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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Preemption of Local Zoning Regulation of Satellite Earth Stations	)	IB Docket No. 95-59
	)	
In the Matter of	)	
	)	
Implementation of Section 207 of the Telecommunications Act of 1996	)	CS Docket No. 96-83
	)	
Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service	)	

REPORT AND ORDER, MEMORANDUM OPINION AND ORDER, and FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: August 5, 1996 **Released: August 6, 1996**

Comment date: September 27, 1996
Reply Comment date: October 28, 1996

By the Commission: Commissioners Quello and Chong issuing separate statements.

Table of Contents

		Paragraph
I.	INTRODUCTION	1
II.	SUMMARY	5
III.	DISCUSSION	
	A. Authority to Preempt	9
	B. Restrictions on Reception	13
	C. Technologies Covered	28
	D. Nongovernmental Restrictions	41
	1. Authority to preempt nongovernmental restrictions	41
	2. Installation on property within the exclusive control of the viewer and	

in which the viewer has a direct or indirect ownership interest 49
E. Process and Procedure 53
IV. FURTHER NOTICE OF PROPOSED RULEMAKING 59
V. CONCLUSION 66
VI. PROCEDURAL PROVISIONS
A. Regulatory Flexibility Act 67
B. Paperwork Reduction Act 86
VII. ORDERING CLAUSES 89

Attachment A - Rule
Attachment B - Parties in DBS Proceeding
Attachment C - Parties in TVBS-MMDS Proceeding
Attachment D - Initial Regulatory Flexibility Analysis for Further Notice

I. INTRODUCTION

1. Section 207 of the Telecommunications Act of 1996 (the 1996 Act), titled "Restrictions on Over-the-Air Reception Devices," states:

> Within 180 days after the date of enactment of this Act, the Commission shall, pursuant to Section 303 of the Communications Act, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.[1]

The 1996 Act's direction to the Commission to prohibit restrictions that impair reception of over-the-air video programming services promotes the primary objective of the Communications Act, to "make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[2]

2. This Report and Order adopts a single rule to implement Section 207. In doing so, we consolidate herein two rulemaking proceedings that involve Section 207. In International

[1]Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) § 207. Section 303 of the Communications Act authorizes the Commission to issue rules and regulations "as public convenience, interest, or necessity requires" and, as amended by the 1996 Act, states that the Commission shall "[h]ave exclusive authority to regulate the provision of direct-to-home satellite service." 47 U.S.C. § 303.

[2]Communications Act of 1934, *as amended*, § 1, 47 U.S.C. § 151.

Bureau (IB) Docket No. 95-59 (*DBS Order and Further Notice*)[3] we adopted rules prohibiting certain restrictions on satellite antenna reception, including a rule partially implementing Section 207 by prohibiting governmental restrictions on reception by direct broadcast satellite (DBS) service receiving devices. In Cable Services Bureau (CS) Docket No. 96-83 (*TVBS-MMDS Notice*),[4] we sought comment on a similar proposed rule to implement Section 207 for restrictions on over-the-air reception of television broadcast service (TVBS) and multichannel multipoint distribution service (MMDS).[5] Our DBS rule was a revision of a 1986 rule that preempted local governmental regulations of satellite earth stations unless the regulations (a) had a reasonable and clearly defined health, safety, or aesthetic objective, and (b) did not unreasonably limit, or did not prevent reception, or impose unreasonable costs on users.[6] In 1995 the Commission commenced a new proceeding to review and amend aspects of this rule.[7] In 1996 the *DBS Order and Further Notice* modified the 1986 rule to create a rebuttable presumption of unreasonableness of local regulations that impose restrictions affecting the installation, use, or maintenance of devices used to receive DBS signals.[8]

3. Although the Commission tentatively concluded that the modified rule satisfactorily implemented Section 207 with regard to governmental restrictions on reception of DBS service, because the revised rule was proposed prior to passage of the 1996 Act, the Commission sought further comment on the impact of the legislation.[9] The Commission also proposed to implement Section 207 for DBS service by prohibiting enforcement of

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[3]Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Docket No. 95-59, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 5809 (1996).

[4]Implementation of Section 207 of the Telecommunications Act of 1996: Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service, Notice of Proposed Rulemaking, CS Docket No. 96-83, 11 FCC Rcd 6357 (1996).

[5]Issues in IB Docket No. 95-59 that are not related to Section 207 -- prohibition of certain restrictions that affect non-DBS satellite earth stations, including very small aperture terminals (VSAT) used primarily for transmitting business communications -- will be addressed in a subsequent order.

[6]Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, CC Docket No. 85-87, 51 Fed. Reg. 5519 (Feb. 14, 1986). The rule preempted local regulation that differentiated between satellite receive-only antennas and other types of antenna facilities. A more detailed history of the Commission's initial consideration and treatment of preemption of land-use regulations that impair reception of satellite signals can be found in the *DBS Order and Further Notice* ¶¶ 3-8.

[7]Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Docket No. 95-59, Notice of Proposed Rulemaking, 10 FCC Rcd 6982 (1995) (*Earth Station Notice*).

[8]The Commission established procedures for parties to seek a declaratory ruling regarding whether their regulation rebutted the presumption of unreasonableness. *See* Public Notice, Procedures for Filing Petitions for Declaratory Relief of Local Zoning Regulations and For Waivers of Section 25.104, Report No. SPB-41, April 17, 1996.

[9]*DBS Order and Further Notice* ¶ 59.

nongovernmental restrictions on devices used to receive DBS programming signals.[10] Subsequently, the Commission released the *TVBS-MMDS Notice* to begin to implement Section 207 with regard to over-the-air TVBS and MMDS video antennas, proposing a rule similar to that adopted in the *DBS Order and Further Notice*.[11] In both proceedings we also asked whether there was a simpler, less burdensome means of implementing the statute than through the proposed rebuttable presumption approach.[12]

4. We have carefully considered all submissions filed in both proceedings. We received comment from various local governments, video programming service providers, individual subscribers, telecommunications organizations, nongovernmental associations, homeowners and others. We have also considered petitions for reconsideration of the *DBS Order and Further Notice* and responsive pleadings that bear on Section 207 implementation.[13]

II. SUMMARY

5. We implement Section 207 by adopting the following rule, and by amending Section 25.104 as indicated in Attachment A:

> (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

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

[11] The comments and reply comments received in response to the *DBS Order and Further Notice* are listed in Attachment B. The comments and reply comments received in response to the *TVBS/MMDS Notice* are listed in Attachment C. These attachments also list *ex parte* filings, and note the short-form names we use here.

[12] *DBS Order and Further Notice* ¶ 59; *TVBS-MMDS Notice* ¶ 8.

[13] A list of petitions for reconsideration of the *DBS Order and Further Notice* and oppositions to these petitions is included in Attachment B.

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:

(1) it is necessary to accomplish a clearly defined safety objective that is either stated in the text, preamble or legislative history of the restriction or described as applying to that restriction in a document that is readily available to antenna users, and would be applied to the extent practicable in a non-discriminatory manner to other appurtenances, devices, or fixtures that are comparable in size, weight and appearance to these antennas and to which local regulation would normally apply; or

(2) it is necessary to preserve an historic district listed or eligible for listing in the National Register of Historic Places, as set forth in the National Historic Preservation Act of 1966, as amended, 16 U.S.C. § 470a, and imposes no greater restrictions on antennas covered by this rule than are imposed on the installation, maintenance or use of other modern appurtenances, devices or fixtures that are comparable in size, weight, and appearance to these antennas; and

(3) it is no more burdensome to affected antenna users than is necessary to achieve the objectives described above.

(c) Local governments or associations may apply to the Commission for a waiver of this rule under Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3. Waiver requests will be put on public notice. The Commission may grant a waiver upon a showing by the applicant of local concerns of a highly specialized or unusual nature. No petition for waiver shall be considered unless it specifies the restriction at issue. Waivers granted in accordance with this section shall not apply to restrictions amended or enacted after the waiver is granted. Any responsive pleadings must be served on all

parties and filed within 30 days after release of a public notice that such petition has been filed. Any replies must be filed within 15 days thereafter.

