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

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OCT - 4 1996

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)

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PETITION FOR RECONSIDERATION

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October 4, 1996

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**Executive Summary of Petition for Reconsideration filed by
Philips Electronics North America Corporation
and Thomson Consumer Electronics, Inc.
in IB Docket No.95-59
and CS Docket No. 96-83**

Petitioners, Philips Electronics North America Corporation and Thomson Consumer Electronics, Inc., respectfully request that the Commission reconsider two narrow but extremely important provisions in its rules adopted in its August 5, 1996 Report and Order in these dockets. Absent these changes, the Commission's otherwise largely successful effort to craft rules implementing Section 207 of the Telecommunications Act of 1996 will be seriously flawed as a matter of both law and policy.

The Commission's decision to permit parties involved in disputes arising under Section 207 to elect to adjudicate those cases before either the FCC or any court of competent jurisdiction violates Section 303(v) of the Communications Act of 1934, as amended by the 1996 Act, and jeopardizes the efficacy of the entire regulatory regime to implement Section 207. Read together, Sections 207 and 303(v) require the Commission to exercise exclusive jurisdiction over disputes under Section 207. The Commission does not have residual discretion to refrain from exercising such sole jurisdiction. The practical consequences of permitting localities, community associations or other entities to race to the local courthouse to save otherwise prohibited restrictions on DBS antennas will be to shred the national, uniform regulatory framework envisioned by the Congress into many contradictory fragments. The viewer, the primary intended beneficiary of Section 207, will be severely disadvantaged because he or she will be subjected to a burdensome, costly litigation scenario to vindicate his or her rights, precisely the opposite of the process

Congress intended. In short, this procedural loophole has the potential to vitiate all of the positive aspects of the substantive rule. Accordingly, the Commission should reconsider its decision to permit concurrent jurisdiction and alter the rule to provide for exclusive jurisdiction over Section 207 disputes to repose with the FCC.

Similarly, the Commission's engrafting of an "unreasonableness" qualifier onto the statutory phrase "impair" in its implementing rules also runs afoul of the express mandate of Section 207. It makes the otherwise clear requirement of the statute vulnerable to subjective interpretations which impermissibly limit the reach of the statute. Therefore, the Commission should amend its rule to delete the word "unreasonably" from its definition of impair.

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PETITION FOR RECONSIDERATION

Pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, Philips Electronics N.A. Corp. ("Philips") and Thomson Consumer Electronics, Inc. ("Thomson") (together, the "Petitioners"), by their attorneys, hereby respectfully seek partial reconsideration of the Federal Communications Commission's Report and Order and Memorandum Opinion and Order ("Report and Order") adopted August 5, 1996, in the above-captioned proceeding.^{1/} As manufacturers of Direct Broadcast Satellite ("DBS") antennas and receivers, the Petitioners have a direct interest in the outcome of this proceeding.

1/ Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, FCC 96-328, (Released August 6, 1996) ("Report and Order").

INTRODUCTION

The Petitioners commend the Commission for its efforts to craft rules faithful to the Congressional intent in enacting Section 207 of the Telecommunications Act of 1996 (the "1996 Act").^{2/} There are, however, several aspects of the new rule adopted by the Commission in the Report and Order which are extremely troublesome as a matter of both law and practice. Specifically, Petitioners request that the Commission amend its new rule to provide for exclusive FCC jurisdiction over disputes arising under Section 207 involving restrictions on the deployment of DBS antennas. The Commission's failure to exercise exclusive jurisdiction almost certainly will lead to a multiplicity of diverse and contradictory rulings governing Section 207 of the 1996 Act -- an outcome clearly at odds with the letter and spirit of the law. In addition, Petitioners request that the Commission amend its new rule to delete the word "unreasonably" from its definition of "impair." The incorporation of a reasonableness standard into the definition of impair impermissibly modifies the plain directive of Congress in the 1996 Act.

I. THE COMMISSION'S REFUSAL TO EXERCISE EXCLUSIVE JURISDICTION OVER SECTION 207 DISPUTES INVOLVING DBS ANTENNAS VIOLATES THE ACT AND UNDERMINES THE PURPOSE OF SECTION 207

A. The Commission's Failure To Exercise Exclusive Jurisdiction Is Inconsistent With the Plain Meaning of the Telecommunications Act of 1996 and Congressional Intent

Section 303(v) of the Communications Act of 1934 (the "Act"), as amended by the 1996 Act, states that the Commission shall "[h]ave exclusive jurisdiction to regulate the

^{2/} Telecommunications Act of 1996, Pub. L. No. 104-104.

provision of direct-to-home satellite services."^{3/} That provision of law is not discretionary; it is a statutory command regarding the FCC's authority.

