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

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WASHINGTON, D.C. 20554

In the Matter of  
Implementation of Section 207  
of the Telecommunications Act  
of 1996

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) CS Docket No. 96-83  
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Restrictions on Over-the-Air  
Reception Devices: Television  
Broadcast and Multichannel  
Multipoint Distribution Service

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JOINT REPLY COMMENTS

Submitted By

CAI Wireless Systems, Inc.  
CS Wireless Systems, Inc.  
Heartland Wireless  
Communications, Inc.

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**JOINT REPLY COMMENTS**

CAI Wireless Systems, Inc., CS Wireless Systems, Inc. and Heartland Wireless Communications Inc. ("the Companies"), by their attorneys, hereby file a reply to the comments filed in the Notice of Proposed Rulemaking in the above-captioned proceeding. The Companies are three of the largest wireless cable operators in the country, providing wireless cable service to a total of approximately 260,000 subscribers.

In their comments, the Companies urged the Commission to adopt a simple straightforward per se preemption policy and permit few, carefully defined waivers. In addition, the Companies called for all adjudication of whatever policy is adopted to take place at the Commission, rather than in "courts of competent jurisdiction." Comments filed by cities and homeowners' associations, urging all manner of exemptions to the Commission's proposals, indicate that our position is correct.

The Commission's proposals are an outgrowth of its less than desirable 1986 policy preempting the regulation of satellite earth station antennas. That policy was an attempt to reverse the tide of local ordinances banning these antennas, while at the same time minimizing impact on the Commission's resources. The 1986 policy did not work. State and local authorities continued to legislate against satellite earth station antennas, including DBS antennas, and the Commission's requirement that legal remedies be exhausted before it would act was dealt a significant blow in the Deerfield case which made it clear that the Commission cannot overrule a federal court decision.

The Commission's new proposals in Docket IB 95-59 reflect an apparent reluctance to be involved with the enforcement of its antenna preemption policies. Now, for DBS antennas at least, all nonfederal administrative remedies must be exhausted, and although the exhaustion concept is designed to accelerate the process, it remains clear that a party aggrieved by a restrictive local ordinance must submit to local processes, with their attendant costs and delays, before coming before the agency whose preemptive policy is at issue.

In proposing its antenna preemption policy for TVBS and MMDS antennas as required by Section 207 of the Telecommunications Act, the Commission has largely duplicated its DBS policy with one significant difference. Signalling its willingness to become somewhat more involved in adjudications of its rebuttable presumption of the unreasonableness of local ordinances restricting antenna use, the Commission proposes that declarations of reasonableness may be made either by the Commission or a "court of competent jurisdiction." Waivers of its preemption policy will be adjudicated solely by the Commission.

The Companies respectfully suggest that the Commission re-think its proposals. Here, while there is no requirement that local remedies be exhausted before coming to the Commission, permission is implicitly granted to forum-shop. Presumably, either a local government or a homeowner may request a declaration of reasonableness from either a court, zoning authority or the Commission. Further, it seems that the Commission has no intention of reviewing local decisions. A local government is likely to pursue its case in a local court. A homeowner is likely to be best served by the agency that adopted the preemption to begin with -- the FCC. What does the Commission intend? Will it adjudicate simultaneously with a local court or local zoning authority? If a court is involved, will the Commission excuse itself from the fray? The effect of the Commission proposal will be that local authorities will turn to local courts to adjudicate a federal policy. There will be hundreds of inconsistent decisions all over the country. The Congressional goal of eliminating restrictions on the use of MMDS and TVBS antennas will be frustrated, something that the nascent wireless cable industry can ill afford.

Although it is understandable that the Commission is reluctant to bear the potentially formidable burden of adjudicating local disputes, it is essential that the Commission bear that burden, nonetheless.<sup>1</sup> Of paramount importance is the Congressional dictate that the Commission prohibit local restrictions on antennas that impair the reception of MMDS and TVBS programming. For such a prohibition to be meaningful, it must be enforced. If the enforcement is to be meaningful, it must be uniform. Thus, the Commission must take the responsibility for enforcement.

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<sup>1</sup> We note that the Commission is willing to bear the burden of making judgements concerning the importance of individual historic districts or wetlands in waiver proceedings.

The Companies contend that the Commission must adopt a per se preemption of local restrictions on antennas and then become the sole forum for waiver petitions that might permit a departure from Commission regulations. The result will be certainty of regulation that will benefit both affected industries and local governments. The Commission can minimize its workload by adopting waiver standards as part of this proceeding and then developing its policies further as it is presented with petitions. (The overall standard, of course, should be that waiver petitions will not be routinely granted.) It is not necessary to have two processing lines, one for declaratory rulings -- the ones that are not presented to "courts of competent jurisdiction" -- and one for waiver petitions. All issues can be handled with waiver petitions and appropriately clear standards.

The Companies submit that if the Commission is to fulfill Congress' intent to remove a significant barrier to the success of the wireless cable industry, it must "bite the bullet" and enforce preemption regulations against local restrictions on TVBS and MMDS antenna use. Wireless cable systems are ready to compete, financially and technically, with wired cable and DBS systems. To do so they must have access to consumers. They need the

Commission's help to see that it happens.

Respectfully submitted,

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