(d) Parties may petition the Commission for a declaratory ruling under Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, or a court of competent jurisdiction, to determine whether a particular restriction is permissible or prohibited under this rule. Petitions to the Commission will be put on public notice. Any responsive pleadings must be served on all parties and filed within 30 days after release of a public notice that such petition has been filed. Any replies must be filed within 15 days thereafter.

(e) In any Commission proceeding regarding the scope or interpretation of any provision of this section, the burden of demonstrating that a particular governmental or nongovernmental restriction complies with this section and does not impair the installation, maintenance or use of devices designed for over-the-air reception of video programming services shall be on the party that seeks to impose or maintain the restriction.

(f) All allegations of fact contained in petitions and related pleadings before the Commission must be supported by affidavit of a person or persons with actual knowledge thereof. An original and two copies of all petitions and pleadings should be addressed to the Secretary, Federal Communications Commission, 1919 M St. N.W.; Washington, D.C. 20554. Copies of the petitions and related pleadings will be available for public inspection in the Cable Reference Room in Washington, D.C. Copies will be available for purchase from the Commission's contract copy center, and Commission decisions will be available on the Internet.

6. The rule is designed to promote two complementary federal objectives: (a) to ensure that consumers have access to a broad range of video programming services, and (b) to foster full and fair competition among different types of video programming services. We believe that in invoking Section 303 of the Communications Act, which authorizes the Commission to issue rules and regulations "as public convenience, interest, or necessity requires,"[14] Congress intended that we consider and incorporate appropriate local concerns. In the *DBS Order and Further Notice* we noted that "we think it reasonable to infer that Congress did not mean . . . to prevent the Commission from preserving reasonable local health and safety regulations; or from granting waivers where unusual circumstances require specialized local regulation."[15] Thus, while the statute requires that we prohibit restrictions that impair viewers' ability to receive the signals in question, it also permits the Commission to minimize any interference caused to local governments and associations as a result. We have thus attempted to implement Section 207 in a way that produces greater competition and

[14] 47 U.S.C. § 303.

[15] *DBS Order and Further Notice* ¶ 59.

consumer choice by ensuring viewers' ability to receive over-the-air signals, while preserving local control of regulation of safety and historic areas.

7. The rule we adopt improves on our existing DBS rule and proposed TVBS and MMDS rule in several ways. By limiting the prohibition of local restrictions to those that "impair" -- the statutory term -- rather than applying the prohibition to all restrictions that "affect," it is more faithful to Section 207 and intrudes less into local governance. By more clearly defining and providing examples of which local restrictions are prohibited and which are not, we make our rule simpler, and less burdensome. By abandoning the presumption in the *DBS Order and Further Notice* that all restrictions affecting reception are unreasonable, and therefore unenforceable until waived by Commission action, we spare localities and antenna users unnecessary administrative burden and expense. Under our revised rule, localities and associations need not come to the Commission to enforce restrictions that may affect but do not impair reception, or that may impair reception but are narrowly tailored to serve public safety or historic preservation objectives. The rule that we adopt applies to governmental regulations and restrictions and to nongovernmental restrictions on property within the exclusive use or control of the viewer in which the viewer has a direct or indirect ownership interest. We also include a Further Notice of Proposed Rulemaking (FNPRM) to seek comment on whether Section 207 applies to restrictions on property not within the exclusive use or control of the viewer and in which the viewer has a direct or indirect property interest.

8. Each element of the rule is discussed in greater detail below.

III. DISCUSSION

A. Authority to Preempt

9. Some commenters argue that our proposed rule exceeds our constitutional authority, under the Commerce Clause, to prohibit local restrictions.[16] In adopting a rule to implement a statute, we exercise the authority delegated to us by Congress under Section 207. For the reasons stated below, we believe that the authority delegated by Congress to this agency pursuant to Section 207 comports with the Commerce Clause, and that our rule implementing Section 207 is constitutional.

10. In their petition and comments, the NLC and the Mayors suggest that the Commission's proposed rule conflicts with the Supreme Court's holding in *United States v. Lopez*.[17] In that case the Court struck down a federal statute that defined a crime of

[16]MIT TVBS-MMDS Reply at 1; Mayors DBS Comments at 8.

[17]*See* NLC DBS Petition at 8; Mayors DBS Comments at Summary, *citing United States v. Lopez*, 115 S. Ct. 1624 (1995).

possession of firearms within 1000 feet of a local school because there was an insufficient nexus to interstate commerce under the Commerce Clause. The Court held that under the Commerce Clause Congress can regulate only activities that "substantially affect" interstate commerce, and that consequently, Congress lacked statutory authority. According to the Mayors, the Court in *Lopez* "curtailed the exercise of the Commerce Clause power in areas reserved for the exercise of traditional local police power."[18]

11. In *Lopez*, the Supreme Court identified three broad categories of activity within Congress's constitutional power to regulate: (a) the use of channels of interstate commerce, (b) the regulation and protection of instrumentalities or things in interstate commerce, even though the threat may come only from intrastate activities, and (c) those activities having substantial relation to interstate commerce.[19] After determining that the regulation at issue could be sustained, if at all, only under the third category, the Court held that the challenged statute was penal and had nothing to do with "commerce" or any sort of economic enterprise, and was not "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[20]

12. Unlike the situation in *Lopez*, however, the instant statutory provision directly involves use of the channels of interstate commerce (e.g., channels of DBS, MMDS, and TVBS), or, alternatively, the regulation and protection of instrumentalities or things in interstate commerce (i.e., receiving devices for such services), or both. Indeed, we believe that the regulation would be deemed constitutional even under the third category in *Lopez* because the regulation we adopt to implement the statute, which is aimed at ensuring reception of radio communications, relates to activities that substantially impact interstate commerce. Moreover, as the Court reaffirmed in *Lopez*, "where the interstate and intrastate aspects of commerce were so mingled together that full regulation of interstate commerce required incidental regulation of intrastate commerce, the Commerce Clause authorized such regulation."[21] This is clearly the case here, where the receiving aspects of such services are inextricably interwoven with the interstate character of the signals of these services themselves. As the Supreme Court stated long ago in *Fisher's Blend Station, Inc. v. State Tax Commission*, a case that invalidated a state occupation tax imposed on radio licensees because it placed an unconstitutional burden on interstate commerce: "By its very nature broadcasting transcends state lines and is national in its scope and importance -- characteristics which bring it within the purpose and protection, and subject to the control, of the commerce

[18] *See* Mayors DBS Comments at Summary.

[19] 115 S. Ct. at 1629.

[20] *Id.* at 1631.

[21] *Id.* at 1627.

clause."[22] The Court held that it was immaterial that the radio licensee "[did] not own or control the receiving mechanisms."[23] Although the placement of a radio antenna may be considered an intrastate activity, the reception of radio communications is clearly interstate commerce, and restrictions on such antennas substantially affect such interstate commerce. We therefore conclude that Congress' action in delegating authority to us in Section 207 was fully consistent with the Supreme Court's ruling in the *Lopez* case[24] and that our exercise of this authority does not exceed the limits of the Commerce Clause.

B. Restrictions on Reception

13. Section 207 of the 1996 Act directs the Commission to prohibit restrictions that impair a viewer's ability to receive over-the-air video programming signals from TVBS, MMDS, and DBS. In the *DBS Order and Further Notice* and the *TVBS-MMDS Notice*, we created a rebuttable presumption of unreasonableness for state and local government restrictions that "affect the installation, maintenance and use of over-the-air reception devices."[25] We used this phrase as an outgrowth of a proceeding initiated in 1995, prior to passage of Section 207, to revise our satellite antenna rule.[26] The Notice in that proceeding responded to evidence that nonfederal restrictions were impeding access to satellite services; the term "affect" was chosen to reach a broad range of restrictions. In implementing Section 207, we conclude it is more appropriate to apply the specific statutory language. The statute directs the Commission "to prohibit restrictions that impair a viewer's ability to receive."[27] The term "impair" means to make worse or damage.[28] The House Report[29] explains that Congress meant to prohibit restrictions that "prevent" the use of antennas, stating, "[t]he Committee intends this section to preempt enforcement of State or local statutes and regulations, or State or local legal requirements, or restrictive covenants or encumbrances that prevent the use of antenna[s] designed for off-the-air reception of television broadcast signals

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[22]297 U.S. 650, 655 (1935). *See also Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933) ("No question is presented as to the power of the Congress, in its regulation of interstate commerce to regulate radio communications. No state lines divide the radio waves and national regulation is not only appropriate but essential to the efficient use of radio facilities").

