

FEDERAL COMMUNICATIONS COMMISSION**47 CFR Parts 1 and 25****[CS Docket No. 96–83; IB Docket No. 95–59; FCC 96–328]****Telecommunications Act of 1996; Preemption of Restrictions on Over-the-Air Reception Devices****AGENCY:** Federal Communications Commission.**ACTION:** Final rule.

SUMMARY: The Report and Order ("R&O") implements Section 207 of the Telecommunications Act of 1996. Section 207 directs that 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." The R&O prohibits restrictions that impair a viewer's ability to install, use and maintain devices used to receive TVBS, MMDS and DBS signals on property within the exclusive use or control of the antenna user and in which the user has a direct or indirect ownership interest. The Memorandum Opinion and Order (MO&O) addresses petitions for reconsideration in IB Docket No. 95–59 as they relate to implementation of Section 207. The intended effect of this R&O and MO&O is to complete the implementation of Section 207 of the Telecommunications Act of 1996. The R&O and MO&O will foster competition among video programming service providers and will increase consumer options for receiving video programming.

EFFECTIVE DATE: Upon approval by the Office of Management and Budget (OMB) of the new information collection requirements adopted herein, but no sooner than October 4, 1996. The Commission will publish a document at a later date advising of the effective date.

ADDRESSES: 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 20054, or via the Internet to 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.

FOR FURTHER INFORMATION, CONTACT: Jacqueline Spindler, Cable Services Bureau, (202) 418–7200. For additional information concerning the information collections contained herein, contact Dorothy Conway at 202–418–0217, or via the Internet at dconway@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's R&O and MO&O in CS Docket No. 96–83, IB Docket No. 95–59, FCC No. 96–328, adopted August 5, 1996 and released August 6, 1996. The full text of this decision is available for inspection and copying during normal business hours in the FCC Reference Center (room 239), 1919 M Street, NW., Washington, DC 20554, and may be purchased from the Commission's copy contractor, International Transcription Service, (202) 857–3800, 1919 M Street, NW., Washington, DC 20554. This R&O and MO&O contain proposed or modified information collections subject to the Paperwork Reduction Act of 1995 (PRA). 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. 104–13. Public and agency comments are due on September 27, 1996; OMB comments are due November 4, 1996. 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.

OMB Approval Number: 3060–0707.

Title: Preemption of Restrictions on Over-the-Air Reception Devices—Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking.

Type of Review: Revision of an existing collection. The following are burden estimates for the Order portion of the document, as well as the Further Notice of Proposed Rulemaking portion of the document. We account for the burdens estimates separately. If, in a subsequent rulemaking, the proposed rules in the Further Notice of Proposed Rulemaking are not adopted in part or in whole, the Commission will adjust its burden estimates accordingly.

Respondents: State and local governments; small organizations; small businesses.

Number of Respondents for the Order: 248. (100 requests for declaratory rulings, 24 comments on requests, 100 petitions for waivers, 24 comments on petitions.)

Estimated Time Per Response for the Order: 2–5 hours.

Total Annual Burden for the Order: 844 hours. It is estimated that 50% of declaratory rulings will be prepared without outside counsel with a burden of 5 hours each and 50% of parties will hire outside counsel. The estimated burden to coordinate information with outside counsel is 2 hours. $50 (50\% \text{ without outside counsel}) \times 5 \text{ hours} = 250 \text{ hours}$. $50 (50\% \text{ with outside counsel}) \times 2 \text{ hours} = 100 \text{ hours}$. It is estimated that 50% of comments on declaratory rulings will be prepared without outside counsel with a burden of 4 hours each and 50% of parties will hire outside counsel. The estimated burden to coordinate information with outside counsel is 2 hours. $12 (50\% \text{ without outside counsel}) \times 4 \text{ hours} = 48 \text{ hours}$. $12 (50\% \text{ with outside counsel}) \times 2 \text{ hours} = 24 \text{ hours}$. It is estimated that 50% of petitions for waivers will be prepared without outside counsel with a burden of 5 hours each and 50% of parties will hire outside counsel. The estimated burden to coordinate information with outside counsel is 2 hours. $50 (50\% \text{ without outside counsel}) \times 5 \text{ hours} = 250 \text{ hours}$. $50 (50\% \text{ with outside counsel}) \times 2 \text{ hours} = 100 \text{ hours}$. It is estimated that 50% of comments on waivers will be prepared without outside counsel with a burden of 4 hours each and 50% of parties will hire outside counsel. The estimated burden to coordinate information with outside counsel is 2 hours. $12 (50\% \text{ without outside counsel}) \times 4 \text{ hours} = 48 \text{ hours}$. $12 (50\% \text{ with outside counsel}) \times 2 \text{ hours} = 24 \text{ hours}$.

