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September 27, 1996

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

Re: Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Docket No. 95-59, CS Docket No. 96-83.

Dear Mr. Caton:

Enclosed are an original and 12 copies of the comments of the Independent Cable & Telecommunications Association for filing in the above-referenced rulemaking proceedings. These include the "Extra Public Copies" requested by the FCC in rulemaking proceedings implementing the 1996 Telecommunications Act as well as additional copies for distribution to the Commissioners' offices.

Please file-stamp the marked copy and return it to my office with the messenger.

Thank you for your assistance with this matter. If you have any questions, please do not hesitate to contact me at 202-371-5770.

Sincerely

Treg Tremont

Treg Tremont

Enclosures

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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	)	
	)	
Preemption of Local Zoning Regulation of Satellite Earth Stations	)	IB Docket No. 95-59
	)	
In the Matter of	)	
	)	
Implementation of Section 207 of the Telecommunications Act of 1996	)	CS Docket No. 96-83
	)	
Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service	)	

To: The Commission

COMMENTS OF INDEPENDENT CABLE & TELECOMMUNICATIONS ASSOCIATION

INDEPENDENT CABLE & TELECOMMUNICATIONS ASSOCIATION

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Dated: September 27, 1996

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SUMMARY AND INTRODUCTION

The Independent Cable & Telecommunications Association ("ICTA") submits these comments in response to the Further Notice of Proposed Rulemaking (the "Further Notice") in the above-referenced proceeding.[1/] Given that ICTA's members focus their competitive efforts in the MDU market, this rulemaking is of critical importance to them. The Commission has asked whether Section 207 should apply to properties where the antenna user either does not have exclusive use or control of the property or where the user does not have an ownership interest in the property (such properties will hereinafter be referred to as the "Unowned or Uncontrolled Properties" to reflect the fact that the antenna user either does not own or does not control the property). For three reasons, the answer to that question is no.

First, the Commission should avoid constructions of statutes that render serious doubts as to the constitutionality of the statute, and such a construction of Section 207 will render the statute unconstitutional under the Fifth Amendment. Forcing private property owners to permit their property to be seized by video service providers is a taking under the Fifth Amendment. The Supreme Court case of Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) is directly on point. Attempts by others to distinguish Loretto cannot withstand even minimum scrutiny. Applying Section 207 to Unowned or Uncontrolled Properties will render the statute invalid because it will result in takings of private property without just compensation. Section 207 does not have a just compensation provision, and in light of Bell Atlantic Telephone Companies v.

[1/] ICTA's members include private cable operators (referred to also as satellite master antenna television), shared tenant services providers, equipment manufacturers, program distributors, and property management development companies. ICTA operator members provide video, voice and data communications services to consumers throughout the country primarily in the residential multiple dwelling unit ("MDU") market.

FCC, 24 F.3d. 1441, 1445 (D.C.Cir. 1994), the Commission certainly cannot use the Tucker Act as the mechanism to compensate those whose property is seized.

Second, applying Section 207 to Unowned or Uncontrolled Properties will turn the statute into a mandatory access statute. Congress, however, has repeatedly considered -- and rejected -- mandatory access legislation, including such legislation in a precursor bill to the Telecommunications Act of 1996. The proposed statutes that were rejected would have unambiguously mandated access to MDUs and clearly spelled out that just compensation would be required. Conversely, in Section 207, Congress did not state anywhere, let alone clearly state, that this was a mandatory access statute. Moreover, Section 207 does not have a just compensation clause. The reason for these omissions is simple: Congress never intended for Section 207 to be a mandatory access statute. If Congress wanted to include mandatory access as part of the 1996 Telecommunications Act, it would have enacted the proposed language in the precursor bill that clearly provided for such. It did not do so.

Third, the legislative history of Section 207 establishes that it was not intended to apply to Unowned or Uncontrolled Properties. The legislative history indicates that the statute is only applicable to State or local statutes and regulations, State or local legal requirements, restrictive covenants or encumbrances. Nowhere in the legislative history does it state or even imply that the statute is applicable to leases. If Section 207 was intended to apply to leases and rental property, the legislative history certainly would have made that clear, especially in light of the large number of apartment dwellers in the country.

DISCUSSION

Section 207 of the Telecommunications Act of 1996 (the "1996 Act") provides as follows:

> Within 180 days after the date of enactment of this Act, the Commission shall, pursuant to Section 303 of the Communications Act, 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 services, or direct broadcast satellite services.[2]

Pursuant to Section 207, on August 6, 1996, the Commission released a Report and Order ("Report and Order") in which the Commission preempted and prohibited any State or local law or regulation, private covenant, homeowners' association rule or similar restriction, to the extent it impairs on certain properties the installation, maintenance or use of DBS, MMDS, ITFS, and LMDS antennas of one meter or less in diameter or diagonal measurement, or of television broadcast antennas.[3] The properties affected are only those within the exclusive use or control of the antenna user where the user also has a direct or indirect ownership interest in the property. Report and Order at ¶ ¶ 49-53. The Commission concluded that preemption of private, nongovernmental restrictions was constitutionally permissible with respect to an antenna installation on property actually owned by the antenna user and within the antenna user's exclusive control primarily because there would be no forced permanent physical occupation; that is, there would be no per se taking of another's private property in order to enable the antenna user to receive video programming services.

