

**ORIGINAL**

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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	)	

APR 15 1996

**Petition for Reconsideration and Clarification  
and Comments to Further Notice of Proposed Rulemaking of DIRECTV**

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**TABLE OF CONTENTS**

	<b><u>Page</u></b>
I. SUMMARY AND INTRODUCTION . . . . .	1
II. RECONSIDERATION . . . . .	3
A. The FCC should adopt an irrebuttable presumption against local regulation of DBS antennas . . . . .	4
1. Defending against Rebuttal Places an Unnecessary and Unreasonable Burden on DBS Subscribers . . . . .	4
2. Section 207 Permits No Burden on DBS Antennas . . . . .	6
3. The Commission Must Enforce its Rule . . . . .	8
B. FCC must exercise its exclusive jurisdiction over satellite services . . . . .	9
III. CLARIFICATION . . . . .	12
A. DBS Subscribers will not have Retroactive Liability . . . . .	12
B. There are no health concerns regarding satellite antennas other than radio frequency emissions . . . . .	14
C. DBS customers are not required to exhaust local remedies . . . . .	14
IV. COMMENTS TO FURTHER NOTICE OF PROPOSED RULEMAKING . . . . .	16
V. CONCLUSION . . . . .	18

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**I. SUMMARY AND INTRODUCTION**

Direct broadcast satellite ("DBS") services can compete with cable television and other multichannel video programming distributors ("MVPDs") only if consumers are able to install and maintain satellite antennas unburdened by local regulations. Congress recognized this need by enacting Section 207 of the Telecommunications Act, which directs the FCC to preempt all local regulations that impair a viewer's ability to receive DBS signals. Likewise, the Commission has revised its preemption rule, Section 25.104, to presumptively preempt local regulations which affect smaller satellite antennas<sup>1/</sup>, including DBS dishes.

The Commission's order adopting the revision (the "*Order*") articulates a strong and sweeping policy in favor of consumers and competition, but the revised rule itself is not nearly as strong as this policy. While the *Order* makes clear that DBS antennas are to

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1. Smaller satellite antennas, as used herein, are those antennas described in Section 25.104(b) (*i.e.*, one meter or less in diameter in a residential area, two meters or less in a commercial area).

be subject to virtually no local regulation, the revised rule employs a system of presumptions and rebuttals that provides little certainty to DBS consumers.

Enhanced parity between DBS and cable television, as Congress sought to achieve through Section 207, can be achieved only through adopting an irrebuttable presumption that local regulations affecting DBS antennas are preempted. The Commission has already recognized the wisdom of per se preemption, proposing to amend Section 25.104 further to prohibit all restrictive covenants, encumbrances and home owners' association rules affecting smaller satellite antennas.

DIRECTV, Inc.<sup>2/</sup> a licensee in the DBS service, submits this Petition for Reconsideration and Clarification and Comments to Further Notice of Proposed Rulemaking to urge the Commission to adopt a per se preemption of local regulations affecting DBS antennas to reflect both Congressional and Commission policy. DIRECTV, the first DBS service in the United States, provides an innovative, state-of-the-art video and audio programming delivery service using digital compression technology. DIRECTV delivers approximately 175 channels of entertainment and informational programming directly to homes and businesses equipped with DIRECTV's DSS® receiving system, which features satellite dish antennas just 18 inches in diameter that are mass marketed on a national basis, sold at consumer electronics stores, and easily installed by the subscriber. At present, DIRECTV serves in excess of 1.4 million subscribers throughout the United States, with hundreds of new customers subscribing each day.

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2. DIRECTV is a wholly-owned indirect subsidiary of General Motors Corporation ("GM") and a licensee in the DBS service.

## II. RECONSIDERATION

The Commission's revisions to Section 25.104 greatly clarify and strengthen the preemption of local regulations affecting smaller satellite antennas, including DBS dishes. Pursuant to the revised rule, DBS subscribers may now install their antennas without seeking a permit from city hall or a variance from the local zoning board.

