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January 28, 1999

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**BY HAND**

Ms. Magalie Salas, Secretary  
Federal Communications Commission  
1919 M Street, NW, Room 222  
Washington, DC 20554

Re: Ex Parte Filing of Hughes Network Systems, IB Docket 95-59

Dear Ms. Salas:

On behalf of Hughes Network Systems ("HNS"), we write to update the record in IB Docket 95-59. HNS, which manufactures very small aperture terminal ("VSAT") antennas, was an active participant in the rulemaking that resulted in the March 1996 amendment of Section 25.104 of the Commission's Rules, 47 C.F.R. § 25.104. HNS urges the Commission to resist altering its March 1996 amendments to Section 25.104, which clarified the Commission's long-standing preemption of state and local regulation of satellite antennas. These clarifications have prevented many local regulators from enforcing unreasonable satellite antenna regulations, and have not interfered with legitimate health and safety interests. While HNS still encounters recalcitrant local officials who refuse to recognize the FCC's preemption rule, the amended rule has advanced the Commission's goal of making satellite communications more accessible and more competitive with landline services.

**A. Clear Preemption is Still Needed to Prevent Unreasonable Regulations**

The Commission adopted its March 1996 amendment to Section 25.104 after a comprehensive rulemaking in which representatives of municipalities, satellite users and satellite manufacturers participated. See *Preemption of Local Zoning Regulation of Satellite Earth Stations*, 11 F.C.C. Rcd. 5809, 5810 (1996) (the "March 1996 Order"). In response to a "national problem" of unreasonable regulation of satellite antennas that existed under its preemption rule adopted in 1986, the Commission revised Section 25.104 to adopt a

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“presumption approach” that requires local regulators to obtain a declaration from the Commission before enforcing regulations affecting the “installation, maintenance, or use” of satellite antennas less than two meters in diameter that are installed in commercial areas. *Id.* at 5814-15.<sup>1</sup> (HNS’s VSAT antennas are generally included within this definition.)

This presumption approach replaced the original rule adopted in 1986. Under that rule, local regulators themselves determined the reasonableness of their own regulations. In addition, aggrieved parties were prevented from presenting its case to the Commission until they had exhausted both local administrative and federal judicial remedies. As the FCC found in its March 1996 Order, local authorities therefore adopted unreasonable regulations with alarming regularity, creating a “national problem.” *See id.* at 5810.

The record in the rulemaking demonstrated convincingly that local regulators, who typically have little experience with satellite technology and limited appreciation for the Commission’s interest in competition between communications providers, could not be relied upon to determine whether their own regulations are reasonable. For instance, the Commission found that even many of the examples of so-called “reasonable” regulations presented in the comments of municipalities were in fact unreasonably burdensome. *March 1996 Order* at 5813 (citing regulations that required permits, set-back requirements and variances).

HNS’s experiences since 1996 with local regulators indicate that a strong preemption rule is still required to prevent the adoption and enforcement of unreasonable regulations. While many municipalities have adopted regulations consistent with Section 25.104, too many local regulators continue to use their leverage over local processes to force HNS and other satellite providers to comply with unreasonable regulations. *See Declaration of Steven P. d’Adolf (“d’Adolf Dec.”) at ¶¶ 2-4, attached hereto as Exhibit A.*

For instance, several municipalities have used their certificate of occupancy processes to force HNS to spend more than \$1,000 to present certified drawings of satellite installations and to abide by unreasonable procedures. *See d’Adolf Dec.* at ¶ 3-4. By refusing to issue a certificate of occupancy, local regulators can delay the opening of a store on which the satellite antenna is installed. *Id.* Rather than lose substantial money from such a delay, HNS’s customer will demand that HNS resolve the problem, often at a cost equaling or exceeding the price of HNS’s VSAT antenna. *Id.*

Other municipalities -- ignoring the presumption -- have levied fines and placed liens on the property of HNS’s customers after HNS installed its VSAT antennas without following unreasonable permit and variance procedures. In some cases, municipalities

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<sup>1</sup> Until August 1996, Section 25.104 also applied to regulations affecting satellite antennas one meter or less in diameter installed in residential areas. When the Commission promulgated Section 1.4000 to preempt regulation of direct-to-home satellite service antennas, it inadvertently omitted non-video residential satellite antennas from the specific preemption provisions of both rules. HNS brought this issue to the Commission’s attention in another filing earlier this month. *See Letter of HNS, January 4, 1999.*

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acknowledge the clear language of the rule, but still refuse to release a lien without payment. *See* d'Adolf Dec. at ¶ 4. For instance, in Lantana, Florida, HNS was required to pay more than \$1,000 to release a lien placed only because HNS did not first obtain a permit for a VSAT installation. *Id.* While Lantana's counsel recognized that the FCC's rule prohibited such a lien from being placed, her client refused to release the lien without receiving the payment from HNS. *Id.*

The only practical leverage HNS has against these municipalities is the clear language of the Commission's rule. Most municipalities will respect a plainly-stated federal rule. Thus, while HNS has been required to accede to some unreasonable demands since March 1996, the amended Section 25.104 prevents the enforcement of most unreasonable regulations, and has resulted in an improved competitive environment for satellite communications from the previous rule.

