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April 12, 1996

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

DOCKET FILE COPY ORIGINAL

Re: Petition for Reconsideration

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

Dear Sir or Madam:

Enclosed herewith please find an original and twelve copies of the Local Communities' Petition for Reconsideration in the above referenced matter. Please file stamp one copy and return to the undersigned in the enclosed envelope. Should you have any questions, I may be contacted at (214) 670-3478.

Sincerely,

Scott Carlson
Assistant City Attorney
City of Dallas

On behalf of the Local Communities

Enclosure

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Petition for Reconsideration

submitted by

the Cities of Dallas, Texas; Arlington, Texas; Austin, Texas;
Fort Worth, Texas; Knoxville, Tennessee,
the National Association of Counties and
the United States Conference of Mayors

for reconsideration of the rule adopted
at 27 C.F.R. § 25.104 (a) through (e)

Summary

The Local Communities, composed of organizations representing local governments nationally and local governments in Texas and Tennessee, request that the adopted rule be reconsidered in light of Congressional instruction in the Telecommunications Act of 1996 ("the Act"), recent Supreme Court decisions curtailing the exercise of Commerce Clause power and the traditional judicial deference which is given to local health and safety regulations.

The Local Communities assert that the rule as developed is more expansive than intended by Congress. The adopted rule covers services which are explicitly excluded from the rulemaking authority. The Commission should defer to the clear expression of Congressional will and intent and limit the application of the rule to those services intended by Congress. Congress, in the most sweeping pronouncement on telecommunications in a half a century, delineated those services which it considered appropriate for rulemaking. Many potential reasons exist for the apparent restraint shown by Congress but the one certainty is that a much more limited rule was envisioned by Congress.

The Local Communities contend that the adopted rule does not reflect the Congressionally directed standard. Congress indicated a standard of impairment should apply. The rule adopted by the Commission simply presumes all State and local government regulations affect the installation of satellite dishes. There is no actual finding of impairment by a particular local

government regulation.

The Local Communities contend that the adopted rule exceeds recently expressed limitations on federal regulatory authority. The Supreme Court recently curtailed the exercise of Commerce Clause power in areas reserved for the exercise of traditional local police power. The Court noted that the regulated activity must “substantially affect” interstate commerce. While the record is replete with alleged instances and allegations of abuse, in reality, compared to the existing number of subscribers and the exponential growth and forecasts for the industry, the regulated activity, local zoning and other codes, do not substantially affect interstate commerce. The Commission has substituted its judgment for that of the state and local government officials in health and safety matters, traditional areas of local police power and judicial deference, and precluded enforcement of such regulations absent Commission approval.

Finally, a per se presumption of invalidity of local ordinances turns the traditional judicial deference which state and local government health and safety regulations enjoy on its head. It is contrary to federalism principles and the review standards which the Commission’s own rules enjoy.

Table of Contents

<u>I.</u> The Adopted Commission Rule.....1 Should be Revised to Reflect Congressional Intent Expressed in Section 207 and the Legislative History	1
A. Congress Directed a Much.....1 More Limited Rule Than the One Adopted by the Commission	1
B. Congress Did Not Mandate6 The Preemption Rulemaking And Presumption Approach Based On Satellite Dish Size Adopted By The Commission	6
<u>II.</u> The Commission's Authority To Intrude7 Into The Intensely Local Province Occupied By Local Zoning, Health And Safety Codes Is Circumscribed By Recent Supreme Court Action	7
<u>III.</u> The Rulemaking Should Not Require11 Local Governments to Justify the Inconsequential Impacts of Their Regulations	11

**Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C.**

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

Petition for Reconsideration

The City of Dallas, Texas by its attorneys and the Cities of Arlington, Texas; Austin, Texas; Fort Worth, Texas and Knoxville, Tennessee and the United States Conference of Mayors and the National Association of Counties with their consent (herein referred to collectively as the "Local Communities") hereby file this Petition for Reconsideration pursuant to 47 C.F.R. § 1.429 and requests reconsideration of the adopted rule related to preemption of State and local government satellite earth station regulations found at 47 C.F.R § 25.104 (a)-(e), adopted February 29, 1996 pursuant to Report and Order and Further Notice of Proposed Rulemaking, IB Docket No. 95-59, DA 91-577, 45-DSS-MSC-93 ("NPRM") and in support thereof would show the following:

I.

The Adopted Commission Rule Should be Revised to Reflect Congressional Intent Expressed in Section 207 and the Legislative History

A. Congress Directed a Much More Limited Rule Than the One Adopted by the Commission

The rule adopted by the Federal Communications Commission (“the Commission”) does not reflect Congressional intention expressed in the Telecommunications Act of 1996 (“the Act”).¹ With passage of the Act, Congress directed the Commission to promulgate regulations addressing State and local regulations which “impair a viewer’s ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel, multipoint distribution service, or direct broadcast satellite services.”² The adopted rule is much broader and more expansive than Section 207 of the Act authorized or Congress intended. This rule should be altered to match Congressional directives.

