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AUG 17 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 16, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Ex Parte Letter Re: Cases WT 99-217; CC 96-98

Dear Secretary Salas:

Enclosed are five (5) copies of an ex parte presentation in the above-referenced proceedings.

With best wishes,

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP

John W. Pestle

JWP/kv
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August 16, 2000

The Honorable William Kennard
Chairman
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AUG 17 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Petition for Environmental Impact Statement
WT Docket No. 99-217
CC Docket No. 96-98

Dear Chairman Kennard:

Attached is a Petition for Environmental Impact Statement submitted by the National League of Cities, National Association of Counties, Michigan Municipal League and Texas Coalition of Cities for Utility Issues ("Municipal Petitioners") in the so-called "competitive networks" case. An Environmental Impact Statement is required for the following reasons.

In the wireless facilities proceeding (WT Docket No. 99-217) the Commission has proposed a rule which would preempt the enforcement of state or local laws, private agreements or other restrictions affecting the installation of certain wireless antennas on rooftops and wires connecting users to such antennas or to ground floor utility entrances. The proposed rule would:

- Threaten the Peregrine falcon which in urban areas nests in precisely the places where wireless antennas would be placed. The Peregrine falcon was removed from the federal endangered species act list a year ago but remains on many state endangered species act lists.

- Similarly threaten the Least Tern and California Least Tern which are on both state and federal endangered species act lists. Such Terns have been displaced from their native beachfront habitats and now predominantly nest on the rooftops of buildings where wireless antennas would be placed.

- Prohibit the enforcement against wireless providers of state and local statutes relating to asbestos in buildings. Millions of buildings contain asbestos in roofs, roofing material, ceilings and floors. Installing wireless antennas and connecting wires will directly involve such asbestos containing materials. The proposed rule preempts state and local laws regarding asbestos abatement, asbestos contractors and the like, all of which are intended to protect the public from the major health impacts of construction involving asbestos.

- Prohibit the enforcement of safety-related engineering codes currently applicable to wireless antennas and connecting wires. Such codes, among other things, require devices to be firmly attached to buildings, prevent excessive structural loads and impose a variety of safety-related requirements on wiring. Under Council on Environmental Quality rules health and safety matters are considered environmental matters for environmental impact statement purposes.

In CC Docket No. 96-98 the Commission has issued a Notice of Inquiry on preempting state and local right of way requirements and taxes affecting telecommunications providers.

- One provider request is that they not have to relocate their lines at their expense if a highway is changed, such as for safety reasons. Such a change, by requiring municipalities to "condemn" telecommunications provider lines prior to improving highways would decrease the number of highway improvements by driving up their costs. Such improvements are done for safety reasons, thus requiring an environmental impact statement.

- AT&T wants new providers to only be subject to those state and local laws in effect when the incumbent provider installed its facilities. It thus wants to be exempted from all health, safety and environmental laws enacted in the last century–since before the Spanish-American war!

- Some providers object to municipalities examining their financial, legal or technical qualifications. Such an examination is necessary to protect the public health, safety and the environment where many new providers with few assets and little experience wish to construct facilities in the rights of way. Assuring proper qualifications both

helps prevent problems in the rights of way, and assures that the providers have the funds to correct problems and compensate the public for harm they cause.

- Other providers want the time municipalities have to review permits or permissions limited to thirty days. Such a limit is inadequate to examine where providers will place their lines on each street they propose to use, make sure that the location does not conflict with other providers and ensure that appropriate environmental protections measures (e.g.–for construction) are in place. The provision of maps of proposed routes and of lines as finally constructed are essential for the preceding review. Some providers object to providing such maps.

- Providers object to compensation for use of the rights of way. If eliminating or reducing such compensation would increase provider construction in the rights of way this would increase the environmental harms that result from increased construction.

The proposed rule on wireless antennas and the Notice of Inquiry on telecommunications providers and rights of way each have significant environmental impacts. Under its rules and those of the Council on Environmental Quality the Commission must therefore prepare an environmental impact statement before taking action on either item.

With best wishes,

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP

John W. Pestle

cc: Commissioner Tristani
Commissioner Ness
Commissioner Powell
Commissioner Furchtgott-Roth
Secretary Salas

JWP/nk
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

TO: WIRELESS TELECOMMUNICATIONS BUREAU
COMMON CARRIER BUREAU

PETITION FOR ENVIRONMENTAL IMPACT STATEMENT

by

NATIONAL LEAGUE OF CITIES

NATIONAL ASSOCIATION OF COUNTIES

MICHIGAN MUNICIPAL LEAGUE

TEXAS COALITION OF CITIES FOR UTILITY ISSUES

John W. Pestle
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August 16, 2000

Their Attorneys

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Exhibit A -- CCO Reply Comments

Exhibit B – NPR Peregrine Falcon Broadcast

Exhibit C – U.S. Fish and Wildlife Service List of Endangered Species

Exhibit D – University of Georgia Research Communication on Endangered Shorebird

Summary

This Petition for Environmental Impact Statement is filed by the National League of Cities, National Association of Counties, Michigan Municipal League and Texas Coalition of Cities for Utility Issues. It is submitted pursuant to Sections 1.1306(a) 1.1307(c) of the Commission's rules which allow any person to submit such a Petition and require that upon a Petition being filed "the Bureau shall review the Petition and consider the environmental concerns that have been raised." *Id.* (emphasis supplied). The Bureau's thus must consider the environmental concerns set forth in the Petition and due to their magnitude and severity (as demonstrated herein) must prepare an Environmental Impact Statement ("EIS"). In preparing an EIS the Commission must minimize environmental impacts, including considering taking no action at all. Under Council of Environmental Quality Rules for EIS purposes environmental impacts effectively include impacts on the public health, safety and aesthetics, matters which are highly controversial, items which may set a precedent for future actions or preemption of state or local requirements imposed for the protection of the environment.

