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 AND CLARIFICATION OF THE SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION OF AMERICA

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October 4, 1996

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Pursuant to the Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking ("Order" or "Further Notice") released by the Commission on August 6, 1996 in the above-captioned proceeding, the Satellite Broadcasting and Communications Association of America ("SBCA") hereby submits this Petition for Reconsideration and Clarification.

INTRODUCTION AND SUMMARY

A decade after adopting its first preemption rule, the Commission is hopefully nearing the end of its efforts to implement a fair and effective rule that will serve the twin goals of engendering true competition among *all* multichannel video programming distributors

("MVPDs") and affording *all* Americans access to the wide variety of video programming services available from such providers. The Commission's most recent action has moved the preemption rule ever closer to the mandate issued by Congress that the Commission "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for . . . direct broadcast satellite services."[1] SBCA applauds the Commission for its efforts. There remain, however, certain crucial additional actions the Commission should take if it is to serve faithfully the "complementary federal objectives" of "ensur[ing] that consumers have access to a broad range of video programming services" and "foster[ing] full and fair competition among different types of video programming services."[2] Accordingly, the Commission should modify its rule in the following respects.

First, in order to implement faithfully the directive of section 205(b) of the 1996 Act, the Commission should reconsider its refusal to exercise its exclusive jurisdiction over direct-to-home ("DTH") satellite antennas. Not only is such action explicitly sanctioned by Congress, exercise of exclusive jurisdiction will produce tangible benefits for consumers and local authorities alike. *By adjudicating disputes at the Commission, the Commission will reduce the burden on potential satellite consumers, eliminate inconsistent court rulings, and avoid the intolerable circumstances that occurred as a result of the* Deerfield *case, under which consumers could be denied the ability to have a ruling by the expert agency on this matter that the Commission has acknowledged is within its primary jurisdiction.*

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, § 207, 110 Stat. 56, 114 (1996) (emphasis supplied) ("1996 Act").

[2] Order at ¶ 6.

Second, the Commission should modify the enforcement, fine and penalty procedures adopted as part of its rule in two important respects. The Commission should clarify in the rule itself that while safety and historic preservation restrictions may be enforced in accordance with their terms immediately, all other restrictions may not be enforced until the validity of such restrictions has been upheld. In addition, the Commission should modify its rule to specify that under no circumstance may fines or other penalties be assessed until after a 21-day grace period during which a satellite owner is afforded an opportunity to comply with the restriction and avoid such fines or penalties.

Third, the Commission should modify its preemption rule to make it adaptable to the ever-changing technological environment. Specifically, the Commission should clarify that *all* small antennas used for video-related services should be included within the ambit of Section 1.4000(a). In addition, the Commission should include residential areas within the scope of Section 25.104(b)(1) to protect those consumers who choose to install small dishes that are used for other types of services, such as data and information.

Finally, the Commission should clarify its definition of "impair" by defining "unreasonably" to mean "in a manner different from other appurtenances of comparable size." By explicitly incorporating a comparative, non-discrimination standard into its definition of "unreasonably," the Commission can ensure that its rule is not circumvented by subjective interpretations of that term.

I. THE COMMISSION SHOULD RECONSIDER ITS REFUSAL TO EXERCISE ITS EXCLUSIVE JURISDICTION OVER DTH SATELLITE ANTENNAS

Despite the urging of many commenters in this proceeding,[3] the Commission refused to exercise its statutorily sanctioned exclusive jurisdiction over DTH satellite antenna regulations, restrictions and disputes. Instead, the Commission expressed its "*hope* that affected persons, entities, or governmental authorities would seek guidance and suitable redress through the processes we have established . . ." and its "*expect[ation]* that [where parties take their cases to court] the 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."[4] The Commission's optimism regarding the likelihood of local authorities taking their disputes to the Commission, while admirable, is likely misplaced. If given the choice, local authorities are far more likely to choose the forum they view as most favorable to their position -- the local courts. Further, unless the Commission exercises its exclusive jurisdiction to decide whether restrictions are preempted under the Commission's rule -- *i.e.*, "those matters that relate to [its] primary jurisdiction"[5] --the Commission will be unable to ensure that courts refer such matters to it. In short, only by exercising its exclusive jurisdiction can the Commission ensure that its hopes and expectations are realized.