The Act represents the most sweeping legislative pronouncement on telecommunications in nearly half a century. Section 207 represents the only instructions to the Commission to promulgate regulations addressing state and local regulations related to over-the-air reception devices. The statute and legislative history are void of any other authority or intention to cover services other than the ones enumerated in the statute or legislative history. Nothing in the Act addresses any authority the Commission may have

¹ Pub. L. No. 104-104, 110 Stat. 56 (1996).

² Section 207 of the Act.

possessed prior to the Act to preempt local zoning regulations³; however, Congress very specifically identified the relevant services for Commission's rulemaking authority. Report language indicates that the rulemaking authority is limited to "zoning laws, regulations... contrary to this Section."⁴ This reference to "this Section" addresses the listed services which Congress intends for the Commission to impact.

The adopted rule expands well beyond the services included within the Section 207 rulemaking directive to include services Congress did not want included. The adopted Commission rule covers transmission antennas, C-band antennas and lower power direct broadcast satellite services.⁵ C-band services were not part of the Commission's mandate.⁶ Among direct broadcast satellite services, only higher power direct broadcast satellite services were contemplated by Congress in the Section 207 authority delegated to the Commission.⁷ Congress did not include lower power direct broadcast satellite services or Fixed Satellite Service ("FSS") within its regulatory

³ NPRM ¶ 16. See also, NPRM ¶ 60, 61 where the Commission makes a similar assertion of authority with regard to VSAT, C-band and lower power DBS service providers.

⁴ House Commerce Committee Report, H. Rep. 104-204 at 124 ("the Report").

⁵ NPRM ¶ 16.

⁶ House Commerce Committee Report, H. Rep. at 124 ("the Report"). "Thus, this section does not prevent the enforcement of State or local statutes and regulations, or State or local legal requirements or restrictive covenants or encumbrances that limit the use and placement of C-band satellite dishes."

⁷ H. Rep. 104-204 at 124.

directions to the Commission. Finally, the text of Section 207 itself is directed to "... regulations which impair reception..." The provision does not target "reception and transmission."

The Commission notes that Congress did not expressly preclude the Commission from enforcing its preemption rule to services other than DBS.⁸ On the other hand, Congress has expressed no affirmative authority to cover services other than DBS. The Local Communities contend that Congress, by including the words "contrary to this Section" in the Report, intended to limit the Commission to regulations which addressed the delineated services.

An approach more aligned with Congressional intent begins with interpretation of Section 207 in light of Congressional notice of the inception of rulemaking for the adopted rule.⁹ As noted, Congress did not include the additional services incorporated by the Commission in its Section 207 directive. Consequently, Congress did not desire the Commission to enact a broader regulation. By implication, in choosing another, more limited and restricted approach than the Commission proposed, Congress rejected the Commission's expansive approach. The only thing that is for certain is that

⁸ NPRM ¶ 61.

⁹ Preemption of Local Zoning Regulation of Satellite Earth Stations, 10 F.C.C. Rcd. 6982 (1995) adopted April 27, 1995, released May 15, 1995 ("Notice"). The House Finance and Telecommunications Subcommittee considered H.R. 1555 on May 17, 1995. The House Commerce Committee considered H.R. 1555 on May 25, 1995. Substantial revisions of the H.R. 1555 were made between the time the bill was reported from Committee and the time the whole House took up the bill. All represented opportunities for the House to adopt the Commission approach. It did not.

Congress spoke in Section 207 of regulations directed at certain satellite dish services and in doing so omitted C-band services, lower power direct broadcasting services and transmission matters.

The Commission notes that it does not believe that Congress intended for FSS to “face regulatory hurdles” not shared by DBS.¹⁰ Congress made no such declaration or even inference in Section 207 or the Report. To the contrary, Congress expressed a clear intention to cover only the higher power DBS.¹¹ At least one reason could center on the smaller and less obtrusive dish. Congress was demonstrating a greater restraint and deference for local regulations in limiting its focus to the smaller dishes. Other reasons rest on finding that no interstate commerce interests are implicated by State and local regulations covering FSS services.

The same analysis applies to C-band type services. The Report plainly expresses that Congress did not intend to include C-band satellite dishes within its rulemaking instruction to the Commission.¹² The Local Communities believe that Congress has spoken clearly on this point and coverage of C-band satellite dishes should be eliminated from the adopted rule.

¹⁰ NPRM ¶ 60.

¹¹ The Report at 124. “The Committee notes that the “Direct Broadcast Satellite Service” is a specific service that is limited to higher power DBS satellites.

