- Ordinary paint cannot be employed to cover wireless cable antennas. While it will often be necessary to employ the same paint used in painting the house in order to accurately match the color of the reception equipment to the color of the house, that paint would be unacceptable. In order to avoid disrupting reception, the paint used to coat a wireless cable antenna must either be completely transparent to RF energy or completely reflective. However, many of the exterior house paints in use today contain some small amount of metal base in their formula. That base does not contain enough metallic content to render the paint uniformly reflective, but contains sufficient quantities that the paint is not completely RF transparent.

- If portions of the antenna are covered by a radome either for technical or aesthetic reasons, the radome is generally made of a different material than the reflector and hence may need a different type of paint. This is particularly true if a conductive coating was required on the reflector, as the coating on the radome must always be non-conductive. This use of two paints will necessarily complicate the painting process, adding costs that may have the effect of impairing service.

- While it may be cost-effective for manufacturers to produce and operators to stock antennas in a small number of colors, the wide array of colors in which houses are painted makes it impossible as a practical matter for the industry to comply with painting requirements except on a custom basis. Each operator will have to either develop a centralized painting facility (which will increase both general overhead and the number of truck rolls necessary for each installation) or have each installer custom paint antennas as necessary (which will greatly increase the time and cost of each installation).

- Because bare metal antennas cannot be stored for an extended period of time, most antennas are coated in some manner by the manufacturer. Many antennas are covered at the factory with a heat-cured, powder coat form of paint that has proven to be extremely reliable and long lasting. At least one antenna manufacturer has indicated that its antennas cannot be painted over, and that the factory paint must be stripped and the product re-finished. In other cases, it will be necessary to first apply a primer coat, and then at least one finish coat, adding to the time and expense of installation.

In short, while a painting requirement may appear, at first blush, to impose little burden on consumers and the wireless cable operator, painting of wireless cable reception antennas is far more complex than the record before the Commission in this proceeding had indicated. Thus, the Commission should make clear that, notwithstanding the language of Paragraph 19, painting

requirements may impair the installation, maintenance and use of reception antennas and will be judged under Section 1.4000(a) accordingly.

B. The Commission Should Amend Section 1.4000 Of The Rules To Comport With The Intent Behind Section 207 of the 1996 Act And Promote Fundamental Fairness.

1. The FCC Should Preempt All Nongovernmental Restrictions That Impair Wireless Cable Reception Antennas, Subject Only To Waiver.

While the Wireless Cable Petitioners do not object to the Commission's decision to exempt *bona fide*, narrowly-tailored safety-related restrictions adopted by local governments from preemption, the Commission should not permit nongovernmental entities to adopt restrictions that impair wireless cable antennas in the name of safety, except where a waiver is granted under exceptional circumstances. By permitting nongovernmental entities to enforce "safety-related" restrictions that impair wireless cable service, the Commission has created an exception that can swallow the rule.

The Commission had it right in the *Notice of Proposed Rulemaking* in CS Docket No. 96-83, where it concluded that "it is appropriate to accord private, nongovernmental restrictions considerably less deference than we grant restrictions imposed by state or local governments."[36] As the Commission recognized in the *Report and Order and Further Notice of Proposed Rulemaking* in IB Docket No. 95-59, while state and local governments have traditionally employed their land use powers to protect the public health and safety, private restrictions

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[36] *NPRM*, 11 FCC Rcd at 6359.

generally target aesthetic concerns."[37] The record developed in this proceeding does not support permitting nongovernmental entities to impair the installation, maintenance or use of wireless cable antennas on safety grounds when such restrictions may be more onerous than, duplicative of, or in conflict with those that state and local authorities have imposed.[38]

Adoption of a *per se* preemption of private, nongovernmental restrictions, subject only to waiver in exceptional circumstances, will implement the clear Congressional intent of Section 207. The House Committee Report language accompanying the statutory provision upon which Section 207 of the 1996 Act was based, explicitly states:

> The Committee intends this section to preempt enforcement of . . . restrictive covenants or encumbrances that prevent the use of antennae . . . Existing regulations, including . . . restrictive covenants or homeowners' association rules, shall be unenforceable to the extent contrary to this section.[39]

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[37] *See Preemption of Local Zoning Regulation of Satellite Earth Stations*, 11 FCC Rcd 5809, 5821 (1996).

[38] Those few commenting parties that advocate exemptions from preemption for safety-related restrictions adopted by nongovernmental entities do not present a compelling case. For example, while the National Apartment Association, et al ("NAA") addresses safety issues, it appears concerned merely with preserving the right to enforce governmental building and fire codes and not with adopting more burdensome restrictions. *See* Joint Comments of NAA, et al, CS Docket No. 96-83, at 17-19 (filed May 6, 1996). Community, meanwhile, focuses on safety issues related to common property — issues that are not covered by the *Report and Order*. *See* Comments of Community, CS Docket No. 96-83, at 7-8 (filed May 6, 1996). While Community baldly states that HOAs have legitimate safety concerns that are not addressed by state and local government regulation, it fails to provide a single concrete example. *See* Community Reply Comments, CS Docket No. 96-83, at 4-7 (filed May 21, 1996)[hereinafter cited as "Community Reply Comments"]. Nonetheless, as discussed above, if a nongovernmental entity can show exceptional circumstances justifying a waiver of Section 1.4000(a), the Wireless Cable Petitioners believe that the Commission should afford an opportunity for such a waiver to be granted.

