

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 disguised 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.

House Committee Report, H. Rep. 104-204, at 124. (emphasis added). In the former proceedings, CAI, ARDA, and NAHC did not assert that the FCC lacked authority to preempt restrictive covenants and homeowners' association rules. However, the common property principles that the FCC now seeks to abrogate are not in the list of regulations cited for preemption. Only "existing regulations" are to be preempted. Since the real property laws, both common law and statutory, in the 50 states (as well as the District of Columbia and the territories) are not "existing regulations," the FCC cannot preempt these laws using § 207.

Section 207 also did not grant the FCC authority to take common property. In Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994), the court held that since the Communications Act of 1934 did not expressly grant the FCC the authority to take private property, the FCC could not imply the authority to do so. The FCC argued in that case that it had the power to obligate local telephone exchange centers ("LECs") to permit competitive access providers ("CAPs") onto LEC property to connect their cables to those of the LECs. The court determined that this rule required a taking of LEC property under Loretto. Bell Atlantic, at 1445. The FCC then asserted that the Communications Act granted the FCC the authority to take private property pursuant to its power to require carriers to "establish physical connections with other carriers." 47 U.S.C. § 201(a). The court held that this language was insufficient to create the authority to take private property, Bell Atlantic, at 1446, since

statutes purporting to authorize takings must be construed narrowly when implicating constitutional questions. Bell Atlantic, at 1445. The FCC asserted that the takings power could be implied from the statute, to which the court replied: "such an implication may be made only as a matter of necessity, where 'the grant [of authority] itself would be defeated unless [takings] power were implied,'" Bell Atlantic, at 1446. (citations omitted), to prevent the Treasury from being charged with unanticipated expenses not specifically authorized by Congress. Bell Atlantic, at 1445. The court did not find such necessity in the Bell Atlantic situation and, therefore, held that the FCC had exceeded its statutory authority in promulgating the rule.

If the FCC were to mandate individual installation on common property, the Commission would create a situation very analogous to that in Bell Atlantic. Section 207 does not provide express authority to the FCC to take common property, as would be required if the takings power were authorized. Bell Atlantic, at 1446. Section 207 includes no language to indicate that Congress intended the FCC to take common property. Section 207 only authorizes the FCC to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming service" (emphasis added). Prohibiting restrictions is not analogous to taking common property. Additionally, since § 207 does not contain a provision for compensating landlords, community associations, or co-owners, as appears to be necessary under Bell Atlantic, the FCC may not promulgate a rule that would require such compensation. Bell Atlantic, at 1445. Therefore, the FCC has no authority under § 207 to promulgate a rule which would result in an impermissible taking of common property.

Nor may the FCC assert that it has implied authority to take common property. The authority granted to the FCC in § 207 would not be defeated if a taking were prohibited, since the FCC has already promulgated a rule preempting restrictions on equipment installation on individual and exclusive use property. Report and Order, IB Docket No. IB 95-59, CS Docket No. 96-83, released August 6, 1996. Since the FCC has no express authority to take common property, and cannot imply that authority, the FCC may not promulgate a rule authorizing individual installation on common property.

In its Report and Order in this proceeding, the FCC noted that "if preemption of the restrictive covenants at issue here could be viewed as a taking, the Tucker Act, 28 U.S.C. § 1491, presumptively would provide an avenue for obtaining just compensation, thus obviating any potential constitutional problem," citing Bell Atlantic. However, the Tucker Act would only be implicated if the FCC had the statutory authority to authorize a taking. Bell Atlantic, at 1444, n. 1. Since no authority exists, the Tucker Act does not apply.

Some Commenters have argued that because Congress included the word "viewer" in § 207, Congress did not intend to make a distinction between individuals based on ownership of the property upon which they would install telecommunications equipment. DIRECTV DBS Comments at 6; SBCA Reply at 2-4. However, to permit renters and community association residents to install equipment on property owned by another, an express grant of authority to take private property would be required. Since there is no such authority, the FCC cannot take common property, regardless of the word "viewer."

