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RECEIVED

May 1, 1997

MAY 1 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 96-83

Dear Mr. Secretary:

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

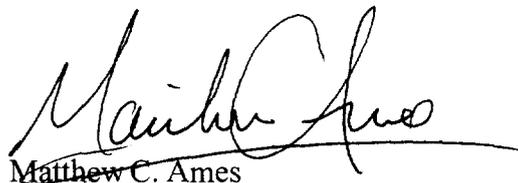
On May 1, 1997, the attached letter addressing the legislative history of Section 207 of the Telecommunications Act of 1996 was delivered on behalf of the Real Estate Associations to Anita Wallgren of Commissioner Ness's office.

Please contact the undersigned with any questions.

Very truly yours,

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

By

  
Matthew C. Ames

Enclosure  
cc: Anita Wallgren, Esq.

No. of Copies rec'd  
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May 1, 1997

Anita Wallgren, Esquire  
Legal Adviser  
Office of Commissioner Ness  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20054

Dear Ms. Wallgren:

Thank you for taking the time last week to meet with Nick Miller and me and discuss issues of concern to owners and managers of leased real property arising out of Section 207 of the Telecommunications Act of 1996.<sup>1</sup> You may recall that we talked about the legislative history of Section 207, and that you requested that we provide you with information to support our argument that extending the Commission's current rules to leased property would go beyond the intent of Congress in adopting Section 207. Attached are excerpts from the Conference Report on S.652 and the House Committee Report on H.R. 1555.

You will see that the Conference Report notes that the original Senate bill contained no provision parallel to Section 207 and that the conference agreement was to adopt the House provision, modified only to include MMDS antennas. Consequently, the legislative history of S. 652 prior to the Conference Report is of no help in elucidating Congressional intent.

The House Report, on the other hand, explains what types of restrictions Section 207 (originally Section 308 of H.R. 1555) was intended to cover. It states:

The Committee intends this section to preempt enforcement of State or local statutes and regulations, or state or local legal requirements, or restrictive covenants or encumbrances that prevent the use of antennae designed for off-the-air reception of television broadcast signals or of satellite receivers designed for receipt of DBS services. Existing regulations, including but not limited to, zoning laws, ordinances, restrictive covenants or homeowners' association rules, shall be unenforceable to the extent contrary to this section.

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<sup>1</sup> We met on behalf of the Building Owners and Managers Association, International; the National Realty Committee; the National Apartment Association; the National Multi Housing Council; the International Council of Shopping Centers; the Institute of Real Estate Management; and the National Association of Real Estate Investment Trusts.

**Miller & Van Eaton, P.L.L.C.**

Anita Wallgren, Esquire

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May 1, 1997

We believe that the foregoing language demonstrates that extending the Commission's current rules to leased property cannot be justified. The types of restrictions identified in the House Report are all imposed and enforced either by governments or quasi-governmental entities and have the effect of limiting the rights of the property owner for the benefit of third parties. On the other hand, a lease is a contractual agreement granting the right to occupy real property; any benefit conferred on third parties is purely incidental.

The House Report first identifies the general types of restrictions to be prohibited, but a lease is not a "State or local statute," a "regulation," a "State or local legal requirement," or a "restrictive covenant or encumbrance." This list identifies all the types of prohibitions affected by Section 207 and all are governmental or quasi-governmental in nature. Restrictive covenants and similar encumbrances were included in Section 207 because they take the place of zoning in many communities.

The Committee next lists specific examples of restrictions to be prohibited. The list does not include leases, and a lease is not a "zoning law," "ordinance," "restrictive covenant," or "homeowners' association rule." Even though this list was not intended to be all-inclusive, it seems odd that something so common and basic as a lease would not have been included, given the specificity of the types of restrictions that were listed.

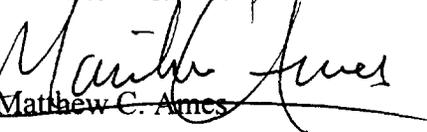
The reliance of some parties on the term "viewer" is misplaced, because the statute does not refer to "all viewers" or "any viewer." Nor does the statute refer to "all restrictions." If Congress had meant to grant rights to all viewers it could and would have said so. The indefinite article "a" refers only to viewers subject to the restrictions to be prohibited, and the restrictions to be prohibited are those specified in the House Report.

Consequently, we believe Congress did not intend to extend Section 207 to leased property.

Please let us know if we can provide any additional information.

Very truly yours,

Miller & Van Eaton, P.L.L.C.

