The attached pleadings in Docket No. 95-59 address this point in greater detail, but the fundamental issue in both dockets is that the proposed rules would force building operators to allow tenants and residents to place antennas anywhere they like, regardless of the consequences to other building occupants, the building operators, or the public in general, or the structural integrity of the buildings themselves.

For the reasons set forth above and in the attached comments and reply comments in Docket No. 95-59, the Commission should abandon any attempt to deal with placement of antennas on private property, and should not adopt the proposed rule.

Respectfully submitted,

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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 and Multichannel Multipoint Distribution Service	)	

JOINT REPLY COMMENTS OF
NATIONAL APARTMENT ASSOCIATION
BUILDING OWNERS AND MANAGERS ASSOCIATION
NATIONAL REALTY COMMITTEE
INSTITUTE OF REAL ESTATE MANAGEMENT
INTERNATIONAL COUNCIL OF SHOPPING CENTERS
NATIONAL MULTI HOUSING COUNCIL
AMERICAN SENIORS HOUSING ASSOCIATION
NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS

Introduction

The commercial real estate industry urges the Commission not to adopt the proposed rule preempting all nongovernmental restrictions on the placement of over-the-air television and MMDS receiving antennas. The proposed rule misreads Section 207 of the Telecommunications Act of 1996 (the "1996 Act") and would constitute a taking of the property of commercial and residential building owners. In addition to addressing comments of other parties in this docket, the joint commenters address certain reply comments submitted in the DBS antenna preemption rulemaking (Docket No. 95-59) that make new arguments that

are also relevant here.

I. THE PROPOSED RULE MANDATES A PERMANENT PHYSICAL TAKING OF RENTAL PROPERTY -- VIOLATING THE FIFTH AMENDMENT.

Several reply comments in Docket No. 95-59 acknowledge our earlier argument that the proposed rule would effect an unconstitutional taking. The replies attempt to persuade the Commission that the Supreme Court's decision in *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), only applies to the permanent occupation of property by a third party. *See* Reply Comments of DIRECTV, Inc. ("DIRECTV"), Philips Electronics North America Corp. ("Philips"), and the Satellite Broadcasting and Communications Association ("SBCA"). These parties assert that "the Fifth Amendment is not implicated by preempting lease and other private restrictions . . . .", Reply Comments of DIRECTV at 8, because the property owner invited the tenant onto the premises, citing *FCC v. Florida Power Corp.*, 480 U.S. 245 (1981). Apparently, those parties believe the government can confer new property rights on a tenant at the property owner's expense without effecting a taking.

This is manifestly not true. Leaseholds are for specified purposes. Commercial tenants and apartment residents enter into leases that grant real property interests in the form of a right to occupy real estate for a specified purpose and term. If a lease does not convey the right to install antennas or run cables, then the property owner has not conveyed that right, and the tenant or resident may not use the property for that purpose. The government cannot grant a tenant a right to permanently occupy property outside the leasehold conveyed by the landlord without effecting a taking.

Despite the telecommunications companies' assertions, *Florida Power* does not apply to the situation presented by the Commission's proposed rules. *Florida Power* addressed the

Commission's authority to set the pole attachment rates Florida Power could charge under certain pole attachment lease agreements. Florida Power had voluntarily conveyed through the lease agreements with the appellant cable companies the right to occupy Florida Power's poles with pole attachments. The Commission's pole attachment rental rate rules directly controlled the leaseholds voluntarily created by Florida Power, viz., attaching cables to poles. Section 207, on the other hand, is different in its very nature. The telecommunications industry is arguing Section 207 grants a right to use property where that use was not included in the negotiations or agreement between the parties with respect to specific premises.

As we discussed in our comments in Docket 95-59, shopping centers often lease roof rights to tenants and service providers for the placement of antennas, for a bargained-for consideration. In other words, shopping centers allow certain entities a defined property interest to occupy a roof for the sole purpose of installing and operating satellite antennas. The same is true of other commercial and residential buildings. The proposed rule, however, proposes to deprive property owners of this real property interest and would grant all tenants the right to install an antenna at will. Therefore, the proposed rule is not a regulation of an existing relationship, but a taking of new property interests from the landlord and a conveyance of these interests to the tenant by governmental fiat.

