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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

October 28, 1996

Mr. William F. Caton
Acting Secretary, Office of the Secretary
Federal Communications Commission
Room 222, 1919 M Street, N.W.
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: In the Matter of: Preemption of Local Zoning Regulations of Satellite Earth Stations: IB Docket No. 95-59; In the Matter of: Implementation of Section 207 of the Telecommunications Act of 1996 Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Services: CS Docket Number 96-83, FCC 96-151 Further Notice of Proposed Rulemaking

Dear Mr. Caton:

Pursuant to the Further Notice of Proposed Rulemaking, the Community Associations Institute, joined by the American Resort Development Association and the National Association of Housing Cooperatives, respectfully submits the enclosed Reply Comments. The original and eleven copies have been provided.

The Community Associations Institute, the American Resort Development Association, and the National Association of Housing Cooperatives appreciate the opportunity to submit Reply Comments on the Proposed Rule and hope that the FCC takes these Reply Comments into consideration when drafting the final rule.

Sincerely,

Community Associations Institute

Robert M. Diamond

By: Robert M. Diamond
President

Lara E. Howley

By: Lara E. Howley
Legislative and Public Affairs Coordinator

Enclosures

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Before the
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Washington, D.C.

In the Matter of	)	
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Preemption of Local Zoning Regulations 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 and Multichannel Multipoint Distribution Services	)	FCC 96-328

REPLY COMMENTS

Pursuant to the Further Notice of Proposed Rulemaking ("FNPR") released August 6, 1996, in the above-captioned proceeding, the Community Associations Institute ("CAI"), joined by the American Resort Development Association ("ARDA") and the National Association of Housing Cooperatives ("NAHC"), submits the following Reply Comments. CAI, ARDA, and NAHC have always supported the broad public policies outlined in the Telecommunications Act of 1996 (the "Act"): to promote access to advanced technological telecommunications services and to promote competition among providers of those services. However, the community associations and homeowners served by these three organizations have serious concerns about the implementation of § 207 of the Act. CAI, ARDA, and NAHC support the rule previously promulgated on August 6, 1996, for it achieves the goal of §207 by preempting restrictions on property individually owned and within the exclusive use and control of the person desiring service through direct broadcast satellite ("DBS"),

television broadcast, or multichannel multipoint distribution system ("MMDS") service. However, the FCC should not extend that rule to permit individual tenants or community association residents to install telecommunications equipment on rental or common property.

Of the organizations submitting comments in this rulemaking, the DBS, television broadcast, and MMDS service providers, cable service providers, and landlords all have an economic stake in the resulting rules. Telecommunications service providers will gain or lose market shares; landlords may gain or lose fees paid by telecommunications service providers for access to rental properties. CAI, ARDA, and NAHC, on the other hand, have no economic interest in the outcome of the rulemaking. CAI, ARDA, and NAHC represent the residents of community associations, many of whom desire an array of telecommunications services. These residents also wish to preserve the common property of their communities and to ensure that those "viewers" who wish to take advantage of new telecommunications services are paying the costs. CAI, ARDA, and NAHC want any FCC rule to achieve these two goals. To assist, CAI, ARDA, and NAHC have proposed several rulemaking options, some of which the FCC adopted in the rule released August 6.

A RULE PERMITTING INDIVIDUAL RESIDENT INSTALLATION OF TELECOMMUNICATIONS EQUIPMENT ON RENTAL OR COMMON PROPERTY WOULD BE AN UNCONSTITUTIONAL TAKING.

Many Commenters have attempted to distinguish Loretto v. Manhattan Teleprompter, 459 U.S. 419 (1982), from a situation in which the FCC would permit individual tenants and association residents to install telecommunications equipment on rental or common property. These Commenters cite several reasons for this distinction. However, the analogies and

arguments used are inapposite. Loretto held that a statute that required a landlord to provide space in her building to cable companies for the installation of cable was a taking of the landlord's property. The situation proposed by DBS, television broadcast, and MMDS service providers is no different than that in Loretto; tenants and community association residents would be installing telecommunications equipment on property they do not own.

