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

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In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services	)	
Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

REPLY COMMENTS OF CONCERNED COMMUNITIES AND ORGANIZATIONS

CA: City of Benicia, City of Cerritos

CO: City and County of Denver, City of Lakewood, and Greater Metro Telecommunications Consortium

FL: City of Alachua, City of Coconut Creek

IL: City of Marshall, Village of Lisle and the Illinois Chapter of NATOA consisting of the City of Chicago, Cook County, and approximately 50 other Illinois municipalities

IN: City of Carmel

MI: City of Detroit, PROTEC (Michigan Coalition to Protect Rights of Way) and 22 other municipalities

OR League of Oregon Cities, Metropolitan Area Communications Commission:

TX: City of Fort Worth and 16 other municipalities

WA: City of Bellingham, City of Medina

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SUMMARY

The proposed rule would allow an unlimited number of antennas for fixed wireless service on the roofs of multi-tenant buildings and would allow multiple wires to be strung from the roof antennas (and from ground level by new conventional phone companies) to individual tenants, all over the landlord's objection. Safety codes, health codes, zoning and planning laws might be preempted. These reply comments opposing the rule are submitted by municipalities and municipal groups from nine (9) states representing a population of more than 18 million people.

Safety-related codes include building codes, fire codes, plumbing and electrical codes. They are adopted for health and engineering reasons and are tailored to local situations (such as winds, hurricanes, temperatures, seismic conditions, ice and snow accumulation). Preempting them may cause catastrophic building collapse, injure firemen, and cause loss of life and extensive damage to property. Such codes (or health codes) also may address the substantial problems in older buildings of (1)–asbestos in insulation and building materials, and (2)–lead based paints. Housing units constructed prior to 1950 (more than 30 million housing units) generally have such problems. The Commission's rule contemplates extensive construction in such buildings as new wires are run to each tenant who desires service by the new wireless (or conventional wired) telephone provider of the tenant's choice. Many (tens or hundreds, depending on the situation) of new phone companies may serve a building, with a corresponding increase in wiring.

To protect the public health and safety, such codes require meaningful enforcement, which may include permits, inspections and prosecution of violators. Any rule must expressly allow such codes to be enforced against the telephone industry just as they enforced against other citizens. The Commission must expressly reject industry attempts to include in the proposed rule prior decisions of the Commission (on

home satellite dishes) to the effect that a $5 permit may not be required, that approval of the location of facilities may not be required, and that local ordinances may not be enforced.

The Commission to date has been presented with no instances of safety-related codes affecting wireless facilities or in-building wiring for new phone companies, much less problems of sufficient severity and frequency to warrant a nationwide preemption of such codes. Nor has the industry shown that it has met with the major safety code promulgating organizations to identify and attempt to obtain needed changes. The Commission cannot preempt safety-related codes, or their enforcement, when there (1)–has been no indication of a problem, (2)–has been no attempt by the industry to obtain any needed changes to such codes, and (3)–as a result there is no ability for the Commission (or others) to identify the risk to life and property that might occur from preemption. In addition, for Federal properties the General Services Administration (GSA) has issued procedures requiring private wireless facilities on Federal property to comply with local safety codes, and the GSA is working toward requiring all new civilian Federal buildings to comply with such codes. There is no rational basis for exempting wireless facilities on private property from the safety codes with which the Federal government requires compliance for wireless facilities on its own property.

The Supreme Court has repeatedly identified both local zoning and planning laws, and health and safety codes, as matters of peculiarly local concern where the ability for Federal intrusion or preemption is minimal. Such precedent has been strengthened by the Supreme Court's recent expansion of the Tenth Amendment to preclude Federal action vis-a-vis the states. As a result, any preemption by the Commission of safety-related codes, health codes, planning and zoning laws, or their enforcement, would be unconstitutional. Any application of the rule to state and local government owned properties would be similarly unconstitutional. According to the Supreme Court zoning and planning laws are matters of

"quintessentially local concern" which ensure compatibility of uses, deter urban blight, protect the environment, preserve property values and the character of our communities. They generally see that needed services, such as telecommunications, are provided in a manner that does not unduly affect other values.