[39] H.R. Rep. No. 204 at 123-24 (emphasis supplied).

There is absolutely nothing in the legislative history of Section 207 that suggests that Congress intended to exempt a nongovernmental restrictive covenant or HOA rule from preemption merely because it purports to be safety-related.

The rule revisions proposed by the Wireless Cable Petitioners in Appendix A are essential to effectuate the federal interest in ensuring consumer access to wireless cable service. The record elicited in response to the *NPRM* demonstrates beyond peradventure that potential wireless cable subscribers are plagued by restrictive covenants and HOA rules that are broader in scope and do more to impair service than their government-imposed counterparts.[40] By virtue of private restrictions, potential wireless cable subscribers are confronted with countless delays, harassment, unreasonable costs, prior written approval requirements (with approval rarely given), and, all too often, outright bans against the installation of wireless cable antennas. Indeed, the Commission has recently acknowledged WCA's concern that "cable operators have begun to pre-wire residential units for cable service at no charge to the developer in exchange for deed covenants and other restrictions forever barring the homeowner from installing rooftop antennas".[41] Significantly, no party participating in this proceeding has refuted the wireless cable industry's showing that these restrictions can be the *quid pro quo* given by real estate

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[40] WCA Comments, CS Docket No. 96-83, at 23-24 (filed May 6, 1996); Comments of Pacific Bell Video Services, CS Docket No. 96-83 (filed May 6, 1996); Reply Comments of People's Choice TV Corp., CS Docket No. 96-83 (filed May 21, 1996).

[41] *1995 Report to Congress*, 11 FCC Rcd at 2113.

developers for benefits given by the franchised cable operator.[42] Yet, the *Report and Order* has established a regulatory regime under which franchised cable operators, operating through real estate developers and others, can continue to preclude competition merely by adding "safety boilerplate" to restrictive covenants and HOA restrictions.

The 1996 Act is intended to eliminate just these types of scenarios. Yet, the Commission has created a safety exception that threatens to swallow the rule. If nongovernmental restrictions on wireless cable antennas can be enforced merely by wrapping them in pro-safety rhetoric, it will not take long for franchised cable operators and those concerned primarily with aesthetics to develop boilerplate "safety" language to immunize otherwise impermissible restrictions from preemption. As the Commission itself has recognized, "[d]ifficulties arise because many local regulations combine safety with other concerns, and it is often hard to separate the various concerns."[43] While a state or local government may be entitled to deference when it asserts that the objective of a given restriction is to protect safety, the record reflects that private restrictions are generally put in place by real estate developers, who certainly are not entitled to the same deference.

As a matter of policy, there is no reason why the Commission should permit enforcement of a nongovernmental "safety" restriction that is more burdensome than, duplicates, or conflicts with one adopted by the state or local government. If the state or local governmental authorities,

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[42]Indeed, Community has conceded that this may occur. *See* Community Reply Comments, at 8.

[43]*See Report and Order,* at ¶ 24.

who have been charged with protection of the public safety, have concluded that there is a less burdensome alternative than the approach taken by the nongovernmental entity, then that determination should be dispositive evidence that the nongovernmental restriction is more burdensome than necessary. Although the Wireless Cable Petitioners cannot conceive of a specific scenario, they concede that exceptional circumstances arguably may arise in which enforcement of a nongovernmental safety restriction would be appropriate. By affording nongovernmental entities an opportunity to secure waiver of the general preemption contained in Section 1.4000(a) of the Rules, the Commission can provide nongovernmental entities an opportunity to protect their charges in such exceptional circumstances.

To implement the 1996 Act's directives and to enable homeowners to receive wireless cable signals without first engaging in protracted disputes with nongovernmental entities, the Commission should adopt the revisions to Section 1.4000 set forth in Appendix A.

2. The Commission Should Be The Sole Arbiter Of Whether A Given Restriction Is Enforceable Under Section 1.4000.

If Section 207 of the 1996 Act is to accomplish Congress' objectives, it is essential that the Commission's implementing rules be interpreted in a manner that is fair and consistent. To achieve that result, the Commission, and only the Commission, should determine whether any given regulation of antennas is enforceable under Section 1.4000.

