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

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)
Service)

CS Docket No. 96-83

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REPLY COMMENTS OF THE NETWORK AFFILIATED STATIONS ALLIANCE

The NBC Television Affiliates Association, the CBS Television Affiliates Association and the ABC Television Affiliates Association (together, the "Network Affiliated Stations Alliance" or "NASA") hereby submit their reply comments in response to the notice of proposed rulemaking in the above-referenced proceeding.^{1/}

It is evident from review of the comments that Section 207 of the Telecommunications Act of 1996 addressed a significant need.^{2/} Indeed, despite Section 207's direct expression of national policy — prohibiting "any restrictions that impair a viewer's ability to receive" over-the-air television — local authorities and private associations showed that they have every intent to impose restrictions on viewers within their jurisdictions and will do so in the absence of regulations that implement the intent of Congress. The Commission should reject

^{1/} Implementation of Section 207 of the Telecommunications Act of 1996, *Notice of Proposed Rulemaking*, CS Docket No. 96-83, rel. Apr. 4, 1996 (the "Notice").

^{2/} Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 (1996) (the "1996 Act") § 207.

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these claims and instead should adopt specific rules that implement the intent of Congress to ensure that consumers can view free, over-the-air television.

I. Congress Spoke Clearly When It Adopted Section 207 and There Is No Justification for Defying This Congressional Determination.

The comments of local authorities and private associations essentially urge the Commission to ignore the plain meaning of Section 207. The Commission should dismiss these arguments and, instead, should follow the mandate of Congress. There is no justification for any other response in this proceeding.

As explained in NASA's initial comments, the Congressional mandate on this matter is obvious. The Commission's rules must prevent any impairment of, *i.e.*, negative effect on, a viewer's ability to receive over-the-air broadcast signals. NASA Comments at 2-3. This is the plain meaning of the statute, which is sufficient in and of itself, and is consistent with the Congressional view of this provision as expressed in the Conference Report.^{3/}

Despite the direct Congressional mandate, some commenters argue that the Commission should not adopt rules that put that mandate into effect. For instance, some commenters suggest that the Commission cannot adopt its proposed rules because Congress

^{3/} *Id.* at 3, *citing* H.R. REP. NO. 458, 104th Cong., 2d Sess., at 166 (1996) (the "Conference Report"). While some commenters rely on language in the House Report on the original bill, that language does not affect this conclusion. *See* Comments of Silverman & Schild at 2. It is a basic canon of statutory construction that a conference report expresses the views of Congress on the final bill and takes precedence over the committee report in one of the houses of Congress. *See, e.g., PSC of New York v. Mid Louisiana Gas Co.*, 463 U.S. 319 (1983) (Conference report interpretation of statute controls over dissent's citation to House report). In any event, where the statutory language is clear there is no need to consider legislative history. *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984).

did not permit preemption of regulations that “affect” over-the-air viewing. *See, e.g.*, Comments of National League of Cities at 4. Even if this argument is correct, it has no effect on the Commission’s substantive power to prohibit regulations that impair or diminish the quality of signals received from over-the-air broadcast stations.

Other commenters claim that the Commission would be remiss if it did not permit localities and private associations to adopt rules for health and safety purposes. *See, e.g.*, Comments of Community Association Institute at 15-17, Comments of City of Dallas at 3. These comments ignore the text of Section 207, which does not include any exceptions. Equally important, they do not demonstrate that over-the-air, rooftop antennas pose more risk than any number of other hazards, such as tree limbs. Indeed, it is rare for a rooftop antenna to come loose from a roof, although tree limbs are blown off in even moderately severe storms.^{4/} At the same time, there is no radiation risk from receive-only antennas, so there is even less reason for community health concerns.^{5/}

Private associations and their representatives take a different tack, claiming that the Commission should address only government regulations. *See, e.g.*, Comments of

^{4/} The Commission correctly noted in its DBS proceeding that antennas are no more dangerous than the structures that support them. *Preemption of Local Zoning Regulation of Satellite Earth Stations, Report and Order and Further Notice of Proposed Rulemaking*, IB Docket No. 95-69, DA 91-577, 45-DSS-MISC-93, rel. Mar. 11, 1996 (the “DBS Dish Order”) at ¶ 35.

^{5/} Comments of Wireless Cable Association at 24. One commenter suggested that antennas pose risks for children and drivers. Comments of City of Indianapolis at 2. This obviously is not the case for rooftop television antennas because they do not create ground-level obstructions.

