Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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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 Service and Multichannel Multipoint Distribution Service	)	

To: The Commission

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REPLY COMMENTS OF INDEPENDENT CABLE & TELECOMMUNICATIONS ASSOCIATION

INDEPENDENT CABLE & TELECOMMUNICATIONS ASSOCIATION

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SUMMARY

The Independent Cable & Telecommunications Association ("ICTA") submits these comments in response to certain comments filed in the Further Notice of Proposed Rulemaking (the "Further Notice") in the above-referenced proceeding. The Commission has asked whether Section 207 should apply to properties where the antenna user either does not have exclusive use or control of the property or where the user does not have an ownership interest in the property (such properties will hereinafter be referred to as the "Unowned or Uncontrolled Properties" to reflect the fact that the antenna user either does not own or does not control the property). For the reasons set forth herein and in ICTA's opening comments filed on September 27, 1996 ("ICTA's Opening Comments"), the answer to that question is no.

ICTA's Opening Comments fully address most of the arguments raised by commenters who contend that the Commission can and should apply Section 207 to Unowned or Uncontrolled Properties. Accordingly, ICTA's reply comments focus only on those few arguments that were not completely addressed in ICTA's Opening Comments.

The issues not covered by ICTA in its Opening Comments include a number of "red herrings," such as the claim that the First Amendment compels the Commission to construe Section 207 to apply to Unowned or Uncontrolled Properties. The First Amendment has no relevance to the issue at hand because, among other things, there is no state action involved. That is, it is private property owners -- and not the states -- that are trying to protect their rights to determine which video service providers will gain access to their properties. The other arguments raised by those commenters requesting that the Commission construe Section 207 to

apply to Unowned or Uncontrolled Properties are similarly without merit, as shown herein and in ICTA's Opening Comments.

DISCUSSION

I. CERTAIN COMMENTERS' CLAIMS THAT THE FIRST AMENDMENT COMPELS THE COMMISSION TO CONSTRUE SECTION 207 TO APPLY TO UNOWNED OR UNCONTROLLED PROPERTIES ARE BASED ON FAULTY ASSUMPTIONS

A few commenters claim that the Commission should interpret Section 207 to apply to Unowned or Uncontrolled Properties because (i) the First Amendment prohibits owners of Unowned or Uncontrolled Properties from preventing video service providers from providing their services on the properties and (ii) the First Amendment takes precedence over the Fifth Amendment. See Opening Comments of Pacific Telesis Group ("Pacific Telesis") at 4-5; Opening Comments of Philips Electronics North America Corporation and Thompson Consumer Electronics (collectively, "Philips") at 12-14. The flaw in this argument is that neither of the assumptions on which it is based are true.

The first assumption is incorrect because there can be no viable claim for impairment of First Amendment rights absent a showing of state action. See Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Cable Investments v. Woolley, 680 F.Supp. 174 (M.D.Pa. 1987), aff'd 867 F.2d 151 (3d Cir. 1989); Continental Cablevision of Michigan, Inc. v. Edward Rose Realty, Inc. et. al., L 87-17 CA 5 (W.D. Mich. 1988) (slip op. attached hereto) ("Continental Cablevision"); Cox Cable San Diego, Inc. v. Bookspan, 240 Cal. Rptr. 407 (Ct. App. 1987). In Lloyd, the Supreme Court unambiguously held that "the First and Fourteenth Amendments safeguard the right of free speech and assembly by limitations on state actions, not on action by the owner of private property used nondiscriminatorily for private purposes only." Id. at 567 (emphasis in

original). It is frivolous to argue that the requisite state action exists here. The persons whose actions are at issue here are private property owners of apartment complexes and like properties. Obviously, such private property owners' actions do not constitute state action.

