Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Implementation of Section 207 of the Telecommunications Act of 1996	)	CS Docket No. 96-83
	)	
	)	
Restriction on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service	)	DOCKET FILE COPY ORIGINAL

COMMENTS

THE WIRELESS CABLE ASSOCIATION
INTERNATIONAL, INC.

Paul J. Sinderbrand

Wilkinson, Barker, Knauer & Quinn
1735 New York Avenue, N.W.
Sixth Floor
Washington, D.C. 20006
(202) 783-4141

Its Attorneys

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EXECUTIVE SUMMARY

While WCA believes that the rules proposed in the *NPRM* represent a valuable first step towards effectuating Section 207 of the Telecommunications Act of 1996, it is essential that the Commission make the revisions set forth in Appendix A hereto. Specifically, WCA believes that the following revisions to the rules and policies proposed in the *NPRM* are necessary to fulfill the mandate of Section 207:

- The Commission should adopt an absolute preemption of local restrictions impairing wireless cable antennas, subject only to waiver in exceptional circumstances, instead of the system of rebuttable presumptions adopted for DBS and proposed in the *NPRM*. Such a rule will enable the Commission to heed Congress' directive that the Commission *prohibit* restrictions that impair a viewer's ability to receive wireless cable signals. At the same time, waivers will still allow case-by-case variances as warranted by unusual circumstances.

- If the Commission retains its rebuttable presumption approach, the Commission should amend its proposed rule to make certain that no restriction has the practical effect of substantially burdening a potential wireless cable subscriber that desires to receive service. Otherwise, localities can be expected to impose restrictions designed to protect franchise fee-paying cable systems from wireless competition under the guise of promoting legitimate local interests.

- If the Commission retains its rebuttable presumption approach, only the Commission should have authority to determine whether the presumption of unenforceability has been overcome. Such an approach is necessary to avoid inconsistent local court rulings and provide wireless cable system operators and consumers with the requisite level of certainty regarding wireless cable reception antenna installations.

- The Commission should clarify that waivers will be granted only if the regulation in issue is essential for preserving or protecting a highly specialized or unique feature of a particular location and only if the scope of the regulation is no broader than necessary to preserve or protect the highly specialized or unique feature. This clarification will prevent a torrent of waiver applications to the Commission and, correspondingly, will avoid burdening the Commission, wireless cable system operators and consumers with addressing spurious waiver applications.

- The Commission should clarify that local governments may not regulate *receive-only* antennas for health reasons. As the Commission has already recognized in the *DBS Order and FNPRM*, receive-only antennas do not emit RF radiation and thus do not pose a health risk. With respect to *transmitting* antennas (and wireless cable subscribers will soon be equipped with antennas capable of transmitting return signals), the Commission should make it clear that only legitimate RF regulation -- not *de facto* bans masquerading as RF regulation -- will be permitted.

- The Commission should clarify that no liability may be assessed or adverse action taken, such as the issuance of an order requiring the disassembly of a wireless cable antenna, against any person for installing a wireless cable reception antenna prior to a final determination as to the validity of the restriction in issue.

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COMMENTS

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, hereby submits its initial comments in response to the *Notice of Proposed Rulemaking* ("*NPRM*") released by the Commission on April 4, 1996 in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

With this proceeding, the Commission is proposing to adopt rules implementing Section 207 of the Telecommunications Act of 1996 (the "1996 Act"), which directs that the Commission shall "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite service."[1] As the Commission is well aware, wireless cable systems are the predominant users of the Multipoint Distribution Service ("MDS") in the United

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[1] Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 (1996).

States today.[2] Thus, WCA, the principal trade association of the wireless cable industry, has a vital interest in this matter.[3]

WCA commends the Congress on the important step Section 207 represents towards promoting competition in the multichannel video distribution marketplace. Section 207 reflects Congress' recognition that consumers denied access to wireless alternatives to cable because of restrictions on reception antennas are effectively denied the benefits of competition.

Congress' preemption mandate came in response to well-documented problems facing wireless cable subscribers. For the better part of a decade WCA has been urging Congress and the Commission to issue a preemption order along the lines now mandated by Section 207.[4] It has been uncontroverted: (a) that local authorities have a strong financial incentive to protect franchise-fee paying coaxial cable systems from wireless alternatives that are not

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[2] *See, e.g. Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 5 FCC Rcd 6410 (1990).