However, due to two main defects, the revised rule has the unintended consequence of providing DBS subscribers with far less than complete protection from regulatory burdens. First, by providing the opportunity for rebuttal of the presumption of preemption, the rule permits DBS subscribers to be subjected to procedural and regulatory burdens not faced by the customers of the local cable service. These burdens are compounded by the lingering uncertainty that a purchased and installed DBS receiving antenna may ultimately be rendered unusable by a successful municipal challenge. Accordingly, the Commission has not created the level playing field for DBS to compete with cable television, as envisioned by Section 207 of the Telecommunications Act.

Second, allowing courts to determine whether the presumption has been rebutted puts the development of Communications policy into the hands of an assortment of judicial offices, rather than the expert body that should promulgate it, the Commission. Moreover, requiring DBS subscribers to defend against the rebuttal of a local regulation will unnecessarily subject them to the expense and time of litigation.

The Commission can remedy both defects by removing the rebuttable presumption and preempting all local regulations affecting smaller satellite antennas. Without the possibility of rebuttal, local regulations will not be allowed to burden DBS

customers, nor will the courts or the Commission be required to review such regulations.

At a minimum, the Commission should exercise its exclusive jurisdiction over satellite services and preclude initial judicial review of Section 25.104. Commission review of local zoning regulations promises to be more efficient, cost-effective and consistent than court litigation.

**A. The FCC should adopt an irrebuttable presumption against local regulation of DBS antennas**

Only by adopting an irrebuttable presumption against all local regulation of DBS antennas can the Commission enhance parity between DBS services and cable television, as intended by Congress in Section 207 of the Telecommunications Act of 1996 (the "Telecom Act"). Under the revised Section 25.104, DBS subscribers, unlike cable customers, will be forced to defend against the possible rebuttal of a local zoning ordinance, either at the Commission or before a court. In addition, if the presumption is rebutted and the local authority is allowed to regulate DBS antennas, the rule will permit local regulatory burdens to be placed upon DBS customers that are not borne by cable television subscribers. The uncertainty created by both of these possibilities will have a chilling effect on the DBS industry, instead of fostering the vigorous competition that Congress and the President intended.

**1. Defending against Rebuttal Places an Unnecessary and Unreasonable Burden on DBS Subscribers**

The system of presumptions and rebuttals adopted in the revised rule means that local authorities will need to take DBS consumers either to court or to the Commission in order to validate their regulations. While the legal burden will be on promulgating

authority to prove that the regulation is not preempted, the DBS customer will still bear the expense, time and uncertainty of litigation in defense of preemption.

The scenario presented to the DBS subscriber by the presumption and rebuttal system is not inviting, and certainly has no analog for cable subscribers: A DBS consumer purchases her dish at the local electronics store, installs it outside her home, and, within the hour, has the remote control in hand and more than 175 channels of digital-quality video and CD-quality sound in her living room. The next day, the town zoning official, in accordance with revised Section 25.104, notifies her that her antenna installation is in violation of a local regulation, and directs her to defend herself before the FCC while the town rebuts the presumption.<sup>3/</sup>

Our DBS consumer now has two choices. She can: (a) call her lawyer and prepare for the Commission proceeding; or (b) pack up her DBS dish and receiver, take it back to the store, and call the local cable company. Congress did not envision this dilemma for DBS subscribers when it passed Section 207, and neither did the Commission when it revised the rule.

The mere threat of litigation, either before a local court or the FCC, will result in the de facto enforcement of preempted local satellite antenna regulations. The cost of such litigation could easily outstrip the cost of a DBS system (approximately \$600), and individual consumers will be loath to spend the money or take the time to defend their rights.

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3. This scenario presumes that the town acts in good faith, and does not begin its own administrative enforcement proceedings. As discussed in Section II.B.3 below, in such a circumstance the Commission should intervene in the local proceedings by, at a minimum, directing a letter to both the promulgating authority and the enforcing body notifying each that such proceedings are not permitted under Section 25.104.

Knowledge of this possibility is likely to stifle the original purchase decision for many consumers. Only by preempting all local regulations affecting DBS antennas can the Commission provide DBS consumers with adequate assurance that they can install and maintain their antennas free from substantive or procedural burdens.

Nor should the municipalities, courts or the Commission be burdened with establishing and enhancing the already severely-limited parameters of local regulation of DBS antennas. The interest in validating those few local regulations that will pass muster under the revised rule<sup>4/</sup> is clearly outweighed by the cost of litigating and the resultant chill on consumers' willingness to purchase and install satellite antennas.

