

FCC MAIL SECTION

Federal Communications Commission

FCC 98-214

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Before the  
Federal Communications Commission  
Washington, D.C. 20554

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	)	

**ORDER ON RECONSIDERATION**

**Adopted: August 27, 1998**

**Released: September 25, 1998**

By the Commission:

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## I. INTRODUCTION

1. In this *Order on Reconsideration*, we grant in part and deny in part petitions for reconsideration of the Commission's implementation of Section 207 of the Telecommunications Act of 1996 ("1996 Act")<sup>1</sup> in its *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking ("Report and Order" and "Further Notice")* released on August 6, 1996.<sup>2</sup> Among other things, the *Report and Order* adopted a set of rules, 47 C.F.R. § 1.4000 (the "Section 207 rules"), that generally prohibit both governmental and nongovernmental restrictions that impair the installation, maintenance or use of over-the-air reception devices covered by Section 207 ("Section 207 devices"),<sup>3</sup> unless the restriction is necessary for safety or historic preservation reasons and is no more burdensome than necessary to achieve those objectives.<sup>4</sup>

<sup>1</sup>Pub. L. No. 104-104, 110 Stat. 114 (Feb. 8, 1996).

<sup>2</sup>See *In re Preemption of Local Zoning Regulation of Satellite Earth Stations, and In re 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*, IB Docket No. 95-59, CS Docket No. 96-83 (consolidated), 11 FCC Rcd 19276 (1996).

<sup>3</sup>Section 207 expressly covers over-the-air reception devices used to receive television broadcast signals ("TVBS"), multichannel multipoint distribution service ("MMDS"), and direct broadcast satellite services ("DBS"). In addition, in the *Report and Order*, we found that our rules implementing Section 207 should also cover: (1) any type of multipoint distribution service, including not only MMDS but also instructional television fixed service ("ITFS") and local multipoint distribution service ("LMDS"); (2) medium-power satellite services using antennas of one meter or less, even though such services may not be technically defined as DBS elsewhere in the Commission's rules; and (3) DBS antennas of over one meter in Alaska (smaller DBS antennas do not work in Alaska). *Report and Order* at paras. 28-32.

<sup>4</sup>See 47 C.F.R. § 1.4000, Restrictions Impairing Reception of Television Broadcast Signals, Direct Broadcast Satellite Services or Multichannel Multipoint Distribution Services, and amending 47 C.F.R. § 25.104, Preemption of Local Zoning of Earth Stations.

2. Seven petitions for reconsideration of the *Report and Order* were filed raising approximately 15 issues for reconsideration,<sup>5</sup> and, in light of these petitions for reconsideration, we raise on our own motion approximately three issues for reconsideration.<sup>6</sup> In this *Order on Reconsideration*, we

- (1) reaffirm our decision not to prohibit all restrictions on a viewer's ability to install, maintain and use Section 207 reception equipment;
- (2) decline to adopt petitioners' proposal that an exception be provided only for "compelling" safety objectives; but adopt a proposal to remove the appearance of a device from the factors we examine to determine the validity of a safety objective, and amend our Section 207 rules to examine how a safety objective treats other objects that pose a similar or greater safety risk;
- (3) decline to exclude nongovernmental entities from using the safety exception;
- (4) reaffirm our decision not to exercise exclusive jurisdiction over the enforcement of our Section 207 rules at this time;
- (5) reaffirm our decision that the permit requirements of the Building Officials & Code Administrators International, Inc. ("BOCA") code are reasonable safety restrictions;
- (6) decide that permit requirements designed to enforce placement restrictions are preempted by our rules;
- (7) decline to adopt a *per se* restriction on DBS antenna painting requirements;
- (8) adopt a proposal that a viewer be given at least 21 days during which to comply with a court or Commission order upholding a restriction before any fine or penalty may be imposed if the viewer's claim is not frivolous;
- (9) reaffirm our standard for signal degradation that qualifies as an impairment under the Section 207 rules;
- (10) reject the proposal that our Section 207 rules protect certain antennas not specifically listed in the Section 207 rules and decide that proponent of a new antenna must make a particular showing that the antenna should be covered by the Section 207 rules;

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<sup>5</sup>Five reply comments were filed. A list of the parties filing petitions for reconsideration and replies thereto is attached as Appendix A.

<sup>6</sup>See 47 U.S.C. § 405; 47 C.F.R. §1.108; *Central Florida Enterprises v. FCC*, 598 F.2d 37, 48 n.51 (D.C. Cir.), *cert. dismissed*, 441 U.S. 957 (1979).

- (11) adopt a proposal that our Section 207 rules protect antennas that have only transmission capability if these transmission antennas are used in conjunction with antennas that receive video programming;
- (12) decline to remove the protections of our Section 207 rules from districts eligible to be listed on the National Register of Historic Places, and amend our rules to protect historic properties as they are defined in the National Historic Preservation Act;
- (13) decline to adopt a proposal that we declare that no fee for installing a Section 207 device is reasonable and that we set a maximum cost that regulations may impose on installation that will impair, but decide that certain fees are unreasonable;
- (14) clarify that declaratory judgments and petitions for waivers must be served on all interested parties;
- (15) amend our Section 207 rules to reflect certain statements made in the Report and Order;
- (16) clarify the rights of a tenant under our Section 207 rules where the tenant has the permission of the property owner to install an antenna;
- (17) clarify that a viewer with a direct or indirect ownership interest in property over which the viewer exercises exclusive use is protected by our Section 207 rules even though the viewer may not exercise exclusive control over the property; and
- (18) clarify that an association or a landlord may prohibit viewers from installing individual Section 207 devices under our current Section 207 rules if the association or a landlord provides the tenant access to a central antenna facility that does not impair the viewers' rights under our Section 207 rules.

We address each of these issues separately below.

## II. ORDER ON RECONSIDERATION

### A. Commission discretion to not preempt all restrictions

#### 1. *Background*

#### 3. Section 207 provides in full:

Within 180 days after the date of enactment of this Act, the Commission shall, pursuant to Section 303 of the Communications Act of 1934, 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.

Section 303 authorizes the Commission to issue rules and regulations "as public convenience, interest, or necessity requires."<sup>7</sup>

4. Under this statutory authority, we promulgated Section 207 rules to preempt restrictions that "impair" a viewer's ability to install, maintain or use a covered reception device. Under our rules, a restriction impairs a viewer's Section 207 rights if it:

- (1) unreasonably delays or prevents installation, maintenance, or use [of a covered Section 207 reception device],
- (2) unreasonably increases the costs of installation, maintenance or use [of a covered Section 207 reception device], or
- (3) precludes reception of an acceptable quality signal [by the device].<sup>8</sup>

In addition, our rules create exceptions for restrictions that promote safety objectives and historic preservation.<sup>9</sup>

5. Two petitioners argue that by imposing a reasonableness standard as to whether a restriction impairs and by creating exceptions for safety and historic preservation, the Commission improperly failed to preempt all restrictions on viewers' ability to install, maintain or use a reception device covered by Section 207.<sup>10</sup> BellSouth argues that it was inappropriate for the Commission to weigh other interests, such as public safety, when considering which restrictions to preempt,<sup>11</sup> and Philips argues that the Commission impermissibly imposed a reasonableness standard on the level of impairment.<sup>12</sup> Both petitioners suggest that the Commission's exercise of discretion under Section 207 runs contrary to Congress' intent.<sup>13</sup>

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<sup>7</sup>47 U.S.C. § 303.

<sup>8</sup>47 C.F.R. § 1.4000(a).

<sup>9</sup>47 C.F.R. § 1.4000(b).

<sup>10</sup>BellSouth Corporation ("BellSouth") Pet. at 5; Philips Electronics Corporation et al. ("Philips") Pet. at 10 (proposing that the Commission adopt a definition of the term "impair" that means any burden on a viewer is prohibited, regardless of whether the burden is reasonable).

<sup>11</sup>BellSouth Pet. at 4-7.

<sup>12</sup>Philips Pet. at 10 ("Commission has impermissibly altered Congress' directive by imposing a reasonableness standard on the level of impairment of a viewer's ability to receive video programming.").

<sup>13</sup>See BellSouth Pet. at 6 ("If Congress intended the Commission to consider other factors [than those listed in Section 207], surely it would have included them in the statute itself or discussed them in its legislative history."); Philips Pet. at 10-11 ("Commission's rule goes beyond scope of authority granted by Congress because it impermissibly limits and modifies the plain language of the 1996 Act.").

## 2. Discussion

6. We decline to revise our Section 207 rules as urged by BellSouth and Philips. Section 207 directs the Commission to promulgate regulations pursuant to Section 303 of the Communications Act. While BellSouth argues that Section 303 merely provides the Commission with authority to promulgate regulations,<sup>14</sup> we note that Section 303 expressly authorizes the Commission to prescribe regulations "as public convenience, interest and necessity requires."<sup>15</sup> If petitioners were correct, there would have been no reason for Congress to direct the Commission to adopt rules at all because, under their argument, no discretion would have been granted to the Commission. Moreover, we note that the language of Section 207 does not require the Commission to prohibit *all* restrictions. We reaffirm our conclusion in the *Report and Order* that Congress, by explicitly invoking Section 303, intended that the Commission exercise its discretion when determining which restrictions should be preempted under Section 207.<sup>16</sup>

7. In addition, we believe that petitioners' proposal that the Commission should prohibit all restrictions that impair a viewer's ability to use a Section 207 reception device would lead to incongruous results. It cannot have been Congress' intent, nor can it be in the public interest, for our Section 207 rules to override legitimate safety concerns. Under petitioners' statutory reading, for instance, a local government would not be able to prohibit its citizens from installing wireless cable antennas in contact with electric power lines. In addition, if our rules did not allow an exception for the public interest embodied by the laws establishing the National Register of Historic Places, our rules might run afoul of those laws protecting properties listed on the Register.<sup>17</sup> Similarly, were the Commission not to establish some limits on the type of restrictions that will be preempted, the Commission might find itself in the position of striking down restrictions that in no way impair the viewer's ability to receive video programming.<sup>18</sup> For example, if the viewer can receive the same strength signal in the back yard as in the front yard, then it would be an unnecessary interference with the legitimate prerogatives of local governments to preempt a restriction limiting the placement of the reception device to the back yard.

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<sup>14</sup>BellSouth Pet. at 5 (Commission "went beyond" objectives of antenna preemption rule in its Section 207 rules by inferring that Congress did not mean to prevent Commission from considering local health and safety regulations under the "public convenience, interest or necessity" considerations of Section 303).

<sup>15</sup>47 U.S.C. § 303.

<sup>16</sup>*Report and Order* at paras. 6, 22.

<sup>17</sup>See National Historic Preservation Act of 1966, as amended, 16 U.S.C. § 470f; see also 16 U.S.C. § 470a(b)(3)(F) and (I).

<sup>18</sup>47 U.S.C. § 303.

## B. The Public Safety Exception

### 1. *The definition of the safety exception*

#### a. Background

8. Under our Section 207 rules, a restriction is permitted if "it is necessary to accomplish a clearly defined safety objective."<sup>19</sup> Several petitioners request that the Commission alter the rule to require a "compelling" safety objective.<sup>20</sup> Petitioners argue that, without a more stringent standard, cities, landlords, and homeowners' associations could disguise improper restrictions under the guise of safety objectives.<sup>21</sup> Wireless Cable Association International, Inc. ("WCA") argues that cable operators may require real estate developers to add purported safety restrictions ("safety boilerplate") to restrictive covenants and association restrictions in order to keep competitors out of the neighborhood rather than to meet genuine safety objectives.<sup>22</sup>

9. In scrutinizing safety objectives, the Consumer Electronics Manufacturers Association ("CEMA") recommends that, in order to ensure that appearance is not used as a pretext, the Commission not consider the appearance of items covered by a safety objective.<sup>23</sup> Under the current rule, CEMA points out that the Commission will permit safety restrictions so "long as they do not discriminate among devices that are comparable 'in size, weight and *appearance*.'"<sup>24</sup>

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<sup>19</sup>47 C.F.R. § 1.4000(b)(1).

<sup>20</sup>BellSouth Pet. at 15-16 ("The Commission has overlooked the simple requirement that a safety objective must be compelling, not merely clearly defined."); National Rural Telecommunications Cooperative ("NRTC") Reply Comments at 3; *see* Network Affiliated Stations Alliance ("NAS") Pet. at 3 (recommending that Commission require objective to be a justifiable objective).

<sup>21</sup>*See* NAS Pet. at 3; BellSouth Pet. at 16 (homeowner's associations may disguise aesthetic concerns as a safety restriction because a restriction may clearly define a safety restriction even if the stated objective lacks merit); NRTC Reply Comments at 3 (under the current definition a non-safety issue could be disguised as a safety objective). *But see* Community Associations Institute ("CAI") Reply Comments at 5 (asserting that many community association rules are adopted precisely to protect the safety, health, and well-being of residents).

<sup>22</sup>WCA Pet. at 24 ("If nongovernmental restrictions . . . can be enforced merely by wrapping them in pro-safety rhetoric, it will not take long for franchised cable operators . . . to develop boilerplate 'safety' language to immunize otherwise impermissible restrictions from preemption.").

<sup>23</sup>CEMA Pet. at 4 (by eliminating "appearance" 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").

<sup>24</sup>CEMA Pet. at 4 (*quoting* portions of 47 C.F.R. § 1.4000(b)(1) with emphasis).