¹² H. Rep., 104-204 at 124. “Thus, this Section does not prevent the enforcement of State or local statutes and regulations, or State or local legal requirements, or restrictive covenants or encumbrances that limit the use and placement of C-band satellite dishes.”

Finally, Section 207 applies only to restrictions which "...impair a viewer's ability to receive video programming." Again, the Commission's proposed rule extends beyond the Congressional instruction for at least two reasons. First, Section 207 is limited to regulations which impair reception. To the extent the adopted rule targets transmission antennas, it is misguided. Second, the Commission mandate under Section 207 covers only video programming. While some VSAT services may have been impacted by local regulations,¹³ they are not used to deliver video programming.

The Local Communities disagree with the Commission conclusion that this language does not address its limited, preexisting preemption.¹⁴ At the minimum, Congress has not directed an expansion of the limited, preexisting preemption which the new rule adopts with respect to lower power direct broadcast satellite services, C-band services and transmission matters.

B. Congress Did Not Mandate The Preemption Rulemaking And Presumption Approach Based On Satellite Dish Size Adopted By The Commission

Congress endorsed development of regulations based on impairment, rather than a presumption of invalidity of all local regulations which apply in

¹³ NPRM ¶ 61.

¹⁴ NPRM ¶ 61. The Commission construes Section 207 as an expression but not the definitive expression of Congressional will regarding C-band satellite dishes. The Commission makes similar statements regarding FSS (see NPRM ¶ 60).

some manner to satellite dishes.¹⁵ The Commission, in the adoption of the presumption approach, only presumes impairment. There is no actual finding of impairment for a particular complainant. Similar to the different services which Congress directed covered and those the Commission has chosen to cover, the Commission has adopted a different approach to the standard of regulation than that dictated by the Congress. Yielding to the delegated authority granted by Congress and the legislative intention of Congress, the Commission rule should not expand its rule to create a per se presumption based on size and denial of enforcement.

II.

The Commission's Authority To Intrude Into The Intensely Local Province Occupied By Local Zoning, Health And Safety Codes Is Circumscribed By Recent Supreme Court Action

The Commission correctly points out its mandate under federal law and case law upholding the exercise of its power in the pursuance of this mandate.¹⁶ Yet, the Commission fails to discuss the most recent Commerce Clause analysis related to State and local issues by the Supreme Court. In U.S. v. Lopez¹⁷, the Supreme Court struck down the federal gun free school zone law. Recognizing that Lopez is a criminal case and the Commission is dealing

¹⁵ Section 207 of the Act.

¹⁶ NPRM ¶ 10 through 14.

¹⁷ U.S. v. Lopez, - US-, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995).

in the traditional economic arena entitled to judicial deference, the Lopez Court still provides lessons which are instructive. For the first time in many years, the Court curtails the exercise of federal power under the Commerce Clause. In reaching its decision, the Court noted areas of traditional local control and federalism principles and analyzed the expansive reach contended by the government. The Court refused to “....convert congressional authority under the Commerce Clause to a general police power of the sort retained by the state.”¹⁸

Although it is possible for federal regulations to preempt state and local law, the Commission surely can not do what the Congress itself can not do. The local regulations at issue in the satellite preemption matters - zoning, land-use, building and other codes - are just those codes which represent an exercise of local government police powers. In essence, the Commission, in substituting its judgment for that of the local governments and assuming these police powers, is proceeding upon the path about which the Court expressed grave misgivings and was unwilling to tread. In this substitution of judgment, the Commission is functioning as both a local zoning board and a local building official issuing permits.

The Lopez Court concluded that the proper test or review of Congressional regulatory authority requires an analysis of whether the

¹⁸ 131 L.Ed. 626, 643.

regulated activity “substantially affects” interstate commerce.¹⁹ The Local Communities question whether the notice of 1000 complaints²⁰ scattered over the country in a time of exponential growth for the direct broadcast satellite industry demonstrates or even suggests that the regulatory activities represented by zoning, building and other local government codes “substantially affects” interstate commerce and justifies the far reaching approach adopted in the rule. The Commission, noting that its evidence relates to only a small percentage of local jurisdictions and based on the record which reflects the complaints cited by industry and bald generalizations²¹ finds that a national problem exists.²² Based on this finding, the Commission adopts the rule at issue which is unprecedented in its scope and effect. While Congress directed the Commission to implement rulemaking, the Local Communities contend that Congress did not have in mind the expansive breadth and scope which the adopted rule embodies. A rule, which yields to the Congressional mandate and recognizes the primary functions of local governments, would be much more in accord with the Lopez decision.

The Local Communities note that the direct broadcast satellite business

¹⁹ 131 L. Ed.2d 626, 656.

²⁰ NPRM ¶ 21.

²¹ E.g. NPRM ¶ 21 and 19.

