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

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Federal Communications Commission
Office of Secretary

IB Docket No. 95-59

CS Docket No. 96-83

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In the matter of)
)
Preemption of Local Zoning Regulation)
of Satellite Earth Stations)
)
Implementation of Section 207 of the)
Telecommunications Act of 1996)
)
Restrictions on Over-the-Air)
Reception Devices: Television Broadcast)
and Multichannel Multipoint Distribution)
Service)

**PETITION FOR RECONSIDERATION AND CLARIFICATION
OF THE NETWORK AFFILIATED STATIONS ALLIANCE**

The NBC Television Affiliates Association, the CBS Television Affiliates Association and the ABC Television Affiliates Association (together, the "Network Affiliated Stations Alliance" or "NASA") hereby submit this petition for reconsideration and clarification of the Order adopted in the above-referenced proceeding.^{1/} As it has throughout this proceeding, NASA supports full implementation of the provisions of Section 207 of the Telecommunications Act of 1996.^{2/} Unfortunately, the Order falls short of implementing the intent of Congress in two key areas. As shown below, the Commission should reconsider and

^{1/} *Preemption of Local Zoning Regulation of Satellite Earth Stations, Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast Services and Multichannel Multipoint Distribution Service, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, IB Docket No. 95-59, CS Docket No. 96-83, rel. Aug. 6, 1996 (the "Order").*

^{2/} Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 (1996) (the "1996 Act") § 207.

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clarify its rules to provide more definitive guidance as to acceptable and unacceptable regulations governing placement of over-the-air reception devices and to prevent inconsistent decision making likely to result from local court consideration of challenges to restrictions on over-the-air reception devices.

I. Introduction

NASA represents more than [600] network-affiliated television stations. Taken together, these stations provide service that can reach almost every household across the country with an over-the-air signal. The ability of NASA members to provide service to consumers nationwide, however, can be limited severely by unreasonable restrictions on the placement of television antennas. As documented in the comments in this proceeding, such restrictions are becoming increasingly common. That is why Congress adopted Section 207 of the 1996 Act and why the Commission's Rules implementing that provision are important to broadcasters and consumers alike.

The rule adopted in the Order makes some progress to eliminate unreasonable regulation of over-the-air reception devices, including television antennas. The Order should be modified in two critical areas, however, to ensure that Congressional intent is implemented and to reduce burdens on homeowners, local governments and the Commission.

First, the Commission should describe specific guidelines for acceptable and unacceptable regulations on the placement of over-the-air reception devices. The current rule, while appropriately limiting the circumstances in which restrictions are permissible,

does not provide adequate guidance for governments and consumers. Additional guidance is essential to prevent unnecessary confusion and litigation.

Second, the Commission should not permit state courts to determine whether a regulation is permissible in the first instance. Experience shows that local adjudication leads to inconsistent decisions and, in practice, can foreclose the Commission from exercising its jurisdiction. Modification of enforcement opportunities is particularly important in light of the indeterminate nature of the Commission's current rules.

II. The Commission Should Adopt More Specific Rules Regarding Permissible and Impermissible Restrictions.

The Commission took an important step in this proceeding when it defined categories of restrictions that are permissible and impermissible. *See* Order at ¶¶ 24-26.

Unfortunately, the Commission declined to provide sufficiently specific guidance as to types of restrictions. Given the history of efforts to restrict the placement of over-the-air reception devices, especially by private entities, it is important for the Commission to provide more specific guidance as to permissible and impermissible restrictions.^{3/}

In interpreting and applying the Commission's policies governing over-the-air reception devices, the most significant problem is likely to be determining what regulations are permissible and impermissible. The new rule provides for two categories of justifications for restrictions and requires that any restriction be "no more burdensome to affected antenna

^{3/} For instance, "screening" regulations have included requirements that antennas be made to look like trees, Order at ¶ 16, and many homeowners associations have attempted to ban outdoor antennas altogether. Comments of American Radio Relay League at 4-5.

users than is necessary[.]” 47 C.F.R. § 25.104. While limiting restrictions in this way is helpful to consumers who want to place over-the-air reception devices, it leaves many questions unanswered, including the extent to which a “clearly defined safety objective” must also be a justifiable objective and how to determine whether a restriction is more burdensome than necessary. The Order specifically declines to address these issues, leaving them to be considered on a case-by-case basis. Order at ¶ 25.

