

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

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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

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CS Docket No. 96-83

COMMENTS OF THE  
CONSUMER ELECTRONICS MANUFACTURERS ASSOCIATION  
ON THE OCTOBER 4, 1996  
PETITIONS FOR RECONSIDERATION

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## EXECUTIVE SUMMARY

The Consumer Electronics Manufacturers Association supports the several petitions for reconsideration that were filed in this proceeding on October 4, 1996. The petitions demonstrate that the Commission can, and should, clarify and tighten its rules implementing Section 207 of the Telecommunications Act of 1996 to make those rules more consumer-friendly.

In particular, the petitions demonstrate that the ultimate goal of Section 207 -- to promote nationwide access to over-the-air programming -- will never be achieved unless the Commission, and the Commission alone, assumes authority to review and preempt local restrictions on the use of over-the-air reception devices. The petitions also demonstrate that the Commission should spell out more plainly what local restrictions are, and are not, permissible; that it should afford consumers greater procedural protection when local authorities seek to enforce their restrictions; and that it should expand its rules to preempt local restrictions on small transmitting antennas. One petition correctly points out that, as a matter of law, the Commission should eliminate from its implementing regulations the notion that local authorities can somehow "reasonably" delay or impose additional costs on consumers' installation of DBS, MMDS and TVBS antennas. The plain meaning of the statute requires the Commission to prohibit any such delays or added costs.

Finally, to remain faithful to the statute and to limit the confusion that the Commission's current implementing regulations are likely to engender, the Commission should consider relying exclusively on the waiver process to determine what local restrictions are, and are not, permissible.

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Preemption of Local Zoning Regulation of Satellite Earth Stations	)	IB Docket No. 95-59
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Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Services	)	

**COMMENTS OF THE  
CONSUMER ELECTRONICS MANUFACTURERS ASSOCIATION  
ON THE OCTOBER 4, 1996  
PETITIONS FOR RECONSIDERATION**

The Consumer Electronics Manufacturers Association ("CEMA") hereby supports the several petitions for reconsideration that were filed on October 4, 1996 in response to the Commission's Report and Order/Memorandum Opinion and Order ("*Order*") in the above-captioned proceeding.<sup>1</sup>

In its own petition, CEMA has noted that the Commission can better promote the pro-consumer goals of Section 207 of the Telecommunications Act of 1996 (the "1996 Act") (1)

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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). References below are to the petitions for reconsideration filed in this proceeding on October 4, 1996 unless otherwise specified.

by setting forth in plain language what local restrictions on the installation and use of over-the-air reception devices are, and are not, permissible; and (2) by eliminating loopholes and ambiguous language from its *Order*, as well as from its regulations implementing Section 207. The other petitions for reconsideration reflect widespread agreement among the DBS, MMDS and TV broadcasting industries that the Commission can and should tighten its rules to make them more understandable and consumer-friendly. As set forth more fully below, the public interest supports making these further refinements and, in particular, clarifying that the Commission will be solely responsible for reviewing local restrictions on viewers' antennas. CEMA also urges the Commission to consider addressing consumers' concerns in a simpler and more effective manner; namely, as BellSouth has suggested, by prohibiting local authorities from impairing viewers' ability to receive over-the-air video programming except where a restriction in question satisfies the Commission's rule waiver standard.

**I. THE COMMISSION SHOULD ASSERT EXCLUSIVE JURISDICTION OVER ANTENNA PLACEMENT ISSUES**

Virtually every petitioner has urged the Commission to assert exclusive jurisdiction over disputes concerning antenna placement in order to foster nationally uniform case law.<sup>2</sup> As CEMA indicated in its petition, if the Commission does not assert exclusive

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<sup>2</sup> Petition for Reconsideration of BellSouth Corporation at 18 ("BellSouth"); Petition for Reconsideration and Clarification of DIRECTV, Inc. at 14-17 ("DIRECTV"); Petition for Reconsideration and Clarification of the Network Affiliated Stations Alliance at 6-9 ("NASA"); Petition for Reconsideration of Philips Electronics N.A. Corporation and Thomson Consumer Electronics, Inc. at 2-9 ("Philips/Thomson"); Petition for Reconsideration and Clarification of the Satellite Broadcasting and Communications Association of America at 4-11 ("SBCA"); Joint Petition for Partial Reconsideration of the Wireless Cable Association International, Inc., *et al.*, at 25-27 ("WCA, *et al.*").

jurisdiction, it actually will encourage local authorities to pursue their claims in local courts, where decisionmakers will be sympathetic to shoring up local authority and inevitably the decisionmaking process will be extraordinarily protracted. These realities will exacerbate consumer confusion and frustration, and will subvert congressional intent by creating a patchwork quilt of local rules.

