component part of reception of multichannel video programming. Cable service, for example, is defined in part as the one-way transmission of video programming or other programming service together with the capability for subscriber interaction that might be required for the selection of use of such video programming or other programming service.[109] Thus, antennas that have transmission capability designed for the viewer to select or use video programming are considered reception devices under the rule.[110] Our rule does not apply to devices that have transmission capability only.

40. Finally, we note that there is no discussion in the record regarding a history of problems regarding local regulation of the size of TVBS antennas that would suggest the need to impose size or height limitations. While commenters indicate that restrictions on TVBS antennas exist, especially from nongovernmental authorities,[111] these restrictions generally take the form of a total prohibition on antennas rather than limits on their size or placement. The lack of record on size or height limits on TVBS antennas may stem from the fact that TVBS is an older and more familiar technology than DBS or MMDS and thus subject to less regulation. There is general public awareness of the variations in the dimensions of TVBS antennas, and commenters have not sought to define these antennas by size or shape. Based on the lack of record showing any such desire, and on the variations in the dimensions of TVBS antennas, we decline to limit the size or shape of such antennas covered by our rule. Nonetheless, we believe that the BOCA guideline regarding the permissibility of permits for installations reaching more than 12 feet over the roofline, which we believe to be a safety guideline, may apply to TVBS antennas as well as to MMDS antennas on masts.

### D. Nongovernmental Restrictions

#### 1. Authority to preempt nongovernmental restrictions

41. In this section, we address the argument raised by commenters that we lack the authority to prohibit nongovernmental restrictions, such as restrictive covenants,[112] because such a prohibition would constitute a taking, requiring compensation under the Fifth

[109] 47 U.S.C. § 602(6).

[110] To the extent that these antennas have transmission capability, they must meet the standards established in the RF Emissions proceeding noted above.

[111] NASA TVBS-MMDS Comments at 5; NAB *ex parte* Presentation June 14, 1996.

[112] A restrictive covenant is an interest in real property in favor of the owner of the "dominant estate" that prevents the owner of the "servient estate" from engaging in an activity that he or she would otherwise be privileged to do. *See* R. Powell, Powell on Real Property § 34.02[2], (Rohan, ed. 1995). Restrictive covenants are recognized to be "part and parcel of the land to which they are attached." Chapman v. Sheridan-Wyoming Coal Co., 338 U.S. 621, 627 (1950). Restrictive covenants are sometimes used by homeowners' associations to prevent property owners within the association from installing antennas.

Amendment of the Constitution.[113] As explained below, we believe the Commission has authority to prohibit enforcement of restrictive covenants and other similar nongovernmental restrictions that are inconsistent with the federal directive written by Congress in Section 207 of the 1996 Act.

42. When Congress enacted Section 207 of the 1996 Act, it directed us to prohibit "restrictions" that impair viewers' ability to receive video programming services through devices designed for over-the-air reception of TVBS, MMDS, or DBS. The legislative history to this section makes clear that Congress intended the prohibition to apply not only to governmental restrictions but also to nongovernmental restrictions such as "restrictive covenants and encumbrances."[114] As stated in the House Report, Congress directed that "[e]xisting regulations, including but not limited to zoning laws, ordinances, restrictive covenants or homeowners' associations rules, shall be unenforceable to the extent contrary to this section."[115] Thus, in promulgating a regulation that prohibits these restrictions, we are fulfilling the Congressional mandate set forth in Section 207.

43. We have no authority to declare the Congressional mandate contained in a statute to be unconstitutional.[116] In any event, however, we find that preemption of nongovernmental restrictions does not conflict with the Fifth Amendment. The Fifth Amendment requires the government to compensate a property owner if it "takes" the homeowner's property.[117] A taking may involve either the direct appropriation of property[118] or a government regulation which is so burdensome that it amounts to a taking of property without actual condemnation or appropriation.[119] A regulation results in a *per se* regulatory taking if it requires the landowner to suffer a permanent physical invasion of his or her property by a third party, or "denies all economically beneficial or productive use of land."[120] If a regulation does not result in a *per se* taking, the courts will engage in an "ad hoc inquiry" to examine "the

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[113]*See, e.g.,* National Trust TVBS-MMDS Comments at 2, 4; NAA TVBS-MMDS Comments at 3; Community TVBS-MMDS Reply at 3; NAA TVBS-MMDS Reply *passim*; Corporon DBS Comments at 2; NAA DBS Comments *passim*; Southbridge DBS Comments; NAA DBS Reply at 3-4; ICTA DBS Reply at 5-6.

[114]*See* House Report at 124; note 36, *supra*.

[115]*Id.*

[116]*See* GTE California, Inc. v. FCC, 39 F.3d 940, 946 (9th Cir. 1994) (*citing* Johnson v. Robison, 415 U.S. 361, 368 (1974)).

[117]*See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014-15 (1992).

[118]Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[119]*Lucas*, 505 U.S. at 1015.

[120]*Id.*

character of governmental action, its economic impact, and its interference with reasonable investment-backed expectations."[121] We do not believe our rule results in a taking of property.

44. The government may abrogate restrictive covenants that interfere with federal objectives enunciated in a regulation. In *Seniors Civil Liberties Ass'n v. Kemp*,[122] the District Court found no taking in an implementation of the Fair Housing Amendments Act (FHAA) that declared unlawful age-based restrictive covenants, thereby abrogating the homeowners' association's rules requiring that at least one resident of each home be at least 55 years of age. The court found that the FHAA provisions nullifying the restrictive covenants constituted a "public program adjusting the benefits and burdens of economic life to promote the common good," and not a taking subject to compensation.[123] Similarly, the Commission's rule implementing Section 207 promotes the common good by advancing a legitimate federal interest in ensuring access to communications,[124] and therefore justifies prohibition of nongovernmental restrictions that impair such access.[125]

45. Some commenters also challenge our authority to prohibit these restrictions under the Commerce Clause. The Supreme Court has made it clear that Congress not only can supersede local regulation, but also can change contractual relationships between private parties through the exercise of its constitutional powers, including the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. In *Connolly v. Pension Benefit Guaranty Corp.*,[126] the Court stated,

> Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights in property, but when contracts deal

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[121]PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980).

[122]761 F. Supp. 1528 (M.D. Fla. 1991), *aff'd*, 965 F.2d 1030 (11th Cir. 1992). *See also* Westwood Homeowners Ass'n v. Tenhoff, 745 P.2d 976 (Ariz. Ct. App. 1987) (holding that a state legislative refusal to enforce restrictive covenants against group homes for the developmentally disabled was not a taking).

[123]*Id.* at 1558-59.

[124]In addition, the assertion that nullifying a homeowner's ability to prevent his neighbor from installing TVBS, MMDS or DBS antennas has a measurable economic impact on the homeowner's property, or interferes with investment-backed expectations, is unsupported by the record here. *See, e.g., Penn Central*, 438 U.S. 104 (1978). Indeed, some commenters argue that the rule enhances the value of the homeowner's property to prospective purchasers who want access to video programming services competitive with cable. SBCA *ex parte* presentation June 11, 1996.

