

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

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

REPLY COMMENTS

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INTERNATIONAL, INC.

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EXECUTIVE SUMMARY

The comments submitted in response to the *NPRM* demonstrate that the Commission should preempt only those state or local zoning, land-use, building, or similar regulations that impair the installation, maintenance, or use of devices designed for over-the-air reception of television broadcast or wireless cable signals. In addition, restrictive covenants, encumbrances, homeowners' association rules, or other nongovernmental restrictions that impair a viewer's ability to receive video programming signals from over-the-air television broadcast or wireless cable stations should be deemed unenforceable.

In determining what restrictions are preempted, the Commission must make clear that restrictions can "impair" reception without preventing it. In particular, restrictions that unduly delay the installation of wireless cable antennas will have the effect of driving potential subscribers to alternative service providers, depriving consumers of the benefits of a competitive choice.

The record establishes that to effectively implement Section 207, the Commission should bar any civil, criminal, administrative, or other legal action of any kind to enforce any regulation that affects the installation, maintenance, or use of such devices until the promulgating authority has obtained either a final declaration from the Commission that such regulation does not impair the installation, maintenance, or use of such devices or a waiver from the Commission due to exceptional circumstances. If consumers are charged with the burden of affirmatively attacking local regulations, the practical effect again will be to drive consumers to "easier" services.

Finally, the Commission should refute the suggestion that local authorities can preclude the installation, use and maintenance of wireless cable antennas so long as some other multichannel video service is made available to residents. Section 207 is designed to promote competition and the widest availability of service — it does not permit local authorities to determine whether wireless cable service will be made available.

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REPLY COMMENTS

The Wireless Cable Association International, Inc. (“WCA”), by its attorneys and pursuant to Section 1.415 of the Commission’s Rules, hereby replies to the initial comments submitted in response to the *Notice of Proposed Rulemaking* (“NPRM”) in the above-captioned proceeding.

I. INTRODUCTION.

In its initial comments, WCA offered a series of modifications to the rules proposed in the *NPRM* to better implement 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/}

^{1/}Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 (1996).

Under WCA's proposal, the Commission would preempt only those state or local zoning, land-use, building, or similar regulations that impair the installation, maintenance, or use of devices designed for over-the-air reception of television broadcast or wireless cable signals. To implement that preemption, the Commission would bar any civil, criminal, administrative, or other legal action of any kind to enforce any regulation that affects the installation, maintenance, or use of such devices until the promulgating authority has obtained either a final declaration from the Commission that such regulation does not impair the installation, maintenance, or use of such devices or a waiver from the Commission due to exceptional circumstances. In addition, under WCA's proposal no restrictive covenant, encumbrance, homeowners' association rule, or other nongovernmental restriction could be enforced to the extent that it impairs a viewer's ability to receive video programming signals from over-the-air television broadcast or wireless cable stations.^{2/} The complete text of WCA's proposed rule revisions, including changes made in response to the initial comments of filers, is set forth at Appendix A.

After reviewing the other comments submitted in response to the *NPRM*, WCA continues to believe that its proposal strikes an appropriate balance between the mandate of

^{2/}WCA's proposal would also ban the promulgating authority from enforcing a regulation that affects the installation, maintenance or use of such devices or impose any penalties pursuant thereto until 30 days after it has provided written notice to the person against whom it wishes to enforce the regulation that such regulation has been authorized by the Commission.

Congress reflected in Section 207 and the legitimate interests of local authorities^{3/} who promulgate private and governmental restrictions.^{4/} As set forth below, the comments submitted by many local authorities represent misguided efforts to distract the Commission from Congress's clear mandate -- to *prohibit* local restrictions that impair the installation, use and maintenance of wireless cable reception antennas. In promulgating rules to implement Section 207, the Commission must make certain that Congress' objective is achieved.

^{3/}As it did in its initial comments, WCA will utilize the term "local authorities" to include both local governmental authorities and those empowered to enforce restrictive covenants, home owner association restrictions and other private limitations on the installation of wireless reception devices.