Other petitioners confirm that local authorities are likely to seek review of their restrictions in local courts, the forum they view as most favorable to their position;<sup>3</sup> that "allowing local authorities to haul consumers to court will result in a decided disadvantage for the consumer [because local] courts cannot offer the expedited and inexpensive review procedures adopted by the Commission"<sup>4</sup>; and that the Commission's bifurcated approach will inevitably result in "a multiplicity of diverse and contradictory rulings governing Section 207."<sup>5</sup> Several petitioners add that local courts, in turn, will be unlikely to refer matters within the Commission's primary jurisdiction to the Commission and that, once local courts have assumed jurisdiction, the Commission potentially will be *precluded* from reviewing local decisions.<sup>6</sup> Collectively, the petitions demonstrate that the ultimate goal of Section 207 -- to promote nationwide access to over-the-air programming -- will never be achieved unless the Commission asserts exclusive authority over the review process.

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<sup>3</sup> SBCA at 4.

<sup>4</sup> DIRECTV at 14.

<sup>5</sup> Philips/Thomson at 7.

<sup>6</sup> DIRECTV at 15-16; NASA at 7; WCA, *et al.*, at 26 (each citing *Town of Deerfield v. FCC*, 992 F.2d 420 (2d Cir. 1993)).

In their joint petition, Philips and Thomson also point out that, under Section 303(v) of the Communications Act, the Commission "shall" have "exclusive jurisdiction to regulate the provision of direct-to-home satellite services."<sup>7</sup> Philips and Thomson correctly note that, taken together, Section 303(v) of the Act and Section 207 of the 1996 Act (as well as the legislative history of each provision) state Congress's intention that the Commission create a national system of rules governing direct-to-home services. Thus, at least with regard to DBS services, the Commission is without discretion to grant local authorities power to review restrictions on the placement of antennas.<sup>8</sup>

## **II. THE COMMISSION SHOULD REFINE ITS RULES TO ENSURE THAT CONSUMERS ENJOY THE FULL BENEFITS OF THEM**

Like CEMA, each petitioner also seeks certain specific refinements to the Commission's rules to ensure that consumers benefit as much as possible from the Commission's actions in this proceeding. These requests are compatible and mutually reinforcing, and seek only to advance Congress's pro-consumer goals.

### **A. The Commission Should Spell Out More Plainly What Restrictions Are, and Are Not, Permissible**

CEMA has urged the Commission to spell out in an addendum to its rules or a public notice the pro-consumer findings that the Commission has made in its *Order* (e.g., local rules cannot require relatively unobtrusive DBS antennas to be screened by landscaping).<sup>9</sup> DIRECTV similarly asks the Commission to add to its rule the discrete findings enunciated in

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<sup>7</sup> 47 U.S.C. §§ 303 (preamble) & 303(v).

<sup>8</sup> Philips/Thomson at 4-5.

<sup>9</sup> CEMA Petition for Clarification and Reconsideration at 6 *citing Order* at ¶ 19.

the body of the recent *Order*. For example, DIRECTV has asked the Commission to amend its implementing regulation to make clear that permit fees and anything more than *de minimis* aesthetic requirements are prohibited.<sup>10</sup> Although these fees and requirements might only be an annoyance to some potential DBS users, they undoubtedly would deter other potential users from considering DBS services. In urging the Commission to provide consumers and local authorities more clarity and guidance, DIRECTV correctly notes that "DBS antenna users are consumers of a mass-market service who have invested as little as \$200 in a dish."<sup>11</sup> Such consumers are unlikely to have access to the Commission's *Order* or, if they did, the expertise to parse through it for clarification of their rights. Clearly, there is a need for the Commission to make its decisions in this area more accessible to consumers, local authorities and providers of over-the-air services so that confusion over what restrictions are, and are not, permissible is minimized.

