

EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action promulgated does not include a Federal mandate that may result in estimated annual costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

G. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a "major" rule as defined by 5 U.S.C. 804(2).

H. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 5, 1999. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements, Particulate matter.

Note: Incorporation by reference of the State Implementation Plan for the State of California was approved by the Director of the Federal Register on July 1, 1982.

Dated: November 20, 1998.

Laura Yoshii,

Acting Regional Administrator, Region IX.

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart F—California

2. Section 52.220 is amended by adding paragraphs (c)(187)(i)(B)(2) and (256)(i)(B)(1) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(187) * * *

(i) * * *

(B) * * *

(2) Rule 74.1, adopted on November 12, 1991.

* * * * *

(256) * * *

(i) * * *

(B) San Diego County Air Pollution Control District.

(1) Rule 50, adopted on August 13, 1997.

[FR Doc. 98-32417 Filed 12-4-98; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[CS Docket No. 96-83; FCC 98-214]

Preemption of Local Zoning Regulation of Satellite Earth Stations and Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service

AGENCY: Federal Communications Commission.

ACTION: Final rule; petition on reconsideration.

SUMMARY: This Order on Reconsideration affirms and clarifies the Over-the-Air Reception Devices Rule, which prohibits governmental and non-governmental restrictions that impair a viewer's ability to receive video programming through devices designed for over-the-air reception of DBS, MDS, or television broadcast signals. This

Order resolves petitions for reconsideration of the Preemption of Restrictions on Over-the-Air Reception Devices Report and Order (CS Docket No. 96-83, FCC 96-328, 61 FR 46557) by reaffirming and clarifying certain parts of the rule.

EFFECTIVE DATES: January 6, 1999, except § 1.4000(d) and (e) contain information collection requirements that will become effective February 16, 1999 following approval by the Office of Management and Budget, unless timely notice is published in the **Federal Register**. The Commission will publish a document in the **Federal Register** announcing the effective dates for those sections. Written comments by the public on the modified information collection requirements are due on or before February 5, 1999. If you anticipate that you will be submitting comments on the modified information collection requirements, but find it difficult to do so within the period of time allowed by this notice, you should advise Judy Boley, listed in the address section, as soon as possible.

ADDRESSES: A copy of any comments on the modified information collection requirements contained herein should be submitted to Judy Boley, Federal Communications, Room C1804, 445 12th St., S.W., Washington, DC 20554 or via Internet to jboley@fcc.gov.

FOR FURTHER INFORMATION CONTACT: Eloise Gore at (202) 418-1066 or via internet at egore@fcc.gov or Darryl Cooper at (202) 418-1039 or via internet at dacooper@fcc.gov. For additional information concerning the modified information collection requirements contained in the Order on Reconsideration contact Judy Boley at (202) 418-0214 or via internet at jboley@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Order on Reconsideration, CS Docket No. 96-83, adopted August 27, 1998 and released September 25, 1998. 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, D.C. 20554, or may be purchased from the Commission's copy contractor, International Transcription Service ("ITS"), (202) 857-3800, 1231 20th Street, NW, Washington, D.C. 20036, or may be reviewed via internet at <http://www.fcc.gov/Bureaus/Cable/WWW/csb.html>. For copies in alternative formats, such as braille, audio cassette or large print, please contact Sheila Ray at ITS.

Paperwork Reduction Act

The requirements contained in this Order on Reconsideration have been analyzed with respect to the Paperwork Reduction Act of 1995 (the "1995 Act") and would impose modified information collection requirements on the public. As part of its continuing effort to reduce paperwork burdens, we invite the general public to take this opportunity to comment on the information collection requirements contained in this Order on Reconsideration, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public comments are due 60 days from date of publication of this Order on Reconsideration in the **Federal Register** and then implementation of any modified information collection requirements will be subject to approval by the Office of Management and Budget ("OMB") as prescribed by the 1995 Act. Comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

OMB Approval Number: 3060-0707.

Title: Over-the-Air Reception Devices.

Type of Review: Revision of a currently approved collection.

Respondents: Individuals, state and local governments.

Number of Respondents: 320.

Estimated Time Per Response: 2-6 hours.

Frequency of Response: On occasion.

Total Annual Burden to Respondents: 1,240 hours.

Total Annual Cost to Respondents: \$138,000.

Needs and Uses: Petitions for waivers of the Section 207 rules are used by the Commission to determine whether the state, local or non-governmental regulation or restriction is unique in a way that justifies waiver of our rules prohibiting restrictions on the use of over-the-air reception devices. Petitions for declaratory rulings pursuant to the Section 207 rules are used by the Commission to determine whether the state, local or non-governmental regulation or restriction is preempted.

