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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
Implementation of Section 207 of The Telecommunications Act of	)	CS Docket No. 96-83
Restrictions on Over-the Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services	)	

OPPOSITION TO PETITIONS FOR RECONSIDERATION

Summary

The Building Owners and Managers Association International, the National Apartment Association, and the National Multi-Housing Council (jointly, the "Real Estate Associations"), pursuant to Section 1.429(f) of the Commission's rules, hereby oppose the Petition for Reconsideration of the Personal Communications Industry Association, *et al.* (the "Wireless Petition") and the Petition for Partial Reconsideration of the National Association of Broadcasters, *et al.* (the "Broadcast Petition"). The Real Estate Associations oppose the rules adopted in *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,* Second Report and Order, CS Docket No. 96-83 (rel. Nov. 20, 1998) (the "Second Report and Order"), because Section 207 of the

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Telecommunications Act of 1996 does not apply to any type of leased property -- but at least the Commission recognized that under no circumstances could it justify allowing tenants and third parties to install antennas in common areas and restricted use areas. The Petitioners, however, would have the Commission compound its error, by extending Section 1.4000 of the Commission's rules to include common areas and restricted use areas.

The Commission should refuse to extend the scope of Section 1.4000 for the reasons stated in the Second Report and Order. The Commission should also reject the Broadcast Petition and the Wireless Petition for the following reasons:

- Section 207 does not authorize the Commission to invalidate lease terms or grant rights to tenants. Furthermore, Congress intended Section 207 to apply only to residential properties and to video programming services. Consequently, the Commission has already gone too far, and any further expansion of Section 1.4000 would surely be rejected by the courts.
- The Commission cannot impose affirmative obligations on property owners.
- Congress did not direct the Commission to assure that every American has access to Section 207 services regardless of the costs of serving a person or technological limitations on the provision of service.
- Extending the rules to common areas would be a taking under the Fifth Amendment because the Commission would be expanding the scope of rights agreed to in lease agreements.
- Finally, extending the rules would not be in the public interest. As the Commission has noted, building owners have strong incentives for ensuring that their tenants have high quality services and can obtain the services they want. In addition, by forcing

building owners to subsidize providers and tenants, extending the rules would violate one of the principles underlying the 1996 Act, which presumes that the person who imposes a cost will bear the cost.

For all these reasons, the Commission should reject the Broadcast Petition and the Wireless Petition. Indeed, what the Commission should do is narrow the scope of Section 1.4000 so it does not apply to leased property, as proposed in the Petition for Reconsideration of the Community Associations Institute.

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[1] The Wireless Petition was filed by the Personal Communications Industry Association, Teligent, Inc., the Association for Local Telecommunications Services, Winstar Communications, Inc., and NextLink Communications, Inc. (the "Wireless Petitioners"). The Broadcast Petition was filed by the National Association of Broadcasters, the Association for Maximum Service Television (the "Broadcast Petitioners"). The Broadcast Petitioners and Wireless Petitioners are jointly referred to as the "Petitioners".

that in extending the scope of Section 1.4000 of its rules to include leased property,[2] the Commission did not go far enough. The Petitioners therefore ask the Commission to go even further, by applying its rules to common areas and restricted use areas not within the exclusive use or control of the tenant. The Petitions, however, are based on incorrect interpretations of the Commission's authority, the Fifth Amendment and state landlord-tenant law, and on incorrect assumptions about the motivations of building owners and managers. The Petitions would also have the Commission undermine fundamental policy principles by forcing building owners to bear costs imposed by the activities of tenants and providers of telecommunications and video programming services. Finally, the current rules already exceed the mandate given by Congress in Section 207. The Commission must not compound its error, and must therefore reject the Petitions.

I. THE COMMISSION HAS NO AUTHORITY TO EXTEND ITS SECTION 207 RULES TO COMMON AREAS AND RESTRICTED USE AREAS.

In the Second Report and Order, the Commission recognized that the law prevented it from applying its new rule to common areas and restricted use areas. The Broadcast Petitioners are correct when they state that the Commission took "extreme, strained steps" in fashioning the rule. Broadcast Petition at 7. But the Commission did not strain to adopt a rule that failed to go as far as Congress wanted; it strained to extend its rule to leased property, beyond the limit intended by Congress, and in the face of formidable legal, Constitutional and practical barriers. The Commission has already exceeded its authority in an attempt to accommodate the unwarranted demands of telecommunications and video programming providers.

