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PACIFIC TELESIS
Group-Washington

EX PARTE OR LATE FILED

October 16, 1996

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Federal Communications Commission
Office of Secretary

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EX PARTE

William F. Caton
Acting Secretary
Federal Communications Commission
Mail Stop 1170
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Dear Mr. Caton:

Re: Cable Inside Wire, CS Docket No. 95-184; Over-the-Air Reception Devices, CS Docket No. 96-83

We are submitting copies of an analysis of "takings" and jurisdictional issues relevant to the above-cited dockets, in accordance with Section 1.206(a)(1) of the Commission's rules. We will be filing another letter, in response to specific questions from the staff, shortly.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions.

Sincerely,

cc: Rick C. Chessen
Jackie Chorney
John E. Logan
JoAnn Lucanik
Larry Walke

No. of Copies rec'd 0+1
List ABCDE

PACIFIC TELESIS
Group-Washington

October 16, 1996

JoAnn Lucanik
Chief, Policy and Rules Division
Cable Services Bureau
2033 M Street, N.W., Room 406
Mail Stop 1200
Washington, D.C. 20554

Re: *Telecommunications Services Inside Wiring, Customer Premises Equipment*, CS Docket No. 95-184, *Restrictions on Over-The-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*, CS Docket No. 96-83

Dear Ms. Lucanik:

We write to address the potential takings and jurisdictional issues raised by the pending cable inside wire docket, Telecommunications Services Inside Wiring, Customer Premises Equipment, CS Docket No. 95-184, Notice of Proposed Rulemaking, 11 FCC Rcd 2747 (1996) ("NPRM"). We remind you that Pacific Telesis advocates movement of the current cable inside wire demarcation point – which is often located inaccessibly inside a wall – to a point which is more readily accessible. We also support giving multiple dwelling unit ("MDU") owners the right to own their cable inside wire prior to termination of service, and giving MDU residents and tenants "control" over their inside wire so they can choose their video provider.

We do not believe that giving alternative video providers access to MDU owners' property in order to connect new video service "takes" the property of the MDU owner, nor do we believe that changing the ownership arrangement of cable inside wire effects an uncompensated taking of the cable incumbent's property. Moreover, we believe the 1996 Telecommunications Act and the 1992 Cable Act, which both advocate increased competition in video markets, give the Commission ample authority to order the changes we propose.

It Is Not A Taking Of Real Property Owners' Property To Allow Alternative Video Providers Access To Cable Already Installed On The Premises

Allowing alternative video providers access to private property for the limited purpose of installing feeder wiring in a building and connecting the video service of individual customers is not a taking of private property.

First, any access alternative video providers need for their personnel to install new feeder wire and establish connections to existing wiring for individual customers will be temporary only. – i.e., the time it takes to enter the premises and connect the service. The Court in Loretto did not prohibit temporary physical "occupations," only permanent ones. The Court distinguished situations in which the occupation was only temporary (and in which no taking was found) – e.g., Kaiser Aetna v. United States, 444 U.S. 164 (1979) and PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980). The Court's more recent decision in First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) that "temporary" takings are compensable is distinguishable, because such takings must "deny a property owner all use of the property" in order to be actionable. Thus the temporary occupation effected by having installers on the premises is not actionable.

Second, to the extent allowing access to MDU owners' property facilitates a tenant or other non-owning resident's access to video competitors, the building owners may have some common law obligation to allow this access for the benefit of their tenants. Such a right would be akin to the implied warranty of habitability that accompanies any tenancy. There is support for affording tenants such rights in the Second Restatement of Property, which gives a tenant the right to "make changes in the physical condition of the leased property which are reasonably necessary in order for the tenant to use the leased property in a manner that is reasonable under all the circumstances."

As the Consumer Federation of America recently argued in Comments filed in the Commission's docket examining Restrictions on Over-the-Air Reception Devices,[1] the Court in Loretto did not rule out regulations which require landlords to provide certain amenities to their tenants. The Court observed that "[i]f [the statute at issue] 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." For example, the Court acknowledged that landlords must provide mailboxes, or allow tenants to install them: "[O]ur 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 link in the common area of a building." (Emphasis added.)

