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**MEMORANDUM**

RECEIVED

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**THE FEDERAL COMMUNICATIONS COMMISSION IS REQUIRED BY SECTION 207  
TO PREEMPT LANDLORDS' AND CONDOMINIUM ASSOCIATIONS' RESTRICTIONS  
ON ACCESS TO DBS SERVICE AND SUCH REGULATIONS WILL NOT EFFECT  
AN IMPERMISSIBLE TAKING**

July 25, 1996

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**I. Introduction:**

Section 207 of the Telecommunications Act of 1996 ("Act") instructs the Federal Communications Commission ("Commission"), *inter alia*, to issue regulations prohibiting restrictions on the use of direct broadcast satellite ("DBS") receivers.<sup>1/</sup> Congress clearly stated its intent that this section preempt, *inter alia*, private contractual restrictions on the use of DBS receivers as well as local zoning restrictions.

Landlords of rental properties erroneously assert that the Commission may not preempt private contractual restrictions on the use of DBS receivers by tenants. In response, the Commission reportedly is considering a proposal that would preempt restrictions on the use of DBS receivers only with respect to homeowners. Restrictions on millions of renters and perhaps even on condominium owners would continue to be allowed.

Any such artificial distinctions between single family homeowners and condominium owners or renters would unfairly deny millions of viewers access to DBS service, in direct contravention of the Act's explicit purpose to expand access to telecommunications services to all Americans. It would engraft onto the legislation a distinction based on economic status of the viewer nowhere to be found in Section 207 and utterly at odds with Congressional intent throughout the Act to avoid creation of information "haves" and information "have nots." Finally, it would thwart the purpose of Section 207: to knock down yet another barrier to the development of robust

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<sup>1/</sup> Section 207 prohibits restrictions only on the use of DBS receivers, which are approximately 18 inches in diameter. Section 207 does not preempt any restrictions on the use or placement of "C-band" satellite dishes, which are much larger. See H.R. Rep. 204, Part 1, 104th Cong., 1st Sess. 124 (1995).

competition in the multichannel video programming distribution market. By permitting the continuation of restrictions on DBS receivers in multiple dwelling units, the FCC would be an accomplice to limiting significantly market penetration of DBS service. Nothing could stray farther from the mandate Congress imposed on the Commission in enacting Section 207.

In Part II, this memorandum: (A) explains why the text and legislative history of Section 207 require preemption of all restrictions on the use of DBS receivers; (B) summarizes Congress' authority to preempt private restrictions on the use of DBS receivers; and (C) explains why preempting such restrictions do not work an unconstitutional taking of private property. In Part III, this memorandum concludes that the Act requires the Commission to preempt all private restrictions on the use of DBS receivers, without regard to whether or not a viewer owns his or her home and without regard to whether or not the residence is detached or a unit within a multiple dwelling building.

## **II. Analysis:**

### **A. The Text and Legislative History State that Section 207 Preempts Private Restrictions on DBS Services**

The Commission apparently is considering dividing viewers into two classes in a manner that Section 207 does not countenance: viewers who own their homes, and viewers that do not. Nothing in the text or legislative history of the Act supports the notion of applying Section 207 differently to viewers who own homes and viewers who rent. Section 207 requires the Commission to: "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for . . . direct broadcast satellite services."<sup>2/</sup> According to the text, Section 207 applies with regard to restrictions on viewers, not homeowners.

Similarly, the legislative history is devoid of any reference to property owners or any basis for relegating renters to second class status not entitled to the benefits conferred by Section 207 upon "viewers". It states that Section 207 was intended:

to preempt enforcement of . . . restrictive covenants or encumbrances that prevent the use of . . . satellite receivers designed for receipt of DBS services. Existing regulations, including but not limited to . . . restrictive covenants or homeowners' association rules, shall be unenforceable to the extent contrary to this section.<sup>3/</sup>

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2/ Pub. L. No. 104, 104th Cong., 1st Sess. § 207, 110 Stat. 56, 114 (1996).

3/ H.R. Rep. 104, Part 1, 104th Cong., 1st Sess. 123-124 (1995).

Nothing in Section 207 or the Act's legislative history supports any distinction between viewers who are homeowners and viewers who are renters. To the contrary, the Act and the legislative history both clearly state that the purpose of the legislation is to increase access of all Americans to telecommunications services.<sup>4/</sup> Any implementing regulations which would permit restrictions on non-homeowners' DBS access, would fly in the face of law and congressional intent. At the July 18, 1996 House Telecommunications and Finance Subcommittee's oversight hearing on implementation of the Act, member after member of the Subcommittee warned the Commission to implement the Act consistent with its terms and intent and not to rewrite it according to the Commission's own policy views. Any Commission rule implementing Section 207 in a manner which would deny its benefits to renters or condominium or cooperative owners would be at odds with that admonition.

