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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

IB Docket No. 95-59

CS Docket No. 96-83

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REPLY COMMENTS OF ALPHASTAR TELEVISION NETWORK, INC.

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AlphaStar Television Network, Inc. ("AlphaStar"), by its attorneys, hereby files its Reply Comments pursuant to Comments filed in response to the Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking ("Further Notice") issued by the Commission in the above referenced docket on August 6, 1996.

I. INTRODUCTION

AlphaStar, a subsidiary of Tee-Comm, Inc., North America's leading manufacturer and distributor of direct-to-home ("DTH") satellite television receiving systems, is the emerging new player in the direct broadcast satellite ("DBS") field. AlphaStar began the provision of DBS programming in July of 1996, utilizing a medium-powered Ku-Band satellite dish measuring between 24 and 30 inches. Because of the vast numbers of potential satellite viewers who presently reside in Multiple Dwelling Units ("MDU's"),¹ the Commission's treatment of such viewers will have a profound effect on the DBS industry, and its ability to compete with cable television as the primary source for America's video programming.

In its Further Notice, the Commission solicited responses on whether it should extend the preemption rule of Section 1.4000 to include property not under the exclusive control of the user with an ownership interest.² The Commission expressed some misgivings about its legal authority to extend the preemption rule given the court rulings in

¹ MDU's represent almost 26% of housing units in the United States. Comments of DIRECTV, filed Sept. 27, at 3.

² Further Notice, at ¶ 63.

Loretto v. Teleprompter Manhattan CATV Corp.³ and Bell Atlantic Telephone Companies v. FCC⁴ and asked for comments on how these cases affect such authority.

The Commission received a number of comments to its Further Notice. Many of the comments, almost exclusively from community associations and the owners and managers of apartment buildings and rental properties, argued that to extend the preemption to commonly owned areas would constitute a takings under the Fifth Amendment under *Loretto* and therefore should not be extended any further than current rules. Other commentators, such as USSB and DIRECTV argued, quite persuasively, that the use of the word “viewer” in Section 207 of the 1996 Telecommunications Act⁵ makes no distinction among the property interests of such persons, and so the Commission should implement the 1996 Act to its fullest extent. These commentators also argued both *Loretto* and *Bell Atlantic* dealt with statutes which gave a third party, a stranger, rights against the property. The Commission’s preemption does nothing more than adjust the *already existing relationship* between a landlord and its tenant, a situation that courts have argued does not constitute a takings under the Fifth Amendment.

AlphaStar wishes to respond to those commentators such as the Independent Cable and Telecommunications Association (“ICTA”), and the National Association of Home Builders (“NAHB”), who argue that the proposed extension of the preemption rules would constitute a takings under the Fifth Amendment. AlphaStar would also like to reply to the proposed rules set forth by the Community Associations Institute, American Resort Development Association, and National Association of Housing

³ 458 U.S. 221.

⁴ 24 F.3d 1441 (D.C. Cir. 1994).

⁵ Telecommunications Act of 1996, Pub. L. No. 104-104, § 207, 110 Stat. 56, § 207 (1996) (“1996 Act”).

Cooperative (collectively “CAI”) which would allow a landlord or association to prevent antennas from being placed on commonly owned areas as long as that landlord or association provided access to a common antenna. AlphaStar supports a variation of such a rule that would allow a landlord or community association to prevent a viewer from installing an antenna on commonly owned property as long as that landlord or community association provided access to the video programming service of that viewer’s choice or were required to provide access to the video programming service if the tenant requested such service.

II. FIFTH AMENDMENT ISSUES

A. FCC’s Proposed Rules Do Not Constitute A Takings Under *Loretto* Or *Bell Atlantic*

Many commentators, including the ICTA and the NAHB, argued that any attempt to extend the current preemption rules to include commonly owned areas or areas where a viewer does not have an exclusive interest, would violate the Fifth Amendment Takings clause. Citing the cases of *Loretto v. Teleprompter Manhattan CATV Corp.* and *Bell Atlantic v. FCC*, these commentators argue that any requirement that property owners allow tenants or residents to place antennas on commonly owned property is a permanent occupation much like the restrictions in *Loretto* and *Bell Atlantic*.⁶

What these comments seem to have disregarded is the fact that the statutes in both *Loretto* and *Bell Atlantic* involved a third party gaining rights to property, which is not the case with the proposed rules before the Commission. In *Loretto*, the rights bestowed by

⁶ See e.g. Comments of NAHB, at 3-5, Comments of ICTA, at 3-14.

the statute rested with the cable company itself, an entity who was not in a prior contractual relationship with the owner of the property. In *Bell Atlantic*, the contested rules required that a local carrier provide connections to its equipment to competing firms. Again, in this situation, a third party with no prior contractual relationship was given the right to come onto the owner's property and occupy it.

The current preemption rules are different. They do not in any way bestow any rights upon third parties. Instead, the rules grant rights to the viewer, who is not an stranger to the property owner, but someone who has a prior contractual relationship. This prior contractual relationship the key to the distinction between the statues in *Loretto* and *Bell Atlantic*⁷ and the rules proposed by the Commission. Instead, the rules are nothing more than the regulation of the boundaries of the landlord tenant relationship, a process that does not implicate the Takings clause.⁸ Therefore the rule proposed by the Commission do not violate the Fifth Amendment.

