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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

DOCKET FILE COPY ORIGINAL

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 Reply 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 submit Reply Comments on the Proposed Rule and hope that the FCC takes these Reply Comments into consideration when drafting the final rule.

Sincerely,

Robert M. Diamond
President
Community Associations Institute

Enclosures

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Before the
FEDERAL COMMUNICATIONS FCC
Washington, D.C.

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In the Matter of)	CS Docket No. 96-83
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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)	
)	

Reply Comments to Subsection (c) of the Proposed Rule

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 Reply Comments in response to subsection (c) of this Notice of Proposed Rulemaking. In these Reply Comments, CAI, ARDA, and NAHC again express their support for the broad public policy goals outlined in Section 207 of the Telecommunications Act of 1996. However, the Proposed Rule as currently drafted poses difficult problems that in some cases will make implementation in some association communities impossible. Several of the Comments to the Proposed Rule submitted by other organizations and industries do not take into account the serious nature of these concerns.

"Impair" Means "Prevent"

The FCC does not define the word "impair" in its Proposed Rule. In its Comments, the Network Affiliated Stations Alliance ("NASA") argues that the word "impair" in subsection (c) should mean to "change or make worse", to "injure," or to "adversely affect".

Comments of NASA, 2, 4. However, this definition of the word "impair" does not reflect congressional intent.

"Impair" is not defined in Subsection (c) of the Proposed Rule. House Report 104-204, which outlines the purpose of Section 207 of the Telecommunications Act of 1996, does provide a clear definition of "impair." The House states:

"The Committee intends this section to preempt enforcement of . . . restrictive covenants or encumbrances that prevent 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). The House Report clearly demonstrates that Congress intended to prohibit restrictions that block access to television and MMDS service, not restrictions which might preclude the very best reception or which regulate the location, installation, use, and maintenance of television broadcast or MMDS equipment. The use of the word "prevent" in the House Report reveals that Congress intended that only those restrictions that would block access to satellite service would be considered to "impair" such access. Such a limiting definition of the word "impair" should be included in the language of the final Rule, since that definition would most clearly enact Congress' intent. The FCC should not adopt the definition suggested by NASA.

In its Comments, Bell Atlantic proposes to replace "impair" with the word "affect." Comments of Bell Atlantic, 4. Based on the House Report, were the FCC to adopt that proposal, it would clearly will clearly exceed Congress' statutory mandate. It is clear from the legislative history that the substitution of the word "affect" for "impair" would be incorrect.

The FCC also cannot fail to define "impair" in the final rule. Without some

definition, there will be an explosion of litigation, as parties involved in disputes will have no recourse but to the courts for interpretation. Therefore, the FCC must include a definition of "impair" in the final rule. This definition should track that provided in the legislative history: "impair" should mean "prevent." CAI, ARDA, and NAHC strongly oppose any definition which would expand the definition of "impair," as such a definition would exceed the congressional mandate.

Installation on Common Property Would Be a Taking Under the Fifth Amendment

CAI, ARDA, and NAHC concur with the Comments submitted by the National Trust for Historic Preservation ("NTHP"), the Independent Cable and Telecommunications Association ("ICTA"), and the Joint Comments of the National Apartment Association et. al. ("NAA"). If the FCC intends that its Proposed Rule require that individual owners be permitted to install their television broadcast or MMDS equipment on common property (or property owned by a third party such as a landlord), then such an interpretation would be a taking under the Fifth Amendment. In addition, NAA states that the FCC "lacks jurisdiction to regulate contractual agreements affecting private property." Comments of NAA, 3. CAI, ARDA, and NAHC concur fully with this statement.

The Comments submitted by CAI, ARDA, and NAHC set forth the unique ownership interest in real property presented within community associations. Comments of CAI, ARDA, and NAHC, 12-14. As a result of this unusual relationship, Subsection (c) would have a significant impact upon the constitutional rights of these members of community associations whose fundamental property rights would be abrogated if the FCC were to mandate installation of satellite receivers by individual owners on common property. Any installation

required by federal law on a portion of common property, for the use of one unit owner to the complete derogation of the other unit owners' ownership interest in the same portion of the common property, would be a violation of property rights. Since this would be a taking without just compensation, it is inconceivable that Congress could have intended that owners in community associations be permitted to place television broadcast and MMDS equipment on the property of others.

