

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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In the Matter Of )  
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Implementation of Section 207 of the )  
Telecommunications Act of 1996 )  
 )  
Restrictions on Over-the-Air )  
Reception Devices: Television Broadcast )  
and Multichannel Multipoint Distribution )  
Service )

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

CS Docket No. 96-83

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**COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS**

**I. INTRODUCTION AND SUMMARY**

In many instances, and over many years, we have seen how actions of local zoning authorities, and more frequently the "restrictive covenants" of builders and homeowners associations, have prevented members of the viewing public from employing outdoor receiving antennas to pick up over-the-air television broadcast stations. For local television broadcasters -- and indeed also for a regulatory agency licensing and regulating stations to serve a local audience -- one of the most fundamental goals is to ensure that members of that audience be able to receive the signals designed to serve them. However, the actions of these non-federal officials and organizations often have thwarted this goal and have impaired full participation of the viewing audience in the receipt of free, over-the-air television.

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In Section 207 of the Telecommunications Act of 1996 (“Telecom Act”),<sup>1</sup> the United States Congress has taken steps to help ensure the attainment of that goal. As described below, that section of the Telecom Act *requires* the FCC to begin and swiftly complete a rule making that will result in rules intended to ensure viewers’ use of such antennas.<sup>2</sup> In the *Notice of Proposed Rule Making*<sup>3</sup> in the above-captioned proceeding the Commission has instituted the required rule making.

The National Association of Broadcasters (“NAB”)<sup>4</sup> strongly believes that the Commission has no choice but to adopt rules that will implement the will of Congress. That Congressional mandate is for the FCC to promulgate rules that will, in pertinent part, “prohibit restrictions that ‘impair’” a viewer’s ability to employ an outdoor antenna capable of receiving over-the-broadcast stations.

Already the FCC has adopted rules to deal with some of the DBS aspects of the law.<sup>5</sup> In general, this approach should serve as a useful model for the adoption of preemption rules applicable to over-the-air television antennas. However, the Commission should ensure that the rules ultimately adopted in the instant proceeding comport with the statutory language: to preempt restrictions that “impair” the use of outdoor, over-the-air

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<sup>1</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 114 (1996).

<sup>2</sup> That statutory provision also directs the FCC to adopt similar preemption rules for Direct Broadcast Satellite (“DBS”) receive-only antennas and antennas used for the reception of Multi-Channel Multipoint Distribution Service (“MMDS”) signals.

<sup>3</sup> *Notice of Proposed Rule Making* in CS Docket No. 96-83, FCC 96-151 (1996).

<sup>4</sup> NAB is a nonprofit, incorporated association of television and radio stations and broadcast networks which serves and represents the American broadcast industry.

<sup>5</sup> *See Report and Order and Further Notice of Proposed Rule Making* in IB Docket No. 95-59, FCC 96-78 (Adopted Feb. 29 and Released Mar. 11, 1996). Here the FCC adopted zoning preemption rules for DBS antennas; the same document asks for further comment on, *inter alia*, preemption of non-government restrictions (*e.g.* restrictive covenants, etc.) on the installation and use of DBS dishes.

television broadcast reception antennas. Such rules would not be limited to cases where there is a "blanket ban" on the use of such antennas; however, nor would they necessarily preempt each and every local government regulation/restriction that might apply to the installation of such antennas.

**II. THE TELECOM ACT MANDATES FEDERAL PREEMPTION --  
PREEMPTION THAT WILL SERVE IMPORTANT COMMUNICATIONS  
POLICY PURPOSES**

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Section 207 of the Telecom Act states:

**SEC. 207. RESTRICTIONS ON OVER-THE-AIR RECEPTION DEVICES**

Within 180 days after the date of enactment of this Act, the Commission shall, pursuant to Section 303 of the Communications Act of 1934, 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.

Thus, by August 8, 1996, 180 days after the date that President Clinton signed the Act into law, the FCC *must* do what the Congress had directed: adopt rules that effectively will preempt non-federal restrictions that *impair* a viewer's ability to receive, *inter alia*, the signals from over-the-air broadcast stations.