[23]297 U.S. at 655.

[24]Indeed, by modifying the rule's standard to preempt restrictions that impair, rather than affect, we are allowing more flexibility in governmental regulation and thus adopting a less intrusive rule.

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

[26]47 C.F.R. § 25.104. *See Earth Station Notice*, 10 FCC Rcd at 6982.

[27]1996 Act § 207.

[28]*See, e.g.*, The Random House College Dictionary 665 (Revised Edition 1980).

[29]H.R. Rep. No. 204, 104th Congress, 1st Sess. at 124 (1995) (House Report).

or of satellite receivers designed for receipt of DBS services."[30] The statute also refers to a viewer's ability to receive, and we continue to use the phrase "installation, maintenance and use" because it encompasses all aspects of reception.

14. Based on our interpretation of the text of the statute and relevant legislative history, as well as consideration of comments, petitions for reconsideration and *ex parte* presentations in the record, we find that a restriction will be deemed to impair a viewer's ability to receive 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 TVBS, MMDS, or DBS; or (b) unreasonably increases the cost of installation, maintenance or use of such devices; or (c) precludes reception of an acceptable quality signal. As a majority of the commenters and some petitioners noted, the Commission's definition of "impair" will greatly influence our implementation of Section 207.[31]

15. Some commenters and petitioners argue that "impair" should be defined broadly, and should include any extra burden imposed on subscribers.[32] Other commenters and one petitioner recommend that we adopt a narrower reading of the statutory language.[33] Some commenters and a petitioner suggest that Congress intended that the statute be very limited in scope.[34] These commenters and petitioners assert that the language of the House Report that

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[30] *Id.*

[31] *See, e.g.,* CEMA DBS Comments at 7 (the term "impair" is a "significant source of ambiguity since reasonable people undoubtedly will differ on what constitutes impairment"); NAB TVBS-MMDS Comments at 6 (impair does not mean affect); Scarinci TVBS-MMDS Comments at 2-3; Silverman TVBS-MMDS Comments at 2; Community TVBS-MMDS Comments at 10; ITFS TVBS-MMDS Comments at 1-2; Mayors TVBS-MMDS Comments at 2-3; NLC TVBS-MMDS Comments at 3-4; UHA TVBS-MMDS Comments at 2; Reston DBS Comments at 3 (citing Webster's Dictionary for a definition of "impair"); Mayors DBS Petition at 6-7 (Section 207 covers only restrictions that impair); DIRECTV DBS Opposition at 6; NLC DBS Petition at 3, 5; Evermay DBS Reply at 2.

[32] *See, e.g.,* Bell Atlantic TVBS-MMDS Comments at 2 (Commission's proposed rule "is necessary to give full effect to Congressional intent"); SBCA *ex parte* presentation June 11, 1996 (any extra burden on a subscriber is an impairment); DIRECTV DBS Opposition at 6.

[33] *See, e.g.,* NASA TVBS-MMDS Comments at 2-3 (defining "impair" as adversely affect or injure); WCAI TVBS-MMDS Comments at 4-5 (affect is too expansive a definition of impair); Reston DBS Comments at 3 (defining impair as decreasing strength, value, amount or quality of reception). *See also* NAB TVBS-MMDS Comments at 5-6 ("By using [the statutory] language the FCC will more squarely respond to the Congressional directive and will adopt a preemption standard that will best be designed to deal with restrictions that should be negated"); Scarinci TVBS-MMDS Comments at 2; Huckleberry TVBS-MMDS Comments at 2; Mayors DBS Comments at 10; NASA TVBS-MMDS Reply at 3; WCAI TVBS-MMDS Reply at 4-6; NATOA *ex parte* presentation March 13, 1996; NAB *ex parte* presentation June 14, 1996; NLC DBS Petition at 3, 5.

[34] *See, e.g.,* Silverman TVBS-MMDS Comments at 2; Community TVBS-MMDS Comments at 10; Reston TVBS-MMDS Comments at 4; NLC DBS Reply at 4-5 and DBS Petition at 3, 5 (all urging that impair means prevent); NAA DBS Comments at 13 (same, adding that Congress did not intend to reach viewers in commercial

accompanied Section 207 indicates that Congress intended "impair" to mean "prevent,"[35] so the only restrictions that should be considered to impair reception are those that preclude access to TVBS, MMDS or DBS signals.[36]

16. The record is replete with examples of various requirements imposed on those who wish to install DBS dishes or MMDS antennas on their property. These range from requirements for permits or other prior approval,[37] to requirements to plant shrubbery to screen the dish,[38] to regulations that the mast and MMDS antenna must look like a tree with leaves,[39] to safety-related restrictions. It is our purpose here to distinguish clearly the sort of restrictions that impair reception from those that do not.

17. Recognizing that effective implementation of our rule hinges on the clarity of our definition of impair, and in response to commenters' arguments, we provide a definition of impair which allows for governmental and nongovernmental restrictions that are necessary to serve valid local interests. First, under our adopted rule, a regulation or restriction that unreasonably delays or prevents antenna installation, maintenance and use will be found to impair reception. This criterion recognizes that the process by which regulations are enforced may be critical in a consumer's choice of video programming service. Procedural requirements -- provisions requiring the approval of community associations or local zoning boards prior to the installation of TVBS, MMDS, or DBS antennas, for example -- can, in practical terms, "prevent" the viewer's access to video programming signals as surely as

areas nor to interfere with "private contractual arrangements"); NRC *ex parte* presentation June 26, 1996 (stating that Congress did not intend for the statute to extend into the real estate arena).

[35]House Report at 124.

[36]*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 and DBS Petition at 2-3, 5 (impair means prevent); 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. *But see* DIRECTV DBS Opposition at 6 (opposing NLC's claim that impair means prevent); SBCA *ex parte* presentation June 11, 1996.

[37]*See, e.g.*, Caughlin Ranch TVBS-MMDS Comments; Community DBS Comments at App. B (Letters from Woodbridge Village Association, Greenbelt Homes); SBCA DBS Petition at 16.

[38]CMC DBS Comments at 1, 3 (requiring screening of antennas by foliage); Reston DBS Comments at 3 (guidelines focus on elements of design (shape, material and color) and location (relation to neighboring properties, screening); ARRL TVBS-MMDS Comments at 6 (citing requirements that antennas be shielded from view, often by shrubs, or by location on a residential lot).

[39]Bell Atlantic *ex parte* presentation April 16, 1996.

outright prohibitions,[40] by creating an extra hurdle for consumers to overcome. Similarly, requirements for permits and/or fees may provide a disincentive for potential consumers, if those requirements apply to one programming signal provider but not another. We believe this kind of impairment can impede a service provider's ability to compete, since customers will ordinarily select a service less subject to uncertainty and procedural requirements.[41] We believe that the imposition of delay is an impairment of the sort Congress sought to prohibit; accordingly, these types of procedural requirements and permits are prohibited except as provided herein. Local conditions involving safety or historic preservation may justify imposition of prior approval, permitting, or fee requirements in some circumstances, as discussed below, but we note that our rule requires that any such restriction be no more burdensome than is necessary to achieve its safety or historic preservation purposes.

