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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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	)	

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REPLY COMMENTS OF
CONSUMER FEDERATION OF AMERICA, LEAGUE OF UNITED LATIN AMERICAN CITIZENS, MINORITY MEDIA TELECOMMUNICATIONS COUNCIL, and OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST

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SUMMARY

This proceeding will determine whether over a third of the American public can participate fully in the information age. The First Amendment guarantees all citizens, ***without distinction or exception***, the right to receive diverse sources of information. So too, Section 207 of the 1996 Telecommunications Act directs the Commission to ensure that all viewers, ***without distinction or exception***, have the unimpaired ability to install devices to receive over-the-air broadcasting, DBS, and MMDS programming. Declining to apply Section 207 to viewers who are forced to rent instead of owning their homes would deny over a third of Americans their First Amendment rights to information access, based solely on their economic status, and would disproportionately impact minorities and lower income citizens.

Parties commenting in this proceeding have largely overlooked these issues. Instead, the discussion has focused on whether preemption of lease restrictions would constitute a taking under the Fifth Amendment and whether it is indeed authorized by Section 207. As Joint Commenters demonstrated in the initial comments and in these reply comments, neither of these arguments poses any obstacle.

In the first instance, opponents of preemption mistakenly analogize preemption to a case where the Supreme Court found that a third party cable company could install equipment without permission of either the landlord or the tenant. But the Court explicitly and carefully limited that case to its facts; it does not apply when the tenant seeks to perform the installation or where the landlord can exercise control over the installation. Indeed, the Court found that lack of authorization and control was at the very heart of what made that case a taking. Yet the proposals made by Joint Commenters and other parties supporting preemption would preserve

the landlord's control, and therefore would not run afoul of takings case law.

Opponents of preemption have also tried to distort the plain language of Section 207 or to evade it altogether. Some commenters look to the use of the general, inclusive term, "viewer" in Section 207, and claim that Congress should have spoken with greater specificity. Others look to the legislative history in an attempt to show that Congress intended something else. Both positions miss the mark. Congress used a term which speaks with great clarity. It is not required to predict every type of viewer and every type of dwelling that may possibly be affected by this provision. Furthermore, it is unnecessary even to look at the legislative history when Congress' intent is clear from the statutory language.

Indeed, the opponents of preemption are the parties urging the Commission to divide citizens, along lines of economics and race, into information haves and have-nots. This is an affirmative discrimination that can find no support in Section 207's use of the word "viewer," and would in fact contradict the plainly expressed goals of the 1996 Act. If any side has failed to meet the burden of proving Congress' intent, they have.

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Consumer Federation of America, League of United Latin American Citizens, Minority Media Telecommunications Council, and Office of Communication of United Church of Christ ("Joint Commenters") respectfully submit the following reply comments in the above-referenced docket.

This proceeding will determine whether more than one-third of the American public can participate fully in the information age. As the Supreme Court and Congress have repeatedly expressed, the First Amendment guarantees all citizens, without distinction or exception, the right to receive diverse sources of information. Indeed, everyone benefits when all citizens enjoy equal, full access to information, thus making it "essential to the welfare of the public." *Turner Broadcasting System v. FCC*, 114 S.Ct. 2445, 2470 (1994).

The First Amendment does not deny the right of information access to some Americans based on economic status. But failure to apply Section 207 of the Telecommunications Act of

1996, Pub.L. No. 104-104 (1996)("1996 Act") to rental property will leave most of this population without a choice - they will be forced to accept whichever video programming provider is dictated to them by their landlord.

The implications of this proceeding for information access and democratic participation have gone virtually unaddressed by other parties commenting in this proceeding. Instead, the discussion has focused on whether preemption of lease restrictions would constitute a taking under the Fifth Amendment and whether it is indeed authorized by Section 207. As demonstrated in the initial comments and in these reply comments, neither of these arguments poses an obstacle. Preemption would not constitute a taking, and it would effectuate the intent of Congress.

I. PREEMPTING LEASE RESTRICTIONS AGAINST THE USE OF RECEPTION DEVICES WOULD NOT CONSTITUTE A TAKING UNDER THE FIFTH AMENDMENT.

Many of the commenters opposing preemption of lease restrictions on reception devices object that, for each lease in which a restriction is stricken, it would effectuate a taking of property without just compensation, and thus a violation of the Fifth Amendment. *E.g.*, Joint Comments of National Apartment Association, *et al.*, at 4 ("NAA Comments"); Comments of Independent Cable & Telecommunications Association at 3 ("ICTA Comments").