Tenants and Association Residents Do Not Have Ownership, Use, or Possession of Property Outside the Unit Rented or Owned.

Several Commenters have attempted to confuse this fact with various arguments. First, they argue that a tenant, by virtue of the lease, gains property rights in the "estate in land" leased.[1] However, a tenant only gains limited property rights through the lease. First, the lease grants the tenant right to possession and use of the unit leased. The lease does not grant ownership rights to the unit leased; the landlord is still responsible for maintenance of the unit (both to the tenants under the lease and to the local government under the law). The tenant may not make permanent alterations to the unit without the landlord's permission. Second, the lease grants the tenant rights to use and possession of only the unit; the lease grants no rights to occupy, use, or possess any of the landlord's property outside the unit. The tenant pays rent to lease only the unit, not any exterior area. At most, the tenant gains only a non-exclusive easement right to use common hallways, stairways, elevators, and amenities such as pools and laundry facilities in common with the other tenants.[2] The tenant

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[1] National Association of Broadcasters, 7, 10; DirecTV 2, 11.

[2] National Association of Home Builders, 14; National Apartment Association et al., 7.

does not gain ownership, or even use or possession rights in areas in which telecommunications equipment would be installed, such as an outside wall or roof.[3] Since the lease does not grant ownership, use, or possession rights to property where telecommunications equipment would be installed, the tenant cannot install this equipment without the consent of the owner or the association.

The same principle applies in community associations. In a cooperative, the resident gains no ownership rights in property; the resident has only a proprietary lease to an apartment. In a condominium, the owner gains ownership rights in a unit, but only a tenancy-in-common interest in the common areas. An individual unit owner has no right to alter any common area without the consent of the other co-owners. No one would dispute that husband and wife must both agree to alterations in a property they own as tenants-in-common.[4] The same situation exists between co-owners of the common elements in a condominium.[5] No resident or owner gains exclusive ownership rights in property located outside the apartment or unit.[6] Therefore, unless all other tenants-in-common agree to such conversion, a unit

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[3] See, National Apartment Association, 8.

[4] Woodbridge Village Association's Comments at 1-2.

[5] For a fuller discussion of the respective property rights granted to cooperative residents and condominium owners, see CAI's, ARDA's, and NAHC's Comments at 4-13.

[6] CAI's, ARDA's, and NAHC's Comments at 10-13 point out that unanimous consent is necessary to permit one owner or resident to take common property and convert it to individual use. The cases cited in the previous Comments, Madeever v. Lyle, 125 Ariz. 384, 609 P.2d 1084 (Ariz. App. 1980), Preston v. Bass, 680 S.W.2d 195 (Ark. App. 1984), Grey v. Coastal States Holding Company, 22 Conn. App. 497, 578 A.2d 1080 (1990), Enright v. Towers Owners Ass'n, Inc., 370 So. 2d 28 (Fla. Dist. Ct. App. 1979), Penney v. Association of Apartment Owners of Hale Kaanapali, 776 P.2d 393 (Hi. 1989), Kaplan v. Boudreaux, 410 Mass. 435, 573 N.E.2d 495 (Mass. 1991), Porter v. Hawks Nest Inc., 659 S.W.2d 786 (Mo. App. 1983), Newmeyer v. Gastman, No. A-1938-92T1 (N.J. App. 2/4/94), U.S. v. Fairway

owner may not install telecommunications equipment outside of the unit.

Loretto Is Applicable When the Tenant or Resident Installs the Telecommunications Equipment.

