

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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In the Matter of)

Preemption of Local Zoning Regulation)
of Satellite Earth Stations)

) IB Docket No. 95-59
) DA 91-577
) 45-DSS-MISC-93

DOCKET FILE COPY ORIGINAL

To: The Commission

REPLY TO THE OPPOSITIONS TO THE 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.

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To: The Commission

**REPLY TO THE OPPOSITIONS TO THE PETITION FOR RECONSIDERATION OF
THE NATIONAL LEAGUE OF CITIES, ET. AL.**

Pursuant to 47 C.F.R. § 1.429, the Local Communities respond to the oppositions to their petition for reconsideration submitted by the Consumer Electronics Manufacturers Association ("CEMA"), DIRECTV, Inc. ("DIRECTV"), GE American Communications, Inc. ("GE"), Hughes Network Systems, Inc. ("Hughes"), Philips Electronics North America Corporation and Thomson Consumer Electronics, Inc. ("PT"), Primestar Partners L.P. ("Primestar"), and the Satellite Broadcasting and Communications Association of America ("SBCA") (collectively, the "Oppositions"). The Oppositions raise three basic arguments against the Local Communities' petition for reconsideration ("Recon Petition"): (i) they claim that Section 207 of the Telecommunications Act of 1996¹ does not limit the Commission's pre-existing authority to preempt state and local laws and regulations relating to satellite antennas; (ii) they assert that the Commission's presumptive preemption of all zoning, land use and building ordinances and regulations affecting small satellite antennas ("Preemption Rule"), as adopted in the Report and Order and Further Notice of Proposed Rulemaking, IB Docket No.

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("Telecom Act").

95-59, DA 91-577, 45-DSS-MISC-93, adopted February 29, 1996 ("Report and Order"), is not violative of the Commerce Clause; and (iii) they claim that smaller satellite antennas such as VSAT and DBS antennas present no health or safety concerns.

I. The Commission's "Broad Authority" To Regulate the Provision of Satellite Services Does Not Extend to Preemption of All Local Regulations That Merely "Affect" Small Satellite Antennas.

The Oppositions assert that the Commission had the authority to preempt all state and local ordinances that interfere with satellite communications prior to the adoption of Section 207 of the Telecom Act.² In support of this position, the Opposition relies upon the Commission's conclusion that it possesses "broad authority to preempt state and local zoning regulations that burden a user's right to receive all satellite-delivered video programming. . ." ³ Assuming, *arguendo*, that the Commission did have such authority prior to Congress' enactment of Section 207, it does not follow that such authority allows the Commission to preempt all zoning, land use, building and similar regulations that merely "affect" small satellite antennas, and certainly not without an adequate showing that any regulation merely affecting such antennas so burdens a user's rights as to frustrate the Congressional intent.⁴ The record in this proceeding certainly contains no such showing.

The Oppositions' reliance on City of New York v. FCC, 486 U.S. 57 (1988), in support of the Commission's asserted preemption authority is likewise unavailing. The issue in New York was whether the Commission had acted within the statutory authority conferred by

² See GE Opposition at 3; Hughes Opposition at 4-5; and SBCA Opposition at 6-7.

³ Report and Order at ¶ 16.

⁴ See Louisiana Public Service Commission v. FCC, 106 S.Ct. 1890, 1898-99 (1986).

Congress when it preempted state and local technical standards governing cable television systems. Unlike here, in New York Congress had specifically authorized the Commission, in the 1984 Cable Act, 47 U.S.C. § 544(e), to establish technical standards for cable television systems. Thus, the Commission was acting pursuant to a clear delegation of authority. In this proceeding, however, the Commission purports to derive its "broad authority" not from a clear, specific, statutory delegation of such authority, but from "the numerous powers granted by Title III of the Act, and Section 705 of the Act, giving certain rights to receive unscramble and unmarketed satellite signals."⁵ Thus, New York is distinguishable from this proceeding both on its facts and the proposition for which it stands.