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[3] *See, e.g.*, Petition for Reconsideration and Clarification and Comments to Further Notice of Proposed Rulemaking of DIRECTV at 8-12 (April 15, 1996); Comments of the Consumer Electronics Manufacturers Association at 6 (May 21, 1996); Comments of Primestar Partners L.P. at 12-13 (April 15, 1996); Hughes Network Systems, Inc. Petition for Reconsideration and Clarification at 3-4 (April 17, 1996); Petition for Reconsideration/Clarification and Further Comments of United States Satellite Broadcasting Co., Inc. at 3 (April 15, 1996).

[4] Order at ¶ 58 (emphasis supplied).

[5] *Id.*

A. The Commission's Authority To Exercise Exclusive Jurisdiction Is Clearer Than Its Authority Not To Exercise Exclusive Jurisdiction

The Commission's authority to exercise exclusive jurisdiction could not be more explicit. Section 205(b) of the 1996 Act specifically empowers the Commission with the "*exclusive* jurisdiction to regulate the provision of direct-to-home satellite services."[6] As the legislative history makes clear, "[f]ederal jurisdiction over DBS service will ensure that there is a unified, national system of rules reflecting the national, interstate nature of DBS service."[7] Indeed, the Commission itself implicitly recognized its authority to exercise exclusive jurisdiction over DTH satellite services "as public convenience, interest, or necessity requires."[8]

The question, therefore, is not whether the Commission may exercise exclusive jurisdiction over DTH satellite services but, rather, whether it has the authority to refrain from exercising the authority explicitly bestowed on it by Congress. SBCA respectfully disagrees with the Commission when it concludes that Section 303 of the Act, which affords the Commission the discretion to act "as public convenience, interest or necessity requires," permits it to decline to exercise exclusive jurisdiction. Section 303's grant of discretion is subject to an important caveat: "Except as otherwise provided in this Act. . . ." Here, the Act provides unequivocally that the FCC shall have exclusive jurisdiction. The Commission can no

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[6] 1996 Act § 205(b) (emphasis supplied). The 1996 Act defines DTH satellite services as "the distribution or broadcasting of programming or services by satellite directly to the subscriber's premises without the use of ground receiving or distribution equipment, except at the subscriber's premises or in the uplink process to the satellite." *Id.*

[7] H.R. Rep. No. 204, 104th Cong., 2nd Sess. at 123 (1995).

[8] *See* Order at ¶ 57 (emphasis omitted).

more refuse to exercise the exclusive jurisdiction bestowed on it by Section 303(v) of the Act than it can choose either to ignore other mandates set forth in the Act or to exercise jurisdiction in matters reserved to the states (*e.g.*, *intra*state telephone communications). The public interest language relied on by the Commission only provides discretion within the boundaries set by Congress. Here, the Commission has eliminated the Commission's discretion to decline exclusive jurisdiction.

B. Exercise Of Exclusive Jurisdiction Will Benefit Consumers And Local Authorities Alike

In any event, there are strong public policy reasons for exercising exclusive jurisdiction. In adopting a waiver-only approach, the Commission expressed its intent to "spare localities *and antenna users* unnecessary administrative burden and expense."[9] The Commission's laudable objective of decreasing administrative burden and expense is disserved by its decision not to exercise exclusive jurisdiction. In fact, the Commission's refusal to exercise its exclusive jurisdiction runs directly contrary to this goal.

Under the adjudicative procedures adopted by the Commission, the following course of events will likely ensue: A consumer installs a satellite antenna that is found objectionable by her neighbor. The neighbor complains to the local zoning board or her homeowners' association ("HOA") and informal negotiations fail to resolve the issue. Despite the Commission's "hopes" to the contrary, the local authority or HOA brings a lawsuit in the local court.[10] The antenna owner is then forced to hire counsel to answer the complaint or risk a

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[9] *Id.* at ¶ 7 (emphasis supplied).

