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COMMUNITY ASSOCIATIONS INSTITUTE

The nation's voice for condominium, cooperative and homeowner associations

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

February 9, 1998

Mr. William F. Caton, Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Ex parte communication with Susan Fox, Senior Legal Advisor to Chairman William E. Kennard in the matters of Telecommunications Services Inside Wiring; Customer Premises Equipment, CS Docket No. 95-184; Preemption of Local Zoning Regulations of Satellite Earth Stations, IB Docket No. 95-59; and Implementation of Section 207 of the Telecommunications Act of 1996 Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Services, CS Docket Number 96-83, FCC 96-151 and Telecommunications Services Inside Wiring, Customer Premises Equipment, CS Docket Number 95-184, and Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Inside Wiring, MM Docket Number 92-260.

Dear Mr. Caton:

On February 9, 1998, Rodney D. Clark, Vice President of Government and Public Affairs and Lara E. Howley, Esq., Manager, Foundation and Special Projects, representing the Community Associations Institute, met with Susan Fox, Senior Legal Advisor to Chairman William E. Kennard, to discuss the ramifications of the above-mentioned rulemaking proceedings on community associations. The discussions focused on the positions outlined in the attached policy paper, which was also presented to Ms. Fox.

CAI is pleased to file the enclosed original and two copies of this letter and attachment with the Secretary to satisfy the FCC's ex parte filing requirements.

Please contact me at 703-548-8600 with any questions.

Sincerely,

Rodney D. Clark

Rodney D. Clark
Vice President
Government and Public Affairs

cc: Susan Fox, Esq.

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PROTECT COMMON PROPERTY!
Community Associations Respond To The FCC

The Community Associations Institute (CAI) shares the FCC's desire that a variety of competitive cable, satellite and telecommunications providers be available to residents of condominiums, cooperatives and planned communities throughout the United States. Community associations -- operated *by* residents *on behalf of* residents -- are particularly sensitive to the needs and demands of the individuals within their communities and are working diligently and effectively to secure new telecommunications opportunities for their residents.

Individuals choose to purchase homes in community associations subject to the covenants, rules and regulations that enable all residents to participate in the governance of the community and establish high levels of services and standards for all. The FCC must recognize this self-determinate process and the role community associations play in maintaining, protecting and preserving the common areas, the value of the community or building and all individually owned property within the development. To fulfill these duties, community associations must be able to control, manage and otherwise protect their common property. CAI urges the FCC to resist any proposal that seeks to weaken the ability of community associations to carry out these important and necessary functions.

• ***The FCC does not have the authority to regulate property owned or controlled by community associations nor to mandate a taking of community associations' private property under the Telecommunications Act of 1996.***

Community associations are composed of different types of property: individually owned property, limited common element property, and common property. Individually owned property is property owned by each home or unit owner alone; the association has no ownership interest in the property. Limited common elements (usually only in a condominium) are property owned by all unit owners in common, but to which exclusive use is limited to one or a few owners. Common property is owned by the association (in a cooperative or planned community) or by all unit owners jointly (in a condominium).

Common property is owned and managed by the association or by all unit owners for maintenance and property improvement reasons to ensure equal benefit to all owners and preserve the value of the community and individual residences contained therein. An individual owner does not have the right to take over common property for exclusive use. To permit such intrusion would deprive the association or all other owners of their property rights in common property. A government regulation depriving an association or other co-owners possession and use of common property without just compensation is a taking prohibited by the Fifth Amendment to the Constitution.

The Telecommunications Act of 1996 contains no statement explicitly authorizing the FCC to effect a taking of property rights as required by Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994). Yet, any FCC mandate allowing a service provider or resident to install wiring or equipment on common property is a physical taking under the Supreme Court's decision in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Furthermore, directing a community association to make reception available using its own facilities would constitute both a taking under Loretto and a regulatory taking under Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). In Hodel v. Irving, 481 U.S. 704 (1987), the Court recognized that the Fifth Amendment protects each strand in an owner's bundle of property rights, including the right to exclude others. Accordingly, any FCC regulation permitting installation of equipment on common property would violate an important strand within community associations' bundle of rights and produce a taking.

Individual takings of common property, besides raising constitutional issues, would also pose great practical problems for associations. The responsibilities and costs associated with maintenance and security would increase, and associations would face significant liability for any personal injuries or property damage that resulted from individual installations of wiring or equipment on common property.

• ***The FCC should concentrate on achieving its objectives by regulating the service providers under its jurisdiction rather than interfering with the self-determinate and effective operations of community associations by attempting to mandate the use of, provide others' access to, or otherwise take their common property.***

Service providers possess the economic incentive, ability and research capability to devise means to service customers without interfering with common property. The FCC should exercise its existing authority to elicit such farsighted solutions from providers rather than attempt to threaten and burden community associations that are not under the FCC's jurisdiction.

INSIDE WIRING & CABLE HOME WIRING

• ***The FCC inside wiring rule released October 17, 1997 will promote competition among video programming distributors, permitting community associations more choice of service providers.***

CAI applauds the promulgation of the FCC's recent inside wiring rule. Properly implemented, this rule will invigorate competition in the video programming marketplace through the streamlined cable inside wiring disposition processes. These procedures will permit alternative multichannel video programming distributors to provide new and enhanced services to community association residents.

