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JAN 23 1997
Federal Communications Commission
Office of Secretary

January 23, 1997

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Presentation in CS Docket 95-184

Dear Mr. Secretary:

Pursuant to 47 C.F.R. § 1.1206, the National Realty Committee ("NRC"), the National Multi Housing Council ("NHMC"), the National Apartment Association ("NAA"), the Institute of Real Estate Management ("IREM") and the International Council of Shopping Centers ("ICSC"), (jointly, the "Real Estate Associations") through undersigned counsel, submit this original and one copy of a letter disclosing a written and oral ex parte presentation in the above-captioned proceeding.

On January 23, 1997, the following individuals met with Jackie Chorney of Chairman Hundt's Office, on behalf of the Real Estate Associations: Roger Platt of NRC; Jim Arbury of NMHC and NAA; Regina Schofield of ICSC; Russell Riggs of IREM; and William Malone and Matthew C. Ames of Miller & Van Eaton, P.L.L.C.

The meeting dealt with the access to real property, the location of the demarcation point, and related issues.

Copies of the attached written presentation and a compilation of comments filed in the above-captioned and related proceedings were given to the Commission staff who attended the meeting.

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Please contact the undersigned with any questions.

Very truly yours,

MILLER & VAN EATON, P.L.L.C.

By

Matthew C. Ames

Enclosure

cc: Jackie Chorney, Esq.

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January 23, 1997

THE REAL ESTATE INDUSTRY OPPOSES MANDATORY ACCESS TO PROPERTY

The owners and managers of multi-tenant residential and commercial properties[1] have demonstrated in their comments that mandating access to private property in the various ways proposed by CS Docket 95-184 (Inside wiring) and other proceedings is unnecessary and would prove counterproductive.

- The Commission should avoid confusing the issue of the demarcation point with the issue of access to property.
- Resolving the location of the demarcation point does not require mandating access to property.
- The location of the demarcation point does not determine property rights.
- The Commission's authority to establish the demarcation point does not include the authority to alter property rights.
- The coalition has stated that it does not object to the Commission setting the demarcation point where it pleases, so long as it does not interfere with the right of owners and managers to control their property.
- In their comments in IB Docket 95-59 (Satellite antennas) and CS Docket 96-83 (Receiving antennas) several telecommunications providers have acknowledged that granting third-party service providers access to premises constitutes a taking under the holding of Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
- The Commission has recognized the seriousness of the issues that would be raised in granting access to premises without the consent of the building owner or manager, in its Further Notice of Proposed Rulemaking in IB Docket 95-59 and CS Docket 96-83. *See* attached excerpt.

For all these reasons, the Commission should confine its decision to questions related to the demarcation point, and avoid addressing access-to-property issues in the inside wiring docket.

Attachment

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[1] Represented in this and related dockets by the Building Owners and Managers Association International, the National Realty Committee, the National Multi Housing Council, the Institute of Real Estate Management, the International Council of Shopping Centers, the National Apartment Association, and the National Association of Real Estate Investment Trusts.

ming, not the antennas themselves. This party also cites *United States v. Lopez*[166] in arguing that zoning and land use regulation are police powers reserved for the states under the Tenth Amendment of the Constitution.[167] Another commenter asserts that the Commission should give the traditional deference to state and federal courts with regard to health and safety matters.[168]

57. At the outset, we state our disagreement with those commenters who maintain that because Section 303(v), as amended by Section 205 of the Telecommunications Act, states that the Commission shall "[h]ave exclusive jurisdiction to regulate the provision of direct-to-home satellite services;"[169] we are required to exercise exclusive jurisdiction over any restrictions that may be applicable to DBS receiving devices. This provision, like all the other provisions appearing in that section, is governed by the prefatory language in Section 303 which, as noted earlier, states, "Except as otherwise provided in this Act, the Commission from time to time, *as public convenience, interest, or necessity requires*, shall. . . ." (emphasis added).

