

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.

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## 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.<sup>1</sup>

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."<sup>2</sup>

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

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<sup>1</sup>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.

<sup>2</sup>Communications Act of 1934, *as amended*, § 1, 47 U.S.C. § 151.

Bureau (IB) Docket No. 95-59 (*DBS Order and Further Notice*)<sup>3</sup> 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*),<sup>4</sup> 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).<sup>5</sup> 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.<sup>6</sup> In 1995 the Commission commenced a new proceeding to review and amend aspects of this rule.<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> The Commission also proposed to implement Section 207 for DBS service by prohibiting enforcement of

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<sup>3</sup>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).

<sup>4</sup>Implementation of Section 207 of the Telecommunications Act of 1996: Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service, Notice of Proposed Rulemaking, CS Docket No. 96-83, 11 FCC Rcd 6357 (1996).

<sup>5</sup>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.

<sup>6</sup>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.

<sup>7</sup>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*).

<sup>8</sup>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.

<sup>9</sup>*DBS Order and Further Notice* ¶ 59.

nongovernmental restrictions on devices used to receive DBS programming signals.<sup>10</sup> 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*.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup>

## 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

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<sup>10</sup>*DBS Order and Further Notice* ¶ 62.

<sup>11</sup>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.

<sup>12</sup>*DBS Order and Further Notice* ¶ 59; *TVBS-MMDS Notice* ¶ 8.

<sup>13</sup>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

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,"<sup>14</sup> 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."<sup>15</sup> 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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<sup>14</sup>47 U.S.C. § 303.

<sup>15</sup>*DBS Order and Further Notice* ¶ 59.

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.<sup>16</sup> 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*.<sup>17</sup> In that case the Court struck down a federal statute that defined a crime of

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<sup>16</sup>MIT TVBS-MMDS Reply at 1; Mayors DBS Comments at 8.

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

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."<sup>18</sup>

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.<sup>19</sup> 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."<sup>20</sup>

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."<sup>21</sup> 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

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<sup>18</sup>See Mayors DBS Comments at Summary.

<sup>19</sup>115 S. Ct. at 1629.

<sup>20</sup>*Id.* at 1631.

<sup>21</sup>*Id.* at 1627.



clause."<sup>22</sup> The Court held that it was immaterial that the radio licensee "[did] not own or control the receiving mechanisms."<sup>23</sup> 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<sup>24</sup> 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."<sup>25</sup> 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.<sup>26</sup> 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."<sup>27</sup> The term "impair" means to make worse or damage.<sup>28</sup> The House Report<sup>29</sup> 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

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<sup>22</sup>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").

<sup>23</sup>297 U.S. at 655.

<sup>24</sup>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.

<sup>25</sup>*DBS Order and Further Notice* ¶ 28 and Appendix II; *TVBS-MMDS Notice* ¶ 8 and Appendix A.

<sup>26</sup>47 C.F.R. § 25.104. See *Earth Station Notice*, 10 FCC Rcd at 6982.

<sup>27</sup>1996 Act § 207.

<sup>28</sup>See, e.g., *The Random House College Dictionary* 665 (Revised Edition 1980).

<sup>29</sup>H.R. Rep. No. 204, 104th Congress, 1st Sess. at 124 (1995) (House Report).

or of satellite receivers designed for receipt of DBS services."<sup>30</sup> 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.<sup>31</sup>

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

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<sup>30</sup>*Id.*

<sup>31</sup>*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.

<sup>32</sup>*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.

<sup>33</sup>*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.

<sup>34</sup>*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,"<sup>35</sup> so the only restrictions that should be considered to impair reception are those that preclude access to TVBS, MMDS or DBS signals.<sup>36</sup>

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,<sup>37</sup> to requirements to plant shrubbery to screen the dish,<sup>38</sup> to regulations that the mast and MMDS antenna must look like a tree with leaves,<sup>39</sup> 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).

<sup>35</sup>House Report at 124.

<sup>36</sup>*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.

<sup>37</sup>*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.

<sup>38</sup>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).

<sup>39</sup>Bell Atlantic *ex parte* presentation April 16, 1996.

outright prohibitions,<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup> Another commenter suggests that a cost-based method is impracticable

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<sup>40</sup>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.

<sup>41</sup>Bell Atlantic *ex parte* presentation June 18, 1996; SBCA *ex parte* presentations June 11, 1996 and June 17, 1996.

<sup>42</sup>Evermay TVBS-MMDS Comments at 3; Community TVBS-MMDS Comments at 11; WCAI TVBS-MMDS Reply at 6, n.10.

<sup>43</sup>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).

<sup>44</sup>SBCA *ex parte* presentation June 17, 1996.

because communities' needs may vary widely.<sup>45</sup>

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.<sup>46</sup> 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-

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<sup>45</sup>Miller, Canfield *ex parte* presentation June 14, 1996.

<sup>46</sup>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.<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup> Similarly, the record reflects general agreement that valid historic concerns should be honored.<sup>50</sup> 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.<sup>51</sup> We acknowledged in the *DBS Order and Further Notice* and the *TVBS-MMDS Notice* that this presumptive approach would be more

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<sup>47</sup>See, e.g., DIRECTV DBS Comments at 16.

<sup>48</sup>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).

<sup>49</sup>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.

<sup>50</sup>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").

<sup>51</sup>*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.<sup>52</sup> 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.<sup>53</sup> Although the rebuttable presumption approach is supported by several commenters,<sup>54</sup> some industry parties suggest that we impose a higher standard for meeting health or safety objectives,<sup>55</sup> or establish a rule of *per se* preemption.<sup>56</sup> 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.<sup>57</sup> 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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<sup>52</sup>DBS Order and Further Notice ¶ 25; TVBS-MMDS Notice ¶ 8.

<sup>53</sup>See *Earth Station Notice*, 10 FCC Rcd at 7001.

<sup>54</sup>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).

<sup>55</sup>See, e.g., BellSouth TVBS-MMDS Comments at 3-5; Bell Atlantic TVBS-MMDS Reply at 6.

<sup>56</sup>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.

<sup>57</sup>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.<sup>58</sup> 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."<sup>59</sup> 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.<sup>60</sup>

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

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<sup>58</sup>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.

<sup>59</sup>National Fire Prevention Association, Inc. model code.

<sup>60</sup>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.



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.<sup>61</sup> 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,<sup>62</sup> 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."<sup>63</sup> 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.<sup>64</sup>

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

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<sup>61</sup>NLC DBS Comments at 13-15; FLC DBS Comments at 1; Mayors DBS Comments at 12.

<sup>62</sup>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.

<sup>63</sup>National Historic Preservation Act of 1966, *as amended*, 16 U.S.C. § 470a(a)(1)(A).

<sup>64</sup>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,<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup> 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."<sup>68</sup>

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.<sup>69</sup> 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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<sup>65</sup>See 16 U.S.C. § 470a(a)(1)(A).

<sup>66</sup>*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."

<sup>67</sup>*DBS Order and Further Notice* ¶ 57, citing House Report at 124.

<sup>68</sup>House Report at 124 (emphasis added).

<sup>69</sup>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.

among video programming services by prohibiting restrictions that impair reception of all forms of video programming.<sup>70</sup> 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),<sup>71</sup> and local multipoint distribution service (LMDS).<sup>72</sup> 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,<sup>73</sup> and medium-power Ku-band DTH satellite services.<sup>74</sup> 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.<sup>75</sup>

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

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<sup>70</sup>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.

<sup>71</sup>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).

<sup>72</sup>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.

<sup>73</sup>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.

<sup>74</sup>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.

<sup>75</sup>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.<sup>76</sup>

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.<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup> As

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<sup>76</sup>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.

<sup>77</sup>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.)

<sup>78</sup>See Attachment A, 47 C.F.R. § 25.104.

<sup>79</sup>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.<sup>80</sup>

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.<sup>81</sup> 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."<sup>82</sup> 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.<sup>83</sup>

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

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

<sup>81</sup>*TVBS-MMDS Notice* ¶ 7.

<sup>82</sup>*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.

<sup>83</sup>*TVBS-MMDS Notice* ¶ 7.

<sup>84</sup>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.

<sup>85</sup>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).

that includes provisions on antenna installation.<sup>86</sup> 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.<sup>87</sup> 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.<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup> 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.<sup>91</sup> Moreover, industry commenters assert that masts are well secured and do not pose a health or safety problem.<sup>92</sup> 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

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<sup>86</sup>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.

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

<sup>88</sup>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.

<sup>89</sup>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.

<sup>90</sup>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.

<sup>91</sup>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.

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

DBS, that for technical reasons do not face such limits.<sup>93</sup> 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.<sup>94</sup> 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.<sup>95</sup>

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

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<sup>93</sup>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.

<sup>94</sup>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.

<sup>95</sup>People's Choice *ex parte* presentation June 13, 1996.

<sup>96</sup>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.

<sup>97</sup>Community TVBS-MMDS Reply at 17.

<sup>98</sup>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.<sup>99</sup>

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.<sup>100</sup> 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.<sup>101</sup> 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.<sup>102</sup> 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

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<sup>99</sup>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.

<sup>100</sup>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.

<sup>101</sup>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.