• ***"Bulk buy" and exclusive contract options should be preserved for community associations to attract providers who would not otherwise serve the association's residents.***

Although the trend in today's marketplace certainly favors the availability of multiple providers in lieu of exclusive arrangements, community associations and their residents are occasionally unable to attract certain telecommunications providers at all or secure favorable rates for residents without the option of entering into a "bulk buy" or exclusive contract. Without these options, some community associations would be unable to obtain cable service, or affordable rates, because the provider determined the profit potential to be inadequate to justify the necessary investment. A bulk buy or exclusive arrangement that guarantees a return for the provider is occasionally the only means to securing service for residents and these options should remain available. Any FCC-mandated cap or other limitation on the duration of exclusive service contracts will impair the ability of some community associations to receive video programming services, a result that contravenes the FCC's intent.

• ***The FCC should adopt a "fresh look" for exclusive service contracts after the incumbent provider has had the opportunity to recoup its investment costs.***

Although the video programming marketplace is rapidly expanding, with the entry of alternative cable and other video programming providers, community associations are often unable to take advantage of this increased competition because of previously existing exclusive service contracts. While "capping" the term of

the contract may hinder competition, permitting community associations to renegotiate contracts under a "fresh look" will promote competition. A "fresh look" option, which could be triggered by a community association either at the time an incumbent service provider recoups its investment costs or after a set term of years, would provide community associations with the choice of renegotiating the terms of exclusive service contracts entered into in an anti-competitive, monopolistic environment. Community associations will be able to use the "fresh look" option to select additional video programming options to serve their communities.

• ***The FCC should preempt state mandatory access statutes.***

Mandatory access statutes are inherently anti-competitive. These statutes create perpetual rights of entry for the first video programming provider, which may then exclude all others from association property. Community associations are prevented from excluding an incumbent provider from their property due to inferior or cost-prohibitive service, impairing associations' ability to select alternative providers that can provide better quality services to association residents. These statutes significantly impede the growth of competition.

The FCC has wisely chosen not to enact a federal mandatory access regulation. However, this action does not assist community associations in mandatory access states. Therefore, the FCC should preempt all state mandatory access statutes to promote competition throughout the nation.

• ***The FCC should promote the simultaneous use of cable inside wiring by multiple video programming providers.***

Several video programming providers have asserted that cable inside wiring may be used by more than one provider simultaneously. CAI has always supported the development of new technology that would permit this use, for it would eliminate a major encumbrance to the ability of community associations to select alternative providers – the lack of space in which to install additional wiring. However, CAI recognizes that there may be constitutional and practical impediments to a FCC mandate of the simultaneous use of inside wiring and encourages the FCC to study this issue further.

OVER THE AIR RECEPTION DEVICES

• ***The FCC should prohibit cable providers from enforcing claims against community associations for violations of exclusive contracts because individual residents are installing competitive satellite and other antenna services under Section 207 of the Telecommunications Act of 1996.***

By adhering to the telecommunications law and allowing the installation of satellite and other antennas according to regulations promulgated by the FCC, community associations place themselves at potential risk from lawsuits and damage claims for violating the exclusivity provisions of existing arrangements with service providers. The FCC should provide relief to community associations by prohibiting such claims when either individual or central antennas are installed.

• ***Community associations that choose to install a central antenna should be allowed to enforce restrictions prohibiting the installation of individual antennas that receive the same service.***

Some community associations wish to invest in a central antenna system to provide service to all residents while minimizing the potential property damage, safety concerns, aesthetic deterioration and resulting property devaluation that can accompany the installation of multiple satellite antennas by association residents. As long as individual residents can access a central antenna and receive services that are available through an individual antenna, the community association should be allowed to enforce restrictions prohibiting the installation of individual antennas. Toward this end, the FCC's regulations should be amended as follows:

"No restrictive covenant, encumbrance, homeowners' association rule, or other nongovernmental restriction shall be enforceable to the extent that it impairs a viewer's ability to receive video programming services over a satellite antenna less than one meter in diameter located on the individual viewer's individual property or exclusive use area; provided, however, that if a community association makes video programming services available, through any accessible means, to any association resident wishing to subscribe to such services, then such nongovernmental restrictions shall not be deemed to impair a viewer's ability to receive such service."

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Founded in 1973, the Community Associations Institute (CAI) is the national voice for 32 million people (one out of every eight) who live in more than 150,000 community associations of all sizes and architectural types throughout the United States. Community associations include condominium associations, homeowner associations, cooperatives and planned communities. CAI represents this extensive constituency on a range of issues including taxation, bankruptcy, insurance, private property rights, telecommunications, fair housing, electric utility deregulation, and community association manager credentialing.

In addition to individual homeowners, CAI's multidisciplinary membership encompasses community association managers and management firms, attorneys, accountants, engineers, builders/developers, and other providers of professional products and services for community homeowners and their associations. CAI members participate actively in the public policy process through 58 local Chapters and 25 state Legislative Action Committees.

For more information, contact CAI's Government and Public Affairs Department at 703-548-8600.