Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of	)	
	)	IB Docket No. 95-59
Preemption of Local Zoning Regulation of Satellite Earth Stations	)	
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In the Matter of	)	
Implementation of Section 207 of the Telecommunications Act of 1996	)	CS Docket 96-83
Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service	)	

REPLY COMMENTS OF DIRECTV, INC. TO FURTHER NPRM

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REPLY COMMENTS OF DIRECTV, INC. TO FURTHER NPRM

I. INTRODUCTION AND SUMMARY

It is now time for the Commission to complete its implementation of Section 207 of the Telecommunications Act of 1996. In its August 6, 1996 Order, the Commission adopted a new rule, 47 C.F.R. § 1.4000, prohibiting both governmental and private restrictions that impair the ability of antenna users to install and use over-the-air reception devices.[1] The Commission limited this new rule solely to land owners with "exclusive use" areas, leaving out two classes of viewers: (i) all renters (who comprise approximately 40% of the population), and (ii) residents of multiple dwelling units ("MDUs") without exclusive use areas suitable for antenna installation. The Commission recognized that it had limited the application of its rule, and asked for comment

[1] *See Preemption of Local Zoning Regulation of Satellite Earth Stations,* IB Docket 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 (August 6, 1996) (the *"August 1996 Order"* or *"Further NPRM"*).

on whether it should extend the protections of Section 207 to renters and MDU residents, and, if so, how this should be accomplished.

The comments submitted in response to the Further NPRM support amending Section 1.4000 to guarantee to *all* viewers the right to access over-the-air multichannel video programming distributor ("MVPD") services, as Congress envisioned when it enacted Section 207. The Commission should, however, use a different approach to amend the rule to protect each of the two classes of viewers it has presently excluded from Section 1.4000. While many commenters have failed to recognize the distinction between renters and MDU residents without exclusive use areas, the legal analysis for prohibiting restrictions on the ability of these viewers to use MVPD antennas is clearly different, and requires a two-part approach.

First, the Commission should eliminate the distinction between renters and land owners, as there is no legal or policy reason whatsoever to distinguish between these viewers as long as they have exclusive use areas in which to install antennas. The Commission has already found that it may preempt restrictions on antennas found in restrictive covenants, such as homeowners association documents; there is no difference if such a restriction is found in a lease. The case law establishes that once the landlord has consented to the tenant's physical occupation of the rented property, the Fifth Amendment does not preclude the government from regulating how the tenant may occupy that space.

Perhaps more importantly, neither Section 207 nor any other provision of the Communications Act uses land ownership as a basis for guaranteeing the federal right to access radio signals, including those delivered via over-the-air antennas. In fact, the record clearly demonstrates that the implications of excluding renters from Section 1.4000 are contrary to any

rational communications or social policy. The dichotomy used by the Commission not only excludes about 40% the population from this federal right, but also has a disproportionate and devastating impact on minorities and low-income viewers, those persons most in need of the competitive benefits derived from being able to choose from among a number of MVPDs offering diverse programming.

Second, the Commission also needs to include within its rule MDU residents, a group comprising about a quarter of the population. If MDU residents are not able to receive MVPD services, the twin goals of fostering competition and ensuring access to programming will not be achieved. MDUs are a key component of the MVPD market, and DIRECTV is beginning to break down barriers to competition by gaining access to buildings.[2] MVPD providers need the Commission's help, however, as many building owners are bound by exclusive contracts with incumbent cable companies that are the product of market power, not the free market.

While the legal analysis with regard to MDU residents without exclusive use areas differs from the prohibition of lease restrictions -- DIRECTV agrees with commenters representing building owners that an antenna user may not take common property for his or her own use[3] -- it does not preclude the Commission from fashioning a rule that implements the Congressional policies enunciated in Section 207. The Commission should first declare unenforceable all exclusive contracts between incumbent cable companies and landlords that prohibit other MVPDs from serving an MDU. The Commission therefore would allow MDU

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2 *See* Exhibit A (Press Release dated October 2, 1996: "RCN's Liberty Cable to Deliver DIRECTV to New York City Multiple Dwelling Unit Market").