**B. The March 1996 Order Did not Interfere with Legitimate Local Interests**

In response to the proposed rule, municipalities complained to the FCC, both in comments and in petitions for reconsideration, that the presumption approach for regulation of very small antennas would preclude the enforcement of legitimate safety regulations and would require local authorities to participate in expensive and time-consuming proceedings before the FCC. Neither prediction has come true in the past three years. Satellite installations remain safe under the amended rule; there have been no safety complaints lodged with the FCC, and the safety record of HNS's VSAT antennas remains impeccable. There been few requests for ruling before the FCC, and there has also been no reported litigation over the scope of preemption under the new rule.

*1. Satellite Antenna Installations Remain Safe*

When it adopted the presumption approach, the Commission had before it an overwhelming record of satellite antenna safety. The same is true today, as HNS's VSAT antenna installations continue to survive major natural disasters. The doomsday predictions of the municipalities, including the Michigan and Texas Communities that predicted that "the proposed rule will kill people," *Comments of Michigan and Texas Communities* at 17, could not have been more wrong.

As the Commission noted in the March 1996 Order, HNS's VSATs withstood Hurricane Andrew in 1993; while air conditioning units were ripped from buildings, VSATs installed alongside did not move. *Id.* at 5816. VSATs installed since that time have withstood other natural disasters, including an antenna that remained installed and operational during a tornado in Houston, Texas that ripped a wall from the mall on top of which it was installed. *See* d'Adolf Dec. at ¶ 6. In more than a decade of VSAT installation experience, HNS has not had a single VSAT antenna move from its installed site due to weather or for any other reason. *See* d'Adolf Dec. at ¶ 5. Furthermore, a review of the Commission's files in this proceeding indicates that it has not received any complaints of injuries caused by satellite antennas since it adopted the presumption approach.

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This safety record is due not only to the diligence of the professionals who install commercial satellite antennas, but also to the technology itself. *See id.* at 5816-17. As HNS demonstrated to the Commission during the rulemaking, satellite technology *requires* that antennas be installed safely, movement will cause the antenna to lose its connection with the satellite. *See d'Adolf Dec.* at ¶ 5.

The Commission should resist any temptation to “harmonize” Section 25.104 with Section 1.4000, which preempts local regulation of certain consumer-use antennas. The antennas subject to the less stringent preemption of Section 1.4000 are typically installed by consumers and are used primarily for entertainment purposes. On the other hand, the antennas subject to the presumption approach of Section 25.104 are used in commercial enterprises and installed by professionals; most local regulations are based on misinformation about the nature of satellite antennas today, and have the effect of inhibiting competition.

2. *A Clear Rule has Almost Eliminated Section 25.104 Litigation*

The presumption approach not only does not jeopardize safety, but it also provides both antenna users and local regulators with clear guidance of the FCC’s preemption, thereby nearly eliminating litigation over its interpretation. In its March 1996 Order, the Commission stated that the record, which included evidence of extensive litigation over the meaning of the 1986 preemption rule, “supports our tentative conclusion that the 1986 rule needs to be clarified.” *March 1996 Order*, 11 F.C.C. Rcd. at 5813. The Commission therefore dismissed the predictions of a consortium of local communities that the “Commission will indeed become a ‘national zoning board.’” *Comments of the City of Dallas, et al.*, filed July 14, 1995.

These predictions, like those concerning amended rule’s threat to safety, proved to be far off the mark. The amended Section 25.104 has provided the clarity the Commission sought, thereby reducing litigation before the FCC and the courts. The Commission has been presented with only a handful of declaratory ruling petitions filed under Section 25.104.<sup>2</sup> Likewise, only 2 of the 33 reported court cases interpreting Section 25.104 have been decided after the March 1996 amendments, a significant reduction in litigation.

For these reasons, HNS respectfully requests that the Commission adhere to the course it took in March 1996, when it amended Section 25.104 to adopt the presumption

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<sup>2</sup> While there have been fewer than ten declaratory ruling petitions under 25.104 reported by the Commission, Commission has had more than 15 such petitions filed under Rule 1.4000, a less clear preemption rule. To “harmonize” Section 25.104 with Section 1.4000 would doubtless lead to an *increase* in litigation.