Many Commenters attempt to distinguish Loretto based on a footnote. These Commenters argue that: "if § 828 required landlords to provide cable installation if the tenant so desires, the statute might present a different question from the question before us," citing Loretto.[7,8] These Commenters, curiously, fail to mention the next phrase of the sentence: "since the landlord would own the installation."[9] If the FCC extended the current rule to cover rental property or common areas, the landlord or community association would not own the installation; the tenant, individual resident, or service provider[10] would own the

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Village Condominium Ass'n, 879 F. Supp. 798 (N. D. Ohio 1995), all hold that unanimous consent is required for a transfer of common property to the exclusive use or possession of one unit owner. The Uniform Acts discussed in CAI's, ARDA's, and NAHC's Comments at 6, nn. 1 and 2 codify this principle. Unif. Condominium Act § 2-117(d); Uniform Common Interest Ownership Act § 2-117(d).

A recent Maryland case held that even the votes of two-thirds of association residents (the percentage necessary for a bylaw amendment) was insufficient to alter the nature of common property; unanimous consent was required. Ridgely Condominium Association v. Smyrnioudis, 1996 Md. LEXIS 86 (August 27, 1996).

[7] 458 U.S. 440, n.19.

[8] National Association of Broadcasters, 9; Consumer Federation of America, et al., 10-11; Consumer Electronics Manufacturing Association, 7; Pacific Telesis Group, 3; National Rural Telecommunications Cooperative, 8; DirecTV, 9, 16.

[9] 458 U.S., at 440, n.19.

[10] The telecommunications equipment to be installed by the tenant or association resident is sometimes leased by a service provider. National Rural Telecommunications Cooperative, 10.

installation. Therefore, Loretto still governs.[11]

Some Commenters have argued that a tenant would not be a third party whose occupation of rental property would constitute a taking because the tenant or association resident already has the right to use a certain portion of the rental or common property.[12] But rental or ownership of a unit does not entitle a tenant or a community association resident the right to own or exclusively occupy property outside the unit. Therefore, this person would be as much "an interloper with a government license,"[13] as a service provider. The fact that a tenant leases a portion of a landlord's building or a community association resident owns a unit or has a proprietary lease of an apartment does not entitle the tenant or resident the right to "forever den[y] the owner any power to control the use of that property."[14] The tenant or resident would be the third party taking rental or common property, which is prohibited under Loretto.

Installing Telecommunications Equipment on Rental or Common Property is a "Permanent Physical Occupation" of Property Prohibited under Loretto as a Per Se Taking.

Many Commenters argue that requiring landlords and community associations to allow individual tenants or association residents to install telecommunications equipment on rental or common property would not constitute the "permanent physical occupation" required under

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[11] CAI, ARDA, and NAHC, 16; Optel, 7; National Association of Home Builders, 6; National Apartment Association, 6.

[12] DirecTV, 9; Consumer Electronics Manufacturing Association, 6; National Rural Telecommunications Cooperative, 6.

[13] FCC v. Florida Power, 480 U.S. 245, 253 (1987).

[14] Loretto, 458 U.S., at 336.

Loretto. However, these arguments fail because it is incontrovertible that any antenna, mast, mounting hardware, and cabling placed on rental or common property would be a permanent physical occupation of the landlord's property or the association's common area just like the physical attachments in Loretto. Loretto defines "permanent physical occupation" as the "placement of a fixed structure on land or real property."[15] Telecommunications equipment once installed is clearly a fixed structure attached to real property.

Some Commenters have stated that since tenants' leases expire and they depart, removing their equipment, that the taking of rental property is not "permanent."[16] Just because a departing tenant could conceivably remove the equipment upon leaving does not make this occupation temporary, for the Court in Loretto found the cable installation permanent, even though it could be removed upon conversion of the building to commercial property.[17] The right to install telecommunications equipment is permanent: at all times the landlord or association would be required to permit installation by the then tenant or resident on rental or common property. Therefore, the exclusion of the landlord, the association, and the other co-owners, the taking, is permanent.

One Commenter has suggested that telecommunications equipment is similar to air conditioners and wind chimes, and should be treated as such by the FCC.[18] However, air conditioners, wind chimes, and other such additions are made to the tenant's or resident's unit,

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[15] 458 U.S. 436.

[16] Consumer Electronics Manufacturers Association, 7, n. 17; National Association of Broadcasters, 10-11.

