

MAR 14 2001

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Promotion of Competitive Networks	)	WT Docket No. 99-217
in Local Telecommunications Markets	)	
	)	
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	)	CC Docket No. 96-98
Provisions in the Telecommunications Act of 1996	)	

**OPPOSITION TO PETITION FOR RECONSIDERATION**

The Wireless Communications Association International, Inc. ("WCA") hereby submits its opposition to the Petition for Reconsideration ("Petition") filed on behalf of the Real Access Alliance ("RAA") in the above-captioned proceeding.

**I. INTRODUCTION.**

Ostensibly, RAA is challenging the Commission's decision in the *First Report and Order* (the "*First R&O*") in WT Docket No. 99-217 to extend the antenna preemption rule (47 C.F.R. § 1.4000, hereinafter the "Rule") to all small subscriber premises fixed wireless antennas, regardless of the services they provide or the frequencies they use. In reality, however, RAA's challenge is far

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narrower: referring back to the Commission's 1998 *Second Report and Order* in CS Docket No. 96-83, RAA reargues that the Commission had no authority in that proceeding to extend the Rule to antenna installations in rental properties, and, by inference, that the Commission's further extension of the Rule in the *First R&O* to all small subscriber premises fixed wireless antennas should not apply to any antenna installation within a tenant's individual leasehold. At a minimum, then, RAA's Petition cannot be a basis for reconsideration of the *First R&O* where antenna installations on *owned* property are concerned. Moreover, the remainder of RAA's Petition is little more than a collection of scattershot legal arguments that the Commission has already rejected or that otherwise are simply wrong. Finally, RAA takes no notice of the unique and substantial benefits that fixed wireless broadband providers and their customers have already realized by virtue of the fact that the Rule now protects small subscriber premises fixed wireless antennas used for broadband services exclusively. Simply stated, RAA's Petition offers no justification for the Commission to reconsider its decision in the *First R&O* to extend the Rule to all small subscriber premises fixed wireless antennas, and thus RAA's Petition should be denied.

## **II. DISCUSSION.**

### *A. RAA's Petition Does Not Provide a Basis for Reconsideration of the First R&O.*

In the *First R&O*, the Commission amended the Rule so that it protects all small subscriber premises fixed wireless 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.<sup>1/</sup> 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. The Commission determined in the *First R&O* 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,”<sup>2/</sup> and that extension of the Rule to all small subscriber premises fixed wireless antennas “will foster the deployment of advanced telecommunications services.”<sup>3/</sup> Because the amended Rule does not distinguish between antenna installations on owned or rented property, it applies to (1) public restrictions (*e.g.*, local zoning ordinances, building codes) on antenna installations on property owned by a fixed wireless subscriber (*e.g.*, single family dwellings), (2) private restrictions (*e.g.*, homeowners’ association covenants) on antenna installations on property owned by a fixed wireless subscriber, and (3) public or private (*e.g.*, landlord-imposed) restrictions on antenna installations within a tenant’s individual leasehold (*e.g.*, the tenant’s balcony, terrace, patio etc.).

At the outset, it is important to recognize the narrow, indirect nature of RAA’s challenge to the Commission’s amendment of the Rule in the *First R&O*. RAA represents the interests of landlords, and thus its Petition is devoted exclusively to stopping preemption of antenna restrictions

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<sup>1/</sup> *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*”).

<sup>2/</sup> *Id.* at ¶ 101.

<sup>3/</sup> *Id.* at ¶ 103.

imposed in *rental* properties.<sup>4/</sup> Accordingly, RAA's Petition is relevant only insofar as the amended Rule applies to public and private restrictions on antenna installations within a tenant's individual leasehold. RAA's Petition thus has no bearing on the amended Rule's applicability to any public or private restrictions on the substantial number of antenna installations on property *owned* by fixed wireless subscribers. At a minimum, then, any Commission *Order* disposing of RAA's Petition should make clear that under no circumstances are antenna installations on owned property implicated by RAA's Petition.