[10] Local authorities and their counsel are most familiar and comfortable with local courts and judges and are therefore far more likely to choose a local forum over a federal agency in Washington, D.C.

default judgment being entered against her. *Faced with this choice, most consumers will forego the legal battle and give up their efforts to receive programming via DTH.* For those hardy few who choose to continue to fight in court, if the Commission's "expectations" are met and the dispute shifts temporarily to the Commission (if the court chooses to refer the zoning preemption portion of the complaint to the FCC), the burden only increases as the Commission's processes will supplement rather than replace the court battle.

However inadvertently, therefore, the Commission's refusal to exercise its exclusive jurisdiction *increases* both the administrative burden and the administrative expense associated with adjudicating a preemption matter. While this burden will be imposed on both the consumer and local authority, the local authority will have the resources to bear the burden more easily than the typical consumer. Such a result is directly contrary to the public convenience, interest and necessity -- and can be easily avoided by the Commission's exercise of exclusive jurisdiction.

As previously discussed by SBCA and other commenters in this proceeding, exercising exclusive jurisdiction will further benefit consumers in a number of tangible ways. For example, as the FCC acknowledges, by limiting all declaratory ruling and waiver petitions to paper submissions, the burden on all parties will be minimized.[11] The FCC agrees with commenters, including SBCA, "that a paper process will be the best and least costly option" and that "formal hearings would be far more burdensome."[12] The option of a paper-only process is not available, however, in the judicial system. Not only will far more paper

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[11] Order at ¶ 55.

[12] *Id.* at ¶ 55 n.154.

submissions be required by courts during the process of discovery and adjudicatory motions, but in-person court appearances are virtually impossible to avoid if a matter is to be finally adjudicated.

By exercising exclusive jurisdiction, thereby limiting resolution of all satellite antenna preemption disputes "to the papers," the Commission will thus minimize the burden upon all parties. This, in turn, will minimize the likelihood that consumers will perceive the litigation burden as too high and consequently be dissuaded from their efforts to obtain DTH service. The Commission quite correctly recognized that if the burdens to entry are too great, consumers will not enter and, instead, will effectively be denied this choice of service.[13] The Commission also correctly concluded that such a result would disserve the public interest.[14] The Commission should now take corrective action to avoid that result by exercising exclusive jurisdiction.

C. Failure To Exercise Exclusive Jurisdiction Will Replicate The Intolerable Circumstances Under *Deerfield*

In the event that courts do not meet the Commission's "expectation" and choose not to seek the Commission's view on matters concerning DTH satellite services, the Second Circuit's ruling in *Town of Deerfield, New York v. FCC*[15] will prevent the Commission from having the opportunity to rule on the legitimacy of the local restriction.[16]

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[13] *Id.* at ¶ 17.

[14] *See id.*

[15] 992 F.2d 420 (2d Cir. 1993).

[16] The Commission could, of course, intervene in the court proceeding *if* it becomes aware of the litigation. There is, however, currently no mechanism by which litigants are required to notify the Commission of these cases. Even if the Commission does learn of the litigation, it

As the Commission is well aware, the *Deerfield* case arose as a result of Joseph Carino's attempt to seek federal preemption of a Deerfield, New York zoning ordinance governing satellite antenna installations. When Mr. Carino was slapped with a criminal citation after he installed a satellite dish, he turned to the Commission for help. The Commission turned him away and instructed him to pursue remedies in court in accordance with the 1986 policy requiring complainants to exhaust their court remedies before coming to the FCC.[17] Mr. Carino filed an action and lost in New York state trial court, appealed his loss to the highest state appellate court in New York (which upheld the lower court's ruling), filed in federal district court in New York (which ruled that he was collaterally estopped from relitigating the issues raised),[18] and finally appealed to the Second Circuit Court of Appeals (which upheld the collateral estoppel ruling).[19] When Mr. Carino finally brought his case before the Commission, the Commission ruled that, contrary to the court rulings, the Deerfield ordinance was, in fact, preempted.[20] The Second Circuit, however, then ruled that the Commission had no authority to override a federal court decision.[21]

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will, of course, have to expend resources to appear in the court proceeding, thereby defeating part of the reason for refraining from exercising exclusive jurisdiction in the first place.

[17] *Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations*, 51 Fed. Reg. 5519, 5524 (Feb. 14, 1986).

