

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



SEP 27 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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In the Matter of

Preemption of Local Zoning Regulation of  
Satellite Earth Stations

In the Matter of

Implementation of Section 207 of the  
Telecommunications Act of 1996

Restrictions on Over-the-Air Reception Devices:  
Television Broadcast and Multichannel Multipoint  
Distribution Service

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) IB Docket No. 95-59  
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) CS Docket No. 96-83  
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**COMMENTS**

**THE WIRELESS CABLE ASSOCIATION  
INTERNATIONAL, INC.**

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September 27, 1996

## TABLE OF CONTENTS

<b>EXECUTIVE SUMMARY</b> .....	ii
<b>I. INTRODUCTION</b> .....	1
<b>II. DISCUSSION</b> .....	4
<b>A. The Commission Lacks Authority To Mandate That Governing Associations     And Landlords Provide Space In Common Areas For Every Communications     Service Provider</b> .....	4
<b>B. The Commission Should Decide The Issues Raised By The R&amp;O and FNPRM     In Tandem With Those Before It In CS Docket No. 95-184 and MM Docket No.     92-260</b> .....	6
<b>C. The Commission Should Clarify That While Lease Provisions Should     Generally Be Enforced, Enforcement Of A Restriction In A Ground Lease That     Impairs The Installation of A Wireless Cable Reception Antenna On A Mobile     Home Owned By The Viewer Is Preempted</b> .....	9
<b>D. The Commission Should Clarify That Governmental Regulations Preempted     Pursuant To Section 1.4000 Cannot Be Enforced, Even Against Renters</b> .....	11
<b>III. CONCLUSION</b> .....	12

## **EXECUTIVE SUMMARY**

While WCA is supportive of the Commission's efforts to promote the emergence of wireless cable and other wireless video distribution services, the reality is that the Commission lacks the authority to mandate that governing associations and landlords turn over their property for the installation of wireless video reception equipment and associated wiring. Thus, WCA urges the Commission to establish a regulatory environment that provides governing associations and landlords incentives to afford access to competitive wireless service providers by minimizing the need for multiple antennas and additional inside wiring.

To accomplish that objective, the Commission should resolve the issues raised by the *R&O and FNPRM* in tandem with the similar issues presently pending before it in CS Docket No. 95-184 and MM Docket No. 92-260. WCA has proposed there a series of inside wiring rules designed to obviate the most common objection landlords and governing associations have to permitting wireless cable operators access to their buildings — the property owner's distaste for having additional distribution wiring installed to each residence. In WCA's view, the adoption of such rules will promote an environment in which landlords and governing associations will be more open to permitting alternative video service providers access to their premises.

The Commission should also clarify that while lease provisions restricting antennas should generally be enforced, enforcement of a restriction in a ground lease that impairs the installation of a wireless cable reception antenna on a mobile homes owned by the viewer is preempted.

Finally, the Commission should clarify that governmental regulations preempted pursuant to section 1.4000 cannot be enforced, even against renters.

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**COMMENTS**

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys, hereby submits its response to the request for additional comments contained in the *Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* (the "*R&O and FNPRM*") released by the Commission on August 6, 1996 in the above-captioned proceedings.

**I. INTRODUCTION.**

With Section 207 of the Telecommunications Act of 1996 (the "1996 Act"), Congress has directed that the Commission must "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.”<sup>1/</sup> The Commission’s *R&O and FNPRM* promulgates new implementing rules applicable to those situations where the viewer in question has exclusive use or control and a direct or indirect ownership interest over the property on which the antenna is to be mounted. However, the Commission concluded “that the record before us at this time is incomplete and insufficient on the legal, technical and practical issues relating to whether, and if so how, to extend our rule in situations in which antennas may be installed on common property for the benefit of one with an ownership interest or on a landlord’s property for the benefit of a renter.”<sup>2/</sup> Thus, the Commission has solicited further comment “to develop the record further before reaching conclusions regarding the application of Section 207 to situations in which the viewer does not have exclusive use or control and a direct or indirect ownership interest in the property where the antenna is to be installed, used, and maintained.”<sup>3/</sup>

Although WCA intends to petition the Commission to reconsider certain aspects of the rules and policies adopted in the *R&O and FNPRM*, those rules and policies generally represent a useful first step towards effectuating Section 207 and promoting the emergence of wireless cable in a competitive multichannel video marketplace. The Commission aptly notes that when the viewer does not have exclusive use or control and a direct or indirect

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<sup>1/</sup>Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 (1996).

<sup>2/</sup>*R&O and FNPRM*, at ¶ 63.