B. DBS Service Providers Do Not Own Systems

In its Comments, ICTA argues that the Takings Clause is still implicated by the proposed rules because “property owners will not be able to prevent DIRECTV, Primestar and every other DBS provider . . . from installing the provider's systems (which are far more than wiring) in the property owner's property.”⁹ This passage, and indeed much of the ICTA's argument, reveals a fundamental misconception about the DBS industry which changes their analysis of the situation: DBS providers do not own or install their

⁷ The court itself acknowledges this in *Loretto* when it states the holding applies to regulations that involve the “physical occupation by a third party.” 458 U.S. at 440.

⁸ See Report and Order, at ¶ 45.

⁹ Comments of ICTA, at 7 (emphasis in the original).

systems.¹⁰ The systems are purchased by the viewer from independent dealers and are installed by the viewer, either himself or professionally. The viewer owns the equipment and the wiring and is responsible for the installation. No third party would be required to even enter the premises for that tenant to receive his or her programming from a DBS provider. AlphaStar has no interest in the system except to authorize the decoder box to enable the viewer to receive the signals, an act which does not require any physical contact with the system. In fact, a consumer can purchase an AlphaStar system and if he or she never attempts to purchase programming, AlphaStar may not even be aware that system exists. Therefore, ICTA's assertion that *Loretto* and *Bell Atlantic* somehow still indicate a takings because the systems will be owned by third parties, is erroneous, at least as it applies to DBS.

C. Proposed Rules Do Not Preclude All Landlord Control

DBS systems are owned by the tenants themselves and are not designed to become a permanent fixture once installed. Therefore, as DIRECTV noted in its comments, there is no permanent occupation of the space they occupy.¹¹ Additionally, nothing in the proposed rules could be interpreted to prevent landlords from requiring that tenants take their DBS systems with them when the tenants leave and that the tenants make the landlord whole by fixing any damage to the building as a result of the installation of the system. Neither situation impairs a viewers ability as the Commission defined the word in its Report and Order.

¹⁰ The exception is Primestar which leases its equipment to its subscribers.

¹¹ Comments of DIRECTV, at 11.

The Commission's definition of impair also does not prevent a landlord from requiring that a tenant use a particular professional installer, so long as that requirement does not result in an unreasonable increase in costs to the viewer. In that situation, the landlord is not preventing or impairing access to the viewer, merely regulating the manner in which that viewer's satellite system gets installed. Again, the current rules would seem to allow this, as long as there is not an unreasonable increase in costs to the viewer. This would also seem to alleviate many commentators' fears as to damage to their building due to careless or unprofessional installation, their potential liability due to the same problems, safety issues and aesthetic concerns because the landlord can have some control over these issues by choosing an installer that will work with the landlord in dealing with such issues.

III. CAI'S PROPOSAL TO ALLOW RESTRICTIONS IF VIEWERS ARE PROVIDED ACCESS

In its Comments, CAI¹² proposed an alternative solution which would allow restrictions on the antennas to remain in effect as long as the landlord or community association provides a common antenna capable of receiving video programming services. A landlord could therefore prevent the installation of a satellite dish on commonly owned property as long as he or she provided a community antenna to receive video programming signals at no greater cost and with equivalent quality.

AlphaStar believes that such a proposal, in abstract, could implement Congressional intent of Section 207 while at the same time alleviating many of the fears

¹²Comment of CAI, at 32. Other Commentator supported similar proposals. See Comments of USSB, at 3-4; Comments of the National Association of Broadcasters ("NAB"), at 16-17. AlphaStar opposes the NAB's suggestion that landlords be able to fulfill its duties by providing basic cable. The entrenched nature of cable is exactly the problem Section 207 was designed to combat.

and concerns such as damage to the building, liability, and safety issues which were raised in the comments. However, AlphaStar agrees with USSB's comments that such a proposal should be viewed with skepticism. While AlphaStar supports a proposal that would allow landlords to maintain and enforce restrictions on the placement and installation of antennas as long as they provided a common antenna, any proposal which would allow them to provide a single signal of "equivalent quality" would fail to carry out Congress' mandate to provide as wide a selection of video programming services to the American people as possible.

Therefore, AlphaStar supports Commission rules which would not preempt restrictions on the installation on placement of satellite antennas on commonly owned area so long as the landlord or community association provided a community antenna which would enable a viewer to choose between multiple competing video programming technologies. For example, if an MDU already has cable, then the landlord could maintain restrictions on the placement and installation of satellite antennas by installing a community DBS dish capable of receiving one or more DBS services.

Alternatively, the Commission's rules could require that a landlord or community association could provide access to a video programming service of the viewers choice while maintaining control of the installation and placement of the antennas, a so-called "mandatory access" rule. Such a rule would not implicate the Takings Clause because the landlord would own the installation and a third party would not be given rights to enter their property, and so there would be no forced occupation of that owner's property. This would implement Congress' mandate as set forth in Section 207, while at the same time, dealing with many of the issues raised in the comments.

IV. CONCLUSION

For the reasons set forth above, the Commission's proposed rules do not constitute a takings under *Loretto* and *Bell Atlantic*. AlphaStar believes, however, that the Commission should issues rules that allow access of video programming through either a series of community antennas or through mandatory access requirements.

Respectfully submitted,



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