<sup>102</sup>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.<sup>103</sup>

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.<sup>104</sup> In contrast, in our proposed implementation of Section 207, we adhered to the statutory text, which refers only to reception, not transmission, devices.<sup>105</sup> 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.<sup>106</sup> 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.<sup>107</sup>

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.<sup>108</sup> However, by definition, such basic signal transmission capability is often and appropriately considered as a

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<sup>103</sup>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.

<sup>104</sup>*DBS Order and Further Notice* ¶ 30. We expressly excepted issues related to RF emissions from the rule.

<sup>105</sup>*TVBS-MMDS Notice* ¶ 7.

<sup>106</sup>*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.

<sup>107</sup>Mayors DBS Petition at 4-6; Community TVBS-MMDS Reply at 14-15; Community DBS Reply at 8.

<sup>108</sup>"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.<sup>109</sup> Thus, antennas that have transmission capability designed for the viewer to select or use video programming are considered reception devices under the rule.<sup>110</sup> 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,<sup>111</sup> 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,<sup>112</sup> because such a prohibition would constitute a taking, requiring compensation under the Fifth

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<sup>109</sup>47 U.S.C. § 602(6).

<sup>110</sup>To the extent that these antennas have transmission capability, they must meet the standards established in the RF Emissions proceeding noted above.

<sup>111</sup>NASA TVBS-MMDS Comments at 5; NAB *ex parte* Presentation June 14, 1996.

<sup>112</sup>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.<sup>113</sup> 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."<sup>114</sup> 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."<sup>115</sup> 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.<sup>116</sup> 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.<sup>117</sup> A taking may involve either the direct appropriation of property<sup>118</sup> or a government regulation which is so burdensome that it amounts to a taking of property without actual condemnation or appropriation.<sup>119</sup> 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."<sup>120</sup> 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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<sup>113</sup>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.

<sup>114</sup>See House Report at 124; note 36, *supra*.

<sup>115</sup>*Id.*

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

<sup>117</sup>See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014-15 (1992).

<sup>118</sup>*Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

<sup>119</sup>*Lucas*, 505 U.S. at 1015.

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

character of governmental action, its economic impact, and its interference with reasonable investment-backed expectations."<sup>121</sup> 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*,<sup>122</sup> 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.<sup>123</sup> Similarly, the Commission's rule implementing Section 207 promotes the common good by advancing a legitimate federal interest in ensuring access to communications,<sup>124</sup> and therefore justifies prohibition of nongovernmental restrictions that impair such access.<sup>125</sup>

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.*,<sup>126</sup> 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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<sup>121</sup>*PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980).

<sup>122</sup>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).

<sup>123</sup>*Id.* at 1558-59.

<sup>124</sup>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.

<sup>125</sup>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).

<sup>126</sup>475 U.S. 211 (1986).

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.<sup>127</sup>

Moreover, in *FCC v. Florida Power Corp.*,<sup>128</sup> 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.<sup>129</sup> Courts have also found that homeowner covenants do not enjoy special immunity from federal power.<sup>130</sup> 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,<sup>131</sup> 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.<sup>132</sup> We note, however, that there was an almost complete lack of a record on nongovernmental restrictions and their purposes.

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<sup>127</sup>*Id.* at 223-24 (quotations and citations omitted).

<sup>128</sup>480 U.S. 245 (1987).

<sup>129</sup>*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").

<sup>130</sup>*See, e.g.*, *Shelley 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).

<sup>131</sup>*DBS Order and Further Notice* ¶ 62 and Appendix II; *TVBS-MMDS Notice* ¶ 10 and Appendix A.

<sup>132</sup>*DBS Order and Further Notice* ¶ 62.

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.<sup>133</sup> 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],"<sup>134</sup> but that an association should be able to enforce reasonable rules related to

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<sup>133</sup>See discussion of waivers and declaratory rulings, *infra* at III. E. Process and Procedure.

<sup>134</sup>Community DBS Comments at 17.

antenna installation if those rules do not impair reception.<sup>135</sup> 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.<sup>136</sup> 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.<sup>137</sup> 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.<sup>138</sup> 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.<sup>139</sup>

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,<sup>140</sup> and that they support our proposed rule.<sup>141</sup> People's Choice, a wireless

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<sup>135</sup>*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.

<sup>136</sup>Silverman TVBS-MMDS Comments at 3; Community DBS Comments at 17.

<sup>137</sup>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.

<sup>138</sup>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.

<sup>139</sup>Community DBS Comments at 19.

<sup>140</sup>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.

<sup>141</sup>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.<sup>142</sup> 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.<sup>143</sup>

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.<sup>144</sup> 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.<sup>145</sup> As argued by commenters, community associations retain the right to impose restrictions on installation as long as they do not impair reception.<sup>146</sup> 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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<sup>142</sup>People's Choice *ex parte* presentation June 11, 1996; People's Choice TVBS-MMDS Reply at 2, 4.

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

<sup>144</sup>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.

<sup>145</sup>Community DBS Comments at 20.

<sup>146</sup>*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.<sup>147</sup>

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.<sup>148</sup> 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.<sup>149</sup> Commenters from industry support our proposal to place the burden of persuasion on the local authorities.<sup>150</sup> These commenters contend that in order to foster competition, the local authority, and not an individual consumer, should have to

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<sup>147</sup>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.

<sup>148</sup>*DBS Order and Further Notice* at Appendix II; *TVBS-MMDS Notice* at Appendix A.

<sup>149</sup>*DBS Order and Further Notice* ¶ 32.

<sup>150</sup>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.<sup>151</sup> 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.<sup>152</sup> 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.<sup>153</sup> 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.<sup>154</sup> In the latter case, general waiver guidelines will apply<sup>155</sup> and petitions must be pled with particularity,<sup>156</sup> 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;<sup>157</sup> 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,<sup>158</sup> 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

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<sup>151</sup>*Id.*

<sup>152</sup>*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).

<sup>153</sup>*DBS Order and Further Notice* ¶¶ 31, 32.

<sup>154</sup>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.

<sup>155</sup>*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.*

<sup>156</sup>*Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968).

<sup>157</sup>*Id.*; *see also Northeast Cellular*, 897 F.2d at 1166.

<sup>158</sup>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.<sup>159</sup>

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.<sup>160</sup> 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.<sup>161</sup> 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."<sup>162</sup> In addition, they note that *Town of Deerfield, New York v. FCC*<sup>163</sup> may require the Commission to intervene in a case before judicial review or not at all.<sup>164</sup> 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.<sup>165</sup> 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*<sup>166</sup> in arguing that zoning and land use regulation are police powers reserved for the states under the Tenth Amendment of the Constitution.<sup>167</sup> Another commenter asserts that the Commission should give the traditional deference to state and federal courts with regard to health and safety matters.<sup>168</sup>

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<sup>159</sup>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.

<sup>160</sup>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.

<sup>161</sup>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).

<sup>162</sup>1996 Act § 205, 47 U.S.C. § 303(v) (emphasis added).

<sup>163</sup>992 F.2d 420 (2d Cir. 1992).

<sup>164</sup>DIRECTV DBS Petition at 10, HNS DBS Petition at 4.

<sup>165</sup>See, e.g., Mayors DBS Petition at 3,12; MIT DBS Opposition at 4-5.

<sup>166</sup>115 S. Ct. 1624 (1995).

<sup>167</sup>MIT DBS Opposition at 4-5.

<sup>168</sup>Mayors DBS Petition at 12.

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,"<sup>169</sup> 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.<sup>170</sup> Commenters also raise issues about

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<sup>169</sup>47 U.S.C. § 303(v).

<sup>170</sup>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.<sup>171</sup> 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.<sup>172</sup> 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.<sup>173</sup>

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.<sup>174</sup> 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.<sup>175</sup> Citing the Supreme Court's ruling in *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>176</sup> 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.<sup>177</sup> 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.<sup>178</sup> NAA argues that a rule requiring antenna installation on landlord-

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Comments; Southbridge DBS Comments.

<sup>171</sup>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.

<sup>172</sup>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).

<sup>173</sup>NAB *ex parte* presentation June 14, 1996. See also DIRECTV DBS Comments at 10.

<sup>174</sup>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.

<sup>175</sup>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.

<sup>176</sup>458 U.S. 419 (1982).

<sup>177</sup>National Trust TVBS-MMDS Comments at 2, 4, citing *Loretto*; NAA DBS Comments, citing *Loretto*. See discussion, *supra*.

<sup>178</sup>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.<sup>179</sup> 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.<sup>180</sup>

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.<sup>181</sup> 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.<sup>182</sup> 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.<sup>183</sup> 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. . . ."<sup>184</sup> SBCA also argues that the installation of a DBS antenna is not a permanent occupation and does not qualify as a taking under *Loretto*.<sup>185</sup> 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

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<sup>179</sup>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.

<sup>180</sup>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.

<sup>181</sup>DIRECTV DBS Comments at 6; SBCA DBS Reply at 2-4.

<sup>182</sup>DIRECTV DBS Comments at 7.

<sup>183</sup>SBCA DBS Reply at 5; DIRECTV DBS Reply at 8.

<sup>184</sup>SBCA DBS Comments at 5.

<sup>185</sup>*Id.* at 5-6.

landlord to install sprinkler systems, have not been deemed a taking.<sup>186</sup>

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.<sup>187</sup> 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*,<sup>188</sup> 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

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<sup>186</sup>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.

<sup>187</sup>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).