<sup>3/</sup>*Id.*, at ¶ 66.

ownership interest in the property on which the antenna is to be installed, difficult issues can arise out of conflicts with the competing rights of those with ownership interests in the property on which the antenna will be mounted. Thus, WCA welcomes the Commission's invitation to submit additional comments.

Essentially, the focus in this phase of the proceeding is on three scenarios. First, the owner of real property who is a member of a condominium, cooperative unit or homeowners association (a "governing association") desires to install an antenna upon property that is not under his or her exclusive control, but instead is common property that is owned and controlled by a governing association that has the right to object to the proposed antenna. Second, a renter desires to install an antenna on property that is not leased to him or her, such as on the rooftop of a rental apartment building. And, third, a renter desires to install an antenna on property that he or she has leased, but where the antenna installation would constitute a violation of a lease provision. In each case, the *R&O and FNPRM* raises the issues of whether the Commission has authority under Section 207 to mandate that the governing association or landlord permit the antenna and, if the Commission does, whether it would be in the public interest to issue such a mandate.

In WCA's view, these issues present a classic confrontation between the Commission's goal of promoting a more competitive video marketplace and the rights of property owners. It is often the case that governing associations and landlords refuse access to wireless cable service providers because they fear that their property will be damaged as

the result of the installation of reception antennas and, even more importantly, inside wiring. Similarly, the record before the Commission in the earlier phases of these proceedings establishes that governing associations and landlords are concerned that the installation of antennas will cause damage and a safety hazard to their property. While WCA is supportive of the Commission's efforts to promote the emergence of wireless cable and other wireless video distribution services, the reality is that the Commission lacks the authority to mandate that governing associations and landlords turn over their property for the installation of wireless video reception equipment and associated wiring. Thus, WCA urges the Commission to establish a regulatory environment that provides governing associations and landlords incentives to afford access to competitive wireless service providers by minimizing the need for multiple antennas and additional inside wiring.

## **II. DISCUSSION.**

### ***A. The Commission Lacks Authority To Mandate That Governing Associations And Landlords Provide Space In Common Areas For Every Communications Service Provider.***

As the wireless cable industry is one of the primary beneficiaries of Section 207, WCA certainly applauds the Commission's efforts to expand the number of consumers that will have access to wireless cable services. However, it would be counterproductive for the Commission to adopt rules and policies in this proceeding that cannot withstand judicial scrutiny, for that will only delay the realization of the consumer benefits that Section 207 is intended to achieve. And therein lies the rub. The record before the Commission in CS Docket No. 95-184 (*Telecommunications Services: Inside Wiring and Customer Premises*

*Equipment*) and MM Docket No. 92-260 (*Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*) demonstrates both that the Commission lacks authority to force governing associations and landlords to provide wireless cable operators access to common property, and that such a mandate would be unwise as a matter of public policy.<sup>4</sup> That legal analysis is equally applicable whether it is a reception antenna or wiring that is being installed on common property. In the interest of brevity, WCA incorporates by reference the arguments advanced in CS Docket No. 95-184 which demonstrate that the Commission lacks authority to force landlords and governing associations to permit the installation of telecommunications equipment on property under their ownership and control.<sup>5</sup>

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<sup>4</sup>*See, e.g.,* Joint Reply Comments of Building Owners and Managers Ass'n Int'l, Nat'l Realty Committee, Nat'l Multi Housing Council, Nat'l Apartment Ass'n, Institute of Real Estate Management and Nat'l Ass'n of Real Estate Investment Trusts, CS Docket No. 95-184, at 5-11 (filed April 17, 1996); Comments of OpTel, Inc., CS Docket No. 95-184, at 3-5 (filed March 18, 1996) ("there is little doubt that requiring MDU owners to open their property to all service providers would . . . constitute a *per se* taking. It is open to serious question whether the Commission has statutory authority to compel such a *per se* taking of private property.") ["OpTel Comments"]; Consolidated Reply Comments of OpTel, Inc., CS Docket No. 95-184, at 3-5 (filed April 17, 1996); Comments of Independent Cable & Telecommunications Ass'n, CS Docket No. 95-184, at 36-41 (filed March 18, 1996) ("Congress has not delegated eminent domain power to the Commission for the purpose of mandating access to private property for the delivery of any component of broadband services by any narrow or broadband provider. Nor has Congress delegated eminent domain power directly to narrowband or broadband service providers for such purposes. To the contrary, Congress has repeatedly considered and rejected passage of a mandatory access law.") ["ICTA Comments"].

