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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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	)	

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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SUMMARY OF COMMENTS

Section 207 of the Telecommunications Act of 1996 (the "1996 Act") requires the Commission to promulgate regulations to prohibit restrictions on the use of devices designed to receive broadcast, DBS and MDS television transmissions. The Commission has solicited comment on whether Section 207 is applicable to restrictions imposed by the owners of multiple dwelling units, i.e., owners of apartments and condominiums.*

Section 207 is quite clear: It applies to *all* restrictions on the use of devices designed to receive over-the-air television signals, regardless of whether such restrictions are imposed by governmental or non-governmental authorities. Indeed, the Commission has earlier concluded that Section 207 applies to non-governmental authorities, such as private homeowner's associations.** No rational distinction can be drawn between the application of Section 207 to homeowner's associations and owners of multiple dwelling units.

Furthermore, prohibiting restrictions by owners of multiple dwelling units would not implicate the Fifth Amendment's prohibition against "taking" without just compensation. The regulation required by Section 207 would, instead, constitute conventional government regulation of the landlord-tenant relationship, akin to regulations requiring access to utility services and the installation of smoke alarms.

Accordingly, Section 207 should be applied to prohibit all restrictions, whether governmental or private, which impair a citizen's right to receive over-the-air television service.

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* *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rule Making*, FCC 96-328 (Released: August 6, 1996).

** *Id.* at ¶ 51.

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COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB"), by and through its attorneys, submits these Comments in response to the Commission's *Further Notice of Proposed Rulemaking ("FNPR")* in the above-referenced dockets.[1] NAB is a non-profit, incorporated association of television and radio stations and broadcast networks which serves and represents the American broadcast industry.

This proceeding was instituted by the Commission in response to the passage of the Telecommunications Act of 1996 (the "1996 Act").[2] Section 207 of the 1996 Act requires the FCC to adopt regulations prohibiting state and local restrictions on the use of over-the-air

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[1] *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking,* FCC 96-328 (Released: August 6, 1996).

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

television antenna to receive television transmissions. Specifically, this provision, titled "Restrictions on Over-the-Air Reception Devices", 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 service, or direct broadcast satellite services.

In its *Report and Order and Memorandum Opinion and Order* accompanying the *FNPR* in these dockets, the Commission adopted a single rule to implement Section 207. The rule prohibits any state law or regulation, local law or regulation, or any private covenant, homeowner's association rule or similar restriction that impairs the "installation, maintenance, or use" of antennae designed to receive over-the-air television, DBS, or MDS signals. Out of concern with the state of the record before it, however, the Commission limited the application of the rule to property "within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest in the property."[3] In issuing the *FNPR* and requesting further comment, the Commission concluded that the record before it was "incomplete and insufficient to extend our rule to situations in which antennae may be installed on common property for the benefit of one with an ownership interest or on a landlord's property for the benefit of a renter."[4]

In its *FNPR*, the Commission asked for comment, among other things, on: (1) the application of the preemption rule to rental property and to common property which a citizen

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[3] *FNPR* at ¶ 5.

[4] *FNPR* at ¶ 63.

does not own but instead has rights in common with others; (2) the FCC's legal authority to prohibit nongovernmental restrictions that impair reception by citizens that do not have exclusive use or control and a direct or indirect ownership interest in the property and, specifically, whether this implicates the Takings Clause of the United States Constitution; and (3) the proposal of Community DBS that community associations should be allowed to make video programming available to any resident wishing to subscribe to such programming at no greater cost and with equivalent quality as would be available from an individual antenna installation.

I. THE COMMISSION MUST ADOPT AN ANTENNA PREEMPTION RULE WHICH APPLIES TO MULTIPLE DWELLING UNITS AND OTHER SIMILARLY SITUATED PROPERTIES

The right of all citizens, no matter where they reside, to have access to video programming services of their choosing is fundamental to Congressional communications policy. Indeed, a primary objective of the Communications Act of 1934, *as amended*, (the "Communications Act"), is to "make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[5] Section 1 of the Communications Act does not exempt persons living in apartments, condominiums or other such residences. For decades, the Commission has sought to implement the Congressional policy reflected in Section 1 of the Communications Act by allocating television frequencies to communities throughout the nation. In so doing, the Commission's first priority has been to assure the availability of at least

