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April 15, 1996

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**VIA HAND DELIVERY**

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, NW  
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

Re: IB Docket No. 95-59 - Preemption  
of Local Zoning Regulation of  
Satellite Earth Stations

Dear Mr. Caton:

Transmitted herewith, on behalf of United States Satellite Broadcasting Company, Inc. ("USSB"), are an original and 11 copies of its Petition for Reconsideration/Clarification and Further Comments in the above-referenced docket.

Should there be any questions, please communicate with the undersigned.

Cordially,



Marvin Rosenberg  
Counsel for United States  
Satellite Broadcasting Company, Inc.

mr:ik  
Enclosures

11 of 11 copies made  
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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

APR 15 1996

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

**PETITION FOR RECONSIDERATION/CLARIFICATION  
AND  
FURTHER COMMENTS  
OF  
UNITED STATES SATELLITE BROADCASTING COMPANY, INC.**

United States Satellite Broadcasting Company, Inc. ("U.S. Satellite Broadcasting") hereby files this Petition for Reconsideration/Clarification and Further Comments pursuant to the Report and Order and Further Notice of Proposed Rulemaking ("Order" or "Further Notice") released by the Commission in the above-referenced docket on March 11, 1996.

I. Introduction

U.S. Satellite Broadcasting is a DBS licensee providing video services by satellite direct to subscriber homes via the DSS™ receive equipment, that includes an 18 inch antenna. The DSS™ system is sold throughout the continental United States. Using the DSS™ equipment, owners may subscribe to the programming services offered by U.S. Satellite Broadcasting, as well as that of DirectTV. Local zoning, home owners association rules, and restrictive covenants, however, are impeding the sale of the DSS™ systems to citizens who desire to purchase them. The Petition for Clarification and Further Comments of the Satellite Broadcasting

and Communications Association of America filed in this proceeding sets forth an illustrative, but partial, listing of such examples. If DBS is to reach its full potential as an effective competitor to cable, MMDS, and other multichannel video program providers, and if the public is to enjoy the benefits of the new technology, the Commission must adopt rules, consistent with Congress's intent, that will permit the unrestrained growth of DBS services. The Commission's newly adopted preemption rule, which relies on a retrospective system of "rebuttable presumptions," will not fulfill Congress's statutory mandate to the Commission to remove impediments to the installation of DBS antennas.

The Commission's Order, following the concept announced in the Notice of Proposed Rulemaking adopted a year ago, *Preemption of Local Zoning Regulation of Satellite Earth Stations*, 10 FCC Rcd 6982 (1995) ("Notice"), utilizes a "rebuttable presumption" approach to implement the preemption of objectionable local zoning regulation with respect to DBS antennas and other antennas of two meters or less in diameter. The Order acknowledges the Congressional mandate set forth in the Telecommunications Act of 1996 ("1996 Act"),<sup>1</sup> but fails to fully implement Congress's directive.

The 1996 Act was enacted:

[T]o provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . . .

H.R. Conf. Rep. No. 458, 104th Cong., 1st Sess. at 1.

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<sup>1</sup> Telecommunications Act of 1996, Pub. L. No. 104-104,, 110 Stat. 56 (1996).

In furtherance of that purpose, Section 205 of the 1996 Act grants "exclusive jurisdiction to regulate the provisions of direct-to-home satellite services" to the Commission and Section 207 of the 1996 Act directs the Commission to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for . . . direct broadcast satellite services." (Emphasis added.)

To give effect to these directives, the Commission must reconsider two aspects of its preemption rule: (1) it must exercise exclusive jurisdiction over DBS services, and (2) adopt a *per se* rule of preemption for DBS antennas. Only in that way will DBS be able to realize its full potential in the competitive market for video distribution services.

## II. The Exercise of Exclusive Jurisdiction is Required

Section 205 of the 1996 Act amends Section 303 of the Communications Act of 1934, as amended ("1934 Act"), 47 U.S.C. § 303, to read:

Except as otherwise provided in this Act, the Commission . . . shall--

(v) Have exclusive jurisdiction to regulate the provisions of direct-to-home satellite services. As used in this subsection, the term "direct-to-home satellite services" means the distribution or broadcasting of programming or services by satellite directly to the subscriber's premises without the use of ground receiving or distribution equipment, except at the subscriber's premises or in the uplink process to the satellite.

