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May 6, 1996

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VIA HAND DELIVERY

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

RE: IB Docket No. 95-59 -- Further Notice of Proposed Rulemaking  
on the Preemption of Local Zoning Regulation of Satellite  
Earth Stations

Dear Mr. Caton:

Transmitted herewith, on behalf of Philips Electronics North  
America Corporation and Thomson Consumer Electronics, Inc. is an  
original and 11 copies (2 of which are annotated "Extra Public  
Copy" as requested in Public Notice on March 22, 1996) of their  
Reply Comments in the above-referenced docket.

If you have any questions concerning this matter, please let  
me know.

Sincerely,

*Lawrence R. Sidman*

Lawrence R. Sidman

Counsel for Philips  
Electronics North America  
Corporation and Thomson  
Consumer Electronics, Inc.

Enclosures

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

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OFFICE OF SECRETARY

In the Matter of	)	
	)	IB Docket No. 95-59
Preemption of Local Zoning	)	DA 91-577
Regulation of Satellite	)	45-DSS-MISC-93
Earth Stations	)	

**REPLY COMMENTS OF**  
**PHILIPS ELECTRONICS NORTH AMERICA CORPORATION AND**  
**THOMSON CONSUMER ELECTRONICS, INC.**

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**REPLY COMMENTS OF**  
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**THOMSON CONSUMER ELECTRONICS, INC.**

Philips Electronics North America Corporation ("Philips") and Thomson Consumer Electronics, Inc. ("Thomson") submit reply comments in the above-captioned Further Notice of Proposed Rulemaking ("Further Notice") to revise the rules regarding preemption of local zoning regulation of satellite earth stations.

I. Section 207's Mandate Should Be Construed Broadly to Effectuate Congress' Intent to Eliminate Governmental and Non-Governmental Barriers to DBS Services.

The common denominator of the comments to the Further Notice from opponents of a per se preemption for governmental and non-governmental restrictions on DBS antennas is an attempt to persuade the Commission to construe the mandate of Section 207 of the Telecommunications Act narrowly.<sup>1/</sup> For example, two opponents wrongly conclude that the word "impair" in the statute means "prevent," and thus, limits the Commission's authority to address only those restrictions that prevent the use of DBS

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<sup>1/</sup> Telecommunications Act of 1996, § 207, Pub. L. No. 104-104, 104th Cong., 1st Sess. § 207, 110 Stat. 56, 114 (1996).

antennas.<sup>2/</sup> Other opponents argue that Section 207 does not apply to certain non-governmental restrictions on DBS

antennas.<sup>3/</sup> These arguments are strained and implausible in the face of the plain language of Section 207 and its legislative history.

Section 207 of the Telecommunications Act of 1996 provides a broad and unambiguous mandate to the Commission to prohibit all restrictions that "impair a **viewer's** ability to receive video programming services" through DBS antennas. The emphasis in this broad mandate is the creation of a viewer's right of access to the video programming service of his or her choice through a DBS antenna. That imperative should form the basis of the Commission's rules and leads to the inescapable conclusion that the rules should provide a per se preemption of all State and local regulations and non-governmental restrictions on DBS antennas.

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2/ See Petition for Reconsideration of the National League of Cities et al. ("NLC Petition") at p. 3, 4; Joint Comments of National Apartment Association et al. ("NAA Joint Comments") at 13. Contrary to these opponents' interpretation of the word "impair," the common definition of "impair" means merely to "diminish" or "lessen." G. & C. Merriam Company, Webster's Third New International Dictionary (1976). Thus, the most logical reading of Section 207 suggests that the Commission is required to prohibit restrictions that "diminish" or "lessen" a viewer's ability to use a DBS antenna to receive video programming.

3/ See e.g., NAA Joint Comments (e.g., shopping malls and apartment buildings); Comments of the Community Associations Institute, et al. ("CAI Comments") (e.g., planned communities with common areas); Comments of the National Trust for Historic Preservation ("National Trust Comments") (easements).

