

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 )  
)  
In the Matter of )  
)  
Implementation of Section 207 of the )  
Telecommunications Act of 1996 )  
)  
Restrictions on Over-the-Air Reception )  
Devices: Television Broadcast and )  
Multichannel Multipoint Distribution Services )

IB Docket No. 95-59

DOCKET FILE COPY ORIGINAL

CS Docket No. 96-83

**PETITION FOR CLARIFICATION AND RECONSIDERATION OF THE  
CONSUMER ELECTRONICS MANUFACTURERS ASSOCIATION**

The Consumer Electronics Manufacturers Association ("CEMA"), a sector of the Electronic Industries Association, hereby petitions the Commission to clarify and reconsider, in part, its Report and Order/Memorandum Opinion and Order ("*Order*") issued in the above-captioned proceeding on August 6, 1996.<sup>1</sup> CEMA urges the Commission to eliminate loopholes and ambiguous language from its *Order*, as well as from its rule implementing Section 207 of the Telecommunications Act, and to set forth in plain language the permissible and proscribed local restrictions on the installation and use of over-the-air reception devices.

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<sup>1</sup> See *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 Services*, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, IB Docket No. 95-59 & CS Docket No. 96-83, FCC 96-328 (released Aug. 6, 1996).

## I. Introduction and Summary

Last spring, Commission adopted a consumer-friendly rule concerning local restrictions on the placement of Direct Broadcast Satellite ("DBS") antennas. Local regulations governing such antennas were presumptively preempted, but that presumption was subject to rebuttal for narrowly tailored health and safety reasons. Local authorities could also seek a waiver of the preemption rule to accommodate "highly specialized or unusual" circumstances.<sup>2</sup> In response to Section 207 of the Telecommunications Act, the Commission then proposed to extend this clear rule to prohibit purely private restrictions on the use of DBS receive-only antennas, as well as government and private restrictions that affect the installation of TV and MMDS antennas.<sup>3</sup> CEMA applauded the Commission's decisive action and argued that, if anything, Section 207 requires the Commission to further simplify and strengthen its prohibition against restrictions on the use of antennas.

In its recent *Order*, however, the Commission has taken several steps backwards. The Commission has decided not to presume that all restrictions that affect antennas are preempted. Instead, local government and private authorities may enforce nondiscriminatory restrictions designed to promote safety or to protect historical districts. In addition, the Commission will only prohibit other restrictions that "impair" reception. Thus, under the new

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<sup>2</sup> See *Preemption of Local Zoning Regulation of Satellite Earth Stations*, Report and Order/Further Notice of Proposed Rulemaking, IB Docket No. 95-59, FCC 96-78, Appendix II (released Mar. 11, 1996).

<sup>3</sup> 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 services." Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 114 (1996).

rules, any restriction is permissible provided it does not (1) "unreasonably delay" installation, (2) "unreasonably increase" the cost of installation or maintenance, or (3) preclude reception of an "acceptable quality" signal. If a consumer disagrees with a particular restriction, he or she must ask the Commission or a court to find that the restriction is overly broad or unnecessary.<sup>4</sup>

These numerous, generally-worded standards threaten to confuse consumers and local authorities alike, propelling the Commission's antenna policy back to the point where confusion impedes consumer access to over-the-air programming. CEMA respectfully urges the Commission to restore clarity to its antenna policy and ensure that the pro-consumer intent of Section 207 is not eviscerated. In particular, CEMA asks the Commission to clarify language in its *Order* that threatens to undermine consumer interests; to spell out in an addendum to its rules (or a public notice) those pro-consumer findings the Commission already has made and, relatedly, the specific restrictions local authorities cannot impose; and to assume sole authority for reviewing local restrictions. To faithfully implement Section 207, the Commission should ensure that consumers *throughout the Nation* can readily install and use antennas, and that consumers understand their rights to do so. These few steps are necessary to achieve these ends.

## **II. The Commission Should Clarify Language in its *Order* and Rules that Potentially Undermines Consumer Interests**

The *Order* and new Section 1.4000 of the Commission's rules introduce at least three ambiguities that require clarification if consumer interests, and the intent of Section 207, are to be served.