<sup>5</sup>The *R&O and FNPRM* specifically seeks comment on the implications of the decision by the United States Court of Appeals for the District of Columbia Circuit in *Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994). *See R&O and*

***B. The Commission Should Decide The Issues Raised By The R&O and FNPRM In Tandem With Those Before It In CS Docket No. 95-184 and MM Docket No. 92-260.***

In addressing the scenarios where an individual seeks to install an antenna on property that is owned or controlled by a governing association or landlord, the Commission should recognize that the issues presented are closely related to those before it in CS Docket No. 95-184 and MM Docket No. 92-260. In those combined dockets, as here, the Commission is confronted with the task of providing consumers access to competitive providers of video programming where to do so requires equipment installed outside of the consumer's own residence. In this proceeding, the Commission is addressing the placement of the reception antenna on a rooftop that is owned and controlled by a governing association or landlord, while in those proceedings, the Commission is addressing the wiring that is located in common areas that are owned or controlled by the governing association or landlord — common areas that would have to be traversed in most cases to connect the reception antenna mounted on a common rooftop to an individual residence.

The two proceedings are pieces of the same puzzle. Access to a commonly-owned rooftop for antenna installation will do a resident no good if he or she cannot run wiring from

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*FNPRM*, at ¶ 65. The record in CS Docket No. 95-184 establishes that the Commission lacks any express grant of authority to adopt a universal mandatory access rule. *See, e.g.*, OpTel Comments, at 3-4; ICTA Comments, at 36-42. As the D.C. Circuit held in the *Bell Atlantic* case in refusing to defer to the Commission's broad interpretation of its authority to order physical collocation on local exchange carrier property for competitive access providers, "deference to agency action that creates a broad class of takings claims . . . would allow agencies to use statutory silence or ambiguity to expose the Treasury to liability both massive and unforeseen." 24 F.3d at 1445. Thus, the *Bell Atlantic* decision supports WCA's position in this proceeding.

the antenna through common areas to his or her residence. Conversely, expanded access to inside wiring will do consumers no good if they cannot connect that wiring to a wireless cable reception antenna. At bottom, the issues presented in the two proceedings are identical -- does the Commission have the authority to compel landlords and governing associations to make space in common areas available for every video communications provider that desires to serve the property and, if so, should the Commission exercise that authority. Indeed, the two proceedings are so inextricably linked that, WCA respectfully submits, they should be resolved in tandem.

Given the Commission's lack of authority to mandate that landlords and governing associations provide access to all potential communications service providers, WCA has proposed, in CS Docket No. 95-184, a series of inside wiring rules designed to obviate the most common objection landlords and governing associations have to permitting wireless cable operators access to their buildings — the property owner's distaste for having additional distribution wiring installed to each residence.<sup>9</sup> Specifically, WCA has proposed that the following:

- The existing demarcation point for purposes of Section 16(d) of the Cable Consumer Protection and Competition Act of 1992 should be moved to the wall plate of the particular unit. Thus, a resident in an MDU environment would be permitted to purchase, upon termination of service, any wiring that

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<sup>9</sup>See, e.g., Comments of Wireless Cable Ass'n, CS Docket No. 95-184, at 12-15 (filed March 18, 1996); Comments of DIRECTV, Inc., CS Docket No. 95-184, at 2 (filed March 18, 1996); Comments of GTE, CS Docket No. 95-184, at 9 (filed March 18, 1996); Joint Comments of the Building Owners and Managers Association International, et al., MM Docket No. 92-260, at 12 (filed March 18, 1996).

is within his or her particular unit, but not wiring within the walls or common areas.

- All wiring devoted to serving an individual unit between the junction with common wiring and the new Section 16(d) demarcation point would immediately upon adoption of new rules become subject to the control of the landlord or governing association and could be purchased at replacement cost immediately.<sup>7/</sup>

In WCA's view, the adoption of such rules will promote an environment in which landlords and governing associations will be more open to permitting alternative video service providers access to their premises.

Adoption of WCA's proposal in CS Docket No. 95-184 will also promote the pro-competitive objectives of this proceeding. It has been the experience of the wireless cable industry that while landlords and governing associations will often permit the installation of a single professionally-installed wireless cable reception antenna to serve the property under their control, they strongly object to the installation of individual antennas for each subscriber and new wiring to distribute programming to the individual residences. If WCA's inside wiring proposal is adopted, it will be possible for the wireless cable operator to install a single reception antenna and connect that antenna to existing internal wiring, thus eliminating the problems associated with multiple antennas and postwiring. And, as the record in the inside wiring proceeding illustrates, once these problems are resolved, marketplace forces will push

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<sup>7/</sup>See Reply Comments of WCA, CS Docket No. 95-184, at 3 (filed April 17, 1996)[“WCA Wiring Reply Comments”].

landlords and governing associations to provide access to competitive video service providers.<sup>2/</sup>