The FCC asserts that it has no authority to declare a statute passed by Congress as unconstitutional. Report and Order, IB Docket No. 95-59, CS Docket No. 96-83, ¶ 43, n.

116, citing GTE California Inc. v. FCC, 39 F.3d 940, 946 (9th Cir. 1994). CAI, ARDA, and NAHC do not assert that § 207 is unconstitutional. CAI, ARDA, and NAHC do assert that the FCC would be interpreting § 207 in an unconstitutional manner if the Commission were to require individual installation on common property.

Nothing in the Telecommunications Act grants the FCC the authority to take common property from landlords, tenants in common, or the association by requiring landlords and community associations to allow individuals to use such property for the installation of telecommunications equipment.<sup>7</sup> As stated in Bell Atlantic, such a taking power would have to be expressly required by the language of § 207. No such language exists. Taking authority may not be implied from § 207. Therefore, the FCC may not authorize a taking of rental or common property to implement § 207.

In its Further Notice, the FCC seeks Comments on the level of just compensation to be provided if the FCC were to issue a rule taking rental or common property. Further Notice, ¶ 64. Notwithstanding the fact that the FCC does not have the authority to take this property, the proper measure of compensation would be the amount that landlords currently

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<sup>7</sup> The FCC cannot claim that any reference to multi-unit housing may be implied from § 207. In the past, when Congress intended to mandate installation of telecommunications equipment in multi-unit housing, it included such a provision in its statutes. See, Cable Investments v. Wooley, 867 F.2d 151 (3rd Cir. 1989). In this case, the court held that the Cable Communications Act of 1984 did not grant cable companies access to multi-unit buildings, for Congress had deleted a section referring to mandatory access to multi-unit buildings (and providing just compensation for the resulting taking). Therefore, Congress is aware that mandating access to rental and common property would be a taking, requiring compensation. Since Congress did not expressly provide such a section in the Telecommunications Act of 1996, it obviously did not envision taking rental or common property.

charge cable, satellite, and other telecommunications service providers for access to their property. Many landlords already permit these providers access to their buildings, and charge for that access. This measure of just compensation would be the fair market value of the property occupied and used by these service providers.<sup>8</sup>

## VI. THE PROVISION OF DBS, TELEVISION BROADCAST, AND MDS SIGNALS IS NOT A CONSTITUTIONALLY-MANDATED PUBLIC POLICY

The FCC stated in its Report and Order that it possessed the authority to preempt restrictive covenants that "interfere with federal objectives enunciated in a regulation," Report and Order, IB Docket No. 95-59, CS Docket No. 96-83, ¶ 44. To support this assertion, the FCC cited Seniors Civil Liberties Association v. Kemp, 761 F. Supp. 1528 (M.D. Fla. 1991), *aff'd*, 965 F.2d 1030 (11th Cir. 1992). The FCC also stated that "homeowner covenants do not enjoy special immunity from federal power," Report and Order, IB Docket No. 95-59, CS Docket No. 96-83, ¶ 45, citing Shelley v. Kraemer, 334 U.S. 1 (1948). The reference to these cases is inapposite. Both of these cases dealt with the issue of discrimination in housing, against families (in Kemp) and African Americans (in Shelley). Eliminating these types of discrimination has been an issue of great importance for several decades, implicating the Equal Protection clause of the Fourteenth Amendment. For that reason, courts have

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<sup>8</sup> Many of CAI's community association members have suggested that satellite, MDS, and other service providers may obtain access to community association property, provided that they compensate the association for the use of the space. If service providers were to compensate associations, as they compensate landlords, for the use of common property, then many associations would be more willing to provide access.

~~voided~~ restrictive covenants. Shelley, however, was limited in scope in that it was not extended to void non-racially restrictive covenants. Girard v. 84th St. & Fifth Ave. Corp., 530 F.2d 66 (2d Cir. 1976). Since the Telecommunications Act does not purport to implicate the Equal Protection Clause or promote an objective such as ending housing discrimination, the Act should not be interpreted to grant the FCC the authority to preempt covenants that are voided only if they are discriminatory.

