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May 6, 1996

Mr. William F. Caton
Acting Secretary
Office of the Secretary
Federal Communications Commission
Room 222, 1919 M Street, N.W.
Washington, D.C. 20554

Re: In the Matter of: Implementation of Section 207 of the Telecommunications Act of 1996 Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Services: CS Docket Number 96-83, FCC 96-151 Notice of Proposed Rulemaking

Dear Mr. Caton:

Pursuant to the Notice of Proposed Rulemaking, the Community Associations Institute, joined by the American Resort Development Association and the National Association of Housing Cooperatives, respectfully submits the enclosed Comments to the Proposed Rule. The original and eleven (11) copies have been provided.

The Community Associations Institute, the American Resort Development Association, and the National Association of Housing Cooperatives appreciate the opportunity to comment on the Proposed Rule and hope that the FCC takes these Comments into account when drafting the final rule.

Sincerely,

Robert M. Diamond

Robert M. Diamond
President
Community Associations Institute

Enclosures

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OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	CS Docket No. 96-83
	)	
Implementation of Section 207 of the Telecommunications Act of 1996	)	FCC 96-151
	)	
Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service	)	

COMMENTS OF THE COMMUNITY ASSOCIATIONS INSTITUTE

JOINED BY

THE AMERICAN RESORT DEVELOPMENT ASSOCIATION

and

THE NATIONAL ASSOCIATION OF HOUSING COOPERATIVES

Robert M. Diamond
President
Barbara Byrd-Lawler, CAE
Executive Vice President
Community Associations Institute

May 6, 1996

TABLE OF CONTENTS

Page

SUMMARY iii

I. INTRODUCTION 1

A. The Community Associations Institute 2

B. The American Resort Development Association 3

C. The National Association of Housing Cooperatives 4

II. LEGAL FRAMEWORK FOR COMMUNITY ASSOCIATIONS 4

A. What is a Community Association? 4

B. Purposes for Restrictions in the Governing Documents of a Community Association 7

III. ANALYSIS OF SUBSECTION (c) OF THE PROPOSED RULE. 9

IV. IMPLEMENTATION OF SUBSECTION (c) OF THE PROPOSED RULE 11

A. The Impact of Proposed Subsection (c) on Community Associations Mostly Comprised of Common Property 12

1. Differences between Common Property and Individual Property 12

2. Individual Owners or Residents May Not Install Television and MMDS Equipment on Common Property Without Consent. 13

3. If the FCC Mandates Individual Resident Installation on Common Property, the Association will be Beset by Numerous Problems 15

B. Impact of Proposed Subsection (c) on Community Associations Comprised Mainly of Individual Property 19

C. Installation of Television Broadcast and MMDS Equipment of Unlimited Sizes and Heights Would Be Unreasonable 20

V. PROPOSED SOLUTIONS 21

VI. CONCLUSION 26

A. The Proposed Rule Does Not Permit Individuals to Install Telecommunications Equipment on Common Property 27

B. Allow Community Associations which Make Television and MMDS Access Available to all Residents to Enforce Their Rules. 27

Appendix A: Statements of Professional Roofers and Architects Regarding Structural Damage to Roofs and Building

1. Letter of Jim Fox, Vice President Residential/Maintenance, Peterson Roofing

2. Limited Warranty, Premier Roofing, Inc

Appendix B: Comments Submitted to the Federal Communications Commission by CAI Members

SUMMARY

The Community Associations Institute ("CAI"), the American Resort Development Associations ("ARDA"), and the National Association of Housing Cooperatives ("NAHC") support the broad public policy that promotes equal access to telecommunications services throughout the United States. However, Subsection (c) of the Proposed Rule, drafted to implement this broad public policy in respect to television broadcast antennas and multichannel multipoint distribution services, unless clarified, will pose great problems for community associations and their residents.

Community associations will face great difficulties in implementing this rule due to the nature of the legal basis for the associations' existence and the different types of property in community associations. The Proposed Rule overlooks these differences. In the vast majority of condominiums and cooperatives, all of the structures upon which a unit owner or resident would be installing telecommunications reception equipment would be on areas commonly owned by all unit owners or by the association. No person may be constitutionally granted the right to use the property of another person without their consent. Thus, neither the Telecommunications Act not the Proposed Rule could intend to allow an owner or resident to install television or MMDS equipment on common property, which such person does not own. Neither the Act nor the Proposed Rule could intend such a fundamental change in property relationships.

