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July 16, 1998


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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY


**VIA HAND DELIVERY**

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

ORIGINAL

Re: Ex Parte Presentation in MM Docket 95-59

Dear Ms. Salas:

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

On July 16, 1998, the following individuals met with Jane Mago of Commissioner Powell's office: Gerard Lavery Lederer of BOMA; Jim Arbury of NMHC and NAA; Megan Booth of IREM; Roger Platt of NRC; and Matthew C. Ames of Miller & Van Eaton, P.L.L.C. The purpose of the meeting was to discuss issues related to the placement of over-the-air receiving devices on leased property. At the meeting, Ms. Mago was given written materials elaborating on the Real Estate Association's positions, copies of which are attached, and copies of comments and reply comments previously filed with the Commission.

Please contact the undersigned with any questions.

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List A B C D E

Very truly yours,

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

By Matthew C. Ames

cc: Jane Mago, Esquire

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

# REAL ESTATE URGES THE COMMISSION TO RESPECT SAFETY CONCERNS AND PROPERTY RIGHTS BY NOT EXTENDING ITS OVER-THE-AIR-RECEIVING DEVICE RULES TO LEASED PROPERTY

- The Real Estate Associations[1] support the Commission's current OTARD rules because they properly balance the intent of Congress and the rights of property owners.

- Property owners have historically promoted the growth of alternative video programming technologies – such as the SMATV industry -- out of the need to serve their customers. Building owners are prepared to introduce DBS and other competitive services, under conditions that protect the safety and quality of their properties.

- The Real Estate Associations encourage their members to allow apartment residents access to all types of video programming services, but property owners must retain full authority to control the location and manner of installation. The Commission should not extend the OTARD rules to leased property for the following reasons:

  - **Commission action would interfere with the free market, which is currently working.** Property owners are already introducing the latest, best and most dependable technologies into their buildings. The Commission should not attempt to extend regulation to a competitive industry which already responds to the needs of tenants and residents.

  - **Building owners must be able to control safety conditions.** Building owners do not ban antennas arbitrarily. Because of their size, weight, and location, improperly-mounted antennas pose a much more substantial danger than other items. If tenants can place antennas at will, the property owner cannot protect itself, tenants or third parties from potential injury, and might face liability itself. Examples of potentially unsafe tenant installations are attached as Exhibit A. The FCC is not in a position to develop and enforce comprehensive safety regulations governing the mounting of antennas – those matters are appropriately governed by state and local building codes and building regulations. Indeed, exterior mounting of antennas is prohibited by some fire and safety codes, and those codes are enforced against building owners, not tenants.

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

- **Building owners must be able to control aesthetic conditions.** Aesthetic considerations undeniably affect property values. For example, consider the visual effect of the multiple dishes shown in the photograph attached as Exhibit B. For the reasons discussed in the Declaration of Harvard Law Professor Charles Haar (attached as Exhibit C), forcing property owners to permit exterior installations would constitute a Fifth Amendment taking.

- **The FCC has no authority over building owners as such.** *Illinois Citizens Committee for Broadcasting, et al. v. Sears, Roebuck & Co.*, 35 FCC 2d 237, *aff'd*, 467 F.2d 1397 (7th Cir. 1972) (FCC had no jurisdiction to address concerns raised by construction of Sears Tower). Therefore, the FCC cannot order building owners to permit tenants to install any kind of facilities.

- **Congress did not intend Section 207 to apply to leased property.** The legislative history refers only to such restrictions as zoning laws and homeowners' association rules – there is absolutely no indication that Congress meant to include leases.

- **Commission regulation would force building owners to subsidize service providers and building tenants.** Any Commission rule requiring building owners to permit installation of antennas will impose costs on the owner, solely for the benefit of third parties. One of the underlying principles of the Telecommunications Act of 1996 was that, unless otherwise expressly stated in the law, the party that creates a cost should pay that cost. The current OTARD rules follow this principle because they grant rights only to property owners. The Commission should continue to uphold this principle.

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**EXHIBIT A-1**

**The two photographs in this exhibit show an antenna mounted on a piece of 2" x 4" lumber, sticking out a third-story window. The need for a building owner to be able to ban such installations would seem obvious. Any Commission rule that permits tenants to install antennas must also regulate such creativity. Note that there is no balcony involved, and that since the lumber is apparently not permanently attached to the outside of the building, this is arguably not an exterior installation. The Real Estate Associations suggest that building management is in the best position to regulate such activities.**

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**EXHIBIT A-2**

**The photograph in this exhibit shows a DBS antenna affixed to the outside of a wooden balcony. This raises several issues: Was the antenna mounted with appropriate fasteners, capable of holding the antenna securely in place in all weather conditions? Are the wooden balcony slats strong enough to support the antenna, or might the slat be pulled out by the weight of the antenna, sending both the slat and the antenna falling? And, not least, does the tenant have the right to install anything on the <u>outside</u> of the balcony? Once again, the Commission cannot possibly police every building in the country, nor can it anticipate all the situations that will face building owners.**

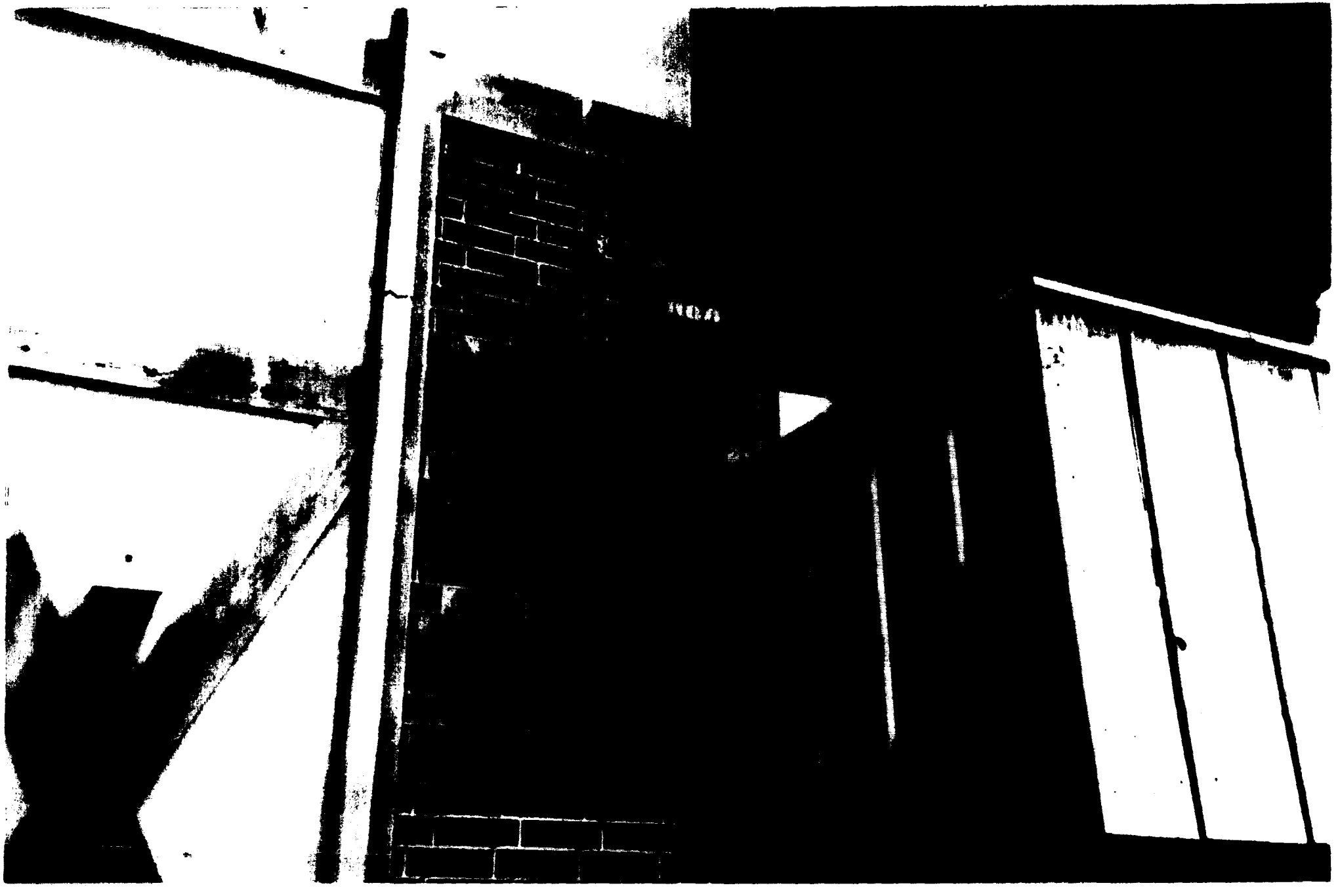
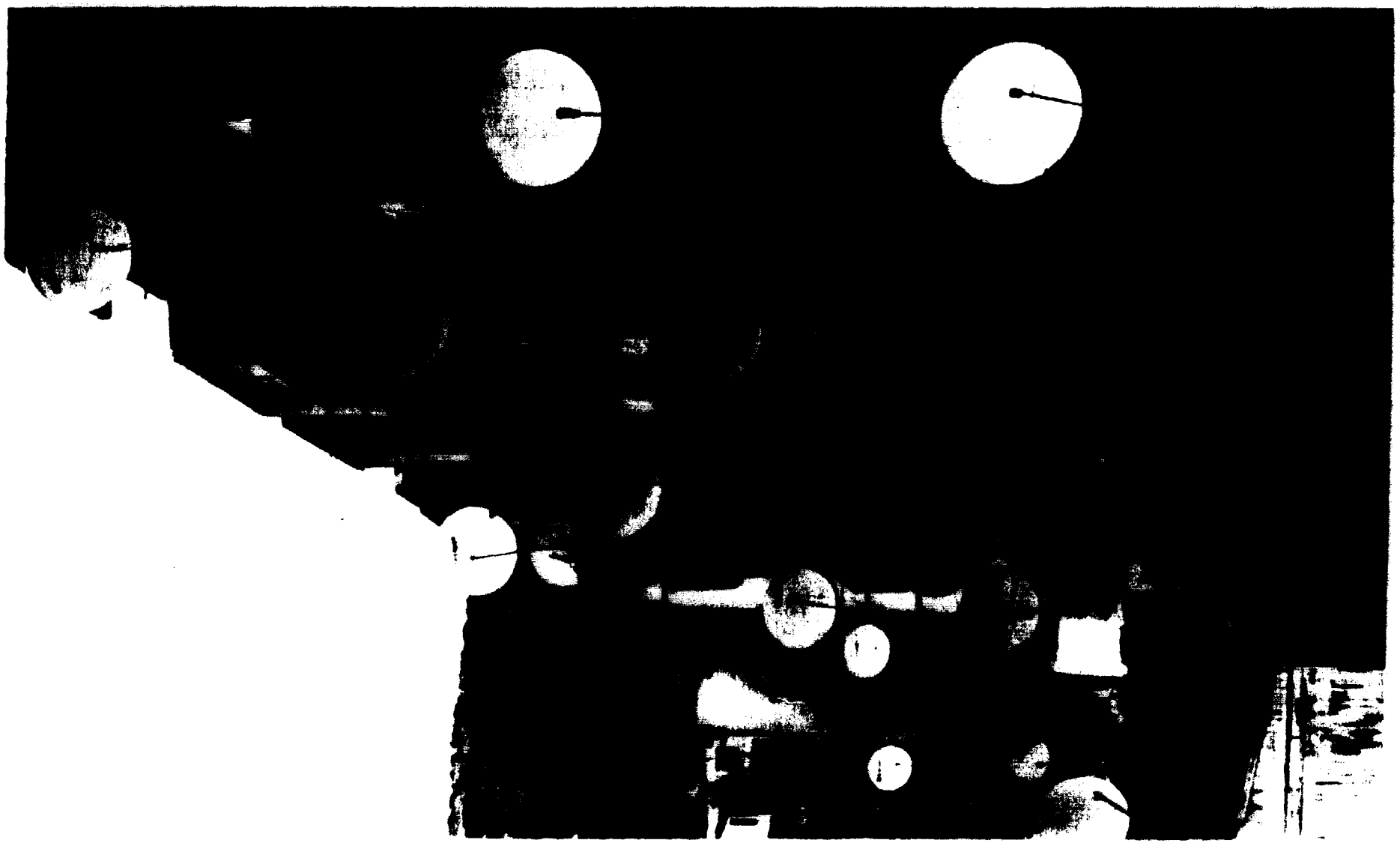


**EXHIBIT B**

**The attached photograph shows an apartment building in Albania covered with what appear to be one-meter dishes. The Real Estate Associations do not believe Americans want their neighborhoods to look like anything remotely resembling this scene. We also believe that appearances affect property values; permitting uncontrolled placement of DBS antennas will, at some point, in some cases, reduce the value of a building and consequently effect a taking under the Fifth Amendment.**



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

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Preemption of Local Zoning Regulation of Satellite Earth Stations | ) | IB Docket No. 95-59 |
| | ) | |
| 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 Service and Multichannel Multipoint Distribution Service | ) | |

**DECLARATION OF CHARLES M. HAAR**
**IN SUPPORT OF 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**

I, Charles M. Haar, declare as follows:

I submit this Declaration in support of the Reply Comments of the above-named associations.

I am a Professor of Law at Harvard Law School and have served in this capacity since 1955. I have taught and written on property and constitutional law issues for thirty years. A copy of my resumé is attached. I have edited a Casebook on Property and Law (with L. Liebman),

and a Land-Use Planning Casebook (5th ed. 1996). The most recent book is Suburbs Under Siege: Race, Space, and Audacious Judges (Princeton U. Press 1996). I was Chief Reporter for the American Law Institute's Model Land Development Code in 1963-65; Assistant Secretary for Metropolitan Development in the U.S. Department of Housing and Urban Development in 1965-68; Chair of Presidential Commissions on housing and urban development (Presidents Johnson and Carter); and Chairman of the Massachusetts Housing Finance Agency.

Based on the foregoing, I submit to the Commission in this Declaration the following analysis making two points: (1) a regulation that would require placement of antennae on owners' and common private property (by tenants or other occupants, involuntarily by owners or by third parties), or limit restrictions in private agreements on such action, would be a taking under the Fifth Amendment, according to several lines of cases; and (2) because of the Fifth Amendment implications, the Commission must apply a narrow construction of the Section 207 prohibition on certain private restrictions.

## I. THE PROPOSED REGULATION IS A TAKING

### A. A "PER SE" TAKING

Under current United States Supreme Court precedent, "a permanent physical occupation authorized by government is a taking without regard to the public interests that

it may serve." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982). Loretto involved a New York statute which authorized the installation of cable television equipment on plaintiff Loretto's apartment building rooftop. The Court held that this statute constituted a taking under the Fifth Amendment as applied to the states under the Fourteenth Amendment. The installation involved the placement of cables along the roof "attached by screws or nails penetrating the masonry," and the placement of two large silver boxes along the roof cables installed with bolts. Id. at 422. In finding a taking, the Court noted that "physical intrusion by government" is a property restriction of unusually serious character for purposes of the Takings Clause. Id. at 426.

In the Commission's Further Notice of Proposed Rulemaking, the Commission seeks comments on a proposed rule in connection with Section 207 of the Telecommunications Act of 1996 (the "Proposed Regulation"). The Proposed Regulation, in requiring that owners allow placement of antennae (by occupants, involuntarily by owners or by third parties) on owners' and common private property, or limit restrictions in private agreements on such action, would directly implicate the Loretto rule. Such installation of reception equipment would be precisely the kind of permanent physical occupation deemed as a

taking by Loretto and the line of cases which follow its analysis.

The reasoning of Loretto extends from an analysis of the character of property rights and the nature of the intrusion by government. The Court did not look at the justification for the government's physical intrusion, but exclusively at what the government had done to the claimant. It considered the injury to the claimant to be particularly serious not because of the financial loss involved or other factors, but because of the intrusiveness of the government's action. The Court found that the claimant could not use the physical area occupied by the cable equipment and concluded that it is unconstitutional permanently to prevent an owner from occupying her own property. Consequent upon the occupation, the "owner has no right to possess the occupied space himself ... [he] cannot exclude others [from the space, and he] can make no nonpossessory use of the property." Id. at 435-36. A permanent physical occupation is an especially severe incursion on the ordinary prerogatives of ownership, and constitutes a per se taking of property; this per se rule provides certainty and underscores the constitutional protection of private property.

Subsequent Court opinions explicitly reaffirm the Loretto rule: a regulation that has the effect of subjecting property to a permanent physical occupation is a

taking per se no matter how trivial the burden thus imposed.[1]

In Loretto, the Court addressed the issue of the public benefit of the proposed regulation, finding that

> where the character of governmental action is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.[2]

Following this reasoning, the Proposed Regulation effects a Fifth Amendment taking on a property owner who -- pursuant to a lease or other private agreement -- cannot prevent placement on the owners' or common private property of one or what could be many satellite dishes, microwave receivers, and other antennae. The Court will not entertain any weighing of the relative costs and benefits associated with the regulation in the case of a permanent physical occupation. Therefore, any public benefit or purpose (such as increased competition in video services or the provision of video services with educational and cultural benefit to the consumer) is irrelevant to the analysis of whether a taking has oc-

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1 See, e.g., Nollan v. California Coastal Commission, 483 U.S. 825, 831 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 489 n.18 (1987); Yee v. City of Escondido, 503 U.S. 519, 527 (1992).

2 Loretto, 458 U.S. at 434-35 (citing Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978)).

curred. Once it is established that a regulation authorizes a permanent physical occupation, as the Proposed Regulation would, a taking has occurred and further analysis of importance of public benefits or degree of economic impact on the owner is moot.

### B. ASSUMING ARGUENDO THAT CERTAIN RECEPTION EQUIPMENT IS NOT A PERMANENT INSTALLATION, THE PROPOSED REGULATION REMAINS A TAKING

Some commenters have suggested that some installations of reception equipment pursuant to the Proposed Regulation may not be "permanent" and thus not subject to the Loretto per se takings rule.[3]

The Court addressed a situation in Nollan in which the occupation (a requirement of public access) was characterized as not permanent yet the Court still found a taking. There is a literal sense in which Nollan's land was not subject to a "permanent" physical occupation as Loretto's was, but the Court dismissed this contention. What is pivotal in the Court's view must be the state of being legally defenseless against invasion at any time. Even for non-permanent antennae installations, Court precedent would render the Proposed Regulation a taking.

A regulation falling outside the per se takings rule for permanent physical occupations would be construed

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[3] Perhaps certain equipment could be placed on a balcony and secured by ballast or its own weight, owned by the occupant and removed when the occupant vacated the premises.

under the Penn Central factual analysis. Penn Central identifies three factors which have "particular significance" in this analysis: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with investment-backed expectations"; and (3) "the character of the governmental action."[4] An examination of each of these factors in the context of the Proposed Regulation renders the same outcome as under the Loretto rule: the Proposed Regulation works a taking on the property owner.

a. Severe economic impact of the Proposed Regulation on owners. The market for residential as well as commercial property depends in large part on the appearance of the building itself and the area surrounding the building. If occupants (be they condominium owners, apartment tenants, commercial lessees or owners without exclusive use or control of the building) were allowed to install reception equipment at their discretion around the property, the value of the property on the market could decrease substantially.

Moreover, the Proposed Regulation would interfere with the ability of an owner (or association of owners) to manage its property. Effective property management requires an owner to decide on a property-specific basis

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[4] Penn Central, 438 U.S. at 124. See also Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

the physical aspects, facilities (including rapidly evolving communications equipment) and service offerings of its property based on its own complex, multiyear analysis of consumer demands, supply opportunities and costs. Instead of market-oriented management, the Proposed Regulation would require owners to devote substantial resources to implementing the government-imposed rules, including resources associated with, among other things, training property managers on the rules, monitoring whether occupants' requests and actions comply with the Commission's rules as well as applicable health and safety codes, developing and collecting charges as allowed by the rules, sorting out interfering requests from multiple occupants or services providers, and implementing procedures and training for various emergency situations.

In the context of CC Docket No. 96-98, the Commission concluded in August 1996 that a right of access to roofs and riser conduit "could impact the owners and managers of small buildings . . . by requiring additional resources to effectively control and monitor such rights-of-way located on their properties." (FCC 96-325, at Par. 1185.)

b. <u>Substantial interference with investment backed expectations</u>. Any regulation which may interfere with the market value of a piece of property would natu-

rally affect any expectations of investors who financed the building as well.

c. Character of the Proposed Regulation authorizes a physical invasion. Even if the structure is temporary, the Proposed Regulation authorizes a physical appropriation of the property as well as a permanent and continuous right to install such a structure. In Nollan, 483 U.S. at 832, the Court stated that a permanent physical occupation occurs "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." Under Nollan, the right to traverse the property, whether or not continually exercised, effected an impermissible taking. It is the "permanent and continuous right" to install the equipment which works the taking, because the right may be exercised at any time without the consent of the owner of the property.

Therefore, the regulation would constitute a taking based on the three-factor analysis set forth in the Penn Central line of cases.

### C. CLOAKING THE PROPOSED REGULATION AS A REGULATION OF THE OWNER/OCCUPANT RELATIONSHIP FAILS TO SAVE THE PROPOSED REGULATION FROM THE TAKINGS CLAUSE

#### 1. The Loretto footnote is not applicable to the Proposed Regulation

Some commenters argued that the holding in Loretto was "very narrow" and applies only to the situation of physical occupation by a third party of a portion of the claimant's property. Moreover, a footnote in Loretto states that "[i]f [the statute] required landlords to provide cable installation if a tenant so desires, the statute might present a different question from the question before us, since the landlord would own the installation." Loretto, 458 U.S. at 440 n.19. The footnote continues to describe how in this scenario where the owner would provide the service at the occupant's request, the owner would decide how to comply with the affirmative duty required by this hypothetical statute. Further the footnote indicates that the owner would have the ability to control the physical, aesthetic and other effects of the installation of the service.

Reliance on this dicta and footnote is misplaced in the context of the Proposed Regulation. Unlike a hypothetical statute requiring an owner to install a single cable interconnection, the Proposed Regulation may require an owner or association of owners to install multiple (an open-ended number) satellite dishes (DirecTV vs.

Primestar vs. C-Band vs. others), microwave receivers (MMDS vs. LMDS vs. others) and other antennae. Such multiple installations may be in ways and areas which may affect the physical integrity of a roof and other building structures, a building's safety, security and aesthetics, and thus its economic value. Moreover, the Proposed Regulation may require an owner to install the cabling associated with multiple antennae in limited riser space. Under the demands of accommodating multiple video antennae, the ability of an owner to control the physical, aesthetic and other effects of the installation of the service may be far more limited than envisioned in the Loretto footnote for a single installation, and thus a taking would be caused.

2. FCC v. Florida Power is not applicable to the Proposed Regulation

Certain commenters and perhaps the Commission appear to rely on FCC v. Florida Power Corp., 480 U.S. 245, 252 (1987), as further evidence of the limited application of the per se takings rule enunciated in Loretto. However, the holding of Florida Power is inapplicable to the Proposed Regulation and its effects on owners. In particular, Florida Power holds that the Loretto per se takings rule does not apply to that case because the Pole Attachments Act at issue in Florida Power, as interpreted by the Court, did not require Florida Power to carry lines belonging to the cable company on its utility

poles. Similarly, the Court in Yee, 503 U.S. at 528, analyzed a local rent control ordinance and found that Loretto did not apply because the ordinance involved regulation without a physical taking or taking of the property owners' right to exclude: "Put bluntly, no government has required any physical invasion of petitioners' property."

In contrast, the Proposed Regulation would do exactly the opposite by requiring owners to install antennae.

D. BUNDLE OF RIGHTS OWNED BY A PROPERTY OWNER

The recent trend in the Court applies the doctrine of "conceptual severance" in taking cases. By continually referring to an owner's "bundle of property rights," the Court is adopting the modern conceptualization of property as an aggregation of rights rather than a single, unitary thing.[5] Any regulation that abstracts and impacts one of the traditional key powers or privileges of property rights -- use or exclusion, for example -- is found to be a taking under the eminent domain clause.

In Kaiser Aetna, 444 U.S. at 179-80, the Court concentrated upon "the 'right to exclude' so universally held to be a fundamental element of the property right."

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[5] See Hohfeld, Fundamental Legal Conceptions as Applied to Judicial Reasoning, 26 Yale L.J. 710 (1917); Michelman, Discretionary Interests -- Takings, Motives, and Unconstitutional Conditions: Commentary on Radin and Sullivan, 55 Alb. L. Rev. 619 (1992).

Loretto referred to this passage (Loretto, 458 U.S. at 435-36) in declaring that "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." Again, Nollan employed this severance approach in broadening Loretto's "permanent occupation" concept. In characterizing the right to exclude as "one of the most essential sticks in the bundle of rights that are commonly characterized as property," it construed a public access easement as a complete thing taken, separate from the parcel as a whole. Nollan, 483 U.S. at 831-32.

Hodel v. Irving, 481 U.S. 704 (1987), is perhaps the clearest exposition thus far of the Court's view of certain fundamental private rights being so embodied in the concept of "property" that their loss gives rise to a right to compensation under the Fifth Amendment. The statute under attack in Hodel provided that upon the death of the owner of an extremely fractionated interest in allotted land, the interest should not pass to devisees but should escheat to the tribe whose land it was prior to allotment. The Court conceded a number of factors in favor of validity: the statute would lead to greater efficiency and fairness; it distributed both benefits and burdens broadly across the class of tribal members. However, the particular right affected -- denominated by the Court as "the right to pass on proper-

ty" -- lies too close to the core of ordinary notions of property rights; it "has been part of the Anglo-American legal system since feudal times". Id. at 716.[6]

In PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 n.6 (1980), the Court emphasized:

> [T]he term "property" as used in the Taking Clause includes the entire "group of rights inhering in the citizen's [ownership]." . . . It is not used in the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . The constitutional provision is addressed to every sort of interest the citizen may possess."

The Court is most likely to extend the Hodel doctrine of separate and distinct interests to the Proposed Regulation that would bar an owner's right to exclude an occupant from the roof and other premises owned by the property owner, or that prevents the owner from the use

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[6] Thus, Hodel adds market alienability as another essential strand of property whose attempted abrogation constitutes a per se taking. In effect, the state may not convert fee simple property into a life estate, even if such conversion is conditioned on the owner's failure to alienate during the owner's lifetime.

The Court cemented, in this fashion, the conceptual severance approach: the Court built onto the "right to exclude others" and the "right to pass on property" as examples of core strands. Both are among "the most essential sticks in the bundle of rights that are commonly characterized as property." See also First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 518-19 (1987) (dividing up the time elements of property rights).