- The various low income housing programs are governed by different rules, which may conflict with any Commission mandate. To avoid conflicts, the Commission would have to exempt these programs.[16]
- Many other kinds of housing for low and moderate income residents may be affected, such as housing on military bases, university dormitories, and low-cost housing surrounding military bases and universities.[17]

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[16] For example, because public housing is owned by local governments, extending Section 207 to apply to leases and common areas in such buildings could constitute an unfunded mandate. Unfunded Mandates Reform Act of 1995, 109 Stat. 48 (1995). In addition to any Fifth Amendment taking that might arise, local governments will be forced to bear the costs of installation, maintenance, and liability. Congress has not appropriated any funds to cover those expenses, so the Commission will have to exempt public housing to avoid imposing an unfunded mandate -- thus creating a class of low income citizens that will not enjoy the benefits of video programming for all.

In addition, HUD Section 8 housing is subject to severe restrictions on the types of expenditures owners may finance under HUD guarantees. HUD rules do not currently include satellite programming delivery systems, so HUD would have to add such facilities to its list of eligible expenses. See Exhibit D. In any case, the federal government is ultimately responsible for all Section 8 housing subsidies. If HUD amended its list of eligible expenses, Congress would have to appropriate additional funding to cover the new costs. In the absence of clear Congressional intent, the Commission might find it advisable not to override HUD rules, but this would, once again, create a class of low income residents who are ineligible for services under Section 207.

[17] The Department of Defense estimates that there are 700,000 off-base rental housing units used by members of the military. Reimbursement for rents paid is via the Base Allowance for Quarters and the Variable Housing Allowance. In many cases, the amount of the subsidy is inadequate to secure decent housing. Given Federal budget constraints, the allowances are unlikely to see a dramatic increase in the near-future. If owners of the off-base housing are mandated to install over-the-air satellite reception devices and systems, the subsequent increases in rents

(continued...)

Thus, an examination of the structure of the housing market, particularly the low income market, demonstrates that the extension of Section 207 to leased properties and common areas will result in the Commission either imposing additional costs on low income residents and the providers of their housing, or providing exemptions for such housing and thereby creating an array of new classes of viewers, each with different rights. Ironically, the buildings most likely to be able to support the installation of new programming delivery systems are large properties occupied by upper income and upper middle income residents.[18] In any case, any attempt by the Commission to avoid making some type of distinction among different types of "viewers" would be futile -- but that does not mean the Commission would be engaging in or condoning unlawful, or even unreasonable, discrimination by acknowledging the limits of its responsibilities under Section 207.

C. Failure to Mandate Access by all Providers is Not an Abridgment of Free Speech.

Various commenters have argued that the First Amendment prohibits the Commission from making a distinction between viewers who own and control the premises on which they wish to

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[17](...continued)
may drive more armed services personnel into even lower quality housing. This runs contrary to what the Pentagon is trying to do to improve off-base housing quality.

[18] See Part IV.B for further discussion.

place an antenna and viewers who do not.[19] These claims take two basic forms. One argument is that Section 1.4000 violates the free speech rights of service providers that wish to deliver their programming to potential viewers who do not live in places that permit the placement of appropriate antennas.[20] The second argument is that Section 1.4000 violates the First Amendment because it restricts the right of certain members of the public to obtain access to certain information sources.[21]

Both views are incorrect. The First Amendment does not grant video programming providers the right to deliver their "message" to all potential customers, regardless of where they live. Nor does the First Amendment include a broad, general right of access by viewers to all information sources, regardless of cost, location, technological factors, and the rights of property owners. We urge the Commission to bear in mind that the First Amendment applies only to actions of the government, not of private individuals. Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Public Utilities Comm'n of the District of Columbia v. Pollak, 343 U.S. 451, 461 (1952); Cohen v. President and Fellows of Harvard College, 568 F. Supp. 658 (D. Mass. 1983), cert. denied, 469 U.S. 874 (1984). The restrictions that the

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[19] MAP Comments at 10; NRTC Comments at 10; Comments of Pacific Telesis Group ("PacTel Comments") at 4; and Philips/Thomson Comments at 12-14.

