

DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

62-111-107

MAY 21 1996

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

DIRECTV, Inc.
Opposition to Petitions for Reconsideration

DIRECTV, Inc.

James F. Rogers
Steven H. Schulman*
of LATHAM & WATKINS
1001 Pennsylvania Avenue, N.W., Suite 1300
Washington, D.C. 20004

May 21, 1996

Its Attorneys

0-11
SEARCHED
SERIALIZED

Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

DIRECTV, Inc.
Opposition to Petitions for Reconsideration

Ten years after adopting Section 25.104 of its rules, and more than five years after this proceeding began, the Commission has strengthened its preemption of local zoning regulations. The local communities, which have enjoyed practically free reign to enforce unreasonable satellite antenna regulations under the 1986 Rule,¹ now ask the Commission to reconsider its revisions to Section 25.104. DIRECTV, Inc., the nation's leading provider of direct broadcast satellite ("DBS") service, opposes the petitions for reconsideration submitted by the National League of Cities ("NLC"), *et al.*; the Florida League of Cities ("FLC"); the City of Dallas, Texas ("Dallas"), *et al.*; and the County of Boulder, Colorado ("Boulder") (collectively referred to as "Petitioners").

¹ The "1986 Rule" refers to Section 25.104 prior to the revisions recently adopted by the Commission.

I. INTRODUCTION AND SUMMARY

Soon after the Commission adopted Section 25.104 of its rules, 47 C.F.R. §25.104, in 1986 to preempt unreasonable local regulation of satellite antennas, it became clear that the rule would not adequately protect the federal interest in universal access to satellite antennas. Consumers were forced to litigate their right to install satellite antennas, leading to inconsistent results.² Moreover, regulations that did not “differentiate” between satellite antennas and other communications facilities were not preempted by the 1986 Rule, allowing local jurisdictions to impose unreasonable costs on satellite antennas.³ With dozens of these experiences as support, groups representing antenna users and manufacturers filed petitions in 1991 and 1993, asking the Commission to strengthen its preemption rule.⁴

The Commission did not act immediately on these petitions, but has treaded cautiously in this area. In 1993, the Commission asked for comment on these petitions, and received more evidence of restrictive local practices.⁵ In 1995, after meetings between industry leaders and local officials failed to result in a solution, the Commission proposed to revise Section

² Compare *Town of Deerfield v. FCC*, 992 F.2d 420, 423 (1992) (preserving state court ruling that limited installation of satellite antennas to lots greater than one-half acre) with *Cawley v. City of Port Jervis*, 753 F. Supp. 128, 132-33 (1990) (precluding enforcement of variance requirement for approval of satellite antenna installation)

³ Regulations that treated satellite antennas as “structures” were commonly upheld, no matter how unreasonable the burden. See *Lyons v. City of Fort Lauderdale*, 1988 U.S. Dist. LEXIS 17646 at *8-10 (S.D. Fla. June 29, 1988) (upholding 25-foot setback requirement because it did not differentiate between satellite antennas and “other structures”).

⁴ See *Petition for Declaratory Ruling of Satellite Broadcasting and Communications Ass’n (“SBCA”)*, filed April 16, 1991; *Petition for Declaratory Relief of Hughes Network Systems, Inc. (“HNS”)*, filed April 19, 1993

⁵ See *Preemption of Local Zoning Regulation of Satellite Earth Stations*, 10 F.C.C. Rcd. 6982, 6986 (1995) (NPRM) (the “Notice”).

25.104 to strengthen the preemption of local restrictions on satellite antennas. Commenters representing local communities and satellite antenna consumers, manufacturers, service providers and installers all participated in the proceeding.

