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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. <u>99-217</u>
	)	
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	)	

MEMORANDUM OPINION AND ORDER

Adopted: April 17, 2001

Released: April 18, 2001

By the Deputy Chief, Wireless Telecommunications Bureau:

I. Introduction

1. On January 8, 2001, the Real Access Alliance ("RAA")<sup>1</sup> filed a Motion for Stay ("Motion") of certain rules promulgated in the First Report and Order in WT Docket 99-217, the Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and the Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57 (collectively, the "Order"), FCC 00-366, adopted October 12, 2000 and released October 25, 2000.<sup>2</sup> Specifically, RAA requests that the Commission stay the effectiveness of the portions of

<sup>1</sup> The Real Access Alliance is a consortium of real estate interests, including 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 Multihousing Council, and the Real Estate Roundtable.

<sup>2</sup> The Order was published in the Federal Register on January 11, 2001. Promotion of Competitive Networks in Local Telecommunications Markets, 66 Fed. Reg. 2,322 (Jan. 11, 2001).

the Order, and corresponding rules, that extend antenna placement protections, codified at 47 C.F.R. Section 1.4000, to customer-end antennas used for transmitting and/or receiving fixed wireless signals. The Motion requests that the Commission stay the effectiveness of the new rules until the Further Notice associated with the Order “is resolved” or until the U. S. Court of Appeals for the D.C. Circuit renders a decision on RAA’s pending challenge to the existing Section 1.4000.<sup>3</sup> For the reasons discussed below, we deny the Motion.

## II. Background

2. The Commission’s current rules allow antennas users to place certain types of antennas on property in which they have a direct or indirect ownership or leasehold interest in order to receive television broadcast signals, direct broadcast satellite services, and multichannel multipoint distribution services.<sup>4</sup> These types of antennas are commonly referred to as Over-the-Air Reception Devices (“OTARDs”). Homeowner associations, landlords, state and local governments, and other third parties may not place restrictions that impair an antenna user’s ability to install, maintain, or use such antennas within the antenna user’s property or leasehold, with some narrow exceptions for safety and historic preservation.<sup>5</sup> The new rules expand upon the types of services that will receive these protections.<sup>6</sup> More specifically, they extend the protections to antennas of the same physical type used for transmitting and/or receiving any fixed wireless signals. Fixed wireless signals include any commercial nonbroadcast communications signals transmitted via wireless technology to or from a customer location.<sup>7</sup> Because these rules require antennas used for these purposes to meet additional labeling requirements, pursuant to the Paperwork Reduction Act (“PRA”), the Office of Management and Budget (“OMB”) must

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<sup>3</sup> Motion at 8. In *Building Owners and Managers Ass’n International, et al v. Federal Communications Commission and United States of America*, No. 99-1009, (D.C. Cir.), RAA is challenging the existing Commission rules prohibiting restrictions on the placement of customer-end antennas for receiving certain video services, insofar as these rules apply to restrictions on use of rental property or in rental leases. In the Order, the Commission extended these rules to antennas used for fixed wireless services.

<sup>4</sup> See 47 C.F.R. § 1.4000; 47 U.S.C. § 303 (note). Specifically, the protections apply to “(i) [a]n antenna that is designed to receive direct broadcast satellite service, including direct-to-home satellite services, that is one meter or less in diameter or is located in Alaska; (ii) [a]n antenna that is designed to receive video programming services via multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services, and that is one meter or less in diameter or diagonal measurement; (iii) [a]n antenna that is designed to receive television broadcast signals; or (iv) [a] mast supporting [such] an antenna . . . .” 47 C.F.R. § 1.4000(a)(1).

<sup>5</sup> See 47 C.F.R. § 1.4000(b)(1)(safety exception); 47 C.F.R. § 1.4000(b)(2)(historic preservation exception).

<sup>6</sup> Order at ¶¶ 97-100.

<sup>7</sup> Order at ¶ 97.

approve the additional labeling requirements associated with these antennas before the rules can become effective.<sup>8</sup> As a result, although we do not know the effective date of these rules with certainty, we anticipate that they will become effective in mid-May 2001.

3. As noted above, RAA filed its Motion on January 8, 2001. Subsequently, on January 18, 2001, the Wireless Communications Association International, Inc. ("WCA") filed a motion for extension of time within which to respond to RAA's Motion. On January 19, 2001, the Commercial Wireless Division ("the Division") issued a Public Notice granting WCA's motion for extension of time until January 26, 2001.<sup>9</sup> The Division received five comments regarding the Motion from the following parties: AT&T Wireless Services; Hughes Electronics Corp.; Satellite Broadcasting and Communications Association/Satellite Industry Association Satellite Broadband and Internet Division; Smart Buildings Policy Project; and WCA. All of these commenters oppose RAA's Motion.