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[2] *See 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,* Second Report and Order, CS Docket No. 96-83 (rel. Nov. 20, 1998) (the "Second Report and Order").

A. The Commission Has Already Gone Beyond the Intent of Congress.

Section 207 was never intended to apply to leased property. The only purpose of Section 207 was to relieve property owners of restrictions on the use and enjoyment of their own property. Responding to complaints from homeowners, Congress wanted the Commission to restore rights that had been limited by the actions of local governing bodies, whether they were public entities or private associations.[3] Section 207 was intended to free property owners from intrusion by governmental and quasi-governmental bodies -- ironically, by extending its rules to leased property and coercing the owners of leased property, the Commission went too far and did the opposite of what Congress intended.

Similarly, the Commission exceeded its mandate by applying Section 207 to commercial properties. As discussed above, Congress meant to allow individual homeowners to install antennas. Congress never anticipated that the Commission would impose any requirements on commercial property owners.

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[3] The House Committee Report on H.R. 1555 explains what types of restrictions Section 207 (originally Section 308 of H.R. 1555) was intended to cover. It states:

> The Committee intends this section to preempt enforcement of State or local statutes and regulations, or state or local legal requirements, or restrictive covenants or encumbrances that prevent the use of antennae designed for off-the-air reception of television broadcast signals or of satellite receivers designed for receipt of DBS services. Existing regulations, including but not limited to, zoning laws, ordinances, restrictive covenants or homeowners' association rules, shall be unenforceable to the extent contrary to this section.

H. Rep. No. 204, 104th Cong., 1st Sess., at 123.

This language is very specific. Congress intended to preempt enforcement of "State or local statutes and regulations," "state or local legal requirements" and "restrictive covenants or encumbrances." The list does not include leases, and leases do not fall within any of the specified categories.

Finally, by its terms, Section 207 applies only to antennas used to receive video programming. Congress never intended to prohibit enforcement of restrictions on the installation of antennas for the purposes of receiving or transmitting telecommunications services. Once again, Congress was concerned only with allowing homeowners to receive the video programming of their choice. Thus, the current scope of the rule already violates Congressional intent. Furthermore, the Wireless Petitioners disingenuously argue for the rights of "all viewers," but they are not in the least concerned with the rights of viewers, because they are not in the video programming business. What the Wireless Petitioners really want is for the Commission to use Section 207 to give them access to every building in the country to deliver telecommunications services. The Commission has already rejected such mandatory access in other contexts and it should do so again.[4]

B. The Commission Has No Authority To Direct Property Owners To Do Anything.

The Commission is an agency of limited jurisdiction and authority. It has jurisdiction only over telecommunications matters, and then only to the extent necessary to regulate the services specified in the Communications Act. The Commission has no jurisdiction over the real estate industry or property owners unless they are engaged in providing regulated services. *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). Similarly, the Commission only has the authority given it by Congress. Congress has not given the Commission the authority to regulate or impose

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[4] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion,* CC Docket No. 98-146 (rel. Feb. 2, 1999) at ¶¶102-104; *Telecommunications Services Inside Wiring, Report and Order and Second Further Notice of Proposed Rulemaking,* 13 FCC Rcd 3659, 3742-43 ("Inside Wiring Order").

requirements of any kind on private property owners. As discussed above, Section 207 speaks only of "prohibit[ing] restrictions," never of imposing restrictions or obligations. Consequently, the Commission cannot order a building owner to permit its tenants to install any kind of facilities anywhere on the owner's property.

The Petitioners would have the Commission confuse its own jurisdiction and authority with the police powers of state and local governments. *See, e.g.,* Wireless Petition at 18-19; Broadcast Petition at 12. Merely because a state or local government might have the power to impose an obligation on a building owner does not mean the Commission does. Therefore, examples of what might be permissible legislation for a state or municipality are of no value in guiding the Commission, which can be guided only by the terms of the Communications Act.