Synopsis of Order on Reconsideration Introductory Background

1. In the Order on Reconsideration, the Commission grants in part and denies in part petitions for reconsideration of the Commission's implementation of section 207 of the Telecommunications Act of 1996 ("1996 Act") (Pub. L. 104-104, 110 Stat. 114 (Feb. 8, 1996)) in its Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking ("Report and Order" and "Further Notice") released on August 6, 1996 (In re Preemption of Local Zoning Regulation of Satellite Earth Stations, and In re Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service, IB Docket No. 95-59, CS Docket No. 96-83 (consolidated), 61 FR 46557 September 4, 1996). The Report and Order adopted 47 CFR 1.4000 (the "Section 207 rules"), that generally prohibits both governmental and nongovernmental restrictions that impair the installation, maintenance or use of over-the-air reception devices covered by Section 207 ("Section 207 devices"), unless the restriction is necessary for safety or historic preservation reasons and is no more burdensome than necessary to achieve those objectives. Section 207 expressly covers over-the-air reception devices used to receive television broadcast signals ("TVBS"), multichannel multipoint distribution service ("MMDS"), and direct broadcast satellite services ("DBS"). The rules implementing Section 207 also cover: (1) any type of multipoint distribution service, including not only MMDS but also instructional television fixed service ("ITFS") and local multipoint distribution service ("LMDS"); (2) medium-power satellite services using antennas of one meter or less, even though such services may not be technically defined as DBS elsewhere in the Commission's rules; and (3) DBS antennas of over one meter in Alaska (smaller DBS antennas do not work in Alaska). Under the rules the Commission promulgated pursuant to Section 207, a restriction impairs a viewer's Section 207 rights if it (1) unreasonably delays or prevents installation, maintenance, or use of a covered Section 207 reception device, (2) unreasonably increases the costs of installation, maintenance or use of a covered Section 207 reception device, or (3) precludes reception of an acceptable quality signal by the device. In addition, the rules create exceptions for

restrictions that promote safety objectives and historic preservation.

2. Seven petitions for reconsideration of the Report and Order were filed raising approximately 15 issues for reconsideration. In this Order on Reconsideration, the Commission

(1) reaffirms the decision not to prohibit all restrictions on a viewer's ability to install, maintain and use Section 207 reception equipment;

(2) denies a petition to revise the safety exception to apply only to "compelling" safety objectives; adopts a proposal to remove the appearance of a device from the factors examined to determine the validity of a safety objective; and revises the Section 207 rules to examine how a safety objective treats other objects that pose a similar or greater safety risk;

(3) denies a request to exclude nongovernmental entities from using the safety exception;

(4) reaffirms the decision not to exercise exclusive jurisdiction over the enforcement of our Section 207 rules at this time;

(5) reaffirms the decision that, based on the current record, the permit requirements of the Building Officials & Code Administrators International, Inc. ("BOCA") code are reasonable safety restrictions;

(6) reaffirms that permit requirements designed to enforce placement restrictions are preempted by our rules;

(7) declines to adopt a *per se* restriction on DBS antenna painting requirements;

(8) adopts a proposal that a viewer be given at least 21 days during which to comply with a court or Commission order upholding a restriction before any fine or penalty may be imposed if the viewer's claim is not frivolous;

(9) reaffirms the standard for signal degradation that qualifies as an impairment under the Section 207 rules;

(10) denies a request that the Section 207 rules protect certain antennas not specifically listed in the Section 207 rules and concludes that a proponent of a new antenna must make a particular showing that the antenna should be covered by the Section 207 rules;

(11) adopts a proposal that the Section 207 rules protect antennas that have only transmission capability if these transmission antennas are used in conjunction with antennas that receive video programming;

(12) denies a request to revise the historic preservation exception to eliminate from its protection districts eligible to be listed on the National Register of Historic Places, and amends the rules to clarify the exception to include historic properties as they are

defined in the National Historic Preservation Act;

(13) denies a petition seeking a statement that any fee for installing a Section 207 device is unreasonable and declines to set a maximum cost that regulations may impose on installation that will impair, but clarifies that certain fees are unreasonable;

(14) clarifies that petitions for declaratory ruling and petitions for waiver must be served on all interested parties;

(15) revises the Section 207 rules to include certain statements made in the Report and Order;

(16) clarifies the rights of a tenant under the Section 207 rules where the tenant has the permission of the property owner to install an antenna;

(17) clarifies that a viewer with a direct or indirect ownership interest in property over which the viewer exercises exclusive use is protected by the Section 207 rules even though the viewer may not exercise exclusive control over the property; and

(18) clarifies that an association or a landlord may prohibit viewers from installing individual Section 207 devices under the Section 207 rules if the association or a landlord provides the tenant access to a central antenna facility that does not impair the viewers' rights under the Section 207 rules.