In the wireless facilities proceeding (WT Docket No. 99-217) the Commission has proposed a rule that would preempt the enforcement of state or local laws, private agreements or other restrictions affecting the installation of certain wireless antennas and wires connecting users to such antennas or to ground floor utility entrances.

The proposed rule would threaten the Peregrine falcon because in urban areas (which have been a key to its recovery) it nests in precisely the places were wireless antennas would be placed.

The Peregrine falcon for many years was on the Federal endangered species act list. It was removed from the Federal list a year ago but remains on many state endangered species act lists. The proposed rule preempts protections afforded Peregrine falcons under state endangered species acts; as well as local zoning, permitting and other requirements which protect the falcons. Even landlords would be prohibited from preventing wireless antennas from being installed in likely Peregrine falcon nesting places.

The Least Tern and California Least Tern are on Federal and state endangered species lists. Originally a shorebird, Least Terns now nest in major numbers on gravel rooftops because human development has displaced them from the beaches that were their original nesting sites. In some states from 61% to 90% of Least Terns now nest on gravel rooftops. Least Terns are threatened by the proposed rule in the same manner as the Peregrine falcon–by preempting state and local laws as well as private agreements and landlord restrictions which protect them.

Millions of buildings nationwide continue to contain asbestos in roofs, roofing materials, ceilings and floors. Installing wireless antennas and connecting wires will involve construction directly affecting such "asbestos-containing materials" or ACM. Many state and local regulations govern ACM including requiring surveys for ACM in advance of installation/construction and (where there is ACM) requiring the use of accredited asbestos abatement contractors. The proposed rule preempts state and local laws regarding ACM. This occurs despite the language in Commission Rule 1.4000 exempting laws and regulations with "legitimate safety requirements" from the application of the rule because the Commission in its Star Lambert/Meade, Kansas decision has effectively read that exemption out of the rule (by prohibiting the enforcement of safety related

codes and regulations against satellite dish providers). The Commission's proposed rule simply extends Rule 1.4000 as it presently exists to cover wireless antennas and connecting wires while leaving the substance of the rule unchanged. The Wireless Communications Association which drafted and petitioned for the change has confirmed that it intends the proposed rule to bring wireless antennas within Rule 1.4000 as it is currently applied i.e., including the Star Lambert/Meade, Kansas prohibition on enforcing safety codes.

Due to the Star Lambert/Meade, Kansas decision the proposed rule would prohibit the enforcement of safety related engineering codes currently applicable to wireless antennas and connecting wires. These codes, among other things, require antennas to be firmly attached to buildings, prevent antennas under extreme conditions (large thicknesses of ice) from imposing excessive structural loads on buildings, require non-toxic insulation on certain wires so that in the event of a fire, building inhabitants are not asphyxiated and the like. The enforcement of such codes and their permitting requirements often reveal the presence of asbestos in the area of the proposed installation, thus triggering asbestos abatement activities and the use of accredited asbestos contractors which would otherwise not have occurred.

Zoning codes protect the aesthetics of buildings and neighborhoods and prevent or reverse urban blight. The Commission has previously given extreme deference to local aesthetic determinations regarding antennas.

In CC Docket No. 96-98 the Commission has issued a Notice of Inquiry on preempting various municipal requirements and state and local taxes relating to telecommunications providers and rights of way. One provider request is to preempt ordinance provisions requiring providers to

relocate facilities at their expense where their facilities are incompatible with public projects. Relocations are essential to protect the environment, health and safety such as when all utility lines have to be relocated due to a major water main or sewer main break. Relocation is similarly necessary when for public safety reasons state and local governments rebuild roads and highways or change their size, curvature, alignment or the like. Preventing relocation in these instances or requiring local units of government to compensate (condemn) telecommunications provider facilities in order to accomplish the change would either prevent such highway improvements or significantly reduce the number of such highway improvements by significantly increasing their cost. Either result impairs the public health and safety.

AT&T contends that municipalities cannot impose on new telecommunications providers requirements that were not imposed on the incumbents when they entered the market over one hundred years ago. AT&T's request would effectively repeal the last century's worth of state and local environmental, health and safety requirements as they apply to telecommunications providers, including state OSHA requirements, requirements on construction in environmentally sensitive areas and the like.

Other commenters object to local regulations requiring providers to show evidence of adequate financial, legal and technical ability prior to their constructing facilities in the rights of way. Such requirements are essential to protect the environment, the public health and safety due to the many new providers with small balance sheets, few assets, no experience in right of way matters and even a checkered track record on such matters. Municipalities must insure that all such providers have adequate qualifications both to minimize problems in the rights of way and to insure

that the provider can adequate compensate the public for any harms which it causes due to actions in the rights of way. The public health, safety and the environment are harmed if municipalities cannot review those qualifications of telecommunications providers.