Ending racial discrimination is a constitutionally mandated public policy. As such, statutes and restrictions purporting to continue this discrimination (whether intentionally or not) are subject to strict scrutiny by the courts, and are more likely to be struck down than other statutes.

Other public policies are not constitutionally mandated. Therefore, they are subject to less protection than constitutionally mandated public policies. For example, the Fair Housing Act Amendments, which invalidated the restrictive covenants in Kemp, have been held not to permit granting of common property to one unit owner. In U.S. v. Fairway Village Condominium Ass'n., 879 F. Supp. 798 (N.D. Ohio 1995), the court held that an association could not grant exclusive use of a commonly-owned parking space to a disabled unit owner, even though the association was attempting to provide "reasonable accommodations" to the owner under the Fair Housing Act Amendments. This grant of common property to one unit owner was held to deprive the other unit owners of their interest in that commonly-owned parking space and, therefore, was prohibited absent unanimous owner consent.

Fairway Village demonstrates several principles. First, maintaining the ownership and easement rights of all owners for common area was a public policy of paramount importance.

Second, this public policy was deemed more important than the public policy of ending housing discrimination, which is closely linked to ending racial discrimination, a constitutionally mandated public policy.

Requiring individual installation on common property would also deprive landlords or associations of common law remedies. A trespass action may be barred under this rule, even though rental or association property has been appropriated. In addition, the landlord or association may not be able to defend against an adverse possession claim. If an individual is permitted actual, open, notorious, exclusive, and adverse use or rental of common property, he may be able to claim that property as his own, under the doctrine of adverse possession. Black's Law Dictionary 53 (6th Ed. 1990). The association would not be permitted to prevent such adverse possession. If an individual is able to claim a portion of common property by adverse possession, this is a deprivation of the landlord's, tenants' in common, or association's ownership rights. This adverse possession could destroy the nature of the community association, since common property would be split between various owners. A rule requiring individual installation on rental or common property should not abrogate these fundamental principles.

Since abrogating property rights in common property implicates both the Fifth Amendment and well-established real property law principles, it is clear that ensuring the continued vitality of these rights is a public policy of major importance. It is of such importance that in Loretto the Court stated that "a permanent physical occupation is a taking without regard to the public interests that it may serve." Loretto, 458 U.S. at 426. Only the

police power may abrogate these property rights, and the use of that power requires the injured property owner to be compensated for the loss.

The Telecommunications Act of 1996 serves many broad and important public policy objectives. Providing access to advanced technology and current information are important goals. However, these goals may not be constitutionally mandated. Private property rights are constitutionally protected. In any conflict between a public policy articulated in a statute and one protected by the United States Constitution, the public policy enjoying constitutional protection takes precedence.

It is an essential precept of the United States Constitution that "no person shall . . . be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use, without just compensation." U.S. Const. amend V. Certainly § 207 cannot overthrow this basic constitutional principle. If the FCC should attempt to require individual telecommunications equipment installation on common property, then it would be placing a statutorily mandated public policy above that of a constitutionally mandated public policy, which it cannot do. Congress has not specifically authorized such a preemption, and would be barred from doing so if compensation were not provided. Congress clearly did not intend to preempt a constitutionally mandated public policy as significant as the protection of private property rights.

## VII. REQUIRING TELECOMMUNICATIONS EQUIPMENT INSTALLATION ON COMMON PROPERTY WOULD POSE MYRIAD PROBLEMS FOR ASSOCIATIONS

In addition to the compelling legal arguments against requiring associations to permit individual installation of telecommunications equipment on common property, the FCC should consider the practical ramifications of such a rule. Permitting individual installation which destroys association control over the property it owns or maintains would expose the association to a myriad of serious and complex problems.