<sup>188</sup>458 U.S. 419 (1982).

installation desired by the tenant.<sup>189</sup> 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*<sup>190</sup> 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."<sup>191</sup>

## 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

### A. Final Regulatory Flexibility Analysis

67. As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *DBS Order and Further Notice* and the *TVBS-MMDS Notice*. The Commission sought written public comments on the proposals in the two proceedings, including comments on the IRFA.<sup>192</sup> The

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<sup>189</sup>*Id.* at 440 n.19.

<sup>190</sup>24 F.3d 1441 (D.C. Cir. 1994).

<sup>191</sup>*Id.* at 1444.

<sup>192</sup>Joint Comments were filed by: National League of Cities; The National Association of Telecommunications Officers and Advisors; The National Trust for Historic Preservation; League of Arizona Cities and Towns; League of California Cities; Colorado Municipal League; Connecticut Conference of Municipalities; Delaware League of



Commission's Final Regulatory Flexibility Analysis (FRFA) in this Report and Order conforms to the RFA, as amended by the Contract With America Advancement Act of 1996 (CWAAA), Pub. L. No. 104-121, 110 Stat. 847.<sup>193</sup>

68. *Need for Action and Objectives of the Rule.* The rulemaking implements Section 207 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56. Section 207 directs the Commission to promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of TVBS, MMDS and DBS.<sup>194</sup> This action is authorized under the Communications Act of 1934 § 1, *as amended*, 47 U.S.C. § 151, pursuant to the Communications Act of 1934 § 303, *as amended*, 47 U.S.C. § 303, and by Section 207 of the Telecommunications Act of 1996.

69. The Commission seeks to promote competition among video service providers and to enhance consumer choice. To accomplish these objectives, the Commission implements Congress' directive by adopting a rule that prohibits restrictions that impair a viewer's ability to install, maintain and use devices designed for over-the-air reception of video programming through TVBS, MMDS, and DBS services. The rule that we adopt preempts governmental regulations and restrictions, and nongovernmental restrictions on property within the exclusive use or control of the viewer in which the viewer has a direct or indirect ownership interest. Our rule exempts regulations and restrictions which are clearly and specifically designed to preserve safety or historic districts, allowing for the enforcement of such restrictions even if they impair a viewer's ability to install, maintain or use a reception device.

70. *Summary and Assessment of Issues Raised by Commenters in Response to the Initial Regulatory Flexibility Analysis.* The Commission, in its *DBS Order and Further Notice* and *TVBS-MMDS Notice*, invited comment on the IRFA and the potential economic

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Local Governments; Florida League of Cities; Georgia Municipal Association; Association of Idaho Cities; Illinois Municipal League; Indiana Association of Cities and Towns; Iowa League of Cities; League of Kansas Municipalities; Kentucky League of Cities; Maine Municipal Association; Michigan Municipal League; League of Minnesota Cities; Mississippi Municipal Association; League of Nebraska Municipalities; New Hampshire Municipal Association; New Jersey State League of Municipalities; New Mexico Municipal League; New York State Conference of Mayors and Municipal Officials; North Carolina League of Municipalities; North Dakota League of Cities; Ohio Municipal League; Oklahoma Municipal League; League of Oregon Cities; Pennsylvania League of Cities and Municipalities; Municipal Association of South Carolina; Texas Municipal League; Vermont League of Cities and Towns; Virginia Municipal League; Association of Washington Cities; and Wyoming Association of Municipalities (together, "NLC").

<sup>193</sup>Subtitle II of the CWAAA is The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), codified at 5 U.S.C. § 601 *et seq.* (1996). We note that the Initial Regulatory Flexibility Analysis needed for our further rulemaking is provided in Attachment D.

<sup>194</sup>1996 Act § 207.

impact the proposed rules would have on small entities.<sup>195</sup> NLC<sup>196</sup> comments that the proposed rule would have a "substantial economic and administrative impact" on over 37,000 small local governments.<sup>197</sup> NLC states that the proposed rule would require "local governments to amend their laws and to file petitions at the FCC . . . for permission to enforce those laws."<sup>198</sup>

71. The Commission has modified its proposed rule and has addressed the concerns raised by NLC by providing greater certainty regarding the application of the rule, and by clarifying that local regulations need not be rewritten or amended. The Commission recognizes that some regulations are integral to local governments' ability to protect the safety of its citizens. The rule that we adopt exempts restrictions clearly defined as necessary to ensure safety, and permits enforcement of safety restrictions during the pendency of any challenges. In addition, limiting the rule's scope to regulations that "impair," rather than the proposed preemption of regulations that "affect," will minimize the impact on small local governments, while effectively implementing Congress' directive. Finally, the inclusion in the Report and Order of examples of permissible and prohibited restrictions will minimize the need for local governments to submit waiver or declaratory ruling petitions to the Commission, decreasing the potential economic burden.

72. Numerous apartment complexes filed comments seeking clarification of Section 207's impact on their lease terms.<sup>199</sup> These filings express concern about the impact the rule will have on the rental property industry. This Report and Order applies only to property in the exclusive control or use of the viewer and in which the viewer has a direct or indirect ownership interest. Thus, this order will have no major impact on the rental property industry. The question of the applicability of Section 207 and our rule to rental properties is raised in the Further Notice of Proposed Rulemaking.<sup>200</sup>

73. Several neighborhood associations suggest that our rule will have a negative economic impact on the value of their land and that such a prohibition would constitute a

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<sup>195</sup>DBS Order and Further Notice at Appendix III; TVBS-MMDS Notice at Appendix B.

<sup>196</sup>See *supra* note 192.

<sup>197</sup>NLC DBS IRFA Comments at 2.

<sup>198</sup>*Id.*

<sup>199</sup>NAA Compilation.

<sup>200</sup>See ¶¶ 63-65, *supra*.

taking, requiring compensation under the Fifth Amendment of the Constitution.<sup>201</sup> We do not believe that implementation of our rule results in a taking of property. There is nothing in the record here to indicate 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, nor that it interferes with investment-backed expectations.<sup>202</sup> In support of the rule, several commenters argue that the rule enhances the value of the homeowner's property to prospective purchasers who want access to video programming services competitive to cable.<sup>203</sup>

74. The Commission also notes the positive economic impact the new rule will have on many small businesses. The new rule will allow small businesses that use video programming services to select from a broader range of providers, which could result in significant economic savings; because providers will be competing for customers, more services will be available at lower prices. In addition, small business video programming providers will be faced with fewer entry hurdles, and will thus be able to develop their markets and compete more effectively, achieving one of the purposes of Section 207.

75. *Description and Estimate of the Number of Small Entities Impacted.* The Regulatory Flexibility Act defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction," and "the same meaning as the term 'small business concern' under section 3 of the Small Business Act."<sup>204</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>205</sup> The rule we adopt today applies to small organizations and small governmental jurisdictions, rather than businesses.

76. The term "small governmental jurisdiction" is defined as "governments of . . . districts, with a population of less than fifty thousand."<sup>206</sup> There are 85,006 governmental entities in the United States.<sup>207</sup> This number includes such entities as states, counties, cities,

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<sup>201</sup>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.

<sup>202</sup>See ¶¶ 43-45, *supra*.

<sup>203</sup>SBCA *ex parte* presentation June 11, 1996.

<sup>204</sup>Regulatory Flexibility Act, 5 U.S.C. § 601(3) (1980).

<sup>205</sup>Small Business Act 15 U.S.C. § 632 (1996).

<sup>206</sup>5 U.S.C. § 601(5).

<sup>207</sup>United States Dept. of Commerce, Bureau of the Census, *1992 Census of Governments*.

utility districts and school districts. We note that restrictions concerning antenna installation are usually promulgated by cities, towns and counties, not school or utility districts. Of the 85,006 governmental entities, 38,978 are counties, cities and towns; and of those, 37,566, or 96%, have populations of fewer than 50,000. The NLC estimates that there are 37,000 "small governmental jurisdictions" that may be affected by the proposed rule.<sup>208</sup>

77. Section 601(4) of the Regulatory Flexibility Act defines "small organization" as "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."<sup>209</sup> This definition includes homeowner and condominium associations that operate as not-for-profit organizations. The Community Associations Institute estimates that there were 150,000 associations in 1993.<sup>210</sup> Given the nature of a neighborhood association, we assume for the purposes of this FRFA that all 150,000 associations are small organizations.

78. *Reporting, Recordkeeping, and Other Compliance Requirements.* The rule does not establish any filing requirements. However, state and local governments and neighborhood associations promulgating regulations that are prohibited by this rule may seek declaratory rulings concerning the validity of a restriction, or may request waivers of the rule.<sup>211</sup> Petitions for declaratory ruling and requests for waiver will be considered through a paper hearing process, and the initiating petition will require only standard secretarial skills to prepare.

79. If a governmental or nongovernmental authority wishes to enforce a safety restriction, the rule requires that the safety reasons for the restrictions be clearly defined in the legislative history, preamble or text of the restriction.<sup>212</sup> Alternatively, the local entity may include a restriction on a list of safety restrictions related to antennas, that is made available to interested parties (including those who wish to install antennas). Thus, governmental entities will not be required to amend their rules. Local officials may need time to review regulations to determine if the safety reasons are clearly defined in the legislative history, preamble or text, or to create a list of applicable restrictions.

80. *Steps Taken to Minimize the Economic Impact on Small Entities and Significant Alternatives Rejected.* The Commission considered various alternatives that would have impacted small entities to varying extents. These included a rebuttable presumption approach,

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<sup>208</sup>NLC IRFA Comments at 2.