Mailboxes are not safety devices, but rather facilitate a tenant's communication with the outside world. Giving a tenant access to alternative video providers serves the same purpose. Thus, a regulation requiring that landlords give alternative providers access in order to accommodate tenants may be just the sort of reasonable

[1] Comments of Consumer Federation of America et al., attached hereto as Exhibit A, at 10-13. See also Comments of the National Association of Broadcasters in the same docket (Exhibit B hereto), at 9-12 (distinguishing the Loretto case).

regulation of the terms of a tenancy that the Court in Loretto declined to foreclose. See also FCC v. Florida Power Corp., 480 U.S. 245, 252 (1987) ("statutes regulating economic relations of landlords and tenants are not per se takings"); Connolly, 475 U.S. at 223-24 ("Contracts, however express, cannot fetter the constitutional authority of congress. . . . Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.").

Finally, as the Consumer Federation of America points out in its Over-the-Air Reception Devices comments, a decision impairing tenants' ability to receive the programming of their choice will directly impact the First Amendment rights of views to have access to a multiplicity of sources of news and other information. See Turner Broadcasting System, Inc. v. FCC, __ U.S. __, 114 S. Ct. 2445, 2470 (1994) ("Assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."); Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 376, 390 (1969) ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences . . . .") (emphasis added).

It Is Not An Actionable Taking Of Cable Company's Property To Give Property Owners Right To Purchase Inside Cable Wire

In the telephony inside wire docket, the Commission found that because telephone companies were compensated for their wiring, the taking effected by transferring ownership of the wiring to premises owners was not actionable. There, Commission stated that "[t]he Fifth Amendment permits a taking of property so long as the person from whom the property is taken receives 'just compensation' and so long as the taking is for a valid 'public use.'" In the Matter of Detariffing the Installation and Maintenance of Inside Wiring, CC Docket No. 79-105, Second Report and Order, 59 RR 2d 1143, paras. 48-50 (1986). Thus, telephone companies were required to abandon any claim of ownership in wiring that "ha[d] been expensed or fully amortized," because such amortization compensated the telephone companies for the cost of the wiring. Id., para. 50.

In like fashion, cable operators should receive "compensation" for the wiring. To the extent the cable companies have already depreciated the wiring or received other cost recovery for it, of course, they should not recover a second time at the time the Commission transfers ownership to end users. See 47 C.F.R. 76.922(g)(6)(i) (providing that cable ratebase may include cost of plant less accumulated depreciation). However, we do believe the compensation formula should include labor costs as well as the value of the physical wiring itself.

The Commission Has Authority to Order Access to Private Property and Transfer of Cable Wiring Ownership to Premises Owners

As we state above, Congress has explicitly advocated competition in video markets. The Commission derives its authority to take the steps we advocate from these congressional pronouncements. The recent enactment of Section 207 of the 1996 Act, which prohibits actions which impair the right of MMDS and other over-the-air video providers to deliver their signals to end users, may be the most powerful tool the Commission has to effect changes in the treatment of cable inside wiring. As the Commission has recognized in its rulemaking implementing Section 207, that provision clearly applies to antennas designed to receive over-the-air signals. However, every Pacific Telesis MMDS antenna must be accompanied by inside wiring in order for the signal to reach the customer. Without better access to inside wiring, therefore, the promises of Section 207 are empty, because we cannot deliver our signal beyond the antenna without such wiring. Therefore, the Commission should construe Section 207 to give it authority over inside wiring, as well as authority to prohibit actions which impair a provider's right to place antennas.

With regard to both wireline and wireless video, other congressional pronouncements give the Commission authority to change its regulation of cable inside wiring. See, e.g., 47 U.S.C. Section 543(a)(2) (re cable rate regulation, headed "Preference for Competition"); 47 U.S.C. Section 548 ("Development of Competition and Diversity in Video Programming Distribution"). Because the current cable inside wiring rules allow virtually no competition in video markets and freeze out new entrants, new rules are required if Congress' intent to foster competition is to be given effect.