Furthermore, the lion's share of RAA's challenge to the amended Rule's applicability in the rental environment lies in its contention that the Commission had no authority in its 1998 *Second Report and Order* in CS Docket No. 96-83 to apply the Rule to antennas installed within a tenant's individual leasehold.<sup>5/</sup> RAA notes that it has already appealed that decision to the United States Court of Appeals for the District of Columbia Circuit, and indeed RAA's Petition incorporates by reference RAA's entire opening brief before the Court.<sup>6/</sup> Again, however, since RAA's appeal before the D.C. Circuit is limited exclusively to the Rule's applicability to antenna installations on rental property, the D.C. Circuit's resolution of that case cannot be a basis for reconsideration of the *First R&O* insofar as antenna installations on owned property are concerned.

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<sup>4/</sup> See *Building Owners and Managers Association International et al. v. FCC* at ii n.1, Case No. 99-1009 (D.C. Cir., filed Jan. 7, 1999) (the "RAA Brief") ("The [Real Access] Alliance was formed to encourage free market competition 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.").

<sup>5/</sup> 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).

<sup>6/</sup> See Petition at 10-11. It is worth noting that in the *First R&O* the Commission 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.

Elsewhere in its Petition, RAA relies on arguments that the Commission has already rejected or that otherwise are simply wrong. In particular, RAA takes the Commission to task for “freely breach[ing] Section 207’s limitation to receive-only video programming services,” and generally asserts that the Commission’s decision in the *First R&O* falls outside the boundaries of the Commission’s preemption authority under Sections 303 and 4(i) of the Communications Act of 1934, as amended.<sup>77</sup> As discussed at length in the *First R&O*, the “video” language in Section 207 is not determinative here, since Section 207 is not the source of the Commission’s statutory authority to expand the Rule so that it covers all small subscriber premises fixed wireless antennas. Rather, Section 207 merely directed the Commission to exercise its *pre-existing* authority under Section 303 of the Communications Act of 1934 in a manner which ensures protection of a particular class of small subscriber premises fixed wireless antennas, *i.e.*, those used to receive video programming service via MDS, ITFS, LMDS, DBS or off-air television.<sup>87</sup> In turn, Section 303, in tandem with Section 4(i) and other provisions of the 1934 Act, provides the statutory basis for the Commission’s exercise of preemption authority over antennas not specifically identified in Section 207.<sup>97</sup> Indeed,

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<sup>77</sup> Petition at 13.

<sup>87</sup> *First R&O* at ¶ 106. See also *Preemption of Local Zoning Regulation of Satellite Earth Stations*, 11 FCC Rcd 5809, 5812 (1996) (“Congress has made clear [in Section 207] that, *at a minimum*, we must preempt restrictions imposed on a subset of all satellite earth station antennas, [*i.e.*] all DBS antennas . . . . We believe that nothing in the new legislation affects our broad authority to preempt state and local zoning regulations that burden a user’s right to receive all satellite-delivered video programming (not just the subset specifically singled out by Congress in Section 207) or that inhibit the use of transmitting antennas.”) (footnote omitted) (emphasis added).

<sup>97</sup> *First R&O* at ¶ 105 (“Section 303 prescribes the general powers of the Commission with respect to radio transmissions. Specifically, it authorizes us to ‘[m]ake such rules . . . as may be necessary to carry out the provisions of [the] Act.’ Section 4(i) provides that ‘[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.’ Federal courts have consistently recognized that these provisions give the Commission broad authority to take actions that are not specifically encompassed within any statutory provision but that are reasonably necessary to advance the purposes of the Act.”) (footnotes omitted).

the Commission pointed out that it had exercised preemption authority over non-federal antenna restrictions well before passage of Section 207,<sup>10/</sup> and to this day the Commission continues to exercise that authority regardless of whether the antenna in question is mentioned in the statute.<sup>11/</sup>

RAA's Petition offers no basis for the Commission to retreat from these findings. Specifically, RAA's Section 207/Section 303 argument appears to arise from its presumption that the Commission's amendment of the Rule in the *First R&O* is an assertion of direct jurisdiction over building owners.<sup>12/</sup> Here again, however, RAA is challenging the Commission's authority to extend the Rule to antenna installations in rental properties, a matter which is already on appeal to the D.C. Circuit.<sup>13/</sup> Also wrong is RAA's suggestion that the Commission's amendment of the Rule in the

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<sup>10/</sup> *Id.* at ¶ 106 n.272, citing *Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations*, 59 Rad. Reg. 2d (P&F) 1073 (1986); *Earth Satellite Communications, Inc.*, 95 FCC 2nd 1223 (1983) (preempting state and local regulation of SMATV systems), *aff'd sub nom. New York State Commission on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984).

