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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)
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Preemption of Local Zoning Regulation of Satellite Earth Stations	) IB Docket No. 95-59
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In the Matter of	)
	)
Implementation of Section 207 of the Telecommunications Act of 1996	) CS Docket No. 96-83
	)
	)
Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service	)

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JOINT PETITION FOR PARTIAL RECONSIDERATION

THE WIRELESS CABLE ASSOCIATION INTERNATIONAL, INC.

BELL ATLANTIC CORPORATION

CAI WIRELESS SYSTEMS, INC.

CS WIRELESS SYSTEMS, INC.

NATIONAL WIRELESS HOLDINGS, INC.

NYNEX CORPORATION

PACIFIC TELESIS GROUP

PEOPLE'S CHOICE TV CORP.

October 4, 1996

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EXECUTIVE SUMMARY

The rules and policies adopted in the *Report and Order* represent a useful first step towards effectuating Section 207 and promoting the emergence of wireless cable in a competitive multichannel video marketplace. Significantly, the *Report and Order* reflects the fact that entities such as state and local governmental authorities, real estate developers, and homeowner associations, which have never been charged with promoting a competitive telecommunications marketplace, have in fact imposed restrictions on wireless cable antennas in a manner that is detrimental to competition. While the Commission has retained a role for these entities in the regulation of antennas, it has also made clear that they must now adapt their restrictions to Congress' goal of promoting wireless competition to cable.

Despite the protections contained in the *Report and Order* against over-reaching local restrictions, the rules and policies adopted in the *Report and Order* must be modified somewhat if a pro-competitive marketplace is to emerge. Most importantly, the Commission, without the benefit of a fully developed record, has prematurely addressed whether certain restrictions comport with newly adopted Section 1.4000 of the Rules, and has incorrectly concluded that those restrictions are enforceable. Therefore, the Commission should take the following steps to correct the *Report and Order*:

- The Commission should reconsider its statement in Paragraph 37 of the *Report and Order* that the set-back requirement set forth in Section 3109.1 of the Building Officials & Code Administrators International, Inc. ("BOCA") model building code is enforceable. While some localities may adopt that section for safety-related reasons, the requirement clearly fails to meet the requirements of Section 1.4000 of the Commission's Rules, because it discriminates against antennas and is more burdensome than necessary to achieve any safety objective.

- The Commission should similarly reconsider its statement in the same Paragraph that the provision in Section 3109.2 of the BOCA model code requiring permits for all antennas mounted more than 12 feet above the roofline complies with Section 1.4000. Again, while some localities may adopt this provision for safety-related objectives, Section 3109.2 of the BOCA model code is more burdensome than necessary to achieve those objectives. Moreover, because the permitting requirements of local jurisdictions vary greatly, it is impossible for the Commission to determine in the abstract whether a particular governmental entity is employing the permit requirement in a manner which entitles it to a safety-related exception to Section 1.4000. And, BOCA's permit requirement discriminates against wireless cable antennas in favor of Direct Broadcast Satellite dishes.

- The Commission should reconsider the statement in Paragraph 19 of the *Report and Order* that "a requirement to paint an antenna in a fashion that will not interfere with reception so that it blends into the background against which it is mounted would likely be acceptable." In fact, certain painting requirements will prevent signal reception, while others will impair the installation, maintenance or use of wireless cable antennas by adding unreasonable costs and delays.

Moreover, certain revisions must be made to the actual rules adopted in the *Report and Order* to fulfill the mandate of Section 207. Specifically, it is urged that:

- The Commission should preempt all nongovernmental restrictions impairing wireless cable antennas, subject only to waiver in exceptional circumstances. Private parties, who have no cognizable expertise in matters of safety, should not be permitted to adopt safety restrictions more onerous than, duplicative of, or in conflict with those adopted by the state and local governmental authorities who are charged with ensuring public safety.

- Only the Commission should have authority to determine whether a particular restriction passes muster under Section 1.4000 of the Commission's Rules. Such an approach is necessary to avoid inconsistent local court rulings and to provide wireless cable system operators and consumers with the requisite level of certainty regarding wireless cable reception antenna installations.

- If the Commission permits local courts to consider whether restrictions are preempted under Section 1.4000 of the Rules, the Commission should assure both that all potentially affected Commission licensees are given actual notice of the proceedings and an opportunity to be heard, and that the burden of demonstrating compliance with Section 1.4000 remains with the proponent of any antenna restriction.

