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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 Rulemaking 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

MOTION FOR STAY OF:

BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL
INSTITUTE OF REAL ESTATE MANAGEMENT
INTERNATIONAL COUNCIL OF SHOPPING CENTERS
MANUFACTURED HOUSING INSTITUTE
NATIONAL APARTMENT ASSOCIATION
NATIONAL ASSOCIATION OF HOME BUILDERS
NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES
NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS
NATIONAL ASSOCIATION OF REALTORS
NATIONAL MULTI HOUSING COUNCIL AND
THE REAL ESTATE ROUNDTABLE

(THE "REAL ACCESS ALLIANCE")

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The Real Access Alliance hereby requests the Commission to stay the effectiveness of those portions of its recent Orders,[1] and the new regulations implementing the Orders, which extend the "OTARD" preemption to include the receipt and transmission of fixed wireless signals via satellite or other radio signals.[2] The Alliance plans to seek reconsideration of these and other aspects of the Orders. Pending action on that petition and any other administrative challenges to the Orders, stay is warranted and urgently required.[3]

Stay is warranted because the Real Access Alliance has demonstrated, in its Comments of August 27, 1999, its Reply Comments of September 27, 1999 and numerous ex parte communications prior to the adoption of the Orders – and will reinforce in its forthcoming petition for reconsideration – that it is likely to prevail on the merits of the issues. That outcome is further strengthened by the Brief and Reply Brief of petitioners in the appeal of the original OTARD order. (note 2, *supra*)

Moreover, stay would advance the public interest but would not harm significantly the interests of other parties. Stay is urgently required because building owners and managers, and

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[1] The Orders consisted of a First Report and Order in WT Docket No. 99-217, a Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98 and a Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57. These documents were combined with a Further Notice of Proposed Rulemaking in WT 99-217, upon which the Real Access Alliance is commenting separately.

[2] Certain members of the Real Access Alliance have challenged the original, video-only version of Section 1.4000, sometimes known as the "Over-the-Air Reception Device" ("OTARD") rule, in Building Owners and Managers International, et al. v. FCC, No. 99-1009, U.S. Court of Appeals for the D.C. Circuit.

[3] Although the Orders for which partial stay is sought were released October 25, 2000, Federal Register publication triggering an effective date of 60 days thereafter for the new Section 1.4000 (Orders, ¶187) has not yet occurred. Thus, implementation of the revised OTARD rule remains months away and no harm has occurred from any delay in filing this stay motion.

possibly their tenants or tenants' guests, are at risk of irreparable harm if the Orders and rules take effect as written.[4]

I. The test for stay.

Parties seeking stay of an agency or judicial order must demonstrate their strong likelihood of prevailing on the merits of the case in subsequent challenge. They must show a degree of injury absent stay which, if not literally irreparable, is at least serious and substantial. Stay should serve the public interest without significantly injuring other interested parties. These principles have emerged from the federal appellate cases cited at note 4, below, and are applied in the discussion which follows.

II. Prevailing on the merits.

The Orders sweep far beyond the FCC's authority in applying Section 207 of the Telecommunications Act of 1996, implemented at Section 1.4000 of the Commission's rules, 47 C.F.R. §1.4000, to small antennas on tenant premises used not only to receive video programming but also to receive and transmit fixed wireless signals delivering data and voice via satellite or terrestrial networks. Unlawfully, the Commission has directly restrained owners from interfering with tenant placement of these small antennas.

First, the Commission had no statutory authority to extend the OTARD rule to leased property; second, the Commission has no inherent takings power, and Section 207 does not expressly direct the Commission to take the property of building owners, so the Commission was

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[4] *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified by *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). The Commission claims to follow these classic expressions of a four-part stay test. *See, e.g.*, In the Matter of Access Charge Reform, CC Docket 96-262, and other dockets, FCC 00-249, released July 14, 2000, 2000 WL 973271, ¶4. In fact, it often takes short cuts, notably in the cable TV rate appeals where, in the mid-1990s, cable operators routinely filed for stay of adverse local franchising authority orders on basic service rates. The FCC either avoided the stay requests altogether, by mooting them upon decision on the merits, or granted them on much less than the four-part showing. *See, e.g.*, *SBC Media Ventures*, 75 RR 2d 639 (1994).

obligated not to raise the takings question in the rulemaking; and finally, if the OTARD rule does not effect a taking, then under the Commission's own reasoning the rule is illogical and unnecessary, and therefore arbitrary, capricious, and an abuse of discretion.

