

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) IB Docket No. 95-59
of Satellite Earth Stations)

To: The Commission

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**REPLY 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 Reply Comments concerning the Commission's Report and Order ("Order") and Further Notice of Proposed Rule Making ("Further Notice") in the above-captioned proceeding.^{1/} On April 15, 1996, NRTC filed Comments supporting the Commission's proposal to preempt nongovernmental restrictions, such as homeowners' association restrictions and deed covenants, against DBS satellite antennas. NRTC's Comments urged the Commission to replace its rebuttable presumption policy with a strict, per se preemption standard for all state and local zoning restrictions and all nongovernmental restrictions against DBS satellite antennas. In this way, NRTC observed, the Commission would fulfill Congress' directive to

^{1/} Report and Order and Further Notice of Proposed Rule Making, released March 11, 1996.

"prohibit restrictions that impair a viewer's ability to receive video programming services through . . . direct broadcast satellite services." 47 U.S.C. § 207.

1. Preemption of Nongovernmental Restrictions

1. Numerous homeowners' associations and real estate management companies filed comments opposing the Commission's proposal to preempt local nongovernmental restrictions against satellite antennas which are one meter or less in diameter. The great majority of these participants simply retyped on their stationery a form letter apparently supplied to them by a trade association.^{2/} This form letter opposes the Commission's proposal on the basis that satellite antennas are, in the views of the authors, aesthetically unappealing and could lead to safety problems. NRTC opposes the unfounded assertions that DBS antennas are inherently more unappealing or more dangerous than a mailbox, weathervane, traditional rooftop antenna, barbecue grill, or other common household devices which are routinely attached to dwellings and have become over time a part of the landscape of American communities.

^{2/} Among the several dozen entities to file the essentially identical form letter are: the Real Estate Board of New York, Inc.; Magnum Dallas Management, Inc.; Chapel Ridge Apartments; Oxford Hill Apartments; Live Oak Properties; Maywood Condominium Association; Cambridge Square; North Village Associates; Equity Residential Properties, Inc.; Westridge Swim & Racquet Club; Harrison & Bates, Inc.; the Charles E. Smith Companies; Ash Tree Apartments; Canterbury Green; Harbor Terrace of Old Town Condominium Association; Fairlington Mews Condominium Association; Chateau Perry Apartments; and PRC Management, Inc.

2. NRTC agrees with those commenters who approve of the FCC's proposals to preempt on a per se basis satellite antennas which are one meter or less in diameter.^{3/} NRTC reiterates its position that the FCC should adopt its per se restrictions against homeowners' association covenants and other nongovernmental regulations against DBS antennas. Homeowners' association restrictions are particularly troubling because there are tens of thousands of such associations across the country. Each particular association has its own rules, which provide different requirements for antennas and contain unique provisions for compliance. Moreover, each association enforces its rules to a different extent. The result of this panoply of micro-regulation is that DBS providers find it impossible to obtain the thousands of nongovernmental restrictions, discern their specific meanings, and attempt to comply with them in any consistent manner. NRTC requests the Commission to prevent homeowners' associations from applying their myriad restrictions on a rebuttable presumption basis. Only a per se preemption of such nongovernmental restrictions against DBS antennas will fulfill Congressional intent.

3. As NRTC pointed out in its Comments, Section 207 of the Telecommunications Act of 1996 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:

^{3/} See, e.g., comments of the Consumer Electronics Manufacturers' Association; Primestar Partners, L.P.; and the Satellite Broadcasting and Communications Association of America ("SBCA").

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.

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.

4. NRTC notes that such divergent interests as the Consumer Electronics Manufacturers' Association ("CEMA"), the National League of Cities, and the City of Dallas, in a joint filing with the National Association of Counties and the United States Conference of Mayors, all espoused the same view that Congress specified per se preemption for DBS programming. As SBCA correctly notes, the House Committee Report accompanying Section 207 of the 1996 Act specifically provided:

The Committee intends this section to preempt enforcement of. . . restrictive covenants or encumbrances that prevent the use of antennae designed for . . . receipt of DBS services. Existing regulations, including. . . restrictive covenants or homeowners' association rules, shall be unenforceable to the extent contrary to this section.