### **B. Congress and the Commission have Authority to Preempt Landlord's Restrictions on DBS Access**

Some incorrectly contend that the Commission may not issue regulations that impinge upon private contractual provisions between landlords and tenants that restrict tenants' access to DBS service because Congress lacks authority to affect such contracts. A long line of judicial precedents, however, reaches exactly the opposite conclusion. The courts agree that: (1) Congress may enact legislation modifying the rights of private parties reflected in contracts; (2) such legislation is not an unconstitutional taking; and (3) the Commission may promulgate regulations in accordance with such legislation. Preempting enforcement of private restrictions on DBS access is clearly within the power of Congress, and Commission regulations implementing such a legislative preemption are lawful.

Congress' power to alter contractual relationships pursuant to its constitutional authority to regulate interstate commerce is firmly established. As the Supreme Court recently stated:

Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they

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4/ See e.g., Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (providing in the preamble: "[a]n Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies"); see also, H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 1 (1996) (providing that the legislation is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition").

have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.<sup>5/</sup>

Retroactive application of statutes modifying contractual rights that predated the legislation is also entirely permissible.<sup>6/</sup>

No one seriously challenges Congress' authority to regulate access to telecommunications services.<sup>7/</sup> The Act establishes an overarching federal policy of promoting competition and consumer choice and furthers that policy by specifically eliminating a host of barriers to competition. Local zoning regulations and private covenants restricting access to DBS service are among those barriers removed. Section 207 and the Act are patterned after civil rights legislation prohibiting discrimination in private contracts.<sup>8/</sup> For example, the Act includes a non-discrimination section -- prohibiting discrimination in the implementation of the Federal Communications Act on the basis of race, color, religion, national origin, or sex" -- which tracks almost verbatim language in the Civil Rights Act of 1968, barring discrimination in the sale or rental of housing.<sup>9/</sup> The reference in Section 207's legislative history to rendering unenforceable private covenants restricting access to

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5/ Connolly v. Pension Benefit Guarantee Corp., 475 U.S. 211, 223-224 (1986). See also Concrete Pipe & Prods. v. Construction Laborers Pension Trust, 508 U.S. 602, 639-640 (1993) (federal legislation may modify existing contractual obligations); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16 (1975) (Congress has right to enact legislation altering the "rights and burdens" between private parties); Norman v. Baltimore & Ohio R.R. Co., 294 U.S. 240, 309-310 (1935) ("no constitutional ground for denying to the Congress the power expressly to prohibit and invalidate contracts, although previously made, and valid when made, when they interfere with the carrying out of the policy it is free to adopt"); Louisville & Nashville R.R. Co. v. Mottley, 219 U.S. 467, 482 (1911) ("contracts must be understood as made in reference to the possible exercise of the rightful authority of the government").

6/ See PBGC v. R.A. Gray & Co., 467 U.S. 717 (1984) (upholding retroactive application of ERISA amendments).

7/ See Congressional Research Service, The Constitution of the United States: Analysis and Interpretation 174 (1982) (Federal Communications Act of 1934 has "evoked no basic constitutional challenge").

8/ In Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964), and Katzenbach v. McClug, 379 U.S. 294 (1964), the Supreme Court upheld Congress' Commerce Clause authority to prohibit discrimination in accommodations.

9/ Compare H.R. Conf. Rep. No. 458 § 104 with 42 U.S.C. § 3604 (Fair Housing Act).

DBS service tracks the cases rendering unenforceable racially restrictive covenants.<sup>10/</sup>

The Commission's authority to modify private leasehold agreements is well recognized by the courts. Under the Pole Attachment Act, the Commission, in implementing an act of Congress, was authorized by Congress to regulate leasehold contracts between utility-pole owners and cable companies for space on the owner's poles.<sup>11/</sup> The Florida Power Corporation unsuccessfully challenged the Common Carrier Bureau's authority to regulate these rates. On review by the full Commission, however, the Commission stated:

It is well established that contracts made in areas of governmental regulation are subject to modification by subsequent legislation. . . . The ability of Congress to react to changing conditions and to legislate in the public interest cannot be restricted by private agreements. Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution.<sup>12/</sup>

### **C. Preempting Landlord's Restrictions on Access to DBS Service is not a Taking**

Landlords argue that any attempts by the Commission to preempt or limit restrictions on tenants' access to DBS service is a regulatory taking under the Fifth Amendment to the Constitution. Takings jurisprudence clearly shows that this is not the case. Preempting such restrictions pursuant to Section 207 of the Act is not an unconstitutional taking.

If Congress has the constitutional authority to enact a statute, application of that statute by regulation cannot be defeated by private contractual provisions.<sup>13/</sup> "For the same reason, the fact that legislation disregards or destroys existing contractual

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10/ See Mayers v. Ridley, 465 F.2d 630 (D.C. Cir. 1972) (*per curiam*) (permitting homeowners' challenge to legality of racially restrictive covenants) (*citing Shelly v. Kraemer*, 334 U.S. 1 (1948) (holding racially restrictive covenants judicially unenforceable)).

11/ 47 U.S.C. § 224.

