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

In the Matter of	)	
	)	
Preemption of Local Zoning 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	)	

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To: The Commission

REPLY COMMENTS OF PRIMESTAR PARTNERS L.P.

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REPLY COMMENTS OF PRIMESTAR PARTNERS L.P.

PRIMESTAR PARTNERS L.P. ("PRIMESTAR"), by its attorneys and pursuant to Section 1.415 of the Commission's rules, 47 C.F.R. § 1.415, hereby submits its reply to the comments filed in response to the Commission's Further Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

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1 *Preemption of Local Zoning Regulation of Satellite Earth Stations*, IB Docket No. 95-59, *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*, CS Docket 96-83, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, FCC 96-328 (released August 6, 1996) ("Order and "Further NPRM"). PRIMESTAR's discussion herein pertains to the

I. INTRODUCTION AND SUMMARY

PRIMESTAR provides direct-to-home ("DTH") satellite television service using a medium power fixed satellite operating in the Ku-band. PRIMESTAR currently offers 95 channels of entertainment and informational programming, including hit movies, regional sports networks, breaking international and national news, family programming, home shopping, pay-per-view and digital music channels to over one and one-half million subscribers.

While not technically a direct broadcast satellite ("DBS") service, PRIMESTAR competes directly with existing DBS providers, including DIRECTV, Inc., United States Satellite Broadcasting Company ("USSB"), and Echostar. PRIMESTAR will soon face increased competition from new DBS providers as well as from other medium power Ku-band services.

As PRIMESTAR and others emphasized in comments filed in previous stages of this proceeding,[2] subscribership to DTH services, particularly DBS-type services, has increased rapidly in recent years. These services offer subscribers many of the same satellite-delivered video programming

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effect of the Commission's rules upon satellite antennas used to provide direct-to-home ("DTH") satellite services.

2 *Preemption of Local Zoning Regulation of Satellite Earth Stations*, 11 FCC Rcd 5809 (Report and Order and Further NPRM) (released March 11, 1996); *Preemption of Local Zoning Regulation of Satellite Earth Stations* 10 FCC Rcd 6982 (Notice of Proposed Rulemaking) (1995).

services typically available from cable systems, in addition to some offerings not available from cable systems.

Recognizing the potential for DTH services to provide effective competition in the market for multichannel video programming distribution, Congress enacted Section 207 of the Telecommunications Act of 1996.[3] Section 207 was designed to remove a formidable barrier to competition by ensuring that DTH users are able to install, operate and maintain their antennas without substantial interference or delay from local authorities.

Through Section 207, Congress charged the Commission with fostering full and fair competition among different types of multichannel video programming distributors ("MVPDs") by prohibiting restrictions that impair reception of over-the-air video programming, such as DBS services. The Commission responded by adopting a rule that applies only to prohibitions on antenna users with a direct or indirect ownership interest in property within their exclusive use or control.[4]

To fully implement Section 207, however, the Commission must extend its protections to all viewers, regardless of whether or not they own property or reside in a single family home. Any viewer, whether an owner or renter, who possesses an exclusive use area, should be able to use that

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[3] Pub. L. No. 104, 104th Cong., 1st Sess. § 207, 110 Stat. 56, 116 (1996) ("1996 Act").

[4] Order at 30-31.

area for the installation of one or more antennas of his or her choice. Where a viewer has no appropriate exclusive use area for an antenna, the landlord or condominium or community association should be required to serve as the gateway to multiple MVPD services, consistent with the desires of the tenants.

Given the comments filed in response to the Further NPRM in this proceeding, it is apparent that the Commission is being besieged by some, such as the National Apartment Association ("NAA") who would eviscerate any positive competitive impact Section 207 might have on the MVPD marketplace by denying its protections to a large segment of the American public -- specifically, renters and residents of multiple dwelling units ("MDUs"). PRIMESTAR submits these reply comments, therefore, to remind the Commission that it must not lose sight of its Congressional directive and to underscore the position advanced by Satellite Broadcasting and Communications Association ("SBCA") and several video programming service providers in their initial comments in this proceeding. Specifically, PRIMESTAR urges the Commission to extend its preemption rules to cover all viewers, regardless of land ownership, and including all residents of MDUs, whether apartment buildings or condominiums.

