LOCAL REGULATION OF COMMUNICATION TOWERS, CELLULAR FACILITIES, AMATEUR ANTENNAE AND SATELLITE DISHES: THE TELECOMMUNICATIONS REFORM ACT OF 1996 AND FCC PREEMPTION RULES

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Technical Service Report No. 10
The Rocky Mountain Land Use Institute

College of Law
University of Denver

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An Annotated Outline of the New Framework for Local Control With Appendix of Applicable FCC Rules and Orders

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ABOUT THE INSTITUTE

The Rocky Mountain Land Use Institute at the University of Denver College of Law engages in a variety of educational and research activities related to public interest aspects of land use and development. In addition to providing educational opportunities for students at the College of Law through internships and research projects, the Institute sponsors workshops and symposia for land use practitioners and citizen groups on specific land use topics. The Institute, working closely with both the public and private sector, also undertakes and supports research and service projects related to land use and development in the Rocky Mountain Region. The Institute operates in affiliation with both regional and national advisory boards, the members of which are among the leading practitioners and academics in the field. The Institute is entirely financially self-sustaining with funds generated by its activities and publications and by gifts from Institute sponsors.

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2. Public Purposes for Regulation

- Public health and safety (including NIER-non-ionizing electromagnetic radiation)
- Visual impact (community aesthetics)
- Property values (particularly near residential areas)

3. Reasonable Regulation Upheld

- Exclusion from residential areas
- Regulation of location, placement and installation
- Regulation of height
- Regulation of screening and camouflage ("stealth" restrictions involving landscaping, painting and lighting, etc.)
- Usually by special permit review

4. Inadvertent Regulation by Oversight

- **Allowed Uses**

  See *Friends of Woodstock, Inc. v. Town of Woodstock*, 152 A.D.2d 876, 543 N.Y.S.2d 1007 (1989) (television tower held to be "public utility"); *Payne v. Taylor*, 178 A.D.2d 979, 578 N.Y.S.2d 327 (1991) (allowing by special permit 400-foot cellular tower in residential area as "public utility building").

- **Accessory Uses**

  See *Irwin v. Kayser*, 112 A.D.2d 192, 491 N.Y.S.2d 419 (1985) (television antennae on roof of commercial station deemed accessory to primary use); *Skinner v. Zoning Bd. of Adjustment*, 80 N.J. Super. 380, 193 A.2d 861 (1963) (100 foot amateur radio tower permissible hobby and "accessory use" in residential district.)

- **Height Restrictions**

  See Jaffe, *Cragsmoor Preservation Alliance v. RCI Corp.*, 119 A.D.2d 854, 500 N.Y.S.2d 427 (1986) (ordinance height restrictions applied to "buildings" not transmission towers); *Carnie v. Town of Richmond*, 139 N.H. 21, 648 A.2d 205 (1994) (exception in ordinance from 35-foot height limitation in residential district for "chimneys or antennas" interpreted to include "ordinary pre-cable television antenna" and not 100-foot cable television tower). The court therein noting:

  > [T]he 2120-foot guyed Warszawa radio mast at Konstantynow, sixty miles northwest of the capital of Poland, is the world's tallest-ever structure. N. McWhirter, *The Guinness Book of Records* 100 (P. Matthews ed. 1994). "The mast was so high that anyone falling off the top would reach terminal velocity and hence cease to be accelerating before hitting the ground." *Id.* Were we to accept the . . . proffered definition of "antenna," this structure would not violate the height limitation. We cannot envision that such a result was contemplated by the town residents when they adopted the zoning ordinance.

- **Variances for Use or Height May be Granted**

  See *Sherman v. Bd. of Appeals*, 235 N.E.2d 800 (Mass. 1968) (commercial tower in residential district); *Levereault v. Lincoln Bd. of Review*, 98 R.I. 466, 204 A.2d 637 (1964) (variance allowed for "structures").

- **Variance Improper Under Spirit and Intent of Ordinance**

  See *Hohmann v. Thomsen*, 32 A.D.2d 669, 300 N.Y.S. 2d 781 (1969) (100-foot transmission tower not in harmony with character of residential area); *Merriam v. Bd. of Zoning Appeals*, 242 Kan. 532, 748 P.2d 883 (1988) (reversing grant of height variance for 990-foot communications tower in light industrial district). The court therein noting:

  > The district judge placed primary emphasis on the 990-foot height of the structure, stating: "Metroplex argues that the design for the tower will be aesthetically pleasing and incorporate important safety features." While it does appear that Metroplex is proposing to build a tower that is as unobtrusive as possible, and as safe as possible, these arguments simply ignore the fact that it will be 990 feet tall. The tower would be taller than an 80 story building. In an area where the skyline primarily consists of treetops, this tower would stick out like a sore thumb. The variance granted by the Board did in fact depart substantially from established height restrictions, and thus violates the general spirit and intent of the zoning ordinance.

5. Supplemental Regulatory Techniques

- **Consolidation by Special Permit Review**

  New towers must be constructed and designed to accommodate multiple users, applicants must demonstrate that their antenna cannot be accommodated on an existing tower and provision for sharing user to be charged reasonable fees and costs for shared use. Multnomah County, Oregon Ord. 11.15.7035 (1982); Oldham County, Kentucky Ord. KOC-90-400.450.7 (1990).

- **Protection of Public Health from NIER**

  Restricting at boundary level NIER (non-ionizing electromagnetic radiation) based on American National Standards Institute benchmarks, fencing from public access, and posting of warnings. King County, Washington Ord. 10021 (1991).

- **Regulating Visual Impact**

  A limit on height to the lowest possible to function effectively, along with generous setbacks, landscaping and screening requirements, including painting and lighting to blend tower into the landscape. Multnomah County, Oregon Ord. 11.15.7035(B)(7)(c); King County, Washington Ord. 10021 §7.

- **Amortization**

  Amortization generally has not been attempted or tested in court. See *Farmington v. Viacom Broadcasting, Inc.*, 522 A.2d 318, 321 (Conn. App. 1987) (requirement that owner dismantle existing tower as condition to approval of new and taller tower had substantial relationship to request for new tower and to town's goal that mountain on which tower was located not be "dotted with numerous towers" which would affect property values and character of surrounding neighborhoods).

6. State Law Preemption Claims

- **Governmental Immunity**

  See *Glascock v. Baltimore County*, 581 A.2d 822 (Md. 1990) (county and state uses immune from zoning).

- **State Preemption for "Public Utilities"**

  See *Collins v. Swackhamer*, 600 N.E.2d 1079 (Ohio App. 1991) (radio broadcasting station held to be exempt "public utility"); *Payne v. Taylor*, 178 A.D.2d 979, 578 N.Y.S. 2d 327 (1991) (400 foot cellular tower held "public utility").

7. Implied Federal Preemption Claims - Generally Rejected

- First Amendment "Free Speech" Claims
- Burdening Interstate Commerce Claims
- Implied FCC Preemption Claims

- Implied FCC Preemption Claims

- But see *Burlington Assembly of God Church v. Zoning Bd. of Adjustment*, 570 A.2d 495, 497 (N.J.Super. 1989) (freedom of religion allowed church to construct radio transmission tower on church property). See generally Duerksen "Regulating Religious Properties in the 1990s," 14 Zoning and Planning L. Rept. 169 (1991).

8. Limited Federal Preemption: Cellular Towers and Personal Wireless Facilities Under Section 704 of the Telecommunications Reform Act of 1996

- Local communities may regulate placement and installation. However,
  a. regulation may not have the effect of prohibiting wireless services with the community;
  b. regulation may not address environmental effects of radio frequency emissions;
  c. applications for wireless facilities must be acted on within a reasonable period of time;
  d. denial of an application must be in writing and supported by substantial evidence from the written record.
- Local communities may not unreasonably discriminate among providers of functionally equivalent services.
- Local communities may regulate their public rights of way and charge fair compensation for facilities thereon.

B. LOCAL CONTROL OF AMATEUR RADIO ANTENNAE

1. Public Purposes for Regulation

- Public Safety

- Visual Impact

- Property Values

2. Reasonable Regulation Upheld

- Location, Placement, Installation

- Height Restrictions

- Screening Requirements

- Local interest in these towers is maximized because they affect residential property values, aesthetic characteristics, and the physical safety of members of the community. See Notes, 73 Harv. L. Rev. 386 (1959): 44 Cornell L.Q. 94 (1958). An opinion of the California Attorney General concluded that pursuant to its police powers, a chartered city may enact reasonable regulations as to height, location, and method of installation of amateur radio antennae. (Op. no. 71-79, 54 Ops. Atty. Gen. 102 (1971).) The request for that opinion was apparently precipitated by an accident in which one man was killed and four others were injured when they lost control of a 65-foot antenna they were attempting to install on a residential roof and allowed it to strike a high power line.

- Cases generally uphold reasonable height and placement restrictions on amateur antennae. See *Schroeder v. Municipal Court*, 73 Cal. App. 3d 841, 141 Cal. Rptr. 85 (1977) (upholding ordinance prohibiting radio or television transmitting or receiving antenna over 40 feet in height in single-family zone); *People v. Krimko*, 145 Misc. 2d 822, 548 N.Y.S.2d 615 (1989) (upholding ordinance prohibiting radio or television antennae (other than parabolic antenna) more than five feet above roof, if affixed to a building, or more than 35 feet above mean ground level at foundation of building).

3. **Limited Federal Preemption: Local Regulation of Amateur Radio Antennae Under FCC Rule 47 CFR §97.15(e)**

- The FCC, by PRB-1, a memorandum opinion and order of the Federal Communications Commission dated September 16, 1985 regarding federal preemption of state and local regulations pertaining to amateur radio facilities (as now set out in 47 CFR §97.15(e)) has preempted local regulation of amateur radio antennae as follows:

> State and local regulation of a station antenna structure must not preclude amateur service communications. Rather, it must reasonably accommodate such communications and must constitute the minimum practicable regulation to accomplish the state or local authority's legitimate purpose.

- **Ban on amateur radio antennae in any area is preempted:** E.g., *Thernes v. Lakeside Park*, 779 F.2d 1187, 1189 (6th Cir. 1986).

"Reasonable Accommodation" and "Minimum Practicable Regulation"

Since local regulations which involve placement, screening, or height of antennae based on health, safety, or aesthetic considerations must be crafted and applied to reasonably accommodate amateur communications and must constitute the minimum practicable regulation to accomplish the local authority's regulatory purposes, restrictions must be applied with findings related to these two criteria.

- **Review by Special Permit or Exception**

Application of local ordinance restrictions that do not incorporate the two criteria set out above may be held preempted and invalid on their face. See *Bodony v. Incorporated Village of Sands Point*, 681 F.Supp. 1009, 1013 (E.D.N.Y. 1987); *Bulchis v. City of Edmonds*, 671 F.Supp. 1270, 1274 (W.D. Wash. 1987). Specific findings by a city, supported by the evidence, under these two criteria are required or a decision denying an application for an amateur radio tower will be held preempted by FCC PRB-1. See *D.R. Evans v. Bd. of County Commissioners*, 994 F.2d 755 (10th Cir. 1993); *Howard v. City of Burlingame*, 937 F.2d 1376, 1380 (9th Cir. 1991) (city must attempt to negotiate satisfactory compromise).

- **Cases Upholding Application Denials**

Height, size and placement restrictions that protect aesthetics and property values imposed after special permit review have been upheld despite the fact that the amateur radio operator did not have maximum international capability. See *D.R. Evans v. Bd. of County Commissioners*, 994 F.2d 755 (10th Cir. 1993) (upholding denial of special permit for tower greater than 35 feet since alternatives and impacts considered); *Williams v. City of Columbia*, 906 F.2d 994 (4th Cir. 1994) (upholding denial of special permit for antennae over 17 feet where tower proposed was retractable 25 foot to 65 foot high antenna and owner refused to accept limitation on hours of extension). But see *Pentel v. Mendota Heights*, 13 F.3d 1261 (8th Cir. 1994) (denial of special permit for 68 foot tower reversed and remanded since existing 56.5 foot tower apparently not reasonably adequate for domestic communications and no attempt to consider alternatives and impacts).

- **Costs of Review Shifted to Applicant**

See *Howard v. Burlingame*, 937 F.2d 1376, 1381 (9th Cir. 1991) (city may shift cost of review for radio antenna application to applicant).

C. LOCAL CONTROL OF SATELLITE DISH ANTENNAE

1. Public Purposes for Regulation

- Public Safety
- Visual Impact
- Property Values

2. Reasonable Regulation Upheld

- Location, Placement, Installation, Size
- Height Restrictions
- Screening Requirements
- See *Johnson v. City of Pleasanton*, 781 F.Supp. 632, 635-36 (N.D. 1991), reversed on other grounds, 982 F.2d 350 (9th Cir. 1992), wherein the court expressly noted the valid public purposes supporting the restrictions therein imposed on satellite dish receivers:

> The Supreme Court has observed, "a city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.'" Renton, 106 S.Ct. at 930 (quoting *Young v. American Mini Theatres, Inc.* 427 U.S. 50 (1976)). The concerns of both visual irritation and a potential decrease in property values and community appraisal resulting from such unsightly objects delineate secondary effects supporting an upholding of the ordinance. See Order of November 26, 1990, at 5 (quoting City's staff report noting that satellite antennas "tend to be unsightly" and "are often indiscriminately installed on existing buildings" and thus "elegant buildings can be made to look trashy by their presence on rooftops"). In addition, such antennas pose a serious threat in

their susceptibility to "'severe wind loadings, necessitating careful attention to their installation in order to avoid injury to persons and property.'" See Order of November 26, 1990, at 5 (quoting a City staff report cited in defendant's Memorandum in Opposition at exh. 1).

3. **Limited Federal Preemption Under FCC Rule 47 CFR §s1.4000: Satellite Receiving Dishes or Antennae One Meter (39.37 inches) or Less in Diameter (or of any size in Alaska) and Television Broadcast Reception Antennae**

- **Applicability and Scope**

The FCC preemption rules below apply to antennae designed to receive direct over-the-air broadcast satellite service (DBS), including direct-to-home satellite services or that are designed to receive over-the-air video programming services, including multichannel multipoint distribution services (MMDs), instructional television fixed services, and local multipoint distribution services that are one meter or less in diameter or diagonal measurement (or of any size in Alaska) and antennae designed to receive television broadcast signals (TVBS) 47 CFR §s1.4000(a)(1)(2)(3) (this rule excludes lower power C-band satellites that require larger dishes or devices that have transmission capability only).

- **Local Restrictions Preempted**

This FCC rule expressly preempts any local regulation or private deed restriction that impairs the installation, maintenance or use of such an antenna on property within the exclusive use or control of the antenna user. Impairment is defined as a rule or restriction that:

(i) prevents or unreasonably delays installation, maintenance or use; or

(ii) unreasonably increases the cost of installation, maintenance, or use; or

(iii) precludes reception of an acceptable quality signal.

- **Impairment of Reception Quality**

The FCC has taken the position that:

> The signals that are protected here are signals intended for reception in the viewing area. Under this criterion, for example, our rule would invalidate a requirement that an antenna be placed in a position where reception would be impossible or would be substantially degraded. However, a regulation requiring that antennas be placed to the extent feasible in locations that are not visible from the street would be permitted under our rule, if this placement would not impair reception of an acceptable signal. Requirements that antennas be set back from the street could be deemed to impair reception if compliance would mean that the antenna could not receive an acceptable signal.

FCC Order No. 96-328, Par. 20.

- **Costs of Regulatory Compliance**

The FCC takes the following position with respect to costs:

> While we decline to adopt a formula based on a specific percentage of the costs of equipment or services, we do require that the costs of complying with governmental and nongovernmental restrictions on the installation, maintenance and use of devices designed for over-the-air reception not be unreasonable in light of the cost of the equipment or services and the visual impact of the antenna. Under this approach, restrictions cannot require that relatively unobtrusive DBS antennas be screened by expensive landscaping. On the other hand, 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. In determining the reasonableness of any additional cost, we will also consider the treatment of comparable devices. For example, if costs are imposed to screen other similar devices in the neighborhood, such as air conditioning units, trash receptacles, etc., similar requirements imposed on antennas may be reasonable under our rule even though they might increase the cost of installation, maintenance or use, if such measures are justified by visual impact.