- Section 1.4000 should be extended to preempt inappropriate restrictions on separate transmission antennas that wireless cable operators install at subscribers' premises to provide interactive services.

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JOINT PETITION FOR PARTIAL RECONSIDERATION

The Wireless Cable Association International, Inc. ("WCA"), Bell Atlantic Corporation ("Bell Atlantic"), CAI Wireless Systems, Inc. ("CAI"), CS Wireless Systems, Inc. ("CS"), , National Wireless Holdings, Inc. ("National"), NYNEX Corporation ("NYNEX"), Pacific Telesis Group ("PacTel"), and People's Choice TV Corp. ("PCTV")(collectively, the "Wireless Cable Petitioners"), by their attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby jointly petition the Commission to reconsider and revise certain of the rules and policies announced in the *Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* (the "*Report and Order*") released by the Commission on August 6, 1996

in the above-captioned proceedings.[1] While the Wireless Cable Petitioners are generally supportive of the rules and policies adopted in the *Report and Order*, they respectfully submit that certain of those rules and policies must be revised to achieve the Commission's stated goals for this proceeding — "(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 programming services."[2]

I. INTRODUCTION AND SUMMARY

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."[3] Section 207 is part and parcel of Congress' effort to eliminate the need for extensive regulation of the cable industry by promoting competitive alternatives. The inclusion of Section 207 in the 1996 Act reflects Congress' recognition that

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[1] On September 23, 1996, WCA, PCTV, National, CAI and CS filed a request that they be permitted to submit a joint petition for reconsideration of the *Report and Order* that exceeds the page limitation set forth in Section 1.429(d) of the Commission's Rules. The Commission's staff has informally advised counsel for WCA that such request will be granted.

[2] *Implementation of Section 207 of the Telecommunications Act of 1996 -- Restriction on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service*, 11 FCC Rcd 6357 (1996)[hereinafter cited as "*NPRM*"].

[3] Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 (1996).

consumers denied access to wireless alternatives to cable because of restrictions on reception antennas are effectively denied the benefits of competition.[4]

The Wireless Cable Petitioners[5] believe that the rules and policies adopted in the *Report and Order* represent a useful first step towards effectuating Section 207 and promoting the emergence of wireless cable in a competitive multichannel video marketplace. Significantly, the

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[4] Congress' preemption mandate came in response to well-documented problems facing wireless cable subscribers. For the better part of a decade, the wireless cable industry has been urging Congress and the Commission to issue a preemption order along the lines now mandated by Section 207. *See, e.g.* Comments of WCA, MM Docket No. 89-600, 93-103 (filed March 1, 1990); Comments of WCA, CS Docket No. 94-48, at 26 (filed June 29, 1994)("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."); Comments of WCA, CS Docket No. 95-61, at 27 (filed June 30, 1995); Comments of WCA in Response to Notice of Proposed Rulemaking, IB Docket No. 95-59, at 3 (filed July 24, 1995)("[WCA's] members have long encountered roadblocks erected by local authorities to the installation of wireless cable reception antennas."). More than five years ago, the Commission specifically reported 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. *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*"]. More recently, the Commission 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". *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 11 FCC Rcd 2060, 2113 (1995)[hereinafter cited as "*1995 Report to Congress*"].

[5] The Wireless Cable Petitioners clearly have standing pursuant to Section 1.429 to submit this petition. WCA, the trade association of the wireless cable industry, submitted formal comments and reply comments in response to the *Notice of Proposed Rulemaking* ("*NPRM*") that commenced CS Docket No. 96-83. PacTel, NYNEX, Bell Atlantic, PCTV, National, CAI, and CS are each in the business of operating wireless cable systems either directly or through affiliated companies, and will be adversely impacted if state and local governmental or nongovernmental entities are permitted to enforce restrictions on wireless cable reception antennas that impair their ability to serve subscribers.

Report and Order reflects the Commission's long-standing understanding that entities such as state and local governmental authorities, real estate developers, and homeowner associations ("HOAs"), which have never been charged with promoting a competitive telecommunications marketplace, impose restrictions on wireless cable antennas in a manner that is detrimental to competition.[6] While the Commission has retained a role for these entities in the regulation of antennas, it has also made clear that they must now adapt their regulation to Congress' goal of promoting wireless competition to cable. The Commission is to be applauded for incorporating several provisions into its rules that are critical to the protection of consumers from enforcement of restrictions that fail to reflect Congress' objectives.

