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 Service	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network	)	CC Docket No. 88-57

To: The Commission

OPPOSITION OF THE SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION/SATELLITE INDUSTRY ASSOCIATION BROADBAND & INTERNET DIVISION TO MOTION FOR STAY OF THE REAL ACCESS ALLIANCE

The Satellite Broadcasting and Communications Association/Satellite Industry Association Satellite Broadband & Internet Division ("SBCA/SIA") hereby submits this Opposition to the Motion for Stay of the Real Access Alliance ("Alliance"), in which the Alliance requests a stay of those portions of the Commission's orders governing over-the-air reception devices ("OTARD rules") that extend the OTARD preemption to "the receipt and

transmission of fixed wireless signals via satellite or other radio signals."[1] For the reasons set forth below, the Motion for Stay does not satisfy the criteria necessary to merit the extraordinary relief requested therein and, accordingly, the Motion for Stay should be denied.

I. Background

Section 1.4000(a) of the OTARD rules provides that:

> Any restriction, including but not limited to any state or local law or regulation, including zoning, land-use, or building regulation, or any private covenant, homeowners' association rule or similar restriction on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest in the property, that impairs the installation, maintenance, or use of . . . an antenna that is designed to receive direct broadcast satellite service, including direct-to-home satellite services. . . [or] an antenna that is designed to receive video programming services via multipoint distribution services. . . is prohibited, to the extent it so impairs . . .

A restriction "impairs" installation, maintenance, or use of an antenna if it: "(1) unreasonably delays or prevents installation, maintenance or use, (2) unreasonably increases the cost of installation, maintenance or use, or (3) precludes reception of an acceptable quality signal."[2] Restrictions that are necessitated by safety or historic preservation concerns are exceptions to the rule; even then, however, the restriction must be as narrowly tailored as possible, impose as little burden as possible, and apply in a nondiscriminatory manner throughout the regulated area.[3]

Section 1.4000 was originally adopted pursuant to Section 207 of the Telecommunications Act of 1996 (the "Telecom Act"), which requires the FCC to "to prohibit

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[1] 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"), *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, at 2 (citation omitted) (filed Jan. 8, 2001) ("Motion for Stay").

[2] 47 C.F.R. §1.4000(a).

[3] *See id.* § 1.4000(b).

restrictions that impair a viewer's ability to receive video programming" from Section 207 devices."[4] "Video programming" is defined under the Act as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station."

In an order released on October 25, 2000, the FCC extended the OTARD rules by amending Section 1.4000 to include customer-end antennas used for transmitting or receiving fixed wireless signals.[5] The Order defined "fixed wireless signals" as "any commercial, non-broadcast communications signals transmitted via wireless technology to and/or from a fixed customer location."[6] The rules were published in the *Federal Register* on January 11, 2001, and will become effective 60-days thereafter.[7]

By extending the rules to encompass fixed wireless devices, the FCC included within the purview of the rules all customer-end antennas and supporting structures of the same physical type, regardless of the nature of the services provided through the antenna.[8] In addition, the amended rules apply to both satellite and terrestrial services and to antennas that both transmit and receive signals, antennas that only transmit signals, and antennas that only receive signals.[9] The Alliance requests a stay of this extension of the OTARD rules to encompass fixed wireless devices.

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[4] Pub. L. 104-140, 110 Stat. 56 (1996) § 207.

[5] *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, FCC 00-366, ¶ 97 (rel. Oct. 25, 2000) ("Order").

[6] *Id.*

[7] *Id.*, ¶ 187.

[8] *Id.*, ¶ 99.

[9] *Id.*

II. The Alliance's Motion Fails to Meet Any of the Four Factors Required for Grant of a Stay

In determining whether to stay the effectiveness of one of its orders, the Commission uses the four-factor test established by the U.S. Court of Appeals for the D.C. Circuit.[10] Under that test, a petitioner must demonstrate that: (1) it is likely to succeed on the merits on appeal; (2) it would suffer irreparable injury absent a stay; (3) a stay would not substantially harm other interested parties; and (4) a stay would serve the public interest.[11] A petitioner must meet each of these tests in order for the Commission to grant a stay.[12] As shown below, the Alliance has not satisfied any of the four factors required for grant of a stay. In lieu of the first factor, the Commission will consider granting a stay upon a showing that its action raises serious legal issues if the petitioner's showing on the other factors is particularly strong.[13] The Alliance also fails to meet this test.[14]