Other providers want rules limiting the time municipalities have to grant permits or franchises to thirty days. Such time frames are inadequate for municipalities to make sure that proposed new lines will not conflict with current facilities, to make sure that appropriate environmental safeguards are in place, to examine alternate routings with fewer construction or environmental consequences and the like.

Other providers object to the provision of maps. Maps of proposed routes are essential to conduct the types of reviews described. Maps of facilities as installed are essential to prevent harm to a provider's facilities and manage the rights of way in the future so as to prevent environmental harms and protect the public health and safety.

Providers object to compensation for use of the rights of way. If eliminating or reducing such compensation would increase provider construction in the rights of way this would increase the environmental harms that result from increased construction

Petitioners have shown significant environmental impacts from both the proposed wireless rule and from the Notice of Inquiry. The Commission must therefore conduct a comprehensive environmental impact statement prior to adopting the proposed rule and prior to proceeding further with the Notice of Inquiry.

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

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	)))))	
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Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	))	CC Docket No. 96-98

TO: WIRELESS TELECOMMUNICATIONS BUREAU
COMMON CARRIER BUREAU

PETITION FOR ENVIRONMENTAL IMPACT STATEMENT

Pursuant to Section 1.1307(c) of the Commission's rules, the rules (40 C.F.R. Chapter V) of the Council on Environmental Quality ("CEQ") and the National Environmental Policy Act ("NEPA", Public Law 91-190, 42 U.S.C. § 4321 and following), the National League of Cities, the National Association of Counties, the Michigan Municipal League and the Texas Coalition of Cities for Utility Issues (collectively "Municipal Petitioners") submit this petition to require the Commission to prepare an Environmental Impact Statement ("EIS") and comply with NEPA (and Commission and CEQ rules implementing NEPA) as follows:

Introduction

1. Summary. Federal agency preemption of state or local environmental, health or safety laws requires an EIS. The Wireless Communications Association International, Inc. ("WCAI") filed a Petition for Rulemaking asking the Commission to preempt governmental and nongovernmental restrictions on the placement of antennas used for telecommunications and video services not presently covered under Section 207 of the Telecommunications Act of 1996, Pub. L No 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* (the "1996 Act"). The Commission responded to that petition in the Notice of Proposed Rulemaking portion of its Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, FCC 99-141, July 7, 1999 (released), June 10, 1999 (adopted) pp 28-39 (involving building access issues) ("NOPR"). Many local government regulations addressing the placement of telecommunications antennas on roofs of structures are intended to protect the environment and the health and safety of their citizens. Preempting such regulations would be highly controversial, would establish a precedent and would increase health and safety risks for citizens living in and around facilities where such antennas and support structures would be located, and would impact local aesthetic, historic and cultural resources. As such, before the Commission adopts any rule preempting such local regulation, it must prepare an EIS and follow Commission and CEQ procedures in connection therewith.

2. Matters relating to the environment, health and safety are one of the main focuses of state and local laws, permits and franchises relating to the public rights-of-way. Many providers of telecommunication services and their trade associations, in comments filed in this docket pursuant

to the Notice of Inquiry portion of the Commission's Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, FCC 99-1411 July 7, 1999 (released), June 10, 1999 (adopted), paragraphs 70-84 ("NOI"), request that the Commission adopt rules preempting state and local requirements regarding access to and usage of the public rights of way, fees for using the rights of way, and state and local taxes on telecommunications providers. Before the Commission can take such action it must prepare an EIS and follow Commission and CEQ procedures attendant thereto.

3. The Municipal Petitioners and Their Interest. The National League of Cities ("NLC") represents cities and villages nationwide. It is the country's oldest and largest organization serving municipal governments and represents more than 17,000 municipalities across the country. The National Association of Counties ("NACO") is the only national organization that represents county governments in the United States. Its membership totals over 1,800 counties representing approximately 210 million Americans. The Michigan Municipal League ("MML") is a non-profit organization created in 1899 to represent and forward the interests of cities and villages in the State of Michigan. Its membership is comprised of over 500 Michigan cities and villages whose residents include 98% of the state's urban population. The Michigan Municipal League's participation in this matter was authorized by the Board of Directors of the Michigan Municipal League Legal Defense Fund, whose purpose is to represent the interests of member cities and villages in lawsuits and similar matters of statewide importance. The Texas Coalition of Cities for Utility Issues ("TCCFUI") consists of approximately 90 Texas municipalities, including essentially all major metropolitan areas in the state, whose interests it represents on telecommunications and utility

related issues. TCCFUI collectively includes municipalities with a population of more than three million people.

4. NLC, NACO and MML have been involved on environmental, health, and safety matters on behalf of their members and their residents for many years. TCCFUI has been so involved for a shorter period of time. The Municipal Petitioners are concerned that the rule proposed by the NOPR on unrestricted building access, if adopted in whole or in part, and that the NOI, if it results in the rulemaking recommended by numerous commenters, could exempt telecommunications providers from a wide range of environmental, health and safety matters necessary to protect the public welfare and that such exemption would result in significant environmental, health, and safety effects, both direct and indirect, as is set forth below. An EIS is thus required.