The Proposed Rule Should Apply Only to Single-Family Dwellings

ICTA, in its Comments, states that Congress did not intend to include multifamily dwellings in Section 207. Comments of ICTA, 4-5. CAI, ARDA, and NAHC agree with this statement. Section 207 could not have been intended to apply to multi-unit dwellings, as most of the property in such buildings is either owned jointly by all owners, an association, or by a private owner who does not occupy any unit (as in a landlord-tenant situation), since the property upon which equipment would be installed is not property owned by that individual. Many of the problems articulated by CAI, ARDA, and NAHC in their Comments refer to health, safety, logistical, and other problems raised by installation of television broadcast and MMDS equipment in multi-unit dwellings. Therefore, in order to eliminate the constitutional and logistical problems raised by such installation, the FCC should exclude multi-unit dwellings from the scope of the final rule.

Community Association Rules Address Health and Safety Issues

Montgomery Village Foundation, in its Comments, states that Congress, in enacting Section 207 of the Telecommunications Act, did not distinguish between state and local government regulation and private nongovernmental regulation. The House Report language

demonstrates that Congress equated state and local governmental restrictions with nongovernmental restrictions. Therefore, nongovernmental restrictions should not be subject to any additional preemptions to which governmental restrictions are not subjected.

Comments of the Montgomery Village Foundation, 2.

However, in its Notice of Proposed Rulemaking, the FCC stated that nongovernmental restrictions should be awarded less deference than governmental rules. Notice of Proposed Rulemaking, Paragraph 10. While no rationale for this distinction is provided in the Notice of Proposed Rulemaking, the FCC stated in the Further Notice of Proposed Rulemaking proposing the preemption for DBS satellite antennas that the reason for the decision to award nongovernmental restrictions less deference was the assumption that nongovernmental restrictions were adopted for aesthetic, not health and safety considerations. Further Notice of Proposed Rulemaking, IB Docket No. 95-59, Paragraph 62. As CAI, ARDA, NAHC, and Montgomery Village Foundation correctly point out, there are many health and safety bases for adopting nongovernmental restrictions. Comments of CAI, ARDA, and NAHC, 7-9; Comments of the Montgomery Village Foundation, 2.

Some Commenters have misinterpreted health and safety concerns articulated by CAI, ARDA, NAHC in previous Comments, focusing on RF emissions as the "health and safety" issue. These Commenters argue that television broadcast and MMDS equipment emissions pose no health or safety risk. Comments of WCAII, 24. RF emissions are not the basis for the health and safety concerns raised by CAI, ARDA, and NAHC, rather it is the concern caused by the location, installation, use, and maintenance of the equipment, not the equipment itself which are related to the health and safety of residents in community associations. As

stated in the Comments submitted by CAI, ARDA, and NAHC, installation of television broadcast and MMDS equipment may cause structural damage to roofs and other parts of buildings, even if installed correctly. Roof warranties would be voided by installation of this equipment. The risk for property and personal injury damage due to equipment detachment during storms is probable, a problem which escalates as the size and height of the equipment increase. Comments of CAI, ARDA, and NAHC, 15-19. These are legitimate health and safety concerns which are currently not addressed in the Proposed Rule.

Many Commenters have also suggested that associations have no legitimate health and safety concerns that should be granted special consideration by the FCC relating to the Proposed Rule, since state and local governments can adequately address these concerns. Comments of BellSouth, 5; Comments of Bell Atlantic, 3; Comments of Nynex, 4-5; Comments of Pacific Bell, 2-3; Comments of the Association for Maximum Service Television ("MSTV"), 5; Comments of NASA, 6; Comments of the American Radio Relay League ("ARRL"), 4. However, as NAA states in its Comments, private entities have legitimate maintenance, safety, security, cost and management issues" concerning television broadcast antenna and MMDS installation, use, and maintenance. Comments of NAA, 3. Associations have very specific health and safety concerns relating to the effects of the Proposed Rule. Many of these concerns cannot be addressed adequately by local governments, particularly since many of their statutes and ordinances would be preempted by the Proposed Rule. In addition, associations have specific, legitimate concerns that may not be adequately addressed by state and local government regulation. Community associations differ from each other in various ways: by development plan, by building type, and by types