[3] WCA's members include wireless cable system operators, manufacturers of wireless cable equipment (including reception antennas), and licensees in the MDS and the Instructional Television Fixed Service ("ITFS").

[4] *See, e.g.* Comments of WCA, MM Docket No. 89-600, 93-103 (filed March 1, 1990); Comments of WCA, CS Docket No. 94-48, at 26 (filed June 29, 1994)("cable operators have begun to pre-wire residential units for cable service at no charge to the developer in exchange for deed covenants and other restrictions forever barring the homeowner from installing rooftop antennas."); Comments of WCA, CS Docket No. 95-61, at 27 (filed June 30, 1995); Comments of WCA in Response to Notice of Proposed Rulemaking, IB Docket No. 95-59, at 3 (filed July 24, 1995)("[WCA's] members have long encountered roadblocks erected by local authorities to the installation of wireless cable reception antennas.").

subject to local franchise requirements; and (b) that restrictive covenants and other private limits on the erection of television broadcast and wireless cable reception antennas in housing developments are often the by-product of franchised cable operator intervention with the developer.

Given this record, it is not surprising that more than five years ago the Commission specifically reported to Congress that "[a] regulatory impediment to [wireless cable] is local land use regulation, which in many localities has appeared to discriminate against wireless cable reception antennas" and recommended that Congress preempt excessive local restrictions on wireless cable antennas.[5] And, just months ago, the Commission acknowledged WCA's concern that "cable operators have begun to pre-wire residential units for cable service at no charge to the developer in exchange for deed covenants and other restrictions forever barring the homeowner from installing rooftop antennas".[6]

Because of the recognized widespread problems that existing and potential subscribers to wireless cable have continued to face, Section 207 is an essential component of Congress' efforts to promote the important federal interest in ensuring that consumers "have wide access

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[5] *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962, 5015-16, 5037 (1990)[hereinafter cited as "*1990 Report to Congress*"].

[6] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 11 FCC Rcd 2060, 2113 (1995).

to all available technologies and information services."[7] Passage of Section 207, coupled with appropriate implementing regulations, will further the Commission's established goal "to facilitate the development and rapid deployment of wireless cable services" as a means of promoting viable competition to existing video delivery systems.[8]

The Commission's *NPRM* focuses on implementation of the Congressional directives contained in Section 207 of the 1996 Act with respect to wireless cable and broadcast television services in particular.[9] WCA heartily endorses the Commission's goals in this proceeding -- "(a) to ensure that consumers have access to a broad range of video programming services; and (b) to foster full and fair competition among different types of video programming services."[10] Thus, WCA agrees with the Commission's decision to craft

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[7] *Preemption of Local Zoning Regulation of Satellite Earth Stations*, IB Docket No. 95-59, FCC 96-78, at ¶ 15 (rel. Mar. 11, 1996)[hereinafter cited as "*DBS Order and FNPRM*"].

[8] *Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service*, MM Docket No. 94-131 at ¶ 1 (rel. June 30, 1995). *See also Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service*, 9 FCC Rcd 7665, 7666 (1994); *1990 Report to Congress*, 5 FCC Rcd at 5014-16.

[9] *See NPRM*, at ¶ 1.

[10] *Id.* at ¶ 2.

rules for wireless cable and broadcast television that are substantially similar to those being developed in IB Docket No. 95-59 with respect to DBS.[11]

At bottom, however, WCA believes that the specific rules being proposed in this proceeding and in the *Order and Further Notice of Proposed Rulemaking* (the "*DBS Order and FNPRM*") in IB Docket No. 95-59 fail to meet the Congressional objective underlying Section 207. WCA agrees with those in the DBS industry that have petitioned the Commission to revisit the rules adopted and proposed in the *DBS Order and FNPRM*[12] — further changes in the Commission's approach to local restrictions on wireless video reception antennas are necessary in order to promote the federal interest in providing consumers access to wireless video programming. While WCA believes that the rules proposed in the *NPRM* represent a valuable first step towards effectuating Section 207, it is

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[11] *See id.* at ¶ 4. In his Separate Statement to the *NPRM*, Commissioner Quello has inquired as to whether wireless cable reception antennas should be treated differently than DBS antennas because DBS antennas "perhaps have been subject to more aggressive preclusion than other types of reception antennas." While it may be true that the larger C-Band satellite antennas have been subject to more aggressive local enforcement action, there is no evidence that wireless cable antennas are given more favorable treatment than DBS by local authorities. Indeed, WCA is aware of situations in which DBS antennas are given favorable treatment by local authorities as compared with wireless cable antennas.