Conclusions

Not all antenna restrictions are preempted

3. Two petitions for reconsideration argued that the Commission improperly failed to preempt all restrictions on viewers' ability to install, maintain or use a reception device covered by Section 207. In this Order, the Commission reaffirms the conclusion in the Report and Order that Congress intended that the Commission exercise its discretion when determining which restrictions should be preempted under Section 207. It cannot have been Congress' intent, nor can it be in the public interest, for the Section 207 rules to override legitimate safety concerns or laws establishing the National Register of Historic Places or restrictions that in no way impair the viewer's ability to receive video programming. For example, if the viewer can receive the same strength signal in the back yard as in the front yard, then it would be an unnecessary interference with the legitimate prerogatives of local governments to preempt a restriction limiting the placement of the reception device to the back yard.

Safety exception reaffirmed, clarified and revised

4. Under the Section 207 rules, a restriction is permitted if "it is necessary to accomplish a clearly defined safety objective." Several petitions requested that the Commission alter the rule to require a "compelling" safety objective. The Commission declines to permit only compelling safety exceptions, but reaffirms and clarifies that to fall within the safety exception, the safety objective must be "clearly defined" and "serve legitimate safety goals," and the proponent of the safety restriction must prove that it is neither discriminatory nor more burdensome than necessary to achieve the safety objective. The rules are modified to include the term "legitimate" in the definition of a safety objective.

5. In the Order on Reconsideration, the Commission deletes the term "appearance" from the list of potential attributes that should be examined to determine whether a safety restriction is being applied in a discriminatory manner. The rules are revised to examine whether a restriction is applied to fixtures or devices posing a similar or greater safety risk as the Section 207 device and whether the restriction is applied to the extent practicable in a non-discriminatory manner to other appurtenances, devices, or fixtures, considering factors such as size, weight, and safety risk. In addition, if "safety boilerplate" is added to restrictive covenants for anticompetitive reasons, the Commission will weigh this factor heavily in determining whether the restriction is necessary, nondiscriminatory, and no more burdensome than necessary to accomplish the objective.

Nongovernmental safety restrictions

6. Two petitions requested that nongovernmental entities, such as homeowners' associations, be prohibited from establishing safety restrictions under our Section 207 rules. The Commission denies these requests and concludes that Section 303 of the Communications Act of 1934 (47 U.S.C. 303) ("Section 303") permits the Commission to consider and minimize the impact of our rules on local associations and governments. If the rules did not permit private safety-based restrictions, the rules would effectively preempt portions of state tort liability law, and, because homeowners' associations focus on the problems that face a particular area or development, they are well-positioned to assess the

safety needs of their individual communities.

Jurisdiction for declaratory ruling petitions

7. The Report and Order and Section 207 rules provide concurrent jurisdiction to the Commission and to courts of competent jurisdiction to hear petitions for a declaratory ruling to determine whether a particular restriction is permissible or prohibited under the Section 207 rules. This Order on Reconsideration denies several petitions that requested the Commission to reconsider the decision not to assert exclusive jurisdiction over petitions for declaratory rulings. The Communications Act does not require the Commission to exercise exclusive jurisdiction over these disputes; therefore, the Commission reaffirms its discretion to decide that it is in the public interest at the current time to share jurisdiction to adjudicate disputes with the courts and retain discretion to provide, on the Commission's motion or in response to a petition, interpretive guidance for the future based on our expertise in developing and applying the statute and the rules. The Commission also reiterates that a court may refer an issue to the Commission under the doctrine of primary jurisdiction, particularly when cases involve the determination of novel issues.

The BOCA Code restrictions

8. The Report and Order adopted rules that reflected the Building Officials & Code Administrators International, Inc. ("BOCA") code permit provisions on antenna height and set back requirements (i.e., require an antenna user to obtain a permit to install an antenna that extends more than twelve feet above the roofline or that is taller than the distance between the antenna and the lot line, but no permit is required for antennas that are no taller than the distance between the antenna and the lot line.) Two petitions asked the Commission to reconsider and delete reliance on the BOCA code. The Order on Reconsideration reaffirms that, in the absence of superior information from those engaged in the installation or use of antennas, the BOCA code provisions regarding permits for height and setback requirements qualify as legitimate safety objectives under Section 207 rules. Acceptance of the BOCA code, however, is limited to the permit requirement and does not constitute a blanket per se prohibition of masts of a particular height. To the extent that a local authority applies BOCA in a discriminatory manner by

not requiring permits for items that pose similar or greater safety risks, such discrimination may be challenged in a particular case, and would, if not justified, be deemed impermissible under the rules. If a local authority created a per se bar to antennas over a certain height, the restriction would be prohibited. To bring the Section 207 rules into accord with the Report and Order, the rules are modified to include masts in the definition of antennas.