As with safety-related codes, the wireless industry has provided no instances of cases where planning and zoning laws have affected (let alone prevented) the installation of fixed wireless facilities. One likely reason is that fixed wireless facilities are typically placed on apartment buildings and offices, both of which are in zoning districts (multifamily residential and commercial, respectively) which are less restrictive than single family residential. Just as with safety codes, there can be no Commission preemption of local zoning laws when there has been no demonstration of a problem of sufficient severity and frequency to warrant a national preemptive rule. GSA has prescribed that wireless facilities on Federal property must comply with local zoning laws. There is no rational basis–and it would be arbitrary, capricious and an abuse of discretion–for the Federal government to exempt wireless facilities on private property from the same zoning laws that the Federal government applies to private wireless facilities on its buildings and lands.

The preceding issues need not be reached because the "preservation of local zoning authority" provisions of Section 332(c)(7) of the Communications Act cover most fixed wireless facilities. This is largely because Section 332(c)(7) expressly covers common carrier wireless facilities. For such facilities Section 332(c)(7) removes Commission zoning preemption authority under <u>any provision</u> of the Communications Act. Any facilities not expressly covered by Section 332(c)(7) are likely physically identical to those covered by the Section and should be covered by existing provisions of zoning and land use law, which generally apply principles similar to those found in that Section.

The rule cannot apply to Federal, state or local government property. The problems described by industry commenters overwhelmingly relate to private landlords and properties. There is thus no basis for any rule to apply to local and state government properties nationwide. To do so would be arbitrary, capricious and an abuse of discretion. Application of any rule to state or local government property would put them in the unpalatable situation, in some instances, of choosing between (1)–foregoing significant compensation (required under the Fifth Amendment) from wireless and telecommunications providers for use of such property, and (2)–risking a municipal bond default, which can have catastrophic consequences for a state or municipality. This situation occurs because state and local government buildings are generally financed through the issuance of tax exempt bonds, which under the Internal Revenue Code limit payments from private parties related to the facility to 5% or 10% (depending on the type of bond) of the amount of the bond (and occasionally to lower limits). In some instances private payments are already at this limit, so as to minimize the facility's cost to taxpayers.

In such situations, additional monies from wireless providers or telephone companies for the usage of space, building alterations (for additional wires) or the like may require the governmental unit to either forego payment (which may cost it millions for alterations and unfairly subsidize the provider) or accept payment and risk a bond default. Such a default (due to the bonds becoming taxable) is typically extremely harsh on the unit of government involved because it will typically either be precluded from borrowing monies for a period of years or be forced to pay a much higher interest rate. Either result prevents or limits the construction of future capital facilities. Existing services (police, trash, fire) may have to be curtailed such that needed facilities can be funded from current cash flows.

Again, the problem is avoided because Congress in Section 704(c) of the 1996 Act expressly

addressed the issue of making government properties available for "new spectrum-based telecommunications services" of all types, and directed the Executive Branch (not this Commission) to adopt procedures making Federal properties available to private parties for such purposes. GSA adopted such procedures three years ago, in 1996. Such procedures and GSA involvement would have been unnecessary if this Commission already had the authority to make Federal property available for wireless telecommunications services. The only role Congress allocated to this Commission was to provide technical support to states and local units of government to "encourage" them to make their property available for the same purpose. Again, such a Congressional mandate to "encourage" was unnecessary if the Commission already had authority to compel such availability.

