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July 3, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Presentation in CS Docket 96-83

Dear Mr. Secretary:

Pursuant to 47 C.F.R. § 1.1206, the Building Owners and Managers Association, International ("BOMA"), the Institute of Real Estate Management ("IREM"), the International Council of Shopping Centers ("ICSC"), the National Apartment Association ("NAA"), the National Association of Realtors ("NAR"), the National Realty Committee ("NRC"), the National Association of Real Estate Investment Trusts ("NAREIT"), the National Multi Housing Council ("NHMC"), and the American Seniors Housing Association ("ASHA") (jointly, the "Real Estate Associations") through undersigned counsel, submit this original and one copy of a letter disclosing a written and oral ex parte presentation in the above-captioned proceeding.

On July 2, 1996, the following individuals met with certain members of the Commission staff on behalf of the Real Estate Associations: Gerard Lavery Lederer of BOMA; James N. Arbury of NAA, NHMC and ASHA; Roger Platt and Edward Desmond of NRC; Regina Brown and Edward C. Maeder of ICSC; Margaret Jaffee of NAREIT; Russell Riggs of IREM; Jeanne Delgado and Jacob Kuitwaard of NAR; and Nicholas P. Miller and Matthew C. Ames of Miller, Canfield, Paddock and Stone, P L.C.

The Commission staff members present were: Meredith Jones, William Johnson, John Logan, Lynn Crakes, Barbara Ebbin, Meryl Icove, Jo Ann Lucanik and Larry Walke.

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The meeting dealt with the concerns of the real estate industry concerning proposals for granting telecommunications providers mandatory access to privately-owned real estate and preemption of private contractual arrangements governing the placement of telecommunications facilities, including matters set forth in the attached written presentation of the Real Estate Associations.

Copies of the attached written presentation were given to all of the Commission staff named above. Commission staff members were also given a compilation of excerpts from formal comments previously filed with the Commission by the Real Estate Associations.

Please contact the undersigned with any questions.

Very truly yours,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By Matthew C. Ames

Matthew C. Ames

Enclosures

cc: Meredith Jones, Esq.
William Johnson, Esq.
John Logan, Esq.
Lynn Crakes, Esq.
Barbara Ebbin, Esq.
Meryl Icove, Esq.
Jo Ann Lucanik, Esq.
Larry Walke, Esq.

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July 2, 1996

THE REAL ESTATE INDUSTRY OPPOSES THE COMMISSION'S ATTEMPT TO ENACT A FEDERAL ENTITLEMENT TO WATCH CERTAIN FORMS OF TELEVISION

The owners and managers of multi-tenant residential and commercial properties[1] have demonstrated in their comments that the Commission's proposed rules preempting lease provisions governing the placement of DBS, MMDS and broadcast receiving antennas as proposed by IB Docket 95-59 (DBS antennas) and CS Docket 96-83 (MMDS and over-the-air antennas) should not be adopted. The Commission apparently has adopted the notion that Section 207 of the Telecommunications Act of 1996 grants all "viewers" a federal entitlement to receive programming. This interpretation is not required by the language of Section 207, is contrary to the legislative history, and would render Section 207 unconstitutional if applied as the Commission suggests.

- Section 207 does not state that all prospective viewers shall have the right to receive video programming through the three classes of antennas in question. What Section 207 does state is that certain restrictions on reception of video programming services shall be prohibited. This does not mean that Congress meant to preempt all nongovernmental restrictions, and indicates that the Commission should not adopt an extreme interpretation of the statute.

- The plain text of Section 207 does not define which restrictions are to be prohibited, but neither does Section 207 preempt ***all*** restrictions. Thus, the Commission has some discretion regarding the restrictions that are to be prohibited.

- The legislative history, in turn, limits the Commission's discretion. There is no suggestion that the FCC may "preempt" contractual relations between private entities. For many years there have been disputes between homeowners and their homeowners' associations, condominium boards and neighbors regarding the placement of satellite dishes and outdoor antennas: it was that issue and only that issue that Congress addressed in Section 207. The legislative history makes this plain: the Conference Report says nothing of substance about the matter, but the House Report plainly refers to homeowners association rules and restrictive covenants -- the same legal devices used to ban antennas in many neighborhoods. The legislative history evidences no intent to confer a federal right on all viewers to receive programming through any transmission means.

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[1] Represented in these four dockets by the Building Owners and Managers Association International ("BOMA"), the Institute of Real Estate Management ("IREM"), the International Council of Shopping Centers ("ICSC"), the National Apartment Association ("NAA"), the National Multi Housing Council ("NHMC"), the National Realty Committee ("NRC"), and the National Association of Real Estate Investment Trusts ("NAREIT") and in the individual comments of some 220 entities engaged in real estate ownership and management.

- The 1996 Act has the express purpose of reducing government regulation and freeing the private sector to compete, yet it appears that the Commission is interpreting the Act to impose additional government regulation on the real estate industry and interfering with the free market. It is inconceivable that a Congress marked by its philosophical opposition to most entitlements would have created a new entitlement for something so relatively trivial as the right to watch television using a certain type of antenna.

- The proposed rules ignore technological limitations affecting the purported new entitlement. Many apartment residents simply cannot receive DBS or MMDS signals because of the location of their units. Surely this fact would have been discussed in the drafting and debate on the 1996 Act if Congress thought that apartments fell within the scope of Section 207. There is no evidence that Congress intended to force building owners to become the equivalent of SMATV operators against their will.

- If Congress intended to create the purported new federal entitlement, the federal government must compensate property owners for the installation and maintenance of those antennas and related facilities, but no appropriation has been made to fund those activities.

- In any case, Congress has no authority to grant the purported new entitlement because it requires regulating the real estate industry in a manner that exceeds the limitations of the Commerce Clause. The 1996 Act contains no finding that the relationship between apartment owners and residents, which would be regulated under the Commission's interpretation of Section 207, has "a substantial relation to interstate commerce," as required by U.S. v. Lopez, 115 S. Ct. 1624 (1995).

- Finally, the Commission has no authority to regulate the relationship between building owners and residents. In enacting Section 207, Congress did not intend to reverse the Supreme Court's holding in Regents v. Carroll, 338 U.S. 586 (1950), reiterated in Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994) that the FCC has no jurisdiction over contractual rights involving private property.

The Commission should amend its proposed rules so they apply only to restrictive covenants and homeowners' association rules, as Congress intended.

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