Not surprisingly, the courts have uniformly rejected the argument that the First Amendment prohibits the property owner of an MDU from excluding video service providers from its property. See Woolley, 867 F.2d at 172-74; Continental Cablevision, L 87-17 CA 5 at 13-17; Cox Cable, 240 Cal. Rptr. at 410-12; Sonic Cable Television v. Creekside Mobilehome Community, No. CV 92-6577 JGD (C.D. Cal. Jan. 20, 1994) at 29-32 (slip op. attached hereto). The decision on this issue was an easy one for the courts. In Woolley, the Third Circuit affirmed the district court's dismissal of the cable operator's claim that the First Amendment gave it the right to serve the MDUs at issue. Woolley, 867 F.2d at 161-163. The Third Circuit found that "we need spend little time" on the cable operator's First Amendment argument because the cable operator has not and cannot show that the property owner "has become a substitute for a municipal government in any meaningful way." Id. at 161-162. Therefore, the requisite state action does not exist. Id. In Continental Cablevision, the court granted summary judgment for the property owner, finding that the owner lacked the sufficient municipal attributes for the First Amendment to apply. Continental Cablevision, L87-17 CA 5 at 16. This decision was so clear that the court concluded that the cable operator would be incapable of "plausibly present[ing] sufficient evidence in the course of further discovery" to change that conclusion. The court recognized that the "disparity is too great between the character of the apartment complexes as apartment complexes and the requirements necessary [to be considered to be acting on behalf of

the state]." Id. at 16-17.[1] With similar conviction, the Cox Cable court concluded that "nothing in the record suggests that [the apartment complex at issue] has the attributes of a quasi-municipality." Cox Cable, 240 Cal. Rptr. at 411.

The First Amendment argument raised by Philips and Pacific Telesis also fails because even if state action were somehow involved, the First Amendment could not apply in a manner that would lead to the impairment of the property owners' Fifth Amendment rights. See Sonic Cable, No. CV 92-6577 JGD at 32 (even if plaintiff, which was attempting to force access to an MDU to provide its video services, could somehow show the requisite state action, it would still have to prove some improper limit on its First Amendment rights; given that there is no general right of access to private property for speech purposes, plaintiff's First Amendment claim fails for this reason as well). The Fifth Amendment provides in pertinent part that private property shall not "be taken for public use, without just compensation." U.S. Constitution Amendment V. Thus, the Fifth Amendment unconditionally requires that just compensation be paid where there is a taking of private property for public use. There is no language in the Fifth Amendment providing for an exception to the just compensation requirement if First Amendment rights are also involved, and therefore if First Amendment rights somehow required the taking of private property they could not obviate the need for just compensation. For all of the reasons discussed

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[1] Many courts, including the district court in Woolley and the Continental Cablevision court, have found that state action exists in the affairs of private parties only "(1) where there is a symbiotic relationship between a private actor and the government; (2) where there is sufficient nexus between the actor and the government [or] (3) where the actor has assumed a public function making it an arm of the state for constitutional purposes." Woolley, 680 F.Supp. at 176; see also Continental Cablevision, L 87-17 CA 5 at 14. As these courts both recognized, none of those three tests are met where the relationship is between an apartment complex owner and a video services provider. See Woolley, 680 F.Supp. at 176-178; Continental Cablevision, L 87-17 CA 5 at 13-17.

in ICTA's Opening Comments, however, the Commission is not authorized to award just compensation under Section 207. See ICTA's Opening Comments at 13-14. Accordingly, even if state action were somehow involved, the Commission could not authorize the taking of private property proposed by those who seek to have Section 207 apply to Unowned or Uncontrolled Properties.

Neither Philips nor Pacific Telesis cite to any of the cases directly on point on this issue, such as Woolley, Continental Cablevision or Cox Cable. Rather, Philips relies primarily on cases that do not involve action by private entities and do not involve permanent occupations of private property. Opening Comments of Philips at 12-14. Needless to say, such cases are irrelevant here.

Pacific Telesis relies solely on PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), which itself has no application here for three reasons. First, PruneYard did not involve a constitutional taking of private property under the Fifth Amendment at all. Id. at 82-84. PruneYard involved high school students seeking to distribute pamphlets at a large shopping center. Id. at 77. The Loretto court expressly distinguished PruneYard because in that case the invasion to the property "was temporary and limited in nature." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434 (1982). Moreover, both the majority and concurring opinions in PruneYard repeatedly stress the transitory nature of the access as a minimal intrusion on the owner's constitutional rights. Had the intrusion "markedly dilute[d] [the owner's] property rights", the case "would present a far different First Amendment issue." PruneYard, 447 U.S. at 81-84, 95-97.