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[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) § 207. Section 303 of the Communications Act authorizes the FCC to issue rules and regulations "as public convenience, interest, or necessity requires" and, as amended by the 1996 Act, states that the FCC shall "[h]ave exclusive authority to regulate the provision of direct-to-home satellite service." 47 U.S.C. § 303.

[3] ICTA does not concede or address herein the validity of the Report and Order.

Id. at ¶ ¶ 41-44.

The Commission did not reach a decision on whether Section 207 applies to properties where the antenna user either does not have exclusive use or control of the property or where the user does not have an ownership interest in the property. The Unowned or Uncontrolled Properties include rental properties and condominiums to the extent that the facilities in the condominiums would be installed in common areas. As to these properties, the Commission issued the Further Notice of Proposed Rulemaking raising the question of whether Congress intended for Section 207 to apply to Unowned or Uncontrolled Properties, and if so, the constitutional ramifications of such an application. For the reasons set forth below, the Commission should conclude that Section 207 does not apply to Unowned or Uncontrolled Properties.

I. THE COMMISSION SHOULD NOT CONSTRUE SECTION 207 TO APPLY TO UNOWNED OR UNCONTROLLED PROPERTIES BECAUSE SUCH CONSTRUCTION WILL RENDER THE STATUTE UNCONSTITUTIONAL UNDER THE FIFTH AMENDMENT OF THE CONSTITUTION

A. If The Commission Construes Section 207 To Apply To Unowned Or Uncontrolled Properties, There Will Be Hundreds Of Thousands Of Takings Of Private Property

If Section 207 applies to Unowned or Uncontrolled Properties, a taking of private property will occur on hundreds of thousands of Unowned or Uncontrolled Properties throughout the country. The Commission has concluded that where Section 207 is applicable it prevents restrictions on DBS (including medium power KU-Band DTH), MMDS, ITFS, and LMDS antennas of one meter or less in diameter or diagonal measurement, or of television broadcast antennas without regard to size or shape. Therefore, if Section 207 applies to Unowned or Uncontrolled Properties, the property owners of those properties will be forced to permit every DBS provider as well as the MMDS

provider, the LMDS provider, and the ITFS provider in the area to install their antennas, dishes and other equipment on the property so long as they each can attract the interest of one tenant or resident of the property.

The fact that such a construction of Section 207 would result in a taking of private property cannot be questioned in light of Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). In Loretto, the United States Supreme Court reviewed a New York statute that provided that owners of multiple dwelling units ("MDUs") may not "interfere with the installation of cable television facilities" upon their premises. Id. at 423. The Supreme Court concluded that the statute exacted a taking of the property owner's property without just compensation in contravention of the Fifth Amendment. Id. at 421.

The Court in Loretto made it abundantly clear that any permanent physical occupation of the property owner's property, no matter how small or minor the occupation, is a taking.[4] Indeed, the Court explicitly stated as much: when there "is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action [that resulted in the taking] achieves an important public benefit or has only minimal

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[4] In concluding that a taking had occurred, the Loretto Court explicitly rejected the argument that because the wiring and equipment would only take a relatively small amount of space on the property, there was no taking:

> Few would disagree that if the State required landlords to permit third parties to install swimming pools on the landlords' rooftops for the convenience of the tenants, the requirement would be a taking. If the cable installation here occupied as much space, again, few would disagree that the occupation would be a taking. But constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.

Loretto, 458 U.S. at 436-37.

economic impact on the owner." Id. at 424-25 (emphasis added).[5] Similarly, the Court declared that "[a]lthough this Court's most recent cases have not addressed the precise issue before us, they have emphasized that physical invasion cases are special and have not repudiated the rule that any permanent physical occupation is a taking." Id. at 432. In addition, the Court concluded that "[w]e affirm the traditional rule that a permanent physical occupation of property is a taking." Id. at 441.

The Court also emphasized the seriousness of such a taking and the correctness of the Court's uniform decisions on this issue :

> The historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such an appropriation is perhaps the most serious form of invasion of an owner's property interest. To borrow a metaphor, . . . the government does not simply take a single "strand" from the bundle of property rights; it chops through the bundle, taking a slice of every strand.
>
> Property rights in a physical thing have been described as the rights to possess, use and dispose of it. To the extent that the government permanently occupies physical property, it effectively destroys each of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.
>
> Moreover, an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property. [P]roperty law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury.
>
> [Where there is a permanent physical occupation of property,] the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation.

