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

OPPOSITION TO MOTION FOR STAY

The Wireless Communications Association International, Inc. ("WCA") hereby submits its opposition to the January 8, 2001 Motion for Stay (the "Motion") filed on behalf of the Building Owners and Managers Association International *et al.* (hereinafter referred to collectively as the "Real Access Alliance" or "RAA") in the above-captioned proceeding.[1/]

[1/] By Public Notice released January 19, 2001, the Commission extended the deadline for opposing RAA's Motion to January 26, 2001. *See* Public Notice, "Commercial Wireless Division Grants Wireless Communications Association International, Inc. Request for Extension of Time To Respond to the Real Access Alliance's Motion for Stay of Revised OTARD Rules, 47 C.F.R. § 1.4000, Which Were Promulgated in FCC 00-366," DA 01-123 (rel. Jan. 19, 2001). Accordingly, WCA's opposition is timely filed.

I. INTRODUCTION.

As the Commission is aware, WCA filed the Petition for Rulemaking which led the Commission to amend the antenna preemption rule (47 C.F.R. § 1.4000, hereinafter the "Rule") so that it protects all small fixed wireless subscriber premises antennas (*i.e.*, those that are up to one meter in diameter or diagonal measurement) against undue non-federal restrictions, regardless of the services or frequency bands involved.[2/] Previously, the Rule only protected such antennas if they were used to receive video programming services in the Multipoint Distribution Service ("MDS"), Instructional Television Fixed Service ("ITFS"), Local Multipoint Distribution Service ("LMDS"), Direct Broadcast Satellite ("DBS") or off-air television frequency bands. In its *First Report and Order* in WT Docket No. 99-217, the Commission determined that the objectives of the Telecommunications Act of 1996 (the "1996 Act") "are effectively hindered by restricting OTARD protections to devices that receive video programming services,"[3/] and that extension of the Rule to all small fixed wireless antennas "will foster the deployment of advanced telecommunications services."[4/] The Commission thus eliminated the Rule's arbitrary distinction between small fixed wireless antennas that receive video programming services and those that do not, paving the way for more rapid deployment of fixed wireless broadband services to consumers that have no broadband

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[2/] *Promotion of Competitive Networks in Local Telecommunications Markets et al.*, WT Docket No. 99-217, CC Docket Nos. 96-98 and 88-57, FCC 00-366, at ¶¶ 97-124 (rel Oct. 25, 2000) (the "*First R&O*").

[3/] *Id.* at ¶ 101.

[4/] *Id.* at ¶ 103.

service at all or who still cannot choose among competing broadband providers.[5]

RAA's Motion offers no legal or public interest basis for the Commission to stay the effective date of the new Rule. Most important, RAA has not demonstrated a likelihood of success on the merits or that it would suffer irreparable injury if its Motion were denied. RAA's Motion merely incorporates by reference prior arguments which the Commission has already rejected, with no real discussion of why the Commission should now reverse field and reinstate the original "video only" version of the Rule. Further, RAA's claims of irreparable harm are supported by not a shred of evidence, and otherwise represent precisely the sort of random speculation that the Commission found unpersuasive in the *First R&O*. Finally, RAA takes no notice of the harm that will be suffered by existing and potential fixed wireless broadband subscribers if the Commission were to deny them the same antenna preemption rights already enjoyed by fixed wireless subscribers who are using the same antennas to receive video programming services. For all of the above reasons, the Commission should deny RAA's Motion.

II. DISCUSSION.

At the outset, it must be emphasized that RAA represents the interests of landlords, and that its stay request is devoted exclusively to stopping preemption of antenna restrictions imposed in multi-tenant rental properties.[6] The new Rule, however, encompasses far more - it also applies to

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[5] *See id.* at ¶ 98 (noting that "distinguishing in the protection afforded based on the services provided through an antenna produces irrational results").

[6] *See, e.g.*, Motion at 2 ("Stay is urgently required because building owners and managers, and possibly their tenants or tenants' guests, are at risk of irreparable harm if the Orders and rules take effect as written."); Brief for Petitioners at (ii) n. 1, *Building Owners and Managers Association International et al. v. FCC*, Case No. 99-1009 (D.C. Cir., filed Jan. 7, 1999) ("The [Real Access] Alliance was formed to encourage free market competition

public (*e.g.*, local zoning ordinances, building codes) and private restrictions (*e.g.*, homeowners association covenants) that unreasonably prevent fixed wireless subscribers from installing, using or maintaining small antennas in *non*-rental properties, including, for example, single family residences owned by antenna users. Accordingly, even if the Commission were to find that RAA has sustained its burden of satisfying all four of the *Virginia Petroleum Jobbers* stay criteria (and it has not), nothing in RAA's Motion should delay the effective date of the new Rule in the non-rental environment.