We appreciate your attention to our concerns.

Sincerely,

Sarah R. Thomas, Senior Counsel
Pacific Telesis Legal Group
140 New Montgomery Street, Room 522A
San Francisco, CA 94105
(415) 542-7649

As we state above, Congress has explicitly advocated competition in video markets. The Commission derives its authority to take the steps we advocate from these congressional pronouncements. The recent enactment of Section 207 of the 1996 Act, which prohibits actions which impair the right of MMDS and other over-the-air video providers to deliver their signals to end users, may be the most powerful tool the Commission has to effect changes in the treatment of cable inside wiring. As the Commission has recognized in its rulemaking implementing Section 207, that provision clearly applies to antennas designed to receive over-the-air signals. However, every Pacific Telesis MMDS antenna must be accompanied by inside wiring in order for the signal to reach the customer. Without better access to inside wiring, therefore, the promises of Section 207 are empty, because we cannot deliver our signal beyond the antenna without such wiring. Therefore, the Commission should construe Section 207 to give it authority over inside wiring, as well as authority to prohibit actions which impair a provider's right to place antennas.

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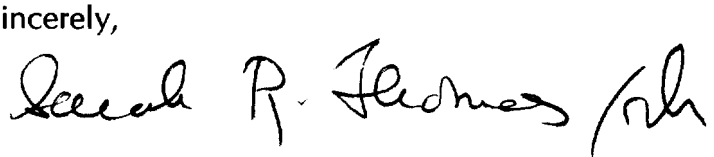

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DOCKET FILE COPY DUPLICATE

Exhibit A

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SEP 27 1996
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 CONSUMER FEDERATION OF AMERICA, LEAGUE OF UNITED LATIN AMERICAN CITIZENS, MINORITY MEDIA TELECOMMUNICATIONS COUNCIL, OFFICE OF COMMUNICATIONS OF THE UNITED CHURCH OF CHRIST, and WRITERS GUILD OF AMERICA EAST

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Gigi B. Sohn
Andrew Jay Schwartzman
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Law Student Intern:
Alex Gofman
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September 27, 1996

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SUMMARY

This proceeding presents a straightforward issue of law. On the one hand, the Commission can take an action which not only effectuates the clearly expressed will of Congress, but promotes many compelling goals: preserving the First Amendment right of viewers to choose from a diversity of sources of news and information; promoting robust competition; and ensuring that the financial and First Amendment benefits of competition flow equally to all citizens regardless of race or economic status.

On the other hand, the Commission could ignore the law to deny these benefits to over one-third of Americans, with scarcely more justification than the aesthetic concerns of landlords.

The plain language of Section 207 expressly directs the Commission to create rules that prohibit restrictions on a "viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, [MMDS, or DBS]." The legislative history further underscores that Congress' intent in using this broad language was to cover all viewers and all restrictions, including restrictions by private entities like landlords. There is no indication that the term "viewers" could mean anything other than *all* viewers, renters and homeowners alike. This fact alone should determine the outcome of the Commission's decision.

But there are also several policy reasons to support prohibition of lease restrictions. The most central reason is that it gives renters a choice, as viewers, between sources of news and information. Not only is this their right, but it is one of the essential goals of the First Amendment.

Furthermore, minorities, lower income Americans, and single mothers make up a

disproportionate percentage of the renting population. For example, the percentages of renters among the black and hispanic communities are twice that of whites. The median income of renters is almost half that of homeowners. These groups already suffer from limited access to technology and information. An adverse decision in this proceeding would foreclose them from the benefits of competition in the video services market, and further consign them to being society's information have-nots.

Finally, the outcome of this proceeding has important implications for both the development of competition in the multichannel video programming market and the health of over-the-air broadcast television. If the Commission does not act to prevent landlord restrictions on reception devices, the total market in which MMDS and DBS can compete could be reduced by one-third, giving cable an immediate advantage. Without antennas, moreover, many apartment dwellers will be unable to receive over-the-air television signals that are of watchable quality. Therefore, preemption of lease restrictions will also advance the Commission's pro-competitive goals.