*C. The Commission Should Clarify That While Lease Provisions Should Generally Be Enforced, Enforcement Of A Restriction In A Ground Lease That Impairs The Installation Of A Wireless Cable Reception Antenna On A Mobile Home Owned By The Viewer Is Preempted.*

In the *R&O and FNPRM*, the Commission has generally concluded that governmental and private restrictions which impair the installation, maintenance or use of wireless cable antennas are preempted unless they can be justified as *bona fide* narrowly-tailored restrictions designed to advance safety or historic preservation concerns. Next week, WCA intends to petition the Commission to reconsider its determination that governing associations have a legitimate interest in restricting on safety grounds the installation of antennas on property that is exclusively owned and controlled by an individual. As WCA will show in detail at that time, nongovernmental entities have no expertise and no legitimate basis for imposing restrictions on the property of others designed to protect safety — that is what governmental entities are for. Thus, WCA will urge the Commission to provide that only governmental entities may impair the installation, maintenance or use of wireless cable antennas for safety-related reasons.

For the same reasons, the Commission should find that those who lease ground space upon which mobile homes are located have no basis for imposing safety-related restrictions that impair the mounting of wireless cable antennas upon the mobile homes owned by

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<sup>2/</sup>See WCA Wiring Reply Comments, at 22-23.

subscribers. In such situations, WCA respectfully submits that the lease restriction should be preempted.

Since the antenna will be mounted on the mobile home that is owned by the consumer, and not by the landlord, there is no legitimate risk that the landlord's property will be harmed by the installation. While the landlord in such cases may allege an interest in the aesthetics of his or her mobile home park, the landlord should be treated no better than a governing association. Under Section 1.4000 of the Commission's Rules, a governing association can justify minor restrictions on aesthetic grounds, but cannot impair the installation, maintenance or use of wireless antennas for aesthetic reasons. The same should hold true here -- those who lease ground space should be permitted to include minor restrictions designed to advance aesthetics (such as a requirement that the antenna be mounted no higher than necessary, or that it be mounted towards the rear of the mobile home), but should not be permitted to impair.

*D. The Commission Should Clarify That Governmental Regulations Preempted Pursuant To Section 1.4000 Cannot Be Enforced, Even Against Renters.*

As noted above, WCA firmly believes that the Commission should not abrogate lease provisions impairing the installation, maintenance or use of antennas where the property on which an antenna will be installed is leased. However, because WCA's view is based on protecting the interests of the property owner relative to a tenant, the Commission should make clear that governmental restrictions that impair the installation, maintenance or use of

wireless cable antennas are preempted (unless justified on safety or historic preservation grounds), even if the residence in question is leased.

As presently drafted, Section 1.4000(a) of the Commission's rules provides that "any restriction . . . on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest in the property, that impairs the installation, maintenance, or use of . . . an antenna that is designed to receive video programming services via multipoint distribution services . . . is prohibited, to the extent it so impairs." If read narrowly, it could be concluded that a governmental restriction that is preempted and cannot be enforced against the owner of a single family home could be enforced against the renter of a single family home because the renter does not have exclusive use or control or a direct or indirect ownership interest in the property.

Other than the quoted language, there is nothing in the *R&O and FNPRM* to suggest that the Commission intends for there to be a distinction between owned and rental property *vis a vis* governmental restrictions. Nor is there any suggestion in the record that would support such a distinction. While the Commission is properly concerned about the rights of renters *vis a vis* property owners, those concerns do not extend to governmental entities.

In short, if a renter is entitled to install an antenna under his or her lease, that renter should be treated no differently from a homeowner when the enforceability of a governmental restriction is at issue. For example, the *R&O and FNPRM* states with crystalline clarity that

**“we would find unenforceable any restriction that establishes specific *per se* height limits.”<sup>2/</sup>**

**If a local government were to adopt an absolute ban on antennas mounted more than ten feet above the roofline, it makes no sense for the Commission to preempt enforcement against homeowners, but not against renters. Thus, the Commission should make clear that the enforceability of governmental restrictions does not depend upon whether the property on which the antenna will be mounted is directly or indirectly owned by and is under the exclusive use and control of the viewer.**

### **III. CONCLUSION.**

**For the reasons set forth above, the Commission should not adopt rules that unlawfully impinge upon the property rights of governing associations and landlords. Rather than attempt to wield a big stick the Commission simply does not have, the Commission should**

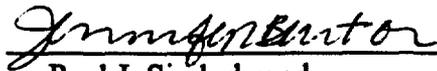
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<sup>2/</sup>*R&O and FNPRM*, at ¶ 37.

extend a carrot to governing associations and landlords by crafting a regulatory environment under which they will have incentives to permit multiple video service providers access to their property.

Respectfully submitted,

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