FCC Order No. 96-328, Par. 19.

- **Prior Permitting or Approval Review Procedures**

The FCC takes the position that:

> Procedural requirements – provisions requiring the approval of community associations or local zoning boards prior to the installation of TVBS, MMDS, or DBS antennas, for example – can, in practical terms, "prevent" the viewer's access to video programming signals as surely as outright prohibitions, by creating an extra hurdle for consumers to overcome.

The FCC further notes:

> We believe that the imposition of delay is an impairment of the sort Congress sought to prohibit; accordingly, these types of procedural requirements and permits are prohibited except as provided herein.

Prior permitting review is interpreted by the FCC to be preempted for antennae except for purposes related to public safety or historic preservation (see discussion below). FCC Order No. 96-328, Par. 17. Such permits, however, "should be handled expeditiously." Id. at Par. 37.

- **Height Limitations on Antennae**

The FCC takes the position that specific per se height limitations are preempted for antennae. However, permitting requirements related to public safety, such as those in the Building Officials and Code Administrators International, Inc. (BOCA) code, relating to setback and installation of antennae extending more than 12 feet above the roofline may be applied to TVBS antennae and MMBS antennae on masts.

FCC Order No. 96-328, Pars. 37 and 40.

- **Otherwise Preempted Restrictions Allowed**

Safety Restrictions that are clearly defined and stated and not unduly burdensome in view of their purpose are allowed as long as such restrictions are applied to the extent practical, to other appurtenances, devices, or fixtures of comparable size, weight, or appearance.

The FCC notes, in regard to safety restrictions:

> [R]egulations that serve a stated safety purpose, such as restrictions requiring minimum distances from high voltage power lines, are permitted. Similarly, a restriction that precludes any installations very near streets and intersections in order to preserve a clear line of sight for drivers is clearly safety-related and permitted, provided that all comparable installations, e.g., foliage, are also precluded. Safety regulations stipulating the adequate bolting or guying of antennas are enforceable under the rule we are adopting, as are the provisions of the model fire code, prohibiting "furnishings, decorations, or other objects ... [that] obstruct fire exits, access thereto, egress therefrom, or visibility thereof." Although the receive-only devices at issue here do not pose significant local health concerns, to the extent that these antennas have transmit capabilities, they must comply with our RF emissions standards as well as with any applicable local health regulations.

FCC Order 96-328, Par. 24.

Historic Preservation Restrictions (for places listed or eligible for listing in the National Register of Historic Places) that are not unduly burdensome in view of their purpose are allowed so long as such restrictions are no greater than otherwise imposed on the installation, maintenance or use of other modern appurtenances, devices, or fixtures of comparable size, weight, and appearance.

The FCC notes in this regard:

> Restrictions on the installation, use and maintenance of over-the-air reception devices for TVBS, MMDS, and DBS in these sites may be enforced to the extent necessary to preserve their special historic status. These regulations may be enforced even if this results in some cases in the impairment of a viewer's ability to receive over-the-air video programming signals, as long as these restrictions are imposed in a nondiscriminatory way, and are no more burdensome than is necessary to achieve the objective. Under this section, regulations are exempted if they apply to all modern devices, but they may treat objects that are consistent with the historical nature of

> the community in a different fashion than objects that are clearly more modern in character such as air conditioning units, trash receptacles, or antennas.

FCC Order No. 96-328, Par. 26.

- **Waiver by FCC of Preempted Restrictions**

Waiver of any local restriction that is otherwise preempted may be sought from the FCC upon a showing of local concerns of a highly specialized or unusual nature.

The FCC notes in this regard:

> [T]he Commission will consider granting waivers where the state, local, or appropriate nongovernmental entity demonstrates that the restriction is necessary to protect other environmental concerns, in view of the particularly unique environmental character or nature of the given area.

FCC Order No. 96-328, Par. 27.

- **Declaratory Ruling Prior to Enforcement**

Until a declaratory ruling on a restriction is sought from the FCC or a court of competent jurisdiction the restriction may not be enforced or fines or penalties accrued.

The FCC notes in this regard:

> Under these procedures, if either the antenna user or the enforcing authority has requested a determination from a court or from this Commission on whether the restriction at issue is permitted as an exception for safety or historic preservation, the restriction may be enforced pending this determination. Otherwise, the restriction may not be enforced until the Commission or a court of competent jurisdiction issues a ruling that the restriction is not preempted. In these circumstances, a viewer may install, use, and maintain an antenna while the proceeding is pending. While the viewer may be subject to the enforcing authority's fine or other penalty for violation if

the restriction is determined to be enforceable, no additional fines or penalties may accrue during the pendency of the proceeding.

FCC Order No. 96-328, Par. 53.

4. **Limited Federal Preemption Under FCC Rule 47 CFR §25.104(a): Satellite Transmission or Receiving Dish Antennae More Than One Meter (39.37 inches) in Diameter**

- **Local Restrictions Preempted**

  Local regulation of such antennae that materially limits transmission or reception or imposes more than minimal costs on users is preempted unless the rule is shown to be reasonable.

- **Reasonable Regulation Allowed Where Demonstrated as Such by Promulgating Authority**

  Any reasonable regulation is allowed – defined as regulation with a clearly defined and stated health, safety, or aesthetic objective and that furthers such an objective without unnecessarily burdening access to services or fair competition.

- **Waiver by FCC of Preempted Restrictions**

  Waiver of any local restriction that is otherwise preempted may be sought from the FCC upon a showing of local concerns of a highly specialized or unusual nature.

- **Declaratory Ruling May be Sought From FCC**

  Any aggrieved person may seek a declaratory order from the FCC that a restriction is preempted by this section.

5. **Limited Federal Preemption Under FCC Rule 47 CFR §25.104(b): Satellite Dish Antennae Two Meters (78.74 inches) or Less in Diameter and Located in Areas Where Commercial or Industrial Uses Are Allowed**

- **Local Regulation Preempted**

Any local regulation of such antennae that affects installation, maintenance or use is presumed unreasonable and preempted unless such a presumption is rebutted.

- **Reasonable Regulation Allowed Where Presumption Rebutted**

  This presumption is rebutted upon a showing that the regulation furthers a clearly defined and stated health or safety objective, is not unduly burdensome, and is specifically applicable on its face to this class of antennae.

- **Waiver by FCC of Preempted Restrictions**

  Waiver of any local restriction that is otherwise preempted may be sought from the FCC upon a showing of local concerns of a highly specialized or unusual nature.

- **Declaratory Ruling Prior to Enforcement**

  Until a declaratory ruling on a restriction is obtained from the FCC or a court of competent jurisdiction that the preemption presumption has been rebutted the restriction may not be enforced.

6. **Relevant Court Decisions Under Prior FCC Preemption Rules With Respect to Compliance Costs and Reception Impact Resulting From Local Regulation of Satellite Dish Antennae**

   - **Compliance Costs**

     See *Abbott v. City of Cape Canaveral*, 840 F.Supp. 880 (M.D.Fla. 1994) (upholding location, installation and height restrictions since compliance costs of $400.00 not excessive in view of costs of purchase and installation of $1,254.00); *Van Meter v. Tp. of Maplewood*, 696 F.Supp. 1024 (D.N.J. 1988) (screening costs excessive since exceeded cost of equipment).

   - **Reception Impact**

     See *Abbott v. City of Cape Canaveral*, 840 F.Supp. 880 (M.D. Fla. 1994) (upholding regulation since owner could receive all satellite transmissions intended for North American audiences); *Van Meter v. Tp. of Maplewood*, 696 F.Supp. 1024 (D.N.J. 1988) (height, size and screening restrictions made signal reception impossible).

D. FCC PREEMPTION AND SECTION 1983 DAMAGE CLAIMS

A finding of FCC preemption of local regulation as applied to an owner with respect to satellite dish installation or amateur radio antennae may itself give rise to a private cause of action for monetary damages and attorney fees under section 1983 of the Federal Civil Rights Act (42 U.S.C. §1983). See *Loschiavo v. City of Deerborn*, 33 F.3d 548 (6th Cir. 1994) (the court holding that the FCC regulation created an enforceable private right of action for the homeowners under Section 1983 because (1) the plaintiffs were among the intended beneficiaries of the FCC regulation, (2) the FCC regulation created a binding obligation on the city not to unreasonably limit the use of satellite antennae, and (3) the interests asserted by the plaintiffs were "sufficiently specific" for purposes of enforcement by the judiciary). But see *Johnson v. City of Pleasanton*, 781 F.Supp. 632 (N.D. Cal. 1991), reversed on other grounds, 982 F.2d 350 (9th Cir. 1992) (contra).

E. BIBLIOGRAPHY

See Ragonetti, "A Towering Problem? Land Use Regulation of Commercial Broadcasting Towers," 15 Zoning & Planning L. Rept. 9 (1992); Bookin & Epstein, Regulating Radio and Television Towers (1984) (APA PAS Report No. 384); APA Zoning News "Survey of Local Regulation" (April, 1996).

APPENDIX 1

FCC REGULATION 47 CFR §97.15(e)

(e) Except as otherwise provided herein, a station antenna structure may be erected at heights and dimensions sufficient to accommodate amateur service communications. [State and local regulation of a station antenna structure must not preclude amateur service communications. Rather, it must reasonably accommodate such communications and must constitute the minimum practicable regulation to accomplish the state or local authority's legitimate purpose.] [*See* PRB-1, 101 FCC 2d 952 (1985) for details.]

APPENDIX 2

FCC REGULATION 47 CFR §s1.4000

s1.4000. Restrictions impairing reception of television broadcast signals, direct broadcast satellite services or multichannel multipoint distribution services.

(a)(1) 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: 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 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 an antenna that is designed to receive television broadcast signals; is prohibited, to the extent it so impairs, subject to paragraph (b) of this section.

(2) For purposes of this section, a law, regulation or restriction impairs installation, maintenance or use of an antenna if it:

(i) Unreasonably delays or prevents installation, maintenance or use,

(ii) Unreasonably increases the cost of installation, maintenance or use, or

(iii) precludes reception of an acceptable quality signal.

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

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

(1) It is necessary to accomplish a clearly defined 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, weight and appearance to these antennas and to which local regulation would normally apply; or

(2) It is necessary to preserve an historic district listed or eligible for listing in the National Register of Historic Places, as set forth in the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470a, 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 s1.3. Waiver requests 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 s1.2, or a court of competent jurisdiction, to determine whether a particular restriction is permissible or prohibited under this section. Petitions to the Commission will be put on public notice. 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.

(e) In any Commission 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.

(f) 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. NW., Washington, DC 20554. Copies of the petitions and related pleadings will be available for public inspection in the Cable Reference Room in Washington, DC. Copies will be available for purchase from the Commission's contract copy center, and Commission decisions will be available on the Internet.

APPENDIX 3

FCC REGULATION 47 CFR §25.104

§25.104 Preemption of local zoning of earth stations.

(a) Any state or local zoning, land-use, building, or similar regulation that materially limits transmission or reception by satellite earth station antennas, or imposes more than minimal costs on users of such antennas, is preempted unless the promulgating authority can demonstrate that such regulation is reasonable, except that nonfederal regulation of radio frequency emissions is not preempted by this section. For purposes of this paragraph (a), reasonable means that the local regulation:

(1) Has a clearly defined health, safety, or aesthetic objective that is stated in the text of the regulation itself; and

(2) Furthers the stated health, safety or aesthetic objective without unnecessarily burdening the federal interests in ensuring access to satellite services and in promoting fair and effective competition among competing communications service providers.

(b)(1) Any state or local zoning, land-use, building, or similar regulation that affects the installation, maintenance, or use of a satellite earth station antenna that is two meters or less in diameter and is located or proposed to be located in any area where commercial or industrial uses are generally permitted by non-federal land-use regulation shall be presumed unreasonable and is therefore preempted subject to paragraph (b)(2) of this section. No civil, criminal, administrative, or other legal action of any kind shall be taken to enforce any regulation covered by this presumption unless the promulgating authority has obtained a waiver from the Commission pursuant to paragraph (e) of this section, or a final declaration from the Commission or a court of competent jurisdiction that the presumption has been rebutted pursuant to paragraph (b)(2) of this section.

(2) Any presumption arising from paragraph (b)(1) of this section may be rebutted upon a showing that the regulation in question:

(i) Is necessary to accomplish a clearly defined health or safety objective that is stated in the text of the regulation itself;

(ii) Is no more burdensome to satellite users than is necessary to achieve the health or safety objective; and

(iii) Is specifically applicable on its face to antennas of the class described in paragraph (b)(1) of this section.

(c) Any person aggrieved by the application or potential application of a state or local zoning or other regulation in violation of paragraph (a) of this section may, after exhausting all nonfederal administrative remedies, file a petition with the Commission requesting a declaration that the state or local regulation in question is preempted by this section. Nonfederal administrative remedies, which do not include judicial appeals of administrative determinations, shall be deemed exhausted when:

(1) The petitioner's application for a permit or other authorization required by the state or local authority has been denied any administrative appeal and variance procedure has been exhausted;

(2) The petitioner's application for a permit or other authorization required by the state or local authority has been on file for ninety days without final action;

(3) The petitioner has received a permit or other authorization required by the state or local authority that is conditioned upon the petitioner's expenditure of a sum of money, including costs required to screen, pole-mount, or otherwise specially install the antenna, greater than the aggregate purchase or total lease cost of the equipment as normally installed; or

(4) A state or local authority has notified the petitioner of impending civil or criminal action in a court of law and there are no more nonfederal administrative steps to be taken.

(d) Procedures regarding filing of petitions requesting declaratory rulings and other related pleadings will be set forth in subsequent Public Notices. All allegations of fact contained in petitions and related

pleadings must be supported by affidavit of a person or persons with personal knowledge thereof.

(e) Any state or local authority that wishes to maintain and enforce zoning or other regulations inconsistent with this section may apply to the Commission for a full or partial waiver of this section. Such waivers may be granted by the Commission in its sole discretion, upon a showing by the applicant that local concerns of a highly specialized or unusual nature create a necessity for regulation inconsistent with this section. No application for waiver shall be considered unless it specifically sets forth the particular regulation for which waiver is sought. Waivers granted in accordance with this section shall not apply to later-enacted or amended regulations by the local authority unless the Commission expressly orders otherwise.

(f) A satellite earth station 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 is covered by the regulations in s1.4000 of this chapter.

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

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

REPORT AND ORDER, MEMORANDUM OPINION AND ORDER, and FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: August 5, 1996 **Released: August 6, 1996**

Comment date: September 27, 1996
Reply Comment date: October 28, 1996

By the Commission: Commissioners Quello and Chong issuing separate statements.

Table of Contents

I. INTRODUCTION

1. Section 207 of the Telecommunications Act of 1996 (the 1996 Act), titled "Restrictions on Over-the-Air Reception Devices," states:

> Within 180 days after the date of enactment of this Act, the Commission shall, pursuant to Section 303 of the Communications Act, 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.[1]

The 1996 Act's direction to the Commission to prohibit restrictions that impair reception of over-the-air video programming services promotes the primary objective of the Communications Act, to "make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[2]

2. This Report and Order adopts a single rule to implement Section 207. In doing so, we consolidate herein two rulemaking proceedings that involve Section 207. In International

[1]Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) § 207. Section 303 of the Communications Act authorizes the Commission to issue rules and regulations "as public convenience, interest, or necessity requires" and, as amended by the 1996 Act, states that the Commission shall "[h]ave exclusive authority to regulate the provision of direct-to-home satellite service." 47 U.S.C. § 303.

[2]Communications Act of 1934, *as amended*, § 1, 47 U.S.C. § 151.