Before the
FEDERAL COMMUNICATIONS COMMISSION
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COMMENTS OF CONSUMER FEDERATION OF AMERICA, LEAGUE OF UNITED LATIN AMERICAN CITIZENS, MINORITY MEDIA TELECOMMUNICATIONS COUNCIL, OFFICE OF COMMUNICATIONS OF THE UNITED CHURCH OF CHRIST, and WRITERS GUILD OF AMERICA EAST

Consumer Federation of America, League of United Latin American Citizens, Minority Media Telecommunications Council, Office of Communications of United Church of Christ, and Writers Guild of America East ("Joint Commenters") respectfully submit the following comments in response to the Commission's *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, FCC No. 96-328, (released August 6, 1996) ("*R&O*").[1] The *R&O* adopts a rule to implement Section 207 of the Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 (1996) ("1996 Act"). Section 207 directs the Commission to adopt regulations prohibiting restrictions on the use of reception devices for over-the-air television, direct

[1]The *R&O* consolidated two proceedings involving Section 207, International Bureau Docket No. 95-59, and Cable Services Bureau Docket No. 96-83 (hereinafter collectively referred to as "earlier proceedings").

broadcast satellite ("DBS"), and multichannel multipoint distribution service ("MMDS").[2]

In the *R&O*, the Commission held, *inter alia*, that "Congress intended Section 207 to apply to nongovernmental restrictions." *R&O* at ¶51. It therefore determined that private, nongovernmental bodies may not impose restrictions such as restrictive covenants and easements on the installation, maintenance, and use of devices such as television and MMDS antennas and DBS dishes. But the Commission applied this prohibition only to property that is within the exclusive control of a person with an ownership interest. *R&O* at ¶59. The Commission did not decide, and now seeks further comment on, whether this rule should apply to placement of antennas in common areas[3] and rental properties.

Joint Commenters believe that the question in this proceeding is not even close. The language of Section 207 shows that Congress intended it to be an expansive prohibition, applied to all viewers. This analysis alone should settle the issue. The legislative history further underscores this conclusion, however. Indeed, nowhere in the record is there any indication that

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[2]Section 207 states: "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." 1996 Act, §207.

[3]While the Commission has asked several questions about the applicability of Section 207 to common areas, *i.e.* property that is owned but not exclusively controlled by the viewer, Joint Commenters will not comment extensively here on these questions. Much of the analysis for renters applies with equal force to common areas. Specifically, the plain language and legislative history of Section 207 demonstrate that Congress intended the Commission to include all viewers - those in units with common areas and those in rental units alike - in its preemption of private restrictions. All viewers have a primary First Amendment right to choose from a diverse range of sources of news and information. Finally, viewers living in units with common areas comprise a significant percentage of the market, and thus are important in bringing the benefits of a level playing field both to the DBS and MMDS industries and to individual viewers.

Congress intended to distinguish homeowners from renters.

But even apart from the Commission's duty to give effect to Congress' unambiguously expressed intent, there are many important policy reasons supporting preemption. First and foremost, failure to include renters in the protection of Section 207 would be a direct insult to viewers' essential First Amendment right to have access to a diverse array of sources of news and information. It would disproportionately injure groups that already face disadvantages in the information age. Finally, it would withhold the benefits of competition from over one-third of the population based solely on economic status, and it would place a severe competitive burden on two fledgling industries.

I. THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 207 SHOW THAT CONGRESS DID NOT INTEND TO DISTINGUISH BETWEEN VIEWERS THAT OWN THEIR HOMES AND THOSE THAT DO NOT.

In its *R&O*, the Commission did not decide, and now requests further comment on, its legal authority to "extend [its] rule to situations in which antennas may be installed on...a landlord's property for the benefit of a renter." *R&O* at ¶63. It notes that in the earlier proceedings the National Apartment Association, property management interests, and the Independent Cable and Telecommunications Association argued that "there are sound reasons," such as aesthetic concerns and the ability to manage the property, "not to regulate antenna placement on private property." *Id.* at ¶61.