18. Second, a regulation will be found to impair a viewer's ability to receive video programming signals if it unreasonably increases the costs of installation, maintenance or use of reception devices. Like procedural requirements, requirements to screen or otherwise beautify an antenna may result in additional costs that discourage consumers from choosing particular antenna-based services. Some commenters propose formulas for calculating whether costs expended in complying with a governmental or nongovernmental authority's regulations regarding the installation, maintenance or use of TVBS, MMDS or DBS reception devices constitute an impairment.[42] Some of these commenters suggest that costs amounting to a certain percentage of the cost of equipment or services should be considered an impairment prohibited by our rule.[43] Other commenters and petitioners argue that adding any expense to the installation, maintenance and use of reception devices for TVBS, MMDS or DBS would be an impairment because it would provide a disincentive to consumers to choose these services.[44] Another commenter suggests that a cost-based method is impracticable

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[40]*See, e.g.*, Bell Atlantic TVBS-MMDS Comment at 4; ARRL TVBS-MMDS Comments at 6; WCAI TVBS-MMDS Reply at 7; Bell Atlantic *ex parte* presentation April 16, 1996; SBCA *ex parte* presentation June 11, 1996. One commenter notes that regulations that impose delays on non-cable technologies make it impossible for those businesses to compete effectively with cable. WCAI TVBS-MMDS Reply at 7. WCAI also notes that the Commission has recognized the importance of prompt service installation by recommending customer service guidelines for local franchising authorities that require cable operators to install cable within seven days of a customer's request. *Id., citing* 47 C.F.R. § 76.309.

[41]Bell Atlantic *ex parte* presentation June 18, 1996; SBCA *ex parte* presentations June 11, 1996 and June 17, 1996.

[42]Evermay TVBS-MMDS Comments at 3; Community TVBS-MMDS Comments at 11; WCAI TVBS-MMDS Reply at 6, n.10.

[43]Evermay TVBS-MMDS Comments at 3; Evermay DBS Reply at 3 (costs amounting to 25% of costs of equipment and/or service would amount to an impairment); WCAI TVBS-MMDS Reply at 6, n.10 (costs amounting to 10% of costs of equipment and/or service would amount to an impairment).

[44]SBCA *ex parte* presentation June 17, 1996.

because communities' needs may vary widely.[45]

19. While we decline to adopt a formula based on a specific percentage of the cost of equipment or services, we do require that the costs of complying with governmental and nongovernmental restrictions on the installation, maintenance and use of devices designed for over-the-air reception not be unreasonable in light of the cost of the equipment or services and the visual impact of the antenna. Under this approach, restrictions cannot require that relatively unobtrusive DBS antennas be screened by expensive landscaping. On the other hand, a requirement to paint an antenna in a fashion that will not interfere with reception so that it blends into the background against which it is mounted would likely be acceptable. In determining the reasonableness of any additional cost, we will also consider the treatment of comparable devices. For example, if costs are imposed to screen other similar devices in the neighborhood, such as air conditioning units, trash receptacles, etc., similar requirements imposed on antennas may be reasonable under our rule even though they might increase the cost of installation, maintenance or use, if such measures are justified by visual impact. We believe that this approach adequately addresses the concerns of those who argue that requirements to paint, screen, or site antennas in particular ways will reduce the competitiveness of particular industries, and accommodates the interests of governmental and nongovernmental authorities, consumers, and providers of TVBS, MMDS and DBS.

20. Third, a regulation will be deemed to impair a viewer's ability to receive video programming signals if it precludes reception of an acceptable quality signal. We affirm the consensus opinion of commenters who discuss this issue that the signals that are protected here are signals intended for reception in the viewing area.[46] Under this criterion, for example, our rule would invalidate a requirement that an antenna be placed in a position where reception would be impossible or would be substantially degraded. However, a regulation requiring that antennas be placed to the extent feasible in locations that are not visible from the street would be permitted under our rule, if this placement would not impair reception of an acceptable signal. Requirements that antennas be set back from the street could be deemed to impair reception if compliance would mean that the antenna could not receive an acceptable signal.

21. In refining our rule to prohibit only restrictions that "impair" viewers' abilities to install, use or maintain devices designed for over-the-air reception, we remove from the scope of this prohibition all restrictions that may affect, but do not impair, a viewer's ability to install, use or maintain devices to receive video programming signals through over-the-air TVBS, MMDS, and DBS services. As discussed below, we also exempt certain regulations protecting safety and historic areas, even though the regulations may impair access to over-

[45]Miller, Canfield *ex parte* presentation June 14, 1996.

[46]Thus, for example, we would not offer the same protection to consumers seeking to install, maintain, or use antennas designed to receive distant TVBS signals.

the-air signals.

22. Some commenters in this consolidated proceeding argue that Congress has spoken clearly, and that local concerns play no role in light of Section 207.[47] Others argue that local concerns are paramount, and that Section 207 can be implemented only to the degree that our implementing regulations do not conflict with recognized local concerns.[48] Most commenters are in agreement that in some limited situations local restrictions should prevail, even if installation, use, and maintenance of devices used to receive over-the-air video signals are thereby precluded. There is, for example, no serious disagreement that regulations addressing valid safety concerns should prevail.[49] Similarly, the record reflects general agreement that valid historic concerns should be honored.[50] Notwithstanding the strong federal policy reflected in Section 207 that reception of over-the-air video programming signals should not be impaired by local regulations, we do not view this policy to be so absolute that it categorically overrides all other concerns. We continue to believe that Congress instructed us to promulgate a rule "pursuant to Section 303," in the public convenience, interest, and necessity, precisely so that we could balance the conflicting interests involved.

23. As noted above, in the *DBS Order and Further Notice* and the *TVBS-MMDS Notice*, we adopted and proposed a rebuttable presumption approach to distinguish acceptable government regulations from unacceptable ones.[51] We acknowledged in the *DBS Order and Further Notice* and the *TVBS-MMDS Notice* that this presumptive approach would be more

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[47]*See, e.g.,* DIRECTV DBS Comments at 16.

[48]*See, e.g.*, NLC TVBS-MMDS Comments at 6-7; Mayors TVBS-MMDS Comments at 2; Mayors DBS Comments at 12; Indianapolis TVBS-MMDS Comments at 2; Killeen TVBS-MMDS Comments; FLC DBS Petition; King's Grant DBS Comments at 1 (allowing "indiscriminate installation" of antennas would result in conflicts with wetlands protection).

[49]*See, e.g.,* WCAI *ex parte* presentation June 11, 1996 (acknowledging that regulations based on safety concerns, such as a fire code, are acceptable); SBCA *ex parte* presentation June 17, 1996 (stating that a nondiscriminatory fire code or building code based on safety reasons would be acceptable; noting that safety restrictions are valid but cautioning that many model codes have non-safety related requirements); NYNEX *ex parte* presentation June 24, 1996; PacTel *ex parte* presentation June 18, 1996.

[50]*See, e.g.,* National Trust TVBS-MMDS Comments *passim* (preemption of historic zoning easements exceeds the Commission's statutory authority); NLC DBS Petition at 15 (supporting exemption of historic districts, and noting that there are some four thousand of them); SBCA *ex parte* presentation June 11, 1996 (acknowledging the importance of historic areas as long as they are "truly historic" and do not have exceptions for other modern property fixtures); People's Choice *ex parte* presentation June 13, 1996. *But see*, Primestar DBS Reply at 2, 7 (stating that Congress did not intend to balance federal interests with local interests); Bell Atlantic TVBS-MMDS Comments at 2 (should adopt rule that preempts any regulation that "affects the installation, maintenance, or use of devices").

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

difficult to administer than a rule of general applicability.[52] We believed, however, that the presumptive approach would better allow us to recognize the "importance and centrality of the local interests" in regulating safety, and that our regulation under this approach would be less intrusive than under a *per se* preemption, even though it might require further action by the Commission.[53] Although the rebuttable presumption approach is supported by several commenters,[54] some industry parties suggest that we impose a higher standard for meeting health or safety objectives,[55] or establish a rule of *per se* preemption.[56] These commenters and petitioners maintain that the rebuttable presumption approach is unnecessarily cumbersome, and does not effectuate Congress' intent. Moreover, although we developed the rebuttable presumption approach to ensure the protection of local interests, several commenters note that the burden of uncertainty and the need to seek individual rulings from the Commission would strain the resources of local authorities.[57] The rule we adopt addresses these concerns.

