

EX PARTE OR LATE FILED

LAW OFFICES OF  
**MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.**

DOCKET FILE COPY ORIGINAL

SIDNEY T. MILLER (1864-1940)  
GEORGE L. CANFIELD (1866-1928)  
LEWIS H. PADDOCK (1866-1936)  
FERRIS D. STONE (1882-1946)

A PROFESSIONAL LIMITED LIABILITY COMPANY

1225 NINETEENTH STREET, N.W.

SUITE 400

WASHINGTON, D.C. 20036

ANN ARBOR, MICHIGAN  
BLOOMFIELD HILLS, MICHIGAN  
DETROIT, MICHIGAN  
GRAND RAPIDS, MICHIGAN  
KALAMAZOO, MICHIGAN  
LANSING, MICHIGAN  
MONROE, MICHIGAN  
WASHINGTON, D.C.

INCORPORATING THE PRACTICE OF  
MILLER & HOLBROOKE

**MATTHEW C. AMES**  
(202) 457-5961

TELEPHONE (202) 429-5575

(202) 785-0600

FAX (202) 331-1118

(202) 785-1234

AFFILIATED OFFICES:  
PENSACOLA, FLORIDA  
ST. PETERSBURG, FLORIDA  
GDAŃSK, POLAND  
WARSAW, POLAND

July 19, 1996

RECEIVED

JUL 19 1996

**VIA HAND DELIVERY**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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 IB Docket 95-59

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 19, 1996, the following individuals met with David Siddall of Commissioner Ness's office, on behalf of the Real Estate Associations: Gerard Lavery Lederer of BOMA; James N. Arbury of NAA, NHMC and ASHA; Peter W. Schwartz of NAA; Edward Desmond of NRC; Edward C. Maeder of ICSC; Margaret Jaffee of NAREIT; Russell Riggs of IREM; Roy Deloach and Jacob Kuitwaard of NAR; and Nicholas P. Miller and Matthew C. Ames of Miller, Canfield, Paddock and Stone, P.L.C.

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

No. of Copies rec'd 071  
ENCLOSURE

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

Mr. William F. Caton

-2-

July 19, 1996

preemption of private contractual arrangements governing the placement of telecommunications facilities, including matters set forth in the attached agenda and written presentation of the Real Estate Associations.

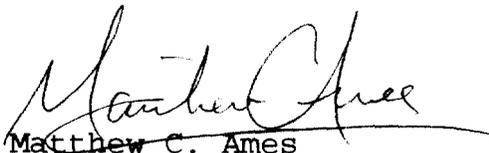
Copies of the attached agenda and written presentation were given to Mr. Siddall. Mr. Siddall was also given a compilation of formal comments previously filed with the Commission by the Real Estate Associations.

Please contact the undersigned with any questions.

Very truly yours,

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

By

  
Matthew C. Ames

Enclosures

cc: David Siddall, Esquire

WAFS1\45128.2-A\107379-00002

July 10, 1996

**PROPOSED AMENDMENTS TO DBS ANTENNA PREEMPTION RULES**

**Text of the Proposed Amendment:**

The following paragraph would be added as new paragraph (g) of Section 25.104 of the Commission's rules:

(g) Nothing in this rule shall include, affect, or apply to the terms of (i) any lease for commercial or residential property; or (ii) any other agreements or relationships between or among owners, occupants or operators of commercial real estate.

In addition, the words "of general applicability" would be added after the words "nongovernmental restriction" in proposed new Section 25.104(f), after the words "or similar regulation" in the first sentence of existing Sections 25.104(a) and (b), and after the words "or other regulation" in existing Section 25.104(c). (See attached.)

**Explanation of the Proposed Amendment:**

The purpose of the proposed amendment is to make it clear that leases and certain other agreements regarding commercial and residential properties do not fall within the scope of proposed new section (c) (the "Proposed Rule").

Subparagraph (i) excludes all leases of commercial and residential properties from the Proposed Rule.