58. While we hope that affected persons, entities, or governmental authorities would seek guidance and suitable redress through the processes we have established, we see no reason to foreclose the ability of parties to resolve issues locally. We accordingly decline to preclude affected parties from taking their cases to a court of competent jurisdiction. We expect that in such instances the court would look to this agency's expertise and, as appropriate, refer to us for resolution questions that involve those matters that relate to our primary jurisdiction over the subject matter. We have no basis to believe, and Congress has not suggested, that disputes and controversies arising over such restrictions should or must be resolved by this agency alone or cannot be adequately handled by recourse to courts of competent jurisdiction.

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

59. As indicated above, we have generally concluded that the same regulations applicable to governmental restrictions should be applied to homeowners' association rules and private covenants, where the property is within the exclusive use or control of the antenna user and the user has a direct or indirect ownership interest in the property. We are unable to conclude on this record, however, that the same analysis applies with regard to the placement of antennas on common areas or rental properties, property not within the exclusive control of a person with an ownership interest, where a community association or landlord is legally responsible for maintenance and repair and can be liable for failure to perform its duties properly. Such situations raise different considerations.

60. The differences are reflected in the comments received. According to one commenter, an individual resident (or viewer) has no legal right to alter commonly owned property unilaterally, and thus no right to use the common area to install an antenna without permission. It argues that Section 207 does not apply to commonly-owned property, and that applying it to such property would be unconstitutional.[170] Commenters also raise issues about the validity of warranties for certain common areas such as roofs that might be affected or rendered void if antennas are installed.[171] These commenters suggest that, in areas where most of the available space is common property, there should be coordinated installation managed by the community association that would assure access to services by all residents.[172] Broadcasters support a suggestion that community associations with the responsibility of managing common property should be able to enforce their restrictions as long as they make access available to all services desired by residents.[173]

61. NAA and others express concern about situations in which the prospective antenna user is a tenant and the property on which she or he wants to install an

166. 115 S Ct 1624 (1995).

167. MIT DBS Opposition at 4-5.

168. Mayors DBS Petition at 12.

169. 47 USC §303(v).

170. Community DBS Comments at 12; Community DBS Reply at 3. *See also* related comments in Community TVBS-MMDS Comments at 11, 13-14; C & R Realty TVBS-MMDS Comments; Silverman TVBS-MMDS Comments at 3; Parkfairfax TVBS-MMDS Comments at 1; Woodburn Village TVBS-MMDS Comments; Southbridge DBS Comments.

171. Community DBS Comments at 14, Appendix A (letters from Peterson Roofing, Premier Roofing, and Schuller Roofing Systems); *see also* Elisha TVBS-MMDS Comments at 2; Christianson DBS Comments.

172. Community DBS Comments at 21. Community offers several examples of possible approaches that would accomplish this result. *See also* Parkfairfax TVBS-MMDS Comments at 2; MASS DBS Comments at 2 (associations should be allowed to solicit bids from service providers so that the owners can select a provider); Orten DBS Comments (developers and community associations should be free to bargain with cable, satellite and MMDS providers to serve community).

173. NAB *ex parte* presentation June 14,1996. *See also* DIRECTV DBS Comments at 10.

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antenna is owned by a landlord.[174] These commenters urge the Commission to clarify that the rule does not affect landlord-tenant agreements for occupancy of privately-owned residential property, and does not apply at all to commercial property.[175] Citing the Supreme Court's ruling in *Loretto v. Teleprompter Manhattan CATV Corp.*,[176] they assert that to force property owners to allow installation of antennas owned by a service provider, a tenant, or a resident would result in an unconstitutional taking in violation of the Fifth Amendment.[177] They assert that in *Loretto*, the Court found that a New York law that required a landlord to allow installation of cable wiring on or across her building was an unconstitutional taking in part because it constituted a permanent occupation.[178] NAA argues that a rule requiring antenna installation on landlord-owned property is similar, and would obligate the Commission to provide compensation based on a fair market value of the property occupied. According to NAA, Congress has not authorized such compensation.[179] Commenters also assert that even if the Commission has jurisdiction in this matter, there are sound reasons not to regulate antenna placement on private property. They state that aesthetic concerns are important and affect a building's marketability, and that our rule could interfere with effective property management.[180]