Second, PruneYard did not involve action by a multiple dwelling unit owner, but rather involved conduct by the owner of a large shopping center that induced 25,000 members of the public to congregate daily. PruneYard, 447 U.S. at 78. In PruneYard, the court stressed the commercial nature of the property at issue as well as the massive size and purposeful "lure" of large groups. Conversely, the apartment complexes and condominiums that are primarily the focus of the discussion in the Further Notice are not open to the nonresident public and therefore are even less like a municipal entity. Moreover, many of them are small and virtually all of them are relatively small in size when compared to the shopping center in PruneYard. These differences are significant. In Cox Cable, a California case in which the court found that the cable operator did not have a First Amendment right to compel access to an apartment complex, the court distinguished PruneYard in large part on these grounds:

> Nothing in the records suggests that the 150-unit Woodlawn apartment complex has the attributes of a quasi-municipality. The record does not indicate that Woodlawn has its own system of roads and streets, security force, parks, recreation facilities, self-government dealing with internal maintenance, security or operation of the complex or other indicia of a quasi-municipality.
>
> Nor is there anything in the record to suggest that Woodlawn is a quasi-public forum like a shopping mall where the public is invited to gather. Instead, Woodlawn is a place where the public is generally excluded, where an individual can escape the public forum by retreating into his or her apartment and closing the door. Specifically, Woodlawn is not a place where the public is generally invited to set up communication equipment or attach it to the various apartment buildings.
>
> The cases on which Cox relies [which include PruneYard] all involve, at most, transitory trespasses by leafletters and speakers. None involve the sort of permanent physical occupation sought here. In none of the cited cases were the individuals seeking to erect a permanent structure. Those cases would be more similar to Cox's situation if, in those cases, the individuals were given the right to build a permanent kiosk to disseminate information or to erect a permanent stage with attached amplification equipment for speeches. Cox's requested right of access here is analogous to a publisher seeking a right to cut slots in apartment

> doors so it can deliver its newspapers directly. The First Amendment has yet to be extended so far.

Cox Cable, 240 Cal Rptr. at 411 (citation omitted); see also Woolley, 867 F.2d at 162 (private residential apartment complex not forum open to the public for the exercise of free speech rights); Continental Cablevision, L87-17 CA 5 at 16 (court recognized the relevance of the fact that the complexes at issue "do not have 'business blocks,' nor are they open to the public").

Third, even the actions of the owner of the large shopping center in PruneYard were not considered state action giving rise to a claim under the First Amendment to the U.S. Constitution. PruneYard, 447 U.S. at 81. The free speech rights at issue in that case arose under the California Constitution. Id. at 76-77. Significantly, the Supreme Court ruled that soliciting and petitioning activities in the public areas of a privately-owned shopping center, although upheld under the California Constitution as permissible infringements upon the owner's free speech rights under the California Constitution, were forbidden under the Federal Constitution. Id. at 95 (White, J., concurring) ("First and Fourteenth Amendments do not prevent the property owner from excluding those who would demonstrate or communicate on his property"). See Hudgens v. NLRB, 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). Given that some other states do not expand their free speech rights past the contours of the First Amendment, under the laws of those states the PruneYard case would have been resolved in favor of the property owner. In fact, Western Pa. Socialist Workers 1982 Campaign v. Connecticut General Life Ins. Co., 515 A.2d 1331 (Pa. 1986) (plurality opinion), reaches a conclusion directly contrary to the result reached under the California Constitution, ruling that privately-owned shopping malls cannot be forced under the Pennsylvania Constitution to grant access to members of the public seeking to exercise their free speech rights thereon. Thus, for all

of the above reasons, PruneYard certainly does not support the claim that First Amendment rights under the U.S. Constitution compel the Commission to apply Section 207 to Unowned or Uncontrolled Properties.

In short, applying Section 207 to Unowned or Uncontrolled Properties would not result in a right of transitory access, but instead would result in permanent access, through a forced seizure by a multitude of video service providers of a "hitherto private forum." See Pacific Gas & Electric Co. v. Public Utilities Comm., 475 U.S. 1 (1986). If such were to occur, for twenty-four hours a day, seven days a week, fifty-two weeks of the year, the owners of the Unowned or Uncontrolled Properties would be forced to incur this invasion of their properties. The First Amendment simply does not compel this result and the Fifth Amendment prohibits it.