Prohibition of permit requirements

9. The Order on Reconsideration reaffirms that permit requirements are permissible to ensure compliance with restrictions that serve safety or historic preservation objectives. Outside of these contexts, blanket permit requirements (i.e., requiring any viewer who wants to install an antenna to obtain a permit) are generally impermissible because they cast too wide a net. A blanket permit requirement imposes unreasonable delay and expense on viewers' ability to install, maintain or use a Section 207 reception device. The Commission affirms the decisions previously made on this issue: *In re Michael J. MacDonald*, 13 FCC Rcd 4844 (CSB, 1997); *In re CS Wireless Systems, Inc.*, 13 FCC Rcd 4826 (CSB, 1997); and *In re Star Lambert and SBCA*, 12 FCC Rcd 10424 (CSB, 1997). By contrast, in the case of legitimate safety or historic preservation restrictions, a shift in the permit framework is justified because restrictions based on safety or historic preservation objectives are enforceable even if they impair a viewer's ability to install, maintain or use a Section 207 reception device.

Painting of reception devices

10. Two petitions requested reconsideration of the Report and Order's policy accepting a requirement to paint an antenna to blend into the background provided painting does not interfere with reception. The Order on Reconsideration denies these requests and reiterates that the statement applies only to painting requirements that will not interfere with reception. This Order also clarifies that if complying with a painting requirement causes an impairment of a viewer's ability to install, maintain or use a Section 207 reception device, the requirement is prohibited under our rules; e.g., if a restriction required painting a Section 207 reception device in a manner that unreasonably increases costs or impairs the ability of the device to receive a signal, then the regulation would be impermissible.

Grace periods to comply with rulings and collection of attorneys fees

11. The Order on Reconsideration concludes that it is consistent with the purpose underlying this rule that the potential threat of a fine or penalty could operate as a substantial deterrent to viewers exercising their right to install an antenna while such a restriction is under review. Therefore, the rule is amended to give viewers at least 21 days to comply with an adverse ruling issued in a proceeding before a fine may be collected, unless the proponent of the restriction can show in the same proceeding that the viewer's claim was frivolous. During this grace period, no additional fines or penalties shall accrue against the viewer, but if at the end of the grace period the viewer has not complied with the adverse ruling, then the initial fine may be imposed. The rule does not grant a grace period to every viewer who unknowingly violates a restriction that has already been upheld in a proceeding pursuant to our rules. Nevertheless, if a viewer believes that the restriction is invalid as applied to the particular viewer and challenges a previously upheld restriction in a proceeding as provided for in our rules, and the viewer does not have a frivolous claim that the upheld restriction is invalid as applied to the particular viewer, then the viewer may be granted at least a 21 day grace period.

12. In addition, as with fines and penalties, some associations attempt to collect from viewers the attorney's fees expended by an association in its efforts to enforce a restriction even while a proceeding is pending to determine whether the association's restriction constitutes an impairment under the rules (See, e.g., *In re James Sadler*, (DA 98-1284, rel. July 1, 1998)). As with fines or other penalties, the attempt to assess attorney's fees while a proceeding is pending and the validity of an arguably invalid restriction has not yet been determined would undermine the purpose underlying both the Section 207 rules and the petition process. Therefore, the rules are amended to prohibit the assessment or collection of attorney's fees while a proceeding is pending.

Definition of signal impairment

13. A restriction impairs a viewer's ability to receive video programming signals if it precludes reception of an acceptable quality signal. Under the balance struck in the rules, viewers are entitled to an antenna location, if one is available, that will provide an "acceptable" quality signal. Subject to

that limitation, local governments and community associations are entitled, in order to protect the interests of local residents, to restrict antenna placement. The proper balance is struck if an acceptable, but not necessarily always optimal, quality signal is available. For example, with respect to signals that are subject to a variety of different but gradual impairments, the rules do not mandate that an antenna can be placed at whatever height reception would be optimized.

14. The situation is altogether different, however, for devices designed to receive digital signals, such as DBS antennas, digital MMDS antennas and digital television ("DTV") antennas. Digital antennas will at times provide no picture or sound unless they are placed and oriented for optimal reception. Where a DBS antenna has an unobstructed, direct view of a satellite, the antenna will produce a complete picture and sound and is less likely to be subjected to frequent weather blackouts. For this reason, to receive an acceptable quality signal, a DBS antenna or other digital reception device covered by Section 207 must be installed where it has an unobstructed, direct view of the satellite or other device from which video programming service is received, if such a location exists on the viewer's property and the property is covered by our rules.

Other technologies that provide over-the-air reception of video programming services

15. Section 207 and the rules apply to restrictions on devices used to receive video programming services. The Order on Reconsideration denies petitions that requested application of the rules to interactive and data transmitting antennas because petitioners did not show that these antennas receive "video programming" as that term is used in the Communications Act of 1934: "programming provided by, or generally considered comparable to programming provided by, a television broadcast station" (see Section 602(20) of the Act; 47 U.S.C. 522(20)). Section 207 is flexible and will encompass newly developed technologies if they are shown to have similar technology and functions and to provide similar services as devices encompassed by Section 207. (For example, because of their similarity in terms of function and technology to services enumerated in Section 207, MDS, ITFS and LMDS are covered by Section 207 and the Section 207 rules even though these services were not mentioned in Section 207.) Proponents must make a particular

showing that the new technology should be covered by the rules.

