Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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	)	

COMMENTS OF OPTEL, INC.

OpTel, Inc. ("OpTel"), submits these comments in response to the Further Notice of Proposed Rulemaking ("Further Notice") in the above-referenced proceedings.[1] The Commission requests comment on the extent to which, if at all, its new preemptive rules, which implement Section 207 of the Telecommunications Act of 1996 (the "1996 Act"), regarding restrictions on over-the-air reception devices ("antennas"), should apply to antennas placed on property in which the viewer does not have an ownership interest or property that is not within the exclusive control of the viewer. For the reasons set forth below, OpTel urges the Commission to refrain from any effort to so extend its antenna preemption rules.[2]

INTRODUCTION AND SUMMARY

Section 207 of the 1996 Act requires the Commission to promulgate regulations to "prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for reception" of video programming materials.[3] In its first order implementing this provision, the Commission preemptively prohibited state, local, and private restrictions on "property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest in the property," that

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[1] In re Preemption of Local Zoning Regulation of Satellite Earth Stations; Implementation of Section 207 of the Telecommunications Act of 1996, IB Docket No. 95-59, CS Docket No. 96-83, Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking (rel. Aug. 6, 1996).
[2] See Appendix A (describing the microwave equipment used in conjunction with OpTel's systems).
[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) § 207.

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impair the use of DBS antennas, MMDS and LMDS antennas, and TV antennas.[4] Any restriction otherwise prohibited by this rule is permitted if it is: (1) nondiscriminatory; (2) "necessary to accomplish a clearly defined safety objective that is either stated in the text, preamble or legislative history of the restriction or described ... in a document that is readily available to antenna users;" and (3) no more burdensome than necessary to achieve the stated objective.[5] The purpose of this rule is to facilitate consumer access to a broad range of video programming services and foster competition in the video programming distribution market.[6]

For the most part, the Commission's current implementing rule promotes private property interests by allowing property owners to install facilities and contract for services on their own property notwithstanding unnecessary local and state government ordinances that otherwise might proscribe the desired use. In some measure, however, the Commission's current rule undermines private property interests and the freedom to contract. To the extent that association rules (*e.g.*, in a private gated community) prohibit installation of antennas on individual lots, those rules are adopted by the collective will of the property owners in the community and are a matter of private contract among the association members. Presumably such private restrictions are adopted by the owners freely and for the purpose of preserving or promoting some shared community value. Such agreements should be respected by the Commission.

The Commission's current rule implementing Section 207 fails to accord private agreements the respect they deserve. Instead, it undercuts personal freedom and superimposes a federal regulatory view of what zoning-type restrictions individuals should negotiate in their private agreements. This rule is inconsistent with the deregulatory purposes of the 1996 Act and the fundamental tenets of our constitutional democracy. The suggestions in the Further Notice to extend the Commission's Section 207 implementing rule to private restrictions on property not even owned or exclusively controlled by the antenna user threatens to compound this error.

The basis for the extension suggested in the Further Notice is, apparently, that the reference to "viewers" in Section 207 makes no distinction between viewers who own the property on which they would like to install an antenna and viewers who do not own or exclusively control the property on which they would like to install an antenna. Therefore, the argument goes, the Commission also should preempt all restrictions on

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[4] 47 C.F.R. § 25.104.
[5] Id.
[6] Further Notice ¶ 6.

antenna installation that impair a viewer's ability to receive video programming, even those that restrict the installation and operation of an antenna on property owned or controlled by others.

This construction of the statute should be rejected. First, there is no reason to believe that Congress intended in Section 207 for the Commission to preempt property owners' right to control their own property. Such a construction would entail a Fifth Amendment taking of private property for which the Commission has no authority, express or implied.

Second, this proposed extension of federal regulatory power over individuals' rights to contract freely should be rejected on policy grounds because it is unwarranted and unnecessary. There is no basis in the record to find that people are being coerced into lease or association agreements that unfairly restrict their right to receive video programming. If there is a market demand for buildings and/or private communities in which each resident or property owner may install his or her own antenna, the market will provide such buildings and/or communities. Conversely, if individuals wish to live in buildings or communities unmarred by antennae, they should have the freedom to do so. Again, the market will provide such buildings and communities. There is, in short, no need for the Commission regulate in this area.