If the Commission adopts a rule which either purports to preempt state and local laws or apply to state and local property it must comply with Executive Order 13,132 on Federalism. Among other things, the Executive Order requires (1)–strict adherence to Constitutional principles, which are being rigorously enforced by the Supreme Court to restrict Federal preemption; (2)–preemption only where "the statute contains an express preemption provision" or there is some clear evidence of Congressional intent to preempt; (3)–preemption to be restricted to the minimum level necessary to achieve the Federal objective, and (4)–extensive consultation with affected state and local officials prior to any preemption. In the present situation, the Commission's meetings and consultation with state and local officials must be as meaningful and extensive as its meetings with industry officials.

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REPLY COMMENTS OF
CONCERNED COMMUNITIES AND ORGANIZATIONS

I. INTRODUCTION

A. Concerned Communities and Organizations:

Concerned Communities and Organizations ("CCO")[1], by their attorneys, hereby file reply

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[1]The Concerned Communities and Organizations consist of the following local governments and organizations:

California: City of Benicia, City of Cerritos

Colorado: City and County of Denver, City of Lakewood, and Greater Metro Telecommunications Consortium consisting of Adams County, City of Arvada, City of Aurora, City of Brighton, City of Castle Rock, City of Cherry Hills Village, City of Commerce City, Douglas County, City of

comments in the above-captioned proceeding pursuant to the amended schedule set forth by the Commission. As is set forth in the preceding footnote, CCO represents hundreds of municipalities with a population of over 18 million people located in nine (9) states.

B. **Opposition to Comments**: Several industry commenters support the extension of the Commission's Rule 1.4000 to cover fixed wireless devices. Any such extension could have

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	Englewood, City of Edgewater, City of Glendale, City of Golden, City of Greenwood Village, City of Lafayette, City of Lakewood, City of Littleton, City of Northglenn, City of Parker, City of Sheridan, Town of Superior, City of Thornton, City of Westminster, City of Wheat Ridge
Florida:	City of Alachua, City of Coconut Creek
Illinois:	City of Marshall, Village of Lisle and the Illinois Chapter of NATOA consisting of the City of Chicago, Cook County, and approximately 50 other Illinois municipalities
Indiana:	City of Carmel
Michigan:	City of Detroit, Ada Township, Alpine Township, Bloomfield Township, City of Ann Arbor, City of Belding, City of Coopersville, City of Gladwin, City of Ishpeming, City of Kentwood, City of Livonia, City of Marquette, City of Monroe, City of Tecumseh, City of Walker, City of Wyoming, Grand Rapids Charter Township, Holland Charter Township, Laketown Township, Robinson Township, Sparta Township, Tallmadge Charter Township, Vienna Township and PROTEC (Michigan Coalition to Protect Rights of Way) representing the units of government throughout Michigan on rights of way matters
Oregon:	League of Oregon Cities (representing all Oregon cities), Metropolitan Area Communications Commission
Texas:	City of Amarillo, City of Arlington, City of Denton, City of Duncanville, City of Fort Worth, City of Grand Prairie, City of Irving, City of Laredo, City of Littlefield, City of Longview, City of Mansfield, City of Plano, City of Rockwall, City of Saginaw, City of Schertz, Town of Addison, Town of Flower Mound
Washington:	City of Bellingham, City of Medina

severe negative impacts on the public health, safety and welfare by affecting safety and health related codes, environmental, planning, zoning, and land use laws and their effective enforcement. For this reason Rule 1.4000 should not be extended, as is set forth below, and any such extension would be statutorily and constitutionally impermissible.

In addition, the some comments support a rule that would be so broad as to apply to buildings and property owned by units of state and local government. As is set forth below, bringing such properties within the scope of any rule is unwise, without any factual basis, and is also statutorily and constitutionally impermissible.

For the reasons stated herein, CCO opposes the proposed Rule relating to access to buildings and rooftops set forth in the Commission's Notice of Proposed Rulemaking, FCC 99-141 (released July 7, 1999) ("NOPR").