Bureau (IB) Docket No. 95-59 (*DBS Order and Further Notice*)[3] we adopted rules prohibiting certain restrictions on satellite antenna reception, including a rule partially implementing Section 207 by prohibiting governmental restrictions on reception by direct broadcast satellite (DBS) service receiving devices. In Cable Services Bureau (CS) Docket No. 96-83 (*TVBS-MMDS Notice*),[4] we sought comment on a similar proposed rule to implement Section 207 for restrictions on over-the-air reception of television broadcast service (TVBS) and multichannel multipoint distribution service (MMDS).[5] Our DBS rule was a revision of a 1986 rule that preempted local governmental regulations of satellite earth stations unless the regulations (a) had a reasonable and clearly defined health, safety, or aesthetic objective, and (b) did not unreasonably limit, or did not prevent reception, or impose unreasonable costs on users.[6] In 1995 the Commission commenced a new proceeding to review and amend aspects of this rule.[7] In 1996 the *DBS Order and Further Notice* modified the 1986 rule to create a rebuttable presumption of unreasonableness of local regulations that impose restrictions affecting the installation, use, or maintenance of devices used to receive DBS signals.[8]

3. Although the Commission tentatively concluded that the modified rule satisfactorily implemented Section 207 with regard to governmental restrictions on reception of DBS service, because the revised rule was proposed prior to passage of the 1996 Act, the Commission sought further comment on the impact of the legislation.[9] The Commission also proposed to implement Section 207 for DBS service by prohibiting enforcement of

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[3]Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Docket No. 95-59, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 5809 (1996).

[4]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, CS Docket No. 96-83, 11 FCC Rcd 6357 (1996).

[5]Issues in IB Docket No. 95-59 that are not related to Section 207 -- prohibition of certain restrictions that affect non-DBS satellite earth stations, including very small aperture terminals (VSAT) used primarily for transmitting business communications -- will be addressed in a subsequent order.

[6]Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, CC Docket No. 85-87, 51 Fed. Reg. 5519 (Feb. 14, 1986). The rule preempted local regulation that differentiated between satellite receive-only antennas and other types of antenna facilities. A more detailed history of the Commission's initial consideration and treatment of preemption of land-use regulations that impair reception of satellite signals can be found in the *DBS Order and Further Notice* ¶¶ 3-8.

[7]Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Docket No. 95-59, Notice of Proposed Rulemaking, 10 FCC Rcd 6982 (1995) (*Earth Station Notice*).

[8]The Commission established procedures for parties to seek a declaratory ruling regarding whether their regulation rebutted the presumption of unreasonableness. *See* Public Notice, Procedures for Filing Petitions for Declaratory Relief of Local Zoning Regulations and For Waivers of Section 25.104, Report No. SPB-41, April 17, 1996.

[9]*DBS Order and Further Notice* ¶ 59.

nongovernmental restrictions on devices used to receive DBS programming signals.[10] Subsequently, the Commission released the *TVBS-MMDS Notice* to begin to implement Section 207 with regard to over-the-air TVBS and MMDS video antennas, proposing a rule similar to that adopted in the *DBS Order and Further Notice*.[11] In both proceedings we also asked whether there was a simpler, less burdensome means of implementing the statute than through the proposed rebuttable presumption approach.[12]

4. We have carefully considered all submissions filed in both proceedings. We received comment from various local governments, video programming service providers, individual subscribers, telecommunications organizations, nongovernmental associations, homeowners and others. We have also considered petitions for reconsideration of the *DBS Order and Further Notice* and responsive pleadings that bear on Section 207 implementation.[13]

II. SUMMARY

5. We implement Section 207 by adopting the following rule, and by amending Section 25.104 as indicated in Attachment A:

> (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; 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

[10] *DBS Order and Further Notice* ¶ 62.

[11] The comments and reply comments received in response to the *DBS Order and Further Notice* are listed in Attachment B. The comments and reply comments received in response to the *TVBS/MMDS Notice* are listed in Attachment C. These attachments also list *ex parte* filings, and note the short-form names we use here.

[12] *DBS Order and Further Notice* ¶ 59; *TVBS-MMDS Notice* ¶ 8.

[13] A list of petitions for reconsideration of the *DBS Order and Further Notice* and oppositions to these petitions is included in Attachment B.

or diagonal measurement; or

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

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

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

(1) it is necessary to accomplish a clearly defined 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, weight and appearance to these antennas and to which local regulation would normally apply; or

(2) it is necessary to preserve an historic district listed or eligible for listing in the National Register of Historic Places, as set forth in the National Historic Preservation Act of 1966, as amended, 16 U.S.C. § 470a, 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 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

consumer choice by ensuring viewers' ability to receive over-the-air signals, while preserving local control of regulation of safety and historic areas.

7. The rule we adopt improves on our existing DBS rule and proposed TVBS and MMDS rule in several ways. By limiting the prohibition of local restrictions to those that "impair" -- the statutory term -- rather than applying the prohibition to all restrictions that "affect," it is more faithful to Section 207 and intrudes less into local governance. By more clearly defining and providing examples of which local restrictions are prohibited and which are not, we make our rule simpler, and less burdensome. By abandoning the presumption in the *DBS Order and Further Notice* that all restrictions affecting reception are unreasonable, and therefore unenforceable until waived by Commission action, we spare localities and antenna users unnecessary administrative burden and expense. Under our revised rule, localities and associations need not come to the Commission to enforce restrictions that may affect but do not impair reception, or that may impair reception but are narrowly tailored to serve public safety or historic preservation objectives. The rule that we adopt applies to governmental regulations and restrictions and to nongovernmental restrictions on property within the exclusive use or control of the viewer in which the viewer has a direct or indirect ownership interest. We also include a Further Notice of Proposed Rulemaking (FNPRM) to seek comment on whether Section 207 applies to restrictions on property not within the exclusive use or control of the viewer and in which the viewer has a direct or indirect property interest.

8. Each element of the rule is discussed in greater detail below.

III. DISCUSSION

A. Authority to Preempt

9. Some commenters argue that our proposed rule exceeds our constitutional authority, under the Commerce Clause, to prohibit local restrictions.[16] In adopting a rule to implement a statute, we exercise the authority delegated to us by Congress under Section 207. For the reasons stated below, we believe that the authority delegated by Congress to this agency pursuant to Section 207 comports with the Commerce Clause, and that our rule implementing Section 207 is constitutional.

10. In their petition and comments, the NLC and the Mayors suggest that the Commission's proposed rule conflicts with the Supreme Court's holding in *United States v. Lopez*.[17] In that case the Court struck down a federal statute that defined a crime of

[16]MIT TVBS-MMDS Reply at 1; Mayors DBS Comments at 8.

[17]*See* NLC DBS Petition at 8; Mayors DBS Comments at Summary, *citing United States v. Lopez*, 115 S. Ct. 1624 (1995).

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 will be put on public notice. 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.

(e) In any Commission 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.

(f) 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. 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.

6. The rule is designed to promote two complementary federal objectives: (a) to ensure that consumers have access to a broad range of video programming services, and (b) to foster full and fair competition among different types of video programming services. We believe that in invoking Section 303 of the Communications Act, which authorizes the Commission to issue rules and regulations "as public convenience, interest, or necessity requires,"[14] Congress intended that we consider and incorporate appropriate local concerns. In the *DBS Order and Further Notice* we noted that "we think it reasonable to infer that Congress did not mean . . . to prevent the Commission from preserving reasonable local health and safety regulations; or from granting waivers where unusual circumstances require specialized local regulation."[15] Thus, while the statute requires that we prohibit restrictions that impair viewers' ability to receive the signals in question, it also permits the Commission to minimize any interference caused to local governments and associations as a result. We have thus attempted to implement Section 207 in a way that produces greater competition and

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[14]47 U.S.C. § 303.

[15]*DBS Order and Further Notice* ¶ 59.

possession of firearms within 1000 feet of a local school because there was an insufficient nexus to interstate commerce under the Commerce Clause. The Court held that under the Commerce Clause Congress can regulate only activities that "substantially affect" interstate commerce, and that consequently, Congress lacked statutory authority. According to the Mayors, the Court in *Lopez* "curtailed the exercise of the Commerce Clause power in areas reserved for the exercise of traditional local police power."[18]

11. In *Lopez*, the Supreme Court identified three broad categories of activity within Congress's constitutional power to regulate: (a) the use of channels of interstate commerce, (b) the regulation and protection of instrumentalities or things in interstate commerce, even though the threat may come only from intrastate activities, and (c) those activities having substantial relation to interstate commerce.[19] After determining that the regulation at issue could be sustained, if at all, only under the third category, the Court held that the challenged statute was penal and had nothing to do with "commerce" or any sort of economic enterprise, and was not "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[20]

12. Unlike the situation in *Lopez*, however, the instant statutory provision directly involves use of the channels of interstate commerce (e.g., channels of DBS, MMDS, and TVBS), or, alternatively, the regulation and protection of instrumentalities or things in interstate commerce (i.e., receiving devices for such services), or both. Indeed, we believe that the regulation would be deemed constitutional even under the third category in *Lopez* because the regulation we adopt to implement the statute, which is aimed at ensuring reception of radio communications, relates to activities that substantially impact interstate commerce. Moreover, as the Court reaffirmed in *Lopez*, "where the interstate and intrastate aspects of commerce were so mingled together that full regulation of interstate commerce required incidental regulation of intrastate commerce, the Commerce Clause authorized such regulation."[21] This is clearly the case here, where the receiving aspects of such services are inextricably interwoven with the interstate character of the signals of these services themselves. As the Supreme Court stated long ago in *Fisher's Blend Station, Inc. v. State Tax Commission*, a case that invalidated a state occupation tax imposed on radio licensees because it placed an unconstitutional burden on interstate commerce: "By its very nature broadcasting transcends state lines and is national in its scope and importance -- characteristics which bring it within the purpose and protection, and subject to the control, of the commerce

[18] *See* Mayors DBS Comments at Summary.

[19] 115 S. Ct. at 1629.

[20] *Id.* at 1631.

[21] *Id.* at 1627.

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clause."[22] The Court held that it was immaterial that the radio licensee "[did] not own or control the receiving mechanisms."[23] Although the placement of a radio antenna may be considered an intrastate activity, the reception of radio communications is clearly interstate commerce, and restrictions on such antennas substantially affect such interstate commerce. We therefore conclude that Congress' action in delegating authority to us in Section 207 was fully consistent with the Supreme Court's ruling in the *Lopez* case[24] and that our exercise of this authority does not exceed the limits of the Commerce Clause.

B. Restrictions on Reception

13. Section 207 of the 1996 Act directs the Commission to prohibit restrictions that impair a viewer's ability to receive over-the-air video programming signals from TVBS, MMDS, and DBS. In the *DBS Order and Further Notice* and the *TVBS-MMDS Notice*, we created a rebuttable presumption of unreasonableness for state and local government restrictions that "affect the installation, maintenance and use of over-the-air reception devices."[25] We used this phrase as an outgrowth of a proceeding initiated in 1995, prior to passage of Section 207, to revise our satellite antenna rule.[26] The Notice in that proceeding responded to evidence that nonfederal restrictions were impeding access to satellite services; the term "affect" was chosen to reach a broad range of restrictions. In implementing Section 207, we conclude it is more appropriate to apply the specific statutory language. The statute directs the Commission "to prohibit restrictions that impair a viewer's ability to receive."[27] The term "impair" means to make worse or damage.[28] The House Report[29] explains that Congress meant to prohibit restrictions that "prevent" the use of antennas, stating, "[t]he Committee intends this section to preempt enforcement of State or local statutes and regulations, or State or local legal requirements, or restrictive covenants or encumbrances that prevent the use of antenna[s] designed for off-the-air reception of television broadcast signals

[22]297 U.S. 650, 655 (1935). *See also Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933) ("No question is presented as to the power of the Congress, in its regulation of interstate commerce to regulate radio communications. No state lines divide the radio waves and national regulation is not only appropriate but essential to the efficient use of radio facilities").

[23]297 U.S. at 655.

[24]Indeed, by modifying the rule's standard to preempt restrictions that impair, rather than affect, we are allowing more flexibility in governmental regulation and thus adopting a less intrusive rule.

[25]*DBS Order and Further Notice* ¶ 28 and Appendix II; *TVBS-MMDS Notice* ¶ 8 and Appendix A.

[26]47 C.F.R. § 25.104. *See Earth Station Notice*, 10 FCC Rcd at 6982.

[27]1996 Act § 207.

[28]*See, e.g.*, The Random House College Dictionary 665 (Revised Edition 1980).

[29]H.R. Rep. No. 204, 104th Congress, 1st Sess. at 124 (1995) (House Report).

or of satellite receivers designed for receipt of DBS services."[30] The statute also refers to a viewer's ability to receive, and we continue to use the phrase "installation, maintenance and use" because it encompasses all aspects of reception.

14. Based on our interpretation of the text of the statute and relevant legislative history, as well as consideration of comments, petitions for reconsideration and *ex parte* presentations in the record, we find that a restriction will be deemed to impair a viewer's ability to receive signals if it: (a) unreasonably delays or prevents installation, maintenance or use of a device used for the reception of over-the-air video programming signals by TVBS, MMDS, or DBS; or (b) unreasonably increases the cost of installation, maintenance or use of such devices; or (c) precludes reception of an acceptable quality signal. As a majority of the commenters and some petitioners noted, the Commission's definition of "impair" will greatly influence our implementation of Section 207.[31]

15. Some commenters and petitioners argue that "impair" should be defined broadly, and should include any extra burden imposed on subscribers.[32] Other commenters and one petitioner recommend that we adopt a narrower reading of the statutory language.[33] Some commenters and a petitioner suggest that Congress intended that the statute be very limited in scope.[34] These commenters and petitioners assert that the language of the House Report that

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[30] *Id.*

[31] *See, e.g.*, CEMA DBS Comments at 7 (the term "impair" is a "significant source of ambiguity since reasonable people undoubtedly will differ on what constitutes impairment"); NAB TVBS-MMDS Comments at 6 (impair does not mean affect); Scarinci TVBS-MMDS Comments at 2-3; Silverman TVBS-MMDS Comments at 2; Community TVBS-MMDS Comments at 10; ITFS TVBS-MMDS Comments at 1-2; Mayors TVBS-MMDS Comments at 2-3; NLC TVBS-MMDS Comments at 3-4; UHA TVBS-MMDS Comments at 2; Reston DBS Comments at 3 (citing Webster's Dictionary for a definition of "impair"); Mayors DBS Petition at 6-7 (Section 207 covers only restrictions that impair); DIRECTV DBS Opposition at 6; NLC DBS Petition at 3, 5; Evermay DBS Reply at 2.

[32] *See, e.g.*, Bell Atlantic TVBS-MMDS Comments at 2 (Commission's proposed rule "is necessary to give full effect to Congressional intent"); SBCA *ex parte* presentation June 11, 1996 (any extra burden on a subscriber is an impairment); DIRECTV DBS Opposition at 6.

[33] *See, e.g.*, NASA TVBS-MMDS Comments at 2-3 (defining "impair" as adversely affect or injure); WCAI TVBS-MMDS Comments at 4-5 (affect is too expansive a definition of impair); Reston DBS Comments at 3 (defining impair as decreasing strength, value, amount or quality of reception). *See also* NAB TVBS-MMDS Comments at 5-6 ("By using [the statutory] language the FCC will more squarely respond to the Congressional directive and will adopt a preemption standard that will best be designed to deal with restrictions that should be negated"); Scarinci TVBS-MMDS Comments at 2; Huckleberry TVBS-MMDS Comments at 2; Mayors DBS Comments at 10; NASA TVBS-MMDS Reply at 3; WCAI TVBS-MMDS Reply at 4-6; NATOA *ex parte* presentation March 13, 1996; NAB *ex parte* presentation June 14, 1996; NLC DBS Petition at 3, 5.