There are strong policy and practical reasons for modifying Section 1.4000 to make the Commission the sole arbiter of whether a given restriction passes muster. As the Commission found in an analogous context, inconsistent court filings will leave both wireless cable subscribers and state and local authorities "unsure of their respective rights and responsibilities"

under the Commission's preemption policy.[44] The record compiled in IB Docket No. 95-59 evidences many inconsistent state court rulings with respect to C-band antennas, and it is reasonable to expect that the same pattern will continue to mark future court decisions regarding other types of wireless antennas. Centralizing all wireless cable and television broadcast antenna adjudications with the Commission will have the important benefit of establishing legitimate, uniform standards. Local governmental and nongovernmental entities, armed with local lawyers familiar with the local courts, will inevitably choose to litigate close to home rather than to proceed before the Commission. Although the Commission has the expectation that "the court would look to this agency's expertise and, as appropriate, refer to us for resolution questions that involve those matters that relate to our primary jurisdiction over the subject matter," there is no assurance that local court's will accept the Commission's invitation.[45] The result will be a hodge-podge of inconsistent rulings. By assuming responsibility for all rulings on the propriety of restrictions on wireless antennas, the Commission can implement a consistent national policy that will inure to the benefit of consumers and local authorities alike. Absent uniform standards, the specter of litigating in local courts over the right to install and use a wireless cable antenna will simply lead many potential wireless cable subscribers to abandon the service altogether. As

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[44] *See Exclusive Jurisdiction With Respect To Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934*, 6 FCC Rcd 7511, 7512 (1991) [hereafter cited as "*Section 315(b) Preemption Order*"].

[45] *Report and Order*, at ¶ 58. Moreover, once a jurisdiction has obtained judicial review of its wireless antenna regulations, Commission review may be precluded entirely. The decision in *Town of Deerfield, New York v. FCC*, 992 F.2d 420 (2d Cir. 1992), requires the Commission to intervene in a case before judicial review or not intervene at all.

the Commission has recognized in a similar context, "such a response to state lawsuits . . . would frustrate the Congressional intention to encourage greater" competition in the provision of programming services.[46]

Moreover, when litigation does occur, centralizing the disputes at the Commission will minimize the burden on all parties. As the *Report and Order* acknowledges, "declaratory ruling and waiver petitions require only paper submissions to the Commission, thus minimizing the burden on all parties."[47] Because the Commission's proceedings are primarily "paper hearings," the costs will be far lower than those associated with a court battle, which can involve numerous court appearances, substantial formal discovery, motions practice and, ultimately, a trial. In addition, while the Commission will need to be presented with the facts, it will not need to be educated with respect to the law. By contrast, there are thousands of courts across the nation, each of which might well be confronting the preemption issue for the first time and, therefore, will need to learn anew about Section 1.4000. Indeed, state and district courts could never bring the same level of expertise to bear that can be expected from the Commission. Particularly after precedent has been established at the Commission by a few rulings in this area, the Commission staff will be able to act expeditiously and with a minimum of burden imposed on the resources of the Commission or its staff.

To implement exclusive jurisdiction, the Commission should revise Section 1.4000 as set forth in Appendix A.

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[46] *Section 315(b) Preemption Order*, 6 FCC Rcd at 7512.

[47] *Report and Order*, at ¶ 55.

3. If The Commission Continues To Permit Local Courts To Resolve Section 1.4000 Issues, The Commission Should Adopt Notice Provisions Which Assure That Affected Licensees And Operators Have Actual Notice Of Local Court Proceedings.

If, despite the arguments set forth by the Wireless Cable Petitioners in Section II.B.2, the Commission permits local courts to issue declaratory rulings regarding compliance with Section 1.4000, the Commission should amend its rules to assure that affected Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS") applicants and licensees and wireless cable system operators have actual notice of such proceedings and an opportunity to be heard.

The *Report and Order* makes clear that in any proceeding before the Commission under Section 1.4000 for a declaratory ruling or waiver, the petition must be served upon all interested parties.[48] However, the Commission has not required those who petition a local court for a declaratory ruling to similarly serve all interested parties.

The Wireless Cable Petitioners fear that this omission will result in substantial harm to wireless cable system operators and MDS and ITFS interests. Service rules differ greatly from local jurisdiction to local jurisdiction, and it is certainly possible that local courts, which have limited knowledge regarding the wireless cable industry, will issue declaratory rulings at the

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[48] *See Report and Order*, at ¶ 55. To avoid any uncertainty, the Commission should clarify that any governmental or nongovernmental entity that seeks a declaratory ruling or waiver from the Commission under Section 1.4000 relating to wireless cable antennas should be required to serve the MDS Basic Trading Area ("BTA") authorization holder for the affected geographic area, as well as every entity that holds an authorization for or has applied for an authorization for an MDS or ITFS station with a protected service area that overlaps in whole or in part the area covered by the request.

behest of local governmental or nongovernmental entities without affording potentially affected parties actual notice and an opportunity to be heard. To avoid such a result, the Commission should modify Section 1.4000 in two respects.

First, the Commission should require those seeking a declaratory ruling from a local court to serve the request on the affected MDS BTA authorization holder, as well as every entity that holds an authorization for or has applied for an authorization for an MDS or ITFS station with a protected service area that overlaps in whole or in part the area covered by the request.[49]

Second, the Commission should require that those seeking a declaratory ruling from a local court also serve the Commission, and that no local declaratory ruling should be issued until after interested parties have been given at least thirty days after the Commission has given public notice of the request to file in opposition. The Commission has incorporated a similar provision in Section 1.4000(d) to assure that all interested parties have a full and fair opportunity to participate in proceedings brought before the Commission under Section 1.4000. Realistically, no wireless cable entity can be expected to routinely monitor proceedings in all of the local courts with jurisdiction over its service areas to ascertain the pendency of any proceedings relating to Section 1.4000. Absent adoption of a notice requirement along the lines proposed by the Wireless Cable Petitioners, there is a substantial risk that local courts will be entering

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[49] While the Wireless Cable Petitioners believe it unlikely that any wireless cable operator would seek a local declaration that a given governmental or private restriction is preempted, any wireless cable operator that does should similarly be required to serve the entity that promulgated the restriction in question.

declaratory rulings without the knowledge and participation of those parties Section 207 is designed to protect.

