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Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
ORIGINAL

In the Matter of)
)
Implementation of Section 207 of the)
Telecommunications Act of 1996)
)
Restrictions on Over-the-Air Reception Devices:)
Television Broadcast, Multichannel Multipoint)
Distribution and Direct Broadcast Satellite)
Services)

CS Docket No. 96-83

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION

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SERVICE TELEVISION**
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Summary

NAB and MSTV recognize that the Commission took an important step forward in its *Second Report and Order (Second R&O)* by extending the benefits of Section 207 preemption to *some* consumers who rent their homes or apartments and have access to suitable balconies, patios or other areas “under their control” for installing an antenna. However, the Commission fell short of Section 207’s mandate to “prohibit restrictions” that impair a viewer’s reception of over-the-air video programming signals by failing to extend its rules to “common or restricted areas” of rental property. The unintended consequence of this failure is to perpetuate the “have-and-have-not” distinction between homeowners and renters. In the end, a tenant is a tenant and a restriction is a restriction, and the Commission erred in failing to extend its Section 207 rules to some tenants, but not others, and by prohibiting some restrictions on the reception of over-the-air signals, but not others.

Specifically, the Commission’s *Second R&O* errs in: (1) establishing rules that create different classes of viewers even though Congress enacted legislation to prohibit such an action; (2) failing to apply bedrock national policy favoring preservation of the free, over-the-air broadcasting; (3) applying a three-part test to the implementation of Section 207 that is not supported by the legislative history or the statutory text and plain meaning of the statute; (4) by concluding that the extension of Section 207 prohibition to *all* restrictions would constitute a takings with respect to rental property not under the “control” of the tenant; and (5) by weighing practical “problems” in implementing Section 207 prohibition with respect to multiple dwelling units and concluding that such “problems” should override the plain meaning of the statute.

The Commission should reconsider its *Second R&O* and fulfill the statutory mandate of Section 207 by extending its Section 207 rules to *all* restrictions that impair a viewer's reception of over-the-air video programming signals.

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“The Commission has thus eliminated the have-and-have-not distinction that gave homeowners access to the competitive video marketplace but denied it to apartment dwellers.”

Separate Statement of
Chairman William E. Kennard

* * * * *

The National Association of Broadcasters (“NAB”) and the Association for Maximum Service Television (“MSTV”), by their attorneys, hereby jointly submit the following Petition for Reconsideration of the Commission’s *Second Report and Order*¹ in the above-referenced proceeding. NAB is a non-profit, incorporated association of television and radio stations and broadcast networks

¹ *Second Report and Order* in CS Docket No. 96-83, Released: November 20, 1998 (“*Second R&O*”).

that serves and represents the American broadcast industry. MSTV is a non-profit association of television stations owners dedicated to preserving the technical integrity of the television broadcast service.

The Commission should be congratulated for extending the benefits of Section 207 preemption to *some* consumers who rent their homes or apartments and have access to suitable balconies, patios or other areas “under their control” for installing an antenna. Nonetheless, by failing to extend its Section 207 rules to “common or restricted areas” of rental property, the Commission fell well short of fulfilling the statutory mandate of Section 207 to “prohibit restrictions” that impair a viewer’s reception of over-the-air video programming signals. As a result, the Commission has created an artificial and false distinction between rental property “under the control” of a tenant and “common or restricted” property and has, contrary to Chairman Kennard’s statement quoted above, *perpetuated* the “have-and-have-not” distinction between homeowners and renters. In the end, a tenant is a tenant and a restriction is a restriction. The Commission erred in extending its Section 207 rules to *some* tenants, but not others, and by prohibiting *some* restrictions which impair the reception of over-the-air signals, but not others.²

² In interpreting Section 207, the Commission must look to the relationship between that statutory provision and the terms and legislative history of the Satellite Home Viewing Act. They are premised on common themes and purposes and must be construed together.