[34] *See, e.g.*, Silverman TVBS-MMDS Comments at 2; Community TVBS-MMDS Comments at 10; Reston TVBS-MMDS Comments at 4; NLC DBS Reply at 4-5 and DBS Petition at 3, 5 (all urging that impair means prevent); NAA DBS Comments at 13 (same, adding that Congress did not intend to reach viewers in commercial

accompanied Section 207 indicates that Congress intended "impair" to mean "prevent,"[35] so the only restrictions that should be considered to impair reception are those that preclude access to TVBS, MMDS or DBS signals.[36]

16. The record is replete with examples of various requirements imposed on those who wish to install DBS dishes or MMDS antennas on their property. These range from requirements for permits or other prior approval,[37] to requirements to plant shrubbery to screen the dish,[38] to regulations that the mast and MMDS antenna must look like a tree with leaves,[39] to safety-related restrictions. It is our purpose here to distinguish clearly the sort of restrictions that impair reception from those that do not.

17. Recognizing that effective implementation of our rule hinges on the clarity of our definition of impair, and in response to commenters' arguments, we provide a definition of impair which allows for governmental and nongovernmental restrictions that are necessary to serve valid local interests. First, under our adopted rule, a regulation or restriction that unreasonably delays or prevents antenna installation, maintenance and use will be found to impair reception. This criterion recognizes that the process by which regulations are enforced may be critical in a consumer's choice of video programming service. Procedural requirements -- provisions requiring the approval of community associations or local zoning boards prior to the installation of TVBS, MMDS, or DBS antennas, for example -- can, in practical terms, "prevent" the viewer's access to video programming signals as surely as

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areas nor to interfere with "private contractual arrangements"); NRC *ex parte* presentation June 26, 1996 (stating that Congress did not intend for the statute to extend into the real estate arena).

[35]House Report at 124.

[36]*See, e.g.*, Caughlin TVBS-MMDS Comments at 2 (nongovernmental restrictions should be preempted only if they preclude reception); Reston TVBS-MMDS Comments at 3 (restrictions that "do not operate as complete bans" or that do not "limit reception" are not inconsistent with Section 207); NLC TVBS-MMDS Comments at 3-4 and DBS Petition at 2-3, 5 (impair means prevent); NAA TVBS-MMDS Comments, Attachment 2 at 5 (only restrictions that completely prevent); Community TVBS-MMDS Reply at 10; NAA DBS Comments at 13; NLC DBS Reply at 5. *But see* DIRECTV DBS Opposition at 6 (opposing NLC's claim that impair means prevent); SBCA *ex parte* presentation June 11, 1996.

[37]*See, e.g.*, Caughlin Ranch TVBS-MMDS Comments; Community DBS Comments at App. B (Letters from Woodbridge Village Association, Greenbelt Homes); SBCA DBS Petition at 16.

[38]CMC DBS Comments at 1, 3 (requiring screening of antennas by foliage); Reston DBS Comments at 3 (guidelines focus on elements of design (shape, material and color) and location (relation to neighboring properties, screening); ARRL TVBS-MMDS Comments at 6 (citing requirements that antennas be shielded from view, often by shrubs, or by location on a residential lot).

[39]Bell Atlantic *ex parte* presentation April 16, 1996.

outright prohibitions,[40] by creating an extra hurdle for consumers to overcome. Similarly, requirements for permits and/or fees may provide a disincentive for potential consumers, if those requirements apply to one programming signal provider but not another. We believe this kind of impairment can impede a service provider's ability to compete, since customers will ordinarily select a service less subject to uncertainty and procedural requirements.[41] We believe that the imposition of delay is an impairment of the sort Congress sought to prohibit; accordingly, these types of procedural requirements and permits are prohibited except as provided herein. Local conditions involving safety or historic preservation may justify imposition of prior approval, permitting, or fee requirements in some circumstances, as discussed below, but we note that our rule requires that any such restriction be no more burdensome than is necessary to achieve its safety or historic preservation purposes.

18. Second, a regulation will be found to impair a viewer's ability to receive video programming signals if it unreasonably increases the costs of installation, maintenance or use of reception devices. Like procedural requirements, requirements to screen or otherwise beautify an antenna may result in additional costs that discourage consumers from choosing particular antenna-based services. Some commenters propose formulas for calculating whether costs expended in complying with a governmental or nongovernmental authority's regulations regarding the installation, maintenance or use of TVBS, MMDS or DBS reception devices constitute an impairment.[42] Some of these commenters suggest that costs amounting to a certain percentage of the cost of equipment or services should be considered an impairment prohibited by our rule.[43] Other commenters and petitioners argue that adding any expense to the installation, maintenance and use of reception devices for TVBS, MMDS or DBS would be an impairment because it would provide a disincentive to consumers to choose these services.[44] Another commenter suggests that a cost-based method is impracticable

[40] *See, e.g.*, Bell Atlantic TVBS-MMDS Comment at 4; ARRL TVBS-MMDS Comments at 6; WCAI TVBS-MMDS Reply at 7; Bell Atlantic *ex parte* presentation April 16, 1996; SBCA *ex parte* presentation June 11, 1996. One commenter notes that regulations that impose delays on non-cable technologies make it impossible for those businesses to compete effectively with cable. WCAI TVBS-MMDS Reply at 7. WCAI also notes that the Commission has recognized the importance of prompt service installation by recommending customer service guidelines for local franchising authorities that require cable operators to install cable within seven days of a customer's request. *Id., citing* 47 C.F.R. § 76.309.

[41] Bell Atlantic *ex parte* presentation June 18, 1996; SBCA *ex parte* presentations June 11, 1996 and June 17, 1996.

[42] Evermay TVBS-MMDS Comments at 3; Community TVBS-MMDS Comments at 11; WCAI TVBS-MMDS Reply at 6, n.10. .

[43] Evermay TVBS-MMDS Comments at 3; Evermay DBS Reply at 3 (costs amounting to 25% of costs of equipment and/or service would amount to an impairment); WCAI TVBS-MMDS Reply at 6, n.10 (costs amounting to 10% of costs of equipment and/or service would amount to an impairment).

[44] SBCA *ex parte* presentation June 17, 1996.

because communities' needs may vary widely.[45]

19. While we decline to adopt a formula based on a specific percentage of the cost of equipment or services, we do require that the costs of complying with governmental and nongovernmental restrictions on the installation, maintenance and use of devices designed for over-the-air reception not be unreasonable in light of the cost of the equipment or services and the visual impact of the antenna. Under this approach, restrictions cannot require that relatively unobtrusive DBS antennas be screened by expensive landscaping. On the other hand, 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. In determining the reasonableness of any additional cost, we will also consider the treatment of comparable devices. For example, if costs are imposed to screen other similar devices in the neighborhood, such as air conditioning units, trash receptacles, etc., similar requirements imposed on antennas may be reasonable under our rule even though they might increase the cost of installation, maintenance or use, if such measures are justified by visual impact. We believe that this approach adequately addresses the concerns of those who argue that requirements to paint, screen, or site antennas in particular ways will reduce the competitiveness of particular industries, and accommodates the interests of governmental and nongovernmental authorities, consumers, and providers of TVBS, MMDS and DBS.

20. Third, 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. We affirm the consensus opinion of commenters who discuss this issue that the signals that are protected here are signals intended for reception in the viewing area.[46] Under this criterion, for example, our rule would invalidate a requirement that an antenna be placed in a position where reception would be impossible or would be substantially degraded. However, a regulation requiring that antennas be placed to the extent feasible in locations that are not visible from the street would be permitted under our rule, if this placement would not impair reception of an acceptable signal. Requirements that antennas be set back from the street could be deemed to impair reception if compliance would mean that the antenna could not receive an acceptable signal.

21. In refining our rule to prohibit only restrictions that "impair" viewers' abilities to install, use or maintain devices designed for over-the-air reception, we remove from the scope of this prohibition all restrictions that may affect, but do not impair, a viewer's ability to install, use or maintain devices to receive video programming signals through over-the-air TVBS, MMDS, and DBS services. As discussed below, we also exempt certain regulations protecting safety and historic areas, even though the regulations may impair access to over-

[45]Miller, Canfield *ex parte* presentation June 14, 1996.

[46]Thus, for example, we would not offer the same protection to consumers seeking to install, maintain, or use antennas designed to receive distant TVBS signals.

the-air signals.

22. Some commenters in this consolidated proceeding argue that Congress has spoken clearly, and that local concerns play no role in light of Section 207.[47] Others argue that local concerns are paramount, and that Section 207 can be implemented only to the degree that our implementing regulations do not conflict with recognized local concerns.[48] Most commenters are in agreement that in some limited situations local restrictions should prevail, even if installation, use, and maintenance of devices used to receive over-the-air video signals are thereby precluded. There is, for example, no serious disagreement that regulations addressing valid safety concerns should prevail.[49] Similarly, the record reflects general agreement that valid historic concerns should be honored.[50] Notwithstanding the strong federal policy reflected in Section 207 that reception of over-the-air video programming signals should not be impaired by local regulations, we do not view this policy to be so absolute that it categorically overrides all other concerns. We continue to believe that Congress instructed us to promulgate a rule "pursuant to Section 303," in the public convenience, interest, and necessity, precisely so that we could balance the conflicting interests involved.

23. As noted above, in the *DBS Order and Further Notice* and the *TVBS-MMDS Notice*, we adopted and proposed a rebuttable presumption approach to distinguish acceptable government regulations from unacceptable ones.[51] We acknowledged in the *DBS Order and Further Notice* and the *TVBS-MMDS Notice* that this presumptive approach would be more

[47] *See, e.g.*, DIRECTV DBS Comments at 16.

[48] *See, e.g.*, NLC TVBS-MMDS Comments at 6-7; Mayors TVBS-MMDS Comments at 2; Mayors DBS Comments at 12; Indianapolis TVBS-MMDS Comments at 2; Killeen TVBS-MMDS Comments; FLC DBS Petition; King's Grant DBS Comments at 1 (allowing "indiscriminate installation" of antennas would result in conflicts with wetlands protection).

[49] *See, e.g.*, WCAI *ex parte* presentation June 11, 1996 (acknowledging that regulations based on safety concerns, such as a fire code, are acceptable); SBCA *ex parte* presentation June 17, 1996 (stating that a nondiscriminatory fire code or building code based on safety reasons would be acceptable; noting that safety restrictions are valid but cautioning that many model codes have non-safety related requirements); NYNEX *ex parte* presentation June 24, 1996; PacTel *ex parte* presentation June 18, 1996.

[50] *See, e.g.*, National Trust TVBS-MMDS Comments *passim* (preemption of historic zoning easements exceeds the Commission's statutory authority); NLC DBS Petition at 15 (supporting exemption of historic districts, and noting that there are some four thousand of them); SBCA *ex parte* presentation June 11, 1996 (acknowledging the importance of historic areas as long as they are "truly historic" and do not have exceptions for other modern property fixtures); People's Choice *ex parte* presentation June 13, 1996. *But see*, Primestar DBS Reply at 2, 7 (stating that Congress did not intend to balance federal interests with local interests); Bell Atlantic TVBS-MMDS Comments at 2 (should adopt rule that preempts any regulation that "affects the installation, maintenance, or use of devices").

[51] *DBS Order and Further Notice* ¶ 28 and Appendix II; *TVBS-MMDS Notice* ¶ 8 and Appendix A.

difficult to administer than a rule of general applicability.[52] We believed, however, that the presumptive approach would better allow us to recognize the "importance and centrality of the local interests" in regulating safety, and that our regulation under this approach would be less intrusive than under a *per se* preemption, even though it might require further action by the Commission.[53] Although the rebuttable presumption approach is supported by several commenters,[54] some industry parties suggest that we impose a higher standard for meeting health or safety objectives,[55] or establish a rule of *per se* preemption.[56] These commenters and petitioners maintain that the rebuttable presumption approach is unnecessarily cumbersome, and does not effectuate Congress' intent. Moreover, although we developed the rebuttable presumption approach to ensure the protection of local interests, several commenters note that the burden of uncertainty and the need to seek individual rulings from the Commission would strain the resources of local authorities.[57] The rule we adopt addresses these concerns.

24. First, we create an exemption for restrictions that serve legitimate safety goals. Difficulties arise because many local regulations combine safety with other concerns, and it is often hard to separate the various concerns. We believe that a recognition that certain types of regulations are permitted is essential to our implementation of Section 207. Thus, regulations that serve a stated safety purpose, such as restrictions requiring minimum distances

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[52] *DBS Order and Further Notice* ¶ 25; *TVBS-MMDS Notice* ¶ 8.

[53] *See Earth Station Notice*, 10 FCC Rcd at 7001.

[54] *See, e.g.*, ITFS Parties TVBS-MMDS Comments at 1-2; NYNEX TVBS-MMDS Comments at 2; Pactel TVBS-MMDS Comments at 1; NAB TVBS-MMDS Comments at 2 (supporting a modified version of the proposed rebuttable presumption rule); UHA TVBS-MMDS Comments at 2; NASA TVBS-MMDS Comments at 4; AT&T DBS Comments at 3 (use of presumptions strikes an appropriate balance); NLC DBS Reply at 6-7 (*per se* rule would improperly preclude *any* state or local regulation absent a waiver and is inconsistent with Section 207).

[55] *See, e.g.*, BellSouth TVBS-MMDS Comments at 3-5; Bell Atlantic TVBS-MMDS Reply at 6.

[56] A rule of *per se* preemption would provide a standard and preempt all rules that failed to meet that standard. *See* CAI Wireless TVBS-MMDS Comments at 5-6; Primestar TVBS-MMDS Comments at 3-4; WCAI TVBS-MMDS Comments at 5-6, 7-14; CEMA TVBS-MMDS Reply at 2; CAI Wireless TVBS-MMDS Reply at 4; CEMA DBS Comments at 6-7 (advocating a *per se*/waiver rule); NRTC DBS Comments at 4 (noting that "by requiring the Commission to 'prohibit' all restrictions that 'impair' reception . . . Congress established a *per se* preemption standard"); Primestar DBS Reply at 2, 7 ("Congress . . . did not envision that the Commission would exercise its authority to balance the federal interest . . . against local interests in zoning."); NRTC DBS Reply at 1; DIRECTV DBS Reply at 3 ("The language of Section 207 and the policies that motivated its adoption . . . support . . . a *per se* preemption of private restrictions[.]"); SBCA DBS Reply at 6-7; Philips DBS Opposition at 3; CAI Wireless *ex parte* presentation May 20, 1996; SBCA *ex parte* presentation June 11, 1996; Miller, Canfield *ex parte* presentation June 14, 1996.

[57] Georgia TVBS-MMDS Comments at 4; Scarinci TVBS-MMDS Comments at 1-2; NLC IRFA Comments at 1-2; Miller, Canfield *ex parte* presentation June 14, 1996.

from high voltage power lines, are permitted. Similarly, a restriction that precludes any installations very near streets and intersections in order to preserve a clear line of sight for drivers is clearly safety-related and permitted, provided that all comparable installations, e.g., foliage, are also precluded.[58] Safety regulations stipulating the adequate bolting or guying of antennas are enforceable under the rule we are adopting, as are the provisions of the model fire code, prohibiting "furnishings, decorations, or other objects . . . [that] obstruct fire exits, access thereto, egress therefrom, or visibility thereof."[59] Although the receive-only devices at issue here do not pose significant local health concerns, to the extent that these antennas have transmit capabilities, they must comply with our RF emissions standards as well as with any applicable local health regulations.[60]

25. Although we are not requiring safety regulations, on their face, to apply to all devices or fixtures similar to antennas, in recognition that safety goals may result in restrictions that apply only to antennas because they are the most likely rooftop installations or appurtenances, we expect local governments and private associations to administer their regulations in a nondiscriminatory manner. A safety regulation is permitted if it would be applied to the extent practicable in a non-discriminatory manner to other appurtenances, devices, or fixtures that are comparable in size, weight, and appearance to these antennas and to which local regulation would normally apply. In any proceeding challenging the validity of a particular regulation, we will look carefully at how safety restrictions are applied across the board. Safety restrictions must be no more burdensome upon antenna users than is

[58] *See, e.g.*, code of East Plano, Texas, section 3-508:

> Except in the BG and CB-1 districts, on any corner lot, no fence, wall, screen, billboard, sign, structure, or foliage of hedges, trees, bushes, or shrubs shall be erected, planted or maintained in such a manner as to obstruct or interfere with a clear line of sight for drivers of approaching motor vehicles within a triangular area formed by extending the two curb lines a distance of 45 feet from their point of intersection, and connecting these points with an imaginary line, thereby making a triangle. If there are no curbs existing, the triangular area shall be formed by extending the property lines a distance of 30 feet from their point of intersection, and connecting these points with an imaginary line, thereby making a triangle. In cases where streets do not intersect at approximately right angles, the Traffic Engineer shall have the authority to vary these requirements as he deems necessary to provide safety for both vehicular and pedestrian traffic; however, he shall not require site distances in excess of 275 feet. Within this triangle, vision shall be clear at elevations between 30 inches and 9 feet above the average grade of the street.