Based upon the exhaustive record before it, earlier this year the Commission adopted revisions to Section 25.104, adopting a rebuttable presumption against the regulation of smaller satellite antennas.⁶ In particular, Section 25.104(b) now presumptively preempts all local regulations affecting satellite antennas one meter or less in diameter in residential areas, and two meters or smaller in commercial areas. By eliminating the ad-hoc “reasonableness” determination and the arbitrary “differentiation” requirement from Section 25.104, the Commission has brought increased certainty and uniformity to its rule, consistent with its mandate to assure “to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communications service with adequate facilities and reasonable charges.”⁷

Petitioners seek to preserve their ability to regulate in this area of interstate commerce, and urge the Commission to reconsider its revisions. These petitions for reconsideration, as directed to the preemption of local DBS antenna regulation, are based primarily on two grounds: (i) that Section 207 of the Telecommunications Act of 1996 (the “Telecom Act”) requires the Commission to adopt a more limited preemption of local satellite antenna regulations; and (ii) that the Commission has not adequately considered the putative safety hazards presented by its preemption of local regulations.

⁶ *Preemption of Local Zoning Regulation of Satellite Earth Stations*, FCC 95-180 Report and Order and Further Notice of Proposed Rulemaking (rel. March 11, 1996) (the “Order”).

⁷ 47 U.S.C. § 151.

Neither of these arguments provide the Commission with a basis to reconsider its rule. First, Section 207 does not preclude the adoption of a rebuttable presumption against local regulations. In fact, given the lack of deference shown to so-called “local interests” in Section 207 and the overwhelming record demonstrating that local officials were unable or unwilling to abide by the federal standards set forth in the 1986 Rule, the Commission would be justified in adopting an even stronger preemption rule.

Second, there is nothing in the record to indicate that DBS antennas present a safety hazard. The Commission has already considered these arguments -- they were presented with full hyperbole by the Petitioners in their comments -- and found that DBS antennas can be installed safely by consumers or installers without local regulatory intervention.

II. SECTION 207 DOES NOT LIMIT THE COMMISSION’S AUTHORITY

In connection with its overhaul of the Communications Act of 1934, Congress directed the Commission to preempt all restrictions, public or private, that “impair a viewer’s ability” to receive programming services through over-the-air reception devices, including DBS antennas. This language is broad and sweeping, and, unlike other sections of the Telecom Act,⁸ contains no indication that the Commission is to balance the federal communications interests against the interests of local authorities.

After failing to convince Congress to allow them to continue to enforce their restrictive regulations, the local jurisdictions now approach the Commission in an attempt to

⁸ See, e.g., Section 704, codified at 47 U.S.C. § 332. Section 704, unlike Section 207, contains clear instructions that the Commission is to preserve local regulation: “Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government . . . over decisions regarding the placement, construction and modification of personal wireless service facilities.” *Id.*

rewrite the clear legislative mandate of Section 207. First, it should be noted that Section 207 is a Congressional direction, not a new delegation of authority to the Commission.⁹ Therefore, because the Commission has premised its revisions in other sections of the Communications Act,¹⁰ its authority is not circumscribed by Section 207.

Second, Petitioners' interpretation of Section 207 does not comport with the statutory language or Congressional policies of Section 207. Disregarding the clear language of the statute, Petitioners urge the Commission to interpret Section 207 as a limitation upon its statutory authority to preempt local regulations. Petitioners argue that Section 207 authorizes the Commission only to preempt those regulations that totally "prevent" reception of DBS signals, and requires the Commission to review every complaint under Section 25.104 on a case-by-case basis.¹¹

Petitioners interpret Section 207 to order preemption of only those restrictions that preclude physical reception of DBS signals.¹² This interpretation hinges on the use of the word "impair" in Section 207,¹³ which Petitioners translate as "prevent,"¹⁴ a meaning at odds with the

⁹ The Commission has interpreted Section 207 as establishing a statutory minimum for preemption of local restrictions. *Order* at ¶ 16

¹⁰ *Order* at ¶ 11.

¹¹ *See* Petition of NLC at 11

¹² *Id.*

¹³ Section 207 directs the Commission to preempt all restrictions "that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of . . . direct broadcast satellite services."

¹⁴ Petition of NLC at 3.

definition of “impair.” “Impair” means “to make worse” or “to diminish in quantity, value, excellence or strength,”¹⁵ a far lower standard of harm than “prevent.”