In enacting the Satellite Home Viewer Act, Congress explained repeatedly that it considered protection of local network stations to be vitally important. *See, e.g.*, Copyright Office Report at 104 (“The legislative history of the 1988 Satellite Home Viewer Act is replete with Congressional endorsements of the network-affiliate relationship and the need for nonduplication protection.”) (emphasis added); Satellite Home Viewer Act of 1988, H.R. Rep. No. 100-887, pt. 2 at 20 (1988) (“The Committee intends [by Section 119] to . . . bring network programming to unserved areas while preserving the exclusivity that is an integral part of today’s network-affiliate relationship”) (emphasis added); *id.* at 26 (“The Committee is concerned that changes in

I. The Commission's Order Is Internally Inconsistent and Fails to Fulfill the Congressional Mandate to "Prohibit Restrictions" Which Impair the Reception of Over-the-Air Signals

In addressing the application of Section 207 to rental property in the *Second R&O*, the Commission concludes:

“[W]e agree with those commenters that argue that Section 207 applies on its face to all viewers, and that the Commission should not create different classes of ‘viewers’ depending upon their status as property owners. For instance, if a local government imposed a zoning restriction that prohibited a landlord from installing a master antenna system for his tenants to receive over-the-air broadcast signals, such a restriction would be preempted, notwithstanding the fact that the viewers in that situation are renters.” *Second R&O* at ¶ 13 (footnote omitted).

This conclusion is a recognition that, in passing Section 207, Congress did not intend for the Commission to create or foster a “second class” viewer that is relegated to receiving video programming service of their landlord’s or homeowner association’s choosing. Chairman Kennard, in his Separate Statement, echoed this conclusion, going so far as to claim, “The Commission has

technology, and accompanying changes in law and regulation, do not undermine the base of free local television service upon which the American people continue to rely”) (emphasis added); H.R. Rep. No. 100-887, pt. 1, at 20 (1988) (“Moreover, the bill respects the network/affiliate relationship and promotes localism.”) (emphasis added). The Commission’s *Notice of Proposed Rule Making* in the current SHVA Grade B proceeding expressly recognizes this crucial point:

“We acknowledge and reiterate Congress’ decision in the SHVA to protect network-affiliate relationships and to foster localism in broadcasting.” *Notice of Proposed Rule Making* in MM Docket No. 98-201, ¶ 36 (1998).

To protect localism and the network/affiliate relationship, Congress made eligibility for distant network stations depend on the strength of signal available to an “outdoor rooftop receiving antenna.” 17 U.S.C. § 119(d)(10). In doing so, Congress clearly indicated that it intended viewers to watch their local television stations through use of rooftop antennas. A misinterpretation of Section 207 in this proceeding would defeat that purpose by preventing viewers from using the equipment necessary to obtain the “rooftop” signals that Congress intended them to receive.

thus eliminated the have-and-have not distinction that gave homeowners access to the competitive video market but denied it to all apartment dwellers.”

But that is not the case. NAB and MSTV herein explain how, despite its recognition of the intent of Congress to create a single class of viewers, the Commission stopped well short of eliminating the classification of viewers based upon their status as property owners. By failing to extend the benefits of preemption to renters who do not have suitable property “under their control” to install an antenna, the Commission has relegated tenants who do not exercise “control” over an area suitable for placement of an over-the-air antenna to “second class” status in today’s video programming marketplace.

Effectively, the Commission’s order now sanctions different classes of viewers, even within a single building. For example, because of the Commission’s unjustifiable distinction between property “under the control of a tenant” and “common or restricted” property, a tenant on one side of an apartment building with a balcony may exercise his or her right to receive free, over-the-air broadcast (or other multichannel video) programming while a tenant on the opposite side of the building – who perhaps does not have a balcony or whose balcony faces in a direction such that he or she cannot receive over-the-air signals – is not allowed to receive such signals. This is precisely the sort of distinction that Congress sought to eliminate in passing Section 207.

National communications policy is premised on the notion that citizens may, by use of a conventional roof-top television antenna, have access to local broadcast television stations – both NTSC and digital. Thus, residents of multiple dwelling units should not be relegated to a video programming service of their landlord’s choosing. Instead, Section 207, and national communications policy, compels that they must be free to select the television programming service

of their choice.