of materials used to construct buildings, etc. Due to the infinite variety of developments and buildings, the individual association, not a local or state government, must be able to control alterations made to property in the association. Each individual association will have different concerns and different needs when dealing with the installation and maintenance of television broadcast and MMDS equipment in the association. Such concerns and needs cannot be adequately addressed by local or state governments, which will have many different types of community associations located in each jurisdiction. Statutes and ordinances will be unable to address the concerns and needs of each individual community association. Since associations have health and safety interests which cannot be adequately protected by state and local governments, associations must be permitted control over the location, means and methods of installation and maintenance in their associations.

In discriminating between governmental and nongovernmental restrictions, the FCC exceeded its statutory mandate. CAI, ARDA, and NAHC urge the FCC to reconsider its conclusions concerning the purposes for nongovernmental restrictions. CAI, ARDA, and NAHC also urge the FCC to take into account the serious health and safety issues that associations would face in implementing the Proposed Rule and therefore award these restrictions, which protect residents' health and safety, more deference than is accorded in Subsection (c) of the Proposed Rule.

**Association Restrictions Are Not Written To Prevent Competition Between Cable Providers
and Other Telecommunications Service Providers**

Several Commenters have suggested that associations have restrictions against television broadcast and MMDS antennas due to association developers' affiliation with cable

companies. Comments of Wireless Cable Association International ("WCAII"), 3; Comments of Community Broadcasters Association ("CBA"), 2; Comments of PBS, 2, ft 1. In particular, CBA alleges that residential developers are paid by cable companies to put in cable lines in return for financial rewards, thereby providing the rationale for restrictions in association documents. In rare circumstances, this may be true. However, in vast majority of situations, this is a broad and erroneous assertion. Many developers include such a restriction in order to ensure that cable companies provide service to residents of the community at a lower cost than the cable companies otherwise would do. The provision of such low cost services benefits the marketability of the individual units in a development. Purchasers of individual units or lots also benefit, as they receive low cost cable service. Developers are motivated by real estate sales, which provide a much larger financial reward than any agreement with a cable company. Restrictions on antennas have been adopted to encourage sales of individual units, and they have been very successful. The success of this marketing reveals that many purchasers support such restrictions, a sentiment which is expressed more fully in the fact that few associations, once they have completed transition to homeowner governance and control, amend the restrictions to permit uncontrolled installation of antennas.

CAI, ARDA, and NAHC reject totally the allegation that community association developers include restrictions prohibiting outdoor antennas in association documents because they are receiving economic rewards by doing so. A developer would be risking sales critical to its economic success for relatively small payments from a cable provider if purchasers did not want restrictions on the installation of antennas.

Aesthetic Concerns Are Not Trivial

The FCC must also recognize the economic rationale for restrictions based on aesthetic considerations. The presence of restrictive covenants in a community association add value to each individual property: these properties sell more quickly, and for higher prices, than those properties not bound by restrictive covenants. To invalidate these covenants, thereby decreasing property values, is an economic taking which would also be prohibited by the Fifth Amendment. The FCC's arbitrary dismissal of aesthetics as of no significance flies in the face of an economic choice made by more than 32 million residents to pay the higher price required to live in a covenant-protected community.

Further, NAA, in its Comments, notes that aesthetic considerations are not trivial, when marketability and habitability of a building, unit, or community are concerned. Comments of NAA, IB Docket No. 95-59, 15. CAI, ARDA, and NAHC concur completely with these well-reasoned arguments. The appearance of a community is directly related to the marketability of units in the community. Community associations have architectural restrictions which ensure that properties are well-maintained, so that the value of properties are not diminished. Individual owners purchase their lots or units with the expectation that the architectural restrictions will continue to be enforced, stabilizing the value of their property. As stated above, properties in community associations have a higher market value than comparable properties not found in community associations. Therefore, the FCC should reconsider its opinion of aesthetic considerations, and award these consideration more deference.