[12] *See, e.g.* Petition of DirectTv, Inc. for Reconsideration and Clarification and Comments to Further Notice of Proposed Rulemaking, IB Docket No. 95-59 (filed April 15, 1996); Further Comments and Petition for Clarification of Satellite Broadcasting and Communications Ass'n of America, IB Docket No. 95-59 (filed April 15, 1996); Petition of United States Satellite Broadcasting Company, Inc. for Reconsideration/Clarification and Further Comments, IB Docket No. 95-59 (filed April 15, 1996); Petition for Clarification and Comments of AlphaStar Television Network, Inc., IB Docket No. 95-59 (filed April 15, 1996); Petition of Hughes Network Systems, Inc. for Reconsideration and Clarification, IB Docket No. 95-59 (filed April 15, 1996).

essential that the Commission make the revisions set forth in Appendix A hereto and discussed below. Specifically, WCA believes that the following revisions to the rules and policies proposed in the *NPRM* must be made to fulfill the mandate of Section 207:

- The Commission should adopt an absolute preemption of local restrictions impairing wireless cable antennas, subject only to waiver in exceptional circumstances, instead of the system of rebuttable presumptions adopted for DBS and proposed in the *NPRM*.[13] Such a rule will enable the Commission to heed the directive in Section 207 of the 1996 Act that the Commission *prohibit* restrictions that impair a viewer's ability to receive wireless cable signals. At the same time, waivers will still allow case-by-case variances as warranted by unusual circumstances.[14]

- If the Commission retains its proposed rebuttable presumption approach, the Commission should amend its proposed rule to make certain that no restriction has the practical effect of substantially burdening a potential wireless cable subscriber that desires to receive service. Otherwise, localities can be expected to impose restrictions designed to protect local franchise-fee paying cable systems from wireless competition under the guise of promoting legitimate local interests.

- If the Commission retains its rebuttable presumption approach, the Commission should provide that only the Commission has authority to determine whether the presumption of unenforceability has been overcome. Such an approach is necessary to avoid inconsistent local court rulings and provide wireless cable system operators and consumers with the requisite level of certainty regarding wireless cable reception antenna installations.

- The Commission should clarify that waivers will be granted only if the regulation is essential for preserving or protecting a highly specialized or unique feature of a particular location and only if the scope of the regulation is no broader than necessary to preserve or protect the highly specialized or unique feature. This clarification will

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[13] *See NPRM*, at ¶ 8.

[14] WCA applauds the Commission for acting upon the unequivocal Congressional intent that its Section 207 preemption rule encompass private, nongovernmental restrictions of wireless cable reception antennas. Prompt action is mandated by the 1996 Act and is essential if homeowners who are subject to restrictive covenants are to be afforded access to competitive video services.

prevent a flood of waiver applications to the Commission and, correspondingly, will eliminate any necessity for wireless cable system operators and consumers to oppose spurious waiver applications.

- The Commission should clarify that local governments may not regulate *receive-only* antennas for health reasons. As the Commission has already recognized in the *DBS Order and FNPRM*, receive-only antennas do not emit RF radiation and thus do not raise legitimate health concerns. With respect to *transmitting* antennas (and wireless cable subscribers will soon be equipped with antennas capable of transmitting return signals), the Commission should make it clear that only legitimate RF regulation -- not bans masquerading as RF regulation -- will be permitted.

- The Commission should clarify that no liability may be assessed or adverse action taken, such as the issuance of an order requiring the disassembly of a wireless cable antenna, against any person for installing a wireless cable reception antenna prior to a final Commission decision as to the validity of the restriction in issue.

II. Discussion

A. The FCC Should Adopt An Absolute Preemption Of Local Restrictions Impairing Wireless Cable Reception Antennas, Subject Only To Waiver.

