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

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REPLY TO OPPOSITION TO
PETITION FOR CLARIFICATION
OF THE
SATELLITE BROADCASTING
AND COMMUNICATIONS ASSOCIATION OF AMERICA

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The Satellite Broadcasting and Communications Association of America ("SBCA") submits this reply to the opposition to SBCA's petition for clarification filed by the Michigan, Illinois and Texas Communities, *et al.* ("MIT Communities").[1]

Despite the MIT Communities' hyperbole regarding SBCA's petition for clarification, the fact is that SBCA's petition for clarification was designed to and does no more than provide some needed precision to the Commission's new preemption rule. As SBCA and other industry commenters have stressed in the many filings with the Commission since the adoption of the new preemption rule, the Commission's new rule is a necessary step in the implementation of sections 205 and 207 the Telecommunications Act of 1996 ("1996 Act")

[1] An opposition to SBCA's petition for clarification was also filed by the National League of Cities, *et al.* ("National League of Cities"). The National League of Cities' opposition, however, merely incorporated by reference its Petition for Reconsideration filed on April 17, 1996. SBCA addressed the National League of Cities' arguments in SBCA's Opposition to Petitions for Reconsideration filed on May 21, 1996, and does not repeat those arguments here.

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and makes important strides toward "ensuring easy access to satellite-delivered services, which have become increasingly important and widespread in the last few years . . . ."[2] SBCA's petition for clarification was intended to facilitate the efficient and effective implementation of the new preemption rule -- a rule that does *not*, contrary to the MIT Communities' claim, "go[] too far."[3]

The MIT Communities' objections to SBCA's proposed clarifications, as well as SBCA's further comments, lack merit. SBCA addresses -- and disposes of -- in turn each of the objections that the MIT Communities raise.

I. THE FCC'S EXERCISE OF ITS EXCLUSIVE JURISDICTION OVER SATELLITE SERVICES IS CONSISTENT WITH CONGRESSIONAL INTENT

By urging the Commission to exercise its exclusive jurisdiction over direct-to-home satellite services, SBCA asks the Commission to do only what was contemplated by Congress in its adoption of section 205 of the 1996 Act. Section 205 unequivocally and explicitly conferred upon the Commission the "*exclusive* jurisdiction to regulate the provision of direct-to-home satellite services."[4] SBCA is simply asking the Commission to exercise that jurisdiction.

The MIT Communities vainly attempt to narrow the Commission's exclusive jurisdiction to "programming" on satellite services -- ignoring the constitutional and statutory

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[2] *Preemption of Local Zoning Regulation of Satellite Earth Stations,* IB Docket No. 95-59, Report and Order Further Notice of Proposed Rulemaking, FCC No. 96-78, at ¶ 1 (March 11, 1996)(hereinafter "Order" or "Further Notice")

[3] Opposition of Michigan, Illinois and Texas Communities, *et al.* ("MIT Communities Opposition") at 4.

[4] 1996 Act § 205, 47 U.S.C. § 303(v)(emphasis supplied).

constraints against content regulation and excluding, somehow, the transmission or reception of the satellite signal itself. They attempt to do so by falsely accusing SBCA of ignoring the plain language of the statute.[5] But, it is the MIT Communities that themselves selectively quote from section 205.[6] As (fully) quoted by SBCA in its Further Comments and Petition for Clarification, the 1996 Act defines direct-to-home satellite services as "the distribution or broadcasting of programming or services by satellite directly to the subscriber's premises without the use of ground receiving or distribution equipment, except at the subscriber's premises or in the uplink process to the satellite."[7] Thus, contrary to the assertions of the MIT Communities, the Commission's authority over direct-to-home satellite services is not related to the "programming" contained thereon. Indeed, the Commission's ability to regulate the content of the programming is constrained by both section 326 of the Communications Act and the First Amendment. Instead, the FCC's authority reaches "the *distribution or broadcasting* of programming or services." Moreover, because Congress conferred the Commission with exclusive jurisdiction over the "*provision* of direct-to-home satellite services," the Commission's exclusive jurisdiction extends to the "equipment . . . at the subscriber's premises or in the uplink process to the satellite."[8]

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[5] MIT Communities Opposition at 5.

[6] MIT Communities quote only that part of the definition pertaining to the "distribution or broadcasting of programming." MIT Communities Opposition at 5. Even then, it is unclear why the MIT Communities think they can ignore the phrase "distribution or broadcasting."

[7] 1996 Act § 205.

[8] *Id.* (emphasis supplied).

In addition, by asking the Commission not to exercise its exclusive jurisdiction but instead to "grant substantial deference, at least in the first instance, to local legislative concerns,"[9] the MIT Communities conveniently ignore the factual and procedural history that led to the adoption of the new preemption rule. As the Commission recognized in its Order, the 1986 preemption rule was adopted "in response to evidence that state and local governments were, in some instances, imposing unreasonably restrictive burdens on the installation of satellite antennas."[10] As a result of continued abuses subsequent to the 1986 rule, as well as procedural difficulties with that rule, the Commission in 1995 proposed a revision to its preemption rule.[11] Congress likewise recognized the need for federal action in the 1996 Act, by including specific provisions regarding FCC regulation of satellite services and antennas.