A. The Alliance is Unlikely to Prevail on the Merits of the Issues

In the Motion for Stay, the Alliance argues that the FCC does not have the authority to extend the OTARD rules to fixed wireless transceivers. Specifically, the Alliance argues that: (1) the FCC had no statutory authority to extend the OTARD rules to leased property; (2) the

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[10] *Access Charge Reform*, Order, 15 FCC Rcd 13191, 13192-93 (2000) ("Access Order"); *see Virginia Petroleum Jobbers Ass'n v FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

[11] Access Order, ¶ 4.

[12] *Id.*

[13] *Id.* at n.9.

[14] Moreover, the Alliance essentially acknowledges that it does not meet all of the criteria for the extraordinary relief it requests. The Alliance cites purported Commission "short cuts" in applying the test and argues 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." Motion for Stay at 4-5 (citation omitted). These attempts to dilute the standard only highlight the weaknesses in the Alliance's showings on the four factors.

FCC has no power to take the property of building owners; and (3) if the OTARD rules do not effect a taking, then the rule at issue is arbitrary, capricious and an abuse of discretion.[15]

The Commission addressed the issue of its authority at length in the Order. The Commission has authority under Sections 303(r) and 4(i) of the Telecom Act to extend the OTARD rules to fixed wireless services signals because the extension: (1) furthers the express objectives of Section 1 of the Telecom Act by facilitating efficient deployment of competitive communications services; (2) fosters the deployment of advanced telecommunications services, as directed in Section 706 of the Telecom Act; and (3) furthers the consumer protection purposes of Sections 201(b), 202(a) and 205(a) of the Telecom Act.[16] In addition, the extension of the OTARD rules falls within the bounds of established preemption principles.[17] The FCC's carefully rendered decision, made pursuant to the authority cited above, clearly was not arbitrary, capricious or an abuse of discretion as the Alliance alleges.

With respect to the takings issue, the Motion for Stay merely mentions previous pleadings filed by the Alliance and attempts to incorporate them by reference, but does not specify any particular arguments that support the request for stay.[18] In response, the SBCA/SIA can only note that the position taken by the FCC in prior rulemaking proceedings and appeals applies equally here. The OTARD rules: (a) do not effect a *per se* taking of the property of landlords; rather they regulate the terms of a voluntary and pre-existing landlord-tenant relationship; and (b) do not effect a regulatory taking. The Commission, after careful consideration, properly found the Alliance's arguments to the contrary unpersuasive in prior rulemakings with respect to the OTARD rules. The Alliance's undifferentiated citation to these

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[15] *Id.* at 3-4.

[16] Order, ¶¶ 102-106.

[17] *Id.*, ¶ 107.

[18] Motion for Stay at 2.

pleadings, which failed in the earlier proceedings, does not make them somehow more persuasive in this proceeding.[19]

B. The Alliance Cannot Make the Requisite Showing as to the Risk of Irreparable Harm

In the Motion for Stay, the Alliance argues that fixed wireless transceivers, unlike the receive-only dishes covered by the OTARD rules prior to the Order, present a human health and safety hazard because they both transmit and receive radio energy at the office or apartment premises of the tenant subscriber.[20] In the absence of the requested stay, the Alliance alleges that irreparable harm will result in the form of serious injury or death to a tenant, guest or worker and enormous expenditures for hazard prevention and insurance for building owners.[21] The Alliance criticizes the Commission for allowing fixed wireless licensees wide discretion with respect to the health and safety concerns raised by transceiver radiation.[22]

In the Order, the Commission fully considered and addressed the radiation safety concerns raised in the Motion for Stay. Existing FCC regulations already protect persons from excessive exposure to RF radiation. The FCC explicitly extended those protections to the fixed wireless systems at issue here by ruling that all FCC-regulated transmitters, including the subscriber terminals used in fixed wireless systems, are required to meet the applicable guidelines regarding radiofrequency exposure.[23] The Commission also provides additional safeguards – the Order (i) requires fixed wireless licensees to ensure that subscriber antennas are

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[19] The Alliance also attempts to rely on a petition for reconsideration that it has not yet filed to support its arguments here. Motion for Stay at 4. Obviously, SBCA/SIA cannot respond, in this Opposition, to the arguments that will be made in that petition.