3 *See id.* at 2 ("To receive DIRECTV programming, RCN customers will not be required to obtain a satellite dish"); *see also* Comments of Consumer Electronics Manufacturers Association at 8, n.17 ("no commenter representing viewer interests has suggested that Section 207 would allow a viewer to permanently affix an antenna to an association's common property or a landlord's property").

residents to access at least one MVPD as a competitive alternative to the incumbent cable company. The Commission also should resolve its proceeding regarding the inside wiring and conduit within MDUs, to enable tenants to receive MVPD programming delivered via antennas installed by building owners on rooftops or other common elements.

II. THERE IS NO POLICY OR LEGAL REASON TO DISCRIMINATE BETWEEN RENTERS AND OWNERS

When the Commission adopted Section 1.4000, it decided that it would prohibit only those restrictions impairing viewers with a "direct or indirect ownership interest in the property" where the antenna is to be installed.[4] Without elaboration, the Commission stated that this limitation recognized "important distinctions in the way in which property is owned."[5] The record in response to the Further NPRM shows, however, that there is no "important distinction," either in law or policy, between renters and owners of property. Section 207 requires that any viewer with an exclusive use area -- whether rented or owned -- be free from governmental or private restrictions that impair the use of MVPD antennas, and no law bars the Commission from enacting such a rule. Accordingly, the Commission should eliminate the distinction between renters and owners in Section 1.4000.

A. Commenters Have Confused the Issue of Ownership with MDUs

Few commenters in this proceeding have grasped the critical distinction between ownership and possession of an exclusive use area. Indeed, in the Further NPRM, the Commission itself focused almost entirely on the difficulties presented by installations on rooftops or other common areas where the building owner or community association might be required to

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4 *August 1996 Order* at ¶ 48.

5 *Id.*

maintain and repair the antenna.[6] The text of the Further NPRM simply fails to distinguish between "common areas" and "rental properties."[7]

Many commenters, particularly those representing building owners and community associations, repeated the Commission's error. The National Association of Home Builders ("NAHB") throughout its comments objects to the installation of antennas on "rental or commonly owned property" without ever distinguishing between the two.[8] The National Apartment Association ("NAA") makes the same mistake, arguing that the Commission cannot prohibit restrictions on the installation of antennas "on premises subject to leases or similar real estate agreements or in common areas."[9] Likewise, the Community Associations Institute ("CAI") argues against the prohibition of restrictions affecting "rental common property," a term it never defines.[10]

As a result of their failure to distinguish rental property from common property, many of the commenters' analyses of the law and policy are rendered inapposite or even misleading. For example, CAI submits several exhibits regarding the damage that could be caused by the installation of an antenna on the rooftop of an MDU, which is generally not part of a

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6 *Id.* at ¶ 59-60

7 *Id.* at ¶ 59 ("We are unable to conclude that the same analysis applies with regard to the placement of antennas on common areas or rental properties, where a community association or landlord is legally responsible for maintenance and repair and can be liable for failure to perform its duties properly.").

8 Comments of National Association of Home Builders at 2 (unless otherwise noted, comments referred to in these Reply Comments are comments filed in response to the Further NPRM).

9 Comments of NAA at 5. The NAA also fails to recognize the important distinction between the rights of a tenant who leases the property to install an antenna in an exclusive use area, and who has no relationship with the building owner to install an antenna on common property.

10 Comments of CAI at 14; *see also* Comments of Independent Cable & Telecommunications Association at 2 (objecting to application of Section 1.4000 to "Unowned or Uncontrolled Properties").

resident's exclusive use area (regardless of whether the resident is an owner or renter).[11] DIRECTV has not suggested that either renters or owners be granted access to common areas such as rooftops. Similarly, the analyses of *Loretto* and its progeny submitted by NAA and CAI improperly focus on the viewer's ability to use a common area to install the antenna.[12] Both the policy and legal analyses become clear, however, when the prohibition of antenna restrictions affecting leased exclusive use areas is distinguished from the issue of how to make MVPD services available to MDU residents.