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<sup>4</sup> See *Order* at Attachment A.

First, at paragraph 25 of the *Order* and in the new rule, the Commission correctly recognizes that local safety regulations should be permitted only if they are applied in a nondiscriminatory manner; *i.e.*, safety restrictions must apply equally to comparable appurtenances, devices and fixtures. In elaborating on this requirement, however, the Commission suggests it will permit local safety restrictions so long as they do not discriminate among devices that are comparable "in size, weight and *appearance*."<sup>5</sup> As the Commission is aware, the ability of local authorities to restrict the use of antennas based on "appearance" has been the subject of significant debate in this proceeding. However, the Commission has not suggested -- nor could it -- that the appearance of an antenna might be relevant to a local safety concern. To avoid any mistaken impression that safety restrictions can take into consideration the "appearance" of antennas, the word should be eliminated from the final text of the rule. The Commission's nondiscrimination policy will remain clear, and the Commission will confirm that safety restrictions cannot be used as pretext for imposing restrictions based on aesthetic concerns.

Second, at paragraph 20 of the *Order*, the Commission states that its new rule would invalidate only local restrictions that require an antenna to be placed in a position "where reception would be impossible or *would be substantially degraded*."<sup>6</sup> The Commission makes this statement in the context of interpreting its obligation under Section 207 to prohibit restrictions that "impair" a viewer's access to over-the-air programming. The quoted language suggests, however, that consumers will have to tolerate restrictions that affect the placement of

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<sup>5</sup> *Id.* at ¶ 25.

<sup>6</sup> *Id.* at ¶ 20.

antennas so long as their reception is not "substantially degraded." Under no circumstances can the statutory term "impair" be equated with substantial degradation. Even "moderate" degradation would impair a viewer's access to over-the-air programming. The intent of Section 207 would be completely undone if local authorities could force antenna users to accept degradation of their over-the-air programming. The Commission should clarify that local restrictions on the placement of antennas (other than exempted safety and historic-district restrictions) cannot require consumers to suffer *any* signal degradation.

Third, at paragraph 37 of the *Order*, the Commission indicates that the BOCA code's blanket restriction on the size of satellite antennas "is unacceptable."<sup>7</sup> In context, the Commission correctly implies that it will prohibit enforcement of the BOCA code and any similar safety rules that restrict the installation and use of DBS antennas one meter or less in diameter and that are based solely on the antenna's size or weight. Given the overwhelming consumer demand for DBS antennas, this is a critical point. The Commission should expressly state that such size-based restrictions are unenforceable to the extent they preclude installation of DBS antennas less than one meter in diameter.

### **III. To the Extent Possible, the Commission Should Separately Spell Out the Types of Restrictions that Are Prohibited and the Types of Restrictions that May Be Allowed**

The record in this proceeding demonstrates the difficulties and frustrations that local government and private restrictions have created for consumers who seek to enjoy the benefits of over-the-air video programming. Indeed, in its *Order*, the Commission continues to recognize that many restrictions imposed by local authorities have been proven to be

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<sup>7</sup> *Id.* at ¶ 37.

unreasonable and should be prohibited. In addition to laying out these findings in the text of its *Order*, the Commission should separately state these findings -- in plain language -- in an addendum to its rules or in a public notice. Such a separate statement will make it as clear as possible to local authorities and consumers what practices already have been found unreasonable and, thereby, will minimize possible disputes and consumer frustration. In its *Order*, for instance, the Commission has made the following findings:

- Local rules that require viewers to obtain prior approval from community associations or local zoning boards for antenna installation are prohibited, as are rules that establish permitting and/or fee requirements, if the rules are unrelated to safety or historical concerns.<sup>8</sup>
- Local rules, if they are unrelated to safety or historical concerns, are prohibited to the extent they result in degraded, or effectively preclude, reception. This includes set-back requirements.<sup>9</sup>
- Local restrictions based solely on the size or weight of a DBS antenna are prohibited to the extent they affect antennas less than one meter in diameter.<sup>10</sup>
- Local rules cannot require relatively unobtrusive DBS antennas to be screened by landscaping. Other screening requirements (*e.g.*, painting) are permissible only where such requirements are also imposed to screen other devices, such as air conditioning units. In no event can a screening requirement unreasonably burden the viewer.<sup>11</sup>
- Safety-related restrictions may be appropriate, provided they serve clearly defined, nondiscriminatory safety objectives. Such restrictions must be no more burdensome than necessary and must be applied to other fixtures that are comparable in size and weight.<sup>12</sup>

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<sup>8</sup> *See id.* at ¶ 17.

