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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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 and Multichannel Multipoint Distribution Services	)	

COMMENTS OF THE
CONSUMER ELECTRONICS MANUFACTURERS ASSOCIATION

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The Consumer Electronics Manufacturers Association ("CEMA"), a sector of the Electronic Industries Association, hereby submits the following comments in response to the Further Notice of Proposed Rulemaking ("*Further Notice*") that the Commission issued in the above-captioned proceeding on August 6, 1996.[1]

I. INTRODUCTION AND SUMMARY

CEMA is the principal trade association of the consumer electronics industry. CEMA members design, manufacture, import, distribute and sell a wide array of consumer

[1] *See Preemption of Local Zoning Regulation of Satellite Earth Stations/Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Services*, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, IB Docket No. 95-59 & CS Docket No. 96-83, FCC 96-328 (released Aug. 6, 1996).

electronics equipment, including television receivers and other video equipment. Virtually all Americans who view video programming do so on products produced by CEMA member companies. CEMA members also produce the small parabolic antennas used both in individual homes and in multi-dwelling units ("MDUs") to receive DBS video programming. These antennas and their associated receivers are among the most successful consumer electronics products to be introduced by CEMA's members in the recent past.[2] CEMA members therefore have a direct interest in the outcome of, and have participated throughout, this rulemaking proceeding.

In the *Further Notice*, the Commission seeks comment on whether it should, and if so how it should, extend its rules governing the placement of over-the-air reception devices to viewers who rent property or who would require the use of a homeowner association's common property for antennas. The Commission also seeks input on the technical and/or practical considerations that should be taken into account in extending its rules to these viewers.[3]

As set forth more fully below, CEMA urges the Commission to assume its full legal authority under Section 207 of the Telecommunications Act, and to ensure that all renters and members of homeowner associations enjoy the same protection from private impediments to antenna placement as do those who own their property outright.[4] Treating all viewers equally

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[2] *See* Comments of Satellite Broadcasting and Communications Ass'n of America, IB Docket No. 95-59, at 7-8 (July 14, 1995) (hereinafter "SBCA").

[3] *See Further Notice* at ¶¶ 59-65.

[4] Section 207 directs the Commission to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices (continued...)

is essential to fulfill the intent of Section 207. According to the plain meaning of the statute, any restriction that impairs "a viewer's ability to receive video programming" is to be prohibited.[5] The statute creates no distinction based on a viewer's occupancy status. Moreover, such a reading will not result in an unconstitutional taking of landlord or homeowner association property. Indeed, the Commission could direct landlords and homeowner associations to make centralized antennas available to their occupants if they desire to minimize the number of antennas that their occupants' use.

II. SECTION 207 REQUIRES EQUAL TREATMENT OF ALL VIEWERS

As an initial matter, CEMA urges the Commission not to shrink from doing all it can, consistent with the law, to promote the ability of all viewers to receive video programming via over-the-air reception devices. Section 207 of the Telecommunications Act is a critical component of Congress's combined desire to extend communications services throughout the Nation and to promote competition among service providers.[6] Lengthy provisions of the Telecommunications Act outline how monopoly service providers (*i.e.*, local exchange carriers) and near-monopoly providers (*i.e.*, cable operators) are to be allowed into each other's markets. Section 207 is intended to ensure that, in addition, viewers have access to already-competitive over-the-air programming services.

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[4](...continued)
designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services." Telecommunications Act of 1996, Pub. L. No. 104-104, § 207, 110 Stat. 56, 114 (1996).

[5] *Id.*

[6] *See id.* at preamble, 110 Stat. at 56.

The Commission should thus move aggressively to promote the use of over-the-air reception devices by occupants of rental property and members of homeowner associations. Although the Commission seeks a fuller record on its legal authority and the practical means to do so, there is no question as to these occupants' need for Commission action. The record in this proceeding already demonstrates that "[n]early 25 percent of American television viewers reside in apartments, condominiums and other multiple dwelling units."[7] It is inconceivable that Congress would have instructed the Commission, without qualification, "to promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming" and, yet, would have sanctioned Commission inaction that would deprive almost a quarter of the viewing public of the benefits of those regulations.

Indeed, the record demonstrates that the class of tenant-viewers is perhaps in greatest need of Commission action. Commenters have pointed out that MDU owners have an economic incentive to limit occupants to the services of a single, exclusive provider of video programming.[8] To the extent MDU owners derive some benefit (*e.g.*, higher fees for conduit use) by restricting occupants' access to alternate sources of video programming, those activities directly conflict with the pro-competitive intent of Section 207.

As to specific recommendations, therefore, CEMA urges the Commission to delete from its final rules in this proceeding any language that explicitly or implicitly discriminates against tenants and members of homeowner associations.

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[7] Reply Comments of DIRECTV, Inc., IB Docket No. 95-59, at 7 (May 6, 1996).

[8] *See, e.g.*, Reply Comments of Network Affiliated Stations Alliance, CS Docket No. 96-83, at 6 (May 21, 1996); Reply Comments of Bell Atlantic, CS Docket No. 96-83, at 3 (May 21, 1996).