^{4/}WCA agrees with The Alliance for Higher Education, *et al*, the National ITFS Association and others who assert that the Commission's rules implementing Section 207 should apply not only to antennas used to receive E and F Group channel Multipoint Distribution Service ("MDS") stations, but antennas used to receive any MDS or Instructional Television Fixed Service ("ITFS") station. *See* Comments of ITFS Parties, CS Docket No. 96-83 (filed May 3, 1996); Comments of National ITFS Ass'n, CS Docket No. 96-83, at 2-3 (filed May 6, 1996); Comments of Bell Atlantic Corp. and Bell Atlantic Video Services Company, CS Docket No. 96-83, at 4-5 (filed May 6, 1996)[hereinafter cited as "Bell Atlantic Comments"]; Joint Comments of CAI Wireless Systems, *et al*, CS Docket No. 96-83, at 2 n.4 (filed May 6, 1996). WCA also agrees that the rule should govern not only restrictions on the antennas themselves, but also any necessary supporting masts and other ancillary equipment. *See* Comments of NYNEX Corp., CS Docket No. 96-83, at 5 n.9 (filed May 6, 1996); Comments of BellSouth Corp. and BellSouth Interactive Media Services, CS Docket No. 96-83, at 5-6 (filed May 6, 1996); Comments of the Ass'n for Maximum Service Television, CS Docket No. 96-83, at 5 (filed May 6, 1996). The rule proposed in Appendix A has accordingly been expanded to cover all MDS and ITFS reception antennas.

In addition, WCA agrees with Pacific Bell Video Services and Cross Country Wireless, Inc. that the Commission's rules should accommodate the coming ability of using wireless cable antennas for bidirectional messaging. *See* Comments of Pacific Bell Video Services and Cross Country Wireless, Inc., CS Docket No. 96-83, at 2 (filed May 6, 1996). *See also* WCA Comments, at 25.

II. DISCUSSION.

A. The Commission Should Not Preempt All Restrictions That Affect Wireless Cable Antennas, But Only Those That Impair Reception Of Service.

Without doubt, the most controversial aspect of the Commission's proposed rule is the first sentence of paragraph (a)(1), which provided that "Any state or local zoning, land-use, building, or similar regulation, that *affects* 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)." (emphasis added). A large number of disparate interests, ranging from the National Association of Broadcasters and WCA to the National League of Cities ("NLC"), recognized that the proposed language goes farther than Congress intended by preempting regulations that affect, but do not impair, the installation, maintenance, or use of applicable antennas.^{5/}

Thus, WCA proposed in its initial comments that the word "affect" be amended to "impair" to better track the language of Section 207. Such an approach, WCA submits, would permit appropriate local regulation of antennas, while making clear that those restrictions that impair reception cannot stand. In addition, adoption of WCA's proposal

^{5/}See, e.g. Comments of Wireless Cable Ass'n Int'l, CS Docket No. 96-83, at 7-14 (filed May 6, 1996)[hereinafter cited as "WCA Comments"]; Comments of Nat'l Ass'n of Broadcasters, CS Docket No. 96-83, at 5-6 (filed May 6, 1996)[hereinafter cited as "NAB Comments"]; Comment of Nat'l League of Cities, *et al*, CS Docket No. 96-53, at 6 (filed May 6, 1996)[hereinafter cited as "NLC Comments"]; Comments of Scarini & Hollenbeck, CS Docket No. 96-83, at 2 (filed May 6, 1996).

would also moot NLC's assertion that the proposed rule exceeds the federal government's authority under the United States Constitution.^{6/} Significantly, NLC concedes that:

the scope of the Proposed Rule should be narrowed to cover only those local regulations that actually impair a viewer's ability to receive over-the-air video programming. Only such a regulation could withstand scrutiny under the Commerce Clause.^{7/}

Since WCA's proposed rule would only result in preemption of those local restrictions that impair reception, adoption of WCA's proposal should not be objectionable to NLC.

B. The Commission Should Make Clear That Restrictions Can Impair Antennas, And Thus Be Preempted, Even If They Do Not Prevent Installation.

While WCA agrees with the local authorities who would only preempt restrictions that "impair," it vigorously objects to the efforts of a few local authorities to have the Commission limit the scope of Section 207 to those situations where the restriction in issue actually "prevents" installation, use and maintenance of a wireless cable reception antenna.^{8/} Had Congress intended for Section 207 to be limited to those restrictions that "prevent" the installation, use or maintenance of wireless reception antennas, it would have used the word

^{6/}See NLC Comments, at 7-9.

^{7/}*Id.* at 9.