Id. at 435-36, 441 (citations omitted)(emphasis added).

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[5] The Court cited cases that, "relying on the character of a physical occupation, clearly establish that permanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land." Id. at 430 (citations omitted).

In Loretto, the Court held that the property that was taken pursuant to the New York statute was the physical space in which the cable wire and associated equipment was installed. If the Commission construes Section 207 to apply to Unowned or Uncontrolled Properties, the property that will be taken is the physical spaces on the properties in which the DBS, MMDS, LMDS, and ITFS providers' cable wire, associated equipment, antenna and dishes will be installed. If Section 207 is so interpreted, the precise parallel between it and the New York statute will be undeniable.

In fact, ignoring for the moment the lack of statutory authority and the uncompensated nature of the takings under Section 207 (see Section I.B. and II, infra), Section 207 would trigger far more takings per property than the New York statute ever could. Under the New York statute there would ordinarily be one taking per property because there is generally only one franchised operator within a franchised area. The Loretto Court recognized, however, that once multiple cable franchisees operated in the same franchised area, the landlord's use of its building would be even "more significantly restrict[ed]" because the statute would require two or more forced installations. Id. at 419 & n.9. If Section 207 applies to Unowned or Uncontrolled Properties, property owners may presently be forced to incur numerous forced installations and that number will only increase in the future as more providers enter the market. [6]

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[6] Further evidence that if Section 207 applies to Unowned or Uncontrolled Properties, takings of private property will occur, comes from the fact that Section 207 also prohibits restrictions that impair the ability to receive over-the-air reception of television broadcast signals. If applied in the MDU context, that would mean that tenants could install large television antennas on the roof of the MDUs. But requiring landlords to submit to such installation would clearly constitute a taking given that the courts have repeatedly recognized that a tenant has no common law right to insist on such installation. See, e.g., Kaplan v. Sessler, 96 N.Y.S.2d 288 (N.Y. App. Term. 1950) (tenant's maintenance of television antenna on roof is intrusion or squatting on the property owner's property); Leona Bldg. Corp. v. Rice, 94 N.Y.S.2d 390 (N.Y. App. Term. 1949) (same); Scroll Realty Corp. v. Mandell, 92 N.Y.S.2d 813 (N.Y. Sup. Ct. 1949); Bellomo v. Bisanzio, 60 A.2d 64 (N.J. Ch. 1948) (a commercial tenant operating a tavern cannot construct a television antenna on a portion

The parties who contend that applying Section 207 to Unowned or Uncontrolled Properties will not result in takings of private property raise four untenable arguments. First, they argue that the Fifth Amendment will not be implicated because Section 207 would merely be regulating the landlord tenant relationship. See Reply Comments of DIRECTV in IB Docket No. 95-59 ("DIRECTV Reply") at 8. In an effort to support this argument, they rely upon the Loretto Court's cite to Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946), which upheld a regulation requiring a landlord to install a sprinkler system for fire protection in its building. See DIRECTV Reply at 8. Such reliance is misplaced. Loretto cited Queenside and other cases to show that the Supreme Court has consistently affirmed the States' power to regulate the landlord tenant relationship. Loretto, 458 U.S. at 440. However, in the sentence immediately following the citation to those cases, the Loretto Court distinguishes those cases from Loretto because in none of those cases "did the government authorize the permanent occupation of the landlord's property by a third party." Id. Thus, whether a statute regulates the landlord tenant relationship merely begs the takings question. If the statute also authorizes the permanent physical occupation of the property by a third party, it is a taking. As the Loretto Court unambiguously and unconditionally concluded: "We affirm the traditional rule that a permanent physical occupation of property is a taking." Id. at 441.[7] Section

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of a common yard behind the building containing the leased premises).

[7] DIRECTV's reasoning based upon FCC v. Florida Power Corp., 480 U.S. 245 (1987), is similarly flawed. See DIRECTV Reply at 8 n.26. Florida Power is distinguishable from Loretto because in Florida Power the cable operators were using the property at the invitation of the property owners (i.e. the utilities). Here, if Section 207 is construed to apply to Unowned or Uncontrolled Properties, video service providers will gain access to private property not at the invitation of the property owners, but by seizure of the property pursuant to a statutory directive.

207, if applied to Unowned or Uncontrolled Properties, would clearly abrogate the Fifth Amendment rights of property owners.