Without doubt, the greatest flaw in the *NPRM* is the Commission's proposal to permit state or local governments an opportunity to rebut the presumption that state or local zoning, land-use, building and similar regulations that impair the installation, maintenance or use of wireless cable reception antennas are unenforceable. Simply put, the enhanced parity between wireless alternatives and cable television which Congress sought to achieve through Section 207 can be realized only through an irrebuttable presumption that local regulations impairing wireless cable, television broadcast and DBS antennas are unenforceable.

With Section 207 and its legislative history, Congress has spoke with crystalline clarity -- an absolute preemption, subject only to Commission waiver under exceptional

circumstance,[15] is necessary to implement the dictates of the 1996 Act. By its very terms, Section 207 mandates that the Commission adopt rules that "*prohibit*" restrictions that impair a consumer's ability to receive wireless cable services.[16] A rebuttable presumption, particularly one that would permit local governments to protect the franchise fee-paying cable operator from wireless competition under the guise of protecting legitimate local interests, is a far cry from the prohibition Congress mandated. Congress was not the least bit equivocal, and the Commission cannot be, either.

The proposed rebuttable presumption rule is, in essence, a deferral to state and local authorities with respect to television broadcast and wireless cable antennas, albeit with some limits. However, the 1996 Act demonstrates that where Congress intended to defer to the discretion of states and local authorities, it did so with specificity. The 1996 Act is replete with instances in which Congress explicitly conferred jurisdiction on or maintained the jurisdiction of local authorities. For example, with respect to the placement, construction and modification of personal wireless services facilities, Congress explicitly preserved the local

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[15]While WCA does not oppose the Commission granting waivers of an otherwise absolute preemption under exceptional circumstances, the Commission should recognize that, because Congress did not specifically vest the Commission with waiver authority, the Commission may not be authorized to waive the absolute preemption mandated by Section 207. *See, e.g. Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 6828, 6843 (1993)(eliminating overbuild exception from cable/MDS cross-ownership rule on the grounds that when Congress codified rule as part of 1992 Cable Act, it did not specifically provide for an overbuild exception).

[16]1996 Act § 207 (emphasis supplied).

zoning authority of state and local governments, subject only to certain federal limitations.[17] Similarly, when Congress conferred exclusive jurisdiction on the Commission with respect to the North American Numbering Plan, it explicitly authorized the Commission to delegate any part of its authority back to state commissions or other entities.[18] Had Congress similarly intended the Commission to defer to local authorities with respect to the regulation of wireless cable and television broadcast, presumably it would have included similar language in Section 207. Such language is, however, conspicuously absent.[19]

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[17] 1996 Act § 704(a) (to be codified at 47 U.S.C. § 332(c)(7)); *see also* 1996 Act § 2541(f) (to be codified at 47 U.S.C. § 254(f)) (with respect to universal service requirements, Congress provided that "[a] State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service."); 1996 Act § 101(a), § 251(d)(3) (to be codified at 47 U.S.C. § 251(d)(3)) (with respect to consistent access and interconnection obligations of local exchange carriers, Congress provided that the "Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission"); 1996 Act § 101(a), § 261(b) (to be codified at 47 U.S.C. § 261(b)) (with respect to the development of competitive markets for common carriers, Congress provided that "[n]othing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing [consistent] regulations after such date of enactment"). In addition, the 1996 Act amended the Public Utilities Holding Company Act of 1935, but explicitly provided that certain state rate authority was not preempted. 1996 Act § 34(j) (to be codified at 15 U.S.C. § 34(j)).

[18] 47 U.S.C. § 251(e)(1).

[19] It is significant that when the Commission recommended that Congress preempt local restrictions on the installation of wireless cable antennas, the Commission suggested that "Congress prohibit local governments from regulating installation of reception equipment beyond those provisions reasonably related to a clearly defined health, safety or reasonable aesthetic objective." *1990 Report to Congress*, 5 FCC Rcd at 5037. In light of this specific recommendation, it cannot be gainsaid that Congress' lack of deference to local concerns was an oversight. Rather, WCA believes that the strong prohibitory language of Section 207 stems from Congress' reasonable conclusion that there are no legitimate reasons for local

Were there any ambiguity in the 1996, the legislative history of Section 207 establishes beyond peradventure that Congress sought to divest local authorities of the ability to prevent the installation of television broadcast, wireless cable and DBS antennas. The Conference Report accompanying the 1996 Act explains that Section 207 is based on the provisions regarding DBS and television antennas contained in H.R. 1555, only expanded to include wireless cable antennas. The House Committee Report, in turn, states that the intent of the provision was:

> to preempt enforcement of State or local statutes and regulations, or State or local legal requirements, or restrictive covenants or encumbrances that prevent the use of antennae designed for off-the-air reception of television broadcast signals or of satellite receivers designed for receipt of DBS services. Existing regulations, including but not limited to, zoning laws, ordinances, restrictive covenants or homeowner's association rules, shall be unenforceable to the extent contrary to this section.[20]

Once again, the legislative intent is unequivocal. It does not speak of rebuttable presumptions; it speaks only of preemption, pure and simple.

Significantly, the legislative history of Section 207 makes clear that Congress did not mandate preemption without carefully balancing traditional state and local interests against the federal interest in promoting competitive sources of video programming. The Commission should note that the same House Report emphatically states that the preemption mandate of Section 207:

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governments or home owner associations to regulate wireless cable antennas that override the strong federal interest in promoting competition.

[20] H.R. Rep. No. 204 at 123-124.

> does not include lower power C-band satellites, which require larger dishes in order for subscribers to receive their signals. Thus, this section does not prevent the enforcement of State or local statutes and regulations, or State or local legal requirements, or restrictive covenants or encumbrances that limit the use and placement of C-band satellite dishes.[21]

One can only conclude from this discussion that Congress carefully considered the legitimate local interests in restricting video reception antennas, and found that no legitimate local interest justified impairing relatively small, lightweight and easily installed DBS, television broadcast and wireless cable reception antennas. The Commission cannot second-guess that Congressional determination.

Even if Congress had not mandated an absolute preemption, the approach WCA proposes would still be the best for the Commission to adopt. Such an approach will provide potential wireless cable subscribers with assurance that they will not have to fight their local authorities for the right to receive wireless cable service.[22] If potential wireless cable subscribers are forced to undertake litigation over a rebuttable presumption, the typical consumer will instead opt for an alternative service -- while WCA believes wireless cable presents a superior service at lower cost than its competitors, most consumers simply lack the stamina and financial wherewithal to engage in a lengthy battle in order to receive wireless cable service when a close substitute is readily available. Rather, the typical consumer will instead simply opt for the service that does not require an antenna -- the locally-franchised

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[21] *Id.* at 124.

[22] Of course, in the unusual situation where the locality obtains a waiver, the locality should be allowed to enforce its rule.

cable service. Such a result would, however, be in direct contravention of the federal interest in ensuring "that consumers have access to a broad range of video programming services", including wireless cable.[23] As the Commission itself has recognized in a similar context, "state or local regulatory control over, or interference with, a federally licensed or authorized interstate communications service, intentionally or incidentally resulting in the suppression of that service in order to advance a service favored by the state, is neither consistent with the Commission's goal of developing a nationwide scheme of telecommunications nor with the Supremacy Clause of the Constitution."[24]

Eliminating the rebuttable presumption and granting waivers only under limited circumstances will also encourage valid regulations and discourage local authorities from commencing unnecessary adjudication proceedings. Local authorities applying for waivers will face higher hurdles than if they were merely seeking to rebut a presumption. The Commission has proposed that waivers only be available "upon a showing by the applicant of local concerns of a *highly specialized or unusual nature*."[25] A presumption, in contrast,

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[23] *NPRM*, at ¶ 2. *See also Orth-O-Vision, Inc.*, 69 F.C.C.2d 657, 668 (1978), *on recon.* 82 F.C.C.2d 178 (1980), *aff'd New York State Commission on Cable Television v. FCC*, 669 F.2d 58 (2d Cir. 1982); *Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223 (1983), *aff'd New York State Commission on Cable Television v. FCC*, 749 F.2d 804 (D.C.Cir. 1984); *Preemption of Local Zoning Regulation of Receive-Only Satellite Earth Stations*, 51 Fed. Reg. 5519, 5522 (Feb. 14, 1986) [hereinafter cited as "*TVRO Preemption Order*"].

[24] *Earth Satellite Communications, Inc.*, 95 F.C.C.2d at 1233.