[59] National Fire Prevention Association, Inc. model code.

[60] Congress and the Commission have taken action to address local health issues concerning devices which produce RF emissions. *See* Telecommunication Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) § 704. The Commission has adopted standards applicable to devices which produce RF emissions; *see* Guidelines for Evaluating the Environmental Effects of RadioFrequency Radiation, ET Docket No. 93-62, Report and Order (FCC 96-326, adopted Aug. 1, 1996). In so far as antennas are used for transmission as well as reception, such antennas must comply with these rules.

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necessary to achieve the desired objective. We do not intend, however, that local authorities be required to rewrite their regulations. Our rule also requires that a restriction covered by this exemption must state, in the text, preamble or legislative history, that it has a clearly defined safety objective. Alternatively, local governments or private associations can comply with this section by describing the restriction and the clearly defined health or safety objective it is intended to promote, in a document that is readily available to antenna users. By offering this alternative, we address the concern raised by commenters that it would be a significant burden for them to revise all of their safety codes to make them specifically applicable to antenna installations.[61] We believe that a such a document will provide the necessary guidance to antenna users regarding which restrictions local governments or associations intend to apply.

26. Although we received extensive comment on the effect preemption of such restrictions might have on historic preservation, we received little comment on the effect it might have on environmental concerns in general. Given the size and nature of the antenna facilities covered by Section 207 and given that these devices are usually associated with already existing structures, e.g., residences or office buildings,[62] we do not believe that our action herein will adversely affect the quality of the human environment in a significant way. Thus, while we see no need to create a general exemption for environmental concerns, we are adopting a rule that recognizes the safeguarding of registered historic preservation areas. Congress has authorized the Secretary of the Interior to maintain a National Register of Historic Places composed of "districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture."[63] Restrictions on the installation, use and maintenance of over-the-air reception devices for TVBS, MMDS, and DBS in these sites may be enforced to the extent necessary to preserve their special historic status. These regulations may be enforced even if this results in some cases in the impairment of a viewer's ability to receive over-the-air video programming signals, as long as these restrictions are imposed in a nondiscriminatory way, and are no more burdensome than is necessary to achieve the objective. Under this section, regulations are exempted if they apply to all modern devices, but they may treat objects that are consistent with the historical nature of the community in a different fashion than objects that are clearly more modern in character such as air conditioning units, trash receptacles, or antennas.[64]

27. Thus as stated above, state and local restrictions, as well as nongovernmental

[61]NLC DBS Comments at 13-15; FLC DBS Comments at 1; Mayors DBS Comments at 12.

[62]It should be noted that the Commission's general environmental processing rules categorically exclude the mounting of antenna(s) on existing buildings unless the building is an historic site. See 47 C.F.R. §1.1306(b)(3) Note 1.

[63]National Historic Preservation Act of 1966, *as amended*, 16 U.S.C. § 470a(a)(1)(A).

[64]*See* NRTC DBS Reply at 2; DIRECTV DBS Reply at 9; SBCA *ex parte* presentation June 11, 1996.

restrictions, e.g., restrictive covenants, that are designed to protect historic areas that are listed or eligible for listing in the National Register of Historic Places,[65] will not be preempted. Additionally, restrictions that are designed for safety purposes will not be preempted. Finally, the Commission will consider granting waivers where the state, local, or appropriate nongovernmental entity demonstrates that the restriction is necessary to protect other environmental concerns, in view of the particularly unique environmental character or nature of the given area.

C. Technologies Covered by Rule

28. The rules that we adopted in the *DBS Order and Further Notice* and proposed in the *TVBS-MMDS Notice* are intended to implement Section 207 fully with regard to TVBS, MMDS and DBS. Although we did not define TVBS or MMDS in the *TVBS-MMDS Notice*, in the *DBS Order and Further Notice* we tentatively concluded that Congress intended "direct broadcast satellite service" to include not only services that are technically DBS, but also medium power Ku-Band DTH services, such as that offered by Primestar, because they use antennas one meter or less in diameter.[66] We also noted that in the House Report, Congress expressly excluded larger C-band satellite antennas from Section 207, and seemed to focus on the size of the antenna, rather than the specific technology, as a basis of distinction.[67] As the House Report states, "This service does not include lower power C-band satellites, *which require larger dishes* in order for subscribers to receive their signals."[68]

29. Several commenters and petitioners suggest that the statute also applies to classes of services related to TVBS, MMDS and DBS, and that our rule should include these related services.[69] These commenters and petitioners contend that the terms "MMDS" and "DBS" should be interpreted broadly because Congress intended Section 207 to promote competition

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[65] *See* 16 U.S.C. § 470a(a)(1)(A).

[66] *DBS Order and Further Notice* ¶ 60. We said that "[w]e do not believe Congress intended for these medium power systems to face local regulatory burdens not shared by their true DBS counterparts."

[67] *DBS Order and Further Notice* ¶ 57, *citing* House Report at 124.

[68] House Report at 124 (emphasis added).

[69] *See, e.g.,* ITFS Parties TVBS-MMDS Comments at 3-4 ("[T]he effective intent [of Section 207] was to encourage the widest dissemination of services in the MDS, MMDS and ITFS bands."); NIA TVBS-MMDS Comments at 3 (include ITFS); WCAI TVBS-MMDS Reply at 3 n.4 (include ITFS and MD); CAI Wireless TVBS-MMDS Comments at 2 n.4 ("It was obviously not the intent of the Congress to limit the applicability of Section 207 to antennas that receive only MMDS frequencies."); Bell Atlantic TVBS-MMDS Comments at 4-6 (include LMDS and other new technologies); WANTV TVBS-MMDS Comments at 2 (noting the impact restrictions have on ITFS); PBS TVBS-MMDS Comments at 3 n.3; Microcom DBS Comments at 2-3 (stating that Section 207 should cover DBS dishes greater than one meter in diameter); CAI Wireless *ex parte* presentation May 20, 1996; WCAI *ex parte* presentation June 13, 1996; Alphastar DBS Petition at 2; SBCA *ex parte* June 11,1996.

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among video programming services by prohibiting restrictions that impair reception of all forms of video programming.[70] For example, some commenters note that MMDS is really a form of multipoint distribution service (MDS), which is a general category of services using the same type of receiving antennas at different frequencies, and recommend that our rule preempt restrictions on the reception of any form of MDS, including MMDS, instructional television fixed service (ITFS),[71] and local multipoint distribution service (LMDS).[72] Other commenters and petitioners suggest that "DBS" also refers to a broad category of technologies. They recommend that we expand our definition of DBS to include other forms of satellite services including very small aperture terminals (VSAT) that transmit information,[73] and medium-power Ku-band DTH satellite services.[74] According to one commenter, the legislative history indicates that Congress intended Section 207 to apply to most reception of wireless video programming except systems using large antennas.[75]

30. We believe that by directing the Commission to prohibit restrictions that impair viewers' ability to receive over-the-air signals from TVBS, MMDS and DBS services, Congress did not mean to exclude closely-related services such as MDS, ITFS, and LMDS. All of these services -- MDS, ITFS, and LMDS -- are similar from a technological and functional standpoint in that point-to-multipoint subscription video distribution service can be provided over each of them. We note that MMDS is the product of MDS technology, the

[70]Some commenters also urge that the rule should be sufficiently broad to accommodate the transition to advanced television (ATV) because ATV will require new transmission antennas and towers. *See* MSTV TVBS-MMDS Comments at 5 (include transmission antennas under Section 207); CEMA TVBS-MMDS Reply at 3 (same). Transmission towers are outside the scope of Section 207, and we accordingly decline to address these comments here.

[71]WANTV TVBS-MMDS Comments at 2; PBS TVBS-MMDS Comments at 3 n.2; WCAI TVBS-MMDS Comments at 18-19; ITFS Parties TVBS-MMDS Comments at 1-2; CAI Wireless *ex parte* presentation May 20, 1996; WCAI *ex parte* presentation June 13, 1996 (noting that ITFS sometimes uses larger antennas because it is an educational broadcasting service designed to reach distant schools, but that these antennas will be on schools, not residential property).

[72]Bell Atlantic TVBS-MMDS Comments at 4-6; ComTech TVBS-MMDS Comments at 4-5; CellularVision TVBS-MMDS Comments at 3; CellularVision TVBS-MMDS Reply at 2-3; ComTech TVBS-MMDS Reply at 2; Bell Atlantic *ex parte* presentation March 13, 1996; ComTech *ex parte* presentation April 5, 1996.

[73]AT&T DBS Comments at 4-5 (declaring that "there is not a valid basis for distinguishing between [transmit/receive antennas and DBS antennas]"); Abbott DBS Reply at 2-3; SBCA *ex parte* presentation June 11, 1996.

[74]Primestar DBS Comments at 10; CEMA DBS Comments at 3-4, n.7; Primestar DBS Reply at 13, 14; Alphastar DBS Petition at 2. *Contra* NLC DBS Reply at 8-9. NRTC opposes the inclusion of medium power fixed satellite services within the meaning of DBS, but argues that DBS providers should be permitted to use dishes larger than one meter in diameter outside the continental United States. NRTC DBS Comments at 5.

[75]Primestar DBS Comments at 10-11.

first multipoint distribution service established by the Commission, and that ITFS is a service whose frequencies are available for transmission of MMDS. LMDS is a service that has been authorized to provide services comparable to MMDS as well as other types of services. The origins of all of these services can be traced to MDS. Thus, all of these related services should be treated the same for purposes of Section 207, and are properly included in the scope of Section 207's provision. We also determine, however, that VSAT, a commercial satellite service that may use satellite antennas less than one meter in diameter, is not within the purview of the statute because it is not used to provide over-the-air video programming.[76]

31. We also believe that the statute can be construed to include medium-power satellite services using antennas of one meter or less that are used to receive over-the-air video programming, even though such services may not be technically defined as DBS elsewhere in the Commission's rules. Therefore, for purposes of implementing Section 207, we affirm our conclusion that DBS includes both high-power and medium-power satellite services using reception devices of one meter or less in diameter.

32. Because of the unique and peculiar characteristics applicable to reception of such services outside the continental United States, it is necessary to provide an exception for Alaska to the general size guidelines in our rule. In contrast with those portions of the continental United States (as well as Hawaii) that are at lower latitudes, DBS reception in Alaska requires larger antennas than those used in the lower part of the United States.[77] The installation, maintenance, and use of these larger antennas in Alaska will be covered by the rules we adopt in this Report and Order, and governmental and nongovernmental restrictions impairing the installation, maintenance and use of these devices will be prohibited, even when the devices exceed one meter in diameter or diagonal measurement.[78] This exception is limited, however, to antennas used to receive DBS service as defined by our rule, and will not apply to antennas that receive signals in the C-band. These larger antennas are subject to the more general satellite antenna preemption in Section 25.104 of our rules. Our decision to protect larger DBS antennas in Alaska than in the rest of the country is consistent with Commission policy to ensure that DBS is available to residents across the United States.[79] As

[76]Issues relating to VSAT and other satellite services will be addressed separately. The International Bureau will issue a public notice soliciting comments to supplement and refresh the record on any issues remaining in IB Docket No. 95-59. In the interim, the rules in 47 C.F.R. § 25.104 regarding antennas not covered by Section 207 remain in effect. Similarly, the rule adopted here will have no application to services other than those named here. Specifically, the rule does not affect restrictions on towers or other equipment used in personal communications, amateur radio, or other such services.

[77]*See* Microcom DBS Comments at 2 (services offered by DIRECTV, USSB and Echostar are available in Alaska using antennas ranging in size from one to 2.4 meters.)

[78]*See* Attachment A, 47 C.F.R. § 25.104.

[79]*See* Revision of Rules and Policies for the Direct Broadcast Satellite Service, IB Docket No. 95-168, 60 Fed. Reg. 65587 (Dec. 20, 1995).

DBS service providers design their systems to comply with the Commission's requirement to serve Alaska, it may be possible to use smaller antennas that are closer to the size used in other parts of the country, and the need for this exemption may be obviated.[80]

33. Also, for purposes of our rule, we believe it is appropriate to treat TVBS and MMDS services, as we did DBS, according to the characteristics of their antennas. In the *TVBS-MMDS Notice*, we remarked that Section 207 addresses TVBS, MMDS, and DBS receiving devices as a group, which suggests that they should be treated similarly.[81] We noted, however, that antennas used to receive TVBS signals can take various forms and sizes, and may not always be comparable to DBS antennas. We also tentatively concluded that antennas used to receive MMDS signals are generally smaller than one meter in diameter or diagonal measurement, and so are comparable to DBS antennas in size, but can be of different shapes, and may be mounted on a higher "mast."[82] In the *TVBS-MMDS Notice*, we sought comment on what types of restrictions would be appropriate for TVBS and MMDS, and particularly whether limits should be placed on mast size.[83]

34. Some commenters and petitioners argue that a widely-adopted model building code provides a useful description of permitted antennas.[84] Of four general model codes,[85] the Building Officials & Code Administrators International, Inc. (BOCA) code is the only one

[80]We are not, however, suggesting that consumers with existing DBS antennas in Alaska can be required to upgrade if smaller antennas become available.

[81]*TVBS-MMDS Notice* ¶ 7.

[82]*TVBS-MMDS Notice* ¶ 7, n.15. We stated:

> MMDS antennas usually take one of three general forms: a rounded disk about 18 inches across, with a metal screen or solid cover; a parabolic (curved rectangular) sheet about 12 inches by 18 inches, either solid or open grillwork; or a "Yagi" antenna, which is a straight, branch-like device of varying length. *See, e.g.*, Petition of ACS Enterprises, Inc. for Preemption of Norristown Zoning Ordinance, filed Sept. 26, 1995.

[83]*TVBS-MMDS Notice* ¶ 7.

[84]Haley DBS Comments at 2; Community DBS Comments at 7, 20; NAA DBS Comments at 17-19; O'Brien DBS Comments at 1; Coordinated DBS Comments at 2; NAHB DBS Comments at 2; Mayors TVBS-MMDS Comments at 2; Indianapolis TVBS-MMDS Comments at 2; Elisha TVBS-MMDS Comments at 1-2; MIT DBS Petition at 7, 8; NLC DBS Petition at 13-15.

[85]Model codes are promulgated by Building Officials & Code Administrators International, Inc. (BOCA), International Conference of Building Officials (ICBO), Southern Building Code Congress International, Inc. (SBCCI), and Council of American Building Officials (CABO).

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that includes provisions on antenna installation.[86] The BOCA code has been adopted in seventeen states and numerous municipalities nationwide, and therefore its provisions on antenna installation seem well-suited as a starting place for our discussion.[87] The BOCA code provides guidelines on the siting and installation of antennas, and technical standards on such things as snow loads. Other commenters argue against adoption of the BOCA code antenna provisions as model restrictions because of BOCA's inclusion of height and size restrictions.[88] These commenters maintain that such restrictions are not related to safety and are of the sort that Congress intended to prohibit, not permit.

35. Several commenters suggest that the Commission expressly preempt all restrictions addressing the shape of antennas or the permitted height of masts.[89] Some of these commenters, representing the DBS and MMDS industries, note that their antennas are usually less than one meter in diameter or diagonal measurement.[90] Some commenters contend that masts should be considered part of the devices used for over-the-air reception, and thus regulations restricting them should be prohibited.[91] Moreover, industry commenters assert that masts are well secured and do not pose a health or safety problem.[92] These commenters suggest that placing size or shape limits on one technology, e.g., regulating the size of MMDS masts, will impede this technology's ability to compete with others, such as

[86]The ICBO code is the only other code to mention height limitations for rooftop installations at all, and the ICBO code sets a limit of 25 feet for a structure of combustible materials, and no limit for structures of non-combustible materials. We believe that antennas for reception of over-the-air signals are noncombustible.