B. There is No Statutory or Policy Basis for the Distinction Between Renters and Owners

The distinction between renters and land owners that has been created by the Commission is premised entirely on the mistaken belief that the Fifth Amendment and other legal reasons require such a dichotomy, as there is no statutory or policy reason whatsoever to grant renters an inferior right to receive MVPD services via over-the-air antennas. Congress did not mention land ownership when it adopted Section 207, and has never made such a distinction in the Communications Act. Indeed, communications policy is only hampered when a significant portion of the population is not protected from restrictions on the installation of MVPD antennas. Furthermore, the comments show that as a matter of social policy, the exclusion of renters from Section 1.4000 is a disaster, reinforcing the inability of minority and low-income viewers to have competitive choices in the reception of diverse information and programming.

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11 Comments of CAI at Appendix (*e.g.*, Comments of Marshall Frost, P.E., P.P., Frost, Christian & Associates).

12 Comments of CAI at 14-18; Comments of NAA at 5-10.

1. Section 207 Applies to All Viewers

The Congressional mandate in Section 207 is unambiguous: the Commission is to prohibit restrictions, whether governmental or private, that "impair a viewer's ability to receive video programming services through devices designed for over-the-air reception." The statutory language does not specify viewers who own their homes, or viewers who rent their homes, but speaks only of "a viewer." The statute does not lend itself to carving out groups of viewers from its protections.[13]

The legislative history makes no mention of a viewer's ownership status, either. The Independent Cable & Telecommunications Associations ("ICTA"), an organization including cable companies that provide programming to MDUs, contends that the legislative history restricts the application of Section 207 solely to homeowners, and "could hardly be clearer."[14] ICTA argues that the House Report "indicates that the statute is *only* applicable to State or local statutes and regulations, State or local legal requirements, restrictive covenants or encumbrances."[15] ICTA overstates the language: the Report continues by stating that Section 207 will preclude restrictions "*including but not limited to,* zoning laws, ordinances, restrictive covenants or homeowners' association rules."[16] The legislative history, like the statute, does not support ICTA's contention; rather, it is silent on any distinction between owners and renters of property.

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13 *See* Comments of Philips Electronics North America Corporation and Thomson Consumer Electronics, Inc. ("Philips/Thomson") at 4-5 (citing Preamble of Telecommunications Act of 1996, which states that the Act is intended to "secure lower prices and higher quality services for American telecommunications consumers").

14 Comments of ICTA at 19.

15 Comments of ICTA at 18-19 (emphasis supplied), citing House Report, H.R. Rep. No. 204, 104th Cong., 1st Sess. at 123-124.

16 House Report at 123 (emphasis supplied).

2. Distinguishing Between Renters and Owners is Bad Policy

Excluding renters from Section 1.4000 is bad policy that defeats both Congressional and FCC objectives. Without protecting renters, the Commission cannot advance the federal policy objectives behind Section 1.4000: to promote competition among MVPDs and to ensure that consumers have access to a wide range of programming services.[17] Moreover, the Commission will be unable to achieve its overarching policy goal: "to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service."[18]

Because nearly 40% of the housing units in the United States are rented,[19] no consumer-oriented policy can be successful if it excludes renters. This is particularly true as applied to the communications policies the Commission is entrusted to advance, including the promotion of widespread access to diverse programming services.[20] Over-the-air MVPDs cannot compete with cable television if landlords have the right to determine whether renters may install and use antennas on their leased exclusive use property.

As the Congressional Black Caucus told the Commission in late July, the exclusion of renters will have a disproportionate impact on minorities and low-income Americans.[21] The record supports this conclusion. The Consumer Federation of America ("CFA"), in joint

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17 *August 1996 Order* at ¶ 6.

18 47 U.S.C. § 151.

19 *See* Comments of DIRECTV at 7, n.15.

20 *August 1996 Order* at ¶ 6.

