

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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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 and Multichannel )  
Multipoint Distribution Service )

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JOINT REPLY COMMENTS OF  
NATIONAL APARTMENT ASSOCIATION  
BUILDING OWNERS AND MANAGERS ASSOCIATION  
NATIONAL REALTY COMMITTEE  
INSTITUTE OF REAL ESTATE MANAGEMENT  
INTERNATIONAL COUNCIL OF SHOPPING CENTERS  
NATIONAL MULTI HOUSING COUNCIL  
AMERICAN SENIORS HOUSING ASSOCIATION  
NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS

Summary

The Commission should not extend its newly-adopted rules on placement of DBS, MMDS, and broadcast receiving antennas. Leases or similar private agreements governing the use of real estate and common areas are outside the scope of Section 207. Other parties are pushing the Commission to ignore Constitutional requirements and to go beyond Congressional intent.

These Reply Comments carefully analyze Constitutional objections to such an expansion. Charles M. Haar, Professor of Law at Harvard Law School and former Assistant Secretary for Metropolitan Development in the U.S. Department of Housing and Urban Development, describes the problems presented in a declaration attached to these Reply Comments. Professor Haar has over forty years' experience as a law professor, and for most of that time has been engaged in teaching and writing on property law and constitutional issues.

Professor Haar demonstrates that any extension of antenna regulation to leased property and common areas is a physical taking under the Supreme Court's decision in Loretto v.

Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

Professor Haar also discusses the doctrine of Hodel v. Irving, 481 U.S. 704 (1987), which recognizes that the Fifth Amendment protects each strand in an owner's bundle of property rights.

One of those strands is the right to exclude others, including the right to bar tenants from roofs and other premises.

Professor Haar rebuts any contention that the Constitution allows the Commission to give tenants or service providers the right to place antennas on property that does not belong to them, or requires building owners to make programming services available to tenants using the owner's facilities.

Professor Haar and the Joint Commenters also rebut the contentions of other parties regarding the role of the First Amendment. The First Amendment does not require provider access

to viewers. If the First Amendment actually secured access, Section 207 would be superfluous. More fundamentally, the First Amendment does not impose obligations on private parties. Building owners are not agents of the government for First Amendment purposes, and they cannot be forced to provide access to their private property, either for the benefit of service providers or for the benefit of viewers.

The language of Section 207 contains no statement explicitly authorizing the Commission to effect a taking of property rights, as required by Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994). Nor does it support any claim of implied authority to effect a taking. Id. Indeed, the language and placement of Section 207 point to the opposite conclusion. Section 207 directs the Commission to exercise its existing authority under Section 303 for a particular purpose within a particular time. Section 207 is not a grant of additional authority. Otherwise, Congress would have enacted Section 207 as an amendment to the Communications Act and codified it. Section 207 is uncodified and not part of the Act. In other words, the Commission must proceed under its existing enumerated powers, and Section 207 negates any implied delegation of new authority.

Neither Section 207 nor Section 303 grants the Commission jurisdiction over building owners or the landlord-tenant relationship. The economic market place will accommodate all legal interests of tenants. There is no threat of improper

marketplace discrimination, either against renters in general, or low-income and minority residents in particular.

Neither the marketplace nor the Constitution guarantee uniformity of treatment or outcomes. Indeed, any attempt by the Commission to extend Section 207 would actually create new disadvantages to various classes of viewers.

The Joint Reply Comments detail examples of the injury Commission rules would cause. Extending the Commission's antenna rules to 4.5 million units of public housing, Section 8 HUD-assisted housing, and low-income, tax-credit-financed housing will increase the cost of low-income housing to both government and tenants. It would impose increased installation, maintenance, and liability costs on the local governments that own public housing. Those costs would constitute an impermissible unfunded mandate, not covered by Congressionally appropriated funds. HUD Section 8 housing rules today may actually prohibit expenditures on the installation of receiving equipment, requiring HUD to amend its rules, and making the federal government liable for increased subsidy payments. The effects on military dependents' housing would be similar.

