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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Manner of )  
Preemption of Local Zoning Regulation )  
of Satellite Earth Stations )

IB Docket No. 95-59  
CS Docket No. 96-83

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REPLY COMMENTS OF THE  
NATIONAL ASSOCIATION OF HOME BUILDERS

The National Association of Home Builders (NAHB) is a trade association representing the nation's housing industry. NAHB's 185,000 member firms are engaged in all aspects of real estate development, ownership, and management and include owners and managers of apartment buildings, cooperatives, condominiums, and community associations. NAHB submits this reply to the comments received in this proceeding.

I. Application of Section 207 to Rental and Commonly Owned Property Amounts to a Taking of Private Property in Violation of the Fifth Amendment

Contrary to the assertions made by some commenters in this proceeding, an order by the Commission requiring owners of multiunit properties to accept placement by tenants or other residents of satellite antennas on common property amounts to a taking of private property within the meaning of the Fifth Amendment of the U.S. Constitution, as held by the Supreme Court in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Although the issue in Loretto concerned the rights of third parties to install equipment on the premises, and not the tenant's right to install such equipment, the result is the same in either case. As the

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Supreme Court stated, “ (a) permanent physical occupation authorized by government is a taking without regard to the public interests it may serve.” Loretto at 426.

As set forth in the NAHB comments of September 27, 1996, under traditional landlord/tenant law, a tenant acquires the right to exclusive occupancy of the leased premises. While a tenant has the right to pass through the common areas, the tenant has no right to make changes to the common areas. Even when a resident has an ownership interest in the common areas, such as in a condominium or cooperative, the resident has no right to make changes to the common areas without the consent of the other owners. Giving a tenant, occupant, or resident the right to install an antenna in a common area against the wishes of the owner, or the other owners, would be an occupation and therefore a taking. This is exactly the type of physical occupation that was held to be a taking in Loretto.

Some commenters in this proceeding have attempted to argue that application of Section 207 to rental property does not constitute a taking and rely heavily on footnote 19 in Loretto as well as on FCC v. Florida Power Commission 480 U.S. 245 (1987) as support for their position. Other comments suggest that application of Section 207 to rental property does not amount to a taking of private property, but rather, is merely “conventional government regulation of the landlord - tenant relationship, akin to regulations requiring access to utility services and the installation of smoke alarms.”<sup>1</sup> NAHB submits that such comments reflect a misunderstanding of takings law jurisprudence, as well as a lack of understanding of government regulation of the landlord/tenant relationship.

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<sup>1</sup> Comments of National Association of Broadcasters, September 27, 1996

There is nothing in Footnote 19 of Loretto that suggests that landlords may be made to suffer the invasion of property over which they maintain exclusive control by tenants who have no legal right to control such property. In Footnote 19, the Court stated that there might be a different question from the one before the Court if the statute at issue required the landlord to provide cable installation at the tenant's request. As the Court stated, "(o)wnership would give the landlord rights to the placement, manner, use, and possibly the disposition of the installation." Loretto at 440, Footnote 19. However, this language has no relevance to this proceeding. Section 207 of the Telecommunications Act does not place an affirmative duty on property owners to provide telecommunications services to residents. There is nothing in Footnote 19 that contradicts the holding that granting a tenant the right to install equipment on the landlord's property is a taking of the landlord's property.

FCC v. Florida Power Corp. 480 U.S. 245 (1987) also has no relevance to this proceeding. In that case, the issue was whether a federal statute that authorized the FCC to regulate rates that utility companies charged cable companies for leasing space on the utility companies' poles amounted to a taking of private property. Nothing in the statute required the utility company to lease space to the cable company. The statute authorized the Commission to regulate rates in those cases in which the owner of a utility pole had already voluntarily entered into a leasing agreement with a cable company. The statute did not authorize a taking or expand the lessee's right to use the lessor's property by giving it new rights. The court held that "(s)tatutes regulating the economic relations of landlords and tenants are not *per se* takings." Florida Power at 251-252.

The statute at issue in Florida Power is completely different from the statute at issue in

this proceeding. In Florida Power, the utility company was not required to suffer a physical occupation of a portion of its property by a third party. The parties in that case had already entered into a voluntary lease, and the statute merely regulated their economic relations. This is entirely different from the situation at issue in this proceeding. To construe Section 207 to require landlords to accept placement of satellite antennas on property under their exclusive control is not a regulation of the economic relationship between landlord and tenant, but rather, amounts to an expansion of the tenant's property rights. This would be a taking of the landlord's property.

Some commenters have suggested that requiring landlords to allow placement of antennas on property within their exclusive control is merely a permissible regulation of the landlord/tenant relationship akin to the government's power to require fire extinguishers and smoke detectors in the common elements of a building. There is no question that the federal government, acting pursuant to the commerce clause of the Constitution, has the power to regulate housing conditions or alter existing contractual relationships in order to promote the general welfare or to avert physical or financial disaster without paying compensation for economic injuries that such regulation entails.<sup>2</sup> There is also no question that states can regulate housing conditions under their general police power. However, a regulation that requires landlords to allow the physical occupation of their property in order to provide residents access to telecommunications services cannot in any way be equated with regulations designed to promote the health and safety of residents. Access to telecommunications services is an

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<sup>2</sup> Connolly v. Pension Benefit Guarantee Corp. 475 U.S. 211 (1986); Home Building and Loan Association v. Blaisdell 290 U.S. 398 (1934)

amenity, not a necessity such as fire extinguishers in an apartment building. While increased access to new technology is an important national objective, there is nothing in the Telecommunications Act that suggests that Congress intended to abrogate private property rights by requiring property owners to allow placement of telecommunications devices on their property by tenants or residents.