12/ Teleprompter Corp. and Teleprompter Southeast, Inc. v. Florida Power Corp., File No. PA-81-0008 et al., 1984 FCC LEXIS 1874 (Oct. 3, 1984), rev'd on other grounds sub nom Florida Power Corp. v. FCC, 772 F.2d 1537 (11th Cir. 1985), rev'd on other grounds by FCC v. Florida Power Corp., 480 U.S. 245 (1987) (leaving intact the Commission's original decision).

13/ Connolly v. Pension Benefit Guaranty Corp., 475 U.S. at 224.

rights does not always transform the regulation into an illegal taking."<sup>14/</sup> In the case of Commission regulations that specifically modified leasehold agreements, the Supreme Court held in FCC v. Florida Power that the Commission regulations pursuant to the Pole Attachments Act, regulating the rates utility pole owners could charge companies for space on their poles, did not effect a taking of the pole owner's property.<sup>15/</sup> The Court concluded that "statutes regulating economic relations of landlords and tenants are not per se takings."<sup>16/</sup>

Government regulation, so long as it is not excessive to accomplish a legitimate government purpose, does not rise to the level of a taking. Consequently, governments have wide latitude to issue regulations governing: (1) prices of rental property, so long as a reasonable rate of return is permitted to the landlord; and (2) health, safety, aesthetic and other regulations that fall into governments' "police powers" unless they reduce by a high percentage the value of the landlord's property.<sup>17/</sup> For example, the Supreme Court has concluded that no taking occurs where laws "merely regulate [the owner's] use of land by regulating the relationship between landlord and tenant."<sup>18/</sup> In such circumstances, the courts generally do not find a taking, unless the government regulation at issue: (1) allows a significant physical occupation of the owner's property by the government, a governmental

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14/ Id.

15/ 480 U.S. 245.

16/ Id. at 252. The Court's opinion in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), is inapposite, because that case involved a state statute that permitted the physical invasion and occupation of the owners' property by third parties. The Loretto court specifically noted that the holding did not extend to the issue of regulatory modifications of rights between landlords and tenants. Id. at 439-441 n.19; see also Yee v. City of Escondido, 503 U.S. 519, 527 (1992) (holding in Loretto limited to physical takings when "government authorizes a compelled physical invasion of property").

17/ Ralph E. Boyer et al., The Law of Property § 12.2 (1991); see also Pennell v. City of San Jose, 485 U.S. 1, 8-11 (1988) (outlining elements of regulatory takings); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. at 440 (reaffirming government authority to enforce building and fire codes and to require installation of mailboxes in apartment buildings); Penn Central Transp. Co. v New York City, 438 U.S. 104, 124 (1978) (outlining three-factor test for takings analysis);

18/ Yee v. City of San Jose, 503 U.S. at 519.

agent, or the public; (2) the harm to the owner's property is a high percentage of its total value; or (3) the loss to the owner outweighs the gain to the public.<sup>19/</sup>

In the case of Section 207, were the FCC to promulgate a simple rule prohibiting landlords from enforcing restrictions which would impair a tenants' ability to receive direct broadcast satellite services, it would not rise to the level of a taking. The landlord could have considerable discretion in determining the means by which tenants could be provided access to DBS based upon the characteristics of the dwelling unit as long as tenants could receive a quality signal. For example, in the case of a high rise apartment, neither DBS service providers nor equipment manufacturers envision a situation wherein each tenant would require his or her own receiver on the roof. Instead, the DBS industry contemplates that all tenants in a high rise building electing to subscribe to a particular DBS service would be able to access that programming through a common DBS receiver on the rooftop. The signals could be distributed to individual units through wire using the same conduit utilized by an incumbent cable or SMATV operator. In the case of attached low rise units, such as townhouses, the landlord might elect to require the tenant to place the DBS receivers in the yard or on the patio, or alternatively, on the roof of his or her unit as long as the placement would not impair the viewer's ability to receive DBS service. Again, the Commission could provide for sufficient flexibility so as to indicate the paramount rights of the viewer to access DBS services while minimizing the extent of intrusion on the property owner's management of the property.

### III. CONCLUSION:

For the reasons stated above, the Commission should not apply Section 207 of the Act in a disparate manner to homeowners and renters. Congress clearly stated that the Act applies equally to all viewers, without regard to whether or not they own their home.

Any distinction based on property ownership, i.e., economic class, would be an invidious discrimination nowhere sanctioned in Section 207 and contrary to specific public policy goals the Commission has championed. Congress' authority to regulate the public's access to video programming services is beyond reproach, as is the Commission's authority -- and duty -- to implement the Act as Congress intended. The minimal regulation of the landlord-tenant relationship entailed by Section 207 is not a taking in violation of the Fifth Amendment.

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<sup>19/</sup> See generally John E. Nowak et al., Constitutional Law § 11.12(e) (1986); see also Yee v. City of Escondido, 503 U.S. at 522 (takings analysis "necessarily entails complex factual assessments of the purposes and economic effects of government actions").