The FCC is Not a Proper Forum for Litigation

Several Commenters have also proposed the inclusion of a new subsection (d) which states: "[t]he sole forum for adjudicating any matters arising under this section shall be with the FCC." Comments of WCAII, 20-22; Comments of Nynex, 3. CAI, ARDA, and NAHC oppose this new section; the rights of associations to litigate in federal and state courts cannot and should not be so easily abrogated.

Nowhere in the Telecommunication Act does Congress grant the FCC the authority to be the sole forum for arbitrating disputes concerning this Proposed Rule. The only authority granted to the FCC in Section 207 is the responsibility to promulgate regulations. Since Congress did not grant the FCC any quasi-judicial authority to hear disputes related to this Proposed Rule, the FCC cannot include a subsection such as the one submitted by WCAII.

WCAII argues that, with the FCC as sole forum, the burden of litigation on consumers will be minimized. Comments of the WCAII, at 22. However, litigation before the FCC would impose immense burdens on consumers, associations, and their respective counsel. Adjudication before the FCC requires the knowledge and expertise of an attorney specializing in administrative law. Many consumers and associations will be unable to locate or afford such counsel. In addition, requiring adjudication in Washington, D.C. will pose great logistical burdens and additional expenses on those associations and consumers located a great distance from Washington, D.C. Such unnecessary burdens will effectively eliminate associations' rights to adjudicate these disputes.

For the above reasons, CAI, ARDA, and NAHC oppose the suggested subsection (d) as contrary to Congress' intent.

The Burden of Demonstrating Impairment Should be on the Individual

The Consumer Electronics Manufacturing Association ("CEMA") argues that the burden should be placed on the private entities seeking to enforce their restrictions to demonstrate that their restrictions do not impair access to service. Comments of CEMA, 5. CAI, ARDA, and NAHC oppose this view. The language of subsection (c) of the Proposed Rule does not create a blanket preemption of private restrictions. The language "to the extent that" in the Proposed Rule clearly limits the preemption to only those parts of restrictions that impair signal access. Since that preemption is so limited, it follows that the burden of demonstrating that the restrictions impair satellite access should rest with the individual seeking to install equipment. CAI, ARDA, and NAHC support language which would place the burden of demonstrating impairment on the individual seeking to install equipment, but oppose any language which places the burden of demonstrating non-impairment on the association.

Satellite, Television Broadcast, and MMDS Antennas Should be Treated with Regulatory

Parity

NASA, the ITFS Parties, and CEMA contend that there should be parity between the regulatory schemes created for satellite antennas and for television broadcast and MMDS antennas and that the television broadcast and MMDS final rule should be modeled after the DBS satellite rule. Comments of NASA, 9; Comments of ITFS Parties, 3; Comments of CEMA, 6. CAI, ARDA, and NAHC concur with these arguments. All three forms of telecommunications equipment are treated equally by statute. In addition, uniform regulations will be easier to implement. Consumers will have access to all forms of telecommunications

services in an equal manner and a truly competitive marketplace will benefit members who choose to subscribe to such services.

**Restrictions that Regulate the Installation and Maintenance of Telecommunications Equipment
Should Not Be Preempted**

PBS, in its Comments, suggests that the FCC adopt a "presumption against all state, local, and private restrictions on the installation and use of outdoor antennas for receiving broadcast signals." Comments of PBS, 2. This preemption would exceed congressional mandate, since only those restrictions which "impair" access to signals are preempted. Many restrictions on the installation and use of such equipment would not "impair" reception.

Not only would this preemption exceed the scope of Section 207, but this preemption is also unnecessary. PBS does not recognize the fact that in most communities where such restrictions on outdoor antennas are located, in suburban and urban areas, PBS signals may already be accessed by using a variety of indoor antennas. Indeed, the FCC should include in the final rule a provision stating that if an individual may receive signal access through an indoor antenna, then that individual may not be permitted to install an outdoor antenna.