## **2. Section 207 Permits No Burden on DBS Antennas**

At bottom, however, the promulgating authority should never have the opportunity to enforce a local regulation inhibiting the use of DBS antennas. In passing Section 207 of the Telecom Act, Congress expressed its desire to provide effective and fair competition to cable television from DBS and other multichannel video programming distributor services by directing the Commission to preempt local regulations that impair this goal. Any local regulatory burdens on competitors to cable television are in direct conflict with the Congressional intent of Section 207.

Section 207 directs the Commission "to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-

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4. As the Commission has noted, consumers and installers can be relied upon to install DBS dishes safely without the threat of regulatory enforcement. *Order* at ¶ 35.

the-air reception of . . . direct broadcast satellite services."<sup>5/</sup> With respect to this limited, defined service, this is not language of compromise; Congress did not envision that the Commission would exercise this authority to balance the federal interest in competition to cable television against local interests in zoning.<sup>6/</sup>

If the statutory intent is not clear from the language standing alone, then comparing Section 207 to provisions where Congress *did* intend to accommodate local concerns renders the intent fairly obvious. For example, in Section 704 of the Telecom Act, Congress expressly preserved state and local zoning regulations when it established a national telecommunications siting policy.<sup>7/</sup> Section 704 preempts local zoning regulations affecting the placement and construction of personal wireless service facilities, but only to the extent that those regulations have the effect of prohibiting wireless services.<sup>8/</sup> Otherwise, the local authority is required only to act on requests for such facilities expeditiously and to make a determination that is supported by substantial evidence.<sup>9/</sup> Section 207 contains no such accommodations to local interests.

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5. Section 207 of the Telecom Act. "Direct broadcast satellite services" was defined as "a specific service that is limited to higher power DBS satellites." H.R. Rep. No. 204, 104th Cong., 1st Sess., pt. 1, at 124.

6. Section 207 of the Telecom Act. The Report of the House Committee on Commerce indicates that the Commission is to preempt inconsistent state and local laws. H.R. Rep. No. 204, 104th Cong., 1st Sess., pt. 1, at 123.

7. Section 704 of the Telecom Act, amending 47 U.S.C. § 332(c).

8. *Id.* at § 332(c)(7)(B)(i)(II).

9. *Id.* at § 332(c)(7)(ii) (iii).

Though the application of the revised Section 25.104 will conflict with Section 207, the policies the Commission expressed in its *Order* are not inconsistent with the statutory intent. The Commission recognizes that local regulations restrict effective alternatives to cable television,<sup>10/</sup> and makes clear that local regulations may not burden the installation and maintenance of smaller satellite antennas. For instance, the Commission noted that "it would not appear to be either reasonable or necessary to require a permit for a consumer-installed, 18-inch DBS antenna and thus a corresponding fee would also be unwarranted."<sup>11/</sup>

These policies are not, however, implemented in the revised rule, which would presumably still permit (after rebuttal) some local regulations that place burdens upon DBS consumers not incurred by cable television subscribers. There is no basis under Section 207 for the Commission to allow these burdens. The Commission should therefore remove the rebuttals from Paragraph (b) and preempt all local regulation of DBS antennas. Paragraph (b) should therefore read, immediately, after (b)(1)(B): "is hereby preempted," deleting the remainder of the paragraph.<sup>12/</sup>

### **3. The Commission Must Enforce its Rule**

Enacting a rule preempting all local regulations affecting DBS antennas is not enough, however. The Commission must also guarantee that it will assist DBS consumers in

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10. *Order* at ¶ 15.

11. *Order* at ¶ 41.

12. The changes suggested by DIRECTV are reflected in draft rules, with "red-lined" versions: Exhibit A (including the irrebuttable presumption) and Exhibit B (including the rebuttable presumption), attached hereto.

enforcing their right to install and maintain antennas without interference from local governments. DIRECTV urges the Commission in its order on reconsideration to provide consumers with a contact at the Commission for consumers to call to report unlawful enforcement of local satellite antenna regulations. The Commission should then intervene on behalf of the consumer by contacting the promulgating authority and the enforcing authority - be it a court, zoning board or other body -- either by telephone or in writing to inform it that Section 25.104 precludes such enforcement.

