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FEDERAL COMMUNICATIONS COMMISSION
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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

PETITION FOR PARTIAL RECONSIDERATION

The Wireless Communications Association International, Inc. ("WCA"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby petitions for partial reconsideration with respect to the Commission's *First Report and Order* in WT Docket 99-217, released October 25, 2000 (hereinafter the "*First R&O*").[1/]

[1/] *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 (rel Oct. 25, 2000).

I. INTRODUCTION.

In the *First R&O*, the Commission reaffirmed its commitment to the pro-consumer objectives of the Telecommunications Act of 1996 by, *inter alia*, amending its 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 unreasonable non-federal restrictions, regardless of the services or frequency bands involved. 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. By eliminating the Rule's arbitrary distinction between small subscriber premises fixed wireless antennas that receive video programming services and those that do not, the Commission has paved the way for more rapid deployment of fixed wireless broadband services to consumers that have no broadband service at all or who still cannot choose among competing broadband providers.[2/]

Significantly, the new Rule also retains the old Rule's "safety exception," which prohibits "safety-related" antenna restrictions that impair installation, maintenance or use of subscriber premises fixed wireless antennas *unless* they are narrowly tailored, nondiscriminatory, and serve a

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[2/] *See 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).

clearly defined, *legitimate* safety objective.[3] Very recently, the Commission reaffirmed that the limitations of the safety exception apply to non-federal antenna restrictions relating to technical matters, including installation guidelines.[4] Unfortunately, certain ambiguous portions of the *First R&O* may leave local governments, homeowners associations ("HOAs") and landlords with the false impression that they now have unbounded authority to require professional installation of subscriber premises fixed wireless broadband antennas with transmit capability ("transceivers"), without regard to the limitations of the safety exception. Such a reading of the *First R&O* would be plainly inconsistent with the Commission's own reading of the Rule, and would empower non-federal entities with no expertise in RF matters to impose arbitrary, inconsistent and excessively burdensome professional installation requirements that have no legitimate safety objective. WCA therefore asks the Commission to clarify that the Rule's safety exception applies with equal force to any professional installation requirements adopted by non-federal authorities for subscriber premises fixed wireless transceivers that are protected by the Rule. Otherwise, fixed wireless operators may once again find themselves subject to the very same arbitrary and unreasonable non-federal antenna restrictions that the Rule is designed to prevent.

II. DISCUSSION.

At the outset, WCA is pleased to report that the new Rule is already having its intended effect on deployment of fixed wireless broadband service in local markets. As reflected in WCA's

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

[4] *Victor Frankfurt*, CSR-5238-O, DA 01-153, at ¶¶ 31-34 (CSB, rel. Feb. 7, 2001).

earlier filings in this docket, fixed wireless broadband providers (particularly MDS/ITFS operators) had been threatened by an increasing number of antenna restrictions imposed by HOAs on subscriber premises fixed wireless antennas used to receive high-speed Internet access service exclusively.[5] Since the release of the *First R&O*, however, those same providers have seen a marked decrease in the number of attempts by HOAs to impose unreasonable restrictions on antennas used only to receive broadband services.[6] The net result has been more rapid deployment of fixed wireless broadband service, which is precisely what the Commission had hoped to achieve by amending the Rule.

Nonetheless, WCA is concerned that the following language in the *First R&O* may reverse that trend if left uncorrected:

> [I]t is recommended that two-way fixed wireless subscriber equipment be installed by professional personnel, thereby minimizing the possibility that the antenna will be placed in a location that is likely to expose subscribers or other persons to the transmit signal at close proximity and for an extended period of time. To the extent that local governments, associations, and property owners elect to require professional installation for transmitting antennas, *the usual prohibition of such requirements under the OTARD rules will not apply.*[7]

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[5] *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).

[6] However, demonstrating a sophisticated understanding of the Commission's processes, certain HOAs still are attempting to obstruct installation of "broadband only" subscriber premises fixed wireless antennas, citing the fact that the new Rule has not yet gone into effect via publication in the Federal Register.

[7] *First R&O* at ¶ 119 (emphasis added).