[20] PacTel Comments at 4.

[21] MAP Comments at 10; NRTC Comments at 10; Philips/Thomson Comments at 12.

telecommunications industry seeks to evade are imposed by private agreements, not the government. Thus, those restrictions do not implicate the First Amendment at all.

1. Service providers do not have a constitutional right to reach all potential customers.

The Supreme Court has already ruled that the First Amendment does not guarantee that a person who wishes to speak shall have unrestricted access to property owned by another person. In Pacific Gas & Electric Co. v. Public Utilities Comm'n of California, 475 U.S. 1 (1986), the Supreme Court struck down a regulation compelling a utility to include a newsletter containing the views of a consumer group with its bills to customers, on the ground that the requirement infringed on the electric company's First Amendment rights.

The same is true when the property in question is real property. For instance, in Greer v. Spock, 424 U.S. 828, 836 (1976), the Court held that a military reservation could ban political speeches and demonstrations because the First Amendment does not mean that the public has the right to speak whenever and wherever it pleases. The Supreme Court has also found that the government may restrict the number of service providers that occupy its property. City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986).[22] If the government

[22] In Preferred, the Court ruled that the First Amendment rights of an applicant for a cable television franchise might have been violated, and remanded the case for further factual inquiry -- but the Court did not find that the denial of the franchise had been a per se violation of those rights, thus (continued...)

can restrict access to its property, then surely a private landowner can as well, since the First Amendment governs the activities only of the government, not private parties. Indeed, in Adderley v. Florida, 385 U.S. 39 (1966), the Supreme Court held that the First Amendment does not grant an absolute right to conduct a demonstration on government property, stating that "[t]he State, *no less than a private owner of property*, has power to preserve the property under its control for the use to which it is lawfully dedicated." Id. at 47 (emphasis added). Implicit in this statement is the idea that a private landowner has a greater right to restrict access than does the government.

In fact, not only do private property owners have a greater right to restrict access to their property than does the government, but private restrictions on access by service providers do not implicate the First Amendment at all.[23]

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[22](...continued)
implicitly admitting that the City could limit the number of service providers occupying its rights-of-way.

[23] CBS v. National Democratic Committee, 412 U.S. 94 (1973). The FNPRM cites Shelley v. Kraemer, 334 U.S. 1 (1948), in which the Supreme Courts ruled that the state action doctrine extends to racially restrictive covenants because of the involvement of the courts in enforcing those covenants. FNPRM at ¶ 46, n.130. Shelley and related cases are, however, rare exceptions limited to very specific areas, and we are aware of no case holding that enforcement of a lease term might constitute a violation of the First Amendment. Indeed, if a broadcaster such as CBS is not required to sell air time to a political party, CBS, 412 U.S. at 132, which would seem to be the paradigm case in which the First Amendment might impose an access obligation on a private party, since CBS is a government licensee, then it seems unlikely that a building owner would have such an obligation. Indeed, the Supreme Court's earlier decisions imposing such obligations on shopping center owners have been overruled. See
(continued...)

PacTel, among others, cites PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) for the proposition that the First Amendment rights of the public outweigh the Fifth Amendment rights of property owners. This is a serious misreading of PruneYard. What that case actually held is that a state may require shopping centers to permit members of the public to collect petition signatures under reasonable rules and regulations. The decision turned on the authority of the state government and the Court reaffirmed its earlier decision that the federal Constitution does not grant a right of access to private property. Lloyd v. Tanner, 407 U.S. 551 (1972). See also Haar Decl. at 25-27.

PruneYard is also distinguishable because it did not involve a permanent invasion of property, but only a temporary right of access, subject to reasonable rules adopted by the property owner.

Since Section 207 does not create new individual rights in expression that apply to leased property and common areas, PruneYard is irrelevant. Even if Section 207 did create such rights, there would be a taking, because the alleged access

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[23](...continued)
Hudgens v. NLRB, 424 U.S. 507, 516-521 (1976).

