



INTERNATIONAL BUREAU

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY  
(202)418-0420  
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May 22, 1996

The Honorable Bart Stupak  
U.S. House of Representatives  
317 Cannon House Office Building  
Washington, D.C. 20515

DOCKET FILE COPY ORIGINAL

Dear Congressman Stupak:

Thank you for your inquiry on behalf of your constituent, Kenneth Chadwick. Mr. Chadwick is interested in information concerning the changes to the current preemption rule for satellite antennas.

In IB Docket No. 95-59, the Commission issued a Report and Order and Further Notice of Proposed Rulemaking (Notice) which adopted modifications previously proposed and proposed a further modification to the current rule. See Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Docket No. 95-59, FCC 96-78 (March 11, 1996). In paragraphs 55 through 62 the Report and Further Notice includes a discussion of the newly adopted rule and the proposed changes. I have enclosed a copy of those paragraphs.

The comment cycle on the Further Notice is now at an end and the comments are under review. The Commission expects to issue a final ruling during the summer. I can assure you that any ruling will attempt to meet the legitimate concerns of all interested parties.

Thank you for your interest in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Donald H. Gips".

Donald H. Gips  
Chief, International Bureau

enclosure

52. A number of commenters urge the Commission to preempt all local regulations related to RF emissions.<sup>99</sup> Because we proposed not to preempt this type of nonfederal regulation, the record in this proceeding is insufficient to take action on this issue. Parties wishing to raise these concerns should do so by formally requesting additional rulemaking action. We note, however, that in reviewing local regulations under revised Section 25.104, we will examine the reasonableness of any health or safety regulation, and that we are not aware of any reasonable health concerns associated with installation of receive-only antennas that do not emit radiation.

### 8. Miscellaneous issues

53. Several commenters urge us to expand the scope of this proceeding to include antennas used for other than satellite services.<sup>100</sup> As we have stated previously, we decline to broaden the issues here to include other services. This proceeding is directed specifically to Section 25.104 and our proposals to revise it. Several other petitions to preempt local regulation of other types of antennas are pending with the Commission and concerns about other services should be discussed in the context of these petitions.<sup>101</sup> In addition, as required by section 207 of the 1996 Act, the Commission does plan to initiate a separate rulemaking proceeding to adopt rules relating to MMDS and over-the-air broadcast antennas.

54. Similarly, we have consistently declined to consider the preemption of private covenants and deed restrictions that ban or inhibit installation of satellite antennas. However, the 1996 Act directs the Commission to now undertake to prohibit the enforcement of such restrictions. We therefore revisit this question in the Further Notice of Proposed Rulemaking below.

### **Further Notice of Proposed Rulemaking**

55. On February 1, 1996, both houses of Congress passed the Telecommunications Act of 1996. The President signed it into law on February 8, 1996. Section 207 of the 1996 Act states:

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<sup>99</sup> Comments of GE at 14, EIA Replies at 6; SBCA at 33, HNS at 31-34, Interlink Satellite Services.

<sup>100</sup> See Comments of ACS Enterprises (wireless cable); Assoc. for Maximum Service Television, Inc. (all antennas); Bell Atlantic (MMDS); NAB; Sony (need to get over the air stations with regular antennas or customers will turn to cable); MCI; Wireless Cable Assoc.

<sup>101</sup> Petition for Declaratory Ruling filed by the Cellular Telecommunications Industry Association on December 22, 1994 (RM-85-77); Petition of ACS Enterprises, Inc. for Preemption of Norristown Zoning Ordinance filed September 26, 1995 (MDS service).

VSAT and C-band services? And (4) how should we implement Congress's intent to prevent enforcement of private restrictions such as deed covenants and homeowners' associations? We address these questions in turn.