Arguably, the italicized language could be read to mean that professional installation requirements now fall completely outside the scope of the Rule, and that non-federal entities may now adopt and enforce such requirements *without regard to the limitations set forth in the "safety exception" to the Rule.* Under the "safety exception," a safety-related antenna restriction is permitted only if it (1) serves a clearly defined, legitimate safety objective, (2) is nondiscriminatory, and (3) is the least burdensome means of achieving the safety objective at issue.[8] Thus, absent further clarification from the Commission, the "professional installation" language in the *First R&O* could be interpreted as permitting non-federal entities with no RF expertise whatsoever to adopt and enforce professional installation requirements that do not have a clearly defined, legitimate safety objective, or that are discriminatory and/or more burdensome than necessary.

There are several reasons why a clarification of this matter is essential at this time. First, as noted above, the Commission has, in a very recent antenna preemption case, reaffirmed that the limitations of the safety exception apply fully to installation requirements adopted by local governments, HOAs and landlords.[9] Second, other portions of the *First R&O* quite explicitly state that the Commission has retained the safety exception in its entirety, and that the exception remains in full force and effect. For example, at paragraph 117 the Commission "reiterate[s] that the OTARD rules provide an exception for 'a clearly defined, legitimate safety objective' provided the objective is articulated in the restriction or readily available to antenna users and is applied in a non-

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[8] 47 C.F.R. § 1.4000(b).

[9] *See Victor Frankfurt, supra* note 4.

discriminatory manner and is no more burdensome than necessary to achieve the articulated objectives."[10] Further, the Commission states that where non-federal entities elect to impose "safety interlock" requirements on subscriber premises fixed wireless transceivers, they must do so in compliance with the safety exception.[11] Clearly, there is no sensible basis for the Commission to apply the safety exception to some RF-related antenna restrictions but not others, and thus it is unlikely that the Commission intended to suggest that the safety exception applies to safety interlock but not to professional installation requirements imposed by non-federal entities.

Third, as the Commission itself notes in the *First R&O,* the Commission has already given thorough consideration to the issue of whether professional installation requirements are necessary for MDS/ITFS subscriber premises transceivers, and determined that they should be required only in limited situations.[12] The Commission did so to "facilitate the installation of very large numbers of response stations without the need for notification or professional installation."[13] Simply put,

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[10] Similarly, in rejecting a request that it conduct an environmental impact statement on its extension of the Rule to all small subscriber premises fixed wireless transceivers, the Commission stated that "the exceptions in the OTARD rules for safety, *which continue to apply to the revisions here*, adequately address [environmental] concerns. Specifically, Section 1.4000(b)(1) provides that any restriction otherwise prohibited by the OTARD rules is permitted if necessary to accomplish a clearly defined, legitimate safety objective and is no more burdensome than necessary to achieve that objective." *First R&O* at ¶ 121 (footnotes omitted) (emphasis added).

[11] *Id.* at ¶ 119 n.296.

[12] *Id.* at ¶ 119 n.294 (citing 47 C.F.R. §§ 21.909, 74.939(p)). Specifically, the Commission has determined that professional installation is not required for MDS/ITFS subscriber premises transceivers that operate at no more than 18 dBW EIRP, provided that the operator of the associated MDS/ITFS hub station provide and install replacement downconverters at any registered and constructed ITFS receive sites within 1960 feet of the hub station's Response Service Area ("RSA"). *See Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions (Report and Order on Reconsideration)*, 14 FCC Rcd 12764, 12778 (1999).

[13] 14 FCC Rcd at 12778.

there is no reason to permit a non-federal entity with no expertise in RF matters to defeat that objective by imposing professional installation on MDS/ITFS subscriber premises transceivers that are more burdensome than those adopted by the Commission.[14]

Moreover, permitting non-federal authorities to adopt their own professional installation requirements independent of the safety exception will inevitably force fixed wireless operators and their customers to contend with an unmanageable patchwork of non-federal professional installation requirements that differ from community to community or even from building to building, a result which the new Rule (and, indeed, the entire concept of federal preemption) is designed to prevent.[15] Given that cable modem and DSL providers are now offering subscriber self-installation as a means of delivering service to customers as quickly and easily as possible, there is little doubt that fixed wireless broadband subscribers will not tolerate delays in service created by arbitrary and inconsistent non-federal professional installation requirements.[16] Instead, they will switch to incumbent

