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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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SEP 27 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Preemption of Local Zoning	)	**IB Docket No. 95-59**
Regulation of Satellite Earth	)	
Stations	)	

To: The Commission

FURTHER COMMENTS
OF
THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

NATIONAL RURAL
TELECOMMUNICATIONS COOPERATIVE

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SUMMARY

In adopting Section 207 of the Telecommunications Act of 1996, Congress did not distinguish among viewers on the basis of their status as property owners. Instead, Congress provided that the Federal Communications Commission should prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for Direct Broadcast Satellite service. Accordingly, NRTC believes that the Commission should apply its preemption rules in a way that does not differentiate among viewers based upon their residential status.

NRTC also believes that the Fifth Amendment is not a bar to preemption. The Commission's preemption rules do not create new commercial relationships between property owners and third parties. Instead, the Commission's preemption policy simply modifies an existing and voluntary relationship between the landlord and tenant or between the occupant of a multiple dwelling unit (MDU) and the MDU community. The modification of an existing, voluntary relationship is akin to valid well-established regulations governing rent control, fire sprinklers, etc.

Free speech and open access to information are the foundation of any democracy. The Commission should not prevent the millions of Americans who do

not own their own home from exercising their right to receive unfettered information _via_ DBS antennas.

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Pursuant to Section 1.415 of the Rules and Regulations of the Commission, the National Rural Telecommunications Cooperative ("NRTC"), by its attorneys, hereby submits these Further Comments concerning the Commission's Report and Order ("Order"), Memorandum Opinion and Order, and Further Notice of Proposed Rule Making ("Further Notice") in the above-captioned proceeding.[1/] Specifically, NRTC supports the Federal Communications Commission's decision to preempt restrictions which impair antenna reception for DBS services.

[1/] Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rule Making, released August 6, 1996.

I. BACKGROUND

1. NRTC has actively participated in this proceeding. In May 1995, the Commission proposed to revise its rules concerning preemption of satellite antennas.[2/] In response, NRTC filed Comments and Reply Comments urging the Commission to strengthen its rules to protect viewers from unnecessary restrictions against DBS antennas. Similarly, on March 11, 1996, the FCC released a Report and Order and Further Notice of Proposed Rule Making in which the FCC proposed to preempt local zoning regulations against DBS receiving antennas and other satellite earth station antennas two meters or less in commercial areas and one meter or less in all other areas. On April 15, 1996 and May 6, 1996, NRTC filed Comments and Reply Comments, respectively, supporting the Commission's proposal to preempt non-governmental restrictions, such as homeowners' association restrictions and deed covenants, against DBS satellite antennas.

2. In its August 6, 1996 Report and Order, the FCC extended its preemption regulations to include homeowners' association rules, restrictive covenants, and private, non-governmental restrictions on DBS and other satellite

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[2/] Notice of Proposed Rule Making ("Notice"), 60 Fed. Reg. 28077 (released May 15, 1995).

antennas less than one meter in diameter. The FCC held that local restrictions may not "impair" the installation, maintenance, or use of DBS antennas.

3. NRTC applauds the Commission for following through on its proposals to protect viewers from restrictions that impair their ability to receive video programming via DBS. Unfortunately, however, the Commission's new protections only include those Americans who own their own property and who exclusively control that property. As noted by DIRECTV, 27% of Americans live in multiple dwelling units ("MDUs") and 46% of Americans live in rental space. Moreover, approximately 55% of minorities do not own their own homes. In light of the fact that so many viewers are not protected by the Commission's current preemption rules, NRTC urges the Commission to extend its rules to cover all viewers, not just one class of viewers: homeowners. In this way, the Commission would fulfill Congress's directive to "prohibit restrictions that impair a viewer's ability to receive video programming services through . . . direct broadcast satellite services." 47 U.S.C. § 207. As demonstrated below, the Commission clearly has the authority to act.

