

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
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Preemption of Local Zoning Regulation of)
Satellite Earth Stations)
)
In the Matter of)
)
Implementation of Section 207 of the)
Telecommunications Act of 1996)
)
Restrictions on Over-the-Air Reception Devices:)
Television Broadcast Service and Multichannel)
Multipoint Distribution Service)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

IB Docket No. 95-59

CS Docket No. 96-83

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REPLY COMMENTS OF OPTEL, INC.

OpTel, Inc. ("OpTel"), submits this reply to the comments filed in response to the Further Notice of Proposed Rulemaking ("Further Notice") in the above-referenced proceedings.

Section 207 of the 1996 Act requires the Commission to promulgate regulations to "prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for reception" of video programming materials.¹ In comments filed in this proceeding, scores of parties have demonstrated that this provision should not, and may not, be applied to restrictions that limit viewers' ability to install antennas on property that the viewer does not own or exclusively control. Such a broad interpretation, the comments explain, would rewrite state property and contract law and result in an unauthorized taking of private property.

Nonetheless, several parties did advocate an extremely broad and intrusive reading of Section 207. These parties, however, fail to justify their position on the text of the statute or to distinguish the judicial decisions indicating that such a taking would be unlawful and unconstitutional. Consequently, the Commission should not interpret Section 207 expansively, but should preserve the right of all Americans to contract freely and to control access to their private property.

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) § 207.

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DISCUSSION

I. Section 207, By Its Terms, Does Not Prevent Private Property Owners From Restricting Use Of Their Property By Others For Antenna Placement.

The parties supporting the expansion of Section 207 to include restrictions that limit viewers' ability to install and maintain antennas on property that they do not own or exclusively control anchor their textual argument on a single word in the statute — "viewers." In one form or another, each of these parties argues that the use of the term "viewers" in the statute refers to "all viewers" and that "Section 207 makes no distinction between viewers who own their homes and those who rent."² The fact that Section 207 makes no such distinction, however, does not indicate that it was intended to vitiate existing property rights.

First, the proposition that the term "viewers" in Section 207 means "all viewers" proves too much. As a matter of logic and common sense, there must be some limit to the universe of "viewers" who may benefit from Section 207 preemption. For instance, it cannot be that a "viewer" living in a house with a line of sight to a DBS satellite that is obscured by other buildings or obstructions has a right to install a DBS dish on someone else's property or to remove those obstructions in order to obtain DBS reception. Simply by virtue of being a "viewer," a person is not given the legal right to invade other peoples' property. Thus, the use of the term "viewers" to describe those who would benefit from the elimination of restrictions on antenna placement does not mean "all viewers," and it does not itself define the nature or scope of the restrictions to be eliminated.

Second, the fact that Congress did not explicitly draw a distinction between those who own the property on which they would like to install their antennae and those who do not is suggestive of nothing. It is fundamental that Congress is "presumed to enact legislation with knowledge of the law such that, absent a clear manifestation of contrary intent, a newly-enacted or revised statute is presumed to be harmonious with existing law and its judicial construction."³ The fact that Congress was silent as to whether Section 207 was intended dramatically to rewrite existing state contract and property law principles cuts in exactly the opposite direction from that advocated by the proponents of an expansion to Section 207. "Absent a clear manifestation of contrary intent," it is

² See, e.g., Comments of the Consumer Federation of America, et al. ("CFA") at 3.

³ E.g., United States v. Boynton, 63 F.3d 337, 343 (4th Cir. 1995) (citations omitted).

implicit in the statute that Congress meant for Section 207 to be interpreted in harmony with established principles of property law.

Finally, the inflammatory rhetoric of a few parties notwithstanding, a strict and faithful construction of Section 207 does not “relegate[e] renters to second class status,” discriminate against minorities, or impinge upon First Amendment rights.⁴ To the contrary, by respecting the right of private parties — whether they rent or own their homes — to contract, a logical construction of Section 207 would validate the full citizenship of all Americans who, rich or poor, of whatever ethnicity, religion or gender, should have the freedom to live in buildings of their own choice, including the choice of whether they want antennae on those buildings. There is nothing discriminatory about this proposition, nor does it devalue any category of citizens. Most certainly, as discussed at length in the reply comments of the Independent Cable & Telecommunications Association of which OpTel is a member, requiring tenants and property owners to abide by their contractual obligations in no way violates the First Amendment.⁵

II. Construing Section 207 To Reach Restrictions On The Installation Of Antennas On The Property Of Others Would Constitute A Fifth Amendment Taking.

As OpTel and others demonstrated in their comments, Commission preemption of private restrictions that impair viewers’ ability to install or maintain antennas on the property of others (*i.e.* in rental units or on leased property) or on property not within the exclusive control of the viewer (*e.g.*, common areas of condominium or cooperative units), would effectuate a *per se* taking of private property under Loretto and, therefore, would require the payment of “just compensation.”

The parties supporting a broad interpretation of Section 207 dispute this point. They argue that compelled acquiescence of property owners to the installation of others’ antennas would not constitute a *per se* taking, but would merely regulate the pre-existing relationship between the property owner and the antenna owner.⁶ For support, these

⁴ See *e.g.*, Comments of Philips Electronics Corporation and Thomson Consumer Electronics at 4; Comments of the Satellite Broadcasting and Communications Assn. at 4; Comments of CFA at 3-5.

⁵ Although it is absurd to assert, as a few parties did in this proceeding, that a property owner’s decision not to allow others to install antennae on her property violates anyone else’s substantive First Amendment rights, the argument is further flawed in that the First Amendment prohibits federal and, by incorporation, state laws that abridge the freedoms enumerated therein. The First Amendment does not in any fashion restrict private conduct. See, *e.g.*, United Brotherhood of Carpenters and Joiners of America v. Scott, 463 U.S. 825, 833 (1983).