Planned communities will have a lesser problem with installations on common property, since there usually is individual property upon which to install telecommunications

equipment. However, planned communities would like to ensure that if an individual owner is able to place equipment in an area that does not violate the architectural restrictions without losing access to television and MMDS services, then the association should be able to require the unit owner to comply with the architectural restriction. The intent of the Proposed Rule is then carried out, as the owner has access to telecommunications services, while the association retains the ability to enforce its controls.

The Proposed Rule as currently drafted does not contain any height or size limitation for television and MMDS antennas. This omission will cause substantial hardship to community associations since these large antennas and towers pose a great threat to the structural integrity of both common and individually-owned property. There must be some limitation on the size and height of such equipment in the final Rule.

CAI, ARDA, and NAHC have suggested additional language to the Proposed Rule that would allow associations to make television broadcast antennas and MMDS available to all of their residents, by whatever means possible. If an association does make these services available, and all members may select their own service provider, the association should then be permitted to enforce its restrictions against any individual unit owner or resident who violates these architectural and other restrictions. The purpose of the Rule would be achieved, since the community association would ensure access to all residents, while still retaining the right to preserve the safety, property values, and character of the community association.

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I. INTRODUCTION

Pursuant to the Notice of Proposed Rulemaking released April 4, 1996, in the above-captioned proceeding, the Community Associations Institute ("CAI"), joined by the American Resort Development Association ("ARDA") and the National Association of Housing Cooperatives ("NAHC"), submits the following Comments in response to Subsection (c) of the Proposed Rule. CAI, ARDA, and NAHC understand and support the broad public policy aimed at eliminating impediments to equal access to television broadcast and multichannel multipoint distribution systems ("MMDS") services. The industries served by these three organizations have serious concerns about how community associations may implement Subsection (c) of the Proposed Rule, however. Those concerns are summarized below.

These Comments are divided into the following sections: 1) an introduction to the three organizations filing the Comments; 2) a description of the legal framework of community associations; 3) a discussion of a proposed interpretation of Subsection (c) of the

Proposed Rule; 4) a discussion of the impact of Subsection (c) of the Proposed Rule on community associations comprised mostly of common property, on community associations comprised mostly of individual property, and on all community associations; and 5) a discussion of proposed solutions to the problems raised in these Comments..

A. The Community Associations Institute

The Community Associations Institute is a national, nonprofit 501(c)(6) association created to educate and represent America's residential community association industry. CAI is a multi-disciplinary alliance leading the industry and fostering effective community associations. CAI's members include condominium and homeowner associations, cooperatives, and association-governed planned communities of all sizes and architectural types; community association managers and management firms; individual homeowners; lawyers, accountants, engineers, builders/developers and other providers of professional services and products for community associations. CAI has nearly 15,000 members in 57 chapters throughout the United States and in several foreign countries.

CAI is the national voice of community associations and their members on issues of common concern. Since its inception in 1973, CAI has consistently represented those interests before state and federal legislatures and courts and has been the leader in accumulating and disseminating the body of knowledge which affects community association

management, law, and operations. One of CAI's goals is to improve the operation and quality of life of community associations for the benefit of those who reside in them.

According to estimates, approximately 32 million Americans live in dwellings governed by a community association. Other estimates show that in 1993 there were approximately 12 million homes located within over 150,000 community associations across the country. Clifford J. Treese, CPCU, ARM, ed. Community Association FactBook, inside cover (1993). Development of, and homeownership in, community associations continues to escalate.

B. The American Resort Development Association

The American Resort Development Association is the only international trade organization exclusively representing the resort and recreational development industry. Established in 1969, ARDA's members include privately-held companies and major corporations in the United States and overseas. ARDA is considered to be the definitive resource for information about the resort industry.

ARDA's diverse membership includes companies with interests in timeshare resorts, vacation clubs, fractional or interval ownership, private membership camp resorts, land development, lot sales, second homes, hotels, and resort communities.