H.R. Rep. No. 204 at 123-124; SBCA at 14.

This Congressional language clearly indicates Congress' desire to preempt, on a per se basis, any and all restrictions against DBS antennas.

2. Preemption of State and Local Governmental Restrictions

5. Section 205 of the 1996 Act explicitly grants the FCC exclusive jurisdiction over direct-to-home satellite services. NRTC joins the other participants that favor restrictions of local zoning regulations and encourage the FCC to exercise its exclusive jurisdiction over satellite services.^{4/} Exclusive jurisdiction would prevent inconsistent state court rulings and would ensure a uniform, national policy for DBS satellite antenna reception. Moreover, exclusive jurisdiction is particularly appropriate in the case of a DBS antenna, which is a very small, receive-only antenna which presents no valid health or safety concerns. In particular, NRTC urges the FCC to clarify its rule so that local governments may not regulate receive-only DBS antennas for health reasons. The Commission should therefore amend Section 25.104(b)(1) by removing the language which states "or a court of competent jurisdiction".^{5/}

6. NRTC also believes that the FCC should adopt a waiver-only approach for small satellite antennas, rather than a rebuttable presumption. A waiver-only

^{4/} DIRECTV at 9; Hughes at 3; SBCA at 5.

^{5/} The City of Dallas, in a joint filing with the National Association of Counties and the United States Conference of Mayors, filed a Petition for Reconsideration of the Commission's decision to preempt local zoning authority on the basis that a recent Supreme Court decision U.S. v. Lopez restricts federal power under the Commerce Clause. That case, however, does not appear analogous to the instant situation because it was a criminal case and involved a federal gun free school zone law.

approach would require local governments to receive a waiver from the Commission before applying their proposed regulation. A presumption, on the other hand, can be rebutted merely by a purported showing that the regulation is necessary to achieve a clearly defined health or safety objective which is stated in the text of the regulation itself. A rebuttable presumption affords local authorities too much leeway to circumvent the Commission's rules simply by placing a nominal health or safety reason into the text of their zoning regulation and then battling DBS consumers in court. Consumers may well be reluctant to expend the significant resources necessary to litigate such a matter against a city or town, which has access to much greater legal resources. By contrast, waivers would be available only upon a specific showing that local concerns are of a highly specialized or unusual nature. Only after receiving a waiver for valid purposes, such as a truly historic area, could the local zoning entity enforce its restrictive policy. In this way, the Commission would "weed-out" those communities that may not "like" satellite antennas but that are nonetheless entitled to no special protection.

7. NRTC reiterates its belief that the FCC should prevent imposition of retroactive liability in instances when consumers purchase satellite antennas and then a community regulation is later found to be valid.^{6/} The onus of compliance with a presumptively unreasonable zoning regulation should not be placed upon individual consumers. Instead, the Commission should clarify that if a local zoning regulation

^{6/} See also, comments of DIRECTV at 14; Hughes at 14; and Primestar at 12, 14.

passes the Commission's approval, then the regulation would apply to future consumer purchases and would not be used to punish consumers that acted in good faith reliance upon the *status quo ante*.

CONCLUSION

8. NRTC believes 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. Moreover, NRTC urges the Commission to recognize that Congress meant to protect DBS providers vis-a-vis all other types of multichannel video programming providers in order to foster the nascent competition between cable companies and DBS providers.

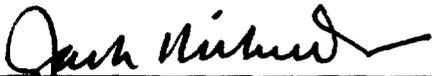
9. NRTC also supports the Commission's decision to permit parties aggrieved by local satellite zoning restrictions to seek redress from the Commission at a much earlier stage in the legal process than currently available. NRTC believes the Commission should exercise exclusive jurisdiction, however, and should protect consumers against retroactive imposition of liability once a community shows its regulations are valid.

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

Respectfully submitted,

**NATIONAL RURAL
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