4. The Burden Of Demonstrating That A Restriction Is Enforceable Under Section 1.4000 Should Remain With The Proponent Of The Restriction In Proceedings Brought Before Local Courts.

If the Commission chooses to continue to allow local courts to issue declaratory rulings regarding the enforceability of restrictions under Section 1.4000, it should assure that the burden of demonstrating that a particular restriction is enforceable is on the party that seeks to enforce the restrictions.

Section 1.4000(e) of the Rules succinctly states that:

> in any Commission proceeding regarding the scope or interpretation of any provision of this section, the burden of demonstrating that a particular governmental or nongovernmental restriction complies with this section and does not impair the installation, maintenance or use of devices designed for over-the-air reception of video programming services shall be on the party that seeks to impose or maintain the restriction.

The Commission explained in the *Report and Order* that this approach is necessary because "placing the burden on consumers would hinder competition and fail to implement Congress' directive, as such a burden could serve as a disincentive to consumers to choose TVBS, MMDS, or DBS services."[50]

The Wireless Cable Petitioners agree with the Commission's analysis, but are mystified as to why Section 1.4000(e) is limited to only proceedings brought before the Commission. If local courts are permitted to shift the burden to the consumer, then the Commission's efforts to

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[50] *Report and Order*, at ¶ 54.

eliminate disincentives to the exercise of consumer choice will be undermined. Thus, the Commission should adopt the revisions to Section 1.4000(e) set forth in Appendix A to make clear that the burden of demonstrating enforceability remains on the proponent of the regulation at issue, regardless of the forum where the proceeding is brought.[51]

C. Section 1.4000 Should Be Expanded To Include Transmission Antennas That Wireless Cable Operators Install At Subscribers' Premises To Provide Interactive Services.

The *Report and Order* is absolutely correct in recognizing that "many over-the-air video services may provide basic signal transmission capability to offer pay-per-view and other interactive services."[52] Thus, the Commission is to be applauded for ruling that "antennas that have transmission capability designed for the viewer to select or use video programming are considered reception devices under the rule."[53] However, the Wireless Cable Petitioners urge the Commission to reconsider its determination that Section 1.4000 "does not apply to devices that have transmission capability only."[54]

Of late, the trade press has been abuzz with stories of the franchised cable industry expanding into a variety of two-way services, particularly Internet access.[55] In light of this

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[51]The Wireless Cable Petitioners are also proposing an editorial revision to Section 1.4000(e) which makes clear that the proponent of a regulation who claims it is entitled to a safety or historic exemption from preemption carries the burden of demonstrating that an exemption is warranted.

[52]*Report and Order*, at ¶ 39.

[53]*Id.*

[54]*Id.*

[55]*See, e.g.* Mitchell, At Continental, Modem Services Are Ready to Roll," *Cable World*, at 1 (Sept. 23, 1996); Breznick, "Telephony, Data Game Plans," *Cable World*, at 22 (filed Sept.

changing environment, it has become clear that if wireless cable operators are to survive in the multichannel video programming marketplace, they must be able to provide a competitive array of interactive communications services. The Commission has already recognized that, while its current technical rules do not readily accommodate such services, MDS channels are available for a variety of uses.[56] Not surprisingly, then, the wireless cable industry has been actively exploring opportunities for providing Internet access and other ancillary two-way services.[57]

23, 1996); Dawson, "Road Runner Hits the Ground," *Multichannel News*, at 1 (Sept. 16, 1996);Tedeso, "Modems: The Great Cable Hope," *Broadcasting & Cable*, at 38-43 (May 27, 1996).

[56] *See, e.g. Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service*, 10 FCC Rcd 13,821, 13,824 (1995); *Revisions to Part 21 of the Commission's Rules*, 2 FCC Rcd 4251, 4255 (1987); *Parts 1, 2, 21 and 43 of the Commission's Rules*, 45 FCC Rcd 616, 619 n.6 (1974).

