

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of)

Implementation of Section 207 of the)
Telecommunications Act of 1996)

Restrictions on Over-the-Air Recep-)
tion Devices: Television Broadcast)
and Multichannel Multipoint)
Distribution Service)

DOCKET FILE COPY ORIGINAL

CS Docket No. 96-83

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MAY - 6 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

**JOINT COMMENTS OF
NATIONAL APARTMENT ASSOCIATION
BUILDING OWNERS AND MANAGERS ASSOCIATION
NATIONAL REALTY COMMITTEE
INSTITUTE OF REAL ESTATE MANAGEMENT
INTERNATIONAL COUNCIL OF SHOPPING CENTERS
NATIONAL MULTI HOUSING COUNCIL
AMERICAN SENIORS HOUSING ASSOCIATION
NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS**

The joint commenters, representing the owners and managers of multi-unit properties,¹ urge the Commission not to adopt the

¹ The joint commenters are the National Apartment Association ("NAA"); the Building Owners and Managers Association International ("BOMA"); the National Realty Committee ("NRC"); the Institute of Real Estate Management ("IREM"); the International Council of Shopping Centers ("ICSC"); the National Multi Housing Council ("NMHC"); the American Seniors Housing Association ("ASHA"); and the National Association of Real Estate Investment Trusts ("NAREIT"). NAA is the largest industry-wide, nonprofit trade association devoted solely to the needs of the apartment industry. Founded in 1907, BOMA is a federation of ninety-eight local associations representing 15,000 owners and managers of over six billion square feet of commercial properties in North America. NRC serves as Real Estate's roundtable in Washington for national policy issues. NRC members are America's leading real estate owners, advisors, builders, investors, lenders, and managers. The IREM represents property managers of multi-family residential office buildings, retail, industrial and (continued...)

rule proposed in Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service, Notice of Proposed Rulemaking, CS Docket No. 96-83 (released April 4, 1996) (the "NPRM"), which would purport to invalidate nongovernmental restrictions on the placement of television broadcast receiving antennas and multi-channel multipoint distribution service receiving antennas. The joint commenters also have filed comments and reply comments in IB Docket No. 95-59, copies of which are appended to these comments.

As discussed in Docket No. 95-59, to force property owners to accept the emplacement on their property of antennas owned by telecommunications providers, tenants or residents would

¹(...continued)

homeowners association properties in the U.S. and Canada. Founded in 1957, ICSC is the trade association of the shopping center industry. Its 30,000 members in 60 countries include owners, developers, managers, retailers, lenders, and others having a professional interest in the shopping center industry. ICSC's 26,000 U.S. members represent almost all of the 40,000 shopping centers in the United States. NMHC represents the interests of more than 600 of the nation's largest and most respected firms involved in the multi-family rental housing industry, including owners and managers of cooperatives and condominiums. ASHA represents the interests of the larger and most prominent firms in the country participating in the seniors housing industry. NAREIT represents over 260 real estate investment trust members and supporting professionals in the fields of law, accounting and investment banking.

The joint commenters are also filing concurrently a response to the regulatory flexibility analysis required by P.L. 96-354, 5 U.S.C. § 601 et seq, as recently amended by P.L. 104-121 (1996).

constitute an unconstitutional taking in violation of the Fifth Amendment.

Moreover, the Commission lacks jurisdiction to regulate contractual agreements affecting private property, and Section 207 of the 1996 Act authorizes -- at most -- only rules preempting certain governmental and quasi-governmental restrictions on antennas. Thus, the Commission lacks statutory authority to regulate the emplacement of antennas in or on private buildings. Finally, preempting nongovernmental restrictions on the placement of television broadcast and MMDS receiving antennas would be an unsound attempt to interfere with the private sector's ability to address legitimate maintenance, safety, security, cost and management issues. In this regard, we are gratified by the comments of Commissioner Quello in the separate statement accompanying the NPRM, which recognizes some of the problems with the proposed rule.