<sup>11/</sup> *See, e.g., Petition of Atlantic Satellite Corporation*, DA 00-2023 (Int. Bur., rel. Sept. 5, 2000) (preempting local government restrictions on antennas placed on commercial property that transmit national and international broadcast services to the public, and that deliver news feeds to television broadcast stations). RAA's attempt to distinguish the cases cited by the Commission at footnote 261 of the *First R&O* fails entirely. By way of example, in the passage RAA quotes from *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 381 n.8 (1999) (Petition at 15), the United States Supreme Court was merely noting that the Commission may not use its ancillary jurisdiction to regulate "any aspect of intrastate communication not governed by the 1996 Act." Since there is no dispute in this proceeding that fixed wireless transmissions constitute *interstate* communications that fall safely within the Commission's jurisdiction, the quoted language is irrelevant. In the language RAA quotes from *Rural Tel. Coalition v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988) (Petition at 16), the D.C. Circuit was only hypothesizing that the Commission could be ruled to have exceeded its authority under Section 4(i) if it were to "propose[] the Universal Service Fund for the purpose of subsidizing the incomes of impoverished telephone users." Save for its pejorative claim that "landlord-tenant relations [is not] among the FCC's functions," RAA does not explain why this observation is pertinent to the Commission's authority to preempt non-federal antenna restrictions. Finally, while RAA quotes the 7<sup>th</sup> Circuit's admonition that Section 4(i) "is not infinitely elastic," it offers nothing aside from its standard landlord-tenant rhetoric that explains how that principle has been violated here. *See* Petition at 16, quoting *North American Telecommunications Ass'n v. FCC*, 772 F.2d 1282, 1292 (7<sup>th</sup> Cir. 1985).

<sup>12/</sup> *See, e.g.,* Petition at 13 ("Read together, Sections 1 and 2 [of the Communications Act of 1934] are general statements of the Commission's jurisdiction which include only persons 'engaged in communication by wire or radio.' MTE owners are not so engaged . . ."), 14 ("Even if the Commission were to determine that it can exercise ancillary authority over building owners, there are limits on the extent of that authority.").

<sup>13/</sup> *See, e.g.,* RAA Brief at 21-22.

*First R&O* gives competing telecommunications providers a right of mandatory access to multi-tenant property.<sup>14/</sup> As noted by the Commission, “[t]he extension of the OTARD rules may not give every potential customer of fixed wireless service an effective right to place a covered antenna. In particular, the action we take today does not confer a right as against the building owner in restricted or common use areas in commercial or residential buildings, like most rooftops.”<sup>15/</sup> Furthermore, RAA’s “mandatory access” argument takes no account of the fact that the Commission has fully preserved the Rule’s pre-existing safety exception, and thus building owners may still 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 objective at issue.<sup>16/</sup>

*B. RAA Has Completely Ignored the Public Interest Benefits of Extending the OTARD Rule to Small Subscriber Premises Fixed Wireless Antennas Used For Broadband Services Exclusively.*

As it has done repeatedly throughout this proceeding, RAA avoids any discussion of the substantial harm that will befall fixed wireless broadband providers and their customers were the Commission to continue to deny small subscriber premises broadband antennas the same level of

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<sup>14/</sup> Petition at 15 (“[T]he proponents have not come close to demonstrating that mandatory access to MTEs is imperative for the achievement of the FCC’s purposes.”).

<sup>15/</sup> *First R&O* at ¶ 124. RAA contends that “it is hardly rational to bias placement of fixed wireless service antennas toward tenant premises when a safer, less aesthetically displeasing solution is available through market negotiation for rooftop access.” Petition at 12. Once more, RAA’s complaint is directed at the Commission’s 1998 decision to extend the Rule to antenna installations with a tenant’s individual leasehold. In any case, as discussed *infra*, RAA’s concerns about safety are more than adequately addressed through the Rule’s “safety exception,” which the *First R&O* preserves in full.

