BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In The Matter of	)	
	)	
Preemption of Local Zoning Regulation of Satellite Earth Stations	)	**IB Docket No. 95-59**
	)	

To: The Commission

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COMMENTS OF THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

Pursuant to Section 1.415 of the Rules and Regulations of the Commission, National Rural Telecommunications Cooperative ("NRTC"), by its attorneys, hereby submits these Comments concerning the Commission's Report and Order ("Order") and Further Notice of Proposed Rule Making ("Further Notice") in the above-captioned proceeding.[1/] For this proceeding, the Commission seeks to expand federal preemption of regulations which affect satellite earth stations by including nongovernmental regulations such as homeowners' association restrictions and deed covenants. NRTC submits that the satellite industry and the viewing public would benefit greatly from these proposed rule changes.

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[1/] Report and Order and Further Notice of Proposed Rule Making, released March 11, 1996.

I. BACKGROUND

1. NRTC is a non-profit cooperative association comprised of 521 rural electric cooperatives and 231 rural telephone systems located throughout 48 states. NRTC's mission is to assist member cooperatives and affiliates in meeting the telecommunications needs of more than 60 million American consumers living in rural areas throughout the country. Through the use of satellite distribution technology, NRTC is committed to extending the benefits of information, education and entertainment programming to rural America -- on an affordable basis and in an easy and convenient manner -- just like those services are available in more populated areas of the country. NRTC seeks to ensure that rural Americans receive the same benefits of the information age as their urban counterparts.

2. Using C-Band technology, NRTC and its Members currently market and distribute packages of satellite-delivered programming, called "Rural TV®," to more than 75,000 Home Satellite Dish ("HSD") subscribers throughout the country. C-Band distribution technology requires the use of relatively large (6-8') receiving antennas.

3. NRTC also provides high-powered Direct Broadcast Satellite ("DBS") services to rural subscribers across the country. Under an Agreement with Hughes Communications Galaxy, Inc. ("HCG") and its successor-in-interest, Direct TV Inc.,

NRTC currently markets and distributes up to 150 channels of popular cable and broadcast programming ("Direct TV®") to more than 350,000 rural households equipped with 18-inch DBS satellite receiving antennas and equipment.

4. Accordingly, NRTC is engaged in the business of making available for purchase, by subscribers and customers, multiple channels of video programming. As a result, NRTC is a Multichannel Video Programming Distributor ("MVPD") pursuant to 47 C.F.R. § 76.1000(e).

II. COMMENTS

5. Section 207 of the Telecommunications Act of 1996 (the "1996 Act") requires the FCC to preempt all state and local regulations that interfere with the federal interest in ensuring access to DBS service. Section 207 specifically provides that the Commission must:

> promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services. 47 U.S.C. § 207.

6. In its Report and Order, the Commission adopted a rebuttable presumption that zoning restrictions on satellite antennas which are one meter or less in any area and two meters or less in commercial or industrial areas are preempted.

In the Further Notice, the Commission tentatively concluded that its newly adopted preemption rule is a sufficient response to Section 207 as it applies to state and local zoning restrictions.

7. NRTC maintains that the Commission's decision to apply a rebuttable presumption against such local zoning restrictions is not sufficient to fulfill Congress' mandate. NRTC believes that by requiring the Commission to "prohibit" all restrictions that "impair" reception of video programming sent to DBS antennas, Congress established a per se preemption standard. NRTC believes that only a per se rule that applies to all DBS antennas can fulfill Congress' directive.

8. The Commission invited comment on whether video programming sent to medium powered Fixed Satellite Service ("FSS") antennas should be included under the protection of Section 207, even though they are not DBS antennas. Notice at ¶ 60. NRTC opposes extension of the protection of Section 207 to such FSS programmers because, as the House Report explains: "the 'Direct Broadcast Satellite Service' is a specific service that is limited to higher power DBS satellites." H.R. Rep. No. 204, 104th Congress, 1st Sess. 124 (1995).

9. The Commission also seeks comment on the impact of DBS service under the proposed rules if DBS service is provided to areas outside the continental United States, i.e., Alaska and Hawaii, using larger antennas. Notice at ¶ 60. NRTC

believes that regardless of the size of the DBS antenna, Congress clearly provided for preemption of regulations restricting provision of DBS services to consumers. If, as a matter of DBS reception technology, DBS antennas must be larger than one meter in order to serve Alaska and Hawaii, this should not alter the FCC's statutory obligation to preempt restrictions on DBS antennas.

10. Section 207 is not limited to preemption of zoning restrictions; instead, Congress flatly and unequivocally directed the FCC to prohibit restrictions on the receipt of video programming via DBS antennas. The Commission correctly observed in its Further Notice that the House Committee Report illustrates this requirement by stating that restrictive covenants, encumbrances and homeowners' association rules shall be unenforceable to the extent that they contravene Section 207. Further Notice at ¶ 56.

11. Local, nongovernmental restrictions against DBS antennas are commonplace in hundreds of communities. These restrictions vary from one neighborhood to another, making it impossible for DBS providers to advise consumers concerning all applicable restrictions. Such restrictive covenants, encumbrances and homeowners' association rules often fail to distinguish one type of antenna from another, despite the obvious differences in size and aesthetic character of various types of antennas. Attached as Exhibit A is an example of such a random restriction imposed by the Colorview Townhomes in St. George, Utah. The practical effect of

this restriction is that there are no outside antennas permitted by the architectural committee of Colorview Townhomes; thus, the only means of receiving video programming in the community is through cable television service. NRTC urges the Commission to preempt these types of local, nongovernmental restrictions on a per se basis, because they impair a viewer's ability to receive nationwide DBS programming.