Estimated Costs Per Respondent for the Order: It is estimated that 50 requests for declaratory rulings, 12 comments on requests for declaratory rulings, 50 petitions for waivers and 12 comments on petitions for waivers will be prepared each year through outside counsel. The estimated annual costs are \$89,400, illustrated as follows: $50 \text{ declaratory rulings} \times 5 \text{ hours} \times \$150/\text{hr.} = \$37,500$. $12 \text{ comments on declaratory rulings} \times 4 \text{ hours} \times \$150/\text{hr.} = \$7,200$. $50 \text{ petitions for waivers} \times 5 \text{ hours} \times \$150/\text{hr.} = \$37,500$. $12 \text{ comments on petitions for waivers} \times 4 \text{ hours} \times \$150/\text{hr.} = \$7,200$.

Number of Respondents for the FNPRM: 248. (100 requests for declaratory rulings, 24 comments on

requests, 100 petitions for waivers, 24 comments on petitions.)

Estimated Time Per Response for the FNPRM: 2–5 hours.

Total Annual Burden for the FNPRM: 844 hours. It is estimated that 50% of declaratory rulings will be prepared without outside counsel with a burden of 5 hours each and 50% of parties will hire outside counsel. The estimated burden to coordinate information with outside counsel is 2 hours. $50 (50\% \text{ without outside counsel}) \times 5 \text{ hours} = 250 \text{ hours}$. $50 (50\% \text{ with outside counsel}) \times 2 \text{ hours} = 100 \text{ hours}$. It is estimated that 50% of comments on declaratory rulings will be prepared without outside counsel with a burden of 4 hours each and 50% of parties will hire outside counsel. The estimated burden to coordinate information with outside counsel is 2 hours. $12 (50\% \text{ without outside counsel}) \times 4 \text{ hours} = 48 \text{ hours}$. $12 (50\% \text{ with outside counsel}) \times 2 \text{ hours} = 24 \text{ hours}$. It is estimated that 50% of petitions for waivers will be prepared without outside counsel with a burden of 5 hours each and 50% of parties will hire outside counsel. The estimated burden to coordinate information with outside counsel is 2 hours. $50 (50\% \text{ without outside counsel}) \times 5 \text{ hours} = 250 \text{ hours}$. $50 (50\% \text{ with outside counsel}) \times 2 \text{ hours} = 100 \text{ hours}$. It is estimated that 50% of comments on waivers will be prepared without outside counsel with a burden of 4 hours each and 50% of parties will hire outside counsel. The estimated burden to coordinate information with outside counsel is 2 hours. $12 (50\% \text{ without outside counsel}) \times 4 \text{ hours} = 48 \text{ hours}$. $12 (50\% \text{ with outside counsel}) \times 2 \text{ hours} = 24 \text{ hours}$.

Estimated Costs Per Respondent for the FNPRM: It is estimated that 50 requests for declaratory rulings, 12 comments on requests for declaratory rulings, 50 petitions for waivers and 12 comments on petitions for waivers will be prepared each year through outside counsel. The estimated annual costs are \$89,400, illustrated as follows: $50 \text{ declaratory rulings} \times 5 \text{ hours} \times \$150/\text{hr.} = \$37,500$. $12 \text{ comments on declaratory rulings} \times 4 \text{ hours} \times \$150/\text{hr.} = \$7,200$. $50 \text{ petitions for waivers} \times 5 \text{ hours} \times \$150/\text{hr.} = \$37,500$. $12 \text{ comments on petitions for waivers} \times 4 \text{ hours} \times \$150/\text{hr.} = \$7,200$.