### III. Discussion

4. Generally, parties seeking a stay of a Commission order must demonstrate the following: 1) a likelihood of success on the merits; 2) irreparable harm to the party seeking stay, if a stay is not granted; 3) lack of significant harm to other parties; and 4) a stay would serve the public interest.<sup>10</sup> If, however, a party makes a strong showing on the other three factors, the motion for stay may be granted, despite a weaker showing of likelihood of success on the merits.<sup>11</sup> We will address RAA's argument with respect to each of the relevant factors in turn.

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<sup>8</sup> Paperwork Reduction Act of 1995, Public Law 104-13. The PRA requires OMB approval of any requirement that imposes a paperwork burden on the public.

<sup>9</sup> Commercial Wireless Division Grants Wireless Communications Association International, Inc. Request for Extension For 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, *Public Notice*, DA 01-123 (rel. Jan. 19, 2001).

<sup>10</sup> See *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*per curiam*)(*Virginia Petroleum Jobbers Ass'n*)(setting forth requirements for stay), as modified by, *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)(*Washington Metropolitan Area Transit Comm'n*)(slightly modifying requirements for stay); see also AVR, L.P. D/B/A Hyperion of Tennessee, L.P. Petition for Preemption of Tennessee Code Annotated Section 65-4-201(D) and Tennessee Regulatory Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Areas, FCC 01-3, CC Docket No. 98-92, n.5 (rel. Jan. 8, 2001) (noting that, when considering a motion for stay, the Commission applies the four-part test set forth in *Virginia Jobbers Ass'n*, subsequently modified by *Washington Metropolitan Transit Comm'n*).

<sup>11</sup> As the D.C. Circuit noted in *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977), a court or agency "when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a

5. While acknowledging that “[i]t is not possible . . . to predict or prejudge the likelihood” that RAA’s arguments will ultimately prevail, RAA nonetheless asserts that the Commission exceeded its statutory authority when it extended OTARD protections to transmit and receive antennas used for non-video services.<sup>12</sup> In particular, RAA argues that “the Commission had no statutory authority to extend the OTARD rule to leased property; . . . the Commission has no inherent takings power, and Section 207 does not expressly direct the Commission to take the property of building owners . . . .”<sup>13</sup> Rather than demonstrating that it will prevail on the merits, RAA simply reiterates arguments that it relied on in its comments and reply comments. Indeed, RAA admits that “these arguments have been made in earlier” filings.<sup>14</sup> In the Order, the Commission noted RAA’s arguments regarding statutory authority, but ultimately rejected them.<sup>15</sup> We conclude that RAA has not shown that it is likely to prevail on the merits. As noted above, however, a party may still be granted a stay if it makes an especially strong showing with respect to the other factors of the stay test. With that standard in mind, we will now review RAA’s showing with regard to the other stay factors.

6. For the second factor of the stay test, a party must show that it will incur irreparable harm in the absence of a stay. RAA argues that the extension of the OTARD rules to transmit antennas creates a “human health and safety hazard because they both transmit and receive radio energy at the office or apartment premises of the tenant subscriber.”<sup>16</sup> RAA argues that the Commission’s new rules leave too much discretion for safety to the licensee, that the rules provide insufficient safety protections as compared with other Commission-regulated services, and that building owners will bear the resulting burdens for protecting “against the potential human health hazards of [radiofrequency] radiation.”<sup>17</sup> Contrary to what RAA’s Motion implies, the Order does not diminish or negate existing radiofrequency (“RF”) exposure safeguards. Rather, the Order sets forth *incremental* safeguards in the form of additional labeling requirements for

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substantial case on the merits.” *Id.* at 843. Thus, “the court is not required to find that ultimate success by the movant is a mathematical probability . . . .” *Id.*

<sup>12</sup> Motion at 4.

<sup>13</sup> *Id.* at 3.

<sup>14</sup> *Id.* at 4. We note that RAA relies on the same arguments in its petition for reconsideration of the Order, filed subsequently to its Motion. *See* Petition for Reconsideration of the Real Access Alliance, WT Docket No. 99-217, 10-16 (filed Feb. 12, 2001).

<sup>15</sup> Order at ¶ 96 (summarizing RAA’s arguments against extending OTARD rules); Order at ¶¶ 101-116 (discussing Commission’s legal authority for extending OTARD rules).