For example, recognizing that restrictions which do not *de jure* prevent the installation, maintenance or use of wireless cable antennas can nonetheless effectively frustrate competition by imposing unreasonable costs or delays or by preventing the reception of an acceptable signal, the Commission has ruled that such restrictions are deemed to "impair" and are generally preempted.[7] Also, while the Commission has exempted from preemption those *bona fide*, narrowly-tailored local restrictions designed to achieve safety or historic preservation objectives, the Commission has implicitly recognized the risk that restrictions intended to frustrate competition can disingenuously be wrapped in a safety or historic preservation banner. To avoid such abuses, the Commission has imposed two critical limitations on those seeking a safety or historic preservation exemption. First, they must demonstrate that the safety or historic

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[6] *See infra* note 4.

[7] *Report and Order*, at ¶¶ 17-20.

preservation restriction in question does not discriminate against wireless cable antennas in comparison to other comparable appurtenances, devices or fixtures.[8] And, second, they must demonstrate that the safety and historic restriction in question is no more burdensome than necessary to achieve the stated safety or historic preservation objective.[9] In the view of the Wireless Cable Petitioners, these two provisions are the lynchpin of the Commission's rules implementing Section 207 — unless they are rigorously enforced, Congress' objective of promoting wireless alternatives to cable will be frustrated.

The Wireless Cable Petitioners applaud the Commission for recognizing the importance of preventing abuse and incorporating these restrictions in the *Report and Order*. However, despite these essential protections, certain of the rules and policies adopted in the *Report and Order* must be modified if the Commission's desire "to facilitate the development and rapid deployment of wireless cable services" as a means of promoting viable competition to existing video delivery systems is to be achieved.[10]

Most importantly, the Wireless Cable Petitioners believe that the Commission, without the benefit of a fully developed record, has prematurely addressed whether three particular

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[8] 47 C.F.R. § 1.4000(b)(1), (2).

[9] 47 C.F.R. § 1.4000(b)(3).

[10] *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 9589 (1995). *See also 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*, 9 FCC Rcd 7665, 7666 (1994); *1990 Report to Congress*, 5 FCC Rcd at 5014-16.

restrictions are enforceable under newly adopted Section 1.4000 of the Rules, and has incorrectly concluded that those restrictions are enforceable. As will be discussed in greater detail below, the result will be to frustrate consumer access to wireless cable services by permitting the enforcement of restrictions that impair the installation, maintenance or use of wireless cable antennas, yet are not entitled to any safety or historic preservation exemption. Therefore, the Wireless Cable Petitioners urge the Commission to take the following steps to correct the *Report and Order*:

- The Commission should reconsider its statement in Paragraph 37 of the *Report and Order* that the set-back requirement set forth in Section 3109.1 of the Building Officials & Code Administrators International, Inc. ("BOCA") model building code is enforceable. While some localities may adopt that section for safety-related reasons, the requirement clearly fails to meet the requirements of Section 1.4000 of the Commission's Rules, because it discriminates against antennas and is more burdensome than necessary to achieve any safety objective.

- The Commission should similarly reconsider its statement in the same Paragraph that the provision in Section 3109.2 of the BOCA model code requiring permits for all antennas mounted more than 12 feet above the roofline complies with Section 1.4000. Again, while some localities may adopt this provision for safety-related objectives, Section 3109.2 of the BOCA model code is more burdensome than necessary to achieve those objectives. Moreover, because the permitting requirements of local jurisdictions vary greatly, it is impossible for the Commission to determine in the abstract whether a particular governmental entity is employing the permit requirement in a manner which entitles it to a safety-related exception to Section 1.4000. And, the permit requirement of the BOCA model code discriminates against wireless cable antennas in favor of Direct Broadcast Satellite ("DBS") dishes, rendering it unenforceable under Section 1.4000(b)(1).

- The Commission should reconsider the statement in Paragraph 19 of the *Report and Order* that "a requirement to paint an antenna in a fashion that will not interfere with reception so that it blends into the background against which it is mounted would likely be acceptable." In fact, certain painting requirements will prevent signal reception, while others will impair the installation, maintenance or use of wireless cable antennas by adding unreasonable costs and delays.

