

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

CS Docket No. 96-83

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**COMMENTS OF THE
CONSUMER ELECTRONICS MANUFACTURERS ASSOCIATION**

The Consumer Electronics Manufacturers Association ("CEMA"), a sector of the Electronic Industries Association, hereby submits the following comments in response to the Notice of Proposed Rulemaking ("*Notice*") which the Commission issued in the above-captioned proceeding on April 4, 1996.¹ In the *Notice*, the Commission requests comment on its proposed rule for implementing Section 207 of the Telecommunications Act of 1996 with regard to television broadcast service ("TVBS") and multichannel multipoint distribution service (MMDS) receive antennas (or "reception devices").²

¹ See *Restrictions on Over-the Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Services*, Notice of Proposed Rulemaking, FCC 96-151, CS Docket No. 96-83 (released April 4, 1996) (hereinafter "*Notice*").

² Section 207 directs the Commission to "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." Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 114 (1996) [hereinafter the "*Telecommunications Act*"].

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I. INTRODUCTION

CEMA is the principal trade association of the consumer electronics industry. CEMA members design, manufacture, import, distribute and sell a wide array of consumer electronics equipment, including television receivers and other video equipment. Virtually all Americans who view video programming do so on products produced by CEMA member companies. CEMA members therefore have a direct interest in the outcome of this rulemaking proceeding.

II. DISCUSSION

In the *Notice*, the Commission proposes a rule regarding TVBS and MMDS receive antennas that is similar to the rule that would apply to direct broadcast satellite ("DBS") receive antennas.³ Specifically, the Commission's proposed rule: (1) would establish a presumption that all governmental and non-governmental restrictions are unreasonable, and therefore preempted, if they affect the installation, maintenance or use of MMDS and TVBS antennas; (2) would allow governmental entities to rebut this presumption by obtaining a "final declaration" from the Commission or a court of competent jurisdiction that the restriction is both necessary to accomplish a clearly defined and expressly stated health or safety objective, and is as narrowly defined as possible to accomplish this objective; and (3) would allow governmental

³ See *Preemption of Local Zoning Regulation of Satellite Earth Stations*, Report and Order and Further Notice of Proposed Rulemaking, IB Docket No. 95-59, FCC 96-7 at ¶62 and Appendix II (released March 11, 1996).

authorities to apply to the Commission to obtain a full or partial waiver of the preemption rule upon a showing of local concerns of a highly specialized and unusual nature.⁴

The context of the Telecommunications Act as a whole, as well as the express language of Section 207 itself, exhibit a clear congressional intent that local and private restrictions in no way impair the public's ability to receive over-the-air MMDS and TVBS video programming services. The original House Committee Report clearly states that "[e]xisting regulations, including but not limited to, zoning laws, ordinances, restrictive covenants or homeowners association rules, shall be unenforceable to the extent [they are] contrary to [Section 207]."⁵

Although the Commission's proposed rule moves in the direction in fulfilling this congressional mandate, it does not go far enough to ensure that all consumers, wherever they may reside, will have full enjoyment and use of their MMDS and TVBS antennas. To ensure that the pro-consumer and pro-competitive goals of Section 207 are achieved, the Commission's proposed rule should be strengthened and simplified so as to:

- *Make irrebuttable the presumption that local government restrictions are preempted, but allow waivers in appropriate circumstances.* Under the proposed rule, local governments can rebut the Commission's presumption of preemption for narrowly tailored health and safety reasons, and either the Commission or a court of competent jurisdiction can determine whether the presumption has been

⁴ See Notice at Appendix A.

⁵ H.R. Rep. No. 204, 104th Cong., 1st Sess., 124 (1995).

successfully rebutted.⁶ Section 207, however, makes clear that Congress saw local restrictions on MMDS and TVBS antennas as a national concern requiring a uniform, national response. Such a response would not be possible if, through the rebuttal process, FCC decisions and the decisions of different courts created a patchwork quilt of rules concerning TVBS and MMDS antennas. Moreover, a rebuttable presumption would encourage forum shopping and efforts to recast impermissible restrictions based on aesthetic concerns as restrictions based on health or safety considerations. To prevent such a result and foster uniform, national rules, the Commission itself should review all future efforts of local governments to restrict the use or placement of MMDS and TVBS antennas. The Commission should conduct this review in the context of the waiver process. Proponents of local restrictions should be required to demonstrate (1) why the restriction is essential *and* (2) how the restriction in question accommodates Congress' express mandate that the public have unfettered access to MMDS and TVBS signals. In addition, the Commission should clarify that, in considering exceptions to the preemption rule, it will promptly conduct brief and unburdensome "paper" proceedings. The Commission also should confirm that, if it approves an exception, consumers in violation of that local rule will have at least 30 days to come into compliance and will not be subject to retroactive penalties. Each of these measures will help alleviate the chilling effect which fear

⁶ *See Notice* at Appendix A.

of local government action can have on consumers as they assess their over-the-air video options.

- *Clarify that any private entity seeking to enforce a private restriction bears the burden of proving to the Commission that such restrictions do not violate Section 207.* The proposed *per se* rule against private restrictions on MMDS and TVBS antennas would prohibit those restrictions which "impair" reception. Although this language tracks the statute, it is a significant source of ambiguity since reasonable people undoubtedly will differ on what constitutes impairment. Yet, Congress recognized that private restrictions present the same impediments to the enjoyment of MMDS and TVBS programming as do local government restrictions. Satisfying congressional intent thus requires a clear rule protecting users of MMDS and TVBS antennas from unsubstantiated, third-party claims that a particular private restriction is consistent with Section 207. To this end, third parties must bear the burden of demonstrating that their restrictions are permissible.
- *Ensure that the final rule covers all MMDS and TVBS antennas, regardless of size.* In the *Notice*, the Commission proposes a rule for MMDS and TVBS devices that does not draw distinctions based on size, while inviting comments concerning whether and when such distinctions might be justified.⁷ CEMA believes that the Commission's final rule should make no size-based distinctions. There is no support for such distinctions in the legislative history or the text of

⁷ *See id.* at ¶7.

Section 207. Furthermore, such distinctions would be contrary to Section 207's goal of ensuring that consumers across the Nation have ready access to MMDS and TVBS signals. For both MMDS and TVBS antennas, size is a function of need. Consumers in various geographic locations require antennas of different sizes and shapes in order to ensure reception of video programming (although, it should be noted that, except for height, sizes and shapes do not vary significantly). Allowing differential regulation based on antenna size would discriminate against viewers living in rural areas or other areas where reception is difficult, and would directly conflict with the Telecommunications Act's mandate to prohibit restrictions that impair a viewer's ability to receive video programming.

Each of these steps is necessary to fully effectuate Section 207 of the Telecommunications Act.

Two final points should also be noted. First, as the Nation transitions to advanced television ("ATV"), it will be all the more important for consumers to be able to install TVBS antennas as their needs require. Second, in revising its rules, the Commission should ensure that the regulations governing MMDS and TVBS antennas are consistent with those governing DBS antennas. To this end, the Commission's action in this proceeding should parallel or, better yet, be taken in tandem with its action in the proceeding addressing DBS antennas, IB Docket No. 95-59. Such a course would ensure that, as the Commission's policies evolve, no unwarranted distinctions develop with respect to the devices identified by Congress for special protection.

III. CONCLUSION

For the foregoing reasons, the Commission should revise its proposed rule governing restrictions on MMDS and TVBS antennas as set forth herein. Only by doing so will the Commission succeed in effectuating the pro-consumer and pro-competitive purposes of Section 207 of the Telecommunications Act of 1996.

Respectfully submitted,

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