<sup>209</sup>5 U.S.C. § 601(4).

<sup>210</sup>Community DBS Comments at 2.

<sup>211</sup>See ¶¶ 53-55, *supra*.

<sup>212</sup>See ¶ 25, *supra*.

the use of the term "affect" in the rule, and a rule that allowed for adjudicatory proceedings in courts of competent jurisdiction, all of which were adopted in the *DBS Order and Further Notice* and proposed in the *TVBS-MMDS Notice*. The rule we adopt today replaces the rebuttable presumption with a simpler preemption approach, adheres to the statutory language by using the term "impair" rather than "affect" in the rule, and allows for adjudication at the Commission or in a court of competent jurisdiction. We believe that we have effectively minimized the rule's economic impact on small entities.

81. In the *DBS Order and Further Notice* and the *TVBS-MMDS Notice*, we adopted and proposed, respectively, a rebuttable presumption approach to governmental regulations,<sup>213</sup> and proposed strict preemption of nongovernmental restrictions.<sup>214</sup> We acknowledged in the *DBS Order and Further Notice* that a rule relying on a presumptive approach would be more difficult to administer than a rule based upon a *per se* prohibition,<sup>215</sup> and we sought comment in the *TVBS-MMDS Notice* on less burdensome approaches.<sup>216</sup> Under the rebuttable presumption approach, local governments would have been required to request a declaratory ruling from the Commission every time they sought to enforce or enact a restriction; and neighborhood associations would not have been able to enforce or enact any restrictions that impaired a viewer's ability to receive the signals in question. The rebuttable presumption approach was adopted to ensure the protection of local interests, including local governments. Based on the record, the Commission recognizes that the burden of rebutting a presumption could strain the resources of local authorities. The Commission has rejected the rebuttable presumption approach for a less burdensome preemption approach.<sup>217</sup> In addition we have provided recourse for both neighborhood associations and municipalities. The rule we adopt today provides for a *per se* prohibition of restrictions that impair a viewer's ability to install, maintain or use devices designed for over-the-air reception of video programming services. Our Report and Order provides examples of reasonable regulations that can be enforced without a waiver application. The Commission believes that the Report and Order provides such clarity as will make the enforcement of the rule the most efficient and least burdensome for local governments, neighborhood associations, and this Commission.

82. In adopting the new rule, the Commission rejected the alternative of preempting all restrictions that "affect" the reception of video programming services through devices designed for over-the-air reception of TVBS, MMDS and DBS services. The new rule prohibits only those local restrictions that "impair" a viewer's ability to receive these signals

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<sup>213</sup>*DBS Order and Further Notice* at ¶ 28, and Appendix II; *TVBS-MMDS Notice* at ¶ 8 and Appendix A.

<sup>214</sup>*DBS Order and Further Notice* ¶ 62 and Appendix II; *TVBS-MMDS Notice* ¶ 10 and Appendix A.

<sup>215</sup>*DBS Order and Further Notice* ¶ 25.

<sup>216</sup>*TVBS-MMDS Notice* ¶ 8.

<sup>217</sup>See ¶¶ 23-27, *supra*.

and exempts restrictions necessary to ensure safety or to preserve historic districts. In defining the term "impair" we reject the interpretation that impair means prevent<sup>218</sup> because that definition would not properly implement Congress' objective of promoting competition. We find that a restriction impairs a viewer's ability to receive over-the-air video programming 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 DBS, TVBS, or MMDS; (b) unreasonably increases the cost of installation, maintenance or use of such devices; (c) precludes reception of an acceptable quality signal.<sup>219</sup> The use of the term impair will decrease the burden on small entities while implementing Congress' objective.

83. 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. The Commission is concerned about uniformity in the application of our rule, and about the financial burden that litigation might place on small entities. While we cannot prohibit parties' applications to courts of competent jurisdiction, we address this concern by exercising our Congressional grant of jurisdiction and implementing a waiver process, and encouraging parties to use this approach rather than relying on costly litigation.

84. Waiver proceedings will be paper hearings, allowing the Commission to alleviate the negative potential economic impact from costly litigation. Further, any regulations necessary to the safeguarding of safety will remain enforceable pending the Commission's resolution of waiver requests. The Commission believes that the rule we adopt today effectively implements Congress' intent while minimizing any significant economic impact on small entities.

85. *Report to Congress.* The Commission shall send a copy of this Final Regulatory Flexibility Analysis, along with this Report and Order, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this FRFA will also be published in the Federal Register.

## B. Paperwork Reduction Act

86. *Final Paperwork Reduction Act of 1995 Analysis.* This Report and Order has been analyzed with respect to the Paperwork Reduction Act of 1995 and found to contain an

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<sup>218</sup>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; 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; NLC DBS Petition at 2-3 (impair means prevent). But see DIRECTV DBS Opposition at 6 (opposing NLC's claim that impair means prevent); SBCA *ex parte* presentation June 11, 1996.

<sup>219</sup>See ¶ 5, *supra*.

information collection requirement on the public. Implementation of an information collection requirement is subject to approval by the Office of Management and Budget as prescribed by the Act.

87. In the *DBS Order and Further Notice* and the *TVBS-MMDS Notice* we proposed an information collection process, utilizing waivers and declaratory rulings, that has now been approved by the Office of Management and Budget (OMB). This Report and Order contains a modified information collection that we believe is less burdensome. As part of our continuing effort to reduce paperwork burdens, we invite the general public and OMB to comment on the modified information collections contained in this Report and Order, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due on or before 30 days from the date of publication of this Report and Order in the Federal Register; OMB comments are due 60 days from the date of publication. Comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

88. Written comments by the public on the modified information collections are due on or before thirty days after publication in the Federal Register. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified collections on or before 60 days after date of publication in the Federal Register. A copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, NW, Washington DC 20554, or via the Internet to [dconway@fcc.gov](mailto:dconway@fcc.gov), and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 17th Street, NW, Washington DC 20503 or via the Internet to [fain\\_t@al.eop.gov](mailto:fain_t@al.eop.gov).

## VI. ORDERING CLAUSES

89. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 303, and Section 207 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, that the rule discussed in this Report and Order and set forth in Attachment A IS ADOPTED as Section 1.4000 of the Commission's rules, 47 C.F.R. § 1.4000.

90. IT IS FURTHER ORDERED that Section 25.104 of the Commission's rules, 47 C.F.R. § 25.104, IS AMENDED as set forth in Attachment A.

91. IT IS FURTHER ORDERED that the Petitions for Reconsideration filed in IB Docket No. 95-59 by Alphastar Television Network, Inc.; County of Boulder, State of Colorado; DIRECTV, Inc.; Florida League of Cities; Hughes Network Systems, Inc.; City of

Dallas *et al.*; National League of Cities *et al.*; Primestar, Inc.; Satellite Broadcasting and Communications Association of America; and United States Satellite Broadcasting Co., to the extent that they address issues related to Section 207, ARE GRANTED in part as discussed herein, and are otherwise DENIED.

92. IT IS FURTHER ORDERED that pursuant to Sections 4(i), 4(j), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 303, and Section 207 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, NOTICE IS HEREBY GIVEN and COMMENT IS SOUGHT regarding the proposals, discussion, and statement of issues in the Further Notice of Proposed Rulemaking that comprises paragraphs 59 to 65 of this Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking.

93. IT IS FURTHER ORDERED that the requirements and regulations established in this decision shall become effective upon approval by the Office of Management and Budget (OMB) of the new information collection requirements adopted herein, but no sooner than 30 days after publication of this Report and Order in the Federal Register.

94. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission rules. *See generally*, 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

95. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before September 27, 1996 and reply comments on or before October 28, 1996. All pleadings must conform to Section 1.49(a) of the Commission's rules, 47 C.F.R. § 1.49(a). To file formally in this proceeding, parties must file an original and six copies of all comments, reply comments and supporting comments. If parties want each Commissioner to receive a personal copy of their comments, they must file an original plus eleven copies. Parties should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Room of the Federal Communications Commission, 1919 M Street, NW, Washington, DC 20554. For further information, contact Jacqueline Spindler at (202) 418-7200.

96. This Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking contains both a modified and a proposed information collection. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this Further Notice of Proposed Rulemaking. The IRFA is set forth in Attachment D. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the OMB to comment on the information collections contained in this Report and Order and Further Notice, as required by the Paperwork Reduction Act of 1995,



Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this Further Notice; OMB comments are due 60 days from the date of publication of this Report and Order and Further Notice in the Federal Register. Comments should address: (a) whether the modified and proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility and clarity of the information collected; and (d) ways to minimize the burden of collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, NW, Washington DC 20554, or via the Internet to [dconway@fcc.gov](mailto:dconway@fcc.gov), and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 17th Street, NW, Washington, DC 20503 or via the Internet to [fain\\_t@al.eop.gov](mailto:fain_t@al.eop.gov).

97. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Report and Order and Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, including the Final Regulatory Flexibility Analysis and the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton  
Acting Secretary

## ATTACHMENT A

Part 1 of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part I is revised to read as follows:

AUTHORITY: 47 U.S.C. 151, 154, 207, 303 and 309(j) unless otherwise noted.