Needs and Uses: Submitted information will be used to evaluate requests for declaratory ruling regarding the reasonableness of state, local and nongovernmental restrictions, or to requests for waiver of the rule.

I. Synopsis of Report and Order, Memorandum Opinion and Order

1. On February 8, 1996, the Telecommunications Act of 1996 ("1996 Act") became law. Section 207 of the 1996 Act directs that 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." In this Report and Order (R&O) and Memorandum Opinion and Order (MO&O) we consolidate two rulemaking proceedings, IB Docket No. 95–59, 11 FCC Rcd 5809 (1996) (61 FR 10710) (*DBS Order and Further Notice of Proposed Rulemaking*), and CS Docket No. 96–83, 11 FCC Rcd 6357 (1996) (61 FR 16890) (*TVBS-MMDS Notice of Proposed Rulemaking*), to implement Section 207 with respect to direct broadcast satellite ("DBS") service, television broadcast signals ("TVBS") and multichannel multipoint distribution service ("MMDS"). We adopt a rule that prohibits restrictions that impair a viewer's ability to install, maintain and use devices designed to receive these services on property within the exclusive use or control of the viewer and in which the viewer has a direct or indirect property interest.

2. In the *DBS Order and Further Notice of Proposed Rulemaking* and the *TVBS-MMDS Notice of Proposed Rulemaking* we adopted and proposed a rule, respectively, establishing a rebuttable presumption of unreasonableness for restrictions on TVBS, MMDS and DBS. In the R&O, we replace the presumptive approach with a *per se* preemption of such restrictions. Although the rebuttable presumption was created in an effort to be less intrusive in local government affairs, it was broadly viewed as creating unsustainable burdens on all parties, including the Commission. Consequently, we replaced the rebuttable presumption approach with a narrower, clearer preemption. In addition, the rule we adopt preempts restrictions and regulations that "impair" rather than "affect" reception, in order to narrow the preemption and adhere more closely to the language of the statute. 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.

3. In the *DBS Order and Further Notice of Proposed Rulemaking* and *TVBS-MMDS Notice of Proposed Rulemaking*, we proposed to preempt nongovernmental restrictions on DBS, TVBS, and MMDS reception devices, and did not provide any recourse for nongovernmental authorities seeking to enforce their restrictions. In the rule we adopt today, we preempt nongovernmental restrictions on the same basis as governmental, and provide the same declaratory ruling and waiver opportunities to nongovernmental associations as we offer to governmental authorities. The legislative history of Section 207 consists of the House Commerce Committee Report, which states clearly that the provision applies to nongovernmental restrictions, including restrictive covenants and homeowners' association rules. The final rule treats nongovernmental restrictions the same as governmental and establishes waiver and declaratory ruling processes.

4. The rule we adopt creates exemptions for regulations serving safety and historic preservation goals. The rule that we adopted in the *DBS Order and Further Notice of Proposed Rulemaking* and proposed in the *TVBS-MMDS Notice of Proposed Rulemaking* required that any governmental entity seeking to enforce a restriction or regulation that affects reception secure a declaration or waiver. Parties generally agree that some restrictions are *prima facie* justified, and we accordingly create exemptions for safety and historic preservation regulations. While these restrictions must be tailored to impose as little burden as possible on the use of receiving devices, they are permissible even if they impair the ability to receive video programming services.

5. To the extent that they receive video programming services, our rule applies to services closely related to DBS, TVBS and MMDS, including medium-power satellite services using antennas one meter or less in diameter or diagonal measurement to receive over-the-air video programming, and multipoint distribution services (MDS), instructional television fixed service (ITFS) and local multipoint distribution service (LMDS). Our rule defines DBS and MMDS by the size and shape of the services' receiving devices, and preempts restrictions on antennas one meter or less in diameter or diagonal measurement. We also include masts in our definition of MMDS, and preempt restrictions on antennas that extend 12 feet or less above the roofline; such

installations cannot require a permit or prior approval, absent a safety or historic preservation reason. In addition, governmental and nongovernmental authorities cannot require permits or prior approvals for installation of an antenna placed a distance at least as far from the lot line as the height of the antenna. Because there is no history of controversy concerning their size or shape, we decline to establish any size or shape limits on TVBS antennas. However, TVBS antennas are subject to the same height limitations as MMDS and DBS.