**b. Discussion**

10. We decline to adopt the petitioners' proposal that we permit only compelling safety exceptions to our Section 207 rules. We believe that the factors we adopted for examining safety objectives address petitioners' concern that the safety exception will be abused. To fall within the safety exception, the safety objective must be "clearly defined"<sup>25</sup> and "serve legitimate safety goals,"<sup>26</sup> and the proponent of the safety restriction must prove that it is neither discriminatory nor more burdensome than necessary to achieve the safety objective.<sup>27</sup> In addition, if it appears, as petitioners allege, that real estate developers add "safety boilerplate" to restrictive covenants for anticompetitive reasons,<sup>28</sup> the Commission will weigh this factor heavily in determining whether the restriction is necessary, nondiscriminatory, and no more burdensome than necessary to accomplish the objective.

11. On reconsideration, we will adopt CEMA's proposal that the term "appearance" be deleted from the list of potential attributes that should be examined to determine whether a safety restriction is being applied in a discriminatory manner. Given the other factors the Commission will consider, appearance adds little to the assessment of whether a covered device poses a safety risk. Instead of examining whether a restriction applies to fixtures or devices of comparable appearance, we will amend our rules to examine whether a restriction would be applied to fixtures or devices posing a similar or greater safety risk as the Section 207 device. Our new rule will ask whether the restriction would be applied to the extent practicable in a non-discriminatory manner to other appurtenances, devices, or fixtures, considering factors such as size, weight, and safety risk.<sup>29</sup>

12. We note that, although we decided in the *Report and Order* that a safety objective must be "legitimate,"<sup>30</sup> the Section 207 rules do not reflect this decision; therefore, in order to bring the Section 207 rules into accord with the *Report and Order*, on our own motion, we will modify our rules to include the term "legitimate" in the definition of a safety objective.<sup>31</sup>

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<sup>25</sup>47 C.F.R. § 1.4000(b)(1).

<sup>26</sup>Report and Order at para. 24.

<sup>27</sup>47 C.F.R. § 1.4000(b)(3), (e); *see also Report and Order* at paras. 24-25.

<sup>28</sup>WCA Pet. at 24.

<sup>29</sup>See Appendix B for full text of new rule.

<sup>30</sup>See *Report and Order* at para. 24.

<sup>31</sup>In light of pending petitions for reconsideration in this proceeding, the Commission retains jurisdiction to reconsider its rules on its own motion. *See* 47 U.S.C. § 405; 47 C.F.R. § 1.108; *Central Florida Enterprises v. FCC*, 598 F.2d 37, 48 n.51 (D.C. Cir.), *cert. dismissed*, 441 U.S. 957 (1979).

## 2. *Nongovernmental safety restrictions*

### 1. **Background**

13. BellSouth and WCA request that the Commission prohibit nongovernmental entities, such as homeowners' associations, from establishing safety restrictions under our Section 207 rules.<sup>32</sup> WCA argues that a blanket preemption of all private, nongovernmental restrictions will implement Congress' clear intent in enacting Section 207.<sup>33</sup> WCA argues that nothing in the legislative history indicates that Congress intended to uphold homeowners' associations safety-related restrictions.<sup>34</sup> To the contrary, WCA argues that the legislative history provides that "[e]xisting regulations, including . . . restrictive covenants or homeowner's associations rules shall be unenforceable to the extent contrary to this section."<sup>35</sup> While governments may be entitled to deference in safety matters, WCA argues that private restrictions are generally put in place by real estate developers, who are not entitled to the same deference.<sup>36</sup> Similarly, BellSouth argues that private entities have no expertise with respect to safety issues<sup>37</sup> and that allowing both governments and private entities to control safety is redundant.<sup>38</sup> WCA argues that the Commission should not permit nongovernmental entities to impose safety restrictions that are more burdensome than those imposed by the government.<sup>39</sup>

14. In reply, CAI asserts that, contrary to petitioners' claims, Section 207 and its legislative history does not distinguish between governmental and nongovernmental restrictions, and that the right

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<sup>32</sup>BellSouth Pet. at 13-15; WCA Pet. at 21-25.

<sup>33</sup>WCA Pet. at 22, 25 (while proposing that nongovernmental entities be permitted to petition the Commission for a waiver in exceptional circumstances).

<sup>34</sup>*Id.* at 23 ("There is absolutely nothing in the legislative history of Section 207 that suggests that Congress intended to exempt a nongovernmental restrictive covenant or [homeowners association rule] from preemption merely because it purports to be safety-related.").

<sup>35</sup>*Id.* at 22 (*quoting* with omissions H.R. Rep. No. 204 at 123-24).

<sup>36</sup>WCA Pet. at 24 ("While state and local government may be entitled to deference [when invoking safety concerns], . . . private restrictions are generally put in place by real estate developers, who are certainly not entitled to the same deference.").

<sup>37</sup>BellSouth Pet. at 13.

<sup>38</sup>*Id.*

<sup>39</sup>WCA Pet. at 22.

of private entities to impose safety restrictions therefore should be upheld.<sup>40</sup> Moreover, CAI argues that association rules are adopted to protect the health and safety of its members.<sup>41</sup>

## 2. Discussion

15. We decline to revise our rules as proposed by WCA and BellSouth. We agree with CAI that Section 207 and its legislative history do not distinguish between governmental and nongovernmental regulations.<sup>42</sup> Moreover, as noted above, Section 303 permits the Commission to consider the public interest, convenience and necessity in fashioning our rules under Section 207. We still believe, as we stated in the *Report and Order*, that Section 303 permits the Commission to consider and minimize the impact of our rules on local associations and governments.<sup>43</sup> In exercising our discretion under Section 303 to consider local concerns, we agree with CAI that community associations have legitimate concerns about the health and safety of their members.<sup>44</sup> If we did not permit private safety-based restrictions we would effectively be preempting portions of state tort liability law. Tort law provides property managers and their insurance carriers with a legitimate interest in safety matters and gives them an incentive to be professional in the imposition of restrictions. Safety standards associated with the insurance process are a traditional and respected means of protecting the public. Because homeowners' associations by definition are focused on the problems that face a particular area or development, we believe that they are in a unique position to assess the safety needs of their individual communities.

### C. Exclusive jurisdiction over Section 207 enforcement

#### 1. Background

16. In the *Report and Order*, we adopted a rule providing concurrent jurisdiction to the Commission and to courts of competent jurisdiction to hear petitions for a declaratory ruling to determine whether a particular restriction is permissible or prohibited under our Section 207 rules.<sup>45</sup> In response to arguments that we should assert exclusive jurisdiction, we stated that "we see no reason to foreclose the

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<sup>40</sup>CAI Reply Comments at 5 ("Congress equated state and local governmental restrictions with nongovernmental restrictions.").

<sup>41</sup>*Id.*

<sup>42</sup>*Id.*

<sup>43</sup>*Report and Order* at para. 6 ("[Section 207] also permits the Commission to minimize any interference caused to local governments and associations as a result"); *see also id.* at 22.

<sup>44</sup>CAI Reply Comments at 5.

<sup>45</sup>*Report and Order* at para. 58; *see* 47 C.F.R. §1.4000(d) ("Parties may petition the Commission for a declaratory ruling under Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2., or a court of competent jurisdiction, to determine whether a particular restriction is permissible or prohibited under this rule.").

ability of parties to resolve issues locally."<sup>46</sup> We did note that, if a case were brought before a local court, we believed that the court would look to our expertise and, "as appropriate, refer to us for resolution questions that involve those matters that relate to our primary jurisdiction over the subject matter."<sup>47</sup> We noted that we did not believe that Congress had mandated that we exercise exclusive jurisdiction or suggested that courts could not adequately handle Section 207 issues.<sup>48</sup>

17. Several petitioners request that the Commission reconsider its decision not to exert exclusive jurisdiction over the enforcement of its Section 207 rules.<sup>49</sup> First, Philips argues that Section 207 directs the Commission to promulgate regulations pursuant to its authority under Section 303, and that Section 303(v) mandates that the Commission shall "[h]ave exclusive jurisdiction to regulate the provision of direct-to-home satellite services."<sup>50</sup> Philips argues that this provision is significantly different from other parts of the 1996 Act in which Congress explicitly granted concurrent jurisdiction.<sup>51</sup>

18. Second, several petitioners argue that if local courts are permitted to give their opinion on the application of the Commission's rule, a patchwork of inconsistent decisions will develop.<sup>52</sup> Philips cites Section 207's legislative history which states that "[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."<sup>53</sup> Philips argues that the Commission's failure to exercise exclusive jurisdiction ignores this mandate and

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<sup>46</sup>*Report and Order* at para. 58.

<sup>47</sup>*Id.*

<sup>48</sup>*Id.*

<sup>49</sup>Philips Pet. at 2-10; BellSouth Pet. at 18-19; CEMA Pet. at 8-9; NAS Pet. at 6-9.

<sup>50</sup>Philips Pet. at 2-3 ( *citing* 47 U.S.C. § 303(v)).

<sup>51</sup>Philips Pet. at 6 (for example, in Section 332(c)(7), concerning the placement of facilities for certain mobile services, Congress provided, "Any person adversely affected by any final action or failure to act by a State or local government . . . that is inconsistent with this subparagraph, may . . . commence an action in any court of competent jurisdiction."). In fact, the courts have exclusive jurisdiction over challenges under this section unless the complaint concerns a regulation based on the environmental effects of RF emissions.

<sup>52</sup>BellSouth Pet. at 18 (" [A]llowing local courts to interpret and apply Section 1.4000 will almost certainly result in a chaotic patchwork of decisions variously interpreting Section 1.4000 that ultimately would frustrate the intention of Congress."); CEMA Pet. at 8 (allowing local courts to hear claims "will exacerbate consumer confusion and frustration, and will subvert Congress's goals by creating a patchwork quilt of local rules"); NAS Pet. at 7-8 ("This could lead to a patchwork of interpretation that differs from state to state, or even from town to town."); WCA Pet. at 26 (arguing that the record compiled in International Bureau Docket No. 95-59 showed many inconsistent state court rulings with respect to C-Band antennas).

<sup>53</sup>Philips Pet. at 4 (*quoting* H. Rep. No. 104-204 (Part 1), 104th Cong., 1st Sess. 123 (1995) (emphasis added)).

prevents a unified, national system of rules from developing.<sup>54</sup> Moreover, some petitioners argue that if courts issue decisions that are inconsistent with the way the Commission views the rule, the Commission will have no opportunity to harmonize them.<sup>55</sup> Petitioners further assert that there is no reason to believe that courts will refer cases brought to them to the Commission or even that the courts have the authority to refer cases to the Commission.<sup>56</sup>

19. Third, petitioners argue that not enough money is at issue to make it worthwhile for the viewer to respond to a case in court.<sup>57</sup> Petitioners argue that if a viewer is sued in a local court, he or she will likely relinquish the antenna rather than incur the expenses associated with defending a lawsuit.<sup>58</sup> Unlike the Commission's paper hearing, where the petitioner and respondent do not even need to retain attorneys, petitioners assert that court procedures will involve hearings and more formal procedures.<sup>59</sup> Furthermore, even if cases are referred to the Commission, petitioners argue that Commission processes will supplement the court case and, in the end, increase costs.<sup>60</sup>

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<sup>54</sup>Philip Pet. at 5 ("By permitting concurrent jurisdiction over Section 207 disputes, the Commission not only destroys the integrity of this statutory scheme, but undermines a fundamental purpose of the Act.").

<sup>55</sup>SBCA Pet. at 8-9 (arguing that the holding in *Town of Deerfield, New York v. FCC*, 992 F.2d 420, 428 (2d Cir. 1993) "will prevent the Commission from having the opportunity to rule on the legitimacy of the local restriction"); Philips Pet. at 7 ("[O]nce disputes arising out of Section 207 are brought in a local court of competent jurisdiction, the judgment of that court is likely to have a preclusive effect and will not be reviewable by the Commission.") (citing *Deerfield*).

<sup>56</sup>DIRECTV Pet. at 15-16 (nothing in Section 1.4000 provides courts with notice that the FCC expects such a referral); WCA Pet. at 26 (there is no assurance that local courts will accept the Commission's invitation to refer cases to the Commission); NAS Pet. at 7 (arguing that prior to the enactment of Section 207, the record does not suggest that courts referred matters regarding preemption of restrictions on satellite dishes to the Commission).

<sup>57</sup>DIRECTV Pet. at 16 ("Today's antenna users have no economic incentive to engage in litigation before a court.").

<sup>58</sup>SBCA Pet. at 6-7 ("Faced with this choice [between litigation and giving up their satellite dish], most consumers will forgo the legal battle and give up their efforts to receive programming via" direct-to-home satellite equipment); Philips Electronics at 9 ("Consumers may lack the resources and wherewithal to challenge local authorities where the cases are litigated in state courts and involve steep attorney's fees.").

<sup>59</sup>Bell South Pet. at 19 ("[U]nlike the 'paper hearing' procedure established by the Commission for Section 1.4000 matters, a local proceeding -- even if properly conducted -- would invariably involve far greater costs to the parties to the extent that such proceedings include a hearing or other formal procedure.").

<sup>60</sup>SBCA Pet. at 7 ("For those hardy few who choose to continue to fight in court . . . the Commission's processes will supplement rather than replace the court battle.").