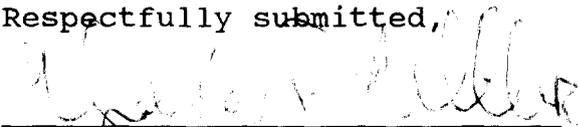
One specific problem is that the proposed rule would appear to preempt lease restrictions forbidding apartment residents and commercial building tenants from placing their own broadcast television and MMDS receiving antennas on the roofs or exteriors of their buildings without the consent of the property owner or manager. As a practical matter, such restrictions are necessary, otherwise rooftops might be covered with uncoordinated individual antennas and cables running to individual apartments and offices, all installed without the landlord's consent or supervision,

solely to improve reception of over-the-air signals on individual television sets.

The attached pleadings in Docket No. 95-59 address this point in greater detail, but the fundamental issue in both dockets is that the proposed rules would force building operators to allow tenants and residents to place antennas anywhere they like, regardless of the consequences to other building occupants, the building operators, or the public in general, or the structural integrity of the buildings themselves.

For the reasons set forth above and in the attached comments and reply comments in Docket No. 95-59, the Commission should abandon any attempt to deal with placement of antennas on private property, and should not adopt the proposed rule.

Respectfully submitted,



Nicholas P. Miller
William Malone
Matthew C. Ames

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
1225 Nineteenth Street, N.W., # 400
Washington, D.C. 20036-2420
TP: (202) 785-0600
FAX: (202) 785-1234

Attorneys for National Apartment Association, Building Owners and Managers Association International, National Realty Committee, Institute of Real Estate Management, International Council of Shopping Centers, National Multi Housing Council, American Seniors Housing Association and National Association of Real Estate Investment Trusts

OF COUNSEL:

Gerard Lavery Lederer, Esq.
Vice President -- Government
and Industry Affairs
Building Owners and Managers Assn Int'l
1201 New York Ave., N.W., Suite 300
Washington, DC 20005

Roger Platt, Esq.
Deputy Counsel
National Realty Committee
1420 New York Ave., N.W., Suite 1100
Washington, D.C. 20005

Edward C. Maeder, Esq.
Counsel to the International
Council of Shopping Centers
400 Madison Street
Suite 2001
Alexandria, VA 22314

Tony M. Edwards, Esquire
General Counsel
National Association of
Real Estate Investment Trusts
1129 20th Street, N.W.
Suite 305
Washington, D.C. 20036

May 6, 1996

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ATTACHMENT 1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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

**JOINT COMMENTS OF
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Summary

Should the Commission decide to adopt any rule preempting nongovernmental restrictions on satellite antennas, the Commission should make clear that such rule (i) does not affect landlord-tenant agreements affecting occupancy of privately-owned residential properties and (ii) does not apply to commercial (non-residential) properties at all.

The Commission lacks jurisdiction generally to regulate contractual agreements affecting private property, and Section 207 of the 1996 Act authorizes at most only rules preempting quasi-governmental restrictions on satellite antennae.

For the Commission to force building owners to allow the mounting of antennae of any kind on the owners' premises would constitute an unconstitutional taking of property under Loretto.

Such a physical invasion is a per se taking that cannot be saved by any balancing test. See Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994). Congress has not authorized the Commission to incur fiscal liability for such takings, and for the Commission to do so would violate the Anti-Deficiency Act.

The Further Notice of Proposed Rulemaking incorrectly concludes that nongovernmental restrictions arise only from aesthetic considerations. In fact, structural, safety, management and cost considerations justify contractual restrictions on the erection of antennas. The Commission could not practicably adopt or administer the complex standards that would be necessary to deal appropriately with the diverse building configurations that exist in the real world.

In adopting its policy governing the placement of wireless service antennas on federal property, the General Services Administration recently acknowledged the importance of a range of considerations -- including aesthetics, safety and security -- that the private sector also considers. The Commission should thus recognize the merit of the concerns that lead to the imposition of non-governmental restrictions.

The real estate marketplace is highly competitive, and the Commission need not attempt to supplant free market regulation.

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Introduction

The joint commenters, representing the owners and managers of multi-unit properties,¹ urge the Commission not to

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(continued...)

adopt the rule proposed in Preemption of Local Zoning Regulation of Satellit Earth Stations, the Report and Order and Further Notice of Proposed Rulemaking, IB docket No. 95-59 (released March 11, 1996) (the "FNPRM"), which would purport to invalidate nongovernmental restrictions on the placement of antenna dishes under one meter in diameter. To force property owners to accept the emplacement on their property of antennas owned by telecommunications providers, tenants or residents would constitute an unconstitutional taking in violation of the Fifth Amendment.