24. First, we create an exemption for restrictions that serve legitimate safety goals. Difficulties arise because many local regulations combine safety with other concerns, and it is often hard to separate the various concerns. We believe that a recognition that certain types of regulations are permitted is essential to our implementation of Section 207. Thus, regulations that serve a stated safety purpose, such as restrictions requiring minimum distances

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[52]*DBS Order and Further Notice* ¶ 25; *TVBS-MMDS Notice* ¶ 8.

[53]*See Earth Station Notice,* 10 FCC Rcd at 7001.

[54]*See, e.g.,* ITFS Parties TVBS-MMDS Comments at 1-2; NYNEX TVBS-MMDS Comments at 2; Pactel TVBS-MMDS Comments at 1; NAB TVBS-MMDS Comments at 2 (supporting a modified version of the proposed rebuttable presumption rule); UHA TVBS-MMDS Comments at 2; NASA TVBS-MMDS Comments at 4; AT&T DBS Comments at 3 (use of presumptions strikes an appropriate balance); NLC DBS Reply at 6-7 (*per se* rule would improperly preclude *any* state or local regulation absent a waiver and is inconsistent with Section 207).

[55]*See, e.g.,* BellSouth TVBS-MMDS Comments at 3-5; Bell Atlantic TVBS-MMDS Reply at 6.

[56]A rule of *per se* preemption would provide a standard and preempt all rules that failed to meet that standard. *See* CAI Wireless TVBS-MMDS Comments at 5-6; Primestar TVBS-MMDS Comments at 3-4; WCAI TVBS-MMDS Comments at 5-6, 7-14; CEMA TVBS-MMDS Reply at 2; CAI Wireless TVBS-MMDS Reply at 4; CEMA DBS Comments at 6-7 (advocating a *per se*/waiver rule); NRTC DBS Comments at 4 (noting that "by requiring the Commission to 'prohibit' all restrictions that 'impair' reception . . . Congress established a *per se* preemption standard"); Primestar DBS Reply at 2, 7 ("Congress . . . did not envision that the Commission would exercise its authority to balance the federal interest . . . against local interests in zoning."); NRTC DBS Reply at 1; DIRECTV DBS Reply at 3 ("The language of Section 207 and the policies that motivated its adoption . . . support . . . a *per se* preemption of private restrictions[.]"); SBCA DBS Reply at 6-7; Philips DBS Opposition at 3; CAI Wireless *ex parte* presentation May 20, 1996; SBCA *ex parte* presentation June 11, 1996; Miller, Canfield *ex parte* presentation June 14, 1996.

[57]Georgia TVBS-MMDS Comments at 4; Scarinci TVBS-MMDS Comments at 1-2; NLC IRFA Comments at 1-2; Miller, Canfield *ex parte* presentation June 14, 1996.

from high voltage power lines, are permitted. Similarly, a restriction that precludes any installations very near streets and intersections in order to preserve a clear line of sight for drivers is clearly safety-related and permitted, provided that all comparable installations, e.g., foliage, are also precluded.[58] Safety regulations stipulating the adequate bolting or guying of antennas are enforceable under the rule we are adopting, as are the provisions of the model fire code, prohibiting "furnishings, decorations, or other objects . . . [that] obstruct fire exits, access thereto, egress therefrom, or visibility thereof."[59] Although the receive-only devices at issue here do not pose significant local health concerns, to the extent that these antennas have transmit capabilities, they must comply with our RF emissions standards as well as with any applicable local health regulations.[60]

25. Although we are not requiring safety regulations, on their face, to apply to all devices or fixtures similar to antennas, in recognition that safety goals may result in restrictions that apply only to antennas because they are the most likely rooftop installations or appurtenances, we expect local governments and private associations to administer their regulations in a nondiscriminatory manner. A safety regulation is permitted if it would be applied to the extent practicable in a non-discriminatory manner to other appurtenances, devices, or fixtures that are comparable in size, weight, and appearance to these antennas and to which local regulation would normally apply. In any proceeding challenging the validity of a particular regulation, we will look carefully at how safety restrictions are applied across the board. Safety restrictions must be no more burdensome upon antenna users than is

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[58]*See, e.g.,* code of East Plano, Texas, section 3-508:

> Except in the BG and CB-1 districts, on any corner lot, no fence, wall, screen, billboard, sign, structure, or foliage of hedges, trees, bushes, or shrubs shall be erected, planted or maintained in such a manner as to obstruct or interfere with a clear line of sight for drivers of approaching motor vehicles within a triangular area formed by extending the two curb lines a distance of 45 feet from their point of intersection, and connecting these points with an imaginary line, thereby making a triangle. If there are no curbs existing, the triangular area shall be formed by extending the property lines a distance of 30 feet from their point of intersection, and connecting these points with an imaginary line, thereby making a triangle. In cases where streets do not intersect at approximately right angles, the Traffic Engineer shall have the authority to vary these requirements as he deems necessary to provide safety for both vehicular and pedestrian traffic; however, he shall not require site distances in excess of 275 feet. Within this triangle, vision shall be clear at elevations between 30 inches and 9 feet above the average grade of the street.

[59]National Fire Prevention Association, Inc. model code.

[60]Congress and the Commission have taken action to address local health issues concerning devices which produce RF emissions. *See* Telecommunication Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) § 704. The Commission has adopted standards applicable to devices which produce RF emissions; *see* Guidelines for Evaluating the Environmental Effects of RadioFrequency Radiation, ET Docket No. 93-62, Report and Order (FCC 96-326, adopted Aug. 1, 1996). In so far as antennas are used for transmission as well as reception, such antennas must comply with these rules.

necessary to achieve the desired objective. We do not intend, however, that local authorities be required to rewrite their regulations. Our rule also requires that a restriction covered by this exemption must state, in the text, preamble or legislative history, that it has a clearly defined safety objective. Alternatively, local governments or private associations can comply with this section by describing the restriction and the clearly defined health or safety objective it is intended to promote, in a document that is readily available to antenna users. By offering this alternative, we address the concern raised by commenters that it would be a significant burden for them to revise all of their safety codes to make them specifically applicable to antenna installations.[61] We believe that a such a document will provide the necessary guidance to antenna users regarding which restrictions local governments or associations intend to apply.

26. Although we received extensive comment on the effect preemption of such restrictions might have on historic preservation, we received little comment on the effect it might have on environmental concerns in general. Given the size and nature of the antenna facilities covered by Section 207 and given that these devices are usually associated with already existing structures, e.g., residences or office buildings,[62] we do not believe that our action herein will adversely affect the quality of the human environment in a significant way. Thus, while we see no need to create a general exemption for environmental concerns, we are adopting a rule that recognizes the safeguarding of registered historic preservation areas. Congress has authorized the Secretary of the Interior to maintain a National Register of Historic Places composed of "districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture."[63] Restrictions on the installation, use and maintenance of over-the-air reception devices for TVBS, MMDS, and DBS in these sites may be enforced to the extent necessary to preserve their special historic status. These regulations may be enforced even if this results in some cases in the impairment of a viewer's ability to receive over-the-air video programming signals, as long as these restrictions are imposed in a nondiscriminatory way, and are no more burdensome than is necessary to achieve the objective. Under this section, regulations are exempted if they apply to all modern devices, but they may treat objects that are consistent with the historical nature of the community in a different fashion than objects that are clearly more modern in character such as air conditioning units, trash receptacles, or antennas.[64]

27. Thus as stated above, state and local restrictions, as well as nongovernmental

[61]NLC DBS Comments at 13-15; FLC DBS Comments at 1; Mayors DBS Comments at 12.

[62]It should be noted that the Commission's general environmental processing rules categorically exclude the mounting of antenna(s) on existing buildings unless the building is an historic site. See 47 C.F.R. §1.1306(b)(3) Note 1.

[63]National Historic Preservation Act of 1966, *as amended*, 16 U.S.C. § 470a(a)(1)(A).

[64]*See* NRTC DBS Reply at 2; DIRECTV DBS Reply at 9; SBCA *ex parte* presentation June 11, 1996.

restrictions, e.g., restrictive covenants, that are designed to protect historic areas that are listed or eligible for listing in the National Register of Historic Places,[65] will not be preempted. Additionally, restrictions that are designed for safety purposes will not be preempted. Finally, the Commission will consider granting waivers where the state, local, or appropriate nongovernmental entity demonstrates that the restriction is necessary to protect other environmental concerns, in view of the particularly unique environmental character or nature of the given area.

