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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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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	)	

REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036

Henry L. Baumann
Executive Vice President and
General Counsel

Barry D. Umansky
Deputy General Counsel

OF COUNSEL:

Wade H. Hargrove
Mark J. Prak
Marcus W. Trathen
BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.
Post Office Box 1800
Suite 1600, First Union Capitol Center
Raleigh, North Carolina 27602

No. of Copies rec'd 0+11
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SUMMARY OF REPLY COMMENTS

The FCC has solicited comment concerning whether Section 207 of the Telecommunications Act of 1996 (the "1996 Act") should be extended to prohibit restrictions imposed by multiple dwelling unit ("MDU") owners such as owners of apartments and condominiums on the reception of over-the-air television broadcast, DBS and MDS signals.*

The opponents of such preemption rely on strained readings of Section 207 as well as relevant case law. All things considered, the intent of Section 207 is unmistakable: the FCC is directed to prohibit all restrictions on the reception of over-the-air television signals. The desire of the opponents of such preemption to reargue the wisdom of such a blanket prohibition is irrelevant. This policy issue has been resolved by Congress, and the FCC's only task is to promulgate appropriate regulations.

Likewise, the opponents' "takings" argument is unavailing. The principal case relied on by the opponents, *Loretto v. Telepromptor Manhattan CATV Corp.*, is readily distinguishable from the proposed regulation. As the Court in *Loretto* made clear, its holding in that case was limited to a regulation which allowed the permanent physical occupation of an owner's property by a "stranger" to the owner. Because it is plain that MDU tenants and occupants are not "strangers" to MDU owners, *Loretto* is not relevant to the application of Section 207 to MDU property. Likewise, Section 207 does not authorize the "permanent physical occupation" of an owner's property. To the contrary, any occupation of property would be limited by the temporary, contractual rights of the particular MDU tenant or occupant.

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* *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rule Making*, FCC 96-328 (Released: August 6, 1996).

Finally, the opponents' concerns regarding potential health and safety issues are equally unavailing. The Commission's application of Section 207 to MDU property should not prohibit reasonable restrictions relating to legitimate health and safety concerns.

For these reasons, Section 207 should be extended to prohibit all restrictions on the reception of over-the-air television signals, whether public or private. The opponents have provided no legitimate basis for distinguishing between public and private restrictions and no such basis exists.

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REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB"), by and through its undersigned attorneys, submits these Reply Comments in connection with the Commission's *Further Notice of Proposed Rule Making ("FNPR")* in the above-referenced dockets.[2] The focus of these Reply Comments is on the specific questions raised by the FCC in its *FNPR*: (1) the Commission's legal authority to prohibit nongovernmental restrictions that impair reception by viewers who do not have exclusive use or control and a direct or indirect ownership interest in the property on which the antenna would be located; (2) whether the preemption of private restrictions on the reception video programming signals implicates the Takings Clause of the United States Constitution and, in particular, the effects of the United States Supreme Court's decision in

[2] *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rule Making,* FCC 96-328, (Released: August 6, 1996).

Loretto and the decision of the United States Court of Appeals for the District of Columbia Circuit in *Bell Atlantic*; (3) the technical and practical feasibility of the extension of Section 207 to rental or commonly-owned property; and (4) the proposal of Community DBS that community associations be allowed to make video programming available to any resident wishing to subscribe to such programming at no greater cost and with equivalent quality as would be available from an individual antenna installation.

I. STATUTORY AUTHORITY AND INTERPRETATION

The preemption opponents argue that Section 207 of the Telecommunications Act of 1996 (the "1996 Act") does not empower the FCC to issue regulations preempting antenna restrictions imposed on viewers who do not own or control the premises where the antenna would be installed. These interpretations are based on highly strained readings of the statute and strained applications of principles of statutory construction. For example, in their Joint Comments, the National Apartment Association and other landlords ("NAA")[3] argue: "The statute does not require the Commission to preempt any specific restrictions, nor does it require the Commission to preempt all possible regulations. Section 207 does not confer new authority on the Commission; it merely directs the Commission to exercise the limited authority previously conferred in Section 303 of the Act."[4]

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[3] The Joint Commenters include: 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, and National Association of Real Estate Investment Trusts (hereinafter "NAA Comments").