History suggests that this approach is certain to be harmful to homeowners because it will lead to confusion, litigation and restrictions on over-the-air reception devices that exceed those contemplated by Congress and the Commission. First, the principal reason that Congress adopted Section 207 was that municipalities and private homeowners associations were imposing a wide variety of restrictions on the placement of over-the-air reception devices, in some cases banning them altogether. There is no reason to believe that these entities will be any less inclined to impose restrictions in the future than they have been in the past.^{4/} Without more specific guidance, it is likely that efforts will be made to cloak existing, otherwise unlawful restrictions in the garb of “safety objectives.”

Even if the past did not suggest that local governments and homeowners associations will attempt to bypass the intent of the rules, it is important that the Commission provide additional guidance to avoid uncertainty as to what restrictions are permissible. The current

^{4/} Indeed, comments from homeowners associations and municipalities indicate that they have every intention of attempting to maintain as much control as they can over the placement of antennas. *See, e.g.*, Comments of City of Indianapolis at 2; Comments of City of Dallas at 3; Comments of Community Association Institute at 19.

rules do not indicate whether any particular restriction is lawful or unlawful. This may, in practice, prevent consumers from exercising their right to use over-the-air reception devices. At the same time, some municipalities and homeowners associations may not adopt reasonable safety-related regulations for fear of running afoul of the rule. Moreover, uncertainty over the meaning of the rule will increase the likelihood of litigation, both at the Commission and in the courts. Additional guidance from the Commission will reduce these risks.

In particular, the Commission should provide additional guidance as to acceptable and unacceptable regulations under the new rule. NASA suggests three areas in which Commission guidance would reduce uncertainty and protect consumers from unreasonable regulations, while recognizing the legitimate concerns of local governments and homeowners associations:

1. *Cost Thresholds:* NASA and other parties have suggested thresholds for additional costs imposed by regulations of over-the-air reception devices. Cost thresholds are useful because they prevent regulators from adopting “gold plating” requirements intended to thwart the placement of antennas. A threshold should be defined in terms of costs imposed by the regulation, in addition to those that would be incurred to place the antenna following normal practices. A threshold of \$250 or the cost of normal installation, whichever is less, would be high enough to permit reasonable restrictions and low enough to avoid making installation of an antenna cost-prohibitive for most consumers.

2. *Building Codes:* The Order does not endorse any specific safety regulations as permissible. This makes it difficult for local governments to determine what regulations they may impose. As NASA and other parties have suggested, provisions of existing model building codes define appropriate regulations for the placement of over-the-air reception devices and other rooftop appurtenances. One of these codes is

the BOCA code. The Commission should provide a specific clarification of its rule to indicate which, if any, existing model building codes contain acceptable regulations.^{5/}

3. *Placement of Television Antennas:* For optimum reception, television antennas must be placed at the highest point on a homeowners' roof. Any restriction that prevents homeowners from doing so impairs reception. Thus, the Commission should provide specific guidance that regulations preventing television antennas from being placed at the highest point of a consumer's roof are presumptively invalid. For example, restrictions that permit the placement of antennas only in attics or in locations on the roof shielded from line-of-sight transmission are inadequate under the statute because they impair the reception of over-the-air signals. The Commission should provide similar guidance adapted to the requirements of MMDS and DBS antennas.

These are not the only areas in which the Commission could provide additional guidance, but are indicative of the types of guidance that would prevent unnecessary disputes regarding the validity of particular restrictions. In some cases, such as model building codes, the Commission could give municipalities and homeowners' associations assurance that certain regulations would not be challenged. In other cases, such as a limit on extra costs imposed by regulations or regulatory processes, additional guidance would prevent consumers from being hurt by regulations that are designed not to achieve legitimate objectives but to unreasonably burden the placement of antennas.

III. The Commission Should Not Permit Determinations of the Validity of Regulations in State Courts.

The Order does not require disputes regarding the validity of particular regulations to come to the Commission. Instead, it permits parties to a dispute to choose their forum,

^{5/} Reliance on an existing code is necessary to avoid subsequent modifications of codes to defeat the purpose of Section 207.

which may be a state court. Order at ¶ 58. To avoid many of the problems that led to the adoption of Section 207 and the new rule, the Commission should reconsider this determination and require all disputes regarding the validity of antenna regulations to be decided initially by the Commission and ultimately in a federal forum.

