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April 8, 1997

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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 96-83

Dear Mr. Secretary:

Pursuant to 47 C.F.R. § 1.1206, the National Multi Housing Council ("NMHC"), the National Apartment Association ("NAA"), the National Realty Committee ("NRC"), and the Institute of Real Estate Management ("IREM"), (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 April 7, 1997, the following individuals met with Rudolfo M. Baca of Commissioner Quello's staff on behalf of the Real Estate Associations: Roger Platt of NRC; Jim Arbury of NMHC and NAA; Russell Riggs of IREM; and Matthew C. Ames of Miller & Van Eaton, P.L.L.C.

The meeting dealt with the issues related to the placement of over-the-air reception devices on leased premises.

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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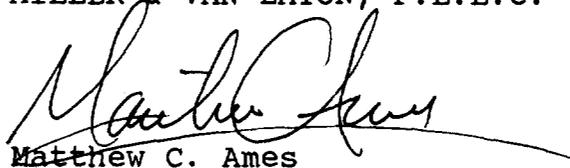
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Please contact the undersigned with any questions.

Very truly yours,

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

BY


Matthew C. Ames

Enclosure

cc: Rudolfo M. Baca, Esq.

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April 7, 1997

**THE REAL ESTATE INDUSTRY OPPOSES ANY ATTEMPT
TO MANDATE INSTALLATION OF RECEIVING ANTENNAS**

The owners and managers of multi-tenant residential and commercial properties¹ have demonstrated in their comments that the Commission should not overturn lease provisions governing the placement of over-the-air receiving devices on multi-unit properties.

- o We share the concerns of Commissioner Quello as stated in the separate statements issued in conjunction with the Notice of Proposed Rulemaking and the Further Notice of Proposed Rulemaking in Docket No. 96-83. We agree that Congress did not intend to prohibit all private, nongovernmental restrictions, and that the Commission must ensure that its rules preserve property rights.
- o The principle laid down in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), governs any rule establishing a right or a duty to install receiving facilities, because any such installation constitutes a physical occupation and is thus a per se taking. The "power to exclude [is] one of the most treasured strands in an owner's bundle of property rights." *Loretto* at 435-36.
- o Granting a tenant the right to install antennas constitutes a per se taking because it prevents the owner from excluding antennas and wiring from the premises and using that part of the property for other uses, and expands the scope of the conveyance bargained for in the lease. *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987), and *Yee v. City of Escondido*, 503 U.S. 519 (1992), do not apply because they involve no such expansion or transfer. *Florida Power* says that if a utility chooses to lease its property, the FCC may, pursuant to explicit statutory authority, regulate the rates charged by the utility. It does not say that once a landowner enters into a lease the government may enlarge the property conveyed to the tenant without effecting a taking. Likewise, *Yee* is a rent control case. Furthermore, the Supreme Court has recognized that there is a point at which regulation of property rights becomes a taking. *Block v. Hirsh*, 256 U.S. 135 (1921).

¹ Represented in Docket Nos. 95-59 and 96-83 by the Building Owners and Managers Association International ("BOMA"), the Institute of Real Estate Management ("IREM"), the International Council of Shopping Centers ("ICSC"), the National Apartment Association ("NAA"), the National Multi Housing Council ("NHMC"), the National Realty Committee ("NRC"), and the National Association of Real Estate Investment Trusts ("NAREIT").

April 7, 1997

- o The statutory language does not authorize the Commission to expand the conveyance made to a tenant. When Congress does grant the right to use property it does so very explicitly. For example, when the 1996 Act amended Section 224 to require utilities to allow telecommunications providers nondiscriminatory access to their rights-of-way, it did so plainly and in considerable detail. No similar language appears in Section 207.

- o Nor may the FCC order building owners to install facilities to serve tenants, for three reasons.
 - First, the mere presence of an antenna on the property without the landlord's consent constitutes a physical invasion because the owner has been denied the use and enjoyment of the space occupied by the facilities. Such a rule would not be analogous to such generally applicable regulations as fire codes. Safety codes are intended to protect the public in general; they do not grant special rights to a limited class at the expense of another limited class. The Supreme Court has justified such regulations on the grounds of "public exigency," *Block v. Hirsh*, 256 U.S. 135 (1921); the right to install an antenna does not address a "public exigency." In addition, such regulations have been enacted by state and local governments under their police powers; the federal government has no police power.

 - Second, the FCC has no authority over building owners. *Illinois Citizens Committee for Broadcasting, et al. v. Sears, Roebuck & Co.*, 35 FCC 2d 237, *aff'd*, 467 F.2d 1397 (7th Cir. 1972). Therefore, the FCC cannot order building owners to provide video services or facilities to their tenants. Section 207 is not a grant of authority over building owners. It is merely a directive to exercise authority under Section 303, and Section 303(v) grants authority only over DBS services -- not building owners.

 - Third, such a rule would be directly contrary to the intent of Congress. The legislative history refers to governmental and quasi-governmental restrictions that limit an owner's rights. Preempting zoning rules actually restores the owner's property rights -- but ordering owners to install facilities does just the opposite.