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

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

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Preemption of Local Zoning Regulation )  
of Satellite Earth Stations )

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To: The Commission

IB Docket No. 95-59

DA 91-577

45-DSS-MISC-93

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**REPLY COMMENTS OF INDEPENDENT CABLE &  
TELECOMMUNICATIONS ASSOCIATION**

**INTRODUCTION**

The Independent Cable & Telecommunications Association ("ICTA"), by its attorneys, hereby submits reply comments in the above-referenced proceeding.<sup>1/</sup> ICTA is a national trade association formed to represent and advance the interests of a cross-section of companies on the cutting-edge of the telecommunications revolution leading the U.S. into the twenty-first century. Its members include private cable operators (also known as satellite master antenna television), shared tenant services providers, equipment manufacturers, program distributors, and property management and development companies. While ICTA operator members originally focused on the video services marketplace, the last five years in particular have marked a shift in their competitive entry efforts into the provision of voice and data communications services to consumers throughout the country. ICTA operator members employ a variety of telecommunications technologies, both wired and wireless, to serve primarily the residential multiple dwelling unit ("MDU") market. Thus, ICTA members

<sup>1/</sup> ICTA is the successor organization to the National Private Cable Association.

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primarily compete with both franchised cable operators, the dominant force in the local multichannel video programming distribution market, and incumbent local exchange carriers, the dominant force in the local telephone market.

## DISCUSSION

### **I. Section 207 Does Not Preclude Enforcement Of The Commission's Preexisting Preemption Rules For Satellite Reception Devices.**

ICTA supports the Commission's tentative conclusion that Section 207 of the Telecommunications Act of 1996 does not affect preexisting Commission rules or ongoing proceedings concerning the preemption of unreasonable local restrictions on the installation of satellite earth station antennas. The Commission's conclusion is correct because it is supported by the language of the statute and the relevant legislative history. Section 207 directs the Commission to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service ["MMDS"], or direct broadcast satellite ["DBS"] services." This provision simply instructs the Commission to preempt restrictions as applied to these specifically enumerated services according to a particular standard. However, Section 207 does not reference or implicate the Commission's preexisting preemption rules or future revision or enforcement of such rules with respect to other services. Accordingly, Congress did not require, or even suggest, that these three services be the exclusive subject of Commission preemption.

As the Commission recognized in the Further Notice, such silence on the part of Congress with respect to the Commission's previous and long-standing preemption of antenna restrictions imposed by local government does not mean that Congress intended to overrule the scope of such

preemption. The Commission promulgated limited preemption measures in 1986, and commenced the present proceeding in the spring of 1995 in order to strengthen these measures. Congress was well aware of the ongoing proceedings on these issues, and its silence should be read as acceptance of the actions already taken by the Commission. Section 207 merely indicates a desire on the part of Congress to add to them. As the Commission noted, "[i]f Congress wished to preclude the Commission from enforcing this preemption rule with respect to services other than direct-to-home video, it could have done so expressly. It did not." Further Notice ¶61.

The legislative history does not indicate otherwise. There is only one explicit reference to C-band dishes in the entire legislative history of Section 207. That reference, contained in the House Report, and relied upon by those urging the Commission to exercise preemption for these three services exclusively, only explains that C-band satellite antennas are not devices which are utilized to receive DBS service, and accordingly, are not covered by the specific preemption standard set forth in section 207.<sup>2/</sup> This language, aimed at both public and private restrictions, does not criticize at all the Commission's earlier preemption of unreasonable governmental restrictions on other services, including C-band video reception. Nowhere did the Committee indicate an intent to erase the preexisting preemption in this area. Since Congress was well aware of what the Commission had done ten years earlier and what the Commission was contemplating in this proceeding, the most logical construction of Section 207 is that Congress determined to strengthen the Commission's resolve to preempt with respect to the identified services, and to expand that preemptive authority to cover private restrictions under very narrow circumstances. Congress concluded that the

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<sup>2/</sup> The House version of Section 207 provided for only broadcast and DBS services. The Conference Committee included MMDS as well. The Senate bill did not contain a similar provision at all.