**B. FCC must exercise its exclusive jurisdiction over satellite services**

To the extent the Commission decides to allow local authorities to rebut the presumption against the regulation of smaller antennas, it must exercise its exclusive jurisdiction over DBS services and preclude initial judicial review of local satellite zoning regulations pursuant to Section 25.104.<sup>13/</sup> Exclusive FCC jurisdiction will allow the Commission to enforce and interpret its own rule consistent with its policies and reduce the procedural burdens on antenna owners.

First, allowing initial judicial review divests the Commission of its exclusive jurisdiction over direct-to-home satellite services, granted in Section 205 of the Telecom Act.<sup>14/</sup> The Commission has already recognized its unique role in regulating satellite

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13. DIRECTV does not suggest that the Commission should, or could, preclude judicial review of the Commission's own decisions pursuant to Section 25.104. See 47 U.S.C. § 402.

14. See Section 205 of the Telecom Act. The statutory language is not at all ambiguous: The FCC shall "have exclusive jurisdiction to regulate the provision of direct-to-home satellite services." *Id.* This section, in contrast to Section 207, includes medium-powered direct-to-home service like that offered by Primstar.

services by adopting and revising its preemption rule.<sup>15/</sup> Allowing courts unfamiliar with Section 25.104 to determine if the presumption has been rebutted will erode the FCC's ability to regulate direct-to-home services as required by Section 205, while simultaneously reintroducing the disparate local influence over the issue which Section 205 sought to avoid.

If the Commission refuses to exercise this jurisdiction, it will ultimately surrender its role in interpreting Section 25.104, as the forum in which to rebut the presumption will be the choice of the promulgating authority. Local jurisdictions, armed with local lawyers familiar with the local courts, will inevitably choose to litigate close to home rather than to proceed before the Commission.

Once a jurisdiction has obtained judicial review of its satellite antenna regulations, Commission review may be precluded entirely. The decision in *Town of Deerfield, New York v. FCC*<sup>16/</sup> requires the Commission to intervene in a case before judicial review or not intervene at all.<sup>17/</sup> Surrendering its jurisdiction over the enforcement of its rule to courts that have little experience with satellite antenna zoning disputes will not further the purposes of Section 205 or Section 207. Only the Commission has the authority and the expertise to establish a consistent body of precedent under Section 25.104.

Second, judicial review will be particularly burdensome to DBS subscribers forced to defend against the local authority's rebuttal; Commission review is more suited to these disputes. The scenario involving the DBS subscriber described above at page 5

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15. See Order at ¶ 11.

16. 992 F.2d 420 (2d Cir. 1992).

17. See Notice at ¶ 48.

becomes even more stark if the local authorities seek judicial review, as the subscriber may then be required to attend hearings, answer pleadings, and even engage in discovery. The costs of court litigation will quickly exceed the cost of a DBS system, placing an unreasonable burden on DBS subscribers.

Local government representatives have also expressed the concern that review procedures not be unduly expensive.<sup>18/</sup> In response, the Commission has noted that it envisions that its own review process will provide "relatively prompt and relatively inexpensive resolution of satellite-antenna zoning disputes,"<sup>19/</sup> requiring only paper filings, not personal appearances.<sup>20/</sup> Judicial proceedings cannot be described in a like manner.

Precluding initial judicial review of local satellite zoning ordinances will serve the interests of all parties concerned. In light of the express jurisdiction granted to the Commission over direct-to-home services by Section 205 of the Telecom Act and the burden judicial review will place upon antenna users, DIRECTV concurs with the Satellite Broadcasting Communications Association ("SBCA") that a new Paragraph (g) should be added to Section 25.104 to state:

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

In addition, Paragraph (b)(1) should be changed by deleting the words "or a court of competent jurisdiction," and Paragraph (b)(2) should be amended by adding the words "to the Commission" after "upon a showing."

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18. See Comments of Texas at 5.

19. Notice at ¶ 49.

20. Order at ¶ 47.

### III. CLARIFICATION

There are several policies articulated in the *Order* that are not reflected in the text of the rule itself. Because consumers and local officials will read the text of the rule and not the *Order*, the rule itself must be as explicit as possible. Moreover, the rule must be clear enough so that local officials are not able to eviscerate its purposes by making unwarranted interpretations favorable to enforcement of preempted regulations.