[125]Moreover, if preemption of the restrictive covenants at issue here could be viewed as a taking, the Tucker Act, 28 U.S.C. §1491, presumptively would provide an avenue for obtaining just compensation, thus obviating any potential constitutional problem. *See* Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441, 1445 n.2 (D.C. Cir. 1994).

[126]475 U.S. 211 (1986).

> with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.
>
> If a regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights, does not always transform the regulation into an illegal taking.[127]

Moreover, in *FCC v. Florida Power Corp.*,[128] the Court permitted the Commission to invalidate certain terms of private contracts relating to property rights. In that case, the Commission's right to regulate pole attachments as mandated by the Pole Attachment Act was upheld even though the regulation invalidated provisions contained in private contracts, including contracts entered into prior to the enactment of the Pole Attachment Act.[129] Courts have also found that homeowner covenants do not enjoy special immunity from federal power.[130] Thus, we conclude that the authority bestowed upon the Commission to adopt a rule that prohibits restrictive covenants or other similar nongovernmental restrictions is not constitutionally infirm.

46. In proposing a strict preemption of such private restrictions without a specific rebuttal or waiver provision,[131] we noted that nongovernmental restrictions appear to be related primarily to aesthetic concerns. We tentatively concluded that it was therefore appropriate to accord them less deference than local governmental regulations that can be based on health and safety considerations.[132] We note, however, that there was an almost complete lack of a record on nongovernmental restrictions and their purposes.

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[127] *Id.* at 223-24 (quotations and citations omitted).

[128] 480 U.S. 245 (1987).

[129] *Cf.* United States v. Midwest Video Corp., 406 U.S. 649, 674 n.31 (1972) (in upholding a Commission rule that required cable operators to originate programming, the Court, quoting from General Telephone Co. of the Southwest v. United States , 449 F.2d 846, 863-64 (5th Cir. 1971), stated the "property of regulated industries is held subject to such limitations as may reasonably be imposed upon it in the public interest and the courts have frequently recognized that new rules may abolish or modify pre-existing interests."); *see also* Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. at 282 ("This Court has had frequent occasion to observe that the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy").

[130] *See, e.g.*, Shelly v. Kraemer, 334 U.S. 1 (1948) (finding racially restrictive covenants judicially unenforceable); Mayers v. Ridley, 465 F.2d 630 (D.C. Cir. 1972) (*per curiam*) (the Court of Appeals *en banc* permitted a challenge by homeowners attacking the legality of racially restrictive covenants to proceed).

[131] *DBS Order and Further Notice* ¶ 62 and Appendix II; *TVBS-MMDS Notice* ¶ 10 and Appendix A.

[132] *DBS Order and Further Notice* ¶ 62.

47. In response to our proposed rules regarding private restrictions, we received extensive comments from consumers as well as representatives of community associations, commercial real estate interests, and video programming services. Based on this record, we have determined that our original proposals should be modified, and that the same rule and procedures applicable to governments will apply to those desiring to enforce certain nongovernmental restrictions on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest in the property.[133] We seek comment below on the application of Section 207 in other kinds of ownership situations.

48. Many commenters, including those representing community associations, commercial real estate interests, and building owners, have expressed significant concern about the applicability of our rules to situations in which a resident wishes to install an antenna on property that is owned by the viewer, is commonly owned, or is owned by a landlord. Based on these comments, we have identified three categories of property rights that might be affected by our rules, including: (a) property within the exclusive use or control of a person who has a direct or indirect ownership interest in the property; (b) property not under the exclusive use and control of a person who has a direct or indirect ownership interest in the property, including the outside of the building, including the roof; and (c) residential or commercial property that is subject to lease agreements. At this time, we conclude that we should apply our rule to property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest in the property. Such a rule appropriately implements the statute while recognizing these important distinctions in the way in which property is owned. With respect to leased property and property not under the viewer's exclusive use or control but where the viewer has an ownership interest, we have determined that the existing record in this proceeding is inadequate to reach a definitive conclusion and that, as discussed below, a further notice of proposed rulemaking is appropriate.

**2. Installation on property within the exclusive use or control of the viewer and in which the viewer has a direct or indirect ownership interest**

49. The first category includes the case in which an individual owns his home and the land on which it sits. This type of ownership can apply to either a single family detached home or a single family rowhouse, and the owner may be subject to restrictions in the form of covenants or homeowners' association rules that are usually incorporated in a deed. One community association commenter asserts that enforcement and implementation of our rule in these areas "will be less cumbersome and less problematic [than where there is no individual ownership],"[134] but that an association should be able to enforce reasonable rules related to

[133] *See* discussion of waivers and declaratory rulings, *infra* at III. E. Process and Procedure.

[134] Community DBS Comments at 17.

antenna installation if those rules do not impair reception.[135] Community association commenters urge that the burden be placed on the homeowner to show why her or his antenna cannot be installed in compliance with the applicable covenant.[136] Other commenters strongly object to our limiting community associations' ability to maintain the appearance of their communities, and argue that people buy into a community because they want the protection of the homeowners' association.[137] Some argue that Section 207 does not authorize different treatment of governmental and nongovernmental restrictions, and that nongovernmental entities should be able to seek waivers or rebut presumptions.[138] Community proposes that a restriction should not be prohibited on individually owned or controlled property if a community association makes video programming available to any resident wishing to subscribe to such programming at no greater cost and with equivalent quality as would be available from an individual antenna installation.[139]

50. Commenters representing video programming service providers and consumers contend that they have encountered numerous problems with installations on property owned exclusively by the antenna user but subject to restrictive covenants or homeowners' association rules,[140] and that they support our proposed rule.[141] People's Choice, a wireless

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[135]*Id. See also* Reston TVBS-MMDS Comments at 3; Huckleberry TVBS-MMDS Comments at 2; Silverman TVBS-MMDS Comments at 3; Oakland TVBS-MMDS Comments at 2; Oakland DBS Comments at 2; City of Foster City DBS Comments.

[136]Silverman TVBS-MMDS Comments at 3; Community DBS Comments at 17.

[137]Community TVBS-MMDS Comments at 8-9; Evermay TVBS-MMDS Comments at 2; Georgia TVBS-MMDS Comments at 3-4; Huckleberry TVBS-MMDS Comments at 1-2; Caughlin TVBS-MMDS Comments at 2; NAA TVBS-MMDS Comments at Attachment 1 at 14-15; Community DBS Comments at 7-8; Corporon DBS Comments at 1-2; Southbridge DBS Comments; Drummer DBS Comments at 2; Montgomery Village DBS Comments; Mount DBS Comments; Heritage DBS Comments; Carriage DBS Comments.

[138]Reston TVBS-MMDS Comments at 4; Montgomery Village TVBS-MMDS Comments; Caughlin TVBS-MMDS Comments at 5; NAA TVBS-MMDS Comments at Attachment 2 at 2; National Trust TVBS-MMDS Comments at 5. The rule we adopt today allows these entities the same waiver process as is allowed to governmental entities.

[139]Community DBS Comments at 19.