Thus, OpTel urges the Commission to reject suggestions that it extend its new preemptive rules to restrictions on the installation of antennas on rental property or on common property not within the exclusive control of the viewer.

DISCUSSION

I. The Commission Lacks Authority To Extend Its Preemptive Rules To Antennas Placed On Property Not Within The Exclusive Control Of The Viewer Or On Property In Which The Viewer Does Not Have An Ownership Interest.

Extending the Section 207 preemptive rules as proposed in the Further Notice would exceed the Commission's statutory and constitutional authority. Nothing in Section 207 or its legislative history indicates that Congress intended for the Commission to require that private property owners allow others to install or maintain antennas on their property. Indeed, were the Commission to so construe the statute, significant constitutional questions would be raised regarding the Commission's takings power and the compensation due for owners of property compelled to allow others to install antennas on their property. In accordance with the principle that statutes should be

construed to avoid substantial constitutional issues, Section 207 should not be read to provide the Commission with authority to extend its preemptive rules as proposed in the Further Notice.

A. Section 207 Does Not, By Its Terms, Apply To Private Restrictions Regarding The Placement Of Antennas On The Property Of Others.

Section 207 provides, in its entirety:

> Within 180 days after the date of enactment of this Act, the Commission shall, pursuant to section 303 of the Communications Act of 1934, 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.[7]

The legislative history of Section 207, to the extent that it can be relied upon to inform the language enacted by Congress,[8] does not further illuminate the intended reach of the statute. The Commission must, therefore, construe Section 207 pursuant to its terms and in accordance with common sense.[9] In addition, as the Commission recognizes in the Further Notice, where there is any doubt, statutes should be "construed to defeat administrative orders that raise substantial constitutional questions."[10]

These principles of statutory construction require an interpretation that Section 207 was not intended to reach private restrictions that prevent viewers from installing or operating antennas on the property of others or on commonly owned property over which they do not have exclusive control. The only argument advanced for the suggested extension of Section 207 is that the statute refers to restrictions that impair a "viewer's" ability to receive video programming services. The proponents of this view claim that the use of word "viewer" in the statute evidences Congress' intent to reach all such restrictions of whatever kind and on whomever's property. Such an inference is unwarranted.

Naturally, those who will receive video programming signals if a given restriction — yet to be defined — is preempted are "viewers." That term implies nothing, however, about their status *vis-a-vis* other property owners or the property on which they would

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[7] 1996 Act, Pub. L. No. 104-104, 110 Stat. 56 (1996) § 207.

[8] Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 617 (1991) (Scalia, J., concurring in judgment) (legislative history is unreliable as a guide to Congressional intent).

[9] See, e.g., First United Methodist Church v. United States Gypsum Co., 882 F.2d 862, 869 (4th Cir. 1989) (common sense is the "most fundamental guide to statutory construction").

[10] Further Notice ¶ 65 (quoting Bell Atlantic Tel. Co. v. FCC, 24 F.3d 1441, 1445 (D.C. Cir. 1994)).

like to place their antennas. Indeed, there is nothing in the text, structure, or context of Section 207 that would suggest a correlation between the kinds of property covered by the statute and the viewer beneficiaries of the preemption.

If the word "viewer" is given the effect that the proponents of the suggested expansion of Section 207 would give it, there is no limit to the reach of the statute. If no private restriction can impair any viewers' right to receive video programming through an over-the-air reception device, does that mean that my neighbor must be allowed to install her DBS dish on my property if it has a less encumbered view of the southern sky than hers? Indeed, could my neighbor make me cut down the tall stand of trees on my property that obscures her line of sight to the satellite? Common sense dictates that Congress did not intend for Section 207 to mean that property owners cannot restrict others from installing antennas on the property owners' property or that they will be made to conform their property to the use of a neighbor's over-the-air antenna. The only fair reading of Section 207 is that it reaches only those restrictions that limit a viewer's right to install an antenna on property that the viewer owns and over which the viewer exercises exclusive control.

B. Construing Section 207 To Reach Restrictions On The Installation Of Antennas On The Property Of Others Would Raise Significant Constitutional Questions.

In addition, the suggested expansion of Section 207 to include the preemption of private restrictions that limit installation and use of antennas on property not owned by the viewer or exclusively controlled by the viewer would raise substantial constitutional questions. As noted above, such an interpretation runs afoul of a well establish principle of statutory construction.[11]

In Bell Atlantic Telephone Companies v. FCC, for instance, the D.C. Circuit reversed the Commission's orders requiring local exchange carriers ("LECs") to make physical collocation available to competitive access providers. The Commission had justified its orders based on its authority to order carriers "to establish physical connections with other carriers."[12] The court found this justification wanting.