21 *See* Letter from The Honorable Edolphus Towns and other members of the Congressional Black Caucus to The Honorable Reed E. Hundt, dated July 29, 1996, attached to Comments of United States Satellite Broadcasting Company, Inc. as Attachment C.

comments filed with several groups representing the interests of minorities and low-income Americans, details the striking disparity in home ownership between whites and minorities:[22]

Race	% homeowners
White	77.1%
Black	44.0%
Hispanic	43.9%
Asian	51.2%
American Indian	52.6%

In other words, about half of the viewers in these minority groups are renters, and therefore unprotected by Section 1.4000, as currently written.

The Commission's rule also discriminates against lower income Americans. CFA points out that the median family income for renters is nearly half that of home owners.[23] Without access to their own antennas, these renters may be at the mercy of the incumbent cable company, which is able to charge higher installation charges or subscription fees because of the lack of competition.[24] As CFA states, excluding renters from Section 1.4000 "will widen the disparity between information haves and have-nots." The Commission surely did not intend to adopt a rule that discriminates against minorities and low-income Americans, and should correct its error by eliminating the prerequisite of ownership from Section 1.4000.[25]

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22 Comments of Consumer Federation of America, League of United Latin American Citizens, Minority Media Telecommunications Council, Office of Communications of the United Church of Christ, and Writers Guild of America East (collectively referred to as "CFA") at 6 (CFA did not show its figures in a chart).

23 Comments of CFA at 7.

24 *Id. See also* Exhibit B, "Savings of Satellite TV," Washington Post, October 21, 1996 (noting that cable subscription rates for cable television is more than two times the rates for DBS service).

25 DIRECTV suggests that the Commission remove the words "where the user has a direct or indirect ownership interest in the property" from Section 1.4000(a).

Not a single commenter has provided any rational policy basis to exclude renters from Section 1.4000. The NAA claims that allowing viewers to install antennas on rented property would pose safety and liability "issues," including improper or unsafe installation, multiple installations and injuries caused by falling antennas.[26] First, these so-called "issues" do not justify discrimination against renters, as they are just as relevant to residents who own their apartment units.[27] For example, NAA's description of a DBS antenna installed on the end of a 2 X 4 placed outside a window would be a concern whether a renter or unit owner performed the installation. Second, no one has suggested that the Commission preempt reasonable and legitimate safety regulations, although the record does not demonstrate any safety problems presented or injuries caused by DBS antennas.[28] DBS antennas can be safely installed on balconies or patios without causing any damage to the building. Third, as DIRECTV stated in its Comments, tenants should not be excused from liability for any damage caused to the leased property by the installation or removal of an antenna.[29]

C. Neither the Fifth Amendment Nor Any Other Law Precludes the FCC From Prohibiting Lease Restrictions on Antenna Installations on Rented Property

The commenters that urge the Commission to exclude renters from Section 1.4000 rely chiefly upon the argument that precluding lease restrictions on the installation of antennas amounts to a taking under the Fifth Amendment. There are no such constitutional implications.

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26 Comments of NAA at 26-28.

27 Once again, NAA confuses the use of rented property with the use of common property, asking whether building owners will "be able to control who goes up on their roofs and walls to install antennas." Comments of NAA at 27.

28 Comments of NAA at 27, Exhibit A. DIRECTV does not dispute that DBS antenna installations should be required to comply with reasonable safety regulations applied to similar items.

29 Comments of DIRECTV at 11, n.25.

Because the owner has already consented to the tenant's occupation of the property, the installation of an antenna does not result in a *per se* taking as defined in *Loretto*;[30] nor does the burden on the property owner approach the level required for a court to find that there has been a regulatory taking. Furthermore, real property law does not provide any justification for discrimination against renters.

The Court's holding in *Loretto* does not stretch as far some commenters contend. The NAA, for example, interprets the case to hold that "granting the tenant the right to install facilities under the tenant's ownership and control would effect a taking of the landlord's property."[31] ICTA's Fifth Amendment analysis also relies solely upon *Loretto,* contending that there is a "precise parallel" between the New York statute examined by the Court and allowing viewers to install antennas on the leased property.[32] *Loretto* is not the "precise parallel" ICTA claims it to be, nor does it stand for the proposition that any government regulation that involves physical occupation amounts to a *per se* taking, as NAA, NAHB and other commenters contend.[33] The primary flaw in these commenters' arguments is the consistent failure to grasp the distinction between leased property over which the antenna user has exclusive use, and common property over which the antenna user has no exclusive use.[34] This distinction is critical.