Transmission-only antennas that assist reception antennas

16. The Report and Order stated that the rule does not apply to devices that have transmission capability only, but antennas that have transmission capability designed for the viewer to select or use video programming are considered reception devices under this rule. The Order on Reconsideration clarifies that the rules do not distinguish between a single antenna that both receives and transmits and paired transmission and reception antennas that perform the same functions. Restrictions that impair transmission devices that work in tandem with and are necessary to enable a viewer to select video programming on a reception device are prohibited by the rules if they impair a "viewer's ability to receive video programming" as set forth in the Section 207 rules. This protection extends only to transmission antennas that are within the size parameters of the Section 207 rules, installed at the viewer's location, and necessary for the viewer to select video programming.

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

17. The historic preservation exception to the Section 207 rules (Section 1.4000(b)(2)) is consistent with the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470f; see also 16 U.S.C. 470a(b)(3)(F) and (I)) ("NHPA"). To maintain that consistency, the Order on Reconsideration denies a petition to eliminate properties designated "eligible to be listed" but not yet listed. The rule is also revised to clarify exemption of "any prehistoric or historic district, site, building, structure or object included in, or eligible for inclusion on, the National Register of Historic Places" to follow more faithfully the definition of historic properties in the NHPA (see 16 U.S.C. 470w(5)).

Limits on fees and costs

18. The Section 207 rules regarding fees and costs are designed to protect viewers from unreasonable expenses that discourage choosing alternative video reception devices. Both fees imposed directly by a restricting entity and costs imposed indirectly as a result of an entity's requirements or restrictions can impose an unreasonable expense that is prohibited by the Section 207 rules. For example, a fee imposes unreasonable expense when

the fee is for a permit that a local government has no discretion to require. On this issue the decision of *In re Star Lambert* (12 FCC Rcd. 10455 (CSB, 1997)) is affirmed. The rules, however, do not prohibit all fees because a reasonable fee, in connection with a permissible requirement, may be within the standards of the Section 207 rules. The Order on Reconsideration reiterates that the standard for determining reasonable fees and costs is whether the expense imposed is reasonable in light of the cost of the equipment or services and the restriction's treatment of comparable devices. The rules are modified to include this language.

Service of petitions and pleadings

19. The Section 207 rules are revised to include language from the Report and Order clarifying that petitions for declaratory rulings and waivers must be served on interested parties. The term "interested" is narrowly interpreted. For example, if a homeowners' association files a petition or a lawsuit seeking to have a restriction declared valid and seeking to enforce the restriction against a particular viewer, service must be made on the particular viewer. The homeowners' association is not required to serve all other members of the association, but must provide reasonable, constructive notice of the proceeding to other residents whose interests may foreseeably be affected by the proceeding (e.g., by placing notices in residents' mailboxes, by placing a notice on a community bulletin board, or by placing the notice in an association newsletter). Similarly, if a local government seeks a declaratory ruling or a waiver from the Commission, the local government must take steps to afford reasonable, constructive notice to residents in its jurisdiction (e.g., by placing a notice in a local newspaper of general circulation). If a viewer files a petition or lawsuit challenging a local government's ordinance or an association's restriction, the viewer must serve the local government or association. Certificates of service and proof of constructive notice must be provided with a petition. The petitioner should provide a copy of the notice and an explanation of where the notice was placed and how many people the notice might reasonably have reached. Parties to a lawsuit that raises issues involving the applicability or the interpretation of Section 207 or the Section 207 rules are encouraged to provide notice of the lawsuit to the Commission and to provide the Commission with a copy of the relevant pleading.

Placing statements from the Report and Order in the Section 207 rules

20. The rules are revised to include certain statements from the Report and Order. First, the revised rules provide that if a petition is filed challenging a restriction, enforcement of that restriction (except restrictions pertaining to safety and historic preservation) is prohibited pending completion of review by a court or the Commission. (Commission review is completed when an order is released and is no longer subject to review or appeal, or when the petition is dismissed or returned without further action.) In addition, the rules are revised to clarify that the party seeking to enforce a restriction has the burden of demonstrating that a particular restriction complies with the rules. The Order on Reconsideration reiterates 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.

21. The standard for review of aesthetic requirements is further clarified by adding the following explanatory language from the Report and Order to paragraph (a) of Section 1.4000: "Any fee or cost imposed on a viewer by a rule, law, regulation or restriction must be reasonable in light of the cost of the equipment or services and the rule, law, regulation or restriction's treatment of comparable devices."