II. CERTAIN COMMENTERS' CLAIM THAT TENANT OWNERSHIP OF THE EQUIPMENT AND WIRING ALTERS THE TAKINGS ANALYSIS IS INCORRECT

Some commenters claim that if Section 207 applies to Unowned or Uncontrolled Properties no taking will occur as long as the tenants are given ownership of all the equipment and wiring for the video services systems. See Further Comments of United States Satellite Broadcasting Company, Inc., at 8; Opening Comments of the National Association of Broadcasters, at 9. This argument is refuted by ICTA's Opening Comments at 8-9 and the Opening Comments of the National Home Builders at 5-10. Moreover, the Loretto decision establishes that if the Commission allows the tenants to own the wiring and the video systems, the tenants' ownership and control of the wiring and systems in the common areas would be a taking of the property owner's property. In fact, the only difference between that scenario and Loretto is that in the former the tenants own the wiring whereas in the latter the cable provider owns the wiring. That difference is immaterial and legally insignificant.

A tenant may not forcibly install a television antenna on the roof of the property over the property owner's objection. See, e.g., Kaplan v. Sessler, 96 N.Y.S.2d 288 (N.Y. App. Term. 1950) (tenant's maintenance of television antenna on roof is intrusion or squatting on the property owner's property); Leona Bldg. Corp. v. Rice, 94 N.Y.S.2d 390 (N.Y. App. Term. 1949) (same); Scroll Realty Corp. v. Mandell, 92 N.Y.S.2d 813 (N.Y. Sup. Ct. 1949). Nor may a commercial tenant operating a tavern construct a television antenna on a portion of a common yard behind the building containing the leased premises. Bellomo v. Bisanzio, 60 A.2d 64 (N.J. Ch. 1948). Numerous other situations can be envisaged where a tenant might desire a particular amenity, but cannot seize the property owner's property in order to have it. For example, a tenant may not insist upon hanging particular works of art in the common hallway or claim a specific area of the property for one's own private parking purposes. MDUs simply would not function if the law were otherwise, since taken to its logical conclusion, a tenant could insist upon installing a swimming pool, tennis court or even a driving range. See Loretto, 458 U.S. at 436.

If the tenant were able to own the wiring and video systems in the common areas, the transformation of the relative property rights of the tenant and the property owner that such a scenario would effect is itself a taking. As the court in Bellomo, 60 A.2d at 65-66, found, if the tenant were to construct and maintain a structure in the yard to support a television antenna, a portion of the yard would be appropriated for that tenant's exclusive use. But the tenant did not have that right since it never procured a private easement from the property owner. Id.

The fact of the matter is that property owners unquestionably own the common areas in an MDU. The tenant no more has an ownership interest in these areas than does the video

service provider. While tenants generally are permitted, and indeed expected, to use the common areas on a nonexclusive basis in their intended manner (e.g., ingress, egress, washing in the laundry room, exercise in the fitness room, etc.), these rights of use do not include the right of permanent physical occupation of such areas. The law is clear that the landlord retains control over the common areas of the property. The tenant cannot determine what property or equipment will be installed or affixed in the common areas over the property owner's objections.

In Woolley, 867 F.2d 151, a cable provider sought to provide cable service (and install and retain its wiring) at an MDU complex in light of a tenant's request to receive service. The cable operator argued, among other things, that the property owner could not prevent the installation of the wiring since the common law gave the tenant the right to receive such cable service, and therefore the right to require that the MDU (including the common areas) be wired for service by the cable operator. Id. at 161. The Third Circuit summarily rejected this argument, finding that the common law did not give tenants the right to insist on having the building wired for cable. Id. The court reasoned that, notwithstanding the tenants' undisputed rights to purchase goods and services of their choice, and allow the providers of same onto the property, a tenant may not force a landlord to install tangible equipment in the landlord's common areas in order to receive such services. Id. "Permitting a tenant to insist that a landlord allow a cable company to install equipment and provide service is an intrusion of a qualitatively different nature than the temporary intrusion effected by tradesmen and business visitors." Id. Obviously, permitting a tenant to insist that a landlord allow the tenant to install or retain the wiring and equipment in the common areas is equally intrusive and impermissible. Therefore, tenants are in

no different position than video service providers when it comes to this issue, and thus the holding in Loretto is equally applicable here.