Individual installation of telecommunications equipment on common property poses several safety risks. The structural damage to association buildings poses a threat to residents, association employees, and guests. Improper installation could lead to the detachment of the equipment in a windstorm, tornado, or hurricane, potentially causing personal injury and property damage. See, Frost, Christenson & Associates; Willoughby of Chevy Chase Condominium, 2. Since the equipment would be attached to common property, the association may be held liable for the injury or damage, even if the association had no control over installation.

Uncontrolled individual installation on common property would expose that property to a great potential for structural damage, particularly if an untrained individual, rather than a specialist, installs the equipment. Roof installation would subject the roof to more than ordinary wear and tear, increasing the possibility for more rapid deterioration and requiring more frequent repair. Many association roofs and exterior walls are made of materials that are easily damaged, particularly by those unaccustomed to roof care. To attach

telecommunications equipment and the necessary coaxial cables to connect the antenna to an individual owner's television, holes must be drilled through the roof or building exterior to mount certain equipment and route the cable. To stabilize the equipment, guy wires must be attached to the equipment and also to the roof, requiring additional holes. The holes would be sealed with soft, synthetic material, which tends to degrade and shrink more quickly than the surrounding roof material. This degradation and shrinkage would compromise the structural integrity of the building, weakening the roof. Water damage is more probable. Additionally, as the number of holes increases, the number of entryways for termites and other insects increases, making the entire building more vulnerable to damage. Considering the number of installations that may be required in a high rise building, the potential for serious damage escalates. (Many of these same problems would be encountered with installation on exterior walls.) See, Frost, Christenson & Associates; Parc East Condominium, 1-2; Willoughby at Chevy Chase, 1-2; Affidavit of James Reinhart, 1-2; Letter of Fred Baron, 1.

Some contractors have asserted that they would be able to install telecommunications equipment without puncturing the roof or exterior wall membrane, thereby avoiding some of the damage listed above. That may be true for the contractors, but not every individual owner would employ a contractor to install equipment. Some of these individuals would be unaware of the damage that their installation could cause. The association would have no control over the means, method, and location of antenna installation, and would be powerless to minimize the roof or exterior wall damage.

The association, as the owner of or party responsible for roof and exterior wall maintenance, would be liable for any damage to the roof, even if an individual owner caused the damage. Roofing warranties are typically voided if any alterations are made to the roof. See, Limited Warranty of Premier Roofing. Since the roof or exterior wall warranty would be voided, the association would be liable for repair of the entire roof. See, Beauregard Heights, 1. The association could seek to have the individual(s) responsible pay for the damage, but it would be unlikely that the individual could indemnify the association for the cost of roof repairs. Associations would then have no option but to use every owner's money for the roof repair caused by equipment used for the benefit of only a few owners. Individual owners not responsible for the damage would bear the cost of repairs, compounding the affront of taking their property. These owners could conceivably sue the association board for breach of fiduciary duty in permitting the roof damage, subjecting the association to additional legal expenses.

Maintenance and repair of common elements would also be substantially more difficult and expensive with individual antennas on common elements. Reroofing and repairing the exterior walls would require that additional time and resources to be allocated in working around the equipment, particularly if a great amount of space is taken up by this equipment. If equipment is installed on the ground, then landscaping will be substantially more difficult and expensive, as groundskeepers would be required to work around the equipment and any cabling. The additional costs incurred in working around this equipment could require a special assessment which would exacerbate problems with owners previously discontented. See, Parc East Condominium, 1.

If several contractors and individuals were to install telecommunications equipment on common property, the liability issues would become even more complex. It may be difficult to establish which equipment is responsible for which damage. Collecting damages from various providers and individuals would be extremely difficult.

To connect the coaxial cable from the equipment to the individual owner's television, the cables may have to pass through other owners' units, particularly the units in the upper part of the building if the existing conduits have insufficient cabling space. Contractors may have to enter these units to drill the necessary holes, disturbing the owners, and taking their individually-owned property. Besides being a taking, this appropriation of property will undoubtedly lead to conflicts between owners.

