MORRISON & FOERSTER LLP

SAN FRANCISCO
LOS ANGELES
SACRAMENTO
ORANGE COUNTY
PALO ALTO
WALNUT CREEK
DENVER

ATTORNEYS AT LAW

2000 PENNSYLVANIA AVENUE, NW
WASHINGTON, D.C. 20006-1888
TELEPHONE (202) 887-1500
TELEFACSIMILE (202) 887-0763

NEW YORK
WASHINGTON, D.C.
LONDON
BRUSSELS
HONG KONG
SINGAPORE
TOKYO

EX PARTE OR LATE FILED

DOCKET FILE COPY ORIGINAL

May 27, 1998

Writer's Direct Contact
(202) 887-1510
ctritt@mofo.com

RECEIVED
1998

Via Hand Delivery

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: *Ex Parte* Letter, IB Docket No. 95-59; CS Docket No. 96-83; CS Docket No. 95-184; and MM Docket No. 92-260

Dear Ms. Salas:

The Satellite Broadcasting and Communications Association ("SBCA"), through its undersigned counsel, opposes a recent *ex parte* proposal submitted by the Community Associations Institute ("CAI") in the above-referenced proceedings on March 30, 1998 ("CAI Proposal"). As SBCA understands the CAI Proposal, a homeowners' association could establish and enforce otherwise prohibited restrictions on individual antenna installation if the association installs a central antenna through which all association residents could subscribe to a specific video service. The CAI Proposal would not provide consumers with any additional services or rights they do not already have under current law and, indeed, would limit consumer choices and increase consumer costs. For these reasons, the Commission should not implement the CAI Proposal.

The CAI Proposal Would Violate FCC Precedent Governing Exclusive Use Units

With respect to single-family home communities, townhouse communities and condominiums with "exclusive use" areas for an owner to install an individual antenna (collectively, for purposes of this pleading, "exclusive use" units), the Commission's existing extensive precedent is clear and should not be changed. With limited exceptions for safety regulation and historic preservation, the Commission's regulations prohibit homeowners' association or similar restrictions to the extent they "impair" the

installation, maintenance or use of a covered satellite antenna.[1] A restriction is deemed to "impair" installation, maintenance or use of an antenna if, among other things, it unreasonably delays or prevents installation, maintenance or use, or it unreasonably increases the cost of installation, maintenance or use.[2] The CAI Proposal on its face has no legitimate or stated safety or historic preservation objective, and (as discussed below in more detail) it clearly would "impair" resident installation, maintenance or use of an antenna. Accordingly, such a restriction would be impermissible under the Commission's existing rules.

The CIA Proposal would "impair" antenna installation, maintenance and use. First, the proposal would delay or prevent antenna installation and use. Under the CAI Proposal, for 90 days following an association's announcement that it intends to install an initial central antenna, any resident who installs an individual antenna could be required to remove the antenna, apparently at the resident's own cost.[3] As a practical matter, few residents would consider installing an individual antenna during this period given the cost of purchasing the receiving equipment and the cost of installation and removal. Accordingly, this aspect of the CAI Proposal effectively would delay desired antenna use for up to 90 days -- far in excess of delays the Commission previously has indicated to be unreasonable.[4]

The CAI Proposal also would require that after an initial central antenna is installed, any resident desiring a different service than that available through the central antenna must request that the association install a central antenna for the desired service. The resident then would have to wait for the association to respond to his/her request, and -- even if the association granted the request -- wait for the association to negotiate with an installer and then for the actual installation.[5] The precise amount of time required to install a central antenna can vary tremendously due to the many variables, but generally such installations require much more time than an individual antenna

---

[1] 47 C.F.R. §1.4000(a).

[2] *Id.*

[3] CAI Proposal at 4.

[4] *See, e.g., Star Lambert and Satellite Broadcasting and Communications Association of America*, 12 FCC Rcd 10455, 10465 (1997) (requiring permit issuance, even if period of time for the process of issuance is mandated to be short, unreasonably delays installation) ("*Star Lambert*").

[5] CAI Proposal at 5.

installation because additional wiring must be run to each unit. Again, this aspect of the CAI Proposal would delay desired use of the antenna for a period far in excess of what the Commission previously has determined to be unreasonable delay.

Second, the CAI Proposal would "impair" the installation, maintenance and use of antennas by unreasonably increasing the cost to residents of antenna installation. Installation of a central antenna is almost always more expensive per home or per unit than individual antennas because a central antenna additionally requires the laying of conduit, the installation of central junction boxes, and the running of separate wiring to each unit. Thus, the pro rata costs per resident for the installation of wiring and conduit and the maintenance of these facilities would be significantly more per unit than if every resident installed a separate antenna. Although the CAI Proposal refers to a resident's monthly service fee for an individual antenna as a baseline for determining reasonable cost,[6] the CAI Proposal ignores the additional required costs for initial installation of a central antenna. Under the Commission's precedent, even very small additional costs have been deemed unreasonable.[7]

In addition, a resident request to install a second central antenna for a different service could lead, under the CAI Proposal, to the full installation cost being passed through only to the resident(s) desiring the second central antenna.[8] If only a small number of residents desire a second service, and if the association could insist that a second central antenna be installed rather than individual antennas, the cost to those few residents could be unreasonably high. As a practical matter, under the CAI Proposal, an association effectively could prohibit an individual antenna, and therefore multiple video programming services, under the guise of "offering" to install a second central antenna -- at a cost that is out of reach for most if not all residents. Implementation of the CAI Proposal effectively would undercut the Commission's basic objectives of "ensur[ing] that consumers have access to a broad range of video programming

---

[6] *Id.* at 4.

