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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

DISPATCH

In the Matter of	)	
	)	
Implementation of Section 207 of the	)	CS Docket No. 96-83
Telecommunications Act of 1996	)	
	)	
Restrictions on Over-the-Air	)	
Reception Devices: Television Broadcast	)	
and Multichannel Multipoint Distribution	)	
Service	)	

**NOTICE OF PROPOSED RULEMAKING**

Adopted: April 2, 1996

Released: April 4, 1996

**Comment Date: May 6, 1996**

**Reply Comment Date: May 21, 1996**

By the Commission: Commissioner Quello issuing a separate statement.

**I. INTRODUCTION**

1. On February 8, 1996, the Telecommunications Act of 1996 (the "1996 Act") became law.<sup>1</sup> Section 207 of the 1996 Act directs that the Commission shall, "pursuant to Section 303 of the Communications Act, 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."<sup>2</sup> In this Notice of Proposed Rulemaking, we address the statutory mandate with regard to television broadcast service ("TVBS") and multichannel multipoint distribution service ("MMDS").<sup>3</sup> We propose a specific rule (*see* Appendix A), and request comments.

<sup>1</sup> Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 (1996).

<sup>2</sup> 1996 Act § 207.

<sup>3</sup> The statutory mandate with regard to direct broadcast signals was addressed in a recent proceeding. *See* discussion *infra* ¶ 4.

2. By implementing Section 207 of the 1996 Act as it relates to TVBS and MMDS, the Commission is promoting two complementary federal interests: (a) to ensure that consumers have access to a broad range of video programming services; and (b) to foster full and fair competition among different types of video programming services. Our rule will address the current problems posed by zoning and land-use restrictions which can interfere with these federal interests and reduce the range of available choices of video programming services. The Commission derives its authority to preempt land-use restrictions from the Congressional directive in Section 207 of the 1996 Act to adopt the proposed rule; from Section 303 of the Communications Act, which instructs us to act in the public interest, convenience, and necessity; and from Section 1 of the Communications Act, which establishes our objective to ensure broad public access to communications.

## II. BACKGROUND

3. Through Section 207 of the 1996 Act, Congress has mandated that the Commission, pursuant to Section 303 of the Communications Act of 1934, preempt state and local restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of TVBS and MMDS. The statute's preemption of such restrictions is also in accord with the objective, set forth in the Communications Act, to assure "to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges."<sup>4</sup>

4. The Commission has considered the issue of preemption of state or local restrictions, such as zoning ordinances, on devices used to receive direct broadcast satellite ("DBS") signals as well as on other earth-based satellite receivers. The Commission adopted a preemption rule in 1986 in response to evidence that state and local authorities were in some instances imposing unreasonable restrictions on installation of satellite antennas.<sup>5</sup> The Commission sought to modify and clarify its rule, and issued a Notice of Proposed Rulemaking in 1995 (*Earth Station Notice*), and a Report and Order and Further Notice of Proposed Rulemaking in 1996 (*Order and Further Notice*).<sup>6</sup> We take note of here, and incorporate by reference, relevant comments filed in response to the *Earth Station Notice*. The *Order and Further Notice* addresses preemption of local zoning and other regulation

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<sup>4</sup> Communications Act of 1934, as amended, § 1, 47 U.S.C. § 151 ("Communications Act").

<sup>5</sup> Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, 51 Fed. Reg. 5519 (Feb. 14, 1986).

<sup>6</sup> Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Docket No. 95-59, 10 FCC Rcd 6982 (1995) (*Earth Station Notice*); Report and Order and Further Notice of Proposed Rulemaking, FCC 96-78 (released Mar. 11, 1996) (*Order and Further Notice*); 47 C.F.R. § 25.104.

regarding all earth-based satellite receivers, including DBS. The *Order and Further Notice* analyzes the Commission's authority to preempt non-federal regulation in this area, and sets forth a rule based on a rebuttable presumption of unreasonableness rather than a per se preemption.<sup>7</sup> In addition, in response to Section 207 of the 1996 Act, the *Order and Further Notice* tentatively concludes that, as far as government restrictions are concerned, the newly adopted preemption rule is a reasonable implementation of Section 207 with regard to DBS signals. Moreover, noting that Section 207 expands the range of preemption to include non-governmental entities such as homeowners' associations, the *Order and Further Notice* proposes a per se preemption of restrictions imposed by non-governmental entities as they affect reception of DBS signals.<sup>8</sup> Pursuant to the 1996 Act, in this Notice of Proposed Rulemaking, we propose a rule regarding prohibitions of restrictions on antennas and other means of receiving TVBS and MMDS over-the-air video programming signals that is similar to the rule for DBS, and we invite comments on our approach.