II. Regulatory Flexibility Analysis

6. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, the Commission's Regulatory Flexibility Analysis with respect to the R&O, MO&O is as follows:

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 of Proposed Rulemaking* and the *TVBS-MMDS Notice of Proposed Rulemaking*. The Commission sought written public comments on the proposals in the two proceedings, including comments on the IRFA. The 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. 104–121, 110 Stat. 847.

7. *Need for Action and Objectives of the Rule.* The rulemaking implements Section 207 of the Telecommunications Act of 1996, Pub. L. No. 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. This action is authorized under the Communications Act of 1934 section 1, *as amended*, 47 U.S.C. 151, pursuant to the Communications Act of 1934 section 303, *as amended*, 47 U.S.C. 303, and by Section 207 of the Telecommunications Act of 1996.

8. 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 and nongovernmental regulations and 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.

9. *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 of Proposed Rulemaking* and *TVBS-MMDS Notice of Proposed Rulemaking*, invited comment on the IRFA and the potential economic impact the proposed rules would have on small entities. NLC comments that the proposed rule would have a "substantial economic and administrative impact" on over 37,000 small local governments. 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."

10. 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.

11. Numerous apartment complexes filed comments seeking clarification of Section 207's impact on their lease terms. 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.

12. 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 taking, requiring compensation under the Fifth Amendment of the Constitution. 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 antennas has a measurable economic impact on the homeowner's property, nor that it interferes with investment-backed expectations. In support of the rule, several commenters argue that the rule enhances the value of the homeowner's property.

13. 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.

14. *Description and Estimate of the Number of Small Entities Impacted.* The Regulatory Flexibility Act, 5 U.S.C. 601(3) (1980), 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." 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), 15 U.S.C. 632 (1996). The rule we adopt today applies to small organizations and small governmental jurisdictions, rather than businesses.

15. The term "small governmental jurisdiction" is defined as "governments of * * * districts, with a population of less than fifty thousand." 5 U.S.C. 601(5). There are 85,006 governmental entities in the United States. United States Dept. of Commerce, Bureau of the Census, *1992 Census of Governments*.

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

16. 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." 5 U.S.C. 601(4). 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. Given the nature of a neighborhood association, we assume for the purposes of this FRFA that all 150,000 associations are small organizations.

17. *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. 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.

18. 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. 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.

19. *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, 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 of Proposed Rulemaking* and proposed in the *TVBS-MMDS Notice of Proposed Rulemaking*. 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.

20. In the *DBS Order and Further Notice of Proposed Rulemaking* and the *TVBS-MMDS Notice of Proposed Rulemaking*, we adopted and proposed, respectively, a rebuttable presumption approach to governmental regulations, and proposed strict preemption of nongovernmental restrictions. We acknowledged in the *DBS Order and Further Notice of Proposed Rulemaking* that a rule relying on a presumptive approach would be more difficult to administer than a rule based upon a *per se* prohibition, and we sought comment in the *TVBS-MMDS Notice of Proposed Rulemaking* on less burdensome approaches. 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. 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.

21. 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 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 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. The use of the term impair will decrease the burden on small entities while implementing Congress' objective.

22. In the *DBS Order and Further Notice of Proposed Rulemaking* and the *TVBS-MMDS Notice of Proposed Rulemaking*, 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.

23. 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.

24. *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.

III. Paperwork Reduction Act of 1995 Analysis

25. *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 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.

26. In the *DBS Order and Further Notice of Proposed Rulemaking* and the *TVBS-MMDS Notice of Proposed Rulemaking* 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 September 27, 1996; OMB comments are due November 4, 1996. 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.

27. Written comments by the public on the modified information collections are due on September 27, 1996. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified collections on or before November 4, 1996. 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, 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.