#### A. DBS Subscribers will not have Retroactive Liability

The presumptive preemption in revised Section 25.104(b) makes clear that owners of smaller antennas covered by that paragraph may install their antennas without regard to local antenna regulations that have not yet been determined reasonable. In the *Order*, the Commission stated that antennas owners will not be liable retroactively for noncompliance with that local regulation during the pendency of any litigation.<sup>21/</sup> The rule, however, makes no reference to this determination. Moreover, the Commission has given no grace period to the antenna owner, nor has it required the local authority to provide the antenna owner with notice of a determination that a previously-preempted ordinance has been found reasonable.

The Commission should therefore require local authorities to provide notice to satellite antenna owners before enforcing a regulation that has been adjudged not preempted by Section 25.104. The *Order's* turgid "caution" to antenna users that some regulations may not be preempted is inconsistent with its determination that consumers may install now and

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21. ¶ 31, n.68 ("Consumers are not liable for any penalties that may accrue for noncompliance with a regulation during the pendency of any case brought for determination of the reasonableness of that regulation.").

fight later.<sup>22/</sup> A consumer should be able to rely upon the Commission's preemption rule without engaging in legal research first to find which local ordinance applies to his antenna and then to determine whether that regulation has been validated.

Once the local authority has rebutted the presumption or has been granted a waiver pursuant to Section 25.104(e), it should be required to provide 30 days' written notice of such rebuttal each time to each party against whom it wishes to enforce its small antenna regulations. Penalties should not begin to accrue until this 30-day period has expired. Such a requirement will not add any burdens to local zoning enforcement, as it is common for local authorities to issue a citation and allow the violator 30 days to come into compliance without penalty.

For example, a local authority could issue a citation or write a letter to the dish owner stating: "Your satellite antenna has not been installed in compliance with local regulation 1.234, which has been approved by the Federal Communications Commission as consistent with Section 25.104 of its rules. You must comply with local regulation 1.234 or you will begin accruing [penalty] within 30 days of the date hereof."

In order to make clear that antenna owners are not retroactively liable for installing small dishes, Paragraph (b)(2) should be amended to add, at the end:

If a state or local authority has rebutted the presumption against its regulation pursuant to this Paragraph, it may not enforce such regulation or impose any penalties pursuant thereto until 30 days after it has provided written notice of such rebuttal to any satellite antenna user against whom it wishes to enforce the regulation.

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22. See *Order* at ¶ 31 ("We caution users that a particular local ordinance may have previously been declared not preempted").

Similar language should be added at the end of Paragraph (e) to require notice be given of any waiver granted.

**B. There are no health concerns regarding satellite antennas other than radio frequency emissions**

The FCC has made clear that radio frequency ("RF") emissions from transmitting antennas is the only health concern regarding satellite antennas that has been identified in this record, and that receive-only antennas present no RF or other health-related issues.<sup>23/</sup> Section 25.104 allows a local authority to justify its regulation of satellite antennas based upon a "health objective," but never identifies any health objectives other than RF emissions. DIRECTV therefore suggests that in order to avoid any confusion or misapplication of the rule, the Commission change references to "health" in Section 25.104 to "radio frequency emissions."

**C. DBS customers are not required to exhaust local remedies**

Revised Section 25.104 employs a system of presumptions and rebuttals that allows antenna owners to "install now and fight later." The Commission stated that Paragraph (b) was drafted in a manner to "assure that local authorities cannot take enforcement action until their regulation is deemed in compliance" with Section 25.104.<sup>24/</sup>

Local zoning administration has a long history, however, and it may be difficult to convince local regulators that smaller satellite antenna owners need not attend hearings or seek variances before or after installing their antennas. The rule must be crystal

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23. See Order at ¶ 52.

24. See Order at ¶ 31.

clear that the exhaustion requirements of Paragraph (c) do not apply to those antennas covered by Paragraph (b).

While Paragraph (c) does state that exhaustion applies to regulations challenged pursuant to paragraph (a), this may not be clear enough. By changing the language in Paragraph (b)(1) to the active from the passive, the restriction on enforcement will be clarified:

No state or local authority may take any action of any kind, including civil, criminal or administrative proceedings, or issue a citation, to enforce any regulation covered by this presumption unless and until the promulgating authority has first obtained a waiver from the Commission pursuant to Paragraph (e), or a final declaration from the Commission that the presumption has been rebutted pursuant to subparagraph (b)(2).