[4] NAA Comments at 14.

This reading of the statute simply cannot be squared with the plain meaning of its text. No amount of sophistry by the preemption opponents can change the fact that Section 207 ***requires*** the Commission to promulgate regulations prohibiting ***all*** restrictions that ***impair*** a viewer's ability to receive the specified video programming services through over-the-air reception devices. Congress has made the public policy determinations inherent in this statute. If Congress had intended to preempt some restrictions but not others it would have so specified. If Congress had intended to invest the Commission with the authority to substitute its own informed judgment as to which restrictions should be prohibited, Congress would have explicitly provided the Commission with such latitude.

Because Congress did not limit its statutory directive in this manner, the Commission must take Section 207 at face value. It is well-established that when a statute's directive is clear, the agency must follow that directive. As the United States Supreme Court has recently confirmed:

> [W]hen we confront an expert administrator's statutory exposition, we inquire first whether the intent of Congress is clear as to the precise question at issue. If so, that is the end of the matter. But, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment controlling weight.[5]

Because the statute in this case is clear, the Commission must follow the statute's directive.

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[5] *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 115 S.Ct. 810, 130 L.Ed.2d 740 (1995) (citations and quotations omitted).

Other preemption opponents take a more subtle approach to the statutory interpretation issue. For example, rather than argue that the language of Section 207 does not empower the Commission to issue the regulation in question, the Independent Cable & Telecommunications Association ("IC&TA") argues that the legislative history of Section 207 indicates that the statute should not be interpreted to apply to property which is not owned or controlled by the viewer.[6] IC&T bases this argument on a brief statement in the House Report accompanying House Bill H.R. 1555, Section 308, the predecessor to Section 207 of the 1996 Act, to the effect that the provision was intended to preempt enforcement of "existing regulations, including but not limited to, zoning laws, ordinances, restrictive covenants or homeowners' association rules."[7] Emphasizing the specific examples cited in the report while ignoring the "including but not limited to" language, IC&T argues that because the House Report does not specifically refer to "multiple dwelling unit lease restrictions" the statute cannot be read to apply to such restrictions.[8]

The obvious rejoinder to this statutory "interpretation" is that there is no need to analyze the legislative history of the Section 207 because the statute's meaning is clear. Where the meaning of a statute is clear on its face, there is no need to attempt to divine the legislative intent from secondary sources.[9]

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[6] IC&T Comments at 18-22. *See also* National Association of Home Builders ("NAHB") Comments at 8-9.

[7] *Id.* at 18.

[8] *Id.* at 19.

[9] *See Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694, 717 (1984).

Even if it is assumed for the sake of argument that Section 207 can be fairly interpreted in more than one way, the legislative history simply does not support the opponents' claims. The opponents completely gloss over the fact that the list of covered regulations cited in the House Report was not intended to be an exhaustive list. Interpreted with reference to its plain meaning, the "including but not limited to" language means that Congress did not intend to exhaustively list the regulations falling within the scope of the statute, but instead only intended to give a few examples of the countless possible examples of impermissible regulations.

Moreover, the cited examples in the House Report are consistent with the extension of Section 207 to non-owned or controlled property. The inclusion of "restrictive covenants" and "homeowners' association rules" is telling. Except for the difference in the ownership interest of the viewer, restrictive covenants and homeowners' association rules are no different from restrictions in leases. Both are contractual restrictions between private parties. The difference in the ownership interest of the viewer is simply not germane to the type of restriction that Congress was attempting to eliminate. From the list cited in the House Report, it is clear that Congress was attempting to eliminate ***all*** restrictions, whether private or public. If Congress had intended to limit the scope of Section 207 it would have been a simple matter for it to do so.

The preemption opponents also argue that Congress' prior rejection of "mandatory access" legislation should somehow bear on the interpretation of Section 207. In particular, IC&T argues that Congress considered and rejected "mandatory access" provisions as part of the Cable Communications Policy Act of 1984 (which would have allowed the installation of cable facilities by third party vendors in multiple-unit residential or commercial buildings or manufactured home parks) and in S. 1822, a precursor bill to the Telecommunications Act of

1996 (which would have allowed the installation of "telecommunications" facilities by third party vendors in multi-unit buildings).[10] IC&T argues that the rejection of these proposed bills implies a Congressional intent with respect to the interpretation of Section 207.