Simply stated, experience has demonstrated that the more limited preemption policy of 1986 continued to frustrate the important federal interest in ensuring that a diversity of program services are available to viewers, including by satellite. The fact that some localities may not have abused their discretion does not obviate the need for a rule to protect viewers in those areas where abuses have occurred and continued to occur.[12] Indeed, in those localities

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[9] MIT Communities Opposition at 4.

[10] Order at ¶ 3.

[11] *See id.* at ¶¶ 4-5.

[12] Similarly, contrary to the MIT Communities' assertion, the growth enjoyed by the satellite industry does not demonstrate that all localities are in compliance with the FCC's preemption rule. A more appropriate way to view the growth of the satellite industry nationwide, *despite* the many prohibitive local ordinances that remain, is that it demonstrates the need for preemption in those areas with restrictive ordinances. *See* SBCA Opposition to Petitions for Reconsideration at 9.

where the local regulations do not affect satellite reception, the local regulations will be unaffected by the new preemption rule. In areas with abuses, however, the federal interest in providing access to satellite services must take precedence over local autonomy.

Because the MIT Communities thus provide no persuasive arguments in opposition to the Commission's exercise of its exclusive jurisdiction over satellite services, the Commission should exercise its exclusive jurisdiction without delay

II. A WAIVER-ONLY APPROACH IS SUPPORTED BY THE 1996 ACT

As SBCA explained at length in its Opposition and Further Comments, not only does section 207 of the 1996 Act provide ample authority for the Commission's preemption rule for small satellite antennas (one meter or less in any area and two meters or less in commercial areas), section 207 also supports the adoption of a waiver-only approach for small dishes. Because the MIT Communities' opposition to SBCA's waiver-only proposal raises no new arguments but relies solely on the petition for reconsideration filed by the National League of Cities,[13] SBCA directs the Commission to its Further Comments (at pages 10-14) and its Opposition to the Petitions for Reconsideration (at pages 1-5), rather than repeat those arguments here.

III. THE PROPOSED PREEMPTION OF NONGOVERNMENTAL RESTRICTIONS DOES NOT EFFECTUATE A TAKING

The MIT Communities' attempt to characterize the FCC's preemption of nongovernmental restrictions as a taking is unavailing.[14] For the reasons stated in SBCA's Further Reply Comments (at pages 5-6), in response to the same arguments made by the

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[13] MIT Communities Opposition at 7.

[14] *Id.*

National Apartment Association *et al.*, the proposed preemption of nongovernmental restrictions does not effectuate a taking. Any attempt to mischaracterize it as such should be rejected.

IV. THERE IS NO BASIS TO REGULATE RECEIVE-ONLY ANTENNAS ON HEALTH GROUNDS

The arguments advanced by the MIT Communities that receive-only antennas should be regulated on the basis of some potential, but as yet undetermined, "health" ground demonstrates precisely the need for the Commission to eliminate health as a basis for regulating receive-only antennas. The MIT Communities concede that the only health concerns raised at this time are RF radiation concerns [15] And the Commission has concluded that receive-only antennas do not emit RF radiation and thus RF radiation could not provide a legitimate basis for regulating receive-only antennas [16] Thus, there is no legitimate health basis for local regulation of receive-only antennas on the basis of the current record.

The MIT Communities' argument that some health concern *might* be discovered *in the future* does not justify regulation for health reasons *now*. If any health concern were to be discovered in the future, the Commission could easily amend its rule. If, however, the Commission leaves health in the rule now as a basis for local regulation, it leaves the door open for a local government to regulate improperly receive-only antennas, based on mythical health concerns that even the MIT Communities cannot identify. So that local authorities cannot circumvent the preemption rule, unless and until there is evidence in the record of health

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[15] *Id.* at 7-8.

[16] Order at ¶¶ 35, 52.

concerns regarding receive-only antennas, the Commission should eliminate the word "health" from paragraphs (a)(1) and (a)(2) of the preemption rule.

V. APPLICATION OF RETROACTIVE LIABILITY WOULD DEFEAT THE FEDERAL INTERESTS AT STAKE IN THIS PROCEEDING

In an attempt to further the federal interest in ensuring the availability of satellite services as a competitive communications service, SBCA has proposed that, with respect to small dishes, no liability should be assessed for actions taken to install a satellite antenna prior to a final Commission decision regarding the validity of a local prohibitive ordinance. As SBCA explained, without such a provision, the practical result will be that most consumers will not undertake the battle for the "right" to install a dish.