Moreover, the Wireless Cable Petitioners believe that certain revisions must be made to the actual rules adopted in the *Report and Order* to fulfill the mandate of Section 207. Specifically, the Wireless Cable Petitioners urge that:

- The Commission should preempt all nongovernmental restrictions that impair wireless cable antennas, subject only to waiver in exceptional circumstances. Private parties, who have no cognizable expertise in safety matters, should not be permitted to adopt safety restrictions more onerous than, duplicative of, or in conflict with those adopted by the state and local governmental authorities entrusted with ensuring the public safety.

- The Commission should provide that only it has authority to determine whether a particular restriction passes muster under Section 1.4000 of the Commission's Rules. Such an approach is necessary to avoid inconsistent local court rulings and to provide wireless cable system operators and consumers with the requisite level of certainty regarding wireless cable reception antenna installations.

- If the Commission permits local courts to consider whether restrictions are preempted under Section 1.4000 of the Rules, the Commission should assure both that all potentially affected Commission licensees are given actual notice of the proceedings and an opportunity to be heard, and that the burden of demonstrating the enforceability of a an antenna restriction remains with the proponent of that restriction.

- Section 1.4000 should be extended to preempt inappropriate restrictions on separate transmission antennas that wireless cable operators install at subscribers' premises to provide interactive services.

II. Discussion

A. The Commission Should Retract Certain Statements In The Report And Order Regarding The Enforceability of Three Specific Restrictions On Antennas Under Section 1.4000.

The Wireless Cable Petitioners appreciate the Commission's attempt in the *Report and Order* to provide the public with guidance through specific examples as to how newly-adopted Section 1.4000 of the Rules will be applied.[11] Because the Commission did not have a complete

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[11] *See Report and Order*, ¶¶ 7, 16.

record before it regarding three of the specific restrictions employed as examples, however, the *Report and Order* indicates that those restrictions can be enforced when, in fact, they should be preempted under Section 1.4000(a) of the Rules.

1. The Commission Should Reconsider Its Statement That The BOCA Model Code's Set-back Requirement Is Enforceable.

One instance in which a Commission pronouncement cannot be squared with Section 1.4000 involves the statement in Paragraph 37 of the *Report and Order* that "we believe that the BOCA code guideline regarding permits for setbacks is safety-based, is reasonable, and does not impose an unreasonable burden."

At the outset, the Commission appears to be operating under a mistaken impression regarding the BOCA set-back requirement. Contrary to the language of Paragraph 37, the set-back requirement of Section 3109.1 of the BOCA model code does not merely require a permit when the antenna will be closer to the lot line than the height of the antenna above the roof; rather, Section 3109.1 imposes an outright ban on such antennas.[12] In some cases, enforcement of Section 3109.1 will effectively preclude service. For example, in the case of a townhouse that

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[12] Section 3109.1 provides, in pertinent part, "the installation of any antennal structure mounted on the roof of a building shall not be erected near to the *lot line* and the total height of the antennal structure above the roof...." As explained in the commentary to this Section:

> to prevent damage to adjacent structure should the antenna collapse, antennas shall not be erected nearer the lot line than the height of the antenna. Therefore, if the antenna is 20 feet in height, the location of the antenna should be at least 20 feet from the nearest lot line.

Nowhere in the BOCA model code or supporting commentary is there any suggestion that Section 3109.1 is intended merely to impose a permit requirement upon roof-mounted antennas that are taller than the distance from the antenna to the lot line.

is 20 feet wide and requires an antenna mounted 11 feet above the roofline in order to receive an acceptable signal due to terrain blockage, enforcement of the BOCA set-back requirement will have the practical effect of preventing service to the home in question, as it bars antennas more than 10 feet in height.

The *Report and Order* specifically acknowledges that "requirements that antennas be set back...could be deemed to impair reception if compliance would mean that the antenna could not receive an acceptable signal."[13] Because it prevents the reception of service in some instances, the BOCA set-back requirement is clearly an impairment to the installation, maintenance and use of wireless cable antennas.[14] And, since Section 3109.1 of the BOCA model code clearly impairs wireless cable service, it can only be enforced if justified under the safety exception of Section 1.4000(b)(1).

Under the provisions of Section 1.4000, before the Commission can declare Section 3109.1 enforceable, the proponents of enforcement must carry the burden of demonstrating that Section 3109.1 is both nondiscriminatory and no more burdensome than necessary to achieve the safety objective. Yet, there is nothing in the record of this proceeding to suggest that the proponents of the BOCA model code have even attempted to carry this burden, much less succeeded. That is not surprising, for the BOCA set-back requirement fails both prongs of the test.