ARDA is actively committed to consumer affairs and has initiated a comprehensive consumer awareness public relations campaign. In addition, ARDA has launched a rigorous professional development program, the ARDA Education Institute, to promote the highest

possible standards in marketing, sales, and customer service. ARDA actively promotes compliance with an industry Code of Standards and Ethics.

C. The National Association of Housing Cooperatives

The National Association of Housing Cooperatives, organized in 1950, is a nonprofit national federation of housing cooperatives, professionals. organizations, and individuals promoting the interests of cooperative housing communities.

II. LEGAL FRAMEWORK FOR COMMUNITY ASSOCIATIONS

A. What is a Community Association?

"Community association" is a broad term: many different types of legal entities are classified as community associations. Generally, a community association is an aggregation of property owners who: (a) own their individual residences or the right to live in individual residences; and (b) have either an interest in property owned in common or membership in a corporation or association which owns common property The association manages this common property on behalf of the individual owners for the common good of the community. To maintain the common property, each owner pays assessments to the association. There are three major types of community associations: condominium, cooperative, and planned community. Each type of community association grants different legal rights to and imposes

different legal responsibilities upon individual owners and residents. Treese, Community Association FactBook, 1.

State law controls the creation, operation, management, and dissolution of community associations. Cooperatives and planned communities may be created and managed pursuant to common law principles, but in many states there are state laws regulating these developments. Condominiums must be created pursuant to a state enabling act. Treese, Community Associations FactBook, 5. All fifty states and the District of Columbia have passed some type of statute regulating condominiums, usually called the Condominium Act or Horizontal Property Act. Many states have also passed similar legislation regarding planned communities and cooperatives.

There are three different types of property in community associations: common property (called "common elements" in condominiums and "common areas" in planned communities), limited common elements or areas, and individually-owned property (called "units" in condominiums, "apartments" in cooperatives, and "lots" in planned communities). In condominiums, each unit owner has an undivided tenancy-in-common ownership interest in the common elements. Unif. Condominium Act, Section 1-103(7) (1990).[1] In cooperatives

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[1] The Uniform Condominium Act (UCA) was drafted by the National Conference of Commissioners on Uniform State Laws. There are two versions of the UCA, one adopted in 1977 and one amended in 1980. The UCA 1977 version has been adopted by three states and the District of Columbia. The 1980 version has been adopted by nine states. Two other states have passed parts of the UCA. Citations are from the Official 1990 Text of Uniform Real Property Acts.

There are three major Uniform Laws and one Model Act relating to community associations drafted by the National Conference of Commissioners on Uniform State Laws. The Uniform Condominium Act is the oldest of the three, originally drafted in 1977 and revised in 1980. The Uniform Planned Community Act was drafted in 1980, and the Model

and planned communities, the common property is owned by an association, usually incorporated. Unif. Common Interest Ownership Act Sections 1-103(4), (10).[2] Common property is described in the declaration. Unfinished parts of walls, floors, and ceilings described in the declaration as boundaries of a unit (e.g., the material underneath floorboards, plaster, paint, wallpaper, wallboard) are common property. Unif. Condominium Act, Section 2-102(1). Any fixture (e.g., flue, duct, wire, bearing element, conduit) that is used by more than one unit is common property. Unif. Condominium Act, Section 2-102(2).

In addition, some community associations have "limited common property" owned either by all members of the association in common or the association itself, but where exclusive access to or use of the limited common property is limited to only a few individual unit owners. Unif. Condominium Act, Section 1-103(16). Limited common property may include fixtures such as wires, conduits, chutes, flues, or bearing walls used by only one unit or owner, or fixtures such as shutters, awning, exterior doors, porches, patios, or balconies located outside the boundary of the unit and designed for use only by that particular unit. Unif. Condominium Act, Sections 2-102(2), (4). Some community associations have a great deal of common property while others have no property held in common. These distinctions

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Real Estate Cooperative Act was drafted at about the same time. The Uniform Common Interest Ownership Act was drafted in 1982 to consolidate the three previous Acts into one comprehensive statutory scheme. All four Acts have sections which contain similar language. When the language between the four Acts is similar, citations are to the Uniform Condominium Act, the oldest and most widely adopted of the three Acts.