First, the court made explicit the appropriate principle of statutory construction: "Within the bounds of fair interpretation, statutes will be construed to defeat

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[11] See, e.g., Rust v. Sullivan, 500 U.S. 173, 190 (1991) (statutes should not be construed so as to raise substantial constitutional questions); Bell Atlantic Telephone Companies, 24 F.3d at 1445 (same).
[12] 24 F.3d at 1445 (citing 47 U.S.C. § 201(a)).

administrative orders that raise substantial constitutional questions."[13] This rule of construction applies, the court explained, when there is an "identifiable class of cases in which application of a statute will necessarily constitute a taking."[14] Thus, the court concluded, agencies should not construe "statutory silence or ambiguity" to imply takings power that would "expose the treasury to liability both massive and unforeseen."[15]

Second, the court reiterated the *per se* takings doctrine: "The doctrine established in Loretto is cast in the form of a rule. If the statute vests the Commission with power to confer an exclusive right of physical occupation, exercise of the statutory power would seem necessarily to 'take' property regardless of the public interests served in a particular case."[16] Based on this analysis, the court found that the Commission's physical collocation orders would constitute a taking of private property compensable under the Fifth Amendment.

Given these interpretive principles, the court held that the Commission's purported statutory authority for the taking was inadequate. The court explained that, although the Commission's authority to order physical connections was broad, it "does not supply a clear warrant to grant third parties a license to exclusive physical occupation of a section of the LECs' central offices."[17] Without a more express grant of authority, the Commission's physical collocation orders, therefore, could not stand.

A similar analysis obtains with regard to the suggested expansion of Section 207. If the Commission were to preempt private restrictions that impair viewers' ability to install or maintain antennas on the property of others (*i.e.* in rental units or on leased property) or on property not within the exclusive control of the viewer (*e.g.*, common areas of condominium or cooperative units), the Commission would, as in the Bell Atlantic case, be requiring property owners to suffer the physical occupation of their property by others. Such a preemption would, in effect, impose a "physical collocation" requirement on property owners for other viewers' antennas. This would effectuate a *per se* taking of private property under Loretto.

Footnote 19 in Loretto is not to the contrary. In footnote 19, the Supreme Court noted in *dicta* that a statute requiring landlords to provide their tenants with access to

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[13] Id. at 1445.
[14] Id. (quoting United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 128 n.5 (1985)).
[15] Id. at 1445.
[16] Id. at 1446 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982)).
[17] Id. at 1446.

cable television service might present a different question "since the landlord would own the installation. Ownership would give the landlord rights to the placement, manner, use, and possibly the disposition of the installation.... [T]he fact of ownership is ... not simply incidental; it would give a landlord ... full authority over the installation."[18] Thus, contrary to the suggestion in the Further Notice, nothing in Loretto turned on whether the cable installation was requested by the tenant or mandated by local regulation. The essential feature of the case was the required physical occupation of private property by others' equipment.[19]

For this same reason, the proposed expansion of Section 207 is nothing like a statute requiring landlords to install a sprinkler system on their property.[20] In the case of a sprinkler system, the landlord "own[s] the installation ... [and has] rights to the placement, manner, use, and possibly the disposition of the installation."[21] The proposed expansion of Section 207 would be more akin to a statute that required landlords to allow their tenants to install their own sprinkler systems in rental units, or a statute mandating that condominium owners be allowed install their own sprinkler systems in common areas. Either such statute would constitute a Fifth Amendment taking.

There similarly can be little doubt that a Commission order preempting private restrictions that would allow tenants to install antennas on private property in which they did not have an ownership interest or that would allow viewers to install antennas in common areas of property over which they did not exercise exclusive control would constitute a *per se* taking. Such an action would not merely regulate the use of the private property in question (*e.g.*, require that the owner provide safety equipment such as a sprinkler system or make some multichannel video programming service available to residents), but would mandate third party access to and control of the property.

As demonstrated above, the Commission lacks authority to effectuate such a taking. Nothing in Section 207 reveals a congressional purpose to have the statute reach so broadly. In accordance with the principle articulated in Bell Atlantic that statutes

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[18] 458 U.S. at 440 n.19.