⁶ See, *e.g.*, Comments of the National Association of Broadcasters (“NAB”) at 9-16; Comments of Philips Electronics and Thomson Consumer Electronics at 9-12. As noted above, however, if “viewers” means

parties rely most heavily on footnote 19 in Loretto and on FCC v. Florida Power Corp., 480 U.S. 245 (1987). Both authorities, however, are unavailing.

To begin with, nothing in footnote 19 of Loretto indicates that landlords may be made to suffer, without just compensation, the invasion of portions of their property — over which they have retained exclusive control — by tenants to whom they have leased other portions of their property. Instead, footnote 19 merely reiterates the central holding of the case by emphasizing that the Court was not presented with a statute requiring landlords to provide their tenants a necessary or important service. Such a statute might present a different question, the Court noted in *dicta*, “since the landlord would own the installation. Ownership would give the landlord rights to the placement, manner, use, and possibly the disposition of the installation.”⁷ Section 207, however, by its terms imposes no positive duty. It cannot, by any stretch, be construed to require landlords to provide their residents and tenants with antenna connections to any and all DBS, MMDS, LMDS, or like services.⁸

The Florida Power case also is inapposite. In Florida Power, the utility company complainants had agreed to lease pole attachment space to various cable companies. The order that was in dispute regulated the rates that the utility companies could charge for these attachments. Thus, unlike the statute in Loretto, “nothing in the Pole Attachments Act... gives cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements with cable operators.... [S]tatutes regulating the economic relations of landlords and tenants are not per se takings.”⁹

Construing Section 207 to preempt restrictions on the installation of antennas on property not owned or exclusively controlled by the antenna owner would go much further than the order at issue in Florida Power. Such a construction would not merely regulate the economic relationship of landlords and tenants (*e.g.*, the rent that a landlord could charge for voluntarily allowing a tenant to install an antenna on the landlord’s property), but would require the landlord to accept a permanent physical occupation of his or her property by the equipment of others.

“all viewers” as urged by these parties, it is not clear that any prior relationship between the property owner and the antenna owner would be required as a condition of preemption.

⁷ Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440 n.19 (1982).

⁸ Even if such a broad mandate were encompassed within the terms of the statute, and even assuming that the *dicta* in footnote 19 indicates that such a broad mandate would not constitute a *per se* taking, it is likely that such a statute would constitute a regulatory taking under Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (regulation of property that “goes too far” constitutes a taking) and its progeny.

⁹ FCC v. Florida Power Corp., 480 U.S. at 251-52 (emphasis added).

Unlike the utility companies in Florida Power, landlords would not have the flexibility to evict a person rather than suffer the unwanted antenna installation. “As the Court has confirmed time and time again, the right to exclude others is perhaps the quintessential property right. Without this right, one’s interest in property becomes very tenuous since it is then subject to the whim of others — an interest more akin to a license than to ownership.”¹⁰ Requiring a property owner to grant access to others for the purpose of installing an antenna deprives them of the “paramount property right,” even if the person to whom the property owner must grant access stands in some other contractual relation to the property owner.¹¹

III. Extension Of The Commission’s Section 207 Preemption Rule Should Be Rejected On Policy Grounds.

The parties who have advocated an expansion of the Commission’s Section 207 preemption rules have vastly underestimated the harm that such an expansion would cause. They dismiss the “aesthetic concerns” of building owners and managers as trivial when compared to the “alarming” lack of choice among video service providers available to renters.¹² However, as the comments in this proceeding make clear, more than aesthetic considerations are at issue and the unwarranted expansion of Section 207 is far from benign.

As the National Association of Home Builders explains in great detail in its comments, the expansion of Section 207 would cause significant damage to buildings (which would be paid for, ultimately, by renters in the form of higher rents), contribute to unsafe living conditions for building residents, diminish the level of security in multiple dwelling units, and have a deleterious effect on the aesthetic appearance of buildings.¹³ Thus, if the Commission were to extend its preemption rules as suggested in the Further Notice, it would be discounting numerous other significant policy concerns for the sole purpose of promoting increased access to multichannel video programming services.

Ironically, however, as OpTel and others explained in their comments, the suggested preemption would not necessarily expand the number of choices for many consumers.¹⁴ Thus, the suggested expansion of the Commission’s Section 207 preemption rules would cause significant damage to property, raise the cost of

¹⁰ Nixon v. United States, 978 F.2d 1269, 1286 (D.C. Cir. 1992).

¹¹ Id.; see also Bell Atlantic Tel. Co. v. FCC, 24 F.3d 1441, 1445-46 (D.C. Cir. 1994).

¹² E.g., Comments of CFA at 3, 5.

¹³ Comments of NAHB at 10-13; see also Comments of the National Trust for Historic Preservation at 2.

¹⁴ See Comments of OpTel at 10; Comments of National Apartment Association, et al., at 14.

maintaining MDUs, lead to increases in rent and association dues, and diminish the quality of life of residents living in MDU settings — all in exchange for a marginal and speculative increase in the number of video programming options available to MDU residents.

CONCLUSION

For the foregoing reasons and those set forth in its comments in this proceeding, OpTel urges the Commission to reject suggestions that it extend Section 207 preemption to prohibit private restrictions that impair a viewer's ability to receive over-the-air video programming on property not within the exclusive control of the viewer or in which the viewer does not have an ownership interest.

Respectfully submitted,

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