



CITY OF DALLAS

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May 30, 1996

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Mr. William M. Caton
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

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Re: Response to Opposition to Petition for Reconsideration

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

Dear Sir or Madam:

Enclosed herewith please find an original and twelve copies of the Local Communities' Response to Opposition to Petition for Reconsideration in the above referenced matter. Please file stamp one copy and return to the undersigned in the enclosed envelope. Should you have any questions, I may be contacted at (214) 670-3478.

Sincerely,

Scott Carlson
Assistant City Attorney
City of Dallas

On behalf of the Local Communities

Enclosure

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**Response to Opposition to
Petition for Reconsideration**

submitted by

the Cities of Dallas, Texas; Arlington, Texas; Austin, Texas;
Fort Worth, Texas; Knoxville, Tennessee and
the National Association of Counties and
the United States Conference of Mayors

for reconsideration of the rule adopted
at 27 C.F.R. § 25.104 (a) through (e)

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C.

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

Response to Opposition to Petition for Reconsideration

The City of Dallas, Texas by its attorneys and the Cities of Arlington, Texas; Austin, Texas; Fort Worth, Texas and Knoxville, Tennessee and the United States Conference of Mayors and the National Association of Counties with their consent (herein referred to collectively as the "Local Communities") hereby file this Response to Opposition to Petition for Reconsideration in the above referenced matter.¹

I. Respondents Fail to Overcome the Express Congressional Intent of Section 207, the Act and the Legislative History

Respondents rely on asserted inherent rulemaking authority not limited or affected by Section 207 of the Telecommunications Act of 1996 ("the Act")² to empower Commission creation of a rule more expansive than envisioned in Section 207. No Respondent attempts to reconcile

¹ Specifically, this Response to Opposition to Petition for Reconsideration is in reply to filings by GE American Communications, Inc. ("GE"); Satellite Broadcasting And Communications Association of America ("SBCA"); ComTech Associates, Inc.; DIRECTV, Inc. ("DTV"); Hughes Network Systems, Inc. ("Hughes"); and Consumer Electronics Manufacturers Association ("CEMA"), Philips Electronics North America Corporation and Thomson Electronics, Inc. ("Philips") collectively referred to as Respondents, opposing the Local Communities Petition for Reconsideration.

² 110 Stat. 56.

Congressional intent in the enactment of Section 207 rulemaking authority on the specifically delineated services with the asserted inherent rulemaking authority. Respondents simply interpret Section 207 to direct the Commission to engage in specific rulemaking, leaving inherent rulemaking authority intact.³ Yet, this interpretation raises questions which Respondents fail to address. Congress was aware of the pendency of this rulemaking during the consideration of the Act. Then, as now, the proposed rule covered the services listed in Section 207 and more. Why then did Congress direct the Commission to engage in rulemaking when the Commission had already done so and more than covered the services included in Section 207? Why did Congress direct a rule with a much more limited scope than the pending Commission rule? The Local Communities suggest that the answers rest in limitation of Commission rulemaking authority to the delineated services. Respondents reliance upon inherent rulemaking authority to authorize a more expansive rule can not be reconciled with the limited scope of Section 207 and renders the provision meaningless

Relying upon FCC v. New York, Respondents urge the Commission to adopt the rule in contradiction to Section 207.⁴ As in City of New York, Respondents point out that Congress did not explicitly disapprove of this policy or rule in enacting the Act. Substantial differences exist, however,

³ GE American Communications, Inc. at 4. Other Respondents adopt similar positions. See, for example, Hughes at 6.

⁴ 486 U.S. 57, 100 L. Ed. 2d 48, 108 S.Ct. 1637 (1986). See Hughes at 5.

between this rulemaking and the rule at issue in City of New York. The City of New York Court considered an established policy. In the rulemaking at hand, the prior rule was judicially invalidated⁵ and this rulemaking begun to develop a new policy and rule. It can not be maintained that the adopted rule is a continuation of the earlier rule and policy. The adopted rule is substantially different and more preemptive than the prior rule. Further, the rule was adopted after the Act was enacted. It would be quite unusual for Congress to explicitly disapprove of a policy and rule which are not yet final.