62. In contrast, video programming service providers argue that the use of the term "viewer" demonstrates that Congress did not intend in Section 207 to distinguish between renters and owners, or to exclude renters from the protection of the Commission's rule.[181] One commenter also asserts that the statute was designed to allow viewers to choose alternatives to cable and not to permit landlords or other private entities to select the service for these viewers.[182] These commenters claim that the Supreme Court's holding in *Loretto* does not compel a distinction between property owned by an individual and that owned by a landlord, and that the holding in *Loretto* is very narrow.[183] In support of its argument, SBCA contends that in *Loretto*, a dispositive fact was that the New York law gave outside parties (cable operators) rights, and did "*not* purport to give the *tenant* any enforceable property rights." Also, SBCA states, the court in *Loretto* noted that if the law were written in a manner that required "'cable installation if a tenant so desires, the statute might present a different question. . . .'"[184] SBCA also argues that the installation of a DBS antenna is not a permanent occupation and does not qualify as a taking under *Loretto*.[185] DIRECTV argues that the Fifth Amendment is not implicated by a rule preempting private antenna restrictions because other regulations of the landlord-tenant relationship, e.g., a regulation requiring a landlord to install sprinkler systems, have not been deemed a taking.[186]

63. Neither the *DBS Order and Further Notice* nor the *TVBS-MMDS Notice* specifically proposed rules to govern or sought comment on the question of whether the antenna restriction preemption rules should apply to the placement of antennas on rental and other property not within the exclusive control of a person with an ownership interest. As a consequence many of the specific practical problems of how possible regulations might apply were not com-

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174. NAA TVBS-MMDS Comments; NAA DBS Comments; ICTA TVBS-MMDS Comments at 4-6; FRM DBS Comments. In addition, there are approximately 442 letters in the record, designated as "Coordinated," from property managers and similar groups expressing the same concerns.

175. National Trust TVBS-MMDS Comments at 5; NAA DBS Comments at 1; Brigantine DBS Comments at 1; Coordinated DBS Comments at 1; C&G DBS Comments at 2; Haley DBS Comments at 2; FRM DBS Comments at 1; Hendry DBS Comments at 1; Hancock DBS Comments at 1; Compass DBS Comments at 1.

176. 458 US 419 (1982).

177. National Trust TVBS-MMDS Comments at 2, 4, *citing Loretto*; NAA DBS Comments, *citing Loretto*. See discussion, *supra*.

178. 458 US at 421, 440.

179. NAA argues that if a subscriber chooses to live where cable service is available but antennas are not permitted, he is not prevented from getting some form of video programming, and that the legislation does not mean that every technology must be available to every individual under every circumstance. NAA DBS Comments at 12-13.

180. *See, e.g.*, Elisha TVBS-MMDS Comments at 1-2 (preemption compromises security of buildings by allowing providers access to rooftops); Georgia TVBS-MMDS Comments at 3-4. Coordinated DBS Comments at 1 (noting that aesthetics directly affect a building's value and marketability); Mass DBS Comments at 2 (same); C&G DBS Comments at 1; NAHB DBS Comments at 2. We note NAA DBS Comments at 14, discussing landlords' provision of facilities for data transmission. Our rule applies only to reception devices. *But see*, 47 CFR §25.104, regarding transmitting antennas and local zoning restrictions.

181. DIRECTV DBS Comments at 6; SBCA DBS Reply at 2-4.

182. DIRECTV DBS Comments at 7.

183. SBCA DBS Reply at 5; DIRECTV DBS Reply at 8.

184. SBCA DBS Comments at 5.

185. *Id.* at 5-6.