But the plain language of Section 207 makes no distinction between viewers who own their homes and those who rent. It simply directs the Commission to "promulgate regulations to prohibit restrictions that impair a ***viewer's*** ability to receive video programming." 1996 Act, §207. There is absolutely nothing indicating that the term "viewer" should be limited to

homeowners. Moreover, the legislative history of Section 207 supports this interpretation.[4] In the face of such unambiguous Congressional intent, the Commission cannot create the arbitrary, unauthorized classification that the landlord groups and their allies urge. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 US 837, 842-43 (1984).

II. AS A MATTER OF POLICY, THE COMMISSION SHOULD PREEMPT LEASE RESTRICTIONS.

While effectuating Congress' clear mandate should be the end of the inquiry, there are also many sound policy reasons supporting preemption.

As a preliminary, fundamental point, Joint Commenters remind the Commission that its decision here directly impacts the First Amendment right of viewers to have access to a multiplicity of sources of news and information. *E.g., Turner Broadcasting System v. FCC*, 114 S.Ct. 2445, 2470 (1994); *Associated Press v. United States*, 326 US 1, 20 (1945); *Time Warner Entertainment Co. v. FCC*, No. 93-5349, slip op. at 30 (D.C. Cir. Aug. 30, 1996). In the case of television antennas, lease restrictions may prevent renters from receiving a quality signal and therefore completely deny them access to news and information *via* broadcast television. In the case of DBS dishes and MMDS antennas, lease restrictions deny them the ability to choose between packages of video programming offered by different competitors.

Moreover, the 1996 Act was intended to expand the public's access to telecommunications

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[4]Congress indicated that it meant to afford broad protection, with no exceptions, from private and governmental restrictions. The report of the House Commerce Committee, in expansive language, directs the Commission to create rules which prohibit private restrictions against ***all*** viewers. "The Committee intends this section to preempt...restrictive covenants or encumbrances that prevent the use of antennae designed for [over-the-air TV reception or of DBS receivers]." H.R. Rep. 104-204, Part 1, 104th Cong., 1st Sess., at 123-24 (1995). *See also*, H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. at 166. Nowhere in the legislative history is there evidence that Congress wanted special protection for homeowners and not for renters.

services; this fundamental goal of the Act was meant to apply to all viewers, not just homeowners. *See, e.g.*, 1996 Act, preamble and §254. But allowing landlords to prevent the use of reception devices will deny many American families access to and choice between video programming services based merely on their economic status. This is made all the more alarming because renting Americans tend to be minorities, lower income Americans, and single mothers, groups that are already most at risk of being left behind in the information age.

A. Allowing Landlords To Prohibit Reception Devices Will Have A Disproportionately Negative Impact On Minorities, Lower Income Americans, And Single Mothers.

The 1996 Act promised that the benefits of expanded access and a competitive telecommunications market would flow to ***all*** Americans, not just those fortunate enough to own their homes. *See, e.g.*, the preamble to S. Conf. Report 104-230, 104th Cong., 2d Sess. (bill to provide competitive market for telecommunications and information technologies "to all Americans"); §254 (ensuring universal service to rural and low income Americans). Sadly, the Commission stands poised in this proceeding to limit renters' choice of video programmers to two: (1) the landlord's favored cable, SMATV, or other operator; or (2) antenna-less, and therefore often poor picture quality, over-the-air television.[5]

This proceeding, however, is not just about renters. Instead, at stake is the ability of all Americans to participate ***equally*** in the new, competitive video programming marketplace. Minorities, lower income households, and single mothers make up a large part of the renting

---

[5]In many multiple dwelling apartment buildings, reception of over-the-air television signals, without the assistance of an antenna, is so poor as to be unwatchable. Thus, to receive any meaningful amount of video programming, apartment dwellers would have to subscribe to whatever cable operator or other multichannel video service is offered by the landlord.

population. A ruling that Section 207 does not apply to renters will result in an inequitable distribution of the benefits of competition by shutting out large portions of these groups. Moreover, it would discriminate against a segment of the population that needs these benefits the most.