IV. Ordering Clauses

28. 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, Public Law No. 104-104, 110 Stat. 56, that the rule discussed in this Report and Order *is adopted* as § 1.4000 of the Commission's rules, 47 CFR 1.4000.

29. *It is further ordered* that § 25.104 of the Commission's rules, 47 CFR 25.104, is amended as set forth below.

30. *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*.

31. *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 October 4, 1996.

32. This Report and Order and Memorandum Opinion and Order contains a modified information collection. 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, as required by the Paperwork Reduction Act of 1995, Pub. L. 104-13. Public and agency comments are due September 27, 1996; OMB comments are due November 4, 1996. 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, 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.

33. *It is further ordered* that the Secretary shall send a copy of this Report and Order including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.* (1981).

List of Subjects

47 CFR Part 1

Telecommunications, Television.

47 CFR Part 25

Satellites.

Federal Communications Commission.

William F. Caton,
Acting Secretary.

Rule Changes

Parts 1 and 25 of Title 47 of the Code of Federal Regulations are amended to read as follows:

1. The authority citation for Part 1 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:

Subpart S—Preemption of Restrictions That “Impair” a Viewer's Ability To Receive Television Broadcast Signals, Direct Broadcast Satellite Services or Multichannel Multipoint Distribution Services

Sec. 1.4000. Restrictions impairing reception of television broadcast signals, direct broadcast satellite services or multichannel multipoint distribution services.

Subpart S—Preemption of Restrictions That “Impair” a Viewer’s Ability To Receive Television Broadcast Signals, Direct Broadcast Satellite Services or Multichannel Multipoint Distribution Services

§ 1.4000. Restrictions impairing reception of television broadcast signals, direct broadcast satellite services or multichannel multipoint distribution services.

(a)(1) Any restriction, including but not limited to any state or local law or regulation, including zoning, land-use, or building regulation, or any private covenant, homeowners’ association rule or similar restriction on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest in the property, that impairs the installation, maintenance, or use of: An antenna that is designed to receive direct broadcast satellite service, including direct-to-home satellite services, that is one meter or less in diameter or is located in Alaska; or an antenna that is designed to receive video programming services via multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services, and that is one meter or less in diameter or diagonal measurement; or an antenna that is designed to receive television broadcast signals; is prohibited, to the extent it so impairs, subject to paragraph (b) of this section.

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

- (i) Unreasonably delays or prevents installation, maintenance or use,
- (ii) Unreasonably increases the cost of installation, maintenance or use, or
- (iii) Precludes reception of an acceptable quality signal.

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

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

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

to the extent practicable in a non-discriminatory manner to other appurtenances, devices, or fixtures that are comparable in size, weight and appearance to these antennas and to which local regulation would normally apply; or

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

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

(c) Local governments or associations may apply to the Commission for a waiver of this rule under § 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 § 1.2, or a court of competent jurisdiction, to determine whether a particular restriction is permissible or prohibited under this section. Petitions to the Commission will be put on public notice. Any responsive pleadings must be served on all parties and filed within 30 days after release of a public notice that such petition has been filed. Any replies must be filed within 15 days thereafter.

(e) In any Commission proceeding regarding the scope or interpretation of any provision of this section, the burden of demonstrating that a particular governmental or nongovernmental restriction complies with this section and does not impair the installation, maintenance or use of devices designed for over-the-air reception of video programming services shall be on the party that seeks to impose or maintain the restriction.

(f) All allegations of fact contained in petitions and related pleadings before

the Commission must be supported by affidavit of a person or persons with actual knowledge thereof. An original and two copies of all petitions and pleadings should be addressed to the Secretary, Federal Communications Commission, 1919 M St. NW., Washington, DC 20554. Copies of the petitions and related pleadings will be available for public inspection in the Cable Reference Room in Washington, DC. Copies will be available for purchase from the Commission’s contract copy center, and Commission decisions will be available on the Internet.

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 new paragraph (f) to read as follows:

§ 25.104 Preemption of local zoning of earth stations.

* * * * *

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

* * * * *

(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 § 1.4000 of this chapter.

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