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July 18, 1996

VIA HAND DELIVERY

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

JUL 18 1996

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, the Institute of Real Estate Management, the International Council of Shopping Centers, the National Apartment Association, the National Association of Real Estate Investment Trusts, the National Multi Housing Council the National Realty Committee, and the American Seniors Housing Association (jointly, the "Real Estate Associations"), through undersigned counsel, submit this original and one copy of a letter disclosing a written ex parte presentation in the above-captioned proceeding.

On July 9 and July 10, 1996, this office filed notices of written and oral ex parte presentations made on behalf of the Real Estate Associations to Suzanne Toller of Commissioner Chong's office and Jackie Chorney of Chairman Hundt's office, respectively. The meetings disclosed by those notices dealt with the concerns of the real estate industry regarding the Commission's proposed rules prohibiting restrictions on the placement of certain classes of receiving antennas.

In the course of the meetings, Ms. Toller and Ms. Chorney requested drafts of possible revisions to the proposed rules that would exclude restrictions imposed by leases for commercial and residential real estate and by certain arrangements between owners of commercial real estate.

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Mr. William F. Caton

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A copy of a written presentation subsequently submitted to Ms. Toller and Ms. Chorney in response to their requests is attached.

Please contact the undersigned with any questions.

Very truly yours,

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

By


Matthew C. Ames

Enclosures

cc: Jackie Chorney, Esquire
Suzanne Toller, Esquire

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July 10, 1996

PROPOSED AMENDMENTS TO MMDS ANTENNA PREEMPTION RULES

Text of the Proposed Amendment:

The following paragraph would be added as new paragraph (d) of the rule proposed in the Notice of Proposed Rulemaking issued in CS Docket No. 96-83, released on April 4, 1996:

(d) 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 "or similar regulation" in the first sentence of proposed new section (a)(1), and after the words "nongovernmental restriction" in proposed new section (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 10 of the NPRM would be modified by making the minor additions and deletion shown in the attachment.

In addition, the following paragraph would be inserted at the end of Paragraph 10 of the NPRM:

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 three 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).