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[13] *Report and Order*, at ¶ 20.

[14] *See id.*

The Set-Back Requirement Is Discriminatory. Newly-adopted Section 1.4000(b)(1) of the Commission's Rules states with crystalline clarity that the safety exception 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." The BOCA set-back requirement simply cannot pass muster under this test.

Annexed hereto as Exhibit 1 is a Declaration of David B. Hattis, President of Building Technology, Inc. (the "Hattis Declaration"), a recognized expert on the BOCA and other model building codes.[15] As Mr. Hattis explains, BOCA imposes no special requirements on roof-mounted flagpoles (despite the fact that they are usually mounted in a manner that is more likely to result in collapse that wireless cable antennas), allowing them to be installed to any height above the roofline, regardless of whether the flagpole is taller than the distance to the lot line.[16] Mr. Hattis further details that under BOCA, even rooftop signs, which 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.[17] Significantly, Mr. Hattis concludes

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[15] A summary of Mr. Hattis' qualifications is included in the Hattis Declaration.

[16] *See* Hattis Declaration, at ¶ 5.

[17] *See id.* at ¶ 6. While newly-adopted Section 1.4000(b) provides that a given safety-related restriction cannot discriminate against antennas in comparison "other appurtenances, devices, or fixtures that are comparable in size, weight and appearance," the Commission should clarify that restrictions cannot discriminate against antennas in comparison to appurtenances, devices or fixtures that impose a greater safety threat, even if they are not directly comparable in size, weight and appearance. The example of rooftop signs is illustrative — they are larger and heavier than wireless cable antennas, yet treated more favorably. It would be arbitrary and

that by their nature wireless cable reception antennas are no more likely to collapse onto adjoining structures than flagpoles or rooftop signs, and that no valid safety-related reason exists for treating wireless cable antennas more harshly.[18] In other words, the Hattis Declaration establishes that the BOCA set-back requirement is discriminatory and therefore unenforceable under Section 1.4000(b).

Less Burdensome Means Exist To Achieve The Safety Objective. Moreover, Mr. Hattis makes it clear that there are less burdensome means for achieving BOCA's stated objective for the set-back requirement -- avoiding the collapse of antennas onto neighboring property.[19] Alternatives include, among others, (i) establishment of appropriate technical standards

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capricious for the Commission to ignore the treatment of rooftop signs under the BOCA model code just because they are not directly "comparable" to wireless cable antennas. Appendix A includes proposed revisions to Section 1.4000(b)(1) to accomplish that clarification, as well as to make clear that the appearance of appurtenances, devices or fixtures is of no relevance when considering safety issues.

Similarly, the Commission should revise Section 1.4000(b)(2) to make clear that historic preservation restrictions will be preempted unless appurtenances, devices or fixtures that have a similar impact on the historic nature of the district are treated similarly (regardless of whether they are comparable in size, weight or appearance).

These revisions clearly reflect the Commission's intent. For example, in Paragraph 19 the *Report and Order*, the Commission discusses how it would compare the burden of screening antennas against "other similar devices in the neighborhood, such as air conditioning units, trash receptacles, etc." While none of those items are comparable to wireless cable antennas in terms of size, weight or appearance, the Commission has recognized that it is appropriate to compare the treatment of items that radically differ in size, weight and appearance where their visual impact is comparable. The revisions to Sections 1.4000(b)(1) and (2) set forth in Appendix A are intended to conform the rules to this acknowledgment.

[18] *See id.* at ¶¶ 5-6.

[19] *See supra* note 12.

governing the antenna installation process to assure safe installations, (ii) governmental pre-approval of the general procedures employed by a wireless cable operator to install its antennas, and/or (iii) governmental reliance on recognized safety experts at organizations like BOCA Evaluation Services, Inc. or National Evaluation Service, Inc. to pre-approve a wireless cable operators antenna installation techniques.[20]

In short, there is absolutely no basis in the record or in fact for the Commission to conclude that the least burdensome mechanism for assuring that wireless cable antennas do not collapse onto neighboring properties is to limit their height to no more than the distance to the lot line. As a result, BOCA's setback requirement is not entitled to preemption.

