



March 10, 1999

Ms. Magalie Roman Salas, Secretary
Office of the Secretary
Federal Communications Commission
Portals, TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Petition for Reconsideration in the matters of Preemption of Local Zoning Regulations of Satellite Earth Stations, IB Docket No. 95-59; and Implementation of Section 207 of the Telecommunications Act of 1996 Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Services, CS Docket No. 96-83, FCC 96-151.

Dear Ms. Salas:

Pursuant to the FCC's administrative rules, the Community Associations Institute ("CAI") hereby respectfully submits an original and ten copies of the attached Opposition to the Petitions for Reconsideration in the above-referenced proceeding.

CAI appreciates the opportunity to file an Opposition to the Petitions of Reconsideration in this important proceeding.

Sincerely,

A handwritten signature in black ink that reads "Rodney D. Clark".

Rodney D. Clark
Vice President
Government & Public Affairs

Attachments

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

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
FCC 95-151

OPPOSITION TO PETITIONS FOR RECONSIDERATION

The Community Associations Institute (“CAI”) files its Opposition to the Petitions for Reconsideration filed by the Association for Maximum Service Television and the National Association of Broadcasters (“Broadcasters”) and the Personal Communications Industry Association, Teligent, Association for Local Telecommunications Services, Winstar Communications, and Nextlink (“Wireless Providers”) on January 22, 1999. CAI urges the Federal Communications Commission (FCC) to deny these petitions, for they request the FCC to expand Section 207 of the Telecommunications Act of 1996 to create unconstitutional takings of common property. Instead, the FCC should reiterate its decision not to extend the Over-the-Air Reception Devices (OTARD) Rule to common property. The FCC should also reverse its decision in the *Second Report and Order* deleting subsection (h)¹ from the OTARD Rule. This decision deprives community

¹ Subsection (h), added to the OTARD Rule in the Order on Reconsideration, provides: So long as the property owner consents, a person residing on the property owner’s property with the property owner’s permission shall be treated as an antenna user covered by this rule and shall have the

association homeowners of the right to ensure that their property is not damaged by antenna installation by their tenants.

I. THE FCC CORRECTLY DETERMINED THAT SECTION 207 DOES NOT PERMIT UNCONSTITUTIONAL TAKINGS OF COMMON PROPERTY

The Broadcasters and the Wireless Providers request the FCC to overturn its decision in the *Second Report and Order* issued November 20, 1998 and extend the OTARD Rule to permit individual antenna installations on common property that these residents do not exclusively own or use.² They contend that Section 207 and public policy concerns mandate this result. However, since neither Section 207 nor public policy is a sufficient rationale to outweigh the constitutional impediments to extending the OTARD Rule to common property, the FCC should reject these requests.

A. THE EXTENSION OF THE OTARD RULE TO COMMON AND RENTAL PROPERTY WOULD CREATE AN IMPERMISSIBLE TAKING

In the *Second Report and Order*, the FCC declined to extend the OTARD Rule to common property, reasoning that such an extension would implicate the Takings Clause of the Fifth Amendment to the United States Constitution.³ This analysis was correct. To permit residents to install antennas on common or rental property without obtaining the association's or the community association homeowner's⁴ approval allows these

same rights as the property owner with regard to third parties, including but not limited to local governments and associations, other than the property owner.

² Broadcasters' Petition, 2; Wireless Providers' Petition, 11.

³ *Second Report and Order*, paragraphs 39-40.

⁴ Some unit or homeowners in community associations lease their units or homes. They differ from traditional landlords in that they typically lease a small number of units or homes.

individuals to deprive community associations and homeowners of their property rights. Neither Section 207 nor public policy mandate this result.

In community associations, individual residents do not have an exclusive ownership right in common property.⁵ Since any individual antenna installation on common property would be on property residents do not own, the FCC correctly determined that Loretto v. Manhattan Teleprompter⁶ clearly applies to these installations. In Loretto, the U.S. Supreme Court invalidated a statute that required a landlord to permit cable operators to install telecommunications equipment in her building without her permission. As CAI has stated throughout this proceeding,⁷ extending the OTARD Rule to common property would create the same unconstitutional taking invalidated by Loretto, since community associations would be required to allow installations that they may not want and cannot control on their property.