C. Technologies Covered by Rule

28. The rules that we adopted in the *DBS Order and Further Notice* and proposed in the *TVBS-MMDS Notice* are intended to implement Section 207 fully with regard to TVBS, MMDS and DBS. Although we did not define TVBS or MMDS in the *TVBS-MMDS Notice*, in the *DBS Order and Further Notice* we tentatively concluded that Congress intended "direct broadcast satellite service" to include not only services that are technically DBS, but also medium power Ku-Band DTH services, such as that offered by Primestar, because they use antennas one meter or less in diameter.[66] We also noted that in the House Report, Congress expressly excluded larger C-band satellite antennas from Section 207, and seemed to focus on the size of the antenna, rather than the specific technology, as a basis of distinction.[67] As the House Report states, "This service does not include lower power C-band satellites, *which require larger dishes* in order for subscribers to receive their signals."[68]

29. Several commenters and petitioners suggest that the statute also applies to classes of services related to TVBS, MMDS and DBS, and that our rule should include these related services.[69] These commenters and petitioners contend that the terms "MMDS" and "DBS" should be interpreted broadly because Congress intended Section 207 to promote competition

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[65] *See* 16 U.S.C. § 470a(a)(1)(A).

[66] *DBS Order and Further Notice* ¶ 60. We said that "[w]e do not believe Congress intended for these medium power systems to face local regulatory burdens not shared by their true DBS counterparts."

[67] *DBS Order and Further Notice* ¶ 57, *citing* House Report at 124.

[68] House Report at 124 (emphasis added).

[69] *See, e.g.,* ITFS Parties TVBS-MMDS Comments at 3-4 ("[T]he effective intent [of Section 207] was to encourage the widest dissemination of services in the MDS, MMDS and ITFS bands."); NIA TVBS-MMDS Comments at 3 (include ITFS); WCAI TVBS-MMDS Reply at 3 n.4 (include ITFS and MD); CAI Wireless TVBS-MMDS Comments at 2 n.4 ("It was obviously not the intent of the Congress to limit the applicability of Section 207 to antennas that receive only MMDS frequencies."); Bell Atlantic TVBS-MMDS Comments at 4-6 (include LMDS and other new technologies); WANTV TVBS-MMDS Comments at 2 (noting the impact restrictions have on ITFS); PBS TVBS-MMDS Comments at 3 n.3; Microcom DBS Comments at 2-3 (stating that Section 207 should cover DBS dishes greater than one meter in diameter); CAI Wireless *ex parte* presentation May 20, 1996; WCAI *ex parte* presentation June 13, 1996; Alphastar DBS Petition at 2; SBCA *ex parte* June 11,1996.

among video programming services by prohibiting restrictions that impair reception of all forms of video programming.[70] For example, some commenters note that MMDS is really a form of multipoint distribution service (MDS), which is a general category of services using the same type of receiving antennas at different frequencies, and recommend that our rule preempt restrictions on the reception of any form of MDS, including MMDS, instructional television fixed service (ITFS),[71] and local multipoint distribution service (LMDS).[72] Other commenters and petitioners suggest that "DBS" also refers to a broad category of technologies. They recommend that we expand our definition of DBS to include other forms of satellite services including very small aperture terminals (VSAT) that transmit information,[73] and medium-power Ku-band DTH satellite services.[74] According to one commenter, the legislative history indicates that Congress intended Section 207 to apply to most reception of wireless video programming except systems using large antennas.[75]

30. We believe that by directing the Commission to prohibit restrictions that impair viewers' ability to receive over-the-air signals from TVBS, MMDS and DBS services, Congress did not mean to exclude closely-related services such as MDS, ITFS, and LMDS. All of these services -- MDS, ITFS, and LMDS -- are similar from a technological and functional standpoint in that point-to-multipoint subscription video distribution service can be provided over each of them. We note that MMDS is the product of MDS technology, the

[70]Some commenters also urge that the rule should be sufficiently broad to accommodate the transition to advanced television (ATV) because ATV will require new transmission antennas and towers. *See* MSTV TVBS-MMDS Comments at 5 (include transmission antennas under Section 207); CEMA TVBS-MMDS Reply at 3 (same). Transmission towers are outside the scope of Section 207, and we accordingly decline to address these comments here.

[71]WANTV TVBS-MMDS Comments at 2; PBS TVBS-MMDS Comments at 3 n.2; WCAI TVBS-MMDS Comments at 18-19; ITFS Parties TVBS-MMDS Comments at 1-2; CAI Wireless *ex parte* presentation May 20, 1996; WCAI *ex parte* presentation June 13, 1996 (noting that ITFS sometimes uses larger antennas because it is an educational broadcasting service designed to reach distant schools, but that these antennas will be on schools, not residential property).

[72]Bell Atlantic TVBS-MMDS Comments at 4-6; ComTech TVBS-MMDS Comments at 4-5; CellularVision TVBS-MMDS Comments at 3; CellularVision TVBS-MMDS Reply at 2-3; ComTech TVBS-MMDS Reply at 2; Bell Atlantic *ex parte* presentation March 13, 1996; ComTech *ex parte* presentation April 5, 1996.

[73]AT&T DBS Comments at 4-5 (declaring that "there is not a valid basis for distinguishing between [transmit/receive antennas and DBS antennas]"); Abbott DBS Reply at 2-3; SBCA *ex parte* presentation June 11, 1996.

[74]Primestar DBS Comments at 10; CEMA DBS Comments at 3-4, n.7; Primestar DBS Reply at 13, 14; Alphastar DBS Petition at 2. *Contra* NLC DBS Reply at 8-9. NRTC opposes the inclusion of medium power fixed satellite services within the meaning of DBS, but argues that DBS providers should be permitted to use dishes larger than one meter in diameter outside the continental United States. NRTC DBS Comments at 5.

[75]Primestar DBS Comments at 10-11.

first multipoint distribution service established by the Commission, and that ITFS is a service whose frequencies are available for transmission of MMDS. LMDS is a service that has been authorized to provide services comparable to MMDS as well as other types of services. The origins of all of these services can be traced to MDS. Thus, all of these related services should be treated the same for purposes of Section 207, and are properly included in the scope of Section 207's provision. We also determine, however, that VSAT, a commercial satellite service that may use satellite antennas less than one meter in diameter, is not within the purview of the statute because it is not used to provide over-the-air video programming.[76]

31. We also believe that the statute can be construed to include medium-power satellite services using antennas of one meter or less that are used to receive over-the-air video programming, even though such services may not be technically defined as DBS elsewhere in the Commission's rules. Therefore, for purposes of implementing Section 207, we affirm our conclusion that DBS includes both high-power and medium-power satellite services using reception devices of one meter or less in diameter.

32. Because of the unique and peculiar characteristics applicable to reception of such services outside the continental United States, it is necessary to provide an exception for Alaska to the general size guidelines in our rule. In contrast with those portions of the continental United States (as well as Hawaii) that are at lower latitudes, DBS reception in Alaska requires larger antennas than those used in the lower part of the United States.[77] The installation, maintenance, and use of these larger antennas in Alaska will be covered by the rules we adopt in this Report and Order, and governmental and nongovernmental restrictions impairing the installation, maintenance and use of these devices will be prohibited, even when the devices exceed one meter in diameter or diagonal measurement.[78] This exception is limited, however, to antennas used to receive DBS service as defined by our rule, and will not apply to antennas that receive signals in the C-band. These larger antennas are subject to the more general satellite antenna preemption in Section 25.104 of our rules. Our decision to protect larger DBS antennas in Alaska than in the rest of the country is consistent with Commission policy to ensure that DBS is available to residents across the United States.[79] As

[76]Issues relating to VSAT and other satellite services will be addressed separately. The International Bureau will issue a public notice soliciting comments to supplement and refresh the record on any issues remaining in IB Docket No. 95-59. In the interim, the rules in 47 C.F.R. § 25.104 regarding antennas not covered by Section 207 remain in effect. Similarly, the rule adopted here will have no application to services other than those named here. Specifically, the rule does not affect restrictions on towers or other equipment used in personal communications, amateur radio, or other such services.