[25] *NPRM* at Appendix A. As discussed in section II.F below, WCA also proposes a more specific waiver standard.

could be more easily defeated. At a minimum, because of the perception that a rebuttable presumption can be overcome more readily, the availability of a rebuttable presumption standard could actually encourage localities to test their antenna regulations by seeking declarations that the presumption has been rebutted. The practical effect of a waiver-only standard, therefore, will be to avoid a flood of requests for declaratory rulings from the Commission.

Finally, it should be noted that a waiver-only rule will, in many communities, actually empower the enforcement authority of local governments. A tough rule that permits waivers only in exceptional circumstances will enable those local governments that do not wish to restrict antennas to deflect easily the entreaties of locally-franchised cable system operators and inevitable complaints from a few cantankerous homeowners who seek to restrict their neighbors' ability to install wireless reception antennas on impermissible aesthetic grounds.

For all these reasons the Commission should adopt a waiver-only approach for wireless cable reception antennas. To adopt such an approach for these antennas, the Commission should amend paragraph (a)(1) of its proposed rule as follows:[26]

(a)(1) Any state or local zoning, land-use, building, or similar regulation, that ~~affects~~ **impairs** the installation, maintenance, or use of devices designed for over-the-air reception of television broadcast signals or multichannel multipoint distribution service ~~shall be presumed unreasonable and~~ is ~~therefore~~ preempted ~~subject to paragraph (a)(2)~~. No civil, criminal, administrative, or other legal action of any kind shall be taken to enforce any regulation ~~covered~~ **that affects the installation, maintenance, or use of such devices** ~~by this presumption~~ **until** ~~unless~~ the promulgating authority has obtained a waiver from the

[26]Deleted material appears with a line through it. New material appears in bold.

> Commission pursuant to paragraph ~~(c)~~**(b)**, or a final declaration from the Commission ~~or a court of competent jurisdiction that the presumption has been rebutted pursuant to paragraph (b)(2)~~ that such regulation does not impair the installation, maintenance, or use of such devices.

In addition, proposed paragraph (a)(2) should be eliminated because the adoption of a waiver-only approach eliminates the need to include a standard for rebutting the presumption of unenforceability.

B. If The Commission Retains Its Rebuttable Presumption Approach, It Must Make Clear That Restrictions That Have The Effect Of Preventing Consumers From Subscribing To Wireless Cable Service Will Always Be Unenforceable.

Given the relatively small size, light weight and ease of installation of television broadcast, wireless cable and DBS antennas, Congress' decision to ban local restrictions on their installation is understandable. Indeed, as a practical matter it likely is the only way the federal government's strong federal interest in promoting competition can be protected against local efforts at shielding franchise fee-paying cable systems from competition. If, however, the Commission nonetheless retains its rebuttable presumption approach, it must adopt a much more strict standard for judging requests to overcome the presumption of unenforceability.

As set forth in Section II.A above, the intent of Congress behind Section 207 is that local restrictions not impair the ability of potential subscribers to secure wireless cable service. Assuming, for purposes of argument only, that Congress intended to give the Commission authority to permit some local restrictions to pass muster, WCA submits that the proposed rule is far too deferential to local governments. As presently drafted, paragraph

(a)(2) of the Commission's proposed rule would permit a locality to restrict a potential subscriber from receiving wireless cable service, so long as the locality could put forth a justification for its restriction that is cloaked in health and safety concerns. That, clearly, is not what Congress had in mind.

In proposing such deference to local authorities, the *NPRM* ignores the long history of anti-competitive local regulation designed to protect the continued flow of cable franchise fees. MDS in particular, and wireless alternatives to cable in general, have been subjected to a variety of local restrictions that the Commission has specifically found were designed to protect franchised cable from competition.[27] In light of this history, the deference afforded local authorities under the proposed rule threatens the very viability of wireless cable. Consistent with the intent of Congress, the Commission must make clear that only *legitimate* local health and safety concerns will justify local restrictions, and that in no event may local restrictions have the practical effect of substantially burdening any consumer who desires to subscribe to a wireless cable service.[28]

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[27]The Commission has recognized on several occasions that city fathers do seek to protect the franchise fee-paying local coaxial cable operator against alternative technologies that are not locally regulated. *See, e.g. Preemption of Local Zoning Regulation of Receive-Only Satellite Earth Stations*, 50 Fed. Reg. 13,986, 13,989 (April 9, 1985); *Earth Satellite Communications, Inc.*, 95 F.C.C.2d at 1232-33, *Orth-O-Vision*, 69 F.C.C.2d at 668.