The Broadcasters and the Wireless Providers attempt to distinguish Loretto from any expansion of the OTARD Rule using two rationales. First, the Broadcasters and the Wireless Providers assert that since the resident, not the cable provider, would be installing the antenna, Loretto no longer applies. Second, they reason that permitting

⁵ In condominiums, the individual resident owns a unit, while all common property is owned in common by all unit owners. In cooperatives, the individual resident owns stock, which entitles him or her to exclusive use of an apartment. All property is owned by the cooperative association. In a planned community, the individual owns a lot (generally more property than a unit or apartment), while the association owns the common property. Since either the community association or all unit owners jointly own common property, no individual resident has exclusive rights to possess and use that property.

⁶ 458 U.S. 419 (1982).

⁷ See, CAI's Comments and Reply Comments submitted in this proceeding in September and October 1996.

individual antenna installations is a mere regulation of the landlord–tenant relationship, not a taking of private property. For the following reasons, both of these arguments fail.

Throughout this proceeding, Loretto's footnote 19 has been the focus of much argument and contention, mainly because of the misinterpretations made by various telecommunications providers. In the current Petitions, the Broadcasters assert that Loretto would apply only if the telecommunications provider owned the telecommunications installation.⁸ They argue that if the tenant or resident owned the installation, then Loretto would not apply. That interpretation is incorrect. Footnote 19 reads, in relevant part:

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. (emphasis added) Ownership would give the landlord rights to the placement, manner, use, and possibly the disposition of the installation. That fact of ownership is, contrary to the dissent, not simply “incidental;” it would give a landlord (rather than a CATV company) full authority over the installation except only as government specifically limited that authority. The landlord would decide how to comply with applicable government regulations concerning CATV and therefore could minimize the physical, aesthetic, and other effects of the installation. Moreover, if the landlord wished to repair, demolish, or construct in the area of the building where the installation is located, he need not incur the burden of obtaining the CATV company's cooperation in moving the cable. [citations omitted]⁹

It is clear from this footnote that Loretto's holding would not apply only in a situation in which the landlord owned the telecommunications equipment, where the landlord could control the means, method, and location of equipment installation. If the FCC grants the Broadcasters' and Wireless Providers' request, however, the resident, not the landlord or community association, would own the installation. Since the landlord and the

⁸ Broadcasters' Petition, 11-12.

⁹ 458 U.S. 419, at 440-441.

community association would have no ownership or control of the installation, Loretto would clearly apply to any expansion of Section 207 to common property. Therefore, any expansion would be an unconstitutional taking.

In seeking to remove any type of control over common or rental property from landlords or community associations, the Broadcasters actually strengthen the case for Loretto's application in this proceeding. They request that residents be permitted to install antennas without permitting landlords or community associations any control over these installations. Since the Court was clearly concerned about the ability of the landlord (or by extension, the community association) to control telecommunications equipment installation on her own property, any proposal to eviscerate that control would violate Loretto. Therefore, the FCC should deny the Broadcasters' and Wireless Providers' request to expand Section 207.

B. EXPANSION OF SECTION 207 WOULD BE A PHYSICAL OCCUPATION OF PROPERTY, NOT A REGULATION OF A LEASE AGREEMENT

The Broadcasters and the Wireless Providers also assert that the Loretto analysis does not apply to Section 207 because any rule permitting residents to install antennas on common property would be a mere regulation of the landlord-tenant relationship and not a physical occupation of property.¹⁰ They argue that the right to install an antenna on common property would be equivalent to the rights of ingress and egress or the right to use conduits and pipes for utility services. In support of their arguments, they cite Yee v.

¹⁰ Broadcasters' Petition, 11-13; Wireless Providers' Petition, 15-19.

City of Escondido,¹¹ contending that antenna installation is the same as rent control because with antenna installation, there is only the regulation of the use of land.¹²

These arguments must fail, however, because antenna installation on common property necessarily involves a physical occupation of that property. Residents installing antennas on common property must use some property that they do not own or exclusively use upon which to mount an antenna. Therefore, comparison to Yee is inapposite. Any expansion of Section 207 to common property would compel a physical occupation of land, which the rent control ordinance in Yee did not.

Moreover, while government has traditionally had some role in regulating the landlord-tenant relationship, permitting residents to install antennas on common property would not fall under that authority. Contrary to the Broadcasters' and Wireless Providers' assertions,¹³ antennas are not analogous to fire sprinklers, fire detectors, utilities, or mailboxes. They are not necessary for safe occupancy or use of the apartment.