186. DIRECTV DBS Comments at 8, *citing FCC v. Florida Power Corp.* for the distinction between the treatment of a tenant and an "interloper with a government license" such as the cable company in *Loretto*. DIRECTV DBS Reply at 8, *quoting Florida Power*, 480 US at 252-53; *see also* NYNEX TVBS-MMDS Comments at 6-7; Philips Electronics DBS Reply at 6-9.

mented on, nor were the policy and legal issues fully briefed. At least one party interested in providing greater access by viewers to DBS service urged the Commission to reserve judgment, noting the insufficiency of the record as to certain common area and exterior surface issues.[187] We conclude that the record before us at this time is incomplete and insufficient on the legal, technical and practical issues relating to whether, and if so how, to extend our rule to situations in which antennas may be installed on common property for the benefit of one with an ownership interest or on a landlord's property for the benefit of a renter. Accordingly, we request further comment on these issues. The Community suggestion, referenced in para. 49 above, involves the potential for central reception facilities in situations where restrictions on individual antenna placement are preempted by the rules, and thus no involuntary use of common or landlord-owned property is involved. We would welcome additional comment in the further proceeding regarding Community's proposal. We seek comment on the technical and practical feasibility of an approach that would allow the placement of over-the-air reception devices on rental or commonly-owned property. In particular, we invite commenters to address technical and/or practical problems or any other considerations they believe the Commission should take into account in deciding whether to adopt such a rule and, if so, the form such a rule should take.

64. Specifically, we seek comment on the Commission's legal authority to prohibit nongovernmental restrictions that impair reception by viewers who do not have exclusive use or control and a direct or indirect ownership interest in the property. On the question of our legal authority, we note that in *Loretto*,[188] the Supreme Court held that a state statute that allowed a cable operator to install its cable facilities on the landlord's property constituted a taking under the Fifth Amendment. In the same case, the Court stated, in dicta, that "a different question" might be presented if the statute required the landlord to provide cable installation desired by the tenant.[189] We therefore request comment on the question of whether adoption of a prohibition applicable to restrictions imposed on rental property or property not within the exclusive control of the viewer who has an ownership interest would constitute a taking under *Loretto*, for which just compensation would be required, and if so, what would constitute just compensation in these circumstances.

65. In this regard, we also request comment on how the case of *Bell Atlantic Telephone Companies v. FCC*[190] should affect the constitutional and legal analysis. In that case, the U.S. Court of Appeals for the District of Columbia invalidated Commission orders that permitted competitive access providers to locate their connecting transmission equipment in local exchange carrier' central offices because these orders directly implicated the Just Compensation Clause of the Fifth Amendment. In reaching its decision, the court stated that "[w]ithin the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions."[191]

V. CONCLUSION

66. We believe that the rule we adopt today reflects Congress' objective as expressed in Section 207 of the 1996 Act. Our rule furthers the public interest by promoting competition among video programming service providers, enhancing consumer choice, and assuring wide access to communications facilities, without unduly interfering with local interests. We also believe it is appropriate to develop the record further before reaching conclusions regarding the application of Section 207 to situations in which the viewer does not have exclusive use or control and a direct or indirect ownership interest in the property where the antenna is to be installed, used, and maintained.

VI. PROCEDURAL PROVISIONS

A. Final Regulatory Flexibility Analysis

67. As required by Section 603 of the Regulatory Flexibility Act, 5 USC §603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *DBS Order and Further Notice* and the *TVBS-MMDS Notice*. The Commission sought written public comments on the proposals in the two proceedings, including comments on the IRFA.[192] The Com-

187. DIRECTV DBS Reply at 9-10 (stating that a decision on the issue of antenna installation in multiple dwelling units should be deferred pending the Commission's action on inside wiring rules and policies, Telecommunications Services Inside Wiring and Customer Premises Equipment, CS Docket No. 95-184).

188. 458 US 419 (1982).

189. *Id.* at 440 n.19.

190. 24 F3d 1441 [75 RR 2d 487] (DC Cir 1994).

191. *Id.* at 1444.

192. Joint Comments were filed by: National League of Cities; The National Association of Telecommunications Officers and Advisors; The National Trust for Historic Preservation; League of Arizona Cities and Towns; League of California Cities; Colorado Municipal League; Connecticut Conference of Municipalities; Delaware League of Local Governments; Florida League of Cities; Georgia Municipal Association; Association of Idaho Cities; Illinois Municipal League; Indiana Association of Cities and Towns; Iowa League of Cities; League of Kansas Municipalities; Kentucky League of Cities; Maine Municipal Association; Michigan Municipal

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