59 First, section 207 clearly recognizes that state and local regulation can and does interfere with the federal interest in widespread access to all forms of video delivery, and that preemption by this Commission is the appropriate response to such interference with the federal interest. We tentatively conclude that insofar as governmental restrictions are concerned, our newly adopted preemption rule is a reasonable way to implement Congress's intent with respect to DBS antennas. It might be argued that by seeking to "prohibit" all restrictions that "impair" reception of video programming, Congress set a higher standard than we have adopted. We note, however, that Congress did not simply preempt all "restrictions that impair a viewer's ability to receive video programming services" from DBS providers. Instead, Congress required that "the Commission shall, pursuant to section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services" from DBS providers (emphasis added). Section 303, authorizes the Commission to issue rules and regulations "as public convenience, interest, or necessity requires."<sup>105</sup> Because Congress invoked the Commission's normal rulemaking authority and because Congress did not prohibit all regulations but rather only those that impaired reception, we think accommodation of local concerns remains permissible under the statute. 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 circumstances require specialized local regulation. We seek comment, however, on whether there is any procedural mechanism that might further Congress's special concern with DBS even more effectively than the presumption approach we have adopted. For example, we seek comment whether, for DBS in particular, a prospective approach relying solely on waivers would be preferable to our retrospective system of rebuttable presumptions. We also seek comment on any respect in which our newly adopted section 25.104 fails to implement the 1996 Act.

60. Second, we tentatively conclude that our presumed preemption for antennas smaller than one meter is consistent with Congress's definition of "direct broadcast satellite services." Our one-meter presumption would include not only services that are technically DBS, but also medium power direct-to-home services (such as that offered by Primestar) that are technically part of the Fixed Satellite Service even though they use antennas only a few inches larger than true DBS antennas. We do not believe Congress intended for these medium power systems to face local regulatory burdens not shared by their true DBS counterparts. The legislative history indicates that Congress intended for section 207 to apply to almost all providers of wireless video programming; among such services, only direct-to-home systems using large, C-band antennas were excluded. We interpret this language as evidence that Congress agreed with our initial determination that antenna size is a major

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<sup>105</sup> 47 U.S.C. § 303.

would appear to be directed to aesthetic considerations. Thus, we tentatively conclude that it is appropriate to accord private restrictions less deference on this basis. We seek comment on this conclusion and on all aspects of our proposed rule.

### **Conclusion**

63. We believe that the rule adopted today furthers the public interests in promoting competition between service providers and in assuring wide access to communications facilities. It does so without unduly interfering with local governments interests in regulating land-use. In addition, the Further Notice of Proposed Rulemaking reflects Congress's newly mandated objective.

### **Ordering Clauses**

64. Accordingly, IT IS ORDERED that the revisions to § 25.104 of the Commission's rules as set out in Appendix B are hereby adopted.

65. The analysis required pursuant to Section 606 of the Regulatory Flexibility Act, 5 U.S.C. § 608, is contained in Appendix C attached.

66. IT IS FURTHER ORDERED that the amendments to 47 CFR § 25.104 adopted in the Report and Order that comprises paragraphs 1 through 52 of this Report and Order and Further Notice of Proposed Rulemaking WILL BECOME EFFECTIVE thirty (30) days after publication in the Federal Register. This action is taken pursuant to Sections 1, 4(i), 4(j), 7, and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 157, and 309(j). The Federal Communications Commission as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the information collection in the adopted rule, as required by the Paperwork Reduction Act of 1995. Comments concerning the Commission's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including the use of automated information techniques, are requested. The Commission has requested an emergency Office of Management & Budget review of this collection with an approval by April 10, 1996.

67. IT IS FURTHER ORDERED that pursuant to the Communications Act of 1934, 47 U.S.C. §§ 151, 154, 303(r), 403, and 405, NOTICE IS HEREBY GIVEN and COMMENT IS SOUGHT regarding the proposals, discussion, and statement of issues in the Further Notice of Proposed Rulemaking that comprises paragraphs 55 through 62 of this Report and Order and Further Notice of Proposed Rulemaking.

68. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

**BART STUPAK**  
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Fax Cover Sheet

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*OIC  
Satellite  
1890*

To: Judith Harris - 418-1900

From: Tim Sechrist - Legislative Director

Date: April 12, 1996 Pages (including cover sheet): 3

Fax Number: 418-2801

**Message:**

Per the attached, will proposed FCC regs on Section 207 of the Telecommunications Act preempt any and all local restrictions on satellite dishes or other receivers less than one meter in diameter? We would appreciate some clarification on this matter. Thanks.

