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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

May 6, 1996

Mr. William F. Caton  
Acting Secretary  
Office of the Secretary  
Federal Communications Commission  
Room 222, 1919 M Street, N.W.  
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: In the Matter of: Preemption of Local Zoning Regulations of Satellite Earth Stations, IB Docket Number 95-59, DA 91-577, 45-DDS-MISC-93, FCC 96-78, Further Notice of Proposed Rulemaking

Dear Mr. Caton:

Pursuant to the Further Notice of Proposed Rulemaking, the Community Associations Institute, joined by the American Resort Development Association and the National Association of Housing Cooperatives, respectfully submits the enclosed Reply Comments to Proposed Section 25.104(f). The original and nine (9) copies have been provided.

The Community Associations Institute, the American Resort Development Association, and the National Association of Housing Cooperatives appreciate the opportunity to comment on the Proposed Rule and hope that the FCC takes these Comments into account when drafting the final rule.

Sincerely,

Robert M. Diamond  
President  
Community Associations Institute

Enclosures

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

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In the Matter of	)	IB Docket No. 95-59
	)	DA 91-577
Preemption of Local Zoning Regulation	)	45-DSS-MISC-93
of Satellite Earth Stations	)	FCC 96-78

Reply Comments to Proposed Section 25.104(f)

Pursuant to the Further Notice of Proposed Rulemaking released March 11, 1996, in the above-captioned proceeding, the Community Associations Institute ("CAI") joined by the American Resort Development Association ("ARDA") and the National Association of Housing Cooperatives ("NAHC"), submits the following Reply Comments in response to the proposed Section 25.104(f) of Chapter 47 of the Code of Federal Regulations. In these Reply Comments, CAI, ARDA, and NAHC again express their support for the broad public policy goals outlined in Section 207 of the Telecommunications Act of 1996. However, the Proposed Rule as currently drafted poses difficult problems for implementation by community associations. Several of the Comments to Proposed Section 25.104(f) submitted by other organizations and industries do not take into account the serious nature of these concerns.

The Definition of the Word "Impair" in Proposed Section 25.104(f) Should be Limited to "Prevent"

In its Comments, the National League of Cities ("NLC") presents forceful arguments concerning the definition of the word "impair," which is not defined in Proposed Section 25.104(f). NLC's analysis of House Report 104-204, which outlines the purpose of Section 207 of the Telecommunications Act of 1996, clearly demonstrates that Congress intended to

prohibit restrictions that blocked access to satellite service. Comments of the National League of Cities, 2. CAI, ARDA, and NAHC concur in this analysis. The use of the word "prevent" in the House Report reveals that Congress intended that only those restrictions that would block access to satellite service would be considered to "impair" such access. Such a limiting definition of the word impair should be included in the language of the final Rule, since that definition would most clearly enact Congress' intent.

Community Association Rules are Drafted to Address Health and Safety Issues

Montgomery Village Foundation, in its Comments, states that Congress, in enacting Section 207 of the Telecommunications Act, did not distinguish between state and local government regulation and private nongovernmental regulation. The House Report language demonstrates that Congress equated state and local governmental restrictions with nongovernmental restrictions. Therefore, nongovernmental restrictions should not be subject to any additional preemptions to which governmental restrictions are not subjected.

Comments of the Montgomery Village Foundation, 2.

However, in its Further Notice of Proposed Rulemaking, the FCC stated that nongovernmental restrictions should be awarded less deference than governmental rules. Further Notice of Proposed Rulemaking, Section 62. The FCC stated that the reason for the decision to award nongovernmental restrictions less deference was due to the fact that nongovernmental restrictions were adopted for aesthetic, not health and safety considerations. As Montgomery Village Foundation correctly points out, there are many health and safety bases for adopting nongovernmental restrictions. Comments of the Montgomery Village Foundation, 2.

In discriminating between governmental and nongovernmental restrictions, the FCC exceeded its statutory mandate. CAI, ARDA, and NAHC urge the FCC to reconsider its conclusions concerning the purposes for nongovernmental restrictions, and therefore award these restrictions more deference than is accorded them in Proposed Section 25.104(f).

Installation on Common Property Would Be a Taking Under the Fifth Amendment

CAI, ARDA, and NAHC concur with the Comments submitted by the National Trust for Historic Preservation. If the FCC intends that its Proposed Rule require that individual owners be permitted to install their satellite equipment on common property, then such an interpretation would be a taking under the Fifth Amendment.