Further, the landlord will undoubtedly remain liable for the maintenance of such facilities. The responsibility for similar systems has been found to rest with the property owner. Property owners have been held accountable for the entirety of the sprinkler system, Payless Discount Centers, Inc. v. 25-29 North Broadway Corp., 443 N.Y.S.2d 21, 23 (N.Y. App. Div. 1981), the heating system, Thompson v. Paseo Manor South, 331 S.W.2d 1, 3-4 (Mo. Ct. App. 1959), and the electrical system, Leavitt v. Glick Realty Corp., 285 N.E.2d 786, 789 (Mass. 1972).[2/] Potential liability on the part of the property owner necessitates control of the wiring and equipment in order to maintain the facilities in accordance with the duty imposed on the property owner under tort law. Indeed, even if the tenant were given the opportunity to purchase the wire and associated equipment in the common area, the property owner would not be relieved of potential liability from, for example, a third party injured by the wiring or equipment. See Scroll Realty, 92 N.Y.S.2d at 814 (landlord able to prevent installation by tenant of television antenna on roof, in part because of potential liability it would impose upon the landlord).

Even further proof that the landlord controls the common area, and that to grant the tenant a permanent interest in it would effect a taking, is that unless the lease states otherwise, a

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[2/] Further examples of common areas found to be within the property owner's responsibility and control include a laundry room maintained for the use of all tenants, Grynbaum v. Metropolitan Life Ins. Co., 70 N.Y.S.2d 534 (N.Y. App. Div. 1947), and a stairway, Kirchhoff v. Murray, 35 Del. Co. 293 (Pa. Com. Pl. 1947) ("Where a building is leased to various tenants, in the absence of any agreement to the contrary, the landlord retains control of such common portions of the premises as the roof, hallways, steps, stairs, plumbing, and drains. . . .") (quoting Thompson on Real Property, Vol. IV, p. 88).

tenant may not prevent a landlord from modifying the common areas as desired. For example, in constructing a 26-story addition to an MDU, a property owner could utilize a portion of the landing in the stairwell to install elevator service to the addition, notwithstanding the objections of the lessee of the entire floor on which the landing was located. Wilfred Labs. v. Fifty-Second St. Hotel Assocs., 519 N.Y.S.2d 220, 223 (N.Y. App. Div. 1987), appeal dismissed without op., 71 N.Y.2d 994 (1988); see also Schrager's Drugs, Inc. v. Lawrence Park Shopping Center, Inc., 48 Del. Co. 422 (Pa. Del. C. 1961).[3/]

III. OTHER EFFORTS TO DISTINGUISH LORETTO ARE REFUTED BY STATE SUPREME COURT DECISIONS AND THE REPEATED AND UNAMBIGUOUS HOLDINGS OF LORETTO

Several commenters who have argued that Section 207 should apply to Unowned or Uncontrolled Properties contend that (i) Loretto is distinguishable on the grounds that the New York statute did not purport to give the tenants any rights whereas Section 207 (if interpreted to apply to Unowned or Uncontrolled Properties) does; (ii) there would be no taking if the property owner is required to own the systems and (iii) in any event, there would not be a permanent taking. These arguments are refuted by ICTA's Opening Comments at 6-9 as well as by state supreme court decisions directly on point. See Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartments Associates, Ltd., 493 So.2d 417 (Fla. 1986); City of Lansing v. Edward Rose Realty, Inc., 502 N.W.2d 638 (Mich. 1993). Storer involved the issue of whether a Florida statute entitled "Right of Tenant to Obtain Franchised or Licensed Cable Television

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[3/] In light of the foregoing and ICTA's Opening Comments at 11-14, there is no merit to the argument made by some commenters that Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441 (D.C. Cir. 1994) is inapplicable because it purportedly only involved substantial constitutional questions under the Takings Clause since a "stranger" was given the right to seize property. See, e.g., Opening Comments of the National Association of Broadcasters at 11-12.

Service" was unconstitutional because it did not provide for just compensation to the property owner. The statute provided in pertinent part that:

> (1) No tenant having a tenancy of 1 year or greater shall unreasonably be denied access to any available franchised or licensed cable television service. . . .
>
> . . .
>
> (4) Nothing herein shall be construed to require a landlord who has installed an independent television receiving unit, which provides a television signal comparable to cable for use by tenants, to accept installation and provision of cable television services from any cable television company.