2. The Commission Should Reconsider Its Determination That The BOCA Model Code's Requirement For Permits For Antennas Mounted More Than 12 Feet Above Rooftop Is Enforceable.

Along similar lines, the Commission should reconsider its determination that the provision of Section 3109.2 of the BOCA code mandating permits for wireless cable antennas mounted more than 12 feet above the roofline is enforceable under Section 1.4000(b). Once again, the Commission did not have sufficient evidence before it to conclude that any locally-

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[20] *See* Hattis Declaration, at ¶ 8. Indeed, although as discussed in detail below the Wireless Cable Petitioners believe that the permit requirement of Section 3109.2 of the BOCA code is unduly onerous and should be unenforceable because less burdensome alternatives are available, even a case-by-case permit requirement similar to those imposed on flagpoles, signs, and other rooftop structures would be less burdensome than the current absolute ban of Section 3109.1 on antennas mounted higher above the roofline than the distance to the lot line. While case-by-case permits are not a solution, the fact that the BOCA model codes does not even permit homeowners to apply for approval of antennas that would not comply with the setback requirement is telling as to the availability of less burdensome alternatives.

adopted permit requirement based on the BOCA code is enforceable under the standards of that section.

The Permit Requirement Is More Burdensome Than Necessary. The *Report and Order* correctly observes that:

> Procedural requirements -- provisions requiring the approval of community associations or local zoning boards prior to the installation of TVBS, MMDS, or DBS antennas, for example -- can, in practical terms, "prevent" the viewer's access to video programming signals as surely as outright prohibitions, by creating an extra hurdle for consumers to overcome. Similarly, requirements for permits and/or fees may provide a disincentive for potential consumers, if those requirements apply to one programming signal provider but not another. We believe this kind of impairment can impede a service provider's ability to compete, since customers will ordinarily select a service less subject to uncertainty and procedural requirements. We believe that the imposition of delay is an impairment of the sort Congress sought to prohibit; accordingly, these types of procedural requirements and permits are prohibited except as provided herein. Local conditions involving safety or historic preservation may justify imposition of prior approval, permitting, or fee requirements in some circumstances, as discussed below, but we note that our rule requires that any such restriction be no more burdensome than is necessary to achieve its safety or historic preservation purposes.[21]

While a few of the parties commenting in response to the NPRM urged the Commission to exempt the BOCA code from preemption, none even alleged (much less demonstrated) that the permit requirement set forth in Section 3109.2 represents the least burdensome approach to assuring the safe installation of wireless cable antennas.[22] That is not surprising, for the BOCA

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[21] *NPRM*, at ¶ 17 (emphasis added and footnote omitted).

[22] In the only comments that specifically addressed BOCA, there was no suggestion, much less a demonstration, that the provisions of the BOCA code applicable to wireless cable antennas were the least burdensome mechanism for achieving local safety concerns. *See* Reply Comments of Michigan, Illinois and Texas Communities, CS Docket No. 96-83, at 3-6 (filed May 21, 1996); Letter of Tillman L. Lay, Counsel to Nat'l League of Cities, *et al.*, to Meredith

permit requirement for antenna installations more than twelve feet above the roofline was apparently adopted more than forty years ago -- long before wireless cable was established -- and, whatever its merit at the time, there are now less onerous mechanisms for protecting the public safety than requiring individual permits for each wireless cable antenna installation that extends more than twelve feet above the roofline.[23]

For example, Mr. Hattis details how, unlike the case with DBS and television broadcast antennas that are often installed by "do it yourself" homeowners, building authorities can safely rely upon professional installation of properly pre-engineered antennas in accordance with specification up to some height greater than 12 feet without jeopardizing safety concerns.[24] In the alternative, Mr. Hattis suggests that rather than reviewing permit applications for each wireless cable installation, local authorities instead could approve an operator's installation procedures, while reserving the right to halt installations if the code requirements are violated.[25]

J. Jones, Chief, Cable Services Bureau, IB Docket No. 95-59 and CS Docket No. 96-83, at 2 (filed July 9, 1996); Petition of Nat'l League of Cites, *et al.*, for Reconsideration, IB Docket No. 95-59, at 14-15 (filed April 17, 1996). Moreover, while the Community Associations Institute, *et al.* ("Community") contended that "large towers and masts could damage not only the individual's own property, but also the property of others and the association," Community never contended that prior approval requirements were the least onerous mechanism for assuring safe installations. *See* Reply Comments of Community, CS Docket No. 96-83, at 16-18 (filed May 21, 1996). Rather Community recognized "the difficulties inherent in establishing a limitation upon the height of such masts or towers" and argued that "there should be a provision in the final rule that the mast height may be limited to that absolutely necessary to receive signal access." *Id.* at 17. The Wireless Cable Petitioners believe that a restriction of the sort proposed by Community is not inappropriate and should not be preempted.

