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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Preemption of Local Zoning
Regulation of Satellite
Earth Stations

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

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APR 17 1995

FEDERAL COMMUNICATIONS COMMISSION

**Hughes Network Systems, Inc.
Petition for Reconsideration and Clarification**

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HUGHES NETWORK SYSTEMS, INC.

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I. Introduction and Summary

Ten years ago, the Commission promulgated a rule, 47 C.F.R. § 25.104, that preempted certain local zoning and other ordinances that were "unreasonable" in impeding the use of satellite technology. Since that time, Hughes Network Systems, Inc. ("HNS"), a leading supplier and operator of very small aperture terminal ("VSAT") satellite systems, has experienced the shortcomings of that rule: as the record of this proceeding amply demonstrates, municipalities across the country have impeded the deployment of satellite technology by the imposition of inconsistent, costly, unnecessary, and time-consuming zoning and permitting requirements.

For the past three years, HNS has urged the Commission to revise and strengthen its rules to ensure that business, education, and industry can in fact enjoy reasonable, inexpensive access to VSAT technology without local regulatory impediments not imposed on VSAT's terrestrial competitors. HNS's experience and the record of this proceeding have taught that only a rule that is clear, simple, and unambiguous, and which

does not require enforcement by the satellite antenna user, can provide the relief needed to ensure that users have access to satellite services and that satellite communications are not unduly burdened vis-a-vis their terrestrial competitors.

On February 29, 1996, the Commission, recognizing that local zoning and permitting requirements continued to place unreasonable burdens on satellite technology, made significant improvements to the current regulatory structure. HNS welcomes these changes, which move toward providing a workable regulatory regime. At the same time, the rule needs to be amended, and the Commission's intent clarified, in a few significant respects.

First, the Commission's apparent authorization of initial review of the presumption of preemption by "a court of competent jurisdiction" opens a Pandora's box of consumer burden, inconsistent interpretation, and general mischief. As the Commission has learned from *Deerfield*, once the issue has gone to the courts, the satellite antenna user faces greatly increased burdens and risks, and the Commission is entitled to no further say in the matter. The Commission should assert exclusive jurisdiction to review municipal challenges to preemption.

Second, the Commission should preempt local regulation of radio frequency ("RF") emissions. RF is a consistent national issue for which varying local regulation cannot be justified. Neither the law nor the political climate precludes the Commission from completely preempting local RF regulation in this proceeding. The attached declaration of the town attorney of Greenburgh, New York, demonstrates that responsible municipal officials will in fact welcome consistent, exclusive federal RF regulations.

The rule needs to be understandable and clear to those who will read it alone, without reference to the *Order* or to any other background materials; a few revisions are therefore necessary. While the Commission clearly intends that users of smaller satellite antennas^{1/} should not be held liable for installation before the municipality has rebutted the presumption against its regulation, further clarifications are necessary to ensure that satellite antenna users are not subjected to local administrative procedures before such a rebuttal. Moreover, we propose that local authorities be required to provide at least 30 days' notice to each satellite antenna user before it enforces and assesses penalties under a local satellite antenna zoning ordinance. Finally, the Commission should make clear that owners of smaller satellite antennas are not subject to the exhaustion requirements set forth in Section 25.104(c).

II. The Commission Should Assert Exclusive Jurisdiction over Section 25.104

The greatest threat to the efficacy of the revised rule is the Commission's decision, not discussed in any detail in the *Order* or the *Notice*, to allow local authorities to rebut the presumption of preemption before a local court and bypass the FCC review process entirely. The Commission apparently has not yet considered all the potential ramifications of permitting local courts to declare the reasonableness of local satellite antenna regulations and grant a "rebuttal of preemption."^{2/}

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1. HNS uses the term "smaller satellite antennas" to indicate those antennas described in Section 25.104(b)(1) (*i.e.*, those antennas one meter in diameter or less in residential areas and two meters in diameter or less in commercial areas).
 2. In other words, the process of rebutting the presumption of preemption envisioned in Section 25.104(b)(2).