These commenters rely on flawed readings of takings case law. The Commission should dismiss their arguments readily, and certainly should not be dissuaded from doing the right thing. For example, many commenters argue that preemption would constitute a permanent physical occupation, but they rely on a holding that the Supreme Court said was "very narrow." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Instead, opponents of preemption misconstrue *Loretto*, arguing that physical occupation takings are the general rule, subject to only

a few exceptions. Similarly, they misconstrue the Court's "regulatory takings" cases, which hold that a total or near-total deprivation of a property's economic value, as measured by the owner's investment-backed expectations, is a taking. They twist this line of cases into an argument that any diminution of value is a taking, no matter how minute and hypothetical.

A. The Proposed Regulation Is Not a *Per Se* Taking Under *Loretto*.

Most of the commenters opposing the application of Section 207 to renters have focused on *Loretto* to argue that such an action would constitute a permanent physical occupation of property and therefore a *per se* Fifth Amendment taking. In so doing, they incorrectly construe footnote 19 of that case as creating a narrow exception, and miscast Joint Commenters and other supporters of protecting tenants as relying solely on that footnote to argue that preemption would come within the exception. *See, e.g.*, Comments of Optel, Inc. at 6-7 ("Optel Comments"); Comments of Apartment and Office Building Association of Metropolitan Washington at 3 ("AOBA Comments");[1] Comments of the National Association of Home Builders at 6 ("NAHB Comments").

Footnote 19 states that if the statute at issue in that case had

> 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. Ownership would give the landlord rights to the placement, manner, use, and possibly the disposition of the installation....[I]t would give a landlord (rather than a CATV company) full authority over the installation....

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[1]AOBA's dismissal of footnote 19 as *obiter dicta* betrays its flawed understanding of the argument Joint Commenters have made. The footnote is another indication that the Court considered its *Loretto* holding to be "very narrow." *Loretto*, 458 U.S. at 441. Far from being unimportant, it is an explicit warning that the holding does not extend to cases where landlords are required to provide cable if a tenant so desires, or where the landlord could control the manner of installation. *Id.* at 440 n. 19.

Loretto, 458 U.S. at 440 n. 19. Opponents of preemption, however, selectively emphasize just a few words of that footnote - "since the landlord would own the installation" - to attempt to portray it as just a narrow exception to a much broader rule. They argue that preemption would fall outside such a narrow exception because either tenants or MVPD providers, not the landlord, would own the reception devices. *E.g.*, NAA Comments at 6. Thus, their comments conclude, footnote 19 "says nothing to undercut the argument" that applying Section 207 to leases would constitute a *per se* taking. *Id.*; Optel Comments at 7.

These arguments, however, amount to little more than the transparent machinations of landlords and MVPD providers that oppose free competition. The Supreme Court has repeatedly made the applicability of that case quite plain: its holding in *Loretto* is to be construed very narrowly. *Loretto*, 458 U.S. at 441; *FCC v. Florida Power Corp.*, 480 U.S. 245, 251-52 (1987); *Yee v. City of Escondido*, 503 U.S. 519, 538-39 (1992). Justice Marshall's opinion states that the Court's holding applies only to statutes which force the property owner to allow use by a ***third party***, *Loretto*, 458 U.S. at 440, not by the tenant or the landlord himself. Commenters such as NAA and Optel, by portraying it as a broadly applicable principle with footnote 19 being an allegedly narrow exception, have attempted to stretch it far beyond its intended limits.

1. The Proposal To Apply Section 207 To Tenants Would Not Permit Access By A Third Party.

Thus constrained by *Loretto*, the NAA and ICTA, *inter alia*, have tried to make tenants fit under the rubric of a "third party." ICTA suggests that installations would not belong to the property owner, but rather to the MVPD provider. ICTA Comments at 7. This assertion is flatly incorrect. DBS equipment, television antennas, and other reception devices are not forcibly installed by the provider, but are sold in retail outlets directly to consumers (in this case either

the landlord or tenants). Mere use by the consumer does not convert the equipment into the provider's property.

Moreover, this argument breaks down completely in the context of television antennas, which are also within the scope of Section 207. Before the widespread prevalence of cable, many leased single-unit and multiple-unit buildings had television antennas, which were owned either by the landlord or the tenants, not by the local broadcast stations. Broadcasters did not have, and preemption will not create, a new right of access merely because tenants will be free to install antennas.