2. The Uniform Common Interest Ownership Act (UCIOA) has been adopted in seven states. Legislation adopting the UCIOA is pending in at least four other states. Citations are from the Official 1990 Text of Uniform Real Property Acts.

are crucial to understanding the effect of the FCC's Subsection (c) of the Proposed Rule on each community association.

The association is established to manage the common property for the benefit of all owners. The association is comprised of all owners in the development; membership is mandatory. The owners elect a board of directors to govern the association. Treese, Community Association FactBook, 21. To manage the common property, the association has the ability to levy and collect assessments, which must be paid by all owners. Treese, Community Association FactBook, 1. The association also has the authority to adopt and amend bylaws and rules and regulations to carry out the association's management functions. Unif. Condominium Act Section 3-103(a). The legal documents which create the community association specify the property rights that the association and the owners have in regard to the three types of property described above.

B. Purposes for Restrictions in the Governing Documents of a Community Association

The FCC "tentatively concludes" that private restrictions are entitled to less deference than local and state government restrictions. Notice of Proposed Rulemaking, Section 62. No reason for this distinction is provided in the Notice, but reference is made to the Further Notice of Proposed Rulemaking, IB Docket No. 95-59, which states that nongovernmental restrictions are drafted for "aesthetic considerations." Further Notice of Proposed Rulemaking, Section 62. This conclusion is incorrect. The purposes for which covenants

("CC&Rs"), bylaws and rules and regulations are adopted are manifold. Restrictions included in CC&Rs control the nature, use, and occupancy of property in a development and determine the character of the community. These restrictions ensure that the purposes for which the development was planned and constructed are not eroded over time. Rules and regulations are adopted by the association board to facilitate the management, operation, use, repair, modification, and improvement of common property. Unif. Condominium Act Section 3-102(a)(6), (7). Many of the rules adopted pertain to maintaining the structural integrity of the common property, therefore ensuring the safety of all owners. If the common area structural integrity is not protected, then damage to common and individual property and personal injury will occur.

Failure to adopt rules and restrictions that will protect the property value or structural integrity of the common property of the association may lead to the liability of the association to its members for failure to act with due diligence and of the directors for breach of their fiduciary obligation.

Restrictions on the use of common (and sometimes individual) property, contained in association documents, often have several purposes: to maintain the value of both the common and individual property, to regulate the wear and tear on the common property, and to prevent damage to the common property, the dwelling units associated with it, and the people using it. The association must have control over the common property to perform maintenance and make improvements.

Architectural restrictions ensure that construction and land use will be consistent with the original development plan. Wayne S. Hyatt & Joanne P. Stubblefield, The Identity Crisis

of Community Associations: In Search of the Appropriate Analogy, Real Property Probate and Trust Journal, 611 (1993). Growth and development of the community can then occur according to an organized, systematic plan. These restrictions also ensure that the property of individual owners will not decrease in value. Byron R. Hanke, Architectural Control Design Review, 2 (1994).

III. ANALYSIS OF SUBSECTION (c) OF THE PROPOSED RULE

Section 207 of the Telecommunications Act of 1996 states that:

> "Within 180 days after the date of enactment of this Act, the Commission shall, pursuant to section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming service through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast television and MMDS services."

This section appears to further the purposes of the Telecommunications Act: to promote equal access to telecommunications services.

In response to Section 207, the FCC has drafted Subsection (c) of the Proposed Rule in regard to television broadcast antennas and MMDS service which states that

> "No restrictive covenant, encumbrance, homeowners' association rule, or other nongovernmental restriction shall be enforceable to the extent that it impairs a viewer's ability to receive video programming signals from over-the-air television broadcast or multichannel multipoint distribution service."

This rule would seemingly preempt any contrary restrictions contained in any association document, no matter what purpose the restrictions served, in order to provide access to telecommunications services. CAI, ARDA, and NAHC recognize that this goal is important,

and part of a broad public policy. CAI, ARDA, and NAHC read the phrase "to the extent that" to mean that if one part of a restriction is preempted by Subsection (c) of the Proposed Rule, the other sections of the restriction remain in effect The inclusion of the phrase "to the extent that" tracks the language discussing Section 207 found in House Report 104-204, which states:

> "Existing regulations, including but not limited to, zoning laws, ordinances, restrictive covenants or homeowners' association rules shall be unenforceable <u>to the extent</u> contrary to this section."