II. SAFETY AND HEALTH CODES

A. Safety Codes Safety codes are adopted by states and local governments throughout the United States for engineering and health related safety reasons. They vary by region, weather patterns and building type. They serve to protect people and property against harm that can come from buildings and structures that are improperly constructed or improperly used. For example, they protect against the hazards that can occur to people and property due to such things as large amounts of ice or water accumulating on a building; wind; earthquakes; hurricanes and the like. They also assure structural integrity, fire safety and other matters relating to buildings, their interior wiring, conduits and risers. Safety codes are typically promulgated in model form by one of several code organizations nationwide. For example the Building Officials and Code Administrators International (BOCA) serves the need for sound and progressive construction regulation through promulgation

of the *BOCA National Code* series of model regulatory codes. The *BOCA National Code*s are performance-oriented model codes responsive to the "latest advancement in construction technology."

Among the model codes promulgated by BOCA are the National Building Code, National Fire Prevention Code, Mechanical Code, Plumbing Code, Property Maintenance Code, and One and Two Family Dwelling Code.

Similar codes are promulgated by the International Conference of Building Officials (ICBO) and Southern Building Code Congress International (SBCCI) under the auspices of the International Code Council (ICC). Over a period of years the preceding several code organizations are phasing in a series of ICC International Codes which replace the analogous codes of the individual model code organizations.

The National Fire Protection Association promulgates the National Fire Code and the National Electric Code. The National Electric Code applies predominantly to wires in buildings and on private property. In addition, the National Electric Safety Code (promulgated by the Institute of Electrical and Electronics Engineers) applies predominantly to communications and electric wires in streets and rights of way. These "electric" codes in fact apply to wiring of all kinds, including telecommunications and cable wires.

These codes have been developed during the last century to protect the public safety as structures and their uses increase substantially in size and complexity, including the advent and proliferation of extensive wiring and facilities for electricity and communications. These safety related codes are neutral on matters related to competition--as stated above they address engineering and health related safety concerns such that buildings, structures, streets and facilities in the public

rights of way are safe for their intended use in the light of health risks, sound engineering judgement and the hard lessons learned by experience.

The codes are updated annually through a democratic process. New editions (again developed through a democratic process) are typically issued every third year.

The democratic process provides (among other things) for input regarding new technologies and thus provide an opportunity for the wireless industry to seek changes on any portions of the codes of concern to them.

States and local units of government may modify the safety codes in the process of adopting them to tailor them to local situations. However, many states require state approval of any changes proposed by a municipality. For example, Section 8 of the Michigan State Construction Code Act of 1972 requires state approval of any local amendments to national codes. MCLA Section 125.1508. Other states have similar provisions. Such approval is required due to the paramount public health and safety issues addressed by safety codes; a recognition that the codes are well drafted; and the need to ensure that any "tailoring" of the safety codes to meet local conditions does not jeopardize public safety.

The fact that due to paramount safety concerns the states often prevent local amendment of safety codes without state approval shows that the Commission should not (and cannot) attempt to preempt such codes particularly here where (as shown below) no problem has been demonstrated, there is no indication of the specific code sections (if any) that might be preempted; and as a result there is no ability to consider the direct harm to the public health and safety that could occur from preemption.

B. **Health Related Codes**: Asbestos and lead based paints are a major problem

nationwide. They are particularly a problem in older buildings, meaning those constructed prior to 1950. According to the US Census Bureau over 30 million housing units date from prior to 1950. Statistical Abstract of the United States (1998) at 723 (Housing Units-Characteristic, by Tenure & Region, 1995).

Asbestos is a carcinogen. Lead is a well known poison affecting the nervous system and brain. Lead based paint or lead particles in dust from construction have a disproportionate impact on infants and children, some of which impacts are irreversible.

The Commission's proposed rule contemplates extensive construction in multi-tenant buildings as it would require new wires to be run to each new tenant who desires service from the new wireless (or conventional wired) telephone provider of the tenant's choice. Commenters and the NOPR discuss such matters as condemnation to obtain additional space in buildings for wires when currently available space is exhausted.