Moreover, the Commission lacks jurisdiction to regulate contractual agreements affecting private property, and Section 207 of the 1996 Act authorizes -- at most -- only rules preempting governmental and quasi-governmental restrictions on satellite antennae. Thus, the Commission lacks statutory authority to regulate the emplacement of antennas in or on

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The joint commenters are also filing a response to the regulatory flexibility analysis required by P.L. 96-354, 5 U.S.C. § 601 et seq, as recently amended by P.L. 104-121.

private buildings. Accordingly, the Commission should abandon any attempt to deal with placement of antennas on private property and should reflect in its rules the realities of the marketplace.

I. COMMISSION-MANDATED ACCESS TO PRIVATE PROPERTY VIOLATES THE OWNERS' FIFTH AMENDMENT RIGHTS.

Any attempt by the Commission to compel the owners of multi-unit buildings to allow the placement of antennas and associated wiring and equipment in or on their buildings or surrounding property by third-party telecommunications providers, tenants, or residents would violate the owners' rights under the Fifth Amendment. Involuntary emplacement of such facilities would be "taking" within the meaning of the Fifth Amendment subject to the requirement for compensation.² No compensation is required by the Commission's proposal.

For the Commission to mandate such placement in and on private buildings would be just as unconstitutional as the New York statute that the Supreme Court held to be unconstitutional because it permitted TelePrompter to run its coaxial cables in and on Mrs. Loretto's apartment building in New York City. See Loretto v. TelePrompter Manhattan CATV Corp., 458 U.S. 419 (1982).

² As the Court said in Ramirez de Arellano v. Weinberger, 240 U.S. App. D.C. 363, 387 n.95, 745 F.2d 1500, 1524 n.95 (1984) (en banc), vacated on other grounds, 471 U.S. 1113 (1985), "the fundamental first question of constitutional right to take cannot be evaded by offering 'just compensation'."

A. Prohibiting Nongovernmental Restrictions on the Placement of Antennas on Private Buildings Would be an Impermissible "Permanent Physical Occupation."

The physical requirement that a landlord permit a third party to occupy space on the landlord's premises and to attach an antenna to the building plainly crosses that clear, bright line between permissible regulation and impermissible takings.

Where the "character of the governmental action," the Supreme Court has said, "is a *permanent physical occupation* of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." Loretto, supra, at 434-35 (emphasis supplied), citing Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).³

B. Forced Antenna Placement Satisfies the Legal Test for an Unconstitutional Taking.

What the Commission has proposed here is not more regulation; it qualifies as a "taking." No *de minimis* test validates physical takings. The size of the affected area is Constitutionally irrelevant. In Loretto, supra, at 436-37, the Court reaffirmed that the "the rights of private property cannot be made to depend on the size of the area permanently occupied."

³ In Penn Central the Supreme Court had observed that there was no "set formula" for determining whether an economic taking had occurred and that the Court must engage in "essentially ad hoc, factual inquiries" looking to factors including the economic impact and the character of the government action. No such detailed inquiry is required *where there is a permanent physical occupation*. Id. at 426.

The access contemplated by the Commission notice is legally indistinguishable from the method or use of intrusion in Loretto, where the Court found a "permanent physical occupation" of the property where the installation involved a direct physical attachment of plates, boxes, wires, bolts and screws to the building, completely occupying space immediately above and upon the roof and along the buildings' exterior wall. Id. at 438.

Loretto settles the issue that government-mandated access to a private property by third parties for the installation or maintenance of satellite antennas and related facilities constitutes a taking, regardless of the asserted public interest, the size of the affected area, or the uses of the hardware. In takings there is no constitutional distinction between state regulation (Loretto) and federal regulation (FCC proposed rulemaking).

C. "Just Compensation" for the Taking Requires Resort to Market Pricing.

The takings objection to Commission-mandated access to private property cannot be avoided by requiring the television viewer or provider benefitted thereby to make a nominal payment to the owner for access. In Loretto the New York statute at issue provided for a one-dollar fee payable to the landlord for *damage* to the property. The Court concluded that the legislature's assignment of damages equal to one dollar did not constitute the "just compensation" required by the constitution.