#### **IV. COMMENTS TO FURTHER NOTICE OF PROPOSED RULEMAKING**

In light of Section 207 of the Telecommunications Act of 1996, the Commission has proposed to revise Section 25.104 further to adopt a per se preemption of all restrictive covenants, encumbrances, and homeowners' association rules affecting smaller satellite antennas. These private restrictions, which heretofore have been unaddressed by the Commission's rules, can place severe restrictions on the ability of DBS to compete with cable television in some markets. For many of the same reasons DIRECTV urges the Commission to remove the rebuttable presumption for governmental restrictions, it supports the Commission's proposal to preempt all non-governmental restrictions on DBS antennas.

The Comments of SBCA provide vivid illustrations of restrictions placed by home owners' associations upon the installation of DBS antennas. As a private organization, home owners' associations are traditionally subject to fewer checks and balances than local governments, and the examples provided by SBCA illustrate the effect of this absence of scrutiny.

By enacting Section 207, Congress clearly intended to preclude any regulation of satellite antennas by non-governmental entities. While Congress did not intend for the Commission to balance the federal interest in competition to cable against any local interests, governmental or non-governmental, there is even less justification for accommodation of the restrictions on DBS antennas contained in home-owners' association rules, covenants, and encumbrances.

The Commission has recognized the statutory intent, and has proposed to adopt a per se preemption of non-governmental restrictions by adding Paragraph (f) to Section

25.104.<sup>25/</sup> The proposed paragraph does not, however, adequately implement the per se prohibition.

The language of Paragraph (f) implies that some non-governmental restrictions on DBS antennas may be valid. In this regard, Paragraph (f) too closely resembles old Section 25.104, which allowed local regulations to restrict the placement of satellite antennas for aesthetic and other reasons as long as reception was not "substantially impaired." While the Commission has attempted to track the statutory language from Section 207 in proposed Paragraph (f), by using the words "to the extent it impairs" the rule suggests that aesthetic restrictions, including screening or site placement, are legitimate as long they do not impair the reception of satellite signals. In addition, the words "shall be" imply that further proceedings are required to determine if the restriction does indeed impair the viewer's ability to receive satellite signals.

The intended per se prohibition on non-governmental satellite antenna restrictions can be implemented more forcefully and clearly by removing those terms.

Paragraph (f) should therefore be revised to read:

- (f) All restrictive covenants, encumbrances, home owners' association rules, and other nongovernmental restrictions affecting satellite antennas less than one meter in diameter used to receive video programming signals are hereby unenforceable.

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25. Order at ¶ 62.

V. CONCLUSION

The Commission's revisions to Section 25.104 leave DBS subscribers at risk of litigation, either before the FCC or the courts, to protect their right to install their 18-inch dishes, a risk not faced by cable customers. Congress envisioned a more level playing field between DBS and cable television when it enacted Section 207 of the Telecom Act.

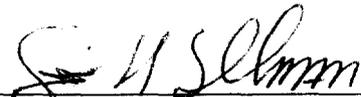
DIRECTV respectfully requests the Commission to adopt an irrebuttable presumption against local regulation of DBS antennas. At the very least, the Commission should exercise its exclusive jurisdiction over direct-to-home satellite services and preclude potentially expensive court litigation for DBS consumers.

Revised Section 25.104 must be clarified to ensure that DBS subscribers will not be retroactively liable for installing their antennas without regard to presumptively preempted local regulations. The Commission should also require that local jurisdictions provide notice before enforcing a regulation that has been adjudged reasonable by the FCC.