III. CONCLUSION

12. NRTC supports the decision made by the Commission in its March 11, 1996 Report and Order to revise the rules governing federal preemption of local zoning regulations which concern satellite earth stations. For too long, local regulations have blocked growth of satellite-based services. NRTC therefore supports the Commission's decision to amend Section 25.104 of its Rules and Regulations to permit broader federal preemption of unreasonable zoning restrictions.

13. NRTC also supports the Commission's decision to permit parties aggrieved by local satellite zoning restrictions to seek redress from the Commission at a much earlier stage in the legal process than currently available. These decisions should spur growth in the satellite industry and benefit video programming consumers nationwide.

14. NRTC believes, however, that Section 207 of the 1996 Act requires the Commission to apply a per se preemption rule against restrictions on DBS antennas. This per se preemption should apply to both local governmental zoning regulations and nongovernmental restrictions such as homeowners' association rules, encumbrances, and deed covenants.

WHEREFORE, THE PREMISES CONSIDERED, the National Rural Telecommunications Cooperative urges the Commission to consider these Comments and to revise its rules in accordance with the views expressed herein.

Respectfully submitted,

NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

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Its Attorneys

Dated: April 15, 1996

EXHIBIT A

SECOND AMENDMENT TO

DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS

OF

COLORVIEW TOWNHOMES

WHEREAS, Dean T. Terry Investments, a Utah Corporation, hereinafter referred to as "Declarant" established the Declaration of Covenants, Conditions and Restrictions of Colorview Townhomes and recorded the same in Book 351, at Pages 935-964, as Entry No. 262784, in the official records of the Washington County Recorder, State of Utah, and recorded the First Amendment to said Declaration in Book 352, at Pages 509-510, Entry No. 263065, and it being the Declarant's intention to record a second amendment of the Declaration of Covenants, Conditions and Restrictions of Colorview Townhomes.

NOW THEREFORE, the Declarant, Dean T. Terry Investments, does hereby amend the amended Declaration of Covenants, Conditions and Restrictions of Colorview Townhomes to read as follows:

I. Delete paragraph 3., Article VI, entitled Maintenance of Evaporative Coolers. Replace paragraph 3 of Article VI with the following:

3. Evaporative Coolers. Maintenance and repair of all evaporative coolers shall be the responsibility of the living unit owner upon which said cooler is located. Owners of living units with evaporative coolers may, at their option and sole expense, replace said evaporative coolers with refrigeration and/or heat pump units. The above notwithstanding, and in accordance with the intention to preserve the uniform and aesthetic nature of the project, the Association may, at its option contract and pay for the maintenance and/or repair of any or all of the evaporative coolers. In that event the Association shall be reimbursed by the living unit owner for the actual costs of such maintenance and/or repairs.

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the descript In conj th the foregoing amendments, of Phase perty contained in Exhibit "B" to of Coven conditions and Restrictions of mes, is h amended to include the following parcels of p rty as described in Exhibit "A" attached hereto and made a p herein by this reference.

Ex as herein amended, or amended by prior amended or supplemen declaration, the Declaration of Covenants, Conditions a estrictions of Colorview Townhomes remains unchanged.

DATED this 12 day of FEB., 1986.

DEAN T. TERRY INVESTMENTS

By Dean T. Terry Pres.
Dean T. Terry, President

SUBSCRIBED and SWORN to before me this 12th day of February 1986, by Dean T. Terry, President of Dean T. Terry Investments, a Utah Corporation who personally appeared before me and signed the foregoing document for purposes therein set forth.

CAROLEE HALL NOTARY PUBLIC STATE OF UTAH

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Residing at: St. George, Ut.

My Commission Expires:
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or on a leash attended by an owner in the Common Areas.

12. Garbage Removal. All rubbish, trash and garbage shall be regularly removed from the Property, and shall not be allowed to accumulate thereon. All clotheslines, refuse containers, woodpiles, storage areas and machinery and equipment shall be prohibited upon any Lot unless obscured from view of adjoining Lots and streets by a fence, building, or appropriate screen.

13. Electronic Antennas and Stove or Chimney Flues. No television, radio, or other electronic antenna or devise of any type shall be erected, constructed, placed or permitted to remain on any of the Living Units or structures on the Lots in said tract unless and until the same shall have been approved in writing by the Architectural Committee of the Association. No stove flue, chimney or other similar venting system shall be installed to the exterior of the unit, nor shall any heating device be installed other than that provided with the unit without the written approval or the Architechtural Control Committee.

14. Exception for Declarant. Notwithstanding the restrictions contained in this Article VII, for the seven-year period following the date on which this Declaration is filed for record in the office of the County Recorder of Washington County, Utah, Declarant shall have the right to use any Lot or Living Unit owned by it and any part of the Common Areas reasonably necessary or appropriate, including, but not limited to, a model or other temporary structure as a sales office, in furtherance of any construction, marketing, sales, management, promotional, or other activities designed to accomplish or facilitate improvement of the Common Areas or improvement and/or sale of all Lots owned by Declarant. Declarant may also conduct collateral business activity on the Project.

VIII. ARCHITECTURAL CONTROL

1. Architectural Control Committee. The Board of Trustees of the Association shall appoint a three-member Committee the function of which shall be to insure that all exterior of Living Units and landscaping within the Property harmonize with existing surroundings and structures. The Committee need not be composed of Owners. If such a Committee is not appointed the Board itself shall perform the duties required of the Committee.

2. Submission to Committee. No Living Unit, accessory or addition to a Living Unit which is visible from the Common Areas, landscaping, or other improvement of a Lot which is visible from the Common Areas shall be constructed, maintained, or accomplished, and no alteration, repainting, or refurbishing of the exterior of any Living Unit shall be performed, unless complete plans and specifications therefor have first been submitted to and approved by the Architectural Control Committee.

3. Standard. In deciding whether to approve or dis-