<sup>9</sup> *See id.* at ¶ 20.

<sup>10</sup> *See id.* at ¶ 37.

<sup>11</sup> *See id.* at ¶ 19.

<sup>12</sup> *See id.* at ¶ 25.

- For example, safety-related permits can be required where the antenna mast exceeds 12 feet above the roofline, where the height of the antenna structure above the roofline exceeds the distance to the property line, or where the antenna would be near an electric power line or would encroach upon a public space.<sup>13</sup>
- Restrictions to preserve the historic status of a registered historic district also may be appropriate. Such restrictions must be no more burdensome than necessary and must be applied to other modern fixtures that are comparable in size, weight and appearance.<sup>14</sup>
- Local restrictions must be made available to viewers in writing.<sup>15</sup> CEMA would add that restrictions also must be in plain English.
- Where a permit is legitimately required, the application for a permit must be handled expeditiously.<sup>16</sup> CEMA would add that the permit application must be processed in a nondiscriminatory fashion and in no less than 30 days after submittal.
- The above principles apply to antennas that have transmission capability designed for the viewer to select or use video programming.<sup>17</sup>

The benefits of spelling out these and similar holdings in an easily accessible, easy-to-read document should be self-evident. To ensure "case law" developments in this area continue to inform consumers and local authorities in their decisionmaking, the list of prohibited and permissible restrictions should also be regularly updated.

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<sup>13</sup> *See id.*

<sup>14</sup> *See id.* at ¶ 26.

<sup>15</sup> *See id.* at ¶ 25.

<sup>16</sup> *See id.* at ¶ 26.

<sup>17</sup> *See id.* at ¶ 40.

#### **IV. To Ensure Nationally Uniform Consumer Rights, the Commission Should Resolve All Disputes Over the Appropriateness of Local Restrictions**

The Commission's new rule retains the Commission's proposal to allow local courts of competent jurisdiction to hear disputes concerning antenna placement. The rule, however, will not provide consumers with the true, nationwide relief Congress intended them to have. The rule actually will encourage local authorities to pursue their claims in local courts, where inevitably the decisionmaking process can be extraordinarily protracted and, in the end, decisionmakers are sympathetic to shoring up local authority. These realities will exacerbate consumer confusion and frustration, and will subvert Congress's goals by creating a patchwork quilt of local rules. Section 207 makes clear that Congress saw local restrictions on DBS, MMDS and TV antennas as a national concern requiring a uniform, national response. Such a response would not be possible if the decisions of different courts create a myriad of conflicting local rules. To prevent such a result and foster uniform, national rules, the Commission itself should reconsider its *Order* and review all future efforts of local authorities to restrict the use or placement of antennas.

In addition, CEMA asks the Commission to adopt a proposal made by others in their filings in this proceeding, but upon which the *Order* is silent. Specifically, the Commission should establish a single point-of-contact within the Commission for consumers to report unlawful enforcement of local antenna regulations and to empower that point-of-contact to intercede in ongoing, unlawful local proceedings.<sup>18</sup> These further refinements will help

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<sup>18</sup> See Petition for Reconsideration of DIRECTV, Inc., IB Docket No. 95-59, at 9 & 14-15 (filed Apr. 17, 1996).

ameliorate the chilling effect which fear of local government action may have on consumers as they consider their over-the-air video options.

## V. Conclusion

The Commission should therefore revise its rules governing restrictions on DBS, MMDS and TV antennas as set forth herein. Only by doing so will the Commission succeed in effectuating the pro-consumer and pro-competitive purposes of Section 207 of the Telecommunications Act of 1996.

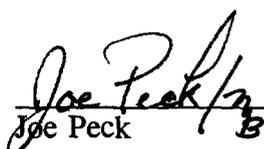
Respectfully submitted,

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