[87]*See* "Who uses BOCA National Codes?" published by Building Officials & Code Administrators International, Inc.; NATOA *ex parte* presentation March 13, 1996.

[88]WCAI TVBS-MMDS Comments at 7, 24-25; HNS DBS Opposition at 10, 12-13; DIRECTV DBS Opposition at 9; NRTC DBS Reply at 5; Primestar DBS Reply at 5-6.

[89]*See, e.g.*, WANTV TVBS-MMDS Comments at 1-2 (discussing factors that can affect the design, size and height of antennas and masts); BellSouth TVBS-MMDS Comments at 5 (preempt any restrictions on mast height); MSTV TVBS-MMDS Comments at 3-5 (preempt restrictions relating to the mounting and installation of devices used in conjunction with antennas); NYNEX TVBS-MMDS Comments at 5-6; NASA TVBS-MMDS Comments at 6; NAB TVBS-MMDS Comments at 7-8; CEMA TVBS-MMDS Reply at 2-3, 5; CEMA DBS Comments at 7-8 (ensure that final DBS rule covers all DBS antennas, including those greater than one meter in diameter); WCAI *ex parte* presentation June 11, 1996.

[90]*See, e.g.*, NYNEX TVBS-MMDS Comments at 5-6; WANTV TVBS-MMDS Comments at 1; Alphastar DBS Petition at 2 (antenna size measuring between 24 and 30 inches); Bell Atlantic *ex parte* presentation March 13, 1996.

[91]*See, e.g.*, MSTV TVBS-MMDS Comments at 3-5; WANTV TVBS-MMDS Comments at 1-2; BellSouth TVBS-MMDS Comments at 5; NYNEX TVBS-MMDS Comments at 5-6; NASA TVBS-MMDS Comments at 6; NAB TVBS-MMDS Comments at 7-8; CEMA TVBS-MMDS Reply at 2-3, 5; CEMA DBS Comments at 6-7; WCAI *ex parte* presentation June 11, 1996.

[92]*Id.*

DBS, that for technical reasons do not face such limits.[93] MMDS industry commenters have suggested that the usual heights for masts range from three feet to fifty feet, and they oppose the twelve foot limit included in the BOCA code as too limiting.[94] Some MMDS providers maintain that their decision to offer MMDS in a market is based upon the average mast size that would be needed in the community to receive the service, and that they do not choose to offer service in communities in which unusually high masts would be required.[95]

36. Other commenters suggest that reasonable limits are necessary to promote health, safety, and aesthetic interests as well as to maintain property values.[96] One nongovernmental association indicates that a one-meter diameter limit would be reasonable to further regulatory parity among the different services.[97] Some governmental and nongovernmental commenters encourage limits on mast height, suggesting that we should adopt the BOCA code's twelve-foot limit.[98] Others suggest that, at a minimum, mast heights should be no higher than

[93]*See, e.g.,* NASA TVBS-MMDS Comments at 8-9 (seek regulatory parity to prevent a competitive imbalance between satellite providers and their competitors); *see also* NYNEX TVBS-MMDS Comments at 5 n.9 (rule should accommodate masts of varying heights); BellSouth TVBS-MMDS Comments at 5-6 (cost of entry into the market would be raised by a mast height restriction); NASA TVBS-MMDS Reply at 5-6.

[94]Bell Atlantic *ex parte* presentation March 13, 1996 (average mast height is 10-15 feet); NYNEX *ex parte* presentation March 13, 1996 (mast heights are usually less than 3 feet or greater than 10 feet); People's Choice *ex parte* presentation June 13, 1996 (largest mast commercially produced is 40 feet); PacTel *ex parte* presentation June 18,1996 (in Riverside, California, the largest mast used is 20 feet); WCAI *ex parte* presentation July 2, 1996 (largest mast used is 50 feet). Some commenters also note that in some communities, they rely on "tree mounts," installing MMDS antennas on trees. They note that tree mounts are often shielded by foliage or by other trees, and are thus relatively unobtrusive. *See, e.g.,* WCAI *ex parte* presentation June 11, 1996; Bell Atlantic *ex parte* presentation April 16, 1996.

[95]People's Choice *ex parte* presentation June 13, 1996.

[96]*See, e.g.,* Community TVBS-MMDS Reply at 17; MIT TVBS-MMDS Reply at 3; NLC DBS Petition at 15-16; Boulder DBS Petition at 7-8 (noting that "incursions of antennas into the hitherto pristine airspace . . . will cause substantial degradation in Boulder County's ongoing effort to preserve scenic views"); Coordinated DBS Comments at 1 ("the appearance of a building directly affects its marketability"); Mass DBS Comments at 2 (unregulated installation of antennas will "lead to a haphazard maze of these devices which will have an adverse visual impact on the community . . . [and] market value"); C&G DBS Comments at 1 (same); NAHB DBS Comments at 2; NAA DBS Comments at 15; Stonecroft DBS Comments at 1; CMC DBS Comments at 1, 3.

[97]Community TVBS-MMDS Reply at 17.

[98]Haley DBS Comments at 2; Community DBS Comments at 7, 20; NAA DBS Comments at 17-19; O'Brien DBS Comments at 1; Coordinated DBS Comments at 2; NAHB DBS Comments at 2; Mayors TVBS-MMDS Comments at 2; Indianapolis TVBS-MMDS Comments at 2; Elisha TVBS-MMDS Comments at 1-2; MIT DBS Petition at 7, 8; NLC DBS Petition at 13-15.

necessary to receive signals, and no more than a few meters above the roofline.[99]

37. Because masts are very often a necessary part of an MMDS receiving device, we include them in our definition of MMDS antennas. However, we decline to adopt the suggestion of some commenters that including masts in the definition of MMDS exempts masts from all regulation. Because we believe that the model antenna height and installation restrictions in the BOCA code are safety-related, they will be enforceable under our rule. We do not believe it will be overly burdensome to require, as is provided in the BOCA code, that antenna users obtain a permit in cases in which their antennas must extend more than twelve feet above the roofline in order to receive signals.[100] However, we would find unenforceable any restriction that establishes specific *per se* height limits. Similarly, we believe that the BOCA code guideline regarding permits for setbacks is safety-based, is reasonable, and does not impose an unreasonable burden.[101] Any such permit application should be handled expeditiously. However, the antenna size restriction for satellite antennas in the BOCA code, 24 inches, is unacceptable, as the diameter or diagonal measurement of the satellite and MMDS antennas covered by our rule is one meter. A one-meter limit will encompass MMDS as well as the other forms of MDS, i.e., LMDS and ITFS. Commenters note that LMDS antennas will be smaller than MMDS antennas, measuring approximately 12 inches in diameter.[102] Generally, ITFS antennas range in size from two feet to twelve feet. Larger antennas are used to receive more distant signals and to minimize interference with other

[99]*See, e.g.*, Silverman TVBS-MMDS Comments at 3; Community TVBS-MMDS at 26, Montgomery Village Letter; Community TVBS-MMDS Reply at 17; Boulder DBS Petition at 9 (preempt only where the proposed owner/user has no reasonable alternative as to placement). Community also suggests that the Commission impose a standard distance that the transmitter may be from a receiving antenna, and that only viewers who live within this standard distance should be allowed to install a receiving antenna. Community TVBS-MMDS Reply at 18. Similarly, representatives from the broadcast industry indicate that while they believe that viewers should be able to receive signals from broadcasters licensed for their area, they did not envision subscribers mounting an antenna to receive signals from all neighboring cities. NAB *ex parte* presentation June 14, 1996.

[100]We note that commenters' references to the BOCA code's 12-foot height limitation are inaccurate; the BOCA code does not limit antenna height to 12 feet, but states only that permits may be required for installations that exceed 12 feet. 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 up to that taller height. If the code were revised, it would be reasonable to assume that deviations from such a revised code would be prohibited.

[101]In the section of the BOCA code entitled "Permits not required" it says:

> The installation of any antennal structure mounted on the roof of a building shall not be erected nearer to the lot line than the total height of the antennal structure above the roof, nor shall such structure be erected near electric power lines or encroach upon any street or other public space.

Thus, subject to the other provisions of the code, if an antenna is no closer to the lot line than its total height above the roof, no permit will be required.

[102]ComTech *ex parte* presentation April 5, 1996; Bell Atlantic *ex parte* presentation March 13, 1996.

signals. However, one commenter notes that the largest antenna used to receive ITFS signals within a 30 mile radius in residential areas is 24 inches in diameter.[103]

38. In the *DBS Order and Further Notice,* the Commission concluded that transmitting satellite earth stations of certain sizes, i.e., smaller than one meter in diameter and located in residential areas, and smaller than two meters in diameter and located in commercial or industrial areas, would have the same protection as receiving stations.[104] In contrast, in our proposed implementation of Section 207, we adhered to the statutory text, which refers only to reception, not transmission, devices.[105] Several commenters to the *DBS Order and Further Notice* and the *TVBS-MMDS Notice* nonetheless urge the Commission to include transmitting antennas under the scope of the rule, arguing that some of the enumerated technologies, particularly MMDS, have transmission as well as reception capabilities.[106] In contrast, some commenters assert that Congress did not intend to cover transmission antennas, and that Section 207 is directed at "regulations which impair reception," not reception and transmission.[107]

39. We note that MMDS and LMDS antennas may be employed to both receive and transmit signals. In the future, many over-the-air video services may provide basic signal transmission capability to offer pay-per-view and other interactive options.[108] However, by definition, such basic signal transmission capability is often and appropriately considered as a

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[103]PacTel *ex parte* presentation July 24, 1996; People's Choice *ex parte* presentation June 13, 1996. While People's Choice notes that larger ITFS antennas, up to six feet in diameter, may be used on schools for distance learning, these antennas would not fall within the purview of our rule.

[104]*DBS Order and Further Notice* ¶ 30. We expressly excepted issues related to RF emissions from the rule.

[105]*TVBS-MMDS Notice* ¶ 7.

[106]*See, e.g.,* MSTV TVBS-MMDS Comments at 5-6; WCAI TVBS-MMDS Comments at 25 (noting that wireless cable operators will be deploying new transmitting antennas which should be covered under Section 207); PacTel TVBS-MMDS Comments at 2 (MMDS will likely have transmission capabilities, and the rule should reference these capabilities now to avoid the need to amend later); ComTech TVBS-MMDS Comments at 3 (include LMDS antennas despite their ability to transmit); CellularVision TVBS-MMDS Comments at 4 (same); Cellular TVBS-MMDS Reply at 3 (preempt restrictions that impair a viewer's ability to transmit information back to the hub); CEMA TVBS-MMDS Reply at 5 (transition to advanced television will require new transmission antennas that should be included under Section 207 protection); AT&T DBS Comments at 2-7; Bell Atlantic *ex parte* presentation March 13, 1996; NYNEX *ex parte* presentation March 13, 1996.

[107]Mayors DBS Petition at 4-6; Community TVBS-MMDS Reply at 14-15; Community DBS Reply at 8.

[108]"2-Way High-Speed Data Service Tested on Wireless Cable Systems," 16 Comm. Daily 5, June 28, 1996 (American Telecasting completed test of wireless cable system delivering 2-way high-speed data service and Internet access showing that wireless cable can operate at same speeds as fastest wired cable modems).

component part of reception of multichannel video programming. Cable service, for example, is defined in part as the one-way transmission of video programming or other programming service together with the capability for subscriber interaction that might be required for the selection of use of such video programming or other programming service.[109] Thus, antennas that have transmission capability designed for the viewer to select or use video programming are considered reception devices under the rule.[110] Our rule does not apply to devices that have transmission capability only.

40. Finally, we note that there is no discussion in the record regarding a history of problems regarding local regulation of the size of TVBS antennas that would suggest the need to impose size or height limitations. While commenters indicate that restrictions on TVBS antennas exist, especially from nongovernmental authorities,[111] these restrictions generally take the form of a total prohibition on antennas rather than limits on their size or placement. The lack of record on size or height limits on TVBS antennas may stem from the fact that TVBS is an older and more familiar technology than DBS or MMDS and thus subject to less regulation. There is general public awareness of the variations in the dimensions of TVBS antennas, and commenters have not sought to define these antennas by size or shape. Based on the lack of record showing any such desire, and on the variations in the dimensions of TVBS antennas, we decline to limit the size or shape of such antennas covered by our rule. Nonetheless, we believe that the BOCA guideline regarding the permissibility of permits for installations reaching more than 12 feet over the roofline, which we believe to be a safety guideline, may apply to TVBS antennas as well as to MMDS antennas on masts.

D. Nongovernmental Restrictions

1. Authority to preempt nongovernmental restrictions

41. In this section, we address the argument raised by commenters that we lack the authority to prohibit nongovernmental restrictions, such as restrictive covenants,[112] because such a prohibition would constitute a taking, requiring compensation under the Fifth

[109]47 U.S.C. § 602(6).

[110]To the extent that these antennas have transmission capability, they must meet the standards established in the RF Emissions proceeding noted above.

[111]NASA TVBS-MMDS Comments at 5; NAB *ex parte* Presentation June 14, 1996.

[112]A restrictive covenant is an interest in real property in favor of the owner of the "dominant estate" that prevents the owner of the "servient estate" from engaging in an activity that he or she would otherwise be privileged to do. *See* R. Powell, Powell on Real Property § 34.02[2], (Rohan, ed. 1995). Restrictive covenants are recognized to be "part and parcel of the land to which they are attached." Chapman v. Sheridan-Wyoming Coal Co., 338 U.S. 621, 627 (1950). Restrictive covenants are sometimes used by homeowners' associations to prevent property owners within the association from installing antennas.

Amendment of the Constitution.[113] As explained below, we believe the Commission has authority to prohibit enforcement of restrictive covenants and other similar nongovernmental restrictions that are inconsistent with the federal directive written by Congress in Section 207 of the 1996 Act.

42. When Congress enacted Section 207 of the 1996 Act, it directed us to prohibit "restrictions" that impair viewers' ability to receive video programming services through devices designed for over-the-air reception of TVBS, MMDS, or DBS. The legislative history to this section makes clear that Congress intended the prohibition to apply not only to governmental restrictions but also to nongovernmental restrictions such as "restrictive covenants and encumbrances."[114] As stated in the House Report, Congress directed that "[e]xisting regulations, including but not limited to zoning laws, ordinances, restrictive covenants or homeowners' associations rules, shall be unenforceable to the extent contrary to this section."[115] Thus, in promulgating a regulation that prohibits these restrictions, we are fulfilling the Congressional mandate set forth in Section 207.

43. We have no authority to declare the Congressional mandate contained in a statute to be unconstitutional.[116] In any event, however, we find that preemption of nongovernmental restrictions does not conflict with the Fifth Amendment. The Fifth Amendment requires the government to compensate a property owner if it "takes" the homeowner's property.[117] A taking may involve either the direct appropriation of property[118] or a government regulation which is so burdensome that it amounts to a taking of property without actual condemnation or appropriation.[119] A regulation results in a *per se* regulatory taking if it requires the landowner to suffer a permanent physical invasion of his or her property by a third party, or "denies all economically beneficial or productive use of land."[120] If a regulation does not result in a *per se* taking, the courts will engage in an "ad hoc inquiry" to examine "the

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[113] *See, e.g.,* National Trust TVBS-MMDS Comments at 2, 4; NAA TVBS-MMDS Comments at 3; Community TVBS-MMDS Reply at 3; NAA TVBS-MMDS Reply *passim*; Corporon DBS Comments at 2; NAA DBS Comments *passim*; Southbridge DBS Comments; NAA DBS Reply at 3-4; ICTA DBS Reply at 5-6.

[114] *See* House Report at 124; note 36, *supra.*

[115] *Id.*

[116] *See* GTE California, Inc. v. FCC, 39 F.3d 940, 946 (9th Cir. 1994) (*citing* Johnson v. Robison, 415 U.S. 361, 368 (1974)).