20. Petitioners also express concern that, unlike the Commission, local courts have no interest in advancing the purpose of Section 207.<sup>61</sup> Petitioners argue that local authorities and landlords will go to local courts because they believe local courts are the more favorable forums.<sup>62</sup> BellSouth claims that, as a result of their local biases, local courts will disrupt business.<sup>63</sup>

21. In reply, CAI argues that concurrent jurisdiction should be maintained.<sup>64</sup> CAI asserts that requiring parties to file papers in Washington, D.C., places administrative burdens on associations outside Washington.<sup>65</sup> By contrast, CAI states that telecommunications providers have experience with declaratory judgments before the Commission and have access to knowledgeable counsel and records.<sup>66</sup> In addition, CAI states that community associations are creatures of state law, and if the Commission exercises exclusive jurisdiction, it would be required to master every state's law governing associations.<sup>67</sup>

## 2. Discussion

22. Most of petitioners' arguments were made, considered, and rejected in the *Report and Order*.<sup>68</sup> Nevertheless, we will briefly address them here. First, we disagree that the Communications Act requires us to exercise exclusive jurisdiction over disputes. Section 303(v) states that the Commission shall "[h]ave exclusive jurisdiction to regulate the provision of direct-to-home satellite services."<sup>69</sup> In resolving disputes involving direct-to-home satellite services, courts are not "regulating" those services. Rather they are applying the relevant provisions of the Communications Act and our regulations to particular disputes. We therefore reaffirm our decision that we have the discretion to decide that it is in the public interest at the current time to share jurisdiction to adjudicate disputes with the courts.<sup>70</sup>

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<sup>61</sup>NAS Pet. at 8 ("Adjudicating antenna placement restrictions in courts is extraordinarily unfriendly and burdensome to consumers."); *see also id.* at 9 ("Any contrary result [to exclusive Commission jurisdiction] plays into the hands of those parties with no official or demonstrable interest in advancing the objective of Section 207.").

<sup>62</sup>SBCA Pet. at 4 ("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.").

<sup>63</sup>*Id.*; *see* BellSouth Pet. at 19.

<sup>64</sup>CAI Reply Comments at 1.

<sup>65</sup>*Id.* at 3 (stating that, for example, the Code of Federal Regulations and public records are not readily available in most libraries).

<sup>66</sup>*Id.*

<sup>67</sup>*Id.*

<sup>68</sup>*Report and Order* paras. 56-58.

<sup>69</sup>Section 303(v).

<sup>70</sup>*See Report and Order* at paras. 57-58.

23. In our discretion, we reject, as we did in the *Report and Order*, petitioners' concern that a patchwork of court decisions will develop to destroy Congress' unified scheme.<sup>71</sup> We believe that the uniform scheme envisioned by Congress was established by our Section 207 rules. We reiterate what we stated in our *Report and Order*:

We have no basis to believe, and Congress has not suggested, that disputes and controversies arising over such restrictions should or must be resolved by this agency alone or cannot be adequately handled by recourse to courts of competent jurisdiction.<sup>72</sup>

In this regard, we did not, and do not, believe that we should "foreclose the ability of parties to resolve issues locally."<sup>73</sup> We retain discretion to provide, on our own motion or in response to a petition, interpretive guidance for the future based on our expertise in developing and applying the statute and the rules.<sup>74</sup>

24. Furthermore, we reiterate our statement made in the *Report and Order*<sup>75</sup> that a court may refer an issue to us under the doctrine of primary jurisdiction,<sup>76</sup> which promotes proper relationships between courts and administrative agencies<sup>77</sup> and is "specifically applicable to claims cognizable in court that contain some issue within the special competence of an administrative agency."<sup>78</sup> Where cases involve the determination of novel issues, we encourage courts to refer those issues to the Commission.

25. We do not discount the expense associated with court proceedings, and, if a viewer is concerned about the cost of court proceedings, our rules attempt to alleviate this concern by giving the viewer an opportunity to seek assistance from the Commission by filing a petition for a declaratory ruling.<sup>79</sup> We recognize that the filing of a petition with the Commission may not preclude the respondent in the Commission proceeding from unnecessarily increasing litigation costs by filing in a local court.

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<sup>71</sup>*Id.* at para. 56.

<sup>72</sup>*Id.* at para. 58.

<sup>73</sup>*Id.*

<sup>74</sup>See *Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984) ("a court may not substitute its own construction of a statutory provision for a reasonable interpretation made" by the agency charged with administering the statute).

<sup>75</sup>*Report and Order* at para. 58.

<sup>76</sup>See, e.g., *Writers Guild of America, West, Inc. v. American Broadcasting Co., Inc.*, 609 F.2d 355, 363-66 (9th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980) (district court should have stayed the action before it and referred the plaintiffs' claims to the FCC because the FCC had primary jurisdiction over the matter).

<sup>77</sup>*Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303 (1976) (citation omitted).

<sup>78</sup>*Reiter v. Cooper*, 507 U.S. 258, 268 (1992).

<sup>79</sup>47 C.F.R. § 1.4000(d).

In order to avoid court litigation costs, the petitioner in the Commission proceeding has a viable alternative in requesting that the court allow the Commission to resolve the dispute under the doctrine of primary jurisdiction.

26. Petitioners have not shown that concurrent jurisdiction is not generally functioning as we intended. Nevertheless, we note that we have the prerogative to exercise exclusive jurisdiction over Section 207 disputes and may do so in the future if concurrent jurisdiction proves unworkable. We believe it premature, however, to do so at this time.

#### D. Reliance on the BOCA Code restrictions

##### 1. Background

27. In the *Report and Order*, we adopted rules that reflected the Building Officials & Code Administrators International, Inc. ("BOCA") code permit provisions on antenna height and set back requirements because we believed them to be safety-related.<sup>80</sup> In particular, we stated that we did not believe it to be unduly burdensome to require an antenna user to obtain a permit if he or she intends to install an antenna that would extend more than twelve feet above the roofline, or that was taller than the distance between the antenna and the lot line.<sup>81</sup> We quoted with approval BOCA's exemption that antennas that were no taller than the distance between the antenna and the lot line would not require a permit.<sup>82</sup> Some petitioners ask the Commission to reconsider these rulings regarding the BOCA code's permit requirements.<sup>83</sup>

28. BellSouth and WCA argue that the Commission had insufficient evidence to determine that the BOCA restriction on antennas exceeding 12 feet in height is reasonable.<sup>84</sup> WCA argues that the 12 feet limitation was adopted 40 years ago, long before wireless cable was invented, and that there are now less onerous mechanisms for ensuring safety.<sup>85</sup> For instance, rather than issuing a permit for each

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<sup>80</sup>*Report and Order* at para. 37. The BOCA code is a building code that has been adopted in seventeen states and includes provisions for antenna installation. *Id.* at para. 34. Because masts are often a necessary part of an MMDS receiving device, we included masts in our definition of MMDS antennas, thus subjecting MMDS masts to these BOCA restrictions. *Id.* at para. 37.

<sup>81</sup>*Id.*

<sup>82</sup>*Id.* at para. 37 n.101.

<sup>83</sup>BellSouth Pet. at 8-10; WCA Pet. at 12-18.

<sup>84</sup>BellSouth Petition at 8-9 ("The record provides no reasoned basis for restricting all antennas to twelve feet absent a permit and such a requirement is thus arbitrary."); WCA Pet. at 12-13 (arguing that no one alleged or demonstrated that requiring a permit for the installation of an antenna exceeding 12 feet is no more burdensome than necessary to assure the safe installation of a wireless cable antenna).

<sup>85</sup>WCA Pet. at 14.

installation, local authorities could approve an operator's installation procedures in advance.<sup>86</sup> In the alternative, WCA argues that even if the Commission were to find that case-by-case permits are appropriate for antennas over 12 feet, the Commission should scrutinize whether the permit process is intended to raise revenues or truly to advance public safety.<sup>87</sup>

29. Moreover, with respect to the BOCA height restriction, WCA argues that there is no reason to be concerned about wireless cable antennas that are installed professionally.<sup>88</sup> WCA argues that wireless antennas are safer than DBS antennas because wireless antennas are installed professionally while DBS antennas are usually installed by the viewer. WCA argues that upholding a permit requirement under these circumstances for wireless antennas is discriminatory because such a requirement is not required for DBS antennas.<sup>89</sup>

30. Regarding the setback requirement, WCA argues that the Commission did not understand the BOCA code when it stated, "[W]e believe that the BOCA code guideline regarding permits for setbacks is safety-based, is reasonable, and does not impose an unreasonable burden."<sup>90</sup> WCA asserts that the BOCA set back restriction does not discuss permits, but rather flatly forbids the placement of the antenna where the height of the antenna is longer than the distance between the antenna and the lot line.<sup>91</sup> Because the BOCA setback restriction may operate as a *per se* bar on installation, WCA argues that it can only be enforceable as a safety restriction under our Section 207 rules where the proponent has demonstrated that the restriction is nondiscriminatory and is no more burdensome than necessary to achieve the safety objective.<sup>92</sup> WCA argues that nothing in the record suggests that anyone has tried, much less succeeded, to carry this burden.<sup>93</sup> To the contrary, WCA argues that the BOCA setback

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<sup>86</sup>*Id.* at 15 ("The local authorities could pre-approve the procedures that are generally employed in order to avoid the need for a case-by-case permit requirement except where customized installations are required.").

<sup>87</sup>*Id.* at 16 ("Before the Commission can determine whether a local permit requirement is necessary to accomplish a clearly defined safety objective and therefore entitled to an exemption . . . the Commission has to examine whether the safety objective is truly advanced by the specific local permit process.").

<sup>88</sup>*Id.* at 14 (building authorities can safely rely upon professional installation of properly pre-engineered antennas in accordance with specifications up to some height greater than 12 feet without jeopardizing safety concerns) (citing Declaration of David B. Hattis (hereinafter "Hattis Declaration"), President of Building Technology, Inc., October 4, 1996, at para. 10).

<sup>89</sup>*Id.* at 18 ("[T]he BOCA model code is discriminatory -- professionally installed wireless cable antennas that present little danger of causing damage are subject to a burdensome permit process while potentially more dangerous DBS antennas can be installed by 'do it yourself' homeowners without any governmental review.").

<sup>90</sup>*Id.* at 8 (citing *Report and Order* at para. 37).

<sup>91</sup>*Id.*

<sup>92</sup>*Id.* at 9.

<sup>93</sup>*Id.*

requirement would not pass muster under the Commission's standard. First, WCA argues that the BOCA setback requirement is discriminatory because it does not apply to flagpoles or to signs which may be installed right on the lot line.<sup>94</sup> WCA argues that wireless antennas are no more likely to collapse onto adjoining structures than flagpoles or rooftop signs and, accordingly, that no valid safety-related reason exists for treating wireless cable antennas more harshly.<sup>95</sup>

31. WCA also states that there are less burdensome means to obtain BOCA's stated objective of avoiding a collapse of the antenna onto neighboring property.<sup>96</sup> For instance, WCA proposes: (1) establishment of appropriate technical standards designed to ensure safe installations; (2) government pre-approval of the general procedures employed by a wireless cable operator to install its antennas; and/or (3) government reliance on experts at places such as the BOCA Evaluations Services, Inc. or National Evaluation Service to pre-approve the standards.<sup>97</sup>

32. While most petitioners argue against reliance on the BOCA code, NAS requests that the Commission adopt all of the safety provisions relating to antennas of a single building code. Otherwise, NAS argues that it will be difficult for local governments to determine which regulations are permissible.<sup>98</sup>

## 2. Discussion

33. The principal challenge to the *Report and Order* regarding the BOCA code is that its permitting process for antennas exceeding 12 feet in height above the roof is based on insufficient evidence that it reflects legitimate safety concerns. In adopting the present rules in the *Report and Order*, we concluded, based on the evidence available to us, that tall antennas pose a safety concern that local authorities should be allowed to address through local restrictions including a building permit, prior approval type of process. In the absence of superior information from those engaged in the installation or use of antennas, we accepted the widely used and long established BOCA criteria as the best available cut-off point.<sup>99</sup> At the same time we did not intend this 12 foot height standard to be an absolute limit but rather simply a trigger for an application process. We invited parties to work with BOCA to develop code provisions that would apply to taller masts and obviate the need for a permit process.<sup>100</sup> Although

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<sup>94</sup>*Id.* at 11 (citing Hattis Declaration at paras. 5-6).

<sup>95</sup>*Id.* (citing Hattis Declaration at paras. 5-6).

<sup>96</sup>*Id.* at 11-12.

<sup>97</sup>*Id.*

<sup>98</sup>NAS Pet. at 5-6, n.5 (urging the Commission to specify an existing code containing acceptable regulations to avoid subsequent modifications of codes intended to frustrate the purposes of Section 207).

<sup>99</sup>*Report and Order* at para. 34.

<sup>100</sup>*See Report and Order* at para. 37 n.100 ("It would not be inappropriate for parties to work with BOCA to develop a uniform model code that would apply to taller masts and obviate the need for a permit.").

we continue to have concerns that the BOCA process should be updated to take into account current information as to the realistic safety issues associated with antenna installations, there is not adequate information in the record to establish a generally acceptable alternative that addresses the relevant safety concerns. We therefore reaffirm our conclusion in the *Report and Order* that the BOCA code provisions regarding permits for height and setback requirements qualify as legitimate safety objectives under our Section 207 rules. We reiterate, however, that our acceptance of the BOCA code is limited to the permit requirement and does not constitute a blanket *per se* prohibition of masts of a particular height.

34. We decline to adopt WCA's proposed alternatives to a permit process. The record is inadequate for the Commission to establish the parameters for procedures to enforce safety objectives. We do think that the intent of Section 207 is best served by more flexible installation standards than those provided by the BOCA code that would obviate the need for a permit process and reflect universal standards. To date, efforts by BOCA and WCA to work together have proven unfruitful.<sup>101</sup> While we are prepared to adjudicate the current BOCA standard on a case by case basis to determine whether it impairs an individual viewer's installation, maintenance or use of a Section 207 reception device, we are concerned that the overall issues will not be adequately resolved through case by case challenges by individuals, and we urge BOCA and WCA to renew their efforts to develop a workable standard.