A. Initial Judicial Review Precludes FCC Procedures

The Commission adopted the revisions to Section 25.104 in light of *Town of Deerfield, New York v. FCC*,^{3/} in which the Second Circuit held that the Commission may not overrule a determination by a court interpreting the Commission's rules.^{4/} *Deerfield* teaches that the Commission cannot act as the appellate court for local judicial decisions under Section 25.104. The Commission has, therefore, dangerously undermined its own jurisdiction by deciding to allow local officials to obtain a rebuttal of preemption from a local court.^{5/}

The Commission did not, apparently, intend this result. It proposed the revisions in response to *Deerfield* so that it would have the ability "to interpret [Section 25.104] prior to any judicial review,"^{6/} and to fulfill its statutory responsibility to make available a nationwide communications system.^{7/} Specifically, the Commission proposed to serve as "a relatively prompt and relatively inexpensive" forum for resolving satellite antenna

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3. See *Order* at ¶¶ 3-5, citing *Deerfield*, 992 F.2d 420, 428-29 (2d Cir. 1992).
 4. *Deerfield*, 992 F.2d at 428-29. The court held that the FCC could not ignore a federal court decision to uphold a state court determination that Section 25.104 did not preempt a local satellite antenna zoning regulation. *Id.*
 5. Under 25.104(b) as just adopted, the municipality will usually select the forum to decide disputes under Section 25.104(b). Given the choice between close and familiar local courts and a remote and foreign FCC, municipalities are unlikely to seek Commission review of their ordinances.
 6. *Notice* at ¶ 2.
 7. *Notice* at ¶ 48 (Congress charged the Commission to protect the "very significant" federal interest in ensuring "a rapid, efficient, nationwide and world-wide wire and radio communications service with adequate facilities at reasonable charges.").

zoning disputes, in order to minimize the burdens of local proceedings and guarantee "speedy federal review."^{8/}

Instead, by appearing to sanction local judicial review, the revised rule may deprive interested parties of a federal forum and even the fundamental fairness of notice and an opportunity to respond to an attempted rebuttal of preemption. Unlike the FCC, with its public notices published in the Federal Register, local courts have no means of providing notice to all interested parties around the country. HNS, for example, installs its VSATs in thousands of jurisdictions. As rewritten, Section 25.104 would require HNS to hire thousands of local attorneys to keep it abreast of the legal calendar in each jurisdiction where it has installed or plans to install a VSAT to determine if it needs to defend against the rebuttal of preemption of a satellite antenna zoning ordinance.

There is no discussion of these issues in the *Order*; the Commission simply did not contemplate the real-world consequences of sanctioning local courts' applying and interpreting Section 25.104 and granting rebuttals of preemption. The following scenarios illustrate the possibilities if local jurisdictions are permitted to summon satellite antenna owners to court in a local proceeding intended to rebut the presumption:

- The satellite antenna owner decides that switching to landline technology would be less expensive than her litigation costs. She fails to appear to defend against rebuttal, and the court enters a default judgment in favor of the town.
- The antenna owner instead hires a local lawyer to defend the suit. The lawyer, who has never read Section 25.104, is easily outperformed by the town attorney, and the town is granted a rebuttal of preemption.

8. Notice at ¶ 17.

- The president of the local cable television service buys a satellite antenna, and puts up little defense as the town rebuts the presumption.
- A year after one of these judgments is rendered, Amoco places an order with HNS to install VSATs at its five stations in the town. The town informs HNS, its installer, and Amoco that the town's regulation has already been adjudged reasonable by the local court, and begins administrative proceedings pursuant to its "rebutted" ordinance. May HNS appeal to the very court that rendered these judgments? May HNS invoke FCC procedures?^{9/}

B. The FCC Can Review Local Ordinances Only if it Exercises Its Exclusive Jurisdiction

The Commission cannot, and HNS would not ask the Commission to, mandate local judicial procedures, nor can it educate all potential litigants or jurists about satellite antennas and the federal interest in nationwide and global communications.^{10/} The Commission can, however, exercise its exclusive jurisdiction over the narrow issue of rebuttals of preemption.^{11/} By asserting exclusive jurisdiction, the Commission can guarantee: (i) consistent application and interpretation of the rule; (ii) notice and an