II. The Commission's Order Is Inconsistent with Fundamental National Policy Favoring Preservation of the Free, Over-the-Air Broadcast System

In its *Second R&O*, the Commission expressed its commitment to the preservation of over-the-air broadcasting and the diversification of video programming services. Specifically, the Commission states: “[W]e believe that Section 207 promotes the substantial governmental interests of choice and competition in the video programming marketplace. . . . [E]xpansion of our rules will promote the important governmental interest in enhancing viewers’ access to ‘social, political, esthetic, moral and other ideas.’ . . . The Supreme Court has ‘identified a ... “governmental purpose of the highest order” in ensuring public access to ‘a multiplicity of information sources.’” *Id.* at ¶ 24 (footnotes omitted).

Similarly, in its orders requiring television broadcasters to convert to digital television, the Commission has found that the preservation of access to free, over-the-air television service is a paramount goal of public importance.³ In this context, the Commission stated:

First, we wish to promote and preserve free, universally available, local broadcast television in a digital world. Only if DTV achieves broad acceptance can we be assured of the preservation of broadcast television’s unique benefit: free, widely accessible programming that serves the public interest. DTV will also help ensure robust competition in the video market that will bring more choices at less cost to American consumers. Particularly given the intense competition in video programming, and the move by other video programming providers to adopt digital technology, it is desirable to

³ See *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Fifth Report and Order*, MM Docket No. 87-268, FCC 97-116 (1997), ¶ 1 (“*Fifth Report and Order*”). See also *Fourth Further Notice of Proposed Rule Making/Third Notice of Inquiry*, MM Docket No. 87-268, 10 FCC Rcd 10541 (1995) (“*Fourth Further Notice/Third Inquiry*”).

encourage broadcasters to offer digital television as soon as possible.⁴

This policy is part and parcel of the Commission's overriding statutory mandate to "make available . . . to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service."⁵ It is also a reflection of the undeniable fact that "broadcast television has become an important part of American life."⁶

Section 207 serves to promote the preservation of free, over-the-air broadcasting. Without complete prohibition of restrictions on antenna placement, landlords will be free to dictate to their tenants what video programming services they may receive and may completely deny access to free, over-the-air broadcast service if they so choose. By not completing the task assigned to it by Congress, the Commission has left a gaping hole in the implementation of Section 207 to the degradation of over-the-air broadcasting and other video providers who, of course, depend on viewers being able to install and use antennas.

⁴ *Fifth Report and Order* at ¶ 5.

⁵ Communications Act of 1934, 47 U.S.C. § 151 § 1.

⁶ *Fifth Report and Order* at ¶ 19 (citing *Fourth Further Notice/Third Inquiry*, at 10543).

III. The Commission Has Fashioned a Three-Part Test Out of Whole Cloth Which Finds No Support in the Legislative History

The Commission applies a three-part test in evaluating whether to prohibit over-the-air antenna restrictions with respect to “common and restricted” areas of rental property. *See, e.g., Second R&O* at ¶ 7 (“We find that Section 207 obliges us to prohibit restrictions on viewers who wish to install, maintain or use a Section 207 reception device within their leasehold because this does not impose an affirmative duty on property owners, is not a taking of private property, and does not present serious practical problems.”).

The Commission’s creation of a three-part test to comply with the directive of Section 207 is symptomatic of its misunderstanding of Section 207, its legislative history and the fundamental nature of the task before the agency. Congress directed the Commission in Section 207 to adopt rules prohibiting *all* restrictions that impair a viewer’s ability to receive the specified video programming services through over-the-air reception devices. Congress did not direct the Commission to pick and choose among the restrictions to be prohibited, yet this is exactly the result which the Commission’s creation and application of the three-part test yields.

With respect to each element of the Commission’s three-part test, the Commission took extreme, strained steps to avoid the straightforward interpretation that the plain language of Section 207 compels.⁷ As shown below, when properly analyzed, even the factors considered by the

⁷ *See, e.g., Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (where the meaning of a statute is clear on its face, there is no need to divine the legislative intent from secondary sources and the agency is bound to follow the interpretation); *United States v. Locke*, 471 U.S. 84, 96 (1985) (“[w]e cannot press statutory construction ‘to the point of disingenuous evasion’ even to avoid a constitutional question”) (*quoting Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379, 53 S.Ct. 620, 622, 77 L.Ed. 1265 (1933)). *See also Nat’l Assoc. of*

Commission support extension of the Section 207 rules to all viewers, including tenants in multiple dwelling units with no access to a patio or balcony.