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30 *Loretto v. TelePrompTer Manhattan CATV Corp.*, 458 U.S. 419 (1982).

31 Comments of NAA at 6.

32 Comments of ICTA at 5; *see also* Comments of NAHB at 3-4.

33 CAI states, for example, that the Court in *Loretto* "held that any 'permanent physical occupation is a taking," a proposition far broader than the holding. Comments of CAI at 14.

34 For instance, CAI cites several inapposite cases holding that a cable operator may not install equipment on a landlord's rental property without the landlord's permission. Comments of CAI at 17. Likewise, ICTA cites cases holding that a tenant may not install an antenna on a roof, property that is not demised in the lease. Comments of ICTA at 5.

In *Loretto,* the New York statute allowed the cable company to install cables and other equipment on the landlord's building. *Loretto,* 458 U.S. at 422-423. The Court found that the installation constituted a "permanent physical occupation of the landlord's property by a third party," and was therefore a *per se* taking. *Id.* at 440. The Court found it particularly significant that the cable company had no prior relationship with the landlord -- it was, in the Court's words, a "stranger" -- and had no right whatsoever to occupy the landlord's property. *Id.* at 436.[35] A tenant, on the other hand, is not in any sense a "stranger" to the landlord's property, but has been specifically granted the right to occupy exclusively the leased premises.[36] Moreover, the antenna installation is in no way permanent; rather, the antenna will most likely be removed when the tenant moves at the expiration of the lease.[37] The case law is clear that once the landlord has granted the right of occupation to the tenant, the government may regulate the terms of that occupation without effecting a *per se* taking. *See, e.g., Yee v. City of Escondido,* 503 U.S. 519, 527 (1992); *FCC v. Florida Power Corp.,* 107 S. Ct. 1107, 1111 (1987) (discussed in the August 1996 *Order* at ¶ 45);[38] *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980) (no *per se*

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35 "[A]n owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property." *Loretto,* 458 U.S. at 436 (emphasis in original).

36 While a lease may contain some exceptions to the right of exclusive use (such as a landlord inspecting the property with notice, or entering the property during an emergency), such exceptions are irrelevant to the Fifth Amendment analysis.

37 DBS antennas, which measure 18 inches in diameter, may be installed in several ways without requiring the penetration of any exterior wall or surface, including weighted platforms and clamping devices for temporary attachment to balcony railings. No drilling or wall penetration is required for the cable connection from an outdoor installation into the residence, either. *See* Declaration of Lawrence N. Chapman, DIRECTV Vice President for Special Markets and Distribution, dated October 24, 1996 ("Chapman Dec.") at ¶ 3. More "MDU-friendly" DBS antennas and cabling devices will be available in the near future. *Id.*

38 ICTA implicitly recognizes the applicability of *Florida Power* to the installation of antennas on leased property by tenants, noting that the "cable operators in that case were using the property *at the invitation* of the property owners." Comments of ICTA at 6, n.7 (emphasis in original).

taking once owner has invited public onto its property and the occupation will not be permanent).[39]

Property law does not affect the Commission's power to include renters within Section 1.4000; in fact, it supports the elimination of its adopted distinction. The NAA argues that the Commission should not allow renters to install antennas on leased property because "the Commission's task will quickly become unmanageable" as it is forced to decide whether its rules preempt state fixture law, which determines whether the ownership of an item stays with the renter or converts to the owner when the lease expires.[40] This argument is a red herring. First, as the Consumer Electronics Manufacturers Association ("CEMA") states, a DBS antenna is not a permanent fixture, but can easily be installed and removed, and taken by the tenant to the next residence.[41] Second, even if a DBS antenna was a fixture under state law, such a determination is entirely irrelevant to whether the Commission should amend its rule to protect tenants from restrictions that impair their ability to use leased property for the installation of antennas. Third, allowing renters to install antennas for leased exclusive use areas will not increase the burden on the FCC; state fixture law will not be an issue for the Commission to resolve any more than billing disputes between DBS providers and subscribers.