While Congress' consideration of the bills cited by IC&T certainly speaks for itself with respect to those particular bills, it does not shed any light on the interpretation of Section 207. Congress' action with respect to totally separate legislation simply has no bearing on the interpretation of Section 207. While it may be that those in favor of allowing MDU owners and operators to maintain their monopoly over television reception devices were successful in lobbying against the bills cited by IC&T, they clearly were not successful with respect to Section 207.

In the end, the real complaint of the preemption opponents is over issues which have already been definitively resolved by Congress. Congress has already made the policy calls which the opponents challenge in their comments. These arguments, however, should have no weight before the Commission: "When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."[11]

Because of the hyperbole of the opponents, it is easy to lose sight of what Section 207 does and does not do. For example, the statute does ***not*** direct the Commission to issue "mandatory access" regulations; it does ***not*** empower the Commission to ensure that every

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[10] IC&T Comments at 15-16.

[11] *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct 2778, 81 L.Ed.2d 694, 717 (1984).

viewer has a right to receive every type of video programming service; it does ***not*** prohibit reasonable regulations relating to health, safety and esthetics; and it does ***not*** require landlords and MDU owners to subsidize the purchase by MDU tenants of video programming equipment. Instead, Section 207 simply requires the preemption of outright, bottleneck restrictions on over-the-air television reception devices. This requirement is a reflection of Congress' policy decision that, in the absence of legitimate health and safety concerns, no viewer should be prohibited from installing a simple antenna in order to receive over-the-air television signals.

II. THE TAKINGS ANALYSIS

The preemption opponents raise numerous arguments in support of their position that the application of Section 207 of the 1996 Act to MDU property results in an unconstitutional "taking" of that property. In doing so, the opponents rely almost exclusively on the application of the Supreme Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.* (*"Loretto"*)[12] to the regulation under consideration. Any fair reading of that case, however, compels the conclusion that it is inapplicable to the regulation under consideration; instead, the takings issue must be analyzed under the multi-factor balancing test put forward by the Supreme Court in *Penn Central Transportation Company v. City of New York ("Penn Central").*[13] It is undisputed the *Loretto* is a special category of takings analysis; if a case does not fit exactly within the facts of *Loretto*, the *Loretto per se* analysis does not apply. The opponents, however, do not

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[12] 458 U.S. 419 (1982).

[13] 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631, *reh. den.*, 99 S.Ct. 226, 58 L.Ed.2d 198 (1979).

specifically address the application of *Penn Central*, apparently putting all their eggs in the *Loretto* basket. In the end, *Loretto* simply cannot support the weight that the preemption opponents would place on it and the opponents' takings argument must be rejected.

The principal arguments raised by the preemption opponents in support of their takings analysis are as follows:

(1) The proposed regulation results in a "permanent physical occupation"

The preemption opponents argue that a "permanent physical occupation" of property within the meaning of *Loretto* will result from the application of Section 207 to MDU property. For example, NAA argues that the installation of an antenna is "just as permanent as the installation of wires in *Loretto*" and, therefore, the result in that case should control.[14]

The analogy between the regulation under consideration in this proceeding and *Loretto* cannot withstand scrutiny. The opponents focus on the "physical occupation" language of *Loretto* and ignore the second requirement--that the physical occupation be at the hands of a third party to the owner. The preemption opponents admit, as they must, that the Court in *Loretto* "did not address the consequences of giving such rights to a tenant rather than a third party with no prior right to occupy the premises."[15] This concession is compelled by any fair reading of *Loretto*. Indeed, the appellant cable company in *Loretto* attempted to save the regulation in question by characterizing it as "effectively" granting a tenant the property right to have the

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[14] NAA Comments at 5. *See also* IC&T Comments at 3-5; NAHB Comments at 3-4; and Comments of the Community Associations Institute (joined by American Resort Development Association and National Association of Housing Cooperatives) ("CAI") at 15.