2. Installation By Either The Landlord Or The Tenant Would Not Constitute A *Loretto* Taking.

There are two scenarios which would allow tenants to have access to reception devices, and neither of them would constitute a *Loretto* taking. First, the equipment could be purchased by the landlord with every tenant having the ability to connect to it. Alternatively, the equipment could be purchased, owned, and perhaps installed by the tenant, but the installation would be subject to reasonable guidelines by the landlord. Joint Commenters would support either alternative, since they would both provide all viewers, regardless of their economic status, with the ability to choose among MVPD providers that is their right under the 1996 Act and the First Amendment.

The first case, where the landlord owns the equipment and gives every tenant the ability to connect to it, would fall directly under the exception described in footnote 19. Opponents of preemption have neglected to mention that the Court has specifically explained why it would not be a taking if the landlord owned the installation. *Loretto* observed that a requirement of occupation by a third party "is qualitatively more severe than a regulation of the use of property, even

a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion." *Loretto*, 458 U.S. at 436. The Court emphasized that, in a use regulation, the landlord would have "full authority over the installation" and could "decide how to comply with applicable government regulations...and therefore could minimize the physical, esthetic, and other effects of the installation." *Id.* at 440 n. 19.

Many commenters have presented the Commission with evidence that such installations would be technically feasible. Comments of DirecTV, Inc. at 17, Appendix A, Appendix E. The Commission should seriously consider this alternative because it would eliminate the concerns of landlord commenters over structural integrity and esthetics, and would fall well outside the narrow *Loretto* holding.

The second alternative, where the tenant owns and installs the reception device subject to the landlord's control, would still fall outside *Loretto*. The NAA asserts that this instance would not fall within the exception created by footnote 19, and would therefore constitute a physical occupation. NAA Comments at 6.

Once again, however, the NAA is erroneously attempting to read footnote 19 as a narrow exception, construing any minor deviation from its exact text as a taking. But as Joint Commenters have just noted, this view is flawed because the Court in *Loretto* clearly limited its holding. In subsequent cases, moreover, the Court has reiterated that tenants cannot cause a physical occupation taking. *E.g., Florida Power*, 480 U.S. at 252-53 ("The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license.").

In the *Loretto* Court's discussion why a different question would be presented if the land-

lord installed equipment at the tenant's request, it emphasized that the landlord would have ***authority over the installation*** and could control placement, manner, and use of the installation to minimize any adverse effects. *Loretto*, 458 U.S. at 440 n. 19. Joint Commenters have suggested that the Commission could give exactly this type of control to the landlord, without taking away the tenant's right to install reception devices. Comments of Joint Commenters at 12 n. 13. This would alleviate the lack of control and ability to minimize the effects of the installation which were the heart of the Court's concern in *Loretto*.

3. The Preemption Of Lease Restrictions Would Not Create A New Tenants' Right, But Would Merely Govern A Freely-Bargained Contractual Relationship.

The NAA has attempted to recast the nature of the proposals in this proceeding as not just a regulation of the landlord-tenant relationship, but as somehow creating a new, positive right, *i.e.* the right of tenants to install reception devices. NAA Comments at 7. Apparently believing that this would be tantamount to "a physical occupation of the property," NAA urges that "giving a tenant new rights is indistinguishable from granting a third party the same rights." *Id.*

The Commission should not be misled by this obvious attempt to divert the discussion away from the true character of preemption. Extending the protection of Section 207 to tenants would effect only the terms of the contract between landlord and tenant. Preemption would not create any new lease provisions or pass any ordinances granting tenants a right to install reception equipment. It simply would tell the landlord that he or she could not place a certain restriction into the lease. As such, it is indistinguishable from fire codes, building codes, and other rules that amend the landlord-tenant relationship by requiring landlords to provide sprinkler systems,

mailboxes, smoke detectors, and the like. Preemption of lease restrictions would no more constitute a taking than would a rule which strengthened the fire codes.