C. The Commission Cannot Preempt the Laws of Physics and Economics.

The Petitioners would have the Commission ignore any factor or limitation that stands in the way of achieving their business goals. *See, e.g.,* Wireless Petition at 12; Broadcast Petition at 4. But neither the express language of Section 207 nor the legislative history direct the Commission to assure that every American has access to Section 207 services regardless of the costs of serving a person or technological limitations on the provision of service. To read such a broad mandate into the words "prohibit restrictions" would be a grave error. The Commission cannot assume, on such thin evidence, that Congress wanted the Commission to make available every form of service that could conceivably be delivered over DBS, MMDS and broadcast receiving antennas, even to people who live in places that do not allow for delivery of the service without extraordinary measures. If Section 207 is as broad as the Petitioners claim, why do they not ask the Commission to develop a means of delivering over-the-air broadcast signals to remote areas? How can the Commission stand by when so many residents of Alaska and other

rural states cannot obtain the benefits of free over-the-air television?[5] The answer, of course, is that Congress had no such intentions.

Congress would have used far more direct and specific language if it had had such a broad mandate in mind. The Commission must presume that Congress expects its directives to be subject to basic technological and economic limitations. For its part, Congress does not presume the impossible; indeed, Congress does not presume that the Commission will take any measure, no matter how extreme, in pursuit of a policy, unless Congress tells it to. In the case of Section 207, it would have been simple enough for Congress to have used the words "prohibit all governmental and contractual restrictions that impair any viewer's ability to receive video programming services, regardless of where the viewer lives or the cost of providing service."

Consequently, the Petitioners' claim that Congress did not mean for the Commission to create "two classes of tenants" has no merit. First, Congress never expected Section 207 to apply to leased property, and second, Congress was well aware that technological and financial circumstances may limit who has access to a service. Therefore, Congress knew that any regulation the Commission might adopt would probably confer benefits or impose obligations on some people and not on others. As noted above, many people cannot now receive free over-the-air signals simply because of where they live -- so even expanding the rules as the Petitioners suggest will still create two classes of viewers.

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[5] The Second Report and Order also exempts college dormitories from Section 1.4000 on the theory that dormitory residents do not have leases. Presumably many other Americans -- such as residents of public housing -- fall into the same category. If the Petitioners truly desire to extend service to all Americans, they should propose a method for serving such groups. If building owners are to bear the many costs associated with extending service to their tenants, perhaps the Petitioners are prepared to endorse an expansion of the Commission's universal service rules under which the Petitioners will contribute funding for receiving equipment and services for all Americans.

For the same reason, the Commission correctly considered the practical problems associated with requiring service in common areas. The Broadcast Petitioners are simply wrong when they say that Congress expected the Commission to ignore any practical problems in implementing Section 207. Broadcast Petition at 13-14. It is the function and responsibility of the Commission to take such practical problems into account. The Commission's error was not in failing to consider such problems, but in ignoring the many physical, legal and financial problems that will be visited on building owners as a result of the rule the Commission did adopt.

D. Extending the Rules to Common Areas Would Constitute a Taking.

The Commission correctly found that extending Section 1.4000 to common areas and restricted use areas would effect a taking under the Supreme Court's decision in *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Although the Commission also wrongly concluded that the holding of *Loretto* did not apply to premises demised under a lease, the Commission at least recognized that allowing tenants or third parties to install facilities in areas not included within the scope of a lease would constitute a *per se* taking.[6] This conclusion is plainly correct, yet the Petitioners vainly assert that by giving tenants access to common areas, property owners somehow give the government the right to "alter the relative rights" of the parties and thus regulate the use of those common areas. The illogic of this argument is illustrated by the following example: if the government were to pass a law declaring that every apartment resident had the right to occupy any adjacent vacant apartment, it would be "altering

[6] Of course, we vehemently disagree with the Commission's decision regarding premises demised by a lease. As Commissioner Furchtgott-Roth stated in his excellent dissent on this point, there really is no difference between the two situations. The Commission's rules are not economic regulation: they expressly alter "the agreed-upon scope of the physical possession" and therefore result in a transfer of property rights. Where property rights are transferred by government action there is at least the possibility of a regulatory taking, and where the transfer of property rights involves the right to affix equipment to the property, there is a *per se* taking.

the relative rights" of the parties – and the law would clearly violate the Fifth Amendment. If the government attempts to expand the physical scope of a tenancy, it is taking the property contained within the expanded scope. This does not constitute mere economic regulation.