[15] *Id.* at 5-6.

cable company install cable facilities on the roof of his building.[16] The Court rejected this characterization, stating, "[T]he short answer is that [the regulation] does not purport to give the *tenant* any enforceable property rights with respect to CATV installation."[17]

In footnote 19, the Court made clear the limits of its decision:

> If [the New York law] 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.[18]

The example considered by the Court was a requirement that the landlord install the requested facilities. The regulation under consideration in the instant proceeding would require the landlord to allow the tenant to install the facilities. In either case, the example considered by the Court makes crystal clear that its decision was limited to regulations requiring owners of MDU facilities to allow third parties--such as DBS or MDS vendors--to install their equipment ***at their own volition***. Where the challenged regulation "does not require the landlord to suffer the physical occupation of a portion of his building ***by a third party***, [it] will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity."[19]

Moreover, as pointed out by other Commentors in this proceeding, the application of Section 207 to MDU property will not result in a "permanent physical occupation" of that

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[16] *Id.* at 885.

[17] *Id.* (emphasis in original).

[18] 458 U.S. 419, 440, 102 S.Ct. 3164, 73 L.Ed.2d 868, 885 n. 19 (citations omitted) (emphasis added).

[19] *Id.* at 885 (emphasis added). *See also id.* at 884-85, n. 17 (referring to "The right of a property owner to exclude a ***stranger's*** physical occupation of his land") (emphasis added).

property.[20] Any occupation of common areas or areas under the sole control of the MDU owner will be subject to the temporary contractual rights of the tenant. As stated by CEMA in its comments: "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."[21]

(2) The proposed regulation is a "mandatory access" regulation

The preemption opponents attempt to circumvent this distinction by arguing that preemption of antenna restrictions would result in a *de facto* mandatory access regulation. For example, IC&T argues:

> The fact of the matter is that if Section 207 applies to Unknown or Uncontrolled Properties, private property owners will not be able to prevent DIRECTV, Primestar and every other DBS provider as well as the MMDS, LMDS and ITFS providers that hold the licenses in the property owner's area from installing the providers' systems (which are far more than wiring) on the property owner's property.[22]

IC&T goes on to argue that "the property that will be taken is the physical spaces on the properties in which the DBS, MMDS, LMDS, and ITFS providers' cable wire, associated equipment, antenna and dishes will be installed."[23]

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[20] *See, e.g.,* Comments of Consumer Electronics Manufacturers Association ("CEMA") at 7.

[21] *Id.*

[22] IC&T Comments at 7.

[23] *Id.* at 5.

This argument is founded on an erroneous and inaccurate characterization of the statute. Section 207 is plainly not a "mandatory access" statute. Unlike the statute under consideration in *Loretto*, the statute does not require landlords to allow third party vendors to install their equipment not does it require landlords or owners themselves to install equipment. On its face, Section 207 does not require MDU owners or landlords to take any affirmative action to install video reception equipment. Instead, Section 207 simply preempts ***restrictions*** that impair a viewer's ability to receive video programming services through the specified devices. The decision in *Loretto* was dependent on the fact that the statute in that case granted the right of installation to ***third parties***. To the contrary, the regulation contemplated by Section 207 only grants rights to owners or tenants. While the practical effect of the application of Section 207 may well be that, in order for a tenant to obtain the video programming service or his or her choice, the tenant will contract with a third party to install equipment in common areas, this is precisely the situation that was expressly carved out by the Court in *Loretto*.

In its comments, the Wireless Cable Association International, Inc. ("WCA"), argues that the Commission should avoid the potential takings issue created by the wiring issues by adopting rules concerning antenna installations in its pending inside wiring rule making proceeding.[24] NAB respectfully disagrees. The issue of ownership of the wires that run from the antenna to the viewer's television is immaterial to the issue of the ability of the Commission to proscribe ***antenna*** restrictions. With respect to the wires that run from an antenna to a television, the Commission can implement regulations providing for the maintenance and control of the installed wires and associated equipment. The Court in *Loretto*, in discussing the importance of

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[24] WCA Comments at 6-9.

maintenance and control issues to the takings analysis, identified several incidents of ownership which would militate against finding a taking of an MDU's owner's property:

> Ownership would give the landlord rights to the placement, manner, use, and possibly the disposition of the installation. The fact of ownership is . . . not simply "incidental"; it would give a landlord (rather than a CATV company) full authority over the installation except only as government specifically limited that authority. The *landlord* would decide how to comply with applicable government regulations concerning CATV and therefore could minimize the physical, esthetic, and other effects of the installation. Moreover, if the landlord wished to repair, demolish, or construct in the area of the building where the installation is located, he need not incur the burden of obtaining the CATV company's cooperation in moving the cable.[25]

The Commission could easily implement regulations to address the interests identified by *Loretto* without interfering with the issue of ownership of the facilities.