Subparagraph (ii) excludes from the operation of the Proposed Rule arrangements and agreements regarding commercial property that are not in the typical form of leases between landlords and tenants, but serve some of the same functions as a lease. For example, it is common in shopping centers for some major tenants, such as department stores, not to be lessees of the shopping center owner, but to either own their premises in fee or to occupy and operate their premises as lessees of third parties. Whatever their ownership or lease arrangements, all such parties enter into agreements that impose limitations on their operations and the use of their premises and the common areas of the shopping center, including the roof. Those limitations are the same as the limitations imposed on stores that lease their space directly from the shopping center owner. In addition, a number of office buildings and office parks have similar arrangements.

The addition of the words "of general applicability" in the places indicated is necessary to make it clear that the sections

in question do not apply to nongovernmental restrictions negotiated on an individual basis.

**Proposed Language for Insertion in the Discussion Section of the Final Order:**

The language of existing Paragraph 62 of the FNPRM would be modified by making the minor additions and deletion shown in the attachment.

In addition, the following paragraph would be inserted before the last sentence of Paragraph 62 of the FNPRM:

We do not, however, believe that Section 207 was intended to reach all nongovernmental restrictions that might affect a viewer's ability to receive video programming. We reach this conclusion for two reasons. First, the legislative history does not evince a Congressional intention to go beyond governmental and quasi-governmental restrictions. The Congressional language does not mention, for example, traditional private property interests such as leases. It only addresses quasi-governmental circumstances such as homeowners association agreements and other membership associations which restrict the ability of a property owner to achieve the full enjoyment of that property. The legislative history does not indicate that Congress intended Section 207 to apply to commercial property, to leases for residential property, to any landlord-tenant relationship, or to agreements and relationships between or among owners, occupants or operators of commercial real estate. Nor does the Commission have general jurisdiction over agreements between non-licensees and non-permittees. Regents v. Carroll, 338 U.S. 586 (1950). Our second reason is respect for fundamental property rights as required by the Fifth Amendment to the Constitution. We do not believe Congress expressed any intention that the Commission engage in any action that could rise to the level of a "taking" of a private property interest with its parallel financial liability on the Federal government. Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994).

**PROPOSED AGENDA FOR  
EX PARTE PRESENTATION TO DAVID SIDDALL  
REGARDING IB DOCKET 95-59 AND CS DOCKET 96-83**

**Date and time:** Friday, July 19, 1996 at 10:00 a.m.

**Place:** Commissioner Ness's office, Room 832, 1919 M Street

**Industry representatives attending:**

Gerard Lavery Lederer:	Building Owners and Managers Association
Ed Desmond:	National Realty Committee
Jim Arbury:	National Multi Housing Council
	National Apartment Association
	American Seniors Housing Association
Edward Maeder:	International Council of Shopping Centers
Russell W. Riggs:	Institute of Real Estate Management
Nicholas P. Miller and Matthew C. Ames:	Miller, Canfield, Paddock and Stone

**Matters to be discussed:**

- I. Policy issues arising out of the Commission's proposed rules implementing Section 207 of the 1996 Act as they affect the interests of real property owners regarding the placement of DBS, MMDS and over-the-air receiving antennas.
  - A. The effects of the proposed rules on the existing free market for real estate.
  - B. The effects of the proposed rules on effective property management, including compliance with safety codes.
  - C. The desirability of creating a federal entitlement to watch certain forms of television.
  
- II. Legal issues arising out of the proposed rules, including:
  - A. Distinctions between governmental and nongovernmental restrictions, as indicated by the legislative history.

- B. Whether the plain text of Section 207 requires the elimination of *all* restrictions.
  - C. Fifth Amendment issues arising out of (i) any prohibition on enforcement of leases and other private agreements, or (ii) the grant of a unilateral right to install antennas on property owned by another.
  - D. The extent of Congressional authority to regulate the landlord-tenant relationship under the Commerce Clause, as indicated by *U.S. v. Lopez*.
  - E. Limitations on the extent of the Commission's authority to regulate the real estate industry, as indicated by *Regents v. Carroll* and *Bell Atlantic v. FCC*.
- III. Administrative issues arising out of the proposed rules, including any process for reviewing waiver requests and resolving disputes between affected parties.

July 19, 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<sup>1</sup> 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

- o 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.
- o 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.
- o 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.

---

<sup>1</sup> Represented in these two 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 135 entities engaged in real estate ownership and management.

- o 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.
- o 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.
- o 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.
- o 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).
- o 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.