The common antenna proposals put forth by other commenters are impractical and do not avoid the objections raised above. Uniformity is impossible. Facilities installed by tenants or third-party service providers will be fixtures under many state laws, but not all. Common antennas are much more complicated and expensive to install than the commenters would have the

Commission believe. They will not be economically feasible in many cases. For example, the DBS industry considers common antenna systems in properties having fewer than 90 units generally unprofitable, and the owner of the apartment complex cited in the comments of Philips Electronics North America Corp. and Thomson Consumer Electronics, Inc., does not consider it feasible to install such facilities in many of its other properties. Approximately 10 million multi-housing units are located on properties of 100 units or fewer.

In the end, however, there is no need for the Commission to supplant free market forces. The multi-unit residential and commercial marketplaces are highly competitive. The market is responding to the desires of consumers without Commission interference or regulation.

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Introduction

The joint commenters urge the Commission to abandon any attempt to extend to leased multiple units and common areas its regulation of the placement of DBS, MMDS, and over-the-air television receiving antennas. The Commission simply does not have the statutory authority to embark on such a course, and any attempt to do so would lead the Commission into a Constitutional

minefield. The Commission must avoid any interpretation of Section 207 of the Telecommunications Act of 1996 that would effect a taking of property subject to a lease or located in a common area of a multi-tenant building.<sup>1</sup>

Our adversaries from the telecommunications industry hope to distract the Commission from such fundamental impediments with perorations about fairness and free speech -- but the Commission must not be fooled. Those arguments, though deeply attractive on their face, are just as deeply flawed in the context of Section 207. There is no evidence that Congress intended to advance the social policy goals embraced by the telecommunications industry; indeed, the means the providers urge upon the Commission would actually harm the interests of those the telecommunications industry claims to want to help.

The Joint Commenters wish to emphasize that they do not oppose the growth and development of any of the affected industries. In fact, many of the individual members of the Joint Commenters and their tenants are users of the services and equipment provided by such industries under arrangements that fit

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<sup>1</sup> In our Joint Comments filed on September 27, 1996 (the "September Comments"), in response to the Commission's Further Notice of Proposed Rulemaking released August 6, 1996 (the "FNPRM"), the joint commenters discussed the application of Section 207 to "similar real estate agreements," meaning certain types of agreements regarding commercial property that are not in the typical form of leases, but serve some of the same functions. In these Reply Comments, references to leases should be read as including such similar real estate agreements, references to common areas and property subject to leases should be read as including property subject to similar real estate agreements, and references to residents or tenants should be read to include occupants of property subject to similar real estate agreements.

their particular needs and requirements. For this reason, we look forward to the appearance of new transmission technologies and the spread of competition in the delivery of video programming services to improve the availability of and reduce the cost of such services. We are unalterably opposed, however, to any mandatory access rule. Such a rule would interfere with the efficiency and effectiveness of real estate markets in providing such services and hinder the progress that is already occurring at its own pace in the name of promoting such progress. Forcing property owners to immediately install today's technology would hinder the development of tomorrow's. Therefore, the Commission should proceed no further and should abandon any attempt to regulate the placement of receiving antennas on leased property or in common areas.

**I. EXTENDING THE COMMISSION'S ANTENNA RULES TO LEASED PROPERTY AND COMMON AREAS WOULD VIOLATE THE FIFTH AMENDMENT.**

The Joint Commenters have already demonstrated, on numerous occasions in these dockets, that any attempt by the Commission to mandate access to common areas and leased property would constitute a taking under the Fifth Amendment<sup>2</sup>. As further

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<sup>2</sup> The Joint Commenters wish to clarify two points here regarding the term "commercial" property and the scope of Section 207. First, in the September Comments, we stated that we did not believe that Section 207 was intended to apply to "income-producing" property. In the parlance of the real estate industry, the term "commercial" is not limited to office and retail space, but includes income-producing residential properties. The Commission may wish to take this account in any further discussion of the term "commercial." Second, we also  
(continued...)

evidence of the reality of the Constitutional problem presented by any extension of the Commission's current rule, the Joint Commenters offer an authoritative analysis by Charles M. Haar, Professor of Law at Harvard Law School, of the constitutional issues raised in this proceeding. Professor Haar has over forty years experience teaching law, has served as Assistant Secretary for Metropolitan Development in the U.S. Department of Housing and Urban Development, and has written extensively on property and land case issues. Professor Haar's declaration and curriculum vitae are attached as Exhibit A (the "Haar Decl.").