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

22. For purposes of the Section 207 rules, a renter, tenant, or any other person residing on a property owner's property with the property owner's permission ("tenant viewer"), who has the property owner's permission to install, maintain and use a Section 207 reception device on the property, shall be treated as a covered viewer with regard to third party restrictions under our Section 207 rules. In this connection, the tenant viewer shall have the same rights under the Section 207 rules as would the owner vis-a-vis restrictions enacted by a homeowners' association, condominium or cooperative association, townhome association, manufactured housing park owner, government and/or any other third party. Thus, if an owner residing on the property were entitled to install a Section 207 device on the property under the rules, then a tenant occupying the property is also entitled to install a

Section 207 device on the property provided the property owner consents.

Property under the exclusive use of the viewer

23. The Section 207 rules protect "property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest." The Order on Reconsideration clarifies that the rules protect a viewer who has either exclusive use or exclusive control of property in which the viewer has a direct or indirect ownership interest. It is not necessary for a viewer to have exclusive control over the property to be protected by the Section 207 rules. For instance, condominium owners, townhome owners, cooperative owners or owners of a manufactured home may not have exclusive control over their dwellings because the association or the park owner may retain rights to enter their dwellings to perform inspections or repairs. These owners have exclusive use over their dwellings because they are the only parties entitled to the beneficial use of the dwellings. A condominium owner, townhome owner, owner of a manufactured home, or cooperative unit dweller who has exclusive use of a balcony, balcony railing, deck, patio, or any other type of property where they have a direct or indirect property interest, has the right, subject to certain restrictions of our Section 207 rules, to place Section 207 devices thereon. That third parties have rights to enter and/or exercise control (e.g., banning grills on balconies) over the owner's exclusive-use area does not defeat the owner's Section 207 rights.

24. With respect to condominiums and cooperatives, the rule applies to antenna restrictions on balconies, decks, patios or similar areas even if the unit owner does not have exclusive ownership, so long as the unit owner has direct or indirect ownership and exclusive use over the area. (In a housing cooperative, the residents' ownership interest in the controlling entity entitles them to exclusive use of a unit and nonexclusive use and enjoyment of other common areas.) Restrictions on a cooperative owner's use of his or her unit and exclusive use areas are prohibited because (1) the owner has an indirect ownership interest in his or her unit and (2) the owner exercises exclusive use or control. Restrictions on the cooperative owner's use of common cooperative property are not prohibited if the cooperative owner does not exercise exclusive use over the common property. With respect to manufactured (mobile) homes, the owner of a

manufactured home is protected by the Section 207 rules even if the home rests on property leased from someone else because the owner has a direct property interest in the home and has exclusive use of the home. Thus, a manufactured home owner, or the owner of any other type of home that rests on leased property, has rights under Section 207, subject to the rules' language and exceptions, to place a Section 207 device anywhere on the home.

Restrictions related to the existence of a Central Antenna

25. The Further Notice requested comments on a proposal to create an exception to the rules to allow antenna restrictions if a community association, landlord or similar private entity voluntarily makes video programming available through a central reception facility. The Order on Reconsideration concludes that this proposal is properly analyzed under the current Section 207 framework, and it is not necessary to amend the Section 207 rules to allow for a central antenna. The installation of a central antenna, and a concomitant restriction on the installation of individual antennas, does not constitute an impairment under the Section 207 rules if, like any other restriction, it does not impair installation, maintenance and use. This Order clarifies that restrictions related to the existence and availability of a central antenna are generally permissible provided that: (1) the viewer receives the particular video programming service the viewer desires and could receive with an individual antenna (e.g., the viewer would be entitled to receive service from a specific DBS provider, not simply a DBS service selected by the association); (2) the video reception in the viewer's home using the central antenna is of an acceptable quality as good as, or better than, the quality the viewer could receive with an individual antenna; (3) the costs associated with the use of the central antenna (including installation and subscriber fees) are not greater than the expense of installation, maintenance and use of an individual antenna; and (4) the requirement to use the central antenna in lieu of an individual antenna does not unreasonably delay the viewer's ability to receive video programming. The Order on Reconsideration further clarifies that no community or association is required by these rules to install a central antenna.

Regulatory Flexibility Analysis

26. As required by the Regulatory Flexibility Act ("RFA"), an Initial Regulatory Flexibility Analysis

("IRFA") was incorporated in International Bureau (IB) Docket No. 95-59 ("DBS Order and Further Notice") and in Cable Services Bureau (CS) Docket No. 96-83 ("TVBS-MMDS Notice"). The Commission sought written public comment on the proposals in those proceedings, including comment on the IRFA's. The Commission's Final Regulatory Flexibility Analysis ("FRFA") was issued in the Report and Order and conformed to the RFA. Pursuant to the RFA, the Commission's final analysis with respect to this Order on Reconsideration is as follows.

Need for, and Objectives of, this Order on Reconsideration

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

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

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

Description and Estimate of the Number of Small Entities to Which Rules Will Apply

29. 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." The rule applies to small organizations, small governmental jurisdictions, and small businesses.

