspect the installation to determine whether it complies with safety codes. In addition, HNS, as a practice, will provide local officials with information regarding the ballasting and windspeed tolerances used in the installation. Moreover, not all local regulations will even be subject to preemption analysis. A regulation that does not impose a "substantial" burden or substantially limit reception cannot even be challenged by a satellite antenna user.^{40/}

In short, HNS does not seek to "bypass,"^{41/} nor does the proposed rule exempt all satellite antenna installation from adherence to, safety codes.^{42/} Instead, the proposed rule will ensure that regulations that evaluate the safety of satellite antenna installations are enforced in a swift and efficient manner that imposes only minimal burdens on satellite antenna users.

C. The Commission Cannot Leave Local Officials Discretion to Regulate Radio Frequency Radiation

While the record before the Commission has established conclusively that local officials are not willing or able to balance the interests of interstate communications when enacting local regulations, the proposed rule regrettably leaves a clear path for circumvention of preemption -- radio frequency ("RF") radiation regulation.^{43/} Such an escape clause will inevitably lead to local rules that are more restrictive than the aesthetic and other regulations the Commission has sought to preempt.

40. See Proposed Section 25.104(a).

41. See *Comments of the Local Communities* at 6.

42. *Comments of Michigan and Texas Communities* at 5.

43. See Proposed Section 25.104(d).

Preemption is perhaps *most* appropriate in the context of RF Radiation. It presents no genuine issues of fact, no local variation, and it therefore demands no tests of reasonableness or balancing. Indeed, it is already the subject of federal regulation, including the Commission's own rules.^{44/}

If the Commission leaves open this escape hatch for local regulation, the goals of the proposed rule may be defeated by local regulations that severely limit or even ban the use of satellite transmitting antennas. Some communities have already 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 is currently under a nine-month moratorium of transmitting antennas.

IV. THE COMMISSION HAS FAIRLY ACCOMMODATED LOCAL CONCERNS

The commenting municipalities also argue that the Commission is not an expert in local land-use issues, and therefore cannot promulgate a rule that equitably balances these local interests with the federal interest in satellite communications.^{45/} It is local officials, however, who are in no position to see the cumulative impact upon the nation's

44. Section 1.1307(b) of the Commission's rules, and the Note thereto, specifically requires that satellite earth stations not

cause exposure of workers or the general public to levels of radio frequency 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"

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

45. *See, e.g., Comments of Michigan and Texas Communities* at 16 ("This Commission has no knowledge or expertise in balancing such interests . . . it has no knowledge of building codes, and none of zoning, land use or related traffic safety issues.").

satellite industry of the various screening, setback, permit, location, variance and other regulations imposed by 10,000 communities.^{46/} The Commission, on the other hand, is uniquely qualified to establish a framework for the unified communications system envisioned by the Communications Act.^{47/} In addition, the Commission understands both the marketplace and the technology, and can establish a framework that will provide local officials with the direction that will enable them to adopt regulations appropriate to satellite antennas. The proposed rule, by circumscribing the types of regulations that will be found acceptable, creates just such a framework.^{48/}

The proposed rule demonstrates that the Commission has accommodated local zoning issues while protecting the federal interest in satellite communications. For instance, Proposed Section 25.104 recognizes that the local interest in zoning in commercial zones differs from that in residential areas. Unlike most local regulations, the proposed rule also acknowledges that the needs of satellite antenna users in the residential consumer market differ from those in the commercial business market.

In commercial and industrial areas, the proposed rule will presumptively preempt regulations of satellite antennas up to two meters in diameter. In these areas, the satellite users need slightly larger antennas for their business communications needs, while the municipalities have a lesser interest in strict zoning regulation, particularly with regard to aesthetics.

46. See, e.g., *Comments of the Local Communities* at 7, 11.

47. See *Notice* at ¶ 3 (citing 1986 Order at ¶ 23). The Communications Act envisions the establishment of a "unified communications system" that will make communications services available to all people. *Id.*

48. See *Comments of HNS* at 31-34.

In residential areas, the Commission has recognized the greater local interest in aesthetic and other zoning regulation, and that residential satellite antenna users have different needs as well. The proposed rule would presumptively preempt regulations affecting only those antennas one meter or less. Therefore, the most common uses of satellite antennas will be allowed to be installed with only minimal burdens, while municipalities will still be free to enact stricter regulations for the larger antennas that may present greater safety or aesthetic concerns.

Through these presumptions, the Commission has balanced the different zoning interests of the localities with the reasonable needs of satellite antenna users in a way that accommodates both, and in a way that 10,000 local authorities could never do on their own. As a result, under the proposed rule, local regulations that address local concerns without imposing undue burdens on competition and access to satellite communications may continue to be enforced.

V. THE COMMISSION WILL NOT BECOME A NATIONAL ZONING BOARD

The leading marcher in the municipalities' parade of horrors is their prediction that the Commission will become a "national zoning board" after promulgation of the proposed rule.^{49/} Given the rapidly advancing technology, the vast majority of satellite antennas will be subject to the presumption under the proposed rule, leaving the municipalities as the only parties that would flood the Commission with requests for review.