[18] *Carino v. Town of Deerfield*, 750 F.Supp. 1156 (N.D.N.Y. 1990).

[19] *Carino v. Town of Deerfield*, 940 F.2d 649 (2d Cir. 1991).

[20] *Preemption of Satellite Antenna Zoning Ordinance of Town of Deerfield, New York*, 7 FCC Rcd 2172 (1992).

[21] *Town of Deerfield v. FCC*, 992 F.2d at 428.

Mr. Carino spent more than $25,000 and more than four years of his life litigating an issue that the Commission now agrees is within the "agency's expertise"[22] -- indeed, within the Commission's "primary jurisdiction."[23] If Mr. Carino were to install a DTH dish today and meet similar local resistance, he could bring his complaint directly to the Commission. But, if the town of Deerfield initiated the litigation process first and went to court in an effort to have its regulation upheld so that Mr. Carino could be forced to remove his satellite dish, Mr. Carino would be in precisely the same predicament as before: he would be unable to obtain a ruling by the expert agency on an issue that the agency concedes is within its primary jurisdiction.[24]

The Deerfield case highlights the need for the Commission to interpret its own rules. Only by confining all satellite antenna preemption adjudications to the FCC will the intolerable circumstances Mr. Carino faced be avoided and a consistent, uniform body of rules result. That uniformity will enure to the benefit of consumers and local authorities alike. For consumers, uniform standards will provide the requisite certainty regarding their right to install satellite dishes -- and will avoid instances like *Deerfield* where the Commission was denied the opportunity to rule that a local regulation was preempted, notwithstanding the court decisions to the contrary. For local authorities, uniform rulings will provide a clear regulatory framework within which they must work to craft legitimate restrictions on satellite antennas.

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[22] Order at ¶ 58.

[23] *Id.*

[24] *Id.*

Given the FCC's recognition that Mr. Carino's was an untenable predicament,[25] the Commission should remedy the situation by immediately exercising its exclusive jurisdiction.

II. THE COMMISSION SHOULD CLARIFY THE ENFORCEMENT, FINE AND PENALTY PROVISIONS OF THE PREEMPTION RULE

The Commission's preemption rule was designed to avoid imposing burdens and risks on consumers that could serve as disincentives to potential consumers to choose the services of competitive MVPDs, thereby hindering competition. To avoid such disincentives, the Commission's preemption rule provides:

> No civil, criminal, administrative, or other legal action of any kind shall be taken to enforce any restriction or regulation prohibited by this rule except pursuant to paragraph (c) or (d). No fine or other penalties shall accrue against an antenna user while a proceeding is pending to determine the validity of any restriction.[26]

SBCA applauds the Commission's decision to adopt a process under which a restriction (other than a safety or historic restriction) may not be enforced and a viewer may not be fined while a proceeding regarding the viewer's antenna is pending. As SBCA explained in earlier comments, satellite consumers likely will refrain from investing in DTH video programming services if they fear reprisals in the form of fines or potential litigation.[27] By permitting consumers to install, maintain and use their antennas during the pendency of any proceeding not involving safety or historic preservation restrictions, the FCC similarly recognized the

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[25] *See Preemption of Local Zoning Regulation of Satellite Earth Stations*, Notice of Proposed Rulemaking, 10 FCC Rcd 6982, 6997-98 (1995).

[26] Order at Attachment A (to be codified at 47 C.F.R. § 1.4000(a)).

[27] Further Comments and Petition for Clarification of the Satellite Broadcasting and Communications Association of America at 24-25 (April 15, 1996).

importance of affording consumers the ability to install DTH antennas immediately rather than after resolution of a dispute. As the Commission acknowledged, unreasonable delays "can impede a service provider's ability to compete, since customers will ordinarily select a service less subject to uncertainty and procedural requirements."[28]

The problem is that, however unwittingly, the Commission has allowed those disincentives to persist in two distinct ways. First, the Commission's rule fails to distinguish explicitly between the enforceability of safety and historic district regulations, which are immediately enforceable pursuant to their terms, and all other restrictions, which are not immediately enforceable. Second, the Commission's rule permits local authorities to assess fines or other penalties against satellite consumers immediately once a regulation or restriction is upheld by a court or the Commission, which could dissuade consumers from installing DTH antennas. Each of these deficiencies must be remedied to eliminate disincentives to the installation of satellite antennas.