II. THE PROTECTIONS OF SECTION 207 MUST NOT BE CONTINGENT UPON LAND OWNERSHIP

Section 207 gives the Commission a broad mandate: "to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception." In response, the Commission adopted Section 1.4000 of its rules, 47 C.F.R. § 1.4000, preempting local governmental restrictions and invalidating homeowners association rules and other restrictive covenants that impair the use of over-the-air reception devices, including broadcast antennas and DBS dishes.

The Commission did not complete implementation of Section 207's directive because of a looming Congressional deadline.[5] The rule adopted in its Order protects only those viewers with a direct or indirect ownership interest in and exclusive use of the area where they seek to install their satellite antenna. PRIMESTAR supports the views of those commenters in this proceeding who urge the Commission to carry out Congress' directive to provide all viewers with the ability to access antenna-delivered video programming and to promote competition among MVPDs by amending the rule to eliminate land ownership as a prerequisite to its protections.

As several commenters have convincingly demonstrated, there is no statutory, legal or policy reason to limit the

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[5] The 1996 Act imposed an August 8, 1996 deadline for implementation.

protections of Section 207 to property owners.[6] The language of Section 207 is sweeping, commanding the Commission to adopt a regulation that prohibits restrictions that impair *a viewer's* ability to receive programming delivered via over-the-air reception devices. Congress intended that *all* Americans receive the benefits of Section 207; as the SBCA states, "all viewers means *all* viewers, regardless of land ownership status." SBCA Comments at 3.

Section 207 was intended to remove barriers which have heretofore constrained the ability of certain MVPDs to compete effectively. If the Commission is to execute its mandate to promote universal access to over-the-air programming services faithfully, it simply cannot exclude those who rent their homes, amounting to almost half of *all viewers*, from the protections of its rule.

Limiting the protections of Section 207 to landowners would deprive a large percentage of the American population of its benefits, eviscerating, for all practical purposes, any beneficial effect the legislation might otherwise have had. As DIRECTV points out, "DBS providers and other MVPDs cannot provide effective competition to cable if federal law permits them to be excluded from such a large segment of the market." Comments of DIRECTV at 7. Further, from a public policy perspective, the record poignantly illustrates the disproportionate negative impact limiting the rule to

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[6] See generally Comments of DIRECTV, Comments of USSB, Comments of Philips/Thomson.

landowners would have on both minority and lower-income viewers, who are primarily renters.[7]

Commenters such as the NAA and other residential landlord groups claim that allowing renters to install antennas would constitute a taking under the Fifth Amendment, citing *Loretto v. Teleprompter Manhattan CATV Corp.*[8] as the applicable precedent. PRIMESTAR submits that the well-reasoned legal arguments advanced by DIRECTV, USSB, Philips/Thomson and others in this proceeding adequately refute any such claim. Invalidating lease restrictions that prevent a tenant from installing an antenna on property he or she already occupies will not result in a taking under the Fifth Amendment. Neither *Loretto* not any other precedent supports such an assertion.

As the Commission discusses in the comprehensive takings analysis undertaken in its Order, governmental regulation effects a taking if it authorizes a permanent physical occupation of property by a third party or the government. *Loretto* at 440. If there is no such permanent physical occupation, the court will engage in a factual assessment to determine if the government has engaged in a regulatory taking, examining the economic impact of the regulation, the extent to which it interferes with

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7 See, e.g., Comments of Consumer Federation of America et al.

8 458 U.S. 419 (1982).

investment backed expectations, and the character of the governmental action.[9]

Prohibiting lease restrictions that impair a tenant's ability to install an antenna on his or her exclusive use area would not result in a *per se* taking of the landlord's property, as there would be no physical occupation by a third party. *Loretto* makes clear that a tenant is not a third party. *Loretto* at 440. The New York statute at issue in *Loretto* did not give rights to a tenant, but instead allowed a cable company, a party with whom the landlord had no prior relationship, to install its equipment on the landlord's building, resulting in a *per se* taking.

Moreover, a tenant's installation of a DBS antenna has at most a *de minimis* economic impact and in no way interferes with the investment backed expectations of a landlord. Once a landlord has voluntarily entered into a lease with a tenant, it has consented to the physical occupation of that space. There is no extension of the occupation by the renter -- the DBS antenna can and should be removed by the renter when he or she leaves the property.

Consistent with this analysis, therefore, the Commission should amend Section 1.4000 to eliminate land ownership as a prerequisite to its protections.