In order to justify the issuance of a stay in this proceeding, RAA must demonstrate that (1) it will suffer irreparable harm if the stay is not granted, (2) it is likely to prevail on the merits of its Petition for Reconsideration, (3) the grant of stay will not harm other interested parties, and (4) the grant would be in the public interest.[7] The criteria are applied as follows:

> In deciding whether to grant an injunction, the [court] must balance the strengths of the requesting party's arguments in each of the four required areas. If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak. An injunction may be justified for example, where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury.[8]

RAA has failed to sustain its burden under the test described above. In particular, RAA has made no showing that it is likely to succeed on the merits - instead, RAA merely incorporates by

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among telecommunications companies for services to tenants in commercial and residential buildings, and to safeguard the constitutional property rights of America's real estate owners.").

[7] *Virginia Petroleum Job. Ass'n v. Federal Power Com'n*, 259 F.2d 921,925 (D.C. Cir. 1958).

[8] *CityFed Financial v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995).

reference the arguments it has already made in its prior filings in this proceeding.[9] Those arguments, however, have already been considered by the Commission and rejected in the *First R&O*,[10] and the mere act of reiterating those arguments by reference falls well short of the "strong showing" required to demonstrate a likelihood of success on the merits.[11]

Equally weightless is RAA's attempt to demonstrate that landlords will suffer irreparable harm in the absence of a stay. Under the *Virginia Petroleum Jobbers* stay criteria, such harm must be "both certain and great; it must be actual and not theoretical."[12] The harm claimed by RAA is *entirely* theoretical: with no factual support whatsoever, RAA merely makes the pejorative claim that antennas covered by the new Rule "are a human health and safety hazard because they both

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[9] Motion at 4.

[10] *See, e.g., First R&O* at ¶¶ 106-116.

[11] *Virginia Petroleum Jobbers,* 259 F.2d at 925; *see also Applications of Public Cable Co.*, 57 FCC 2d 743, 744 (1975) ("WCBB has essentially reiterated the same arguments we rejected in our September 16 order; it has submitted no additional facts in support of its arguments or in response to our [previous] analysis . . . ."). RAA also claims that a stay is warranted by the arguments it has made in its briefs before the D.C. Circuit in *Building Owners and Managers Association International et al. v. FCC* (*see* n. 6, *supra).* In that case, however, RAA is appealing the Commission's 1998 decision in CS Docket No. 96-83 to apply what was then the "video only" antenna preemption rule to antennas installed within individual leaseholds on rental property. *See Implementation of Section 207 of the Telecommunications Act of 1996 – Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services*, 13 FCC Rcd 23874 (1998). Even if the D.C. Circuit were to vacate that decision, it would only mean that the new Rule would not apply to antennas installed within individual leaseholds in rental properties; all other antenna installations covered by the Rule would be unaffected. Accordingly, nothing in RAA's appeal before the D.C. Circuit has any bearing on the Commission's decision to extend the Rule to all small fixed wireless antennas, and thus RAA's appeal cannot be a basis for a stay of that decision. In any case, the Commission has already considered and rejected the "takings" argument that lies at the heart of RAA's appeal before the D.C. Circuit. *See First R&O* at ¶ 116.

[12] *Wisconsin Gas Company v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). *See also Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931) (injunctive relief "will not be granted against something merely feared as liable to occur at some indefinite time").

transmit and receive radio energy."[13] RAA ignores the fact that the antennas covered by the Rule are already required to comply with the Commission's RF radiation rules, 47 C.F.R. §§ 1.1307(b)(1) and 1.1310, which are specifically designed to eliminate unsafe human exposure to RF transmissions.[14] RAA's Motion is bereft of any showing whatsoever as to why the Commission's RF radiation rules are insufficient to address the "human health and safety hazard" RAA alleges here, and thus RAA's Motion cannot justify a stay of the new Rule on that basis.[15]

Moreover, any speculative safety-related "harm" that might be suffered by landlords under the new Rule is mitigated by the fact that *the Commission has fully preserved the Rule's pre-existing safety exception*. Thus, the new Rule still permits landlords to adopt and enforce any type of safety-related antenna restriction, provided that the restriction (1) serves a clearly defined, legitimate safety objective, (2) is nondiscriminatory and (3) is the least burdensome means of achieving the safety

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[13] Motion at 5.