Other owner conflicts are likely to occur as a result of individual installation on common property. Two owners may decide that a particular portion of common property is the optimal location for their equipment. One owner might place equipment in a location that blocks access to another owner. It may also be necessary for an owner to install equipment on the individually-owned property of another, which would be another taking. In another scenario, an owner might need to install equipment on another's limited common element, in which case the second owner's legally guaranteed right to exclusive use would be violated. Many associations will not have adequate space for each owner to install individual equipment. In addition, the extra coaxial cable may not fit into the existing conduits. (Using association cable would, of course, be a prohibited taking of association property for individual use.)

In many community associations the common elements are reserved for certain purposes and central facilities are built to serve all residents and owners. Some of these facilities include parks, parking spaces, swimming pools, common decks, and golf courses. The use and enjoyment of these common areas could be destroyed if individual unit owners were permitted to install equipment on these common elements. Individual unit owners should not be permitted to interfere with the use of common elements, as all owners would be deprived of use of these facilities.

Association restrictions are drafted and adopted to enhance and preserve property values over time. Community associations provide many services to their residents. They conduct regular maintenance of common and, often, individual property. They build and maintain facilities open to all residents, such as swimming pools, tennis courts, parks, playgrounds, and golf courses, which individual residents would not be able to afford on their own. The association also regulates modifications to common areas, including the exterior of their buildings. This regulation occurs through the adoption and enforcement of architectural controls. If uncontrolled installation were to occur on common property, these architectural controls would be vitiated. In some cases, these violations would be unnecessary, but some owners may be less willing to accommodate the community's common interest because of their personal interest installing their equipment in a convenient location. Individual installation could impair the appearance of the community, particularly if individuals were to install prominently different types and sizes of equipment in plain view. Due to this degradation, property values would decrease as a result of this degraded appearance. See, Willoughby of Chevy Chase Condominium, 1. The increased cost of maintenance and repair

would lead to higher assessments to all owners. High assessments decrease the resale value of units. See, Parc East Condominium, 2. Therefore, individual installation of telecommunications equipment on common areas would lead to a diminution of all owners' property values.

For all of the practical, technical, and economic reasons listed above, individual installation on common property would create manifold problems for the association, exacerbating conflicts between associations and their residents and between neighbors. These problems should provide the FCC with additional reasons to limit the rule to its current language and leave the restrictions on individual installation on common property alone.

#### VIII. A COMMON ANTENNA SUPPLYING SERVICE TO ALL ASSOCIATION OWNERS AND RESIDENTS WHO DESIRE SERVICE IS PRACTICAL AND FEASIBLE

In the Further Notice of Proposed Rulemaking, the FCC requested Comments on whether a common antenna supplying telecommunications service would be feasible and practical. Further Notice of Proposed Rulemaking, IB Docket No. 95-59, CS Docket No. 96-83, ¶ 63. This proposal was suggested in the Comments submitted by CAI, ARDA, and NAHC in both of the previous proceedings. CAI, ARDA, and NAHC DBS Comments at 19. In some types of community associations, an antenna may be installed on common property to serve all residents who desire service. However, the FCC should not require that

associations install a common antenna on common property, since that obligation would also be a taking of common property.

A. Common Antenna Installation Is Both Feasible and Practical, but Should Not Be Mandated by the FCC

Several satellite antenna distributors have informed CAI that they are presently providing large, high-rise community associations with a common antenna, installed on the roof. All residents who desire service from the common antenna may then be connected to the antenna, thus receiving service. There does not appear to be any limit on the number of receivers that may be attached to one common antenna. See, DSS brochure, 11; Letter of Don Amesbury, Abask Marketing, Inc. Some antennas may be installed that permit association residents to select between different providers (DIRECTV and USSB) from one common antenna. See, Alternative Cable Company brochure. In addition, at least one of the major satellite service providers has created a new division specifically targeted to selling its services through a common antenna to multi-unit housing. Telephone conversation, Robert M. Diamond and staff of DirecTV, August 19-20, 1996.