Data from the U.S. census bureau shows that a larger percentage of minorities than whites do not own their own homes. In the second quarter of 1996, the homeownership rate for the U.S. as a whole was 65.4 percent. U.S. Census Bureau, *Housing Vacancy Survey: Second Quarter 1996*, released July 22, 1996, at 3 ("Census Housing Survey"). In the same quarter, the proportion of whites owning their own homes was 71.7 percent, but for blacks was only 44.0 percent. The rate of homeownership was slightly lower, 43.9 percent, for hispanics. *Id.* Therefore, the percentage of renters among the black and hispanic communities is nearly twice the percentage among whites.[6]

Similarly, the American Indian and Asian populations each trail significantly behind the white population, even though they have somewhat higher homeownership than blacks and hispanics, with 52.6 and 51.2 percent respectively in 1993. Timothy Grall, U.S. Department of Housing and Urban Development and U.S. Census Bureau, *Our Nation's Housing in 1993*, released October, 1995, at 5, 19 ("Our Nation's Housing").

Renters also tend to have a lower income than homeowners. For example, the median annual family income among renters was almost $19,000 in 1993,[7] which was about one-half

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[6]In other words, about 56 percent of blacks or hispanics rent their homes compared with about 28 percent of whites. This calculation is based on the assumption that the percentage of renters corresponds to 100 percent minus the percentage of homeowners.

[7]Among urban renters, the median income level was an even lower $17,152. Our Nation's Housing at 10.

the median income for homeowners. Our Nation's Housing at 10, 16. Among the renting population, about 25 percent had an income below the poverty level. *Id.*

Finally, single mothers constitute a large proportion of the renting population, with about one-third owning their own homes. In comparison, the homeownership rate was 56 percent among single fathers and over 75 percent for married couples with children. Our Nation's Housing at 5, 18. Homeownership among women in nonfamily households is also well below the national average, at only 53 percent. *Id.*

These individuals will be left without a choice simply because they cannot afford to own their homes. Thus, the monopoly cable operator, SMATV, or any other multichannel video provider serving each building will face no competition.[8] This may result in residents paying higher subscription fees or installation charges,[9] or suffering with a service that has poor customer service and technical quality. Moreover, renters' First Amendment interests will be compromised, because they may be forced to buy the operator's service even though it offers less diversity and niche programming than others. Or they may have to subscribe to the service, when they would not otherwise choose to do so, because they cannot get viewable reception quality for over-the-air television unless they attach TV antennas.

Yet these are groups which society can least afford to leave without the benefits of

---

[8]In many multiple dwelling units, the landlord has an agreement with a cable operator or SMATV operator in which the landlord promotes the service to tenants in exchange for a fee. In almost all such cases, the operator demands exclusivity, *i.e.* that the landlord not allow tenants to subscribe to competing services.

[9]Of course, the cable operator would only be free to charge monopoly rates after the rate deregulation compelled by the 1996 Act, or where the operator's rates were deregulated earlier because it faced effective competition in its market as a whole. 1996 Act, §301(b).

information access. Allowing landlord restrictions will widen the disparity between information haves and have-nots, with the greatest negative impact being felt by these groups. These individuals are even less likely than the average American to obtain the benefits of information access - news and information, social and economic interaction, and participation in democratic processes - from other sources.

B. Preempting Lease Restrictions Will Promote Fair, Robust Competition For Multichannel Video Programming Service.

In the multichannel video market, cable remains the Goliath to the David that is DBS and MMDS.[10] If the Commission cares about promoting a truly competitive environment, it should adopt rules promoting these fledgling competitors, instead of allowing landlords to hinder them. Preempting lease restrictions will promote the pro-competitive goals of the Commission and Congress by freeing renters to receive the competing technologies of DBS and MMDS, or to choose to receive free, over-the-air television instead of cable.