Commission had addressed C-band antennas and the like to its satisfaction, but weighed in with respect to these other services, in order to ensure federal preemption according to a congressionally adopted standard. Therefore, Section 207 does not preclude enforcement of the Commission's preexisting preemption rules with respect to satellite earth station antennas or future Commission revisions of such rules.

**II. Congress Did Not Intend To Preempt Private Restrictions Which Impair A Viewer's Ability To Receive Video Programming Services In The Multifamily Context.**

The Commission proposes the following rule to govern private, nongovernmental restrictions pursuant to Section 207:

No restrictive covenant, encumbrance, homeowners' association rule, or other nongovernmental restriction shall be enforceable to the extent that it impairs a viewer's ability to receive video programming services over a satellite antenna less than one meter in diameter. (emphasis added)

The Commission should either modify this rule to exempt MDUs from its reach, or clarify in the ensuing Report and Order that this provision is not intended to be applied to multifamily properties.

In addressing private restrictions impairing the viewer's ability to receive broadcast, MMDS and DBS services by Section 207, Congress meant only to preempt such restrictions in the context of single-family homes within, e.g., planned unit developments. Congress did not intend for this provision to govern multifamily dwellings. The relevant legislative history makes this clear. While the Conference Report is silent with respect to private restrictions, the House Report references "restrictive covenants," "encumbrances," and "homeowners' association rules" as the private restrictions targeted by Section 207. The very same terms are employed by the Commission in its proposed rule. These terms are understood to refer to single-family homes within planned unit

developments and the like, indicating an intent on the part of Congress to address only dwellings owned by the party wishing to erect the antenna. The use of the terms cannot, and should not, be implied to alter the relationship between landlord and tenant as governed by lease agreements in the multifamily context.

The vague, unlimited catch-all provision contained in the proposed rule could, by its terms, be applied to inhibit the enforcement of a lease agreement. As such, the rule could easily result in an unconstitutional taking of private property. By way of demonstration, any tenant could insist upon the physical installation of a DBS antenna anywhere on the property, including common areas, over the objection of the landlord and in violation of the lease agreement. The property owner unquestionably owns and controls the common areas of the MDU.<sup>3/</sup> Although tenants, of course, have nonexclusive rights of use in the common areas, these rights do not include the right to permanently, physically occupy these areas.<sup>4/</sup> Indeed, common areas are the most likely location which would allow for the receipt of video programming services by satellite antenna. For example,

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<sup>3/</sup> Further, the property owner would undoubtedly remain liable for the maintenance of any facilities installed in the MDU. For example, even if the antenna were affixed on the balcony of an individual unit, the landlord would be liable if faulty installation caused the antenna to fall and injure someone. In related areas, the liability of property owners has been extended to the entirety of the sprinkler system, Payless Discount Centers, Inc. v. 25-29 North Broadway Corp., 443 N.Y.S.2d 21, 23 (N.Y. App. Div. 1981), the heating system, Thompson v. Paseo Manor South, 331 S.W.2d 1, 3-4 (Mo. Ct. App. 1959), and the electrical system, Leavitt v. Glick Realty Corp., 285 N.E.2d 786, 789 (Mass. 1972). This potential liability necessitates control over the installation of any facilities on the property.

<sup>4/</sup> It is ironic that some early skirmishes over the respective rights of landlords and tenants in common areas were centered on tenants' attempts to install television antennas on the roofs of properties over the property owners' objections. See, e.g., Kaplan v. Sessler, 96 N.Y.S.2d 288 (N.Y. App. Term 1950); Leona Bldg. Corp. v. Rice, 94 N.Y.S.2d 390 (N.Y. App. Term 1949); Scroll Realty Corp. v. Mandell, 92 N.Y.S.2d 813 (N.Y. Sup. Ct. 1949). The tenants were routinely prevented from doing so.

the tenant's individual unit may face an obstructed side of the building such that an antenna installation there would not enable signal receipt. Accordingly, pursuant to the Commission's proposed language, that tenant (and numerous others) could force a landlord to allow the installation of individual antennas on the rooftop with associated facility installation throughout the building into the units.<sup>5/</sup> The proposed rule, if read to include MDUs, renders the lease unenforceable, as "impairing" the tenant's ability to receive video programming services.