Community Association Institute at 19. They plainly misread the statute. Congress specifically intended to reach *all* restrictions on over-the-air reception devices, public and private. The statute contains no exceptions for private entities and the legislative history specifically states that private restrictions “shall be unenforceable.”^{6/}

The efforts of private entities to fall back on other arguments also are unavailing. While some parties argue that Congress did not alter “contractual” arrangements such as community association by-laws or restrictive covenants, the statute and the legislative history contradict that claim. Moreover, it is not unusual for Congress or legislatures to take actions that alter private relationships or even prohibit specific private relationships.^{7/} Similarly, “takings” arguments are irrelevant because Section 207 is more accurately compared to a regulation, which almost never constitutes a taking, than to a physical occupation.^{8/} In sum,

^{6/} See Comments of NASA at 7. Thus, the arguments of the National Trust for Historic Preservation (the “National Trust”) that Congress did not express an intent to override private restrictions is incorrect. Comments of National Trust at 5. The National Trust’s citation to the Conference Report on local land use issues also is inapposite. *Id.* The passage quoted by the National Trust refers to Section 704 of the 1996 Act, which governs transmission facilities, not to Section 207. Conference Report at 207-8.

^{7/} For instance, prostitution and drug transactions are illegal even though they can be characterized as consensual contractual arrangements.

^{8/} See *Penn Central Transportation Co. v. United States*, 438 U.S. 104, 136 (1978). Arguments based on the *Loretto* case are erroneous because the factual context is different. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In *Loretto*, a third party was given the right to physically invade the landlord’s property. Here, the law merely adjusts elements of the existing contractual relationship between, for instance, a homeowner and a community association. That in no way represents the invasion of private property. *Loretto* is plainly inapplicable.

there is no good argument to support the restrictive view of Section 207 taken by the municipalities and private associations in this proceeding.

II. The Rules Adopted by the Commission in This Proceeding Should Address the Whole Range of Regulations that Could Impair the Ability of Consumers to Receive Over-the-Air Television.

If nothing else, the comments reveal the importance of Commission action in this proceeding. Many of the commenters that oppose proper implementation of Section 207 base their claims on an erroneous understanding of radio reception and of the competitive implications of restrictions on over-the-air antennas. Consequently, the Commission should adopt rules that severely limit regulation of over-the-air antennas by municipalities; that prohibit private restrictions; and that place the burden of obtaining waivers on municipalities that intend to impose restrictions.

First, the comments reveal that many parties that oppose regulation do not understand how over-the-air reception devices work. For instance, the Huckleberry Community Association argues that restricting the placement or size of an antennas does not impair a consumer's ability to receive television programming. Comments of Huckleberry Community Association at 2. As the American Radio Relay League (the "ARRL") points out, this is plainly wrong: over-the-air antennas must be placed high enough that they have line-of-sight to the transmitting tower and without shielding, or reception necessarily will be impaired.^{9/} In other words, regulations that address aesthetics by prohibiting visible antennas

^{9/} Comments of ARRL at 6. This effect can be tested with a transistor radio. It is
(continued...)

or by requiring them to be sited in any way that restricts lines of sight to transmitters are precisely the types of regulation that Congress intended to ban.

The Commission's rules also will have significant competitive implications. As NASA described in its comments, one important effect of Section 207 is that it preserves parity between over-the-air broadcasters and their competitors, including cable operators. Comments of NASA at 8. This concern cannot be overstated. In fact, the ARRL has found that it is almost impossible to buy a new home on the East Coast without also being subject to covenants that restrict antenna use or, even more significantly, prohibit the use of an antenna if cable television is available. Comments of ARRL at 4-5. As a consequence, absent Commission action to prohibit this sort of restriction, consumers will increasingly be deprived of the choice to obtain free, over-the-air television programming without paying for cable services as well.

Private restrictions imposed by multiple dwelling units ("MDUs") also have competitive implications. Owners of MDUs have significant economic incentives to prefer the use of cable or satellite services and to impair reception of over-the-air television. *See* Comments of Public Broadcasting Service at 2. A strong Commission mandate in this proceeding is the only way to counter these financial pressures and preserve consumer choice in video programming.

9/ (...continued)

much easier to receive a signal from any given station in an open park than it is from inside a building. The same test can be conducted with a cellular phone, a television or other devices that receive and process radio waves.

