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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

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OPPOSITION OF NATOA, EMR NETWORK
AND COUNCIL ON WIRELESS TECHNOLOGY IMPACTS
TO PETITIONS FOR RECONSIDERATION

The National Association of Telecommunications Officers and Advisors ("NATOA"), EMR Network and the Council on Wireless Technology Impacts ("CWTI")[1] hereby oppose the Petitions for Reconsideration of the Commission's Orders of last October (FCC 00-366), filed

[1] NATOA is a 20-year-old national association representing the telecommunications needs and interests of local governments, and those who advise local governments. Its web address is www.natoa.org. The EMR Network is a non-profit corporation, based in Marshfield, Vermont, of "citizens and professionals for the responsible use of electromagnetic radiation." More information can be found at www.EMRNetwork.org. CWTI is composed of "citizens and professionals concerned about safe uses of electromagnetic radiation." www.energyfields.org.

February 12, 2001 in the captioned proceedings by Satellite Broadcasting and Communications Association jointly with the Satellite Industry Association's Broadband & Internet Division ("SBCA/SIA") and by the Wireless Communications Association International, Inc. ("WCA").

SBCA/SIA ask the Commission to (1) "clarify that its regulations regarding radiofrequency ("RF") emission safety issues, which are applicable to all FCC-regulated transmitters including fixed wireless antennas, preempt state and local authorities and homeowners associations from adopting different RF exposure standards;" and (2) rescind the permission granted local governments, property owners and homeowner associations to require professional installation of fixed wireless transceivers. (Petition, 2)

WCA essentially seeks to gut the professional installation allowance by asking the FCC to "clarify that the [OTARD] Rule's safety exception applies with equal force to any professional installation requirements adopted by non-federal authorities for subscriber premises fixed wireless transceivers." (Petition, 3) Unlike SBCA/SIA, WCA acknowledges that "this proceeding is not the proper forum" for preempting "*all* non-federal RF-related antenna restrictions that conflict with the Commission's existing RF safety rules." (Petition, 7, n.14) It goes on to suggest, however, that a "per se preemption" would be a fine idea.

SBCA/SIA's preemption request must be dismissed out of hand as beyond the pale of this rulemaking. If not dismissed, it should be denied for all the reasons discussed below. WCA's discussion of the topic should be stricken for the same reason that SBCA/SIA's plea must be dismissed. As to the professional installation requirement challenged in slightly different ways by the two Petitioners, the Commission has made the correct and prudent safety call. Both Petitions should be denied on this issue.

I. THE SBCA/SIA PREEMPTION REQUEST IS IRREGULAR, UNLAWFUL AND UNSOUND.

WCA is correct that these proceedings are not the "proper forum" for considering extension of the Commission's narrow, statute-based preemption of non-federal RF radiation standards.[2] Even if the FCC possessed the authority to expand the statutory RF preemption, which we doubt, it would be a manifest violation of the Administrative Procedure Act ("APA") to do so without the required notice to the public.[3]

NATOA, EMR Network and CWTI have no doubt that the rules implementing the National Environmental Policy Act ("NEPA") at 47 C.F.R. §§1.1307 and 1.1310 apply to fixed wireless transceivers. (Petition, 3) But this does not make preemptive the maximum permissible exposure ("MPE") limits in those regulations. The only restriction on non-federal authorities in these regulations is found at Section 1.1307(e) and is expressly limited to "personal wireless service facilities." This narrow authority derives from a limited provision in the Communications Act applying to such facilities, 47 U.S.C.§332(c)(7)(B)(iv). OTARD fixed wireless transceivers, of course, are not personal wireless service facilities. (Orders, ¶¶99, n.256, and 101)

The Commission has been asked at least three times in the past five years to assert its authority, apart from Section 332(c)(7)(B)(iv), to expand the RF safety standards preemption beyond personal wireless services. Twice it has explicitly refused, and in the third case it has deferred action for so long as to be tantamount to rejection. In the course of recently amending the NEPA rules, the Commission stated first:

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[2] 47 U.S.C. §332(c)(7)(B)(iv), applicable to personal wireless service facilities only, and implemented at 47 C.F.R. §1.1307(e).

[3] 5 U.S.C. §§551, 553.

> 167. The Telecommunications Act does not preempt state or local regulations relating to RF emissions of broadcast facilities or other facilities that do not fall within the definition of "personal wireless services." It would appear from comments that a few such regulations have been imposed, generally as a result of health and safety concerns. At this point, it does not appear that the number of instances of state and local regulation of RF emissions in non-personal wireless services situations is large enough to justify considering whether or not they should be preempted. We have traditionally been reluctant to preempt state or local regulations enacted to promote bona fide health and safety objectives. We have no reason to believe that the instances cited in the comments were motivated by anything but bona fide concerns.[4]

The Commission thus denied all petitions and comments "requesting a broad-based preemption policy to cover all transmitting sources." *Id.*

On reconsideration, the Commission stood fast on the same ground:

> 88. Based upon the current record in this proceeding, we find that there is insufficient evidence at this time to warrant our preempting state and local actions that are based on concerns over RF emissions for services other than those defined by Congress as "personal wireless services."[5]

Noting that three months earlier the National Association of Broadcasters ("NAB") had filed a similar request for broad preemption of local and state actions affecting the siting of broadcast facilities, the Commission deferred consideration to a later time. That was 1997. Nearly four years later, the FCC has found no cause to act on the NAB petition.

There is even less cause to consider the SBCA/SIA preemption request here. In 1996 and 1997, the Commission was working from some sort of record. Here there is no documentation for two good reasons. First, comments were not requested on the subject. Second, no party

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[4] Environmental Effects of Radiofrequency Radiation (ET Docket 93-62), 11 FCC Rcd 15123, 15183-84 (1996).