[77]*See* Microcom DBS Comments at 2 (services offered by DIRECTV, USSB and Echostar are available in Alaska using antennas ranging in size from one to 2.4 meters.)

[78]*See* Attachment A, 47 C.F.R. § 25.104.

[79]*See* Revision of Rules and Policies for the Direct Broadcast Satellite Service, IB Docket No. 95-168, 60 Fed. Reg. 65587 (Dec. 20, 1995).

DBS service providers design their systems to comply with the Commission's requirement to serve Alaska, it may be possible to use smaller antennas that are closer to the size used in other parts of the country, and the need for this exemption may be obviated.[80]

33. Also, for purposes of our rule, we believe it is appropriate to treat TVBS and MMDS services, as we did DBS, according to the characteristics of their antennas. In the *TVBS-MMDS Notice,* we remarked that Section 207 addresses TVBS, MMDS, and DBS receiving devices as a group, which suggests that they should be treated similarly.[81] We noted, however, that antennas used to receive TVBS signals can take various forms and sizes, and may not always be comparable to DBS antennas. We also tentatively concluded that antennas used to receive MMDS signals are generally smaller than one meter in diameter or diagonal measurement, and so are comparable to DBS antennas in size, but can be of different shapes, and may be mounted on a higher "mast."[82] In the *TVBS-MMDS Notice*, we sought comment on what types of restrictions would be appropriate for TVBS and MMDS, and particularly whether limits should be placed on mast size.[83]

34. Some commenters and petitioners argue that a widely-adopted model building code provides a useful description of permitted antennas.[84] Of four general model codes,[85] the Building Officials & Code Administrators International, Inc. (BOCA) code is the only one

[80]We are not, however, suggesting that consumers with existing DBS antennas in Alaska can be required to upgrade if smaller antennas become available.

[81]*TVBS-MMDS Notice* ¶ 7.

[82]*TVBS-MMDS Notice* ¶ 7, n.15. We stated:

> MMDS antennas usually take one of three general forms: a rounded disk about 18 inches across, with a metal screen or solid cover; a parabolic (curved rectangular) sheet about 12 inches by 18 inches, either solid or open grillwork; or a "Yagi" antenna, which is a straight, branch-like device of varying length. *See, e.g.,* Petition of ACS Enterprises, Inc. for Preemption of Norristown Zoning Ordinance, filed Sept. 26, 1995.

[83]*TVBS-MMDS Notice* ¶ 7.

[84]Haley DBS Comments at 2; Community DBS Comments at 7, 20; NAA DBS Comments at 17-19; O'Brien DBS Comments at 1; Coordinated DBS Comments at 2; NAHB DBS Comments at 2; Mayors TVBS-MMDS Comments at 2; Indianapolis TVBS-MMDS Comments at 2; Elisha TVBS-MMDS Comments at 1-2; MIT DBS Petition at 7, 8; NLC DBS Petition at 13-15.

[85]Model codes are promulgated by Building Officials & Code Administrators International, Inc. (BOCA), International Conference of Building Officials (ICBO), Southern Building Code Congress International, Inc. (SBCCI), and Council of American Building Officials (CABO).

that includes provisions on antenna installation.[86] The BOCA code has been adopted in seventeen states and numerous municipalities nationwide, and therefore its provisions on antenna installation seem well-suited as a starting place for our discussion.[87] The BOCA code provides guidelines on the siting and installation of antennas, and technical standards on such things as snow loads. Other commenters argue against adoption of the BOCA code antenna provisions as model restrictions because of BOCA's inclusion of height and size restrictions.[88] These commenters maintain that such restrictions are not related to safety and are of the sort that Congress intended to prohibit, not permit.

35. Several commenters suggest that the Commission expressly preempt all restrictions addressing the shape of antennas or the permitted height of masts.[89] Some of these commenters, representing the DBS and MMDS industries, note that their antennas are usually less than one meter in diameter or diagonal measurement.[90] Some commenters contend that masts should be considered part of the devices used for over-the-air reception, and thus regulations restricting them should be prohibited.[91] Moreover, industry commenters assert that masts are well secured and do not pose a health or safety problem.[92] These commenters suggest that placing size or shape limits on one technology, e.g., regulating the size of MMDS masts, will impede this technology's ability to compete with others, such as

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[86]The ICBO code is the only other code to mention height limitations for rooftop installations at all, and the ICBO code sets a limit of 25 feet for a structure of combustible materials, and no limit for structures of non-combustible materials. We believe that antennas for reception of over-the-air signals are noncombustible.

[87]*See* "Who uses BOCA National Codes?" published by Building Officials & Code Administrators International, Inc.; NATOA *ex parte* presentation March 13, 1996.

[88]WCAI TVBS-MMDS Comments at 7, 24-25; HNS DBS Opposition at 10, 12-13; DIRECTV DBS Opposition at 9; NRTC DBS Reply at 5; Primestar DBS Reply at 5-6.

[89]*See, e.g.*, WANTV TVBS-MMDS Comments at 1-2 (discussing factors that can affect the design, size and height of antennas and masts); BellSouth TVBS-MMDS Comments at 5 (preempt any restrictions on mast height); MSTV TVBS-MMDS Comments at 3-5 (preempt restrictions relating to the mounting and installation of devices used in conjunction with antennas); NYNEX TVBS-MMDS Comments at 5-6; NASA TVBS-MMDS Comments at 6; NAB TVBS-MMDS Comments at 7-8; CEMA TVBS-MMDS Reply at 2-3, 5; CEMA DBS Comments at 7-8 (ensure that final DBS rule covers all DBS antennas, including those greater than one meter in diameter); WCAI *ex parte* presentation June 11, 1996.

[90]*See, e.g.*, NYNEX TVBS-MMDS Comments at 5-6; WANTV TVBS-MMDS Comments at 1; Alphastar DBS Petition at 2 (antenna size measuring between 24 and 30 inches); Bell Atlantic *ex parte* presentation March 13, 1996.

[91]*See, e.g.*, MSTV TVBS-MMDS Comments at 3-5; WANTV TVBS-MMDS Comments at 1-2; BellSouth TVBS-MMDS Comments at 5; NYNEX TVBS-MMDS Comments at 5-6; NASA TVBS-MMDS Comments at 6; NAB TVBS-MMDS Comments at 7-8; CEMA TVBS-MMDS Reply at 2-3, 5; CEMA DBS Comments at 6-7; WCAI *ex parte* presentation June 11, 1996.

[92]*Id.*

DBS, that for technical reasons do not face such limits.[93] MMDS industry commenters have suggested that the usual heights for masts range from three feet to fifty feet, and they oppose the twelve foot limit included in the BOCA code as too limiting.[94] Some MMDS providers maintain that their decision to offer MMDS in a market is based upon the average mast size that would be needed in the community to receive the service, and that they do not choose to offer service in communities in which unusually high masts would be required.[95]

36. Other commenters suggest that reasonable limits are necessary to promote health, safety, and aesthetic interests as well as to maintain property values.[96] One nongovernmental association indicates that a one-meter diameter limit would be reasonable to further regulatory parity among the different services.[97] Some governmental and nongovernmental commenters encourage limits on mast height, suggesting that we should adopt the BOCA code's twelve-foot limit.[98] Others suggest that, at a minimum, mast heights should be no higher than

[93]*See, e.g.,* NASA TVBS-MMDS Comments at 8-9 (seek regulatory parity to prevent a competitive imbalance between satellite providers and their competitors); *see also* NYNEX TVBS-MMDS Comments at 5 n.9 (rule should accommodate masts of varying heights); BellSouth TVBS-MMDS Comments at 5-6 (cost of entry into the market would be raised by a mast height restriction); NASA TVBS-MMDS Reply at 5-6.