Professor Haar makes the following points in support of the arguments the Joint Commenters have earlier raised: First, permitting third party service providers to install antennas without the permission of property owners would unquestionably be a taking under Loretto v. Teleprompter Manhattan CATV Corp., 458

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<sup>2</sup>(...continued)

have always believed that office and retail properties, defined as commercial property as the Commission uses the term, were outside the scope of Section 207. Indeed, paragraph 48 of the FNPRM implies that the Commission sees a distinction between residential and commercial (i.e., retail and office) buildings. Further, it is clear from the proposals and arguments made by other commenters that while most commenters believe Section 207 applies to residential property, apparently none would extend it to nonresidential property. Consequently, we urge the Commission to refrain from extending Section 207 to income producing properties, and note that, at a minimum, there appears to be a consensus that retail and office space should be excluded. For all these reasons, these Reply Comments will discuss the issues in the context of residential property only, with the understanding that the same arguments apply to nonresidential property. We do not thereby intend to abandon the argument that all income-producing property, including retail, office, and residential space, is beyond the scope of Section 207.

U.S. 419 (1982);<sup>3</sup> second, allowing tenants to install their own antennas without the permission of property owners would also constitute a taking under Loretto; and third, directing building owners to make reception available using their own facilities would constitute both a taking under Loretto and a regulatory taking under Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). Haar Decl. at 3-12. In the process, Professor Haar's Declaration firmly rebuts all the contentions of the telecommunications industry regarding the meaning and applicability of Loretto, FCC v. Florida Power Corp., 480 U.S. 245 (1987), and Yee v. City of Escondido, 503 U.S. 519 (1992). Haar Decl. at 12-13. In addition, Professor Haar illustrates that the bundle of rights that constitutes the ownership of property includes the right to exclude occupants and others from occupying the roof and other areas of the property. Thus, under Hodel v. Irving, 481 U.S. 704 (1987), extending the antenna rules in the manner suggested by various commenters would produce a taking. Haar Decl. at 15-17.

We have earlier argued that aesthetic considerations are worthy of greater respect than the FNPRM has given them because aesthetics affect economics. Professor Haar demonstrates that aesthetic factors are also one strand in the bundle of property

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<sup>3</sup> Indeed, even the telecommunications industry concedes this point. See Comments of DIRECTV, Inc., filed September 27, 1996 ("DIRECTV Comments"), at 10; Comments of United States Satellite Broadcasting Co., Inc., filed September 27, 1996 ("USSB Comments"), at 7; and Comments of the Wireless Cable Association, International, filed September 27, 1996 ("WCA Comments"), at 5.

rights a buildings owner holds, meaning that the elimination of the right to address aesthetic factors is a taking. Haar Decl. at 17-25.<sup>4</sup>

**II. CONGRESS DID NOT INTEND TO AUTHORIZE THE COMMISSION TO TAKE ACTIONS OF DUBIOUS CONSTITUTIONAL PROPRIETY.**

Nothing in Section 207 directs the Commission to take private property or even implies that the Commission has such authority over building owners. Nor has Congress given the Commission such authority elsewhere in the Communications Act. Professor Haar's declaration stands as a warning to the Commission to avoid the treacherous shoals of unconstitutionality. The Commission should not embark on so serious a course on the strength of dubious authority and the urgings of a few interested parties.

**A. The Commission Cannot and Need Not Determine Whether Section 207 Is Constitutional; but the Commission Should, and the Courts will, Construe Section 207 to Avoid Constitutionally Suspect Actions.**

The National Association of Broadcasters ("NAB") asserts that the Commission has no authority to determine the constitutionality of Section 207. NAB Comments at 7. We agree. The Commission need not concern itself with whether Section 207 is constitutional.<sup>5</sup>

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<sup>4</sup> In his declaration, Professor Haar also addresses several other points, such as First Amendment issues and statutory interpretation arguments, which are discussed and cross-referenced below.