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9. These and other questions of procedure are complex and troubling. Will a decision granting a rebuttal of preemption rendered in a case involving an 18" DBS dish or a 10-foot C-band antenna be binding on the installation of a VSAT? Prudential doctrines of *res judicata*, collateral estoppel and *stare decisis* may preclude further proceedings after a court has rendered a decision granting rebuttal.
 10. HNS does not suggest that local courts should not hear purely local disputes involving local ordinances with local litigants. To the extent the proper interpretation and application of Section 25.104 is at issue, however, the FCC's expertise in federal communications policies and its ability to develop a uniform body of law requires that exclusive jurisdiction reside with the Commission.
 11. The Commission, by adopting and revising Section 25.104, has already recognized its paramount role in regulating satellite services. The Commission's duty to protect the federal interest in nationwide communications service is not altered by the jurisdiction of the party desiring access.

opportunity to participate in the decisionmaking process for interested parties; and (iii) reduced costs and increased efficiency in the review process.^{12/}

It is widely recognized that "agency adjudication offers enormous advantages over court adjudication."^{13/} Agency adjudication is less expensive, yields more consistent and accurate results, and relieves the already congested courts of a significant burden.^{14/}

First, reducing the expense of litigation is necessary to achieve the Commission's objectives, "to assure access to satellite signals and to promote competition between communications services."^{15/} Even if a VSAT user successfully defends in a local court against a rebuttal, litigation expenses will likely exceed the cost of the equipment itself, the very burden the Commission is attempting to remove.^{16/} In their comments, local governments recognized that an expensive resolution of a local satellite antenna zoning dispute can obscure the correct substantive result, serving neither party's interest.^{17/} In

12. HNS still believes, however, that adopting a per se rule against the enforcement of local satellite antenna regulations is the only certain way to ensure parity between VSAT systems and their terrestrial competitors, which encounter little local regulation.

13. Davis & Pierce, ADMINISTRATIVE LAW TREATISE, Vol. I at § 2.8 (3d ed.).

14. *Id.*

15. *Order* at ¶ 23. The Commission has recognized that even the cost of pursuing variances and other nonfederal administrative remedies can raise the cost of VSAT systems enough to force a user to seek another communications alternative. *Id.* at ¶¶ 19-23 (record reveals "numerous regulations that are so burdensome that antennas are rendered useless").

16. *See Order* at n. 92 (recognizing the litigation can be so burdensome as to force users to abandon satellite technology).

17. *See Comments of Texas* at 5.

response, the Commission has stated that its own review process will provide "relatively prompt and relatively inexpensive resolution of satellite-antenna zoning disputes,"^{18/} requiring only paper filings, not personal appearances.^{19/}

Second, the Commission has the expertise to produce a consistent and fair body of case law. Generalist courts will be far less well equipped than the FCC to weigh the federal interests in the universal reception of satellite signals and competition in the communications marketplace. Moreover, each lawsuit to rebut Section 25.104(b) will likely be a case of first impression, given the thousands of jurisdictions. On the other hand, the Commission will quickly gain experience in resolving disputes under the new rule, which can be applied to every subsequent case. The Commission's public notice system will also allow most interested parties to participate in the proceedings, either formally or informally, offering the Commission the benefit of many different viewpoints, an advantage often not available in the context of court litigation. Commission decisions will also provide guidance as to the parameters of the preemption of Section 25.104 to both industry and local officials that cannot be given by local court decisions. Third, while the parties still retain their right to seek judicial review after the Commission has brought its expertise to bear upon the case,^{20/} requiring initial Commission review will reduce the burden on already congested courts.

18. *Notice* at ¶ 49.

19. *Order* at ¶ 47.

20. *See* 47 U.S.C. § 402(a); *see also* 18 U.S.C. § 2342(1) (allowing any United States Circuit Court, other than the Federal Circuit, to review Commission decisions made reviewable by Section 402(a)).

