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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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 Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service	CS Docket No. 96-83

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

JOINT RESPONSE TO INITIAL
REGULATORY FLEXIBILITY ANALYSIS OF

NATIONAL APARTMENT ASSOCIATION
BUILDING OWNERS AND MANAGERS ASSOCIATION
NATIONAL REALTY COMMITTEE
INSTITUTE OF REAL ESTATE MANAGEMENT
INTERNATIONAL COUNCIL OF SHOPPING CENTERS
NATIONAL MULTI HOUSING COUNCIL
AMERICAN SENIORS HOUSING ASSOCIATION
NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS

The joint commenters, representing the owners and managers of multi-unit properties,[1] submit these comments in response to

[1] The joint commenters are the National Apartment Association ("NAA"); the Building Owners and Managers Association International ("BOMA"); the National Realty Committee ("NRC"), the Institute of Real Estate Management ("IREM"); the International Council of Shopping Centers ("ICSC"); the National Multi Housing Council ("NMHC"); the American Seniors Housing Association ("ASHA"); and the National Association of Real Estate Investment Trusts ("NAREIT").

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the Initial Regulatory Flexibility Analysis contained in Attachment D of the Commission's Further Notice of Proposed Rulemaking (FCC 96-328), released August 6, 1996 (the "FNPRM"). The FNPRM requests comment on whether the Commission's recently adopted rules preempting certain governmental and quasi-governmental restrictions on the placement of DBS, MMDS and television broadcast receiving antennas should be extended to include common areas in multi-unit buildings and properties subject to leases.

This response is filed pursuant to the Regulatory Flexibility Act, P.L. 95-354 (1981), as amended by the Debt Limit Act, P.L. 104-121, Title II of which is known as the Small Business Regulatory Enforcement Fairness Act of 1996. The Debt Limit Act was signed by the President on March 29th. Subtitle D of Title II imposes specific requirements on the Commission with respect to its regulatory flexibility analyses.

Attachment D of the FNPRM correctly recognizes that a large number of small property owners and managers could be affected by any modification of the Commission's rules. To illustrate the number of businesses that could be affected and the nature of the concerns of the joint commenters, we attach and incorporate by reference the Joint Response of the joint commenters to the Initial Regulatory Flexibility Analysis in IB Docket No. 95-59, filed April 15, 1996.

Conclusion

In adopting any rule purporting to preempt antenna restrictions beyond those imposed by quasi-governmental entities, the Commission must disclaim any intent to impact small owners and managers of real estate.

Respectfully submitted,

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September 27, 1996
Attachment

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September 27, 1996

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

APR 15 1996

In the Matter of	)	IB Docket No. 95-59
	)	DA 91-577
Preemption of Local Zoning Regulation of Satellite Earth Stations	)	45-DSS-MISC-93

JOINT RESPONSE OF
NATIONAL APARTMENT ASSOCIATION
BUILDING OWNERS AND MANAGERS ASSOCIATION
NATIONAL REALTY COUNCIL
INSTITUTE OF REAL ESTATE MANAGEMENT
INTERNATIONAL COUNCIL OF SHOPPING CENTERS
NATIONAL MULTI HOUSING COUNCIL
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NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS

TO INITIAL REGULATORY FLEXIBILITY ANALYSIS

Summary

These joint comments point to the failure of the Commission's initial regulatory flexibility analysis to consider the impact of an unduly broad interpretation of the proposed rule on the thousands of small owners of rental properties.

An improper construction of the proposed rule would effect an unconstitutional taking of these small business' property. Other interests of the joint commenters could be adversely affected.

Any impact on these small entities could be avoided by clearly excluding private businesses from the scope of the proposed rule. The relevant marketplace is highly competitive,

and competition will take care of any problem the Commission might anticipate. Moreover, these small businesses are not within the statutory directive which the Commission's rule purports to enforce.

In adopting any rule purporting to preempt restrictions on antennae beyond those imposed by quasi-governmental entities, the Commission must disclaim any intent to impact small owners and managers of real estate.

Introduction

The joint commenters, representing the owners and managers of multi-unit properties,[1] submit these comments in response to the Initial Regulatory Flexibility Analysis contained in Appendix III to the Commission's Report and Order and Further Notice of Proposed Rulemaking (FCC 96-78), released March 11, 1996. The further notice proposes to implement Section 207 of the Telecommunications Act of 1996, P.L. 104-104, by extending the Commission's rules preempting state and local governmental restrictions to quasi-governmental and non-governmental restrictions.

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This response is filed pursuant to the Regulatory Flexibility Act, P.L. 95-354 (1981), as amended by the Debt Limit Act, P.L. 104-121, Title II of which is known as the Small Business Regulatory Enforcement Fairness Act of 1996. The Debt Limit Act was signed by the President on March 29th. Subtitle D of the Title II imposes specific requirements on the Commission with respect to its regulatory flexibility analyses.

Contrary to the statements regarding the potential effect on small entities found in Appendix III of the order and further notice, the Commission's proposal will have a "significant effect on a substantial number of small entities." 5 U.S.C. § 603.

Argument

I. SMALL OWNERS AND MANAGERS OF REAL ESTATE WOULD BE AFFECTED IF THE COMMISSION's ANTENNA RULES WERE EXTENDED TO COVER PRIVATE LANDLORD-TENANT RELATIONS.

The extension of the Commission's antenna preemption rules to private multi-unit properties would effect an unconstitutional taking of the property in buildings and other properties owned and managed by small businesses. Requiring the involuntary emplacement and mounting of antennae owned by others on the owners' private property is a clear violation of the owners' Fifth Amendment rights. See Loretto v. TelePrompTer Manhattan, 458 U.S. 419 (1982); cf. Bell Atlantic v. FCC, 306 U.S.App.D.C. 333, 339, 24 F.3d 1441, 1447 (1994)(co-location).