For example, although DBS operators and broadcasters have public service obligations, they are not required to carry the programming of every person who tries to buy time. CBS v. National Democratic Committee, 412 U.S. 94 (1973). Building owners are neither common carriers nor government licensees, and therefore cannot have a greater obligation to make their property available to any person who requests it than do public utilities and government licensees.

rights would be new rights, not preexisting limitations on an owner's property rights.

2. The First Amendment does not establish an unlimited right of access to all forms of information.

Some commenters assert that the Commission must impose access obligations on building owners because the First Amendment grants potential viewers the right of access to information. The great irony -- and the obvious fallacy -- of this argument is that if it were correct, Section 207 would be unnecessary. If Section 207 were an expression of a general First Amendment right to obtain access to any and all forms of information, then every apartment resident in the country who lacks good over-the-air reception, cable service, satellite service, or access to any of a multitude of other sources of information, such as the Internet, has had a constitutional claim for years.

The fact is, of course, that the failure to mandate access is not an abridgement of free speech. The First Amendment does not grant such broad rights to viewers, and limiting the alleged scope of Section 207 raises no First Amendment issues whatsoever. "The First Amendment does not reach acts of private parties in every instance where the Congress or the Commission has merely permitted or failed to prohibit such acts." CBS v. Democratic National Committee, 412 U.S. 94, 119 (1973).

It is true that the Supreme Court has found that the First Amendment affords some protection to the public's right to obtain information, but that right is far more limited than MAP, NRTC,

and Philips/Thomson would have the Commission believe. The cases recognizing the concept of "informational rights" either involve very specific factual situations, or very broad, general statements of policy, which clearly cannot be applied indiscriminately.[24] Furthermore, the Supreme Court has explicitly stated that these informational rights are not absolute. For example, there is no absolute right to obtain access to information in the possession of the government,[25] and the government can pass laws banning the distribution of leaflets on private property without the owners' consent.[26]

Philips/Thomson and MAP put great store in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), which contains expansive language regarding the "right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences . . . ." id. at 390. That case upheld the Commission's rules implementing the "fairness doctrine," and thus

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[24] See, e.g., Richmond Newspapers, Inc v. virginia, 448 U.S. 555 (1980) (First Amendment protects right of public to attend criminal trial); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (public has right to receive information about prescription drug prices); Procunier v. Martinez, 416 U.S. 396 (1974) (prisoner's wife has First Amendment right to receive uncensored mail); Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969) (fairness doctrine is justified in part by public's right to receive information); Stanley v. Georgia, 394 U.S. 557 (1969) (First Amendment protects right to private possession of obscene material).

[25] Houchins v. KQED, Inc., 438 U.S. 1 (1978).

[26] See Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (stating that the First Amendment does not prohibit "a state from preventing the distribution of leaflets in a church against the will of the church authorities.").

dealt primarily with the right of a private party to obtain access to spectrum-limited facilities licensed to broadcast licensees. Red Lion must also be read carefully in light of the Supreme Court's later decision in CBS v. Democratic National Committee, 412 U.S. 95 (1973). CBS makes it clear that broadcasters have discretion to refuse to carry advertisements and other programming, and that even the goal of advancing the First Amendment cannot turn broadcasters into government agents who are subject to the First Amendment. By statute, of course, broadcasters -- let alone building owners -- are not common carriers. See Network Project v. FCC, 511 F.2d 786, 795 (1974); Section 3(10) (broadcasters are not common carriers). By the same token, advancing First Amendment principles cannot turn building owners into government agents, either.

In addition, none of the cases that has found a right to obtain information on the part of a listener has involved a private restriction such as a lease. The cases all involve government regulations that have restricted the ability of some party to obtain information. Section 207 does not limit the ability of any party to obtain information, nor does Section 1.4000 of the Commission's rules. Both the statute and the rule limit certain restrictions, but the Commission has no constitutional obligation -- or statutory mandate -- to lift all such restrictions. Furthermore, extending Section 207 to cover leases and common areas would invalidate private restrictions, something the courts have never done to advance First Amendment

interests. The First Amendment protects speakers, and to some degree listeners and viewers, against government intrusion -- it does not protect private parties against freely entered into private limitations on their use of another's property.