In any event, the Oppositions miss the point. New York certainly cannot be read to stand for the proposition that the Commission had authority then to preempt all local laws that merely "affect" cable systems. Yet they now argue that the Commission's general Title III authority gives it such broad authority -- presumably, to presumptively preempt all state and local laws nationwide that in any way "affect" interstate communications. Neither New York -- nor any other case -- can be read to stand for that proposition. The single truth is that nothing in the Communications Act of 1934 empowers the Commission to preempt all local zoning, land use, building or similar regulations that merely "affect" small satellite antennas.

The Oppositions' attempt to characterize the Preemption Rule as merely an extension of the 1986 rule and of the Commission's "well established" preemption authority cannot be

⁵ Report and Order at ¶ 11.

supported.⁶ The 1986 rule did not limit municipalities' traditional police power to regulate satellite antennas as they deemed appropriate, as long as such regulation did not differentiate between such antennas and other types of antenna facilities and did not prevent, or impose unreasonable costs upon, the reception of satellite delivered signals.⁷ Moreover, unlike the current Preemption Rule at issue here, the former rules did not single out for across-the-board, automatic preemption a whole class of local regulations that the Supreme Court has long recognized go to the heart of local police power.⁸ Thus, the 1986 preemption rule, unlike the current Preemption Rule, did not require the Commission to engage in the impermissible exercise of local police power.⁹

The fallacy of the Oppositions' position is apparent in their failure to come to grips with the Supreme Court's decision in U.S. v. Lopez.¹⁰ As we explained in our Recon Petition,

⁶ SBCA also notes that none of the local governments acknowledged Congress' adoption of Section 205, which gives the Commission exclusive jurisdiction over direct-to-home ("DTH") satellite services. SBCA Opposition at 4-5. Section 205 was not acknowledged because it does not present an issue in this proceeding. Section 205 reaffirms the Commission's jurisdiction over the "distribution or broadcasting of programming or services" via satellite. Such jurisdiction has nothing at all to do with zoning, land use and building codes. The FCC has long had similarly exclusive jurisdiction over broadcast services, but no one has ever seriously suggested that such jurisdiction preempts every single local regulation or police power that merely "affects" broadcast facilities.

⁷ 47 U.S.C. § 25.104 (1995).

⁸ See FERC v. Mississippi, 102 S.Ct. 2126, 2142, n. 30 (1982).

⁹ Given the holding in Lopez discussed below, it is also far from clear whether even the judicially untested 1986 preemption rule would withstand constitutional challenge.

¹⁰ U.S. v. Lopez, 115 S.Ct. 1624 (1995). On the one hand, the Oppositions state that Lopez is "inapposite" (SBCA Opposition at 7); on the other hand they state that local zoning regulations "substantially affect" interstate commerce (GE Opposition at 6). Nothing in the record suggests, even remotely, that such state and local regulations substantially affect interstate commerce. In fact, the opposite is true. The unprecedented growth of the DBS industry and

Lopez stands for the proposition that the Commerce Clause does not permit Congress to regulate state activity unless that activity "substantially affects" interstate commerce.¹¹ The Preemption Rule goes beyond Lopez, however, because it preempts all local zoning, land use and building regulations that merely "affect" small satellite antennas. The Oppositions try to bridge the obvious gap by asserting that "local zoning regulation of satellite antennas 'substantially affects' interstate commerce."¹² But this linguistic sleight-of-hand wilts under scrutiny. For the argument to be correct, Congress would have to have the raw power to preempt all state and local laws or regulations that in any way "affect" interstate commerce. In other words, Congress would have the power to presumptively preempt virtually all state and local laws that are on the books. This is precisely the proposition that Lopez dispels. Under Lopez, Congress has no authority to preempt all state and local regulations that merely "affect" small satellite antennas. And if Congress cannot exercise such power, neither can the Commission.