II. FURTHER COMMENTS

A. Congress Did Not Distinguish Among Classes of Property Owners.

4. NRTC urges the Commission to extend its preemption rules to include renters and all other residents of property which is not under their exclusive control. Section 207 of the Telecommunications Act of 1996 ("1996 Act") calls for the Commission to preempt non-federal restrictions that impair antenna reception for certain direct-to-home video services, including DBS services. Specifically, the language directs the FCC to:

> [P]romulgate 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.

47 U.S.C. § 207. Thus, Congress directed the FCC to preempt restrictions that interfere with the federal interest in ensuring access to DBS service.

5. The fact that Congress did not distinguish between exclusive property owners and others is vitally important. One of the fundamental tenets of a democratic society is freedom of access to information. The Commission should not deny access to information which is transmitted via DBS to an entire class of society: non-

homeowners. To deny this huge segment of society access to information which is transmitted via DBS is contrary to the democratic ideals upon which this Nation was founded and the express language of Section 207 of the 1996 Act.[3/]

6. NRTC is not suggesting that landlords and common property owners have no rights. Those rights must be balanced, however, against both the competing interest of society in the free flow of information and the compelling rights of individuals to choose among their sources of information. For example, the Community Association suggested that, in areas where most of the available space is common property, a community should be permitted to coordinate the installation of DBS antennas. Further Notice at ¶ 60. NRTC opposes adoption of this suggestion because it could result in the exclusion of one DBS service provider over another. This policy could allow a mobile home park owner, for example, to control the terms upon which DBS service is made available to residents. NRTC believes that the Commission should instead adopt a policy that allows any viewer to receive the DBS service of his or her choice, regardless of the viewer's residential status.

[3/] This ability to recognize competing interests while protecting freedom of choice for individuals is what Thomas Jefferson referred to in the Declaration of Independence as the collective right of "liberty".

B. The Fifth Amendment Is Not a Bar to Preemption.

1. Preemption regulates an existing commercial arrangement.

7. NRTC agrees with SBCA, DIRECTV and the other participants in this proceeding who argue that the installation of a DBS antenna does not constitute a Fifth Amendment taking. See, SBCA DBS Comments at 5, DIRECTV Comments at 8. In the seminal case of Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), the Supreme Court struck down a New York law that required a landlord to allow installation of cable wiring in her building as an unconstitutional taking of private property. Loretto, 458 U.S. at 421, 440. The Court reached its decision because the violative statute in Loretto was not aimed at regulating the landlord-tenant relationship, but was instead aimed at forcing the creation of a relationship between the property owner and a third party. In fact, the Loretto Court also noted that its holding was "very narrow" and did not impact the "power to regulate. . . the landlord-tenant relationship." Loretto, 458 U.S. at 440.[4/]

8. Likewise, the case of Bell Atlantic Telephone Companies v. F.C.C., 24 F.3d 1441 (D.C. Cir. 1994), cited by the Commission in its Further

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[4/] For example, fire sprinkler system installation is a modification of an existing landlord-tenant relationships which has been upheld. See, Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946), discussed *infra*.

Notice, involved an attempt to force the creation of a relationship between a property owner and a third party concerning use of and access to the owner's property. In that case, the U.S. Court of Appeals for the District of Columbia invalidated FCC orders that allowed competitive access providers to locate their connecting transmission equipment in local exchange carriers' central offices. Bell Atlantic, 24 F.3d at 1441. The regulation was found to be violative of the Fifth Amendment because it forced property owners to permit third parties, or interlopers, to gain access to and use of their property. The Commission's preemption policy, however, is not analogous to the situation described in Bell Atlantic because the preemption regulation permitting viewers access to DBS service does not force the creation of a new commercial relationship but merely modifies an existing, voluntary one.

9. An example of this distinction is found in FCC v. Florida Power Corp., 480 U.S. 245 (1987), where in the Supreme Court upheld the modification of an existing commercial relationship between two entities. There, the Court upheld an FCC regulation concerning pole attachment rates by distinguishing the Loretto case on the grounds that in Loretto, the successfully challenged law permitted "an interloper with a government license" to enter and occupy the private property, whereas in Florida Power, the pole attachment regulations governed an existing commercial relationship that the property owner had voluntarily entered into with another entity, the lessee. Florida Power, 480 U.S. at 252-253. Thus, rather than forcing a private

property owner to enter into a relationship with a third party concerning use of and access to the property, the regulation in Florida Power simply sought to govern one aspect of a pre-existing, voluntary relationship.