[17] See, 458 U.S. 439 and n.17.

[18] Consumer Federation of America, 11.

not to property which is not rented or exclusively owned. This analogy is therefore incorrect. This Commenter also notes that the intrusion may be minimal.[19] Under Loretto, the size of the physical occupation is irrelevant.[20] Therefore, the installation of an 18-inch antenna, associated cabling, and mounting hardware would still be a taking, even if only one antenna were installed. Under any broadening of the current rule, every tenant or resident could install one antenna for each different service--today permitting 17 antennas per unit.[21]

Some Commenters argue that a broader rule covering rental and common property should be analyzed under Penn Central Transportation Co. v. City of New York,[22] instead of Loretto, so that the FCC could balance the economic impact of the regulation when evaluating the Constitutionality of the rule.[23] The Penn Central analysis only applies to a regulatory taking of the economic benefits of property--where there is no direct physical occupation of property. Because a broader FCC rule would result in a direct physical occupation of property, Penn Central does not apply, while the Loretto per se taking rule would apply. The purpose of the regulation and its economic impact on the property owner are irrelevant issues when a direct physical occupation of the property is involved.[24] Therefore, the installation of telecommunications equipment is a "permanent physical occupation" of rental or common

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[19] Consumer Federation of America, 12.

[20] 458 U.S. 436.

[21] Oral statement of Mr. Buddy Davis, representative of the Satellite Broadcasting and Communications Association, at a CAI seminar, October 22, 1996, Tysons Corner, Virginia.

[22] 438 U.S. 104 (1978).

[23] National Association of Broadcasters, 12; Consumer Federation of America, 12.

[24] 458 U.S. 434-435.

property and explicitly prohibited as a taking under Loretto.

A Rule Requiring Individual Installation on Rental Property Would Not be a Mere Alteration of the Landlord-Tenant Relationship.

Another argument is that requiring installation on common property is merely an alteration of the existing landlord-tenant relationship, not a taking,[25] similar to a rent control ordinance.[26] The Commenters on this issue are ignoring the real and actual physical invasion of the equipment. It is the physical invasion of the property which creates the per se taking prohibited under Loretto.

These Commenters also argue that Florida Power, not Loretto, is the appropriate analogy.[27] However, the Court in Florida Power dealt with a restriction on rental rates on property already leased. The Court made a clear distinction between that property and property occupied by one not invited by the landlord.[28] Tenants have no right to occupy areas of the property not covered by the lease agreement. Therefore, Florida Power does not apply to this situation.

These Commenters also argue that providing access to telecommunications services is analogous to providing utility connections or requiring mailboxes, security locks, etc.[29,30]

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[25] Consumer Federation of America, 10-11; United States Satellite Broadcasting Company, 7; National Association of Broadcasters, 10, 13; Consumer Electronics Manufacturers Association, 8; Pacific Telesis, 4.

[26] DirecTV, 10.

[27] Philips Electronics, 10.

[28] Florida Power, 480 U.S. 252.

[29] Loretto still permits governmental regulation of the landlord-tenant relationship (such as regulation of utility connections), as long as the regulation does not amount to a

However, this analogy is inapposite because telecommunications service providers are not utilities: they are not monopolies;[31] they are not essential; they are not required to provide universal services;[32] and they are not subject to strict governmental rate regulation.

The attempts to avoid the Loretto analysis ignore several fundamental issues: tenants and community association residents only have limited property rights in apartments and associations. Only in a condominium does the resident actually own the unit. Tenants and cooperative residents own no property and have no property rights in property outside the unit. Condominium unit owners own a tenancy-in-common interest in common areas outside their units. Neither tenants nor residents exclusively own rental or common property. Therefore, they cannot install telecommunications equipment on rental or common property. For the FCC to mandate installation on rental or common property, the Commission would be taking the property of the landlord, the association, or the other co-owners for one resident's exclusive use. The Loretto analysis is directly on point and prohibits such a rule as a taking unless just compensation is provided.