[5] Communications Act of 1934, *as amended*, § 1, 47 U.S.C. § 151.

one television service to all of the people of the United States.[6] A second priority has been to make competing television signals available to all people.[7] The nation's television broadcast service is now mature, ubiquitous and competitive; virtually all citizens receive at least four competing over-the-air television services and most receive many more. Los Angeles, for example, receives service from some 17 television stations.[8]

The right of citizens to enjoy uninhibited access to video programming takes on special importance with respect to over-the-air television broadcasting. Over-the-air television remains the cornerstone of the nation's video delivery system, a system that has been expanded in recent years by cable television, VCRs, DBS, MMDS and other video delivery technologies.[9] Nevertheless, terrestrial over-the-air television is the nation's free, universal television service, and it remains the means by which all Americans, regardless of financial means, can receive television news, information, entertainment and sports programming. Accordingly, Congress has determined that all citizens, whether they own or rent a home, condominium, townhouse or apartment, should be able to employ a simple roof-top television antenna to receive the terrestrial television stations in the local market where they live.

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[6] *Sixth Report and Order*, 41 FCC 148, 167 (1952); *see also*, *WITN-TV, Inc. v. FCC*, 849 F.2d 1521, 1523 (D.C. Cir. 1988).

[7] *Id.*

[8] *TV & Cable Factbook* (Warren 1996 ed.), p. A-99.

[9] *Second Annual Report (Video Competition)*, FCC 95-491 (Released: December 11, 1995), at p. 2, ¶ 3.

National communications policy is premised on the notion that citizens may, by use of a conventional roof-top television antenna have access to local broadcast television stations.[10] Thus, the residents of multiple dwelling units[11] cannot be relegated to a video programming service of their landlord's or homeowner association's choosing. Instead, they must be free to select the television programming service of their own choice. Should the antenna preemption rules implementing Section 207 not be extended to MDUs, residents of such dwellings may well lose access to the nation's free, universal over-the-air television service.

Moreover, Congress and the FCC, by statute and regulation, require television broadcasters to provide certain programming deemed to be in the public interest. Political

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[10] Congress' concern that citizens have access to their local broadcast stations is also reflected in the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992. Public Law No. 102-385, 106 Stat. 1460, *codified at* 47 U.S.C. § 534. In addition, out of concern for those who live in areas that, because of terrain obstructions or other interference, cannot receive broadcast television network programming from a local station, Congress in 1988 enacted the Satellite Home Viewer Act ("SHVA"), P.L. 103-369, 17 U.S.C. §119. The SHVA created a special exemption from conventional copyright law to provide satellite carriers a statutory copyright to enable them to retransmit the signal of a distant network station and deliver that signal by satellite to home dish owners who are unable to receive a signal of at least Grade B intensity from a local affiliate of that network. The SHVA gives a blanket compulsory copyright for satellite delivery of independent television stations. The SHVA is a truly extraordinary intrusion into the traditional free market in copyrights and reflects a longstanding Congressional concern for assuring access by the American people to television broadcast programming. That concern was reflected again in The Cable Television Consumer Protection and Competition Act of 1992, *supra,* which exempts from that Act's retransmission consent provisions the retransmission by satellite of distant network stations to home dish owners who are beyond the reach of a local network affiliate.

[11] Apartments, condominiums, townhouses and other forms of multiple dwelling units which, under state laws and/or private contracts, provide common areas for the benefit of residents are referred to as "MDUs."

programming and children's programming are examples.[12] It would be illogical in the extreme for Congress to require the broadcast of such programming without prohibiting restrictions -- wherever imposed -- on antennae and devices necessary to receive that programming.

Accordingly, NAB proposes that the Commission adopt the following rule to implement Section 207:

> Any private restriction on the placement of television receiving antennae imposed by deed, covenant, easement, homeowner's association agreement, lease or any similar instrument shall be deemed unenforceable, provided that a reasonable restriction on the placement of television receiving antenna in or on a multiple dwelling unit shall be enforceable if the signals of all television stations placing a predicted Grade B contour (as that term is defined in sections 73.683 and 73.684 of this chapter) or an actual Grade B signal as measured under the provisions of this chapter over the premises are transmitted without material degradation to all dwelling units subject to the restriction via a common antenna or other means without separate charge to the owners or tenants of those dwelling units.