In opposing SBCA's proposal, the MIT Communities suggest that local communities, under the guise of local police power, should be able to ignore blithely the Commission's preemption rule and enforce their questionable prohibitive ordinances.[17] By suggesting such action, the MIT Communities wholly misinterpret the purpose and intent of the FCC's presumptive preemption rule for small antennas. Contrary to the MIT Communities' contentions, however, rather than entitling a satellite dish owner to "flaunt local police power regulations,"[18] the Commission's rule, and the proposal offered by SBCA, empower satellite antenna owners to exercise their rights under federal law.

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[17] MIT Communities Opposition at 9.

[18] *Id.*

VI. CLARIFICATION TO THE SCOPE OF THE PROPOSED WAIVER STANDARD IS WARRANTED

The MIT Communities appear to concede their support for the Commission's waiver rule while simultaneously opposing the clarifications to the rule proposed by SBCA.[19] Their opposition is ill-founded, however. SBCA is not suggesting that the Commission entirely revamp its waiver rule Instead, SBCA simply proposes specific clarifications to the rule, *i.e.*, waivers should only be granted if the local regulation is essential for preserving or protecting a highly specialized or unique feature of a particular location and, further, only if the boundaries of the particular location and the scope of the regulation are no broader than necessary to preserve or protect the highly specialized or unique feature. This clarification to the scope of the FCC's waiver provision adds a level of precision that, in turn, will provide guidance to local authorities attempting to comply with the Commission's preemption rule.

VII. SPECIFIC PROCEDURES FOR DECLARATORY RULINGS AND WAIVERS ARE APPROPRIATE

From the outset, SBCA has supported specific procedures governing petitions for declaratory rulings and waivers regarding the new preemption rule. We therefore support the procedures recently adopted by the Commission [20] These procedures implement much of what SBCA proposed in its Petition for Clarification, *e.g.*, placement of all petitions on public

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[19] MIT Communities Opposition at 9-10 (stating that, with respect to the Commission's waiver standard, "[t]he Commission should go no further than it already has.")

[20] *FCC Public Notice, Procedures for Filing Petitions for Declaratory Relief of Local Zoning Regulations and for Waivers of Section 25.104,* Report No. SPB-41, April 17, 1996.

notice, submission of comments within 30 days of public notice publication, and submission of replies within 15 days thereafter.[21]

Rather than attack the specific procedures already adopted by the Commission, the MIT Communities instead challenge SBCA's proposals. Specifically, the MIT Communities request that contrary to SBCA's proposal (and the Commission's Public Notice), all petitions for waivers and declaratory rulings be placed on public notice by publication in the Federal Register and that comments should be submitted within 60 days after such publication.[22] Both of these proposals, of course, would only serve to extend the time substantially in which the Commission could rule on any given petition. However, as we explained in our Petition for Clarification, *if* the Commission prohibits the imposition of liability for actions taken prior to a final FCC ruling, and, therefore, *if* consumers can install satellite antennas without fear of the imposition of retroactive liability, then the urgency associated with ruling on any given petition is alleviated. Under these circumstances, therefore, SBCA would not oppose the MIT Communities' proposed Federal Register publication requirement. The MIT Communities cannot, however, have it both ways. If a satellite consumer could be subject to retroactive liability, then the Commission should not require Federal Register publication (which will delay a ruling) and should commit to ruling on all petitions within 60 days of receipt.

Finally, the MIT Communities' claim that the proposed waiver process would somehow constitute an invalid rulemaking demonstrates only that the MIT Communities fail to

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[21] Further Comments and Petition for Clarification of SBCA at 27. Because the Commission's Public Notice already implements the public notice and comment and reply aspects of our Petition for Clarification, at this point we ask only that the Commission further clarify that it will commit to act within 60 days.

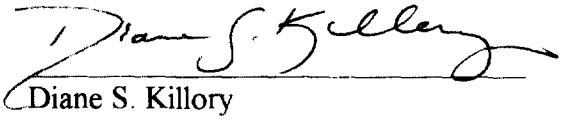
[22] MIT Communities Opposition at 12-13.

comprehend the distinction between the waiver process and a rulemaking.[23] The grant of a waiver is not a rulemaking, but rather an application of a Commission rule to a specific case. Indeed, as the Commission is well aware, it is *required* to grant waivers when the public interest would be better served by grant of a requested waiver rather than by strict application of the rule.[24]

CONCLUSION

For the reasons set forth both in its Petition for Clarification and this Reply, the Commission should grant the Petition for Clarification filed by SBCA.

Respectfully submitted,



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[23] MIT Communities Opposition at 11.

[24] *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

CERTIFICATE OF SERVICE

I, Kathryn M. Stasko, do hereby certify that the foregoing **REPLY TO OPPOSITION TO PETITION FOR CLARIFICATION OF THE SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION OF AMERICA** has been furnished, via U.S. Mail on this 31st day of May, 1996, to the following:

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