H.R. Rep. No. 104-204, 104th Cong., 1st Sess. at 124 (1996). Congress clearly intended the preemption of community association restrictions to be limited so that only those sections of restrictions that "impair" signal access should be preempted. The FCC should retain this language in its final Rule, as it clearly reflects the intent of Congress.

In Subsection (c) of the Proposed Rule, the word "impair" is not defined. Since there is no clear definition in the regulation, its interpretation will be very difficult and contentious. In the House Report discussing Section 207, the House stated:

> "The Committee intends this section to preempt enforcement of . . . restrictive covenants or encumbrances that <u>prevent</u> the use of antennae designed for off-the-air reception of television broadcast signals or satellite receivers designed for receipt of DBS services."

H.R. Rep. No. 104-204, at 123-24 (emphasis added). Congress intended "impair" to mean "prevent" access to signal service. Therefore, in order to comply with Congress' intent, the FCC must define "impair" in a narrow manner. To the extent that the FCC interprets the Act to require a broader interpretation, CAI, ARDA, and NAHC suggest the following interpretation of the word "impair": a private restriction "impairs" access to television broadcast and multichannel multipoint distribution service if it: (1) precludes installation of

television broadcasting or MMDS devices and/or cabling through reasonable means or (2) materially increases the cost of installation of such equipment. This definition is broader than Congress' narrow definition of the word "impair," but at least it provides an objective standard for determining impairment or prevention of signal access.

In Subsection (c) of the Proposed Rule concerning television broadcasting and MMDS equipment, restrictions on any equipment, regardless of size or height, are preempted. While CAI, ARDA, and NAHC realize that the size and height of installations will vary depending on the distance of the association from the source of the signals, some type of association regulation of larger installations will be necessary, as explained fully in Section IV (C).

IV. IMPLEMENTATION OF SUBSECTION (c) OF THE PROPOSED RULE

Even though CAI, ARDA, and NAHC understand and support the broad public policy rationale behind Section 207 and Subsection (c) of the Proposed Rule, community associations will have different types of problems in implementing this rule. These differences are due to the different types of community associations and the different types of common property ownership in such community associations. Common property is not owned solely by an individual owner or resident. Since many community associations have a great deal of common property, individual owners may not be able to install television broadcast and MMDS equipment unless the community association makes common property available for that purpose.

A. The Impact of Subsection (c) of the Proposed Rule on Community Associations Mostly Comprised of Common Property

1. Difference Between Common and Individual Property

The association and the individual owner or resident has different property rights and responsibilities in relation to the different types of property in a community association. The association is established to manage the common property. (In cooperatives and planned communities, the association itself owns the common property.) The association is the entity legally responsible for the maintenance, repair, and replacement of the common elements. Unif. Condominium Act, Section 3-107(a). If the association fails to maintain the common property, then it may be liable for any damages suffered as a result of such neglect. Association board members may also be liable for failure to maintain the common property. Hyatt & Stubblefield, 616.

In condominiums, mere possession of an undivided interest in the common property does not entitle a unit owner unilateral control over common property. Generally, a unit owner may not change any of the common elements unless the owner obtains permission from the association. Unif. Condominium Act Section 2-111. The individual owner is so limited because he does not own an individual interest in the common property; he shares his ownership with all other unit owners and has ceded control of the common elements to the

condominium association. The common area must be used to promote the common good of all unit owners, not merely the individual interests of one or a few unit owners.

In cooperatives and planned communities, the community association, not the owner or resident, owns the common property. The individual owner has no legal right to make unilateral alterations to the common property, including the installation of television and MMDS equipment.