2. A new Subpart S is added to Part 1 to read as follows:

**§ 1.4000. Restrictions impairing reception of Television Broadcast Signals, Direct Broadcast Satellite Services or Multichannel Multipoint Distribution Services**

(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 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 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.

Part 25 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 25 - Satellite Communications

1. The authority citation for Part 25 continues to read as follows:

**AUTHORITY:** Sections 25.101 to 25.601 issued under Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply secs. 101-104, 76 Stat. 416-427; 47 U.S.C. 701-744; 47 U.S.C. 554.

2. Section 25.104 is amended by revising paragraph (b)(1) and adding paragraph (f) as follows:

§ 25.104 Preemption of Local Zoning of Earth Stations

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(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). 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), or a final declaration from the Commission or a court of competent jurisdiction that the presumption has been rebutted pursuant to subparagraph (b)(2).

\* \* \* \* \*

(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 47 C.F.R. Part 1, Subpart S Section 1.4000.

## ATTACHMENT B

## Comments in DBS Proceeding

AT&T  
Brigantine Group (Brigantine)  
C&G Investment Associates May and July Filings (C&G)  
Carriage Park Condominium (Carriage)  
Christianson, Ralph and Gwen (Christianson)  
Cities of Texas, Tennessee, National Association of Counties and the United States  
Conference of Mayors (Mayors)  
Community Associations Institute, American Resort Development Association and National  
Association of Housing Cooperatives<sup>220</sup> (Community)  
Community Management Corporation (CMC)  
Compass Retail, Inc. (Compass)  
Consumer Electronics Manufacturers Association (CEMA)  
Corporon, Hoehn, Svitavsky, Vaughters & Eyler LLC (Corporon)  
Danberry Homeowners' Ass'n (Danberry)  
DIRECTV (DIRECTV)  
Drummer Boy Homes Assoc., Inc. (Drummer)  
First Realty Management (FRM)  
Foster City, City of  
Haley Realty (Haley)  
Hancock, Robert & Co. (Hancock)  
Hendry Investments Inc. (Hendry)  
Heritage Forest HomeOwners Assoc. (Heritage)  
Jindal, Dr. Roop L. (Jindal)  
Joint Comments<sup>221</sup> (NAA)  
Kraegel, Becky (Kraegel)  
Microcom (Microcom)  
Montgomery Village Foundation (Montgomery Village)  
Mount Vernon Square Townhouse Community Assoc. (Mount)  
National Association of Home Builders (NAHB)  
National Rural Telecommunications Cooperative (NRTC)

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<sup>220</sup>Community Associations Institute appended support letters from following commenters (in order of their appearance): James Reinhardt, Peterson Roofing, Premier Roofing, Fred M. Baron, Orange County CAI, Elisha et. al., Woodbridge Village, Corporon et. al., Hilltop Summit, Riverside Condos, Ali Ohana Property Management, Taber Income Tax Service, Coldwell Banker, Mililani Town, Great Northwest, Molly Rice, Robert Pigors, Montgomery Village, Kings Grant, Windgate of Arlington, Greenbelt Homes, Westridge Swim & Racquet, AV Builder.

<sup>221</sup> National Apartment Assoc., National Realty Council, Institute of Real Estate Management, International Council of Shopping Center, National Multi Housing Council, American Seniors Housing Council, and National Assoc. of Real Estate Investment Trusts (together, "Joint Comments").

O'Brien, Stewart, Esq. (O'Brien)  
 Oakland Mills Community Assoc., Inc. (Oakland)  
 Orten Hindman & Jordan (Orten)  
 Reston Home Owners Assoc. (Reston)  
 Southbridge Community Assoc. (Southbridge)  
 StoneCroft Condominium (Stonecroft)  
 Sully Station Community Ass'n (Sully Station)  
 Zalco Realty, Inc. (Zalco)

Commenters Submitting Similar Letters

Fifty community association management companies<sup>222</sup> (Mass)  
 Four hundred and sixty-one property management companies<sup>223</sup> (Coordinated)

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<sup>222</sup>Mass includes the following companies: 4000 Tunlaw Road Condominium, Alexandria House Council of Owners, Alexandria Knolls West Condominium, Annandale Gardens Condominium, Arkansas Princess Condo HOA, Ashmere, Braemar Towers Condo Ass'n, Carelton Condos, Cascades, Catalina Shores, Clusters at Woodlawn Condominium, Comstock, Country Creek Ass'n, Danberry Homeowners Ass'n, Danberry Board of Directors, Daventry Park HOA (Daley, Feldman, Flynn, Shriver), Eastwood Owners Ass'n, Fairfax West Condominium, Fairlington Meadow Council of Co-Owners (Girovasi, Walker), Foxhall East Condominium, Gayton Station HOA, The Gibson Condominium, Highpointe Housing Corporation, Jamaica House Ass'n, Kentlands View Condominium Assoc., Lafayette Place HOA, Newgate, North Apple Creek HOA, Oak Park Condos, The Olympus, Park Place Condominium, Quaker Hill Community Assoc., River Oaks, Russett, Saxony Square Condominium, Seven Oaks, Sully Station (Community Ass'n, Board of Trustees, II), SummerRidge Condominium, Townes at Baldwin Grove, Troro HOA, Virginia Run, Watergate of Alexandria Condominium, Wellington Condominium Assoc., Wellington, Westlake Park Condominium B".

<sup>223</sup>650 Fifth Avenue, AW Perry, Inc., A&G Rentals, Abbot's Cove, The Acadiana, Martin L. Adams Y Sons, Aetna Realty investors (Burrill, O'Keefe), The Affordable Housing Management Group, Allied Realty Services, Ltd., AMLI Residential, Ambassador (July 10), American international, American Apartment Communities, Amurcon Realty Group (April and July 9 filing), Apartment and Office Building Association of Metropolitan Washington, Apartment Association, Aranov (July 22), Arbour East (July 22), Ardenwood L.P., Arlington Properties, Inc., Armstrong Management (Armstrong, Wood), Artcraft Companies, Ash Tree Apartments, Ashley, Ardmore Terrace (July 10), Atlantic Gardens (July 15), Atlantic Realty Partners, Atlantic Terrace (July 10), Avalon Properties (Albert, Berman, Blair, Cote, Michaux, Slater, Sweeney), Baird & Warner Management Services, Inc., Basic Capital Management, Inc., Beacon Residential Management, Bear Capital, Belle View, Bellsford Landing, Ben-Steele Properties, Bernard/Finney Management, Bethel Bishop (July 15), Bluebonnet Ridge L.P., Bob Ross Realty (April and July filings), Boston Financial Property Management, Braden Fellman (July 10), Bradley Apartment Homes, Broad Viewe (July 15), Brodsky Organization, Burberry Court, Burns Properties, Cal-American Corp., Calder's Corner, Cambridge Courts, Cambridge Square, CAMCO (Kennedy, Mitchell), Candlestick Apartments, Capital Associates (Colella, Kupferberg, Pabian), Care Real Estate, Carlyn Place, Carmel, Casa de Monterey (July 22), Cathcart Properties, Inc., Cedarbrook Park (July 12), Centre Mortgage, Chalmers & Company, Chapel Ridge Apartment Community (Cotton, Garza, Kinslow, Robles, Vargas, Rodriquez, Raley, Vallardes, Ramirez), Charles E. Smith Companies (Kostyk, Taylor), Charlottesville Towers, Chateau Perry Apartments, Chelsea Place (July 22), Chesapeake Apartment Homes (July 12), Circle Apartments, Citadel Management, Clinton Manor (July 15), Cloverdale, Colavita, College Main Apartments, Colonial American (July 12), Colonial Manor, Columbus Apartment Ass'n (Garland, Graver, Thayer), Community Realty Company, Community Housing Improvement Program (July 10), Concord Mews, Copper Mill (July 12), Covington-Ring (July 10), Crosspointe, Crestview Villa (July 15),