With respect to the reception of standard over-the-air broadcast signals, the issue of ownership and control of the facilities will not be as complex. In many cases, the installation of a simple television antenna will not involve trained technicians, cumbersome equipment, or complicated installation. It may not even involve the presence of a third party. All that is needed is a simple antenna and a wire from the antenna to the television set. Again, the Commission can deal with issues of maintenance and control of this wire in its implementing regulations.

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[25] 458 U.S. at 440, n. 19, 73 L.Ed.2d at 885, n. 19.

(3) The proposed regulation would extend a tenant's common law rights

The preemption opponents also suggest that the "logic" of *Loretto* applies even where a tenant has the right to install and retain ownership over the facilities.[26] For example, NAA argues that because tenants have only limited rights of access, granting tenants the right of "physical occupation" is "over and above the rights that the tenant was originally granted and is paying for." Therefore, NAA concludes, "giving a tenant new rights is undistinguishable from granting a third party the same rights."[27] Other Commenters argue that tenants have no common law right to "insist" on the installation of antennae on the roofs of rented property.[28]

These arguments, however, miss the point. With respect to the application of *Loretto*, the determinative question is the relationship between the owner of the property owner and the party that is being granted rights by the regulation. With respect to the regulation under consideration, the tenant is not a stranger to the landlord; instead, the tenant has contractual rights, albeit limited contractual rights, with respect to the property. As NAA concedes: "A tenant, resident or occupant has the right to pass through common areas and use them for limited purposes."[29]

With respect to the *Penn Central* takings analysis, the opponents argument also fails. The cases relied on by the preemption opponents are all cases from the dawn of television

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[26] NAA Comments at 6-7.

[27] *Id.* at 7.

[28] IC&T Comments at 5, n. 6.

[29] *Id.* at 10.

service, i.e., 1948-1950.[30] Given the importance of television service in today's world as ***the*** predominant source of household information and entertainment, it is clear that any landlord would contemplate that a tenant will have a television set and will expect to receive adequate television service, whether through direct reception of over-the-air broadcast signals or other means. In this light, the proposed regulation is simply a descendent of the common law principle that the tenant is entitled to appurtenances for necessary tenant purposes.[31] It is as unreasonable to expect a tenant to do without access to over-the-air television reception as it would be to require the tenant to require the tenant to rent a post office box to receive mail or to use a window for ingress and egress.

The comments of the NAHB concerning "the well established landlord/tenant relationship"[32] overlook the fact that residential tenants rightfully expect any number of amenities which are beyond the walls of their demised premises and which are not necessarily set out in their lease agreements--including amenities such as a doorway to the outside, a hallway to get to the doorway, and a mailbox. Each of these are located in areas, like the roof, which normally remain under the landlord's control but nonetheless benefit all tenants. Moreover, courts have recognized that, at common law, tenants may have implied licenses to do things on apartment-building rooftops which they cannot do within the confines of their apartments.[33] A rule properly implementing Section 207 would not bar landlords from renting out rooftops for

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[30] *See* IC&T Comments at 5, n.6; NAA Comments at 14.

[31] *See Maiatico v.Stevens*, 125 A.2d 275, 278 (D.C. App. 1956).

[32] NAHB Comments at 14.

[33] *See, e.g., Seaman v. Henriques*, 139 Conn. 561, 95 A.2d 701(1953)(hanging laundry).

advertising signs or from enforcing safety rules intended to prevent falls and other accidents on the rooftop. The rule would simply provide a common-sense duty to keep a portal to broadcast signals as available to tenants as their portal to the sidewalk or parking lot.