II. THE COMMISSION IS WITHOUT AUTHORITY TO REVIEW THE CONSTITUTIONALITY OF SECTION 207 OF THE 1996 ACT

As acknowledged by the Commission in its order accompanying the *FNPR*,[13] Section 207 of the 1996 Act is mandatory. Section 207 provides that the Commission "shall" promulgate regulations to prohibit restrictions which impair the ability of citizens to use antennae to receive over-the-air television signals. The language of the statute and the legislative intent indicate that

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[12] *See* 47 U.S.C. §§ 312(a)(7), 315 (political programming); Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. §§ 303a, 303b, 394; 47 C.F.R. §§ 73.1930, 73.1940, 73.1941, 73.1942, 73.1943, 73.1944 (political rules); 47 C.F.R. §§73.670, 73.671 (children's TV rules).

[13] *See FNPR* at ¶ 43 ("the statute requires that we prohibit restrictions that impair viewers' ability to receive the signals in question . . . .").

Congress did not envision exceptions for specific classes of residents. Nothing in the legislative history suggests that Congress' concern extended only to those citizens who own their own single-family, detached dwelling. To the contrary, the Conference Report makes clear that the Commission is required to apply Section 207 to restrictions which "inhibit" reception of over-the-air television signals.[14] Private contracts, leases and homeowner's association rules which restrict the ability of a lessee or unit owner are impermissible under Section 207. Any attempt to draw a distinction between whether a citizen possesses a direct or indirect ownership in a residence as a basis for determining whether the citizen may use an antenna to receive over-the-air television service is without support in the statute or legislative history.

The Commission is without authority to declare the Congressional mandate to be unconstitutional.[15] To the extent that policy judgments must be made concerning the scope of the regulation, Congress has already made those judgments. Thus, the Commission must implement the will of Congress in such a way as to ensure that all citizens who choose to do so may avail themselves of access to the nation's free, over-the-air television system. It is hornbook law that one who leases real property from another possesses a non-freehold estate in the land itself.[16] This is true whether the lease runs for a term of years, from year to year, from month to month, or from day to day.[17] Thus, the Commission's focus on whether a citizen has a direct or indirect ownership in his residence as a basis for drawing a legal distinction in his

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[14] *H.R. Rep. No. 458, 104th Cong. 2d Sess., p. 166 (1996).*

[15] *FNPR, at ¶ 43 (citing GTE California, Inc. v. FCC,* 39 F.3d 940, 946 (9th Cir. 1994) and *Johnson v. Robison*, 415 U.S. 361, 368 (1974)).

[16] *See* Smith & Boyer, *Survey of the Law of Property,* 2d ed. 1971, West, p. 16.

[17] *Id.*

right to use an antenna to receive over-the-air television signals is conceptually flawed. Section 207 requires the Commission to ensure that all citizens -- whether they own or rent -- are free to use an antenna to secure access to the over-the-air television service.

III. THERE IS NO "TAKING" CREATED BY THE EXTENSION OF THE ANTENNA PREEMPTION RULES TO MULTIPLE DWELLING UNITS

The "Takings Clause" of the Fifth Amendment to the United States Constitution requires the government to compensate a property owner if it "takes" the owner's property. A taking may involve either the direct appropriation of property or a government regulation which is so burdensome that it amounts to a taking of property without actual condemnation or appropriation. A regulation results in a *per se* regulatory taking if it requires the landowner to suffer a permanent physical invasion of his or her property by a third party or "denies all economically beneficial or productive use of land."[18] It is well settled that if a regulation does not result in a *per se* taking, courts will engage in an "ad hoc" inquiry to examine "the character of governmental action, its economic impact, and its interference with reasonable investment-backed expectations."[19] When properly analyzed, the regulation proposed here does not constitute a "taking" by the Commission.

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[18] *Penn Central Transp. Comp. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631, *reh. den.*, 99 S.Ct. 226, 58 L.Ed.2d 198 (1978); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014-15 (1992).

[19] *PruneYard Shopping Ctr. v. Robins,* 447 U.S. 74, 83 (1980).