Second, in a related argument, the supporters of applying Section 207 to Unowned or Uncontrolled Properties contend that footnote 19 in Loretto supports their view. See Further Reply Comments of the Satellite Broadcasting and Communications Association of America in IB Docket No. 95-59 ("SBCA Reply") at 5. Footnote 19 speculates that if the New York statute had instead required the landlord to install its own cable wiring it "might present a different question" because then the landlord would own the wiring as opposed to a third party. Id. at 440 n.19 (emphasis added). Yet even if the result in Loretto would have been different if the statute required the landlord to install its own cable wiring rather than allow a third party's wiring on the property, that difference under that hypothetical would have no relevance to the issue in front of the Commission. The fact of the matter is that if Section 207 applies to Unowned or Uncontrolled Properties, private property owners will not be able to prevent DIRECTV, Primestar and every other DBS provider as well as the MMDS, LMDS and ITFS providers that hold the licenses in the property owner's area from installing the providers' systems (which are far more than wiring) on the property owner's property. These systems will not be owned and operated by the property owner; rather, each of the video service providers on the property will own and operate its own system. Moreover, even if the property owner could somehow obtain ownership and control of all of the pertinent video service providers' systems -- an absurd and burdensome scenario that would essentially put the property owner in the video services business as the owner of a multitude of video services -- there is simply no way that Section 207 reasonably can be so construed to mandate such a result. Section 207 concerns prohibiting certain restrictions that impair certain persons' ability to receive video services

from certain providers. Section 207 certainly does not force any provider -- let alone private property owners -- to provide video services to anyone. The Loretto Court did not rewrite the New York statute to try and make it constitutional. Similarly, the Commission cannot rewrite Section 207 if it determines that it applies to Unowned or Uncontrolled Properties to somehow make that statute constitutional.

Third, the supporters of applying Section 207 to Unowned or Uncontrolled Properties claim that Loretto is distinguishable because the New York statute gave the franchised operator the right to force access to its property whereas Section 207 would only give those providers whose service was requested by at least one tenant or resident the right to force access. See SBCA Reply at 5. This is a distinction without a difference. Obviously, no provider will force access to a building unless at least one tenant or resident there will subscribe to the service. Moreover, it simply is not true, as SBCA claims, that if the Commission applies Section 207 to Unowned or Uncontrolled Properties, "no rights [will be] bestowed on outside parties." SBCA Reply at 5. If Section 207 is so applied, once a tenant or resident requests a DBS, MMDS, LMDS, or ITFS provider's service, that provider would be able to install permanently its system on the property owner's private property and occupy that property so long as it is able to maintain at least one subscriber. That is the right the video service providers would gain under such a construction of Section 207, and that right results in a taking of private property. That right leads directly to a permanent physical occupation of the property, which Loretto undeniably, unconditionally, unambiguously and repeatedly held was a taking. Id. at 424-25, 432, 441.

SBCA also incorrectly states that in Loretto "a dispositive fact" was that the New York law gave outside parties rights, but did not purport to give the tenant any enforceable rights. SBCA

Reply at 5. This was not a dispositive fact in Loretto. Id. at 439.[8] In any event, Section 207 would not provide tenants with any rights that the tenants under the New York statute did not have. Under either the New York statute or Section 207 if it applies to Unowned or Uncontrolled Properties, the tenant would have the right to obtain certain video services if and only if the provider of such services chose to serve that property. Thus, the New York statute in Loretto is not materially distinguishable from Section 207 if the new law applies to Unowned or Uncontrolled Properties. Moreover, as discussed above in refuting the first of the arguments raised by the supporters of applying Section 207 to Unowned or Uncontrolled Properties, the Loretto Court made it clear that regardless of whether the government's action is for the purpose of regulating the landlord tenant relationship, if the action authorizes a permanent occupation of the property owner's property by a third party it is a taking. Id. at 439.

Fourth, the supporters of applying Section 207 to Unowned or Uncontrolled Properties claim that Loretto is distinguishable because no occupation of private property under Section 207 would be permanent. See SBCA at 5-6. Nothing could be further from the truth. For example, MMDS

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[8] The Loretto Court merely mentioned an argument made by the cable operator (that the statute gave the tenant a property right to have a CATV installation placed on the roof) and then stated that it did not even need to address that argument since the statute did not purport to give the tenant any enforceable property rights. Moreover, in the remaining sentences of that same paragraph in Loretto, the Court provided a strong indication that had the statute sought to give the tenant an enforceable property right that would not have made any difference:

> Of course, [the cable operator], not appellant's tenants, actually owns the installation. Moreover, the government does not have unlimited power to redefine property rights. See Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980) ("a State, by ipse dixit, may not transform private property into public property without compensation").

Id.

providers are permitted to gain access to private properties nationwide under Section 207, the providers will need to install their microwave receiving antennas on the roof of each of the buildings they will serve and then wire the buildings to provide service to whatever units select those providers. Unless MMDS providers lose all of their subscribers at every building nationwide at least some MMDS providers will have their microwave receiving antenna on the roofs as well as their wiring throughout some buildings permanently. In fact, the likelihood is that at most buildings the MMDS providers will be able to retain at least some business permanently. While the equipment and wiring vary between providers of the other technologies covered under Section 207, the situation does not differ much from that of the MMDS providers. Therefore, unless each of those providers and the MMDS providers at every building nationwide lose every one of their subscribers, there will be permanent occupations by at least some providers on some properties.