[7] *See, e.g.*, *Star Lambert*, 12 FCC Rcd at 10465 ($5 permit fee unreasonably increases costs of installation); *Petition of Willie and Chun Ok Brown*, 12 FCC Rcd 9626, 9630-31 (1997) (rejecting local attempt to require purchase of a smaller antenna at greater cost); *Michael J. MacDonald*, 10 CR 316, 320-21 (1997) (even small $5 fee is an "unreasonable expense because it is an unwarranted charge"). In addition, under the terms of the CAI Proposal, the installation costs and perhaps even the monthly service cost could be added to the fees paid by all residents, whether or not they desire or utilize the service. CAI Proposal at 3.

[8] CAI Proposal at 5.

services" and "foster[ing] full and fair competition among different types of video programming services."[9]

Any Change in the FCC's Regulations Governing
Exclusive Use Units is Contrary to the Public Interest

Similarly, the public interest is not served by any change in the Commission's existing rules for "exclusive use" units in order to permit implementation of the CAI Proposal. First, in the case of single-family homes and townhomes, grant of the CAI Proposal effectively would permit the creation of a small, private cable system -- with all the attendant problems of such a system. A central antenna system in these communities would require a junction box with conduit running to each individual home. In addition, running this conduit might require rights-of-way, which creates additional costs, delays and possible legal challenges.

Moreover, the Commission's existing rules permit installation of a central antenna system so long as such installation would not undercut other legal options available to consumers, but the Commission should not allow an association to further limit or delay a consumer's desired alternative video service or to increase the cost of such service. This is particularly true where -- as with the CAI Proposal -- the basis for the limitation appears to be a bald attempt to require an association's impermissible aesthetic preferences be imposed against individual satellite antennas. Because different direct broadcast satellite services often provide programming with a different focus, *e.g.*, movies versus sports, a single provider will not necessarily satisfy the needs of multiple residents. Any change such as that requested by CAI would simply limit consumer choice and add to consumer costs without adding any rights or advantages that consumers do not already enjoy.

---

[9] *Preemption of Local Zoning Regulation of Satellite Earth Stations and Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service*, 11 FCC Rcd 19276, 19281 (1996).

Further, a potential flaw in the CAI Proposal could have significant adverse consequences for consumers. CAI states that simultaneous use of inside wiring by two or more video providers may not be possible,[10] but blithely asserts that its proposal would encourage the development of sharing technology.[11] SBCA is aware, however, of situations in which cable companies have been unwilling to share wiring even if it is possible, and the Commission has not to this point required such sharing. If programming providers are unwilling to share wiring and the Commission does not require such sharing, the installation of multiple wiring for multiple central antennas would increase exponentially the costs to residents.

Finally, the CAI proposal could stifle other types of technological and programming innovation as well. For example, one major satellite programming provider plans to roll out a broad package of foreign language services this summer, but the receipt of the signals for this service requires a new and different antenna. Similarly, DTH customers currently enjoy the option of accessing both DBS video services and high-speed Internet access from a single 21-inch antenna that operates in both the FSS and BSS Ku bands, and is different than the regular DBS antenna. The system is marketed by Hughes Network Systems (HNS), an SBCA member, and is known as "DirecDuo™." It offers consumers the highest speed (400 kbps) Internet access service available on a nation-wide basis today. Installation of a central antenna "locks" customers more so than an individual antenna due to the increased burden of installing a second central antenna (both in terms of time and expense) as compared to a second individual antenna. Therefore, installation of an initial central antenna could limit the potential customers for (and thus the development of) innovative programming.

Application of the CAI Proposal to MDUs Also is Contrary to the Public Interest

For many of the same policy reasons stated above, the Commission should not implement the CAI Proposal for condominiums lacking "exclusive use" areas for individual antenna installation and rental multi-dwelling units (collectively, for purposes of this pleading, "MDUs"). First, Section 207 of the Telecommunications Act of 1996 instructs the Commission to prohibit restrictions that impair a *viewer's* ability to receive direct broadcast satellite programming. Neither the plain language of the Act nor legislative history suggest that the Commission draw any distinction between different types of buildings or between owners and renters. Second, as noted above, central antennas are permitted under existing FCC rules, including for MDUs, and no Commission action is needed to permit the installation of such antennas. The CAI

---

[10] CAI Proposal at 5.

[11] *Id.*

Proposal would, however, limit the rights of owners or renters if implemented. As a practical matter, the installation of a central antenna in these types of buildings likely would result in few additional residents desiring an individual antenna. Third, as noted for "exclusive use" units above and equally applicable to MDUs, the unwillingness of two providers to share the same inside wiring, absent an FCC mandate that they do so, could create greatly increased costs for consumers. Finally, innovative programming is equally restrained by central antennas in the MDU context.

In sum, the CAI Proposal appears to be an attempt to enforce aesthetic preferences, for either "exclusive use" units or for MDUs, and should be denied. A Commission grant would condone a limitation on consumer choice in video programming in contravention of Congressional intent as expressed in Section 207 of the Telecommunications Act of 1996.

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. §1.1206, SBCA is filing two copies of this letter. If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,

Cheryl A. Tritt/JEN

Cheryl A. Tritt
Joan E. Neal

cc: Eloise Gore, Cable Services Bureau
Darryl Cooper, Cable Services Bureau
Rosalee Chiara, International Bureau