**II. Congress Did Not Give the Commission the Authority to Require Owners to Provide Telecommunications Services or the Authority to Preempt Owners' Restrictions on the Use of Their Property**

Some commenters have asserted that the Commission has authority to prevent private property owners from restricting placement of antennas on their property because Section 207 refers to “viewers” and does not make a distinction between those who live in single family residences, and those who live in multiple dwelling unit buildings. Such a reading strains common sense and conflicts with established principles of statutory construction. It is well established that the rule making power granted to an administrative agency charged with administration of a federal statute is not the power to make law, but rather, the power to adopt regulations to carry into effect the will of Congress expressed in the statute. Ernst and Ernst v. Hochfelder 425 U.S. 185, 213-214 (1976).

Section 207 of the Telecommunications Act of 1996 requires the Commission to “...pursuant to Section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer’s ability to receive video programming services...” Section 207 does not confer any new authority on the Commission. The Commission must act

under the authority conferred under Section 303 of the Communications Act of 1934.

The Commission's authority under Section 303 is limited to providers of telecommunications services and facilities. The Commission has no authority under Section 303 to regulate the real estate industry or individual building owners. Therefore, the Commission has no authority to impose an affirmative obligation on building owners to provide telecommunications services to their residents. Section 207 cannot reasonably be construed as giving tenants or residents the right to receive certain services in the absence of language giving the Commission authority to direct building owners to provide such services.

The legislative history of Section 207, discussed in NAHB comments of September 27, 1996, indicates that Congress was concerned with restrictive covenants and homeowners' association rules that limit the placement of antennas. The use of such language implies that Congress was concerned with restrictions that burden a property that the viewer owns and over which the viewer exercises exclusive control since such terms are generally understood to apply to single family properties, not multiple dwelling unit properties. There is no indication in the legislative history that Congress intended to abrogate privately negotiated leases, or similar real estate agreements. Simply by virtue of being a "viewer," a person is not given legal right to invade another's property.

Some commenters have also argued that limiting application of Section 207 to those who reside in single family homes will have a disproportionately negative impact on lower income people since the renter population tends to be made up of lower income Americans and minorities. There is no dispute that persons who reside in multiple dwelling unit buildings tend to have lower income than those who own their own residences. There is also no doubt that

construing Section 207 not to apply to multiple dwelling unit properties will have a disproportionate impact on lower income persons. However, the Commission has no general authority to implement a policy not committed to it by Congress, even if the policy promotes the general welfare. NAACP v. Federal Power Commission 425 U.S. 662, 669 (1976). Therefore, the Commission cannot base its actions on such arguments.

It is important to note that there is a 36% turnover rate annually among renters in multiple dwelling unit buildings, and renters are nearly five times more likely to move in a year than those who own their own residences.<sup>3</sup> It is clear that owners of multiple dwelling unit buildings will face an increase in the cost of operations if every tenant is allowed to place a satellite antenna on the common area of an apartment building. There are costs associated with the installation, maintenance, repair and removal of antennas that will be borne by the building owners. In market rate housing, such increased costs may be passed onto the new residents.

Application of Section 207 to rental properties would mean that federally assisted housing would be covered as much as market rate housing since there is nothing in the Telecommunications Act to suggest that the Commission has authority to distinguish between market rate and subsidized housing. Federally assisted housing is designed to assist lower income persons who cannot afford market rate housing. In federally assisted housing projects, owners are statutorily precluded from raising rents. Given the turnover rate in rental housing, it is clear that owners of assisted housing projects will face an increase in the cost of operations as a result of application of Section 207 to such housing. However, unlike owners of market rate

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<sup>3</sup>See *American Housing Survey 1993*, Bureau of the Census, Current Housing Reports, H150/93

housing, owners of assisted housing cannot pass such costs onto existing or new residents because federal law precludes owners from raising rents in such projects. The result is that owners will not be able to maintain such projects, and the already limited affordable housing stock will continue to diminish. Thus, a policy that was supposed to benefit lower income persons will actually have the effect of reducing the supply of affordable housing. Surely this is not what Congress intended when it enacted Section 207.

### **III. A Logical Construction of Section 207 Does Not Violate the First Amendment**

As set forth above, the Commission has limited authority under Section 207. Some commenters<sup>4</sup> have argued that Congress meant to create an entitlement giving citizens the right to receive video programming services. They assert that Section 207 provides that viewers have a “paramount First Amendment” right to receive such services.

It strains credulity to assert a First Amendment issue here. The First Amendment is a restriction on the power of the federal government. While the First Amendment gives citizens certain rights, those rights are not at issue in this proceeding. The Commission has no authority to take private property on the grounds that Fifth Amendment property rights are outweighed by First Amendment rights.

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<sup>4</sup> Comments of Phillips Electronics North America and Thompson Consumer Electronics, Sept. 27, 1996, page 12.

**Conclusion**

For the foregoing reasons and those set forth in its comments in this proceeding, the National Association of Home Builders urges the Commission not to adopt any rule that would require owners of multiunit properties to accept placement on their property of satellite antennas owned by tenants, residents, or telecommunications providers.

Respectfully submitted,



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