The Petitioners cite several cases to support their view, but these cases are easily distinguishable. In *Yee v. City of Escondido*, 503 U.S. 519 (1992), the challenged law did not give tenants the right to occupy any property that they were not already occupying. Nor did it allow them to install equipment prohibited by their leases. The Yees' complaint was that the rent control law had the effect of transferring part of the value of their property to their tenants in a way that amounted to a transfer of a right of physical occupation. The Supreme Court held that while the rent control ordinance might constitute a regulatory taking, there was no physical taking. The Petitioners understandably emphasize the Court's statements to the effect that the Yees had consented to the occupation by renting the land, and the government had not forced them to accept tenants against their will. This is correct, but it ignores the essential difference between the *Yee* case and Section 1.4000. The tenants in Yee had the right to occupy the land and the government had done nothing to expand those rights. There was no physical taking because the terms of the tenancy, other than the ability to raise the rent, had not changed. In this case, however, the Petitioners are asking the Commission to expand the scope of tenancies by giving tenants the right to permanently install facilities on premises they do not otherwise have the right to occupy, except in the most transient fashion. That would be a *per se* physical taking, and would be subject to the rule of *Loretto*.

Similarly, *FCC v. Florida Power*, 480 U.S. 245 (1987), is a rate regulation case. It merely stands for the proposition that the government may regulate the rates one party pays another for the use of facilities – it does not say that the government may direct a property owner

to allow another person to occupy the property over the owner's objections. In fact, the recent decision in *Gulf Power Co. v. U.S.*, 998 F. Supp. 1386 (N.D. Fla. 1998), which the Petitioners ignore, makes just this point. Allowing tenants to use common areas and restricted areas to install antennas would not constitute rate regulation. It would constitute the grant of a right to permanently attach facilities to the property, which is nothing other than a *per se* taking. Accordingly, the Petitioners' reliance on *Florida Power* is misplaced.

The Wireless Petitioners also cite the wholly irrelevant case of *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp.*, 65 F.3d 1113 (4th Cir. 1995). This case involved a statute that reads:

> No landlord shall demand or accept any payment of any fee, charge or other thing of value from any provider of cable television service, satellite master antenna television service, direct broadcast satellite television service, subscription television service or service of any other television programming system in exchange for giving the tenants of such landlord access to such service; and no landlord shall demand or accept any such payment from any tenants in exchange therefor unless the landlord itself is the provider of the service.

Va. Code § 55-248.13:2.

The Wireless Petitioners argue that Section 1.4000 is more like this statute than the statute in *Loretto*. Wireless Petition at 19. This makes no sense at all. The Commission's rule mandates access: it requires property owners to allow tenants to install antennas. If the Commission were to accept the Wireless Petitioners' argument, it would be extending that right. But the Virginia statute establishes no such right whatsoever. It expressly states that a property owner may not demand payment of a fee from a video programming provider for the right of access – but the case does not say that the property owner must give the provider access to the

property. So the Virginia statute is entirely different from the Commission's rule and the case is of no significance in this discussion.

Finally, the Petitioners misstate the nature and scope of the rights of tenants under state law. The Petitioners seem to argue that the Commission may safely regulate landlord tenant relations without violating the Fifth Amendment because state landlord-tenant law sometimes gives tenants certain rights beyond the express terms of their leases. Wireless Petition at 18; Broadcast Petition at 12. This argument is flawed for several reasons. First, as noted earlier, the Commission does not have police power authority, and therefore it can only do what Congress authorizes it to do. Second, the implied rights that the Petitioners rely on are not true regulations. They are common sense doctrines developed to aid in determining what rights a lease actually conveys. Thus, they raise questions of contract interpretation, not potential violations of the Fifth Amendment. And third, the state law rights cited by Petitioners do not extend to the reception of video programming. The citations provided by the Petitioners are quite clear and revealing on these points. Tenants are presumed to have the right to get in and out of their demised premises, through common areas if necessary. 49 Am. Jur. 2d LANDLORD AND TENANT, § 628, 651. They are also presumed to have access to heat, light, water and sewer facilities. *Id.* at § 632. In other words, the law presumes that if one leases property one will not be forced to pay for something that is useless. But the implied covenant of quiet enjoyment and related doctrines extend only to matters that are "necessary and essential to the enjoyment of the premises." *Id.* at § 625. Matters of mere convenience are not included. *Id.* at §§ 625, 628; Annotation, Easements or Privileges of Tenant of Part of Building as to Other Parts Not Included in the Lease, 24 A.L.R. 3d 133 (1997). However important access to certain types of video programming may appear to the Commission and to members of that industry, it is a mere

convenience and not "necessary and essential to the enjoyment of the premises." Indeed, there are a number of cases decided under state law holding that an apartment resident does not have the right to install an external television antenna without the property owner's consent. See Annotation, Legal Aspects of Television, 15 A.L.R. 2d 785 (1997) § 7. Therefore, the proposed extension of Section 1.4000 would break new ground. It would not be consistent with state law, but would create a new body of federal landlord-tenant law, without authority from Congress.