Preemption will promote greater competition in two ways. First, it will allow DBS and MMDS to reach a wider market. As noted above, in the second quarter of 1996, over one-third of all homes were not owned; the widespread use of lease restrictions could reduce the potential market for DBS and MMDS services by this amount. Indeed, few businesses could keep up with their competitors if they were barred from reaching one-third of their total market. The importance to DBS and MMDS of this segment of the market might be even greater than the numbers suggest; the concentration and proximity of these viewers makes it easier and less

---

[10]The SBCA estimated that last March there were about 2.3 million high-power DBS customers in the United States, compared to 62.5 million cable TV subscribers. David Bross, "Echostar Launches Nation's Fifth DBS Network," *Communications Today*, March 5, 1996, at 6.

expensive to advertise to them and to initiate service. Preventing lease restrictions, therefore, will ensure that DBS and MMDS have a more level playing field, will improve their position and strength as competitors, and will lead to more robust competition in the overall market for multichannel video programming.

Preemption will also ensure that individual subscribers have a meaningful choice between services. Otherwise, lease restrictions could effectively bar viewers from receiving video programming from DBS, MMDS, or over-the-air television. Their only alternative would be the incumbent cable operator. *See* note 8, above.[11] These individuals will be subjected to a landlord-created monopoly - foreclosed from sharing in any benefits from competition - for the sole reason that their economic status or housing preference caused them not to own their homes.

C. Preemption Of Lease Restrictions Will Help Preserve Free, Over-the-air Television And Promote The Ability Of Renters To Receive It.

Finally, Joint Commenters urge the Commission to bear in mind that the outcome of this proceeding has important implications for the health of free, over-the-air broadcast television. Broadcast television remains the most important form of electronic media. Not only do approximately one-third of viewing households still rely on it as their only source of video programming, but it is the primary source of news and information for over three-fourths of

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[11]Renters may someday be able to choose between two or more cable operators in the same building. But this is rarely the case in the present, and it may never come to pass if not permitted by the outcome of the Commission's pending examination of its rules for broadband home wiring and cable customer premises equipment. Telecommunications Services Inside Wiring and Customer Premises Equipment, CS Docket No. 95-184; Cable Home Wiring, MM Docket No. 92-260. There are, in fact, many similarities between the policy considerations in all three proceedings, and the Commission should keep in mind the effect of the policy issues and outcome of the home wiring and customer premises equipment proceedings when reaching its conclusion here.

Americans, and it is the only video medium which is available practically for free to every citizen on an equal basis.

Yet, as noted above, note 5, the quality of television signals in many multiple dwelling apartment buildings is very poor unless the viewer uses an antenna. If the Commission allows landlord restrictions, the effect will be to foreclose many renters from the benefits of free television or to force them to subscribe to the building's monopoly cable operator or other multichannel video provider. Indeed, such a decision would be a direct affront to the "paramount" right of these citizens, as viewers, to receive news and information *via* broadcasting. *Red Lion Broadcasting v. FCC*, 395 US 367, 390 (1969).[12]

III. PREEMPTING LEASE RESTRICTIONS AGAINST THE USE OF RECEPTION DEVICES WOULD NOT CONSTITUTE A TAKING UNDER THE FIFTH AMENDMENT.

The Commission also seeks comment on whether forbidding lease restrictions would constitute a taking under the Fifth Amendment. It asks about the applicability of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419 (1982), in which the Supreme Court found a state statute effectuated a taking because it required landlords to permit installation of cable television equipment on their property. *R&O* at ¶64.

But the answer to the Commission's question is clear: *Loretto* does not apply here, and preemption would not constitute a taking. It is well-settled case law that Commission action taken pursuant to a clear Congressional mandate does not rise to the level of a taking merely because it implies a modification of contractual rights. In *FCC v. Florida Power Corp.*, 480 US 245

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[12]"It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged...by the FCC." *Id.*

(1987), for example, the Supreme Court held that Commission rules promulgated pursuant to the Pole Attachments Act, which regulated the rates utility companies could charge to lease space on their poles, were not a taking of a pole owner's property. The Court reiterated that "[s]tatutes regulating economic relations of landlords and tenants are not *per se* takings." *Id.* at 252. *Accord Yee v. City of Escondido*, 503 US 519 (1992).