<sup>16/</sup> See 47 C.F.R. § 1.4000(b); see also *First R&O* at ¶ 117. 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. See 47 C.F.R. § 1.4000(a).

preemption protection already accorded to similar antennas used to receive video services.<sup>17/</sup> The timely rollout of fixed wireless broadband service has been threatened of late by an increasing number of antenna restrictions imposed by non-federal entities on small subscriber premises fixed wireless antennas used for high-speed Internet access service exclusively.<sup>18/</sup> Since adoption of the amended Rule, however, fixed wireless broadband providers have begun to see a marked decrease in the number of attempts by those same entities to impose unreasonable restrictions on “broadband only” antennas.

Clearly, then, the public interest would *not* be served by a grant of RAA’s Petition, particularly as it relates to subscriber premises antennas used for MDS/ITFS-based broadband service. The Commission recently reaffirmed that MDS/ITFS-based broadband service is “intended to provide affordable service to those market sectors that are more likely to be underserved and provide a competitive choice to consumers in more urban and more affluent markets.”<sup>19/</sup> In a similar vein, the Commission also found that “in rural or otherwise underserved markets in the country,

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<sup>17/</sup> Oddly, RAA contends that the 1996 Act “did not expressly seek to promote competition or advance the deployment of fixed wireless service.” Petition at 12. In fact, the Commission has recognized in a number of proceedings that Section 706 of the 1996 Act directs the Commission to promote wireless broadband deployment on a technology-neutral basis and thus applies with equal force to fixed wireless services. *See, e.g., Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, ET Docket No. 00-258, FCC 00-455, at ¶ 1 (rel. Jan. 5, 2001); *Amendment of Parts 2 and 25 of the Commission’s Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range et al.*, FCC 00-418, ET Docket No. 98-206, at ¶ 1 (rel. Dec. 8, 2000).

<sup>18/</sup> *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).

<sup>19/</sup> “Interim Report - Spectrum Study of the 2500-2690 MHz Band: The Potential for Accommodating Third Generation Mobile Systems,” ET Docket No. 00-232, *FCC Staff Report*, at 57 (emphasis added) (the “*FCC Interim Report*”).

ITFS/MDS may be the sole provider of broadband service.”<sup>20/</sup> Indeed, Sprint alone has already launched the service in a dozen markets,<sup>21/</sup> and WorldCom has acquired MDS/ITFS licenses and spectrum rights covering more than 31 million households.<sup>22/</sup> Moreover, there are a number of smaller, independent MDS/ITFS operators that are or soon will be offering MDS/ITFS broadband service in rural and smaller markets in, *inter alia*, Alabama, Louisiana, Pennsylvania, Tennessee, Virginia, California, Colorado, Florida, Oregon, Wyoming, South Dakota, Michigan, Utah, Alaska, Arizona, Iowa, Maryland, Maine, Ohio, Idaho and Montana.<sup>23/</sup> RAA, on the other hand, would have the Commission ignore these developments and restore the former “video only” Rule, solely for the purpose of permitting landlords to dictate when and where their tenants may place small fixed wireless broadband antennas within their individual leaseholds. The Commission has not found RAA’s position compelling before, and should not do so now. RAA’s Petition should be denied.<sup>24/</sup>

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<sup>20/</sup> *Id.* at 22.

<sup>21/</sup> See “Sprint Introduces New Broadband Wireless Service to Fresno’s Residential and Small Business Customers,” Sprint Broadband Direct Press Release (Jan. 23, 2001). 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. “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>>).

<sup>22/</sup> See Comments of WorldCom, Inc., ET Docket No. 00-258, at 6 (filed Feb. 22, 2001). WorldCom is currently providing commercial MDS/ITFS-based broadband service in Baton Rouge, LA; Memphis, TN; and Jackson, MS, and is planning to provide service in 30 markets by the end of this year. *Id.* In addition, 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. *FCC Interim Report*, Appendix 3.3 at A-41. It plans to launch the service in 15-20 markets by the end of 2001. *Id.*

<sup>23/</sup> *FCC Interim Report*, Appendix 3.3 at A-42-43.