[19] It is no answer that the dicta from footnote 19 suggests that landlords may be compelled to install their own antennas at the request of a tenant. In the first place, whatever restrictions on antenna placement Section 207 does reach, nothing in the statute allows the Commission to require landlords to furnish antennas of their tenants' choosing and at their tenants' requests. Further, even if such a broad mandate were encompassed within the terms of the statute, and even assuming that the dicta in footnote 19 indicates that such a broad mandate would not constitute a Loretto *per se* taking, it is likely that such a statute would constitute a regulatory taking under Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (regulation of property that "goes too far" constitutes a taking) and its progeny.

[20] See Further Notice ¶ 62.

[21] 458 U.S. at 440 n.19.

should be construed to avoid substantial constitutional questions, Section 207 should not be read to allow or require such an expansive preemptive order.

II. As A Matter Of Public Policy, The Extension Of The Commission's Section 207 Preemption Rule Described In The Further Notice Should Be Rejected.

As discussed above, Section 207 should not be construed to allow or require preemption of private antenna restrictions that impair reception by viewers who do not have exclusive use or control and an ownership interest in the property on which they wish to install their antennas. In any event, however, such a sweeping intrusion into private contractual affairs would be unwarranted and unwise as a matter of public policy.

A. Extending The Preemptive Rules Would Unnecessarily Intrude Upon Individual Freedom To Enter Into Private Agreements.

The expansion of Section 207 suggested in the Further Notice would inject the Commission into areas in which it need not, and should not regulate. As such, the suggested expansion runs contrary to the purposes of the 1996 Act. The 1996 Act was intended to "provide for a procompetitive, deregulatory national policy framework."[22] This objective is consistent with current efforts to "reinvent" government and reduce unnecessary regulatory burdens.[23] Fundamental to the achievement of both of these goals is the need to avoid unnecessary regulation and to allow market forces to dictate resource use where possible.

Private contracts which allow the lease or shared-ownership of property, but which impose restrictions on the use of that property is one such area in which FCC regulation of antenna restrictions is unnecessary. There is no evidence that the residential real estate market is not highly competitive and fully functioning. Indeed, whereas the multichannel video programming market is characterized by a series of local monopoly franchised cable providers, the residential real estate market is one of the most diverse and consumer-responsive markets in the United States.[24] Moreover, the decision to buy property or to rent a home is one of the most significant decisions that most Americans make. It should be assumed, therefore, that individuals lease apartments or buy shares in

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[22] See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 11 FCC Rcd 7413 (1996) ¶ 4 (citing Pub. L. No. 104-104, Joint Explanatory Statement at 1).

[23] See, e.g., USA Today, Clinton Goal: Fix Government, page 1A (Sept. 7, 1993) (effort to reinvent government will eliminate "absurd regulations"); 55 Broadcasting & Cable, Hundt: New Bureau To Enforce Cable Act (Dec. 20, 1993) (Cable Bureau intended to be more streamlined than other bureaus in accordance with efforts to reinvent government).

[24] See, e.g., 5 Regulatory Compliance Watch 1 (Jan. 8, 1995) (profit margins for community development banking low because of "highly competitive nature of residential real estate").

common property by choice, with due consideration to all applicable rights and limitations appurtenant to such lease or purchase. Indeed, this assumption is the very premise on which the concept of a free society is based.[25]

Thus, for example, individuals should have the freedom to rent an apartment in a building that permits the in-unit installation of renter-owned antennas. Conversely, people should have the freedom to rent an apartment in a building in which the aesthetic appearance of the building is more tightly controlled. Assuming that there is market demand for either such building, there is no basis to believe that the highly competitive real estate market will not provide such choices to consumers. At the very least, the Commission should forbear from intruding upon these agreements until DBS and MMDS/LMDS technologies become more prevalent and the Commission can determine whether there has, in fact, been a market failure such that preemptive regulations are necessary. Short of such a market failure, an extension of the Section 207 preemptive rules to cover private restrictions on the agreed-to use of private property would be wholly unnecessary and inappropriate.

B. Requiring Property Owners To Allow The Installation Of Any And All Antennae Would Raise A Host Of Aesthetic And Safety Concerns.