Storer, 493 So.2d at 418. If Section 207 applied to Unowned or Uncontrolled Properties there is no question that it would be similar in all material respects to Section 1 of the Florida statute. In fact, the cable operator in Storer made the identical arguments that those supporting applying Section 207 to Unowned or Uncontrolled properties are raising here. That is, the cable operator argued that the Florida statute was constitutional because (i) it was distinguishable from the New York statute in Loretto since "the Florida statute vests enforceable property rights in tenants;" (ii) the Florida statute "does not require a permanent occupation because it links cable service to tenancy duration;" and (iii) the Florida statute "does not fall into the class of statutes that accomplish a per se taking because it allows landlords to exclude cable television franchisees by providing their own cable service to requesting tenants." Id. at 419. The Florida Supreme Court rejected all of the cable operator's arguments, holding as follows:

> To apply [the Florida statute] to the instant situations would require [the property owners] to install cable equipment, including cables and wiring, on property that is not specifically held out for tenants use. A taking results regardless of the size of the occupied area. We do not agree that [the Florida statute] can be characterized as authorizing a temporary, rather than a permanent, physical invasion. Under the statute, once a tenant requests that service, the landlord is required to give up to the cable television company the exclusive possession and use of a portion of his property.

Id.

In Edward Rose, 502 N.W.2d at 640, the statute under constitutional attack also was clearly parallel to Section 207 if that section applies to Unowned or Uncontrolled Properties. The statute in Edward Rose provided as follows:

> No owner, agent or representative of the owner of any dwelling shall directly or indirectly prohibit any resident of such dwelling from receiving cable communication installation, maintenance and services from a Grantee operating under a valid franchise issued by the City.

Id. The Edward Rose court found that the statute was unconstitutional, which ruling was premised in part on the fact that the statute required a taking of private property under the Fifth Amendment. Id. at 640-643.

The bottom line is simple. Loretto could hardly be clearer. Attempts to distinguish it by those who want the Commission to apply Section 207 to Unowned or Uncontrolled Properties are baseless. In fact, ICTA's counsel is hard-pressed to ever recall a case that more often or more clearly laid out its holding than Loretto. As the following ten quotations from Loretto show, when a property owner is compelled to incur a permanent physical occupation of its property, that is a taking -- period:

1. "We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." Loretto, 458 U.S. at 425.

2. "When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking." Id. at 427.

3. "Later cases, relying on the character of a physical occupation, clearly establish that permanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of the land." Id. at 430 (citations omitted).

4. "Although this Court's most recent cases have not addressed the precise issue before us, they have emphasized that physical invasion cases are special and have not repudiated the rule that any permanent physical occupation is a taking." Id. at 432.

5. "The cases [recently decided by the Court] . . . do not suggest that a permanent physical occupation would ever be exempt from the Takings Clause." Id. at 432.

6. "The opinion [in Penn Central Transportation Co. v. New York City] does not repudiate the rule that a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." Id. at 432.

7. "A permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant." Id. at 433, n.9 (citation omitted).

8. "In short, when the 'character of the governmental action,' Penn Central, 438 U.S. at 124, is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." Id. at 434-35.

9. "The historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such an appropriation is perhaps the most serious form of invasion of an owner's property interests. To borrow a metaphor, . . . the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." Id. at 435 (citation omitted).

10. "We affirm the traditional rule that a permanent physical occupation of property is a taking." Id. at 441.[4]

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[4] Several commenters who support applying Section 207 to Unowned or Uncontrolled Properties attempt to rely on Yee v. City of Escondido, 503 U.S. 519 (1992) in an effort to avoid the clear holding in Loretto. Yee, however, is manifestly distinguishable. Yee involved a rent control ordinance and not a permanent physical occupation of the property owner's property. Id. at 526-27. The Yee court even recognized that where the government forces the landowner to suffer the installation of a cable, "the Takings Clause requires compensation if the government authorizes a compelled physical invasion of property." Id. at 527. Thus, Yee supports ICTA's position here.

IV. DIRECTV'S PROPOSAL OF REQUIRING THE PROPERTY OWNER TO OWN AT LEAST TWO VIDEO SYSTEMS ON ITS PROPERTY SHOULD BE REJECTED

DIRECTV contends that the Commission should compel property owners of Unowned or Uncontrolled Properties to permit at least two video services providers on their properties and to agree that the property owners will own the equipment and wiring for the systems. See Opening Comments of DIRECTV at 16-18. DIRECTV'S proposal "comes out of left field" and cannot possibly be supported by Section 207. [5/]

As discussed in ICTA's Opening Comments at 7-8, Section 207 concerns prohibiting certain restrictions that impair certain persons' ability to receive video services from certain providers. Section 207 does not require anybody to provide service to anyone. That is, Section 207 cannot be construed as forcing any provider -- let alone a property owner -- to provide services to a tenant or anyone else. Moreover, there is absolutely nothing in the language or legislative history of Section 207 to suggest an acceptance of DIRECTV's two provider approach. To the contrary, under the unambiguous language of Section 207, to the extent that the statute prevents certain restrictions on certain properties, it prevents such restrictions as to all DBS, MMDS, LMDS, or ITFS providers. In short, DIRECTV'S proposal has no support in Section 207 and should be readily rejected.

