

EX PARTE OR LATE FILED

WILKINSON, BARKER, KNAUER & QUINN

LAW OFFICES

1735 NEW YORK AVENUE, N.W.  
WASHINGTON, D. C. 20006-5209

(202) 783-414

July 2, 1996

GERMAN OFFICE

GOETHESTRASSE 23

60313 FRANKFURT A.M. GERMANY

011-49-89-20876

011-49-69-297-8453 (TELECOPIER)

TELECOPIER

(202) 783-5851

(202) 833-2360

RECEIVED

JUL 2 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

William F. Caton  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, DC 20554

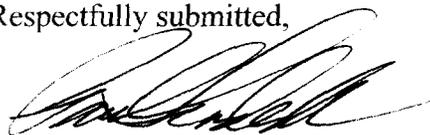
Re: *Implementation of Section 207 of the Telecommunications Act of 1996:  
Restrictions on Over-the-Air Reception Devices: Television Broadcast and  
Multichannel Multipoint Distribution Service -- CS Docket No 96-83*  
*WRITTEN EX PARTE COMMUNICATION*

Dear Mr. Caton:

On behalf of the Wireless Cable Association International, Inc. ("WCA") and in accordance with Section 1.1206(a)(1) of the Commission's Rules, we hand you herewith for inclusion in the docket of the above-referenced proceeding two copies of a written *ex parte* presentation delivered today to Randi Albert of the Cable Services Bureau.

Please contact the undersigned should you have any questions regarding this *ex parte* presentation.

Respectfully submitted,



Paul J. Sinderbrand

Counsel to the Wireless Cable Association  
International, Inc.

0+1

WILKINSON, BARKER, KNAUER & QUINN

LAW OFFICES

1735 NEW YORK AVENUE, N.W.  
WASHINGTON, D. C. 20006-5209

202 783-4441

July 2, 1996

GERMAN OFFICE

GOETHESTRASSE 23

6033 FRANKFURT A.M., GERMANY

01-49-89-20876

01-49-69-297-8453 TELECOPIER

TELECOPIER

(202) 783-5851

(202) 833-2360

HAND DELIVERY

Randi Albert  
Cable Services Bureau  
Federal Communications Commission  
2033 M Street, NW, Room 700-Q  
Washington, DC 20554

RECEIVED

JUL 2 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Re: *Implementation of Section 207 of the Telecommunications Act of 1996:  
Restrictions on Over-the-Air Reception Devices: Television Broadcast and  
Multichannel Multipoint Distribution Service -- CS Docket No 96-83*  
EX PARTE COMMUNICATION

Dear Ms. Albert:

When we last met to discuss the positions of the Wireless Cable Association International, Inc. ("WCA") regarding the issues raised in the *Notice of Proposed Rulemaking* in the above-referenced proceeding, you expressed concerns regarding the propriety of Commission pre-emption of restrictive covenants.

As a general matter, courts have refused to enforce restrictive covenants that are contrary to public policy or law, unreasonable, or in restraint of trade.<sup>1</sup> With Section 207 of the Telecommunications Act of 1996, Congress has firmly established that restrictive covenants which impair the installation of wireless cable antennas now run counter to federal law and public policy.<sup>2</sup>

Section 207's effect on restrictive covenants is analogous to solar energy regulations adopted by various states.<sup>3</sup> These statutes declare restrictive covenants which prohibit the installation of

---

<sup>1</sup>See 20 AM JUR 2D § 166.

<sup>2</sup>See, e.g., *Calumet Council Bldg. Corp. v Standard Oil Co. of Ind.*, 167 F.2d 539 (7th Cir. 1948) (using sections of relevant statutes as the source for discerning public policies against restrictions on the use of land).

<sup>3</sup>See, e.g., Colo. Rev. Stat. 38-30-168 (1995) (declaring unreasonable restrictions on solar energy devices void); Cal. Civ. Code § 714 (1995) (same).

roof-top solar energy systems to be void and unenforceable.<sup>4</sup> As a result, courts in states with these statutes or similar public policies have refused to uphold such restrictive covenants.<sup>5</sup> Simply put, the benefits of solar energy were deemed to outweigh the aesthetic or other interests protected by the restrictive covenants. Similarly, Congress has determined that the public policy benefits of promoting competition from wireless cable outweigh whatever interests are protected by restrictive covenants impairing wireless cable reception.

Compensation to the party denied enforcement of the restrictive covenant was never awarded in these solar energy cases. That is not surprising. In a significant number of jurisdictions, courts have held that restrictive covenants are not property rights, but are merely contract rights which need not be compensated for in eminent domain proceedings.<sup>6</sup> It is a basic tenet of contract law that contracts which are contrary to law or public policy are void.<sup>7</sup> No party to such a contract is entitled to damages for its breach because a void contract is unenforceable and totally without any legal effect.<sup>8</sup> Thus, in jurisdictions that view restrictive covenants as contracts, landowners benefiting from a restrictive covenant that has been voided as violative of law or public policy are not entitled to compensation.<sup>9</sup> Further, even if restrictive covenants are viewed as property rights, courts have not awarded compensation for the extinguishment of a restrictive covenant that violates law or public policy.<sup>10</sup> Thus, regardless of whether restrictive covenants are property or contract rights, compensation is not necessary if the restrictive covenant has been declared void as contrary to law or public policy.

In sum, the Commission, pursuant to Congress' directive, is well within its rights to declare void as contrary to law and public policy restrictive covenants that impair the installation.

---

<sup>4</sup>*Id.*

<sup>5</sup>*See Governor's Ranch Homeowner's Ass'n, Inc. v. Gunther*, 705 P.2d 1011 (1985) (Colo. App. 1985); *Kravy v. Old Orchard Ass'n.*, 1 Solar L. Rptr. 503 (Cal. 1979).

<sup>6</sup>*See, e.g., Board of Public Instruction v. Town of Bay Harbor Islands*, 81 So.2d 637, 640-42 (Fla. 1955).

<sup>7</sup>*See* RESTATEMENT (SECOND) OF CONTRACTS § 178 (1980).

<sup>8</sup>*See, e.g., Sang Moo Cho v. North Shore Flushing, Inc.*, 436 N.Y.S.2d 843, 845 (1981).

<sup>9</sup>*See, e.g., Lain v. Rennert*, 32 N.E.2d 375 (Ill.App. 1941).

<sup>10</sup>*See, e.g., Shelley v. Kramer*, 334 U.S. 1 (1948); *Barrows v. Jackson*, 346 U.S. 249 (1953).

Randi Albert  
July 2, 1996  
Page 3

maintenance or use of wireless cable reception antennas

I hope this information proves helpful to you. If I can provide any further information, please do not hesitate to call.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Paul J. Sinderbrand", written in a cursive style.

Paul J. Sinderbrand

Counsel to the Wireless Cable Association  
International, Inc.

cc: Office of the Secretary (2 copies)