It is also clear that the First Amendment precludes the government from forcing building owners to install their own facilities and provide programming services to tenants and residents. The Supreme Court has repeatedly refused to expand the First Amendment rights of some at the expense of others.[27] The only exceptions to these cases have involved obligations imposed on broadcast licensees and cable companies.[28] Private

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[27] See, e.g., Pacific Gas and Electric Co. v. Public Utilities Comm'n of California, 106 S. Ct. 903 (1986) (order by utility commission granting consumer group access to billing envelopes violated First Amendment); Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley, 454 U.S. 290 (1981) (striking down limit on contributions to ballot initiative committees); Buckley v. Valeo, 424 U.S. 1 (1976) (invalidating limits on candidate expenditures).

[28] As discussed above, the critical factor in the Red Lion case, 395 U.S. 367, was that Red Lion held an FCC broadcast license. The Supreme Court found that the scarcity of the broadcast spectrum justifies imposing obligations on licensees that the government would be not be permitted to impose on nonlicensees. Because building owners are not broadcast licensees, this logic does not apply. Likewise, the Supreme Court has upheld the 1992 Cable Act's must-carry rules -- at least, so far -- because it found that they are content neutral and impose only an incidental burden on speech. Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445 (1994). The court did not say, however, that the interests Congress sought to advance -- preserving over-the-air television, promoting competition and promoting a multiplicity of information sources, were mandated by the First Amendment. Finally, the Supreme Court has yet to directly address the constitutionality of cable leased access and public access requirements. The D.C. Circuit, however, has upheld them, citing Turner. Time Warner Entertainment Co., L.P. v. FCC, 93 F.3d 957 (1996). Therefore,

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property owners fall into neither category. Therefore, the Commission should abandon any attempt to impose access obligations on building owners.

D. Attempting to Preempt Lease Restrictions Will Raise a Myriad of Different Factual Situations, Depending on Lease Terms and State Law, that the Commission is Not Equipped to Handle.

As we noted in our September Comments, over 430 building owners have already submitted their leases to the Commission, asking which provisions of those leases would be affected by any possible Commission action. In the September Comments, we also offered the example how an ingenious apartment resident in Kansas is trying to circumvent the terms of his lease by attaching an antenna to a length of 2" x 4" lumber and putting it outside his window.

As it stands, all such disputes are left to the private sector to resolve. Every one of the leases cited above contains not just one but many provisions that could be contravened by installing an antenna. Individual property owners and managers, along with residents, are making their own decisions about how best to accommodate residents' telecommunications needs and these decisions are reflected in relevant lease provisions. If the Commission overrides all such lease provisions, however, the Commission itself will have to address all of the myriad of

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[28] (...continued)
access requirements may not violate the First Amendment when imposed on entities in the business of disseminating information. That does not mean, however, that the government's interests would be found strong enough to compel property owners, who are not that business to take on similar obligations.

issues involved, and make decisions about them. We do not believe this is a task that the Commission is equipped to perform. Nor do we believe the Commission really wants to undertake the task, rather than leaving it to the competitive real estate market and the parties themselves.[29]

Furthermore, as we noted in our discussion of Loretto in the September Comments, the Commission has yet to take any notice of the effects of state fixtures laws. The telecommunications industry has also conveniently forgotten to consider that issue, even though the Commission has recognized the problem in its existing cable home wiring rules. 47 C.F.R. § 76.801. Those rules do not apply if cable home wiring is a fixture under state law, because of limitations on the Commission's authority under

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[29] Several telecommunications industry commenters have made points that illustrate the range of state law issues that might arise out of an attempt to override lease provisions. For example, Pacific Telesis is correct when it says that a lease can be a contract to deliver a package of services and facilities -- but if that contract does not include access to certain services or the right to install certain facilities, then those services and facilities are not included. See PacTel Comments at 2-3. Interpreting such lease provisions is ultimately a question of state law. In a second example, NAB asserts that apartment residents have interests in common areas under the terms of the leases, other contracts, and state law. NAB Comments at 14. This, of course, is our point -- residents' rights are defined by law and contract and expanding them is a taking. We would also note that we are unaware of any authority for the proposition that the right to watch television is part of any of a landlord's implied covenants.