Finally, were the Commission to extend its preemptive rules as suggested in the Further Notice, it would be based, implicitly or explicitly, on the judgment that unlimited access to any source of over-the-air video programming is more important to consumers that all other aesthetic and safety concerns combined. Such a conclusion is unwarranted.

As several of the comments filed in response to the first Notice Of Proposed Rulemaking in these proceedings make clear, aesthetic concerns regarding the indiscriminate placement of antennae are not trivial.[26] In fact, the appearance of a building or private community may have a considerable effect on the economic value of the property or properties concerned.

Moreover, it is not at all clear that private restrictions such as those at issue in the Further Notice do not have more than an incidental effect on safety, security, and building or community integrity. Building managers and homeowner associations have responsibilities to see that their properties are maintained in a safe and secure manner. A

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[25] See U.S. CONST. art. 1, § 10 (no State shall pass any law impairing the obligation of contracts); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 572 (1972) (the concept of liberty under the Due Process Clause includes the right to contract).

[26] See, e.g., Comments of the National Apartment Association, *et al.*, (filed Apr. 15, 1996) at 15.

preemptive rule allowing third party access to rental units and commonly owned property would undermine their ability to do so. Installations might be done improperly leading to unsafe conditions, or they might allow unscrupulous vendors access to secure areas. Even where the physical safety and security of the residents is not implicated by an installation, preemptive access would make it difficult or impossible for responsible building owners and managers, or association managers, to oversee every installation and ensure that the integrity of the structures involved is not undermined.

Thus, if the Commission were to extend its preemption rules as suggested in the Further Notice, it would be discounting numerous other significant policy concerns for the sole purpose of promoting unlimited access to multichannel video programming services. Ironically, however, the suggested preemption would not even achieve this limited purpose. To the extent that residents in multi-unit settings can guarantee a service provider exclusive access to the building or community, they can engage in collective bargaining with service providers and obtain a wider range of services for lower rates than residents of single family homes. The extension of Section 207 preemption suggested in the Further Notice would undermine their ability to do so.

CONCLUSION

For the foregoing reasons, OpTel urges the Commission to reject suggestions that it extend Section 207 preemption to prohibit private restrictions that impair a viewer's ability to receive over-the-air video programming on property not within the exclusive control of the viewer or in which the viewer does not have an ownership interest.

Respectfully submitted,

OPTEL, INC.

/s/ W. Kenneth Ferree

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Its Attorneys

September 27, 1996

APPENDIX A

OpTel SM
The choice is clear.
A Vidéotron Company

Memorandum ***Network Engineering***

DATE: Friday, September 06, 1996

TO: Ben Miller

CC: Vinod Batra

FROM: Fred Sylvester FS

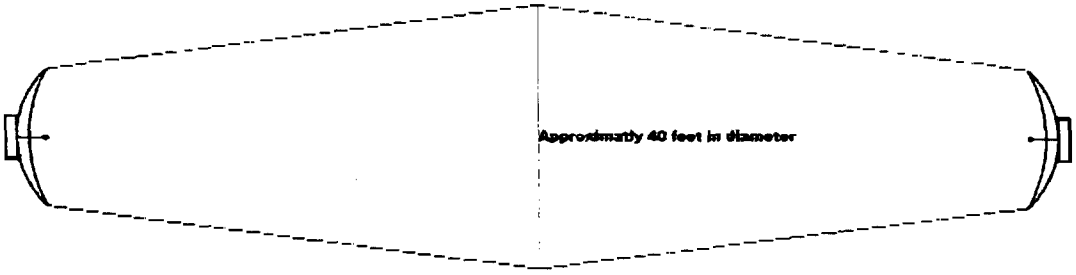
RE: Microwave Dish Sizes and Specifications

Attached please find pictures of representative microwave dishes used by OpTel in the transmission and reception of microwave radio signals.