Cronheim (July 15), Crossings of Bellevue (July 22), Crosswood Park (July 22), Countryside Village (July 22), Dangel, Deerwood, Del Webb Corp., Desert Park, De Ville Southwest, Dietrich Apartments, Dominion Companies (Glaser, Keefe), Dominion Development Corp., Dominion Group, Donathan Properties, Donewald Property Management, Inc., Draper and Kramer, Drees Company, Drucker & Falk, Edgewood Management Corp. (April and July 10 filing), ElDorado Hills (July 11), Ellis Property Management Services, Engineered Concepts, Equitable Real Estate Investment Management Inc., Equity Capital Management Corp., Equity (Andren, Batchelor, Brackenridge, Brewer, Brown, Brucks, Buckley, Collins, Fabiani, Gawronski, Lavine, Layman, Navitsky, Monaco, Musen, Offenbacher, Pater, Salter, Santee, Smith, Swift, Toumi, Wakenight, Wetzel), Eugene Burger Management, Evans Withycombe Residential, Essex Partners (July 10), F&W Management Corp., FDC Management, Falls Chase, FDC Management, First Capital Property Group, First Capital Corp., First Lake (Artigues, Bandi, L'Hoste, McCormick, Kueter, Villarrubia) (April and July filings), First Worthing Co., Flint Building Co., Flournoy & Calhoun (April and July 8 filing), Fogelman Properties, Forest City Management (Cvijovic, Darcy, Meyers, Morren, Rosendale), Forest Glen Apartment, Forest Hill Gardens (July 22), Forest Hills Village (July 22), Four Seasons Apartments, Frankel Family Trust, Franklin Farm foundation, Gannon Management, Gates at westfalls, General Investment, Gentry Waipio CA, Gerson Bakar & Associates, Glenborough Corp., Glenwood Management Corp., Gold Crown, Great Eastern Management Co., Great West Management (July 22), Greater Las Vegas Ass'n of Realtors (July 10), Green Oaks, Grubb Management, H.N. Gorin, H&B Multifamily Management, Habitat Company, Hallcrest Heights Associates, Harbor Terrace, Harbor Village, Harold Apartments (July 15), Harrison & Lear, Harrison & Bates, Heitman Properties Ltd., Heritage Woods, Heritage Knoll, Hickory Woods, Hillwood at Landmark, HMB Property, Hoffman Architects, Holly Court (July 12), Host Apartments, Insignia Management Group (Gormaker, Shuler) (April and July filings), Intercity Investments, Inc., Investors Realty, Irwin R. Rose & Company, JBG Companies, Jon-Mark Properties, Julian LeCraw (July 12), Just enterprises, Kaiserman Management April and July filings), King Properties, King's Pointe, Knollwood Apartments (April and July filings), Kucera Management, La Plaza (July 10), Lake Forest, Lakes L.P., LakesII L.P., Lakeside Apartments, LAMCO, Lane Company, LCOR Inc. (Polich, Merkle, Lundahl, Hard), Langley Family Trust, Legow Management (April and July filings), Legum Norman, Lenox Gates, Live Oak Properties, Love Properties, Luke, Madison Square II L.P., Magnum Dallas Management, Inc., Mahaka Valley Towers (Doyle, Hankins, Jaran, Milligan), Management Specialists, Management Services (April and July filings), Manhattan Gardens, Mathews-Click BaumanInc., Maxim Property, Maywood, MBL Life Assurance, McCallister Co., McDougal Properties, McLean Chase, Medford Property, Merry Land & Investment, Metropolitan Life Insurance Co., Mid-America Apartment Communities, Mid-America Management, Mike Breeding state Farm, Mink & Mink, Mission Shadows, Morton G. Thalheimer, Morton M. Gerson, Mt. Zion (July 15), National Housing Corp., New America, Nordblom Company, Norris & Stevens, North Village, Northeast Louisiana, Northpointe, O & M Properties, Oak Park Apartments, Oaks Retirement Community, Oakwood Management, Oasis Residential, Inc., On-line Realty, Oxford Hill, Oxford Properties, The Palms, Paragon Group (Cobb, Lavin), Parc East, Parkdale (July 15), Park Spring, Park Place on Turtle Creek, Partners Management, Pecan Valley, Pecan Manor, Perrin Square, Pest Management, Picrme Development, Pinetree (July 15), Platinum Coast, Pleasant Hills, Pleasanton Village. Post Apartments, PRC Management, Preston Square, Principal Management, ProComm (Alba, Herrington, Maciorowski, Perez), Professional Property management Assoc. of San Francisco, Property Management Specialists (Also filed July 10), Property One, PW Funding, Rainbow Property, Raintree Properties, Rainy Meadows (July 15), Ralmor Corp., Realty One, The Real Estate Board of New York, Inc., Regency Gates, Regency windsor, Regency Palms, Ridpath, Donald and Rosemary, Ripley Wright Assoc., Riser Management, Robert Hancock, Roger C. Perry & Co. (April and July filings), Rose's Down Home, Rosslyn Heights (North, South, East), RPM ManagementRoachell, Beal), Rugby McIntyre, S.L. Nussbaum, S&S Property Management, SCG Realty Services, Samuel Geltman & Co, San Diego County AA, Santa Fe, SARES\*REGIS Group, Sentinel (July 10), Sentry Property, Shannon Manor (July 15), Showe Management, Siara, Siegen Lane, Silver Shadow, Simon Companies, Simpson Housing, South West Property, Southern engineering, Southpark, Southwest Louisiana Apartment Assoc., Spradling & Biddinger, Springfield Green, St. Stephens (July 15), State Farm, Steppes of Barcroft, Stratton House, Stalworth Real Estate Services, Stone Hollow (July 15), Summers, Summerhouse, Summit Properties, Sun Wood, Sunburst, TCRS, Tecton, Terrace, Thomas Group, Thompson Place, Tiber View, Tonti Organizations, Tonti Realty, Town & Country Apartments (Boyce,

**Reply Comments in DBS Proceeding**

Robert J. Abbott (Abbott)  
Community Associations Institute (Community)  
Consumer Electronic Manufacturers Association (CEMA)  
DIRECTV, Inc. (DIRECTV)  
Evermay Community Association (Evermay)  
Independent Cable & Telecommunications Association (ICTA)  
Local Communities and National League of Cities (NLC)  
National Rural Telecommunications Cooperative (NRTC)  
National Apartment Association, Building Owners & Managers Association, et. al. (NAA)  
Philips Electronics & Thomson Consumer Electronics, Inc. (Philips)  
PRIMESTAR Partners L.P. (PRIMESTAR)  
Satellite Broadcasting and Communications Association (SBCA)

**DBS Ex Parte Presentations**

Community Associations Institute, Montgomery Village (Community *ex parte*)  
Miller, Canfield, Paddock and Stone. (Miller, Canfield *ex parte*)  
National Realty Committee, Rockefeller Group Telecommunications Services, Inc.  
(NRC *ex parte*)  
National Apartment Association, National Multi Housing Council (NAA *ex parte*)  
Satellite Broadcasting and Communications Association, DIRECTV, Inc., Hughes Network  
Systems (SBCA *ex parte*)

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Edwards, Guerin, Milder, Ruff) (Also filed July 10), Towne Properties, Townhomes in the Pines (July 15), TownHomes Management, Trademark Properties, Trammel Crow Residential Services (Bunch, Chestnut, Durkin, Ford, Holland, Moriarty, Nolen, Simpson, Talbot, Valach, Ward, Wood), Tuck Investments (July 10), Tulsa Properties, TVO Realty, United Dominion (July 10), University Towers, USA Properties Fund (G.Brown, J.Brown, Gall, Herzog, May, McCleery, McCurdy, Stevenson), Vermont Gardens, Villa Solana, Villages at Falls Church, The Villas of Henderson Pass (Aldrich, Almaguer, Busby, Flores, Muniz, Muniz, Watson), Vintage Realty, Vista del lago, Waialae Gardens, Wallace H. Campbell, The Wallick Companies (Goldston, Phillips), Wapelton, Waterford at Blue Lagoon, Waterford, Wellsford, Wentworth Place, Westchase, Western Reserve (July 10), Westgate, Wilkinson Group, Willow Trace, Willow River, Wilton Companies, Windgate, Windward Towers, Winnsboro (July 15), Woodburn Village, Woodmont Real Estate Services, Worth Hallmark, Wymer (Abbot's Cove, Arbors, Ashberry Village, Asherton of Dublin, Autumn Chase, Cabot Cove, Colonial Village, Copperleaf, Danbury Meadows, Forest Creek, Greene Countrie, Hamilton Arms, Heather Glen, heritage Way, Hibernia, Highland Park, Karric Place, Lakes of Westdale, Lakeview square, Mallard's Run, Millington, Nicholas Square, Northland Square, Olde Cape Colony, Park Club, Ponderosa Village, Rosebrook Village, Sanctuary Village, Shannon Village, Silvertree, Springburne, Startford Village, Timber Creek, Westmont Village, Wexford Lakes, Williamsburg Square, Woodcrest, Woodland terrace, Wyandotte Village), Zalco Realty, Zehman-Wolf (July 10), Zink Partners, Zions Securities.



**DBS Petitions for and Oppositions to Reconsideration**

Alphastar (Alphastar)  
Boulder, County of (Boulder)  
Consumer Electronics Manufacturers Association (CEMA)  
Cities of Texas, Tennessee, National Association of Counties and the United States  
Conference of Mayors (Mayors)  
DIRECTV, Inc. (DIRECTV)  
Florida League of Cities (FLC)  
Hughes Network Systems, Inc. (HNS)  
Michigan, Illinois, Texas Communities (MIT)  
National League of Cities (NLC)  
Philips Electronics & Thomson Consumer Electronics (Philips)  
Primestar Partners L.P. (Primestar)  
Satellite Broadcasting and Communications Association of America (SBCA)  
United States Satellite Broadcasting Co. (USSB)

**Supplemental Filings**

Compilation of 432 letters and leases apparently submitted by members of National Apartment Association<sup>224</sup> (NAA Compilation)