In order to implement the Commission's exclusive jurisdiction in this area, Section 25.104 should be changed as follows. Paragraph (b)(1) should be amended to read, "a final declaration from the Commission," deleting "or a court of competent jurisdiction." Paragraph (b)(2) should be amended to read, ". . . may be rebutted upon a showing to the Commission that the regulation . . ." And a new Paragraph (g) should be added:

- (g) The sole forum for adjudicating any matters within this section shall be the Commission.^{21/}

III. Local Radio Frequency Regulations Must be Reasonable

In their petitions for rulemaking and the comments in this proceeding, HNS and other parties asked the Commission to preempt any and all local regulations based on RF emissions.^{22/} As HNS stated in its comments, RF is more appropriately regulated on the national, not local level, as its characteristics do not change from community to community. There are, in fact, no "traditionally local" concerns that suggest that RF emissions should be the subject of individualized local regulations.

The Commission declined to preempt all local RF regulation,^{23/} but decided

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- 21. The changes to Section 25.104 suggested by HNS are illustrated in a proposed rule, attached hereto as Exhibit A.
 - 22. *See, e.g.*, Comments of HNS at 31-34; Comments of GE at 14.
 - 23. *Order* at ¶ 52. The Commission contends that "the record in this proceeding is insufficient to take action on this issue." This is incorrect as a matter both of fact and law. The issue was clearly addressed in the comments; the Commission notes that several parties urged it to preempt all RF regulation. *Id.* at n.99. The Commission specifically raised the issue in the Notice of Proposed Rulemaking, at ¶ 60 & n.75, and proposed a rule that would permit local regulation of radio frequency emissions. After reviewing the comments in the proceeding, the Commission clearly has the authority to abandon its decision to allow local RF regulation in this proceeding, rather than require a separate rulemaking on the issue. *Order* at ¶ 52. The

instead to "examine the reasonableness of any health or safety regulation."^{24/} The revised rule, however, includes an ambiguous statement in Paragraph (a) that "nonfederal regulation of radio frequency emissions is not preempted by this rule." This could be misinterpreted to permit any and all local regulation of RF emission, including a complete ban on transmitting antennas.

If the Commission adheres to its decision not to preempt *all* local RF regulation, it at least must ensure that transmitting satellite antennas are not subjected to *unreasonable* local RF ordinances and are accorded the same regulatory treatment as other RF-emitting devices. The Commission needs to clarify when and how it will review local regulation of RF emissions. There is no basis for allowing local officials absolute discretion to promulgate any regulation, no matter how burdensome, that is based upon a desire to limit or eliminate RF radiation, particularly if the local jurisdiction singles out satellite antennas for discriminatory treatment.

Commission's determination that it lacks such authority leads "to the absurdity that . . . the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary." *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 n.51 (D.C. Cir. 1973). In fact, an agency may reject its own tentative conclusions and adopt a proposal raised in the public comments, as long as it is a "logical outgrowth" of the proposed rule. *National Resources Defense Council v. Thomas*, 838 F.2d 1224, 1242-43 (D.C. Cir. 1988). HNS urges the Commission to reconsider its decision to allow local regulation of RF emissions and to amend Section 25.104 to preempt all such regulations in this proceeding.

24. As discussed below, there can be no reasonable health regulation besides that regulating RF emissions. As to safety, the Commission has found that consumers and professional installers can be relied upon to install satellite antennas without the threat of regulatory enforcement. *See Order* at ¶ 35.

Allowing this RF provision to remain in the rule could render satellite antennas "useless."^{25/} Consider a real case. The Town of Greenburgh has on its books a complete ban on transmitting antennas, which HNS has asked the Commission to declare preempted pursuant to Section 25.104.^{26/} After filing the petition, HNS has worked closely with the Town to revise its existing satellite antenna regulations and to convince the citizens involved in the process that VSAT antennas present no health concerns.^{27/}

The Commission's revision to Section 25.104 to include the statement that "nonfederal regulation of radio frequency emissions is not preempted" reversed months of education in Greenburgh. This provision almost defeated the effort to revise the Greenburgh Town Code. Greenburgh Town Attorney Rick Turner, in his declaration attached hereto as Exhibit B, expresses the concern that the new rule provides "an open invitation to local regulation in a field that requires professional training and expertise unlikely to be found at the local level."^{28/}

HNS, like Mr. Turner, is "puzzled as to the meaning and scope" of this provision in Section 25.104(a).^{29/} Even local regulations based upon honestly-held concerns about RF exposure could leave transmitting satellite antennas unprotected by Section 25.104.