5. Disclaimer. This filing is confined to the necessity for the Commission to prepare an EIS for any Commission deliberation, consideration or action taken pursuant to the Commission's NOPR and NOI. This filing takes the NOPR, the NOI and the various industry filings therein at face value. Doing so should not be construed as agreement or acquiescence by Municipal Petitioners that the NOPR, NOI or industries' claims are valid or appropriate, or that the Commission has the authority to act as set forth in the NOPR or NOI (or as requested by the industries). In fact, Municipal Petitioners believe that the opposite is the case.

Legal Requirements

6. National Environmental Policy Act. NEPA is our nation's basic charter for protection of the environment at the Federal level. It requires the preparation of an EIS for Federal actions

which may significantly affect the quality of the human environment. NEPA § 102(2)(C) (42 U.S.C. § 4321 and following); 40 C.F.R. § 1508.18, and CEQ comments thereon at 43 Federal Register 55,989 (Nov. 29, 1978). As required by CEQ rules and the courts, among other things:

-- Federal agencies are required to act "according to the letter and spirit of [NEPA]". 40 C.F.R. §§ 1500.1(a) (emphasis added); see also 40 C.F.R. §1500.3.

-- Environmental considerations must be taken into account early in the Federal agency decision-making process so as to serve as a practical contribution to agency decision-making, not just as a rationalization after the fact of decisions already arrived at. "An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal . . . so that preparation can be completed in time for the final [EIS] to be included in any recommendation or report on the proposal. The [EIS] shall be prepared early enough so that it can serve practically as an important contribution to the decision making process and will not be used to rationalize or justify decisions already made." 40 C.F.R. § 1502.5.

-- For adjudications the final EIS "shall normally precede the final staff recommendation." 40 C.F.R. § 1502.5(1). For informal rulemakings (such as may result from the NOI) a draft EIS "shall normally accompany the proposed rule." 40 C.F.R. § 1502.5(d). For formal rulemakings (such as the NOPR) an EIS should be prepared even earlier.

-- A principal goal is to minimize the environmental impacts of Federal agency action. 40 C.F.R. § 1502.1. An EIS "is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions." Id. To this end in particular, Federal agencies must consider conflicts of their actions with state and local government regulations, policies, agreements and the like; involve affected state and local governments in the environmental process (*see*, e.g., 40 C.F.R. §§ 1502.16(c), 1501.7, 1503.1(a)(2)(i), 1506.6(b)(3)(i)); and to the extent possible remove such conflicts (40 C.F.R. §§ 1502.16(c), 1506.2(d)).

-- To achieve the preceding goals, among other things, Federal agencies must consider taking no action at all. *See e.g.*, 40 C.F.R. § 1502.14.

– To achieve the preceding goals federal agencies must consider alternatives to the proposed action. As the CEQ Rules state, the requirement that "agencies shall . . . [r]igorously explore and objectively evaluate all reasonable alternatives" "is the heart of the Environmental Impact Statement." 40 C.F.R. § 1502.14 and 14(a).

– "In the case of an action with effects of national concern [agency] notice shall include publication in the Federal Register and notice by mail to national organizations reasonably expected to be interested in the matter." 40 C.F.R § 1506.6(a)(2).

7. Failure to prepare an EIS or to do so in accordance with applicable law routinely results in Federal court injunctions against the agency action in question.

8. Council on Environmental Quality's NEPA Regulations. The CEQ regulations implementing NEPA are instructive in determining whether the rulemaking prepared at WCAI's

request and contained in the NOPR or the rulemaking requested by commenters pursuant to the NOI would significantly affect the quality of the human environment.

- "Significantly" as used in NEPA requires consideration of both context and intensity. Context includes society as a whole, the affected region, the affected interests and the locality. Intensity refers to the severity of the impact and requires the evaluation of several factors including: (1) public health and safety; (2) unique characteristics of the geographic area; (3) the degree to which the effects on the quality of the human environment are likely to be highly controversial; (4) the degree to which the action may establish a precedent for future actions; (5) the degree to which the action adversely affects highways, structures or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant cultural resources; (6) the degree to which the action may adversely affect endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973, and (7) whether the action threatens a violation of federal, state or local law or requirements imposed for the protection of the environment. 40 CFR §1508.27.
- "Effects"[1] "includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic,

[1]NEPA uses the term "affecting" ["major Federal actions significantly affecting the quality of the human environment," NEPA §102(C)] and the CEQ rules define "affecting" as "will or may have an effect on." 40 C.F.R. § 1508.3.

cultural, economic, social or health, whether direct, indirect, or cumulative." 40 CFR §1508.8 (emphasis added).

- "Human environment" is "interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment." 40 CFR §1508.14.
- "Major federal action" tends to fall within one of four categories including the "approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities." 40 CFR §1508.18 (emphasis added).

9. A principal goal of NEPA and the rules implementing it is to minimize the environmental impacts of action by Federal agencies. *See e.g.*, 40 C.F.R. § 1502.1. Preempting the environmentally-oriented requirements of state laws and local ordinances thwarts this goal. As a result, CEQ rules ordinarily require an EIS for Federal action such as the proposed rulemaking prepared by the Commission at WCAI's request in the NOPR (and the rulemaking proposed by commenters to the NOI) which "threatens a violation of Federal, state or local law or requirements imposed for the protection of the environment." 40 C.F.R. § 1508.27(b)(10). And compare 40 C.F.R. § 1506.2(d).