30. The term "small governmental jurisdiction" is defined as "governments of . . . districts, with a population of less than fifty thousand." There are 85,006 governmental entities in the United States. 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. One commenter estimates that there are 37,000 "small governmental jurisdictions" that may be affected by the proposed rule.

31. 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." This definition includes homeowner and condominium associations that operate as not-for-profit organizations. An industry association 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.

32. 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). Industry sources estimate that the following SIC codes apply to this industry: SIC Codes 6512 (operators of nonresidential buildings), 6513 (operators of apartment buildings), and 6514 (operators of dwellings other than apartment buildings). The SBA defines a small entity in each of these codes as one with less than \$5,000,000 in gross annual revenues. Based on census data that lists businesses according to these SIC codes and their total revenue, industry sources state that there are 28,089 operators of nonresidential buildings and 39,903 operators of apartment buildings. Industry sources state the Bureau of Census includes operators of dwellings other than apartment buildings in the same category as other types of businesses, but states that the figures for this category as a whole show that the number of operators of dwellings other than apartment buildings are similar to the numbers of operators covered by SIC codes 6512 and 6513.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

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

Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Rejected

34. The Commission finds that there are no significant alternatives to the rules and policies set forth in this Order that would minimize the economic impact on small entities, and notes that no commenter proffered alternatives to these rules and policies. Because most of the conclusions reached in this Order on Reconsideration merely clarify and provide guidance under the current Section 207 rules, those conclusions need not be analyzed here because the impact of the current Section 207 rules was already analyzed in the Report and Order. Nevertheless, there are some changes to the rules that are addressed here.

35. First, the Commission adopts a proposal that viewers be given at least 21 days during which to comply with a court or Commission order upholding a restriction before any fine or penalty may be imposed on the viewer if the viewer's claim is not frivolous that the restriction was facially invalid or was invalid as applied to the specific viewer. The Order concludes that the potential threat of a fine or penalty could operate as a substantial deterrent to viewers exercising their right to install an antenna while such a restriction is under review and there is no significant alternative way to remove this deterrent.

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

37. Third, the Section 207 rules protect antennas that have transmission

capability only if these transmission antennas are used in conjunction with antennas that receive video programming. Because this ruling was merely a clarification of the initial rule, this ruling has no more impact than the initial ruling analyzed in the Report and Order.

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

39. Fifth, the Order rejects a proposal that the Section 207 rules protect per se any other new antenna not specifically listed in the Section 207 rules. This decision was required by the statutory language of Section 207. Moreover, the impact of this rule is diminished because the Commission will consider on a case by case basis whether a particular device is covered by the rules.

40. Sixth, as set forth, the rules clarify how service should be made and how certification of service provided. No significant alternative was proposed.

Report to Congress: The Commission will send a copy of this Order on Reconsideration, including this FRFA, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801(a)(1)(A).

Ordering Clauses

41. Accordingly, it is ordered that, pursuant to authority found in 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 104-104, 110 Stat. 56, the Commission's rules are hereby amended. The amendments shall become effective January 6, 1999, except that § 1.4000 (d) and (e), which contain new information collection requirements that shall become effective upon approval by OMB, but no sooner than February 16, 1999. The Commission will publish a document in the **Federal Register** announcing the effective date for those sections.

42. It is further ordered that the Petitions for Reconsideration in CS Docket No. 96-83 are granted in part and denied in part.

43. It is further ordered that the Commission's Office of Public Affairs, Reference Operations Division, shall send a copy of this Order on Reconsideration, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance

with paragraph 603(a) of the Regulatory Flexibility Act, Public Law No. 96-354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.* (1981).

List of Subjects in 47 CFR Part 1

Antenna, Satellite,
Telecommunications, Television.
Federal Communications Commission.

Shirley S. Suggs,
Chief, Publications Branch.

Rule Changes

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

PART 1—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303(r), 309.

2. Section 1.4000 is revised to read as follows:

§ 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

(i) 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;

(ii) 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;

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

(iv) a mast supporting an antenna described in paragraphs (a)(1)(i), (ii) or (iii) of this section; is prohibited to the extent it so impairs, subject to paragraph (b) of this section; 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) Any fee or cost imposed on a viewer by a rule, law, regulation or restriction must be reasonable in light of the cost of the equipment or services and the rule, law, regulation or restriction's treatment of comparable devices. No civil, criminal, administrative, or other legal action of any kind shall be taken to enforce any restriction or regulation prohibited by this section except pursuant to paragraph (c) or (d) of this section. In addition, except with respect to restrictions pertaining to safety and historic preservation as described in paragraph (b) of this section, if a proceeding is initiated pursuant to paragraph (c) or (d) of this section, the entity seeking to enforce the antenna restrictions in question must suspend all enforcement efforts pending completion of review. No attorney's fees shall be collected or assessed and no fine or other penalties shall accrue against an antenna user while a proceeding is pending to determine the validity of any restriction. If a ruling is issued adverse to a viewer, the viewer shall be granted at least a 21 day grace period in which to comply with the adverse ruling; and neither a fine nor a penalty may be collected from the viewer if the viewer complies with the adverse ruling during this grace period, unless the proponent of the restriction demonstrates, in the same proceeding which resulted in the adverse ruling, that the viewer's claim in the proceeding was frivolous.