^{8/}See Comments of Silverman & Schild, LLP, CS Docket No. 96-83, at 2 (filed May 6, 1996)[hereinafter cited as "Silverman Comments"]; Joint Comments of Nat'l Apartment Ass'n, *et al*, CS Docket No. 96-83, at Attachment 1, p. 13 (filed May 6, 1996)[hereinafter cited as "NAA Comments"]. Montgomery Village Foundation goes so far as to propose that it be permitted to impose height restrictions that would have the practical effect of preventing reception — a result clearly not contemplated by Congress. See Comments of Montgomery Village Foundation, CS Docket No. 96-83, at 3 (dated May 2, 1996)(annexed to comments of Community Ass'ns Institute).

“prevent,” just like it did in Sections 101, 103, 51, 304, 502, 509, 602(c), 701 and 708(c)(2)(D) of the 1996 Act.

As the Commission has recognized in a similar context, a restriction can impair reception without preventing it.^{9/} Thus, WCA agrees with the Reston Home Owners Association that:

In order to comply with the Congressional mandate and promulgate regulations that focus on restrictions that impair reception, in our opinion the FCC obviously must first determine the meaning of impaired reception. A reading of Webster’s shows that impair is defined as “to decrease in strength, value, amount or quality.” If is a decrease in the strength of the reception, value of the reception, amount of the reception or quality of the reception that Congress clearly had in mind passing Section 207 of the Act.^{10/}

^{9/}*See Preemption of Local Zoning Regulation of Satellite Earth Stations*, 10 FCC Rcd 6982, 6987 (1995)(“because satellite antennas must have a ‘line of sight’ to the space station that is not blocked by buildings or vegetation, even residents who are able to obtain installation permits may be faced with placement restrictions that substantially impair reception.”).

^{10/}Comments of the Reston Home Owners Ass’n, CS Docket No. 96-83, at 2-3 (filed April 15, 1996)[hereinafter cited as “Reston Comments”]. *See also* Comments of the Network Affiliated Stations Alliance, CS Docket No. 96-83, at 2 (filed May 6, 1996)(“‘Impair’ means ‘to damage or make worse’ or ‘injure.’ It is not synonymous with ‘prevent’ or ‘eliminate.’”). Evermay Community Association suggests that any restriction that would increase the cost of installation by more than 25% of the usual cost of the antenna, support structure, and installation labor be deemed to “impair” installation. *See* Comments of Evermay Community Ass’n, CS Docket No. 96-83, at 3 (filed May 3, 1996). While WCA believes that this might be a useful approach, given the price competitive nature of the multichannel video marketplace, WCA believes that restrictions that impose more than a 10% penalty over the cost of a “normal” installation have a significant impact and should be barred. Of course, as discussed below, the Commission must also provide a definition for “impair” that accommodates restrictions that do not impose additional costs, but delay installation.

It is reasonable to assume that Congress used the word “impair” for a good reason — it recognized that substantial burdens on antennas can be as devastating to competition as outright bans. As Bell Atlantic properly notes in its comments, “it is not only outright prohibitions on antennae and associated devices that limit consumer access to wireless video services, but also restrictions and regulations — such as application and review processes — that impose undue delay on such access.”^{11/} It is WCA’s experience that requirements which delay service can be as devastating to wireless cable operators as blatant prohibitions on service.

This should come as no surprise to the Commission. In response to substantial evidence of consumer dissatisfaction with poor customer service in the cable television industry, the Cable Consumer Protection and Competition Act of 1992 directed the Commission to establish national customer service standards mandating, among other things, speedy installation of cable service.^{12/} As promulgated, the Commission’s rules require that a standard cable installation be performed within seven business days after an order has been placed.^{13/} Since consumers demand rapid installation of any new multichannel video service, a cable operator that provides service within seven business days of receiving an order will have a substantial competitive benefit over a wireless operator forced to comply with

^{11/}Bell Atlantic Comments, at 2.

^{12/}47 U.S.C. § 552 (b)(2) (1994).

^{13/}47 C.F.R. § 76.309 (c)(2)(i) (1995).

burdensome local regulations that impair its ability to install wireless service as quickly.

Wireless cable operators have consistently found that potential subscribers are often unwilling to wait for service while architectural review boards, zoning commissions, and other local authorities consider whether to permit the installation of reception equipment. Moreover, there is nothing in WCA's experience or the record in this proceeding to suggest that local authorities have any legitimate reason for requiring approval of wireless cable antennas prior to installation. To the contrary, local authorities can serve their legitimate interests, without imposing undue burden on potential wireless cable subscribers, by adopting appropriate standards and permitting the installation of antennas without prior approval, so long as they comport with the appropriate standards.^{14/} If the Commission truly intends "to foster full and fair competition among different types of video programming services,"^{15/} it cannot tolerate local restrictions that delay the installation of wireless cable reception equipment.