10. States and municipalities throughout the country are far better situated than an agency in Washington, D.C. to determine and minimize the environmental impact of actions within their borders. To this end, CEQ rules have extensive requirements on involving affected state and local

governments in the environmental assessment process (*see e.g.*, 40 C.F.R. §§ 1502.16(c), 1501.7, 1503.1(a)(2)(i), 1506.6(b)(3)(i)) with one principal goal being identifying and minimizing potential conflicts of Federal action with state and local government regulations (especially with state and local environmental regulations). (*See e.g.*, 40 C.F.R. §§ 1502.16(c), 1506.2(d)).

11. Precedential Effect. Agency actions such as that requested or suggested by WCAI, the NOI and NOPR commenters which tend to be "precedential" (individually or cumulatively) on environmental, health, or safety matters require an EIS. *See* CEQ rules at 40 C.F.R. § 1508.27(b)(6) which state that a significant factor in requiring an EIS is:

> "The degree to which the [agency] action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration." *Id.*

See also, 40 C.F.R. § 1508.18(a), (b)(1) which state that agency actions involving adoption of official policies or new or revised policies require an EIS. The key is the effect of the Commission's decision -- the Commission is not exempted from preparing an EIS because it is not itself licensing or permitting new physical facilities.

12. Prior Commission rulings on right of way matters have had a significant precedential effect with courts and agencies throughout the country. The NOI is intended to have a similar effect. For example, the Commission's decisions In re Classic Telephone, 11 F.C.C. RCD 13082 (1996) ("Classic Telephone") and TCI Cablevision of Oakland County, 12 F.C.C.R. 21396 (1997) ("Troy") interpreted Section 253 of the 1996 Act and expanded upon the phrase "manage the public rights of way" set forth in subsection (c) of Section 253. In most of the subsequent Federal court cases under Section 253 (to determine inter alia whether a municipality is prohibiting or effectively

prohibiting a telecommunications provider from providing service) the Federal courts have at minimum considered and sometimes have deferred to the Commission's description in Classic Telephone and Troy of when municipal action constitutes "managing the rights of way" so as to be protected under Section 253. As stated by the Federal District Court in Bell Atlantic-Maryland, Inc. v. Prince Georges County, Maryland, 49 F. Supp. 2d 805 (1999),

> "[T]his Court joins the other District Courts which have looked for guidance to the interpretation offered by the Federal Communications Commission, the agency charged with implementing the FTA [Federal Telecommunications Act]."

49 F. Supp. 2d at 815, vacated and remanded on other grounds 212 F. 3d. 863.

13. Among the other Federal cases relying upon Commission rulings in either Classic Telephone or Troy are AT&T Communications of the Southwest, Inc. v. City of Dallas, 8 F.Supp. 2d 582, 591-592 (N.D. Tex. 1998); AT&T Communications of the Southwest, Inc. v. City of Dallas, 52 F.Supp. 2d 756, 761 (N.D. Tex. 1998); Bell South Telecommunications, Inc. v. City of Coral Springs, Florida, 42 F.Supp. 2d 1304, 1308 (S.D. Fla. 1999); Omnipoint Communications, Inc. v. Port Authority of New York and New Jersey, No. 99 Civ. 0060, 1999 SL 494120, 1011 (S.D.N.Y. July 13, 1999); PECO Energy Company v. Township of Haverford, No. 99-4766, 1999 U.S. Dist. Lexis 19409 at *18 (E.D. Penn. 1999); Bell South Telecommunications, Inc. v. Town of Palm Beach, Florida, No. 98-8232-Civ., 1999 U.S. Dist. Lexis 16904, at *6 (S.D. Fla. September 28, 1999). Court and agency citations to Classic Telephone or Troy are not happenstance–telecommunications providers repeatedly and emphatically tell such entities that they must defer to the decisions of this Commission in Classic Telephone and Troy on telecommunications right of way matters because it is the "expert agency" on such matters. The

Commission's adoption of a rule in this proceeding preempting or affecting state or local government regulation of their rights-of-way would have a similar precedential effect.

14. The precedential nature of the NOI is also shown also by the participation in this case of national telecommunications providers (AT&T, MCI, GTE, Sprint, SBC, Cox) and national utility, cable and telecommunications industry associations (National Cable Television Association, United States Telephone Association, Personal Communications Industry Association, American Gas Association, United States Communications Association and Cellular Telecommunications Industry Association). These national industry associations clearly expect and intend that the Commission's rules, policies or standards resulting from the NOI will be precedential nationally by preempting many "state or local" statutes and regulations affecting the rights of way.

15. Thus the Commission's actions in the NOI proceeding, and any subsequent rule, fall squarely within the scope of the CEQ rules of "establish[ing] a precedent for future actions with significant effects." An Environmental Impact Statement is required.