<sup>5</sup> See GTE California, Inc. v. FCC, 39 F.3d 940, 946 (9th Cir. 1994).

On the other hand, the Commission does have an obligation to avoid interpreting Section 207 in a way that might cause the Commission to violate the Constitution. Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994). In other words, the Commission is not responsible for the words of the statute and must implement them to the best of its ability -- but the Commission is responsible for how it interprets the statute and for avoiding any interpretation that might contravene the Constitution. Thus, it is misleading for NAB and other commenters to shout "Damn the torpedoes -- full speed ahead." It is the Commission that will bear the shock of any constitutional torpedoes it may encounter. The Commission would be particularly remiss were it to be hit by a torpedo that it has now been warned is off the port bow. In any case, Bell Atlantic requires the Commission to examine its authority carefully and make every effort to avoid any constitutional problem.<sup>6</sup>

**B. The Language of Section 207 Neither Permits Nor Compels the Commission to Impair Fifth Amendment Rights.**

In light of the Constitutional considerations outlined above and in Professor Haar's declaration, the Commission is obliged to construe Section 207 in a way that minimizes these concerns, notwithstanding the providers' argument to the Commission that it

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<sup>6</sup> Bell Atlantic is also important because of what it says about takings. Contrary to the comments of USSB at 9 and the National Association of Broadcasters ("NAB") at 11, the fact that Bell Atlantic involved an occupation by third party is not particularly significant here. As with Loretto, giving an existing tenant the right to occupy property is just as much a taking as creating a new commercial relationship.

should construe Section 207 broadly. Section 207 was a limited directive, not a broad mandate for the installation of facilities for the reception of DBS, MMDS, and over-the-air broadcast signals.

For example, as we discussed in the September Comments, Section 207 does not say that the ability of every viewer to receive programming by means of DBS, MMDS, or broadcast receiving antennas must be entirely unimpeded. Section 207 only requires the Commission, "pursuant to section 303 of the ... Act ...," to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive [certain] video programming services . . . ." Thus, Section 207 does not actually require the Commission to do what it proposes, and the Commission is not compelled to effect a taking.

The language of the statute is also important in light of Bell Atlantic, because Bell Atlantic requires an express statement of intention to effect a taking. Id. at 1446. There is no statement anywhere in the 1996 Act or the legislative history that orders the Commission to override the terms of privately-negotiated leases or to invade common areas. In other words, Section 207 does not contain the express statement required by Bell Atlantic. Indeed, we challenge any party to point out the words in Section 207 that make an express statement authorizing a taking.

Bell Atlantic also states that the Commission only has implied authority to effect a taking where the purpose of any

authority expressly granted by a statute would be defeated without such an implication. Id. Section 207 directs the Commission to prohibit certain restrictions, and that is all. The statute does not mention the property that would be taken or the owners of that property, so Section 207 cannot be said to imply that those types of property or those classes of owners would be subject to a taking. Furthermore, in issuing Section 1.4000 of its rules, the Commission was able to interpret Section 207 in a way that the Commission believes avoided at least some takings, so the Commission cannot argue that Section 207 cannot be interpreted in a way that avoids defeating the entire purpose of the grant. Thus, Section 207 contains no implied takings power, either.

Since Section 207 does not authorize the Commission to effect a taking, either expressly or by implication, and the Commission has no other authority under which to effect a taking, the Commission is not permitted to adopt rules invading leased premises and common areas.

Being neither compelled nor permitted to take anybody's property, the Commission should not attempt to do so.

**C. The Language Congress Used in Section 207 -- "Pursuant to Section 303" -- Does Not Give the FCC the Authority to Affect Landlord-Tenant Relations.**

Section 207 cannot reasonably be construed as a broad delegation of authority to the Federal Communications Commission to regulate landlord-tenant relations. Indeed, by its literal terms, Section 207 is not a grant of jurisdiction at all:

**Sec. 207. Restrictions on Over-the-Air Reception Devices.**

Within 180 days after the date of enactment of this Act, the Commission shall, pursuant to section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.