A. The Commission's Construction of Section 207 to Prohibit Requiring Affirmative Action by Landlords Misconstrues the Meaning of the Statute

In discussing its authority under Section 207, the Commission concluded that it did not have authority to require "affirmative actions" by landlords:

"Section 207 authorizes the Commission to remove restrictions; Section 207 does not authorize the Commission to impose independent affirmative obligations on a property owner or a third party to enable the viewer to use a Section 207 device. Interpreting Section 207 to grant viewers a right of access to possess common or restricted access property for the installation of the viewer's Section 207 device would impose on the landlord or community association a duty to relinquish possession of property." *Second R&O* at ¶ 35.

Because the extension of Section 207 to common and restricted areas would entail allowing the placement of antennas in areas outside the "control" of tenants, the Commission reasons that this is inconsistent with the mandate of Section 207 to (only) *prohibit* restrictions. In other words, the Commission concludes it has authority to "prohibit" but not to require affirmative action by third parties, including landlords.

Recycling Industries, Inc. v. Interstate Commerce Commission, et al., 660 F.2d 795, 799 (C.A. D.C. 1981) ("In any case concerning the interpretation of a statute the 'starting point' must be the language of the statute itself, and it is a fundamental principle of statutory construction that effect must be given, if possible, to every word, clause and sentence of a statute . . . so that no part will be inoperative or superfluous, void or insignificant." (quotation and citations omitted) (quoting 2A Sutherland, Statutory Construction, § 46.06).

This reading is a hyper-technical parsing of Section 207 which cannot be sustained. Indeed, the Commission construes Section 207 as an empty vessel into which it can pour its own policy predilections. While the Commission is, of course, correct that Section 207 does not explicitly authorize the Commission to require action by third parties, Section 207 does require the Commission to “prohibit restrictions” wherever they may be found. In the face of this clear legislative direction, there is no basis for the Commission to refuse to carry out the directive under the guise of an “affirmative obligations” test of its own making.

Moreover, as a matter of regulatory drafting, it is clear that the Commission could adopt a rule which prohibits all restrictions without mandating any specific action on the part of multiple dwelling unit owners, other than to obey the law.⁸ In the end, however, it is clear that the Commission’s concern with mandating “affirmative obligations” by third parties conflates into its erroneous “takings” analysis. The Commission concludes that the extension of Section 207 to all tenants would cause landlords to “relinquish possession” of common and restricted property, which, under the Commission’s analysis, would present a takings issue. As discussed below, the Commission misconstrues controlling precedent in its consideration of the takings issue. In any event, the Commission mistakenly introduced a quasi-takings analysis in its discussion of its authority to impose “affirmative obligations” on third parties.

No matter how one slices the issue of “affirmative obligations,” the Commission simply erred in misconstruing the mandate of Section 207. Section 207, properly interpreted, directs the

⁸ Depending on how one characterizes the effect of a particular regulation, all regulation could be construed as requiring affirmative action by a third party by, for example, complying with the regulation. This resolves into a matter of semantics and characterization which must give way to the clear intent of the statute.

Commission to adopt rules that prohibit all restrictions, without distinguishing between classes of viewers or the authors of such restrictions. The Commission clearly erred in creating and applying an “affirmative obligations” test and in concluding that this test precluded extension of Section 207 to all restrictions impairing access to over-the-air video programming.

B. The Commission Erred in Concluding that Extension of Section 207 to Common and Restricted Areas Implicates the Takings Clause

The Commission improperly concluded that the *per se* takings analysis of *Loretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. 419 (1982), would be implicated by extending the Section 207 rules to all tenants. The Commission found:

“If we were to extend our Section 207 rules to permit a tenant to have exclusive possession of a portion of the common or restricted access property where a lease has not invited a tenant to do so, the tenant would possess that property as an ‘interloper with a government license’ thereby presenting facts analogous to those presented in *Loretto*. . . .