16. Commission Regulations, Rules and Orders Under NEPA. The Commission presumably contends that this proceeding is within the categorical exclusion of Sections 1.1306 of the Commission's Rules, 47 C.F.R. § 1.1306. However, as provided in Sections 1.1306(a) and 1.1307(c) and related CEQ Rules any person may submit a petition to the Commission alleging that "a particular action, otherwise categorically excluded, will have a significant environmental effect." 47 C.F.R. § 1.1307(c). Upon a petition being filed "the Bureau shall review the petition and consider the environmental concerns that have been raised." *Id.* (emphasis supplied). It is important to note that by this Commission rule the Bureau must consider the environmental concerns set forth

in this Petition. As is set forth below, those concerns are of sufficient magnitude and severity to require an EIS.

17. The Commission has also specifically noted that under the safeguard provisions of §1.1307(c) of the rules that parties may continue to raise aesthetic objections to proposed Commission actions and that those objections will be decided on a case-by-case basis. *In the Matter of Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality, Report and Order,* FCC 79-163, 60 R.R. 2d 13, par. 10-13. ("Amendment of Environmental Rules").

18. Significantly, the Commission in its Amendment of Environmental Rules Order justified its removal of the scenic and recreational classification from the automatic requirement of submitting an environmental assessment on the basis of state and local land use authorities. The Commission stated:

> We would also note that aesthetic concerns may more appropriately be resolved by local, state, regional or local land use authorities. Those authorities can better handle such questions given their experience and familiarity with land use values. Accordingly, in considering any objections based upon aesthetic concerns, due recognition and considerable weight will be accorded to the fact that site approval has been obtained from a local, state, regional or federal land use board or agency, if that approval has taken into account the environmental impact of the proposal.

Amendment of Environmental Rules at 8-9 (Emphasis added).

19. In making the preceding statement the Commission cited to portions of an earlier Order which stated as follows:

> 'Commission interference with common land use determinations traditionally made at the local level would under most circumstances place a considerable strain on our concept of the Federal system. Where local land use authorities have authorized the

> use of a site for communications facilities, we think that the Commission's role under NEPA should be narrowly construed. In such circumstances, we will proceed with caution and with due respect for the role[sic] qualifications of local authorities. Deference will be accorded to their rulings and their views, particularly in matters of aesthetics and when the record demonstrates that environmental issues have been given full and fair consideration.'
>
> *49 FCC 2d at 1328-29.* The Commission stated that because state or local authorities do not function under NEPA 'their approval of a project cannot be accepted as conclusive and does not absolve the Commission of its statutory responsibilities. Their prior consideration of the project and objections thereto, on the other hand, should materially facilitate Commission efforts to reach the correct decision.'

Amendment of Environmental Rules at 1329 (emphasis added), citing *In the Matter of Implementation of the National Environmental Policy Act of 1969, Report and Order*, FCC 74-1042, 49 FCC 2d 1313 (1974) ("First Report and Order").

20. The above-quoted portions of the Amendment of Environmental Rules demonstrates that the Commission's deference to local governments on aesthetic, environmental, health and safety matters made in the First Report and Order were not overturned. Thus, for example, the Commission's statement in the First Report and Order that "local zoning and planning authorities have an important role" and that "their disapproval of a site on the basis of land use considerations is conclusive" (First Report and Order at 1324) (emphasis added) remains Commission policy.

21. Similarly, the Commission made the following statement concerning the role of local land use authorities:

> Local, state and regional land use authorities and federal agencies responsible for the management of government land are obviously better situated than the Commission-by location, experience, and awareness of local values-to deal with land use questions. *First Report and Order* at 1328 (emphasis added).

Again, this remains Commission policy.

22. The Commission's Rules provide that the petitions for an EIS shall be submitted to "the Bureau" responsible for processing the action in question. *Id.* Because the NOPR and NOI involve proceedings before two different bureaus (Wireless Telecommunications Bureau and Common Carrier Bureau) this Petition for EIS is being served on the chiefs of both Bureaus. It is being served as well as upon all members of the Commission.

23. Local Governments Regulate the Human Environment Through Zoning and Regulatory Ordinances. In most if not all states, local governments are granted express authority to adopt ordinances regulating the public health, safety and general welfare of persons and property, including the maintenance of rights-of-way and adoption of building and other safety codes. *See, e.g.* Michigan Compiled Laws Annotated ("MCLA") §§ 41.181; 46.11; and 117.3. Municipalities also are specifically authorized to adopt zoning ordinances under which they can regulate the use of land, buildings and natural resources, including the regulation of the location and size of structures, and the preservation of open space and other aesthetic considerations. Again, *see, e.g.* MCLA §§ 117.4i; 125.201 et seq.; and 125.271 *et seq.*

24. It is well accepted that "environmental protection and conservation are legitimate purposes for zoning." McQuillan, Municipal Corporations, §25.21.50 (1999 Supp). As examples, this treatise lists zoning restrictions on development in wetland areas, on waterfronts, on hillside slopes, where there is a scenic view, and to preserve open spaces. It provides that state and local environmental protection boards or departments are the primary regulators of land use in ecologically sensitive areas. Finally, it notes that local zoning authorities conduct environmental design reviews of site plans for construction projects. *Id.*

25. State legislatures typically authorize local governments to regulate through zoning or regulatory ordinances natural features that are unique to a particular area or have cultural or ecological significance. For example, in Michigan local governments are authorized to regulate through zoning ordinances the protection of critical sand dunes. MCLA § 324.35312. The ordinance, among other things, protects trees and other dune vegetation, provides minimum set backs, requires environmental assessments and environmental impact statements for certain developments, and requires property owners to obtain local zoning approval before conducting any construction in dune areas "that have slopes steeper than 1 on 3." MCLA §§ 324.35313-.35320. Local governments are authorized to prohibit development in wetlands without first obtaining a permit from the local government. MCLA §§ 324.30307-.30310.

