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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

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

**REPLY COMMENTS OF  
PEOPLE'S CHOICE TV CORP.**

People's Choice TV believes that the FCC should adopt the proposed rules, as modified by the WCAI, contained in the Notice of Proposed Rulemaking released on April 5, 1996. Federal preemption of municipal regulations and home owners association antenna restrictions is critical to the development of a viable competitive alternative to traditional cable TV. These Reply Comments focus specifically on home owners association restrictions and set forth a summary of the legal principles at issue, the strategies that People's Choice has utilized to deal with these restrictions, and the results of these strategies.

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Our argument is simple. The law supports the preemption of antenna restrictions. Antenna restrictions are not the result of negotiated agreements among homeowners, but rather the result of coercion on the part of developers. While it is theoretically possible to provide service in communities with antennas restrictions, in reality, antenna restrictions hamper and oftentimes foreclose the development of wireless cable companies. The preemption of all antenna restrictions will unshackle the citizenry and allow individuals to make their own choices concerning their telecommunications needs.

### **I. Legal Principles**

The antenna restriction problem results from a conflict between several common law principles. The first is the common law right of property owners to agree to covenants that restrict the use of their property. In today's housing industry, a developer imposes a set of conditions, covenants and restrictions (CCRs) on a new subdivision, that are binding on all future property owners who purchase lots in the subdivision. The developer usually also creates a Homeowners Association (HOA), an entity whose membership includes every lot owner in the subdivision. The HOA, in most cases, is governed or managed by a Board of Directors (Board) which serves as a quasi-governing body over the entire subdivision. These CCRs place limitations on the use of the property by each individual lot owner, and almost always ban or restrict the use of antennas on the property.

When considering the persuasiveness of this legal principle, the FCC must remember that the CCRs are coercive; a homeowner has no real opportunity to bargain or

negotiate over the CCRs that bind his or her property. Anyone who has purchased a home from a developer in a subdivision in the last thirty years knows that the CCRs are twenty small print pages of take-it-or-leave-it commands. If you dare to point to the antenna restriction in the CCRs and say to the developer “Everything but this antenna restriction is fine”, the developer will smile and the acquisition of your new home will stop dead in its tracks. It is almost impossible to acquire a new home in America that is not subject to CCRs.

Two important legal principles, however, support the rules proposed by the FCC. First, the law favors the free use and transfer of real property. A homeowner should be allowed to use his or her home for any legal purpose. This principle is a variation on the more universal concept that an individual is best able to make his or her own decisions. The less restrictions on the individual, the more innovation will flourish. Obviously, this principle should be limited when the community has a more pressing interest at stake. Restricting the placement and color of an antenna, however, can never constitute such a pressing interest.

The second important legal principle which favors the FCC position is that a restrictive covenant may not upset or undermine an important public policy. For example, it is illegal to create a restrictive covenant that places a limitation on the race or religion of the homeowner in a given subdivision. In addition, overly burdensome restrictions on the right of free speech, such as a prohibition against the display of political campaign signs, have been held to be unenforceable. In this case, the important public policies at stake are (1) developing true, vigorous competition in the

telecommunications marketplace and (2) making available all forms of telecommunications services to all citizens. These two policies are clearly undermined by the restrictions on the use of antennas.

Putting these legal principles aside, what do CCRs mean for the wireless cable business? Consider two of the most common restrictions found in CCRs:

No building, fence structure of improvement whatsoever will be made to the Property without the written approval of the Architectural Committee.

No television antenna, antenna-like structure or satellite dish shall be installed on any Property.

The use of the wireless antenna is severely limited in all communities that are subject to these types of CCRs. People's Choice TV competes with traditional cable companies in large metropolitan areas, areas which have experienced tremendous growth in the past twenty to thirty years. Almost all new housing in these areas has been built by developers who have elected to develop property by creating HOAs with CCRs that restrict the use of antennas. In almost every community in which we hope to compete, we must overcome the obstacles presented by these antenna restrictions. The FCC should consider whether the CCRs currently in place at almost all HOAs would have come into place without the influence of cable companies; it may not be coincidental that the increase in CCRs has coincided with an increase in penetration by cable companies in HOA communities. The following is a brief summary of the various strategies that People's Choice TV has utilized in trying to sell our service in antenna restricted areas.

## **II. Strategies for Overcoming Antenna Restrictions**

### **A. Complying with Restrictions**

Our first strategy is to work with the HOA and to attempt to comply completely with the CCRs of the subdivision. We have one sales person in charge of doing all advance work to fully understand the restrictions. The sales person makes contact with the HOA Board to discuss the fact that the wireless operator will be providing its service to residents of the subdivision. The sales person learns how the architectural review provisions of the HOA work and prepares any materials that need to be submitted for architectural review. The installer of the antennas and other equipment are made aware of the restrictions and the style of installation that the HOA expects.

We also try to enter into a private agreement with the Board of the HOA not to enforce the restrictions against People's Choice TV. Ideally, such an agreement contains two key provisions: (1) the Board and Architectural Committee pre-approve design guidelines that the Operator must meet; and (2) if design guidelines are met, the Board agrees not to challenge the installations, but if the design guidelines are not met, the HOA will notify the Operator and allow the Operator an opportunity to correct the installation.