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<sup>224</sup>Acadian Oaks, ACCO Management, Altman Development Corp., Amberwood, Arbor Place, Arthur Mays Villas, ARV, Ashley Woods, Ambassador, Amurcon Realty Group, Arbour East, Ardmore Terrace, Arlington Properties, Armand Place, Aronov, Artcraft Companies, Arthur Mays Villas, Asbury Arms, Atlantic Gardens, Atlantic Terrace, Autumn Woods, Bay Crest Village, Bay Place, Benning Heights, Bethel Bishop, Bluffs, Bob Ross Realty, Braden Fellman, Bridgedale Terrace, Brighton Place, Boulder Springs, Broad Viewe, Barrington Place, Belmont/Foxwood, Bennington Square, Berger, Bethel, Bexley House, BH Equities, Big Walnut, Blakewood, Blythe Ocean View, BOCA East, Braeswood Harbor, Breakers, Breslyn House, Brittany Point, Broad Street Management, Broadmoor, Brookhollow, Buckeye Real Estate, Bull Creek, Burgundy Court, C&G Investment, Calibre Crossing, Casa de Monterey, Cedarbrook Park, Chambers Ridge, Chapel Ridge, Chasco Woods, Chelsea Place, Chesapeake Apartment Homes, Cheyenne Woods, City Heights, Clinton Manor, Cloverdale, Colonial American, Colony at Kenilworth, Community Realty Company, Community Housing Improvement Program, Concord Mews, Copper Mill, Country Place, Covington-Ring, Crestview Villa, Croft House, Cronheim, Crossings of Bellevue, Crosswood Park, Countryside Village, Covington-Wilson, Cambridge Place, Cardinal Realty, Carlton House, Caroline, Carriage House, Carriage Place, Carriage Hill, Carter Company, Cauwels & Associates, Central Court, Centreville Commons, Church Hill House, Churchill Park, Colony of Springdale, Columbus Court, Concierge, Connecticut Village, Contadora, Coopers Pointe, Cottonwood, Country Place, Country Oaks, Courtside at Olympia, Creekwood, Crossing, Crossroads, Deshler, Dial Communities, DMC Management, Dominion Companies, Dunlap & Magee, Day Holding Co., Day Two Properties, Deerfield, Delta View, DeSoto Estates, Driscoll Place, Drucker & Falk, Druid Hills, Drusilla, Dunbarton, Eastbrook, Eastridge, East Village, Edgewood Management Corp., ElDorado Hills, Ensor Forest, Essex Partners, Evans Withycombe, East Farm Village, Emberwood, Emerald Village, Emmanuel-Morris Brown-Ebenezer, Essex Park, Fairwood, FDC Management, First Lake, FlournoyProperties, Forest Hills Village, Forest Hill Gardens, Forest Park South, Favrot and Shane, Fieldcrest, First Management, Forest Park South, Forrest Grove, Fountain Lake, Foxfire, Giles County Housing, Glens, Glen Lakes, Gorsuch, Great West Management, Greater Las Vegas Ass'n of Realtors, Greenwood Park, G.T. Properties, Glendale Terrace, Glynn Place, Goulds-Elderly, Harold Apartments,

Hayes Place, Hedges, Hickory Heights, Holly Court, Harbor Management Heritage Park, Heritage Park, Hibben Ferry, Hidden Pointe, High Ridge, Highland Hills, Highland Creek, Hill View Village, Holly Court, Homefinders, Houston Apartment Ass'n, Hunters Chase, Huntwick, Independence Hill, Insignia Management Group, Irwin R. Rose & Company, InterCapital, Ivory Canyon, Join the Community, Jonathan's Landing, Julian LeCraw, Jefferson West, Jenny Lind Hall, John B. Hughes, Johnson Court, Joseph Paul, Kaiserman Management, Kalmia, Knollwood Apartments, Kennedy Heights, Kenneth Court, Key Management, Kingsrow, La Plaza, Lafayette Square, Lakes at Sandy Forks, Lakeside Apartments, Lane Company, Lawn Wood, Legow Management, Lexington, Lincoln Property, Lockwood Group, Lynco, Lynnewood Gardens, L&B Multifamily Advisors, La Fontenay, Lake June Village, Lake Charles Realty Lakeville, Lakewood at Pelham, LasCasitas, Laurens Villa, Leawood, Lebanon Station, Lexington Green, Liberty Terrace, Lincoln, Lincoln Green, Live Oak, Management Support, Management Services, Meadows at Elk Creek, Meadow Terrace, Michelson Organization, Miramar University Apartments, Misty Woods, Mt. Zion, Meadow Wood, Metropolitan Management, Missouri Apartment Ass'n, Morningside, Mountain View, Mountainview Terrace, Mulberry Hill, Nashboro, National Realty Management, Northgate, Nottingham, Napa Valley, Newport Manor, Nob Hill Villa, North Dallas Crossing, Oakland, Oakwood Management, Oak Pointe, Oakbrook Village, Olentangy Commons, Oracle Villa, Orchard Park, Paddock Park, Palisades, Park Laureate, Parktown, Pathfinder Village, Pembroke Village, Picerme Development Corp., Pinehaven Villas, Playa Pacifica, Point West, Post Management, Presidential House, Paddock Club, The Park at Addison, Parkdale, Peppertree, Pierce Const., Pierce Properties, Pine Manor, Pinetree, Pinewood Park, Pinnacle, Plainview, Point James, Post Ridge, Property Asset Management, Property Management Specialists, Quantum Residential, Quail Ridge, Quail Woods, Quail Run, Quail Hollow, Raymonia, Remington Place, Rentmore Management, Richardson Highlands, Ridgecrest, River Oaks, Rivercrest Village, Riverdale, Ross Trust, Roxbury Park, Rainy Meadows, Randol Mill Terrace, The Real Estate Board of New York, Ridgecrest, Riverwalk, RMK Management, Rochester Apartments, Roger C. Perry & Co., RPM Management, Seasons, Sentinel, Shannon Manor, Sherril Oaks, Sherwood Apts, Sierra Pines, Society Park, Southern Hills, Spring Creek, St. Stephens, Starwood, Stone Hollow, Summit Properties, Summit Real Estate, Sunscape, Swift Creek, Salem Square, Samuel Kelsey, San Martin Twin Towers, Sand Pebble Village, SandLake Villa, Sandpiper, Sandy Hill Terrace, Schatten Properties Management, Scotchollow, Scottsdale Legacy, Seasons, Sequoia, Towers, Shadow Lake, Shadowlake, Shaker Square, Shanel, Snowden, South Pointe, Southridge I&II, Springfield Apartment & Housing Ass'n, Steeplechase, Stonebridge, Stonybrook, Summer lake, Suncrest, Sunflower Park, Sunrise, Sunset Village, Sutton Place, Tahoe Springs, Tahquitz Court, Tates Creek Village, Terry Hill, The Pavilion, The Landing, The Village, The Liberty, The Loft, The Meadows, The Village at Pennbrook, The Place, The Boston Land Co., The Glades, The Huntingdon, The Lake, The Gables, The Gallery, The Villas, The Meadowbrook, The Windmere, Tiger Plaza, Timber Ridge, Towne Centre Village, Trailridge, Trinity Methodist, Twin Lakes, Tennis World, Town & Country Apartments, Townhomes in the Pines, Trails, Trammel Crow Residential Services, Trestles, Trestletree, Tuck Investments, United Dominion, USA Wentworth, Vanderbilt Square, Villas of Henderson Pass, Villa Serena, Val Verde, Valley Creek Village, Venango House Associates, Village Green, Village Brooke, Village East Towers, Village Square, Walden, Wallingford, Waterford Square, Wellsford, Westlake, Westview, Westwick, Whispering Pines, Whisperwood, Wildewood Place, Wildwood Management, Willow Creek, Willow Bend Lake, Willowick, Wilshire Place, Wilshire Villa, Windrush, Wispillion, Woodcrest, Woodhaven, Woodland Village, Woodmere, Woodruff, Woods on the Fairway, Worthing Companies, Wallick Companies, Webster Court, Westchester Park, Western Reserve, Westwood/English Village, Wildwood, Wilton Companies, Winnsboro, Wiston, Woodland Apts., Woods of Inverness, Woodscape, Zehman-Wolf Management.

## ATTACHMENT C

## TVBS/MMDS Comments:

American Radio Relay League, Inc. (ARRL)  
Association for Maximum Service Television, Inc. (MSTV)  
Barrett, Loren  
Bell Atlantic  
BellSouth Corporation and BellSouth Interactive Media Services, Inc. (BellSouth)  
Brody Group (Brody)  
C & R Realty and Management Co., Inc. (C&R Realty)  
CAI Wireless Systems, Inc., CS Wireless Systems, Inc. and Heartland Wireless  
Communications, Inc. (CAI Wireless)  
Caughlin Ranch Homeowners' Association (Caughlin)  
CellularVision, USA, Inc. (CellularVision)  
Cities of Texas, Tennessee, National Association of Counties and the United States  
Conference of Mayors (Mayors)  
Client Condominium Ass'n (Client)  
Community Associations Institute (Community)  
Community Broadcasters Association (CBA)  
ComTech Associates, Inc. (ComTech)  
Consumer Electronics Manufacturers Association (CEMA)  
Drummer Boy Homes Ass'n (Drummer Boy)  
Elisha, Ekimoto and Harada (Elisha)  
Evermay Community Association (Evermay)  
Georgia Municipal Association (Georgia)  
Huckleberry Community Association, Inc. (Huckleberry)  
Independent Cable & Telecommunications Association (ICTA)  
Indianapolis, Indiana  
Island Colony  
ITFS Parties  
Killeen, Texas  
Leonard Kryfho (Kryfho)  
National Apartment Association, *et al.* (NAA)  
National Association of Broadcasters (NAB)  
National ITFS Association (NIA)  
National League of Cities *et al.* (NLC)  
National Trust for Historic Preservation (National Trust)  
Network Affiliated Stations Alliance (NASA)  
NYNEX Corporation (NYNEX)  
Pacific Bell Video Services (PacTel)  
Parkfairfax Condominium Unit Owners Association (Parkfairfax)  
Plano, Texas  
Primestar Partners, L.P. (Primestar)