(emphasis supplied). Literally, Section 207 is a one-time direction to the Commission to promulgate regulations concerning receiving devices under its existing authority by a date certain. Since the Commission has already complied with that direction, Section 207 has served its purpose and is of no further force and effect, *i.e.*, it is *functus officio*. That this reading of the limited and transitory role of Section 207 is correct is demonstrated by the fact that Congress itself did not provide for the codification of Section 207 in the Communications Act but only as a footnote to Section 303 in Title 47 of the U.S. Code. 110 Stat. 114

As further evidence that Section 207 is not a self-contained delegation of authority, we note that Congress would not have intended for the Commission to lack authority subsequently to amend rules once promulgated as required by Section 207. Section 207 cannot be reasonably construed to make the rules promulgated by the date certain immutable thereafter. Thus, any rules issued pursuant to Section 207's direction can only be under the authority provided in Section 303, and Section 303 marks the bounds of the Commission's ability to implement Section 207.

None of the authority the Commission might invoke under Section 303 would warrant any attempt to regulate the landlord-tenant relationship, as urged by various providers. Section 303 basically combined Sections 4 and 5 of the Radio Act of 1927,<sup>7</sup> and neither of those sections nor any of the original subsections of Section 303 has ever been interpreted as giving the Commission power over receiving installations. Indeed, the 1927 Act, which largely became Title III of the 1934 Act, embodied a Congressional rejection of the British system of licensing broadcast receivers. As to the remaining basis of Commission jurisdiction, see U.S. v. Southwestern Cable Co., 392 U.S. 157, 167-68 (1968), under Title II (Common Carriers) -- derived from the Interstate Commerce Act -- the Commission has "jurisdiction over only common carriers and not all of those." Pennsylvania R.R. v. P.U.C. of Ohio, 298 U.S. 170, 174 (1936).

When Congress wanted to reach out to non-licensees it did so by specific legislation, as it did twice to reach manufacturers of television receivers in adding Sections 303(s) and 330; in adding Section 302 to reach devices interfering with radio reception; in amending Section 303(q) to reach non-licensee owners of radio towers; in amending Section 224 to give the Commission regulatory powers over telephone and electric poles; etc.

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<sup>7</sup> H. Rep. 1918, 73d Cong., 2d Sess., to accompany S. 3285 at 47 (1934).

The Commission should not accept the argument that Section 303(v) gives the Commission exclusive jurisdiction over satellite receiving dishes.<sup>8</sup> First of all, that contention proves both too much and too little. Section 207 clearly does not contemplate exclusive Federal jurisdiction, and Subsection (v) does not address the subject of MMDS and over-the-air broadcast antennas at all. Second, Section 303(v) speaks of exclusive jurisdiction over "regulation," and private landlord-tenant leases do not reasonably fall within the term "regulation." Third, subsection (v) speaks only of the "provision" of satellite service, and the building owners are not "providing satellite service." If the building owner had any intermediary role, the service would no longer even fit the statutory definition of "direct-to-home satellite services" in the second sentence of subsection (v), since the receiving equipment would not be on the subscriber's premises but on the building owner's. Given that the Commission has traditionally never licensed satellite receiving dishes (except in the international common carrier service),<sup>9</sup> Congress would have used more encompassing language than "provision," if it had intended thereby to reach satellite reception under subsection (v).

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<sup>8</sup> This argument was made in petitions for reconsideration of Section 1.400. So far as we are aware, it was not made in any of the comments.

<sup>9</sup> See Section 25.131(i) of the Commission's rules, reflecting the fact that Section 301 of the Act gives the Commission Title III jurisdiction over only emitters.

The Commission cannot find a grant of authority to reach the landlord-tenant relationship in Section 303(r) ("make such rules and regulations..., not inconsistent with law, as may be necessary to carry out the provisions of this Act"), since Section 207, as noted above, is not a "provision[]" of this Act...." To construe Section 303(r) otherwise would result in a circularity because of the reference back to Section 303 in Section 207.