35. Based on the record before us, we disagree with WCA that BOCA discriminates by requiring permits for wireless cable antennas but not for DBS antennas. Under the new standard adopted in this *Order*, safety restrictions must not discriminate between fixtures that are "comparable in size and weight and pose the same or a similar safety risk as" the device that is restricted.<sup>102</sup> We believe that a local authority could reasonably conclude that a mast exceeding twelve feet with a wireless cable antenna attached to the top, or a television antenna exceeding twelve feet, might pose a different safety risk than an 18 inch DBS antenna that is not on a mast. Similarly, we believe that a local authority could reasonably conclude that a television antenna or wireless cable antenna might pose a different safety risk than a flagpole, even if all three objects exceed twelve feet in height. To the extent that a local authority applies BOCA in a discriminatory manner by not requiring permits for items that pose similar or greater safety risks, such discrimination may be challenged in a particular case, and would, if not justified, be deemed impermissible under the rules.

36. Regarding WCA's disagreement with our conclusion in the *Report and Order* that BOCA requires a permit where the height of an antenna is longer than the distance between the antenna and the lot line<sup>103</sup> and WCA's argument that instead BOCA flatly forbids the installation under such circumstances, even if WCA's interpretation is correct, our rules would preempt the BOCA requirement as interpreted by WCA. In the *Report and Order*, we specifically stated that "we would find unenforceable any

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<sup>101</sup>WCA proposed to BOCA for adoption an installation method for a 30 foot antenna that WCA asserts would be as safe as BOCA's current 12 feet above the roof standard, but BOCA denied the proposal. WCA asserts that BOCA failed to give the proposal adequate consideration. WCA *ex parte* presentation (May 13, 1997).

<sup>102</sup>See Appendix B at para. (b)(1). Note that 47 C.F.R. § 25.104, which governs satellite antennas larger than one meter in diameter, provides different rules for pole mounting than Section 1.4000 of our rules.

<sup>103</sup>See *Report and Order* at para. 37 n.101 and discussion therein.

restriction that establishes specific *per se* height limits."<sup>104</sup> If a local authority created a *per se* bar to antennas over a certain height, the restriction would be prohibited.

37. Regarding NAS's request that the Commission adopt the provisions of a single building code, we have already done so by giving preliminary approval to the provisions contained in BOCA. We agree with NAS that having one building code will lead to less confusion for viewers, local governments and service providers.

38. In addition, while the *Report and Order* includes masts in its definition of MMDS antennas, the Section 207 rules do not.<sup>105</sup> To bring the Section 207 rules into accord with the *Report and Order*, on our own motion, we will modify our rules to include masts in the definition of MMDS antennas.

## **E. Prohibition of permit requirements**

### **1. Background**

39. Several petitioners ask the Commission to adopt a rule prohibiting all permit requirements or to establish strict time periods after which a permit must be approved.<sup>106</sup> DIRECTV argues that the rules should state that any regulations that require the approval of a third party prior to installation are *per se* unreasonable.<sup>107</sup> BellSouth argues that the Commission's ruling that permits required for safety reasons be processed "expeditiously" is vague and asserts that the Commission should either prohibit permits altogether or set a precise limit on the number of days an entity may take to process a permit.<sup>108</sup> In addition, DIRECTV argues that permit requirements discriminate against DBS in favor of traditional cable service which generally does not require a permit,<sup>109</sup> and BellSouth argues that permit requirements disadvantage wireless cable companies because permits are generally not required for cable and DBS.<sup>110</sup>

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<sup>104</sup>*Report and Order* at para. 37.

<sup>105</sup>"Because masts are very often a necessary part of an MMDS receiving device, we include them in our definition of MMDS antennas." *Report and Order* para. 37.

<sup>106</sup>BellSouth Pet. at 10-13; DIRECTV Pet. at 7-9; United States Satellite Broadcasting Company, Inc. ("USSB") Reply Comments at 4-5.

<sup>107</sup>DIRECTV Pet. at 8; *see also* USSB Reply Comments at 4.

<sup>108</sup>BellSouth Pet. at 11-13; *see Report and Order* at para. 37.

<sup>109</sup>DIRECTV Pet. at 7, n.10.

<sup>110</sup>BellSouth Pet. at 11, n.27 (arguing that wireless cable operators would suffer a competitive disadvantage at the hands of traditional cable and DBS systems, who generally are not subject to a permitting process, because "potential customers will choose the [provider] they can have 'now'").

40. DIRECTV argues that any delay at all in the DBS market is unreasonable.<sup>111</sup> According to DIRECTV, DBS providers are successful competitors to cable, in part, because a viewer may purchase and install a DBS antenna on the same day, whereas to obtain cable there may be delays in installations. Requiring a DBS viewer to obtain a permit unreasonably delays the viewer's installation and destroys the DBS provider's competitive advantage.<sup>112</sup>

## 2. Discussion

41. We generally reaffirm our decision in the *Report and Order* that permit requirements are permissible to ensure compliance with restrictions that serve safety or historic preservation objectives.<sup>113</sup> Outside of these contexts, we clarify that blanket permit requirements (i.e., requiring any viewer who wants to install an antenna to obtain a permit) are generally impermissible because they cast too wide a net. By their nature, blanket permit requirements burden not only those who would otherwise place their reception device in an improper location, but also those whose placement would be entirely proper. For this latter category of viewers, a blanket permit requirement imposes unreasonable delay and expense on their ability to install, maintain or use a Section 207 reception device. Under our Section 207 rules, it is an unreasonable delay to subject viewers who install reception devices in lawful locations to the delay and expense of obtaining a permit in order to protect against the potential illegal actions of others.<sup>114</sup> By contrast, in the case of safety and historic preservation, the interests at stake are so significant that a shift in the permit framework is justified. This is consistent with the context of our rules that restrictions based on safety or historic preservation objectives are enforceable even if they impair a viewer's ability to install, maintain or use a Section 207 reception device.

42. We reject BellSouth and DIRECTV's argument that our Section 207 rules improperly harm their competitive positions. Section 207 mandates that the Commission remove restrictions that impair a viewer's ability to receive certain video programming services, not to attempt to calibrate the competitive advantages among various multichannel video programming providers. The Section 207 rules implement Congress' directive.

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<sup>111</sup>DIRECTV Pet. at 7.

<sup>112</sup>*Id.* ("Mass-marketed antenna-delivered services such as DIRECTV are successful competitors to cable television in part because they allow the consumer to purchase the system and install it on the same day.").

<sup>113</sup>*Report and Order* at para. 17.

<sup>114</sup>On this issue, we hereby affirm the decisions previously made by the Cable Bureau. See *In re Michael J. MacDonald*, DA-97-2189, slip op. at para. 27 (Oct. 14, 1997); *In re CS Wireless Systems, Inc.*, DA 97-2187, slip op. at para. 19 (Oct. 14, 1997); *In re Star Lambert and SBCA*, DA 97-1554, slip op. at paras. 23-27 (July 22, 1997).

**F. Painting of reception devices****1. Background**

43. Several petitioners seek reconsideration of the Commission's policy set forth in the *Report and Order* that "a requirement to paint an antenna in a fashion that will not interfere with reception so that it blends into the background against which it is mounted would likely be acceptable."<sup>115</sup> According to BellSouth, the Commission did not have an adequate record on which to assert that an antenna could be painted without impairing reception.<sup>116</sup>

44. Similarly, WCA argues that painting requirements may impermissibly impair the installation, maintenance and use of a wireless cable antenna in several ways: (1) a requirement to use dark colored paint might destroy the antenna because the antenna and its attendant parts require light colored paint to reduce and dissipate heat;<sup>117</sup> (2) a requirement to use optically reflective paint might destroy the antenna because the sun might become focused on the assembly and overheat or destroy it;<sup>118</sup> (3) a requirement that the viewer paint the antenna with the same paint that was used to paint the house could destroy reception because paint used on a wireless antenna must be completely transparent to RF energy or completely reflective and house paint does not meet these requirements;<sup>119</sup> (4) a requirement that an antenna be covered by a radome will increase the cost because if a conductive coating is required on the antenna, then the coating on the radome must always be nonconductive;<sup>120</sup> (5) a requirement to duplicate the wide array of colors in which houses are painted would require custom painting at increased costs, because the industry could not stock the wide array of colored antennas that would be required;<sup>121</sup> and (6) because most antennas are coated by the manufacturer so that they may be stored for extended

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<sup>115</sup>BellSouth Pet. at 14; WCA Pet. at 19-20; see *Report and Order* at para. 19.

<sup>116</sup>BellSouth Pet. at 14 ("The Commission simply has no adequate record to opine on whether an antenna could, in fact, be painted without impairing antenna performance.").

<sup>117</sup>WCA Pet. at 19.

<sup>118</sup>*Id.*

<sup>119</sup>*Id.* at 20.

<sup>120</sup>*Id.*

<sup>121</sup>*Id.* WCA argues that, as a result, the industry could either develop a central painting facility (increasing overhead and the number of truck rolls necessary to complete the installation) or have each installer custom paint antennas as necessary. Both of these methods will greatly increase the time and cost of each installation. Without examining the cost of painting and maintaining paint on an antenna, WCA argues that the Commission's conclusions are arbitrary. *Id.*

periods of time, painting requirements may require that some manufacturers strip and repaint antennas as they are sold.<sup>122</sup>

## 2. Discussion

45. We decline to reconsider the statement in the *Report and Order* regarding the painting of antennas. On its face, the statement only applies to painting requirements "that will not interfere with reception."<sup>123</sup> If complying with a painting requirement causes an impairment of a viewer's ability to install, maintain or use a Section 207 reception device, the requirement will be prohibited under our rules. If a regulation or rule required painting a Section 207 reception device in a manner that unreasonably increases costs or impairs the ability of the device to receive a signal, then the regulation would be impermissible under our Section 207 rules.<sup>124</sup> The record does not demonstrate that a *per se* prohibition of painting requirements is necessary or desirable.

### G. Grace periods to comply with rulings

#### 1. Background

46. Under the current Section 207 rules, fines cannot accrue while a proceeding is pending to determine the validity of a restriction, but an initial fine can be imposed if the restriction is ultimately upheld.<sup>125</sup> Petitioners request that no fines be permitted whatsoever so long as the viewer complies with an adverse court or Commission ruling within a 21 day grace period.<sup>126</sup> According to DIRECTV, the prohibition on the accrual of fines does not remove the deterrent effect of a single fine on a viewer, for viewers may not feel comfortable subscribing to DBS service if they fear immediate enforcement and liability.<sup>127</sup> In addition, SBCA requests that viewers who install their antennas not knowing that a restriction has been upheld by the Commission or a court be given a 21-day grace period to comply with the restriction.<sup>128</sup>

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<sup>122</sup>*Id.* (other manufacturers contend that it will be necessary to first apply a primer coat and then at least one finish coat, again increasing the time and cost of installation).

<sup>123</sup>*Report and Order* at para. 19.

<sup>124</sup>*Report and Order* at para. 18.

<sup>125</sup>See 47 C.F.R. §1.4000(a) ("No fine or other penalties shall accrue against an antenna user while a proceeding is pending to determine the validity of any restriction.").

<sup>126</sup>DIRECTV Pet. at 11; USSB Reply Comments at 3; NRTC Reply Comments at 4.

<sup>127</sup>DIRECTV Pet. at 11.

<sup>128</sup>SBCA Pet. at 14 (consumer should be given a reasonable time to comply with the rule before a fine is imposed); DIRECTV Pet. at 11.

## 2. Discussion

47. The *Report and Order* states that viewers are generally permitted to install, maintain and use a Section 207 reception device while the validity of a restriction is being reviewed, except where safety and historic preservation restrictions are at issue.<sup>129</sup> We do not believe it would be consistent with the purpose underlying this rule to permit a viewer to be fined when the validity of an arguably invalid regulation has not yet been determined, and we agree with petitioners that the potential threat of a fine or penalty could operate as a substantial deterrent to viewers exercising their right to install an antenna while such a restriction is under review. We agree that a viewer should be given at least 21 days to comply with an adverse ruling issued in a proceeding before a fine may be collected from the viewer, unless the proponent of the restriction can show in the same proceeding that the viewer's claim was frivolous. We believe that 21 days is a reasonable time to give most viewers the opportunity to move Section 207 devices and that allowing the device to remain 21 days does not unreasonably burden a government or community association's interests. During this grace period, no additional fines or penalties shall accrue against the viewer, but if at the end of the grace period the viewer has not complied with the adverse ruling, then the initial fine may be imposed.

48. Regarding SBCA's proposal, we decline to grant a grace period to every viewer who unknowingly violates a restriction that has already been upheld in a proceeding pursuant to our rules.<sup>130</sup> Nevertheless, if a viewer believes that the restriction is invalid *as applied* to the particular viewer and challenges a previously upheld restriction in a proceeding as provided for in our rules,<sup>131</sup> and the viewer does not have a frivolous claim that the upheld restriction is invalid as applied to the particular viewer, then the viewer may be granted at least a 21 day grace period.

49. In addition, as with fines and penalties, some associations attempt to collect from viewers the attorney's fees expended by the association in its efforts to enforce a restriction even while a proceeding is pending to determine whether the association's restriction constitutes an impairment under our rules.<sup>132</sup> Because this question is related to the accrual of fines during the pendency of a proceeding, we raise on our own motion whether attorney's fees are collectible under our Section 207 rules while a petition for a declaratory ruling is pending. The Section 207 rules provide that viewers are generally permitted to install, maintain and use a Section 207 reception device while the validity of a restriction is being reviewed, except where safety or historic preservation restrictions are at issue.<sup>133</sup> Moreover, the Section 207 rules provide that "[n]o fine or other penalties shall accrue against an antenna user while a

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<sup>129</sup>*Report and Order* at para. 53.

<sup>130</sup>See 47 C.F.R. § 1.4000(c), (d).

<sup>131</sup>47 C.F.R. §1.4000(d).