[14] *See First R&O* at ¶ 117 ("We emphasize that all FCC-regulated transmitters, including the subscriber terminals used in fixed wireless systems, are required to meet the applicable Commission guidelines regarding radiofrequency exposure limits.") (footnote omitted); 47 C.F.R. § 1.1307(b)(1), 1.1310.

[15] RAA also refers to language in the *First R&O* that appears to give landlords greater latitude to require that fixed wireless providers comply with equipment labeling, professional installation and safety "interlock" requirements. Motion at 6. RAA contends that the Commission has thereby "effectively [laid] off on building owners an obligation to protect themselves commercially against the potential human health hazards of RF radiation." *Id.* WCA agrees that regulation of RF radiation matters should *not* be delegated to landlords or other private parties who have no expertise in the matter. Moreover, non-federal RF regulation of subscriber premises fixed wireless antennas will subject fixed wireless operators and their customers to an unmanageable patchwork of local RF rules that may differ from community to community (or even from building to building), with no countervailing benefit to the public. WCA thus would not oppose a stay of those portions of the *First R&O* that appear to give landlords and other non-federal entities expanded rights to restrict antenna installations on the basis of RF safety. *See, e.g., First R&O* at ¶¶ 118-119 and n. 296. Ultimately, however, this would be only a temporary solution to the problem - the Commission can and should eliminate the problem *permanently* by restoring RF regulation of subscriber premises fixed wireless antennas to the Commission's exclusive jurisdiction, and by reestablishing itself as the sole entity charged with enforcing RF radiation rules where fixed wireless providers are concerned. WCA intends to address this issue in greater detail in its upcoming Petition for Partial Reconsideration in WT Docket No. 99-217.

objective at issue.[16] Moreover, even in the absence of a clearly-defined, legitimate safety objective, landlords still retain the authority to adopt restrictions that do not "impair" the installation, maintenance and use of subscriber premises fixed wireless antennas covered by the Rule.[17] By retaining the Rule's safety exception and "impairment" standard, the Commission has carefully balanced the legitimate interests of antenna users and landlords and accommodated both. RAA's random claims to the contrary do not demonstrate otherwise.

RAA also has failed to demonstrate that a stay of the effective date of the Rule will not harm other interested parties. In particular, RAA conspicuously avoids any discussion of the substantial harm that will befall fixed wireless broadband providers and their customers were the Commission to continue to deny fixed wireless broadband subscribers the same level of antenna preemption protection already accorded to fixed wireless video subscribers. As reflected in WCA's earlier filings in this docket, the timely rollout of fixed wireless broadband service (particularly by MDS/ITFS operators) has been threatened by an increasing number of antenna restrictions imposed by homeowners associations ("HOAs") and local governments on subscriber premises fixed wireless antennas used to receive high-speed Internet access service exclusively.[18] Since adoption of the new

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[16] *See* 47 C.F.R. § 1.4000(b); *see also First R&O* at ¶ 117.

[17] *See 47* C.F.R. § 1.4000(a).

[18] *See, e.g.,* Reply Comments of The Wireless Communications Association International, Inc., WT Docket No. 99-217, at 5-6 and Exhibits 1 and 2 (filed Sept. 27, 1999) (citing examples of attempts by homeowners associations to use the former "video only" provision of the Rule to restrict installation of subscriber premises fixed wireless broadband antennas). *See also First R&O* at ¶ 98 ("In the *OTARD First Report and Order*, the Commission determined that restrictions on the placement of antennas one meter in diameter or smaller unreasonably limit a video programming customer while restrictions on larger C-band reception antennas might be reasonable. *We find that the same types of restrictions on the same types of antennas unreasonably restrict deployment regardless of the services provided.*") (emphasis added).