26. States also regulate natural resources that are unique to the region or that have cultural or ecological significance. For example, Michigan regulates Wilderness and Natural Areas, MCLA §§ 324.35101 *et seq.*; Natural Beauty Roads, MCLA §§ 324. 35701 *et seq.*; Natural Rivers, MCLA §§ 324.30501 *et seq.*; Farmland and Open Space, MCLA §§ 324.36101, *et seq.*; and Soil Erosion and Sedimentation, MCLA §§ 324.9101 et seq. Other states have analogous statutes.

27. Comprehensive EIS Required. This Petition sets forth several reasons which individually and cumulatively require the Commission to prepare an EIS on the NOPR and NOI. That EIS, however, must not be confined solely to those environmental matters described in this Petition because they are only illustrative, and not exhaustive. Once the requirement to conduct an EIS is triggered the Commission must conduct a full EIS which looks at all potential environmental impacts of matters covered by the NOPR and NOI. Stated otherwise, the environmental matters set

forth in this Petition are only those sufficient to show that an EIS is required. Under NEPA and CEQ Rules the Commission's EIS must address all environmental impacts of the NOI and NOPR.

NOPR's Environmental Effects

Safety Code Preemption

28. Introduction. Examples of the potential environmental effects of granting WCAI's Petition (or adopting a rule such as proposed in the NOPR) in whole or in part are set forth below. As is set forth in the CEQ rules, an EIS can be required either due to the direct effects of agency actions, their indirect effects or a combination of the two. 40 C.F.R. §§ 1502.16(a), (b), 1508.8(a), (b). Indirect effects are those "caused by the [agency] action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). Corresponding to the preceding, the impacts described below generally proceed from the immediate and direct to those which are indirect but foreseeable.

29. Preemption of State and Local Safety Codes. The Commission's NOPR, and the WCAI Petition for Rulemaking on which it is based, propose to effectively preempt safety related codes such as building codes, fire codes, plumbing codes, electrical codes and the like. The NOPR expressly proposes to extend Section 1.4000 of the Commission's Rules, 47 C.F.R § 1.4000, to include fixed wireless dishes. NOPR at paragraph 69; Petition of the Wireless Communications Association International for Rulemaking dated May 26, 1999 upon which paragraph 69 in part is based; and the revised text of Rule 1.4000 as submitted by the WCAI in the preceding Petition and in its October 22, 1999 Further Reply Comments in this proceeding. Rule 1.4000 currently applies

only to DBS satellite dishes less than one meter in diameter, MMDS dishes less than 1 meter in diameter, TV antennas and masts for the preceding.

30. This Commission has interpreted Rule 1.4000 to preclude the effective enforcement of safety and safety type codes. *See*, In re Star Lambert and Satellite Broadcasting Association of America, DA 97-15554 (July 22, 1997) ("Star Lambert") where the Commission ruled that under Rule 1.4000:

- The City of Meade, Kansas may not require a $5 permit prior to installation of a satellite dish.
- The City may not require City approval of the dish location.
- The City's property setback regulations are preempted.
- The City may not impose a $500 per day fine for violating City safety codes.

The Commission's decision in Star Lambert has the effect of preventing the effective enforcement of safety related codes as to satellite dishes. If a rule is adopted in substantially in the form proposed in the NOPR, it would apply to approximately 38,000 units of local government in the United States and the fifty states (for safety codes which states promulgate directly), and would prevent their enforcing safety and safety type codes on the placement of fixed wireless facilities on (and related wiring in) tens of millions of buildings.

31. As is set forth above, a proposed agency action affecting "public health or safety" is an environmental impact for which an EIS may be required. 40 C.F.R. § 1508.27(b)(2). The codes that the proposed rule may preempt include such safety related codes as building codes, fire codes, plumbing and electrical codes. Such codes are adopted solely for engineering-related health and

safety issues. Preempting them may cause building collapses, injure firemen and others, or cause loss of life and extensive damage to properties throughout the country. The protection of the public health and safety requires the meaningful enforcement of such codes, which may include permits, inspections and prosecution of violators. Any Rule must allow such codes to be enforced against the telecommunications industry, just as they are enforced against other citizens. Further details on the preceding are set forth next and in Exhibit A. Suffice to say that the proposed Rule (or any variant of it with a similar effect) which precludes the effective enforcement of such safety related codes is a major Federal action significantly affecting the human environment. An EIS is required.

32. Safety related codes are described in detail in the Reply Comments of Concerned Communities and Organizations in this Docket dated September 25, 1999 at pages 3-16 ("CCO Reply Comments"). A copy of the pertinent portion of the CCO Reply Comments is attached as Exhibit A. The following is a summary of key aspects of such Reply Comments.