II. Congress Intended Section 207 To Place A Limit On the Commission's Authority to Preempt Local Regulations

The Oppositions assert that Section 207 is not a limit on FCC authority but is a directive to the FCC to exercise its preexisting authority.¹³ In support of this position, the Oppositions claim that since Congress was aware of the then-pending rulemaking proceeding, if it wanted

the over 70,000 VSATs installed by Hughes over the past five years (Hughes Opposition at 13) demonstrate that such regulations actually have little to no affect on interstate commerce.

¹¹ See Recon Petition at 8.

¹² GE Opposition at 6.

¹³ DIRECTV Opposition at 5; Hughes Opposition at 5; and GE Opposition at 3.

to preclude the Commission from preempting local regulation of services other than those enumerated in Section 207, it could have done so.¹⁴

But the Oppositions' argument merely proves our point. Assuming Congress knew of this pending rulemaking proceeding, then its decision to enact Section 207, with its DBS-limited scope, in the face of the FCC's far broader proposed rules at the time, means either that Congress intended to curtail the Commission's "preexisting authority" or that Section 207 was a superfluous exercise. As we stated in our Recon Petition, it is a basic canon of statutory construction that statutes should be construed to give effect to every clause and word, so far as possible.¹⁵ If the Commission already had the authority to preempt local regulation of all small satellite antennas, then Section 207 must be read as a limitation on that authority. To read the section otherwise would suggest that Congress engaged in the nonsensical exercise of merely directing the Commission to promulgate a rule that was far narrower in scope than the rules the FCC had already proposed and that were on threshold of being adopted. Such a reading would impermissibly render Section 207 a nullity.¹⁶

¹⁴ GE Opposition at 4.

¹⁵ Recon Petition at 7, citing United States v. Menasche, 348 U.S. 528, 538-39, 75 S.Ct. 513, 520 (1955).

¹⁶ One should note that in addition to enacting the narrow Section 207 in the face of the Commission's broader satellite zoning preemption rules, Congress also enacted Section 704, which stresses Congress' general desire that local zoning authority be preserved. Read *in toto*, the 1996 Act thus evidences Congress' general intent to rein in the Commission's authority to preempt local zoning laws.

III. The Preemption Rule Goes Far Beyond Section 207.

The clear and unequivocal mandate of Section 207 is that the Commission must adopt rules that prohibits only those regulations that "impair" a viewers ability to receive DBS programming via DBS antennas -- not to wipe out all regulations that merely "affect" a far broader class of dishes. The Oppositions try to sidestep this defect by quibbling with our reliance on the House Commerce Committee's use of the word "prevent" when the statutory word is "impair."¹⁷ But "impair" is far closer to "prevent" than it is to "affect." One conclusion is clear: nothing in Section 207 or in its legislative history remotely supports the mere "affects" test in the Preemption Rule. The rule therefore cannot be squared with the statute.

IV. The Oppositions Sidestep the Serious Health, Safety, and Aesthetic Problems Presented by the Preemption Rule.

The Oppositions assert that the "record makes it abundantly clear that smaller satellite antennas, such as VSATs, present no health or safety concerns."¹⁸ The only support offered for this assertion are the unsupported claims that: (i) local jurisdictions typically do not regulate items of similar size; and (ii) local governments have not shown that the immediate invalidation of health and safety regulations would result in unsafe or hazardous installations.¹⁹ As the reply of the City of Dallas, et. al. points out, the contention that local governments typically do not regulate non-satellite items of a size similar to VSAT antennas is untrue. More to the point, however, is that fact that VSAT antennas, unlike basketball hoops and mail boxes, are electrical

¹⁷ DIRECTV Opposition at 6.

¹⁸ Hughes Opposition at 12.

¹⁹ Hughes Opposition at 13.

devices that are often affixed to roofs and other areas where improper installation or inadequate grounding could result in injury to persons and property. Comparing such devices to basketball hoops and mail boxes thus ignores reality.