Moreover, even if none of these takings was permanent, i.e., lasting forever, that would not change the fact that compensable takings will occur. The Supreme Court has repeatedly held that even where the occupation is temporary, a taking has occurred for which just compensation is due. See First English Evan. Lutheran Church v. Los Angeles, 482 U.S. 304, 317-19 (1987); United States v. Dow, 357 U.S. 17, 26 (1958); Kimball Laundry Co. v. U.S., 338 U.S. 1, 5-7 (1949); United States v. Petty Motor Co., 327 U.S. 372, 374-77 (1946); United States v. General Motors Corp., 323 U.S. 373, 379-382 (1945).[9] Indeed, even in Loretto, it was not, nor could it be, certain that the

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[9] As the Court in First English recognized, Kimball Laundry, Petty Motor and General Motors each involved appropriation of private property by the United States for use during World War II and although "the takings were in fact temporary ... there was no question that compensation would be required for the Government's interference with the use of the property ." First English, 482 U.S. at 318.

franchised operator would stay on the property forever. That, of course, did not affect the Loretto Court's decision. Loretto simply is not distinguishable on these or any other grounds.[10/]

B. Section 207 Will Unconstitutionally Deprive Private Property Owners Of Their Fifth Amendment Rights If It Is Construed To Apply To Unowned Or Uncontrolled Properties

As established above, if Section 207 applies to Unowned or Uncontrolled Properties, a taking of private property will occur on hundreds of thousands of properties throughout the country. It is equally clear that those private property owners will not receive any compensation as Section 207 does not have a just compensation clause. The Fifth Amendment to the United States Constitution, of course, expressly prohibits the taking of private property without just compensation. Therefore, the Commission should not interpret Section 207 to apply to Unowned or Uncontrolled Properties, as such will render the statute unconstitutional.

It is a well-settled principle that where another construction is reasonable, statutes should not be construed in a manner that will raise substantial questions regarding the constitutionality of the statute. See, e.g., Debartolo Corp. v. Florida Gulf Coast Bldg. & Construction, 485 U.S. 568, 575 (1988); Bell Atlantic Telephone Companies v. FCC, 24 F.3d. 1441, 1445 (D.C.Cir. 1994).

> The elementary rule is that every reasonable construction must be resorted to, [sic] in order to save a statute from unconstitutionality (citation omitted). This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not

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[10/] The supporters of applying section 207 to Unowned or Uncontrolled Properties also rely on the Loretto Court's statement that its holding is very narrow. DIRECTV Reply at 8. That statement, however, must be considered in context. The very next sentence of the Loretto opinion contains the unambiguous and unconditional holding that "[w]e affirm the traditional rule that a permanent physical occupation of property is a taking." Given that a permanent physical occupation will take place if Section 207 applies to Unowned or Uncontrolled Properties, this situation falls within the "narrowness" of the Loretto holding in any event.

> lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.

Debartolo, 458 U.S. at 575 (citation omitted).

Accordingly, where administrative bodies interpret statutes in a manner that raises serious constitutional concerns, such constructions are set aside. See Debartolo, 485 U.S. at 575-80 (Supreme Court affirmed appellate court's reversal of NLRB's order interpreting National Labor Relations Act to prohibit union from distributing certain handbills at a shopping mall; NLRB's construction of the Act would raise a substantial question as to whether the Act is in derogation of the First Amendment); Bell Atlantic, 24 F.3d. at 1445-46 (court reversed FCC order requiring local telephone companies to permit a portion of their central offices to be used by competitive access providers to connect their facilities to the local exchange companies' network through physical collocation; the statutory provision at issue did not provide for just compensation to the local exchange companies for use of their property and therefore the FCC's construction would raise a substantial constitutional question as to whether the statute resulted in an unconstitutional taking under the Fifth Amendment). Not surprisingly, under such circumstances, the courts do not give administrative bodies the deference they otherwise ordinarily would receive when construing statutes under their area of expertise. Debartolo, 485 U.S. at 574-75; Bell Atlantic, 24 F.3d at 1445.

