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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	IB Docket No. 95-59
Preemption of Local Zoning Regulation of Satellite Earth Stations	)	
	)	
In the Matter of	)	
	)	
Implementation of Section 207 of the Telecommunications Act of 1996	)	CS Docket 96-83
	)	
Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service	)	

COMMENTS OF DIRECTV, INC. IN SUPPORT OF ITS PETITION FOR RECONSIDERATION AND CLARIFICATION OF AUGUST 6, 1996 ORDER

On October 4, 1996, DIRECTV, along with other parties representing manufacturers and consumers of antennas used to deliver over-the-air video programming (collectively referred to as the "Petitioners"),[1] filed petitions requesting that the FCC reconsider and clarify its August 6, 1996 Order adopting Section 1.4000 of its rules, 47 C.F.R. § 1.4000.[2] Each of these parties proposed amendments and clarifications to the rule that will more effectively

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1 These parties include the Satellite Broadcasting and Communications Association ("SBCA"); BellSouth Corporation; Philips Electronics N.A. Corporation and Thomson Consumer Electronics, Inc. ("Philips/Thomson"); the Consumer Electronics Manufacturers Association ("CEMA"); The Network Affiliated Stations Alliance ("NASA"); and a consortium of Wireless Cable operators.

2 *See Preemption of Local Zoning Regulation of Satellite Earth Stations,* IB Docket 95-59, *Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service,* CS Docket 96-83, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, FCC 96-328 (August 6, 1996) (the *"August 1996 Order"*).

implement the Congressional mandate in Section 207 of the Telecommunications Act of 1996, which requires the Commission to prohibit all restrictions that "impair" the use of antennas used to receive over-the-air programming. *Not a single opposition to these petitions has been received by the Commission.*

The petitions focused on four primary issues for amendment or clarification of Section 1.4000: (a) the Commission must provide a more clear definition of the term "impair" to instruct both antenna users and local officials as to which regulations are prohibited; (b) the Commission should assert exclusive jurisdiction over disputes regarding the application of Section 1.4000; (c) the Commission should clarify the procedures to be followed by antenna users and local governments or homeowners associations if a local regulation is subject to dispute; and (d) the Commission should ensure that only local governments are allowed to enforce safety-related restrictions, and that those restrictions are *bona fide*. DIRECTV, the nation's largest provider of direct broadcast satellite ("DBS") service, requests that the Commission adopt these recommendations and amend Section 1.4000.

A. The Commission Must Define What Regulations Are "Reasonable"

In March 1996, the Commission adopted Section 25.104 of its rules, which employed a rebuttable presumption approach to the preemption of local governmental regulations of satellite antennas. In adopting Section 1.4000, which applies to regulations that affect not only satellite antennas but also MMDS and television antennas, the Commission abandoned this approach, deciding instead to prohibit only those regulations that "impair" the installation, maintenance or use of these antennas. The new rule does not, however, provide a workable definition of "impair"; it states only that a regulation "impairs" 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 a quality signal."[3]

This new "reasonableness" approach has several flaws. First, as noted by Philips/Thomson, the Commission has diverted from Congressional intent by using the word "reasonable" to modify "impair," which results in a definition of "impair" different from the statutory language.[4] Rather than simply prohibit all regulations that "damage" or "do harm to" the ability to install, maintain and use antennas (as adherence to the dictionary definition of "impair" would require), Section 1.4000 prohibits only those regulations that *"unreasonably"* harm such use, adding a subjective component to the analysis of such regulations. There is no support in the statute or legislative history for this approach.

Second, even if the Commission were to retain its reasonableness approach, the rule itself leaves the definition of "impair" subject to inconsistent interpretations, both by local authorities promulgating antenna regulations and by local courts reviewing challenges to those regulations. As DIRECTV noted in its Petition for Reconsideration, the Commission has stated consistently in this proceeding that it considers regulatory delay and costs to be unreasonable, as these will "discourage consumers from choosing particular antenna-based services."[5] The text of the rule itself does not, however, enunciate this policy by defining "impair" to include all regulatory delay and fees. The Commission should therefore amend Section 1.4000 to state that local governments and homeowners associations may not adopt regulations that delay the

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3 47 C.F.R. § 1.4000.

4 Petition of Philips/Thomson at 10-12.

5 Petition of DIRECTV at 6-8, citing *August 1996 Order* at ¶ 18; *see also* Petition of CEMA at 6.

installation of antennas, nor may they impose any fees or more than *de minimis* costs upon antenna users.

B. The Commission Should Assert Its Exclusive Jurisdiction

The Commission began this rulemaking in response to the Second Circuit's decision in *Town of Deerfield v. FCC,*[6] which determined that the FCC could not review judicial interpretations of its own regulations. By refusing to assert exclusive jurisdiction over disputes regarding the applicability of Section 1.4000 and make itself the forum of first resort, the Commission threatens to end this proceeding precisely where it began. All of the Petitioners have urged the Commission to reconsider its decision to allow local courts to hear disputes under Section 1.4000, so that consumers will have a low-cost and efficient forum in which to seek relief from unreasonable local restrictions.