[140]WCAI TVBS-MMDS Comments at 23-24; ARRL TVBS-MMDS Comments at 4; CBA TVBS-MMDS Comments at 2; Kraegel DBS Comments; Jindal DBS Comments; NRTC DBS Comments at 5-6; DIRECTV *ex parte* presentation June 11, 1996; People's Choice *ex parte* presentation June 11, 1996; PacTel *ex parte* presentation June 17, 1996.

[141]Bell Atlantic TVBS-MMDS Comments at 3-4; MSTV TVBS-MMDS Comments at 5; NAB TVBS-MMDS Comments at 5; NASA TVBS-MMDS Comments at 6-7; NYNEX TVBS-MMDS Comments at 4-5; PacTel TVBS-MMDS Comments at 2; WCAI TVBS-MMDS Comments at 6, n.14; AT & T DBS Comments at 3; Bell Atlantic *ex parte* presentation June 17, 1996; PacTel *ex parte* presentation June 17, 1996; NYNEX *ex parte* presentation June 24, 1996.

cable provider, states that restrictive covenants on the use of property are not the result of negotiated agreements among homeowners, but instead result from coercion by developers and the influence of cable companies.[142] Once covenants are in place, they are difficult to amend, according to these commenters, often requiring approval by a two-thirds majority of homeowners and recording of changes in local land records.[143]

51. As noted above, in light of the statutory language and the legislative history, we conclude that Congress intended Section 207 to apply to nongovernmental restrictions. We adopt a rule that prohibits nongovernmental restrictions that impair reception by antennas installed on property exclusively owned by the viewer. Under our rule, nongovernmental restrictions on antennas installed on such property are limited in the same manner and governed by the same standards as governmental restrictions.[144] Thus, homeowners' associations and similar nongovernmental authorities may regulate antenna placement or indicate a preference for installations that are not visible from the neighboring property, as long as a restriction does not impair reception. In addition, these nongovernmental authorities can enforce the same type of restrictions based on safety or historic preservation that governments can enforce. Finally, these entities can apply for declaratory rulings or waivers of our rule.

52. In addition to covering restrictions on antenna placement on property owned by the viewer, our rule will also apply where an individual who has a direct or indirect ownership interest in the property seeks to install an antenna in an area that is within his or her exclusive use or control. In this situation, other owners will not be directly impacted by the installation.[145] As argued by commenters, community associations retain the right to impose restrictions on installation as long as they do not impair reception.[146] Viewers who have exclusive use or control of property in which they have a direct or indirect ownership interest cannot be prohibited from installing antennas on this property where such a prohibition would impair reception, absent a safety or historic preservation purpose.

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[142]People's Choice *ex parte* presentation June 11, 1996; People's Choice TVBS-MMDS Reply at 2, 4.

[143]People's Choice TVBS-MMDS Reply at 5-6; Bell Atlantic *ex parte* presentation June 18, 1996.

[144]We reject the suggestion made by some commenters that the Commission exempt existing nongovernmental restrictions from the application of the rule. *See, e.g.*, Danberry DBS Comments; Zalco DBS Comments; Sully Station DBS Comments (each arguing that grandfathering existing rules would allow developers of new communities to accommodate antennas in the design of the community and to include covenants that are consistent with Commission regulations.) The legislative history of Section 207 specifically says that "existing" regulations are to be covered by our rule, and thus a grandfathering approach would not implement Congressional intent. *See* House Report at 124.

[145]Community DBS Comments at 20.

[146]*Id.*

### E. Process and Procedure

53. We envision at least three types of situations where parties might seek Commission relief pursuant to our rule. Individual antenna users or service providers may seek a determination that a restriction is prohibited by our rule. Entities seeking to enforce a restriction may seek a determination that the restriction is not preempted. Finally, enforcing authorities may seek a determination that although their restriction is subject to preemption, our rule should be waived in a particular case. We have adopted procedures addressing each of these scenarios. Under these procedures, if either the antenna user or the enforcing authority has requested a determination from a court or from this Commission on whether the restriction at issue is permitted as an exception for safety or historic preservation, the restriction may be enforced pending this determination. Otherwise, the restriction may not be enforced until the Commission or a court of competent jurisdiction issues a ruling that the restriction is not preempted. In these circumstances, a viewer may install, use and maintain an antenna while the proceeding is pending. While the viewer may be subject to the enforcing authority's fine or other penalty for violation if the restriction is determined to be enforceable, no additional fines or penalties may accrue during the pendency of the proceeding.[147]

54. In any Commission proceeding seeking a determination under our rule, the burden will be on the entity seeking to enforce a restriction to show that such restriction is not preempted. The rules that we adopted in the *DBS Order and Further Notice* and proposed in the *TVBS-MMDS Notice* placed the burden of rebutting the presumption and the burden of seeking a waiver on the enforcing authority. Those rules also would have prevented the local authority from taking any action to enforce restrictions that are inconsistent with our rule, unless the authority had secured a waiver or a declaration that the presumption had been rebutted.[148] In the *DBS Order and Further Notice*, we stated that by placing the burden on the enforcer, our approach allowed municipalities and consumers to determine the applicability of local regulations.[149] Commenters from industry support our proposal to place the burden of persuasion on the local authorities.[150] These commenters contend that in order to foster competition, the local authority, and not an individual consumer, should have to

[147]For example, if the fine for violating a restriction is $50, the viewer may be subject to that fine if the restriction is determined to be enforceable. If the restriction establishes an ongoing or cumulative fine (e.g., $50 per month, interest, late fees, or other penalties), these shall not accrue while a court or the Commission is considering the enforceability of the restriction. *See* DIRECTV DBS Petition at 12; Primestar DBS Petition at 14.

[148]*DBS Order and Further Notice* at Appendix II; *TVBS-MMDS Notice* at Appendix A.

[149]*DBS Order and Further Notice* ¶ 32.

[150]*See, e.g.*, NASA TVBS-MMDS Comments at 7-8; NAB TVBS-MMDS Comments at 7; CEMA TVBS-MMDS Reply at 4; NASA TVBS-MMDS Reply at 7; Bell Atlantic TVBS-MMDS Reply at 6; NAB TVBS-MMDS Reply; WCAI TVBS-MMDS Reply at 10-11; CEMA DBS Comments at 7; DIRECTV DBS Reply at 5; SBCA DBS Reply at 8.

demonstrate that a regulation does not impair access.[151] Local authorities disagree, and argue that the party seeking to install the reception device or the video service provider should demonstrate that a local regulation impairs his access to TVBS, MMDS or DBS signals.[152] For the reasons stated in the *DBS Order and Further Notice*, we affirm our conclusion that the entity seeking to enforce a restriction bears the burden of demonstrating the validity of its regulation.[153] We believe that placing the burden on consumers would hinder competition and fail to implement Congress' directive, as such a burden could serve as a disincentive to consumers to choose TVBS, MMDS, or DBS services.