The common antenna is connected to individual units by threading cable through existing ducts and conduits. Alternatively, if the association owns the cable that provides cable service, the cable may also be used for transmitting satellite signals to individual units.<sup>9</sup>

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<sup>9</sup> There is a question of whether the service provider may be able to use the cable if the cable is owned by someone other than the association. This issue is the subject of another rulemaking procedure, CS Docket No. 95-184.

There is no cost to either the association or individual residents for installation of a common antenna. See, Alternative Cable Company, Proposal for Condominiums. One service provider estimates that the cost of cable installation to each individual unit would be \$200.00, with a yearly service fee of \$75.00. To receive signals, an individual unit owner would also be required to purchase a satellite receiver to be placed on an individual's television, which decodes the signals received by the common antenna. See, Alternative Cable Company Resident Information Sheet. The prices of these receivers vary. Another service provider estimates that the cost of installation would vary from \$100.00 to \$200.00, depending on the number of units in the building and the number of subscribers. The satellite receiver costs approximately \$200.00. Telephone communication, Robert M. Diamond and Don Amesbury, September 10, 1996. The service provider charges the individual unit owner directly for the services; the association collects no fees on behalf of itself or the service provider. Individual unit owners who choose not to receive service do not incur the costs of the common antenna or service.

The common antenna provides associations, individual residents desiring access to satellite service, and those individual unit owners who do not desire service with several advantages. The individual unit owner has access to advanced telecommunications services without expending time and money to determine the proper location for equipment installation. The cost of connecting to a common antenna may become less expensive than purchasing and installing an individual antenna. The owner also would not be subjected to liability concerns should the antenna damage the common property. With a common antenna, the cost of maintaining the common property would not greatly increase, since only one

antenna, properly installed, would be on common property. There would be no need to increase assessments to cover increased maintenance costs. The property values of the individual units would not decrease due to higher assessments. Therefore, individuals who choose not to receive service would not be harmed by the installation of a common antenna.

The association would have control over the means, method and location of equipment installation, thus minimizing the potential for damage to common property. The appearance of the association would be maintained, stabilizing property values. No assessments are expended in the purchase and maintenance of the equipment; all costs are borne by the subscriber. Individual unit owners who do not desire service would not be subjected to additional assessments to pay for the common antenna.

For the most part, the common antenna would be practical only in a multi-unit building. Otherwise, the amount and cost of necessary cabling would be prohibitively expensive. However, a great majority of multi-unit buildings are either condominiums or cooperatives, and most of the building is common property. Since individual unit owners would be unable to install equipment, a common antenna would provide that access to signals otherwise precluded.

The FCC cannot promulgate a rule requiring associations to install common antennas, however. Such a rule would require associations to permit service providers access to their common elements for equipment installation, a clear taking of common property under Loretto.

**IX. IF THE ASSOCIATION ELECTS TO INSTALL A COMMON ANTENNA ON COMMON PROPERTY, THE ASSOCIATION SHOULD BE PERMITTED TO PROHIBIT INDIVIDUAL INSTALLATION OF EQUIPMENT USED TO RECEIVE THE SAME SERVICE ON INDIVIDUALLY-OWNED PROPERTY**

In their Comments in the original proceedings, CAI, ARDA, and NAHC suggested that if an association were to install a common antenna on common property, then the community association should be permitted to prohibit individual installation of telecommunications equipment in the association. This suggestion has been slightly misinterpreted. If the association chooses to install a common antenna, then it should be permitted to prohibit installation of telecommunications equipment designed to receive the same service that might otherwise be received through equipment installed on property individually owned. If an individual installs equipment designed to receive a different service, then the individual would be able to do so on individually-owned property, subject only to the new 47 C.F.R. § 1.4000.

Even under the common antenna scenario, individuals would not be permitted installation of telecommunications equipment on common property if they desired service other than that provided by the common antenna, because it would be a prohibited taking of common property.

