

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

MAY 11 1996

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

**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 on the petitions for reconsideration and clarification that were filed in response to the Commission's Report and Order ("R&O") in the above-captioned proceeding on April 15 and 17, 1996.¹ As set forth below, the Commission should grant the relief requested by those petitions that have demonstrated the need to strengthen and simplify the Commission's recently-adopted rule which prohibits local governments from restricting the ability of consumers to utilize Direct Broadcast Satellite ("DBS") antennas. Conversely, the Commission should deny those petitions which seek to limit the reach of the Commission's rule.

¹ See *Preemption of Local Zoning Regulation of Satellite Earth Stations*, Report and Order/Further Notice of Proposed Rulemaking, FCC 96-78, IB Docket No. 95-59, DA 91-577, 45-DSS-MISC-93 (released Mar. 11, 1996). The appendix to this statement lists the petitioners and the abbreviations used herein to identify them.

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I. THE COMMISSION SHOULD REFINE SECTION 25.104 OF ITS RULES TO PROVIDE CONSUMERS CLEARER PROTECTION FROM LOCAL GOVERNMENT RESTRICTIONS ON DBS ANTENNAS

In the *R&O*, the Commission broadened the scope of Section 25.104 of its rules to address growing consumer frustration with local government restrictions on the installation and use of DBS antennas. Under newly revised Section 25.104, local government restrictions on DBS and other small satellite antennas are presumptively preempted. Local governments, however, are free to rebut the presumption for narrowly tailored health and safety reasons; alternatively, they can seek a waiver of the rules for "unique" circumstances.² New Section 25.104 will do much to facilitate the unimpeded installation of DBS and similar antennas, except where localities have obtained special relief from the Commission.

In its Further Notice of Proposed Rulemaking ("*FNPRM*") in this proceeding, the Commission has asked whether Section 207 of the Telecommunications Act of 1996 impacts the recently-adopted preemption rule in any material way. Section 207 requires the Commission to prohibit local restrictions that impair the use of over-the-air broadcast, multichannel multipoint distribution service ("*MMDS*") and DBS antennas.³ The Commission has tentatively concluded that the Telecommunications Act does not require any changes in its rules.⁴

² *Id.* at Appendix II.

³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 114 (1996) [hereinafter the "Telecommunications Act"]. 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." *Id.*

⁴ *R&O* at ¶¶ 59-62.

Several of the petitions for reconsideration and clarification focus on how the Commission's rule should be changed in light of Section 207 of the Telecommunications Act. In other words, they raise arguments of the kind solicited by the *FNPRM*.⁵ To avoid burdening the Commission with needless paper, CEMA incorporates by reference the comments and reply comments that it filed in response to the *FNPRM*.⁶ In those earlier comments, CEMA urged the Commission (i) to eliminate Section 25.104's rebuttable presumption and, instead, allow local governments to seek relief through the Commission's waiver procedures; (ii) to apply the preemption rule, as modified, to DBS antennas of all sizes; (iii) to clarify that, in considering requests for waivers, the Commission will expeditiously conduct brief and unburdensome "paper" proceedings;⁷ (iv) to make clear that, if a waiver is granted, consumers that are in violation of the local rule must be given at least 30 days to come into compliance and may not be subjected to retroactive penalties;⁸ and (v) to ensure that the DBS preemption rule is consistent with the rule ultimately adopted in the Commission's concurrent proceeding, CS Docket No. 96-83 (concerning local government and private restrictions on television broadcast and MMDS antennas).

The comments and reply comments filed by other parties advance similar arguments in response to the *FNPRM*. These parties agree that the Telecommunications Act

⁵ See, e.g., Petition of City of Dallas, *et al.* at 3-4; Petition of DIRECTV, Inc. at 7; Petition of National League of Cities, *et al.* at 3-5.

⁶ See Comments of Consumer Electronics Manufacturers Association [hereinafter "CEMA"] (Apr. 15, 1996); CEMA Reply Comments (May 6, 1996).

⁷ See also Petition of SBCA at 27-29.

⁸ See also Comments of Primestar Partners, L.P. at 14 (Apr. 15, 1996).

requires the Commission to reexamine and clarify Section 25.104 so that consumers *throughout the nation* can readily install and use receive-only antennas, without regard to whether they are designed to receive DBS, television broadcast, or MMDS programming.⁹

Although there is substantial overlap between the issues raised by the *FNPRM* and those raised by the petitioners, a few additional points warrant discussion. In its petition for reconsideration, DIRECTV, Inc. has asked the Commission (i) to rephrase Section 25.104(b)(1), *i.e.*, to change it from the passive to the active voice, so as to make clear that consumers need not avail themselves of local procedures before installing their DBS antennas; (ii) to establish a single point-of-contact within the Commission for consumers to report unlawful enforcement of local antenna regulations; and (iii) to empower that point-of-contact to intercede in ongoing, unlawful local proceedings.¹⁰ CEMA supports each of these further refinements. Together, they will help ameliorate the chilling effect which fear of local government action may have on consumers as they consider their over-the-air video options.

In its petition, the Satellite Broadcasting and Communications Association ("SBCA") has asked the Commission to clarify Section 25.104's waiver standard. Specifically, SBCA has asked the Commission to make clear: (i) that waivers will only be granted if the regulation in question is "essential" to protecting a unique local feature; (ii) that, in determining

⁹ See, *e.g.*, Petition of SBCA at 7-8.