The Commission finds its warrant in Section 303(r), a general empowerment to make rules. But the regulations must be "not inconsistent with law." Section 303(r) cannot function as a short circuit to whatever broad policy objectives the Commission perceives as included under Sections 1 or 2 of the Act. The substance of Titles II and III must be heeded or else there is nothing left for Congress to do and the Commission usurps the national legislature. In any event, as concerns building owners, "the Commission has no ancillary jurisdiction where it has no jurisdiction under Section 2(a)." (Real Access Alliance Reply Comments, 35)

As noted above, these arguments have been made earlier in Real Access Alliance comments, reply comments and ex parte communications, augmented by appellate briefs and soon to be reinforced by the Alliance's forthcoming petition for reconsideration. To avoid restating the points here, the comments, reply comments and ex parte communications leading up to the Orders are incorporated by reference, as are the briefs on appeal. At such time as its reconsideration petition is filed, the Alliance asks that the petition also be incorporated by reference.

It is not possible, of course, for the Real Access Alliance or the Commission to predict or prejudge the likelihood that these arguments will succeed on the merits. The courts have recognized that when one or more of the above-referenced four factors in the time-honored test

for stay are particularly compelling, the other factors need not be as strong in the balance.[5] While the Alliance believes it will prevail, we move now to the compelling factor of irreparable harm which requires these proceedings to be suspended at the *status quo ante* to avoid serious injury, even death, to persons and significant damage to property.

III. Risk of irreparable harm.

Fixed wireless transceivers are unlike the receive-only dishes described in the OTARD rule prior to its amendment by the Orders. They are a human health and safety hazard because they both transmit and receive radio energy at the office or apartment premises of the tenant subscriber. The Commission discusses at some length, but ultimately leaves to the wide discretion of the fixed wireless service licensee, the health and safety concerns raised when each tenant subscriber becomes a transmitter of radio energy in a densely-populated environment:

> We believe it is incumbent upon fixed wireless licensees, including satellite providers, to exercise reasonable care to protect users and the public from radiofrequency ["RF"] exposure in excess of the Commission's limits.

(Orders, ¶117) The Commission trusts that "economic incentives" will keep service providers from carelessly installing antennas so that subscribers or other persons would be "easily able to venture into and interrupt the transmit beams." After all,

> [s]uch interruptions can degrade the quality of service to the subscriber and ultimately reduce the value of the carrier's service. *Id.*

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[5] "But injury held insufficient to justify a stay in one case may well be sufficient to justify it in another, where the applicant has demonstrated a higher probability of success on the merits." *Virginia Petroleum Jobbers*, 259 F. 2d at 925 "[W]hen confronted with a case in which the other three factors strongly favor interim relief [a court] may exercise its discretion to grant a stay if the movant has made a substantial case on the merits." *Washington Metropolitan Area Transit*, 559 F.2d at 843. The Commission has put some additional gloss on the likelihood of success factor. It will stay its hand in the face of "serious legal issues." Access Charge Reform, FCC 00-249, ¶4 (cited at note 4, *supra*). The constitutional issues, we submit, are sufficiently serious.

In the end, however, the Commission is not content to rely solely on "economic incentives" to prevent harm. Yet the Orders provide no reasoned explanation why warning labels are deemed sufficient for the fixed wireless services at issue here, while LMDS and MMDS services warrant "safety interlock features" (note 296) and MDS and ITFS antennas of certain types must be professionally installed. (note 294) Clearly, the Orders recognize that transmitters in or near tenant units create hazards. But further federal action is deferred, and the problem is left in the hands of "State or local governments, home owner associations, building owners, or other third parties," who are expected to calibrate a measure of self-help that is "no more burdensome than necessary." (note 296)[6]

By deferring further federal action and inviting public or private third parties to come up with remedies no more burdensome than necessary, the FCC effectively lays off on building owners an obligation to protect themselves commercially against the potential human health hazards of RF radiation. Thus, death or serious injury to a tenant or a tenant's guest or a building workman are not the only irreparable harms that must be considered here. It is not far-fetched, in our view, to imagine enormous expenditures for hazard prevention on the one hand and hazard insurance on the other. The expenses are likely to fall largely upon building owners. Once made, they cannot be recovered except through rent increases or other assessments against carriers and subscriber tenants which are almost certain to be challenged as impediments to telecommunications competition.