Similarly, the cases relied on by IC&T in its comments are inapposite. The cases cited in IC&T's comments at footnote 6 (all of which, interestingly, were opinions of trial-level courts) present a snapshot of difficulties courts had at the dawn of the television broadcast era in dealing with new technology. A carefully drafted rule would not prohibit landlords from reasonable restrictions such as would prohibit a 25-foot pole (*Bellomo v. Bisanzio,* 60 A.2d 64 N.J. Ch. 1948) or other unreasonably large structures. At the same time, an appropriate rule would recognize a landlord duty to ensure tenants access to what has come to be recognized as an essential portal to the outside world. As the judge in the *Scroll Realty Corp. v. Mandell* case stated:

> It is unfortunate that the plaintiff landlord should assume the attitude that it does. . . . The landlord could be realistic and practical and provide a master aerial on the apartment house from which leader lines could be run to the various tenants that might have television sets and provide a fair and reasonable rental for such service. It is hoped that the landlord might so meet the situation in this case.

Congress, through Section 207, has given the Commission the mandate to bring to fruition the spirit of the *Scroll Realty* court's comments.

(4) <u>The application of *Bell Atlantic*</u>

The preemption opponents uniformly argue that the decision of the United States Court of Appeals for the District of Columbia Circuit in *Bell Atlantic v. FCC*[34] *("Bell Atlantic")*

[34] 24 F.3d 1441 (D.C. Cir. 1994).

applies to the regulation under consideration in this proceeding.[35] In *Bell Atlantic*, the court held that the FCC had exceeded its power in requiring local exchange companies ("LECs") to permit competitive access providers ("CAPs") to install their facilities on LEC property to interconnect their cables to those of the LECs. In issuing this order, the FCC relied on Section 201(a) of the Communications Act of 1934, as amended (the "Communications Act"),[36] which provides, in pertinent part:

> It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers. . ..

The *Bell Atlantic* court concluded (1) that the FCC's co-location order constituted a "taking" of property of the LECs and (2) that Section 201(a) of the Communications Act did not empower the FCC to take private property.

The case is distinguishable on numerous grounds. First, the regulation under examination in *Bell Atlantic* clearly implicated the Supreme Court's decision in *Loretto*. The regulation required LECs to permit the permanent occupation of LEC property by CAPs. In contrast to the application of Section 207 to MDU viewers, the CAPs in *Bell Atlantic* were clearly a "third parties" to the LECs within the meaning of *Loretto*. Second, unlike Section 207 of the 1996 Act, Section 201(a) of the Communications Act did not clearly direct the Commission to require

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[35] *See, e.g.,* CAI Comments at 19-21; NAA Comments at 8; IC&T Comments at 11-12.

[36] 47 U.S.C. § 201(a).

physical co-location by LECs with other telecommunications providers. As the *Bell Atlantic* court noted, there were other options available to the Commission, including "virtual" co-location which would not have caused a permanent physical occupation of the LECs' property by a stranger.

In short, the application of *Bell Atlantic* is necessary dependent on a resolution of the "takings" issue. Because there is no takings implicated by the extension of Section 207 to MDU property, *Bell Atlantic* is not relevant to the regulation under consideration in this proceeding.

III. HEALTH, SAFETY AND TECHNICAL CONCERNS

Several commenting parties concerns regarding the health, safety and technical implications of applying Section 207 of the 1996 Act to MDU facilities.[37] In its comments, NAA cites the example of an apartment building tenant in Kansas who allegedly has installed a DBS antenna to a free standing piece of lumber held in place by the weight of the sash of the outside apartment window. NAA asks, "This is hardly a practical or safe installation method -- but what authority will building owners have to regulate such activities if the Commission preempts all of the restrictions on such actions in their leases?"[38]

The answer to NAA's question is simply that the Commission will not preempt reasonable health and safety requirements. As the Commission has done with its preemption rules regarding planned unit developments, the Commission can and should apply Section 207

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[37] *See, e.g.,* Comments of Marshall Frost, P.E. (Appendix to CAI Comments); NAA Comments at 25.

[38] NAA Comments at 27.

to MDU property in a way such as not to prohibit restrictions that serve legitimate health and safety goals.[39]

IV. THE PROPOSAL OF COMMUNITY DBS

In its *FNPRM*, the Commission sought comment on the proposal of Community DBS to allow community associations to make video programming available to any resident wishing to subscribe to such programming through the use of a common antenna facility under the ownership and control of the association owner. Such facilities would be provided at no greater cost and with equivalent quality as would be available from an individual antenna installation.