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

(1) It is necessary to accomplish a clearly defined, legitimate safety objective that is either stated in the text, preamble or legislative history of the restriction or described as applying to that restriction in a document that is readily available to antenna users, and would be applied to the extent practicable in a non-discriminatory manner to other appurtenances, devices, or fixtures that are comparable in size and weight and pose a similar or greater safety risk as these antennas and to which local regulation would normally apply; or

(2) It is necessary to preserve a prehistoric or historic district, site, building, structure or object included in, or eligible for inclusion on, the National Register of Historic Places, as set forth in the National Historic Preservation

Act of 1966, as amended, 16 U.S.C. 470, and imposes no greater restrictions on antennas covered by this rule than are imposed on the installation, maintenance or use of other modern appurtenances, devices or fixtures that are comparable in size, weight, and appearance to these antennas; and

(3) It is no more burdensome to affected antenna users than is necessary to achieve the objectives described in paragraph (b)(1) or (2) of this section.

(c) Local governments or associations may apply to the Commission for a waiver of this section under § 1.3 of this part. Waiver requests must comply with the procedures in paragraphs (e) and (g) of this section and will be put on public notice. The Commission may grant a waiver upon a showing by the applicant of local concerns of a highly specialized or unusual nature. No petition for waiver shall be considered unless it specifies the restriction at issue.

Waivers granted in accordance with this section shall not apply to restrictions amended or enacted after the waiver is granted. Any responsive pleadings must be served on all parties and filed within 30 days after release of a public notice that such petition has been filed. Any replies must be filed within 15 days thereafter.

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

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

is required, the petitioner or plaintiff must file with the Commission or the court overseeing the proceeding a copy of the constructive notice with a statement explaining where the notice was placed and why such placement was reasonable.

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

(g) All allegations of fact contained in petitions and related pleadings before the Commission must be supported by affidavit of a person or persons with actual knowledge thereof. An original and two copies of all petitions and pleadings should be addressed to the Secretary, Federal Communications Commission, 445 12th St. S.W., Washington, D.C. 20554, Attention: Cable Services Bureau. Copies of the petitions and related pleadings will be available for public inspection in the Cable Reference Room in Washington, D.C. Copies will be available for purchase from the Commission's contract copy center, and Commission decisions will be available on the Internet.

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

[FR Doc. 98-32362 Filed 12-4-98; 8:45 am]
BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 98-138; RM-9309]

Radio Broadcasting Services; Whitehall, MT

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document allots Channel 274A to Whitehall, Montana, in response to a petition filed by Whitehall

Broadcasting Company. See 63 FR 41765, August 5, 1998. The coordinates for Channel 274A at Whitehall are 45-56-11 and 112-13-51. There is a site restriction 12.7 kilometers (7.9 miles) northwest of the community. With this action, this proceeding is terminated. A filing window for Channel 274A at Whitehall, Montana, will not be opened at this time. Instead, the issue of opening a filing window for this channel will be addressed by the Commission in a subsequent order.

EFFECTIVE DATE: January 11, 1999.

FOR FURTHER INFORMATION CONTACT: Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, MM Docket No. 98-138, adopted November 18, 1998, and released November 27, 1998. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Center, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Services, Inc., 1231 20th Street, NW., Washington, DC. 20036, (202) 857-3800, facsimile (202) 857-3805.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Montana, is amended by adding Whitehall, Channel 274A.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 98-32366 Filed 12-4-98; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 98-164; RM-9357]

Radio Broadcasting Services; Linn, MO

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document allots Channel 276A to Linn, Missouri, in response to a petition filed by R. Lee and Sarah H. Wheeler. See 63 FR 49682, September 17, 1998. The coordinates for Channel 276A at Linn are 38-29-06 and 91-51-06. With this action, this proceeding is terminated. A filing window for Channel 276A at Linn, Missouri, will not be opened at this time. Instead, the issue of opening a filing window for this channel will be addressed by the Commission in a subsequent order.

EFFECTIVE DATE: January 11, 1999.

FOR FURTHER INFORMATION CONTACT: Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, MM Docket No. 98-164, adopted November 11, 1998, and released November 27, 1998. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Center, 445 Twelfth Street, S.W., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Services, Inc., 1231 20th Street, NW., Washington, DC. 20036, (202) 857-3800, facsimile (202) 857-3805.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Missouri, is amended by adding Linn, Channel 276A.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 98-32364 Filed 12-4-98; 8:45 am]

BILLING CODE 6712-01-P