[5] Second Memorandum Opinion and Order, 12 FCC Rcd 13494, 13529 (1997)

presented, even without invitation, facts to suggest that local and state regulation of RF radiation from non-preempted sources (a) was common at all, much less prevalent, or, if extant, (b) was obstructing federal purposes in radio licensing.

From the foregoing, it is plain that FCC preemption of non-federal regulation based on RF safety concerns is neither "implicit in the Order" nor necessitated by national occupation of the field. (Petition, 4) Mere reference to RF exposure guidelines in federal regulations, and simple acknowledgment of those guidelines, *Id.* at note 7, does not make the regulations preemptive. Despite SBCA/SIA's conflation (Petition, 5) of Congressional instructions given the FCC in the respective Sections 207 (OTARD rules) and 704 (personal wireless facilities zoning rules) of the Telecommunications Act of 1996, the two sets of instructions had nothing to do with each other. Each had its own narrow purpose not touching the other.

Possessing neither a factual nor a legal basis for their request, SBCA/SIA resort to speculation. "[S]tate and local regulation, by interfering with the deployment of innovative fixed wireless technologies to the public, *would pose* an obstacle" to Congress' intentions to promote telecommunications competition and deployment of advanced capabilities. (Petition, 6, emphasis added) At other points, the most the Petitioner can come up with is some future "opportunity to impose conflicting and more onerous RF limits" (page 9) or hypothetical "regulations that potentially conflict" (page 10) with FCC standards.

The Commission emphasized in 1996 and 1997, and should say again here, that its natural and understandable reluctance to preempt state and local regulations motivated by RF safety concerns can only be overcome by a factual record compelling federal action. Such a record was not called for in this proceeding and has not emerged. The SBCA/SIA petition for expanded preemption must be denied, if not dismissed.

II. PROFESSIONAL INSTALLATION OF FIXED WIRELESS TRANSCEIVERS IS A JUSTIFIED LOCAL SAFETY OPTION.

WCA and SBCA/SIA ask the Commission to reconsider its decision to permit "local governments, associations and property owners" to "require professional installation for transmitting antennas." (Orders, ¶119). The Commission explained that it was distinguishing the fixed wireless case of two-way transmission from the video, receive-only communications characteristic of the prior OTARD rules.

The distinction is justified for all the safety reasons outlined in note 296 of the Orders, and must be maintained. For the "usual prohibition" on requirements of professional installation for receive-only small dishes, the Commission cites a case in which safety was never a defense and the installer's sole purpose was to certify, from a technical perspective, that a "non-preferred" location for the antenna was essential to adequate video reception. The Commission found that "requiring an antenna user to hire an installer solely to provide a certificate is an unreasonable expense that violates the [OTARD] Rule."[6]

The fixed wireless case is nothing like that. The Commission supplies all the precautionary reasons why not only fixed wireless but also LMDS and MMDS subscriber-premise installations could be dangerous enough to warrant safety "interlock" features that would automatically shut down transmissions when blocked by intervening objects or prevent their startup if the transceiver is improperly installed.[7] In fact, by comparison with the safety requirements for LMDS and MMDS transceivers on customer premises, the fixed wireless rules

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[6] *Michael J. MacDonald*, 13 FCC Rcd 4844, 4853 (1997).

[7] Interlocks to enable shut-off upon blocking of transmission are elective but strongly encouraged; prevention of faulty startup is mandatory for MMDS transceivers. Reconsideration Order, Docket 97-217, 14 FCC Rcd at ¶29. Interlock requirements may be justified by local governments, homeowner associations and owners for safety reasons.

are more hortatory than mandatory. This is no time to diminish their protection further by rescinding the professional installation option.

It is no answer to speculate (SBCA/SIA Petition, 10) that the professional installation allowance is "susceptible to being misapplied . . . in a manner that may unduly constrain the deployment" of satellite dishes. If detrimental misapplication occurs, it can be remedied at the time. Nor is it persuasive to compare the "subscriber self-installation" allegedly now available to cable modem and DSL customers. (WCA Petition, 7) So far as we can determine, that self-installation, if available, refers to wire transmission and not radio. Clearly, different safety considerations apply to the latter. Furthermore, the professional installation requirement is an option for owners and governments, not a mandate.

WCA seems to be asking for less in not seeking direct rescission of the professional installation option. Instead, it desires only the FCC's "clarifying that the safety exception to the [OTARD] 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." That might as well be rescission.

The Commission's application of the prior OTARD regulation demonstrates its conviction that one-way video reception at small wireless dishes rarely, if ever, raises legitimate safety concerns. (note 6, *supra*, and accompanying text) Accordingly, the so-called "safety exception" has been scrutinized virtually out of existence. The fixed wireless case here is different. Notes 294 and 296, and their accompanying text, create a firm presumption of safety hazard which non-federal authorities may – but are not required to – meet with a professional installation requirement.

Thus, any safety exception for the fixed wireless professional installation option must operate entirely differently from the old OTARD safety exception. It must begin from the recognition that the Commission, in these Orders, has found enough potential danger to permit the discretionary application of professional installation. The burden must be on the service provider to overcome this strong presumption. Rather than invite legal wrangling, the Commission should simply keep the professional installation allowance as it now reads. Since it is optional, let fixed wireless service providers explain to non-federal authorities why amateur installation is perfectly safe.

CONCLUSION

For the reasons discussed above, the Petitions for Reconsideration of SBCA/SIA and WCA should be dismissed or denied.

Respectfully submitted,

NATOA, EMR NETWORK, CWTI

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CERTIFICATE OF SERVICE

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