Rule, however, fixed wireless broadband providers have begun to see a marked decrease in the number of attempts by homeowners associations and landlords to impose unreasonable restrictions on antennas used only to receive broadband services. Conversely, a grant of RAA's Motion would reverse that trend and return fixed wireless broadband service providers and their customers to the *status quo ante*, a result which is exactly the opposite of what the Commission hoped to achieve by amending the Rule. Under the latter scenario, the harm to the fixed wireless industry and consumers is self-evident.[19]

Finally, RAA has failed to demonstrate that the issuance of a stay would serve the public interest. As the Commission is well aware, there remains a "digital divide" between certain segments of American society who have ready access to broadband services and those who do not:

> The [wireline] companies appear to be interested in competing for the business of a small segment of the market - intensive users of numerous telecommunications and TV services. The group of consumers who are attractive to companies is quite small. The drive to expand the infrastructure serves the needs of this small group and leaves the rest behind.[20]

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[19] RAA attempts to minimize the harm by asserting that "negotiated access is occurring more rapidly than CLECs can fulfill through installation of service." Motion at 4. In a similar vein, RAA states that "rooftops and other building antenna sites are... the subject of marketplace negotiations between multi-tenant property owners and competing communications providers." *Id.* Here RAA's misunderstanding of the Rule is obvious: the fact that CLECs may be negotiating easier access to *common* areas in multi-tenant properties (an assertion for which RAA again provides no factual support) has no bearing whatsoever on the rights of a tenant to install a small fixed wireless antenna within his or her *individual leasehold*, which is all that the Rule protects in the multi-tenant environment.

[20] Cooper and Kimmelman, "The Digital Divide Confronts the Telecommunications Act of 1996: Economic Reality Versus Public Policy," at 3-4 (Feb. 1999). *See also* "Falling Through the Net: Defining the Digital Divide," National Telecommunications and Information Administration White Paper, at 5 (July 1999) ("[D]istinct disparities in [broadband] access remain. Americans living in rural areas are less likely to be connected by PCs or the Internet - - even when holding income constant. Indeed, at most income brackets below $35,000, those living in urban areas are at least 25% more likely to have Internet access than those in rural areas.") (citations omitted).

Clearly, then, the public interest would *not* be served by any Commission action which hinders or delays the ongoing rollout of new broadband services that narrow the "digital divide." Those services would include MDS/ITFS-based fixed wireless broadband service, which the Commission has recognized is uniquely suited for serving rural and other underserved areas. Indeed, Sprint alone has already launched the service in a dozen markets,[21] and in the recent MDS/ITFS two-way filing window Sprint submitted applications for two-way authority in a total of 45 markets, which will enable it to initiate service to its first two million customers.[22] WorldCom too has invested over $1 billion to acquire MDS/ITFS spectrum rights in 160 U.S. markets comprising more than 45 million households, and is conducting market trials of its fixed wireless broadband service in Boston, Dallas, Baton Rouge, Memphis, and Jackson, MS.[23] In the recent MDS/ITFS two-way filing window, WorldCom filed applications for two-way authority in over 70 markets.[24]

The rapid deployment of MDS/ITFS-based fixed wireless broadband service and the unique economic and societal benefits it provides are precisely what the Commission intended to encourage

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[21] *See* "Sprint Introduces New Broadband Wireless Service to Fresno's Residential and Small Business Customers," Sprint Broadband Direct Press Release (Jan. 23, 2001) (available at <http://www.sprintbbd.com/prsite/pr/2001/0123-Fresno.html>).

[22] "Sprint Files For Two-Way MMDS Licenses In 45 Major Markets" (Aug. 22, 2000) (available at <http://www.sprint.com/Stemp/press/releases/200008/200008221040.html>).

[23] Federal Communications Commission Interim Report - Spectrum Study of the 2500-2690 MHz Band; The Potential for Accommodating Third Generation Mobile Systems, Appendix 3.3, at A-39 (Nov. 15, 2000).

[24] *Id.* at A-40. Also, Nucentrix Broadband Networks, Inc. currently offers two-way high-speed Internet access using MDS spectrum in Austin and Sherman, TX, and is running a trial of the service in Amarillo, TX. *Id.* at A-41. It plans to launch the service in 15 to 20 markets by the end of 2001. *Id.*

by extending antenna preemption protection to all small subscriber premises fixed wireless antennas, regardless of the services or frequencies involved. Conversely, RAA, under the rubric of "safety," would have the Commission cast that agenda aside and stay the effective date of the new Rule solely for the purpose of permitting landlords to dictate when and where their tenants may place small fixed wireless antennas within their individual leaseholds. The Commission has not succumbed to this tactic before and should not do so now. RAA's Motion should be denied.

WHEREFORE, for the reasons set forth above, WCA requests that the Commission deny the Motion for Stay filed by the Real Access Alliance.

Respectfully submitted,

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January 26, 2000

Certificate of Service

I, Candace J. Lamoree, hereby certify that on this 26th day of January, 2001, copies of the foregoing "Opposition to Motion for Stay" were sent via U.S. mail, first class, postage prepaid upon the following:

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