### III. DISCUSSION

5. Section 207 of the 1996 Act directs that the Commission shall, "pursuant to Section 303 of the Communications Act, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception. . . ."<sup>9</sup> We believe that in order to implement the 1996 Act, and to promote wider choice and full and fair competition among various forms of video programming, we should adopt a preemption rule of clear standards and presumptions, that provides for individualized treatment where appropriate. In developing our approach here, we have drawn on the *Order and Further Notice*, and on comments filed in that proceeding.

6. Section 207 evidences Congress' recognition that the federal interests at stake warrant preemption of inconsistent state and local regulations, even when those regulations address a traditionally local subject such as land use. We believe that in invoking Section 303 of the Communications Act, which authorizes the Commission to issue rules and regulations "as public convenience, interest, or necessity requires,"<sup>10</sup> Congress also intended that we be cognizant of appropriate local concerns. In the *Order and Further Notice*, we noted that

We think it reasonable to infer that Congress did not mean, for example, to prevent the Commission from preserving reasonable local health and safety regulations; or from granting waivers where unusual

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<sup>7</sup> *Order and Further Notice*, ¶¶ 10-12, 24-25.

<sup>8</sup> *Id.* ¶ 61.

<sup>9</sup> 1996 Act § 207.

<sup>10</sup> 47 U.S.C. § 303.

circumstances require specialized local regulation.<sup>11</sup>

We concluded in the *Order and Further Notice* that, in exercising our authority to preempt unreasonable local regulations, our preemption should generally be presumptive rather than per se,<sup>12</sup> and we tentatively concluded that the preemption rule we adopted for DBS was a reasonable way to implement Congress's intent.<sup>13</sup> We tentatively reach the same conclusion here with respect to Section 207's prohibition on restrictions with regard to TVBS and MMDS reception devices.

7. In the *Order and Further Notice* we adopted a rule that provides a higher level of protection for antennas smaller than one meter, including all DBS receivers.<sup>14</sup> Section 207 groups TVBS, MMDS, and DBS receiving devices together, which suggests that they should be treated similarly. However, antennas used to receive TVBS signals can take various forms and sizes, and may not always be comparable to DBS antennas. Antennas used to receive MMDS signals are generally smaller than one meter in diameter, and so are comparable to DBS dishes in size, but they can be of different shapes, and may be mounted on a longer "mast."<sup>15</sup> Therefore, while we propose a rule for TVBS and MMDS devices that does not draw distinctions among receivers based on size, we invite comments suggesting whether and when such distinctions might be justified, within the Commission's authority to implement the statutory language pursuant to Section 303 of the Communications Act. To implement the statutory directive of Section 207 of the 1996 Act, we propose a rule that preempts all unreasonable local zoning and other restrictions. We tentatively conclude that this approach fully implements the statute while preserving some measure of local autonomy and providing

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<sup>11</sup> *Order and Further Notice*, ¶ 59.

<sup>12</sup> *Id.* ¶ 25.

<sup>13</sup> *Id.* ¶ 59.

<sup>14</sup> *Order and Further Notice*, ¶ 55, citing H.R. Report No. 204 at 123-24 (§ 308) as showing Congressional agreement with that distinction. The *Order and Further Notice* adopted a higher level of protection for antennas that are one meter or less in diameter (which includes all DBS antennas) than for antennas that are larger. § 25.104(a) [no size specified] and (b) [antennas two meters or less in commercial zones, one meter or less anywhere]. We also sought comment on how we should treat DBS dishes larger than one meter in diameter, such as are contemplated for areas outside the contiguous United States, like Alaska. *Order and Further Notice* at ¶ 60.