49. *See, e.g., Comments of Michigan and Texas Communities* at 17 ("there is little doubt that [the FCC] will become a Federal Zoning Commission under the proposed rule"); *Comments of the Local Communities* at 2 (the proposed rule "will ensure that Commission will indeed become a 'national zoning board'").

The proposed rule portends resolution, not litigation, of local disputes. Local officials will have clear guidelines by which to enact ordinances that do not unreasonably burden satellite antenna users. Gone will be the several balancing tests required by the current rule, which give little guidance to local officials and invariably lead them to tip the scale in favor of their own local interests. In its place, the proposed rule will put municipalities on notice that the federal interest in satellite communications must be accommodated. For example, it will be clear that no aesthetic regulation will be allowed for smaller satellite antennas, and that other requirements must be narrowly tailored to meet a specific health or safety objective.

Furthermore, it is in the interest of all concerned to resolve satellite zoning disputes at the local level. Some commenting municipalities complain that hearings before the Commission will be expensive.^{50/} HNS concurs,^{51/} and notes that this will provide a strong incentive for settlement long before a case comes before the Commission.

VI. THE COMMISSION HAS AUTHORITY TO PREEMPT LOCAL REGULATION

The municipalities submit a host of arguments challenging the Commission's authority to preempt local regulation of satellite antennas, citing several amendments to the U.S. Constitution (the Fifth, Tenth and Fourteenth), the Unfunded Mandate Reform Act of 1995, the Standard Zoning Enabling Act, and even Newt Gingrich's recent comments to the

50. See, e.g., *Comments of the Local Communities* at 13-14.

51. HNS has spent tens of thousands of dollars filing petitions for declaratory ruling before the Commission since the *Notice* was issued.

National League of Cities.^{52/} None of these sources, however, limits the Commission's ability to preempt local satellite antenna regulations as proposed.

A federal agency may preempt state and local regulations when it is "acting within the scope of its congressionally delegated authority."^{53/} Its preemption power, however, is not dependent upon express congressional authorization.^{54/} As long as the agency has made a "reasonable accommodation of conflicting policies" committed to the agency's care, the courts will not disturb the decision to preempt local or state regulation, unless the statute or legislative history makes clear that Congress would not have sanctioned such an action.^{55/}

The Commission has before it a substantial record of local satellite antenna regulation, and has taken care to reconcile the local zoning interests with the federal interest in access to satellite communications in proposing a limited -- not a *per se* -- preemption. In

52. See, e.g., *Comments of Michigan and Texas Communities; Comments of the City of Dallas*. But see *Comments of Newt Gingrich to Cellular Telephone Indus. Ass'n*, (Comm. Daily) Feb. 2, 1995 (local officials must be prevented from establishing rules for their "own cronies" at the expense of a national communications network).

53. *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988) (citing *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 369 (1986)).

54. *Id.*

55. *United States v. Shimer*, 367 U.S. 374, 383 (1961). The municipalities spend the bulk of their preemption discussion on inapposite cases that address the method in which courts will interpret a statute to determine whether Congress intended to preempt local law when Congress was silent on the point, not an agency's power to preempt. See, e.g., *Comments of the City of Plantation*, filed July 14, 1995, at ¶¶ 4-5; *Comments of Michigan and Texas Communities*, filed July 14, 1995, at 10-12. The cases are simply irrelevant to the Commission's power to promulgate the proposed rule. See, e.g., *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977) (cited by Plantation); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (cited by Michigan and Texas Communities). The Michigan and Texas Communities do concede, however, that courts have recognized the Commission's authority to preempt local law. *Id.* at 14.

addition, the Communications Act grants the Commission broad authority to create a ubiquitous nationwide communications system, including access to satellite signals.^{56/}

The municipalities have offered no evidence that the Communications Act prohibits such a preemption.^{57/} In fact, the Commission's preemptions of greater magnitude in the cable television industry have been consistently upheld by the courts as proper exercises of statutory authority.^{58/} The Commission thus has both the authority and the responsibility to adopt the proposed Section 25.104.

VII. CONCLUSION

The Commission has before it an overwhelming record that establishes that local satellite antenna regulation is placing unreasonable burdens on consumers, business users, installers, manufacturers, and service providers. The commenting municipalities have done nothing to rebut these arguments, but rather have shown their complete unawareness of satellite technology and competition within the industry they regulate. The balancing tests mandated by the current preemption rule are therefore meaningless when applied by local officials. The new rule is needed to provide clearer guidance and to circumscribe the discretion of the municipalities.

Under the proposed rule, local communities retain the power to determine appropriate zoning districts, and may enforce reasonable satellite antenna regulations

56. See 47 U.S.C. §§ 151, 705; Notice at ¶ 3.

57. The Michigan and Texas Communities' citation to Section 636(a) of the Communications Act, which pertains to Cable Communications, is off the mark. *Comments of Michigan and Texas Communities* at 12. Their claim that the Commission must find express preemption authorization in the Communications Act is likewise inaccurate. *Id.*

58. See, e.g., *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).