As noted above, the Commission already has taken a related action at it applies to antennas designed to receive DBS signals. That action is important, and for two reasons. First, it serves as a useful model for action in the instant proceeding. Second, and equally important, it signals a need for the Commission to take a complementary approach in its

mission to adopt a preemption rule for outdoor antennas capable of receiving over-the-air television broadcast signals.

Clearly, the Commission must take action here in response to the direct and unequivocal Congressional direction. But, other interests of communications policy also are involved here. That is, preemption of restrictions on outdoor antenna use will better ensure full competition in the video marketplace.

Obviously, the ability to receive television signals from a rooftop antenna will give viewers a clear competitive choice, in light of the service available from cable television and DBS sources, as well as from other current and future multi-channel video providers. Moreover, under the terms of the Satellite Home Viewer Act,<sup>6</sup> a viewer living in an area within the Grade B contour of a network-affiliated television broadcast station may not be provided that network's television programming from a satellite carrier. However, if that viewer is kept from employing an outdoor antennas, he or she may thus be deprived of terrestrial over-the-air and satellite sources of that network's programming. As a result, that viewer's only option for obtaining such network programming would be to subscribe to a cable television system. Thus, preemption action in the instant proceeding, in addition to carrying the specific will of Congress as articulated in the Telecom Act, will help achieve greater competition in the video marketplace.

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<sup>6</sup> P.L. 103-369. *See also* 17 U.S.C. § 119.

**III. FCC RULES BASED ON THE LANGUAGE OF THE ACT WILL ACHIEVE A LAWFUL AND REASONABLE APPROACH TO FEDERAL PREEMPTION**

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**A. The Commission's Rules Flatly Should Prohibit Restrictions by Non-Government Entities That Impair Installation and/or Use of Outdoor, Terrestrial Broadcast Television Reception Antennas.**

If one thing is clear from a reading of Section 207 of the Telecom Act, it is that *all* private restrictions that impair outdoor TV antennas installation and use must fall. No longer may homeowners association restrictive covenants, etc., be allowed to prohibit or otherwise impair outdoor TV antenna use -- not for purposes of aesthetics or any of the other reputed bases for such non-government restrictions.

Thus, the Commission must adopt rules that completely will bar such restrictions from impairing installation and use of outdoor receiving antennas for over-the-air broadcast stations. Though the record in this proceeding and in the related proceeding dealing with satellite dish antennas reflects the howls of protests from such homeowners associations, builders and related organizations, they truly have no right of recourse at the FCC. The Congress has made the outcome of the instant proceeding truly predictable -- complete preemption of private restrictions that impair installation and/or use of outdoor antennas used for reception of terrestrial television stations.

**B. The Commission's Preemption Rules Should Apply to all Non-Federal, Government Restrictions Which "Impair" Such Antennas' Construction and/or Use.**

At the outset, NAB observes that the Commission's proposed rule for preempting local zoning authorities' and other non-federal governmental units' restrictions or

regulations applying to outdoor terrestrial television receiving antennas departs from the statutory language of preempting those restrictions and ordinances, etc. that “impair” such antennas’ installation and/or use. Additionally, for those zoning or other non-federal government restrictions that “affect” outdoor TV antenna use, the FCC has proposed a system under which the state/local authority may apply for a full or partial “waiver” of the FCC preemption rule.<sup>7</sup>

NAB recommends that the FCC adopt a preemption rule – for non-federal government and private restrictions – that applies to all such ordinances, rules, covenants, etc. that “impair” installation and/or use of outdoor TV antennas. By using this language the FCC will more squarely respond to the Congressional directive and will adopt a preemption standard that will best be designed to deal with restrictions that should be negated. Also, by using the “impair” language in its rule, the FCC will avoid being inundated by the likely flood of waiver requests coming in from those non-federal governmental authorities that may have adopted a zoning ordinance, etc. that even remotely “affects” the installation and/or use of outdoor TV antennas but does not “impair” their use.