Here, construing Section 207 to apply to Unowned or Uncontrolled Properties would not merely raise substantial questions as to the constitutionality of the statute -- which is all that is required to mandate that the Commission avoid that interpretation -- but it would guarantee that Section 207 would in fact be unconstitutional. To construe Section 207 in such a manner would result in mandatory access to private property by any DBS, MMDS, LMDS, and ITFS provider who

can attract any business whatsoever on the property. Several courts, including the Supreme Court in Loretto, have struck down mandatory access laws that did not provide for just compensation. See, e.g., Loretto, 459 U.S. at 421; Storer Cable TV v. Summerwinds Apartments Associates, Ltd., 493 So.2d 417 (Fla. 1986) (mandatory access statute governing access to rental properties was overturned as an unconstitutional taking of private property without just compensation); Greater Worcester Cablevision, Inc. v. Carabetta Enterprises, Inc., 682 F.Supp. 1244 (D. Mass. 1985) (mandatory access statute invalidated due to lack of just compensation). Moreover, given the unambiguous language of the Fifth Amendment to the Constitution, which requires that just compensation be awarded for takings of private property, there can be no doubt that construing Section 207 to apply to Unowned or Uncontrolled Properties would render the statute unconstitutional.

If the Commission construes Section 207 to apply to Unowned or Uncontrolled Properties, the Tucker Act, 28 U.S.C. § 1491, will not save the ruling from reversal by the courts. Under certain circumstances, the Tucker Act provides the mechanism for receiving compensation from the government for a taking of private property. Bell Atlantic, 24 F.3d at 1444-45 & n.1. However, as the Bell Atlantic Court made clear, the Tucker Act does not authorize compensation for takings that result from agency constructions of statutes (that have no just compensation provisions) where such constructions result in an identifiable class of takings. Id. at 1445-46.[11] Here, there would certainly be an identifiable class of takings comprised of all private property owners of Unowned

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[11] The only exception to this rule is where the statute clearly and unambiguously mandates a taking. Id. at 1446. As shown in Section II below, that is not the case here, and in fact, the opposite is true.

or Uncontrolled Properties whose properties would be seized by DBS, MMDS, LMDS and ITFS providers who are able to attract at least one subscriber on the property.

As the Bell Atlantic Court correctly reasoned, Congress has the exclusive power to raise revenues and appropriate funds, and agencies should not "use statutory silence or ambiguity to expose the Treasury to liability both massive and unforeseen." Id. at 1445. Here, the liability would be massive given the number of properties involved. The liability would also be unforeseen given, as shown in Section II below, that Congress did not intend for Section 207 to apply to Unowned or Uncontrolled Properties, which would make it a mandatory access statute. The Bell Atlantic Court construed the statute involved in that case strictly and narrowly to prevent such an unauthorized invasion into the public coffers. Id. at 1445-47. The Commission should do the same thing here.

II. THE COMMISSION DOES NOT HAVE THE STATUTORY AUTHORITY TO APPLY SECTION 207 TO UNOWNED OR UNCONTROLLED PROPERTIES BECAUSE CONGRESS DID NOT INTEND FOR SECTION 207 TO BE A MANDATORY ACCESS STATUTE

A. Congress' Repeated Rejection Of Proposed Mandatory Access Legislation, Including Its Rejection Of Mandatory Access Legislation In A Precursor Bill To The Telecommunications Act Of 1996, Establishes That Congress Did Not Intend Section 207 To Be A Mandatory Access Statute

As previously indicated, if Section 207 is applied to Unowned or Uncontrolled Properties, it will become a mandatory access statute. Private property owners will be unable to prevent a whole host of video service providers from forcing their way onto the property owners' properties to install their dishes, equipment and wires. That Congress did not intend for Section 207 to produce such a result is clear from the two occasions that Congress considered -- and rejected -- mandatory access legislation. On both of these occasions, Congress clearly spelled out that the legislation it was considering was a mandatory access statute. On both of these occasions, Congress clearly

spelled out that the property owner would be entitled to just compensation for the taking of its property. In Section 207, Congress did not state anywhere, let alone clearly state, that this was a mandatory access statute. Moreover, Section 207 does not have a just compensation clause. The reason for these omissions is simple: Congress never intended for Section 207 to be a mandatory access statute. It is disingenuous for anyone to claim to the contrary given Congress' repeated consideration of, and repeated rejection of, mandatory access legislation.

In 1984, as part of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) ("1984 Cable Act"), Congress considered enacting section 633, a proposed mandatory access provision. That proposed legislation was clear as to what its effect would have been and upon whom:

> The owner of any multiple-unit residential or commercial building or manufactured home park may not prevent or interfere with the construction or installation of facilities necessary for a cable system, consistent with this section, if cable service or other communications service has been requested by a lessee or owner (including a person who owns shares which entitle such person to occupy a unit in a cooperative project) of a unit in such building or park.