2. Individual Owners or Residents May Not Install Television and MMDS Equipment on Common Property Without Consent

Subsection (c) of the Proposed Rule does not address the distinction between individually-owned property and the various types of common property found in community associations. For the following reasons, CAI, ARDA and NAHC conclude that Subsection (c) of the Proposed Rule addresses the installation of television and MMDS equipment on individually-owned property. It is a fundamental tenet of property law that one person may not enter onto another person's property and alter the condition of that property without consent. The Telecommunications Act of 1996 did not require the FCC to alter basic property law by precluding enforcement of restrictions on installation of individual television and MMDS equipment on common property; Section 207 only authorizes preemption of "restrictions," not fundamental property law relationships. The Proposed Rule tracks this intent by preempting "restrictive covenant[s], encumbrance[s], homeowners' association rule[s], or other nongovernmental restriction[s]". Therefore, neither the Act nor the Proposed

Rule authorize a change in these fundamental property law principles. To hold otherwise would exceed the statutory mandate of Congress and raise significant constitutional issues, particularly in regard to "taking" issues and impairment of contracts.

A federal rule requiring involuntary installation of individuals' telecommunications equipment on private property owned by others has already been declared an unconstitutional taking of private property. See, Loretto v. TelePrompTer Manhattan, 458 U.S. 419 (1982). State courts have also held that cable operators may not enter private property to install their equipment, because any statutorily-mandated entry would be an unconstitutional taking of private property. See also Waltham Tele-Communications v. O'Brien, 403 Mass. 747 532 N.E2d 656 (1989); Greater Worcester Cablevision, Inc. v. Carabetta Eneterprises, Inc., 682 F.Supp. 1244 (D.Mass. 1985).

The Uniform Condominium Act requires the consent of the association for any individual owner to make changes to common property. Unif. Condominium Act Section 2-111. The governing documents for many community associations require the consent of all or a majority of the unit owners to an individual's use of common property for individual purposes. Carney v. Dolney, 261 Ill. App. 3d 1002, at 1010, 633 N.E. 2d 1015, 199 Ill. Dec. 219 (1994), *reh'g denied*. Therefore, in passing the Telecommunications Act, Congress could not have intended to abrogate the property rights of the other owners in the common property without compensation, in violation of the United States Constitution. U.S. Constitution, Amendment V.

3. If the FCC Mandates Individual Owner or Resident Installation on Common Property, the Community Association will be Beset by Numerous Problems

CAI, ARDA, and NAHC interpret both the Telecommunications Act and Subsection (c) of the Proposed Rule to leave unchanged an association's right to prohibit individuals from installing telecommunications equipment on common property which the individual does not solely own. Subsection (c) of the Proposed Rule affects only the community association's ability to restrict installation on individually-owned property. However, if the FCC does not allow a community association to restrict the installation of such equipment on common property, then (in addition to the constitutional issues) the following practical problems have been suggested by CAI's members.

If the FCC were to void restrictions on installation of television and MMDS equipment on common property, installation of such equipment by an individual owner or resident on common property has great potential to cause numerous structural problems. For example, service providers or individual owners installing equipment on the roof would subject the roof to abnormal damage, since roofs are constructed of materials that are easily damaged. To attach the television antennas or MMDS equipment and the necessary coaxial cable to the individual owner's television, holes would have to be drilled, in order to mount the antenna and/or tower and to route the cable, either through the roof or through the exterior walls. To stabilize the antenna and/or tower, guy wires must be attached to the antenna and/or tower and then attached to the roof. Additional holes would need to be drilled into the roof to affix these wires to the roof. Such holes are sealed by soft, synthetic

material, which tends to degrade and shrink more quickly than concrete or roofing material. This degradation and shrinkage would compromise the structural integrity of the building, weakening the roof and the exterior walls. Water damage is more probable as a result of such drilling. As the number of holes increases, the number of entries for insects such as termites also increases. Considering the large number of installations that might be necessary on the roof of a high-rise building, the potential for damage escalates.