C. The Availability of Other Video Other Services Does Justify Impairment of Wireless Cable Antennas.

Several of the parties opposing the rules proposed in the *NPRM* contend that so long as local authorities make some video service available to residents, Section 207 permits them to impair the installation, use or maintenance of wireless cable and television broadcast

^{14/}Of course, local authorities should not be permitted to enforce those standards unless and until they have obtained a declaration from the Commission that such standards do not impair the installation, use or maintenance of wireless cable reception antennas.

^{15/}*NPRM*. at ¶ 2.

antennas.^{16/} Their arguments, however, ignore the plain language of Section 207, as well as its legislative history.

On its face, Section 207 mandates that consumers have access to their choice of wireless cable, DBS or television broadcast services, and provides no basis for allowing a local authority to substitute its judgment for the consumer's. Indeed, the conference report accompanying the 1996 Act makes clear that the underlying purpose of the legislation is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector development of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . ."^{17/} The Commission itself has recognized that its objectives must be: "(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

^{16/}See Issues and Position Statement of The Caughlin Ranch Homeowners' Ass'n, CS Docket No. 96-83, at 3-4 (filed May 6, 1996)(contending that so long as homeowners association permits unimpaired installation of DBS antennas, it may restrict wireless cable and television antennas); NAA Comments, at 13-14 (suggesting that availability of cable service should justify restrictions on alternatives); Comments of the Community Associations Institute, *et al* CS Docket No. 96-83, at 27-28 (filed May 6, 1996)[hereinafter cited as "CAI Comments"].

^{17/}H.R. Rep. No. 104, 104th Cong., 2nd Sess. 113 (1996). If Section 207 is interpreted so that the availability of cable service is sufficient to justify restrictions on wireless reception antennas, Section 207 will be applicable to just that 4% of households nationwide that are not passed by cable. See *Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates*, 10 FCC Rcd 11951, 11957 (1995). There is nothing in the 1996 Act or its legislative history to indicate that Congress intended to limit the benefits of wireless technology to that small sub-group.

programming services.”^{18/} Thus, any argument that Section 207 should be read formulaically so as to exclude or hinder one competitor to the advantage of another is fundamentally flawed.

That is particularly so given the history of many of the restrictions at issue. Like WCA, the Community Broadcasters Association has expressed concern that cable operators are encouraging local regulations that restrict outdoor receiving antennas or enter into financial arrangements with real estate developers that involve placing covenants in deeds that bar such antennas.^{19/} As such, it would be passing strange for the Commission to permit the availability of cable service to justify anti-competitive restrictions on wireless reception antennas.

D. The Commission Should Not Shift The Burden of Presenting A Prima Facie Case To The Consumer.

Much like the rules proposed in the *NPRM*, WCA’s proposed rules would prevent a local authority from enforcing a restriction that affects wireless reception antennas until that authority can demonstrate that the restriction does not impair the installation, use or maintenance of such antennas. Others have proposed similar approaches.^{20/} Not

^{18/}*NPRM* at ¶ 2 (emphasis added).

^{19/}*See* WCA Comments, at 2-4; Comments of the Community Broadcasters Ass’n, CS Docket No. 96-83, at 2 (filed May 6, 1996)(“The monopoly poser of the cable television industry . . . is exacerbated when cable operators encourage local regulations that restrict outdoor receiving antennas or enter into financial arrangements with real estate developers that involve placing covenants in deeds that bar such antennas.”).

^{20/}*See* NAB Comments, at 6-7.

surprisingly, however, a few local authorities seek to undercut the pro-competitive intent of Section 207 by permitting the enforcement of a restriction unless and until the consumer can demonstrate that the restriction does not impair reception.^{21/}

Those efforts must be rejected if the rules implementing Section 207 are to achieve Congress' objectives. As WCA demonstrated in its initial comments, rules that place the burden on the consumer to commence and then endure lengthy and time-consuming administrative or judicial processes before receiving wireless cable service will inevitably drive consumers to the "easier" service — the franchise fee-paying local cable operator.^{22/} By contrast, local authorities have the incentive and the resources to initiate proceedings before the Commission for declaratory ruling and waivers to support their efforts at restricting antennas.