Indeed, the preemption of lease restrictions at issue here is far different from the permanent physical occupation which was compelled by the statute in *Loretto*. Justice Marshall's opinion characterized the Court's holding there as "very narrow," *Loretto*, 458 US at 441, and specified that it did not cover the instance where the government merely requires the landlord to provide cable installation ***if the tenant so desires***. *Id.* at 440 n.19. In subsequent cases, the Court has made very clear that *Loretto* only applies to statutes that "specifically require[] landlords to permit permanent occupation of their property by cable companies." *Florida Power*, 480 US at 251-53; *Yee*, 503 US at 527. For example, it has declined to find a taking where the state does not require occupation, but merely regulates the terms of a preexisting lease arrangement. *Florida Power*, 480 US at 251-53.

Similarly, preemption of lease restrictions would not require a landlord to install DBS dishes, television antennas, or MMDS antennas. It would merely allow tenants to make a choice to install them. Indeed, for purposes of the takings issue, these devices are no different than other items that a tenant is permitted to attach to the property for the duration of the lease only, such as air conditioning units, bird feeders, or wind chimes. Moreover, in no way does preemption go so far as to compel a landowner to rent his or her property or to refrain from

terminating a tenancy. *See Florida Power*, 480 US at 251-52 n.6; *Yee*, 503 US at 528.[13]

In cases that do not require landlords to suffer a permanent physical occupation of a portion of the building by a third party, the courts will conduct an *ad hoc*, factual inquiry to determine whether the regulation amounts to a taking. *Penn Central Transportation Co. v. New York City*, 438 US 104 (1978). In conducting this review, courts will examine certain factors of particular significance, such as the "character of governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *R&O* at ¶43, *citing Pruneyard Shopping Center v. Robins*, 447 US 74, 83 (1980). A taking is less readily found in cases of a "public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 US at 124.

In light of these factors, it is clear that the preemption of lease restrictions at issue here does not effect a regulatory taking. As discussed above, preemption would promote the public good in many important ways. Moreover, the economic impact would be minimal. The installation of an antenna or dish, which will often be on the outside of the outer walls of the apartment, on the roof, or on a balcony or patio, will not reduce the long term value of the apartment or the landlord's investment in the apartment.[14] Also, since the DBS dishes or antennas will have been installed at the tenant's request, they are unlikely to reduce his or her willingness to pay

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[13]The Court has also distinguished the case where a regulation requires the landlord himself to install items such as smoke detectors, mailboxes, and fire extinguishers on the property, but does not control the manner of installation. *Loretto*, 458 US at 440. Therefore, to alleviate landlords' concerns, the Commission could permit reasonable restrictions to control the manner of installation, so long as these restrictions are not so burdensome as to have the effect of preventing tenants from installing the devices.

[14]As discussed above, note 13, reasonable restrictions could be placed on the installations to allay landlord concerns about the method of installation.

rent. There will be no substantial physical harm to the apartment, because in the vast majority cases the devices will be removed by the tenant or by the landlord upon the end of the lease.[15] If there are any remaining costs from the reception device's installation, there is already a method for the landlord to recover - the security deposit.

[15]Many DBS subscribers paid $600-700 for their equipment. Only a few months ago, prices for some dishes broke lower than that level, but still remain about $200, and involve other fixed costs such as installation kits, fixed term service contracts, and decoder boxes. In any event, this is not a trivial investment for many renters, and they can be expected to take their dishes with them when they vacate an apartment.

CONCLUSION

The Commission faces an easy decision in determining whether to apply Section 207 to renters. Congress contemplated the issue and gave clear direction to the Commission to include all viewers. Moreover, there are many sound policy reasons that reinforce this conclusion. Therefore, the Commission should create rules prohibiting landlords from creating restrictions impairing a viewers' ability to receive programming using DBS dishes, MMDS antennas, or over-the-air broadcast television antennas.

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September 27, 1996

Exhibit B

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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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