**B. The Commission Should Afford Consumers Greater Procedural Protection**

The petitioners also correctly point out that the Commission should improve upon the procedural protections to be afforded consumers who potentially face financial penalties for installing a reception device. The Commission's *Order* evidences an intent to protect consumers from pre-hearing penalties that local authorities might impose. Yet, the *Order*, by only forbidding imposition of penalties "while a proceeding is pending," does not adequately achieve that end; it does not eliminate the possibility that local authorities might impose pre-hearing fines. To address this shortcoming, DIRECTV and SBCA urge the Commission to prohibit the

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<sup>10</sup> DIRECTV at 8-9.

<sup>11</sup> *Id.* at 4.

imposition of fines on a viewer until 21 days after the viewer receives notice of an authority's intent to enforce a *bona fide* restriction.<sup>12</sup> SBCA also asks the Commission to ensure that any procedural delays or costs imposed on DBS users are not imposed in a discriminatory fashion.<sup>13</sup>

CEMA concurs with each of these recommendations. The Commission's current approach does not eliminate the possibility that fines imposed before a proceeding becomes "pending" could be used to limit consumer access to over-the-air programming. Nor does the Commission's current approach adequately address the potential for local rules to be applied in a discriminatory manner. Together, DIRECTV and SBCA offer the Commission a more effective means of achieving its pro-consumer goals without meaningfully affecting local authorities' interests.

**C. The Commission Should Eliminate Its Vague "Reasonableness" Standard and Prohibit Any Restrictions that Delay or Impose Costs on Consumers**

Philips and Thomson note that the Commission has inappropriately inserted a "reasonableness" standard into its rule implementing Section 207. Specifically, the Commission's *Order* implies that local authorities *can* delay the installation of an antenna and increase the cost of installing and using such an antenna, provided those delays and cost increases are not "unreasonable." Aside from the inherent ambiguity in a reasonableness standard, Philips and Thomson note that there simply is no basis in the statute for the

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<sup>12</sup> DIRECTV at 10-14; SBCA at 14-16.

<sup>13</sup> SBCA at 18-21 (urging the Commission to ensure that local restrictions on the class of all appurtenances and fixtures do not discriminate against reception devices).

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Commission to create such a standard. They urge the Commission to clarify that local restrictions should impose *no* delays or additional costs on DBS users.<sup>14</sup>

In its petition, CEMA has noted that the Commission improperly interpreted the statutory prohibition against restrictions that "impair" reception as a prohibition against restrictions that "substantially degrade" reception. CEMA has argued that, under no circumstances, can the statutory term "impair" be equated only with substantial degradation.<sup>15</sup> In objecting to the Commission's reasonableness standard, Philips and Thomson have struck upon a similar, inappropriate interpretation of the statute. On its face, the statute does not contemplate allowing local authorities to impose even "reasonable" delays or additional costs. The intent of Section 207 would be undermined if local authorities could force antenna users to accept delayed access to, or increased costs for accessing, their over-the-air programming. The Commission should clarify that local restrictions on the placement of antennas cannot require consumers to suffer *any* delay, additional cost or signal degradation.

**D. The Commission's Rules Should Also Cover Transmitting Antennas**

Hughes asks the Commission to reinstate the prior preemption rule to cover transmitting antennas less than one meter in diameter that are placed in residential areas.<sup>16</sup> In earlier rounds in this proceeding, CEMA had urged the Commission to achieve essentially the same end by preempting state and local health and safety regulations relating to radio frequency

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<sup>14</sup> Philips/Thomson at 10-12.

<sup>15</sup> CEMA at 5 (even moderate degradation would impair a viewer's access to over-the-air programming).

