

EX PARTE OR LATE FILED

November 17, 1998

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

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FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554

Re: Ex Parte Presentation in CS Docket No. 96-83

Dear Ms. Salas:

During the course of a meeting this afternoon with Kathy Brown of the Common Carrier Bureau, David Turetsky of Teligent, Inc. discussed issues relating to the above-referenced docket. Specifically, Ms. Brown and Mr. Turetsky discussed coverage of fixed wireless antennae by Section 207 of the 1996 Telecommunications Act.

In accordance with the Commission's rules, I hereby submit to the Secretary of the Commission two copies of this notice of Teligent's ex parte presentation as well as copies of a paper provided to Ms. Brown by Mr. Turetsky concerning the above-referenced topic.

Respectfully submitted,

  
Gunnar D. Halley

cc: Kathy Brown

Enclosures

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THE APPLICATION OF SECTION 207 TO FIXED WIRELESS ANTENNAE

- **The Policy Goals Underlying Section 207 Favor Inclusion of Fixed Wireless Carriers.** Section 207 prevents discriminatory treatment of technologies that permit consumers to receive video programming over the air. These policy goals -- improving consumer choice and preventing discriminatory treatment -- counsel the inclusion of fixed wireless carrier antennae within the scope of Section 207.
- **Fixed Wireless Antennae Are Sufficiently Small.** Observing that Congress "seemed to focus on the size of the antenna, rather than the specific technology, as a basis of distinction,"<sup>1</sup> the Commission concluded that MMDS, ITFS, LMDS, and DBS antennas must be one meter or less in diameter to be covered by Section 207.<sup>2</sup> Teligent's antenna are approximately 12 inches in diameter, well within the antenna size limits established by the Commission. Carriers that compete with Teligent receive the benefit of Section 207 while Teligent is excluded from the scope of that provision.

  - Consistent with Congress' emphasis on facilities rather than technologies, the Commission should focus on similarity of facilities rather than the services offered over those facilities. Indeed, this is consistent with notions of regulatory parity. LMDS antennas are afforded the protections of Section 207.<sup>3</sup> LMDS providers may offer both telephone service, video services or a combination thereof and, hence, may compete with carriers such as Teligent. It is not unreasonable to infer that the failure to afford regulatory parity to LMDS providers and fixed wireless carriers could result in marketplace distortions resulting from the facilitation of LMDS network antenna siting relative to fixed wireless antenna siting. To avoid regulatory determinations of relative market success, the Commission should extend to fixed wireless carriers the protections of Section 207.
- **Consumers May Receive Video Programming Services Over Fixed Wireless Networks.** Fixed wireless carriers offer services contemplated by Section 207. Teligent has the capacity to offer conventional multi-channel video programming should it choose to do so. The provision of conventional multi-channel video programming would require trade-offs with other services (such as voice or broadband data transmission), so the decision to offer these conventional video services would entail strategic considerations.

  - Moreover, Internet-based video offerings continue to proliferate. They increasingly appear similar to video programming offered by a television broadcast station and,

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<sup>1</sup> Preemption of Local Zoning Regulation of Satellite Earth Stations; Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service, IB Docket No. 95-59; CS Docket No. 96-83, *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 19276 at ¶ 28 (1996)("OTARD Order").

<sup>2</sup> See id. at ¶ 31; see also 47 C.F.R. § 1.4000(a)(1).

<sup>3</sup> Id. at ¶ 30.

therefore, would appear to constitute video programming. In its most recent video competition report to Congress, the Commission referred to the Internet as an increasingly competitive source of video programming and noted the development of technologies to enhance this phenomenon.<sup>4</sup> Some Internet sites, such as Microsoft Netshow, currently provide the capability to watch full motion broadcast video.<sup>5</sup> Moreover, it was reported recently that NBC intends to invest in and supply programming to an Internet-based service, Intertainer.<sup>6</sup> The Commission should not dismiss fixed wireless service as an alternate means of providing video programming services to consumers.

- ***The Commission Has Expanded The Scope of Section 207.*** The expansion of Section 207 to include additional categories of video programming distributors would not be unprecedented. The Commission declined to narrowly restrict the scope of Section 207 to MMDS. Instead, it concluded that services technologically and functionally similar to MMDS should also be included within the scope of Section 207.<sup>7</sup> Fixed wireless service providers offering high-speed Internet access are reasonably included within this provision: Their antennae are sufficiently small and they receive video programming over the air.
  - The expansion of Section 207's scope implicates the Commission's more general authority underlying that provision. Section 207 refers to Section 303 as the basis for the Commission's OTARD rule promulgation. Section 303(r) bestows upon the Commission expansive authority to "[m]ake such rules and regulations . . . as may be necessary to carry out the provisions of this Act."<sup>8</sup>

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<sup>4</sup> Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fourth Annual Report, 13 FCC Rcd 1034 at ¶¶ 97-102 (1998).

<sup>5</sup> <[www.microsoft.com/netshow/live](http://www.microsoft.com/netshow/live)>.

<sup>6</sup> Andrew Pollack, "NBC Backing an On-Line TV Service," New York Times, at D4 (Aug. 3, 1998).

<sup>7</sup> See OTARD Order at ¶ 30 (noting that MDS, ITFS, and LMDS were similar to MMDS in that "point-to-multipoint subscription video distribution service can be provided over each of them"). Moreover, the Commission noted that MMDS or similar services could be provided over the frequencies allocated to ITFS and LMDS and that all of these services were related in that their origins could be traced to MDS. See id.

<sup>8</sup> 47 U.S.C. § 303(r). Moreover, Section 4(i) permits the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i).

- The refusal to expand the scope of Section 207 to providers of Internet-based video programming was based on an inconsistent and inappropriate application of the definition of "video programming" contained in -- and by its terms restricted to -- Title VI.<sup>9</sup>

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<sup>9</sup> Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service, CS Docket No. 96-83, *Order on Reconsideration*, FCC 98-214 at ¶ 56 (rel. Sep. 25, 1998).

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