The number of new providers per building--and corresponding construction--could be significant, for example, in the tens or hundreds of phone providers per building depending on the building. By way of example in the last three years the state of Michigan has certified approximately eighty new telephone companies.[2] Florida has certified approximately 250 new phone companies.[3] New phone companies continue to be certified at a rapid rate.

In many or most of the 30 million pre-1950 housing units the installation of the new building wiring contemplated by the rule will involve construction in and around building components

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[2]Press Release, Michigan Public Service Commission, August 31, 1999.

[3]Wall Street Journal, September 1, 1999 "Telecom Battle Erupts Deep Inside Buildings" at B1, B8.

containing asbestos. It will similarly involve construction and drilling through walls and other surfaces coated with lead based paints.

The safety codes, health codes and environmental laws of states and local units of government address the public health hazards of construction involving asbestos and lead based paints. The safety, health and environmental laws and codes relating to these matters protect the public health, safety and welfare and cannot be preempted.

C. **No Problems Demonstrated**: Although various commenters by supporting an extension of Rule 1.4000 indicate that safety codes and their effective enforcement should be preempted, the comments in this proceeding provide neither:

- A listing of specific problems that providers claim to have encountered with safety-related, health or environmental codes.
- A citation of the specific code sections or enforcement mechanisms that the commenters believe are troublesome.

The NOPR itself provides neither of the preceding items. Although some comments argue that extending Rule 1.4000 affecting safety, health, environmental and other codes for video dishes to cover fixed wireless dishes would be a good thing–they do not go beyond this--they do not indicate which specific code sections have been a problem, when or where.

To put it most directly the Commission cannot preempt when there is neither:

- A statement of specific problems
- A description of the specific code sections to be preempted, and
- Consideration of the adverse health, safety, environmental and other consequences that would result from preemption.

As a result of the lack of specificity, CCO and other units of states and local government nationwide are effectively prevented from providing the Commission with a detailed comments on the safety code sections to be preempted. CCO and other state and municipal entities cannot and should not engage in speculation or a game of "blind man's bluff" about what code sections are involved and where they are claimed to restrict competition. The wireless and other industries have had an ample opportunity to make their case and have not done so.

D. **No Attempt to Modify Codes**: As described above, safety-related codes are updated annually and new editions issued every third year utilizing a democratic process to obtain input from all relevant sources.

The wireless industry has made no showing that it has attempted to participate in this process on any matters in the safety, health or other codes of concern to it. The Commission cannot and should not act if the wireless industry has not taken the basic step of attempting to work with the national code organizations or other entities on matters of concern to them (if any).

Thus, the Commission cannot and should not act where (assuming there are problems) the participants have not even met and attempted to identify and resolve the issues. Because the codes deal with safety, health, environmental and related matters there is a strong likelihood that the issues may be resolved amicably and without Commission intervention. Such a resolution would both address the telephony and competition goals of primary interest to the Commission and prevent the potentially significant risk to the public health, safety and welfare a preemption ruling might cause. It would also prevent the serious legal issues related to preemption discussed herein. At a minimum, participation by the wireless industry with the national code and other organizations would narrow the matters in dispute and clarify the issues so as to aid any future Commission intervention.

The Commission should thus not act to preempt safety and related codes but instead should encourage the wireless industry to promptly meet with entities such as those described above to identify and attempt to resolve any issues.

E. Potential Harms

1 **Hazards Protected Against**: The following is a brief description of some of the general types of hazards (in addition to asbestos and lead based paint matters, discussed above) which safety related codes protect against on matters related to the NOPR. Because of the number of different safety-related codes in effect nationwide, the amendments to them to tailor to local situations, and the lack of specificity in this proceeding as to what sections providers claim are problematic the following is not keyed to any specific code. Instead it is simply an indication of the general types of hazards that safety-related codes may protect against on matters related to the NOPR.