## X. CONCLUSION

In its Further Notice of Proposed Rulemaking, the FCC has requested Comments on the issue of whether § 207 of the Telecommunications Act of 1996 permits installation of individual owner's telecommunications equipment on rental or common property. Since common property is owned either by all unit owners as tenants in common or by the association, individual unit owners have no unilateral right to alter or appropriate the exclusive use of that property; to do so would be to diminish the ownership and easement rights that others have in that property. Therefore, for the FCC to issue a rule permitting individuals to alter or use common property without the permission of the other homeowners or the association would be a taking of common property, exactly like the taking of rental property prohibited in Loretto. That taking of rental or common property is prohibited by the Fifth Amendment to the United States Constitution unless just compensation is paid to the landlord, other co-owners, or the association. Section 207 does not provide a method for determining such compensation. The FCC lacks the statutory authority to take common property.

For associations that choose to do so, installation of a common antenna would provide access to telecommunications services which would otherwise be prohibited by the Fifth Amendment. The technology to install this common antenna and provide services to all who wish to receive them is not only feasible, but in every area of the country either has been or is being implemented. CAI, ARDA, and NAHC have promoted the idea of a common antenna, which achieves the public purpose of § 207 without violating constitutional or other

real property issues. However, for the reasons articulated above, the FCC lacks the authority to obligate associations to permit installation of an individual antenna or a common antenna on common property.

CAI, ARDA, and NAHC respectfully request the FCC to take these important constitutional, legal, and practical issues into account when drafting the final rule.

## **APPENDIX**



In the Matter of

Preemption of Local Zoning )  
Regulation of Satellite Earth Stations)

IB Docket No. 95-59

and )

Implementation of Section 207 of the )  
Telecommunications Act of 1996 )

CS Docket No. 96-83

Objection to the Adoption of a Rule )  
Requiring Installation of Direct )  
Satellite Dish Antennae at )  
Condominium Associations )  
and Cooperatives )

**COMMENTS OF:**

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I, Marshall Frost, file these comments on September 24, 1996, with reference to the FCC Docket Numbers IB 95-59 and CS 96-83.

**Summary**

It is Frost, Christenson & Associates' opinion that the regulations adopted on August 6, 1996 by the Federal Communications Commission should not be applied to Condominium Associations or Cooperatives for the following reasons:

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- Installation of the direct satellite dish antennae requires penetration of the building envelope, which will result in water penetration through the envelope system.
- Leaks, which manifest in the interior of dwelling units, will occur in units other than the unit which installed the direct satellite dish antenna.
- Leaks, which do not penetrate into the dwelling units, will, over time, cause damage to the common elements.
- Depending on the architectural design, the multiplicity of installations will concentrate the potential for water penetration through the building envelope.
- Patio, balcony, wall and chimney mounted installations will destroy the development scheme of the community.
- Ground mounted direct satellite dish antennae will be subject to damage during normal grounds maintenance and repairs.
- Building and roof mounted direct satellite dish antennae will interfere with the maintenance, repair and replacement of the building's common elements.
- Interior leaks, and resultant damage will be difficult, if not impossible, to trace to a particular installation of a direct satellite dish antenna, to establish responsibility for the damage.
- The general membership will be required to bear the cost of repairs and/or premature replacement of common elements due to damage resulting from the installation of the direct satellite dish antennae by a limited number of the Unit Owners.
- Implementation of the rule will preclude the Association membership from determining, in accordance with the requirements of the Association's enabling documents, whether the membership should accept the additional responsibility of allowing the installation of the direct satellite dish antennae.