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39 No commenter has contended that allowing renters to install antennas on leased property would constitute a "regulatory taking" as defined in *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978). As the National Association of Broadcasters ("NAB") states, eliminating lease restrictions on the installation of an antenna would be the kind of regulation repeatedly found to be consistent with the Fifth Amendment. Comments of NAB at 12-15

40 Comments of NAA at 6-7.

41 Comments of CEMA at 8, n.17 ("the comments confirm that antennas -- especially today's small, state of the art antennas -- are not fixtures which a viewer would want to permanently attach to another's property, but are best characterized as personal property that a viewer will take along whenever he or she moves").

Real property law supports eliminating the distinction between renters and owners, as there is little legal difference between possession by an owner and possession by a renter. A lease is a "non-freehold estate in the land itself," NAB notes in its comments, just like a fee simple and a life estate.[42] The Commission should not put itself or courts in the position of determining whether a person with a life estate, as opposed to another with a 100-year lease, may install an antenna. Any person with exclusive use of an area where the antenna is to be installed should be free from restrictions.

III. THE RECORD SUPPORTS ELIMINATING RESTRICTIONS THAT IMPAIR MDU RESIDENTS' ABILITY TO RECEIVE MVPD PROGRAMMING

The broad policy goals of Section 1.4000 cannot be accomplished simply by eliminating the distinction between renters and land owners. Approximately one-quarter of the population lives in MDUs, many of whom do not have exclusive use areas suitable for the installation of an antenna. While being mindful of the Fifth Amendment implications of the installation of antennas on common property, the Commission should fashion a rule that allows MDU residents to receive antenna-delivered MVPD signals.

While DIRECTV believes that free-market negotiations between MVPDs and building owners[43] will provide the greatest benefit to MDU residents, the Commission must adopt rules that remove the current barriers to competition in the MDU market. Specifically, the Commission should declare void exclusive contracts between incumbent cable operators and building owners that preclude competitive MVPDs from providing service to the MDU residents

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42 Comments of NAB at 7; Comments of DIRECTV at 11-12.

43 The term "building owner" includes a landlord, community association, condominium association, cooperative or any other entity that owns and/or operates an MDU.

through the landlord.[44] The Commission also should resolve its pending proceeding regarding inside wiring to allow MVPDs access to existing conduit and wiring inside MDU buildings on a non-interference basis.[45] Through these actions, the Commission will allow most MDU residents to receive two MVPD services, from the incumbent cable company and at least one alternative MVPD.

The statutory language requires the Commission to adopt a rule that prohibits all restrictions that interfere with the reception of antenna-delivered programming for all viewers. As noted above, Section 207 does not distinguish among viewers: the statute grants equal rights to all Americans, whether residing in single family homes, rowhouses, condominiums, apartments, townhomes or cooperatives. Moreover, Section 207 does not focus on the viewer's right to install an antenna, but instead guarantees that the "viewer's ability to receive video programming services" delivered via antennas will not be impaired by any restrictions.[46]

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44 The Commission should also prohibit any exclusive contract between a building owner and cable operator that purports to limit the right of a tenant to install an antenna on his or her exclusive use leased property.

45 *See Telecommunications Services Inside Wiring and Customer Premises Equipment,* CS Docket 95-184 ("Inside Wiring Proceeding").