### **B. Working With Developers**

People's Choice TV has also attempted to work with developers in our communities to prevent antenna restrictions from becoming part of the CCRs in the first

place. The best way to avoid these restrictions is to teach developers, real estate attorneys and citizens about the unnecessary limits on technological advances that they are placing on the subdivisions they create. We also attempt to approach the individual builders or developers before they have sold a lot in their new developments. It is crucial to become involved prior to the active sale of homes, for once lots have been conveyed, each homeowner will have to consent, in writing, to revisions to the CCRs.

### C. Amending the CCRs

In situations where the homes have already been constructed, People's Choice TV has also attempted to amend the CCRs. CCRs can be amended according to their terms or through a mechanism provided for in the state law. Typically, to amend a restrictive covenant, the CCRs require a two-thirds majority of the entire set of home owners to agree to any amendments. Not only do they need to agree, but a formal amendment must be executed, notarized and recorded properly at the local land records before the change is effective.

### **III. Results: Limited Success**

People's Choice TV has had limited success implementing these strategies. In general terms, the biggest problems have been that (1) the HOA Board is generally an insular institution not responsive to a changing world; rather the Board is interested in mindlessly defending the CCRs and its own power; (2) the HOAs have the time and resources to defend the CCRs and the ability to threaten and punish the residents who

wish to receive our service; (3) the CCRs are needlessly strict and burdensome; and (4) People's Choice TV, as a start up competitor, does not have the resources to combat the HOAs. True life stories are the best way of demonstrating these trends.

In our Tucson wireless cable system, we have a department responsible for entering into agreements with HOAs. In one case, because the membership of the Board changed so often, our representative made at least three different presentations to the Board. At one point, the Board was willing to allow us to provide service with certain minimal conditions; the next Board stated that it was not interested in having our antennas at all; the most recent Board, with which a deal was struck, has permitted us to install our antennas, but only under very strict design limitations. After twenty months of negotiating, we have twelve customers in a nice new subdivision of close to three hundred homes. Many other residents have expressed interest in our service, but they are not able to meet the stringent design requirements.

In our Houston system, a new customer was installed and unbeknownst to us, the resident's property was subject to antenna restrictions. We attempted to negotiate with the HOA but they have been unwilling even to talk with us. Our customer has been fined over \$800 by the HOA for her failure to comply with the antenna regulations and a lien has been placed on the customer's home. In addition, the HOA has demanded the payment by either the Customer or People's Choice of all attorney's fees incurred by the HOA. This Customer is now attempting to sell her home, but is facing difficulties because of the lien on the property. The imposition of fines and so-called compliance

costs by the HOA has proven to be an effective method for forcing our customers to submit to the absolute power of the HOA Boards.

In another situation, People's Choice TV had over 30 potential customers in an HOA subdivision, all expressing an interest in our service. Some of these people stated that they wanted the ability to have access to other wireless technologies, but that they were unaware that the mounting of a receiving antenna would run afoul of the subdivision rules. Because we sensed a critical mass of people in this HOA who recognized the value of the wireless alternative, we engaged a local real estate attorney to work on a plan to amend the CCRs. The HOA refused to work with us, even though we were able to demonstrate that a significant number of residents wanted the service and were unaware of the CCRs when they purchased their homes. Because of the very costly estimates given to us by our attorney to amend the CCRs, we were forced eventually to walk away from these customers, but not after spending several thousand dollars in outside counsel fees.

On many occasions, our representatives have made presentations to the Board of an HOA, showing off the sleek styling and small stature of the wireless antenna. Many months later, the representative receives a letter, stating that the HOA has decided that it does not wish to see large satellite dishes installed at its exclusive subdivision. These responses seem to reflect either a failure to listen or a "Monster Satellite Dish" stereotype that the Board members can not shake from their subconscious.

In our Houston system, we knew that we would have difficulties bringing our service to the HOA communities, but never anticipated that we would have to fight a

pitched battle. We have been operating in Houston since April, 1994 and we currently have approximately 25,000 customers. In that short two year period, we have documented the loss of 1500 customers which we signed up and installed and then were forced to disconnect because of the CCRs in the communities. We put a value of over \$2,000,000 on the customers in Houston which have been lost to antenna restrictions in two years.

In sum, we have devoted and will continue to devote great amounts of our limited resources to gaining access to all homes in the areas we serve. Overall, however, the rigidity and inflexibility of the HOAs and the HOA's superior resources continue to make it very difficult for People's Choice to provide our service in these communities.

#### **IV. Conclusion: Federal Preemption is the Best Solution**

The Congress has stated clearly that competition in telecommunications services is an important public policy goal of the United States. Local and state rules and regulations that hamper and impede that goal must and should be preempted. As we have demonstrated, antenna restrictions, while theoretically agreements among land owners, are in practice coercive. In addition, HOAs are not amenable to positive change, but rather Boards often serve as a bottleneck that stultifies progress, as unresponsive and myopic as the worst bureaucracies. While People's Choice TV can slowly and inefficiently combat these impediments to our growth, our resources are better spent elsewhere. The adoption of the proposed rules under Section 207 will allow wireless cable companies to divert important resources away from fighting CCRs. We will be able

to spend our money providing video services at a competitive price, thereby allowing more people to receive these types of services and forcing the traditional cable TV companies to compete on price, quality and service. The individual will have been given the freedom to choose and with this choice in hand will ultimately discipline all multichannel video providers. And the Board, while no longer able to impair a homeowner's ability to choose new technological innovations, will still have the right to enforce its other myriad regulations.

Respectfully Submitted.

People's Choice TV Corp.

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