SECTION 207 DOES NOT GRANT THE FCC AUTHORITY TO MANDATE INDIVIDUAL INSTALLATION ON COMMON PROPERTY.

All of the Comments presented by representatives of DBS, television broadcasting, and

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taking. 458 U.S. 440.

[30] National Association of Broadcasters, 10, 15.

[31] In fact, deregulation of the telecommunications industry in general was a major goal of the Act.

[32] Despite the arguments of telecommunications service providers, such services are not the same as gas, electric, and water utilities.

MMDS service providers argue that § 207 requires the FCC to issue a rule requiring individual installation of telecommunications equipment on rental or common property. However, § 207 only applies to preempting restrictions, not attempting to preempt Constitutional law. Section 207 neither directs nor authorizes the FCC to abrogate fundamental property rights.

These Commenters have focused on the word "viewer" in § 207, arguing that by using this word, Congress meant to provide universal access to telecommunications services.[33] These Commenters reason that since Congress did not distinguish between property owners and non-property owners, it is impermissible for non-property owners to overturn traditional property law in installing telecommunications equipment and trespassing on the property of others. This argument assumes that to preserve traditional property rights, Congress would have to exempt them specifically. However, the Constitution requires that to alter property ownership rights, Congress must specifically state that these rights are being altered and that compensation is to be provided for any taking of property.

Section 207 stated only that "restrictions" would not be enforceable. The legislative history in House Report 104-204 refers to "restrictive covenants or encumbrances" and "restrictive covenants or homeowners association rules" as those types of restrictions to be preempted by § 207. As articulated in CAI's, ARDA's, and NAHC's Comments,[34] and

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[33] Satellite Broadcasting and Communications Association, 3; Consumer Federation of America, 3-4; United States Satellite Broadcasting Company, 2; Philips Electronics, 2,4; National Rural Telecommunications Cooperative, 4-5; DirecTV, 6.

[34] 18-23.

Comments submitted by others,[35] ownership of property is not an "existing regulation," unlike homeowners association rules and restrictive covenants. Therefore, § 207 cannot be interpreted to abrogate these fundamental property rights.

To alter property ownership rights, Congress must specifically address these rights. When Congress imposes duties on private parties or takes away their constitutionally protected rights, it must do so by explicit, clear language. As one Commenter has noted, when Congress wished to impose burdens on private parties in the Act, it did so in explicit language.[36] As another Commenter has noted, when Congress wishes to include multiunit dwellings in statutes requiring universal access, it has done so.[37] Since Congress did not do so in § 207, it cannot be implied that Congress meant to abrogate these property rights.

Even if Congress had intended to preempt property rights in § 207, the section as written fails to pass constitutional muster. In order to take private property, Congress must provide compensation therefor. Section 207 does not provide for this compensation. Therefore, any rule promulgated under § 207 cannot take property.

Bell Atlantic v. FCC[38] provides that statutes should be "construed to defeat administrative orders that raise substantial constitutional questions."[39] This is exactly the case

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[35] Rouse Company, 5; Woodbridge Village Association, 3.

[36] The National Apartment Association noted that §§ 201, 251, and 244(f) of the Act all imposed duties on private parties. In each section, Congress explicitly placed those burdens upon the parties.

[37] National Association of Home Builders, 9.

[38] 24 F.3d 1441 (D.C. Cir. 1994).

[39] Bell Atlantic, at 1445.

here. The FCC has already promulgated a rule implementing § 207 that violates no constitutional principles. To extend the rule to rental and common property would violate the Constitution. Therefore, the FCC cannot so extend the rule.

THE FCC IS NOT REQUIRED TO DECLARE SECTION 207 UNCONSTITUTIONAL.