The Wireless Providers also contend that in granting a lease, a landlord cedes control of the property, so that antenna installation on common property is incidental to the lease.¹⁴ That is not the case. Just because a lease grants rights to resident for the use of particular property does not mean that the lease grants rights to use the entire building's property. Typically, leases permit occupancy and use of a certain apartment, together with certain

¹¹ 503 U.S. 519 (1992).

¹² Broadcasters' Petition, 12-13; Wireless Providers' Petition, 16-17.

¹³ Broadcasters' Petition, 13.

¹⁴ Wireless Providers' Petition, 15.

portions of the building. Leases do not grant residents the rights to use roofs and walls. Additionally, leases do not usually grant the right to permanently alter leased property, which antenna installation would do. To expand Section 207 to permit antenna installation on common property would extend residents' rights to control and use property that was not contemplated by their leases. Such an expansion of the OTARD Rule would exceed governmental authority to regulate the lease.

Furthermore, CAI urges the FCC to reverse a decision announced in the *Second Report and Order* that permits tenants in community associations to install antennas without having to obtain the permission of the homeowner. As discussed in CAI's Petition for Reconsideration, such a decision prohibits community association homeowners (and to a lesser extent community associations) from having any control over antenna installations that may damage or injure the leased property, common property, or association residents and personnel. Collecting compensation after the damage or injury has occurred cannot completely restore the property or injured person, particularly when that damage could easily have been prevented.¹⁵ The FCC correctly determined in the *Order on Reconsideration* that tenants in community associations should obtain the homeowner's permission before installing antennas, thereby reducing the potential for damage to

¹⁵ Community associations may not even be able to recover for any damage done to common property. The association may be barred from recovery against a tenant because of the lack of a relationship between the association and the tenant. The association may also be barred from recovering from the homeowner, since the homeowner had no control over the installation.

homeowner and common property.¹⁶ The FCC should now restore subsection (h) to the OTARD Rule and permit homeowners to be able to control antenna installations on their own property.

C. COMMUNITY ASSOCIATIONS ARE NOT LANDLORDS

In their Petitions, the Broadcasters and the Wireless Providers assume that the community association-resident relationship is analogous to the landlord-tenant relationship. They presume that community associations are regulated like landlords, so that the statutes and case law permitting regulation of the landlord-tenant relationship would also apply to community associations. This is not the case. Because community associations are predicated on the concept of homeownership, not rental arrangements, community association creation and operations are controlled by statutes that differ greatly from landlord-tenant statutes.¹⁷ Therefore, the internal operations of community associations and rental properties are very different, since homeowners control community association operations by virtue of their ownership in the association. The line of cases permitting governmental authority over landlords cannot be applied to community associations because of these vast differences. The FCC should not begin to do so by using landlord-tenant statutes and case law to regulate community association operations.

¹⁶ Paragraph 77.

¹⁷ Since condominiums can only be created by statute, each state has a condominium statute. In addition, most states have statutes regulating cooperatives and planned communities. In the states that have adopted the Uniform Common Interest Ownership Act, the regulation of all types of community associations has been consolidated into one scheme. These statutes are completely different from state landlord-tenant statutes.

Expansion of Section 207 to common property would clearly be a “permanent physical occupation of land” prohibited by Loretto. Therefore, the FCC was correct to refrain from permitting individual antenna installations on common property. The FCC should continue to refrain from expanding Section 207 to common property. Instead, the FCC should reinstate subsection (h) to the OTARD Rule.

II. PUBLIC POLICY DOES NOT REQUIRE AN EXPANSION OF SECTION 207

The Broadcasters and Wireless Providers also assert that public policy mandates that Section 207 be expanded to cover antenna installations on common property.¹⁸ They assert that expansion of Section 207 would increase access to advanced telecommunications services. However, the Petitions fail to mention that there are other public policies that are equally or even more important than increasing the growth of a single market. One of these fundamental public policies is the protection of private property rights, which is enshrined in the Fifth Amendment to the United States Constitution. The desire to have video programming signals cannot trump a constitutional right to prevent the permanent occupation of common property by antennas installed by people who do not own the property upon which they are installing these antennas.