[94]Bell Atlantic *ex parte* presentation March 13, 1996 (average mast height is 10-15 feet); NYNEX *ex parte* presentation March 13, 1996 (mast heights are usually less than 3 feet or greater than 10 feet); People's Choice *ex parte* presentation June 13, 1996 (largest mast commercially produced is 40 feet); PacTel *ex parte* presentation June 18,1996 (in Riverside, California, the largest mast used is 20 feet); WCAI *ex parte* presentation July 2, 1996 (largest mast used is 50 feet). Some commenters also note that in some communities, they rely on "tree mounts," installing MMDS antennas on trees. They note that tree mounts are often shielded by foliage or by other trees, and are thus relatively unobtrusive. *See, e.g.,* WCAI *ex parte* presentation June 11, 1996; Bell Atlantic *ex parte* presentation April 16, 1996.

[95]People's Choice *ex parte* presentation June 13, 1996.

[96]*See, e.g.,* Community TVBS-MMDS Reply at 17; MIT TVBS-MMDS Reply at 3; NLC DBS Petition at 15-16; Boulder DBS Petition at 7-8 (noting that "incursions of antennas into the hitherto pristine airspace . . . will cause substantial degradation in Boulder County's ongoing effort to preserve scenic views"); Coordinated DBS Comments at 1 ("the appearance of a building directly affects its marketability"); Mass DBS Comments at 2 (unregulated installation of antennas will "lead to a haphazard maze of these devices which will have an adverse visual impact on the community . . . [and] market value"); C&G DBS Comments at 1 (same); NAHB DBS Comments at 2; NAA DBS Comments at 15; Stonecroft DBS Comments at 1; CMC DBS Comments at 1, 3.

[97]Community TVBS-MMDS Reply at 17.

[98]Haley DBS Comments at 2; Community DBS Comments at 7, 20; NAA DBS Comments at 17-19; O'Brien DBS Comments at 1; Coordinated DBS Comments at 2; NAHB DBS Comments at 2; Mayors TVBS-MMDS Comments at 2; Indianapolis TVBS-MMDS Comments at 2; Elisha TVBS-MMDS Comments at 1-2; MIT DBS Petition at 7, 8; NLC DBS Petition at 13-15.

necessary to receive signals, and no more than a few meters above the roofline.[99]

37. Because masts are very often a necessary part of an MMDS receiving device, we include them in our definition of MMDS antennas. However, we decline to adopt the suggestion of some commenters that including masts in the definition of MMDS exempts masts from all regulation. Because we believe that the model antenna height and installation restrictions in the BOCA code are safety-related, they will be enforceable under our rule. We do not believe it will be overly burdensome to require, as is provided in the BOCA code, that antenna users obtain a permit in cases in which their antennas must extend more than twelve feet above the roofline in order to receive signals.[100] However, we would find unenforceable any restriction that establishes specific *per se* height limits. Similarly, we believe that the BOCA code guideline regarding permits for setbacks is safety-based, is reasonable, and does not impose an unreasonable burden.[101] Any such permit application should be handled expeditiously. However, the antenna size restriction for satellite antennas in the BOCA code, 24 inches, is unacceptable, as the diameter or diagonal measurement of the satellite and MMDS antennas covered by our rule is one meter. A one-meter limit will encompass MMDS as well as the other forms of MDS, i.e., LMDS and ITFS. Commenters note that LMDS antennas will be smaller than MMDS antennas, measuring approximately 12 inches in diameter.[102] Generally, ITFS antennas range in size from two feet to twelve feet. Larger antennas are used to receive more distant signals and to minimize interference with other

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[99]*See, e.g.*, Silverman TVBS-MMDS Comments at 3; Community TVBS-MMDS at 26, Montgomery Village Letter; Community TVBS-MMDS Reply at 17; Boulder DBS Petition at 9 (preempt only where the proposed owner/user has no reasonable alternative as to placement). Community also suggests that the Commission impose a standard distance that the transmitter may be from a receiving antenna, and that only viewers who live within this standard distance should be allowed to install a receiving antenna. Community TVBS-MMDS Reply at 18. Similarly, representatives from the broadcast industry indicate that while they believe that viewers should be able to receive signals from broadcasters licensed for their area, they did not envision subscribers mounting an antenna to receive signals from all neighboring cities. NAB *ex parte* presentation June 14, 1996.

[100]We note that commenters' references to the BOCA code's 12-foot height limitation are inaccurate; the BOCA code does not limit antenna height to 12 feet, but states only that permits may be required for installations that exceed 12 feet. It would not be inappropriate for parties to work with BOCA to develop a uniform model code that would apply to taller masts and obviate the need for a permit up to that taller height. If the code were revised, it would be reasonable to assume that deviations from such a revised code would be prohibited.

[101]In the section of the BOCA code entitled "Permits not required" it says:

> The installation of any antennal structure mounted on the roof of a building shall not be erected nearer to the lot line than the total height of the antennal structure above the roof, nor shall such structure be erected near electric power lines or encroach upon any street or other public space.

Thus, subject to the other provisions of the code, if an antenna is no closer to the lot line than its total height above the roof, no permit will be required.

[102]ComTech *ex parte* presentation April 5, 1996; Bell Atlantic *ex parte* presentation March 13, 1996.

signals. However, one commenter notes that the largest antenna used to receive ITFS signals within a 30 mile radius in residential areas is 24 inches in diameter.[103]

38. In the *DBS Order and Further Notice,* the Commission concluded that transmitting satellite earth stations of certain sizes, i.e., smaller than one meter in diameter and located in residential areas, and smaller than two meters in diameter and located in commercial or industrial areas, would have the same protection as receiving stations.[104] In contrast, in our proposed implementation of Section 207, we adhered to the statutory text, which refers only to reception, not transmission, devices.[105] Several commenters to the *DBS Order and Further Notice* and the *TVBS-MMDS Notice* nonetheless urge the Commission to include transmitting antennas under the scope of the rule, arguing that some of the enumerated technologies, particularly MMDS, have transmission as well as reception capabilities.[106] In contrast, some commenters assert that Congress did not intend to cover transmission antennas, and that Section 207 is directed at "regulations which impair reception," not reception and transmission.[107]

39. We note that MMDS and LMDS antennas may be employed to both receive and transmit signals. In the future, many over-the-air video services may provide basic signal transmission capability to offer pay-per-view and other interactive options.[108] However, by definition, such basic signal transmission capability is often and appropriately considered as a

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[103]PacTel *ex parte* presentation July 24, 1996; People's Choice *ex parte* presentation June 13, 1996. While People's Choice notes that larger ITFS antennas, up to six feet in diameter, may be used on schools for distance learning, these antennas would not fall within the purview of our rule.

[104]*DBS Order and Further Notice* ¶ 30. We expressly excepted issues related to RF emissions from the rule.

[105]*TVBS-MMDS Notice* ¶ 7.

[106]*See, e.g.,* MSTV TVBS-MMDS Comments at 5-6; WCAI TVBS-MMDS Comments at 25 (noting that wireless cable operators will be deploying new transmitting antennas which should be covered under Section 207); PacTel TVBS-MMDS Comments at 2 (MMDS will likely have transmission capabilities, and the rule should reference these capabilities now to avoid the need to amend later); ComTech TVBS-MMDS Comments at 3 (include LMDS antennas despite their ability to transmit); CellularVision TVBS-MMDS Comments at 4 (same); Cellular TVBS-MMDS Reply at 3 (preempt restrictions that impair a viewer's ability to transmit information back to the hub); CEMA TVBS-MMDS Reply at 5 (transition to advanced television will require new transmission antennas that should be included under Section 207 protection); AT&T DBS Comments at 2-7; Bell Atlantic *ex parte* presentation March 13, 1996; NYNEX *ex parte* presentation March 13, 1996.

[107]Mayors DBS Petition at 4-6; Community TVBS-MMDS Reply at 14-15; Community DBS Reply at 8.

[108]"2-Way High-Speed Data Service Tested on Wireless Cable Systems," 16 Comm. Daily 5, June 28, 1996 (American Telecasting completed test of wireless cable system delivering 2-way high-speed data service and Internet access showing that wireless cable can operate at same speeds as fastest wired cable modems).