Finally, the scope of a tenant's right to make changes in the property reasonably necessary for the tenant's use of the property is also a matter of state law. See PacTel Comments at 3. We doubt that any state has found the right to install an antenna is reasonably necessary to make use of the property. There is no common law right to watch television.

the Cable Act. The Commission's authority under Section 207 is no greater.

Thus, it will be impossible for the Commission to adopt any rule that applies uniformly to all tenants and residents all across the country. In other words, one of the fundamental claims of the telecommunications industry -- that Congress meant to give all viewers the same rights and the Commission must do likewise -- is false.

E. The Competitive Real Estate Market Will Respond to the Viewing Choices Tenants Demand.

As we have noted in our earlier filings, building owners benefit from satisfied tenants, so it is in their interests to meet the demands of the market. For example, we earlier provided the Commission with information regarding the practice in the shopping center industry of ensuring that retail tenants have full access to satellite communications, if they desire it, and a choice of service providers.[30]

The apartment industry is also responding to the demands of its customers by providing advanced communications facilities. For example, at the National Apartment Association 1996 Educational Conference in Dallas, Texas in June, 1996, Howard F. Ruby, Chairman of R&B Realty Group of Los Angeles, California made the following comments:

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[30] Declaration of Stanley R. Saddoris, attached as Exhibit A to Joint Comments of the National Apartment Association, et al., in IB Docket No. 95-59, filed April 15, 1996. This example is only one of several ways in which this issue is dealt with in shopping centers.

> Apartments that are successful have something unusual. It used to be health clubs and game rooms. To be unusual, you have to have what I call a "screecher." What is a screecher? It is something that causes someone driving by your property to slam on the brakes and have the car go "screech" because what they have just seen is so different or so attractive. Today, a revolution as dramatic as garden apartments thirty-five years ago is happening. It is a major change, a revolution. We are talking about high tech services. Let me give you two recent example. First, there is an apartment building in Greenwich Village that has just put in the internet using its own Local Area Network....In two months the property has been fully rented and 70 percent of the residents have signed up for the internet service. Second, an apartment property in California put out a banner that says, "Free Internet Service -- Classes Provided). This banner made a great deal of potential renters "screech".
>
> How do you keep your apartment buildings up to date so you can attract tenants? Work is no longer a place you go to, but what you do. There are 9 million Americans telecommuting to work. Telecommuting is growing at a rate of 20 percent a year and two million businesses now have telecommuting policies for their employees. Internet is a major bombshell. Think back to that apartment property in Greenwich Village. The owner of that property is providing his residents with a new and revolutionary service.

As these examples show, the market is responding to tenant demand, and government intervention is unnecessary.

F. Congress Did Not Intend for the Commission to Adopt an Industrial Policy that Would Force Building Owners to Install Costly Telecommunications Facilities that May Be Overtaken by, and Stymie, Technological Change.

Several commenters, principally Philips/Thomson, have proposed particular methods of delivering video programming services to building residents. Others have simply asserted that one way or another tenants and residents must have access to such services, in the name of providing all Americans with access to the latest technology.

Ironically, if the Commission adopts any of these proposals, it will be defeating the very goal it will be attempting to advance. For instance, if building owners are required to install their own infrastructure, they will presumably be forced to do it in relatively short order. This means they will be installing current technology at great expense, but if there is one thing we know about the telecommunications industry today it is that it is changing very rapidly. Indeed, the 1996 Act was intended to both accommodate this phenomenon, and encourage it further. If building owners install today's technology, however, in a very short time that current technology may be completely superseded, leaving viewers served by outmoded facilities.

Under such a scenario, technological growth actually will be delayed, because there will be insufficient incentive for building owners to replace the old technology with the new, thus limiting the potential market for it. This is directly the opposite of what the Commission's policy should be under Sections 7(a) and 303(g) of the Act.