A. The Commission Should Explicitly Distinguish Between The Enforceability Of Safety And Historic District Restrictions And All Other Restrictions

In the text of the Order, the Commission distinguishes clearly between the immediate enforceability of safety and historic preservation regulations in accordance with their terms and the enforceability of all other regulations. The text of the rule, however, contains ambiguities about this distinction. Paragraph 53 of the text of the Order explicitly provides that where a local authority has requested a determination regarding the validity of a safety or historic

[28] Order at ¶ 17 (footnote omitted).

preservation restriction, "the restriction may be enforced pending this determination."[29] The Order just as explicitly provides, "[o]therwise, the restriction *may not be enforced* until the Commission or a court of competent jurisdiction issues a ruling that the restriction is not preempted."[30]

The text of the preemption rule fails to duplicate this crucial distinction. Section 1.4000(a) of the Commission's rules prohibits only the enforcement of "restriction[s] or regulation[s] *prohibited* by this section."[31] For the majority of local authorities that likely will read the rule alone without the benefits of the clarifying text of the order, it will not be easy to discern precisely which restrictions may be enforced and when. SBCA thus fears that local authorities will (perhaps understandably) read the rule language expansively and attempt to enforce, during the pendency of a proceeding, regulations not related to safety and historic preservation, by claiming that such regulations are not "prohibited" by the preemption rule. Both the threat and instigation of any such enforcement actions, however, are clear disincentives to the selection of satellite service.

To rectify this unintentional ambiguity, the Commission should explicitly state in the text of its rule exactly what types of rules may and may not be enforced and when such enforcement may take place. SBCA thus proposes deleting the current enforcement provisions contained in paragraph (a) (*i.e.*, the last two sentences of paragraph (a)) and instead adding a

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[29] *Id.* at ¶ 53.

[30] *Id.* (emphasis supplied).

[31] *Id.* at Attachment A (to be codified at 47 C.F.R. § 1.4000(a)(3)) (emphasis supplied).

new paragraph (g) that would contain explicit enforcement provisions. Proposed language follows the discussion in Section B that immediately follows.

B. The Commission Should Reconsider Its Decision To Allow An Immediate Assessment Of Fines Or Other Penalties Where Governmental Or Nongovernmental Restrictions Are Upheld

The Commission's decision to allow an immediate assessment of fines and penalties, once a restriction is upheld, opens the door to the creation of a huge disincentive against the choice of satellite antenna service. The Commission posits an example involving a $50 fine that may be levied against a satellite owner immediately after a restriction is upheld, even though it could not be levied, retroactively, for each day the satellite was in place prior to the ruling.[32] The Commission apparently presumes that the specter of a $50 fine will not cause potential satellite owners to think twice about making the not insubstantial investment in a satellite antenna. The Commission's presumption may or may not be correct (particularly if the fine were per day and it took several days or even weeks to get an installer to come take down a satellite dish). If the potential fine were substantially larger -- for example, $500, $1000, or higher -- or, even worse, if a consumer could be hit with a criminal citation the moment a restriction were upheld, then eliminating retroactive liability would *not* eliminate the disincentives.

In order to achieve the intended goal of eliminating these disincentives, the Commission should prohibit local authorities from assessing fines or penalties against antenna owners immediately after a restriction is upheld, so long as a viewer complies with the restriction within a reasonable time period. Based on SBCA's understanding of the typical backlog for

[32] *Id.* at ¶ 53 n. 147.

satellite installations, it proposes a 21-day grace period. This grace period would be available under three circumstances. First, if a local authority receives a ruling upholding the validity of any restriction not related to safety or historic preservation, an antenna owner would be permitted 21 days following written notice of such ruling before the local authority could impose a fine or other penalty or otherwise enforce the restriction. Second, if a local authority has previously received a ruling upholding the validity of a particular restriction, an antenna owner would be permitted 21 days following written notice of such ruling before the local authority could impose a fine or other penalty or otherwise enforce the restriction. Third, if the restriction involves the validity of a safety or historic preservation restriction, the restriction could be enforced pending resolution of the dispute, but an antenna owner would be permitted 21 days following written notice of an alleged violation of the restriction before the local authority could impose a fine or other penalty.