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9 See, e.g., *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

III. *ALL* VIEWERS, REGARDLESS OF THEIR ABILITY TO USE OR CONTROL AN EXCLUSIVE AREA, SHOULD HAVE ACCESS TO DBS ANTENNAS

The Commission's task will not be completed by eliminating the distinction between owners and renters. Viewers without exclusive use areas -- primarily residents of MDUs, whether condominium owners or renters -- have not yet been guaranteed access to over-the-air reception devices by Section 1.4000. Consistent with the intent of Section 207, *all* viewers must be able to choose their MVPD provider.

While certain MDU residents will be able to receive DBS programming by installing antennas in an exclusive use area, because of the southern exposure required for the reception of DBS signals, many MDU residents will not have access to a suitable area for installation. Section 207, however, makes no distinction between residents of single family homes or MDUs. Again, Section 207 was enacted to provide *all* Americans with access to over-the-air video programming, and to promote competition among MVPDs. These goals cannot be accomplished if MDU residents, a group which, according to DIRECTV, comprises more than 25% of the population,[10] are not provided with the benefits of the Commission's regulation. Consistent with Congressional intent, the Commission's rules should ensure that an MDU resident is able to choose his or her MVPD provider, just as Section 207 affords this opportunity to other viewers.

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10 Comments of DIRECTV at 3.

PRIMESTAR acknowledges that where viewers need access to common areas to receive satellite signals, the issues confronting the Commission are more challenging. To ensure that those viewers without access to exclusive use areas receive the protections to which they are entitled under Section 207, PRIMESTAR supports the course of action advocated by the SBCA in its initial comments -- the Commission should guarantee that MDU residents have access to multiple MVPDs. Therefore, the Commission's rules should require landlords or community or condominium associations to make available an area where antennas may be placed for reception of a number of MVPD services, as may be selected by residents. PRIMESTAR cannot, however, concur with the position of DIRECTV, as expressed in its comments, that requiring landlords to provide two competing MVPD services would satisfy the letter and the spirit of Section 207. Congress, through Section 207, sought to provide *viewers* with choice, not to afford landlords (or condominium or community associations) the ability to make the choice of an MVPD provider for them.

Certain commenters in this proceeding claim that requiring the installation and maintenance of antennas on property not in the exclusive use or control of a tenant cannot pass constitutional muster under a takings analysis. Again, the record in this proceeding contains cogent legal arguments refuting that claim. A regulation results in a *per se* taking only if it requires a property owner to suffer

a permanent physical occupation by a third party. While the Commission should be guided by *Loretto* and its progeny in promulgating its regulations, these cases do not preclude the adoption of a rule requiring landlords to provide access to antennas. As long as the landlord maintains control over the installation and maintenance of the antenna, the FCC's rule will be a constitutional regulation of the landlord-tenant relationship, not at all implicating the takings clause. Such a requirement can be distinguished from the New York statute at issue in *Loretto*, which gave a third party -- the cable company -- the right to occupy the landlord's property permanently. In fact, the *Loretto* court was careful to note that if New York had required the landlord to provide cable television service at the tenant's request, the outcome might be different, as the landlord would have "full authority over the installation," including the right to minimize its aesthetic impact and other effects and the ability to use his property on and around the installation without involving a third party.

Finally, PRIMESTAR believes there is substantial merit to an argument advanced by Philips/Thomson in their comments in this proceeding -- assuming, *arguendo*, that requiring landlords to provide tenants with access to DBS antennas implicates the takings clause, the asserted interests of landlords and condominium associations do not outweigh the countervailing rights that their tenants and unit owners possess under the First Amendment as viewers of electronic

video programming services. As Philips/Thomson state, "Section 207 is entirely consistent with a long line of legal precedent which provides that viewers have a 'paramount' First Amendment right to receive a variety of information from diverse sources." Philips/Thomson Comments at 12.

IV. CONCLUSION

The Commission cannot fully implement Section 207 until it provides all viewers with access to over-the-air reception devices. There is no statutory basis upon which to exclude any viewer from the benefits of Section 207, nor can the rule completely achieve Congress's policy goals by discriminating between owners and renters or by excluding residents of MDUs. The Commission can constitutionally ensure access to all viewers by eliminating land ownership as a prerequisite to the protections of Section 1.4000, and, for residents of MDUs, by fashioning a rule that allows landlords to maintain control over the installation of antennas installed in common areas, such as on rooftops. The Commission should, therefore, amend Section 1.4000 to require landlords (condominium associations and other homeowners groups) to provide access to multiple MVPD

services for residents who do not have exclusive use of areas suitable for antenna installation.

Respectfully submitted,

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