Public Broadcasting Service and the Association of America's Public Television Stations  
(PBS)

Reston Home Owners Association (Reston)  
Scarinci & Hollenbeck (Scarinci)  
Silverman & Schild, LLP (Silverman)  
United Homeowners Association (UHA)  
WANTV, American Telecasting, Inc. (WANTV)  
Western Reserve  
Wireless Cable Association International, Inc. (WCAI)  
Woodburn Village

**TVBS/MMDS Reply Comments**

Bell Atlantic/Bell Atlantic Video Services (Bell Atlantic)  
CAI Wireless Systems, Inc. (CAI Wireless)  
CellularVision USA, Inc. (CellularVision)  
Community Associations Institute (Community)  
ComTech Associates, Inc. (ComTech)  
Consumer Electronics Manufacturers Association (CEMA)  
Michigan, Illinois and Texas Communities (MIT)  
National Apartment Association, et al. (NAA)  
National Association of Broadcasters (NAB)  
Network Affiliated Stations Alliance (NASA)  
People's Choice TV Corp. (People's Choice)  
Wireless Cable Association International, Inc. (WCAI)

**TVBS/MMDS Ex Parte Presentations:**

Bell Atlantic (Bell Atlantic *ex parte*)  
CAI Wireless (CAI Wireless *ex parte*)  
ComTech (ComTech *ex parte*)  
Community Associations Institute (Community *ex parte*)  
Independent Cable & Telecommunications Association (ICTA *ex parte*)  
National Apartment Association, et al. (NAA *ex parte*)  
National Association of Broadcasters (NAB *ex parte*)  
National Association of Telecommunications Officers and Advisors (NATOA *ex parte*)  
National Realty Committee, International Council of Shopping Centers, National Multi  
Housing Council, National Apartment Association, Rockefeller Group (NRC *ex parte*)  
NYNEX (NYNEX *ex parte*)  
Pacific Telesis (PacTel *ex parte*)  
People's Choice TV (People's Choice *ex parte*)  
Wireless Cable Association International, Inc. (WCAI *ex parte*)

## ATTACHMENT D

**Initial Regulatory Flexibility Analysis**

As required by Section 603 of the Regulatory Flexibility Act,<sup>225</sup> the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the potential economic impact on small entities of the approach proposed in this Further Notice of Proposed Rulemaking. Written public comments are requested on the IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Further Notice of Proposed Rulemaking provided above.

*Reason for Action.* The rulemaking is initiated to obtain comment on the implementation of Section 207 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, as it applies to the installation, maintenance or use 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.

*Objectives.* The Commission seeks to evaluate whether preempting non-federal restrictions on commonly owned property and property subject to lease agreements, would: 1) enhance viewers' ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals and multichannel multipoint distribution services; 2) provide an unreasonable management burden for parties owning and legally responsible for the property at issue; and 3) result in the Commission exceeding its statutory authority and Congress' constitutional authority.

*Legal Basis.* The proposed action is authorized under Section 1 of the Communications Act of 1934, *as amended*, 47 U.S.C. § 151, and Section 207 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56.

*Reporting, Recordkeeping, and Other Compliance Requirements.* Depending on the outcome of the Further Notice of Proposed Rulemaking, neighborhood associations, property management companies and individual landlords promulgating regulations that restrict the installation, maintenance or use of devices designed for receiving over-the-air signals of DBS, MMDS and TVBS may, in certain circumstances, request declaratory rulings from the Commission that their regulations are reasonable, or petition the Commission for waiver of the rule.

*Federal Rules that Overlap, Duplicate or Conflict with These Requirements.* None.

*Description and Estimate of the Number of Small Entities Impacted.* The Regulatory

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<sup>225</sup>5 U.S.C. § 603 (1996).

Flexibility Act defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction," and "the same meaning as the term 'small business concern' under section 3 of the Small Business Act."<sup>226</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>227</sup> Neighborhood associations and property rental businesses may be affected by the ultimate outcome in the Further Notice of Proposed Rulemaking. These entities might need to revise their covenants and lease restrictions so that they conform with the rule.

Section 601(4) of the Regulatory Flexibility Act defines "small organization" as "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."<sup>228</sup> This definition includes homeowner and condominium associations that operate as not-for-profit organizations. The Community Associations Institute estimates that there were 150,000 associations in 1993.<sup>229</sup>

The U.S. Small Business Administration classifies a small entity as a firm with fewer than 500 employees.<sup>230</sup> Utilizing the Standard Industrial Classification Codes for Real Estate Agents and Managers, 100,135 firms (of a total of 100,554) have fewer than 500 employees.<sup>231</sup> This number does include real estate agents, who would not be burdened by the proposed rule, but does not include sole proprietors engaged in leasing rental property, who might be burdened.

*Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives.* This Notice solicits comments on a general approach only.

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<sup>226</sup>Regulatory Flexibility Act, 5 U.S.C. § 601(3) (1980).

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

<sup>228</sup>5 U.S.C. § 601(4).

<sup>229</sup>Community DBS Comments at 2.

<sup>230</sup>United States Small Business Administration, *A Guide to the Regulatory Flexibility Act*, App. A (1996).

<sup>231</sup>United States Dept. of Commerce, Bureau of the Census, *1993 Census of Cable and Other Pay Television Services*, quoted by, Dr. William Whiston, Chief, Research Contracts Branch, Office of Advocacy for the Small Business Administration, July 31, 1996.

**Separate Statement  
of  
Commissioner James H. Quello**

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

This Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking takes several actions to implement the intent of Congress in the Telecommunications Act of 1996 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 service."<sup>1</sup>

I previously expressed my concerns that the clear intent of Congress not be applied overbroadly to private, nongovernmental provisions restrictive covenants and homeowners' association rules that run to the placement of over-the-air television, MMDS, and DBS reception devices.<sup>2</sup>

With respect to the impact on private agreements, the Further Notice in this proceeding raises a range questions for further comment including the technical feasibility of providing service in common areas, and legal property issues for access in landlord -owned areas as well as common property for community associations. The issues identified for further comment also reflect an effort to respect rights of property owners as well as an effort to preempt provisions in private agreements only as necessary to preserve reception of signals.

Concerning the interests of localities as expressed in this proceeding, I believe that this decision takes appropriate steps in several respects. First, I support the action to eliminate the rebuttable presumption approach and prohibit only state or local laws that "impair", rather than "effect", the installation, maintenance, or use of the reception devices. I am pleased that this clarification will allow local governments more flexibility in traditional land use areas than the previous proposal. The decision also offers greater clarity and guidance to local jurisdictions for their application of the rules. Second, I anticipate that the decision's allowance of exemptions for purposes of safety, and preservation of historic areas

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<sup>1</sup> 1996 Act, Section 207.

<sup>2</sup> See In the Matter of Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices, Television Broadcast Service and Multichannel Multipoint Distribution Service, Notice of Proposed Rulemaking, CS Docket No. 96-83, 11 FCC Rcd 6357 (1996), Separate Statement of Commissioner James H. Quello.

will allow local authorities to address the specific needs of their communities through their own rules.

In both of the above respects, I believe that the Commission is taking positive steps to address my previous concerns, and will work to resolve the land ownership issues after receiving further comment from interested parties. I also am aware that the issues I have highlighted must be balanced with the intent of Congress not to limit development of competing distributors in the multichannel video marketplace. This is particularly relevant in urban areas or densely populated areas with multiple dwelling units. Accordingly, I believe that this item takes fair and cautious steps to balance these ownership and jurisdictional issues with the minimal necessary conditions for use of reception devices.



SEPARATE STATEMENT OF  
COMMISSIONER RACHELLE B. CHONG

*Re: Preemption of Local Regulation of Satellite Earth Stations, IB Docket No. 95-59, Implementation of Section 207 of the Telecommunications Act of 1996, CS Docket 96-83, Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*

In this Report and Order, we implement Section 207 of the Telecommunications Act of 1996. Section 207 directs the Commission to preempt nonfederal restrictions on certain direct-to-home video services, including Direct Broadcast Satellite (DBS) services. I write separately to note my strong support of the rule we adopt today, which is simpler than the one we proposed in our Notice of Proposed Rulemaking. I believe that this rule will be easier to administer and will produce fair results consistent with the intent of Congress.

In crafting this rule, we have performed a delicate balancing act. On the one hand, we have weighed the federal interests of ensuring that all consumers have access to a broad range of video programming services and promoting competition among those services. On the other hand, we have weighed important local interests in safety and managing land use in their communities. Ultimately, we have decided to cleave to the language of the 1996 Act and preempt local restrictions that "impair" reception unless the restriction is narrowly tailored to serve public safety or historic preservation objectives. In my judgment, this is very fair to both important interests.

I note that we have not completed our work in this proceeding. The rule we adopt applies to governmental and nongovernmental restrictions on property within the exclusive use or control of the viewer, so long as the viewer has a direct or indirect ownership interest. Our Further Notice seeks comment on how Section 207 applies in rental and common ownership situations. This issue is a difficult one. Once again we have competing interests to balance. We must consider the information rights of viewers against the property rights of landlords and those with common ownership, such as condominium associations. It is my view that our resolution of this issue will benefit from a fuller record that fleshes out the legal and practical consequences of either preempting or not preempting in rental and common ownership situations. I encourage interested parties to fully discuss the options and consequences available to us.