This is why *Florida Power* does not apply and *Loretto* does apply. *Loretto* addressed physical occupations by third parties. Similarly, as noted in the preceding paragraph, the proposed rule is a grant of rights to a party beyond those contained in any existing contractual relation with the landlord. The owner would be forced by the government to give up a part of its bundle of rights that it had not agreed to give up in its negotiations with the tenant. This is

a taking.[1] Loretto applies, and so does the Anti-Deficiency Act, 31 U.S.C. § 1341 (1996).

The other parties also misconstrue the distinction *Loretto* makes between takings and the exercise of the police power to regulate landlord-tenant relationships. Police power regulation is not at issue because Section 207 is not an exercise of the police power. Indeed, the federal government has no such police power. Section 207 is, if anything, an exercise of the power of Congress to regulate interstate commerce. This power is limited to matters that substantially affect interstate commerce. There is currently some doubt as to how far the authority of Congress under the commerce clause extends. *U.S. v. Lopez*, 115 S.Ct. 1624, (1995). Congress and the Commission should avoid dictating private leasehold arrangements or terms, matters uniquely subject to local law and not in interstate commerce, in the name of improving television reception.

As we said in our initial comments, the plain language of Section 207 and its legislative history show that Congress has not given the Commission express authority to regulate the landlord-tenant relationship. Nor does the Commission have the general power to do so in the public interest or elsewise. *NAACP v. Federal Power Comm'n*, 425 U.S. 662, 669 (1976) (federal agency does not have "a broad license to promote the general public welfare").

Finally, SBCA attempts to avoid *Loretto* by saying that installing an antenna is not a permanent occupation of the property. General real estate legal principles treat all building attachments as fixtures. Once an antenna is installed, it will remain in place indefinitely -- just

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[1] In addition, the other commenters assume that in every case the proposed rule would grant only the tenant new rights. But the rule is so broad that at least in some cases it would seem also to allow intrusion by totally new parties who are not existing tenants. *Loretto* applies, even under the commenters' own argument.

as the installation of cable television wires at issue in *Loretto*.

The Commission's proposal would preempt private lease arrangements; grant tenants, residents and third parties new or expanded rights to use private property; permit the permanent physical occupation of that property; and do so regardless of the fair market value of the occupancy right. This is undeniably a taking. Therefore, the Commission should not adopt the proposed rule.

II. SECTION 207 DOES NOT ENTITLE EVERY INDIVIDUAL IN THE COUNTRY TO RECEIVE TELECOMMUNICATIONS SERVICES.

Several commenters in the DBS rulemaking also overstate the true reach of Section 207. These commenters claim that Section 207 gives viewers an absolute right to receive any programming service they desire, regardless of technical, physical and geographic limitations. In an attempt to deflect attention from our initial comments on the true scope of the statute, DIRECTV claims that the commercial real estate industry would "turn Section 207 on its head."

For example, Philips asserts that "a viewer has the right of access to video programming service of his or her choice through a DBS antenna [and, by extension, an over-the-air or MMDS antenna] regardless of the nature of the residence." Reply Comments of Philips at 4-5. And SBCA states that Section 207 "was enacted precisely to ensure that *every individual* will have many different sources and technologies available that provide video programming services." Reply Comments of SBCA at 3 (emphasis added).

These statements go too far. Section 207 says nothing about giving viewers rights. It merely authorizes the Commission to preempt certain restrictions. Thus, the commenters have

overstated their case. In addition, they make impossible claims. People today live in places where it is technically impossible to receive DBS programming - or over-the-air or MMDS programming. Those people do not and cannot have the right to receive what they cannot possibly get. Consider, for example, residents on the north side of the second floor of a New York City apartment building, surrounded by high rises. Those residents may find it impossible to receive DBS or MMDS programming of any kind, unless a cable is run in from a roof with a line-of-sight path to the transmitting antenna. They may even have poor over-the-air broadcast reception. These are unfortunate facts of life. Section 207 says nothing about mandating any kind of service to those residents regardless of the cost, the level of physical intrusion, or the technical requirements. And it surely does not direct the landlord to absorb all the economic costs.

DIRECTV and others also misstate our argument in their zeal for finding a new right of access for all viewers. Reply Comments of DIRECTV at 7; Reply Comments of SBCA at 4. We have never argued that owners have different rights than renters. We have merely pointed out that the statute and the legislative history do not authorize the preemption of private lease arrangements. If this means that some renters have different rights than some owners, it is merely further evidence that Congress did not intend to create a new entitlement when it adopted Section 207.

III. CONGRESS DID NOT INTEND FOR THE COMMISSION TO PREEMPT ALL NONGOVERNMENTAL RESTRICTIONS.

As we argued above and in our initial comments, if the Commission really intends to preempt *all nongovernmental* restrictions on the placement of broadcast television and MMDS receiving antennas, it must find its authority to do so somewhere other than Section 207 of the 1996 Act. The language of the statute and the legislative history do not support the preemption of lease restrictions governing the activities of apartment residents and commercial building tenants. The comments of other parties implicitly support this conclusion.

None of the other commenters has directly asserted that apartment or commercial leases fall within the scope of the rule or were intended to be covered by Section 207. Indeed, to our knowledge, no other party has even mentioned commercial properties in its comments. The commenters limit their claims to asserting that "restrictive covenants" and "homeowners' association rules" should be preempted. *See, e.g.,* Comments of Bell Atlantic at 3; Comments of the Wireless Cable Association International, Inc. at 23-24. The discussions of Section 207 in the various comments make it plain that the section applies only to residential properties. And even in apartment rental settings, no commenter has asserted that a residential lease constitutes either a restrictive covenant or a homeowners' association rule.

If any of the other parties thought the statute permits preemption of leases, they should have said so. The most that can be said, however, is that some commenters use such terms as "restrictive covenants" vaguely to take advantage of that breadth if the opportunity arises. *See, e.g.,* Comments of the National Association of Broadcasters at 5.

For example, the Network Affiliated Stations Alliance ("NASA") proposes that all private restrictions on the placement of antennas should be preempted. To the extent that any

existing restriction is "legitimate" and not inconsistent with Section 207, NASA says, property owners should be required to seek adoption of state or local governmental regulation. Comments of NASA at 6-7. NASA does not, however, explicitly argue that commercial and rental residential properties come within the scope of Section 207, and by conceding that some restrictions may be "legitimate" and "not inconsistent with" Section 207, NASA ratifies our argument on this point.

Any party that wants the rule to apply to commercial and residential leases must introduce evidence of the validity of such an interpretation into the record in this proceeding. Since none has done so, the Commission should not adopt the rule as proposed.

IV. TENANT ACTIVITIES SHOULD NOT BE REGULATED THROUGH LOCAL GOVERNMENT REGULATION.

The NASA proposal mentioned above suggests that state and local governments should adopt legislation aimed at addressing all the issues currently covered by private lease terms. This proposal is flawed for several reasons and should be rejected.

First, the NASA proposal could never be implemented simply because it would require hundreds of thousands of property owners to seek relief from tens of thousands of local governments. The expenditure of resources on both sides would be enormous, and in the end the result would not replicate the effectiveness of the current private market. Many local governments would simply refuse to address the issue for a variety of reasons, many having nothing to do with the merits of the issue. Other communities would adopt incomplete or ineffective rules. And some would probably adopt overly intrusive rules.

Second, the NASA proposal is also based on the assumption that individualized decisions about the management of particular buildings can be subsumed into general rules to

be adopted and enforced by local governments. This falsely assumes that the wide variety of building characteristics and landlord-tenant relationships can be addressed through regulation. Different types of commercial properties, such as high-rise office buildings and shopping centers, raise totally novel and unique questions. Residential properties are totally different again. In reality, therefore, communities cannot use regulation to substitute for the infinite variety of safety, maintenance and management concerns that are accommodated by free market lease negotiations. Thus, NASA's proposal is absurd to suggest that regulation can do a better job than a fully functioning free market in addressing the needs of both landlords and tenants. Local governments cannot possibly adopt and enforce effective regulations.

Furthermore, the broadcasters suggest that rules adopted should be subject to an additional level of regulatory review, if the telecommunications industry chooses to challenge the rules as "illegitimate," or "inconsistent with Section 207." The prospect of multiple levels of regulations, adopted at the request of the real estate industry, is silly. Few local governments would willingly step into that morass at all.

In short, local governments cannot effectively act as the rental agent for hundreds of thousands of rental buildings.

Therefore, the Commission should leave the free and competitive real estate market to work. Property management issues should be negotiated between property owners and their tenants.

Conclusion

The Commission should abandon any attempt to deal with placement of antennas on private property, and should not adopt the rule as proposed.

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May 21, 1996

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

In the Matter of	)	
Telecommunications Services Inside Wiring	)	CS Docket No. 95-184
Customer Premises Equipment	)	

JOINT COMMENTS OF
BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL
NATIONAL REALTY COMMITTEE
NATIONAL MULTI HOUSING COUNCIL
NATIONAL APARTMENT ASSOCIATION
INSTITUTE OF REAL ESTATE MANAGEMENT
NATIONAL ASSOCIATION OF HOME BUILDERS

Summary

The commenters welcome the prospect of a rationally de-regulated market place for telecommunications services. Our customers -- our tenants and prospective tenants -- are demanding and enjoying this kind of deregulated market for many services, including of course, telecommunications services. Just as the telecommunications industry will be revolutionized, and ultimately improved, by competitive opportunities, our industry recognizes opportunities in increased customer sophistication and demands for new telecommunications services. Indeed, these demands will be (and already are) providing opportunities for our businesses to compete, one against the other, for market share. Our members aggressively market the characteristics of their properties, including telecommunications services. These

comments include a detailed discussion of the manner in which the real estate markets have responded and are responding to the proliferation of new telecommunications providers and the market forces that define this response (Point IV[A]).

The benefits to our customers -- consumers, if you will -- of the new competitive pressures unleashed by the efforts of Congress and the FCC are clear. As an industry, we are, therefore, at a loss to understand how the Federal Communications Commission could rationally interject a static regulatory regime at the intersection between our business and the telecommunications revolution. As set forth in these comments, constitutional and policy considerations weigh heavily against FCC-generated ground rules regarding the terms of telecommunications companies' access to and their highly profitable use of the real estate owned and managed by our respective members.

Any attempt by the Commission to mandate access to multiple-unit buildings by telecommunications providers -- whether under the guise of defining demarcation points or otherwise -- would lead to a taking of private property under the Fifth Amendment and would plainly exceed the Commission's statutory authority.

The U.S. Supreme Court has held in Loretto v. TelePrompTer Manhattan, 458 U.S. 420 (1982), that any regulation allowing a telecommunications provider to emplace its cables in, on, or over a private multi-tenant building is a governmental taking.

Congress has not given the Commission the power of eminent domain; Congress has passed no legislation that would allow the Commission to obligate the United States to respond in damages in the Claims Court for such a taking; and any such attempt by the Commission to impose such an unbudgeted fiscal liability on the federal treasury would violate the Anti-Deficiency Act of 1870, now 31 U.S.C. § 1341. A previous Commission attempt to force even carriers subject to the Communications Act to make their central office buildings available to competing carriers has been rebuffed in the courts. See Bell Atlantic v. FCC, 306 U.S.App.D.C. 333, 24 F.3d 1441 (1994)(central office co-location). The Commission's power over non-carrier buildings is even less than the Commission's power over building in subject carriers' regulated rate bases. Moreover, the Commission would not be prepared to undertake the case-by-case adjudications necessary to fix just compensation for multitudinous takings. (Points II and III)

Aside from the straight-forward Constitutional and jurisdictional impediments to Commission regulation of access to private premises, other considerations suggest the benefit of an unregulated approach. First, the nation's limited but growing experience with unregulated (competitive) access providers makes

clear that there is no need for the Commission to intervene on the access issue. Access is adequately regulated by the marketplace, and only the market will be flexible enough to respond to fast-changing consumer needs and technological developments. (Point IV[A]) Second, the Commission could not craft one-size-fits-all regulations that would be superior to on-the-spot management's responsibility for particularized building safety and code compliance, occupant security. Indeed, effective management of the property, including allocation of limited duct and riser space and prevention of physical interference between competing providers is all demanded by the nature of the real estate business and its responsiveness to tenant concerns. (Point IV[B])

Accordingly, the Commission should (i) decouple the access-to-property and the demarcation-point issues, (ii) abandon any attempt to deal with the former, and (iii) adopt rules for the specific demarcation point and other wiring issues raised by the

NPRM that reflect the realities of the diverse physical and market characteristics of multiple-unit buildings. (Points I and V)

* * *

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

In the Matter of Telecommunications Services Inside Wiring Customer Premises Equipment	)	CS Docket No. 95-184

JOINT REPLY COMMENTS OF
BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL
NATIONAL REALTY COMMITTEE
NATIONAL MULTI HOUSING COUNCIL
NATIONAL APARTMENT ASSOCIATION
INSTITUTE OF REAL ESTATE MANAGEMENT
NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS

Summary

The overwhelming response of the real estate industry to the Commission's Notice of Proposed Rulemaking in this docket demonstrates the depth of the industry's concern. The prospect of Commission interference in the ability of building operators to effectively manage their properties is of enormous concern to the entire industry and a factor that the Commission should take into account.

The Commission should leave building access to the marketplace rather than attempting to impose one-size-fits-all rules. The commenters, like the industry in general, do not believe that Commission regulation that might affect the ability of operators of commercial and residential buildings to control access to their properties is necessary. The real estate

business is extremely competitive, and landlords have very strong incentives to meet their tenants' needs. Over the long run, the building operators that do so will succeed, and those that do not will fail, because the real estate industry is not a monopoly.

The claims of "discrimination" and "gatekeeping" by telecommunications service providers reflect a lack of understanding of the influence tenants have over their landlords, and the costs to building operators of supervising the activities of service providers in their buildings. Building operators have no incentive to exclude service providers, so long as the additional costs of their presence in the building are met, and they provide services of acceptable quality.

Moreover, the Commission has no authority over building operators that would permit it to impose a right of access. The vast majority of building operators are not in the telecommunications business, and even those that are protected from physical invasion of their property by the Fifth Amendment. See Bell Atlantic v. FCC, 306 U.S. App. D.C., 333, 339, 24 F.3d 1441, 1447 (1994).

In addition, the dominant service providers are large businesses and fully capable of negotiating with their counterparts in the real estate industry. While some of these providers may desire that the Commission grant them certain advantages, the Commission should recognize that what these service providers are requesting is the distortion of the free market.

To the extent the Commission has power to adopt regulations, the Commission should reflect the distinctions between various types of commercial and residential properties that require different treatment.

Finally, the Commission's power to establish any demarcation point is limited. The Commission's authority to prescribe demarcation points derives from its statutory authority to establish the rate base and regulate carrier services and does not include the right to preempt state property law. The Commission may define the demarcation point for these regulatory purposes, but such a definition neither implies nor requires that a service provider have the absolute right to physical access to the property. Congress did not withdraw from building operators their authority to control access to and the use of their property. Consequently, although there may be a general presumption that the demarcation point is at the property line, property owners retain the discretion to enter into agreements with service providers granting them access and perhaps establishing different demarcation points for different purposes. Under no circumstances should a tenant or resident have any right of access or ownership interest in wiring lying in the property of others outside the tenant's or resident's demised premises.

In summary, the comments of others in this docket fully support the proposition that Commission regulation of access to multi-unit buildings is unnecessary.