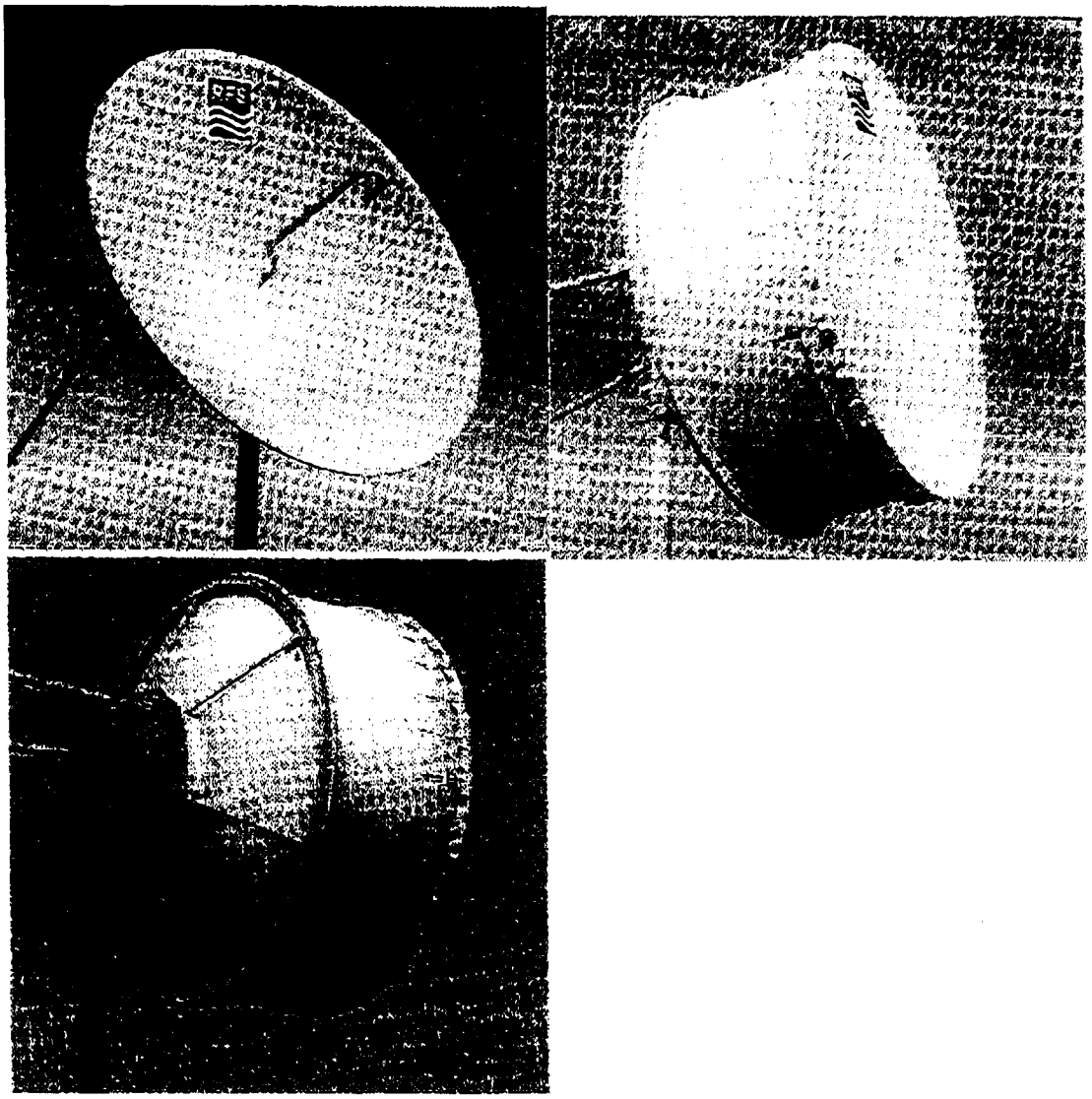
The sizes of these dishes range from 2 feet in diameter to 8 feet in diameter. The weight of the dish with mounting equipment but without support structure ranges from 34 pounds to 524 pounds. These dishes require a support structure rated to hold the dish in 125 mph winds. The support structure for OpTel dishes is always certified by a registered professional mechanical engineer to meet all OpTel, municipal, county, state and federal regulations.

Unlike a satellite receive dish, a microwave dish must have a clear line of sight to its corresponding transmit or receive dish. This line of sight must be clear of all obstructions to a point 20 feet perpendicular to the axis of the path midway along the path. Envision a pair of truncated cones, joined at their bases (two Styrofoam coffee cups with the tops taped together), which are 40 feet in diameter, originating at the transmit dish and terminating at the receive dish. (See Drawing)

These dishes and mounting structures may be painted to blend in with architectural or environmental features of the property.



Double Truncated Cone illustration of required microwave dish clearance

OpTel

Network Engineering - Microwave