It has been suggested by local interests that there is no evidence that local governments impair television broadcast and wireless cable reception, and thus no need to require local governments to secure Commission approval of antenna restrictions prior to enforcement.^{23/} This line of argument is fundamentally flawed — the facts presented by WCA, individual wireless cable system operators, and the broadcast industry demonstrate

^{21/}See, e.g. Silberman Comments, at 3; NLC Comments, at 6-7.

^{22/}See WCA Comments, at 11-12.

^{23/}See NLC Comments, at 7.

that the problem is widespread.^{24/} Indeed, one cannot ignore that the Commission has specifically found 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.”^{25/}

NLC goes so far as to assert that even once the consumer demonstrates impairment, the local government should be permitted to enforce its regulation so long as it was necessary to accomplish a health, safety, or aesthetic objective and is narrowly tailored to achieve that objective.^{26/} Such an approach, however, cannot be squared with the language of Section 207. While, as discussed above, WCA does not believe all local restrictions affecting antennas must be preempted, Section 207 makes clear that if a local restriction impairs reception, it must be preempted regardless of the health, safety or aesthetic objective behind it.

^{24/}See, e.g. WCA Comments, at 2-3; NAB Comments, at 1; Comments of Ass’n for Maximum Service Television, CS Docket No. 96-83, at 1-2 (filed May 6, 1996); Comments of American Telecasting, Inc., CD Docket No. 96-83 (filed May 2, 1996).

^{25/}*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”].

^{26/}See NLC Comments, at 7.

III. CONCLUSION.

The United Homeowners Association said it well:

By preempting outdated restrictions, homeowners will be provided with an on ramp to the "telecommunications super highway" enabling many of them to finally have access to more choice in the present and future marketplace. This will insure competition in the industry, lower prices and prevent homeowners from being at the mercy of one "take it or leave it provider."^{27/}

For the reasons set forth in WCA's initial comments and above, the Commission should adopt the proposed rule implementing Section 207 set forth in Appendix A.

Respectfully submitted,

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^{27/}Comments of the United Homeowners Association, CS Docket No. 96-83, at 2 (filed May 6, 1996).

PROPOSED RULE

(a) (1) Any state or local zoning, land-use, building, or similar regulation, that ~~affects~~ **impairs** the installation, maintenance, or use of devices **(including antennas, supporting masts and other ancillary equipment)** designed for over-the-air reception of television broadcast signals or, **Multipoint Distribution Service or Instructional Television Fixed Service signals** ~~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 Commission pursuant to paragraph ~~(e)~~**(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. **No promulgating authority may enforce a regulation that affects the installation, maintenance or use of such devices or impose any penalties pursuant thereto until 30 days after it has provided written notice that such regulation has been authorized by the Commission to the person against whom it wishes to enforce the regulation.**

~~(2) Any presumption arising from paragraph (a)(1) of this section may be rebutted upon a showing that the regulation in question:~~

- ~~———— (A) is necessary to accomplish a clearly defined health or safety objective that is stated in the text of the regulation itself;~~
- ~~———— (B) is no more burdensome to television broadcast service or multichannel multipoint distribution service reception device users than is necessary to achieve the health or safety objective; and~~
- ~~———— (C) is specifically applicable on its face to devices designed for over-the-air reception of television broadcast signals or multichannel multipoint distribution service.~~

- (b) Any state or local authority that wishes to maintain and enforce zoning or other regulations inconsistent with this section may apply to the Commission for a full or partial waiver of this section. Such waivers may be granted by the Commission in its sole discretion, upon a showing by the applicant of ~~local concerns of a highly specialized or unusual nature~~ **(i) the regulation is essential for preserving or protecting a highly specialized or unique feature of a particular location and (ii) the physical boundaries of the particular location and the scope of the regulation are no broader than necessary to preserve or protect the highly specialized or unique feature.** No application for waiver shall be considered unless it specifically sets forth the particular regulation for which waiver is sought. Waivers granted in accordance with this section shall not apply to later-enacted or amended regulations by the local authority unless the Commission expressly orders otherwise.
- (c) No restrictive covenant, encumbrance, homeowners' association rule, or other nongovernmental restriction shall be enforceable to the extent that it impairs a viewer's ability to receive video programming signals from over-the-air television broadcast or **Multipoint Distribution Service or Instructional Television Fixed Service stations** ~~multichannel multipoint distribution service~~.
- (d) **The sole forum for adjudicating any matters arising under this section shall be with the Commission.**