Section 207 of the 1996 Act directs the Commission to promulgate regulations to eliminate a critical barrier to the growth of Direct Broadcast Satellite ("DBS") service as a major competitive medium in the multichannel video programming marketplace. Specifically, the Commission is required 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."^{4/} Pursuant to that direction, the Commission's rule implementing Section 207 provides, in pertinent part: "[P]arties may petition the Commission for a declaratory ruling under Section 1.2 of the Commission's rules . . . or a court of competent jurisdiction to determine whether a particular restriction is permissible or prohibited under this rule."^{5/}

It is a basic rule of statutory construction that sections of law which relate to each other should be read together.^{6/} Here, the statutory relationship between Sections 303 and 207 is expressly established in the language of Section 207: "... the Commission shall,

^{3/} 47 U.S.C. § 303(v).

^{4/} 1996 Act, § 207.

^{5/} 47 C.F.R. § 1.4000(d).

^{6/} Erlenbaugh v. U.S., 409 U.S. 239, 243-45 (1972).

pursuant to section 303 of the Communications Act of 1934, promulgate regulations").^{7/} Section 207's prohibition of restrictions "impairing a viewer's ability to receive DBS services" is a specific regulation of "direct-to-home satellite services," DBS being a subset of direct-to-home satellite service.

When read together, the plain language of Sections 303(v) and 207 makes clear that the Commission is required to exercise exclusive jurisdiction over the regulation of disputes arising out of Section 207. The Commission's authority to promulgate regulations implementing Section 207 is derived from Section 303. Subsection (v) mandates that the Commission exercise that jurisdiction on an exclusive basis. The Commission's decision to permit state courts to resolve disputes arising under Section 207 is at odds with that mandate.

This conclusion is bolstered by the legislative history of Sections 303(v) and 207, respectively. The House Report accompanying Section 303(v) provides: "[This section] reaffirms and clarifies that the Commission has exclusive authority over the regulation of DBS service. Federal jurisdiction over DBS service will ensure that there is a unified, national system of rules reflecting the national, interstate nature of DBS service."^{8/} The House Report accompanying Section 207 makes clear that one of the concrete means of achieving such uniform, national rules is through Federal preemption: "The 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

^{7/} 1996 Act, § 207.

^{8/} H. Rep. No. 104-204 (Part 1), 104th Cong., 1st Sess. 123 (1995) (emphasis added).

antennae designed for off-the-air reception of television broadcast signals or of satellite receivers designed for receipt of DBS services."^{9/}

The legislative history of Sections 303(v) and 207 elaborates upon the linkage between these provisions, establishing that they are intended to be mutually reinforcing. On the one hand, to ensure federal preemption over the implementation of Section 207, Congress mandated in Section 303(v) that the Commission exercise exclusive jurisdiction; on the other, to achieve a "unified, national system of rules reflecting the national, interstate nature of DBS service," Congress sought to preempt local and state authority over zoning or other restrictions impairing a viewer's ability to receive DBS service.

Viewed in these terms, Sections 303(v) and 207 represent the statutory basis for a single regulatory scheme, the proper operation of which requires implementation of both sections as provided expressly in the law and intended by Congress. By permitting concurrent jurisdiction over Section 207 disputes, the Commission not only destroys the integrity of this statutory scheme, but undermines a fundamental purpose of the Act.

B. The Commission's Justification for Allowing Concurrent Jurisdiction Cannot Withstand Judicial Review

In the Report and Order, the Commission justifies its refusal to exercise exclusive jurisdiction on the ground that it has "no basis to believe, and Congress has not suggested, that disputes and controversies arising over such restrictions should or must be resolved by this agency alone or cannot be adequately handled by recourse to courts of competent

^{9/} Id. at 123-24.

jurisdiction."^{10/} Given the express language of Section 303(v), as well as the pertinent legislative history reflecting congressional intent, the Commission's claim that it had "no basis to believe" that the law mandates exclusive jurisdiction cannot be sustained. Indeed the claim is flatly contradicted by the Commission's own admission in the Report and Order, in which the agency acknowledged that "we are required to exercise exclusive jurisdiction over any restrictions that may be applicable to DBS receiving devices."^{11/} Certainly, Section 207 deals with such a restriction.