Upon closer inspection, the City of New York decision actually supports Petitioner's contentions. After establishing broad principles upon which agency regulation may preempt state regulation, the Court states that the administrative regulation will survive judicial scrutiny "unless it appears from the statute or legislative history that the accommodation is not one that Congress would have sanctioned."⁶ The opinion of the Court is replete with additional statements supporting this proposition.⁷ Indeed, the Local

⁵ Town of Deerfield v. FCC, 992 F. 2d 420 (1992).

⁶ 486 U.S. 57, 64, citing United States v. Shimer, 367 U.S. 374, 383, 6 L. Ed. 2d 908, 81 S.Ct. 1554 (1961).

⁷ For example, at page 66 the Court states:

"First, an agency literally has no power to act, let alone preempt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency. [Emphasis ours]"

See also, Louisiana Public Service Commission v. FCC, 476 U.S. 355, 368-369, 90 L. Ed. 2d 369, 106 S.Ct. 1890 (1986)

Communities rely upon this proposition in contending that the adopted rule is improper because it does not comport with statutory authorization of Section 207.

Respondents rely also upon Section 205 in giving the Commission the authority to preempt in areas not envisioned by Section 207.⁸ The Commission should resist this argument. Section 205 simply grants exclusive FCC jurisdiction over direct-to-home broadcasting services. Local zoning and other regulations do not affect content, who can apply or what kind of service may be sought. Any effect upon direct-to-home broadcasting services, particularly setback, height restrictions and variance processes, is incidental. No rulemaking authority is present. Congress instead reserved that for Section 207.

II. Recent Supreme Court Decision is Dispositive and Applicable to This Rulemaking

Respondents contend that the Lopez decision is inapplicable to the rulemaking at hand. Two principal points are advanced for this conclusion - 1) Lopez is a criminal case and therefore has no bearing on this rulemaking and 2) the test of Lopez is met as evidenced by the record established in this proceeding. Yet, an understanding of the Lopez decision and its analysis of the extent of Commerce Clause authority is, contrary to Respondent's

⁸ SBCA at 4-5. Philips at 2.

assertions, dispositive and applicable to the rulemaking at hand.

The Lopez court established a new test for determining the proper reach of federal regulation under the Commerce Clause. An activity must substantially affect interstate commerce before it is susceptible to regulation. Further, this standard was announced in the context of federalism issues and the exercise of traditional local authority. The Lopez Court expressly refused to sanction a federal police power intruding upon the distinctly local province of education.

To contend that the Lopez decision is inapposite to this rulemaking, as have some Respondents, is inaccurate.⁹ The Court did not limit the application of this test to firearms in school zones. Rather, the court established this standard for all exercises of power under the Commerce Clause and the standard would apply to the Act and this rulemaking. The Commission enacts a broad, sweeping rule which presumes, based on an admitted limited record of abuse,¹⁰ that local zoning and other regulations throughout the entire country “impair” satellite reception and then proceeds to preempt those regulations. Enforcement is only authorized after the Commission has determined that a local government has enacted a valid health and safety related regulation which meets Commission criteria. The Commission has established itself as the ultimate arbiter of local land use and

⁹ See SBCA at 7. Respondents inaccurately note that Lopez involved a local statute. In fact, the Lopez court considered a Congressionally enacted statute, 18 U.S.C. §922(q).

¹⁰ ¶ 30 of the Order.

other controls in the context of satellite dishes - a federal police power over traditional local concerns.

Respondents point to the "substantial record" developed as evidence of the substantial affect that local regulations have upon the interstate activities in support to the rule.¹¹ Assuming that all requests for declaratory action are meritorious and all complaints are valid, when compared to the substantial number of subscribers, the resulting percentage of complaint related to subscribers is insubstantial and fails to warrant the broad sweeping action adopted by the Commission. Respondents would have the Commission believe that a percentage registering in the hundredths of points evidences a substantial affect upon interstate commerce. The same Respondent asserts that it is more accurate to portray the growth of the satellite broadcasting industry as occurring in spite of local regulations.¹² A more plausible characterization is that local regulations have a negligible, if any, effect upon satellite dish reception.¹³

Respondents incorrectly state that local governments do not regulate

¹¹ SBCA at 8. SBCA points out five declaratory judgments and lists specific twelve local jurisdictions which it contends have burdensome regulations. SBCA also notes over 1300 complaints or inquiries since 1994 and makes unsupported statements about other substantial overreaching local regulations. CEMA complains of the chilling effect that local government regulations create upon satellite service. It is difficult to understand what "chilling effect" local governments have upon the satellite industry when industry growth exceeds projections. See also, DTV at 9.