25. *Order* at ¶ 23.

26. *See* Petition for Declaratory Ruling of Hughes Network Systems, 134-SAT-DR-95 (filed August 3, 1995).

27. *See* Answer of the Town of Greenburgh, 134-SAT-DR-95 (filed Sept. 15, 1995).

28. Declaration of Frederick W. Turner, dated April 17, 1996, at ¶ 7 ("Turner Dec.").

29. Turner Dec. at ¶ 6.

A town's complete ban on transmitting satellite antennas -- an absolute guarantee that no RF will be emitted -- may be left unreviewable. A requirement that transmitting antenna owners hire an expert to measure actual RF emissions on each antenna may be left unreviewable. A regulation mandating chain-link fencing and warning signs surrounding a VSAT may be left unreviewable. Combined with the Commission's initial determination that it will allow local authorities to bypass FCC review entirely, Section 25.104(a) will allow a local courts to validate such burdensome and unreasonable RF regulations and preclude any opportunity for the FCC to rule otherwise.

If the Commission is to permit local regulation of transmitting satellite antennas based upon RF emissions, then it must demand that local jurisdictions regulate other RF-emitting devices, such as cellular and PCS telephones and tower sites, microwave ovens, and CB radios, in the same manner. Since 1986, the Commission has recognized that "discriminatory local regulation" against satellite antennas is contrary to its "competitive regulatory policies",^{30/} and discrimination against satellite antennas is at the heart of this proceeding. Allowing local regulators to single out transmitting satellite antennas as the sole source of RF emissions would be a giant step backward.

The RF language in the revised rule is somewhat ambiguous and confusing. Paragraph (a) states that "nonfederal regulation of radio frequency emissions is not preempted," but Paragraph (b) does not mention RF emissions regulation. It is unclear whether owners of smaller satellite antennas are able to install without regard to local RF

30. *Preemption of Local Zoning Regulations of Receive-Only Satellite Earth Stations*, 51 Fed. Reg. 5519 at ¶ 26 (Feb. 14, 1986).

regulations (as they should be), or are required to follow such regulations without being entitled to the rebuttable presumption.

Local satellite antenna ordinances based upon "health" concerns should, at least, be limited to RF emissions regulation. The FCC has made clear that it considers RF emissions as the only legitimate health concern regarding satellite antennas, and it is the only such concern that has been identified in this record.^{31/} Accordingly, there can be no reasonable local health regulation of satellite antennas that is not based upon RF emissions. The inclusion of both the RF statement in Paragraph (a) and "health" as a legitimate objective of local regulation throughout the text is therefore redundant.

To eliminate this redundancy and ensure that the Commission can review local RF regulations for their reasonableness, the words "radio frequency emissions" should be substituted for "health" throughout the text of the rule. This will enable local authorities to use reasonable RF emissions objectives as one factor in rebutting a presumption under Paragraph (b)(2), and will be a permissible justification for regulation of larger satellite antennas pursuant to Paragraph (a). In order to prevent discrimination against satellite transmitting antennas, the Commission should also add the following language to Paragraph (a), after "such regulation is reasonable": "provided that nonfederal regulation of radio frequency emissions shall not discriminate among sources of such emissions." Similar language should be included in Paragraph (b)(2)(D): "to the extent it regulates radio frequency emissions, does not discriminate among sources of such emissions."

31. *See Order* at ¶ 52.

IV. Satellite Antenna Users are not Retroactively Liable

The presumptive preemption in revised Section 25.104(b) makes clear that owners of the smaller antennas covered by that paragraph may install their antennas without regard to local antenna regulations that have not yet been granted a rebuttal of preemption. In the *Order*, the Commission stated that antennas owners will have no retroactive civil or criminal liability for noncompliance with that local regulation during the pendency of any litigation.^{32/} This should be set forth in the rule itself.