The National Association of Broadcasters ("NAB") argues that "all private restrictions that impair outdoor TV antennas installation and use must fall." Comments of NAB, 5. NAB concludes that all private restrictions relating to television broadcast antennas would impair signal access. ARRL argues that restrictions include procedural impediments which impair access to service. Comments of ARRL, 6. CEMA interprets the Proposed Rule to preempt restrictions on the installation, use, and maintenance of television broadcast and MMDS equipment. Comments of CEMA, 2. These interpretations, however, go far beyond

congressional mandate. Only those restrictions impairing signal access are preempted under Section 207. Those restrictions relating to the regulation of the location, means, and method of installation, use, and maintenance are not preempted under Section 207 if they do not impair signal access. These restrictions do not necessarily impair signal access; they merely ensure that installation will be effected in a systematic manner which would cause the least amount of damage and risk to associations and their residents. NAB also does not recognize the complex constitutional and practical issues involving installation on common property. NAB states that there were "howls of protest from homeowners associations" in Comments submitted in response to the satellite dish Proposed Rule; however, NAB misinterprets the nature of those Comments and refuses to recognize the insurmountable problems inherent in any final rule which would eliminate any regulation of installation and maintenance of television broadcast equipment in community associations. CAI, ARDA, and NAHC are dedicated to working with the FCC to devise a solution to these intractable problems; a blanket preemption of private restrictions will not aid associations in their attempts to ensure that homeowners gain access to satellite and broadcast signal while maintaining property values of home in community associations.

WCAII points out, in its Comments, that a private restriction that regulates installation of television broadcast and MMDS equipment does not automatically impair signal access. Comments of WCAII, 24, ft. 40. CAI, ARDA, and NAHC concur completely with this view. Many private restrictions regarding installation and maintenance would not impair signal access. Since they would not, the FCC cannot preempt these restrictions; to do so would exceed the scope of Section 207.

Section 207 Does Not Grant Television Broadcast and MMDS Service Providers Preferential

Treatment

In a recent federal court case, Sprint Spectrum v. City of Medina, No. C96-408WD, (W.D. Wash. 1996), the court held that federal communications law does not preempt restrictions that apply to a general group of industries and persons. In this case, the court specifically stated that the communications industry should not receive preferred treatment over others in a similar circumstance. (For example, a telecommunications service provider seeking to install towers should be treated equally to another entity seeking to install towers.) Sprint Spectrum v. City of Medina, 8-9. This case is analogous to the situation presented by the Proposed Rule. The Proposed Rule should not grant television broadcast and MMDS service providers any advantage over any other contractor. As long as associations do not impair signal access, they should be able to control the method of installation, location, etc., just as they would installations of other types of equipment. CAI, NAHC and ARDA agree with this federal judge's approach which is to treat all antennas and other large installations fairly, with the understanding that associations may not impair an owner's right to receive signals. Preferential treatment to television broadcast and MMDS service providers is unnecessary.

The Proposed Rule Only Applies to Receive-Only Antennas

CellularVision, Pacific Bell Video Services ("Pacific Bell"), and the Association for Maximum Service Television ("MSTV") argue that Subsection (c) of the Proposed Rule should preempt restrictions regarding antennas that both transmit and receive signals. Comments of CellularVision, 5; Comments of Pacific Bell, 2; Comments of MSTV, 2-3.

CAI, ARDA, and NAHC oppose this extension of the FCC's preemption authority because it exceeds the FCC's congressional mandate. Section 207 explicitly limits the FCC's preemption authority to "promulgat[ing] 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 and MMDS signals. Section 207 (emphasis added). In the House Report, Congress states that only restrictions relating to "off-the-air reception of television broadcast signals" are to be preempted. House Report, at 123-24, (emphasis added). Congress chose not to include transmit antennas in this language; since they are not included, it is clear that Congress did not intend that the FCC preempt restrictions relating to transmit antennas. Therefore, the only restrictions preempted by the Proposed Rule should be those restricting receive-only antennas. CAI, ARDA, and NAHC oppose the extension of the preemption to any antennas that are not receive-only antennas.