2 **Antennas**: In general, the NOPR contemplates an unlimited number of antennas being placed on the roof of buildings. The following aspects of safety codes may be implicated.

- Weight: Safety codes specify the maximum loads that a structure or a portion of it (e.g roof area) can accommodate. These are computed not based upon simply the weight of objects placed on the roof but take into consideration the weights under extreme conditions, for example, with ten to twelve inches of ice on antennas, high wind, and the presence of weighty amounts of ice and snow on the roof. In appropriate areas hurricanes, earthquake (seismic) loadings may be taken into account also. The addition of a large number of antennas (especially with thick

ice) to buildings not designed to carry such loads risks catastrophic failure of the structure.

- Missile Effects: Safety codes may require exterior objects to be securely fastened such that in high winds or earthquakes they do not become dislodged and blow off the edge of a building, thus becoming missiles which can cause major property damage, injuries and death. In hurricane situations objects blowing off one building can easily breach the window of an adjacent building. All experts agree that maintaining the structural integrity of windows is essential in hurricane situations--once a window has been breached rain and wind will enter such that the building will be extensively damaged.[4]

- Roof Breach: A related concern is that the more items there are fastened to a roof the greater the likelihood that it will leak or the items will tear out in a heavy wind, similarly resulting in wind and water ingress such as that described above.[5]

- Fire/Emergency Access: Unrestricted placement of antennas on roof can easily block fire/emergency exits which are essential for safety and rescue purposes on tall structures.

3 **Wiring**: The NOPR also contemplates wires running from antennas (or

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[4]See, e.g. the discussion of this in "Should Building Codes be Tightened in Zones Prone to Hurricanes?" Wall Street Journal, September 16, 1999, page 1.

[5]For this reason building owners often will prohibit the fastening of antennas or devices to the roof itself (where they would breach the waterproof membrane that is on the surface of the roof). Instead they may require that they be placed on a parapet.

ground level utility entrances) to any occupant of a building. Safety related codes may address the following considerations, among others, in this regard:

- Structural: The NOPR contemplates among other things utilities condemning whatever space is necessary within a building so that many new wires to reach all occupants. In a large apartment building this could be a large amount of space given that apartment buildings have several hundred or several thousand tenants and (as noted above) in some states there have been as many as 80 or 250 competing telephone companies certified within the last two to three years (with such numbers increasing rapidly). Any expansion of the space taken for wiring must not in anyway violate safety codes regarding the structural integrity of the building or it's safety for inhabitants.

- Health: Health matters relating to asbestos, lead paints and construction for new wiring is discussed separately above.

- Conduits: Some electrical safety codes require wiring to be in conduits. This protects the wiring (which often may carry significant voltages or is important for safety considerations, e.g.--such that 911 service is not interrupted) against harm from rodents and from harm from nails, screws, saws and the like (from subsequent building work and remodeling) and interference from other providers.

- Separation: Some codes require physical separation between wires for safety reasons.

- Fire: Fire related provisions often require obvious exterior means for eliminating all power supplies to a building. This is done so that when firemen have

to use axes or saws to tear out portions of walls (either to gain entry or to eradicate a fire which is in or behind walls) they are not electrocuted by chopping through live wires. Some communications system may carry substantial amounts of voltage.[6]

The preceding give some overview of some of the types of hazards that safety codes may protect against. No action should be taken by the Commission which would in any way jeopardize these types of goals.

4 **Effective Enforcement**: The states and local units of government currently have various enforcement mechanisms in place to insure that the various codes and laws described above, including health and environmental laws, are enforced and complied with. The enforcement mechanisms may vary so that they are appropriate for the particular item, code and situation. Among the potential mechanisms are permits, prior government approvals, inspections after the fact and penalties for non-compliance. Any rule adopted by the Commission must in no way affect these various mechanisms for enforcing the codes and laws described above. Nor may it affect the ability of states and local governments to determine which enforcement mechanisms to use for particular situations.