Roofing contractors will not provide additional warranties for such television and MMDS service providers' movements and drilling operations. See, Letter of Jim Fox, Peterson Roofing. In fact, such movement and drilling will void roofing warranties for the entire structure. See, Limited Warranty of Premier Roofing. Improper installation may lead to more damage, as larger holes are drilled and not properly sealed. Therefore, associations will lose their roof warranties, and would be responsible for paying the costs of roof repair and property damage suffered by other owners or residents caused by any improper installation of such equipment, even though they have no control over the means or method of installation nor the choice of the contractor performing the installation. A community association would then have to determine which owners' equipment caused the damage, and seek monetary compensation from these owners.[3]

Maintenance of the common elements will be made substantially more difficult due to the installation of television and MMDS equipment. Reroofing and repairing the exterior of buildings upon which equipment is attached will be more difficult. The association will have

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[3] These property damages may often be quite expensive, running into several thousands of dollars.

to increase its assessments in order to cover these expenses, which will lead to conflicts with those owners not installing any television or MMDS equipment. Many associations are limited in their authority to increase assessments, creating a potentially devastating financial situation.

Installation of television and MMDS equipment on common areas would also lead to conflicts between owners or residents. If there is insufficient space to set up equipment for all owners, then some owners will be unable to install equipment. In other situations, one owner's optimal space for installation may block access of another owner to television and MMDS services. Similarly, one owner's optimal space may be on another owner's limited common element (for example, a patio or balcony), to which the first owner's legally guaranteed use would be violated. Trees and other improvements installed by the association or surrounding municipalities may interfere with access to signals, since line-of-sight signal reception is required for MMDS signals. An individual owner clearly cannot be permitted to destroy association or other landscaping or improvements which interfere with signal access simply to create a clear signal path.

Coaxial cables connecting the antennas to the owner's television equipment may have to pass through other owners' units, particularly units on the upper floors of a building, subjecting them to contractors entering their homes to drill the necessary holes. In addition, the multiplicity of service providers installing equipment will cause confusion, especially if several providers' equipment is located in the same common area. This could lead to difficulty in establishing liability for damage to the common property caused by the installation or negligence of one or more providers of such equipment. In addition, some

units in a building may not be able to receive optimal services, due to their location in the building.

In summary, the problems associated with allowing individual owners or residents to install television and MMDS equipment on common property are manifold. The installation of this equipment will increase the possibility of damage to the structural integrity of the building. Installation and maintenance will increase association costs. Damage caused by such equipment will lead to increased litigation against associations, even if the association ultimately may seek contribution from the individual owner. Liability issues will also arise when it is unclear as to which telecommunications provider caused which damage.

In many community associations, the common property is used to provide recreational and other facilities to all owners and residents. These facilities include decks, pools, clubhouses, playgrounds, golf courses and picnic areas. The use and enjoyment of these common areas could be destroyed if an individual owner could not be restricted from installing television and MMDS equipment in the middle of the playground, deck or golf course because that particular owner perceives it as the best location for service.

It is the position of CAI, ARDA, and NAHC that television and MMDS equipment should <u>not</u> be installed on common property by individual owners or residents; and that neither the Telecommunications Act nor Subsection (c) of the Proposed Rule as written precludes a community association from enforcing restrictions on an individual owner's or resident's installation of a television and MMDS equipment on common property. However, if the FCC interprets Subsection (c) of the Proposed Rule to permit individual owners to install television and MMDS equipment on common property, unfettered by association

restrictions, then the community association must retain control of the common property to coordinate installation and maintenance if it is to solve the problems, previously noted, that will surely occur.

B. Impact of Subsection (c) of the Proposed Rule on Community Associations Comprised Mainly of Individual Property

In community associations in which most property is individually owned, implementation of the FCC Subsection (c) of the Proposed Rule will be less cumbersome and less problematic. However, another problem for these community associations is the interpretation of architectural restrictions which are in place to maintain property values.

If there is a reasonable way in which such television and MMDS equipment may be installed in compliance with existing architectural controls, owners can be required to comply with the regulation without violating the intent of Section 207. The association should preserve the right to enforce reasonable installation rules so long as enforcement does not impair access to service. For example, if an owner can receive service by placing the television and MMDS equipment in either the front or the back yard, then a rule that restricts such equipment to the back yard of a lot should be enforceable. If an owner chooses to install television and MMDS equipment in violation of a community association restriction, the burden should be on that owner to demonstrate that the equipment cannot be installed in compliance with the restriction. Continued enforceability of these restrictions will both provide equal access to television and MMDS services and permit a community association to