III. TREATING ALL VIEWERS EQUALLY WILL NOT RESULT IN TAKINGS

Representatives of landlords, homeowner associations and similar interest groups likely will urge the Commission not to adopt such rules since they would potentially affect landlord-tenant, homeowner association and similar agreements. In the earlier phase of this proceeding, many of these parties alleged that the Commission's then-proposed preemption rule raised Fifth Amendment "takings" concerns and, in support, cited the Supreme Court's rulings in *Loretto v. Teleprompter Manhattan CATV Corp.*[9] and *Bell Atlantic Telephone Companies v. FCC.*[10] In the *Further Notice*, the Commission evinces a degree of sympathy for these claims, noting that in *Bell Atlantic* the court applied the general rule of jurisprudence that statutes are to be construed so as to avoid substantial constitutional questions.[11]

Undoubtedly, landlords and homeowner associations will press these same claims in this phase of the proceeding. The Commission should reject them. By its own terms, *Loretto* is inapposite. Since *Bell Atlantic* applies *Loretto,* it too is inapposite.[12] In *Loretto*, the Court found that a New York State statute that required a landlord to allow the installation of cable wiring on or across her building was a taking without just compensation.[13] The Court held that a law requiring landlords to permit a permanent, physical occupation of their property by a

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[9] 458 U.S. 419 (1982).

[10] 24 F.3d 1441 (D.C. Cir. 1994). *See, e.g.*, Joint Comments of the National Apartment Association, *et al.*, IB Docket No. 95-59, at i-ii (Apr. 15, 1996) (hereinafter "NAA").

[11] *See Further Notice* at ¶ 65 *citing Bell Atlantic*, 24 F.3d at 1444.

[12] *See Bell Atlantic*, 27 F.3d at 1445 (the Commission's decision "implicates" the rule enunciated in *Loretto*).

[13] *See Loretto,* 458 U.S. at 421.

third-party cable company effected a taking. The Court cautioned, however, that its decision was "very narrow."[14]

Illustrating just how "very narrow" the holding in *Loretto* was, the Court stated:

> 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 the rights to the placement, manner, use, and possibly disposition of the installation . . . . [O]wnership . . . would give a landlord . . . full authority over the installation except only as government specifically limited that authority.[15]

If anything, Section 207 presents a case similar to this hypothetical, "different question" than the question the Court considered in *Loretto*.

The purpose of Section 207 is to promote the public's access to various video programming providers. It is not to grant any third-party service provider access to individual buildings. The record demonstrates that, in the case of MDUs and similar properties, this necessarily will require landlords and associations to afford occupants greater access to common property. One example is that of the apartment or condominium dweller seeking to install a reception device on a patio or balcony. Within the lease or homeowner association rules, patios and balconies might be considered common property, subject to myriad restrictions on use of that property. Section 207 simply says that those restrictions should be prohibited to the extent they impair viewer access to over-the-air programming. In addition to placing a barbecue, table,

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[14] *Id.* at 441.

[15] *Id.* at 440, n. 19. *Cf. Expanded Interconnection with Local Telephone Company Facilities,* 9 FCC Rcd 5154, 5164-66 (1994) (finding that requiring local exchange carriers to offer other carriers "virtual collocation" does not result in a taking, because the local exchange carriers will continue to be able to control third-party access to their property).

chairs and other property on a patio or balcony, then, the occupant's right to access that common property should include the right to install a DBS antenna or other over-the-air reception device.

In contrast, in *Loretto*, the Court applied the historical rule that permanent, government-sanctioned, physical occupation of property by a third party effects a taking. As the Court later elaborated, *Loretto* is applicable only where the regulation requires the landlord to suffer the permanent physical occupation of a portion of his property by "an interloper with a government license."[16] Section 207 does not invite third-party interlopers to permanently, physically occupy property. Rather, with respect to private restrictions on antenna placement, the Section should be read as regulating the relative rights of parties under their existing contracts, modifying those contracts where necessary to allow greater use of common property for the installation of such antennas.

Indeed, to CEMA's knowledge, no commenter in this proceeding has suggested that a third-party service provider should have the right to roam about the property of a landlord or homeowner association looking for the best place to install a DBS, MMDS or TVBS antenna. That is, no party has advocated that interlopers should be allowed to effect a *Loretto*-like taking by intruding into and occupying the property of a landlord or homeowner association. Similarly, no commenter has advocated that landlords and homeowner associations should be deprived of

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[16] *FCC v. Florida Power Corp.*, 480 U.S. 245, 252-253 (1987).

traditional authority to ensure the safety of their premises in a nondiscriminatory fashion, or to exclude occupants from those portions of property within their exclusive domain.[17]

Thus, to the extent a takings issue does arise in the context of MDUs and similar properties, the question is whether Congress's instructions that the Commission promulgate restrictions that affect common property constitute a "regulatory taking." Only in the rarest of occasions, however, do such restrictions on an owner's use of its property rise to the level of a taking. The Supreme Court has made it clear, for instance, that "[w]hen a landowner decides to accept tenants, the government may place ceilings on the rents the landowner can charge . . . or require the landowner to accept tenants he does not like . . . without automatically having to pay compensation."[18] Indeed, the Court emphasized that its analysis in *Loretto* did not alter government's authority "to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in common areas of the building."[19]