The Commission mandate should be simple and direct. As NASA suggested in its comments, all private restrictions on over-the-air antennas must be preempted. Comments of NASA at 6-7. The facts provided to the Commission in the comments strengthen the case for complete preemption because it is evident that private restrictions are becoming more and more burdensome.^{10/}

The Commission also should substantially restrict government regulation of over-the-air antennas including, as the Association for Maximum Service Television suggests, restrictions on mounting and installation devices. Comments of MSTV at 5-6. Indeed, this proceeding has not provided any evidence that municipalities normally have any interest sufficient to justify restrictive regulation.

Municipalities that wish to regulate over-the-air reception devices because of unusual circumstances should be required to obtain a waiver from the Commission. The waiver process should put the burden of proof on the municipality, not consumers. Municipalities have far greater resources than consumers and, in any event, Section 207 establishes a strong

^{10/} Comments of ARRL at 4-5; Comments of Pacific Bell Video Systems at 2. Suggestions from community associations that their covenants should not be preempted because they can be altered by majority vote are disingenuous. Comments of Coughlin Ranch Homeowners at 2. Congress did not adopt Section 207 to protect the majority, but rather those viewers who want or need over-the-air antennas. Requiring those viewers to obtain the consent of their neighbors is plainly contrary to the intent of Section 207. To the extent that a private organization, such as the National Trust, can demonstrate a compelling need for a particular, site-specific restriction, it can avail itself of the Commission's normal waiver processes. See *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (D.C. Cir., *cert. denied*, 409 U.S. 1027 (1972) (Commission must consider requests for waiver of its rules).

presumption against any regulation.^{11/} Municipalities should be required to prove an important government purpose for their regulations, and to prove that their regulations do not have the effect of impairing the ability of viewers to receive over-the-air television signals. As the Consumer Electronics Manufacturers Association suggests, the Commission can adopt truncated procedures for waiver requests to reduce the burdens on all parties. Comments of CEMA at 4-5.

The Commission also should not permit municipalities to have recourse to local courts, but should require all proceedings to be before the Commission. Section 207 is a federal provision and should be interpreted by the Commission, as the expert federal agency, and by federal courts. Otherwise, a patchwork of inconsistent local decisions could result. That would be contrary to the Congressional intent for the Commission, not local governments, to set the rules, as expressed in the specific language of Section 207.

^{11/} While some municipalities complain they lack the resources to seek waivers, they plainly have more resources than the average consumer. Moreover, if individual consumers are required to complain to the Commission, the Commission could be flooded with complaints. There are many fewer municipalities than consumers.

III. Conclusion

For all of these reasons, the Network Affiliated Stations Alliance urges the Commission to adopt rules in accordance with these comments.

Respectfully submitted,

THE NETWORK AFFILIATED STATIONS ALLIANCE

By: *Werner K. Hartenberger, jr.*
WERNER K. HARTENBERGER
J.G. HARRINGTON
DOW, LOHNES & ALBERTSON
A Professional Limited Liability Company
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 776-2630
*Counsel to the NBC Television
Network Affiliates Association*

By: *Kurt A. Wimmer, jr.*
KURT A. WIMMER
ELLEN P. GOODMAN
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, DC 20044-7566
(202) 662-5278
*Counsel to the CBS Television
Network Affiliates Association*

By: *Wade H. Hargrove, jr.*
WADE H. HARGROVE
BROOKS PIERCE MCLENDON
HUMPHREY & LEONARD, L.L.P.
P.O. Box 1800
Raleigh, NC 27602
(919) 839-0300
*Counsel to the ABC Television
Network Affiliates Association*

May 21, 1996

CERTIFICATE OF SERVICE

I, Tammi A. Foxwell, a secretary at the law firm of Dow, Lohnes & Albertson, do hereby certify that on this 21st day of May, 1996, I caused copies of the foregoing "Reply Comments of The Network Affiliated Stations Alliance" to be served via hand-delivery to the following:

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, NW, Room 814
Washington, DC 20554

The Honorable James H. Quello
Commissioner
Federal Communications Commission
1919 M Street, NW, Room 802
Washington, DC 20554

The Honorable Susan Ness
Commissioner
Federal Communications Commission
1919 M Street, NW, Room 832
Washington, DC 20554

The Honorable Rachelle B. Chong
Commissioner
Federal Communications Commission
1919 M Street, NW, Room 844
Washington, DC 20554

Dorothy Conway
Federal Communications Commission
1919 M Street, NW, Room 234
Washington, DC 20554

Timothy Fain
OMB Desk Officer
10236 NEOB
725 17th Street, NW
Washington, DC 20503

International Transcription Services, Inc.
2100 M Street, NW, Suite 140
Washington, DC 20037



Tammi A. Foxwell