A. *Loretto* And *Bell Atlantic* Are Not Dispositive

The Commission has requested comment on the application of *Loretto v. Teleprompter Manhattan CATV Corp.*[20] and *Bell Atlantic Telephone Companies v. FCC*[21] to Section 207.

As noted by the Court in *Loretto* as well as in subsequent Supreme Court decisions, that case was decided on narrow grounds and is limited to the specific facts of the case.[22] In *Loretto,* a state law provided that a landlord could not "interfere" with the installation on his property of cable television facilities by a cable operator. Significantly, the state statute at issue in *Loretto* did not give the tenant any enforceable property rights with respect to the cable television installation; instead, the cable company, *not the tenant*, owned the installation.[23] This fact was deemed dispositive in *Loretto*; the Court expressly declined to opine concerning the respective property rights of landlords versus tenants, which, of course, is the precise issue here.[24] The Court in *Loretto* went on to note:

> If [the statute] required landlords to provide cable installation if a tenant so desires, the statute might present a different question from the question before us, since the landlord would own the installation. Ownership would give the landlord rights to the placement, manner, use, and possibly the disposition of the installation. . . . The landlord would decide how to comply with

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[20] 458 U.S. 419 (1982).

[21] 24 F.3d 1441 (D.C. Cir. 1994) ("Bell Atlantic").

[22] *See* 458 U.S. at 441, 73 L.Ed.2d at 886 ("Our holding today is very narrow."); *FCC v. Florida Power Corp.*, 480 U.S. 245, 251, 107 S.Ct. 1107, 94 L.Ed.2d 282, 289 (1987) (Acknowledging, "We characterized our holding in *Loretto* as "very narrow.").

[23] *Id.* at 339.

[24] *Id.*

> applicable government regulations concerning CATV and therefore could minimize the physical, esthetic, and other effects of the installation.[25]

Moreover, the holding in *Loretto* was premised on the Court's finding that the state law at issue constituted a permanent physical occupation and deprivation of the owner's property by a third party with no legal interest in the property. In contrast, the regulation at issue here involves only a temporary physical occupation by one who has a property right in the real estate. As noted above, a lease is an estate in land.[26] The Court in *Loretto* affirmed the broad public power of states to regulate housing conditions in general and the landlord-tenant relationship in particular without necessarily being required to pay compensation for all economic effects that such regulation may entail. The Court concluded:

> Consequently, our holding today in no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of the building. So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to non-possessory governmental activity.[27]

The regulation proposed here is, indeed, a permissible regulation of the landlord-tenant relationship. Moreover, if states have latitude to regulate property rented by landlords, then there can be no question but that Congress may, as it has done in enacting Section 207, impose

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[25] *Id.* at 440 n. 19.

[26] *Smith & Boyer, supra.*

[27] *Id.* at 440 (emphasis added).

such restrictions on the use of property as it deems appropriate to ensure the availability to all citizens of the nation's system of television broadcasting.[28]

The decision of the D.C. Circuit Court of Appeals in *Bell Atlantic* is also irrelevant to the takings issue. In *Bell Atlantic*, the court struck down two Commission orders requiring Local Exchange Companies ("LECs") to set aside a certain portion of their central offices for occupation and use ("co-location") by competitive access providers ("CAPs"). The sole question before the court was whether the Commission's order compelling LECs to provide co-location orders for CAPs was authorized by statute.[29] Of course, no such question arises here because Congress, in Section 207 of the 1996 Act, has explicitly directed the Commission to promulgate the regulation in question. Because the FCC had no such authorization in *Bell Atlantic*, the court construed the FCC's power narrowly.[30] Such construction was necessary, the court concluded, because the co-location orders raised "substantial" constitutional questions under the Takings Clause in light of the Supreme Court's holding in *Loretto*. Again, the regulation under consideration in this proceeding is distinguishable from the *Bell Atlantic* and *Loretto* facts because (1) no "stranger" to the owner is granted rights with respect to an owner's property, and (2) the regulation does not authorize a permanent interference with the owner's property interests. In *Bell Atlantic*, the CAPs had no ownership or contractual interest in the

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[28] 47 U.S.C. §151.

[29] *Id.* at 1444 n. 1 ("The only question we consider is whether the order under review were indeed duly authorized by law.").