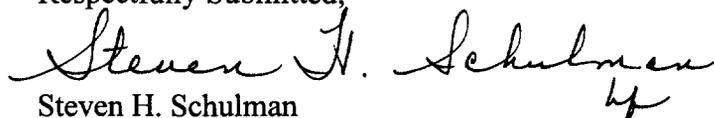
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approach. An attempt to harmonize Section 25.104 with Section 1.4000 would be unwise policy, and would reverse many of the correct decisions made in March 1996.

Respectfully Submitted,



Steven H. Schulman  
of LATHAM & WATKINS

Enclosure

cc: Selina Khan, FCC  
Rosalee Chiara, FCC  
Daryl Cooper, FCC

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## DECLARATION OF STEVEN P. D'ADOLF

1. I, Steven P. d'Adolf, am the Assistant Vice President of Installation Services for Hughes Network Systems, Inc. ("HNS"). As Assistant Vice President of Installation Services, I manage the installation of the approximately 20,000 VSAT antennas installed annually across the country. Since 1988, HNS has installed over 125,000 VSAT antennas, amounting to approximately 550,000 "antenna years" of experience.

2. Since 1996, when the FCC's preemption rule was amended to adopt the "presumption approach," HNS has faced fewer unreasonable local regulations. However, there are still many local officials who use their leverage over local processes to force HNS to capitulate to unreasonable regulations.

3. In several cases, local officials have withheld a certificate of occupancy for one of HNS's customers in order to force HNS to comply with unreasonable permitting requirements. Because a certificate of occupancy is required before a building can open, local authorities have overwhelming leverage over HNS. While a satellite antenna is a vital communications link for a company, opening the store is its highest priority. Accordingly, when a local official withholds the certificate of occupancy, HNS's customers often demand that HNS comply with unreasonable regulations so that the store can open on time. For instance, in July 1998 the City of North Lauderdale, Florida refused to issue a certificate of occupancy to Mobil Oil Company for its new service station because a permit was not obtained for the HNS satellite antenna.

4. Another example is Lantana, Florida, where HNS was required to pay the Town \$1,500 to have a lien released from an Amoco station where HNS had installed a VSAT antenna. The VSAT had been installed by a professional installer and complied with all applicable safety regulations. The Town, however, wanted HNS to apply for a permit, which required expensive engineering drawings, and to screen the antenna for aesthetic reasons. Due to client demands, HNS agreed to submit the drawings, but would not construct aesthetic screening, a clearly preempted requirement. Even though the Town's attorney acknowledged that its regulation was preempted and not enforceable, Town officials demanded that HNS make a payment to release the lien. Rather than litigate the matter, HNS agreed to pay \$1,500 so that the lien would be released. As a point of comparison, the cost of the entire VSAT installation was in the \$2,500 range.

5. The amendment of Section 25.104 in March 1996 has had no impact on the safety of HNS's VSAT installations. HNS VSATs are installed with care to ensure that there will be almost no movement, as the antennas must maintain a line of sight with the satellite. Nearly any kind movement of the antenna renders it inoperable. Both customers and installers report any problems with VSAT antenna installations to either me or my staff at HNS. During these 550,000 antenna years, on only a handful of occasions have we been informed that natural forces have moved an HNS VSAT antenna from its installed location. One of these occurrences involved isolated gusts of extreme force -- one gust, measured at over 200 miles per hour, moved a 727 jetliner on a nearby runway. In none of these cases did the VSAT antenna fall from the roof, and there were no reports of any injuries.

6. In 1998, a tornado hit the Houston, Texas area and caused a wall of the Sugarland Mall to collapse. The HNS VSAT antenna installed on the roof of the mall not only did not move, but it also remained fully operational during the storm.

7. HNS has built this safety record by maintaining high installation and manufacturing standards. HNS carefully selects, certifies and monitors its local installers. These local installers are typically paid \$35 per hour. In the case of a non-penetrating mount that is secured to a roof by ballast, HNS uses a computer program developed by Reva, Klein & Timmons, a nationally-recognized licensed structural engineer. This program utilizes data from the American National Standards Institute, the Electronic Industry Association, and the National Weather Service to determine the windloading and appropriate ballast. We routinely provide these calculations to local officials when requested. HNS has always been willing to have any of its installations be inspected by local building officials.

8. HNS continues to experience situations where a customer's landlord will not allow an antenna installation without HNS presenting a permit from the local municipality. When HNS provides the landlord with a copy of the FCC's ruling, the landlord still will not relent unless HNS provides a letter from the municipality indicating a permit is not required. Since such a letter is almost impossible to obtain, in order to complete the installation, HNS must then indemnify the landlord against any reprisals by the municipality. Landlords remain fearful that they can literally have their doors locked by a building official for lack of a permit for their tenant's satellite antenna. The only protection against such reprisals is a clearly-worded preemption rule.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 28th day of January, 1999, at Germantown, MD.

  
Steven P. d'Adolf