<sup>132</sup>See, e.g., *In re James Sadler*, CSR-5074-O, slip op. at para. 41 (DA 98-1284, rel. July 1, 1998).

<sup>133</sup>*Report* at para. 53.

proceeding is pending to determine the validity of any restriction."<sup>134</sup> As with fines or other penalties, the attempt to assess attorneys fees while a proceeding is pending, and the validity of an arguably invalid restriction has not yet been determined, would undermine the purpose underlying both the Section 207 rules and the petition process. Thus, we will modify our rules so as to prohibit the assessment or collection of attorney's fees while a proceeding is pending.<sup>135</sup>

## H. Definition of signal impairment

### 1. Background

50. Under our current rules, a regulation will be deemed to impair a viewer's ability to receive video programming signals if it precludes reception of an acceptable quality signal.<sup>136</sup> For example, a signal does not have an acceptable quality where "reception would be impossible or would be substantially degraded."<sup>137</sup> CEMA proposes that the Commission state that signal reception is impaired if *any* signal degradation exists.<sup>138</sup> NAS proposes that, because television antennas must be placed at the highest point on a homeowner's roof for optimum reception, the Commission require that antennas be placed where reception is optimal.<sup>139</sup> NAS also proposes that other Section 207 devices be placed where reception is optimal.<sup>140</sup>

### 2. Discussion

51. We decline to adopt the CEMA and NAS proposals with respect to television broadcast antennas because it has not been shown that these devices cannot receive an acceptable signal quality if they are located in a less than optimum position. Under the balance struck in the rules, viewers are entitled to an antenna location, if one is available, that will provide an "acceptable" quality signal. Subject to that limitation, local governments and community associations are entitled, in order to protect the interests of local residents, to restrict antenna placement. The rules are intended to provide a reasonable reconciliation of the specific interests of individual viewers and the collective interests of the community at large. This balance is properly struck if a reasonable, but not necessarily always optimal, quality signal

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<sup>134</sup>47 C.F.R. § 1.4000(a).

<sup>135</sup>See Appendix B; 47 C.F.R. § 1.4000(a).

<sup>136</sup>*Report and Order* at para. 20.

<sup>137</sup>*Id.*

<sup>138</sup>CEMA Pet. at 5 (other than exempted safety and historic-district restrictions).

<sup>139</sup>NAS Pet. at 6 ("Any restriction that prevents homeowners from [placing antennas on the highest point on the homeowners' roof] impairs reception.").

<sup>140</sup>*Id.* ("The Commission should provide similar guidance adapted to the requirements of MMDS and DBS antennas.").

is available. For example, with respect to signals that are subject to a variety of different but gradual impairments, the rules do not mandate that an antenna can be placed at whatever height reception would be optimized. If that were the case, there would be many situations where no accommodation whatsoever would be made to the interests of the local community.

52. The situation is altogether different, however, for devices designed to receive digital signals, such as DBS antennas, digital MMDS antennas and digital television ("DTV") antennas. Unlike analog antennas, digital antennas, even in the presence of sufficient over-the-air signal strength, will at times provide no picture or sound unless they are placed and oriented for optimal reception. Where a DBS antenna has an unobstructed, direct view of a satellite, the antenna will produce a complete picture and sound. As the antenna is moved or oriented slightly to a position where its view of the satellite becomes less direct or partially obstructed, the antenna will continue, up to a point, to produce a complete picture and sound because digital reception devices have error correcting systems that fill in the missing data by taking into account interruptions in the digital data stream caused by the obstruction. At some point, however, as the antenna's view becomes slightly more obstructed, the obstruction will cause the picture and sound to become fragmented because the obstruction is blocking too many pieces of digital data for the antenna's error correcting system to correct. As the antenna is moved a negligible distance farther and its view of the satellite becomes more obstructed, the antenna will produce no picture or sound at all because the antenna can no longer receive sufficient data. This is the "cliff effect" which is the point at which there is a complete loss of picture and sound because the antenna can no longer receive sufficient data. At the cliff, the transition between a complete picture and no picture takes place almost immediately.<sup>141</sup>

53. Obstructions are not the only causes of data disruption. Weather conditions such as severe rain can interfere with the data streams to such a degree that most antennas will be unable to produce a picture during some periods throughout the year. Manufacturers assume that satellite antennas will have an unobstructed view of the satellite and design them to keep these weather blackouts to a minimum while at the same time producing the smallest antenna possible. For antennas that have an obstructed view of the satellite, these weather blackouts will occur more frequently than for antennas that have an unobstructed view of the satellite because both the obstruction and the weather are blocking the data stream. For this reason, we conclude that, to receive an acceptable quality signal, a DBS antenna or other digital reception device covered by Section 207 must be installed where it has an unobstructed, direct view of the satellite or other device from which video programming service is received, if such a location exists on the viewer's property and the property is covered by our rules.<sup>142</sup>

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<sup>141</sup>Because of the frequency band used, DBS antennas need an unobstructed, direct view of a satellite to produce a complete picture and sound. Due to the propagation characteristics of the 12.2 - 12.7 GHz band, communication systems using these frequencies require unobstructed paths between the transmitter and receivers. This type of path is often called "line-of-sight" ("LOS").

<sup>142</sup>See 47 C.F.R. §1.4000.

**I. Other technologies that provide over-the-air reception of video programming services****1. Background**

54. The Commission's current Section 207 rules cover the following reception equipment:

(1) an antenna that is designed to receive direct broadcast satellite service, including direct-to-home satellite services, that is one meter or less in diameter or is located in Alaska; or

(2) an antenna that is designed to receive video programming services via multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services, and that is one meter or less in diameter or diagonal measurement; or

(3) an antenna that is designed to receive television broadcast signals...<sup>143</sup>

55. SBCA proposes that the rule should be flexible and encompass any newly-developed over-the-air reception device that provides video programming service, especially devices that receive video programming viewable on a computer screen.<sup>144</sup> SBCA urges that the Section 207 rules should encompass interactive antennas that receive video programming that can be viewed via computers.<sup>145</sup> Similarly, WCA urges that "video programming includes all information (e.g., information received over the internet) that is commonly viewed on the video screen (including computer monitors)."<sup>146</sup>

**2. Discussion**

56. We reject WCA and SBCA's proposal because they have not shown that interactive and data transmitting antennas receive "video programming" as that term is used in the Communications Act of 1934. In the Act, video programming "means programming provided by, or generally considered comparable to programming provided by, a television broadcast station."<sup>147</sup> At this time, the record does not reflect that the statutory definition of video programming is met with respect to the antennas WCA and SBCA propose to include. The petitioners have not shown that the described video-related services

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<sup>143</sup>47 C.F.R. §1.4000(a).

<sup>144</sup>SBCA Pet. at 17 ("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.").

<sup>145</sup>*Id.*; see also Hughes Network Systems Inc. ("Hughes") Pet. at 2 (requesting that the Commission include Hughes' "DirectPC, a residential satellite Internet gateway service," within the preemption restrictions).

<sup>146</sup>WCA Pet. at 33 n.58.

<sup>147</sup>Communication Act of 1934, § 602(20); 47 U.S.C. § 522(20).

are comparable to that provided by a television broadcast station. Section 207 is flexible and will encompass newly developed technologies if they are shown to have similar technology and functions and to provide similar services as devices encompassed by Section 207.<sup>148</sup> Proponents must make a particular showing that the new technology should be covered by our rules.<sup>149</sup>

## J. Transmission-only antennas that assist reception antennas

### 1. Background

57. In the *Report and Order*, the Commission stated that "antennas that have transmission capability designed for the viewer to select or use video programming are considered reception devices under this rule," but that the rule "does not apply to devices that have transmission capability only."<sup>150</sup>

58. WCA requests that the Commission reconsider its exclusion of devices with transmission capability only. According to WCA, in order to offer interactive services that cable provides, it may become necessary for WCA to install two devices, one to transmit and one to receive.<sup>151</sup> Because the transmission device is necessary for the viewer to select the video programming that the viewer will receive in the reception device, WCA argues that the rule should protect devices that have transmission capability only if they are used in tandem with a video reception device.<sup>152</sup>

### 2. Discussion

59. Section 207 requires that we "prohibit restrictions that impair a viewer's ability to receive video programming" from Section 207 devices.<sup>153</sup> Transmission devices are covered by our rules to the extent that restrictions on them prevent a viewer from receiving video programming on a Section 207 reception device.<sup>154</sup> We see no reason to distinguish in this regard between a single antenna that both receives and transmits and paired transmission and reception antennas that perform the same functions.

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<sup>148</sup>For example, in the *Report and Order*, we stated that we believed that Congress did not mean to exclude from protection services that are closely related to the services specifically addressed in Section 207, such as TVBS, MMDS and DBS. *Report and Order* at para. 30. Thus, because of their similarity in terms of function and technology to services enumerated in Section 207, we found that MDS, ITFS and LMDS were covered by Section 207 and our Section 207 rules even though these services were not mentioned in Section 207. *Id.*

<sup>149</sup>See, e.g., *In re Terrastar*, DA-97-1364 (July 3, 1997) in which the Commission denied Terrastar's petition that its new satellite reception device be covered by our Section 207 rules.

<sup>150</sup>*Report and Order* at para. 39.

<sup>151</sup>WCA Pet. at 33.

<sup>152</sup>*Id.*

<sup>153</sup>Pub. L. 104-140, 110 Stat. 56 (1996) § 207.

<sup>154</sup>*Report and Order* at para. 39.

We conclude that restrictions that impair transmission devices that work in tandem with and are necessary to enable a viewer to select video programming on a reception device are prohibited by our rules if they impair a "viewer's ability to receive video programming" as set forth in our Section 207 rules. We stress that this protection extends only to transmission antennas that are within the size parameters of the Section 207 rules, installed at the viewer's location, and necessary for the viewer to select video programming.

**K. Districts eligible to be listed on the National Register of Historic Places**

**1. Background**

60. The Commission's current rules permit restrictions if they are "necessary to preserve an historic district listed or eligible for listing on the National Register of Historic Places."<sup>155</sup> According to BellSouth, if a property has been determined to have met the standards for being listed on the National Register but a property owner objects to having his property listed on the National Register, then his or her property is merely designated "eligible to be listed" so that he or she can avoid restrictions applying to property listed on the National Register.<sup>156</sup> Thus, BellSouth argues that our Section 207 rules should not protect unlisted property that is not subject to state and local government historic preservation restrictions.<sup>157</sup>

**2. Discussion**

61. We decline to adopt BellSouth's proposal because our historic preservation exception is consistent with the National Historic Preservation Act of 1966, as amended ("NHPA"), which directs a federal agency to "take into account the effect of the [agency's] undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register."<sup>158</sup> Having reviewed the NHPA, we find that our exception does not go far enough to satisfy our statutory obligations. Our current Section 207 rules protect only "districts" listed or eligible to be listed on the National Register, whereas the NHPA defines protected historic properties to mean "any prehistoric or historic district, site, building, structure or object included in, or eligible for inclusion on the National Register."<sup>159</sup> Therefore, on our own motion, we will revise our rules to exempt "any prehistoric or historic district, site, building, structure or object included in, or eligible for inclusion on, the National Register of Historic Places" in order to follow the definition of historic properties in the NHPA.<sup>160</sup> It was not our intention through the

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<sup>155</sup>47 C.F.R. § 1.4000(b)(2).

<sup>156</sup>BellSouth Pet. at 17.

<sup>157</sup>*Id.*

<sup>158</sup>16 U.S.C. § 470f; *see also* 16 U.S.C. § 470a(b)(3)(F) and (I).

<sup>159</sup>16 U.S.C. § 470w(5).

<sup>160</sup>*See* Appendix B, 47 C.F.R. §1.4000(b)(2).

rules adopted, nor do we believe it was the intention of Congress in adopting Section 207, to overrule specific restrictions or regulations designed to protect historic properties.

**L. Limits on fees and costs**

**1. Background**

62. Our Section 207 rules prohibit regulations and restrictions that "unreasonably increase[] the costs of installation, maintenance or use" of a Section 207 device.<sup>161</sup> In the *Report and Order*, we noted that such costs might deter consumers from purchasing a Section 207 device.<sup>162</sup>

63. DIRECTV requests that the Commission bar all fees assessed by local governments for installing antennas because the rules currently give little guidance and significant discretion to local officials to determine what is a reasonable fee.<sup>163</sup> At a minimum, USSB suggests that discriminatory fees for antennas be prohibited in the rule itself.<sup>164</sup>

64. Regarding restrictions that may incidentally increase the cost of installation, NAS proposes that a ceiling of \$250 or the cost of installation, whichever is less, would be high enough to permit reasonable restrictions but low enough to avoid making installation cost-prohibitive to the consumer.<sup>165</sup> DIRECTV and USSB request that the rule reflect that an aesthetic requirement may only impose a *de minimis* cost and cannot impair reception.<sup>166</sup>

**2. Discussion**

65. The Section 207 rules regarding fees and costs are designed to protect viewers from unreasonable expenses that discourage choosing alternative video reception devices.<sup>167</sup> Both fees imposed directly by a restricting entity and costs imposed indirectly as a result of an entity's requirements or restrictions can impose an unreasonable expense that is prohibited by the Section 207 rules. For example, a fee imposes unreasonable expense when the fee is for a permit that a local government has no discretion

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<sup>161</sup>47 C.F.R. § 1.4000(a).

<sup>162</sup>*Report and Order* at para. 17.

<sup>163</sup>DIRECTV Pet. at 9 ("The Commission should amend Section 1.4000 to make clear that local governments and homeowners associations may not charge fees for the right to install a satellite antenna.").

<sup>164</sup>USSB Pet. at 4.