Petitioners ignore this commonly accepted definition, and contend that “by ‘impair,’ Congress meant ‘prevent,’” pointing to the legislative history to support this interpretation.¹⁶ First, the language of the House Commerce Committee Report cannot override the clear statutory language. Second, the legislative history is not nearly as clear as Petitioners would have the Commission believe. Both the House Commerce Committee Report and the Conference Committee Report state that Section 207 “directs the Commission to promulgate rules prohibiting restrictions that *inhibit* a viewer’s ability” to receive DBS signals.¹⁷ The word “inhibit,” like “impair,” does not mean “prevent.”¹⁸

Petitioners’ entire statutory argument flows from the equation of “impair” with “prevent.” Petitioners contend that Section 207 would allow the enforcement of any local restriction on DBS antennas so long as physical reception is not prevented. Moreover, Petitioners’ state, Section 207 requires the viewer to prove that his reception has been prevented by the local regulation. Neither the statutory language, nor the Congressional policy goals support such a narrow preemption.

¹⁵ WEBSTER’S THIRD NEW INT’L DICTIONARY.

¹⁶ NLC contends that because the House Commerce Committee report states that Section 207 is to preempt restrictions that “prevent the use of antennae,” that “impair” means “prevent.” Petition of NLC at 2-3, citing H.R. Rep. No. 204, 104th Cong., 1st Sess. at 124 (1995) (“House Report”).

¹⁷ House Report at 123; H.R. Rep. No. 104-450, 104th Cong., 1st Sess. at 166 (emphasis supplied).

¹⁸ Inhibit means “to operate against the full development” or “to repress, restrain, or discourage”. WEBSTER’S THIRD NEW INT’L DICTIONARY.

Section 207 directs the Commission to preempt restrictions that harm a “viewer’s ability” to receive satellite-delivered signals. The proper focus is therefore on restrictions that adversely effect the ability of the viewer to receive DBS service, not merely upon their impact on the physical ability of the antenna to receive the satellite signals. Thus, restrictions that increase a DBS subscriber’s costs must be preempted, as well as restrictions that prevent the reception of the satellite’s signals. Ignoring the substantial policy issue reflected by Section 207, Petitioners would have the Commission preempt only the latter.

Congress passed the statute in order to foster competition between multichannel video programming distributors (“MVPDs”), including DBS, and cable television. Therefore, any local regulation that would lead a consumer to choose cable television over DBS must be preempted, not only those that preclude actual reception. As the Commission has found, local regulations that require screening, variance procedures, or permits burden a viewer’s ability to receive DBS signals or significantly diminish competition between DBS and cable television.¹⁹

Likewise, NLC’s statement that Section 207 requires each and every antenna user to prove actual physical impairment conflicts with the statutory language and purpose. Merely shifting the burden onto the consumer to prove that a local restriction is interfering with her ability to receive DBS imposes costs that are not borne by cable television customers, defeating the Congressional policy objective. The Commission must therefore, at a minimum, retain the

¹⁹ See *Order* at ¶ 23 (noting that record contains examples of “numerous regulations that are so burdensome that antennas are rendered useless”); ¶ 41 (“it would not appear to be either reasonable or necessary to require a permit for a consumer-installed, 18-inch DBS antenna and thus a corresponding fee would also be unwarranted”).

presumptive preemption to prevent a local jurisdiction from imposing "any costs" upon DBS consumers.²⁰

The revised rule may not, however, be enough to promote these policy objectives. While the Commission has already greatly narrowed scope of permissible local regulation of DBS antennas, it will presumably still allow local jurisdictions to bring consumers into court or before the FCC to rebut the presumption.²¹ The risk of such proceedings will undoubtedly chill a consumer's willingness to use DBS service, particularly when subscribers to cable television bear no such risks. The Commission should therefore promote the policy objectives of Section 207 more effectively by: (i) adopting an irrebuttable presumption of preemption of local regulations affecting DBS antennas; and (ii) exercising its exclusive jurisdiction over direct-to-home satellite services, found in Section 205 of the Telecom Act, and eliminating the right of a local jurisdiction to rebut the presumption by taking a DBS antenna user to court