The Oppositions' second claim begs the question. The National Electrical Code and the BOCA building code are crafted to ensure that devices such as VSAT antennas are securely installed on rooftops, and have the proper electrical connections and grounding. The Oppositions do not deny that these regulations are rendered unenforceable by the Preemption Rule and that as a result, compliance with them is now entirely voluntary and subject to considerations that should not be part of the safety equation, *e.g.*, the cost of properly installing the device. Thus, while the Local Communities cannot "show" that the preemption of long standing and generally applicable health and safety regulations will necessarily result in unsafe or hazardous installations, a local government and its residents should not have to wait for a two-meter satellite antenna to blow off of a rooftop onto pedestrians or for a resident to be electrocuted before it can regulate the manner in which such antennas are installed and grounded.

Similarly, the Oppositions do not deny that each of the nation's 4000 historic districts are now defenseless against defacement by satellite dishes. Apparently, the industry believes such defacement is simply a price that must be paid for to enhance its profits and sales.

V. Expanding the Preemption Rule Would Exacerbate the Rule's Legal Infirmities.

The Oppositions suggest that the Preemption Rule does not go far enough and that the Commission should adopt an irrebuttable presumption of preemption of local regulations

affecting DBS antennas.²⁰ Adopting such an irrebuttable presumption would only exacerbate the legal infirmities of the Preemption Rule. The Commission has no authority to preempt all local regulations that merely affect DBS antennas. Section 207 limits the Commission's preemption authority in this area to those local regulations that impair a viewer's ability to receive DBS service. Thus, the Commission cannot do what the Oppositions request.

VI. Conclusion

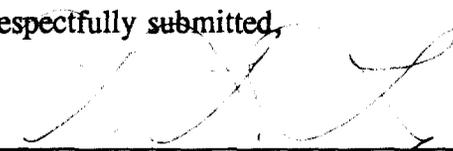
The Commission must reconsider its Preemption Rule in light of the constraints placed on its preemption authority by Lopez and Section 207. The Oppositions' reliance upon the Commission's "preexisting authority" to preempt all local regulations merely "affecting" small satellite antennas totally ignores Lopez, and rests on a misreading of both Section 207 and the scope of the Commission's preexisting authority.

There should be little doubt in the minds of reasonable people that the invalidation of all health and safety codes "affecting" small satellite antennas will eventually result in health and safety hazards. If everyone could be trusted to implement such measures voluntarily, the codes would not have been enacted in the first instance. Whether driven by economic realities, a deficient morality, or both, some satellite installer in some local community will decide not to voluntarily comply with the local health and safety codes that the Preemption Rule purports to preempt. This will ultimately result in a health and/or safety hazard. To argue that this scenario will not come to pass merely because one satellite manufacturer has advised its

²⁰ DIRECTV Opposition at 8.

installers "to abide by any and all reasonable local satellite antenna regulations"²¹ sounds of naivete. The Commission should grant our Recon Petition and narrow its rules.

Respectfully submitted,



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²¹ Hughes Opposition at 14.

CERTIFICATE OF SERVICE

I, J. Darrell Peterson, hereby certify that on this 31st day of May, 1996, a copy of the foregoing Reply to the Oppositions the Consumer Electronics Manufacturers Association, DIRECTV, Inc., GE American Communications, Inc., Hughes Network Systems, Inc., Philips Electronics North America Corporation and Thomson Consumer Electronics, Inc., Primestar Partners L.P., and the Satellite Broadcasting and Communications Association of America, was mailed, via first class mail, postage prepaid to:

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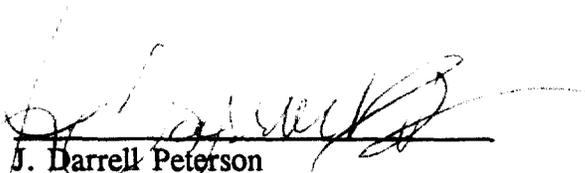
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