Such a policy would also reduce competition, not advance it as some commenters have claimed. While some owners of upscale properties might find that their residents are able and willing to pay a higher price for new amenities, the owners and residents of most properties would have to settle for the old DBS, MMDS, and over-the-air systems they would have in place. This may be good for the current DBS, MMDS, and broadcasting industries -- but the market entrants of the future will have to wait their

turn, as will all the residents of most buildings wired for the old technologies, no matter how badly they want the new ones.

Therefore, to encourage technological development, the Commission should allow building owners and their residents to make their own decisions about the best way of providing video programming services.

IV. CONGRESS DID NOT INTEND FOR THE COMMISSION TO ORDER BUILDING OWNERS TO INSTALL THEIR OWN FACILITIES FOR THE DELIVERY OF VIDEO PROGRAMMING TO TENANTS.

Numerous commenters are promoting the idea that the Commission can and should order building owners to install facilities to deliver video programming services to residents who do not own and control a suitable site for installing their own antennas. Although the details of the various proposals are not entirely clear, there appear to be two variants of this idea. In one, building owners would be required to install multiple facilities on common areas or other areas under their control so that every resident would be able to receive the service of his or her choice.[31] In the other, building owners would only be required to install a single set of facilities to serve residents and would be required to provide programming from multiple service providers using those facilities.[32] Even under the latter proposal, however, building owners would have to install

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[31] DIRECTV Comments at 17.

[32] Philips/Thomson Comments at 14-17; CAI Comments at 32-35.

at least three antennas: one for over the-air broadcast signals, a second for DBS signals, and a third for MMDS.

We oppose all of these proposals. As we stated in our September Comments, Congress did not impose a duty on building owners to provide what might be called "reception service." Furthermore, installation of common antenna systems is not nearly as simple as commenters have implied, and the cost of such installations makes them uneconomical for all but the largest buildings.

A. Section 207 Does Not Give Tenants the Right to "Reception Service," and the FCC Has no Other Jurisdictional Basis for Forcing Building Owners into the Video Distribution Business.

The various comments filed in response to the FNPRM merely confirm our observations in the September Comments regarding the common antenna proposals. The telecommunications industry views the common antenna proposals as a panacea, which would provide video programming services to building residents, enhance the competitive positions of various service providers at the expense of the real estate industry, and, so they hope, cleverly avoid the annoyance of complying with the Fifth Amendment. In fact, however, the proposal is untenable because the Commission does not have the authority to require building owners to provide such services.

The Commission's authority under Section 207 is limited. By its terms, Section 207 does not confer new jurisdiction on the Commission. Rather the Commission is directed to act only within its express authority set out in Section 303 of the 1934 Act, and

new Section 303(v) provides the Commission only with jurisdiction over DBS services, not authority over building owners. Conspicuously absent from Congress's direction in Section 207 is any invocation of the Commission's so-called implied authority in Section 4(i) of the Act. Therefore, authority for any Commission implementation of Section 207 must be found in the language of Section 303; and any person the Commission seeks to reach in implementing Section 207 must be reachable under its Section 303 powers. As we discussed earlier in Part II, the real estate industry does not fall within the reach of Section 303.

In the September Comments, we noted that it is difficult to believe that Congress would have established such broad new rights with so little discussion or elaboration. Furthermore, the language of Section 207 is not the sort of language Congress uses to establish obligations of this magnitude. When Congress wishes to define an obligation, it knows how to do so, as it did in Sections 251, 201(a), and 224(f) of the Communications Act, where it imposed specific duties on specific parties. Section 207, however, never uses the word "duty." Nor does Section 207 specify the subject of any duty, other than the Commission's obligation to prohibit certain restrictions.

Section 207 cannot reasonably be construed to give all viewers the right to receive certain services in the absence of language giving the Commission jurisdiction to direct building owners to provide those services. In fact, the Commission cannot effectively adopt such a requirement because it has no authority

to direct building owners to do anything. Section 207 directs the Commission to exercise only the negative power to limit restrictions and not the affirmative power to command property owners to provide reception services.