[57] *See, e.g.* "Modem alternatives emerge," *Broadcasting & Cable*, at 44 (May 27, 1996)("Although the cable industry is waiting for two-way, high-speed cable modems, National Digital Networks is looking to get into the market first by offering high-speed asymmetrical wireless cable modems."); Deagon, "Phone Industry and TV: Moving Fast, on Plan B," *Investor's Business Daily*, at A10 (June 6, 1996); Naik, "'Wireless Cable' Firm Plans to Boost Speed of Internet Access," *Wall St. J.*, at B16 (May 30, 1996); *Communications Daily*, at 10 (May 24, 1996)("Wireless cable operator CAI has begun testing technology to deliver high speed Internet access via wireless cable"); McConville, "Liberty Cable gets full-service boost," *Broadcasting & Cable*, at 51 (April 8, 1996); *CableFax* (April 1, 1996)("People's Choice said it would use its 28 wireless cable licenses won in the FCC's MDS auction to offer Internet access, data services, and fixed wireless local loop telephony in addition to video programming); Isenberg, "Fast Speeds, Phone Wires, No ISDN," *Digital Media*, at 25 (Feb. 6, 1996)("Certainly, most of today's Internet applications fit ADSL's capabilities perfectly. But here, three new technologies look like competition: cable modems, wireless cable and ISDN."); "Good News: Digital Audio-Visual Council To Publish Digital Specs By End Of Year," *Video Technology News* (Sept. 25, 1995)("DAVIC's plan for the coming year encompasses such areas as . . . data and Internet access services through cable systems and wireless cable."); Berniker, "Microsoft

The *Report and Order* recognizes this trend, and makes clear that antennas employed by wireless cable operators both to receive and transmit signals are entitled to protection under Section 1.4000.[58] At present, however, it is uncertain whether wireless cable operators will require a second antenna for return path transmissions, although it is certainly a possibility. Thus, the Wireless Cable Petitioners are troubled by the Commission statement that "[o]ur rule does not apply to devices that have transmission capability only."[59]

Since the marketplace will apparently demand that wireless cable operators provide two-way services and since technological limits may require the use of two antennas to provide those services, the goal behind Section 207 — promoting wireless cable as a competitive alternative to cable — will be frustrated by this policy. Given that the transmission antennas will likely be similar in size and shape to reception antennas, local entities have no logical basis for treating the two antennas any differently.[60] Thus, the

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Sees 'Broadcast PC' Evolving Soon," *Broadcasting & Cable*, at 60 (Sept. 18, 1995)("Microsoft is trying to stay flexible by working [with] wireless cable systems to deliver data to PCs . . ..").

[58]The Commission should clarify, however, that although the preemption is limited to antennas with transmission capability "designed for the viewer to select or use video programming," video programming includes all information (including, for example, information received over the Internet) that is commonly viewed on a video screen (including computer monitors).

[59]*Report and Order*, at ¶ 39.

[60]The only material difference between the antennas will be that the transmission antenna will, as discussed in the *Report and Order*, be subject to limitations on RF emissions. *See id.* at ¶ 39 note 110. The Commission should clarify that while transmission antennas will be subject to restrictions on RF emissions, the ability of local governmental authorities to impose RF limitations is limited by the provisions of the August 1, 1996 *Report and Order* in ET Docket No. 93-62. *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, FCC 96-326, at ¶¶ 164-168 (rel. Aug. 1, 1996).

Wireless Cable Petitioners urge the Commission to amend Section 1.4000 as set forth in Appendix A to provide that all antennas used in connection with MDS are entitled to protection, even if they are merely used to transmit return signals.

III. CONCLUSION.

It has been almost six years since the Commission advised to Congress 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" and recommended that Congress preempt excessive local restrictions on wireless cable antennas.[61] Congress heeded the Commission's advise and, when it adopted Section 207 of the 1996 Act, spoke firmly and plainly -- state and local governmental and nongovernmental entities can no longer hamper the emergence of the wireless cable industry through restrictions that impair the installation of reception antennas. For the reasons set forth above, the Commission should revise the rules and policies adopted in the *Report and Order* and adopt the revisions to Section 1.4000 set forth in

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[61] *1990 Report to Congress*, 5 FCC Rcd at 5015-16, 5037.

Appendix A. Such fine-tuning will promote Congress' efforts to enhance the viability of wireless cable by minimizing the degree to which wireless cable operators are hampered by unnecessary burdens.

Respectfully submitted,

PEOPLE'S CHOICE TV, INC.
NATIONAL WIRELESS HOLDINGS, INC.

By: _____
Paul J. Sinderbrand
Jennifer A. Burton
Wilkinson, Barker, Knauer & Quinn
1735 New York Avenue, N.W.
Sixth Floor
Washington, D.C. 20006
(202) 783-4141

PACIFIC TELESIS GROUP

By: _____
Sarah R. Thomas
Senior Attorney
Pacific Telesis Legal Group
140 New Montgomery Street
Room 1522A
San Francisco, CA 94105
(415) 542-7649

NYNEX CORPORATION

By: _____
Richard G. Warren

NYNEX Corporation
1113 Westchester Avenue
White Plains, NY 10604
(914) 644-6662

BELL ATLANTIC CORPORATION

By: _____
Leslie A. Vial

Bell Atlantic Corporation and Bell Atlantic Video Services Company
1320 North Courthouse Road, 8th Floor
Arlington, VA 22201
(703) 974-2819

CAI WIRELESS SYSTEMS, INC.
CS WIRELESS SYSTEMS, INC.

By: _____
Gerald Stevens-Kittner
Sr. Vice President - Regulatory Affairs
2101 Wilson Boulevard
Suite 100
Arlington, VA 22201
(703) 812-8805

WIRELESS CABLE ASSOCIATION
INTERNATIONAL, INC.