The practical point is this, viz., that the Commission has not proposed to, and cannot, prescribe a nominal amount as

compensation for access -- the affected property owner is constitutionally entitled to compensation measured against fair market value. See U.S. v. Commodities Trading Corp., 339 U.S. 121, 126 (1950) (current market value); Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441, 1445 n.3 (D.C. Cir. 1994). Is ascertainment of the disputed market values of differing impingements on large numbers of highly diverse commercial and residential properties something that either the Commission or the courts are ready to handle?

II. CONGRESS DID NOT GIVE THE COMMISSION POWER TO COMPENSATE OWNERS FOR ANTENNAS EMPLACED ON THEIR PROPERTY WITHOUT THEIR CONSENT.

A. Congress Did Not Give the Commission the Power of Eminent Domain.

As the D.C. Circuit made clear in Bell Atlantic, supra, the Congress did not confer the power of eminent domain on either the Commission or its regulatees. Indeed, even in the former Post Roads Act,⁴ Congress itself made no attempt to confer such authority on telecommunications providers. In City of St. Louis v. Western Un. Tel. Co., 148 U.S. 92, 13 S. Ct. at 488-89 (1893), the Court made it perfectly clear that even Congressional authorization of carriers' use of public rights-of-way did not carry with it the power to take non-federal property without compensation. See Western Un. Tel. Co. v. Pennsylvania R.R., 195

⁴ The Post Roads Act of 1866, R.S. 5263, et seq., as amended, formerly classified to 47 U.S.C. §§ 1 et seq., was repealed by the Act of July 16, 1947, 61 Stat 327.

U.S. 540 (1904), citing Western Un. Tel. Co. v. Ann Arbor Ry., 178 U.S. 239 (1900).

Where a taking of real property for public uses is involved, the usual procedure is for the Department of Justice to initiate judicial proceedings at the request of the agency pursuant to 40 U.S.C. § 257 or § 258a in a U.S. district court under 28 U.S.C. § 1358. Commenters have found no other section of the U.S. Code that would authorize the Commission to deviate from the prescribed procedure.

B. Congress Did Not Give the Commission Implied Authority to Expose the Government to Fiscal Liability in the Court of Federal Claims.

The Commission's lack of explicit statutory authority to take private property cannot be rectified by a reliance on implied authority. The courts have long interpreted statutes narrowly so as to prohibit federal officers and personnel from exposing the Federal government under the Tucker Act, 28 U.S.C. § 1491(a), to fiscal liability not contemplated or authorized by Congress. Since the Constitution, Art. I, §§ 8 and 9, assigns to Congress the exclusive control over appropriations, the courts have required a clear expression of intent by Congress to obligate the Government for claims which require an appropriation of money, such as an award of just compensation in the instance of a taking of private property for public use as required under the Fifth Amendment to the Constitution.

The D.C. Circuit in Bell Atlantic, supra, declared that where an administrative application of a statute constitutes a

taking for an identifiable class of cases, the courts must construe the statute to defeat such constitutional claims wherever possible. The court further made clear that such a narrow construction of the laws is designed to prevent encroachment on the exclusive authority of Congress over appropriations. In so doing, the court rejected the traditional deference accorded to administrative agency interpretations as required by the Supreme Court in Chevron v. N.R.D.C., 487 U.S. 837 (1984), on the grounds that such deference would provide the Commission with limitless power to use statutory silence or ambiguity on a particular issue to create unlimited liability for the U. S. Treasury.

Given the lack of any clear intent by Congress to provide for takings in an area where Congress has been sensitive to such issues, courts are unlikely to uphold the authority of the Commission to promulgate any rules on inside wiring that will effect a taking of private property, thereby subjecting the Government to liability for just compensation.

The general rule on implied takings is similarly given full effect in Exec. Order 12630, 5 U.S.C. § 601n (1988). Executive Order 12630 ("Governmental Actions and Interference with Constitutionally Protected Property Rights") requires executive department agencies to review all federal proposed rulemakings, final rulemakings, legislative proposals, and policy statements that, if implemented, could effect a taking under the Fifth Amendment, in order to protect the U.S. Treasury against

unnecessary claims for just compensation. "Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings," published by the Attorney General in June 1988 to implement such Executive Order, requires subject federal agencies to conduct a predecisional Takings Impact Analysis (TIA). The TIA, in part, requires both an assessment of whether the rule or policy in question would effect a taking and also an analysis of alternative policies or rules that would be less intrusive on the rights of private property owners. See generally CIT Group v. U.S., 24 Cl. Ct. 540, 543 (1991).