**C. The Consumer/Viewer Should Bear No Burden of Demonstrating the Unreasonableness of Any Governmental Restriction Which Impairs Antenna Construction and/or Use.**

To the extent that the Commission believes it is necessary to adopt a formal “waiver” approach for dealing with state or local authorities (but not private entities

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<sup>7</sup> NAB notes with favor the fact that the Commission has not proposed any such “waiver” opportunity for the non-government entities that seek to impose restrictions that would impair over-the-air, terrestrial television reception antenna installation and/or use.

imposing restrictive covenants, encumbrances, etc., to which a “no exceptions” FCC rule will apply) that have imposed or seek to impose a zoning or other regulation that would “impair” installation and/or use of an outdoor TV antenna, the burden of obtaining such a waiver must be on the zoning board or other state/local government authority. It should not be on the consumer/viewer.

Moreover, until the time that the FCC acts on any such waiver request, the consumer/viewer *must* be allowed to install/use the outdoor antenna to receive terrestrial, over-the-air broadcast television stations.

**IV. THE COMMISSION’S PREEMPTION RULES SHOULD NOT DISTINGUISH UPON THE BASIS OF THE “SIZE” OF THE BROADCAST RECEIVING ANTENNA**

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NAB notes that the Commission’s *Report and Order and Further Notice of Proposed Rule Making* in IB Docket No. 95-59<sup>8</sup> adopted a regulatory scheme for space satellite receive antennas that distinguishes various antennas on the basis of size, and adopts different regulatory provisions for larger as opposed to smaller, less than one meter dishes. Correspondingly, the Commission’s *Notice of Proposed Rule Making* in the instant proceeding asks whether antenna “size” should be a consideration in the breadth and impact of the Commission’s preemption rules for, *inter alia*, antennas designed to receive terrestrial, over-the-air television broadcast signals. We urge the Commission *not* to employ such a size consideration insofar as outdoor TV antennas are concerned.

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<sup>8</sup> *Report and Order and Further Notice of Proposed Rule Making* in IB Docket No. 95-59, *supra* note 5.

By specifying antenna size in its dish preemption proceeding, the Commission sought to implement the will of Congress – which *did* distinguish on the basis of size.<sup>9</sup> But, again, the reference to size by the Congress – and by the FCC – was to distinguish among different space satellite communications services. The size distinction served to distinguish DBS service and DBS antennas from those associated with Ku and C band operations.

However, by specifying “over-the-air reception of television broadcast signals,” and making no reference to the size or other characteristics of such antennas, it is clear that the Congress sought to preempt all such restrictions that would impair use of *all* outdoor TV antennas.<sup>10</sup> The choice of antenna size is governed by the reception conditions where the consumer/viewer resides. In some locations a modest size antenna on a short mast will be adequate; in other locales an antenna of greater size and/or on a taller mast may be required to ensure reliable reception. The FCC must adopt regulations that will preempt restrictions which impair the installation and/or use of any size antenna designed for reception of terrestrial, over-the-air television broadcast stations.

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<sup>9</sup> The Commission’s *Notice* refers (at n. 14) to H.R. Report No 204, which, at 123-24, explained that the term “direct broadcast satellite services” referred to those space satellite services employing higher powered satellite and, correspondingly, smaller receive dishes.

<sup>10</sup> The Congress also did not distinguish between the antennas used to receive conventional analog television signals from those (which should not vary significantly in size or configuration) which will receive digital television signals from terrestrial broadcast stations.

**V. CONCLUSION**

For the reasons stated above – and consistent with the unambiguous direction of the United States Congress – NAB urges the Commission to adopt a preemption system that effectively will negate private and non-federal government restrictions that impair the installation and/or use of outdoor antennas designed for the reception of terrestrial, over-the-air television broadcast stations.

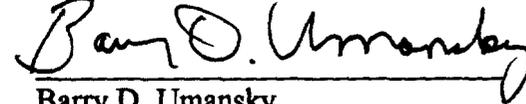
Respectfully submitted,

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