33. The CCO Reply Comments describe in detail the nature of engineering and health related safety codes; the fact that approximately five national organizations currently promulgate such codes; that such codes include such items as the National Building Code, National Fire Prevention Code, Mechanical Code, Plumbing Code, Property Maintenance Code, One and Two Family Dwelling Code, National Fire Code, National Electric Code and the National Electric Safety Code, all of which may be affected by the proposed rule. These codes, among other things, address wiring, fixtures and structures of all kinds including telecommunications and cable antennas, wires and fixtures.

34. The codes have been developed and extensively modified during the last century to protect public health and safety. They are neutral on matters of competition--they address engineering and health related safety concerns such that buildings, structures, streets, facilities and the public rights of way are safe for their intended use. The codes are updated annually through a democratic process. States and local units of governments may modify the safety codes to tailor them to local situations such as local weather conditions (earthquakes, hurricanes, ice accumulations, etc.).

35. Hazards Protected Against--Antennas: The following is a brief description of some of the general types of hazards which safety related codes protect against on matters related to the NOPR. In general, the NOPR contemplates a large number of antennas being placed on the roofs of buildings. The following aspects of safety codes may be implicated.

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

(b) 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.[2]

(c) 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.[3]

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

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[2]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.

[3]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.

36. Hazards--Wiring: The NOPR also contemplates wires running from antennas (or ground level utility entrances) to any occupant of a building. Safety related codes may address the following considerations, among others, in this regard:

(a) Structural: The NOPR contemplates among other things utilities condemning whatever space is necessary within a building so that many new wires can reach all occupants. In a large apartment building this could be a large amount of space given that apartment buildings can have several hundred or several thousand tenants and in some states there have been as many as 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.

(b) 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, from nails, screws, saws (from subsequent building work and remodeling) and the like and protects against electrical interference from other providers.

(c) Separation: Some codes require physical separation between wires for safety reasons.

(d) Fire: Fire related code 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 a building's 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.[4] Also, some safety codes specify requirements for wiring installed in the plenum (space between false ceiling and structural ceiling) of buildings where the plenum is used to move air to and from the heating and air conditioning system in lieu of separate duct work. Such codes required wiring installed in such plenums to meet special requirements so that in the event of a fire burning insulation does not emit highly toxic fumes into the heating and air conditioning system and thence into the building. Such special non-toxic insulation is required, for example, so that fumes will not harm, incapacitate or lead to the death of building occupants.

37. Asbestos Abatement: As is set forth below in Section 56 and following below compliance with safety codes and their permitting requirements as a practical matter often insures compliance with state, federal and local regulations relating to asbestos such as surveying for asbestos in the area of a proposed installation and using an accredited asbestos abatement

[4]Cable systems typically run at 40 to 80 volts; electric providers are attempting to provide telecommunications over electric systems which typically have even higher voltage.

contractors. An exemption which impacts such enforcement of asbestos related matters requires an EIS.

38. Effective Enforcement: The states and local units of government currently have various enforcement mechanisms in place to insure that various codes and laws such as those 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 typical mechanisms are permits, prior government approvals, inspections after the fact and penalties (civil or criminal) for non-compliance. The proposed rule extends Rule 1.4000 to fixed wireless facilities and interior building wiring such that the Star Lambert/Meade Kansas decision applies to them, with the result that they are effectively exempted from meaningful enforcement of the codes and laws described above.

39. The proposed rule thus affects public health or safety (40 C.F. R § 1508.27(b)(2)), is highly controversial (40 C.F.R. § 1508.27(b)(4)), may set a precedent for future action (40 C.F.R. § 1508.27(b)(6)) and will or may have a significant effect (40 C.F.R. § 1508.8) on the human environment. An EIS is required.

40. EIS Required--Fall 1999: Under the Commission's Rules the Bureau responsible for a particular action shall require an applicant (in this case most likely the WCAI) to submit an EA if the responsible Bureau determines that a matter otherwise categorically excluded may have a significant environmental impact. 47 C.F.R. § 1.1307(d). At least since September 25 of last year (the date of CCO's Reply Comments) the responsible Bureau or Bureaus have been on notice of the preceding environmental affects, all of which are described in more detail in such reply comments.

The failure of the Commission to require an EA shortly thereafter is a violation of the requirements of NEPA and CEQ Rules to take environmental considerations into account early in the agency decision making process to serve as a practical contribution to decision making and not just rationalize after the fact decisions already arrived at. 40 C.F.R. § 1502.5. Until such an EA and EIS are prepared, all Commission deliberations or actions in this matter are suspect, void, or voidable on the environmental grounds just described.

41. EIS Required--Any Rule: Municipal Petitioners appreciate that although the NOPR describes a particular rule the Commission might adopt some different or variant of the rule described in it. Due to the significant impacts described above of any effective preemption of the implementation or enforcement of safety-related codes against telecommunications providers, an EIS is required for any Commission rule that adversely impacts state or local adoption or enforcement of such safety-related codes.

Zoning Preemption

42. The NOPR in paragraph 69 proposes to preempt local zoning, planning and land use laws as to fixed wireless devices (due to bringing such devices within the scope of Commission Rule 1.4000).

43. Effects of Zoning Preemption: The NOPR contemplates many antennas being placed on the roofs of buildings. In some situations this may create zoning concerns. 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 try to prevent blight (or reverse blight that has occurred) in part through zoning-related restrictions. Such