²² NPRM ¶ 23.

has grown exponentially over the last several years. Forecasts of 5.6 million subscribers between 1994 and 2000 were made by Wall Street analysts.²³ One recent publication indicates that there are currently 2.6 million subscribers.²⁴ At least one direct broadcast satellite programmer enlisted over one million subscribers in slightly more than a year.²⁵ Other providers exceeded forecasts for sales in 1994 and upped forecasts for 1995.²⁶ Assuming all complaints received by the Commission are meritorious, all numbers are accurate, and the number of subscribers is truly 2.6 million, the complaints amount to .05% of installations. In light of the federalism principles and deference to local matters announced by the Lopez court, the Local Communities question whether the national interest at stake, as demonstrated by these statistics, demands the sweeping, dramatic rule adopted by the Commission. Industry has failed to demonstrate through actual complaints or instances of overreaching, a pervasive national problem requiring a per se presumption of preemption of all local regulations adopted by the Commission. Indeed, industry representatives have stated that problems with local zoning

²³ Broadcasting and Cable, June 6, 1994 at 55.

²⁴ Doug Abrahms, *Mayors dish out objections to satellite-TV zoning ban*, Washington Times, April 3, 1996 at B8.

²⁵ Broadcasting and Cable, November 6, 1995 at 106.

²⁶ HFN, the Weekly Journal for the Home Furnishing Network, November 16, 1995, at 216. The article notes that nearly 600,000 units were sold. Estimates were nearly 400,000. Projections for 1995 were raised from 1.2 million to 1.5 million.

currently does not exist.²⁷ In the absence of such demonstrated evidence of substantial affects justifying the broad adopted rule, the Commission should adopt a rule which is more narrowly tailored and address only the services directed by Congress.

III.

The Rulemaking Should Not Require Local Governments to Justify the Inconsequential Impacts of Their Regulations

The Commission asserts that shifting of the burden of persuasion to local governments to justify their regulations is really not determinative of the outcome of the rulemaking.²⁸ Instead, the Commission notes that local governments have failed to demonstrate how their regulations do not impair reception, states that it is replacing state and local law, and that state and local

²⁷ Doug Abrahms, *Mayors dish out objections to satellite-TV zoning ban*, Washington Times, April 3, 1996, at page B8. A representative of the satellite dish industry, Paul Bross, editor of *Satellite News*, states, “The growth of this industry is at a critical point. Zoning [restrictions] are not a problem now, but down the road they could be. [Emphasis added] at B12.

²⁸ The Commission notes in ¶32 that reversal of the standard of persuasion is not determinative. Yet, it is instructive that the federal courts apply exactly the opposite standard to health and safety regulations enacted by local governments. E.g. *Pennington v. Vistron Corp.*, 876 F.2nd 414 (5th Cir. 1989), “Presumption against preemption applies to state or local regulation on matters of health and safety” at 417, *see also Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 715, 105 S. Ct. 2371, 2376, 85 L.Ed.2d 714 (1985). *Interstate Towing Ass’n, Inc. v. City of Cincinnati*, 6 F.3d. 1154 (6th Cir. 1993) where the court in considering towing regulations which were enacted for safety, minimum levels of service and consumer protection reasons states, “Such concerns have consistently been regarded as legitimate, innately local in nature and presumptively valid, even where regulations enacted to address those concerns have an impact on interstate commerce.” at 1163. *See also Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L.Ed.2d 174 (1970).

governments, under the proper circumstances may appeal or seek a waiver from the Commission.²⁹ This approach turns on its head the traditional judicial deference which State and local government health and safety regulations have enjoyed. The adopted rule is predicated on this disregard for the traditional deference. A rule which per se presumes the invalidity of a state or local regulation can not at the same time exhibit the traditional presumption in favor of those rules.

The Commission's adopted rule represents a substantial departure from the preexisting Commission rule.³⁰ Formerly, the Commission did not substitute its judgment for that of state and local government officials in the matter of health and safety. The former rule allowed for enforcement. There was no per se presumption established of all local regulation which touch satellite dishes of a certain size. The adopted preemption standard represents a reversal of the standard to which the regulations of the Commission itself are entitled when under review by a court. The Local Communities respectfully suggest that the Commission follow established federal and state judicial precedent in development of a rule which will reflect the traditional deference which state and local safety and health regulations have enjoyed in the federal courts.

²⁹ NPRM ¶ 32.

³⁰ Notice ¶ 4. "We [the Commission] also recognized, however, that zoning regulations have traditionally been enacted and administered by local authorities pursuant to the states' police powers. This led us to adopt only a limited preemption of local zoning restrictions."

Respectfully submitted,



Janis Everhart



Scott Carlson
Assistant City Attorneys
City of Dallas
1500 Marilla, Room 7/D/N
Dallas, Texas

On behalf of the Local
Communities