[28]For example, WCA does not object to restrictions on the height of wireless cable antennas, so long as those restrictions do not effectively preclude the receipt of wireless cable service. As a matter of economics, wireless cable operators generally do not install reception devices any higher than necessary, and thus would not oppose a local restriction requiring the installation of wireless reception antennas no higher above the roofline than necessary.

As is clear from the *Orth-O-Vision* line of decisions cited above, the Commission has a long-held regulatory interest in the development of microwave technology as a mechanism for the economical distribution of programming available via satellite.[29] In adopting the rules which have made wireless cable service possible, the Commission has confirmed that its goal is to promote the distribution of satellite programming services to the public through a multiplicity of media. As the Commission stated at that time:

> It is clear that substantial demand exists for multichannel premium television service. In uncabled areas (some of which may never be cabled), multichannel MDS is a means for satisfying consumer demand for additional premium television. In areas that are or are about to be cabled, competition from multichannel MDS may spur cable systems to build promised systems faster, improve existing systems, and keep prices low.[30]

The Commission must, however, recognize that in the competitive multichannel video distribution marketplace, unduly burdensome requirements can effectively prevent a wireless cable operator from serving a subscriber. Thus, for example, a requirement that a homeowner conduct extensive surveys or secure a building permit before permitting installation of a wireless cable antenna will effectively drive that potential customer to the "quicker and easier" service -- the franchise fee-paying local cable system. There are less restrictive mechanisms for the local authorities to preserve their legitimate interests. Thus, the Commission should make clear that such burdensome restrictions will not pass muster.

[29] 69 F.C.C.2d at 669.

[30] *Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in Regard to Frequency Allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, 94 F.C.C.2d 1203, 1228 (1983).

In addition, as noted *supra*, the Commission intends that the leasing of excess ITFS capacity to wireless cable systems result in the distribution of improved instructional and educational programming over the ITFS.[31]

These Commission goals will most certainly be frustrated if local officials are permitted to inhibit the establishment of wireless cable reception points. Obviously, such a result would deprive consumers of the very benefits that the Commission has intended in allocating spectrum to make wireless cable possible. Residents of uncabled neighborhoods will be deprived of a low-cost source of multichannel video programming (and the only source capable of providing local broadcast signals), while those who live in cabled areas will not enjoy the benefits that accrue when consumer options are present. As the Commission acknowledged in an analogous setting:

> our competitive regulatory policies . . . have been promulgated to provide for a variety of services by consumers. It would be contrary to those policies to permit discriminatory local regulation which reduces the range of choice.[32]

In addition, onerous restrictions on the installation of wireless cable reception equipment enacted by one locality will inevitably have an adverse impact on the availability of wireless cable services within neighboring communities. A wireless cable operator must be able to spread its transmission head-end costs and other infrastructure costs among a critical mass of subscribers if it is to maintain its rates at competitive levels. If a local

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[31] *Id.* at 1250.

[32] *TVRO Preemption Order, supra*, 51 Fed. Reg. at 5522.

government can, in effect, preclude wireless cable from entering a community through onerous antenna regulations, the ability of an operator to serve neighboring communities will be adversely impacted by the reduced potential subscriber base.

Even where the decision by a local community to utilize its local land use laws to prevent the introduction of wireless cable does not preclude service to neighboring communities, it likely affects the cost and quality of service available in those neighboring communities and elsewhere. As the Commission is well aware, programming networks offer discounts to their normal per-subscriber fees based on the volume of subscribers served. If wireless operators are limited in their ability to freely establish receive sites in some communities, they will necessarily be charged higher fees for programming, and will not be able to pass the benefits of volume discounts on to subscribers. Moreover, the wireless cable industry will find it increasingly difficult to develop additional programming sources. To quote the Commission's finding in *Orth-O-Vision*, "[i]f we were to allow non-federal authorities to limit the number of receive points, the overall development of programming for interstate MDS transmission would very likely be curtailed."[33/]

And, finally, if any locality can limit the number of receive sites for a wireless cable service, it will undermine the Commission's efforts to promote financing for improved ITFS services. Obviously, to the extent wireless cable systems are never built because of undue local regulation, the local ITFS community will be unable to reap the benefits enjoyed by

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[33/] 82 F.C.C.2d at 182.