One Commenter has reiterated that the FCC has no authority to declare a statute passed by Congress to be unconstitutional.[40] CAI, ARDA, and NAHC addressed this issue in their Comments.[41] CAI, ARDA, and NAHC have never stated that § 207 is unconstitutional; § 207 does not require individual installation of telecommunications equipment on rental or common property. However, if the FCC were to promulgate a rule prohibiting the enforcement of restrictions against individual installation of telecommunications equipment on rental or common property, the FCC would be interpreting § 207 incorrectly, extending it beyond its scope, and impermissibly violating the "Takings" clause of the U.S. Constitution. The FCC has neither the authority to do so, nor to provide compensation for any taking.

ASSOCIATIONS PROHIBIT INSTALLATION ON COMMON PROPERTY TO PRESERVE ASSOCIATION PROPERTY.

Some Commenters have suggested that landlords and associations limit installation of telecommunications equipment out of self-interest to preserve favorable economic

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[40] National Association of Broadcasters, 7.

[41] CAI, ARDA, and NAHC, 23-26.

arrangements with one service provider.[42] CAI, ARDA, and NAHC dispute this misrepresentation with respect to community associations. Although a few associations may benefit economically for providing access to common areas to telecommunications service providers, most arrangements provide for "bulk service" to association residents at highly favorable rates--for the benefit of the residents. CAI, ARDA, and NAHC have supported the public policy goals of § 207. Over half of the members of these three associations are homeowners who desire to receive service. CAI, ARDA, and NAHC have consistently attempted to ensure that their homeowner members receive this service. However, homeowners have also expressed the need to maintain control over the common property: to preserve the structural integrity and economic value of the property which the association owns and for which it is responsible. CAI, ARDA, and NAHC have opposed an expansion of the FCC rule to installation on common property. Mandating individual access to common property would surely increase maintenance costs[43] and insurance risks.[44] Associations should not have to bear these increased risks.

Some Commenters have also suggested that landlords and associations have no right to control programming choices of their residents.[45] This argument is spurious. CAI, ARDA, and NAHC have never supported controlling the content of telecommunications services.

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[42] Consumer Electronics Manufacturing Association, 4; National Association of Broadcasters, 15.

[43] All residents involuntarily bear these costs, not just those desiring access to telecommunications services. See, CAI, ARDA, and NAHC, at 27-32.

[44] See, Letter of John C. Hebden, Insurance Agent, October 25, 1996.

[45] National Association of Broadcasters, 14-16; National Rural Telecommunications Cooperative, 5.

CAI, ARDA, and NAHC only seek to ensure that the integrity of rental or common property is preserved.

PROHIBITING INDIVIDUAL INSTALLATION OF TELECOMMUNICATIONS EQUIPMENT ON COMMON PROPERTY DOES NOT VIOLATE RESIDENTS' FIRST AMENDMENT RIGHTS.

Many Commenters have argued that prohibiting installation on rental and common property violates tenants' and association residents' First Amendment rights.[46] They analogize the situation here to the situation in PruneYard Shopping Ctr. v. Robins,[47] where the owner of a shopping center was prohibited from infringing on the free speech rights of political petitioners.[48] The reference to this case is inapposite for several reasons. First, the case involved a shopping center, which is open to the general public. The Court held that this policy of openness prohibited the management of the shopping center from banning certain types of political discourse. A rental property or association community is not open to the public. Second, the case involved free speech rights, the right to express (or transmit) an opinion, clearly protected as a First Amendment right. Having access to information over every form of broadcast reception is not a First Amendment right.

Several Commenters also argue that prohibiting installation on rental property discriminates against tenants, and disproportionately against minorities, since a larger

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[46] Consumer Federation of America, 4; Pacific Telesis, 4, Philips 12-13; National Rural Telecommunications Cooperative, 5.

[47] 447 U.S. 74 (1980).

[48] Pacific Telesis, 4.

percentage of tenants are minorities.[49] To the extent that this argument is directed at condominiums, cooperatives, and homeowners associations, CAI, ARDA, and NAHC resent the implication presented. These Commenters seek to confuse the main question presented with issues that, while important in other contexts, are not relevant to the current proceeding. The issue in this proceeding is the integrity of common property, which would be destroyed by individual installation of telecommunications equipment on the property without regulation by the landlord or community association.