By: _____
Paul J. Sinderbrand
Jennifer A. Burton
Wilkinson, Barker, Knauer & Quinn
1735 New York Avenue, N.W.
Sixth Floor
Washington, D.C. 20006
(202) 783-4141

Of counsel:

Andrew Kreig
Vice President and General Counsel
The Wireless Cable Association
International, Inc.
1140 Connecticut Avenue, NW
Suite 810
Washington, DC 20036

October 4, 1996

EXHIBIT 1

DECLARATION OF DAVID B. HATTIS

DECLARATION OF DAVID B. HATTIS

David B. Hattis hereby states the following under penalty of perjury:

BACKGROUND

1. I am President of Building Technology, Inc. ("BTI"), a professional services company based in Silver Spring, MD and founded in 1972. BTI provides architectural, consulting, research and project management services related to the building industry throughout the United States and overseas, including Europe, the former Soviet Union and the Middle East. In the area of building code and regulatory consulting services, BTI's clients include U.S. federal agencies active in the regulatory field, such as National Institute of Standards and Technology ("NIST"), Department of Housing and Urban Development ("HUD"), Federal Emergency Management Agency ("FEMA") and General Services Administration ("GSA"); state and local governments; trade associations; and building owners and developers. Also, BTI has provided building regulatory consulting services to the governments of Israel and Kazakhstan under U.S. Agency for International Development ("USAID") technical assistance contracts. I make this declaration in support of a petition being filed by The Wireless Cable Association International and others for reconsideration of the *Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* (the "*Report and Order*") of the Federal Communications Commission ("FCC") in IB Docket No. 95-59 and CS Docket No. 96-83. This "*Report and Order*" refers to provisions of the Building Officials and Code Administrators International, Inc. ("BOCA") model building code. Specifically, I have been retained to address the FCC's statement that state and local building codes that incorporate the provisions of the BOCA National Building Code related to the erection of wireless cable reception antennas are: a) non-discriminatory, and b) no more burdensome than necessary to achieve their safety-related objectives.

2. My education and other personal qualifications are as follows: Swarthmore College (A.B., summa cum laude, 1955); and Graduate School of Design, Harvard University (M. Arch., 1960). My memberships include all three major model code organizations: BOCA; Southern Building Code Congress International ("SBCCI"); and International Conference of Building Officials ("ICBO"). Also, I am a member of ASTM (formerly the American Society of Testing and Materials); National Institute of Building Sciences ("NIBS"); National Fire Protection Association ("NFPA"); American Society of Civil Engineers ("ASCE"); Insurance Institute for Property Loss Reduction ("IIPLR"); Society of American Military Engineers ("SAME"); and The

National Trust For Historic Preservation. On a frequent basis, I interact with the senior staffs of the three model code organizations in various forums, such as NIBS, NIST and ASTM, and have employed them as consultants for building regulatory technical assistance work overseas. I am currently directing two building code development projects, one for the State of New Jersey and the other for HUD. Also, I am co-chairman of ASTM Task Group E06.51.17, through which the leading wind experts in the United States are developing a standard test method and a standard specification for windows, doors and shutters to resist the impact of wind-borne debris in hurricanes and windstorms.

3. I am familiar with the BOCA National Building Code, and have participated in the BOCA code change process. My declaration will address BOCA's restrictions of both setbacks and height. The BOCA National Building Code (both 1993 and 1996 editions) includes a provision at Paragraph 3109.1 that imposes an outright ban on antenna/mast combinations where the antenna will be closer to the lot line than the height of the antenna above the roof. Despite the title of Paragraph 3109.1, this outright ban is clearly stated in the Commentary to the BOCA National Building Code/1993. Therefore, in my belief, the FCC was clearly in error when it stated in Paragraph 37 of the "*Report and Order*" that BOCA provides for a permit process in such situations. Second, the BOCA National Building Code includes a provision at Paragraph 3109.2 that mandates permits for wireless cable antennas mounted more than 12 feet above the roof. A discussion of these two provisions follows below.

THE BOCA SETBACK REQUIREMENT

4. Section 1.4000(b)(1) of the FCC's Rules provides that a safety exception to the FCC's general preemption is unavailable unless the restriction in question is applied "in a non-discriminatory manner to other appurtenances, devices, or fixtures that are comparable in size, weight and appearance to these antennas and to which local regulation would normally apply." BOCA's setback requirement does not fulfill that requirement.

5. In Section 202.0, the BOCA National Building Code defines the term "*appurtenant structure*" as follows: "A device or structure attached to the exterior or erected on the roof of a building designed to support service equipment or used in connection therewith, or for advertising or display purposes or other similar occupancies." Wireless cable antennas clearly fall within this definition, as do flagpoles and roof signs, among others. The only restriction on flagpoles in the BOCA National Building Code is at Paragraph 1510.1, which requires flagpoles more than 40 feet in height to be constructed of noncombustible materials. Flagpoles may be installed to any height above the roof, regardless of whether the flagpole is taller than the distance to the lot line. Yet, tall wireless cable reception antennas are usually guyed with wires, and are less likely to

collapse onto adjoining structures than flagpoles, which are usually cantilevered with no guy wires. No valid safety-related reason exists for treating wireless cable antennas more harshly than flagpoles.