Dated: April 15, 1996

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**EXHIBIT A-1**  
Petition for Reconsideration and Clarification and  
Comments to Further Notice of Proposed Rulemaking of DIRECTV  
Irrebuttable Presumption ("Red-Line")

Section 25.104: Preemption of Local Zoning of Earth Stations

(a) Any state or local zoning, land-use, building, or similar regulation that materially limits transmission or reception by satellite earth station antennas, or imposes more than minimal costs on users of such antennas, is preempted unless the promulgating authority can demonstrate that such regulation is reasonable~~{, except that nonfederal regulation of radio frequency emissions is not preempted by this rule}~~. For purposes of this paragraph (a), reasonable means that the local regulation:

- (1) has a clearly defined ~~{health}~~ ~~[radio frequency emissions]~~, safety, or aesthetic objective that is stated in the text of the regulation itself; and
- (2) furthers the stated ~~{health}~~ ~~[radio frequency emissions]~~, safety or aesthetic objective without unnecessarily burdening federal interests in ensuring access to satellite services and in promoting fair and effective competition among competing communications service providers.

(b)(1) Any state or local zoning, land-use, building or similar regulation that affects the installation, maintenance, or use of:

- (A) 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
- (B) 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 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).~~

~~(2) Any presumption arising from subparagraph (b)(1) of this section may be rebutted upon a showing that the regulation in question:~~

~~(A) is necessary to accomplish a clearly defined health or safety objective that is stated in the text of the regulation itself;~~

~~(B) is no more burdensome to satellite users than is necessary to achieve the health or safety objective; and~~

~~(C) is specifically applicable on its face to antennas of the class described in paragraph (b)(1).} [is hereby preempted.]~~

(c) Any person aggrieved by the application or potential application of a state or local zoning or other regulation in violation of paragraph (a) of this section may, after exhausting all nonfederal administrative remedies, file a petition with the Commission requesting a declaration that the state or local regulation in question is preempted by this section.

Nonfederal administrative remedies, which do not include judicial appeals of administrative determinations, shall be deemed exhausted when

- (1) the petitioner's application for a permit or other authorization required by the state or local authority has been denied and any administrative appeal and variance procedure has been exhausted;

(2) the petitioner's application for a permit or other authorization required by the state or local authority has been on file for ninety days without final action;

(3) the petitioner has received a permit or other authorization required by the state or local authority that is conditioned upon the petitioner's expenditure of a sum of money, including costs required to screen, pole-mount, or otherwise specially install the antenna greater than the aggregate purchase or total lease cost of the equipment as normally installed; or

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

(d) Procedures regarding filing of petitions requesting declaratory rulings and other related pleadings will be set forth in subsequent Public Notices. All allegations of fact contained in petitions and related pleadings must be supported by affidavit of a person or persons with personal knowledge thereof.

(e) Any state or local authority that wishes to maintain and enforce zoning or other regulations inconsistent with this section may apply to the Commission for a full or partial waiver of this section. Such waivers may be granted by the Commission in its sole discretion, upon a showing by the applicant that local concerns of a highly specialized or unusual nature. No application for waiver shall be considered unless it specifically sets forth the particular regulation for which waiver is sought. Waivers granted in accordance with this section shall not apply to later-enacted or amended regulations by the local authority unless the Commission expressly orders otherwise.

[(f) All restrictive covenants, encumbrances, home owners' association rules, and other nongovernmental restrictions affecting satellite antennas less than one meter in diameter used to receive video programming signals are hereby unenforceable.]

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

**EXHIBIT A-2**  
**Petition for Reconsideration and Clarification and**  
**Comments to Further Notice of Proposed Rulemaking**  
**Irrebuttal Presumption**

Section 25.104: Preemption of Local Zoning of Earth Stations

- (a) Any state or local zoning, land-use, building, or similar regulation that materially limits transmission or reception by satellite earth station antennas, or imposes more than minimal costs on users of such antennas, is preempted unless the promulgating authority can demonstrate that such regulation is reasonable, ~~except that nonfederal regulation of radio frequency emissions is not preempted by this rule.~~ For purposes of this paragraph (a), reasonable means that the local regulation:
- (1) has a clearly defined ~~health radio frequency emissions~~, safety, or aesthetic objective that is stated in the text of the regulation itself; and
  - (2) furthers the stated ~~health radio frequency emissions~~, safety or aesthetic objective without unnecessarily burdening federal interests in ensuring access to satellite services and in promoting fair and effective competition among competing communications service providers.
- (b)(1) Any state or local zoning, land-use, building or similar regulation that affects the installation, maintenance, or use of:
- (A) 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
  - (B) a satellite earth station antenna that is one meter or less in diameter in any area, regardless of land use or zoning category