The plain meaning of Section 205 is that Congress intended to allocate regulatory authority of DBS services solely to the Commission *See, e.g., California v. Federal*

*Energy Regulatory Commission*, 495 U.S. 490, 495 (1990). Indeed, the delegation of exclusive jurisdiction to the Commission was not without Congressional purpose:

Federal jurisdiction over DBS service will ensure that there is a unified, national system of rules reflecting the national, interstate nature of DBS service.

H.R. Rep. No. 204 at 123.

It is, therefore, both mandatory and necessary for the Commission to assert exclusive jurisdiction over any determinations on the preemption of local zoning and to grant or deny any waivers of its preemption rules with respect to DBS antennas. National uniform standards must be established if DBS service is to be available to all citizens on a nondiscriminatory basis. National uniform standards developed by the Commission will encourage local jurisdictions to impose and enforce rules consistent with Commission decisions, thereby reducing the quantity of litigation which otherwise is likely to develop as local jurisdictions attempt to preserve restrictions on DBS antennas under imaginative scenarios of self-interest through local courts of choice rather than before the Commission. Local jurisdictions will require citizens desiring DBS service to litigate their right to install a receiving antenna before the local zoning authority and local courts of competent jurisdiction at great expense and inconvenience. The cost and delay of the local litigation process will favor those imposing the zoning restriction. On the other hand, resolution of any dispute at the Commission will more fairly place the litigation burden upon the local jurisdiction seeking a waiver of the Commission's rules. Indeed, because a local jurisdiction would be privy to the purpose behind its

zoning restriction, it would be in a better position than the consumer to litigate a zoning conflict before the Commission. Moreover, a consumer is not as likely to be familiar with the procedures necessary to litigate zoning conflicts.

To implement its exclusive jurisdiction, the Commission must strike from proposed Section 25.104(b) the language “or a court of competent jurisdiction.” To further clarify and forthrightly express its exclusive jurisdiction, the Commission should also add a new subsection (g) to Section 25.104 that states:

(g) The sole forum for adjudicating any matters within this section shall be the Commission.

The Commission’s exclusive jurisdiction should also protect a DBS antenna owner from civil or criminal penalties sought to be imposed by local authorities enforcing a DBS antenna ban which has not been granted a waiver by the Commission. Accordingly, the following language should be added at the end of proposed Section 25.104(b):

Prior to a final Commission decision, no liability may be assessed or action taken (including, but not limited to, the issuance of any directive or order requiring the disassembly of the satellite antenna) against a person for actions taken to install a satellite earth station antenna.

### III. A *Per Se* Rule of Preemption Should be Adopted For Small Satellite Antennas

Proposed Section 25.104(b) utilizes a system of “rebuttable presumptions” to implement the preemption of zoning restrictions with regard to satellite earth station antennas of one meter or less in diameter located in any area, regardless of land use or zoning category, and satellite earth station antennas of two meters or less in diameter located in any area where commercial or industrial uses are

generally permitted by nonfederal land use regulation. The rebuttable presumptions procedure, however, conflicts with Congress's intent and the directive of Section 207 of the 1996 Act that the Commission "promulgate regulations to **prohibit** restrictions that impair a viewer's ability to receive" DBS services. (Emphasis added.) Therefore, the Commission must modify its rules to provide a *per se* preemption for the DBS antennas covered by Section 25.104(b).

The language of Section 207 of the 1996 Act is clear and unequivocal. The legislative history also supports the plain meaning of Section 207. The Conference Report explains that Section 207 is based upon the House provisions.<sup>2</sup> The House Committee Report, in turn, states that the intent of the provision is to:

[P]reempt enforcement of State or local statutes and regulations, or State or local legal requirements, or restrictive covenants or encumbrances that prevent the use of antennae designed for . . . receipt of DBS services. Existing regulations . . . shall be unenforceable to the extent contrary to this section.<sup>3</sup>

There is little doubt that Congress was well aware of the nature of the authority it was delegating to the Commission. The 1996 Act is replete with specific examples of Congress conferring jurisdiction on states or retaining federal jurisdiction as it deemed appropriate. With regard to zoning and land use, Congress explicitly retained the local zoning authority of state and local governments with respect to the siting of personal wireless service facilities, except for a specified exception with regard to the environmental effects of RF emissions. *See* 1996 Act

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<sup>2</sup> H.R. Conf. Rep. No. 458, 104th Cong., 1st Sess. at 166 (1996).