**Introduction**

Frost, Christenson & Associates has received a copy of FCC 96-328 regarding the installation of Direct Satellite Dish Antenna. As part of 96-328, the FCC indicated that the rules regarding the installation of Direct Satellite Dish Antenna did not apply to:

*"48. ... (b) property not under the exclusive use and control of a person who has a direct or indirect ownership interest in the property, including the outside of the building, including the roof; and (c) residential or commercial property that is subject to lease agreements."*

further, they state:

*"59. ... We are unable to conclude on this record, however, that the same analysis applies with regard to the placement of antennae on common areas or rental properties, property not within the exclusive*

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*control of a person with an ownership interest, where a community association or landlord is legally responsible for maintenance and repair and can be liable for failure to perform its duties properly. Such situation raises different considerations.*

and;

*"63 ... We conclude that the record before us at this time is incomplete and insufficient on the legal, technical and practical issues relating to whether, and if so how, to extend our rule to situations in which antennae may be installed on common property of the benefit of one with an ownership interest or on a landlord's property for the benefit of a renter."*

As a result of these findings, the FCC has invited further comment on the applicability of regulations regarding installation of Direct Satellite Dish Antenna at community associations where the Unit Owner does not have:

*"48. (a) property within the exclusive use or control of a person who has a direct or indirect ownership interest in the property:"*

This letter is intended to provide comments on the applicability of rules requiring the installation of Direct Satellite Dish Antenna at property held in a Condominium or Cooperative form of ownership.

### Background

Frost, Christenson & Associates has been actively involved with community associations for almost twenty (20) years. During that time period, Frost, Christenson & Associates has provided engineering, planning and landscape architectural services to over three hundred (300) community associations. For the most part, these Associations are located in New Jersey, but a limited number of clients have been from Pennsylvania, New York, and Virginia.

A significant part of the services Frost, Christenson & Associates provides to community associations relates to the building envelope, and almost always involves water penetration into the individual units, or worse, into wall cavities where it typically goes unnoticed. In the latter case, it is not unusual for continuing deterioration of the building components and structural elements to occur over time, resulting in major expenditures on the part of the Association to replace damaged building elements.

At the same time, Frost, Christenson & Associates provides services to community associations when they replace components of the building's envelope at the end of the building element's service life. This procedure is complicated by the diversity of personalities of the individual owners, and the difficulty in obtaining cooperation of the residents.

With the adoption of 96-328, Frost, Christenson & Associates has been contacted by various community associations as to the applicability of Rule 96-328 to their particular

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situation, and the anticipated impact. Frost, Christenson & Associates has made technical recommendations to various Homeowner Associations on the implementation of that Rule, and has spent considerable time evaluating the implementation of the Rule as it pertains to Condominium Associations. As a result of this latter evaluation, Frost, Christenson & Associates has decided to submit written comments directly to the FCC for consideration.

### **Form of Ownership**

The form of ownership of the property is not the proper determining factor in whether the installation of Direct Satellite Dish Antenna should be permitted in every instance. For the purposes of discussion, the following will differentiate between a Homeowner Association (where the property is "within the exclusive use or control of a person who has a direct or indirect ownership interest in the property"), and a Condominium Association (where the property is "not under the exclusive use and control of a person who has a direct or indirect ownership interest in the property, including the outside of the building, including the roof"). However, many Homeowner Associations fall within this latter group since the Homeowner Association is responsible for the maintenance, repair and replacement of the building envelope and grounds.

Specific reference will not be made to Cooperatives. However, it has been our experience that Cooperatives generally have the same characteristics as Condominiums regarding the building envelope (roof, siding, etc.). Our comments that follow relate equally to Condominiums and Cooperatives, although only Condominiums will be referenced. In addition, many of the comments may apply to leased residential property.

It should be noted that many Homeowner Associations have maintenance, repair and replacement requirements for the building envelope (roofs, siding, etc.), and should be considered to fall under Section 48(b) above. However, this will not be addressed in this writing.

The issue of installation of Direct Satellite Dish Antenna on common areas cannot be clearly defined by the distinction between a Homeowner Association, and a Condominium Association.

The installation of a Direct Satellite Dish Antenna impacts a number of areas including:

- Aesthetics.
- Denigration of the Development Scheme.
- Interference with Association maintenance, repair and replacement requirements.
- Potential damage to property not owned by the owner-installer of the Direct Satellite Dish Antenna.