6. Similarly, the BOCA National Building Code regulates roof signs at Paragraph 3102.8. Closed signs that impose a far greater risk of causing damage to neighboring structures than a wireless cable antenna due to their size, shape and weight can be installed right up to the lot line. Again, wireless cable reception antennas by their nature are less likely to collapse onto adjoining structures than rooftop signs. Therefore, no valid safety-related reason exists for treating them more harshly than rooftop signs.

7. Section 1.4000(b)(3) of the FCC's Rules provides that a safety exemption will not be afforded unless the restriction at issue "is no more burdensome to the affected antenna users than is necessary to achieve" the safety-related objection. The setback requirement of the BOCA National Building Code also fails to meet that test. BOCA's objective, as stated in the Commentary to BOCA National Building Code/1993, is: "To prevent damage to adjacent structures should the antenna collapse, antennas shall not be erected nearer the lot line than the height of the antenna." There are less burdensome means for avoiding the collapse of antennas onto neighboring property than BOCA's outright ban.

8. Alternative means for avoiding the collapse of antennas onto neighboring property are various combinations of the following elements: proper engineering design of the antenna and its support structure; quality control in the selection of materials of the supporting structure and in the use of standardized installation procedures; and professional installation by appropriately trained personnel. As is discussed in detail in Paragraph 10, there are several mechanisms that local authorities can employ to assure that properly pre-engineered antennas meeting appropriate safety standards are properly installed by wireless cable operators without resorting to an absolute ban.

THE BOCA PERMIT REQUIREMENT

9. The provisions of Paragraph 3109.2 of the BOCA National Building Code requiring that building permits be obtained for all wireless cable antennas installed more than 12 feet above the roof do not comport with the requirement of Section 1.4000(b)(3) of the FCC's Rules that a safety exception to the FCC's general preemption is unavailable unless the restriction in question "is no more burdensome to the affected antenna users than is necessary to achieve" the safety-related objection. In fact, there are several alternatives that localities can employ to assure the safe installation of wireless cable antennas.

10. Since no permits are required for non-professional, non-engineered installations up to 12 feet, they can also be waived to a higher limit with additional assurances for safety. Alternatives to requiring a building permit for every installation that will assure the safe installation of wireless cable antennas include: reliance on professional installation of

pre-engineered antennas meeting appropriate, pre-established standards up to some heights of more than 12 feet (for example, 25 feet) in order to achieve compliance with applicable standards of safety; a local authority's pre-approval of a wireless cable operator's antenna installation procedures while retaining the right to halt any specific installation if the code requirements are violated (the State of New Jersey has adopted such a procedure for the installation of electrical load control devices); regional or national pre-approval of a wireless cable operator's antenna installation procedures based on a research report by BOCA Evaluation Services, Inc. or the National Evaluation Service, Inc. ("NES"), respectively. BOCA Evaluation Services is run by expert BOCA staff out of its headquarters at Country Club Hills, IL. Similarly, NES is jointly run by expert staff from BOCA and the two other model building code groups SBCCI and ICBO. The NES presidency and primary base of operations rotate amongst the three bodies, and currently reside with BOCA. The BOCA and NES evaluation services are procedures specifically intended to review and evaluate pre-engineered products or systems, and to determine their compliance with the model building codes. A research report issued by one of these services provides a detailed, objective and authoritative review of a particular product in accordance with applicable code sections and referenced standards, and can usually be used by the local code official to aid in the determination of the product's compliance with the code. In the case of wireless cable reception antennas, a research report could be similarly relied upon as authoritative by the FCC itself.

11. Permits are specified and described in Chapter 1, Administration, of the BOCA National Building Code. When a state or local jurisdiction adopts the BOCA code, it usually substantially amends Chapter 1 or deletes it in its entirety and substitutes its own administrative section, including the section on permits. The administrative provisions, including permit requirements that are adopted by state and local jurisdictions, vary widely. In some states, a building permit is issued by the state, although local permits are much more common. Some jurisdictions have a single construction permit, while others have multiple permits (building, electrical, plumbing, etc.) A permit to erect an antenna may be a building permit in one jurisdiction and an electrical permit in another. Where there are multiple permits, some jurisdictions issue them all from a single office, while others may have multiple locations. Some jurisdictions define certain types of work as minor work that does not require a permit but is required to comply with the code. Permit fees vary greatly from one jurisdiction to another. The documentation requirements for a wireless antenna permit application also vary greatly: some jurisdictions require complete engineering calculations; others require a simple sketch; and yet others require no documentation beyond the signature of the owner or a licensed professional. In the latter case, the local authority will not carry out any technical review whatsoever, and therefore its permit process has no safety component. The time required to obtain a permit may vary from one day to more than two weeks. In conclusion, the burden imposed by requiring a building permit is variable, and thus by definition will be more burdensome than necessary in many jurisdictions.