55. Declaratory ruling and waiver petitions require only paper submissions to the Commission, thus minimizing the burden on all parties.[154] In the latter case, general waiver guidelines will apply[155] and petitions must be pled with particularity,[156] setting forth the local regulation in question and its applicability to TVBS, MMDS, or DBS. Petitioners for waiver must show good cause why the rule should be waived;[157] petitioners seeking to enforce restrictions should show that the restrictions are so vital to the public interest as to outweigh the federal interest in such a prohibition; challengers of restrictions should show that the restrictions are not reasonably related to, or necessary to serve, the stated public interest function. Petitions for waiver should be targeted as narrowly as possible to achieve the desired end. Petitions for declaratory rulings or waivers must be served on all interested parties,[158] and will be noted by the Commission on a public notice that establishes a pleading period. Oppositions and replies to petitions for declaratory rulings or waivers will be

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[151] *Id.*

[152] *See, e.g.,* Community TVBS-MMDS Reply at 11; Reston DBS Comments at 3; Mayors DBS Petition at 12; NAA DBS Comments at 4-6; NATOA *ex parte* presentation March 13, 1996 (burden should be on video service providers because they have more resources than local governments).

[153] *DBS Order and Further Notice* ¶¶ 31, 32.

[154] Commenters suggest that a paper process will be the best and least costly option. CEMA DBS Reply at 4; SBCA *ex parte* presentation June 11, 1996. We agree; formal hearings would be far more burdensome.

[155] Northeast Cellular Tel. Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*citing* WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969)). *Northeast Cellular* held that a waiver is appropriate only if special circumstances warrant a deviation from the general rule, if the waiver will serve the public interest, and if the waiver is granted in a nondiscriminatory fashion. *Id.*

[156] Rio Grande Family Radio Fellowship, Inc. v. FCC, 406 F.2d 664, 666 (D.C. Cir. 1968).

[157] *Id.; see also Northeast Cellular,* 897 F.2d at 1166.

[158] For example, a community association requesting a waiver should serve any residents who have challenged its restriction and/or have installed antennas.

permitted, but are not required.[159]

56. In the *DBS Order and Further Notice* and the *TVBS-MMDS Notice*, we discussed the possibility of parties seeking judgment from either the Commission or a court of competent jurisdiction. Many industry commenters recommend that the Commission retain exclusive jurisdiction to resolve disputes between local authorities and consumers.[160] They contend that if local courts are allowed to adjudicate federal policy, the results may be inconsistent, and that uniformity provides the certainty needed to compete effectively.[161] These commenters cite Section 205 of the 1996 Act as explicitly conferring upon the Commission the "exclusive jurisdiction to regulate the provision of direct-to-home [satellite] services."[162] In addition, they note that *Town of Deerfield, New York v. FCC*[163] may require the Commission to intervene in a case before judicial review or not at all.[164] Finally, these industry commenters argue that the Commission should exercise exclusive jurisdiction to ensure national uniform standards consistent with Section 207 and the Commission's rule.. Some community commenters oppose the exercise of exclusive jurisdiction by the Commission.[165] One commenter states that Section 205, read in its entirety, grants the Commission exclusive jurisdiction over only programming, not the antennas themselves. This party also cites *United States v. Lopez*[166] in arguing that zoning and land use regulation are police powers reserved for the states under the Tenth Amendment of the Constitution.[167] Another commenter asserts that the Commission should give the traditional deference to state and federal courts with regard to health and safety matters.[168]

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[159]In order to expedite action on these petitions, we hereby delegate authority to the staff to issue the initial rulings in these matters, subject to the usual Commission review process.

[160]*See e.g.,* SBCA DBS Opposition at 3-5; DIRECTV DBS Petition at 8-12; CEMA DBS Petition and Opposition at 6; Primestar DBS Petition at 12-13; HNS DBS Petition at 3-4; USSB DBS Petition at 3.

[161]CAI Wireless TVBS-MMDS Comments at 7; WCAI TVBS-MMDS Comments at 20-22; CAI Wireless TVBS-MMDS Reply at 3. *But see* Community TVBS-MMDS Reply at 10; Community DBS Reply at 6 (establishing the Commission as the sole forum for resolving disputes will disadvantage local authorities who lack experience in practicing before the Commission).

[162]1996 Act § 205, 47 U.S.C. § 303(v) (emphasis added).

[163]992 F.2d 420 (2d Cir. 1992).

[164]DIRECTV DBS Petition at 10, HNS DBS Petition at 4.

[165]*See, e.g.,* Mayors DBS Petition at 3,12; MIT DBS Opposition at 4-5.

[166]115 S. Ct. 1624 (1995).

[167]MIT DBS Opposition at 4-5.

[168]Mayors DBS Petition at 12.

57. At the outset, we state our disagreement with those commenters who maintain that because Section 303(v), as amended by Section 205 of the Telecommunications Act, states that the Commission shall "[h]ave exclusive jurisdiction to regulate the provision of direct-to-home satellite services,"[169] we are required to exercise exclusive jurisdiction over any restrictions that may be applicable to DBS receiving devices. This provision, like all the other provisions appearing in that section, is governed by the prefatory language in Section 303 which, as noted earlier, states, "Except as otherwise provided in this Act, the Commission from time to time, *as public convenience, interest, or necessity requires*, shall ..." (emphasis added).

58. While we hope that affected persons, entities, or governmental authorities would seek guidance and suitable redress through the processes we have established, we see no reason to foreclose the ability of parties to resolve issues locally. We accordingly decline to preclude affected parties from taking their cases to a court of competent jurisdiction. We expect that in such instances the court would look to this agency's expertise and, as appropriate, refer to us for resolution questions that involve those matters that relate to our primary jurisdiction over the subject matter. We have no basis to believe, and Congress has not suggested, that disputes and controversies arising over such restrictions should or must be resolved by this agency alone or cannot be adequately handled by recourse to courts of competent jurisdiction.

## IV. FURTHER NOTICE OF PROPOSED RULEMAKING

59. As indicated above, we have generally concluded that the same regulations applicable to governmental restrictions should be applied to homeowners' association rules and private covenants, where the property is within the exclusive use or control of the antenna user and the user has a direct or indirect ownership interest in the property. We are unable to conclude on this record, however, that the same analysis applies with regard to the placement of antennas on common areas or rental properties, property not within the exclusive control of a person with an ownership interest, where a community association or landlord is legally responsible for maintenance and repair and can be liable for failure to perform its duties properly. Such situations raise different considerations.

60. The differences are reflected in the comments received. According to one commenter, an individual resident (or viewer) has no legal right to alter commonly owned property unilaterally, and thus no right to use the common area to install an antenna without permission. It argues that Section 207 does not apply to commonly-owned property, and that applying it to such property would be unconstitutional.[170] Commenters also raise issues about

[169] 47 U.S.C. § 303(v).