The Court warned, in *Loretto* and several subsequent cases, that its physical takings cases were only concerned with laws that "require[d] the landowner to submit to the physical occupation." *Yee*, 503 U.S. at 527. The holding in *Loretto* did not extend to the regulation of the landlord-tenant relationship, and in fact reaffirmed that there is a "broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Loretto*, 458 U.S. at 440. Similarly, in *Yee*, the Court found that when the landlord voluntarily rents his or her land, and is not compelled to continue doing so, an ordinance governing the terms of that rental does not constitute a physical occupation taking. *Id.*

B. The Proposed Rule Is Not a Regulatory Taking Under *Lucas* or *Keystone*.

Some commenters assert that even if application of Section 207 to tenants does not constitute a physical occupation taking, it would still be a "regulatory taking" under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470 (1987). NAA Comments at 11-12; AOBA Comments at 4. NAA asserts that *Lucas* stands for the notion that "when the economic effect of a regulation has interfered with the owner's investment-backed expectations, something less than a complete loss of value might be compensable." NAA Comments at 11 (*citing Lucas*, 112 S.Ct. at 2895 n. 8). Therefore, NAA concludes, in some cases, the expense from the installation of reception devices would cause a "severe injury to the owner's investment-backed expectations," and constitute a regulatory taking. *Id.* at 12; AOBA Comments at 4.

The Commission should not give any credence to such an overbroad reading of the case law. The Supreme Court has long maintained that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). While courts generally conduct an *ad hoc*, factual inquiry, in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), and later cases, the Supreme Court reviewed its framework for determining just how far is too far. As the Commission noted in its *R&O*, this framework includes certain factors, such as the "character of governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *R&O* at ¶43, *citing Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980).

Preemption would in no way deprive landlords of reasonable investment-backed expectations. NAA's reliance on *Lucas* is therefore misplaced. In that case, the petitioner real estate developer was barred from erecting ***any*** permanent habitable structures on his land and thus was deprived of all meaningful value. *Lucas*, 112 S.Ct. at 2889. That is simply not the case here. Landlords' investment-backed expectations are to rent their apartment units.[2] Even with preemption they would still receive rent and would still be able to fill existing vacancies.[3]

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[2]In fact, landlords are likely to be able to use the availability of reception devices as a selling point. Just as appliances and amenities such as fireplaces, patios, exercise rooms, and the availability of cable TV may allow them to charge greater rent or other fees, so too would the availability of DBS or MMDS.

[3]AOBA invokes *Keystone* to support its argument that landlords would be deprived of their investment-backed expectations. AOBA Comments at 4. *Keystone* actually works against this argument. Noting that those who allege a regulatory taking face a "heavy burden," the Court required petitioners in that case to show that the regulation made it "commercially impracticable" to continue their business. *Keystone*, 480 U.S. at 495-96. Moreover, the Court held that it is not enough to show that some small segment of the value of the land is deprived, because

NAA asserts that installations might require some expenditure on the part of the landlord, and that in some cases this could be large enough to constitute a severe injury to investment-backed expectations. NAA Comments at 12. Even putting aside the unsupported, speculative nature of this argument, it is difficult to imagine a situation where the installation of an antenna would prove so expensive as to render the building valueless. In any event, no commenters have suggested that a landlord could not pass along the costs of installation to the tenant (or tenants) desiring the service. And because the landlord would maintain control over the manner of installation, she would be motivated to take steps to limit the degree of any permanent damage from fastener holes and the like.[4]

Furthermore, AOBA argues that the proposed regulation does not advance the type of legitimate state interest contemplated by *Keystone*, because "telecommunications services to tenants have never been recognized by the Court to be a matter of public health and safety or morals." AOBA Comments at 4. However, AOBA has based this argument on an overly narrow restatement of the Court's holding in *Keystone*. In that case, the Court invoked the standard that

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"'[w]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety.'" *Id.* at 497 *quoting Andrus v. Allard*, 444 U.S. 51, 65-66 (1979).

[4]Some commenters suggest that fastener holes would damage a building's structural integrity or make it more difficult to comply with building codes. NAHB Comments at 11; NAA Comments at 25. But Joint Commenters fail to see how these holes would be any more damaging than the many holes that are made, in both interior and exterior building surfaces, to attach such items as fire escapes, outdoor lighting, cable or telephone wiring, artwork, and curtain rods. In those cases, they are repaired with simple material like spackle and sealant, by either the landlord or the tenant, and the landlord recovers any permanent damage from the tenant's security deposit. Therefore, it is difficult to believe that fastener holes would cause enough damage to deprive the landlord of investment-backed expectations, regardless whether those fasteners were used to anchor the antenna or satellite dish or to fasten inside wiring.

"land use regulation can effect a taking if it 'does not substantially advance legitimate state interests,...'" or is "enacted solely for the benefit of private parties..." *Keystone*, 480 U.S. at 485-86. The Court did not limit "legitimate state interests" to the public health, safety or morals.