II. Section 207 Requires a Per Se Preemption of State and Local Governmental Restrictions on DBS Antennas.

Contrary to the position of the National League of Cities that the Commission's rules on satellite antennas exceed its statutory authority,<sup>4/</sup> Philips and Thomson believe that the current rules fall short of the statutory mandate in Section 207 regarding DBS antennas and require strengthening to be compliant with the Telecommunications Act of 1996. Philips and Thomson agree with the comments of the Satellite Broadcasting and Communications Association of America (SBCA) that a per se preemption with a prospective waiver-only approach is necessary to effectuate Section 207 faithfully.<sup>5/</sup>

Although the National League of Cities cites the City of Williamsburg, Virginia with its famous historic district as an example of why the Commission should refrain from preempting local zoning regulations,<sup>6/</sup> the City of Williamsburg actually proves the case in support of a per se preemption for DBS antennas. The City of Williamsburg has recognized that "[c]ompetition in the telecommunications sector (cable, telephone, satellite communications, etc.) is one key to future service improvements at a fair price" and has reviewed its zoning regulations "with eye [sic] toward removing impediments to the

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4/ See NLC Petition at pp. 3-5.

5/ See Further Comments and Petition for Clarification of the SBCA at 10-14.

6/ See NLC Petition at pp. 16-17.

functioning of the telecommunications marketplace."<sup>7/</sup> As a result of this review, the City of Williamsburg amended its zoning ordinances to make it easier for its residents to install 18-inch DBS antennas.

Under the Commission's new rules, a waiver would be available to the City of Williamsburg "upon a showing by the applicant that local concerns are of highly specialized or unusual nature."<sup>8/</sup> The Commission has retained the discretion to waive its preemption rules to permit modest regulation of DBS antennas in those rare instances in which a truly compelling countervailing public interest might warrant it.<sup>9/</sup> Philips and Thomson believe that a waiver-only approach would permit the City of Williamsburg to make its case for preserving its local zoning ordinance.

III. The Commission's Proposed Rule on Non-Governmental Restrictions Preserves a Viewer's Right to Access Video Programming Services Through a DBS Antenna.

With regard to non-governmental restrictions, the Commission's rules must also fulfill Congress' mandate that a viewer has the right of access to video programming service of

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<sup>7/</sup> See Attachment to NLC Petition (Memorandum of Jackson C. Tuttle, City Manager to the Mayor and City Council of the City of Williamsburg).

<sup>8/</sup> See 47 C.F.R. § 25.104(e).

<sup>9/</sup> However, Philips and Thomson urge the Commission to reaffirm that a waiver will be available only in the narrowest of circumstances "depending on the circumstances and on how other types of antennas or modern accoutrements are treated, are genuine historic districts, waterfront property, or environmentally sensitive areas." Further Notice at ¶ 51.

his or her choice through a DBS antenna regardless of the nature of the residence. The per se rule that the Commission proposes for non-governmental restrictions (47 C.F.R. § 25.104(f)) achieves this goal by rendering unenforceable any restrictive covenant, encumbrance, homeowners' association rule or other non-governmental restriction that would impede a viewer's right. In fact, the Commission acknowledges that the proposed rule for non-governmental restrictions tracks the language of the legislative history closely.<sup>10/</sup>

A. The Commission Should Reject Attempts to Carve Out Certain Non-Governmental Restrictions on DBS Antennas.

Nevertheless, some opponents of the proposed rule suggest that Section 207 does not cover various forms of non-governmental restrictions.<sup>11/</sup> The statutory language of Section 207 and its legislative history, however, makes no such distinctions about residential status,<sup>12/</sup> and thus, neither should the Commission in implementing its rules.

One opponent, the Community Association Institute, essentially concedes that the goal of providing access to telecommunications service is an important one that the proposed rule serves and that there is no legal impediment to prevent the Commission from invalidating association rules that restrict installation on individually-owned property within an

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<sup>10/</sup> See Further Notice at ¶ 62.

<sup>11/</sup> See note 3 supra.

<sup>12/</sup> See H. Rep. No. 104-204, 104th Cong., 1st Sess. 123-24 (1995).

association.<sup>13/</sup> Nevertheless, the Community Association Institute attempts to persuade the Commission to permit associations to enforce aesthetic requirements.<sup>14/</sup> The Commission rightly rejected aesthetic considerations in its formulation of the proposed rule with regard to unobtrusive 18-inch DBS antennas and should continue to do so.<sup>15/</sup>

Some opponents also try to persuade the Commission that the proposed rule should permit a homeowner's association or landlord to substitute cable or some other video programming medium for a viewer's right to use a DBS antenna to receive video programming.<sup>16/</sup> Their arguments completely ignore the plain language of the statute. Section 207 on its face provides specifically for viewers' ability to receive programming through a DBS antenna, an over-the-air TV antenna or an MMDS antenna, which cannot be read to permit a building owner to substitute its judgment for that of the viewer. Section 207 provides that it is the viewer's choice that is paramount and the Commission's rules and its order should make this clear.