E. Extending the Rules to Common Areas Would Not Promote the Public Interest.

The Petitioners are quick to claim that the public interest demands that their private interests be accommodated. In fact, however, the public interest involves more than just promoting the sale of video programming services and equipment. The public interest is not synonymous with the interests of the telecommunications industry, either. The Supreme Court has expressly stated that in determining the public interest, the Commission must consider more than just the promotion of competition. *FCC v. RCA Comm'ns, Inc.*, 346 U.S. 86 (1953). Although the public interest standard, as applied in any given case, may entail the consideration of a number of factors, in general it requires the Commission to consider not merely the interests of particular parties, or even individual members of the general public, but of society at large. This means that the Commission may need to consider and respect concerns that have nothing to do with the telecommunications or video programming industries. The Commission did err in applying the standard, but not in the way the Petitioners imagine.

In any case, as the Commission has already noted in another context,[7] building owners have an incentive to meet the needs and demands of their tenants. Building owners will not

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[7] Inside Wiring Order at 3690-91.

tolerate high prices or low quality for video programming services, because their tenants will not tolerate them. Contrary to the claims of the Wireless Petitioners, Wireless Petition at 21, compensation from video programming providers does not drive a property owner's decision. Property owners derive only a minuscule amount of compensation, if any, from programming providers, when compared to the hundreds of dollars a month each tenant pays in rent. It is far more important to preserve the rental income stream by ensuring that tenants are satisfied with the services they receive. This is particularly the case with high-end properties, which, of course, are the ones the Wireless Petitioners are most interested in serving. Furthermore, on average, 33% of apartment residents move every year – because they are highly mobile, they will take the existing level of services in a building into account in deciding whether to move, as well as to where they move. Therefore, it is not in the public interest to impose costs and obligations on building owners, under the false assumption that they stand in the way of competition.

Nor is it in the public interest to force building owners to subsidize service providers for any other reason. 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 Commission's original OTARD rules followed this principle because they granted rights only to property owners. The Second Report and Order undermines the policy of the 1996 Act by imposing costs on building owners solely for the benefit of service providers and their subscribers. To expand the rules to include common areas and restricted use areas would do further violence to this policy.

Finally, the policy of promoting free over-the-air broadcasting is irrelevant in this case. The Broadcast Petitioners' concerns are unfounded because the implementation of Section 207 can do nothing to hinder that policy. Even a complete failure to act by the Commission would

have no effect on the status quo, and thus would not harm the interests of the Broadcast Petitioners. The Commission might take actions that do not advance the interests of the Broadcast Petitioners as much as they would like, but that is not the same as undermining the policy.

II. THE COMMISSION SHOULD REPEAL THE RULES, NOT EXPAND THEM.

In a separate Petition for Reconsideration, the Community Associations Institute asks that the Commission repeal the amendments to Section 1.4000 issued in the Second Report and Order. CAI argues that the Commission's rules harm the interests of property owners by limiting their ability to protect their property from damage and themselves from liability. CAI also notes that allowing property owners to apply the same procedures to installation of antennas that they do to other alterations to a property is not unduly burdensome. We concur with those arguments. For these reasons, as well as the various criticisms of the current rule expressed above, the Commission should reverse itself and repeal the extension of the rule to leased properties.

Conclusion

For the foregoing reasons, we urge the Commission to reject the arguments raised in the Petitions. The Commission's rules are already flawed on statutory, Constitutional and practical grounds and to expand them would only compound the Commission's error.

Respectfully submitted,

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March 10, 1999

CERTIFICATE OF SERVICE

I, Matthew C. Ames, hereby certify that on March 10, 1999, I caused copies of the foregoing Opposition to Petitions for Reconsideration to be served by first class mail, postage prepaid, on the following:

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