Under these circumstances, we agree with those commenters that argue that the permanent physical occupation found to constitute a *per se* taking in *Loretto* appears comparable to the physical occupation of the common and restricted access areas at issue here.” *Second R&O* at ¶¶ 39-40 (footnotes omitted).

This conclusion is untenable in the face of the very narrow grounds upon which *Loretto* was decided. Indeed, the facts of the present proceeding – involving the prohibition of restrictions on the installation of over-the-air antennas on common and restricted property by or on behalf of tenants – were expressly reserved by the *Loretto* court.

In *Loretto*, a state law provided that a landlord could not interfere with the installation on his property of cable television facilities by a cable operator. Significantly, the state statute at issue did not give the tenant any enforceable property rights with respect to the cable television installation; instead, the cable company, *not the tenant*, owned the installation. This fact was deemed dispositive by the *Loretto* court. The court expressly declined to opine concerning the respective property rights of landlords versus tenants, which is the precise issue presented here. In determining whether the statute at issue constituted a permanent physical occupation of the landlord's building by a third party, the court noted:

“If [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. Ownership would give the landlord rights to the placement, manner, use, and possibly the disposition of the installation The landlord would decide how to comply with applicable government regulations concerning CATV and therefore could minimize the physical, esthetic, and other effects of the installation.” *Loretto*, at 440 n. 19.

In considering and purporting to distinguish this language, the Commission engages in a classic example of circular reasoning. Observing that the assumption of the hypothetical contained in note 19 was that the “landlord would own the installation,” the Commission concluded that so long as the tenant owned the reception device placed in a common or restricted area “the landlord’s or association’s property would be subjected to an uninvited permanent physical occupation.” *Second R&O*, at ¶ 43. This reasoning completely *begs* the real question. The determinative fact in the *Loretto* hypothetical was not that the landowner would *own* the installation but that the cable operator would *not own* the installation. In other words, the determinative fact in *Loretto* was that a third party to the landlord/tenant relationship – the cable operator – would own and control the

installation.

The *Loretto* court expressly affirmed the “State’s power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of the building.” *Id.* at 440 (emphasis added). In this regard, the extension of Section 207 preemption to common and restricted areas of apartment buildings involves the regulatory modification of the relative rights between landlords and tenants. *See Loretto*, 458 U.S. at 441 (“We do not . . . question . . . the authority upholding a State’s broad power to impose appropriate restrictions upon an owner’s use of his property.”). It is completely inaccurate to assume that tenants stand in the same shoes as third parties with respect to their rights in common and restricted areas. For example, absent an express provision to the contrary, tenants have the implicit right to access and use certain building common areas, as a way of necessity between their “landlocked” unit and the street outside. *See* 49 Am. Jur. 29 *Landlord and Tenant* § 628 (1995) (“Where property is leased to different tenants and the landlord retains control of passageways, hallways, stairs, etc., for the common use of the different tenants, each tenant has the right to make reasonable use of the portion of the premises retained for the common use of the tenants.”); *see id.* at § 651 (“The landlord’s interference with the tenant’s right of access and exist . . . may constitute a constructive eviction, especially in case of the lease of rooms or apartments in a building.”). Tenants are also entitled to an implied right of necessity for the use of conduits and pipes through a building for utility services, even if it includes some enlargement. *Id.* at § 632. Over-the-air broadcast and other video services stand on a similar footing.

Similarly, in *Yee v. City of Escondido*, 503 U.S. 519 (1992), the Supreme Court considered a rent control ordinance that prohibited mobile home parks from terminating tenancies under certain

circumstances. Despite the fact that the effect of the challenged ordinance was that tenants were allowed to occupy their landlord's property over the landlord's objections, the Court found that the ordinance did not constitute a compelled physical occupation of land. The Court noted that the statute "merely regulate[d] petitioners' use of their land by regulating the relationship between landlord and tenant." *Id.* at 528 (emphasis in original). The Court went on to explain: "When a landowner decides to rent his land to tenants, the government may . . . require the landowner to accept tenants he does not like without automatically having to pay compensation." *Id.* at 529 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964)).