[23] *See* Hattis Declaration, at ¶ 10.

[24] *See id.*

[25] *See id.*

Each wireless cable operator utilizes a small set of rooftop mounting techniques, depending upon the type of roof, the size of the antenna and the height of the mast. Most installations are made utilizing those techniques, with only the very unusual installation requiring customization. The local authorities could pre-approve the procedures that are generally employed in order to avoid the need for a case-by-case permit review except where customized installations are required. Similarly, Mr. Hattis suggests that local authorities could rely upon pre-approval of a wireless cable operator's antenna installation procedures by BOCA Evaluation Services, Inc. or National Evaluation Service, Inc., organizations that review and evaluate pre-engineered products or systems and determines their compliance with model building codes.[26]

Moreover, even if the Commission were to find that the case-by-case permit requirement for antennas mounted more than 12 feet above the roofline is no more burdensome than necessary, the Commission still should refrain from blessing permit requirements in the abstract, without specific knowledge of the local process for securing such a permit. As Mr. Hattis discusses, those state and local authorities that employ the BOCA model code generally adopt

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[26] *See id.* The Wireless Cable Petitioners recognize that the Commission has indicated that "it would not be inappropriate for parties to work with BOCA to develop a uniform model code that would apply to taller masts and obviate the need for permit up to that taller height." *Report and Order*, at ¶ 37 note 100. WCA has already commenced the process of securing a revision in the BOCA model code that will eliminate the requirement for permits in most circumstances. However, because of BOCA's internal mechanisms, the earliest a revision to the BOCA model code can be adopted would be September, 1997, and may be delayed for a significantly longer period. Forcing homeowners to comply with Section 3109.2 of the BOCA model code in the interim, despite the fact that Section 3109.2 is unenforceable under Section 1.4000 of the Commission's Rules, would unfairly preclude consumers from enjoying the competitive benefits wireless cable offers. Particularly since there is no assurance BOCA will adopt WCA's proposal with dispatch, the Commission should not delay this proceeding to await BOCA's response to WCA.

customized permit requirements in place of those set forth in Chapter 1 of the BOCA model code.[27]

While the Wireless Cable Petitioners do not dispute that BOCA has promulgated the permit requirement set forth in Section 3109.2 of its model code to protect the public safety, it is not always the case that local authorities adopt Section 3109.2 to advance *bona fide* safety objectives. As is set forth in the Hattis Declaration, local governmental authorities may impose permit requirements to collect associated permit fees, but not engage in any technical review of permit applications.[28] Under such circumstances, it cannot be said that the permit requirement is intended to advance the public safety — it is merely a revenue raising device that should be preempted. Before the Commission can determine whether a local permit requirement is necessary to accomplish a clearly defined safety objective and therefore entitled to an exemption under Section 1.4000(b)(1) of the rules, the Commission has to examine whether the safety objective truly is advanced by the specific local permit process.

Moreover, even if a particular local permit process does advance a safety objective, the Commission must examine whether that process is more burdensome than necessary. The Commission has explicitly recognized that "the process by which regulations are enforced may be critical in a consumer's choice of video programming service.[29] The Hattis Declaration

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[27] *See* Hattis Declaration, at ¶ 11.

[28] *See id.* at ¶ 10.

[29] *Report and Order*, at ¶ 17.

describes how some jurisdictions require more than is necessary to secure a permit. [30] Under circumstances such as these, where less burdensome permit application processing would still achieve the safety objective, no exemption from preemption is justified under Section 1.4000(b)(3).[31]

The Permit Requirement Is Discriminatory. Section 1.4000(b) provides that a safety-related exemption from preemption is unavailable unless the restriction in question is applied "in a non-discriminatory manner." The BOCA permit requirement for wireless cable antennas mounted more than twelve feet above the rooftop cannot satisfy that requirement, because it discriminates against wireless cable antennas and in favor of the DBS competition.