The Order declines to take full jurisdiction over disputes because it “sees no reason to foreclose the ability of parties to resolve issues locally.” This decision is based, in part, on a belief that reviewing courts, including state courts, “would look to [the Commission’s] expertise and, as appropriate, refer . . . for resolution questions that involve those matters that relate to [the Commission’s] primary jurisdiction over the subject matter.” *Id.* History demonstrates that this view is, at best, overly optimistic.

First, the record of state courts prior to the enactment of Section 207 does not suggest they automatically will defer to the Commission’s expertise. Indeed, the *Town of Deerfield* case arose because a state court did not choose to seek the Commission’s advice.^{6/} It is unclear, for that matter, whether state courts have the authority to refer cases to the Commission for expert analysis. Moreover, once a case is adjudicated in state court, the Commission may lose the power to intervene in that matter. *Id.*; see also Order at ¶ 56.

The difficulties that may arise from state court litigation are compounded by the lack of specificity in the Commission’s new rule. Without further guidance as to permissible and impermissible regulations, state courts are unlikely to apply the rule uniformly. This could lead to a patchwork of interpretations that differ from state to state, or even from town to

^{6/} *Town of Deerfield, New York v. FCC*, 992 F.2d 420 (2d Cir. 1992).

town, depending on whether review of a regulation is sought at the Commission or a state court. The end result would be confusion among both consumers and local entities as to the permissible scope of regulation of over-the-air reception devices. This would be contrary to Congressional intent in requiring the Commission to adopt national rules.

The most serious deficiency in the Commission's allocation of jurisdiction, however, is that it fails to accommodate the needs of consumers in a way that is consistent with the principal purpose of Section 207. Consumers, not municipalities or homeowners associations, are the intended beneficiaries of Section 207. Congress recognized that consumers' rights to receive over-the-air broadcast signals were seriously compromised, and in many cases completely foreclosed, by municipal regulations and homeowners association covenants. Adjudicating antenna placement restrictions in courts is extraordinarily unfriendly and burdensome to consumers. The Commission's objective in implementing Section 207 must be to facilitate not hinder the opportunity of consumers to enforce their rights under the statute to receive over-the-air television signals.

Facilitating the rights of homeowners also is consistent with the public interest expectations of the Commission concerning the unfettered reception of local television signals. The filing and prosecution of an administrative agency complaint is plainly preferable to adjudicating an issue interpreting Section 207 in court. That is particularly appropriate since it is the Commission's expectation that a "court would look to this agency's expertise and, as appropriate, refer to us for resolution questions that involve those matters that relate to our primary jurisdiction over the subject matter." Order at ¶ 58. The public

interest objective recognized by Congress in adopting Section 207, and the Commission's unwavering efforts to insure the reception by homeowners of local signals, requires that consumers be able to turn to this agency to protect their right to receive local signals. Any contrary result plays into the hands of those parties with no official or demonstrable interest in advancing the objective of Section 207.

The intent of Congress and the rights of consumers are best advanced by requiring that any adjudication of the validity of a particular restriction take place in a federal forum, and initially at the Commission.^{7/} The Commission's policies governing antenna placement and the statute that required those policies to be adopted are both federal in nature and, consequently, federal adjudication is appropriate. At the same time, federal adjudication will help to ensure consistent decisions, reducing uncertainty for municipalities, homeowners associations and consumers alike. In addition, it is likely that the administrative burden of such adjudications will be relatively light, especially if the Commission also adopts the rule clarifications described above. The Commission should reconsider its decision to permit state-level adjudications of the validity of regulations governing over-the-air reception devices and should require all such adjudications to be considered in a federal forum.

^{7/} Not all disputes must be resolved at the Commission. Once a regulation has been determined to be valid, local enforcement mechanisms could be applied.

IV. Conclusion

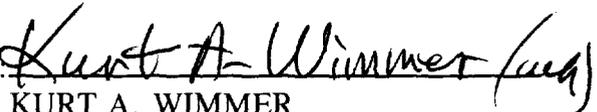
For all these reasons, the Network Affiliated Stations Alliance respectfully requests that the Commission reconsider and clarify the rule adopted in this proceeding as proposed herein.

Respectfully submitted,

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October 4, 1996

CERTIFICATE OF SERVICE

I, Tammi A. Foxwell, a secretary at the law firm of Dow, Lohnes & Albertson, do hereby certify that on this 4th day of October, 1996, I caused copies of the foregoing "Petition for Reconsideration and Clarification of The Network Affiliated Stations Alliance" to be served via hand-delivery to the following:

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