<sup>16</sup> Hughes *passim*. WCA, *et al.*, also seek to expand the Commission's rule to encompass transmitting MMDS antennas. WCA, *et al.*, at 31-34.

radiation. As CEMA noted there, concerns about RF radiation are not uniquely or even primarily local or regional in nature. The regulation of harmful RF radiation is a uniquely federal responsibility. It is also one which the Commission has expressly undertaken in Section 1.1307(b) of its rules. CEMA therefore agrees with Hughes that the Commission should preempt state and local regulation of satellite transmit-antennas less than one meter in diameter.<sup>17</sup>

If the Commission fails to exercise its preemptive authority in this area, state and local ordinances could prevent the deployment of interactive DBS and similar services by placing unjustified restrictions on transmit-receive satellite antennas. Plainly, such a result would be inconsistent with the Commission's statutory goals, both with respect to communications generally and satellite communications in particular.

**III. TO REMAIN FAITHFUL TO THE STATUTE AND TO LIMIT CONFUSION, THE COMMISSION SHOULD CONSIDER RELYING EXCLUSIVELY ON THE WAIVER PROCESS TO DETERMINE WHAT LOCAL REGULATIONS ARE, AND ARE NOT, PERMISSIBLE**

Last spring, Commission adopted, what in CEMA's view was, an appropriate consumer-friendly rule concerning local restrictions on antenna placement. Local regulations governing such antennas were presumptively preempted. That presumption was subject to rebuttal for narrowly tailored health and safety reasons, or local authorities could also seek a

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<sup>17</sup> Reply Comments of Consumer Electronics Group of the Electronic Industries Association, IB Docket No. 95-59, at 6-7 (Aug. 15, 1995) (filed under CEMA's prior name).

waiver of the preemption rule to accommodate "highly specialized or unusual" circumstances.<sup>18</sup> CEMA argued then that, if anything, the Commission should further simplify and strengthen its prohibition against restrictions on the use of antennas by relying exclusively on the waiver process.

On reconsideration, BellSouth argues that the Commission is compelled by the plain meaning of the statute to adopt a simpler, stronger preemption rule along the lines CEMA previously advocated; *i.e.*, preempting all local restrictions, but allowing for exceptions by waiver. BellSouth quotes the fundamental doctrine of statutory interpretation: "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." BellSouth then notes that Section 207 admits of no blanket exceptions to the prohibition on restrictions on over-the-air devices; *e.g.*, whether or not those restrictions are predicated on safety or historic preservation grounds.<sup>19</sup>

CEMA concurs that "the starting point for interpreting a statute is the language of the statute itself."<sup>20</sup> Agencies are not at liberty to interpret a statute so as to contradict its plain language.<sup>21</sup> In this regard, Section 207 plainly states that any restriction that impairs a

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<sup>18</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>19</sup> BellSouth at 6-7 (quoting *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984)).

<sup>20</sup> *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1191 (D.C. Cir. 1985) (citations omitted).

<sup>21</sup> *K Mart Corp. v. Cartier, Inc.*, 108 S.Ct. 1811, 1819 (1988).

viewer's ability to receive over-the-air video services is to be prohibited by the Commission. Thus, BellSouth's argument is compelling -- the Commission is not at liberty to translate (as it has done in the *Order*) the statute's preemption of local restrictions into a preemption of all local restrictions *except* those addressing safety or historical concerns.

CEMA also concurs that the more appropriate approach is to review local restrictions in the context of the waiver process.<sup>22</sup> Proponents of local restrictions should be required to demonstrate (1) why the restriction is essential and (2) how the restriction in question accommodates Congress's interest in ensuring that the public has ready access to DBS technology. The waiver process will ensure that local restrictions are indeed narrowly tailored to promote legitimate local interests. In addition to distorting the plain language of the statute, the current rules threaten to encourage efforts to recast impermissible restrictions based on aesthetic concerns as restrictions based on health or safety considerations -- a result that Congress certainly did not intend.

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<sup>22</sup> BellSouth at Exhibit 1.

#### IV. CONCLUSION

As set forth herein and in CEMA's petition for reconsideration, the Commission should tighten and clarify its rules governing restrictions on DBS, MMDS and TV antennas. 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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November 20, 1996

**CERTIFICATE OF SERVICE**

I, Marc Berejka, do hereby certify that on this 20th day of November 1996 I have caused a copy of the foregoing to be served via postage paid first-class mail upon the persons listed below.

  
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