[170] Community DBS Comments at 12; Community DBS Reply at 3. *See also* related comments in Community TVBS-MMDS Comments at 11, 13-14; C & R Realty TVBS-MMDS Comments; Silverman TVBS-MMDS Comments at 3; Parkfairfax TVBS-MMDS Comments at 1; Woodburn Village TVBS-MMDS

the validity of warranties for certain common areas such as roofs that might be affected or rendered void if antennas are installed.[171] These commenters suggest that, in areas where most of the available space is common property, there should be coordinated installation managed by the community association that would assure access to services by all residents.[172] Broadcasters support a suggestion that community associations with the responsibility of managing common property should be able to enforce their restrictions as long as they make access available to all services desired by residents.[173]

61. NAA and others express concern about situations in which the prospective antenna user is a tenant and the property on which she or he wants to install an antenna is owned by a landlord.[174] These commenters urge the Commission to clarify that the rule does not affect landlord-tenant agreements for occupancy of privately-owned residential property, and does not apply at all to commercial property.[175] Citing the Supreme Court's ruling in *Loretto v. Teleprompter Manhattan CATV Corp.*,[176] they assert that to force property owners to allow installation of antennas owned by a service provider, a tenant, or a resident would result in an unconstitutional taking in violation of the Fifth Amendment.[177] They assert that in *Loretto*, the Court found that a New York law that required a landlord to allow installation of cable wiring on or across her building was an unconstitutional taking in part because it constituted a permanent occupation.[178] NAA argues that a rule requiring antenna installation on landlord-

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Comments; Southbridge DBS Comments.

[171]Community DBS Comments at 14, Appendix A (letters from Peterson Roofing, Premier Roofing, and Schuller Roofing Systems); *see also* Elisha TVBS-MMDS Comments at 2; Christianson DBS Comments.

[172]Community DBS Comments at 21. Community offers several examples of possible approaches that would accomplish this result. *See also* Parkfairfax TVBS-MMDS Comments at 2; MASS DBS Comments at 2 (associations should be allowed to solicit bids from service providers so that the owners can select a provider); Orten DBS Comments (developers and community associations should be free to bargain with cable, satellite and MMDS providers to serve community).

[173]NAB *ex parte* presentation June 14,1996. *See also* DIRECTV DBS Comments at 10.

[174]NAA TVBS-MMDS Comments; NAA DBS Comments; ICTA TVBS-MMDS Comments at 4-6; FRM DBS Comments. In addition, there are approximately 442 letters in the record, designated as "Coordinated," from property managers and similar groups expressing the same concerns.

[175]National Trust TVBS-MMDS Comments at 5; NAA DBS Comments at 1; Brigantine DBS Comments at 1; Coordinated DBS Comments at 1; C&G DBS Comments at 2; Haley DBS Comments at 2; FRM DBS Comments at 1; Hendry DBS Comments at 1; Hancock DBS Comments at 1; Compass DBS Comments at 1.

[176]458 U.S. 419 (1982).

[177]National Trust TVBS-MMDS Comments at 2, 4, *citing Loretto*; NAA DBS Comments, *citing Loretto*. *See* discussion, *supra*.

[178]458 U.S. at 421, 440.

owned property is similar, and would obligate the Commission to provide compensation based on a fair market value of the property occupied. According to NAA, Congress has not authorized such compensation.[179] Commenters also assert that even if the Commission has jurisdiction in this matter, there are sound reasons not to regulate antenna placement on private property. They state that aesthetic concerns are important and affect a building's marketability, and that our rule could interfere with effective property management.[180]

62. In contrast, video programming service providers argue that the use of the term "viewer" demonstrates that Congress did not intend in Section 207 to distinguish between renters and owners, or to exclude renters from the protection of the Commission's rule.[181] One commenter also asserts that the statute was designed to allow viewers to choose alternatives to cable and not to permit landlords or other private entities to select the service for these viewers.[182] These commenters claim that the Supreme Court's holding in *Loretto* does not compel a distinction between property owned by an individual and that owned by a landlord, and that the holding in *Loretto* is very narrow.[183] In support of its argument, SBCA contends that in *Loretto*, a dispositive fact was that the New York law gave outside parties (cable operators) rights, and did "*not* purport to give the *tenant* any enforceable property rights." Also, SBCA states, the court in *Loretto* noted that if the law were written in a manner that required "'cable installation if a tenant so desires, the statute might present a different question. . . .'"[184] SBCA also argues that the installation of a DBS antenna is not a permanent occupation and does not qualify as a taking under *Loretto*.[185] DIRECTV argues that the Fifth Amendment is not implicated by a rule preempting private antenna restrictions because other regulations of the landlord-tenant relationship, e.g., a regulation requiring a

[179]NAA argues that if a subscriber chooses to live where cable service is available but antennas are not permitted, he is not prevented from getting some form of video programming, and that the legislation does not mean that every technology must be available to every individual under every circumstance. NAA DBS Comments at 12-13.

[180]*See, e.g.*, Elisha TVBS-MMDS Comments at 1-2 (preemption compromises security of buildings by allowing providers access to rooftops); Georgia TVBS-MMDS Comments at 3-4. Coordinated DBS Comments at 1 (noting that aesthetics directly affect a building's value and marketability); Mass DBS Comments at 2 (same); C&G DBS Comments at 1; NAHB DBS Comments at 2. We note NAA DBS Comments at 14, discussing landlords' provision of facilities for data transmission. Our rule applies only to reception devices. *But see*, 47 C.F.R. § 25.104, regarding transmitting antennas and local zoning restrictions.

[181]DIRECTV DBS Comments at 6; SBCA DBS Reply at 2-4.

[182]DIRECTV DBS Comments at 7.

[183]SBCA DBS Reply at 5; DIRECTV DBS Reply at 8.

[184]SBCA DBS Comments at 5.

[185]*Id.* at 5-6.

landlord to install sprinkler systems, have not been deemed a taking.[186]

63. Neither the *DBS Order and Further Notice* nor the *TVBS-MMDS Notice* specifically proposed rules to govern or sought comment on the question of whether the antenna restriction preemption rules should apply to the placement of antennas on rental and other property not within the exclusive control of a person with an ownership interest. As a consequence many of the specific practical problems of how possible regulations might apply were not commented on, nor were the policy and legal issues fully briefed. At least one party interested in providing greater access by viewers to DBS service urged the Commission to reserve judgment, noting the insufficiency of the record as to certain common area and exterior surface issues.[187] We conclude that the record before us at this time is incomplete and insufficient on the legal, technical and practical issues relating to whether, and if so how, to extend our rule to situations in which antennas may be installed on common property for the benefit of one with an ownership interest or on a landlord's property for the benefit of a renter. Accordingly, we request further comment on these issues. The Community suggestion, referenced in para. 49 above, involves the potential for central reception facilities in situations where restrictions on individual antenna placement are preempted by the rules, and thus no involuntary use of common or landlord-owned property is involved. We would welcome additional comment in the further proceeding regarding Community's proposal. We seek comment on the technical and practical feasibility of an approach that would allow the placement of over-the-air reception devices on rental or commonly-owned property. In particular, we invite commenters to address technical and/or practical problems or any other considerations they believe the Commission should take into account in deciding whether to adopt such a rule and, if so, the form such a rule should take.