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[14] WCA recognizes that this proceeding is not the appropriate forum for consideration of the larger question of whether the Commission should preempt *all* non-federal RF-related antenna restrictions that conflict with the Commission's existing RF safety rules, including those pertaining to professional installation. However, WCA believes that the Commission eventually will need to evaluate whether the rapid deployment of fixed wireless broadband service is truly promoted by permitting local governments, HOAs and landlords to impose RF or other safety restrictions based on technical matters in which they have no expertise, particularly where the Commission itself has already considered and adopted regulations that address those very same matters. WCA submits that the Commission can and should eliminate the problem by adopting a *per se* preemption of all non-federal RF-related antenna restrictions that impair installation, maintenance or use of subscriber premises fixed wireless transceivers, subject to waiver in exceptional circumstances.

[15] *See, e.g., General Telephone of California v. FCC*, 413 F.2d 390, 398, 401 (D.C. Cir. 1968) (the need for comprehensive Commission powers stems from "the practical difficulties inhering state-by-state regulation of parts of an organic whole . . . fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communications.").

[16] *See, e.g.*, Harmon, "ICPs + DSL = Challenges," *Outside Plant* (May 2000) ("Another growing trend in the [DSL] industry to improve the installation process on the customer premises is the emergence of "self-installation" kits. These kits, coupled with new standards, such as DSL-lite and G.lite, should reduce the number of "truck rolls"

providers who offer the benefit of self-installation without the threat of sanction by local authorities, property owners or HOAs.[17] There is no legitimate public interest rationale for the Commission to invite that result.

Finally, there are broader public policy reasons for the Commission to clarify the Rule as requested above. In the *First R&O*, 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,"[18] and that extension of the Rule to all small fixed wireless antennas "will foster the deployment of advanced telecommunications services."[19] As noted above, the Commission has already been proven right: since the release of the *First R&O*, fixed wireless broadband providers have seen a marked decrease in the number of attempts by non-federal entities to impose unreasonable restrictions on antennas used only to receive broadband services. Patently, then, the public interest would *not* be served by any Commission action which hinders or delays the ongoing deployment of fixed wireless broadband systems in residential markets. Those services would include MDS/ITFS-based fixed wireless broadband

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required to make service available."), *at* http://www.opsmag.com/features/2000/icps_+_dsl_=_challenges.htm.

[17] *See, e.g., Preemption of Local Zoning Regulation of Satellite Earth Stations and Implementation of Section 207 of the Telecommunications Act of 1996 and Restrictions on Over-the-Air Reception Devices (First Report and Order)*, 11 FCC Rcd 19276, 19287 (1996) (noting that prior approval and fee requirements "can impede a service provider's ability to compete, since customers will ordinarily select a service less subject to uncertainty and procedural requirements").

[18] *First R&O* at ¶ 101.

[19] *Id.* at ¶ 103.

service, which the Commission has recognized is uniquely suited for serving underserved areas.[20] 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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[20] *See, e.g., Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services (Fifth Annual Report)*, FCC 00-289, Appendix E at 8 (2000) ("[MDS/ITFS] transmissions have a greater radius than upperband fixed wireless service, generally 35 miles versus three to five miles for upperband services. This is partly due to the fact that [MDS/ITFS] signals are less attenuated by rain and other severe weather conditions. [MDS/ITFS's] larger radius makes the service well-suited for not only residential customers, but customers in rural, underserved, and unserved areas as well.").

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

[22] *See* "Sprint Files For Two-Way MMDS Licenses In 45 Major Markets" (Aug. 22, 2000), *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, any language in the *First R&O* which unintentionally narrows the scope of the Rule's safety exception will only produce the opposite result. WCA therefore asks that the Commission eliminate any potential confusion over this matter by clarifying that the safety exception to the Rule continues to apply in all respects to *any* professional installation requirements that may be adopted by non-federal entities for subscriber premises fixed wireless transceivers.

WHEREFORE, for the reasons set forth above, WCA requests that the Commission clarify its *First R&O* in WT Docket No. 99-217 in accordance with the recommendations set forth herein.

Respectfully submitted,

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