¹² SBCA at 9.

¹³ As pointed out in the Petition, representatives of the satellite industry have stated as much.

basketball hoops and air conditioning units.¹⁴ Actually, these uses must meet setback requirements and variance processes if not in compliance with such restrictions. Central air conditioning units must be installed according to the appropriate codes. In large part, the Local Communities simply request that satellite dishes be treated as all other land uses.¹⁵ What certain Respondents really urge is a unique, federal land use regulation which eliminates local controls, including typical setback, height restrictions and variance requirements.¹⁶ This represents the sort of usurpation of traditional local police powers and creation of a federal police power that the Lopez court refused to approve.

III. The Rulemaking Does Not Grant Deference to Traditional Local Control

As previously pointed out, the Commission's adopted rule is much more onerous than the preexisting Commission rule.¹⁷ Respondents point to the fact that the Commission has not created a per se preemption and, as a result, deference has been demonstrated.¹⁸ Other Respondents contend that

¹⁴ See Hughes at 13.

¹⁵ In its Petition for Reconsideration, SBCA urges adoptions of a waiver process which is premised upon similar treatment of basketball hoops and satellite dishes. Indeed, if the adopted rule authorized such treatment many concerns of local governments would be addressed. SBCA at 26.

¹⁶ See DTV at 4.

¹⁷ ¶ 4 of the Order. "We [the Commission] also recognized, however, that zoning regulations have traditionally been enacted and administered by local authorities pursuant to the states' police powers. This led us to adopt only a limited preemption of local zoning restrictions."

¹⁸ For example, see GE at 7.

the Commission must adopt an irrebuttable presumption with respect to its dishes to comport with Section 207.¹⁹ The Commission was correct to reject this contention.²⁰ Viewed against the backdrop of the prior rule, the adopted rule with its nationwide presumed impairment, no actual demonstration that specific local regulations affect satellite dish reception and denial of enforcement until the Commission has approved a local regulation grants little deference in reality. Local communities will have to look to Washington for a determination of what is health and safety related in the context of satellite dishes. Setback requirements will have to be specially crafted for satellite dishes. The costs to redraft local ordinances in accordance with the new rule, carving out special treatment for satellite dishes subject to Commission approval - a process which will be repeated across the country - will be enormous.

Conclusion

The Local Communities urge the Commission to reconsider its adopted rule in light of the limitations expressed in Section 207 of the Telecommunications Act of 1996, recent Commerce Clause jurisprudence and the deference which is generally accorded state and local regulations. Respondents have failed to demonstrate the need or the authority for the

¹⁹ DTV at 4. Contrary to DTV assertions, the plain reading of the statute directs Commission action only on local regulations which impair, not presume that all regulations impair reception.

²⁰ See Order ¶ 59.

broad preemptive rule adopted by the Commission. Statutory constraints mandate a rule limited to the specific services in Section 207. The alleged record of abuse does not justify the sweeping action taken in the adopted rule - a preemption which presumes impairment rather than an actual showing. The presumption itself turns on its head the traditional deference shown state and local regulations which is compounded by a requirement that all ordinances meet specific Commission standards and, before enforcement, be approved by the Commission. Rather, a less expansive rule in accordance with Congressional intent and the actual demonstrated affect upon interstate commerce, is required and more deferential to the interests of local governments.

Respectfully submitted,



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On behalf of the Local
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CERTIFICATE OF SERVICE

I, Joyce Basinger, do hereby certify that the foregoing Response to Opposition to Petition for Reconsideration has been furnished, via U.S. mail, on this 30th day of May, 1996 to the following:

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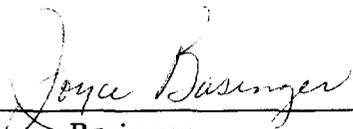
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