Section V of the Attorney General's guidelines contains an analysis of "the general principles and assessment factors which inform considerations of whether a takings implication... exists". Op.cit. at 11. The guidelines warn that "[a]s a general rule, where a physical occupancy exists no balancing of the economic impact on the owner and the public benefit will occur in the taking analysis." Id. at 13.

C. Any Commission Attempt to Condemn Private Property Would be Unlawful under the Anti-Deficiency Act.

Even if the Commission had Congressional authorization to effect a taking in this instance, any such taking would be unlawful under the Anti-Deficiency Act because Congress has not appropriated funds to compensate property owners. The Anti-Deficiency Act, as codified in part at 31 U.S.C. § 1341, provides that no officer or employee of the United States Government may

(A) make or authorize an expenditure or obligation exceeding an amount available in appropriation or fund for the expenditure or obligation; or

(B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

Id.

The purpose of the Anti-Deficiency Act is to keep all governmental disbursements and obligations for expenditures within the limits of amounts appropriated by Congress. Since the Act applies to "any officer or employee of the United States Government," it applies to all branches of the federal government, legislative and judicial, as well as executive. See 27 Op. Att'y Gen. 584, 587 (1909) (applying the Act to the Government Printing Office). The Comptroller General of the United States has interpreted the term "obligations" broadly and has opined that actions under the Anti-Deficiency Act include not just recorded obligations but also "other actions which give rise to Government liability and will ultimately require expenditure of appropriated funds." 55 Comp. Gen. 812, 824 (1975). The Comptroller General has set forth as examples of such other actions those which "result in Governmental liability under clear line of judicial precedent, such as through claims proceedings."

Id.

Furthermore, the Comptroller General has said that violation of the Act does not depend on an official's wrongful intent or lack of good faith since such a requirement would in effect make the Act null and void. The extent to which there are factors beyond an agency's control in creating obligations which exceed its appropriations level is considered by the Comptroller General

in determining violations of the Act. The greater the control that the agency possesses with respect to such obligation, the greater the risk of violating the Act.

The courts have relied on potential violations of the Anti-Deficiency Act in narrowly construing actions by executive officers that might otherwise have exposed the government to unlimited liability. Only weeks ago, the Supreme Court affirmed the Comptroller General's interpretation that the Anti-Deficiency Act is violated where a government agency enters into indemnity contracts, either express or implied in fact, which expose the Government to unlimited liability. In Hercules v. U.S., 116 S. Ct. 981, 987, 64 U.S.L.W. 4117, 4120 & n.9 (1996), the Court rejected the government contractor's argument of an implied-in-fact indemnity contract, in part on the grounds that the Anti-Deficiency Act bars any government official from entering into contracts for which no appropriations have been made (as in the case at issue) or for which payment exceeds existing appropriations. The Court also reiterated that contracts for such open-ended liability have been repeatedly rejected by the Comptroller General.

Certainly, a rulemaking which exposes the Government to the inevitable filing of claims founded in the Fifth Amendment subjects the Government to the kind of open-ended liability that has been rejected by the Comptroller General and the courts as a violation of the Anti-Deficiency Act and subject to precautionary procedures under Executive Order 12630.

III. THE COMMISSION LACKS STATUTORY AUTHORITY TO PREEMPT ALL NONGOVERNMENTAL RESTRICTIONS ON THE PLACEMENT OF SATELLITE ANTENNAS.

Section 207 of the 1996 Act requires the Commission to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive [certain] video programming services" Section 207 of the Act does not require the Commission to impose any specific restrictions, nor does it expressly direct the Commission to preempt nongovernmental restrictions of any kind. The legislative history indicates that Congress was concerned with local zoning rules and other governmental and quasi-governmental restrictions that ostensibly limit the placement of satellite dishes. But nowhere in the legislative history are nongovernmental restrictions addressed.