The Commission's relevant authority under Section 303 is limited to providers of telecommunications services and facilities. See GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973). In enacting Section 207, Congress did not intend to reverse the Supreme Court's holding in Regents v. Carroll, 338 U.S. 586 (1950), that the FCC has no jurisdiction over contractual rights involving private property. Under Section 303, the Commission may not regulate the real estate industry as such and may regulate building owners only to the extent they subject themselves to the Commission's jurisdiction by voluntarily providing telecommunications services or facilities.[33]

The Commission has no general authority to implement a particular government policy not committed to it by Congress. NAACP v. Federal Power Comm'n, 425 U.S. 662, 669 (1976) (federal agency does not have "a broad license to promote the general

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[33] This is not a case in which property owners are seeking benefits within the Commission's jurisdiction. In 47 C.F.R. § 73.635, by contrast, the Commission states that it would not be in the public interest to grant a television license to an applicant that owns, leases or controls an antenna site that is not available to other users, if no other comparable site is available. In that case, the Commission is exercising jurisdiction not over a property owner as owner of the site, but over an applicant for a Commission-issued license irrespective of site ownership.

public welfare"). An agency can only implement those policies that can be advanced through regulation of entities subject to its statutory jurisdiction.

None of the other commenters has made any attempt to establish that the Commission has any authority over building owners. They merely recite, over and over, the single word "viewers," as if repeating it often enough will magically give the Commission what it does not have. Other than this weak incantation, there is nothing in the record to support the notion that the Commission can impose any affirmative obligation on building owners or anyone else to begin providing communications services to their tenants, occupants, or residents. The Commission's power rests on lawfully given and exercised authority, not the imaginations of industry marketing executives.

B. Installation of Common Antenna Facilities Is More Complicated and Less Effective than Commenters Imply, and Not Economically Feasible In Many Circumstances.

Several commenters -- principally Philips/Thomson and DIRECTV -- have asserted that it would be technically feasible to install common antenna systems for the reception and delivery of video programming in apartment buildings. We agree that such installations are, in one form or another, technically feasible. We do not agree, however, that they are necessarily as simple to install and operate as some commenters have implied. We also must point out that none of the commenters addresses the critical question of economic as opposed to technical feasibility. The simple fact is that installation of common antenna systems is not

economically feasible in the vast majority of buildings, especially if there is more than one provider in a building.

In their discussions of common antenna systems, the satellite industry commenters have oversimplified several technical issues.

First, none of the commenters has made it plain that each building would require three antennas: one for over-the-air broadcast reception, one for DBS and one for MMDS. See Philips/Thomson Comments at 17.

In addition, the commenters have not addressed all the implications of delivering the signals once received. All three types of systems will require access to inside wiring of some kind. DIRECTV has proposed that the Commission mandate access to inside wiring so that DBS providers can share existing wiring. DIRECTV Comments at 17-18. There are at least two problems with this proposal. First, it involves a taking of the wiring, whether it belongs to an incumbent cable company, the building owner or another provider. Second, as DIRECTV indirectly admits, in most cases it is not technically feasible for more than one service provider to use the wiring. In other words, in most buildings, common antenna systems will require the installation of one or more sets of additional wiring.

Installing additional wiring would lead to substantially increased costs, especially if multiple systems are needed. In fact, even sharing wiring increases the cost of an antenna system because of the expense of signal splitting equipment. The

complexities involved are enormous. Every unit must be wired for every service because the high turnover rate[34] in rental units means that the building owner must be prepared to deliver every service to every unit. In addition, to meet the legal requirements that would be imposed under the commenters' preemption proposal, any system that relied on shared wiring would have to be able to receive signals from at least four sources (cable, broadcast, DBS and MMDS) and deliver each of those services, or any combination of them, to every unit in the building. We are not at all convinced that this is technically feasible at a reasonable cost.

Therefore, the Commission should not assume that the best case scenario that the DBS industry presents means that common antenna systems are technically feasible in all cases. Indeed, there are important questions that remain unanswered.