The comments filed in response to the *FNPRM* confirm that the installation of a common antenna which supplies service to all tenants or residents of an MDU is practical and feasible.[40] Such technology is currently in use nationwide and is readily available at minimal expense.[41]

CAI opposes any requirement that association owners install common antenna facilities but is generally in favor of a rule which would allow association owners to install such facilities at their option. CAI explains the benefits of such a service:

> The association would have control over the means, method and location of equipment installation, thus minimizing the potential for damage to common property. The appearance of the association

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[39] *See Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rule Making*, FCC 96-328, ¶ 24.

[40] *See, e.g.*, CAI Comments at 32; Further Comments of United States Satellite Broadcasting Company, Inc. ("USSB") at 5; and Comments of Philips Electronics North America Corporation and Thomson Consumer Electronics, Inc. ("Philips and Thomson") at 14.

[41] *See generally* CAI Comments at 33.

> would be maintained, stabilizing property values. No assessments are expended in the purchase and maintenance of the equipment; all costs are borne by the subscriber. Individual unit owners who do not desire service would not be subject to additional assessments to pay for the common antenna.[42]

NAB reiterates its support of the Community DBS proposal. NAB believes that, in applying Section 207 of the 1996 Act to MDU property, the Commission should allow MDU owners, as a voluntary option, to install common antenna facilities for use by all tenants. Consistent with this proposal, NAB urges the Commission to adopt the following rule to implement Section 207 as to private restrictions on the use of antennae:

> Any private restriction on the placement of television receiving antennae imposed by deed, covenant, easement, homeowner's association agreement, lease or any similar instrument shall be deemed unenforceable, provided that a reasonable restriction on the placement of television receiving antennae in or on a multiple dwelling unit shall be enforceable if the signals of all television stations placing a predicted Grade B contour (as that term is defined in sections 73.683 and 73.684 of this chapter) or an actual Grade B signal as measured under the provisions of this chapter over the premises are transmitted without material degradation to all dwelling units subject to the restriction via a common antenna or other means without any separate charge to the owners or tenants of those dwelling units.

V. CONCLUSION

The preemption opponents have not raised any compelling arguments supporting their assertion that the application of Section 207 of the 1996 Act to MDU owners and operators will cause an unconstitutional taking. The opponents rely almost exclusively on the Supreme Court's decision in *Loretto*, which, by any fair and informed reading, does not apply to the application

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[42] CAI Comments at 35.

of Section 207 to MDU property. The preemption opponents have provided no sound basis in the 1996 Act or the United States Constitution for treating persons residing in apartments, condominiums, townhouses, or other such MDUs differently from persons who own a single-family, detached dwelling.

October 28, 1996

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036

Henry L. Baumann
Executive Vice President and
General Counsel

Barry D. Umansky
Deputy General Counsel

OF COUNSEL:

Wade H. Hargrove
Mark J. Prak
Marcus W. Trathen
BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.
Post Office Box 1800
Suite 1600, First Union Capitol Center
Raleigh, North Carolina 27602

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Reply Comments of the National Association of Broadcasters** was served by hand-delivery to the following:

Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, NW, Room 814
Washington, D.C. 20554

Commission James H. Quello
Federal Communications Commission
1919 M Street, NW, Room 814
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, NW, Room 814
Washington, D.C. 20554

Commission Rachelle B. Chong
Federal Communications Commission
1919 M Street, NW, Room 814
Washington, D.C. 20554

William H. Johnson
Federal Communications Commission
Cable Services Bureau
2033 M Street, NW, Room 918B
Washington, DC 20554

Jacqueline Spindler
Federal Communications Commission
Cable Services Bureau
2033 M Street, NW, Room 918B
Washington, DC 20554

Roy J. Stewart
Federal Communications Commission
Mass Media Bureau
1919 M Street, NW, Room 314
Washington, DC 20554

Robert Ratcliffe
Federal Communications Commission
Mass Media Bureau
1919 M Street, NW, Room 314
Washington, DC 20554

This the 28th day of October, 1996.

Angela K Adams