**III. CONGRESS COULD NOT HAVE INTENDED FOR THE COMMISSION TO PURSUE THE ILLUSORY GOAL OF PROVIDING ALL VIEWERS WITH EXACTLY THE SAME VIEWING CHOICES.**

From the beginning, the telecommunications industry has attempted to convince the Commission that Congress meant to bestow the benefits of Section 207 on all and sundry. In particular, service providers object to any distinctions based on who happens to own a particular parcel of real estate. We recognize the appeal of this plea for uniformity and consistency. Unfortunately, uniformity and consistency are impossible to achieve in this case, and they were never goals that were contemplated -- let alone mandated -- by Congress. If the Commission were to intervene in the realm of lease agreements and common areas, it would quickly find that it had created new classes of people with different rights, depending on what state they live in, how old or how small their building is, who owns the building, how it was financed, and a range of other factors.

Rather than pursue the illusory goals of uniformity and consistency, the Commission should accept that even its current rule does not provide uniformity and consistency, and this is what Congress contemplated.

**A. The Commission Should Not be Misled by the Argument that Tenants and Owners Must Have the Same Media Alternatives -- No Regulatory Scheme Could Constitutionally Eliminate Inherent Differences Among Providers.**

The Commission should not be misled by the earnest protestations of some commenters that all viewers want, and should have the right to, access to the services in question. Some commenters advocating this position stand to benefit from the opportunity to gain access, at no cost, to the property of third parties.<sup>10</sup> Other commenters, such as MAP, undoubtedly believe that they are advocating the public interest -- but, as we discuss below, we think that they may not have considered the full effects of their position on the very people they wish to help.<sup>11</sup>

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<sup>10</sup> Notwithstanding the Comments of Philips Electronics North America Corp. and Thomson Consumer Electronics, Inc. ("Philips/Thomson Comments"), at 7, there is no evidence that Section 207 was patterned after any civil rights legislation. Indeed, the 1996 Act does express Congressional concern for low income groups, but not in Section 207. For example, as noted in the Comments of the Media Access Project ("MAP Comments") at 5, new Section 254(b)(3) addresses access by low-income consumers to telecommunications and information services.

<sup>11</sup> MAP's comments at 11 are also inapposite: many leases would forbid the installation of A/C units, bird feeders and wind chimes, and antennas are no different.

The issues before the Commission are not as simple as most commenters would have it. Section 207 raises many complexities, and the more things interested parties try to make it do, the more complex it becomes.

Indeed, there are so many factors involved in defining the relationship between a particular resident and a particular building owner that it is practically impossible to achieve a uniform outcome with other residents and their building owners. In addition, the Constitution will not permit the wholesale violation of property rights that would be necessary to achieve such an end. As discussed below, state laws, lease provisions, building characteristics, new technologies, the needs and desires of the parties, and many other factors all come into play. The Commission can only adopt rules of general applicability -- it cannot tailor its rules to meet every possible contingency, and if it tried it would inevitably fall afoul of one restriction or another.

**B. Section 207 May Lead to Disparate Results for Tenants and Homeowners, but Congress Did Not Intend to Burden Public Housing Agencies and Low Income Tenants with the Additional Costs of an Array of New Services.**

Perhaps the most important respect in which the Commission is being asked to impose uniformity is in the treatment of renters as opposed to owners of property. Many commenters have argued that for the Commission to recognize that leased premises and common areas are not subject to Section 207 would favor property owners over tenants. From this they go on to assert that not extending Section 207 to cover leased premises and

common areas would constitute discrimination against low income and minority groups, because members of those groups are more likely to be renters than owners of property. Therefore, these commenters argue, to relieve such individuals of the burden of this alleged discrimination, the Commission must grant them the same viewing rights as people who own their residences.<sup>12</sup>

In fact, however, it is those who insist on overriding lease restrictions and invading common areas who would impose the greater burden on those least able to afford it.<sup>13</sup> Guaranteed

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<sup>12</sup> See, e.g., Comments of CellularVision USA, Inc. ("CellularVision Comments") at 5-6; DIRECTV Comments at 6-8; MAP Comments at 5-8; NAB Comments at 3-6; Comments of the National Rural Telecommunications Cooperative ("NRTC Comments") at 4-5; Philip/Thomson Comments at 3.