<sup>165</sup>NAS Pet. at 5.

<sup>166</sup>DIRECTV Pet. at 9; USSB Reply Comments at 4.

<sup>167</sup>*Report and Order* at paras. 17-18.

to require.<sup>168</sup> We decline, however, to prohibit all fees because a reasonable fee, in connection with a permissible requirement, may be within the standards of the Section 207 rules. Moreover on the current record, there is insufficient evidence of the types of fees that might fall under the flat prohibition of petitioners' request, and in the absence of adequate information we cannot find that all fees should be barred. Similarly, with respect to costs, in the *Report and Order* we declined to adopt a formula or precise dollar amount that will constitute an unreasonable expense in every case. The record remains inadequate to determine whether a ceiling of a given amount, as NAS suggests, or a de minimis standard, as DIRECTV and USSB propose, will be reasonable in every case. The standard for determining reasonable fees and costs is whether the expense imposed is reasonable in light of the cost of the equipment or services and the rule, law, regulation or restriction's treatment of comparable devices.<sup>169</sup> In this *Order*, we modify the rule to include this language.<sup>170</sup>

## M. Service of petitions and pleadings

### 1. Background

66. Although the *Report and Order* requires that "[p]etitions for declaratory rulings or waivers must be served on all interested parties,"<sup>171</sup> the rule itself does not address this issue. WCA proposes that the Commission find that applications or pleadings must be served on potentially affected service providers.<sup>172</sup> WCA argues that a service provider may be bound by a judgment even if it does not receive notice of a suit.<sup>173</sup>

67. WCA also requests that if an entity files in court that it be required to also serve the Commission.<sup>174</sup> Furthermore, WCA argues that the Commission should find that a court may not issue

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<sup>168</sup>On this issue, we affirm the decision of *In re Star Lambert*, 12 FCC Rcd. 10455, at para. 24 (1997) (city ordinance required a fee for a permit that was required to be issued automatically).

<sup>169</sup>*Report and Order* at para. 19.

<sup>170</sup>See paragraph 75, *infra*, and the revised Section 1.4000(a) in *Appendix B*.

<sup>171</sup>*Report and Order* at para. 55.

<sup>172</sup>WCA Pet. at 28. Lawsuits seeking declaratory rulings from the courts should be served on the MDS Basic Trading Area ("BTA") holder for the affected area, as well as every entity that holds or has applied for authorization for an MDS or ITFS station in the area potentially covered by the ruling. *Id.* If the wireless company initiated the proceeding, then it would be required to serve the government. *Id.* at 29.

<sup>173</sup>*Id.* at 29-30 ("Absent adoption of a notice requirement along the lines proposed by the Wireless Cable Petitioners, there is a substantial risk that local courts will be entering declaratory rulings without the knowledge and participation of those parties Section 207 is designed to protect.").

<sup>174</sup>*Id.* at 29.

a declaratory judgment until after the Commission has given 30 days public notice to interested parties of the declaratory judgment action.<sup>175</sup>

## 2. Discussion

68. We agree that the Section 207 rules should reflect the statement in the *Report and Order* that petitions for declaratory rulings and waivers must be served on interested parties. We will amend the rules accordingly.<sup>176</sup> We will interpret the term "interested" narrowly. For instance, if a homeowners' association files a petition or a lawsuit seeking to have a restriction declared valid and seeking to enforce the restriction against a particular viewer, service must be made on the particular viewer.<sup>177</sup> The homeowners' association will not be required to serve all other members of the association, but must provide reasonable, constructive notice of the proceeding to other residents whose interests may foreseeably be affected by the proceeding so that they might protect their interests.<sup>178</sup> This may be accomplished, for example, by placing notices in residents' mailboxes, by placing a notice on a community bulletin board, or by placing the notice in an association newsletter. Similarly, if a local government seeks a declaratory ruling or a waiver from the Commission, thereby availing itself of the Commission's procedures, the local government must take steps to afford reasonable, constructive notice to residents in its jurisdiction (e.g., by placing a notice in a local newspaper of general circulation). If the local government files a lawsuit in court, we assume the court will require the local government to provide constructive notice of the lawsuit to its citizens so that they might intervene in the government's lawsuit. Finally, if a viewer files a petition or lawsuit challenging a local government's ordinance or an association's restriction, the viewer must serve the local government or association.<sup>179</sup>

69. Certificates of service and proof of constructive notice must be provided with a petition. In this regard, the petitioner should provide a copy of the notice and an explanation of where the notice was placed and how many people the notice might reasonably have reached.<sup>180</sup>

70. We reject petitioner's request that we mandate that potentially affected service providers be served when a case is filed in court. When a service provider is the party in interest, it must be served. However, the record does not support requiring service when service providers are not directly affected. We assume that service providers potentially affected by a ruling can learn of a pending action through the constructive notice discussed above.

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<sup>175</sup>*Id.*

<sup>176</sup>See Appendix B, 47 C.F.R. §1.4000(e).

<sup>177</sup>*Report and Order* at para. 55 n.158. We assume that for actions filed in courts of competent jurisdiction, the courts' procedural rules will require service on parties in interest.

<sup>178</sup>*Report and Order* at para. 55 n.158.

<sup>179</sup>See Appendix B, 47 C.F.R. §1.4000(e).

<sup>180</sup>See Appendix B, 47 C.F.R. §1.4000(e).

71. We will not adopt the petitioners' proposal that a party filing a suit in court be required to serve a copy of the complaint on the Commission because WCA has not shown why service is warranted. We encourage parties to a lawsuit that raises issues involving the applicability or the interpretation of Section 207 or the Section 207 rules to provide notice of the lawsuit to the Commission and to provide the Commission with a copy of the relevant pleading so that the Commission may provide public notice of the suit if we choose to do so. At this time we think the Commission will have adequate opportunity to become aware of particular cases and, if appropriate, to submit its views to the court. Our decision not to require service on the Commission renders moot petitioners' proposal that the Commission require local courts not to issue a decision on a complaint until public notice of the complaint is given.

**N. Placing statements from the *Report and Order* in the Section 207 rules**

**1. Background**

72. Several petitioners request that certain statements that were made in the *Report and Order* be placed in the text of the Section 207 rules and clarified<sup>181</sup> or set forth in a separate document.<sup>182</sup> DIRECTV, SBCA, and USSB request that the rules reflect the *Report and Order's* statement that enforcement of antenna prohibitions, except those pertaining to safety and historic preservation, is prohibited pending review by the Commission and the Court.<sup>183</sup> Because the *Report and Order* states that the Commission will examine an aesthetic regulation's treatment of similar objects to determine whether the regulation is reasonable,<sup>184</sup> several petitioners request that the Commission place this opinion directly in the rule.<sup>185</sup> USSB proposes that an aesthetic regulation impairs if it treats the antenna "in a manner different from other appurtenances of comparable size."<sup>186</sup> CEMA further proposes that standards for examining safety and historic preservation objectives be placed in the rule.<sup>187</sup> Because the rule requires that the burden of enforcing a restriction in a Commission proceeding rests on the party seeking to enforce the restriction,<sup>188</sup> WCA requests that the rule also state the party on which the burden rests in a court action.<sup>189</sup>

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<sup>181</sup>CEMA Pet. At 6; NAB Reply Comments at 5.

<sup>182</sup>CEMA Ex Parte Letter dated February 7, 1997.

<sup>183</sup>DIRECTV Pet. at 11; SBCA Pet. at 12; USSB Reply Comments at 3.

<sup>184</sup>*Report and Order* at para. 19.

<sup>185</sup>DIRECTV Pet. at 9; USSB Reply Comments at 4.

<sup>186</sup>USSB Reply Comments at 4.

<sup>187</sup>CEMA Ex Parte letter at 3 (*citing Report and Order* at para. 25).

<sup>188</sup>47 C.F.R. §1.4000(e).

<sup>189</sup>WCA Pet. at 30.

73. Regarding its petition that the Commission clarify its restrictions, CEMA requests that the Commission provide a document with certain easy to read clarifications of the rule.<sup>190</sup> In particular, CEMA proposes that the document provide that “[a]ny local restrictions on DBS antenna placement must be made available to viewers in writing.”<sup>191</sup>

## 2. Discussion

74. We clarify our rules to state that if a petition is filed challenging a restriction, enforcement of that restriction, except restrictions pertaining to safety and historic preservation, is prohibited pending completion of review by a court or the Commission.<sup>192</sup> We also agree with WCA that there is no reason to distinguish between proceedings in court and proceedings at the Commission and accordingly will clarify that the burden of demonstrating that a particular restriction complies with the rules adopted in this proceeding rests on the party seeking to enforce the restriction.<sup>193</sup> We reiterate our conclusion in the *Report and Order* that “placing the burden on consumers would hinder competition and fail to implement Congress’ directive, as such a burden could serve as a disincentive to consumers to choose TVBS, MMDS, or DBS services.”<sup>194</sup>

75. Regarding the requests that the rule be altered to explain the Commission’s standards for reviewing aesthetic, safety and historic regulations, we believe that the standards for review of our safety and historic exemptions are adequately set forth in the rules. We do adopt the proposal to bring paragraph (a) of our Section 207 rules into accord with paragraph 19 of the *Report and Order* for reviewing aesthetic and other regulations:

Any fee or cost imposed on a viewer by a rule, law, regulation or restriction must be reasonable in light of the cost of the equipment or services and the rule, law, regulation or restriction’s treatment of comparable devices.<sup>195</sup>

76. We decline to adopt CEMA’s proposal to include a statement in the Fact Sheet that local restrictions must be made available to viewers in writing upon demand. We believe that local

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<sup>190</sup>CEMA Pet. at 6.

<sup>191</sup>CEMA Ex Parte letter at 3 (*citing Report and Order* at para. 25).

<sup>192</sup>Commission review is completed when an order is released and is no longer subject to review or appeal, or when the petition is dismissed or returned without further action.

<sup>193</sup>WCA Pet. at 30.

<sup>194</sup>*Report and Order* at para. 54.

<sup>195</sup>See Appendix B for full text of revised rule.

governments and associations will make such restrictions available as a matter of course or at least provide viewers an opportunity to make copies of the restrictions.<sup>196</sup>

**O. Application of the Section 207 rules to tenants who have the owner's permission to install an antenna**

77. For purposes of our Section 207 rules, a renter, tenant, or any other person residing on a property owner's property with the property owner's permission ("tenant viewer"), who has the property owner's permission to install, maintain and use a Section 207 reception device on the property, shall be treated as a covered viewer with regard to third party restrictions under our Section 207 rules. In this connection, the tenant viewer shall have the same rights under the Section 207 rules as would the owner vis-a-vis restrictions enacted by a homeowners' association, condominium association, townhome association, manufactured housing park owner, government and/or any other third party. Thus, if an owner residing on the property were entitled to install a Section 207 device on the property under our rules, then a tenant occupying the property is also entitled to a Section 207 device on the property provided the property owner consents. This clarification in no way alters the current rights, duties or obligations of a landlord with respect to a tenant. The rights of the tenant viewer with respect to a property owner who prohibits or restricts the installation, maintenance or use of a Section 207 device (e.g. a viewer who rents an apartment from a landlord who owns the building) will be addressed in the *Second Report and Order* in response to the *Further Notice* issued in the *First Report and Order*.

**P. Property under the exclusive use of the viewer**

78. Our Section 207 rules protect "property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest."<sup>197</sup> Because numerous inquiries have been made to the Commission regarding the meaning of "exclusive use," we will, on our own motion, clarify the meaning of "exclusive use" as that phrase is used in our Section 207 rules. The rule protects a viewer who has *either* exclusive use *or* exclusive control of property in which the viewer has a direct or indirect ownership interest. It is not necessary for a viewer to have exclusive control over the property to be protected by our Section 207 rules.

79. For instance, a condominium owner, townhome owner, cooperative owner and owner of a manufactured home may not have exclusive control over their dwellings because the association or the park owner may retain rights to enter their dwellings to perform inspections or repairs. These owners do exercise exclusive use over their dwellings because they are the only parties entitled to the beneficial use of the dwellings. A condominium owner, townhome owner, owner of a manufactured home, or cooperative unit dweller who has exclusive use of a balcony, balcony railing, deck, patio, or any other

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<sup>196</sup>We believe that we have already complied with CEMA's proposal that the Commission produce a separate document with easy to read clarifications of the rule. The Cable Services Bureau has produced a five-page Fact Sheet that explains our Section 207 rules in layman's terms. This document is available on the Cable Services Bureau's web site. See [www.fcc.gov/bureaus/cable/www/csb.html](http://www.fcc.gov/bureaus/cable/www/csb.html).

<sup>197</sup>47 C.F.R. § 1.4000(a).

type of property where they have a direct or indirect property interest, has the right, subject to certain restrictions of our Section 207 rules, to place Section 207 devices thereon. That third parties have rights to enter and/or exercise control (e.g., banning grills on balconies) over the owner's exclusive-use area does not defeat the owner's Section 207 rights. With respect to condominiums, this rule applies to antenna restrictions on balconies, decks, patios or similar areas even if the condominium owner does not have exclusive ownership, so long as the condominium owner has direct or indirect ownership and exclusive use over the area.

80. In a housing cooperative, residents own shares (or some other indicia of ownership) in an entity that holds title to the building, but the residents do not directly own the unit in which they reside.<sup>198</sup> The residents' ownership interest in the controlling entity entitles them to exclusive use of a unit and nonexclusive use and enjoyment of other common areas.<sup>199</sup> Restrictions on a cooperative owner's use of his or her unit is prohibited by the current rule because (1) the owner has an indirect ownership interest in his or her unit and (2) the owner exercises exclusive use or control over the unit. Restrictions on the cooperative owner's use of common cooperative property is not prohibited if the cooperative owner does not exercise exclusive use over the common property.