Moreover, as shown in Section III above, the Florida Supreme Court recognized that even if the property owner is forced to own the wiring a taking has occurred. Storer, 493 So.2d at 419. Indeed, there are undoubtedly limits as to what a government can require a property

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[5/] DIRECTV also requests that the Commission ban exclusive video service contracts. That issue is not even raised in the Further Notice. In any event, ICTA's views on that issue are set forth in its Opening Comments in CS 95-184.

owner to install on its property without paying just compensation. A property owner certainly could not be required to construct a swimming pool or miniature golf course on its roof without receiving just compensation. Similarly, a property owner cannot be required to get into the video services business and own and install DBS, MMDS, LMDS, and ITFS's systems on its roof and throughout the common areas without receiving just compensation. For this reason as well, the Commission should reject DIRECTV's proposal.[6]

V. SECTION 104 OF THE 1996 ACT DOES NOT COMPEL THE COMMISSION TO APPLY SECTION 207 TO UNOWNED OR UNCONTROLLED PROPERTIES

Some commenters claim that because the majority of minority households purportedly rent whereas the majority of white households own homes, refusing to apply Section 207 to Unowned or Uncontrolled Properties would be discriminatory. See, e.g., Opening Comments of Philips at 5-7; Opening Comments of Consumer Federation of America, et. al. at 4-8. Philips argues that in light of the foregoing, refusing to apply Section 207 to Unowned or Uncontrolled Properties would violate Section 104 of the 1996 Act. The very fact that this argument was raised demonstrates that those seeking to apply Section 207 to Unowned or Uncontrolled Properties have no viable arguments and must try to rely upon arguments that do not even pass the "straight face test."

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[6] Some commenters claim that Loretto supports applying Section 207 to Unowned or Uncontrolled Property because the Loretto Court stated that its decision does not alter the analysis regarding the states' power to require landlords to provide smoke detectors, comply with building codes and provide utility connections, as long as these regulations do not require the landlord to suffer the physical occupation of a portion of its building by a third party. See, e.g., Opening Comments of the National Associations of Broadcasters at 10-11. For the reasons set forth herein and in ICTA's Opening Comments at 7-8, such reliance is misplaced both because Section 207 cannot be construed as requiring Property Owners to own and install a multitude of video systems, and if the Property Owners were so required, such a requirement would be a taking.

Simply put, there is no wrongful discrimination here. Section 207 does not apply to Unowned or Uncontrolled Properties at least in part because of the abridgment of property owners' Fifth Amendment rights if it did so. If Philips' position was correct, property owners' Fifth Amendment rights could so easily be squashed that the Constitution would not mean much. Given the laws against discrimination in this country, taking Philips' argument to its logical conclusion would mandate that renters be allowed to have all rights that property owners have because otherwise the government would be discriminating on the basis of race. That is, under Philips' theory, tenants should have the right to destroy their apartment or build a swimming pool on the roof or a miniature golf course in their living room because property owners have those rights with respect to their own property. But, as we all know, it does not work that way. Property owners have rights that tenants do not have because the former own the property where they reside whereas the latter do not. Those rights certainly do not depend on the percentages of minority and white households renting apartments.

Moreover, Section 104, upon which Philip relies, is merely an amendment to Section 1 of the 1934 Act (47 U.S.C. §151), which is the general provision providing for the formation of the Federal Communications Commission. To say the least, it is specious to claim that this broad provision somehow trumps the Fifth Amendment to the Constitution. If Congress had wanted Section 207 to apply to leases and multiple dwelling units, it would have said so. It certainly would not have tried to rely on this general provision of the 1934 Act.

CONCLUSION

In light of the foregoing and ICTA's Opening Comments, the Commission should not apply Section 207 to Unowned or Uncontrolled Properties.

Respectfully submitted,

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