Moreover, an examination of other provisions in the Telecommunications Act of 1996 indicates that where Congress wanted to preserve state court jurisdiction over disputes involving federal and local interests it made explicit statutory provision for such jurisdiction. For example, under Section 332(c)(7), dealing with siting of facilities for certain mobile services, local zoning authority over the placement of personal wireless service facilities is expressly preserved subject to overarching Federal limitations.^{12/} To effectuate this allocation of jurisdiction, Congress provided: "Any person adversely affected by any final action or failure to act by a State or local government ... that is inconsistent with this subparagraph may . . . commence an action in any court of competent jurisdiction."^{13/} This different treatment of zoning and other restrictions on DBS antennas and PCS towers and cell sites reflects the fundamental and sound judgment made by Congress that the

^{10/} Report and Order at ¶ 58.

^{11/} Id. at ¶ 57.

^{12/} Communications Act of 1934, as amended, 47 U.S.C. § 332 (c)(7).

^{13/} Id.

legitimate local interest in regulating transmitting towers is far greater than that associated with regulating small DBS dishes which only receive signals. Whereas Section 332 provides for direct access to the courts to resolve disputes, Section 207 does not. The contrast between these provisions is corroborating evidence that Congress did not intend to subject disputes arising out of Section 207 to the jurisdiction of state courts.

C. The Commission's Refusal to Exercise Exclusive Jurisdiction Defeats the Goal of Achieving a Unified, National System for Regulating DBS Service

The Commission's refusal to exercise exclusive jurisdiction will place disputes arising out of Section 207 on separate, parallel adjudicatory plains. Notwithstanding Congress' clear intent to preempt local law in the regulation of DBS services, once disputes arising out of Section 207 are brought in a local court of competent jurisdiction, the judgment of that court is likely to have preclusive effect and will not be reviewable by the Commission.^{14/} The wholly predictable result of this bifurcated regulatory scheme is a multiplicity of diverse and contradictory rulings governing Section 207 -- an outcome wholly contrary to the congressional goal of ensuring a "unified, national system of rules reflecting the national, interstate nature of DBS service." This intolerable state of affairs is foretold in Town of Deerfield New York v. FCC.^{15/} The Deerfield case arose as a result of plaintiff's attempt to seek federal preemption of a local zoning ordinance governing satellite installations. Under the Commission's rules prevailing at that time, owners of satellite dishes subject to

^{14/} Town of Deerfield, New York v. FCC, 992 F.2d 420, 428 (Cir.2d 1993).

^{15/} Town of Deerfield, New York v. FCC, 992 F.2d 420 (Cir.2d 1993).

local zoning ordinances were precluded from bringing their case before the Commission until they exhausted all judicial remedies.^{16/} After being cited for an ordinance violation, the plaintiff filed an action in New York court where he lost at trial and later on appeal.^{17/} Plaintiff then filed an action in federal district court, where he lost on grounds of collateral estoppel,^{18/} a ruling which was later upheld by the Second Circuit Court of Appeals.^{19/} Having exhausted all judicial remedies, plaintiff was finally eligible to bring his case before the FCC. Although the plaintiff ultimately prevailed in his case before the Commission, which held that Deerfield's ordinance was preempted by federal law,^{20/} his victory was short-lived, since in a subsequent action brought by Deerfield, the Second Circuit overturned the Commission's ruling on grounds that the Commission lacked authority to override a decision by an Article III court.^{21/}

Thus, as long as the Commission permits concurrent jurisdiction over Section 207 disputes over DBS antennas, the problems that arose in Deerfield almost certainly will be repeated. Local court rulings will likely undermine federal preemption policies because in most cases the plaintiffs in such actions will be local authorities, associations, landlords or developers who will race to state court in the belief that it will be a more favorable forum

^{16/} Id. at 423.

^{17/} Id. at 425.

^{18/} Id.

^{19/} Id.

^{20/} Id. at 426.

^{21/} Id. at 430.

for them than the FCC. On the other hand, consumers will tend to prefer bringing their cases before the Commission which is more familiar with the national telecommunications policies which prompted Congress to preempt state and local regulation in Section 207. Consumers may lack the resources and wherewithal to challenge local authorities where the cases are litigated in state court and involve steep attorney's fees.

The creation of such a procedural "stacked deck" against consumers created by permitting concurrent jurisdiction over Section 207 disputes is completely antithetical to the procompetitive, pro-consumer purposes of Section 207. Unless the Commission exercises exclusive jurisdiction, it will have created a procedural means to gut the substantive protections in the rule it has just promulgated.