[117] *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014-15 (1992).

[118] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[119] *Lucas*, 505 U.S. at 1015.

[120] *Id.*

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character of governmental action, its economic impact, and its interference with reasonable investment-backed expectations."[121] We do not believe our rule results in a taking of property.

44. The government may abrogate restrictive covenants that interfere with federal objectives enunciated in a regulation. In *Seniors Civil Liberties Ass'n v. Kemp*,[122] the District Court found no taking in an implementation of the Fair Housing Amendments Act (FHAA) that declared unlawful age-based restrictive covenants, thereby abrogating the homeowners' association's rules requiring that at least one resident of each home be at least 55 years of age. The court found that the FHAA provisions nullifying the restrictive covenants constituted a "public program adjusting the benefits and burdens of economic life to promote the common good," and not a taking subject to compensation.[123] Similarly, the Commission's rule implementing Section 207 promotes the common good by advancing a legitimate federal interest in ensuring access to communications,[124] and therefore justifies prohibition of nongovernmental restrictions that impair such access.[125]

45. Some commenters also challenge our authority to prohibit these restrictions under the Commerce Clause. The Supreme Court has made it clear that Congress not only can supersede local regulation, but also can change contractual relationships between private parties through the exercise of its constitutional powers, including the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. In *Connolly v. Pension Benefit Guaranty Corp.*,[126] the Court stated,

> Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights in property, but when contracts deal

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[121]PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980).

[122]761 F. Supp. 1528 (M.D. Fla. 1991), *aff'd*, 965 F.2d 1030 (11th Cir. 1992). *See also* Westwood Homeowners Ass'n v. Tenhoff, 745 P.2d 976 (Ariz. Ct. App. 1987) (holding that a state legislative refusal to enforce restrictive covenants against group homes for the developmentally disabled was not a taking).

[123]*Id.* at 1558-59.

[124]In addition, the assertion that nullifying a homeowner's ability to prevent his neighbor from installing TVBS, MMDS or DBS antennas has a measurable economic impact on the homeowner's property, or interferes with investment-backed expectations, is unsupported by the record here. *See, e.g., Penn Central*, 438 U.S. 104 (1978). Indeed, some commenters argue that the rule enhances the value of the homeowner's property to prospective purchasers who want access to video programming services competitive with cable. SBCA *ex parte* presentation June 11, 1996.

[125]Moreover, if preemption of the restrictive covenants at issue here could be viewed as a taking, the Tucker Act, 28 U.S.C. §1491, presumptively would provide an avenue for obtaining just compensation, thus obviating any potential constitutional problem. *See* Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441, 1445 n.2 (D.C. Cir. 1994).

[126]475 U.S. 211 (1986).

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> with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.
>
> If a regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights, does not always transform the regulation into an illegal taking.[127]

Moreover, in *FCC v. Florida Power Corp.*,[128] the Court permitted the Commission to invalidate certain terms of private contracts relating to property rights. In that case, the Commission's right to regulate pole attachments as mandated by the Pole Attachment Act was upheld even though the regulation invalidated provisions contained in private contracts, including contracts entered into prior to the enactment of the Pole Attachment Act.[129] Courts have also found that homeowner covenants do not enjoy special immunity from federal power.[130] Thus, we conclude that the authority bestowed upon the Commission to adopt a rule that prohibits restrictive covenants or other similar nongovernmental restrictions is not constitutionally infirm.

46. In proposing a strict preemption of such private restrictions without a specific rebuttal or waiver provision,[131] we noted that nongovernmental restrictions appear to be related primarily to aesthetic concerns. We tentatively concluded that it was therefore appropriate to accord them less deference than local governmental regulations that can be based on health and safety considerations.[132] We note, however, that there was an almost complete lack of a record on nongovernmental restrictions and their purposes.

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[127] *Id.* at 223-24 (quotations and citations omitted).

[128] 480 U.S. 245 (1987).

[129] *Cf.* United States v. Midwest Video Corp., 406 U.S. 649, 674 n.31 (1972) (in upholding a Commission rule that required cable operators to originate programming, the Court, quoting from General Telephone Co. of the Southwest v. United States , 449 F.2d 846, 863-64 (5th Cir. 1971), stated the "property of regulated industries is held subject to such limitations as may reasonably be imposed upon it in the public interest and the courts have frequently recognized that new rules may abolish or modify pre-existing interests."); *see also* Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. at 282 ("This Court has had frequent occasion to observe that the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy").

[130] *See, e.g.*, Shelly v. Kraemer, 334 U.S. 1 (1948) (finding racially restrictive covenants judicially unenforceable); Mayers v. Ridley, 465 F.2d 630 (D.C. Cir. 1972) (*per curiam*) (the Court of Appeals *en banc* permitted a challenge by homeowners attacking the legality of racially restrictive covenants to proceed).

[131] *DBS Order and Further Notice* ¶ 62 and Appendix II; *TVBS-MMDS Notice* ¶ 10 and Appendix A.

[132] *DBS Order and Further Notice* ¶ 62.

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47. In response to our proposed rules regarding private restrictions, we received extensive comments from consumers as well as representatives of community associations, commercial real estate interests, and video programming services. Based on this record, we have determined that our original proposals should be modified, and that the same rule and procedures applicable to governments will apply to those desiring to enforce certain nongovernmental restrictions 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.[133] We seek comment below on the application of Section 207 in other kinds of ownership situations.

48. Many commenters, including those representing community associations, commercial real estate interests, and building owners, have expressed significant concern about the applicability of our rules to situations in which a resident wishes to install an antenna on property that is owned by the viewer, is commonly owned, or is owned by a landlord. Based on these comments, we have identified three categories of property rights that might be affected by our rules, including: (a) property within the exclusive use or control of a person who has a direct or indirect ownership interest in the property; (b) property not under the exclusive use and control of a person who has a direct or indirect ownership interest in the property, including the outside of the building, including the roof; and (c) residential or commercial property that is subject to lease agreements. At this time, we conclude that we should apply our rule to property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest in the property. Such a rule appropriately implements the statute while recognizing these important distinctions in the way in which property is owned. With respect to leased property and property not under the viewer's exclusive use or control but where the viewer has an ownership interest, we have determined that the existing record in this proceeding is inadequate to reach a definitive conclusion and that, as discussed below, a further notice of proposed rulemaking is appropriate.

2. Installation on property within the exclusive use or control of the viewer and in which the viewer has a direct or indirect ownership interest

49. The first category includes the case in which an individual owns his home and the land on which it sits. This type of ownership can apply to either a single family detached home or a single family rowhouse, and the owner may be subject to restrictions in the form of covenants or homeowners' association rules that are usually incorporated in a deed. One community association commenter asserts that enforcement and implementation of our rule in these areas "will be less cumbersome and less problematic [than where there is no individual ownership],"[134] but that an association should be able to enforce reasonable rules related to

[133] *See* discussion of waivers and declaratory rulings, *infra* at III. E. Process and Procedure.

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[134] Community DBS Comments at 17.

antenna installation if those rules do not impair reception.[135] Community association commenters urge that the burden be placed on the homeowner to show why her or his antenna cannot be installed in compliance with the applicable covenant.[136] Other commenters strongly object to our limiting community associations' ability to maintain the appearance of their communities, and argue that people buy into a community because they want the protection of the homeowners' association.[137] Some argue that Section 207 does not authorize different treatment of governmental and nongovernmental restrictions, and that nongovernmental entities should be able to seek waivers or rebut presumptions.[138] Community proposes that a restriction should not be prohibited on individually owned or controlled property if a community association makes video programming available 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.[139]

50. Commenters representing video programming service providers and consumers contend that they have encountered numerous problems with installations on property owned exclusively by the antenna user but subject to restrictive covenants or homeowners' association rules,[140] and that they support our proposed rule.[141] People's Choice, a wireless

[135]*Id. See also* Reston TVBS-MMDS Comments at 3; Huckleberry TVBS-MMDS Comments at 2; Silverman TVBS-MMDS Comments at 3; Oakland TVBS-MMDS Comments at 2; Oakland DBS Comments at 2; City of Foster City DBS Comments.

[136]Silverman TVBS-MMDS Comments at 3; Community DBS Comments at 17.

[137]Community TVBS-MMDS Comments at 8-9; Evermay TVBS-MMDS Comments at 2; Georgia TVBS-MMDS Comments at 3-4; Huckleberry TVBS-MMDS Comments at 1-2; Caughlin TVBS-MMDS Comments at 2; NAA TVBS-MMDS Comments at Attachment 1 at 14-15; Community DBS Comments at 7-8; Corporon DBS Comments at 1-2; Southbridge DBS Comments; Drummer DBS Comments at 2; Montgomery Village DBS Comments; Mount DBS Comments; Heritage DBS Comments; Carriage DBS Comments.

[138]Reston TVBS-MMDS Comments at 4; Montgomery Village TVBS-MMDS Comments; Caughlin TVBS-MMDS Comments at 5; NAA TVBS-MMDS Comments at Attachment 2 at 2; National Trust TVBS-MMDS Comments at 5. The rule we adopt today allows these entities the same waiver process as is allowed to governmental entities.

[139]Community DBS Comments at 19.

[140]WCAI TVBS-MMDS Comments at 23-24; ARRL TVBS-MMDS Comments at 4; CBA TVBS-MMDS Comments at 2; Kraegel DBS Comments; Jindal DBS Comments; NRTC DBS Comments at 5-6; DIRECTV *ex parte* presentation June 11, 1996; People's Choice *ex parte* presentation June 11, 1996; PacTel *ex parte* presentation June 17, 1996.

[141]Bell Atlantic TVBS-MMDS Comments at 3-4; MSTV TVBS-MMDS Comments at 5; NAB TVBS-MMDS Comments at 5; NASA TVBS-MMDS Comments at 6-7; NYNEX TVBS-MMDS Comments at 4-5; PacTel TVBS-MMDS Comments at 2; WCAI TVBS-MMDS Comments at 6, n.14; AT & T DBS Comments at 3; Bell Atlantic *ex parte* presentation June 17, 1996; PacTel *ex parte* presentation June 17, 1996; NYNEX *ex parte* presentation June 24, 1996.

cable provider, states that restrictive covenants on the use of property are not the result of negotiated agreements among homeowners, but instead result from coercion by developers and the influence of cable companies.[142] Once covenants are in place, they are difficult to amend, according to these commenters, often requiring approval by a two-thirds majority of homeowners and recording of changes in local land records.[143]

51. As noted above, in light of the statutory language and the legislative history, we conclude that Congress intended Section 207 to apply to nongovernmental restrictions. We adopt a rule that prohibits nongovernmental restrictions that impair reception by antennas installed on property exclusively owned by the viewer. Under our rule, nongovernmental restrictions on antennas installed on such property are limited in the same manner and governed by the same standards as governmental restrictions.[144] Thus, homeowners' associations and similar nongovernmental authorities may regulate antenna placement or indicate a preference for installations that are not visible from the neighboring property, as long as a restriction does not impair reception. In addition, these nongovernmental authorities can enforce the same type of restrictions based on safety or historic preservation that governments can enforce. Finally, these entities can apply for declaratory rulings or waivers of our rule.

52. In addition to covering restrictions on antenna placement on property owned by the viewer, our rule will also apply where an individual who has a direct or indirect ownership interest in the property seeks to install an antenna in an area that is within his or her exclusive use or control. In this situation, other owners will not be directly impacted by the installation.[145] As argued by commenters, community associations retain the right to impose restrictions on installation as long as they do not impair reception.[146] Viewers who have exclusive use or control of property in which they have a direct or indirect ownership interest cannot be prohibited from installing antennas on this property where such a prohibition would impair reception, absent a safety or historic preservation purpose.

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[142]People's Choice *ex parte* presentation June 11, 1996; People's Choice TVBS-MMDS Reply at 2, 4.

[143]People's Choice TVBS-MMDS Reply at 5-6; Bell Atlantic *ex parte* presentation June 18, 1996.

[144]We reject the suggestion made by some commenters that the Commission exempt existing nongovernmental restrictions from the application of the rule. *See, e.g.*, Danberry DBS Comments; Zalco DBS Comments; Sully Station DBS Comments (each arguing that grandfathering existing rules would allow developers of new communities to accommodate antennas in the design of the community and to include covenants that are consistent with Commission regulations.) The legislative history of Section 207 specifically says that "existing" regulations are to be covered by our rule, and thus a grandfathering approach would not implement Congressional intent. *See* House Report at 124.

[145]Community DBS Comments at 20.

[146]*Id.*

E. Process and Procedure

53. We envision at least three types of situations where parties might seek Commission relief pursuant to our rule. Individual antenna users or service providers may seek a determination that a restriction is prohibited by our rule. Entities seeking to enforce a restriction may seek a determination that the restriction is not preempted. Finally, enforcing authorities may seek a determination that although their restriction is subject to preemption, our rule should be waived in a particular case. We have adopted procedures addressing each of these scenarios. Under these procedures, if either the antenna user or the enforcing authority has requested a determination from a court or from this Commission on whether the restriction at issue is permitted as an exception for safety or historic preservation, the restriction may be enforced pending this determination. Otherwise, the restriction may not be enforced until the Commission or a court of competent jurisdiction issues a ruling that the restriction is not preempted. In these circumstances, a viewer may install, use and maintain an antenna while the proceeding is pending. While the viewer may be subject to the enforcing authority's fine or other penalty for violation if the restriction is determined to be enforceable, no additional fines or penalties may accrue during the pendency of the proceeding.[147]

54. In any Commission proceeding seeking a determination under our rule, the burden will be on the entity seeking to enforce a restriction to show that such restriction is not preempted. The rules that we adopted in the *DBS Order and Further Notice* and proposed in the *TVBS-MMDS Notice* placed the burden of rebutting the presumption and the burden of seeking a waiver on the enforcing authority. Those rules also would have prevented the local authority from taking any action to enforce restrictions that are inconsistent with our rule, unless the authority had secured a waiver or a declaration that the presumption had been rebutted.[148] In the *DBS Order and Further Notice*, we stated that by placing the burden on the enforcer, our approach allowed municipalities and consumers to determine the applicability of local regulations.[149] Commenters from industry support our proposal to place the burden of persuasion on the local authorities.[150] These commenters contend that in order to foster competition, the local authority, and not an individual consumer, should have to

[147]For example, if the fine for violating a restriction is $50, the viewer may be subject to that fine if the restriction is determined to be enforceable. If the restriction establishes an ongoing or cumulative fine (e.g., $50 per month, interest, late fees, or other penalties), these shall not accrue while a court or the Commission is considering the enforceability of the restriction. *See* DIRECTV DBS Petition at 12; Primestar DBS Petition at 14.

[148]*DBS Order and Further Notice* at Appendix II; *TVBS-MMDS Notice* at Appendix A.

[149]*DBS Order and Further Notice* ¶ 32.

[150]*See, e.g.*, NASA TVBS-MMDS Comments at 7-8; NAB TVBS-MMDS Comments at 7; CEMA TVBS-MMDS Reply at 4; NASA TVBS-MMDS Reply at 7; Bell Atlantic TVBS-MMDS Reply at 6; NAB TVBS-MMDS Reply; WCAI TVBS-MMDS Reply at 10-11; CEMA DBS Comments at 7; DIRECTV DBS Reply at 5; SBCA DBS Reply at 8.

demonstrate that a regulation does not impair access.[151] Local authorities disagree, and argue that the party seeking to install the reception device or the video service provider should demonstrate that a local regulation impairs his access to TVBS, MMDS or DBS signals.[152] For the reasons stated in the *DBS Order and Further Notice*, we affirm our conclusion that the entity seeking to enforce a restriction bears the burden of demonstrating the validity of its regulation.[153] We believe 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.