The Comments submitted by CAI, ARDA, and NAHC set forth the unique ownership interest in real property presented within community associations. As a result of this unusual relationship, Section 25.104(f) would have a significant impact upon the constitutional rights of these members of community associations by abrogating fundamental property rights, if the FCC were to mandate installation of satellite receivers by individual owners on common property. If satellite equipment were to be installed on a portion of the common property, that portion of the common property would then be appropriated for the use of one unit owner, to the complete derogation of the other unit owners' ownership interest in the same portion of the common property. Since this would be a taking without just compensation, it is inconceivable that Congress could have intended that owners in community associations be permitted to place satellite equipment on the property of others.

If Installation is Required on Common Property, Then Structural Damage Will Occur

The National Association of Home Builders ("NAHB") Multifamily Council articulates concerns that the structural integrity of buildings may be severely affected by this Proposed Rule. CAI, ARDA, and NAHC share these concerns, as explained in the Comments submitted by this coalition. CAI, ARDA, and NAHC urge the FCC to take into consideration the concern that unlimited installation of satellite devices, if mandated by the FCC, will pose structural hazards, and potential property damage and personal injury if the satellite equipment were to become detached from the building by wind or other storms.

NAHB's Multifamily Council also noted that building owners could not maintain their buildings properly if individuals were permitted unfettered installation on the property. Comments of the NAHB Multifamily Council, 1. The same principle applies to associations, which either own the common property or are required to maintain the common property. Permitting individual owners to install equipment on common property would inhibit the association's maintenance activities, and quite possibly lead to the deterioration of the structural integrity of the building.

The Language Suggested by DirecTV and Hughes Network Systems Would Not  
Implement Congressional Intent

In their Comments, both DirecTV and Hughes Network Systems propose new language for Section 25.104(f) that, if adopted by the FCC, will exceed Congress' statutory mandate. Their proposed language for Section 25.104(f) reads:

"All restrictive covenants, encumbrances, homeowners' association rules, and other nongovernmental restrictions affecting satellite antennas less than one meter in diameter used to receive video programming signals are hereby unenforceable"

Comments of DirecTV, 17; Comments of Hughes Network Systems, Exhibit A-2. (emphasis added). The inclusion of the word "affects" widens the scope of FCC preemption beyond that which Congress intended. Section 207 of the Act reads:

"[The FCC] shall . . . promulgate regulations to prohibit restricts that impair a viewer's ability to receive video programming services through . . . direct broadcast satellite services"

(emphasis added). As stated above, Congress intended that "impair" should mean "prevent," not "affect." The use of the word "affect" in any FCC regulation implementing Section 207 would extend the Section's preemption to nongovernmental restrictions beyond Congress' intended preemption. Therefore, CAI, ARDA, and NAHC strongly oppose any amendment to the Proposed Section 25.104(f) which would substitute the word "affect" for "impair." Such a substitution would be contrary to Congress' mandate.

In addition, this suggested language contains a blanket preemption of private nongovernmental restrictions. Congress did not intend to create such a preemption. As the language in the House Report indicates, Congress only intended a preemption of private restrictions "to the extent that" these restrictions impaired satellite access. House Report, at 123-24. The FCC, in drafting Proposed Section 25.104(f), included that language in the Rule, thereby implementing Congress' intent. To delete that language from the Proposed Rule would be contrary to congressional intent, as expressed in the House Report. Therefore, CAI, ARDA, and NAHC oppose the deletion of such language from the final Rule.

#### Suggested Subsection (g) Would Limit Associations' Right of Access to the Courts

Several Commenters have also proposed the inclusion of a new subsection (g), which states: "[t]he sole forum for adjudicating any matters within this section shall be the

Commission.” Comments of Hughes Network Systems, Exhibit A-2; Comments of the U.S. Satellite Broadcasting Company, 5; Comments of DirecTV, 9-10; Comments of the Satellite Broadcasting and Communications Associations of America (“SBCA”), 7-10. CAI, ARDA, and NAHC oppose this new section; the rights of associations to litigate in federal and state courts cannot be easily abrogated. Section 205 of the Telecommunications Act grants the FCC exclusive jurisdiction to regulate the provision of direct-to-home satellite services. Section 205(b). (emphasis added). The House Report further states that Congress intended this exclusive jurisdiction to be extended only to its rulemaking authority, as is stated in the House Report, “[f]ederal jurisdiction over DBS service will ensure that there is a unified, national system of rules reflecting the national, interstate nature of DBS service.” House Report, at 123-24. (emphasis added). Congress clearly intended to grant the FCC authority to “regulate” provision of satellite services, not the adjudication of disputes related to FCC regulations. Therefore, associations should not be deprived of their right to litigate in federal and state courts.