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[6] Thresholds of presumed RF radiation harm are set out for LMDS services in the table at Section 1.1307 of the Rules, but are not specified for the fixed wireless services at issue here. Moreover, the consumer seeking to understand the information on warning labels would need to know the frequencies and power levels at which his transmitter could be expected to operate. Even when these are known, the calculation of hypothetical electric and magnetic fields and power densities is neither simple nor straightforward. Finally, actual measurement of fields and power densities can only be accomplished accurately by trained technicians using expensive equipment. (Exhibit A is a partial transcript of the oral argument from the unsuccessful appeal of the FCC's RF radiation rules.)

Although the Orders "recommend" professional installation and "do not preclude the possibility" that additional safeguards for MTE operators and their tenants might be tolerated under the revised OTARD rule (¶119 and note 296), the strictness with which the Commission has viewed property owner controls under the current regulation would seem to hold for landlords only less hope and more litigation.[7]

Under other circumstances these hazard expenses might be classified simply as costs of doing business in a regulated environment rather than irreparable harm. But in the case here, they come close to waste. The Real Access Alliance has argued, as have other parties, that rooftop or other building antenna sites are, and can continue to be, the subject of marketplace negotiation between MTE owners and competing communications providers. The serving of multiple tenants through master antennas at such sites is safer, cheaper and aesthetically less intrusive than a transceiver for every subscriber.

IV. No significant harm to other interested parties.

In this regard, the record fashioned by the Alliance and other commenters demonstrates that negotiated access is occurring more rapidly than CLECs can fulfill through installation of service. The implementation issues still pending in the Further Notice (¶¶151-58) and the need for closer definition of rights-of-way (¶¶169-70) suggest that the regulatory certainty required for compulsory access – if that is the Commission's choice – awaits the completion of additional rulemaking in any event. Meanwhile, there would be no change in the status quo with respect to receive-only antennas or transceivers. For these reasons, the Real Access Alliance submits that

[7] *See, e.g., Michael J. McDonald*, 13 FCC Rcd 4844 (1997).

stay of the effectiveness of the revised OTARD rule will not greatly disadvantage CLECs or other interested parties.[8]

V. Stay serves the public interest.

In light of the serious legal questions which the Commission accepts as a surrogate for the likelihood of success factor; in view of the substantial if not irreparable harm threatened by inadequate RF health and safety preparations; given the pendency of substantial implementation issues; and in the absence of significant harm to other interested parties, the Real Access Alliance believes that the public interest would be served by staying the effectiveness of the new OTARD rule until the Further Notice is resolved or the appeal of the current rule is decided.[9]

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[8] Should stay pending resolution of the Further Notice seem too open-ended, the Commission could provide that the revised OTARD rule would become effective within a specified number of days following a Commission-favoring decision on appeal in No. 99-1009, note 2, *supra*, or the release of a dispositive order in the Further Notice, whichever comes sooner.

[9] If the Commission is not persuaded by the application of the four-part test here, it can stay the effectiveness of orders on its own motion for reasons of its own choosing. For example, the FCC recently deferred orders in the Universal Service Lifeline and Link Up assistance programs, pending receipt of further comment on the meaning of the term "near reservations." Promoting Deployment and Subscribership in Unserved and Underserved Areas, CC Docket No. 96-45, FCC 00-332, released August 31, 2000, 2000 WL 1233933. Similarly here, the effectiveness of the new OTARD rule could and should be suspended pending resolution of the Further Notice, or at least deferred until the OTARD judicial appeal is concluded.

CONCLUSION

The Real Access Alliance urges the Commission to stay the Orders and related regulations in keeping with the foregoing discussion.