<sup>16</sup> Motion at 5. We note that RAA does not advance this alleged safety hazard as a reason that it is likely to succeed on the merits, nor does it raise any safety arguments in its petition for reconsideration of the Order.

<sup>17</sup> *Id.* at 6.

antennas for which licensees seek the new OTARD protections, as well as the recommendation that such antennas should be professionally installed.<sup>18</sup> WCA, in its opposition, aptly notes that “RAA ignores the fact that the antennas covered by the [rules] are already required to comply with the Commission’s RF radiation rules . . . .”<sup>19</sup> Moreover, as WCA also notes in its opposition, the OTARD rules contain a safety exception that permits restrictions on antennas if “necessary to accomplish a clearly defined, legitimate safety objective . . . .”<sup>20</sup> This provision can be used as a backstop in the event that there are unusual circumstances that create or contribute to a particular safety hazard. Without acknowledging these considerations, RAA make only general, unsupported assertions of safety issues. We therefore conclude that RAA has failed to demonstrate that it, or others, will be irreparably harmed if the stay is not granted.<sup>21</sup>

7. Although RAA has failed to make the requisite showing under the first two factors of the stay test, we will nevertheless review its showing with regard to the third factor of the test, that a stay would not impose significant harm on other parties. RAA asserts that competitive local exchange carriers (“CLECs”), which it presumes are the sole beneficiaries of the extension of the OTARD protections, would not be adversely affected by a stay because “negotiated access is occurring more rapidly than CLECs can fulfill through installation of service.”<sup>22</sup> CLECs and other service providers disagree.<sup>23</sup> For example, Hughes Electronics, which provides, among other services, DirecPC consumer satellite Internet service, notes that it is “currently deploying” its services to customers and that the OTARD rules “are critical to Hughes’s deployment of its advanced services.”<sup>24</sup> Moreover, RAA ignores the benefits that will accrue to consumers as a result of these rules – benefits such as access to more choices for local telecommunications services and the increased availability of advanced services.<sup>25</sup> Indeed, in the Order, the

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<sup>18</sup> Order at ¶¶ 117-120.

<sup>19</sup> WCA Opposition at 6; *see also* AT&T Wireless Services, Inc. Opposition at 3 (“[a]ll FCC-regulated transmitters must meet the applicable RF guidelines, and fixed wireless antennas are no exception”).

<sup>20</sup> 47 C.F.R. § 1.4000(b)(1); *see* WCA Opposition at 6.

<sup>21</sup> *See* Smart Buildings Policy Project Opposition at 5 (“[a] mere imagined possibility of harm cannot be sufficient to stay the Commission’s rules”).

<sup>22</sup> Motion at 7.

<sup>23</sup> *See* AT&T Wireless Opposition at 5 (citing CLECs potentially adversely affected by stay); Satellite Broadcasting and Communications Association/Satellite Industry Association Broadband & Internet Division Opposition at 7; WCA Opposition at 7-8.

<sup>24</sup> Hughes Electronics Corp. Opposition at 6 (emphasis in original).

<sup>25</sup> *See* WCA Opposition at 7-8 (asserting that “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

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Commission pointed to these benefits as a principal rationale for extending the OTARD protections.<sup>26</sup>

8. RAA also asserts that a stay would cause no harm to other interested parties due to “implementation issues still pending in the Further Notice” included with the Order.<sup>27</sup> This is erroneous. The implementation issues raised in the Further Notice do not relate to the OTARD rules; they relate to other rules under consideration by the Commission. Because a stay would likely harm competitive carriers, as well as consumers, we conclude that RAA has not demonstrated that its requested relief will not harm other interested parties.

9. The fourth, and final, factor to be considered in the stay test is whether a stay would serve the public interest. RAA’s Motion fails in this respect as well. RAA adds no further arguments for this factor of the stay test and, instead, relies on the arguments it makes in support of the other factors. In light of our earlier analysis, and because we believe that full and swift implementation of the OTARD rules will best serve consumers of telecommunications and other fixed wireless services, we believe that a stay would not serve the public interest.

10. As demonstrated by the foregoing analysis, RAA has failed to make the requisite showing to warrant a stay of the effectiveness of the extension of the Commission’s OTARD protections.

#### IV. Ordering Clause

11. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 303 of the Communications Act, as amended, 47 U.S.C. §§ 154(i) and 303, and authority delegated by Section 0.331 of the Commission’s rules, 47 C.F.R. § 0.331, that RAA’s Motion for stay filed on January 8, 2001, is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

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already accorded to fixed wireless video subscribers”).

<sup>26</sup> Order at ¶¶ 97-98.

<sup>27</sup> Motion at 7.