SBCA argues that the FCC should be the sole forum for adjudicating satellite disputes, since it would not be burdensome for parties to litigate before the FCC. Comments of the Satellite Broadcasting and Communications Commission of America, at 9. However, litigation before the FCC would impose immense burdens on associations and their counsel. Adjudication before the FCC requires the knowledge and expertise of an attorney specializing in administrative law. Many associations will be unable to locate or afford such counsel. In addition, requiring associations to have their cases adjudicated in Washington will pose great

logistical burdens on those associations located a great distance from Washington. Such burdens will effectively eliminate associations' rights to adjudication in these disputes.

For the above reasons, CAI, ARDA, and NAHC oppose the suggested Section (g) as contrary to Congress' intent.

The Burden of Demonstrating Impairment Should be on the Individual

The U.S. Satellite Broadcasting Company argues that the burden should be placed on the private entities seeking to enforce their restrictions to demonstrate that their restrictions do not impair access to service. CAI, ARDA, and NAHC oppose this view. The language of Proposed Section 25.104(f) does not create a blanket preemption of private restrictions. The words in the Proposed Rule "to the extent that" clearly limit the preemption to only those parts of restrictions that impair satellite access. Since that preemption is so limited, it follows that the burden should be on the individual seeking to install equipment to demonstrate that the restrictions impair satellite access. CAI, ARDA, and NAHC support language which would place the burden of demonstrating impairment on the individual seeking to install equipment, but oppose any language which places the burden of demonstrating non-impairment on the association.

The Proposed Rule Should Only Apply to Receive-Only DBS Antennas Less Than

One Meter in Diameter

The U.S. Satellite Broadcasting Company also argues that Proposed Section 25.104(f) should preempt restrictions regarding all DBS satellite antennas, even those over one meter in diameter. Comments of the U.S. Satellite Broadcasting Company, 7. CAI, ARDA, and NAHC oppose this extension. Community associations will have sufficient difficulties in

implementing the Proposed Rule relating to satellite antennas under a meter in diameter (See, Comments of CAI, ARDA, and NAHC, 13-17); implementation of a Rule preempting restrictions of large antennas will exacerbate these difficulties. The Rule as currently drafted will place a lighter administrative burden on the FCC, since it is consistent with the rest of Section 25.104. Such a Rule permits both governmental and nongovernmental entities to regulate satellite antennas over one meter in diameter, which is consistent with Congress' intent to treat equally governmental and nongovernmental restrictions.

AT&T, in its Comments, urges the FCC to include both receive-only and transmit and receive satellite antennas. Comments of AT&T, 2. However, in the House Report, Congress states that only restrictions relating to "satellite receivers designed for receipt of DBS services," House Report, at 123-24, (emphasis added), are to be preempted. Congress does not include transmit and receive satellite antennas in this language; since they are not included, it is clear that Congress did not intend to include them. Therefore, the only restrictions preempted should be those restricting receive-only antennas. CAI, ARDA, and NAHC oppose the extension of the preemption to any antennas that are not receive-only antennas.

#### Conclusion

CAI, ARDA, and NAHC express their agreement with the Comments submitted by the National League of Cities, the NAHB Multifamily Council, and the National Trust for Historic Preservation. CAI, ARDA, and NAHC strongly oppose the suggested changes to Proposed Section 25.104(f) submitted by Hughes Network Systems and DirecTV as contrary to Congress' intent. In addition, CAI, ARDA, and NAHC strongly oppose the suggested

Section 25.104(g), as it deprives community associations of their rights to litigate in federal or state courts.

CAI, ARDA, and NAHC appreciate this opportunity to submit Reply Comments to the Further Notice of Proposed Rulemaking on Proposed Section 25.104(f). CAI, ARDA, and NAHC urge the FCC to consider their unique concerns when drafting the final Rule.