<sup>3</sup> H.R. Rep. No. 204, 104th Cong., 1st Sess., pt. 1, at 123-124.

§ 704. In addition to that section, the federal/state jurisdiction issue was addressed with respect to access and interconnection obligations of local exchange carriers (47 U.S.C. § 251(d)(3)); universal service requirements (47 U.S.C. § 254(f)); and the development of competitive markets for common carriers (47 U.S.C. § 261(d)).<sup>4</sup> Further, the 1996 Act amended the Public Utilities Holding Company Act of 1935, but explicitly provided that certain state rate authority was not preempted.<sup>5</sup>

Moreover, the adoption of a *per se* procedure would not preclude a local zoning authority from demonstrating that a waiver of the zoning preclusion is in the public interest because of some unique situation, such as an architecturally historic area. The Commission recognizes that, while the *per se* rule may be more intrusive, the rebuttable presumption approach would be more difficult to administer. Order ¶ at 25. As the *per se* rule would be applied only to small antennas the intrusion on local zoning is minimal. On the other hand, because it is likely, as the Mayor of Knoxville, Tennessee, stated in a recent press conference, that thousand of requests will be filed with the Commission by local governments seeking to maintain limitations on the installation of DBS antennas, the most efficient means of administration should be adopted. Statement by Mayor Victor Ashe, Press Conference at FCC, April 2, 1996.

To create a *per se* preemption rule for DBS and other small antennas, the Commission should amend Section 25.104(b) as follows:<sup>6</sup>

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<sup>4</sup> These amendments to Title 47 are found in Section 101 of the 1996 Act.

<sup>5</sup> 1996 Act § 103.

<sup>6</sup> Deleted material appears with a line through it. New material appears in bold.

(b) Any state or local zoning, land-use, building, or similar regulation that affects the installation, maintenance, or use of:

(1) a satellite earth station 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 nonfederal land-use regulation;

or

(2) a satellite earth station antenna that is one meter or less in diameter in any area, regardless of land use or zoning category ~~shall be presumed unreasonable and is therefore preempted subject to paragraph (b)(2).~~ No civil, criminal, administrative, or other legal action of any kind shall be taken to enforce any regulation covered by this ~~presumption~~ **preemption until unless** the promulgating authority has obtained a waiver from the Commission pursuant to paragraph (e), ~~or a final declaration from the Commission or a court of competent jurisdiction that the presumption has been rebutted pursuant to subparagraph (b)(2).~~ **Prior to a final Commission decision, no liability may be assessed or action taken (including, but not limited to, the issuance of any directive or order requiring the disassembly of the satellite antenna) against a person for actions taken to install a satellite earth station antenna.**

IV. Procedures for Petitions Seeking Declaratory Rulings and Waivers Should be Adopted Now

The Commission notes, in Section 25.104(d), that it will adopt procedures for the filing of petitions requesting declaratory rulings and waivers will be adopted in subsequent Public Notices. It is strongly recommended that such procedures be adopted in this proceeding. The procedures to be adopted by the Commission must require that all requests for declaratory rulings and waivers be placed on public notice with the opportunity for interested parties to file comments within 30 days of the public notice and all replies within 15 days thereafter. It is also important that the decisions be published so that they are available through commercial services and on the Internet. The widest dissemination thereof is required to encourage the national uniformity contemplated by Congress.

V. Private, Nongovernmental Restrictions

The Commission in the Further Notice, proposes in Section 25.104(f), a *per se* preemption of restrictive covenants, encumbrances, homeowners' association rules, or other nongovernmental restrictions. U.S. Satellite Broadcasting supports the Commission's proposed language as a reasonable implementation of Section 207 of the 1996 Act. The Commission could do no less.

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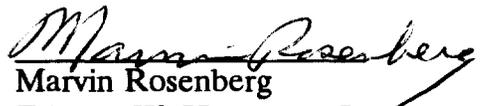
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VI. Conclusion

For the foregoing reasons, the Commission should modify Section 25.104 as set forth herein.

April 15, 1996

Respectfully submitted,

  
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