46 ICTA's lengthy argument that Section 207 is not a "mandatory access" statute because it does not provide for "just compensation" is entirely inapposite. Comments of ICTA at 14-18. ICTA claims that interpreting Section 207 to apply to "Unowned or Uncontrolled Properties" would mean that "[p]rivate property owners would be unable to prevent a whole host of video service providers from forcing their way onto property owners' properties to install their dishes, equipment and wires." *Id.* at 14. Again, ICTA has failed to recognize the distinction between common property and leased property. DIRECTV agrees with ICTA that Section 207 is *not* a "mandatory access" statute in the sense that MVPDs should be allowed to "force their way onto property owners' properties." However, the refusal of Congress to provide for just compensation for building owners does not preclude the application of Section 207 to prohibit restrictions that impair MDU residents, whether or not they possess exclusive use areas, from receiving over-the-air MVPD signals. The Commission is therefore required to adopt a rule that allows MDU renters to receive this programming, and can do so by prohibiting lease restrictions that prevent renters from using exclusive use areas to install antennas and by voiding exclusive cable contracts. Moreover, ICTA's citation to cable access statutes and rejected precursor legislation cannot serve as a basis for the interpretation of Section 207; the interpretation of one statute by reference to an analogous

Allowing MDU residents to receive MVPD services also will serve the policy goals of Section 207 and Section 1.4000. Competition among MVPDs will be weakened if cable operators are able to maintain their current stranglehold on the substantial MDU market.[47] Universal access to MVPD services cannot be achieved without guaranteeing MDU residents the right to receive antenna-delivered programming. Moreover, as Philips/Thomson notes, making MVPD programming available to MDU residents protects these viewers' First Amendment rights, a right the Supreme Court has held to be "paramount."[48]

The only legal difference between the application of Section 1.4000 to renters and MDU residents is the applicability of the Fifth Amendment. While there is little dispute that an MDU resident may not use common property over which he or she has no right of exclusive use for the installation of an antenna without providing just compensation to the property owner(s),[49] the Constitution does not altogether preclude the Commission from adopting a rule that allows MDU residents to receive MVPD services via antennas. If the building owner owns the MVPD equipment or agrees to allow a third party to install the antenna, there is no taking.[50] The best

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but unrelated statute is an unreliable means of discerning legislative intent. 2A SANDS, SUTHERLAND ON STATUTORY CONSTRUCTION, § 53.05 at 349.

47 The Commission has found that cable operators have considerable market power in the MVPD market. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Second Annual Report, CS Docket No. 95-61 (December 11, 1995), at ¶¶ 194-209 ("markets for the distribution of video programming are not yet competitive").

48 Comments of Philips/Thomson at 12-14; *see also* Comments of CFA at 4-5.

49 *See, e.g.,* Comments of CAI at 14-18; Comments of NAA at 5-6; Comments of NAHB at 3-4.

50 DIRECTV agrees with CAI that "[i]t is clear that landlord, tenant in common, or association ownership of the cable [or antenna] installation would remove a situation from the *Loretto* analysis." Comments of CAI at 16. *But see* Comments of NAA at 10-12. NAA argues that requiring a building owner to install an MVPD antenna and wiring would significantly reduce the value of the building and preclude it from "realizing any 'economically beneficial or productive use of [its] land,'" citing *Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2886, 2893 (1992). NAA provides no support for this assertion; it is hard to believe that an MVPD installation would preclude economically viable uses or diminish the value of the building to the extent required to

solution is to remove barriers that prevent MVPDs and building owners from freely entering into agreements to provide programming to MDU residents.

The most important step the Commission can take to ensure that MDU residents can receive MVPD programming is to void exclusive contracts between cable companies and building owners. Commenters that urge the Commission to forebear from regulating MVPD-building owner contracts do not recognize the substantial barriers that have been created by these exclusive contracts,[51] most of which were entered into many years ago when cable television was the only MVPD.[52] Throughout the country, DIRECTV has been prevented from serving many MDUs because cable operators required building owners to grant exclusivity as a condition to the provision of cable television service to the MDU residents.[53] These contracts commonly last for years, some for the life of the cable franchise.[54]

The Commission has already recognized in this proceeding that it has the authority to prohibit private agreements that interfere with viewers' reception of MVPD signals via antennas. In the *August 1996 Order,* the Commission found that it could preempt private

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find a regulatory taking. *See Keystone Bituminous Coal v. DeBenedictis,* 480 U.S. 470 (1987) (most diminutions in economic value of a property will be insufficient to constitute a taking); *Euclid v. Ambler Co.*, 272 U.S. 365 (1926) (upholding regulation that diminished property value by 75%). In fact, the installation of MVPD equipment may very well *increase* a building's value.