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**SPECIAL LEGISLATIVE ALERT**

**URGENT: ACTION REQUESTED BY APRIL 15, 1996**

**TO: COMMUNITY ASSOCIATION CLIENTS AND THEIR  
MANAGERS AND MANAGEMENT FIRMS**

**FROM: CHADWICK, WASHINGTON, OLTERS, MORIARTY & LYNN, P.C.**

**RE: TELECOMMUNICATIONS ACT OF 1996 AND SATELLITE DISHES**

**DATE: MARCH 20, 1996**

We are writing to alert our community association clients and their managers and management firms to a significant change in the law which will have a tremendous impact on community associations and their enforcement of restrictive covenants related to satellite dishes and architectural control. This past February, Congress passed and the President signed the Telecommunications Act of 1996. Buried in that Act is a provision related to "Over-The-Air Reception Devices." This section, Section 207 of the Act, provides as follows:

Within 180 days after the date of enactment of this Act, the Commission shall, pursuant to section 303 of the Communications Act of 1934, 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.  
[Emphasis Added].

This section promotes the stated public policy of the current Administration related to citizens' unrestricted access to the Information Super-Highway. Accordingly, the Federal Communications Commission ("FCC") is empowered under this Act to promulgate regulations which will preempt restrictions, whether public or private, which impair a citizen's right or ability to receive over-the-air television broadcast signals, including direct broadcast satellite services. The restrictions which can and will be preempted include condominium and homeowner association recorded restrictive covenants which "impair a viewer's ability to receive video programming."

Late last week the FCC promulgated proposed rules governing "nongovernmental restrictive covenants." Paragraph 62 of the FCC's Notice of Proposed Rulemaking provides as follows:

62. Finally, we tentatively conclude that section 207 of the 1996 Act requires us to promulgate a new rule prohibiting enforcement of nongovernmental restrictions on small-antenna video reception. We therefore propose to add the following paragraph (f) to section 25.184 of our rules:

(f) 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 services over a satellite antenna less than one meter in diameter.

This proposed rule closely tracks the language of section 207, as amplified by the House Committee Report. The per se nature of the rule does treat private restrictions differently from restrictions imposed by state or local governments. However, as we have recognized throughout this proceeding, state and local land-use regulations have traditionally been near the core of these governments' general police powers. The presumption in favor of small antennas can be rebutted only by health or safety concerns. Nongovernmental restrictions would appear to be directed to aesthetic considerations. Thus, we tentatively conclude that it is appropriate to accord private restrictions less deference on this basis. We seek comment on this conclusion and on all aspects of our proposed rule.

Based on a preliminary review of the Act and this proposed rule, it would appear that an Association's ability to enforce restrictive covenants related to satellite dishes and/or architectural control provisions related to satellite dishes under one meter in diameter is in jeopardy. Obviously, under the Act and the proposed rule, restrictive covenants containing out-right prohibitions of satellite dishes or antennas will no longer be enforceable against satellite antennas less than one meter in diameter. In addition, an Association's ability to control the location, placement and aesthetics of a satellite installation could also be affected to the extent that such controls would "impair a viewer's ability to receive video programming."

Although we understand the public policy concerns regarding the free access to the "information super-highway" by a broad spectrum of the citizenry, we are disturbed by the FCC's clear intention to usurp control from community associations over certain community and proprietary considerations, including aesthetics. While it is clear from the legislation and the proposed rule that satellite dishes under a meter in diameter will no longer be prohibited within covenanted residential communities, there is still an opportunity during the hearing period to attempt to persuade the FCC of the importance of architectural controls. Perhaps if enough people communicate their concerns, the FCC will tailor a more artfully drafted rule which preserves some degree of control in associations, while allowing individuals to receive the video programming services intended by Congress. However, this is unlikely unless the FCC hears directly from you. We urge our community association clients, their managers and management firms to write to the FCC and voice your concerns relative to this governmental intrusion into the private sector. The hearing period ends on April 13, 1996 and interested parties should file comments on or before that date. To file formally, an original and five copies of all comments should be sent to:

Office of the Secretary  
Federal Communications Commission  
Washington, D.C. 20554

If you need additional information you may contact the FCC directly through Rosalee Chiara at (202) 418-0754.

Obviously, we will apprise you regarding developments in this situation as circumstances warrant. In the meantime, please feel free to call us should you have any questions regarding how the proposed rules might affect your community association.