B. The Commission's Proposed Rule on Non-Governmental Restrictions Does Not Violate the Fifth Amendment.

To support their narrow interpretation of Section 207, some opponents have also argued that the Commission's proposed rule

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<sup>13/</sup> CAI Comments at pp. 9, 13.

<sup>14/</sup> Id. at p. 17.

<sup>15/</sup> See Further Notice at ¶ 62.

<sup>16/</sup> See NAA Joint Comments at p. 13, 14; CAI Comments at pp. 18-20.



preempting non-governmental restrictions would be unconstitutional as a violation of the Fifth Amendment rights of some private property owners.<sup>17/</sup> These opponents wrongly rely upon Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) to suggest that the Commission cannot render unenforceable non-governmental restrictions, such as landlord-imposed restrictions, that impair a viewer's right of access to video programming of his or her choice via a DBS antenna. However, this reliance is misplaced because the Loretto case is inapposite.

In Loretto, the Court held that a New York statute that required an apartment building owner to permit a cable television franchisee to place its wires on the owner's property constituted a per se taking of the owner's property requiring just compensation. The Court determined that the statute mandated a permanent physical occupation of the owner's property by a third party without just compensation, and thus, violated the Fifth Amendment rights of the building owner.

The Court's decision in Loretto rested on the fact that the physical occupation involved a third party, not a landlord-tenant relationship. The Loretto Court explicitly noted that the issue in Loretto did not involve a landlord-tenant relationship.<sup>18/</sup> In fact, the Loretto Court affirmed that governmental entities "have

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<sup>17/</sup> See NAA Joint Comments at pp. 3-5; CAI Comments at p. 12; National Trust Comments at pp. 1-3.

<sup>18/</sup> Id. at 439-441, n. 19.

broad power to regulate housing conditions in general and landlord-tenant relationships in particular without paying compensation for all economic injuries that such regulation entails."<sup>19/</sup> Unlike Loretto, in this case, the Commission's proposed rules do not mandate a permanent physical occupation by a third party of an owner's property, rather they render unenforceable non-governmental restrictions that impair a viewer's ability to receive video programming via a DBS antenna, whether that viewer is a homeowner or a tenant in an apartment building.

The appropriate guidance from the Court on the issue of such landlord-tenant relationships comes from Federal Communications Commission v. Florida Power Corp., 480 U.S. 245 (1987). In Florida Power, the Court held that the Pole Attachments Act, which authorized the Commission to regulate the rates that utility-pole owners charged cable companies for space on the poles did not effect an unconstitutional taking of the pole owners' property.

The pole owners in that case had argued that the case should be governed by the analysis in Loretto. The Court, however, rejected this argument and distinguished Loretto. The Court noted that while "the statute . . . in Loretto specifically required landlords to permit permanent occupation of the property by cable companies," the pole owners were not required by the Pole Attachments Act to allow installation of the cable on the

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<sup>19/</sup> Id. at 440.

poles.<sup>20/</sup> Rather, the public utility landlords had "voluntarily" entered into leases with cable company tenants.<sup>21/</sup> The Court found that the "invitation" made the difference and that "the line which separates these cases from Loretto is the unambiguous distinction between a commercial lessee and an interloper with a government license."<sup>22/</sup> The Court reaffirmed its observation from Loretto that "statutes regulating economic relations of landlords and tenants are not per se takings."<sup>23/</sup>

#### Conclusion

In enacting Section 207, Congress intended to remove State and local governmental and non-governmental impediments to a viewer's access to DBS services. A per se preemption of State and local regulations and non-governmental restrictions on DBS antennas is necessary to effectuate a faithful implementation of the plain meaning and spirit of the law.

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<sup>20/</sup> 480 U.S. at 251 (emphasis in the original).

<sup>21/</sup> 480 U.S. at 252.

<sup>22/</sup> 480 U.S. at 252-253.

<sup>23/</sup> 480 U.S. at 252.

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Respectfully submitted,

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Dated: May 6, 1996