[20] *Id.* at 5.

[21] *Id.* at 6. The Alliance directs all of its arguments to *tenants*' use of fixed wireless devices. This distinction is nonsensical, particularly if the Alliance is concerned, as it claims, with the health and safety of all persons.

[22] *Id.* at 5-6.

[23] Order, ¶ 117.

labeled to give notice of potential radiofrequency safety hazards and specifies the types of information that the labels must contain;[24] and (ii) recommends that two-way fixed wireless subscriber equipment be installed by professionals to minimize the possibility that the antenna will be placed in a location that is likely to expose persons to the transmit signal at close proximity and for an extended period of time.[25] These existing rules and additional safeguards, applicable to an area – RF radiation – in which the FCC has particular expertise, and is uniquely qualified to govern, clearly satisfy the RF radiation safety concerns raised by the Alliance. Thus, there is no threat of harm and no need for a stay to be granted on the basis of those concerns.

C. Harm to Consumers and the Fixed Wireless Industry Will Result if a Stay is Granted

The Alliance asserts that CLECs and other interested parties will not be harmed by the requested stay because additional time is needed for negotiated access for CLECs and implementation issues pending before the Commission.[26] This argument does not take the interests of either consumers or the fixed wireless industry into consideration. With respect to consumers, if the stay is granted, it will deprive large numbers of consumers, both homeowners and tenants, of the benefit of innovative fixed wireless technologies and services for an indefinite period of time while the Alliance litigates against the rules. Grant of the stay will also harm the economic interests of providers of fixed wireless services without any corresponding benefit, since the health and safety concerns are fully addressed by the Order.

D. The Public Interest is not Served by a Stay

With respect to the required public interest showing, the Alliance states that in light of the issues it has raised regarding the previous three factors, the public interest would be served by a

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[24] *Id.*, ¶ 118.

[25] *Id.*, ¶ 119.

[26] Motion for Stay at 7-8.

stay. To the contrary, as shown above, because the Alliance has failed to demonstrate that it is likely to prevail on the merits, has failed to show that irreparable harm will occur in the absence of a stay and has failed to show that other interested parties will not be harmed by the stay, the public interest would be better served by permitting the rules to become effective as scheduled.

III. Conclusion

For the reasons set forth above, the Commission should deny the Alliance's Motion for Stay.

Respectfully submitted,

/s/ Margaret L. Tobey

Margaret L. Tobey
Cristina Chou Pauzé
Morrison & Foerster, LLP
2000 Pennsylvania Avenue, NW
Suite 5500
Washington, DC 20006
(202) 887-1500

Counsel for the Satellite Broadcasting and Communications Association/Satellite Industry Association Satellite Broadband & Internet Division

January 16, 2001

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 2001, I caused a true and correct copy of the foregoing Opposition of the Satellite Broadcasting and Communications Association/Satellite Industry Association Satellite Broadband & Internet Division to the Motion for Stay of the Real Access Alliance to be served by U.S. first-class mail, postage prepaid, upon the following:

James R. Hobson
Matthew C. Ames
Nicholas P. Miller
MILLER & VAN EATON, P.L.L.C.
Suite 1000
1155 Connecticut Avenue, NW
Washington, D.C. 20036

Gerard Lavery Lederer
Vice President -- Industry and Government Affairs
Building Owners and Managers Association International
Suite 300
1201 New York Avenue, NW
Washington, D.C. 20005

Tony Edwards
General Counsel
National Association of Real Estate Investment Trusts
Suite 600
1875 Eye Street, NW
Washington, D.C. 20006

Clarine Nardi Riddle
General Counsel
National Multi Housing Council
Suite 540
1857 N Street, NW
Washington, D.C. 20036

Roger Platt
National Policy Counsel
Real Estate Roundtable
Suite 1100
1420 New York Avenue, NW
Washington, D.C. 20005

Bruce Lundegren
National Association of Home Builders
1201 15th Street, NW
Washington, D.C. 20005

/s/ Theresa L. Pringleton_____
Theresa L. Pringleton