In any event, as Joint Commenters have already noted, what is at stake in this proceeding is the ability of over one-third of Americans freely to choose among a diversity of sources of news and information, whether via broadcast television or multichannel video programming services. As courts have constantly reminded, the importance of this goal cannot be under-estimated. As recently as 1994, the Supreme Court has stated:

> [A]assuring that the public has access to a multiplicity of information sources is a ***governmental purpose of the highest order***, for it promotes values central to the First Amendment. Indeed, it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is ***essential to the welfare of the public***.

Turner Broadcasting System, Inc. v. FCC, 114 S.Ct. 2445, 2470 (1994)(emphasis added). In the context of broadcast television, as Joint Commenters have observed, many apartment-dwelling Americans who still rely on over-the-air television will be unable to receive quality signals without the aid of some type of reception device. The Supreme Court has noted that protecting these households' ability to receive broadcasting service "is an important federal interest." *Turner*, 114 S.Ct. at 2469. In the context of DBS, the D.C. Circuit has specifically held that DBS is a "new technology of enormous significance" which, like broadcasting, enhances the availability to the public of a diversity of views and information. *Time Warner Entertainment Co. v. FCC*, No. 93-5349, Slip Op. at 28-30 (D.C. Cir. 1996).

II. THE PLAIN LANGUAGE AND THE LEGISLATIVE HISTORY OF SECTION 207 SUPPORT ITS APPLICATION TO RENTAL PROPERTY.

Several commenters have questioned whether Section 207 gives the Commission authority

to preempt lease restrictions. Their arguments fall into two groups. Some commenters look to the use of the general, inclusive term, "viewer's," in Section 207, and claim that Congress should have spoken with greater specificity. Others look to the legislative history in an attempt to show that Congress intended something else.

Both arguments stretch credibility, however, because as Joint Commenters and others have demonstrated, the plain language of Section 207 includes ***all*** viewers. Certainly, and in any event, it does not indicate that Congress intended to create the type of dichotomy along class and racial lines that opponents of preemption advocate.

A. Use Of General Terms Instead Of An Exhaustive Laundry List Should Not Defeat Congress' Plainly Expressed Intent.

Some commenters have argued that Congress should have explicitly stated that Section 207 applies to tenants. NAA claims that Section 207 is just a "limited directive" because it does not specify that "all possible restrictions" are preempted against "every viewer." NAA Comments at 14. ICTA and NAHB look to the Cable Communications Policy Act, Pub.L. No. 98-549 (1984)("1984 Cable Act"), and S. 1822, 103d Cong., 2d Sess. §302(a)("S. 1822"), and note that the access provisions in those proposals "expressly referred to multi-dwelling units." ICTA Comments at 20; NAHB Comments at 9-10. They conclude that these provisions prove that Congress knows how to use specific language to create access rights, and would have done so if it did intend to create such rights. *Id.*

This argument misconstrues the very nature of statutory draftsmanship: legislatures often draft laws using general terms. Congress is not required to write laws that list specific examples, exhaustively describing a statute's applicability, especially when the meanings of the general terms are clear. Indeed, that is why administrative agencies were created - to flesh out the

specific applicability of a statute, especially one which is phrased generally.

Indeed, it is the argument advanced by NAA, ICTA, and NAHB which lacks any support in the statutory language or legislative history. The result these commenters advocate would give to two-thirds of Americans the benefits of a diverse array of information sources and a choice between competing MVPD providers. But it would consign the remaining one-third to inferior status, including a disproportionate percentage of minorities and lower income citizens, for no other reason than a financial inability or a choice not to own their own homes. This is an affirmative discrimination that can find no support in Section 207's use of the word "viewer." In fact, this interpretation would be inconsistent with the explicit statutory language of the 1996 Act preamble, which guarantees "advanced telecommunications and information technologies and services to ***all Americans*** by opening ***all telecommunications markets*** to competition." 1996 Act, preamble (emphasis added).

B. The Actions Of Prior Congresses Have No Relevance To Determining The Intent Of Congress In The 1996 Act.

Some commenters opposing preemption have looked for support in the legislative history of other statutes and prior bills that were not enacted. ICTA, for example, first tries to distort the nature of the prohibition in Section 207, by saying that it creates a right of mandatory access for DBS, MMDS, and other MVPD providers. ICTA Comments at 14. From this premise, ICTA argues that because two prior Congresses did not adopt mandatory access provisions, Congress in passing the 1996 Act must not have meant for Section 207 to give mandatory access either. *Id.* at 14-18.