¹⁰ See Petition of DIRECTV, Inc. at 9 & 14-15. DIRECTV recommends that Section 25.104(b)(1) be amended to read as follows: "No state or local authority may take any action of any kind, including civil, criminal or administrative proceedings, or issue a citation, to enforce any regulation covered by this presumption unless and until the promulgating authority has first obtained a waiver from the Commission pursuant to Paragraph (e) . . ." *Id.* at 15.

whether a regulation is essential, the Commission will look at related restrictions (such as whether the local government restricts placement of basketball hoops); and (iii) that the restriction must be no broader than necessary to protect the local feature requiring the waiver.¹¹ CEMA also supports these refinements. As CEMA explained in its initial comments on the *FNPRM*, a local government seeking a waiver should be required to demonstrate *both* that the restriction in question is essential and that it is consistent with Congress' interest in ensuring that the public has ready access to DBS technology.¹² SBCA's recommended refinements will help achieve this goal.

II. THE COMMISSION SHOULD REJECT EFFORTS BY LOCAL GOVERNMENTS TO EVISCERATE SECTION 25.104

In addition to DIRECTV and SBCA, several local governments have filed petitions for reconsideration. In their petitions, these governments have asked the Commission to pare back revised Section 25.104. Simply stated, the petitioners argue that revised Section 25.104 goes too far. These parties variously claim that the presumption of preemption voids regulations that technically do not impair the use of DBS antennas;¹³ that local government restrictions and, in particular, those promoting aesthetic goals are entitled to the Commission's

¹¹ See Petition of SBCA at 26.

¹² See CEMA Comments at 7 citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (waivers are appropriate where they do not undermine the policy underlying the rule).

¹³ See Petition of County of Boulder at 3; Petition of City of Dallas, *et al.* at 7; Petition of Delhi Township, *passim*; Petition of Florida League of Cities, *passim*; Petition of National League of Cities, *et al.* at 14.

deference;¹⁴ and that there is insufficient legal justification for preempting thousands of different local restrictions.¹⁵

Yet, the petitions do not offer any workable alternative to the rule which the Commission has adopted. Indeed, the petitions -- the gist of which would result in a patchwork quilt of different rules, regulations and procedures -- demonstrate the need for a clear, straightforward federal policy preempting local restrictions. As CEMA and others have argued throughout this proceeding, the Commission's regulations need further refinement so that the rules of the road are clear. The local government petitioners, however, would move national policy in the other direction, towards a regime of diverse, unclear local rules and marketplace uncertainty. In short, these petitioners would have the Commission turn its back on a clear Congressional directive that consumers be guaranteed the ability to employ over-the-air reception devices of their own choosing. The rules ultimately adopted in this proceeding should reflect the letter and spirit of that mandate. The Commission should therefore deny the petitions which would have it do otherwise.

III. CONCLUSION

For all of the reasons set forth above and in CEMA's other filings in this proceeding, the Commission should modify Section 25.104 of its rules so as to provide consumers with greater protection against local government restrictions on the installation and

¹⁴ See Petition of County of Boulder at 8; Petition of City of Dallas, *et al.* at 12; Petition of National League of Cities, *et al.* at 18.

¹⁵ See Petition of National League of Cities, *et al.* at 9-12.

use of DBS antennas. The Commission should deny the petitions for reconsideration filed by local governments that would frustrate this goal.

Respectfully submitted,

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APPENDIX

**Petitions for Reconsideration and Clarification
IB Docket No. 95-59**

Petition for Clarification and Comments of Alphastar Television Network, Inc. (Alphastar)

Petition for Reconsideration of County of Boulder, State of Colorado (County of Boulder)

Petition for Reconsideration submitted by the Cities of Dallas, Texas; Arlington, Texas; Austin, Texas; Fort Worth, Texas; Knoxville, Tennessee; the National Association of Counties and the United States Conference of Mayors (City of Dallas, et al.)

Petition for Reconsideration of Dehli Township, Ohio (Dehli Township)

Petition for Reconsideration and Clarification and Comments to Further Notice of Proposed Rulemaking of DIRECTV, Inc. (DIRECTV, Inc.)

Petition for Reconsideration of Florida League of Cities (Florida League of Cities)

Hughes Network Systems, Inc. Petition for Reconsideration and Clarification (Hughes)

Petition for Reconsideration of the National League of Cities; the National Association of Telecommunications Officers and Advisors; the National Trust for Historic Preservation; League of Arizona Cities and Towns; League of California Cities; Colorado Municipal League; Connecticut Conference of Municipalities; Delaware League of Local Governments; Florida League of Cities; Georgia Municipal Association; Association of Idaho Cities; Illinois Municipal League; Indiana Association of Cities and Towns; Iowa League of Cities; League of Kansas Municipalities; Kentucky League of Cities; Maine Municipal Association; Michigan Municipal League; League of Minnesota Cities; Mississippi Municipal Association; League of Nebraska Municipalities; New Hampshire Municipal Association; New Jersey State League of Municipalities; New Mexico Municipal League; New York State Conference of Mayors and Municipal Officials; North Carolina League of Municipalities; North Dakota League of Cities; Ohio Municipal League; Oklahoma Municipal League; League of Oregon Cities; Pennsylvania League of Cities and Municipalities; Municipal Association of South Carolina; Texas Municipal League; Vermont League of Cities and Towns; Virginia Municipal League; Association of Washington Cities; and Wyoming Association of Municipalities (National League of Cities, et al.)

Further Comments and Petition for Clarification of the Satellite Broadcasting and Communications Association of America (SBCA)

Petition for Reconsideration/Clarification and Further Comments of United States Satellite Broadcasting Company, Inc. (USSB)

CERTIFICATE OF SERVICE

I, Marc Berejka, certify that a copy of the foregoing "Comments of the Consumer Electronics Manufacturers Association" has been served by first class mail upon the following petitioners for reconsideration and/or clarification in this proceeding.


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