Only Restrictions Impairing MMDS Receiving Devices Are Preempted by the
Proposed Rule

Several Commenters argue that the scope of the Proposed Rule should be broadened, and that restrictions on equipment used to transmit or receive other types of broadcast signals should also be preempted. In particular, several Commenters have submitted arguments proposing the inclusion of instructional television fixed service ("ITFS"), local multipoint distribution service ("LMDS") and/or single channel multipoint distribution service ("MDS") in the Proposed Rule. Comments of Bell Atlantic, 5 (urging inclusion of ITFS and LMDS); Comments of the ITFS Parties, 3-4 (ITFS and MDS); Comments of the National ITFS Association ("NIA"), 3 (ITFS only); Comment of ComTech Associates ("ComTech"), 1-2

(LMDS only); CellularVision, 3-4 (LMDS only). While CAI, ARDA, and NAHC support the extension of such services to consumers, particularly homeowners, these services often require the installation of other antennas, antennas not included in Section 207. Section 207 of the Act mandates that only those restrictions on "television broadcast signals, multichannel multipoint distribution services, or direct broadcast satellite service" be preempted. Since no other services were included in the language of Section 207, it is clear that Congress did not intend that the FCC preempt restrictions on ITFS, LMDS, and MDS services. If the FCC were to include ITFS, LMDS, and MDS antennas in the Proposed Rule, however, the FCC would exceed its statutory mandate. Therefore, the FCC should not add ITFS, LMDS, and MDS services to the list of those services preempted under the Proposed Rule.

The Final Rule Must Contain Some Type of Limitation that Would Restrict Size and Height of Television Broadcast and MMDS Equipment

Many Commenters have argued that there should be no height or size limitation on television broadcast and MMDS antennas and supporting equipment in the final rule. Comments of Nynex, 6; Comments of BellSouth, 5; Comments of NAB, 7; Comments of American Telecasting, 1-2; Comments of CEMA, 5-6; Comments of NASA, 6. However, as articulated in the Comments submitted by CAI, ARDA, and NAHC, a final rule that does not contain some reasonable height limitation would pose serious problems for associations. See, Comments of CAI, ARDA, and NAHC, at 20-21, 25-26. CAI, ARDA, and NAHC understand that the height of the equipment will vary depending on the distance between the transmitter and the receiving antenna and the strength of the transmitter. However, precluding restrictions on the size and height of equipment installed on any type of association property

would create greater potential for property damage and personal injury as the size and height of the equipment increases. Large towers and masts could damage not only the individual's own property, but also the property of others and the association. In addition, masts and towers of unlimited size could violate air space restrictions promulgated by the Federal Aviation Administration for urban areas such as Washington, D.C. Therefore, there must be some height and size limitation in the final rule to avoid the intractable conflicts that would surely occur.

Many of the Comments submitted by various business entities have submitted conflicting statements on what type of size and height restrictions would be acceptable for antennas. For example, Nynex and American Telecasting have stated that many MMDS antennas are now under one meter in diameter. Comments of Nynex, 5-6; American Telecasting, 1. A one meter restriction on MMDS antenna size appears reasonable. Such a rule would also achieve parity with the Proposed Rule on satellites, accomplishing the goal of many Commenters. CAI, ARDA, and NAHC can support a one meter size limitation on antenna size.

Nynex and BellSouth assert that mast heights should be unlimited. Comments of Nynex, 5 ft. 9; Comments of BellSouth 5-6. CAI, ARDA, and NAHC recognize the difficulties inherent in establishing a limitation upon the height of such masts or towers; however, there should be a provision in the final rule that the mast height may be limited to that absolutely necessary to receive signal access. As soon as the mast reaches a height at which signals may be received, then the individual should not be permitted to extend this mast any further. This should be no more than a few meters above the roof line. The FCC

should be able to establish some type of height limitation which will be reasonable for all parties involved. Otherwise, associations will be faced with the myriad health and safety issues already discussed.

The FCC must also address the issue of the distance between the transmitter and the receiving antenna. There must be some type of distance at which viewers cannot expect to receive signals, and therefore, they should not be permitted to install equipment to receive such signals. The FCC must include some type of distance limitation in the final rule.