By   
Matthew C. Ames

Attachments

## SECTION 206—AUTOMATED SHIP DISTRESS AND SAFETY SYSTEMS

*Senate bill*

Section 306 of the Senate bill provides that notwithstanding any other provision of the Communications Act, any ship documented under the laws of the United States operating in accordance with the Global Maritime Distress and Safety System provisions of the Safety of Life at Sea Convention is not required to be equipped with a radio telegraphy station operated by one or more radio officers or operators.

*House amendment*

This House provision is identical.

*Conference agreement*

The conference agreement adopts the Senate provision with a modification placing the provision as an amendment to section 364 of the Communications Act. This provision permits a ship that fully complies with the Global Maritime Distress and Safety System (GMDSS) provisions of the Safety of Life at Sea Convention to be exempted from requirements to carry a radio telegraph station operated by one or more radio operators. Due to the conferees' concern about the proper implementation of the GMDSS, the provision specifies that this exemption shall only take effect upon the United States Coast Guard's determination that the system is fully installed, maintained, and is operating properly on each vessel.

## SECTION 207—RESTRICTIONS ON OVER-THE-AIR RECEPTION DEVICES

*Senate bill*

No provision.

*House amendment*

Section 308 of the House amendment directs the Commission to promulgate rules prohibiting restrictions which inhibit a viewer's ability to receive video programming from over-the-air broadcast stations or direct broadcast satellite services.

*Conference agreement*

The conference agreement adopts the House provision with modifications to extend the prohibition to devices that permit reception of multichannel multipoint distribution services.

## TITLE III—CABLE SERVICES

## SECTION 301—CABLE ACT REFORM

*Senate bill*

Section 203(a) of the Senate bill amends the definition of "cable system" in section 602 of the Communications Act.

Section 203(b) of section 204 of the bill limits the rate regulations currently imposed by the 1992 Cable Act.

Paragraph (1) amends the rate regulation provisions of section 623 of the Communications Act for the expanded tier. First, it eliminates the ability of a single subscriber to initiate a rate com-

Conference Report on SCSZ, SEN REP 104-458  
104th Cong. 2d Sess (1996)

plaint proceeding at the Commission. Franchising authorities are the relevant State and local government entities that still retain the ability to initiate a rate proceeding. Second, rates for cable programming services will only be considered unreasonable, and subject to regulation, if the rates substantially exceed the national average for comparable cable programming services.

Paragraph (2) amends the definition of effective competition in section 623(l)(1) to allow the provision of video services by a local exchange carrier either through a common carrier video platform, or as a cable operator, in an unaffiliated cable operator's franchise area to satisfy the effective competition test.

Section 203(c) eliminates cable rate regulation for small cable operators serving areas of 35,000 or fewer subscribers.

Section 203(d) provides that any programming access rules that apply to a cable operator under section 628 of the Communications Act also apply to a telecommunications carrier or its affiliate that provides video programming directly to subscribers.

Section 203(e) provides for expedited decisions by the Commission regarding market determinations under section 614 of the Communications Act.

Section 203(f) provides that the provisions of this section take effect on the date of enactment.

*House amendment*

Section 307(a) of the House amendment amends the definition of "cable service" in section 602(6) of the Communications Act by adding "or use" to the definition, reflecting the evolution of video programming toward interactive services.

Subsection (b) prohibits the Commission from requiring the divestiture of, or preventing or restricting the acquisition of, any cable system based solely on the geographic location of the system.

Subsection (c) amends section 623(a) of the Communications Act to deregulate equipment, installations, and additional connections furnished to subscribers that receive more than basic cable service when a cable system has effective competition pursuant to section 623(l)(1)(b).

Subsection (d) amends section 623(a) of the Communications Act to limit basic tier rate increases by a cable operator to once every six months and permits cable operators to implement such increases after 30 days notice. Subsection (d) limits the franchising authority's scope of review to the incremental change in the basic tier rate effected by a rate increase.

Subsection (e) amends section 623(a) of the Communications Act to promote the development of a broadband, two-way telecommunications infrastructure. Under this paragraph, cable operators are permitted to aggregate equipment costs broadly. However, subsection (e) does not permit averaging for equipment used by consumers that subscribe only to basic service tier. Subsection (e) directs the Commission to complete its revisions to current rules necessary to implement this subsection within 120 days.

Subsection (f) amends section 623(c) of the Communications Act governing review of complaints by inserting a new paragraph (3) requiring that the Commission receive complaints from three

eign country policies and regulations addressing sub-markets different from that applied for need not be considered for purposes of section 310(f). Notwithstanding a determination made for purposes of this section, the Committee recognizes that cross market discussions could be undertaken in trade negotiations by the United States.