64. Specifically, we seek comment on the Commission's legal authority to prohibit nongovernmental restrictions that impair reception by viewers who do not have exclusive use or control and a direct or indirect ownership interest in the property. On the question of our legal authority, we note that in *Loretto*,[188] the Supreme Court held that a state statute that allowed a cable operator to install its cable facilities on the landlord's property constituted a taking under the Fifth Amendment. In the same case, the Court stated, in dicta, that "a different question" might be presented if the statute required the landlord to provide cable

[186]DIRECTV DBS Comments at 8, *citing FCC v. Florida Power Corp.* for the distinction between the treatment of a tenant and an "interloper with a government license" such as the cable company in *Loretto*. DIRECTV DBS Reply at 8, *quoting Florida Power*, 480 U.S. at 252-53; *see also* NYNEX TVBS-MMDS Comments at 6-7; Philips Electronics DBS Reply at 6-9.

[187]DIRECTV DBS Reply at 9-10 (stating that a decision on the issue of antenna installation in multiple dwelling units should be deferred pending the Commission's action on inside wiring rules and policies, Telecommunications Services Inside Wiring and Customer Premises Equipment, CS Docket No. 95-184).

[188]458 U.S. 419 (1982).

installation desired by the tenant.[189] We therefore request comment on the question of whether adoption of a prohibition applicable to restrictions imposed on rental property or property not within the exclusive control of the viewer who has an ownership interest would constitute a taking under *Loretto*, for which just compensation would be required, and if so, what would constitute just compensation in these circumstances.

65. In this regard, we also request comment on how the case of *Bell Atlantic Telephone Companies v. FCC*[190] should affect the constitutional and legal analysis. In that case, the U.S. Court of Appeals for the District of Columbia invalidated Commission orders that permitted competitive access providers to locate their connecting transmission equipment in local exchange carrier' central offices because these orders directly implicated the Just Compensation Clause of the Fifth Amendment. In reaching its decision, the court stated that "[w]ithin the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions."[191]

## V. CONCLUSION

66. We believe that the rule we adopt today reflects Congress' objective as expressed in Section 207 of the 1996 Act. Our rule furthers the public interest by promoting competition among video programming service providers, enhancing consumer choice, and assuring wide access to communications facilities, without unduly interfering with local interests. We also believe it is appropriate to develop the record further before reaching conclusions regarding the application of Section 207 to situations in which the viewer does not have exclusive use or control and a direct or indirect ownership interest in the property where the antenna is to be installed, used, and maintained.

## VI. PROCEDURAL PROVISIONS

### A. Final Regulatory Flexibility Analysis

67. As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *DBS Order and Further Notice* and the *TVBS-MMDS Notice*. The Commission sought written public comments on the proposals in the two proceedings, including comments on the IRFA.[192] The

[189] *Id.* at 440 n.19.

[190] 24 F.3d 1441 (D.C. Cir. 1994).

[191] *Id.* at 1444.

[192] Joint Comments were filed by: 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

Commission's Final Regulatory Flexibility Analysis (FRFA) in this Report and Order conforms to the RFA, as amended by the Contract With America Advancement Act of 1996 (CWAAA), Pub. L. No. 104-121, 110 Stat. 847.[193]

68. *Need for Action and Objectives of the Rule.* The rulemaking implements Section 207 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56. Section 207 directs the Commission to 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 TVBS, MMDS and DBS.[194] This action is authorized under the Communications Act of 1934 § 1, *as amended,* 47 U.S.C. § 151, pursuant to the Communications Act of 1934 § 303, *as amended,* 47 U.S.C. § 303, and by Section 207 of the Telecommunications Act of 1996.

69. The Commission seeks to promote competition among video service providers and to enhance consumer choice. To accomplish these objectives, the Commission implements Congress' directive by adopting a rule that prohibits restrictions that impair a viewer's ability to install, maintain and use devices designed for over-the-air reception of video programming through TVBS, MMDS, and DBS services. The rule that we adopt preempts governmental regulations and restrictions, and nongovernmental restrictions on property within the exclusive use or control of the viewer in which the viewer has a direct or indirect ownership interest. Our rule exempts regulations and restrictions which are clearly and specifically designed to preserve safety or historic districts, allowing for the enforcement of such restrictions even if they impair a viewer's ability to install, maintain or use a reception device.

70. *Summary and Assessment of Issues Raised by Commenters in Response to the Initial Regulatory Flexibility Analysis.* The Commission, in its *DBS Order and Further Notice* and *TVBS-MMDS Notice*, invited comment on the IRFA and the potential economic

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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 (together, "NLC").

[193]Subtitle II of the CWAAA is The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), codified at 5 U.S.C. § 601 *et seq.* (1996). We note that the Initial Regulatory Flexibility Analysis needed for our further rulemaking is provided in Attachment D.

[194]1996 Act § 207.

impact the proposed rules would have on small entities.[195] NLC[196] comments that the proposed rule would have a "substantial economic and administrative impact" on over 37,000 small local governments.[197] NLC states that the proposed rule would require "local governments to amend their laws and to file petitions at the FCC . . . for permission to enforce those laws."[198]

71. The Commission has modified its proposed rule and has addressed the concerns raised by NLC by providing greater certainty regarding the application of the rule, and by clarifying that local regulations need not be rewritten or amended. The Commission recognizes that some regulations are integral to local governments' ability to protect the safety of its citizens. The rule that we adopt exempts restrictions clearly defined as necessary to ensure safety, and permits enforcement of safety restrictions during the pendency of any challenges. In addition, limiting the rule's scope to regulations that "impair," rather than the proposed preemption of regulations that "affect," will minimize the impact on small local governments, while effectively implementing Congress' directive. Finally, the inclusion in the Report and Order of examples of permissible and prohibited restrictions will minimize the need for local governments to submit waiver or declaratory ruling petitions to the Commission, decreasing the potential economic burden.

72. Numerous apartment complexes filed comments seeking clarification of Section 207's impact on their lease terms.[199] These filings express concern about the impact the rule will have on the rental property industry. This Report and Order applies only to property in the exclusive control or use of the viewer and in which the viewer has a direct or indirect ownership interest. Thus, this order will have no major impact on the rental property industry. The question of the applicability of Section 207 and our rule to rental properties is raised in the Further Notice of Proposed Rulemaking.[200]

73. Several neighborhood associations suggest that our rule will have a negative economic impact on the value of their land and that such a prohibition would constitute a

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[195] *DBS Order and Further Notice* at Appendix III; *TVBS-MMDS Notice* at Appendix B.

[196] *See supra* note 192.

[197] NLC DBS IRFA Comments at 2.

[198] *Id.*

[199] NAA Compilation.

[200] *See* ¶¶ 63-65, *supra*.

taking, requiring compensation under the Fifth Amendment of the Constitution.[201] We do not believe that implementation of our rule results in a taking of property. There is nothing in the record here to indicate that nullifying a homeowner's ability to prevent his neighbor from installing TVBS, MMDS or DBS antennas has a measurable economic impact on the homeowner's property, nor that it interferes with investment-backed expectations.[202] In support of the rule, several commenters argue that the rule enhances the value of the homeowner's property to prospective purchasers who want access to video programming services competitive to cable.[203]

74. The Commission also notes the positive economic impact the new rule will have on many small businesses. The new rule will allow small businesses that use video programming services to select from a broader range of providers, which could result in significant economic savings; because providers will be competing for customers, more services will be available at lower prices. In addition, small business video programming providers will be faced with fewer entry hurdles, and will thus be able to develop their markets and compete more effectively, achieving one of the purposes of Section 207.