The Supreme Court firmly established that the permanent physical invasion and occupation of another's property is a taking in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). The New York mandatory access statute at issue in Loretto contained a similar prohibition to the one in the Commission's proposed regulation.<sup>6/</sup> The property owner may not "interfere with" or "impair" the forced installation of facilities in an MDU -- both obstruct the property owner's authority over the property.<sup>7/</sup>

Thus, if the regulations which the Commission enacts pursuant to Section 207 are applied to tenants in MDUs, such application will work an uncompensated taking of the property owners' property. The Commission cannot exact this taking constitutionally, as Congress has not given the

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<sup>5/</sup> This is not to say that an installation within the unit, contrary to the language of the lease but pursuant to statutory authority, would not also represent an unconstitutional taking of private property. Such installation represents as much of a permanent physical invasion and occupation of private property over the objection of the landlord as a forced installation within the common area.

<sup>6/</sup> Therein, an owner of an MDU could not "interfere with the installation of cable television facilities." Id. at 423.

<sup>7/</sup> The analysis does not change regardless of whether the tenant "owns" the antenna. Notwithstanding that certain DBS operators lease the antenna to the customer and retain ownership, the scenario remains that the tenant wishes to obtain DBS service, thus forcing the installation of facilities onto the property

Commission the power of eminent domain in this instance. There is no reading of Section 207 which could imply a grant of eminent domain. In addition, the proposed rule does not provide for just compensation for this taking. Given that legislation must be interpreted, where possible, so as to preserve its constitutionality, the regulations enacted pursuant to Section 207 unquestionably should exclude the multifamily setting to avoid the takings issue. See, e.g., Frisby v. Schultz, 487 U.S. 474, 483, 108 S.Ct. 2495, 2501, 101 L.Ed.2d 420 (1988); United States v. Brown, 731 F.2d 1491, 1494 (11th Cir. 1984); Federal Election Comm'n v. Florida For Kennedy Comm., 681 F.2d 1281, 1287 (11th Cir. 1982).

This is why Congress's statutory language was limited to terms referencing a single family home context. Preempting nongovernmental restrictions barring or limiting the installation of antennas within the confines of a single family lot where that lot is wholly owned by the party wishing to install that antenna does not represent a physical, permanent invasion or occupation of another's private property.

Finally, not only would the proposed rules be unconstitutional, they would also represent an unworkable policy. The Commission invites a free-for-all if each tenant in an MDU has the unrestricted right to install a DBS antenna. There are relevant space and safety concerns in addition to the aesthetic concerns earmarked by the Commission. Clearly the Commission does not want to, nor should it, become involved in promulgating regulations governing the minutiae which determine who can place an antenna in each location, the priority among residents if space is limited, etc. These determinations are the province of the property owner. Only the property owner is in the position to assess the circumstances of the particular MDU and place the property's overall needs first. Therefore, the Commission should modify, or clarify, the broad "catch-all" contained in its proposed

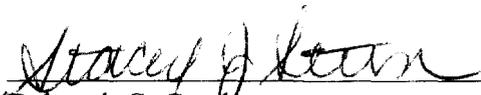
rule ("or other nongovernmental restriction") specifically to exempt multifamily properties.

**CONCLUSION**

The Commission reached the correct conclusion when it determined that the specifically enumerated services contained in Section 207 are not meant to be exclusive, and do not preclude enforcement of the Commission's preexisting preemption rules with respect to other services. This result should be affirmed. Moreover, to realize the intent of Congress and to avoid working an unconstitutional taking, the Commission should explicitly exclude MDUs from its preemption of nongovernmental restrictions on the ability to receive video programming services over satellite antennas.

Respectfully submitted,

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Dated: May 6, 1996

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