Moreover, the rule contains no requirement that a local authority give the antenna owner a grace period or even notice before it enforces a previously-preempted ordinance. The *Order's* turgid "caution" to antenna users that some regulations may not be preempted is inconsistent with the Commission's determination that satellite antenna users may install now and fight later.^{33/}

The Commission should therefore require local authorities to provide written notice to the satellite antenna owner or the installer before enforcing a regulation that has been adjudged not preempted by Section 25.104. A VSAT user or installer should be able to rely upon the Commission's preemption rule without engaging in legal research first to find

32. *Id.* at ¶ 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.").

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

which local ordinance applies to its antenna and then to determine whether that regulation has been validated.^{34/}

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 at least 30 days' written notice of such rebuttal to every 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. The thirty-day notice period will also allow for communication between the installer, the antenna owner and the property owner to determine the appropriate course of compliance.^{35/}

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] commencing 30 days from the date hereof."

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34. HNS recognizes that if a local authority does obtain a rebuttal of preemption, the satellite antenna user must then come into compliance with the regulation after notice has been given. In other words, the principle of "install now, fight later" comes with the risk of deinstallation or other compliance measures.
 35. As HNS noted in its initial comments, some VSAT users (Amoco Oil Company, for example) are large businesses with layers of management. A notice period is particularly important to these VSAT users, as the local authority may send the notice to the national headquarters, which then in turn needs to contact the appropriate person with control over the VSAT installation.

In order to make clear that antenna owners are not retroactively liable for installing small dishes and to provide an adequate notice period for compliance, 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.

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

V. Small antenna owners 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.^{36/}

Local zoning administration has a long history, however, and it may be difficult to convince local regulators that VSAT users and installers need not acquire a permit, attend hearings or seek variances before or after installing their antennas. The rule must be crystal 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), the passive language somewhat clouds the issue. By

36. See Order at ¶ 31.

changing the language in Paragraph (b)(1) to the active from the passive voice, 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 require a permit, 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).

VI. Conclusion

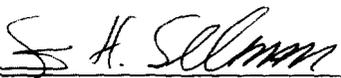
After a decade of difficulty in enforcing its preemption of local satellite antenna zoning regulations, the FCC has revised its rule. The revision, however, would allow local courts to interpret and apply Section 25.104, effectively precluding FCC review of local ordinances. This must be corrected.

In its reluctance to address the issue of RF emissions, the Commission has also left ambiguous the parameters of appropriate local regulation of satellite transmitting antennas. The Commission must clarify its intention to scrutinize closely local RF regulations for smaller satellite antennas. If the Commission provides efficient and fair processes for review of local ordinances pursuant to Section 25.104, and makes the rule self-explanatory so that both local authorities and satellite antenna users can understand its limits and objectives, the Commission will have achieved its objectives, and will not need to address this issue again in 2006.

Dated: April 17, 1996

Respectfully submitted,

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EXHIBIT A-2
Petition for Reconsideration and Clarification
Hughes Network Systems, Inc.
Proposed Rule 25.104

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, provided that nonfederal regulation of radio frequency emissions shall not discriminate among sources of such emissions. For purposes of this paragraph (a), reasonable means that the local regulation:
- (1) has a clearly defined radio frequency emissions, safety, or aesthetic objective that is stated in the text of the regulation itself; and
 - (2) furthers the stated 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 state or local authority may take any action of any kind, including civil, criminal, or administrative proceedings, or require a permit, or issue a citation, 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 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 to the Commission that the regulation in question:

- (A) is necessary to accomplish a clearly defined radio frequency emissions 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 radio frequency emissions or safety objective;
- (C) is specifically applicable on its face to antennas of the class described in paragraph (b)(1); and
- (D) to the extent it regulates radio frequency emissions, does not discriminate among sources of such emissions.

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.

(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. If a state or local authority has obtained a waiver for 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 waiver to any satellite antenna user against whom it wishes to enforce the regulation.

(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.