Here, the extension of the Section 207 rules to all tenants would only constitute a regulatory modification of the rights as between landlords and tenants, which clearly does not fall within the *per se* takings analysis. The extension of the Section 207 rules in this context no more constitutes a taking than does the requirement that landlords install fire detectors, fire sprinklers or mailboxes. Such regulatory intrusions on the property of a landlords are consistent with the regulated nature of the relationship and are permissible exercised of Governmental authority.

C. The Commission Improperly Placed Reliance on "Practical Problems" of Implementing Section 207 Preemption

In rejecting the extension of the Section 207 rules to common and restricted property in MDUs, the Commission placed great weight on the "practical" implementation problems with such a rule. With respect to its authority to consider implementation issues, the Commission concluded: "Congress gave the Commission the discretion to devise rules that would not create serious practical problems in their implementation." *Second R&O* at ¶ 7. The Commission based this conclusion on Section 207's directive to promulgate regulations "pursuant to Section 303 of the Communications

Act of 1934.” Section 303, in turn, authorizes the Commission to promulgate regulations “as public convenience, interest or necessity requires.” Communications Act, § 303, 47 U.S.C. § 303.

In so holding, the Commission erroneously concluded that its discretionary authority extended so far as to permit the overriding of an explicit Congressional directive. Section 207 directs the Commission to adopt rules “prohibiting restrictions” that impair the reception of over-the-air video programming signals. The Commission, however, erroneously interpreted this command as if it read, “if you think it’s a good idea and will not create practical implementation problems, adopt rules prohibiting restrictions.”

In truth, the Commission has identified several minor practical problems with extending preemption to common and restricted areas. However, these problems can be solved by MDU owners themselves quite easily if the Commission mandates the installation and/or use of a common antenna, as proposed by NAB in its original comments and as approved by Commission in its *Order on Reconsideration* in this proceeding with respect to landlords that voluntarily undertake to install a common antenna. In any event, the fact that multiple dwelling unit owners may be inconvenienced by the extension of the Section 207 rules, or that such owners may have to make new arrangements with their tenants concerning the use of common and restricted areas, in no way diminishes the explicit Congressional directive to establish rules to “prohibit restrictions” which impair a viewer’s ability to receive over-the-air signals.

CONCLUSION

For the reasons expressed herein, NAB and MSTV respectfully request that the Commission reconsider its *Second R&O* and extend the Section 207 rules to prohibit all restrictions that impair the reception of over-the-air video programming.

Respectfully submitted,

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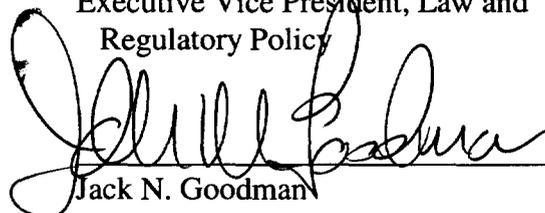
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**NATIONAL ASSOCIATION OF
BROADCASTERS**

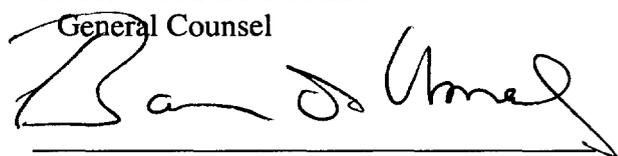
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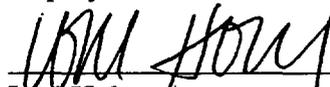
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CERTIFICATE OF SERVICE

I, Philip Bogdonoff, hereby certify that a true and correct copy of the foregoing National Association of Broadcasters and Association for Maximum Service Television Petition for Partial Reconsideration was sent this 22nd day of January, 1999, by first-class mail, postage prepaid, to the following:

FCC Chairman William E. Kennard

FCC Commissioner Susan Ness

FCC Commissioner Harold Furchtgott-Roth

FCC Commissioner Michael K. Powell

FCC Commissioner Gloria Tristani

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