In this regard CCO is concerned because industry commenters have supported extending Rule 1.4000 to fixed wireless facilities. In general, Rule 1.4000 was adopted under the 1996 Act (over the opposition of municipalities) and applies (in general) to small receive only satellite television dishes. Portions of the rule are currently on appeal to the courts. The Commission has previously ruled under Rule 1.4000 that:

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[6]Cable systems typically run at 40 to 80 volts; electric providers are attempting to provide a telecommunications over current electric systems.

- The City of Meade, Kansas may not require a $5.00 permit prior to installation of a satellite dish
- That City may not require City approval of the dish location
- That City's property setback regulations are preempted
- That City may not impose a $500 per day fine for violating City safety codes

In re Star Lambert and Satellite Broadcasting Association of American, DA 97-15554 (July 22, 1997).

The Commission has subsequently reaffirmed and extended the decision in this case in a series of subsequent rulings involving various approvals by condominium or home owner associations.[7]

The wireless and telephone industry apparently will claim that under any extension of Rule 1.4000 to fixed wireless facilities and interior building wiring that the Star Lambert/Meade Kansas decision applies to them, such that they are effectively exempted from all the codes and laws described above.

CCO has set forth above the substantial environmental, health and safety matters addressed by safety and related codes. It has demonstrated why their effective enforcement is essential to continue to protect the public health, safety and welfare. Any rule adopted by the Commission in this proceeding must therefore expressly allow safety, health, environmental and related codes to be

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[7]CCO believes that the Star Lambert/Meade decision does not comply with applicable law. It is concerned that the Commission adopted what it may consider to be a precedent setting rule in a case involving a city of 1,700 people which (as the Commission and participants knew) lacked the resources to effectively participate at the Commission or appeal any adverse decision.

enforced against wireless and other telephone companies, just as they are enforced against (and to protect) other citizens. In particular the Commission must expressly reject in advance any claims that the Star Lambert/Meade Kansas decision or its principles apply under any extension of Rule 1.4000.

F. **Safety and Related Codes Apply to Federal Property**: The importance of safety codes is shown by the action of the Federal government under the Telecommunications Act of 1996 ("1996 Act"). Section 704 of that Act deals with siting wireless facilities. Section 704 (c) requires the Federal government to

> "Prescribe procedures by which Federal departments and agencies may make available on a fair, reasonable, and non-discriminatory basis, property, rights-of-way and easements under their control for the placement of new telecommunications services that are dependent, in whole or in part, upon the utilization of Federal spectrum rights for the transmission or reception of such services."

This Section was implemented by the General Services Administration (GSA) in 1996 by adopting "Government-Wide Procedures for Placing Commercial Antennas on Federal Properties." The procedures in pertinent part state that the placement of antennas "should be done in accordance with Federal, State and local laws and regulations." 61 Federal Register No. 62 (March 29, 1996) at 14,101. Each executive department and agency owning real estate is to implement the procedures and determine the "programmatic impact of placing commercially owned antennas on their properties." Id. The procedure and the GSA notice summarizing it specifically states that it implements requirement of Section 704 (c) of the Telecommunications Act of 1996. Id.

Relatedly, the Commission should be aware that as a part of a long term project between the major safety code organizations nationwide and the GSA that the GSA is moving towards (in general) requiring all new civilian Federal properties to comply with the model safety codes adopted

by the jurisdiction in which a Federal building is being constructed.

These two actions show the importance attached by the Federal government itself to complying with safety and related codes. They reinforce why the Commission cannot and should not preempt safety codes (or extend any existing preemption) as a part of this rulemaking. It would be arbitrary, capricious and an abuse of discretion for the Commission to preempt the applicability of safety related codes as a part of this rulemaking in the face of the GSA actions described above.