The Proposed Rule is a Disincentive to the Development of Better Technological Solutions

The Proposed Rule provides no incentive for television broadcast and MMDS service providers to create new technologies which would obviate the need for antennas and other equipment covered by this rule. The rule should encourage the development of more safe and less damaging devices to provide access to such signals. It would be a disservice if the FCC were, through its regulatory process, to create a disincentive to the development of innovative technological solutions to the problems CAI, NAHC and ARDA have outlined. If the FCC does not accept the reasonable requests and suggestions included in the Comments submitted by CAI, ARDA, and NAHC, the industry will have no incentive to develop alternatives. Such technology has been adopted successfully in the cable industry. For example, relay transmission and reception signals between buildings are currently used for cable systems to cross public streets and interstate highways. Cable operators have been forced to adopt new technologies to distribute their signals within communities when they cannot tunnel under an interstate highway. Perhaps the FCC could allocate some band width to television broadcast and MMDS service providers so that smaller house-to-house or building-to-building

transmissions could be conveyed from a central MMDS, satellite, or other antenna, without a horizon of unending rooftop installations. CAI, ARDA, and NAHC urge the FCC not to take the short-term view which ignores the possibility of better solutions developed by the industry. This rulemaking process may be addressing a short term problem, however. Certainly, no one would be surprised if, within 5-15 years, current communications devices and antennas will be outmoded. The FCC's rule should encourage that new technology rather than requiring consumers to purchase and live with the with current problematic technology any longer than necessary.

Conclusion

As currently drafted, this Proposed Rule creates several potential intractable problems. To resolve these problems, CAI, ARDA, and NAHC propose the following solutions. CAI, ARDA, and NAHC urge that the final rule include a definition of the word "impair" which means "prevent", as intended by Congress. CAI, ARDA, and NAHC support the Comments submitted by the NTHP, the ICTA, and the NAA, since the Proposed Rule, in its current form, may imply that associations are prohibited from preventing installation of television broadcast and MMDS equipment on common property owned by either all unit owners jointly or by the association. The final rule should clarify that restricting such installation would be permitted, as it would otherwise be a taking under the Fifth Amendment. The burden should be on the individual seeking to install equipment to demonstrate that the nongovernmental restrictions impairs signal access. Additionally, the FCC should grant community association restrictions more deference than is currently afforded in the Proposed Rule as written, recognizing the important health and safety interests which these restrictions protect. The

FCC should also clarify that the final rule would only preempt those restrictions which bar signal access, not restrictions which control the location, installation, use, and maintenance of television broadcast and MMDS equipment, as these restrictions serve important health and safety interests. The FCC must also include some limitation on the height and size of television broadcast and MMDS antennas and equipment, as well as a limitation on the distance from which a viewer may be from the transmitter, in its final rule. To leave the rule without such limitations would cause insurmountable problems for associations and for individual owners.

CAI, ARDA, and NAHC oppose the addition of language suggested by many Commenters.¹ Since Section 207 of the Telecommunications Act authorizes the FCC to promulgate regulations preempting restrictions only on receive-only television broadcast antennas, MMDS, and DBS satellite antennas, the final rule should be limited to preemption of restrictions regarding only those devices. To expand the scope of the final rule to include

¹ The ARRL states, in its Comments, that enforcement of deed restrictions by federal and state courts is state action. Comments of ARRL, 7-8. While not relevant in this proceeding, that statement contains such an egregious error of law that CAI, ARDA, and NAHC cannot permit the statement to be unanswered.

The case upon which ARRL relies, Shelley v. Kramer, states that since enforcement of restrictive covenants based on race would be state action, such restrictive covenants are prohibited. Shelley v. Kramer has not been extended beyond these cases, however. In several cases, most recently in Midlake on Big Boulder Lake Condominium Association v. Cappuccio, a Pennsylvania Superior Court case, courts have held that judicial enforcement of non-rationally restrictive deed covenants is not "state action" to be scrutinized under the Due Process clause of the Fourteenth Amendment. (CAI submitted an *amicus curiae* brief in this case, advocating the position later adopted by the court.)

ARRL argues that any type of permit process would "provide procedural impediments" to installation of television broadcast or MMDS equipment. CAI, ARDA, and NAHC take absolute exception to this suggestion.

other types of telecommunications equipment would exceed the authority granted the FCC by Congress. The FCC would also exceed Congress' mandate if it became the sole arbiter of disputes concerning this Proposed Rule.

CAI, ARDA, and NAHC appreciate this opportunity to submit Reply Comments to the Further Notice of Proposed Rulemaking on subsection (c) of the Proposed Rule. CAI, ARDA, and NAHC urge the FCC to consider their unique concerns when drafting the final Rule.