ITFS licensees operating in more enlightened regions. Moreover, any limit on the potential subscriber base will have an adverse impact on the development of ITFS services. In most excess capacity leases, a significant part of the lease payments to ITFS licensees is based on the number of subscribers who receive programming transmitted over each licensee's channels. If an operator is limited in the number of receive sites it can establish by local regulations, its payments to the local ITFS community will necessarily be reduced.

For these reasons, the Commission must make certain that, if it permits local authorities to overcome the presumption of unenforceability, it does not permit local authorities to impose such substantial burdens on potential wireless cable subscribers that they are driven to other multichannel video programming services favored by the local authorities.[34]

C. If The Proposed Rebuttable Presumption Approach Is Retained, The Commission Should Be The Sole Arbiter Of Whether The Local Regulation Passes Muster.

If the Commission chooses to retain its rebuttable presumption approach, it should amend its proposed rules to make clear that the Commission, and only the Commission, can determine whether the presumption of unenforceability has been overcome.

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[34]For purposes of the remainder of these comments, WCA will utilize the term "local authorities" to include both local governmental authorities and those empowered to enforce restrictive covenants, home owner association ("HOA") restrictions and other private limitations on the installation of wireless reception devices. As discussed *infra*, WCA believes the Commission is correct in barring all private restrictions that impair the installation of wireless cable reception antennas. If, however, the Commission retreats from its *per se* ban on such restrictions, there is no reason for such restrictions to be treated more favorably than governmental restrictions.

There are strong policy and practical reasons for taking such action with respect to wireless cable services. As the Commission found in an analogous context, inconsistent court filings will leave both wireless cable subscribers and state and local authorities "unsure of their respective rights and responsibilities" under the Commission's preemption policy.[35] The record previously compiled in IB Docket No. 95-59 evidences many inconsistent state court ruling with respect to C-band antennas, and it is reasonable to expect that the same pattern will continue to mark future court decisions regarding other types of wireless antennas. By assuming responsibility for all rulings on the propriety of restriction on wireless antennas, the Commission can implement a consistent national policy that will inure to the benefit of consumers and local authorities alike for a variety of reasons:

First, centralizing all wireless cable and television broadcast antenna adjudications with the FCC will have the important benefit of establishing legitimate, uniform standards. Antenna owners will not be impeded by irrational and unreasonable regulations or other restrictions in gaining access to video services -- which the Commission has explicitly, and appropriately, recognized as a strong federal interest.[36] Absent uniform standards, the specter of litigating in local courts over the right to install and use a wireless cable antenna will simply lead many potential wireless cable subscribers to abandon the service altogether. As

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[35] *See Exclusive Jurisdiction With Respect To Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934*, 6 FCC Rcd 7511, 7512 (1991) [hereafter cited as "*Section 315(b) Preemption Order*"].

[36] *See NPRM*, at ¶ 2.

the Commission has recognized in a similar contest, "such a response to state lawsuits . . . would frustrate the Congressional intention to encourage greater" competition in the provision of programming services.[37]

If the Commission permits local courts to consider whether the presumption of unenforceability has been preempted, it will ultimately surrender its role in interpreting the new rules, as the forum in which to rebut the presumption will be the choice of the promulgating authority. Local jurisdictions, armed with local lawyers familiar with the local courts, will inevitably choose to litigate close to home rather than to proceed before the Commission.

Moreover, once a jurisdiction has obtained judicial review of its wireless antenna regulations, Commission review may be precluded entirely. The decision in *Town of Deerfield, New York v. FCC*, 992 F.2d 420 (2d Cir 1992), requires the Commission to intervene in a case before judicial review or not intervene at all. Surrendering its jurisdiction over the enforcement of its rule to courts that have little experience with wireless antenna zoning disputes will not further the purposes of Section 207. Only the Commission has the authority and the expertise to establish a consistent body of precedent under Section 207.

Second, In addition to affording potential wireless cable subscriber the certainty necessary to make the decision to use this developing technology, Commission-imposed consistency will encourage states and localities to impose and enforce rules that conform with

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[37] *Section 315(b) Preemption Order*, at 7512.