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[17] Moreover, no commenter representing viewer interests has suggested that Section 207 would allow a viewer to permanently affix an antenna to an association's common property or a landlord's property. Rather, the comments confirm the common perception that antennas -- especially today's small, state-of-the-art antennas -- are not fixtures which a viewer would want to permanently attach to another's property, but are best characterized as personal property that a viewer will take along whenever he or she moves. That attribute further distinguishes any viewer-installed antenna from the infirmities that the Court found with the statute at issue in *Loretto*. *See* Further Reply Comments of SBCA, IB Docket No. 95-59, at 5-6 (May 6, 1996), *citing Loretto*, 458 U.S. at 435.

[18] *Yee v. City of Escondido*, 503 U.S. 519, 529 (1992) (citations omitted).

[19] *Loretto*, 458 U.S. at 440.

Ultimately, neither the *Further Notice* nor prior comments suggest there is a legitimate regulatory takings issue here, even though some apartment owners have argued that the value of their properties would be diminished by a proliferation of antennas on them.[20] Even assuming *arguendo* some diminishment in property value, it is difficult to imagine that Commission action in this area could be found to be a regulatory taking. The Commission would be advancing a significant public interest that Congress has identified, and it would *not* render use of landlord or homeowner association property economically inviable.[21] Indeed, if anything, the record clearly indicates that reasonable means are available both to promote the goals of Section 207 and to minimize the statute's economic impact on owners of MDUs and similar properties.

IV. THE COMMISSION SHOULD DIRECT LANDLORDS AND HOMEOWNER ASSOCIATIONS TO MAKE CENTRALIZED ANTENNAS AVAILABLE TO THEIR OCCUPANTS AS AN ALTERNATIVE TO INDIVIDUAL OCCUPANT ANTENNA INSTALLATION

To date, the debate over the takings issue has included a fair amount of hyperbole. For instance, NAA has characterized others' efforts to advance apartment and condominium dwellers' interests as seeking "an absolute right to receive any programming . . . regardless of technical, physical and geographic limitations."[22] It is, of course, ludicrous to suggest that Congress could legislate around innate limitations on the reach of over-the-air services.

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[20] *See* NAA Comments, IB Docket No. 95-59, at 15 (Apr. 15, 1996).

[21] *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) ("use" regulations do not effect a taking if they substantially advance a legitimate government interest and allow an owner economically viable use of his or her land).

[22] NAA Reply Comments, CS Docket No. 96-83, at 5 (May 21, 1996).

Congress has acted, however, to promote unimpaired access to over-the-air video programming by *all* viewers notwithstanding their status as tenants or condominium owners. To ensure CEMA's arguments are not taken out of context, we reiterate that we do not read Section 207 as prohibiting property owners' reasonable and nondiscriminatory safety restrictions, or reasonable exclusion of occupants from property in the owners' exclusive domain. CEMA advocates a practical, and in particular an equitable, approach to the implementation of Section 207.

For example, with respect to restrictions affecting exclusive-use properties, the Commission has recognized that safety restrictions of local governments and homeowner associations cannot be used as pretext to frustrate viewers' ability to install antennas. These local restrictions must be applied "to the extent practicable in a non-discriminatory manner to other appurtenances, devices, or fixtures that are comparable in size, weight and appearance to . . . antennas."[23] Likewise, safety regulations governing MDUs and similar properties should not be used as pretext to frustrate viewers' rights under Section 207. In fact, to the extent the *Further Notice* clarifies what types of restrictions affecting exclusive-use properties are permissible and what are not, those principles should apply with equal force in the context of viewers' use of common property.

It is also clear that landlords and associations are in a position both to further the purpose of Section 207 and to minimize the proliferation of antennas in their communities. The Community Associations Institute, joined by the American Resort Development Association and the National Association of Housing Cooperatives, has proposed a variety of compromise

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[23] *Further Notice* at ¶ 5.

solutions to address the interests of viewers and associations, including an option that would allow associations to install one or more common antennas for different services. According to these parties, "[e]ach individual resident would then be able to select and subscribe to the service of his or her choice."[24]

CEMA agrees with these and similar, earlier comments which argue that centralized antenna facilities may best balance the viewers' rights under Section 207 and property owners' interests in overseeing the safe, minimally intrusive placement of antennas. Indeed, where the association or landlord makes such facilities reasonably available, CEMA submits that the Commission could exempt the entity from requirements that it otherwise allow the installation of antennas on common property. CEMA urges the Commission to promote, and where possible mandate, these types of win-win solutions.

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[24] Comments of the Community Associations Institute, *et al.*, CS Docket No. 96-83, at 22 (May 6, 1996).

V. CONCLUSION

For all of the reasons set forth above, the Commission should ensure that its rules protect renters and all members of homeowner associations against private restrictions on the installation and use of DBS, TVBS and MMDS antennas to the same degree that the Commission protects those with exclusive access to their property.

Respectfully submitted,

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