<sup>15</sup> MMDS antennas usually take one of three general forms: a rounded disk about 18 inches across, with a metal screen or solid cover; a parabolic (curved rectangular) sheet about 12 inches by 18 inches, either solid or open grillwork; or a "Yagi" antenna, which is a straight, branch-like device of varying length. See, e.g., Petition of ACS Enterprises, Inc. for Preemption of Norristown Zoning Ordinance, filed Sept. 26, 1995.

clarity of application and procedure. We accordingly propose a rule to preempt restrictions that impair a viewer's ability to receive TVBS and MMDS signals that is similar to the rule adopted to preempt restrictions of a viewer's ability to receive DBS signals. Our proposed rule allows state and local governments to seek waiver of the preemption rule under certain circumstances. See Appendix A.

8. The *Order and Further Notice* establishes a presumption that restrictive state or local regulations are unreasonable, and therefore preempts them, if they affect the installation, maintenance, or use of a satellite earth station antenna that is one meter or less in diameter.<sup>16</sup> The presumption could be rebutted by obtaining a "final declaration" from the Commission or a court of competent jurisdiction that the state or local regulation is both necessary to accomplish a clearly defined and expressly stated health or safety objective, and is as narrowly drawn as possible to accomplish that objective. The local agency cannot overcome the presumption on aesthetic grounds. We tentatively conclude that this same presumption is applicable to all MMDS and TVBS antennas. In the *Order and Further Notice* we also determined that any state or local authority that wished to maintain and to enforce regulations inconsistent with the preemption rule could apply to the Commission for a full or partial waiver. Such a request must show local concerns of a highly specialized or unusual nature, and must include the particular regulation for which waiver is sought.<sup>17</sup> We tentatively conclude that this determination applies to MMDS and TVBS as well, and we accordingly propose rule section (b) to reflect that. See Appendix A. We solicit comment on this tentative conclusion and proposed rule, and specifically ask commenters to provide estimates of the volume of waivers we might expect under this proposed rule. We ask, too, whether any workable alternative approach exists that would reduce the anticipated burden on this Commission of processing numerous requests for waivers or for declaratory rulings.

9. As we did in the *Order and Further Notice*, we note that antenna users and local governments are free to pursue litigation remedies in federal or state courts if they wish to forego Commission review.<sup>18</sup> Further, our recently adopted rule states that

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<sup>16</sup> *Order and Further Notice* at Appendix II, § 25.104(b)(1)(B). The rule for larger satellite antennas preempts all state and local regulations that materially limit transmission or reception by satellite earth station antennas, but allows for rebuttal for aesthetic as well as health or safety objectives.

<sup>17</sup> *Id.* We noted "some examples of circumstances that might warrant consideration of a waiver, depending on the circumstances and on how other types of antennas or modern accoutrements are treated, are genuine historic districts, waterfront property, or environmentally sensitive areas." We emphasized that "this list is not exhaustive nor is it determinative." *Order and Further Notice* at ¶ 51 [footnotes omitted].

<sup>18</sup> *Id.* ¶ 47.

No civil, criminal, administrative, or other legal action of any kind shall be taken to enforce any regulation covered by this presumption unless the promulgating authority has obtained a waiver from the Commission . . . , or a final declaration from the Commission or a court of competent jurisdiction that the presumption has been rebutted. . . .

47 C.F.R. § 25.104(b)(1). We tentatively find that this approach would be appropriate here as well; *see* paragraph (a) of our proposed rule.

10. As noted in the *Order and Further Notice*,<sup>19</sup> Section 207, by its terms and by its legislative history, is not limited to governmental restrictions like zoning ordinances; rather, Section 207 refers simply to "restrictions that impair a viewer's ability to receive video programming."<sup>20</sup> The House Committee Report explains that this House-originated section was intended "to preempt enforcement of State or local statutes and regulations, or State or local legal requirements; or restrictive covenants or encumbrances. Existing 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 this section."<sup>21</sup> We tentatively conclude here, as we did in the *Order and Further Notice*, that Section 207 of the 1996 Act requires us to promulgate a rule prohibiting enforcement of non-governmental as well as governmental restrictions on devices used to receive TVBS and MMDS signals. We accordingly propose a rule that includes a prohibition of non-governmental restrictions for TVBS and MMDS similar to that we proposed for DBS in the *Order and Further Notice*. Here, as in that order, we tentatively conclude that it is appropriate to accord private, nongovernmental restrictions considerably less deference than we grant restrictions imposed by state or local governments, and we accordingly propose a rule that denies to such entities the rebuttal and waiver provisions we provide for governmental entities. *See* Appendix A. We seek comment on this proposed rule.