As SBCA articulated in its Petition, the Commission clearly has the authority to assert exclusive jurisdiction in this arena, as Congress granted it such authority in Section 205(b) of the Telecommunications Act of 1996.[7] Section 207 also makes clear that Congress envisioned that the FCC would adopt a uniform, national response to the problems faced by antenna users, not allow local courts to create a "myriad of conflicting local rules."[8] Moreover, the paper review process adopted by the FCC is far more conducive to the expeditious and consistent resolution of these disputes than protracted and costly court litigation.[9]

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6 *Town of Deerfield v. FCC,* 992 F.2d 420 (2d. Cir. 1992).

7 Petition of SBCA at 5; Petition of Philips/Thomson at 2-3.

8 Petition of CEMA at 8.

9 *See* Petition of BellSouth at 18-19; Petition of SBCA at 6-7.

C. The Commission Should Adopt Clear Procedural Guidelines

While the Commission has clearly intended to protect antenna users from unreasonable regulations, the Petitioners have noted that the rule as written leaves consumers quite vulnerable in at least two respects. Section 1.4000 allows local jurisdictions to enforce non-safety or historic preservation-related regulations pending review, and to impose fines upon antenna users who challenge local regulations, both of which will discourage consumers from challenging unreasonable local regulations.

First, the Commission should make clear its determination in the August 1996 Order that only those regulations that are related to *bona fide* safety and historic preservation objectives may be enforced pending a challenge by an antenna user.[10] The rule as written is vague on this score. DIRECTV supports SBCA's proposal to add a new paragraph (g) to Section 1.4000 to ensure that local authorities cannot enforce other regulations pending Commission review.[11]

Second, the Commission should establish grace periods for consumers to come into compliance with local antenna regulations that have been determined to be reasonable by the Commission.[12] DIRECTV suggests that Section 1.4000 to amended to prohibit local jurisdictions from imposing any fines upon an antenna user until after that user has been given written notice of the decision finding the regulation to be reasonable and a 21-day grace period to come into

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10 *August 1996 Order* at ¶ 53.

11 Petition of SBCA at 12-14.

12 If, contrary to the suggestions of the Petitioners, the FCC refuses to exercise its exclusive jurisdiction over disputes arising under Section 1.4000, consumers should be given the same 21-day grace period to comply with judicial decisions.

compliance.[13] Likewise, while local authorities may enforce safety or historic preservation in accordance with their terms, no fines should be imposed upon antenna users for failing to comply with such regulations until the expiration of a 21-day grace period.[14]

D. The Exemption for Safety-Related Restrictions Should be Narrowly-Tailored

Section 1.4000(b) allows local governmental and non-governmental entities to adopt and enforce restrictions on antennas where "it is necessary to accomplish a *clearly defined* safety objective" that is "no more burdensome to affected antenna users than is necessary to achieve [this] objective[]."[15] While no Petitioner disagrees with the Commission's interest in allowing local jurisdictions to enforce *bona fide* safety regulations, the language of Section 1.4000 goes well beyond such a policy. Not only would Section 1.4000 permit local jurisdictions to adopt safety regulations that have little merit, but it also would allow homeowners associations, which do not typically regulate on the basis of safety, to adopt aesthetic regulations under the guise of safety concerns.

As BellSouth notes in its Petition, a safety regulation that is "clearly defined" and "no more burdensome than necessary" may still unreasonably impair reception if the safety objective itself is not reasonable.[16] For example, a local jurisdiction may decide that it is not willing to tolerate *any* risk to safety from people installing, maintaining or using antennas. Because any human endeavor is accompanied by some risk, a ban on antennas would "clearly define" the objective of eliminating all risk, and be no more burdensome than necessary. This,

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13 Petition of DIRECTV at 11-12.

14 *See id.* at 13.

15 47 C.F.R. § 1.4000(b) (emphasis supplied).

16 Petition of BellSouth at 15-16.

however, is clearly not a *bona fide* safety objective. DIRECTV agrees with BellSouth that the Commission should amend Section 1.4000 to permit only "compelling" or "*bona fide*" safety objectives.

In addition, the Commission should prohibit non-governmental entities, such as homeowners associations, from enforcing putative safety regulations against antenna users. These associations have no expertise in the realm of public safety, but have been established primarily for aesthetic and business considerations.[17] Refusing to allow non-governmental entities to regulate antennas on the basis of safety will not pose any harm to residents, either, as these antennas will still be subject to *bona fide* local governmental safety regulations.

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[17] *Id.* at 13-15.

E. Conclusion

While the initial rulemaking in this proceeding was hotly contested, not a single commenter has voiced disagreement with the revisions proposed by the Petitioners. The Commission therefore should amend and clarify Section 1.4000 as suggested by the Petitioners. Such revisions will make the rule more clear and enable the Commission to implement faithfully the intent of Congress.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Steven H. Schulman, certify that I have, this 2nd day of December, 1996, served by United States mail, postage prepaid, the Comments of DIRECTV in Support of its Petition for Reconsideration of the August 6, 1996 Order to the following:

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