55. Declaratory ruling and waiver petitions require only paper submissions to the Commission, thus minimizing the burden on all parties.[154] In the latter case, general waiver guidelines will apply[155] and petitions must be pled with particularity,[156] setting forth the local regulation in question and its applicability to TVBS, MMDS, or DBS. Petitioners for waiver must show good cause why the rule should be waived;[157] petitioners seeking to enforce restrictions should show that the restrictions are so vital to the public interest as to outweigh the federal interest in such a prohibition; challengers of restrictions should show that the restrictions are not reasonably related to, or necessary to serve, the stated public interest function. Petitions for waiver should be targeted as narrowly as possible to achieve the desired end. Petitions for declaratory rulings or waivers must be served on all interested parties,[158] and will be noted by the Commission on a public notice that establishes a pleading period. Oppositions and replies to petitions for declaratory rulings or waivers will be

[151] *Id.*

[152] *See, e.g.*, Community TVBS-MMDS Reply at 11; Reston DBS Comments at 3; Mayors DBS Petition at 12; NAA DBS Comments at 4-6; NATOA *ex parte* presentation March 13, 1996 (burden should be on video service providers because they have more resources than local governments).

[153] *DBS Order and Further Notice* ¶¶ 31, 32.

[154] Commenters suggest that a paper process will be the best and least costly option. CEMA DBS Reply at 4; SBCA *ex parte* presentation June 11, 1996. We agree; formal hearings would be far more burdensome.

[155] Northeast Cellular Tel. Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*citing* WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969)). *Northeast Cellular* held that a waiver is appropriate only if special circumstances warrant a deviation from the general rule, if the waiver will serve the public interest, and if the waiver is granted in a nondiscriminatory fashion. *Id.*

[156] Rio Grande Family Radio Fellowship, Inc. v. FCC, 406 F.2d 664, 666 (D.C. Cir. 1968).

[157] *Id.*; *see also Northeast Cellular*, 897 F.2d at 1166.

[158] For example, a community association requesting a waiver should serve any residents who have challenged its restriction and/or have installed antennas.

permitted, but are not required.[159]

56. In the *DBS Order and Further Notice* and the *TVBS-MMDS Notice*, we discussed the possibility of parties seeking judgment from either the Commission or a court of competent jurisdiction. Many industry commenters recommend that the Commission retain exclusive jurisdiction to resolve disputes between local authorities and consumers.[160] They contend that if local courts are allowed to adjudicate federal policy, the results may be inconsistent, and that uniformity provides the certainty needed to compete effectively.[161] These commenters cite Section 205 of the 1996 Act as explicitly conferring upon the Commission the "exclusive jurisdiction to regulate the provision of direct-to-home [satellite] services."[162] In addition, they note that *Town of Deerfield, New York v. FCC*[163] may require the Commission to intervene in a case before judicial review or not at all.[164] Finally, these industry commenters argue that the Commission should exercise exclusive jurisdiction to ensure national uniform standards consistent with Section 207 and the Commission's rule. Some community commenters oppose the exercise of exclusive jurisdiction by the Commission.[165] One commenter states that Section 205, read in its entirety, grants the Commission exclusive jurisdiction over only programming, not the antennas themselves. This party also cites *United States v. Lopez*[166] in arguing that zoning and land use regulation are police powers reserved for the states under the Tenth Amendment of the Constitution.[167] Another commenter asserts that the Commission should give the traditional deference to state and federal courts with regard to health and safety matters.[168]

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[159]In order to expedite action on these petitions, we hereby delegate authority to the staff to issue the initial rulings in these matters, subject to the usual Commission review process.

[160]*See e.g.*, SBCA DBS Opposition at 3-5; DIRECTV DBS Petition at 8-12; CEMA DBS Petition and Opposition at 6; Primestar DBS Petition at 12-13; HNS DBS Petition at 3-4; USSB DBS Petition at 3.

[161]CAI Wireless TVBS-MMDS Comments at 7; WCAI TVBS-MMDS Comments at 20-22; CAI Wireless TVBS-MMDS Reply at 3. *But see* Community TVBS-MMDS Reply at 10; Community DBS Reply at 6 (establishing the Commission as the sole forum for resolving disputes will disadvantage local authorities who lack experience in practicing before the Commission).

[162]1996 Act § 205, 47 U.S.C. § 303(v) (emphasis added).

[163]992 F.2d 420 (2d Cir. 1992).

[164]DIRECTV DBS Petition at 10, HNS DBS Petition at 4.

[165]*See, e.g.*, Mayors DBS Petition at 3,12; MIT DBS Opposition at 4-5.

[166]115 S. Ct. 1624 (1995).

[167]MIT DBS Opposition at 4-5.

[168]Mayors DBS Petition at 12.

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57. At the outset, we state our disagreement with those commenters who maintain that because Section 303(v), as amended by Section 205 of the Telecommunications Act, states that the Commission shall "[h]ave exclusive jurisdiction to regulate the provision of direct-to-home satellite services,"[169] we are required to exercise exclusive jurisdiction over any restrictions that may be applicable to DBS receiving devices. This provision, like all the other provisions appearing in that section, is governed by the prefatory language in Section 303 which, as noted earlier, states, "Except as otherwise provided in this Act, the Commission from time to time, *as public convenience, interest, or necessity requires*, shall ..." (emphasis added).

58. While we hope that affected persons, entities, or governmental authorities would seek guidance and suitable redress through the processes we have established, we see no reason to foreclose the ability of parties to resolve issues locally. We accordingly decline to preclude affected parties from taking their cases to a court of competent jurisdiction. We expect that in such instances the court would look to this agency's expertise and, as appropriate, refer to us for resolution questions that involve those matters that relate to our primary jurisdiction over the subject matter. 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.

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

59. As indicated above, we have generally concluded that the same regulations applicable to governmental restrictions should be applied to homeowners' association rules and private covenants, where the property is within the exclusive use or control of the antenna user and the user has a direct or indirect ownership interest in the property. We are unable to conclude on this record, however, that the same analysis applies with regard to the placement of antennas on common areas or rental properties, property not within the exclusive control of a person with an ownership interest, where a community association or landlord is legally responsible for maintenance and repair and can be liable for failure to perform its duties properly. Such situations raise different considerations.

60. The differences are reflected in the comments received. According to one commenter, an individual resident (or viewer) has no legal right to alter commonly owned property unilaterally, and thus no right to use the common area to install an antenna without permission. It argues that Section 207 does not apply to commonly-owned property, and that applying it to such property would be unconstitutional.[170] Commenters also raise issues about

[169] 47 U.S.C. § 303(v).

[170] Community DBS Comments at 12; Community DBS Reply at 3. *See also* related comments in Community TVBS-MMDS Comments at 11, 13-14; C & R Realty TVBS-MMDS Comments; Silverman TVBS-MMDS Comments at 3; Parkfairfax TVBS-MMDS Comments at 1; Woodburn Village TVBS-MMDS

the validity of warranties for certain common areas such as roofs that might be affected or rendered void if antennas are installed.[171] These commenters suggest that, in areas where most of the available space is common property, there should be coordinated installation managed by the community association that would assure access to services by all residents.[172] Broadcasters support a suggestion that community associations with the responsibility of managing common property should be able to enforce their restrictions as long as they make access available to all services desired by residents.[173]

61. NAA and others express concern about situations in which the prospective antenna user is a tenant and the property on which she or he wants to install an antenna is owned by a landlord.[174] These commenters urge the Commission to clarify that the rule does not affect landlord-tenant agreements for occupancy of privately-owned residential property, and does not apply at all to commercial property.[175] Citing the Supreme Court's ruling in *Loretto v. Teleprompter Manhattan CATV Corp.*,[176] they assert that to force property owners to allow installation of antennas owned by a service provider, a tenant, or a resident would result in an unconstitutional taking in violation of the Fifth Amendment.[177] They assert that in *Loretto*, the Court found that a New York law that required a landlord to allow installation of cable wiring on or across her building was an unconstitutional taking in part because it constituted a permanent occupation.[178] NAA argues that a rule requiring antenna installation on landlord-

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Comments; Southbridge DBS Comments.

[171]Community DBS Comments at 14, Appendix A (letters from Peterson Roofing, Premier Roofing, and Schuller Roofing Systems); *see also* Elisha TVBS-MMDS Comments at 2; Christianson DBS Comments.

[172]Community DBS Comments at 21. Community offers several examples of possible approaches that would accomplish this result. *See also* Parkfairfax TVBS-MMDS Comments at 2; MASS DBS Comments at 2 (associations should be allowed to solicit bids from service providers so that the owners can select a provider); Orten DBS Comments (developers and community associations should be free to bargain with cable, satellite and MMDS providers to serve community).

[173]NAB *ex parte* presentation June 14,1996. *See also* DIRECTV DBS Comments at 10.

[174]NAA TVBS-MMDS Comments; NAA DBS Comments; ICTA TVBS-MMDS Comments at 4-6; FRM DBS Comments. In addition, there are approximately 442 letters in the record, designated as "Coordinated," from property managers and similar groups expressing the same concerns.

[175]National Trust TVBS-MMDS Comments at 5; NAA DBS Comments at 1; Brigantine DBS Comments at 1; Coordinated DBS Comments at 1; C&G DBS Comments at 2; Haley DBS Comments at 2; FRM DBS Comments at 1; Hendry DBS Comments at 1; Hancock DBS Comments at 1; Compass DBS Comments at 1.

[176]458 U.S. 419 (1982).

[177]National Trust TVBS-MMDS Comments at 2, 4, *citing Loretto*; NAA DBS Comments, *citing Loretto*. *See* discussion, *supra*.

[178]458 U.S. at 421, 440.

owned property is similar, and would obligate the Commission to provide compensation based on a fair market value of the property occupied. According to NAA, Congress has not authorized such compensation.[179] Commenters also assert that even if the Commission has jurisdiction in this matter, there are sound reasons not to regulate antenna placement on private property. They state that aesthetic concerns are important and affect a building's marketability, and that our rule could interfere with effective property management.[180]

62. In contrast, video programming service providers argue that the use of the term "viewer" demonstrates that Congress did not intend in Section 207 to distinguish between renters and owners, or to exclude renters from the protection of the Commission's rule.[181] One commenter also asserts that the statute was designed to allow viewers to choose alternatives to cable and not to permit landlords or other private entities to select the service for these viewers.[182] These commenters claim that the Supreme Court's holding in *Loretto* does not compel a distinction between property owned by an individual and that owned by a landlord, and that the holding in *Loretto* is very narrow.[183] In support of its argument, SBCA contends that in *Loretto*, a dispositive fact was that the New York law gave outside parties (cable operators) rights, and did "*not* purport to give the *tenant* any enforceable property rights." Also, SBCA states, the court in *Loretto* noted that if the law were written in a manner that required "'cable installation if a tenant so desires, the statute might present a different question. . . .'"[184] SBCA also argues that the installation of a DBS antenna is not a permanent occupation and does not qualify as a taking under *Loretto*.[185] DIRECTV argues that the Fifth Amendment is not implicated by a rule preempting private antenna restrictions because other regulations of the landlord-tenant relationship, e.g., a regulation requiring a

[179]NAA argues that if a subscriber chooses to live where cable service is available but antennas are not permitted, he is not prevented from getting some form of video programming, and that the legislation does not mean that every technology must be available to every individual under every circumstance. NAA DBS Comments at 12-13.

[180]*See, e.g.*, Elisha TVBS-MMDS Comments at 1-2 (preemption compromises security of buildings by allowing providers access to rooftops); Georgia TVBS-MMDS Comments at 3-4. Coordinated DBS Comments at 1 (noting that aesthetics directly affect a building's value and marketability); Mass DBS Comments at 2 (same); C&G DBS Comments at 1; NAHB DBS Comments at 2. We note NAA DBS Comments at 14, discussing landlords' provision of facilities for data transmission. Our rule applies only to reception devices. *But see*, 47 C.F.R. § 25.104, regarding transmitting antennas and local zoning restrictions.

[181]DIRECTV DBS Comments at 6; SBCA DBS Reply at 2-4.

[182]DIRECTV DBS Comments at 7.

[183]SBCA DBS Reply at 5; DIRECTV DBS Reply at 8.

[184]SBCA DBS Comments at 5.

[185]*Id.* at 5-6.

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landlord to install sprinkler systems, have not been deemed a taking.[186]

63. Neither the *DBS Order and Further Notice* nor the *TVBS-MMDS Notice* specifically proposed rules to govern or sought comment on the question of whether the antenna restriction preemption rules should apply to the placement of antennas on rental and other property not within the exclusive control of a person with an ownership interest. As a consequence many of the specific practical problems of how possible regulations might apply were not commented on, nor were the policy and legal issues fully briefed. At least one party interested in providing greater access by viewers to DBS service urged the Commission to reserve judgment, noting the insufficiency of the record as to certain common area and exterior surface issues.[187] We conclude that the record before us at this time is incomplete and insufficient on the legal, technical and practical issues relating to whether, and if so how, to extend our rule to situations in which antennas may be installed on common property for the benefit of one with an ownership interest or on a landlord's property for the benefit of a renter. Accordingly, we request further comment on these issues. The Community suggestion, referenced in para. 49 above, involves the potential for central reception facilities in situations where restrictions on individual antenna placement are preempted by the rules, and thus no involuntary use of common or landlord-owned property is involved. We would welcome additional comment in the further proceeding regarding Community's proposal. We seek comment on the technical and practical feasibility of an approach that would allow the placement of over-the-air reception devices on rental or commonly-owned property. In particular, we invite commenters to address technical and/or practical problems or any other considerations they believe the Commission should take into account in deciding whether to adopt such a rule and, if so, the form such a rule should take.

64. Specifically, we seek comment on the Commission's legal authority to prohibit nongovernmental restrictions that impair reception by viewers who do not have exclusive use or control and a direct or indirect ownership interest in the property. On the question of our legal authority, we note that in *Loretto*,[188] the Supreme Court held that a state statute that allowed a cable operator to install its cable facilities on the landlord's property constituted a taking under the Fifth Amendment. In the same case, the Court stated, in dicta, that "a different question" might be presented if the statute required the landlord to provide cable

[186]DIRECTV DBS Comments at 8, *citing FCC v. Florida Power Corp.* for the distinction between the treatment of a tenant and an "interloper with a government license" such as the cable company in *Loretto*. DIRECTV DBS Reply at 8, *quoting Florida Power*, 480 U.S. at 252-53; *see also* NYNEX TVBS-MMDS Comments at 6-7; Philips Electronics DBS Reply at 6-9.

[187]DIRECTV DBS Reply at 9-10 (stating that a decision on the issue of antenna installation in multiple dwelling units should be deferred pending the Commission's action on inside wiring rules and policies, Telecommunications Services Inside Wiring and Customer Premises Equipment, CS Docket No. 95-184).

[188]458 U.S. 419 (1982).

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installation desired by the tenant.[189] We therefore request comment on the question of whether adoption of a prohibition applicable to restrictions imposed on rental property or property not within the exclusive control of the viewer who has an ownership interest would constitute a taking under *Loretto*, for which just compensation would be required, and if so, what would constitute just compensation in these circumstances.

65. In this regard, we also request comment on how the case of *Bell Atlantic Telephone Companies v. FCC*[190] should affect the constitutional and legal analysis. In that case, the U.S. Court of Appeals for the District of Columbia invalidated Commission orders that permitted competitive access providers to locate their connecting transmission equipment in local exchange carrier' central offices because these orders directly implicated the Just Compensation Clause of the Fifth Amendment. In reaching its decision, the court stated that "[w]ithin the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions."[191]

V. CONCLUSION

66. We believe that the rule we adopt today reflects Congress' objective as expressed in Section 207 of the 1996 Act. Our rule furthers the public interest by promoting competition among video programming service providers, enhancing consumer choice, and assuring wide access to communications facilities, without unduly interfering with local interests. We also believe it is appropriate to develop the record further before reaching conclusions regarding the application of Section 207 to situations in which the viewer does not have exclusive use or control and a direct or indirect ownership interest in the property where the antenna is to be installed, used, and maintained.

VI. PROCEDURAL PROVISIONS

(Deleted)

VII. ORDERING CLAUSES

(Deleted)

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[189] *Id.* at 440 n.19.

[190] 24 F.3d 1441 (D.C. Cir. 1994).

[191] *Id.* at 1444.

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