Moreover, the proposal would interfere with the ability of property managers to insure compliance with safety codes, for which they are responsible; to provide for the safety of tenants, residents, visitors, neighbors, and passers-by, for which they are responsible; to maintain the structural integrity of their buildings, for which they are responsible; and to coordinate among users of rooftop and the other limited space on the premises, for which they are responsible. These concerns are particularly important in the context of small businesses, which have limited staffs and resources to fulfill these functions.

II. THE COMMISSION'S PROPOSAL WILL AFFECT A SUBSTANTIAL NUMBER OF SMALL ENTITIES.

There are a large number of small businesses in the rental real estate industry. Our members are primarily engaged in lines of business that fall under Standard Industrial Classification Codes 6512 (operators of nonresidential buildings); 6513 (operators of apartment buildings); and 6514 (operators of dwellings other than apartment buildings). The Small Business Administration defines a small entity in each of those SIC codes as one with less than $5,000,000 in gross annual revenues. 13 C.F.R. § 121.601. Other definitions apply to small governmental entities.

The 1992 Census of Financial, Insurance and Real Estate Industries published by the Bureau of the Census contains revenue and employment information regarding businesses in various SIC codes, tabulated in several different ways. Table 4 of the

Establishment and Firm Size Report, "Revenue size of Firms: 1992," lists the number of firms, total revenue and other information for various SIC codes, including SIC codes 6512 and 6513.[2] The table also breaks the data down by size of firm, in terms of annual revenues.

The total number of firms for SIC Code 6512 that were operated for all of 1992 was 28,089; those entities earned total revenues of $36,295,913,000. The number of firms that operated the entire year and earned revenues of less than $5,000,000 was 26,960, and they reported earning a total of $14,366,122,000. This is a very large number of businesses, and a significant amount of money. In fact, businesses earning under $5,000,000 were 96% of all the businesses in this category, and accounted for 40% of all the revenue earned by operators of nonresidential buildings. This is clearly a substantial fraction.

An analysis of SIC code 6513 produces even more dramatic results. There were 39,903 firms in that category that had gross revenues of less than $5,000,000 in 1992, out of a total of 40,455. Thus, fully 99% of apartment building operators are small businesses. In addition, those firms accounted for $21,267,875,000 out of total revenues of $28,530,070,000, or 75% of the industry total. In addition, BOMA conducted a survey of

[2] Table 4 lumps SIC Code 6514 together with several other categories, so we have not included that data. The figures as a whole, however, show that the size and annual revenues of firms break down similarly to the analysis shown below for SIC codes 6512 and 6513.

its members in 1995. Although not as accurate or comprehensive as the Census Bureau's figures, the BOMA survey corroborates the Census information. BOMA received 3,620 responses to that survey, and based on those responses 81% of commercial and residential building operators have gross revenues of less than $5,000,000 per year.

Based on the foregoing information, we believe it is inconceivable that the Commission's proposed rules, broadly construed, would not have a significant effect on a substantial number of small businesses.

III. THE COMMISSION SHOULD AMEND ITS RFA FINDINGS AND EXEMPT SMALL BUSINESSES FROM ANY FINAL RULE.

In preparing its final regulatory flexibility analysis in this proceeding, the Commission should amend its initial findings to reflect the information provided above. Commenters would also urge the Commission to review its proposals in light of this new information and to revise them accordingly.

In particular, commenters urge the Commission to find specifically that the proposed rules will have a significant effect on a substantial number of small businesses. We also urge the Commission to exempt small businesses from the application of the rules, should it adopt a final rule in this proceeding.

IV. THE COMMISSION SHOULD AVOID IMPACTING SMALL BUSINESSES BY LIMITING THE SWEEP OF THE RULE TO CONGRESS' INTENT.

The Commission should avoid impacting small businesses by excluding them from the scope of the rule proposed in paragraph 62 of its March 11th order and further notice. In their joint comments filed concurrently herewith, the responding parties urge the Commission to make clear that its proposed rule (i) does not apply to landlord-tenant agreements affecting occupancy of privately owned residential properties and (ii) does not apply to commercial (non-residential) properties at all.

Congress did not intend to sweep-in private multi-unit buildings. This is clear from a careful reading of the legislative history. Section 207 of the 1996 act derives from Section 308 (Restrictions on over-the-air reception devices) of H.R. 1555. As reported, Section 308 of the House bill read essentially as does Section 207 of the act, save for the addition of MMDS antennae. This addition is the only change noted in the joint explanatory statement of the conferees. See H. Conf. Rpt. 104-458 at 166 (1996)("the conference agreement adopts the House provision...).

H. Rpt. 104-204 to accompany H.R. 1555 (1995) at 123-24 describes Section 308 in pertinent part as follows:

> The Committee intends this section to preempt enforcement of State or local statutes and regulations, or State or local legal requirements, or restrictive covenants or encumbrances that prevent the use of antennae.... 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.

It is plain from this language that Congress did not intend the statutory language to "preempt" contractual provisions of lease agreements and the like pertaining to occupancy of multi-unit buildings. It should also be inferred that Congress intended to reach television viewers in only residential and not commercial (non-residential) buildings, because other over-the-air services are not adverted to.

Conclusion

In adopting any rule purporting to preempt antenna restrictions beyond those imposed by quasi-governmental entities, the Commission must disclaim any intent to impact small owners and managers of real estate.

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