In addition to the constitutional private property right, there is a very important public policy in ensuring that community associations operate efficiently. As CAI has stated

¹⁸ Broadcasters’ Petition, 3-6; Wireless Providers’ Petition, 20-24.

before in this proceeding,¹⁹ community associations are responsible for the maintenance of common property, to ensure the physical integrity of the property and prevent damage to individually-owned homes or units and personal injury. Expansion of Section 207 would undermine this responsibility. Individual antenna installations pose the risk of causing damage to common property roofs and exteriors, voiding warranties by puncturing the roof or exterior, and exposing the association to liability for any personal injury or property damage that occurs due to antenna installation. Associations could easily be forced to bear the entire costs of repairing or replacing the roof or exterior, costs which could not be collected from the resident who installed the antenna (particularly if the resident is a tenant). Therefore, all other residents would bear the cost through increased assessments. An expensive repair could easily threaten the financial solvency of the association. Section 207 should not be expanded to mandate that result.

Eviscerating community association common property rights and threatening the financial stability of community associations are not the methods by which to promote growth in the telecommunications marketplace. Throughout this proceeding, CAI has consistently sought to create methods of promoting the growth of telecommunications services in community associations while still preserving the integrity of common property. One such method was CAI's central antenna proposal, in which CAI proposed that community associations could prohibit installations of individual antennas if they chose to install central antennas. This proposal was partially endorsed in the *Order on*

¹⁹ See, CAI's Comments and Reply Comments submitted in this proceeding in September and October 1996.

Reconsideration released September 25, 1998.²⁰ As CAI has shown, there are numerous ways in which the telecommunications marketplace can be promoted that do not involve the taking of common property.

The Broadcasters and the Wireless Providers also contend that individual residents must be allowed to install antennas on common property because they cannot choose telecommunications providers.²¹ In community associations, this is not the case. Community associations are governed by owners on behalf of all owners. All owners participate in the selection of telecommunications providers through their board of directors, which is comprised of owners elected by owners to oversee the association's operations. Therefore, any argument that community association residents do not choose telecommunications providers is spurious.

Many of the telecommunications providers have asserted that without an extension of Section 207, competition in this marketplace would not expand.²² However, nowhere in the entire three years of this proceeding have any of the telecommunications providers submitted evidence (other than anecdotes) to justify this assertion. Public policy choices should not be predicated upon isolated stories.

In contrast, the FCC has noted that the number of subscribers to non-cable video providers grew by 18 percent between July 1997 and July 1998, compared with a two

²⁰ Paragraphs 82-90.

²¹ Broadcasters' Petition, 3-4; Wireless Providers' Petition, 21.

²² Broadcasters' Petition, 1-7; Wireless Providers' Petition, 11-14.

percent growth in cable subscribers during that same period.²³ The number of subscribers to various video providers will continue to grow without the expansion of Section 207. Since the marketplace currently promotes competition, the FCC should not interfere in the growth of this marketplace by expanding Section 207.

Because of the fundamental constitutional protections afforded to private property rights, as well as the important public policy in protecting the financial stability of community associations, the FCC should not expand Section 207 to cover common property. The public policies articulated by the Broadcasters and the Wireless Providers can easily be furthered through means other than the expansion of Section 207.

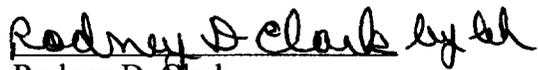
CONCLUSION

CAI opposes the Petitions for Reconsideration filed by the Broadcasters and the Wireless Providers because they propose to impermissibly extend Section 207 beyond the intent of Congress by creating unconstitutional takings of common property. Since any individual antenna installation on common property would necessarily involve a physical occupation of land, the Loretto analysis would apply, invalidating any such rule promulgated by the FCC. The Broadcasters and the Wireless Providers cannot attempt to distinguish this potential taking from Loretto. In addition, the public policies articulated by the Broadcasters and the Wireless Providers cannot outweigh the constitutional protection given to private property rights by the U.S. Constitution, particularly when those public policies can be achieved through methods that do not create constitutional

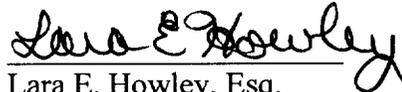
²³ FCC Report 98-335, paragraph 12.

impediments. For these reasons, the FCC should not extend the OTARD Rule to include individual antenna installation on common or rental property.

Respectfully submitted,



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March 10, 1999

CERTIFICATE OF SERVICE

I, Lara Howley, hereby certify that on March 10, 1999, copies of the Community Associations Institute's Opposition to Petitions for Reconsideration were mailed, postage prepaid, to the following:

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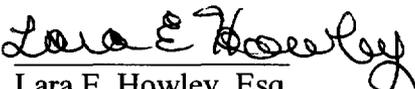
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