The legislation also specifically provided that "[a] state or franchising authority may, and the Commission shall, prescribe regulations which provide . . . (D) methods for determining just compensation under this section." After Congress decided against enacting section 633 and struck it from the legislation, see H.R. Rep. No. 934, 98th Cong., 2d Sess. at 79-83 (1984), reprinted in 1984 U.S.C.C.A.N. at 4716-20, some providers nevertheless tried to claim that the 1984 Cable Act provided them with mandatory access. These providers argued that section 621(a) of the 1984 Cable Act, which authorized franchised operators to construct their systems over dedicated easements, in essence gave such operators mandatory access. The courts uniformly rejected such a construction of section 621(a) in light of Congress' refusal to enact section 633. See, e.g., Cable

Investments, Inc. v. Woolley, 867 F. 2d 151, 155-56 (3d Cir. 1989) (finding that section 621(a) did not authorize franchised cable companies to force their way onto private property in order to offer cable television services to tenants because the deletion of section 633 "is a strong indication that Congress did not intend that cable companies could compel the owner of a multi-unit dwelling to permit them to use the owner's private property to provide cable services to apartment dwellers"); Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund, 953 F. 2d 600, 607 (11th Cir.), (holding that "[t]his Court is reluctant to assume Congress intended to encompass sub silentio in Section 621(a) what it expressly rejected in Section 633"), cert denied, 113 S. Ct. 182 (1992); Media General Cable v. Sequoyah, 991 F. 2d 1169 (4th Cir. 1993); TCI of North Dakota, Inc. v. Schriock Holding Company, 11 F.3d 812 (8th Cir. 1993); Century Southwest Cable Television, Inc. v. CIIF Associates, 33 F.3d 1068 (9th Cir. 1994). Several of the courts also relied upon the fact that the just compensation provision in section 633 was not included in section 621(a). See Woolley, 867 F.2d at 157; Cable Holdings, 953 F. 2d at 606-07. Most of all, however, the courts relied upon good old-fashioned common sense. They reasoned that if Congress had wanted mandatory access it would have enacted section 633, which clearly provided for mandatory access and just compensation, rather than rely upon section 621(a), which did not clearly provide for either mandatory access or just compensation.

Common sense should govern here as well. Not only did Congress consider and reject section 633 in 1984, but in a precursor bill to the Telecommunications Act of 1996, i.e., S. 1822, the Senate specifically sought the inclusion of a provision, proposed new section 230(j), which would have provided for mandatory access. S.1822, 103d Cong., 2d Sess. §302(a) (1994) ("section

230(j)"). That proposed legislation -- which was rejected and was not part of the Telecommunications Act of 1996 -- provided as follows:

> "(j) Multi-Unit Building. - No person owning, leasing, controlling, or managing a multi-unit building shall forbid or unreasonably restrict any occupant, tenant, or lessee of such building from any provider of its choice, who is duly certified by or otherwise authorized by the State regulatory agency of relevant jurisdiction. The owner of such multi-unit building may require from any such telecommunications carrier just and reasonable compensation for purposes of accessing the building to serve any occupant, tenant, or lessee or for the use of building facilities, provided that such compensation is just and reasonable and does not discriminate between or among providers of telecommunications services or charge any telecommunications service provider greater compensation than that imposed, if any, on the local exchange carrier. Nothing in this subsection shall affect the ability of a person owning, leasing, controlling or managing a multi-unit building to impose, on a competitively neutral basis, requirements necessary to protect the safety and security of the property and the safety and convenience of other persons.

Section 230(j), like its predecessor section 633, unambiguously would have provided for mandatory access (albeit for different services). Section 230(j), like section 633, unambiguously would have provided for just compensation. Section 207 provides for neither. As the two prior mandatory access statutes that Congress rejected show, Congress knows and has known for at least 12 years how to draft unambiguous mandatory access legislation and have it provide for just compensation. Congress did not do so under Section 207 because it is not a mandatory access statute. [12/]

[12/] In addition, in its sweeping reform and re-regulation of the franchised cable industry in the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act"), Congress did not alter its position on the wisdom of allowing marketplace choice to occur rather than mandate government intervention to tie the property owners' hands. With full knowledge that several circuits had construed the 1984 Cable Act as endorsing the right of property owners and associations to exclude and admit whichever video providers they chose, Congress elected not to alter this outcome or even comment upon it. "Congress is presumed to be aware of . . . [a] judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change. . ." Lorillard, 434 U.S. 575, 580 (1978) (citation omitted). It is especially appropriate to assume congressional adoption of judicial decisions that are "long-standing and well known . . . ." Ankenbrandt v. Richards, 112 S. Ct. 2206, 2213 (1992). Had Congress disagreed with these judicial constructions or had Congress changed its policy conclusions, Congress surely would have corrected the situation

If Congress wanted to include mandatory access as part of the 1996 Telecommunications Act it would have enacted section 230(j). It did not do so. The attempt by certain entities to claim that section 207 provides for mandatory access must fail. Such claims for mandatory access under Section 207 have no more merit than did the earlier claims that section 621(a) provided for mandatory access. The correct result could not be more clear here. Section 207 is not a mandatory access statute -- it does not apply to Unowned or Uncontrolled Properties. The Commission does not have the statutory authority to hold otherwise.