[30] The *Bell Atlantic* court did not rest its decision on a Takings Clause analysis. *Id.* at 1444, n. 1 ("The only question we consider is whether the orders under review were indeed duly authorized by law.")

land used by the LECs for their central offices. Thus, a different takings analysis applies to the facts of this regulation.

B. When The Proper Standard Is Applied, It Is Evident That No "Taking" Is Created By The Application Of The Proposed Rule To Third-Party Property Owners

The Takings Clause issue is properly analyzed under the standard set forth in the Supreme Court's decision in *Penn Central Transp. Comp. v. City of New York.*[31] In that case the Court conceded that it has "been unable to develop any set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government...."[32] Whether a taking has occurred depends largely "upon the particular circumstances [in a] case," and the process of analysis is essentially an "ad hoc, factual" inquiry.[33] Nonetheless, the Court has identified the following factors which inform and guide the analysis:

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the government action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public

[31] 438 U.S.104, 98 S.Ct. 2646, 57 L.Ed.2d 631, *reh. den.*, 99 S.Ct. 226, 58 L.Ed.2d 198 (1978).

[32] *Id.* at 124, 57 L.Ed.2d at 648 (quotations omitted).

[33] *Id.*

> program adjusting the benefits and burdens of economic life to promote the common good.[34]

As recognized by the Commission in its Order accompanying the *FNPR*, Congress has the power to change contractual relationships between private parties through the exercise of its constitutional powers. In *Connolly v. Pension Benefit Guaranty Corp.*,[35] the Court stated:

> Contracts, however, express, cannot fetter the constitutional authority of Congress. Contracts may create rights in property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them. . . .[T]he fact that legislation disregards or destroys existing contractual rights, does not always transform the regulation into an illegal taking.[36]

Regulation of landlord-tenant relationships is an everyday fact of life. Federal, state and local governments place numerous requirements and regulations on landlords concerning the terms under which property may be rented. Many of these requirements (i.e., provision of heat, smoke detectors, utility hookups) require a landlord to do things or to permit tenants to do things which affect, in some way, the property owned by the landlord. These regulatory requirements are not "takings" in the constitutional sense because of the incidental nature of the intrusion on the owner's property interests in relation to the public interest goal sought to be achieved by the government.

The nature of the regulation required by Section 207 is analogous to conventional regulations governing the landlord-tenant relationship. Any intrusion into the owner's property

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[34] *Id.*

[35] 475 U.S. 211 (1986).

[36] *Id.* at 223-24 (quotations and citations omitted).

is minimal. The right created by Section 207 is a right given to individuals and not, as did the state law struck down in *Loretto*, a right given to the video program provider. Instead, the regulation required by Section 207 will only give tenants and unit owners the right to install antennae to receive video services. For an owner of a unit in a condominium or townhouse, the ability to use such an antenna is likewise incident to the ownership interest possessed by the resident. It is important to note that the person for whose benefit the regulation is adopted would not be a "stranger"[37] to the owner. Instead, the regulation is for tenants who are in direct contractual relationship (i.e., privity) with the landlord/owner and with respect to property in which the citizen has a leasehold right or, in the case of condominiums and other common ownership forms, by one with an ownership stake in the property. Although persons residing in MDUs do not generally own common areas such as rooftops, they clearly do have interests in these areas to the extent provided in the rental agreement, other contractual declaration, or applicable state law.

The regulation is simply a minimal and temporary intrusion of the kind which has been allowed by the Supreme Court. *See Northern Transportation Co. v. Chicago,* 99 U.S. 635 (1879) (no taking where city constructed a temporary dam in river to permit construction of a tunnel, even though plaintiffs were thereby denied access to their premises, because the obstruction only impaired the use of plaintiffs' property). In *PruneYard Shopping Center v. Robins*, 447 U.S. (1980), the Court considered a state constitutional requirement that shopping center owners permit individuals to exercise free speech and petition rights on their property to

[37] *Cf. Loretto* ("an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property.")

which they had already invited the general public. In concluding that this requirement did not involve an unconstitutional taking, the Court found determinative that the invasion was "temporary and limited in nature" and that the owner "had not exhibited an interest in excluding all persons from his property." The Court noted: "The fact that [the solicitors] may have physically invaded [the owners'] property cannot be viewed as determinative." *Id.* at 84. As was the case in *PruneYard*, the use allowed by the regulation required by Congress here is not inconsistent with uses allowed by the owner. MDU owners are under affirmative duties to allow the installation of and interconnection with utility services such as electricity and telephone. The addition of facilities to receive over-the-air television programming is no different in nature from these types of utility services.