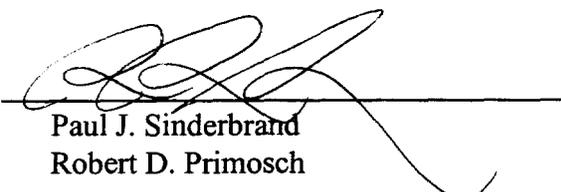
<sup>24/</sup> WCA also notes that a Petition for Clarification and Partial Reconsideration has been filed in this proceeding by the Satellite Broadcasting and Communications Association/Satellite Industry Association Broadband & Internet Division, requesting that the Commission clarify that its RF safety rules for subscriber premises fixed wireless antennas will preempt any inconsistent RF safety rules that may be adopted by non-federal entities as a result of the *First R&O*. See Petition for Clarification and Partial Reconsideration of the Satellite Broadcasting and Communications Association/Satellite Industry Association Broadband & Internet Division, WT Docket No. 99-217, at 3-10 (filed Feb. 12, 2001). WCA agrees that the Commission eventually will need to evaluate whether the rapid deployment of fixed

WHEREFORE, for the reasons set forth above, WCA requests that the Commission deny the Petition for Reconsideration filed in the above-captioned proceeding by the Real Access Alliance.

Respectfully submitted,

THE WIRELESS COMMUNICATIONS  
ASSOCIATION INTERNATIONAL, INC.

By: \_\_\_\_\_

  
Paul J. Sinderbrand  
Robert D. Primosch

WILKINSON BARKER KNAUER, LLP  
Suite 700  
2300 N Street, NW  
Washington, DC 20037-1128  
202.783.4141

Its Attorneys

March 14, 2001

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wireless broadband service is truly promoted by permitting local governments, homeowners associations and landlords to impose their own RF or other safety restrictions based on technical matters (including professional installation) in which they have no expertise, particularly where the Commission itself has already considered and adopted regulations that address those very same matters. Accordingly, 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 small subscriber premises fixed wireless antennas, subject to waiver in exceptional circumstances. If, however, the Commission believes that reconsideration of the *First R&O* is not the appropriate forum for a review of this issue, then WCA would support the issuance of a *Second Further Notice of Proposed Rule Making* in this proceeding to give all interested parties an opportunity to provide additional comments for inclusion into the record.

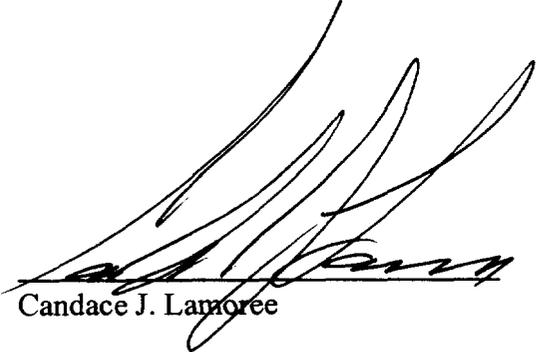
## CERTIFICATE OF SERVICE

I, Candace J. Lamoree, hereby certify that on this 14th day of March, 2001, copies of the foregoing "Opposition to Petition for Reconsideration" were sent via U.S. mail, first class, postage prepaid upon the following:

Matthew C. Ames  
James R. Hobson  
Nicholas P. Miller  
Miller & Van Eaton, P.L.L.C.  
Suite 1000  
1155 Connecticut Avenue, N.W.  
Washington, D.C. 20036-4306

Joel Taubenblatt\*  
Federal Communications Commission  
Wireless Telecommunications Bureau  
The Portals  
445 12th Street, S.W.  
Washington, D.C. 20554

Lauren Van Wazer\*  
Federal Communications Commission  
Wireless Telecommunications Bureau  
The Portals  
445 12th Street, S.W.  
Washington, D.C. 20554



Candace J. Lamoree

\*Indicates hand delivery.