Respectfully submitted,

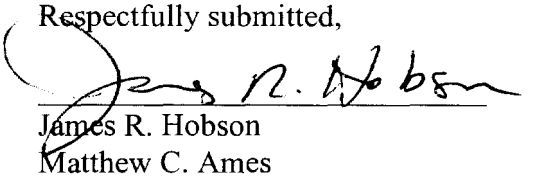

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Exhibit A

Attached is an excerpt from a commercial transcript, prepared with the permission of the Court, recording the oral argument in Cellular Phone Taskforce v. FCC, No. 97-4328 (L) and consolidated cases, argued April 5, 1999, decided February 18, 2000, 205 F. 3d 82 (2d Cir. 2000). The outlined colloquy is between Circuit Judge John M. Walker and FCC Counsel Joel Marcus.

EXHIBIT A

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1 JUDGE WALKER: Let me ask you this:
2 If a person were concerned about exposure,
3 is it difficult if an individual who was
4 concerned about exposure living in a
5 building here in New York, what would be
6 involved technically in getting the
7 information that's necessary to make a
8 presentation concerning that exposure?
9 MR. MARCUS: The best information to
10 get would be the actual readings.
11 JUDGE WALKER: What sort of device is
12 necessary for that?
13 MR. MARCUS: There is a device that
14 does the readings. I think that that device
15 is a fairly technical, sophisticated one.
16 It's not the sort of thing that you buy at
17 Radio Shack.
18 JUDGE WALKER: It's not a hand held
19 piece of machinery of some sort?
20 MR. MARCUS: It's not. I've never
21 actually seen one of these, but as I
22 understand it, it's not a room size piece of
23 equipment looking like a metal detector.
24 Nevertheless, it's a sophisticated piece of
25 equipment. Members of the general public

1 don't typically have these things.
2 On the other hand, if somebody
3 could show the FCC that there was an antenna
4 that was extremely close to their apartment,
5 let's say, that itself might suffice to have
6 the FCC investigate further into the matter.
7 So it's not really necessary for
8 an individual to take such measurements;
9 although, that would certainly be the best
10 evidence to present to the agencies.
11 JUDGE WALKER: Can you address the
12 other point that was made here about the
13 agency's reconsideration of the other health
14 related agencies' view points and the
15 environmental agencies' view points?
16 MR. MARCUS: I think that the agencies
17 bent over backwards to consider the other
18 health and safety --
19 JUDGE WALKER: They're saying on
20 reconsideration that wasn't the case.
21 MR. MARCUS: Okay. Well, for one
22 thing, the agency had already consulted
23 extensively with EPA, FDA, OSHA, NIAC. The
24 agency had developed its standards based on
25 the recommendations of two expert

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1 scientifically loaded standard-setting
2 bodies.
3 The agency took under advisement
4 the request that it consult more with the
5 health and safety agencies, and in the
6 Reconsideration Order it said that we
7 decline to do that. I'll find that for you
8 in a minute.
9 JUDGE NEWMAN: You know that they did.
10 The question is: Having disclaimed their
11 own expertise, why wasn't it arbitrary not
12 to go back to the expert agencies with what
13 is alleged to be substantial added evidence?
14 MR. MARCUS: In responding to that, I
15 think it's important to keep in mind what
16 expertise the Commission is talking about
17 when it said that we don't have the
18 expertise. The Commission concededly does
19 not take a bunch of studies to formulate its
20 own standards for RF exposure.
21 That's a very difficult thing.
22 It takes IEEE and NCRP intense years to do
23 this. It is not something that could have
24 easily been put into the work done in the
25 reconsideration of the rule making.

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1 The agency does have the
2 expertise to decide what standards are
3 reasonable, to evaluate and select among
4 various and complete standards. The FCC has
5 the expertise to strike policy balances in
6 an area where there are potential public
7 policies at issue.
8 JUDGE NEWMAN: Where do we find that
9 the FCC's disclaimer is as narrow as you
10 suggest; only to disclaim the authority to
11 promulgate a standard and not to access
12 whether evidence shows somebody else's
13 standard is inadequate?
14 MR. MARCUS: Well, I don't think that
15 I'm embellishing on what the agencies said
16 to be sure, but I think that if you look
17 at --
18 JUDGE NEWMAN: Well, we're going to
19 review it as far --
20 MR. MARCUS: Absolutely.
21 JUDGE NEWMAN: -- as what the agencies
22 said. So that's why I wanted you to tell us
23 what they said.
24 MR. MARCUS: Absolutely. I would
25 direct your attention particularly to Page