To accomplish these goals, SBCA proposes the following rule language:

> (g)(1) A governmental or nongovernmental authority may enforce any restriction hereunder based on a clearly defined safety objective or to preserve an historic district as defined in paragraph (b) during the pendency of any proceeding to determine the validity of such restriction provided, however, that the governmental or non-governmental authority may not impose a fine or other penalty for 21 days following written notice to the viewer of an alleged violation of the restriction. If the viewer complies with the restriction within 21 days following such notice, no fine or penalty may be imposed.

(g)(2) A governmental or nongovernmental authority may not enforce any other restriction hereunder during the pendency of any proceeding to determine the validity of such restriction. If a ruling is issued (or, as the case may be, if a ruling was previously issued) that a particular restriction is not preempted, the governmental or nongovernmental authority may then enforce such restriction and impose a fine or other penalty provided, however, that the governmental or nongovernmental authority may not impose a fine or other penalty or otherwise enforce the restriction for 21 days following written notice to the viewer of the ruling. If the viewer complies with the restriction within 21 days following such notice, no fine or penalty may be imposed and no enforcement action may be taken.

III. THE COMMISSION'S RULES SHOULD PROTECT ALL SMALL SATELLITE ANTENNAS IN RESIDENTIAL AREAS

With respect to small satellite antennas, Section 1.4000 of the Commission's rule protects only those one meter or less antennas that are used to provide over-the-air video programming.[33] The Commission explains that "larger [C-band] antennas are subject to the more general satellite antenna preemption in Section 25.104 of our rules,"[34] and "VSAT and other satellite services will be addressed separately."[35] While the Commission states that "the component part[s] of . . . multichannel video programming" will be included within the purview of Section 1.4000 -- including pay-per-view and other interactive options[36] -- it also states that "the rule adopted here will have no application to services other than those named

[33] *See id.* at ¶ 30.

[34] *Id.* at ¶ 32.

[35] *Id.* at ¶ 30 n.76.

[36] *Id.* at ¶ 39.

here."[37] It is thus less than clear precisely what protections are afforded small satellite antennas that are used for nontraditional video-related services.

During the decade in which this proceeding has progressed so, too, has technology. New uses for small satellite antennas, one meter or less, are constantly being introduced to the market. These new uses include, for example, interactive dishes that transmit video programming to computers. New and innovative uses for satellite dishes will continue to be developed in ways that cannot be envisioned; and the Commission should not adopt a rule that requires it to revisit its rule each time technology progresses. To avoid such a result, the Commission should clarify that *all* video-related uses of small satellite antennas are protected within the ambit of Section 1.4000. In addition, the Commission should amend Section 25.104 of its rules to cover small, DTH satellite dishes in residential areas that are used solely for the transmission of information or data.

To this end, SBCA proposes to amend Sections 1.4000(a)(1) and 25.104(b)(1) as follows (new material is underlined):

> (a)(1) an antenna that is designed to receive direct broadcast satellite service, including direct-to-home satellite services <u>or other video-related services</u>, that is one meter or less in diameter or is located in Alaska; or
>
> * * *
>
> (b)(1) Any state or local zoning, land-use, building, or similar regulation that affects the installation, maintenance, or use of<u>:</u>
>
> <u>(A)</u> a satellite earth station antenna that is two meters or less in diameter and is located or proposed to be located in any area where commercial or industrial uses are generally permitted by non-federal land-use regulation<u>; or</u>

[37] *Id.* at ¶ 30 n.76.

> (B) a satellite earth station antenna that is one meter or less in diameter in any area, regardless of land-use or zoning category
>
> shall be presumed unreasonable and is therefore preempted subject to paragraph (b)(2). No civil, criminal, administrative, or other legal action of any kind shall be taken to enforce any regulation covered by this presumption unless the promulgating authority has obtained a waiver from the Commission or a court of competent jurisdiction that the presumption has been rebutted pursuant to subparagraph (b)(2).

These modifications will ensure that all small satellite antennas in residential areas, regardless of their specific use, are protected by the Commission's preemption rule.