75. *Description and Estimate of the Number of Small Entities Impacted.* The Regulatory Flexibility Act defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction," and "the same meaning as the term 'small business concern' under section 3 of the Small Business Act."[204] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[205] The rule we adopt today applies to small organizations and small governmental jurisdictions, rather than businesses.

76. The term "small governmental jurisdiction" is defined as "governments of . . . districts, with a population of less than fifty thousand."[206] There are 85,006 governmental entities in the United States.[207] This number includes such entities as states, counties, cities,

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[201]*See, e.g.,* National Trust TVBS-MMDS Comments at 2, 4; NAA TVBS-MMDS Comments at 3; Community TVBS-MMDS Reply at 3; NAA TVBS-MMDS Reply *passim*; Corporon DBS Comments at 2; NAA DBS Comments *passim*; Southbridge DBS Comments; NAA DBS Reply at 3-4; ICTA DBS Reply at 5-6.

[202]*See* ¶¶ 43-45, *supra.*

[203]SBCA *ex parte* presentation June 11, 1996.

[204]Regulatory Flexibility Act, 5 U.S.C. § 601(3) (1980).

[205]Small Business Act 15 U.S.C. § 632 (1996).

[206]5 U.S.C. § 601(5).

[207]United States Dept. of Commerce, Bureau of the Census, *1992 Census of Governments.*

utility districts and school districts. We note that restrictions concerning antenna installation are usually promulgated by cities, towns and counties, not school or utility districts. Of the 85,006 governmental entities, 38,978 are counties, cities and towns; and of those, 37,566, or 96%, have populations of fewer than 50,000. The NLC estimates that there are 37,000 "small governmental jurisdictions" that may be affected by the proposed rule.[208]

77. Section 601(4) of the Regulatory Flexibility Act defines "small organization" as "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[209] This definition includes homeowner and condominium associations that operate as not-for-profit organizations. The Community Associations Institute estimates that there were 150,000 associations in 1993.[210] Given the nature of a neighborhood association, we assume for the purposes of this FRFA that all 150,000 associations are small organizations.

78. *Reporting, Recordkeeping, and Other Compliance Requirements.* The rule does not establish any filing requirements. However, state and local governments and neighborhood associations promulgating regulations that are prohibited by this rule may seek declaratory rulings concerning the validity of a restriction, or may request waivers of the rule.[211] Petitions for declaratory ruling and requests for waiver will be considered through a paper hearing process, and the initiating petition will require only standard secretarial skills to prepare.

79. If a governmental or nongovernmental authority wishes to enforce a safety restriction, the rule requires that the safety reasons for the restrictions be clearly defined in the legislative history, preamble or text of the restriction.[212] Alternatively, the local entity may include a restriction on a list of safety restrictions related to antennas, that is made available to interested parties (including those who wish to install antennas). Thus, governmental entities will not be required to amend their rules. Local officials may need time to review regulations to determine if the safety reasons are clearly defined in the legislative history, preamble or text, or to create a list of applicable restrictions.

80. *Steps Taken to Minimize the Economic Impact on Small Entities and Significant Alternatives Rejected.* The Commission considered various alternatives that would have impacted small entities to varying extents. These included a rebuttable presumption approach,

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[208]NLC IRFA Comments at 2.

[209]5 U.S.C. § 601(4).

[210]Community DBS Comments at 2.

[211]*See* ¶¶ 53-55, *supra.*

[212]*See* ¶ 25, *supra.*

the use of the term "affect" in the rule, and a rule that allowed for adjudicatory proceedings in courts of competent jurisdiction, all of which were adopted in the *DBS Order and Further Notice* and proposed in the *TVBS-MMDS Notice*. The rule we adopt today replaces the rebuttable presumption with a simpler preemption approach, adheres to the statutory language by using the term "impair" rather than "affect" in the rule, and allows for adjudication at the Commission or in a court of competent jurisdiction. We believe that we have effectively minimized the rule's economic impact on small entities.

81. In the *DBS Order and Further Notice* and the *TVBS-MMDS Notice*, we adopted and proposed, respectively, a rebuttable presumption approach to governmental regulations,[213] and proposed strict preemption of nongovernmental restrictions.[214] We acknowledged in the *DBS Order and Further Notice* that a rule relying on a presumptive approach would be more difficult to administer than a rule based upon a *per se* prohibition,[215] and we sought comment in the *TVBS-MMDS Notice* on less burdensome approaches.[216] Under the rebuttable presumption approach, local governments would have been required to request a declaratory ruling from the Commission every time they sought to enforce or enact a restriction; and neighborhood associations would not have been able to enforce or enact any restrictions that impaired a viewer's ability to receive the signals in question. The rebuttable presumption approach was adopted to ensure the protection of local interests, including local governments. Based on the record, the Commission recognizes that the burden of rebutting a presumption could strain the resources of local authorities. The Commission has rejected the rebuttable presumption approach for a less burdensome preemption approach.[217] In addition we have provided recourse for both neighborhood associations and municipalities. The rule we adopt today provides for a *per se* prohibition of restrictions that impair a viewer's ability to install, maintain or use devices designed for over-the-air reception of video programming services. Our Report and Order provides examples of reasonable regulations that can be enforced without a waiver application. The Commission believes that the Report and Order provides such clarity as will make the enforcement of the rule the most efficient and least burdensome for local governments, neighborhood associations, and this Commission.

82. In adopting the new rule, the Commission rejected the alternative of preempting all restrictions that "affect" the reception of video programming services through devices designed for over-the-air reception of TVBS, MMDS and DBS services. The new rule prohibits only those local restrictions that "impair" a viewer's ability to receive these signals

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[213] *DBS Order and Further Notice* at ¶ 28 and Appendix II; *TVBS-MMDS Notice* at ¶ 8 and Appendix A.

[214] *DBS Order and Further Notice* ¶ 62 and Appendix II; *TVBS-MMDS Notice* ¶ 10 and Appendix A.

[215] *DBS Order and Further Notice* ¶ 25.

[216] *TVBS-MMDS Notice* ¶ 8.

[217] *See* ¶¶ 23-27, *supra*.

and exempts restrictions necessary to ensure safety or to preserve historic districts. In defining the term "impair" we reject the interpretation that impair means prevent[218] because that definition would not properly implement Congress' objective of promoting competition. We find that a restriction impairs a viewer's ability to receive over-the-air video programming signals, if it (a) unreasonably delays or prevents installation, maintenance or use of a device used for the reception of over-the-air video programming signals by DBS, TVBS, or MMDS; (b) unreasonably increases the cost of installation, maintenance or use of such devices; (c) precludes reception of an acceptable quality signal.[219] The use of the term impair will decrease the burden on small entities while implementing Congress' objective.

