

EX PARTE OR LATE FILE

THE ROUSE COMPANY

June 4, 1996

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Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D. C. 20054

Re: The Rouse Company  
IB Docket No. 95-59  
Ex Parte Presentation

Dear Mr. Caton:

In conformity with Section 1.1260(a) of the Commission's Rules, enclosed please find two copies of an ex parte written presentation for inclusion in the above-referenced docket.

Should you have any questions concerning this matter, please contact the undersigned directly.

Sincerely yours,

*Donna M. Sills*

Donna M. Sills  
Senior Assistant General Counsel  
for The Rouse Company

DMS/klc

Enclosures

Division of Engineering and Technology  
LRI 18008

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

Re: Ex Parte Presentation -- IB Docket No. 95-59  
Further Notice of Proposed Rulemaking

Dear Mr. Caton:

The Rouse Company is a national development company which owns and manages commercial real estate projects consisting of Shopping Centers, Mixed-Use Projects, Office Buildings, Business/Industrial Parks and large scale, Master-Planned Land Developments throughout the United States. The Rouse Company is the developer of the city of Columbia, Maryland, a planned community and the second largest City in Maryland. The Rouse Company, through its affiliates or subsidiaries, is also the contract purchaser of Howard Hughes Properties, Limited Partnership, the developer of Summerlin, a 22,500 acre, master-planned community outside of Las Vegas, Nevada. Adoption of the rule as proposed in the above-referenced Further Notice of Proposed Rulemaking ("Notice"), would have serious adverse effects on all planned communities.

The approximately eighty-three thousand residents of Columbia and twenty thousand residents of Summerlin, like hundreds of thousands of other residents in planned communities across the country, are attracted to a planned community in large part because there are restrictive covenants that insure esthetically pleasing surroundings. The covenants which we place on all of the property in our planned developments require that improvements are compatible with their environment in order to preserve the architectural integrity of the community. No external antennas of any kind are allowed without prior written approval of the Architectural Committee. The approval process ensures that the antennas are constructed in a manner consistent with the environment the homeowners themselves have chosen to live in. The proposed FCC regulation is not in the public interest, as it will interfere with homeowners' interests in preserving architectural and community integrity.

Moreover, the Commission's legal authority to preempt private restrictive covenants is questionable. While in its Notice, the Commission discussed at length its authority to

preempt state and local regulations, nowhere did it establish similar legal grounds to preempt nongovernmental or private interests. The Rouse Company does not question the Commission's general authority to preempt state and local regulations where necessary to ensure achievement of its statutory responsibilities. See e.g., New York State Commission on Cable Television v. FCC., 74 F.2d 804 (D.C. Cir. 1984). The Commission's preemption authority, however, has generally been with respect to conflicting state and local laws, not private restrictive covenants.

The Commission's proposed rule also raises another constitutional issue. To the extent that the Commission's proposed rule infringes on the rights of property owners by authorizing a permanent, physical occupation of real property, such action implicates the Just Compensation clause of the Fifth Amendment. See e.g., Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994) ("Bell Atlantic"); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) ("Loretto"); Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). Because Section 207(f), as proposed, does not provide for an award of just compensation for a government authorized permanent physical occupation, Section 207(f) would effect an unconstitutional "taking" of private property. Bell Atlantic, 24 F.3d at 1445. This is true even where the taking furthers an important public interest or has only a minimal economic impact on the owner. Loretto, 458 U.S. at 426-435. If the Commission intends to extend its authority to affect the rights of private property owners, who have already voluntarily consented to contracts that run with the land, it must be prepared to pay compensation.

As the Loretto Court discussed, "property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property." Id. at 436. The size or amount of space involved is irrelevant for purposes of characterizing physical occupations. Id. at 430. The key factor is that the taking is permanent in nature. But for the Commission's proposed rule, homeowners would continue to make decisions concerning the use and occupation of their property in accordance with their preapproved arrangements. The Commission's Notice fails to address any of these considerations.

In addition, the 1996 Telecom Act does not expressly authorize the Commission to preempt restrictive covenants. The plain language of Section 207 does not authorize the Commission to preempt nongovernmental ordinances and restrictive covenants.

The only support for the Commission's interpretation is one passage in the House Report. Notice at ¶56. However, reliance upon a sentence in the House Report to the Telecom Act is not sufficient to justify preemption of private restrictive covenants because, absent an express intent by Congress to preempt other laws, the Commission should not imply one. Indeed, Section 601(c) of the 1996 Telecom Act prohibits preemption of other laws based upon mere implication:

(1) NO IMPLIED EFFECT - This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

This provision clearly recognizes that the Commission, where directed, has authority to preempt only governmental laws. No other types of rules or restrictions are expressly contemplated by this Section 207 or 601(c).

In light of the constitutional ramifications of the proposed rule, the Commission should not attempt to extend its preemption authority in nongovernmental contexts. The court in Bell Atlantic determined that "statutes will be construed to defeat administrative orders that raise substantial constitutional questions." 24 F.3d at 1445 (citations omitted). The Commission's authority to preempt covenants between private homeowners is ambiguous at best.

In the event that the Commission, nonetheless, determines that its preemption authority encompasses private covenants, it should only exercise such authority to the extent that restrictive covenants impose unreasonable restrictions in conflict with federal objectives. It is our position that, in addition to the health and safety concerns mentioned in the Notice, reasonable regulations regarding location and screening of satellite antennas less than one meter in diameter would not "impair a viewer's ability to receive video programming services...." Notice at ¶59. Unless the proposed rule is revised to exempt such regulations, the Commission will be jeopardizing the entire planned community concept. A one meter antenna located in the middle of a front yard or on the peak of a roof can destroy the pleasing architectural facade of a building. A one meter antenna properly placed with greenery in front of it can be compatible with its surroundings.

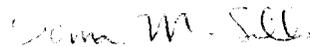
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The proposed rule may also open additional problems for planned communities. It may be difficult to enforce other covenants restricting improvements which are less obtrusive than a satellite antenna, if the antenna cannot be challenged. For instance, a covenant requiring brick chimneys may become meaningless if an owner can put up a satellite antenna blocking the chimney. The entire concept of restrictive covenants and the purpose they accomplish is challenged when the ability to privately regulate a one meter antenna is denied.

For these reasons we request that, to the extent the Commission believes it has the authority to adopt any rule, the proposed rule be amended to specifically allow restrictions on antennas which further aesthetic considerations, provided that such regulations "do not impair a viewer's ability to receive video programming services over a satellite antenna less than one meter in diameter".

In accordance with the Commission's ex parte rules, two copies of this letter will be submitted this day with the Commission's Secretary's Office.

Sincerely yours,



Donna M. Sills  
Senior Assistant General Counsel  
(410) 992-6160

DMS/kjg

cc: See Attached List

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cc: The Honorable Roscoe G. Bartlett  
The Honorable Richard H. Bryan  
The Honorable Benjamin L. Cardin  
The Honorable Elijah E. Cummings  
The Honorable Robert L. Ehrlich, Jr.  
The Honorable John Ensign  
The Honorable Wayne T. Gilchrest  
The Honorable Steny H. Hoyer  
The Honorable Barbara Mikulski  
The Honorable Constance A. Morella  
The Honorable Harry M. Reid  
The Honorable Paul Sarbanes  
Mr. Alton J. Scavo  
Mark Tauber, Esquire  
The Honorable Barbara F. Vucanovich  
The Honorable Albert R. Wynn