#### IV. CONCLUSION

11. Consistent with the approach we adopted for DBS antennas in the *Order and Further Notice*, in this Notice we propose to adopt a presumptive preemption approach for all governmental restrictions on over-the-air reception devices, and a full preemption approach for non-governmental restrictions. We seek comment on these proposed approaches and on whether there is any procedural mechanism that might better effectuate the intent of the statute than the approach we adopted in the *Order and Further Notice*. We will incorporate

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<sup>19</sup> *Id.* ¶ 56.

<sup>20</sup> 1996 Act § 207.

<sup>21</sup> H.R. Report No. 204, 104th Cong., 1st Sess. 123-24 (1995).

in this proceeding any relevant comments received in response to the *Earth Station Notice* and the *Order and Further Notice* in IB Docket No. 95-59, so that participants in that proceeding need not resubmit or duplicate their arguments here.

## V. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to the Communications Act of 1934, 47 U.S.C. §§ 151, 154, 303(r), 403, and 405, and the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) § 207, NOTICE IS HEREBY GIVEN and COMMENT IS SOUGHT regarding the proposal, discussion, and statement of issues in this Notice of Proposed Rulemaking.

13. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations and contacts are permitted, provided they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1206.

14. As required by the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the Notice itself, but must have a separate and distinct heading identifying them as responses to the Initial Regulatory Flexibility Analysis.

15. This Notice of Proposed Rulemaking contains either a proposed or modified information collection. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this Notice, as required by the Paperwork Recuotion Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this Notice of Proposed Rulemaking; OMB comments are due 60 days from the date of publication of this Notice in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection tehcniques or other forms of information technology.

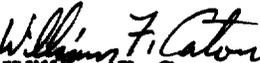
16. Pursuant to applicable procedures set forth in Section 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before May 6, 1996, and reply comments on or before May 21, 1996. As noted above, relevant comments filed in the DBS proceeding, IB Docket No. 95-59, will be incorporated in the record here and will contribute to the development of our final rule. All pleadings must conform to Section 1.49(a) of the Commission's rules, 47 C.F.R. §1.49(a). To file formally

in this proceeding, you must file an original and six copies of all comments or reply comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus eleven copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. For further information contact Randi Albert or Jacqueline Spindler at (202) 416-0800.

17. Written comments by the public on the proposed and/or modified information collections are due May 6, 1996. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, NW, Washington DC 20554, or via the Internet to [dconway@fcc.gov](mailto:dconway@fcc.gov), and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 17th Street, NW, Washington DC 20503 or via the Internet to [fain\\_t@al.eop.gov](mailto:fain_t@al.eop.gov).

19. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Notice of Proposed Rulemaking to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 95-354, 94 Stat. 1164, 5 U.S.C. §§ 601 *et seq.* (1981).