Section 207 derives from Section 308 (Restrictions on over-the-air reception devices) of H.R. 1555. The only difference between Section 207 of the 1996 Act and Section 308 of H.R. 1555 is that Section 207 includes MMDS antennas. See H. Rep. No. 104-458 at 166 (1996). H. Rpt. 104-204 to accompany H.R. 1555 (1995) at 123-24 describes Section 308 in pertinent part as follows:

The Committee intends this section to preempt enforcement of State or local statutes and regulations, or State or local legal requirements, or restrictive covenants or encumbrances that prevent the use of antennae.... Existing regulations, including but not limited to, zoning laws, ordinances, restrictive covenants or homeowners' association rules, shall be unenforceable to the extent contrary to this section.

It is plain from this language that Congress did not intend the statutory language to "preempt" contractual provisions of

lease agreements and the like pertaining to occupancy of multi-unit buildings. It should also be inferred that Congress intended to reach television viewers in only residential and not commercial (non-residential) buildings, because other over-the-air services are not mentioned.

Thus, one might conclude that the Commission has authority to address certain "quasi-governmental" restrictions imposed by homeowner's associations and deed covenants that limit the placement of satellite antennas. Nevertheless, even if such preemptions were intended, there is no reason to conclude that Congress intended to direct the Commission to alter the rights of private property owners by interfering in private contractual arrangements. Therefore, we conclude that, at a minimum, the Commission has no jurisdiction over landlord-tenant agreements regarding the occupancy of residential real estate, nor does it have any jurisdiction over commercial properties whatsoever.

In addition, the Commission should note that the legislative history cited above indicates that Section 207 is intended to prohibit restrictions that "impair" -- meaning "prevent" -- a viewer from receiving video programming. But if a subscriber chooses to live in a building that has cable service but forbids the installation of DBS antennas, that subscriber can still receive some form of video programming. Surely the law does not mean that every technology must always be available to every individual under every circumstance. People make choices, and sometimes one option forecloses another. Building operators

likewise make choices to meet their tenants' needs, such as negotiating bulk contracts with cable operators. But such contracts are predicated on certain "buy rates" designed to ensure that the service provider can make a profit. If residents have other choices, a service contractor may find it cannot serve the building profitably, which means that many -- perhaps most -- residents will not have cable as an option, or will pay a higher price. Thus, an overbroad interpretation of Section 207 will defeat the purpose of the law.

IV. AS A MATTER OF POLICY, THE COMMISSION SHOULD NOT ATTEMPT TO REGULATE THE PLACEMENT OF SATELLITE ANTENNAS ON PRIVATE PROPERTY.

There are sound and persuasive reasons why the Commission should not attempt to regulate the placement of antennas on private property, even if it had jurisdiction to do so. First, the aesthetic concerns that the Commission believes underlie nongovernmental restrictions that would be preempted by the proposed rule have an economic component. Second, Commission regulation would interfere with the on-the-spot management needed to effectively address maintenance problems and safety and security concerns, assure compliance with building and electrical codes, coordinate the needs of different tenants and service providers, properly allocate costs, and in general oversee the efficient day-to-day operations of hundreds of thousands of buildings. Finally, the validity of these concerns is illustrated by the procedures for antenna placement on federal

property recently established by the General Services Administration. See point IV D, infra.

A. The Commission's Assumption that Aesthetic Concerns Are Entitled to Less Deference than Other Considerations Fails to Appreciate the Economic Importance of Aesthetics.

The FNPRM incorrectly states that "nongovernmental restrictions would appear to be directed to aesthetic considerations." It is certainly true that aesthetic considerations play a part, but it is by no means the only concern. Nor are aesthetic considerations trivial -- the appearance of a building directly affects its marketability. People generally prefer to live in attractive buildings, and the sight of hundreds of satellite antennas bolted to the outside of apartment units will not be appealing to potential residents. Attached as Exhibit A are three sets of photographs showing what two different apartment complexes might look like with satellite dishes affixed outside each unit. Being in two dimensions, the photographs give only some idea of what buildings would look like if residents could install antennas outside their units -- the visual effects of such clutter when actually standing in front of a building would be even greater.

Thus, aesthetic considerations are actually economic considerations and should not be dismissed so lightly.