In addition, the statistics presented by these Commenters indicate only the percentage of tenants in the population; they do not indicate the percentage of tenants who cannot receive acceptable broadcasts of free television, satellite services, or cable television service. In fact, the broadcasters and satellite service providers have provided no data on the percentage of renters and the percentage of minorities who are receiving such telecommunications services--information uniquely within their possession. Other than the naked assertion that this is a real problem, there has not been one shred of evidence presented by any of these commenters that renters or minorities do not have the same access to telecommunications services that owners or non-minorities have. The argument could just as well be made that because a disproportionate number of minorities are residents of urban areas, they have greater access to a larger number of free television broadcasts available using only "rabbit ears" antennas and a larger number of cable television channels. Those wishing to make the enforcement of restrictive covenants prohibiting antennas into a racial issue must first provide

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[49] Satellite Broadcasting and Communications Association, 3-4; Consumer Federation of America, 5; United State Satellite Broadcasting Company, 9; Philips Electronics, 5-7.

the statistics necessary to prove that minorities are denied access to telecommunications services. Since most tenants live in urban areas, the probability of being denied access to television broadcast and other signals is slight. Other statistics are necessary to indicate whether tenants are denied access to most telecommunications services.

Across America today, there is without any doubt, broad access to telecommunications services of all types by viewers. Broadcast television antennas can be seen atop houses lacking inside plumbing and in some cases, telephone service. The Act is not bringing heat and electricity to formerly cold, dark rooms across the land. Instead, the Act spurs competition between delivery systems to offer access to a greater range and choice of entertainment, weather and news than is currently available. Although telecommunications services and the information and entertainment they provide are important, the implementation of the Act by the FCC should not overthrow basic real property law and fundamental principles of constitutional law.

CAI, ARDA, and NAHC support any person's right to obtain access to telecommunications services on individually owned or exclusive use property. For the reasons outlined above and in all other submissions by CAI, ARDA, and NAHC, individual installation on common property should continue to be to be subject to regulation by the owner of the property, the landlord, or the community association in which the resident is a voting member.

ASSOCIATIONS CANNOT BE REQUIRED TO INSTALL A COMMON ANTENNA.

CAI, ARDA, and NAHC have previously proposed that residents of some condominiums and cooperatives could gain access to telecommunications service if their

association were to install a common antenna, which could be connected to individual residences. Several Commenters have misinterpreted this position, and now argue that the FCC should mandate that the community association should install a common antenna to receive service.[50] This would also constitute a constitutional takings problem, since service providers would be installing telecommunications equipment on association property without the association's consent. Mandatory, involuntary installation of a common antenna would also deprive the landlord or association of the property upon which the common antenna is installed, which is prohibited under Loretto.[51] Were the FCC to mandate a central antenna for each service that any renter or resident wanted, up to 17 antennas would be required, at the expense of the landlord or all residents of the community association, not just the "viewers" wishing service.[52] Fortunately, § 207 does not mandate that the association provide access to such services; the FCC would therefore be exceeding its statutory authority in mandating such installation.

Community associations should not be required to bear the cost of installing common antennas.[53] (Currently, 17 such common antennas may be required to cover all possible

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[50] Satellite Broadcasting and Communications Association, 5-6; United States Satellite Broadcasting Company, 16.

[51] National Apartment Association, 11.

[52] Oral statement of Mr. Buddy Davis, representative of the Satellite Broadcasting and Communications Association, at a CAI seminar on October 22, 1996 in Tysons Corner, Virginia.

[53] While some service providers install their own DBS satellite antenna on common property at no charge to the association, there would be lesser incentives for these providers to do so if installation were mandated.

viewers' selections.) Associations would have to specially assess all owners to pay for installing the common antenna which would serve tenants (who would not be assessed) and only some of the owners. Owners who did not want service would be paying to make the service available to others. Burdening community associations with mandatory installation of common antennas at the expense of the owners would be for the sole benefit of telecommunications service providers.