III. DBS ANTENNAS PRESENT NO SAFETY HAZARDS

As they have throughout this proceeding, Petitioners resort to hyperbole in an attempt to shock the Commission into rescinding its rule.²² NLC accuses the Commission of exhibiting "an alarming, and unprecedented, lack of concern" about health and safety objectives, and warns of "imminent health or safety hazards" should the revised rule continue in effect.²³

²⁰ See *Order* at ¶¶ 41, 15.

²¹ See Section 25.104(b)(2); *Order* at ¶ 47.

²² See *Comments of Michigan and Texas Communities* at 15 (predicting that the revised rule would lead to death and destruction).

²³ *Petition of NLC* at 12-13.

Boulder contends that the revised rule will interfere with its (undefined) “fire protection and traffic safety” concerns.²⁴

NLC tells the Commission that the revisions to Section 25.104 are “ill-considered,”²⁵ but the arguments presented by Petitioners have already been fully explored.²⁶ Throughout this five-year proceeding, local jurisdictions have yet to provide a single example of a health or safety hazard presented by a DBS antenna, and Petitioners do not offer anything new in this most recent round of pleadings. NLC cites to the BOCA code, the National Electrical Code, and other regulations of “general application,”²⁷ but never explains why or how these should apply to DBS antennas.

Indeed, the installation of a DBS antenna requires no local regulation. A DBS antenna is typically installed by the consumer, and connected to the receiving system using a simple cable that presents no more hazard than plugging a VCR into a television set. The Commission correctly found that consumers can be trusted to follow simple safety precautions, such as securely mounting the antenna.²⁸ In this regard, the installation of a DBS antenna is no different than typically unregulated activities, such as putting up a basketball hoop or installing a window air conditioning unit.²⁹

²⁴ Petition of Boulder at 8.

²⁵ Petition of NLC at 12.

²⁶ See Order at ¶ 26.

²⁷ Petition of NLC at 13-14.

²⁸ Order at ¶ 35.

²⁹ *Id.*

IV. CONCLUSION

Petitioners offer no new factual, legal or policy considerations to support reconsideration of the revised Section 25.104. Section 207 of the Telecom Act does not limit the Commission's authority to adopt its revisions, nor does Petitioners' interpretation of Section 207 withstand scrutiny. Section 207 should prompt the Commission to strengthen, not weaken, its revised rule. Petitioners' contention that the presumptive preemption will result in unchecked safety hazards is not credible, either. The record contains not a single example of a safety hazard presented by a DBS antenna. DIRECTV therefore requests that the Commission dismiss these Petitions for Reconsideration.

May 21, 1996

Respectfully submitted,

DIRECTV, Inc.

By:



James F. Rogers

Steven H. Schulman*

of LATHAM & WATKINS

1001 Pennsylvania Avenue, N.W., Suite 1300

Washington, D.C. 20004

Its Attorneys

*Admitted in Maryland only

CERTIFICATE OF SERVICE

I certify that I have, this 21st day of May, served by United States mail, postage prepaid, DIRECTV's Opposition to Petitions for Reconsideration, to the following:

Tilman L. Lay
Miller, Canfield, Paddock & Stone, P.L.C.
1225 9th Street, N.W., Suite 400
Washington, D.C. 20036

Counsel for National League of Cities, et. al.

H. Lawrence Hoyt
Boulder County Attorney
P.O. Box 471
Boulder, CO 80306-0471

Counsel for Board of County Commissioners, Boulder County, Colorado

Scott Carlson
Assistant City Attorney
City of Dallas
City Hall
Dallas, TX 75201

Counsel for the City of Dallas, et. al.

Michael Sittig
Executive Director
Florida League of Cities
201 West Park Avenue
P.O. Box 1757
Tallahassee, FL 32302-1757

For the Florida League of Cities


Steven H. Schulman