81. Even if the home rests on property leased from someone else, an owner of a manufactured home is protected by our Section 207 rules because the owner (1) has a direct property interest in the home and (2) has exclusive use of the home (and likely has exclusive control as well, although as noted above, the lack of exclusive control is not dispositive of the issue). Thus, a manufactured home owner, or the owner of any other type of home that rests on leased property, has rights under Section 207, subject to the rules' language and exceptions, to place a Section 207 device anywhere on the home.

## **Q. Central Antenna Proposal**

### **1. Background**

82. In the *Further Notice*, we asked for comments on a CAI proposal to create an exception to our rules that would allow antenna restrictions if a community association, landlord or similar private entity voluntarily "makes video programming available [through a central reception facility] to any resident wishing to subscribe to such programming at no greater cost and with equivalent quality as would be available from an individual antenna installation."<sup>200</sup> CAI advocates this approach to give viewers access to service without using individual installation sites and suggests that the cost of service for individual members of a group could be lower than for individuals on their own. CAI also contends that a central

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<sup>198</sup>See Comments filed in response to the *Further Notice*, e.g., CAI Comments at 8 (Resident does not own property, but holds shares in cooperative; cooperative owns all the real estate, resident is permitted exclusive use of an unit); Frost Comments at 4; NAHB Comments at 14-15; CAI Reply Comments at 4.

<sup>199</sup>Chadwick Comments at 1.

<sup>200</sup>*Report and Order* at paras. 49, 63.

antenna eliminates personal liability exposure for an individual viewer and aesthetic degradation due to multiple antennas.<sup>201</sup>

83. The commenters who responded to the *Further Notice* agree that it is technically feasible for a central antenna to provide service to more than one viewer,<sup>202</sup> however, commenters disagree about the burden placed on the landlord or community association in meeting the demands of a viewer for a particular service. The National Apartment Association ("NAA") argues that, to meet viewers' demands, a landlord would need to install three different antennas: one antenna for over-the-air broadcasts, one for direct broadcast services, and one for multichannel multipoint distribution services.<sup>203</sup> NAA also contends that the cost of installing a central antenna system is prohibitive.<sup>204</sup> In addition, while commenters agree that one antenna could provide the same type of service to every viewer residing in a multiple dwelling unit that desired such a service,<sup>205</sup> commenters disagree over whether different services could share the same set of wiring to provide service to viewers.<sup>206</sup>

84. Some industry commenters endorse the central antenna proposal as a way to implement Section 207 while alleviating concerns about safety, liability and damage to the building.<sup>207</sup> These commenters are concerned, however, that a central antenna should not preclude installation of individual antennas or deprive viewers of access to multiple competing video programming providers.<sup>208</sup>

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<sup>201</sup>CAI Comments at 34.

<sup>202</sup>See, e.g., USSB Comments at 5 ("Placing satellite reception devices on rental or commonly-owned property is thus clearly technically and practically feasible. A basic way to distribute DSS without requiring individual antennas exists via special MDU antennas and hardware which would allow each viewer's dwelling unit to have its own individually addressable receiver.").

<sup>203</sup>NAA Reply Comments at 39.

<sup>204</sup>NAA Reply Comments at 38-39.

<sup>205</sup>DIRECTV Comments at 17 n.38; PENAC Comments at 14; NAA Reply Comments at 38.

<sup>206</sup>Philips Electronics contends that more than one service can use the same set of inside wiring. Philips Comments at 15. *But see* NAA Reply Comments at 39 (stating that "in most cases it is not technically feasible for more than one service provider to use the wiring" and that to comply with this exception most buildings will require one or more additional sets of wiring).

<sup>207</sup>See, e.g., Alphastar Reply Comments at 7-8; CEMA Comments at 11; NAB Comments at 16-17 (services should be offered at no greater cost to the resident and with quality equivalent to individual installations); Philips Reply Comments at 8-9; USSB Comments at 4; and USSB Reply Comments at 2 (central antenna eliminates aesthetic concerns).

<sup>208</sup>Pacific Telesis Reply Comments at 3-4 ("common antennas should not be used as a means to deprive tenants of other video options"); *see also* Alphastar Reply Comments at 8 (opposing a rule standard that would allow a single signal of equivalent quality); CellularVision Comments at 8; NRTC Comments at 5 (opposes this suggestion because it could result in exclusion of one DBS provider over another); USSB Comments at 4.

85. In an *ex parte* filing CAI suggests that a viewer who installs an individual antenna within 90 days of an association's announcement of a good faith intention to install a central antenna could be required to remove the individual antenna after the central antenna is activated.<sup>209</sup> In response to CAI's *ex parte* proposal, SBCA contends that CAI's suggestion will effectively require viewers to wait 90 days or more for video service because the requirement to remove the antenna will deter individual installations.<sup>210</sup> SBCA also contends that installation of a central antenna is more expensive on a per home basis than installation of an individual antenna and expresses concern that this additional cost will be imposed on viewers.

## 2. Discussion

86. Although the central antenna proposal initially suggested by CAI was presented for comment in the *Further Notice*, we are addressing it in this *Order on Reconsideration* rather than the *Second Report and Order* in this proceeding because we have concluded that the proposal is properly analyzed under our current Section 207 framework. We conclude that it is not necessary to amend the Section 207 rules to allow for a central antenna because the same standard of impairment can be applied to a restriction based on the existence of a central antenna as is applied to any other antenna restriction. That is, the installation of a central antenna, and a concomitant restriction on the installation of individual antennas, will not constitute an impairment under our Section 207 rules if, like any other restriction, it does not impair installation, maintenance and use.

87. We interpret and apply the Section 207 rules in a manner consistent with the goals of ensuring access to a broad range of video programming services and fostering competition among different types of video programming services.<sup>211</sup> This proposal can be extremely useful in accommodating both the interests of communities in protecting the aesthetic quality of the local environment and the interests of individual residents in having unimpeded access to satellite, broadcast, or MMDS service. No community would be required to exercise this option, but where a decision is made by a community association, condominium, cooperative, rental, or other facility governed by the rules to make the additional investment necessary to install central reception facilities, the interests of both the community at large and individual residents could be satisfied.<sup>212</sup> In addition, residents not able to take advantage of the rules and install their own equipment because of line-of-sight or other problems with antenna placement could also benefit from the additional options made available through the installation of such a facility.

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<sup>209</sup>CAI *ex parte* filing, March 30, 1998.

<sup>210</sup>SBCA *ex parte* filing, May 27, 1998.

<sup>211</sup>*Report and Order* at para. 6.

<sup>212</sup>We find it unlikely that homeowner associations of single-family detached homes will find the central antenna approach feasible if it is necessary to install underground cables throughout a neighborhood. While we do not rule out the possibility that a community of single-family homes may be able to utilize the central antenna approach, we note that the time and costs associated with installing a new central antenna in such a community are likely to create the type of unreasonable delay and unreasonable expense that are prohibited by the Section 207 rules.

88. While we believe this proposal may be useful in many situations and is consistent with both Section 207 and the Section 207 rules, it cannot be used to restrict access. Thus, restrictions based on the availability of a central antenna will generally be permissible provided that: 1) the viewer receives the particular video programming service the viewer desires and could receive with an individual antenna (e.g., the viewer would be entitled to receive service from a specific DBS provider, not simply a DBS service selected by the association); 2) the video reception in the viewer's home using the community antenna is of an acceptable quality as good as, or better, than the quality the viewer could receive with an individual antenna; 3) the costs associated with the use of the central antenna are not greater than the cost of installation, maintenance and use of an individual antenna; and 4) the requirement to use the community antenna in lieu of an individual antenna does not unreasonably delay the viewer's ability to receive video programming.

89. Based on the comments received in the *Further Notice*, we believe that community associations are more likely to provide a central antenna if by so doing they can limit the number of individual antennas. It is not our intention, however, that community associations be permitted to deter viewers from making individual antenna purchases by announcing an intention to install a central antenna and using that announcement as a basis to prohibit individual installations for an indefinite period of time. We note that in CAI's *ex parte* proposal, associations could require viewers to remove an antenna installed after the association announced its intention to provide a central antenna, but the proposal does not specify who would pay for removal of the antenna. We believe that if the association paid for the removal of the antenna and reimbursed the viewer for the value of the antenna, then it is unlikely the viewer would be deterred or unreasonably delayed. If, however, an association requires a viewer to remove an individual antenna at the viewer's expense, then such a requirement would impose both an unreasonable delay and unreasonable expense. Similarly, an individual who wants video programming other than that available through the central antenna should not be unreasonably delayed in obtaining the desired programming either through modifications to the central antenna, installation of an additional central antenna, or via an individual antenna.<sup>213</sup> In addition, a restriction that imposes additional costs that total more than the viewer would pay for installation, maintenance and use of an individual antenna in an exclusive use area is not permitted under the Section 207 rules.

### III. FINAL REGULATORY FLEXIBILITY ANALYSIS

90. As required by the Regulatory Flexibility Act ("RFA"),<sup>214</sup> an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in International Bureau (IB) Docket No. 95-59 ("*DBS Order and*

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<sup>213</sup>We do not agree with CAI's argument that an association be permitted to provide an "equivalent" service rather than the specific service the tenant requested. Accordingly, we also reject the proposal by the Manufactured Housing Institute ("MHI") that restrictions should be permitted if alternative programming is made available. MHI Comments filed in the *Further Notice* proceeding at 2.

<sup>214</sup>See 5 U.S.C.A. § 603. The RFA, *see* 5 U.S.C.A. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

*Further Notice*")<sup>215</sup> and in Cable Services Bureau (CS) Docket No. 96-83 ("*TVBS-MMDS Notice*").<sup>216</sup> The Commission sought written public comment on the proposals in those proceedings, including comment on the IRFA's.<sup>217</sup> The Commission's Final Regulatory Flexibility Analysis ("FRFA") was issued in the *Report and Order* and conformed to the RFA. Pursuant to the RFA, the Commission's final analysis with respect to this *Order on Reconsideration* is as follows:

**A. Need for, and Objectives of, this Order on Reconsideration**

91. This *Order on Reconsideration* implements Section 207 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56. Section 207 directs the Commission to promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through certain devices designed for over-the-air reception, including MMDS, LMDS, DBS, TVBS and ITFS ("Section 207 devices").<sup>218</sup> This action is authorized under the Communications Act of 1934 § 1, *as amended*, 47 U.S.C. § 151, pursuant to the Communications Act of 1934 § 303, *as amended*, 47 U.S.C. § 303, and by Section 207 of the Telecommunications Act of 1996. This *Order on Reconsideration* provides guidance on how the Commission will interpret its Section 207 rules<sup>219</sup> and amends the Section 207 rules to provide more clarity in the existing rules.

**B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA**

92. None of the parties in this proceeding filed comments on how issues raised in the petitions for reconsideration would impact small entities. Nevertheless, we discuss below how we considered the impact of the amendment of our Section 207 rules on small entities.

**C. Description and Estimate of the Number of Small Entities To Which Rules Will Apply**

93. The Regulatory Flexibility Act defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction," and "the same

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<sup>215</sup>Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Docket No. 95-59, *Report and Order and Further Notice of Proposed Rulemaking*, Appendix III, 11 FCC Rcd. 5809 (1996).

<sup>216</sup>Implementation of Section 207 of the Telecommunications Act of 1996: Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service, *Notice of Proposed Rulemaking*, Appendix B, CS Docket No. 96-83, 11 FCC Rcd. 6357 (1996).

<sup>217</sup>*Report and Order* at Attachment D.

<sup>218</sup>1996 Act § 207.

<sup>219</sup>47 C.F.R. § 1.4000.

meaning as the term 'small business concern' under Section 3 of the Small Business Act."<sup>220</sup> The rule we adopt today applies to small organizations, small governmental jurisdictions, and small businesses.

94. The term "small governmental jurisdiction" is defined as "governments of . . . districts, with a population of less than fifty thousand."<sup>221</sup> There are 85,006 governmental entities in the United States.<sup>222</sup> This number includes such entities as states, counties, cities, utility districts and school districts. We note that restrictions concerning antenna installation are usually promulgated by cities, towns and counties, not school or utility districts. Of the 85,006 governmental entities, 38,978 are counties, cities and towns; and of those, 37,566, or 96%, have populations of fewer than 50,000. The NLC<sup>223</sup> estimates that there are 37,000 "small governmental jurisdictions" that may be affected by the proposed rule.<sup>224</sup>

95. Section 601(4) of the Regulatory Flexibility Act defines "small organization" as "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."<sup>225</sup> This definition includes homeowner and condominium associations that operate as not-for-profit organizations. The Community Associations Institute estimates that there were 150,000 associations in 1993.<sup>226</sup> Given the nature of a neighborhood association, we assume for the purposes of this FRFA that all 150,000 associations are small organizations.

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<sup>220</sup>Regulatory Flexibility Act, 5 U.S.C. § 601(3) (1980).

<sup>221</sup>5 U.S.C. § 601(5).

<sup>222</sup>United States Dept. of Commerce, Bureau of the Census, *1992 Census of Governments*.

