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MAY 21 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

May 21, 1996

By Hand

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, NW  
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

Re: Notice of Proposed Rulemaking  
CS Docket No. 96-83

Dear Mr. Caton:

On behalf of CellularVision USA, Inc., enclosed please find an original and six (6) copies of its Reply Comments filed in the above-referenced rulemaking proceeding.

Please direct any questions regarding this matter to the undersigned.

Sincerely,



Michael R. Gardner  
Counsel for CellularVision USA, Inc.

Enclosures

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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MAY 21 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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

**REPLY COMMENTS**

CellularVision USA, Inc.<sup>1</sup> ("CellularVision"), by its attorneys, hereby files Reply Comments in regard to the Notice of Proposed Rulemaking ("NPRM") in the above-referenced proceeding.

CellularVision is the parent of CellularVision of New York, L.P., which holds a commercial license to use the 27.5-28.5 GHz band in the New York Primary Metropolitan Statistical Area ("PMSA") to operate a Local Multipoint Distribution Service ("LMDS") video delivery system. CellularVision is the FCC-acknowledged pioneer of LMDS technology<sup>2</sup>, which is a wireless, multi-cell, two-way video,

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<sup>1</sup> CellularVision USA, Inc. is publicly traded on the NASDAQ National Market under the symbol "CVUS."

<sup>2</sup> See In the Matter of Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Third Notice

telephony and data service that the Commission has proposed to license nationwide in the 28 GHz band as a competitive alternative to both cable operators and local exchange carriers.<sup>3</sup>

In its Comments, CellularVision argued that the Commission should extend the protections of Section 207 of the Telecommunications Act of 1996 (“Telecom Act”)<sup>4</sup> to LMDS since the same public policy reasons that prompted Congress to protect the reception of broadcast, MMDS and DBS services – to ensure that consumers have access to a broad range of video programming services, and to foster full and fair competition among different types of video programming services – apply equally to LMDS, also a wireless competitor in the video marketplace.

Like CellularVision, Bell Atlantic Corporation (“Bell Atlantic”) and ComTech Associates, Inc. (“ComTech”) also filed Comments in the instant proceeding supporting the extension of the Commission’s proposed preemption of restrictions on reception devices to include LMDS antennas. As Bell Atlantic explained,

[t]he Commission should also clarify that its proposed preemption policy would apply to other categories of multipoint distribution service, including “local” multipoint distribution service (“LMDS”). MMDS is only one wireless “cable technology.” The Commission is currently developing service rules for LMDS, [footnote omitted] and there may be other technologies in the future. LMDS and other new technologies will compete with a variety of multichannel video service platforms, including

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of Proposed Rulemaking and Supplemental Tentative Decision, CC Docket No. 92-297, FCC 95-287 (released July 28, 1995).

<sup>3</sup> Id.

<sup>4</sup> Telecom Act, Pub. L. No. 104-104, 110 Stat. 56, 114 (1996).

cable television, direct broadcast satellite (“DBS”), and MMDS. The Commission should not treat the new technologies differently, but instead should ensure that LMDS and other new technologies have the same ability to serve the market as does MMDS. [footnote omitted] Accordingly, Bell Atlantic asks the Commission to clarify that its proposed rules would apply to all types of MDS, including LMDS.<sup>5</sup>

Likewise, ComTech stated that “the same public interest considerations that motivated the Commission to preempt zoning regulations affecting satellite antennas and Congress to enact Section 207 apply to LMDS transmit and receive antennas.”<sup>6</sup> Thus, ComTech concluded that “[t]his proceeding is the perfect opportunity for the Commission to preempt local zoning restrictions for LMDS transmit and receive antennas.”<sup>7</sup>

Accordingly, consistent with the intent of Section 207, the FCC’s broad statutory-based preemption authority and the Comments in this proceeding, the Commission should preempt state or local governmental and non-governmental restrictions that impair a viewer’s ability to receive video programming with LMDS antennas. Further, since LMDS has two-way capabilities, such preemption should encompass restrictions that impair a viewer’s ability to transmit information back to the hub, and thus should protect both subscriber receive antennas and subscriber transmit antennas.

With regard to the preemption of non-governmental restrictions, any suggestion

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<sup>5</sup> Comments of Bell Atlantic, pp.5-6.

<sup>6</sup> Comments of ComTech, p.3.

<sup>7</sup> Id., p.5.

that the Commission should arbitrarily exempt multi-family dwelling units (“MDUs”) from the scope of the Commission’s proposed preemption rule is unsupported in law and would, in fact, defeat the expressed intent of Congress in adopting Section 207 of the Telecom Act.<sup>8</sup> By enacting Section 207, Congress sought to protect a “viewer’s ability to receive video programming services . . . .”<sup>9</sup> Congress did not discriminate among “viewers” based upon their choice of residence, whether single-family homes, MDUs, interconnected town homes within “planned communities,” or mobile home parks. As the House Report stated, “[e]xisting regulations, including but not limited to, zoning laws, ordinances, restrictive covenants or home owners’ association rules, shall be unenforceable to the extent contrary to this section.”<sup>10</sup> Accordingly, any such restriction, and not just those that arguably could be categorized to fit a “single family home” scenario, constitute *per se* invalid restrictions under Section 207 and the Commission’s appropriate rule implementing Section 207. As a result, any suggestion that the Commission should alter its proposed rule to exempt MDUs, or alternatively, just include single family homes, is meritless and should be rejected.

Finally, based on the explicit Congressional intent of Section 207 to promote

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<sup>8</sup> See Comments of the Independent Cable & Telecommunications Association, p. 4.

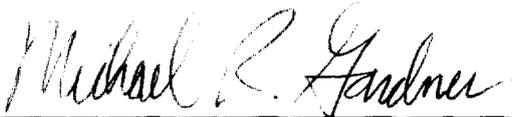
<sup>9</sup> Telecom Act, supra note 4 (emphasis added).

<sup>10</sup> H.R. Report No. 204, 104th Cong., 1st Sess. 124 (1995) (emphasis added).

consumer choice and video programming competition and based on the proven ability of CellularVision's LMDS system in New York to provide robust competition to cable, it is essential that the Commission extend the protections of Section 207 of the Telecom Act to all LMDS providers when they are licensed, hopefully later this year, through the Commission's spectrum auctions of the largely fallow 28 GHz spectrum.

Respectfully submitted,

CELLULARVISION, USA INC.

By:   
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Its Attorneys

May 21, 1996

Certificate of Service

I, Ryan J. McCumber, hereby certify that copies of the foregoing "Reply Comments" of CellularVision USA, Inc., were delivered by hand, on May 21, 1996, to the following:

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