Arguably the situation in Deerfield was the product of a statutory vacuum. At the time that case was brought, there was no express statutory provision requiring the Commission to exercise exclusive jurisdiction over DBS service disputes. In the absence of express authority, the Commission could have reasonably believed that Congress had intended such disputes to be subject to concurrent jurisdiction. No such belief is reasonable today. Under the present law there is no statutory vacuum; the law is clear. The Commission should recognize the requirement imposed by Section 303(v) to exercise exclusive jurisdiction over Section 207 disputes and implement its rules accordingly to avoid a repetition of the absurd, anti-consumer, litigation nightmare caused by the Deerfield scenario. Changing the rule to provide for exclusive FCC jurisdiction will promote the achievement of a unified, national system of DBS service regulation envisioned by the Congress.

II. THE COMMISSION'S DEFINITION OF "IMPAIR" IMPERMISSIBLY MODIFIES THE PLAIN MEANING OF SECTION 207 OF THE 1996 ACT

Section 207 directs the Commission to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite service." The Commission has impermissibly altered Congress' directive by imposing a reasonableness standard on the level of impairment of a viewer's ability to receive video programming.

Section (a) of the new rule defines a law or regulation that impairs the installation, maintenance or use of an antenna as one that "(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."^{22/} The insertion of the qualifier "unreasonably" in subsections (a)(1) and (2), in contrast to subsection (a)(3), reveals that the standard is not a requirement of the statute, but rather, an arbitrary and additional requirement imposed, sua sponte, by the Commission.

The Commission's rule goes beyond the scope of the authority granted by Congress because it impermissibly limits and modifies the plain language of the 1996 Act. A regulation may not amend a statute, Koshland v. Helvering, 298 U.S. 441, 447, 56 S. Ct. 767, 770 (1936)("[W]here, as in this case, the provisions of the act are unambiguous, and its directions specific, there is no power to amend it by regulation"), or add to the statute something which is not there. U.S. v. Calamaro, 354 U.S. 351, 359, 77 S. Ct. 1138, 1143

^{22/} 47 C.F.R. § 1.4000(a) (emphasis added).

(1957); Iglesias v. U.S., 848 F.2d 362, 366 (2nd Cir. 1988); California Cosmetology Coalition v. Riley, 871 F. Supp. 1263, 1270 (C.D.Cal 1994); see also, 73 C.J.S. *Public Administrative Law and Procedure* § 89 (1983)("Furthermore, at least in the absence of a specific statement in the statutory grant of rule-making power, [an agency] may not, by its rules and regulations, amend, alter, enlarge, or limit the terms or operation of a legislative enactment").

In the Report and Order, the Commission cites the definition of impair as "to make worse or damage."^{23/} Another dictionary defines impair as "to make worse: diminish in quantity, value, excellence, or strength, do harm to: damage, lessen."^{24/} Neither of these definitions include the concept of reasonableness. Under the latter definition, a restriction which imposes any burden on a consumer's right to erect a satellite antenna would "impair" the ability of that consumer to receive DBS service and thus should be prohibited. This interpretation is consistent with the explicit language of § 207. The reasonableness provisions added to §1.4000 by the Commission inject a subjective standard for distinguishing the validity of restrictions on the ability of consumers to receive video programming services where the statutory language provides no room for subjectivity. Such a distinction is particularly inappropriate, and unnecessary, in light of the fact that Section (b) of the new rule contains clear exceptions for restrictions concerning safety and historic preservation. These narrow exceptions should be the only restrictions allowed under the

^{23/} Report and Order at ¶ 13.

^{24/} Webster's Third New International Dictionary (1976).

language of § 207. Any other restrictions that impair a viewer's ability to receive video programming should be prohibited, without regard to their "reasonableness."

By engrafting a reasonableness standard on to regulations intended to prevent the impairment of viewers' ability to receive DBS services, the Commission has not only acted inconsistently with the "public convenience, interest and necessity" but it has impermissibly altered the plain language of § 207 of the 1996 Act. The Commission should reconsider the imposition of a reasonableness standard and delete the word "unreasonably" from 47 C.F.R. §1.4000(a)(1) and (2).

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request the Commission to reconsider those portions of its new rule discussed above. The Congressional intent of the 1996 Act was clear -- to give the Commission exclusive jurisdiction to regulate the provision of direct-to-home satellite services. The Commission's failure to exercise exclusive jurisdiction will lead to contradictory rulings under Section 207 throughout the country.

Such a result is manifestly at odds with Congress' intention of creating a national and uniform regulatory regime for DBS service, reflecting its national, interstate nature.

Respectfully submitted,
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