<sup>223</sup>The following entities filed joint comments in response to the IRFA's contained in IB Docket No. 95-59 (*DBS Order and Further Notice*) and in CS Docket No. 96-83 (*TVBS-MMDS Notice*): National League of Cities; The National Association of Telecommunications Officers and Advisors; The National Trust for Historic Preservation; League of Arizona Cities and Towns; League of California Cities; Colorado Municipal League; Connecticut Conference of Municipalities; Delaware League of Local Governments; Florida League of Cities; Georgia Municipal Association; Association of Idaho Cities; Illinois Municipal League; Indiana Association of Cities and Towns; Iowa League of Cities; League of Kansas Municipalities; Kentucky League of Cities; Maine Municipal Association; Michigan Municipal League; League of Minnesota Cities; Mississippi Municipal Association; League of Nebraska Municipalities; New Hampshire Municipal Association; New Jersey State League of Municipalities; New Mexico Municipal League; New York State Conference of Mayors and Municipal Officials; North Carolina League of Municipalities; North Dakota League of Cities; Ohio Municipal League; Oklahoma Municipal League; League of Oregon Cities; Pennsylvania League of Cities and Municipalities; Municipal Association of South Carolina; Texas Municipal League; Vermont League of Cities and Towns; Virginia Municipal League; Association of Washington Cities; and Wyoming Association of Municipalities (collectively "NLC").

<sup>224</sup>NLC IRFA Comments at 2.

<sup>225</sup>5 U.S.C. § 601(4).

<sup>226</sup>Community DBS Comments at 2.

96. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SA).<sup>227</sup> NAA argues that its members fall into three areas of SIC Codes 6512 (operators of nonresidential buildings), 6513 (operators of apartment buildings), and 6514 (operators of dwellings other than apartment buildings).<sup>228</sup> The SA defines a small entity in each of these codes as one with less than \$5,000,000 in gross annual revenues. Based on census data that lists businesses according to these SIC codes and their total revenue, NAA states that there are 28,089 operators of nonresidential buildings and 39,903 operators of apartment buildings. NAA states the Bureau of Census includes operators of dwellings other than apartment buildings in the same category as other types of businesses; thus, NAA would not provide the data, presumably because it would not be useful; however, NAA states that the figures for this category as a whole show that the number of operators of dwellings other than apartment buildings are similar to the numbers of operators covered by SIC codes 6512 and 6513.

**D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements**

97. The new rules clarify that petitions for declaratory judgment and waivers must be filed on interested parties and that a certificate of service must be filed with the petition or the complaint. In addition, the new rules require associations and local governments in Commission proceedings to provide constructive notice to their members or citizens and file a copy of the notice with the Commission with a statement explaining where the notice was placed and why such placement was reasonable. In a court proceeding brought by an association, the association must give constructive notice to its members.

**E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Rejected**

98. We find that there are no significant alternatives to the rules and policies set forth in this *Order* that would minimize the economic impact on small entities, and we note that no commenter proffered alternatives to these rules and policies. Because most of the conclusions reached in this *Order on Reconsideration* merely clarify and provide guidance under the current Section 207 rules, those conclusions need not be analyzed here because the impact of the current Section 207 rules was already analyzed in the *Report and Order*.<sup>229</sup> Nevertheless, there were some changes to the rules that we must address.

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<sup>227</sup>Small Business Act 15 U.S.C. § 632 (1996).

<sup>228</sup>Joint Comments were filed by the National Apartment Association, the Building Owners and Managers Association, the National Realty Committee, the Institute of Real Estate Management, the International Council of Shopping Centers, the National Multi Housing Council, the American Seniors Housing Association, and the National Association of Real Estate Investment Trusts (collectively "NAA") in response to the IRFA in the *Further Notice*.

<sup>229</sup>*Report and Order* at para. 67.

99. First, we adopted a proposal that viewers be given at least 21 days during which to comply with a court or Commission order upholding a restriction before any fine or penalty may be imposed on the viewer if the viewer's claim is not frivolous that the restriction was facially invalid or was invalid as applied to the specific viewer.<sup>230</sup> We agreed with petitioners that the potential threat of a fine or penalty could operate as a substantial deterrent to viewers exercising their right to install an antenna while such a restriction is under review. We do not find that there is a significant alternative way to remove this deterrent.

100. Second, we amended our rules to clarify that the burden of demonstrating that a particular restriction complies with our Section 207 rules rests with the proponent in both a court and Commission proceeding. No one proposed a significant alternative to this rule.

101. Third, we adopted a proposal that our Section 207 rules protect antennas that have transmission capability only if these transmission antennas are used in conjunction with antennas that receive video programming. Because this ruling was merely a clarification of the initial rule, we find that this ruling has no more impact than the initial ruling analyzed in the *Report and Order*.

102. Fourth, we amended our rules to protect "properties," not just "districts," listed or eligible to be listed on the National Register of Historic Places. No significant alternative was proposed that would not run afoul of federal laws and regulations protecting such properties.

103. Fifth, we rejected a proposal that our Section 207 rules protect *per se* any other new antenna not specifically listed in the Section 207 rules. This decision was required by the statutory language of Section 207. Moreover, the impact of this rule is diminished because we stated that we will consider petitions for a declaration whether a particular device is covered on a case by case basis.

104. Sixth, as set forth in Section D above, our rules clarified how service should be made and how certification of service provided. No significant alternative was proposed.

**Report to Congress:** The Commission will send a copy of this *Order on Reconsideration*, including this FRFA, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this *Order on Reconsideration* and FRFA (or summary thereof) will also be published in the Federal Register, pursuant to 5 U.S.C.A. § 604(b), and will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

#### IV. PAPERWORK REDUCTION ACT OF 1995 ANALYSIS

105. This *Order on Reconsideration* contains modified information collection requirements. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget ("OMB") to take this opportunity to comment on the information collection requirements contained in this Order on Reconsideration, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public comments are due 30 days from date of publication of this *Order on*

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<sup>230</sup>See Section II.G.

*Reconsideration* in the Federal Register; OMB comments are due 60 days from date of publication of this *Order on Reconsideration* in the Federal Register. Comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

106. Written comments by the public on the modified information collection requirements are due on or before 30 days after publication of this *Order on Reconsideration* in the Federal Register. Written comments by OMB on the modified information collection requirements must be submitted on or before 60 days after the publication of this *Order on Reconsideration* in the Federal Register. A copy of any comments on the information collection requirements contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to [jboley@fcc.gov](mailto:jboley@fcc.gov) and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to [fain\\_t@al.eop.gov](mailto:fain_t@al.eop.gov).

#### V. ORDERING CLAUSES

107. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 303, and Section 207 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, that the amendments to rule 47 C.F.R. § 1.4000 discussed in this *Order on Reconsideration* and set forth in Appendix B are ADOPTED. The amendments set forth in Appendix B shall become effective 30 days after publication in the Federal Register, except that paragraphs (d) and (e) of the amended rule impose new information collection requirements and shall become effective 70 days after publication in the Federal Register, following OMB approval, unless a notice is published in the Federal Register stating otherwise.

108. IT IS FURTHER ORDERED that the Petitions for Reconsideration in CS Docket No. 96-83 are GRANTED IN PART and DENIED IN PART, as provided above.

109. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Order on Reconsideration*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas  
Secretary

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**APPENDIX A****Petitions for Reconsideration**

BellSouth Corporation  
Consumer Electronics Manufacturers Association  
DIRECTV, Inc.  
Hughes Network Systems, Inc.  
Network Affiliated Stations Alliance  
Philips Electronics N.A. Corporation and Thomson Consumer Electronics, Inc.  
The Wireless Cable Association International, Inc., CAI Wireless Systems, Inc., National Wireless Holdings, Inc., Pacific Telesis Group, Bell Atlantic Corporation, CS Wireless Systems, Inc., NYNEX Corporation, People's Choice TV Corporation

**Reply Comments**

Community Associations Institute  
Instructional Television Fixed Service ("ITFS") Parties (jointly)<sup>231</sup>  
National Association of Broadcasters  
National Rural Telecommunications Cooperative  
United States Broadcasting Company, Inc.

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<sup>231</sup>The Alliance for Higher Education, Arizona Board of Regents for the Benefit of the University of Arizona, Board of Regents of the University of Wisconsin System, California State University, Calnet, Catholic Telemedia Network, Escondido Union Elementary School District, Greater Dayton Public Television, Inc., INTELLECOM Intelligent Telecommunications, KCTS Television, Long Beach Unified School District, Oceanside Unified School District, Oklahoma State University, San Diego Community College District, San Diego County Office of Education, San Diego State University, Santa Ana Unified School District, Santa Clara County Office of Education, South Carolina Educational Television Commission, St. Louis Regional Education and Public Television Commission, State of Wisconsin--Educational Communications Board, University of Idaho, University of Southern California, University System of the Ana G. Mendez Educational Foundation and Washington State University.

**APPENDIX B**

Section 1.4000 of Title 47 of the Code of Federal Regulations is amended to read as follows:

(a) Any restriction, including but not limited to any state or local law or regulation, including zoning, land-use, or building regulation, or any private covenant, homeowners' association rule or similar restriction on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest in the property, that impairs the installation, maintenance, or use of:

(1) an antenna that is designed to receive direct broadcast satellite service, including direct-to-home satellite services, that is one meter or less in diameter or is located in Alaska;

(2) an antenna that is designed to receive video programming services via multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services, and that is one meter or less in diameter or diagonal measurement;

(3) an antenna that is designed to receive television broadcast signals; or

(4) a mast supporting an antenna described in subparagraphs (1), (2) and (3) above

is prohibited, to the extent it so impairs, subject to paragraph (b). For purposes of this rule, a law, regulation or restriction impairs 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. Any fee or cost imposed on a viewer by a rule, law, regulation or restriction must be reasonable in light of the cost of the equipment or services and the rule, law, regulation or restriction's treatment of comparable devices. 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). In addition, except with respect to restrictions pertaining to safety and historic preservation as described in paragraph (b) below, if a proceeding is initiated pursuant to paragraph (c) or (d) below, the entity seeking to enforce the antenna restrictions in question must suspend all enforcement efforts pending completion of review. No attorney's fees shall be collected or assessed and no fine or other penalties shall accrue against an antenna user while a proceeding is pending to determine the validity of any restriction. If a ruling is issued adverse to a viewer, the viewer shall be granted at least a 21 day grace period in which to comply with the adverse ruling; and neither a fine nor a penalty may be collected from the viewer if the viewer complies with the adverse ruling during this grace period, unless the proponent of the restriction demonstrates, in the same proceeding which resulted in the adverse ruling, that the viewer's claim in the proceeding was frivolous.

(b) Any restriction otherwise prohibited by paragraph (a) is permitted if:

(1) it is necessary to accomplish a clearly defined, legitimate safety objective that is either stated in the text, preamble or legislative history of the restriction or described as applying to that restriction in a document that is readily available to antenna users, and

would be applied to the extent practicable in a non-discriminatory manner to other appurtenances, devices, or fixtures that are comparable in size and weight and pose a similar or greater safety risk as these antennas and to which local regulation would normally apply; or

(2) it is necessary to preserve a prehistoric or historic district, site, building, structure or object included in, or eligible for inclusion on, the National Register of Historic Places, as set forth in the National Historic Preservation Act of 1966, as amended, 16 U.S.C. § 470, and imposes no greater restrictions on antennas covered by this rule than are imposed on the installation, maintenance or use of other modern appurtenances, devices or fixtures that are comparable in size, weight, and appearance to these antennas; and

(3) it is no more burdensome to affected antenna users than is necessary to achieve the objectives described above.

(c) Local governments or associations may apply to the Commission for a waiver of this rule under Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3. Waiver requests must comply with the procedures in subsections (e) and (g) of this rule and will be put on public notice. The Commission may grant a waiver upon a showing by the applicant of local concerns of a highly specialized or unusual nature. No petition for waiver shall be considered unless it specifies the restriction at issue. Waivers granted in accordance with this section shall not apply to restrictions amended or enacted after the waiver is granted. Any responsive pleadings must be served on all parties and filed within 30 days after release of a public notice that such petition has been filed. Any replies must be filed within 15 days thereafter.

(d) Parties may petition the Commission for a declaratory ruling under Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, or a court of competent jurisdiction, to determine whether a particular restriction is permissible or prohibited under this rule. Petitions to the Commission must comply with the procedures in subsections (e) and (g) of this rule and will be put on public notice. Any responsive pleadings in a Commission proceeding must be served on all parties and filed within 30 days after release of a public notice that such petition has been filed. Any replies in a Commission proceeding must be served on all parties and filed within 15 days thereafter.

(e) Copies of petitions for declaratory rulings and waivers must be served on interested parties, including parties against whom the petitioner seeks to enforce the restriction or parties whose restrictions the petitioner seeks to prohibit. A certificate of service stating on whom the petition was served must be filed with the petition. In addition, in a Commission proceeding brought by an association or a local government, constructive notice of the proceeding must be given to members of the association or to the citizens under the local government's jurisdiction. In a court proceeding brought by an association, an association must give constructive notice of the proceeding to its members. Where constructive notice is required, the petitioner or plaintiff must file with the Commission or the court overseeing the proceeding a copy of the constructive notice with a statement explaining where the notice was placed and why such placement was reasonable.

(f) In any proceeding regarding the scope or interpretation of any provision of this section, the burden of demonstrating that a particular governmental or nongovernmental restriction complies with this section

and does not impair the installation, maintenance or use of devices designed for over-the-air reception of video programming services shall be on the party that seeks to impose or maintain the restriction.

(g) All allegations of fact contained in petitions and related pleadings before the Commission must be supported by affidavit of a person or persons with actual knowledge thereof. An original and two copies of all petitions and pleadings should be addressed to the Secretary, Federal Communications Commission, 1919 M St. N.W.; Washington, D.C. 20554, Attention: Cable Services Bureau. Copies of the petitions and related pleadings will be available for public inspection in the Cable Reference Room in Washington, D.C. Copies will be available for purchase from the Commission's contract copy center, and Commission decisions will be available on the Internet.

(h) So long as the property owner consents, a person residing on the property owner's property with the property owner's permission shall be treated as an antenna user covered by this rule and shall have the same rights as the property owner with regard to third parties, including but not limited to local governments and associations, other than the property owner.