In the *Report and Order*, the Commission preempted the portion of the BOCA model code that had mandated building permits before the installation of DBS dishes one meter or less in diameter.[32] Thus, no building permit can be required to install a DBS dish of one meter or less

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[30] *See* Hattis Declaration, at ¶ 11.

[31] In blessing the permit requirement adopted by BOCA, the Commission states that "We do not believe it will be *overly burdensome* to require, as provided in the BOCA code, that antenna users obtain a permit in cases in which their antennas must extend more than twelve feet above the roofline." *Report and Order*, at ¶ 37. Clearly, the Commission has applied the wrong test — the issue is whether a restriction is no more burdensome than necessary, not whether it imposes an "unreasonable burden." As noted above, the Commission has stated that "[l]ocal conditions involving safety or historic preservation may justify imposition of prior approval, permitting, or fee requirements in some circumstances, as discussed below, but we note that our rule requires that any such restriction be no more burdensome than is necessary to achieve its safety or historic preservation purposes." Implementing that discussion, Section 1.4000(b)(3) provides that safety-related impairments will only be exempted from preemption if they are "no more burdensome to affected antenna users than is necessary to achieve the objectives . . ."

[32] *Report and Order*, at ¶ 37.

in diameter. Yet, as Mr. Hattis describes, engineering studies establish that a one meter DBS dish imposes far greater wind loading upon a structure than does a wireless cable antenna mounted on a 14 foot mast.[33] As such, the BOCA model code is discriminatory — professionally installed wireless cable antennas that present little danger of causing damage are subject to a burdensome permit process while potentially more dangerous DBS antennas can be installed by "do it yourself" homeowners without any governmental review. While the Wireless Cable Petitioners believe that the risk of damage from a DBS dish one meter or less in diameter is sufficiently remote that the Commission's preemption order should stand *vis a vis* small DBS dishes, the discriminatory treatment of wireless cable antennas dictates that the preemption from the permit requirement be expanded to equally safe wireless cable antenna installations.

3. The Commission Should Reconsider Its Determination That Restrictions Requiring The Painting of Wireless Cable Reception Antennas "Would Likely Be Acceptable."

The Commission should also reconsider the determination set forth in Paragraph 19 of the *Report and Order* that "a requirement to paint an antenna in a fashion that will not interfere with reception so that it blends into the background against which it is mounted would likely be acceptable."[34] Although the Wireless Cable Petitioners cannot speak to the impact such a painting requirement would have on DBS or television broadcast reception antennas, there is no question that such a requirement constitutes an impairment of wireless cable service.

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[33] *See* Hattis Declaration, at ¶ 13.

[34] *Report and Order*, at ¶ 19.

As noted previously, an essential element of Section 1.4000(a) is the provision which preempts a restriction that "precludes reception of an acceptable quality signal." Implicit in the language of Paragraph 19 quoted above is a recognition that a painting requirement can have the effect of interfering with reception, and that in such cases the painting requirement must be preempted. In fact, in many instances a painting requirement will impose a significant technical impairment to service. In other cases, although it will be technically possible to meet a painting requirement, the cost for doing so will be so unreasonable as to effectively preclude services.[35] Yet, Section 1.4000(a) clearly provides that a restriction will be preempted if it "unreasonably increases the costs of installation, maintenance or use" of wireless cable antennas. The Commission should reconsider its statement regarding painting requirements given that:

- A painting requirement could result in significant harm to the LNB/feedhorn assembly and the downconverters that are either integrated into the antenna or are attached in close proximity to the antenna. These pieces of the antenna assembly are generally installed in light-colored housing in order to both promote the dissipation of heat they generate and to minimize internal temperature increases due to outside temperatures. Tests conducted by a leading downconverter manufacturer demonstrate that the use of a light colored housing reduces the internal thermal increase by as much as 15 degrees Centigrade. Particularly in the southwestern regions of the United States, where ambient temperatures can reach 120 degrees Fahrenheit, the difference between a light colored housing and a dark colored housing can be the difference between an acceptable signal and none at all.

- A local requirement mandating the use of optically reflective paint would effectively preclude service in many instances. Even at a zero degree elevation angle the sun can be focused into the LNB/feedhorn assembly and overheat or destroy it.

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[35] This is particularly true when the cumulative effect of various governmental and nongovernmental painting requirements are considered. If local authorities, as well as local developments within a given wireless cable operator's service area were to adopt different painting requirements, it would be an operational nightmare for wireless cable operators to comply.