This bizarre argument simply starts out wrong, and with the assistance of some suspect methods of statutory construction, it gets worse. To begin with, its premise is flawed because,

as discussed above, at pages 6-7, Section 207 does not create a mandatory access right, but instead merely delimits the landlord-tenant relationship.

But this erroneous assumption leads to an even more flawed conclusion. ICTA and NAHB rely on a legislative event which happened 12 years before the enactment of Section 207, the failure of the ***98th Congress*** to adopt a mandatory access statute for a different technology, to urge the FCC to ignore the clear mandate of the statutory language. NAHB Comments at 9; ICTA Comments at 15-16. ICTA further relies on the fact that S. 1822, the telecommunications reform bill introduced in the ***103rd Congress***, would have included a provision explicitly governing telecommunications carrier access to multi-unit dwellings. ICTA Comments at 16-18.

Those actions by previous Congresses carry absolutely no weight in the interpretation of Section 207. These are different bodies, composed of different individuals and controlled by a different party, than the 104th Congress that passed the 1996 Act.[5] ICTA's reliance on S. 1822 is even more incredible. S. 1822 was not even passed by the Senate, and thus did not even represent the intent of that entire body, let alone both houses of an entirely different Congress. By ICTA's and NAHB's curious reasoning, any time a bill addressing a given subject failed to pass either house, Congress would be forever barred from legislating on that subject.

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[5]For this reason, ICTA's and NAHB's attempts to invoke *Cable Investments v. Wooley*, 867 F.2d 151 (3rd Cir. 1989), are entirely inappropriate. ICTA Comments at 15-16, NAHB Comments at 9-10. In *Wooley*, the Third Circuit declined to hold that an ambiguously worded section of the 1984 Cable Act created a right of access for cable operators. *Id.* at 156. The court noted that the original House bill had contained separate language specifically creating the identical right of access, and that this language was dropped from the bill that ultimately was passed. *Id.* at 155-56. But there, the court was examining the actions of the same Congress in the same law. *Wooley* does not apply to the 1996 Act because there was no preemption section that was considered and dropped.

C. Non-Exhaustive Lists Of Examples From The Legislative History Cannot Be Used To Defeat The Plain Meaning Of The Statutory Language.

Finally, some commenters look to the House Report accompanying H.R. 1555, which listed some of the specific situations that would be effected by preemption. They argue that because the list did not explicitly list lease restrictions, Congress must have intended not to include them. ICTA Comments at 20; NAHB Comments at 9; NAA Comments at 15.

These arguments are doubly mistaken. First, these commenters have attempted to apply a principle of statutory construction, *expressio unius est exclusio alterius*, to the legislative history instead of the statutory language. Section 207 does not list specific types of viewers; it merely uses the general, inclusive term.[6] There is no need even to reach the legislative history when Congress' intent is clear from the statutory language, and doing so to defeat the plain meaning is, simply put, an invalid application of the *expressio unius* maxim.

Moreover, and in any event, the commenters have applied the maxim incorrectly. While ICTA and NAHB cite a part of the House Report that lists several types of rules to be included in Section 207, this is not an exclusive list. Instead, the House Report lists the types of rules to be rendered unenforceable as "***including but not limited to***, zoning laws, ordinances, restrictive covenants or homeowners' association rules." H.R. Rep. at 124 (emphasis added). It would be improper to conclude that there is an exclusive list here merely because the House Report sought to provide some examples of rules that would be preempted. Sutherland Statutory Con-

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[6]As Joint Commenters showed in their comments, Congress meant for "viewers" to be a broadly inclusive term; it did not differentiate among types of viewers. Joint Comments at 3-4. Nor is it reasonable to expect Congress to do so. ICTA's argument seems to urge the absurd result that Congress cannot use categorical terms like "viewer" unless it lists all the specific types of viewers to be included.

struction, §47.23.

CONCLUSION

Extending Section 207 to renters would promote First Amendment values and would be good for competition. It neither constitutes a *per se* taking under *Loretto*, nor a regulatory taking under *Lucas* and *Keystone*. Absent any such constitutional concerns, the Commission should effectuate Congress' plainly expressed intent, and should not be swayed by creative, but erroneous constructions of the legislative history.

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