51 *See, e.g,* Comments of Glenwood Management Corporation at 1 ("property owners, operating in a highly competitive market, are already meeting tenant needs by providing the latest in telecom services. It's a well-functioning, free-market process that doesn't need governmental intrusion."). Exclusive contracts garnered through market power would not exist in a "well functioning" free market.

52 *See* Chapman Dec. at ¶ 3.

53 *Id.*

54 *Id.*

covenants, such as homeowners association rules, that restrict the use of antennas.[55] In its comments, Philips/Thomson provides a comprehensive analysis of the Commission's power to void private contracts.[56] The very same reasoning applies to the Commission's ability to void exclusive contracts between incumbent cable operators and building owners.[57] Furthermore, as DIRECTV demonstrated in its initial Comments, these exclusive contracts violate communications policy by hindering the ability of MVPDs to provide programming to potential subscribers.[58]

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55 *August 1996 Order* at ¶ 45, citing *Connolly v. Pension Benefit Guaranty Corp.*, 480 U.S. 245 (1987).

56 Comments of Philips/Thomson at 7-9 (applying analysis to support Commission's power to prohibit lease restrictions on the installation of antennas).

57 Because other MVPDs do not possess the market power that cable television does, the same analysis would not apply to an exclusive contract freely entered into between an alternative MVPD and a building owner.

58 *See* Comments of DIRECTV at 19, citing Communications Act Section 628(b), 47 U.S.C. § 548(b) ("It shall be unlawful for a cable operator . . . to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor from providing programming to subscribers or customers."); *see also* 47 C.F.R. § 76.1001 (similar language).

IV. CONCLUSION

For the reasons stated above, the Commission should amend Section 1.4000 of its rules to eliminate the distinction between renters and landowners. The Commission also should preclude all exclusive contracts between cable operators and building owners as anticompetitive, so that viewers will not be impaired in the receipt of antenna-delivered MDU service.

Respectfully submitted,
DIRECTV, Inc.

By: _____

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October 28, 1996

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DECLARATION OF LAWRENCE N. CHAPMAN

1. I, Lawrence N. Chapman, am the Senior Vice President for Special Markets and Distribution for DIRECTV, Inc. My responsibilities include marketing DIRECTV's satellite programming services to both residents and owners of multiple dwelling units ("MDUs"), a term that includes apartment buildings, condominiums, and townhome developments.

2. DIRECTV can serve MDU residents in two ways. First, DIRECTV serves MDUs through its contractors who enter into agreements with building owners to provide service to residents via a master antenna. DIRECTV has, however, been precluded from serving many MDUs through such contracts, not because the building owner does not want to allow DIRECTV to provide programming, but because the building owner had been forced to grant the local cable company an exclusive contract. Cable operators commonly demanded -- and received -- these exclusivity provisions when they were the only multichannel video programming distributor ("MVPD") in the market. These contracts typically bind building owners for many years; in some cases, they last for the life of the cable franchise.

3. Second, MDU residents can receive DIRECTV by installing antennas on their balconies or in other leased or owned areas. There are numerous readily available ways in which small DBS antennas may be installed without requiring the penetration of any exterior wall or surface. These include weighted platforms with pole mounts and clamping devices for the temporary attachment to balcony railings. Such techniques can provide safe, non-intrusive antenna installation that in many cases can be hidden from view. Additionally, there are cable connection devices specifically designed for sliding glass doors and windows that allow cabling to be brought into the interior of the multiple dwelling unit without any need for drilling holes in building walls. DIRECTV is confident that once the Commission provides a confirmation of the rights of MDU residents to install antennas to receive alternative video programming, manufacturers will make available to the public an even greater variety of MDU-friendly antenna installation and cabling devices. For example, the transparent antennas made of leaded glass and flat plate antennas that are currently available for the European DBS market could be sold in the United States.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 25th day of October, 1996 at El Segundo, California.

Lawrence N. Chapman
Senior Vice President
Special Markets and Distribution
DIRECTV, Inc.