<sup>13</sup> Not that we concede that there is any unlawful or unreasonable discrimination in the first place. Section 207 has nothing to do with the status or rights of tenants, and properly read it does not harm or impose any burden on tenants. Furthermore, any disparities in wealth or race between owners and tenants are irrelevant because Section 207 does not discriminate on its face or as applied. The Supreme Court has ruled that a disproportionately adverse effect upon a racial minority is unconstitutional only if that effect can be traced to a discriminatory purpose. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 272 (1979) (citing Washington v. Davis, 426 U.S. 229 (1976); Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); see also Adarand Constructors v. Peña, 115 S. Ct. 2097, 2107 (1995)). There are many poor and minority property owners and many rich, nonminority tenants, and there is no evidence that omitting leased property and common areas could be traced to any discriminatory purpose. Indeed, as we will show below, if extended to leases and common areas, Section 207 might actually require that services be provided disproportionately to wealthier renters.

In addition, the discrimination argument proves too much: Nothing in Section 207 justifies requiring property owners to pay the cost of providing service to tenants, or mandates any party to provide free service to lower income Americans. Merely because some people can afford to pay for a service and others cannot, or can afford to live in a place where service is

(continued...)

access and common antenna requirements are essentially a tax on the poor. Furthermore, because the housing market is made up of many different types of housing, efforts to override lease restrictions will actually engender more discrimination and less uniformity.

The federal government has gone to great lengths to establish incentives for the private sector to serve the low income housing market. Any reduction in the incentives for that private sector involvement, including an increase in costs, will be an impediment to the federal government's efforts in this regard. Even in heavily subsidized markets, what may appear to be modest changes can have severe unintended consequences. Thus, any attempt by the Commission to impose access or require service will be counterproductive. Furthermore, Congress has a long history of experience with these programs, and it is very unlikely that it would have used Section 207 to impose new requirements on providers of low-income housing without some discussion of the effects of such requirements.

With this in mind, we urge the Commission to consider the following points regarding the structure of the housing market.

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<sup>13</sup>(...continued)  
available and others cannot, does not mean there is discrimination. As long as individual users are liable for their own subscriptions there is no public policy that says that a rule that might benefit a group that is predominantly better off financially than another group is discriminatory. See National Ass'n of Theatre Owners v. FCC, 420 F.2d 194 (D.C. Cir. 1969 cert. denied 397 U.S. 922 (1970)).

- The apartment market is very diverse, and the economic characteristics of different-sized buildings affect the economic viability of different types of capital improvements. For example, there are approximately 10 million units in properties that contain between five and 100 units, and nearly six million in buildings of between five and forty units. In apartment properties containing only two, three, or four rental units, there are over 2.5 million units.<sup>14</sup>
- There are approximately 4.5 million units of low income housing in the United States, and all of these units are governed by some type of lease.<sup>15</sup> If the Commission interprets Section 207 as requiring all viewers, regardless of ownership status, to be afforded the benefits of DBS, MMDS, and broadcast television programming, it will have to override relevant provisions of every one of those leases.

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<sup>14</sup> Attached as Exhibit B is a chart showing the number of rental properties in the United States and the number of properties containing specified numbers of units. Exhibit C is another chart showing the number of apartment properties with 5-40 units, and the total number of units in buildings of each size from five through forty.

<sup>15</sup> There are 1,250,000 public housing apartment units owned by local governments across the country, 2,375,000 units that have been built using Department of Housing and Urban Development funds under the "Section 8" program, or are part of the Section 8 tenant-based program, and approximately 900,000 units that have been built by the private sector under the federal Low Income Housing Tax Credit program. These programs are designed to provide affordable housing for all Americans. By definition, residents in these 4.5 million units alone are low income.