10. Likewise, in the situation where a viewer is renting from a landlord or owns a unit in an MDU, a commercial relationship already exists between the renter and landlord and between the MDU occupant and the rest of the community. Thus, a regulation assuring a viewer's right to video programming services per Section 207 of the 1996 Act does not force creation of a relationship with a third party "interloper". Because the 1996 Act is not aimed at forcing property owners to allow third party DBS companies to directly access their property (but rather merely allows viewers to receive signals), the Loretto and Bell Atlantic decisions are simply not analogous. As the Loretto Court itself acknowledged, if the statute before the Court were written in a manner that required "cable installation if a **tenant** so desires, the statute might present a different question . . ." Loretto, 458 U.S. at 441, n.19 (emphasis added). Here, the statute requires a landlord to permit a viewer to access DBS service if the viewer so desires. The Commission's incidental regulation of a landlord-tenant relationship is not violative of the Fifth Amendment because a commercial relationship already exists between the landlord and the tenant/viewer.

2. A viewer's right to receive information should outweigh an owners' ability to limit the free flow of information.

11. NRTC believes that the public's interest in unfettered dissemination of information should outweigh private property interests. For example, the Loretto Court cited with approval a previous Supreme Court decision upholding a regulation that required a landlord to install fire sprinklers in his building. Loretto, 458 U.S. at 440; *citing* Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946). The Court's Queenside decision is analogous to preemption of DBS antenna restrictions because, in certain instances, the concerns of society warrant impinging upon the rights of individual landlords to control access to and use of their property. As the Loretto Court stated, courts have often upheld substantial regulation of an owner's use of his or her own property where deemed necessary to promote the public interest. Loretto, 458 U.S. at 426. Examples of such regulation include rent control and fire escapes. "So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party," they will be analyzed under a less stringent, multifactor inquiry set out in Penn Central Transportation Co. v. New York City. Loretto, 458 U.S. at 432.[5]

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[5] This inquiry, first set out in the Penn Central case, involves examination of several factors to balance the competing public interests involved. These factors can include: (1) the economic impact of the regulation; (2) the extent to which it interferes with investment-backed expectations; and (3) the character of the governmental action.

> A taking may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Penn Central, 438 U.S. 104, 124; see, Florida Power, 480 U.S. at 252-253. In the case of DBS, there is no "physical occupation" by a third party, but rather, merely placement of a small dish owned or leased by the tenant.

12. It is a fundamental principle of democracy that the free flow of information furthers the common good. In fact, the First Amendment specifically protects the right of free speech for all Americans. In order to preserve this most basic foundation of our American democracy, the Commission should enable all viewers to access information via DBS, -- regardless of whether they are homeowners, MDU occupants, or renters.

III. CONCLUSION

13. NRTC applauds the Commission for adopting rules which will permit millions of Americans to finally gain access to DBS service. The Commission should not rest upon its laurels, however, because millions of Americans who live in rental property, MDUs and other types of housing which they do not exclusively control are still being denied the protections afforded to homeowners by the FCC's new rules.

These non-homeowners should not be discriminated against simply because of their residential situation. NRTC believes that the clear language of Section 207 of the 1996 Act requires the Commission to apply its preemption rules against restrictions on DBS antennas, regardless of the type of residential property involved. The Fifth Amendment is not a bar to Commission regulation of landlord-tenant and similar relationships. In fact, valid regulations which require action by property owners, such as regulations requiring landlords to install fire sprinklers, are far more intrusive than a regulation which simply permits a viewer to receive DBS service.

WHEREFORE, THE PREMISES CONSIDERED, the National Rural Telecommunications Cooperative urges the Commission to consider these Further Comments and to revise its rules in accordance with the views expressed herein.

Respectfully submitted,

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