B. The Legislative History Of Section 207 Further Establishes That Congress Did Not Intend For Section 207 To Apply To Unowned Or Uncontrolled Properties

The legislative history of Section 207 also shows that Congress did not intend for Section 207 to apply to Unowned or Uncontrolled Properties. Section 207 was derived from Section 308 of the House bill; there was no corresponding provision in the Senate bill. The legislative history of Section 308 of the House bill provides in pertinent part as follows:

> The Committee intends this section to preempt enforcement of State or local statutes and regulations, or State or local legal requirements, or restrictive covenants or encumbrances that prevent the use of antennae designed for off-the-air reception of television broadcast signals or of satellite receivers designed for receipt of DBS services. Existing regulations, including but not limited to, zoning laws, ordinances, restrictive covenants or homeowners' association rules, shall be unenforceable to the extent contrary to this section.
>
> .... [T]his section does not prevent the enforcement of State or local statutes and regulations, or State or local legal requirements, or restrictive covenants or encumbrances that limit the use and placement of C-band satellite dishes.

H.R. Rep. No. 204, 104th Cong., 1st Sess. ("House Report") at 123-24.

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in the 1992 Act given its substantial revisions to other areas of cable legislation. Cannon v. University of Chicago, 441 U.S. 677, 698-99 (1979).

The legislative history of this provision could hardly be clearer. The provision was designed to do what the Commission has already done in its August 6 Report and Order: prevent zoning laws, ordinances, restrictive covenants and homeowners' association rules from restricting the ability of homeowners to get DBS dishes and similar equipment. The legislative history indicates that the statute is only applicable to State or local statutes and regulations, State or local legal requirements, restrictive covenants or encumbrances. Nowhere in the legislative history does it imply, let alone state, that the statute is applicable to leases and the like. If Section 207 was intended to apply to leases and rental property, the legislative history certainly would have made that clear. Unintentionally, DIRECTV proves this point. It argues that:

> Nearly 25% of American television viewers reside in apartments, condominiums and other multiple dwelling units ("MDUs"). Congress surely did not intend that the Commission would implement Section 207 in a manner that would exclude such a significant portion of the viewing population.

DIRECTV Reply at 7. The fact that Congress did not intend to have this group covered under Section 207 is evident from the fact that given the significant percentage of multi-unit dwellers, Congress surely would have made it clear that leases could not restrict antenna user's rights if Congress meant Section 207 to apply in the MDU setting.[13/] The well-known maxim of statutory interpretation, expressio unius est exclusio alterius, is applicable here. Under that principle of statutory construction, where a statute lists the items that it covers, anything not listed is ordinarily deemed to be excluded. Territory of Alaska v. Journal Printing Co., 135 F.Supp. 169, 171 (D.

[13/] Moreover, DIRECTV's argument ignores the qualitative and constitutional difference between forcing a seizure of MDU owners' property and allowing homeowners to have DBS dishes or MMDS wiring on their own properties. The former constitutes a taking of private property raising all sorts of concerns under the Fifth Amendment whereas the latter does not. Congress' refusal to enact proposed section 230(j) shows that Congress recognized that distinction and decided to draw the line at refusing to authorize a taking of private property.

Alaska 1955). Here, the legislative history expressly states that the statute applies to State or local statutes and regulations, State or local legal requirements, restrictive covenants or encumbrances. The fact that leases are not mentioned, especially in light of the substantial number of apartment dwellers, is dispositive here.

Further proof that ICTA's position is correct comes from the text of proposed sections 633 and 230(j) referred to in section II.A. Those proposed statutes expressly referred to multi-dwelling units and lessees and tenants and made it crystal clear that such buildings and such occupants would be covered by those provisions. Section 633 provided that "[t]he owner of <u>any multiple-unit residential or commercial building or manufactured home park</u> may not prevent or interfere with the construction or installation of facilities necessary for a cable system . . . if cable service or other communications service has been requested by a <u>lessee</u> or owner . . .of a unit in such building or park." H.R. Rep. No. 934 at 79-83 (emphasis added). Similarly, section 230(j) provided that "no person owning, leasing, controlling, or managing <u>a multi-unit building</u> shall forbid or unreasonably restrict any <u>occupant, tenant, or lessee</u> of such building from any provider of its choice." S.1822, §302(a) (emphasis added). Here, in stark contrast, not only does the text of Section 207 fail to refer to multi-unit buildings, tenants or lessees but so does the more expansive legislative history. This is no coincidence. Section 207 was never intended to apply to Unowned or Uncontrolled Properties.

Those who support applying Section 207 to Unowned or Uncontrolled Properties attempt to rely upon the presence of the word "viewer" in the statute to argue that all persons, including renters, are covered by the statute. Such reliance is misplaced. As the foregoing demonstrates, to apply Section 207 to Unowned or Uncontrolled Properties would render the statute unconstitutional and would undermine Congress' clear intent under Section 207, as shown by Congress' repeated