12. Section 1.4000(b)(1) of the FCC's Rules provides that a safety exception to the FCC's general preemption is unavailable unless the restriction in question is applied "in a non-discriminatory manner to other appurtenances, devices, or fixture that are comparable in size, weight and appearance to these antennas and to which local regulation would normally apply." BOCA's permit requirement for wireless cable masts extending more than 12 feet above the roof does not fulfill that requirement when compared to the respective requirement applicable to DBS antennas.

13. The FCC has preempted a permit requirement for DBS antennas less than one meter in diameter. My engineer has carried out a comparative analysis of the resistance to wind loads required by the BOCA National Building Code for the two cases of a one-meter diameter DBS antenna mounted approximately two feet above the roof and a standard cable reception antenna mounted 14 feet above the roof. Even when using the most liberal assumptions allowed by BOCA for the DBS antenna and the most conservative assumptions for the wireless cable antenna, the loads that must be resisted in the former case (DBS) are approximately three times greater than the latter (14-foot wireless cable). Thus, the BOCA National Building Code, as preempted in part by the FCC, discriminates against wireless cable antennas by requiring a permit even though they present less of a windloading problem than solid DBS antennas.

David B. Hattis

October 4, 1996

APPENDIX A

PROPOSED RULE REVISIONS

§ 1.4000. Restrictions impairing reception of Television Broadcast Signals, Direct Broadcast Satellite Services or Multichannel Multipoint Distribution Services

(a) Any restriction, including but not limited to any state or local law or regulation, including zoning, land-use, or building regulation, or any private covenant, homeowners' association rule or similar 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:

(1) an antenna that is designed to receive direct broadcast satellite service, including direct-to-home satellite services, that is one meter or less in diameter or is located in Alaska; or

(2) an antenna that is designed to provide ~~receive video programming~~ services via multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services, and that is one meter or less in diameter or diagonal measurement; or

(3) an antenna that is designed to receive television broadcast signals,

is prohibited, to the extent it so impairs, subject to paragraph (b). For purposes of this rule, a law, regulation or restriction impairs installation, maintenance or use of an antenna if it: (1) unreasonably delays or prevents installation, maintenance or use, (2) unreasonably increases the cost of installation, maintenance or use, or (3) precludes reception of an acceptable quality signal. No civil, criminal, administrative, or other legal action of any kind shall be taken to enforce any restriction or regulation prohibited by this rule except pursuant to paragraph (c) or (d). No fine or other penalties shall accrue against an antenna user while a proceeding is pending to determine the validity of any restriction.

(b) Any restriction otherwise prohibited by paragraph (a) is permitted if:

(1) it is necessary to accomplish a clearly defined safety objective established by a state or local governmental entity that is either stated in the text, preamble or legislative history of the restriction or described as applying to that restriction in a document that is readily available to antenna users, and would be applied to the extent practicable in a non-discriminatory manner to other appurtenances, devices, or fixtures that ~~are comparable in size, weight~~

~~and appearance~~ have a similar or greater impact on safety compared to these antennas and to which local regulation would normally apply; or

(2) it is necessary to preserve an historic district listed or eligible for listing in the National Register of Historic Places, as set forth in the National Historic Preservation Act of 1966, as amended, 16 U.S.C. § 470a, and imposes no greater restrictions on antennas covered by this rule than are imposed on the installation, maintenance or use of other modern appurtenances, devices or fixtures that are comparable in ~~size, weight, and appearance~~ their impact on the historic nature of the district to these antennas; and

(3) it is no more burdensome to affected antenna users than is necessary to achieve the objectives described above.

(c) Local governments or associations may apply to the Commission for a waiver of this rule under Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3. Waiver requests will be put on public notice. The Commission may grant a waiver upon a showing by the applicant of local concerns of a highly specialized or unusual nature. No petition for waiver shall be considered unless it specifies the restriction at issue. Waivers granted in accordance with this section shall not apply to restrictions amended or enacted after the waiver is granted. Any responsive pleadings must be served on all parties and filed within 30 days after release of a public notice that such petition has been filed. Any replies must be filed within 15 days thereafter.

(d) Parties may petition the Commission for a declaratory ruling under Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, ~~or a court of competent jurisdiction,~~ to determine whether a particular restriction is permissible or prohibited under this rule. Petitions to the Commission will be put on public notice. Any responsive pleadings must be served on all parties and filed within 30 days after release of a public notice that such petition has been filed. Any replies must be filed within 15 days thereafter.

(e) In any ~~Commission~~ proceeding regarding the scope or interpretation of any provision of this section, the burden of demonstrating that a particular governmental or nongovernmental restriction complies with this section and either does not impair the installation, maintenance or use of devices designed for over-the-air reception of video programming services or does so impair but such impairment is permitted pursuant to subsection (b) shall be on the party that seeks to impose or maintain the restriction.

(f) All allegations of fact contained in petitions and related pleadings before the Commission must be supported by affidavit of a person or persons with actual knowledge thereof. An original and two copies of all petitions and pleadings should be addressed to the Secretary, Federal Communications Commission, 1919 M St. N.W.; Washington, D.C. 20554. Copies of the petitions and related pleadings will be available for public inspection in the Cable Reference Room in Washington, D.C.