In determining the home market of any applicant, the Commission should use the citizenship of the applicant (if the applicant is an individual or partnership) or the country under whose laws a corporation is controlled by entities (including individuals, other corporations or governments) in another country, the Commission may look beyond where it is organized to such other country. Thus, a foreign entity could not organize in a country with a more open policy toward U.S. investment than its home country in order to circumvent the U.S. rules.

The Committee believes that in order to encourage competitiveness in the global telecommunications market, applications for licenses for spectrum-based services should be considered promptly. Accordingly, the Committee intends that the Commission act upon such applications in a reasonable time frame.

Subparagraph (3) authorizes the Commission to continue to review whether a foreign country meets the requirements permitting an investment approved by the Commission. This provision permits the Commission, under limited circumstances and with great deference to the President, to withdraw licenses granted where a foreign country changes its policies and retention of a license is no longer in the public interest and could not be granted under section 310(b). The Committee anticipates that this provision would be utilized only where the policies and practices of a foreign country are egregious and would result in significant harm to U.S. companies, e.g., where national security and law enforcement concerns would require such action.

It is not the Committee's intent to have the U.S. government implement a unilateral provision to remove negotiated benefits which would be unacceptable to the U.S. government if proposed by other nations for themselves. Sufficient authority to accomplish the desired results already exists under current trade and regulatory provisions.

#### *Section 304. Terms of licenses*

Section 304 amends section 307(c) of the Communications Act to provide for a seven year license term for broadcast licenses. Under current law, radio broadcast licenses are seven years and television broadcast licenses are for five years. By applying a uniform license term of seven years for all broadcast station licenses, the Committee simply recognizes that there is no reason for longer radio license terms than for television licenses. The Committee intends that applying a uniform license term of seven years for radio and television licenses will enable the Commission to operate more efficiently in the awarding of new or renewed licenses for all broadcast licenses.

#### *Section 305. Broadcast license renewal procedures*

Section 305 amends section 309 of the Communications Act by adding a new subsection (k) mandating a change in the manner in which broadcast license renewal applications are processed. Subsection (k) allows for Commission consideration of the renewal application of the incumbent broadcast licensee without the contemporaneous consideration of competing applications. Under this subsection, the Commission would grant a renewal application if it finds that the station, during its term, had served the public interest, convenience, and necessity; there had been no serious violations by the licensee of the Act or Commission rules; and there had been no other violations of the Act or Commission rules which, taken together, indicate a pattern of abuse. If the Commission finds that the licensee has failed to meet these requirements, it could deny the renewal application or grant a conditional approval, including renewal for a lesser term. Only after denying a renewal application could the Commission accept and consider competing applications for the license.

The Committee believes this change in procedure will lead to a more efficient method of renewing broadcast licenses and should result in a significant cost saving to the Commission. The Committee notes that subsection (k) does not alter the standard of renewal employed by the Commission and does not jeopardize the ability of the public to participate actively in the renewal process through the use of petitions-to-deny and informal complaints. Further, this section in no way limits the ability of the Commission to act sua sponte in enforcing the Act or Commission rules.

#### *Section 306. Exclusive Federal jurisdiction over direct broadcast satellite service*

Section 306 amends section 303 of the Communications Act of 1934 to clarify that the Commission has exclusive jurisdiction over the regulation of direct broadcast satellite (DBS) service. DBS is a direct-to-home satellite broadcasting service which utilizes Ku-Band satellites. The Commission currently regulates and issues licenses for DBS service pursuant to its authority contained in Title III of the Communications Act. Section 306 reaffirms and clarifies that the Commission has exclusive authority over the regulation of DBS service. Federal jurisdiction over DBS service will ensure that there is a unified, national system of rules reflecting the national, interstate nature of DBS service.

#### *Section 307. Automated ship distress and safety systems*

This section states that notwithstanding the Communications Act of 1934, a ship shall not be required to be equipped with a radio telegraphy station operated by one or more radio officers or operators.

#### *Section 308. Restrictions on over-the-air reception devices*

Section 308 directs the Commission to promulgate rules prohibiting restrictions which inhibit a viewer's ability to receive video programming from over-the-air broadcast stations or direct broadcast satellite services. The Committee intends this section to preempt enforcement of State or local statutes and regulations, or State or

local legal requirements, or restrictive covenants or encumbrances that prevent the use of antennae designed for off-the-air reception of television broadcast signals or of satellite receivers designed for receipt of DBS services. Existing regulations, including but not limited to, zoning laws, ordinances, restrictive covenants or homeowners' association rules, shall be unenforceable to the extent contrary to this section.