G. Lack of Statutory Authority: Due to Section 332(c)(7) of the Communications Act the Commission lacks preemption authority for fixed wireless devices. Section 332(c)(7) is discussed in more detail in Section III.E., below. However, the following aspects of it are discussed here due to their importance for state and local safety, health, environmental and related codes, and the lack of Commission preemption authority as to them.

Section 332(c)(7) is best known for preserving local zoning authority. However its reach goes beyond zoning. Specifically, Section 332(c)(7) preserves state and local authority over the "placement, construction, and modification of personal wireless service facilities" (emphasis supplied) .[8] Due to the plain language of the statute state and local authority is preserved (and Commission preemption authority removed) not just as to zoning and land use matters, but as to the safety related codes, health codes and environmental laws discussed above.

The plain language of Section 332(c)(7) thus prevents any application or extension to fixed wireless facilities of those portions of Rule 1.4000 related to state and local laws, codes and ordinances.

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[8]As is discussed below, "personal wireless service facilities" includes fixed wireless facilities. It also includes all wiring associated with them.

This is important as to environmental and health related laws because subsection (b) (1) of Rule 1.4000 expressly exempts from the prohibition on impairment of subsection (a) of Rule 1.4000 only those state or local restrictions "necessary to accomplish a clearly defined safety objective." Health and the environment are not mentioned.

As is set forth above, particularly on matters relating to asbestos and lead based paints, there are significant health, environmental objectives which states and local governments achieve via safety-related codes, environmental laws and health codes. CCO would be concerned about this, but for the Congressional action in Section 332(c)(7) preserving state and local jurisdiction on such matters and removing any Commission jurisdiction.

However, if and to the extent the Commission believes that any portion of the subject matter of the rule proposed in the NOPR is outside the scope of Section 332(c)(7) or otherwise still subject to Commission authority, it must insure that any blanket exemption (such as Section 1.400(b)(1)) is broadened to include health and environmental objectives as well as safety objectives.

In addition, in the many comments already received in the proceeding the Commission has been presented with an extensive analysis of why it lacks the statutory authority to act at all in this area. The reasoning set forth there applies in particular to safety codes and will not be repeated here. However, particular, CCO supports the reasoning set forth in the Joint Comments of the National Association of Counties, the National Association of Telecommunications Officers in Montgomery, Maryland; and the Comments of the City and County of San Francisco.

III. ZONING

A. Zoning Goals and Objectives: Zoning, planning and land use laws are matters of exclusively local concern. They protect and promote the public health, safety and welfare and

protect the environment in a variety of ways, predominantly by insuring compatibility of uses, preserving property values and the character of communities. They do this while at the same time seeing that needed services (communications, gas, electric, water) are provided.

States and municipalities where appropriate condition the numbers, types, locations, size and aesthetics of antennas on buildings to achieve these legitimate goals yet see that needed services are provided. This requires a balancing of competing concerns and may include restrictions such as:

- Requiring antennas to be placed in a location which allows service to be provided while minimizing the aesthetic or other impact on a community.
- For similar reasons requiring screening such as is commonly imposed for rooftop appliances such as elevator machinery, air conditioning equipment and stairwell housings.

B. **Zoning Related Concerns**: The NOPR contemplates an essentially unlimited number of antennas placed on the roofs of buildings.

In some situations this may create zoning concerns. In many others it will not. For example, one of the major problems affecting cities has been preventing the deterioration of neighborhoods and shopping centers, of which an extreme case is urban blight. Municipalities often prevent blight (or try to reverse blight that has occurred) in part through zoning related restrictions which assure, among other things, a consistent and pleasing facade on buildings. For example, buildings may be required to be maintained at a certain (high) level; design and aesthetic criteria may be carefully specified (and cover such things as setbacks, the types and quality of exterior construction materials that may be used, their color and signage).

These attempts to thwart urban blight by creating a consistent, harmonious environment