IV. THE COMMISSION'S DEFINITION OF "IMPAIR" NEEDS CLARIFICATION

Throughout its participation in this proceeding, SBCA, like other industry commenters, has consistently stressed the paramount importance of drafting a preemption rule that is both clear and comprehensive in order to facilitate the most efficient and effective implementation of the rule. Without question, the most recent iteration of the Commission's preemption rule has made substantial strides in that direction. Nonetheless, in certain respects the preemption rule still needs clarification.

In adopting an impairment standard to judge whether a restriction is subject to the Commission's preemption rule, the Commission stated, "[i]t is our purpose here to distinguish clearly the sort of restrictions that impair reception from those that do not."[38] To accomplish this laudable goal, the Commission needs to clarify its definition of "impair."

[38] *Id.* at ¶ 16.

Section 1.4000(a) of the Commission's rules prohibits restriction that "impair" the installation, maintenance or use of an antenna. The rule further provides that a law, regulation or restriction will be found to impair installation, maintenance or use of an antenna if it:

> (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.[39]

The Commission does not define, in the rule, what it means by "unreasonably increases the cost" or "unreasonably delays . . . installation." And while it does provide a number of examples of prohibited and permissible costs and delays in the text of its Order, the Commission's list is far from exhaustive, and could not reasonably be expected to be so.

To eliminate the unavoidable vague and subjective interpretations that will be given to the current definition of impair, SBCA urges the Commission to define "unreasonably" in its rule to mean "in a manner different from other appurtenances of comparable size." This approach is consistent with the Commission's intent as evidenced by the examples provided in the Order. It also is identical to the Commission's approach with respect to the two specifically enumerated exceptions to its preemption rule, safety and historic district preservation regulations. In adopting those two exceptions, the Commission cautioned that their validity would depend in great measure upon the extent to which the restrictions are administered in a nondiscriminatory manner, *i.e.*, the regulations must "be applied to the extent practicable in a non-discriminatory manner to other appurtenances, devices, or fixtures that are comparable in size, weight, and appearance to these antennas and to which local regulation

[39] *Id.* at Attachment A (to be codified 47 C.F.R. § 1.4000(a)).

would normally apply" and are "no more burdensome upon antenna users than is necessary to achieve the desired objective."[40]

While recognizing the local authorities' legitimate need to govern safety and historic district concerns, the Commission appropriately concluded that the legitimacy of restrictions could be judged by comparing the burdens and restrictions on services such as cable and, more generally, "treatment of comparable devices."[41] By explicitly incorporating a comparative, non-discrimination standard in its definition of "unreasonably," the Commission can ensure that its impairment standard is not circumvented in the name of reasonableness.

SBCA strongly urges the Commission to add this definition to the text of the rule itself or in a note following the rule. The Commission has already recognized the importance of crafting the text of this rule to be as explicit as possible.[42] SBCA could not agree more. While FCC pundits may devour every line of Commission decisions, most individuals -- including those involved in local governments or HOAs -- will focus their attention on the rule itself. Accordingly, the FCC should include the definition of "unreasonably" in the text of the rule or in an accompanying note, as follows:

> For purposes of paragraph (a), unreasonably means in a manner different from other appurtenances of comparable size.

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[40] *Id.* at ¶ 25.

[41] *Id.* at ¶ 19.

[42] As noted above, the Commission's safety and historic district exceptions each contain explicit provisions prohibiting discriminatory treatment for like appurtenances, devices and fixtures and disproportionate burden upon antenna users.

CONCLUSION

For the reasons set forth in this Petition for Reconsideration and Clarification, SBCA urges the Commission to modify and clarify its preemption rule to (1) immediately exercise exclusive jurisdiction over all DTH satellite services, (2) modify the enforcement, fine and penalty provisions of its preemption rule to eliminate the disincentives to potential satellite consumers, (3) provide explicit protection for all small satellite antennas in residential areas, and (4) clarify its definition of "impair" by defining "unreasonably" in the text of its rule. These modest, yet extremely important steps, are paramount if the Commission is to have a fully effective and equitable preemption rule.

Respectfully submitted,

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October 4, 1996