FEDERAL COMMUNICATIONS COMMISSION

  
William F. Caton  
Acting Secretary

## APPENDIX A

### Proposed Rule:

- (a)(1) Any state or local zoning, land-use, building, or similar regulation, that affects the installation, maintenance, or use of devices designed for over-the-air reception of television broadcast signals or multichannel multipoint distribution service shall be presumed unreasonable and is therefore preempted subject to paragraph (a)(2). No civil, criminal, administrative, or other legal action of any kind shall be taken to enforce any regulation covered by this presumption unless the promulgating authority has obtained a waiver from the Commission pursuant to paragraph (b), or a final declaration from the Commission or a court of competent jurisdiction that the presumption has been rebutted pursuant to paragraph (a)(2).
- (2) Any presumption arising from paragraph (a)(1) of this section may be rebutted upon a showing that the regulation in question:
  - (A) is necessary to accomplish a clearly defined health or safety objective that is stated in the text of the regulation itself;
  - (B) is no more burdensome to television broadcast service or multichannel multipoint distribution service reception device users than is necessary to achieve the health or safety objective; and
  - (C) is specifically applicable on its face to devices designed for over-the-air reception of television broadcast signals or multichannel multipoint distribution service.
- (b) Any state or local authority that wishes to maintain and enforce zoning or other regulations inconsistent with this section may apply to the Commission for a full or partial waiver of this section. Such waivers may be granted by the Commission in its sole discretion, upon a showing by the applicant of local concerns of a highly specialized or unusual nature. No application for waiver shall be considered unless it specifically sets forth the particular regulation for which waiver is sought. Waivers granted in accordance with this section shall not apply to later-enacted or amended regulations by the local authority unless the Commission expressly orders otherwise.
- (c) No restrictive covenant, encumbrance, homeowners' association rule, or other nongovernmental restriction shall be enforceable to the extent that it impairs a viewer's ability to receive video programming signals from over-the-air television broadcast or multichannel multipoint distribution service.

**Initial Regulatory Flexibility Analysis**

**Reason for Action**

The rulemaking is initiated to obtain comment on the implementation of Section 207 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), as it applies to over-the-air reception of television broadcast signals and multichannel multipoint distribution services.

**Objectives**

The Commission seeks to evaluate whether our proposed rule preempting non-federal restrictions on zoning and land-use will enhance viewers' ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals and multichannel multipoint distribution services.

**Legal Basis**

The proposed action is authorized under Section 1 of the Communications Act of 1934, as amended, 47 U.S.C. § 151, and Section 207 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996).

**Reporting, Recordkeeping, and Other Compliance Requirements**

State and local governments propounding regulations which restrict the installation, maintenance or use of devices designed for receiving over-the-air signals of television broadcast and multichannel multipoint distribution services may request declaratory rulings from the Commission that their regulations are reasonable, or may petition the Commission for waiver of the rule.

**Federal Rules that Overlap, Duplicate or Conflict with These Requirements**

None.

**Description, Potential Impact and Number of Small Entities Involved**

Any policies or regulations adopted in this proceeding could affect small businesses that install or use devices designed for over-the-air reception of television broadcast signals and multichannel multipoint distribution services. In addition, small non-federal entities will be affected by the rule and may have to reevaluate their land-use policies.

**Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives**

This Notice solicits comments on any suggested alternatives.

**Separate Statement of  
Commissioner James H. Quello**

**In the Matter of  
Implementation of Section 207 of the  
Telecommunications Act of 1996**

**Restrictions on Over-the-Air  
Reception Devices: TV and MMDS**

I support this Notice of Proposed Rulemaking to the extent it implements the intent of Congress 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 service." 1996 Act Section 207. I write separately to underline my concern that this clear Congressional intent could be applied overbroadly to private, nongovernmental provisions in restrictive covenants and homeowners' association rules that run to the placement of over-the-air television and MMDS reception devices.

Specifically, the Notice states that the Commission intends to accord such private, nongovernment restrictions less deference than we grant restrictions imposed by state and local governments, and we accordingly propose a rule that denies to such entities the rebuttal and waiver provisions we provide for government entities. To the extent this language could be interpreted to preempt any such restriction, regardless of whether it would, in fact, preclude off-air broadcast and MMDS reception, I would not support it. For example, I would see nothing wrong with a covenant provision requiring reception devices to be placed behind a chimney or a bush for aesthetic purposes. Such a provision should be preempted only if it precludes reception of the desired signals. I find such a potentially overbroad application particularly troubling in the context of restrictive covenants or similar private agreements, because these are generally entered into knowingly and as a private contractual matter by the purchaser.

Accordingly, I encourage comment on the distinction between provisions in homeowners' covenants and similar private agreements that preclude reception, as opposed provisions that merely address placement of reception devices. In this vein, I would also encourage commenters to address whether this class of reception devices merits different treatment for preemption purposes than DBS dishes, which have perhaps been subject to more aggressive preclusion than other types of reception devices.