The Committee notes that the "Direct Broadcast Satellite Service" is a specific service that is limited to higher power DBS satellites. This service does not include lower power C-band satellites, which require larger dishes in order for subscribers to receive their signals. Thus, this section does not prevent the enforcement of State or local statutes and regulations, or State or local legal requirements, or restrictive covenants or encumbrances that limit the use and placement of C-band satellite dishes.

#### *Section 309. DBS signal security*

Section 309 amends section 705(e)(4) of the Communications Act of 1934 to extend the current legal protection against signal piracy to direct-broadcast services. The Committee finds this section necessary to protect the DBS industry from unauthorized decryption of its signals by pirates or hackers.

#### TITLE IV—EFFECT ON OTHER LAWS

##### *Section 401. Relationship to other laws*

Section 401 of the bill contains savings provisions for other applicable laws.

Subsection (a) provides that, although Title I of the bill supersedes the MFJ's line-of-business restrictions; the other parts of the MFJ are not affected. For clarity, those other parts are explicitly enumerated.

Subsection (b) provides that nothing in this Act shall be construed to modify, impair, or supersede any of the Federal antitrust laws.

Subsection (c) provides that nothing in the Act shall be construed to modify, impair, or supersede any other Federal law other than law expressly referred to in this Act. This subsection also contains a savings clause for State and local law, except "to the extent such law would impair or prevent the operation of this Act."

Subsection (d) provides that the provisions of the GTE consent decree shall cease to be effective on the date of the enactment of this Act. GTE's consent decree resulted from its 1982 acquisition of Southern Pacific Communications Company (Sprint), which provided national long distance service, and Southern Pacific Satellite Company (Spacenet), a provider of satellite communications services. The Department of Justice, as part of its statutory Hart-Scott-Rodino Act review of the proposed acquisition, negotiated a consent decree with GTE. The consent decree was approved in December, 1984 and permitted GTE to proceed with its acquisition of Sprint, but regulated its provision of interexchange services. The agreement required structural separation between General Telephone Operating Companies (GTOCs) and the Sprint assets and prohibited the GTOCs from providing interexchange services. The decree

also prohibited the joint marketing of those services. The Committee further notes that GTE has since disposed of all Sprint assets and has sold Spacenet to a subsidiary of General Electric Company. Despite the disposition of these assets, and other changes in the marketplace, the decree remains in effect, making GTE the only independent telephone company subject to such restrictions. The Committee notes that GTE's consent decree is not related to the court ordered line of business restriction imposed on the BOCs. Because of the changes in circumstances that have occurred since 1984, the Committee finds that the GTE consent decree should be vacated.

Subsection (e) makes clear that the provisions of the MFJ do not apply to wireless companies which were previously owned by a BOC or its affiliate. The Committee, by this subsection, intends to ensure that former BOC wireless operations will be free from any restrictions imposed under the MFJ once they are no longer affiliated with the BOC's wireline exchange monopoly. The Committee emphasizes that it does not matter how that termination of affiliation is achieved, whether by transfer, spinoff, or in any other manner.

#### *Section 402. Preemption of local taxation with respect to DBS services*

Section 402 preempts local taxation on the provision of direct-to-home satellite services. Direct-to-home (DTH) satellite services are delivered via satellite directly to consumers equipped with satellite receivers at their premises.

The Committee finds that DTH satellite service is a national rather than local service. A DTH satellite service provider transmits the service via a Commission-licensed satellite and bills consumers for that service. Unlike other video programming distributions systems, satellite-delivered programming services do not require the use of the public rights-of-way, or the physical facilities or services of a community.

This section exempts DTH satellite service providers and their sales and distribution agents and representatives from collecting and remitting local taxes on satellite-delivered programming services. Section 402 does not preempt local taxes on the sale of the equipment needed to receive these services.

#### TITLE V—DEFINITIONS

##### *Section 501. Definitions*

Subsection (a) adds new definitions to the Communications Act of 1934, including definitions for "information service," "telecommunications," "telecommunications service," "telecommunications equipment," "local exchange carrier," "affiliate," "customer premises equipment," "electronic publishing," "exchange area," and "rural telephone company." "Information service" and "telecommunications" are defined based on the definition used in the Modification of Final Judgment.<sup>15</sup> The definition of "telecommunications" refers to transmission "by means of an electromagnetic transmission medium." The Committee is aware that there is some

<sup>15</sup> 522 F. Supp. at 229.