TELECOMMUNICATIONS SERVICE PROVIDERS SHOULD COMPETE ON A LEVEL PLAYING FIELD

The Telecommunications Act of 1996 was intended to deregulate the telecommunications industry, to assist other telecommunications service providers in challenging the monopoly of cable service providers in many areas of the United States, and to result in higher quality service and lower prices for consumers. The Act was designed to level the playing field between cable and other telecommunications service providers. However, in this rulemaking proceeding, the DBS, television broadcast, and MMDS providers are seeking advantages over cable service providers, not merely the equal opportunity to compete for customers. In this proceeding, these service providers have argued that they (or their customers) should have free access to property not owned by the service provider or the customer. Cable service providers have gained access to rental and common property by negotiating the use of the property with the owner. If DBS, television broadcast, and MMDS service providers want the same access to this property, then they should also have to negotiate with community associations for the use of common property. In this way, associations can control the means, methods, and location of central antenna facilities on their

own property and fairly allocate liability for any damage caused by the installation. The FCC should not grant DBS, television broadcast, and MMDS service providers an unfair advantage by permitting these providers access to common property without being subject to existing restrictive covenants enforced fairly by community associations against all forms of telecommunications service providers.

CONCLUSION

In these Reply Comments, CAI, ARDA, and NAHC again reiterate their support for promoting greater access to telecommunications services by community association residents. However, the FCC cannot exceed the statutory authority granted to it by § 207 of the Telecommunications Act of 1996 and permit individual installation of telecommunications equipment on rental and common property. To do so would abrogate the fundamental rights that landlords, community associations, and co-owners have in this property, violating the Fifth Amendment to the United States Constitution. Therefore, the FCC should not expand the reach of the existing rule to rental or common property not owned by the potential "viewer."

If the FCC were to expand the current rule to rental and common property, it would be the equivalent of allowing one homeowner who could not receive an acceptable signal from his or her own property to install telecommunications equipment on a neighboring homeowner's property. The FCC could not conceivably have any authority to deny the neighboring homeowner the right to prohibit that installation on his or her property. Neither § 207 nor any other portion of the Act grants this authority. The rule proposed by several Commenters would produce this result: possession, occupation, and use of someone else's

property by the viewer without the consent of the owner.

Section 207 only prohibits enforcement of "restrictive covenants," "encumbrances," and "homeowners association rules," not a property owner's common law rights. Section 207 does not require the FCC to abrogate these property rights and the FCC has no authority to do so. In the face of Loretto, which declares an extension of the current FCC rule to rental and common property to be an unconstitutional taking, the telecommunications service providers have argued that Congress' use of the word "viewer" in § 207 authorizes the FCC to mandate universal access to telecommunications services and that a footnote in Loretto implies that such a mandate would not be an unconstitutional taking. Despite these arguments, § 207 does not mandate universal access to these services. Universal service may be the business objective of these providers, but § 207 provides no statutory authority for the FCC to mandate universal access.

CAI, ARDA, and NAHC respectfully urge the FCC not to extend the current rule to prohibit landlords and community associations from enforcing restrictions on individual installation of telecommunications equipment on rental or common property.

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October 25, 1996

Mr. William F. Caton
Acting Secretary, FCC
Room 222
1919 M Street, NW
Washington, D.C. 20554

Re: Liability exposures implicit in Telecommunications Act

Dear Mr. Caton,

As an agent who insures community associations, I am concerned about the increased liability exposure the Act portends for owners of homes in these communities.

In summary form, all the owners collectively will have to be prepared to assume an indeterminate burden for the defense and indemnification of any alleged injuries or damages arising out of the installation, maintenance, or use of satellite dishes by one or more of the individual owners. And that is arguably unfair and unreasonable, without delving into the problematic insurance response to some of the potential allegations.

A consideration of this concern would be appropriate as this important legislation move forward.

Sincerely,

John C. Hebden, Agent
/jh