What is really at issue with respect to the proposed regulation is the purported "right" of landlords to exercise "bottleneck control" over the means by which tenants gain access to video programming. MDU owners would like to have the ability to control their tenants' access to video programming so that tenants will be channeled to "approved" video programming sources. Not surprisingly, landlords are using their leverage to extract additional revenues from their tenants while at the same time excluding competing video service providers from access to tenants in MDUs. In so doing, the owners of MDUs may frustrate the ability of citizens to access the video programming of their choice. If the Commission's commitment to competition and consumer choice is to have real substance, then tenants in MDUs must have the ability to choose the video services they desire. Landlords do not have a property right to act as a "bottleneck" or inhibit competition in video program delivery. Simply put, neither Congress' elimination of this "bottleneck" leverage from landlords, nor the Commission's rule to

implement Section 207, implicate the Takings Clause. As the Court noted in *Andrus v. Allard*, regulations affecting an owner's future profits do not constitute a taking:

> [L]oss of future profits--unaccompanied by any physical property restriction--provides a slender reed upon which to rest a takings claim.[38]

In sum, the rule required by Congress is a government regulation of the sort recognized by the Court as permissible in *Loretto*. Viewed in the context of the important governmental interests at stake and the very limited impact on the property rights of affected owners, the regulation simply does not implicate the Takings Clause of the United States Constitution.

IV. OWNERS OF MULTIPLE DWELLING UNITS SHOULD HAVE THE OPTION OF VOLUNTARILY SUPPLYING THE NECESSARY ANTENNA FACILITIES TO THEIR TENANTS AS AN ALTERNATIVE TO THE INSTALLATION OF FACILITIES BY RESIDENTS

In its Comments, Community DBS proposed that community associations should be allowed to make video programming available to any resident wishing to subscribe to such programming at no greater cost and with equivalent quality as would be available from an individual antenna installation. NAB believes that this suggestion has practical and legal merit and should be considered by the Commission.

NAB supports the proposal to give MDU owners the ability to comply with the requirements of Section 207 of the 1996 Act by constructing common antenna facilities for use by all tenants. Indeed, this was a common practice before the advent of cable television. As noted by the Court in *Loretto*, ownership of the antenna facilities would give the landlord rights

[38] 441 U.S. 51, 66, 100 S.Ct. 318, 62 L.Ed.2d 210, 223 (1979).

to the "placement, manner, use and possibly the disposition . . . The landlord would decide how to comply with applicable government regulations concerning [antenna installation] and therefore could minimize the physical, esthetic, and other effects of the installation."[39] As a result, any perceived intrusion on the interests of the land owner are minimized. However, such an option should be conditioned upon the requirement that such common antenna facilities be offered at no greater cost to the resident and with equivalent quality as would be available with an individual installation.

As another option for ensuring the availability of local television stations to MDU residents, landlords might choose to arrange for the provision of basic cable service for all tenants at no charge. The Commission has already recognized the legitimacy of such a "pass through" approach in its decision to allow MMDS operators to pass through local broadcast signals without obtaining retransmission consent so long as the provision of such signals is (1) without charge; and (2) owned by the subscriber; or (3) under control of the subscriber or building owner and available for purchase by the subscriber or building owner upon termination of service.[40]

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[39] 458 U.S. at 440, n. 19.

[40] *Must Carry and Retransmission Consent (Reconsideration)*, 9 FCC Rcd 6723, 76 RR2d 627, 649 (1994); 47 C.F.R. §76.64(e).

CONCLUSION

For the reasons set forth herein, the Commission should adopt NAB's proposed rule prohibiting local or private restrictions which impair the reception of over-the-air video programming services. There is no basis in the 1996 Act or in the United States Constitution for treating persons residing in apartments, condominiums, townhouses, or other such MDUs differently from persons who own a single-family, detached dwelling. MDU owners must not be allowed to deny residents access to the nation's free, over-the-air television broadcast system. Consumer choice must be the foundation of any system of marketplace competition.

Respectfully submitted,

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