83. In the *DBS Order and Further Notice* and the *TVBS-MMDS Notice*, we discussed the possibility of parties seeking judgment from either the Commission or a court of competent jurisdiction. The Commission is concerned about uniformity in the application of our rule, and about the financial burden that litigation might place on small entities. While we cannot prohibit parties' applications to courts of competent jurisdiction, we address this concern by exercising our Congressional grant of jurisdiction and implementing a waiver process, and encouraging parties to use this approach rather than relying on costly litigation.

84. Waiver proceedings will be paper hearings, allowing the Commission to alleviate the negative potential economic impact from costly litigation. Further, any regulations necessary to the safeguarding of safety will remain enforceable pending the Commission's resolution of waiver requests. The Commission believes that the rule we adopt today effectively implements Congress' intent while minimizing any significant economic impact on small entities.

85. *Report to Congress.* The Commission shall send a copy of this Final Regulatory Flexibility Analysis, along with this Report and Order, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this FRFA will also be published in the Federal Register.

### B. Paperwork Reduction Act

86. *Final Paperwork Reduction Act of 1995 Analysis.* This Report and Order has been analyzed with respect to the Paperwork Reduction Act of 1995 and found to contain an

[218] *See, e.g.*, Caughlin TVBS-MMDS Comments at 2 (nongovernmental restrictions should be preempted only if they preclude reception); Reston TVBS-MMDS Comments at 3 (restrictions that "do not operate as complete bans" or that do not "limit reception" are not inconsistent with Section 207); NLC TVBS-MMDS Comments at 3-4; NAA TVBS-MMDS Comments, Attachment 2 at 5 (only restrictions that completely prevent); Community TVBS-MMDS Reply at 10; NAA DBS Comments at 13; NLC DBS Reply at 5; NLC DBS Petition at 2-3 (impair means prevent). *But see* DIRECTV DBS Opposition at 6 (opposing NLC's claim that impair means prevent); SBCA *ex parte* presentation June 11, 1996.

[219] *See* ¶ 5, *supra*.

information collection requirement on the public. Implementation of an information collection requirement is subject to approval by the Office of Management and Budget as prescribed by the Act.

87. In the *DBS Order and Further Notice* and the *TVBS-MMDS Notice* we proposed an information collection process, utilizing waivers and declaratory rulings, that has now been approved by the Office of Management and Budget (OMB). This Report and Order contains a modified information collection that we believe is less burdensome. As part of our continuing effort to reduce paperwork burdens, we invite the general public and OMB to comment on the modified information collections contained in this Report and Order, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due on or before 30 days from the date of publication of this Report and Order in the Federal Register; OMB comments are due 60 days from the date of publication. Comments should address: (a) whether the 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 techniques or other forms of information technology.

88. Written comments by the public on the modified information collections are due on or before thirty days after publication in the Federal Register. 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. 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, 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.

## VI. ORDERING CLAUSES

89. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 303, and Section 207 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, that the rule discussed in this Report and Order and set forth in Attachment A IS ADOPTED as Section 1.4000 of the Commission's rules, 47 C.F.R. § 1.4000.

90. IT IS FURTHER ORDERED that Section 25.104 of the Commission's rules, 47 C.F.R. § 25.104, IS AMENDED as set forth in Attachment A.

91. IT IS FURTHER ORDERED that the Petitions for Reconsideration filed in IB Docket No. 95-59 by Alphastar Television Network, Inc.; County of Boulder, State of Colorado; DIRECTV, Inc.; Florida League of Cities; Hughes Network Systems, Inc.; City of

Dallas *et al.*; National League of Cities *et al.;* Primestar, Inc.; Satellite Broadcasting and Communications Association of America; and United States Satellite Broadcasting Co., to the extent that they address issues related to Section 207, ARE GRANTED in part as discussed herein, and are otherwise DENIED.

92. IT IS FURTHER ORDERED that pursuant to pursuant to Sections 4(i), 4(j), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 303, and Section 207 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, 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 59 to 65 of this Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking.

93. IT IS FURTHER ORDERED that the requirements and regulations established in this decision shall become effective upon approval by the Office of Management and Budget (OMB) of the new information collection requirements adopted herein, but no sooner than 30 days after publication of this Report and Order in the Federal Register.

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

95. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before September 27, 1996 and reply comments on or before October 28, 1996. 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, parties must file an original and six copies of all comments, reply comments and supporting comments. If parties want each Commissioner to receive a personal copy of their comments, they must file an original plus eleven copies. Parties should send comments and reply comments to Office of the Secretary, Federal Communications Commission,Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Room of the Federal Communications Commission, 1919 M Street, NW, Washington, DC 20554. For further information, contact Jacqueline Spindler at (202) 418-7200.

96. This Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking contains both a modified and a proposed information collection. As required by Section 603 of 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 Further Notice of Proposed Rulemaking. The IRFA is set forth in Attachment D. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the OMB to comment on the information collections contained in this Report and Order and Further Notice, as required by the Paperwork Reduction Act of 1995,

Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this Further Notice; OMB comments are due 60 days from the date of publication of this Report and Order and Further Notice in the Federal Register. Comments should address: (a) whether the modified and proposed collections of information are 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 collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. 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, 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.

97. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Report and Order and Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, including the Final Regulatory Flexibility Analysis and the Initial Regulatory Flexibility Analysis, 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. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary

## ATTACHMENT A

Part 1 of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part I is revised to read as follows:

AUTHORITY: 47 U.S.C. 151, 154, 207, 303 and 309(j) unless otherwise noted.

2. A new Subpart S is added to Part 1 to read as follows:

§ 1.4000. Restrictions impairing reception of Television Broadcast Signals, Direct Broadcast Satellite Services or Multichannel Multipoint Distribution Services

(a) Any restriction, including but not limited to any state or local law or regulation, including zoning, land-use, or building regulation, or any private covenant, homeowners' association rule or similar restriction on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest in the property, that impairs the installation, maintenance, or use of:

(1) an antenna that is designed to receive direct broadcast satellite service, including direct-to-home satellite services, that is one meter or less in diameter or is located in Alaska; or

(2) an antenna that is designed to receive video programming services via multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services, and that is one meter or less in diameter or diagonal measurement; or

(3) an antenna that is designed to receive television broadcast signals,

is prohibited, to the extent it so impairs, subject to paragraph (b). For purposes of this rule, a law, regulation or restriction impairs installation, maintenance or use of an antenna if it: (1) unreasonably delays or prevents installation, maintenance or use, (2) unreasonably increases the cost of installation, maintenance or use, or (3) precludes reception of an acceptable quality signal. No civil, criminal, administrative, or other legal action of any kind shall be taken to enforce any restriction or regulation prohibited by this rule except pursuant to paragraph (c) or (d). No fine or other penalties shall accrue against an antenna user while a proceeding is pending to determine the validity of any restriction.

(b) Any restriction otherwise prohibited by paragraph (a) is permitted if: