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Office of Secretary

July 10, 1998

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

Re: Ex Parte Presentation in MM Docket 96-83

Dear Ms. Salas:

Pursuant to 47 C.F.R. § 1.1206, 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 (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 July 10, the enclosed letter was delivered to Susan Fox of Chairman Kennard's office. Included with the letter were written material elaborating on the Real Estate Association's positions, which are attached, and copies of comments and reply comments previously filed with the Commission.

Please contact the undersigned with any questions.

Very truly yours,

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

By Matthew C. Ames

Matthew C. Ames

cc: Susan Fox, Esquire

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JUL 10 1998

Federal Communications Commission
Office of Secretary

SUMMARIES OF COMMENTS OF THE REAL ESTATE INDUSTRY FILED WITH THE FEDERAL COMMUNICATIONS COMMISSION IN CS DOCKET NO. 95-184, MM DOCKET NO. 92-260, IB DOCKET NO. 95-59, CS DOCKET NO. 96-83 AND MM DOCKET NO. 96-98

BUILDING OWNERS AND MANAGERS ASSOCIATION,
INTERNATIONAL INSTITUTE OF REAL ESTATE MANAGEMENT
INTERNATIONAL COUNCIL OF SHOPPING CENTERS
NATIONAL APARTMENT ASSOCIATION
NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS
NATIONAL MULTI HOUSING COUNCIL
NATIONAL REALTY COMMITTEE

Miller & Van Eaton, P.L.L.C.
July, 1998

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	IB Docket No. 95-59
	)	DA 91-577
Preemption of Local Zoning Regulation of Satellite Earth Stations	)	45-DSS-MISC-93

JOINT COMMENTS OF
NATIONAL APARTMENT ASSOCIATION
BUILDING OWNERS AND MANAGERS ASSOCIATION
NATIONAL REALTY COMITTEE
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

Summary

Should the Commission decide to adopt any rule preempting nongovernmental restrictions on satellite antennas, the Commission should make clear that such rule (i) does not affect landlord-tenant agreements affecting occupancy of privately-owned residential properties and (ii) does not apply to commercial (non-residential) properties at all.

The Commission lacks jurisdiction generally to regulate contractual agreements affecting private property, and Section 207 of the 1996 Act authorizes at most only rules preempting quasi-governmental restrictions on satellite antennae.

For the Commission to force building owners to allow the mounting of antennae of any kind on the owners' premises would constitute an unconstitutional taking of property under Loretto.

Such a physical invasion is a per se taking that cannot be saved by any balancing test. See Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994). Congress has not authorized the Commission to incur fiscal liability for such takings, and for the Commission to do so would violate the Anti-Deficiency Act.

The Further Notice of Proposed Rulemaking incorrectly concludes that nongovermental restrictions arise only from aesthetic considerations. In fact, structural, safety, management and cost considerations justify contractual restrictions on the erection of antennas. The Commission could not practicably adopt or administer the complex standards that would be necessary to deal appropriately with the diverse building configurations that exist in the real world.

In adopting its policy governing the placement of wireless service antennas on federal property, the General Services Administration recently acknowledged the importance of a range of considerations -- including aesthetics, safety and security -- that the private sector also considers. The Commission should thus recognize the merit of the concerns that lead to the imposition of non-governmental restrictions.

The real estate marketplace is highly competitive, and the Commission need not attempt to supplant free market regulation.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	IB Docket No. 95-59
	)	DA 91-577
Preemption of Local Zoning Regulation of Satellite Earth Stations	)	45-DSS-MISC-93

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 entire real estate industry strongly supports the positions taken in our initial comments. We note that before the comment period closed on April 15, 1996, the Commission had received comments from approximately 84 firms and associations connected with the real estate industry, all fundamentally supporting the positions taken by the joint commenters. When comments received after the deadline are included, over 90% of the approximately 135 submissions responding to the March 11, 1996, Report and Order and Further Notice of Proposed Rulemaking (the "FNPRM") were filed by owners and managers of commercial and residential properties. The prospect of the Commission's intervening in the ownership and management of real property is enormous. The Commission should consider the magnitude of the

real estate industry's opposition to any Commission regulatory intrusion into the competitive real estate market.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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 and Multichannel Multipoint Distribution Service	)	

JOINT 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

Summary

In its newly-adopted rules regarding restrictions on placement of DBS, MMDS and broadcast receiving antennas, the Commission correctly imposed limits on the reach of its preemption under Section 207 of the Telecommunications Act of 1996 (the "1996 Act"). The Commission need not and should not make any further attempt to limit conditions imposed by leases or

similar agreements governing the use of multi-unit, revenue-producing real estate or affecting the use of common areas.

The Commission has no reason to extend its preemption beyond that initially adopted in its order of August 6, 1996. The statute does not require the preemption of all restrictions, nor does it specify that restrictions imposed in residential or commercial leases or similar real estate agreements are to be preempted. The statute is aimed only at governmental restrictions and certain defined non-governmental restrictions. It clearly does not apply to limitations on revenue-producing real properties.

For the Commission to force building owners to allow the mounting of antennas of any kind on the owners' premises would constitute an unconstitutional physical taking of property under Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1987). Such a physical invasion is a per se taking that cannot be saved by any balancing test. See Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994). Loretto not only stands for the proposition that requiring owners to permit the placement of antennas on their properties would be a taking, but also for the proposition that to give such a right to tenants themselves is equally a taking. The fact that a building owner has invited the tenant onto the premises does not mean the owner has surrendered its Fifth Amendment rights. Giving the tenant the right to use the property in a new way -- that is, to occupy the property with the tenant's facilities -- constitutes a taking just as surely as

if the government had attempted to convey full title in that part of the premises to the tenant.

Giving tenants the right to install antennas may defeat the ostensible purpose of any regulation. Loretto indicates that, in many states, such tenant installations may be deemed fixtures and therefore the property of the building owner. Unless the Commission were prepared to preempt state fixtures law, it would be unable to establish a uniform right to receive services.

Any attempt to force building owners themselves to enter a new line of business installing facilities for the benefit of their residents or providing "reception service" would similarly constitute a regulatory taking. Section 207 must be construed in light of the fact that Congress has given the Commission no power to effect any Fifth Amendment taking. Bell Atlantic, 24 F.3d at 1446. The Commission has no power of eminent domain, either under the Communications Act or any other provision of law. Moreover, Congress has not authorized the Commission to incur fiscal liability for any takings, and for the Commission to do so here would violate the Anti-Deficiency Act.

Section 207 absolutely does not confer upon members of the public any general right to watch television using certain types of equipment, regardless of any other legal, technical or practical constraints, nor does it require building owners to provide tenants, occupants, and residents with "reception service."

The Commission lacks jurisdiction generally to regulate

contractual agreements affecting private property and has no authority to regulate the real estate industry. Therefore, the Commission cannot direct property owners to install facilities for the benefit of tenants. Section 207 contains no grant to the Commission of new express authority -- by its terms the section invokes only prior-existing authority in Section 303 of the Communications Act -- and it omits any invocation of the Commission's so-called implied authority in Section 4(i) of the Act.

There are immense practical difficulties associated with any scheme that would allow tenants to install their own antennas, or request that service providers install them. Proposals for installing antennas for shared use raise just as many problems. This is not an area that the Commission can effectively regulate, and neither the Commission nor the courts are prepared for the inevitable litigation regarding interpretation of lease provisions and the consequences of allowing uncontrolled installation.

Finally, the real estate marketplace is highly competitive and is responding to the desires of its customers. The Commission need not attempt to supplant free market regulation.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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 Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service	)	CS Docket No. 96-83

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

Summary

The Commission should not extend its newly-adopted rules on placement of DBS, MMDS, and broadcast receiving antennas. Leases or similar private agreements governing the use of real estate and common areas are outside the scope of Section 207. Other parties are pushing the Commission to ignore Constitutional requirements and to go beyond Congressional intent.

These Reply Comments carefully analyze Constitutional objections to such an expansion. Charles M. Haar, Professor of Law at Harvard Law School and former Assistant Secretary for Metropolitan Development in the U.S. Department of Housing and Urban Development, describes the problems presented in a declaration attached to these Reply Comments. Professor Haar has over forty years' experience as a law professor, and for most of that time has been engaged in teaching and writing on property law and constitutional issues.

Professor Haar demonstrates that any extension of antenna regulation to leased property and common areas is a physical taking under the Supreme Court's decision in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Professor Haar also discusses the doctrine of Hodel v. Irving, 481 U.S. 704 (1987), which recognizes that the Fifth Amendment protects each strand in an owner's bundle of property rights. One of those strands is the right to exclude others, including the right to bar tenants from roofs and other premises. Professor Haar rebuts any contention that the Constitution allows the Commission to give tenants or service providers the right to place antennas on property that does not belong to them, or requires building owners to make programming services available to tenants using the owner's facilities.

Professor Haar and the Joint Commenters also rebut the contentions of other parties regarding the role of the First Amendment. The First Amendment does not require provider access

to viewers. If the First Amendment actually secured access, Section 207 would be superfluous. More fundamentally, the First Amendment does not impose obligations on private parties. Building owners are not agents of the government for First Amendment purposes, and they cannot be forced to provide access to their private property, either for the benefit of service providers or for the benefit of viewers.

The language of Section 207 contains no statement explicitly authorizing the Commission to effect a taking of property rights, as required by Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994). Nor does it support any claim of implied authority to effect a taking. Id. Indeed, the language and placement of Section 207 point to the opposite conclusion. Section 207 directs the Commission to exercise its existing authority under Section 303 for a particular purpose within a particular time. Section 207 is not a grant of additional authority. Otherwise, Congress would have enacted Section 207 as an amendment to the Communications Act and codified it. Section 207 is uncodified and not part of the Act. In other words, the Commission must proceed under its existing enumerated powers, and Section 207 negates any implied delegation of new authority.

Neither Section 207 nor Section 303 grants the Commission jurisdiction over building owners or the landlord-tenant relationship. The economic market place will accommodate all legal interests of tenants. There is no threat of improper marketplace discrimination, either against renters in general, or

low-income and minority residents in particular.

Neither the marketplace nor the Constitution guarantee uniformity of treatment or outcomes. Indeed, any attempt by the Commission to extend Section 207 would actually create new disadvantages to various classes of viewers.

The Joint Reply Comments detail examples of the injury Commission rules would cause. Extending the Commission's antenna rules to 4.5 million units of public housing, Section 8 HUD-assisted housing, and low-income, tax-credit-financed housing will increase the cost of low-income housing to both government and tenants. It would impose increased installation, maintenance, and liability costs on the local governments that own public housing. Those costs would constitute an impermissible unfunded mandate, not covered by Congressionally appropriated funds. HUD Section 8 housing rules today may actually prohibit expenditures on the installation of receiving equipment, requiring HUD to amend its rules, and making the federal government liable for increased subsidy payments. The effects on military dependents' housing would be similar.

The common antenna proposals put forth by other commenters are impractical and do not avoid the objections raised above. Uniformity is impossible. Facilities installed by tenants or third-party service providers will be fixtures under many state laws, but not all. Common antennas are much more complicated and expensive to install than the commenters would have the Commission believe. They will not be economically feasible in

many cases. For example, the DBS industry considers common antenna systems in properties having fewer than 90 units generally unprofitable, and the owner of the apartment complex cited in the comments of Philips Electronics North America Corp. and Thomson Consumer Electronics, Inc., does not consider it feasible to install such facilities in many of its other properties. Approximately 10 million multi-housing units are located on properties of 100 units or fewer.

In the end, however, there is no need for the Commission to supplant free market forces. The multi-unit residential and commercial marketplaces are highly competitive. The market is responding to the desires of consumers without Commission interference or regulation.

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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 COMMENTS OF
NATIONAL APARTMENT ASSOCIATION
BUILDING OWNERS AND MANAGERS ASSOCIATION
NATIONAL REALTY COMMITTEE
INSTITUTE OF REAL ESTATE MANAGEMENT
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The joint commenters, representing the owners and managers of multi-unit properties,[1] urge the Commission not to adopt the

[1] The joint commenters are the National Apartment Association ("NAA"); the Building Owners and Managers Association International ("BOMA"); the National Realty Committee ("NRC"); the Institute of Real Estate Management ("IREM"); the International Council of Shopping Centers ("ICSC"); the National Multi Housing Council ("NMHC"); the American Seniors Housing Association ("ASHA"); and the National Association of Real Estate Investment Trusts ("NAREIT"). NAA is the largest industry-wide, nonprofit trade association devoted solely to the needs of the apartment industry. Founded in 1907, BOMA is a federation of ninety-eight local associations representing 15,000 owners and managers of over six billion square feet of commercial properties in North America. NRC serves as Real Estate's roundtable in Washington for national policy issues. NRC members are America's leading real estate owners, advisors, builders, investors, lenders, and managers. The IREM represents property managers of multi-family residential office buildings, retail, industrial and homeowners association properties in the U.S. and Canada.

rule proposed in Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service, Notice of Proposed Rulemaking, CS Docket No. 96-83 (released April 4, 1996) (the "NPRM"), which would purport to invalidate nongovernmental restrictions on the placement of television broadcast receiving antennas and multi-channel multipoint distribution service receiving antennas. The joint commenters also have filed comments and reply comments in IB Docket No. 95-59, copies of which are appended to these comments.

As discussed in Docket No. 95-59, to force property owners to accept the emplacement on their property of antennas owned by telecommunications providers, tenants or residents would constitute an unconstitutional taking in violation of the Fifth

(..continued)
Founded in 1957, ICSC is the trade association of the shopping center industry. Its 30,000 members in 60 countries include owners, developers, managers, retailers, lenders, and others having a professional interest in the shopping center industry. ICSC's 26,000 U.S. members represent almost all of the 40,000 shopping centers in the United States. NMHC represents the interests of more than 600 of the nation's largest and most respected firms involved in the multi-family rental housing industry, including owners and managers of cooperatives and condominiums. ASHA represents the interests of the larger and most prominent firms in the country participating in the seniors housing industry. NAREIT represents over 260 real estate investment trust members and supporting professionals in the fields of law, accounting and investment banking.

The joint commenters are also filing concurrently a response to the regulatory flexibility analysis required by P.L. 96-354, 5 U.S.C. § 601 et seq, as recently amended by P.L. 104-121 (1996).

Amendment.

Moreover, the Commission lacks jurisdiction to regulate contractual agreements affecting private property, and Section 207 of the 1996 Act authorizes -- at most -- only rules preempting certain governmental and quasi-governmental restrictions on antennas. Thus, the Commission lacks statutory authority to regulate the emplacement of antennas in or on private buildings. Finally, preempting nongovernmental restrictions on the placement of television broadcast and MMDS receiving antennas would be an unsound attempt to interfere with the private sector's ability to address legitimate maintenance, safety, security, cost and management issues. In this regard, we are gratified by the comments of Commissioner Quello in the separate statement accompanying the NPRM, which recognizes some of the problems with the proposed rule.

One specific problem is that the proposed rule would appear to preempt lease restrictions forbidding apartment residents and commercial building tenants from placing their own broadcast television and MMDS receiving antennas on the roofs or exteriors of their buildings without the consent of the property owner or manager. As a practical matter, such restrictions are necessary, otherwise rooftops might be covered with uncoordinated individual antennas and cables running to individual apartments and offices, all installed without the landlord's consent or supervision, solely to improve reception of over-the-air signals on individual television sets.