In addition, as we said above, the Commission should not assume that common antenna systems make economic sense, either. In many cases, the cost of a common antenna system, especially for DBS will be prohibitive. For example, we understand that the cost of installing the antenna and hardware for a DSS system (the same system cited in the Philips/Thomson Comments) capable of delivering 42 channels of programming is about $42,000. This does not include the cost of installing any additional inside wiring that may be needed, or the cost of programming service.

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[34] The average annual turn-over rate in multi-housing is 40% per year. 1993 Annual Housing Survey, U.S. Bureau of the Census.

The cost of a DSS system capable of delivering the full range of DBS signals would be higher because individual residents are required to purchase their own converters to receive those channels.

There are about 6,000,000 apartment units in properties of between 5 and 40 units in the United States. See Exhibit D. There are another 2,500,000 units in properties having four or fewer units. See Exhibit C. The cost of installing the antennas and hardware for a property of 40 units would be about $1,000 per unit -- for a property of 5 units, it would be over $8,000 per unit. Once again, these amounts exclude inside wiring installation. One can see that the effect of these costs on smaller buildings is prohibitive. If the property owner were responsible for the installation cost, it would take 13 years to recover the expense of installation in a 5-unit building, even with a rent increase of $50 a month. On the other hand, if the service provider were responsible for the cost, the result would be increased subscription rates, which might not be competitive. Indeed, we understand that DBS system installers generally prefer to install the system in buildings or complexes of at least 90 units to ensure profitability.

This means that extending Section 207 to required common antenna systems may be economically feasible in many instances.

For example, attached as Exhibit E is a letter from the Hills Real Estate Group ("Hills") the owner of Wellington Place.

Wellington Place is the community in Fishers, Indiana, cited in the Philips/Thomson Comments as an example of a common antenna system. Hills states that the cost of DBS service in the community is much higher than cable service, and that the cost of rewiring other communities would be prohibitive. In addition, Hills "would not even consider the type of system at Wellington Place" for other properties because each community presents a different situation, and "[i]n many cases a satellite antenna system makes absolutely no sense...."

The Commission should reject the common antenna proposals as unworkable. The Commission should also reject related proposals, including DIRECTV's suggestion that the Commission mandate access to inside wiring, NAB's proposal that apartment owners provide basic cable at no charge, and WCA's proposal that the issues in this docket be resolved as part of the inside wiring docket.

V. THE COMMISSION MUST ACKNOWLEDGE THE VALIDITY OF THE SAFETY CONCERNS UNDERLYING NONGOVERNMENTAL RESTRICTIONS ON THE PLACEMENT OF ANTENNAS, JUST AS IT DID IN ITS NEW RULE REGARDING GOVERNMENTAL AND QUASIGOVERNMENTAL RESTRICTIONS.

The Joint Commenters have noted on numerous occasions the importance of lease provisions in preserving building safety and security. Building owners must have the ability to establish and enforce lease terms that will prevent residents from endangering the lives, health, and property of residents and their guests, the owner and its employees and contractors, and third parties. As just one illustration, we earlier referred to the example of the Kansas apartment resident whose makeshift antenna mount

overhangs a parking lot from a third floor window. The Commission must allow property owners to determine how best to provide for the safety of their buildings.

The telecommunications industry is not accustomed to dealing with the nature and level of liability that face building owners and managers every day.[35] Thus, commenters such as NAB find it easy to assume that the real estate industry is motivated by the desire to maintain "bottleneck control." Comments of NAB at 15. In fact, however, owners have much more important concerns. Safety and security issues should not be trivialized.

The Commission has recognized the importance of safety concerns, at least to some degree, in Section 1.4000 of its rules. The rule permits local governments and homeowners' associations to enforce certain safety rules. Since the Commission has already recognized the validity of this concern with respect to restrictions covered by Section 1.4000, we urge the Commission to give even greater deference to safety issues in connection with leases and common areas, where such issues are more complicated. The FNPRM seems to recognize the importance of this issue at paragraph 59, where it states that the Commission was unable to conclude that the analysis applicable to governmental and quasigovernmental restrictions applies "where a community association or landlord is legally responsible for

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[35] Even if, as MAP asserts at p. 13 of its comments, security deposits cover damage to property, they do not adequately protect the owner against a resident's liability to third parties.