

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REPLY

WinStar Communications, Inc., Teligent, Inc., NEXTLINK Communications, Inc.,
Association for Local Telecommunications Services, and the Personal Communications Industry
Association (collectively the "Petitioners") hereby reply to the Oppositions¹ to the Petition for
Reconsideration the Petitioners filed regarding the Second Report and Order in the above-
captioned docket.²

I. INTRODUCTION.

The Petitioners represent the competitive alternatives Congress had in mind when enacting
Section 207 and the Telecommunications Act of 1996 ("1996 Act"). The Petitioners are in the
process of delivering to consumers across the country the next generation of advanced services of
all types using wireless technologies. To be able to provide competitive alternatives to all
consumers, the Petitioners must have access to viewers in multiple dwelling units ("MDUs"). Due

¹ See Oppositions of CAI, BOMA, and the National Association of Realtors, respectively.

² In re Implementation of Section 207 of the Telecommunications Act of 1996, Second Report and Order, CS Dock. No. 96-83 (rel. Nov. 20, 1998) ("Order").

to the line-of-sight nature of fixed operations in higher frequency bands, Petitioners must place a small antenna on the rooftop of each building in which they have customers. Without this unobtrusive rooftop access, the Petitioners will be unable to offer competing services in MDUs.

CAI, BOMA, and the National Association of Realtors (collectively, the "Property Owners"), filed Oppositions to the Petition for Reconsideration filed by the Petitioners.³ The Property Owners dispute the purpose of the 1996 Act and Section 207, as well as the Commission's authority under the Act.⁴ In addition, the Property Owners claim that any prohibition on a building owners' ability to restrict the installation of Section 207 devices in common areas constitutes a "taking" under the Fifth Amendment of the Constitution.

To ensure a competitive marketplace for video programming delivery, the Commission must promulgate rules that prohibit all restrictions (other than those necessary for public safety) that impair viewers' ability to receive video programming through Section 207 devices, including those restrictions on Section 207 devices in common areas and restricted use areas in MDUs. Section 207 specifically provides the Commission with ample authority to do just that. The Commission should act to implement Section 207 to the full extent expected by Congress and

³ CAI's claim that community associations and homeowners will have no means to protect their property from damage by Section 207 devices is specious. See CAI Opposition at 10. There are common law tort remedies available to community associations and homeowners alike. See WinStar's Opposition to CAI's Petition for Reconsideration in this docket (filed Feb. 4, 1999). Clearly, the Commission's rules do not prohibit such damage claims.

⁴ The Commission should reject CAI's position that Section 207 does not apply to community associations. See CAI Opposition at 8. Congress was clear that Section 207 applied to homeowner associations, thereby encompassing community associations. See House Report No. 204, 104th Cong., 1st Sess., at 123 ("homeowners association rules, shall be unenforceable . . ."). Indeed, even if the restrictions are imposed by boards elected by residents, Section 207 still applies.

As an aside, it should be noted that BOMA mischaracterizes CAI's Petition for Reconsideration as a request to repeal all the rules enacted in the Second Report and Order. See BOMA Opposition at 13. In fact, CAI only requested the reinstatement of subsection (h) of 1.4000.

ensure that all viewers have access to competing sources of over-the-air video programming. Contrary to the Property Owners' claims, Commission prohibition of access restrictions to common areas of MDUs is not a "taking." Should the Commission find it is a "taking," it need only fashion rules that provide for just and reasonable compensation.

II. CONGRESS INTENDED TO BENEFIT CONSUMERS BY GIVING THEM CHOICES AMONG VIDEO PROGRAMMING SERVICE PROVIDERS.

Contrary to the assertion made by the National Association of Realtors,⁵ the Communications Act was enacted primarily to promote and protect the interests of consumers.⁶ Indeed, Congress intended for the 1996 Act to promote competition in many communications service markets, including the delivery of video programming, for the benefit of consumers. Specifically, in the 1996 Act, Congress enacted Section 207 as part of its plan to open the multichannel video programming market to competition. Section 207 requires that the Commission promulgate rules that prohibit restrictions that impair a viewer's ability to receive video programming through antennae.

Clearly, Section 207 is expressly about promoting the interests of video programming viewers. Congress did not categorize viewers into those that own property versus those that lease. Indeed, nothing in the Act nor the legislative history suggests that Section 207 was intended to protect only those consumers who own their residences. To the contrary, the legislative history expressly states that "[e]xisting regulations, including but not limited to, zoning

⁵ National Association of Realtors' Opposition at 2.

⁶ Throughout the Communications Act, Congress has provided specific sections to protect consumers. Indeed, the concept of common carriers' nondiscrimination and just and reasonable rates requirements are based upon the notion of protecting consumers. See also 47 U.S.C. § 228 (to afford reasonable protection to consumers of pay-per-call services) and 47 U.S.C. § 225 (to make telecommunications relay services available to the extent possible to hearing-impaired and speech-impaired individuals).

laws, ordinances, restrictive covenants or homeowners' association rules, shall be unenforceable to the extent contrary to this section."⁷ Thus, the FCC, through its rules, "should not create different classes of 'viewers' depending upon their status as property owners,"⁸ and it should extend Section 207's protection to all residents -- including the millions in MDUs that lack the ability to use Section 207 devices from within their exclusive space.⁹ By doing so, the Commission will be promoting competition as intended by Congress.¹⁰

III. MARKET FORCES WILL NOT GUARANTEE THAT VIEWERS IN MDUs CAN EXERCISE A CHOICE IN VIDEO ALTERNATIVES.

The Commission's jurisdiction to regulate communications services is unquestionably broad.¹¹ BOMA is incorrect to suggest otherwise.¹² The courts consistently and repeatedly have emphasized Congress' recognition that it is often difficult to predict developments in the dynamic sphere of communications and consequently has provided the Commission with significant discretion and authority to regulate within the scope of its expertise.¹³ Indeed, restrictions on the

⁷ House Report No. 204, 104th Cong., 1st Sess., at 123 (emphasis added).

⁸ Order, at ¶ 13.

⁹ CAI claims that Section 207 need not be fully implemented because competition to cable has significantly grown without it. CAI Opposition, at 11-12. Just imagine how much more competition would be enhanced (especially in MDUs) if owners were absolutely prohibited from restricting access to video programming providers.

¹⁰ Indeed, as it is currently written, the Commission's rule does not cover antennae that can serve multiple tenants in a building. Clearly, Section 207 was intended to cover all video programming providers, even those that use a single antenna per building.

¹¹ See, e.g., AT&T Corp. v. Iowa Utilities Bd., 119 S.Ct. 721 (1999).

¹² See BOMA Opposition at 6, 10.

¹³ See, e.g., F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940)("Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors."); see also National Broadcasting Co. v. U.S., 319 U.S. 190, 218-219 (1943)("True enough, the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic. . . . the Act gave the Commission not niggardly but expansive powers."); see also Philadelphia Television Broadcasting Co. v. F.C.C., 359 F.2d 282, 284 (D.C. Cir. 1966)("Congress in

Commission's ability to address new issues or problems concerning interstate radio and wire communication would impair the realization of the Commission's mandate to safeguard and promote the public interest and provide for the widest dissemination of communications.¹⁴ Bearing this in mind, BOMA's assertion that "the Commission [should not] take any measure, no matter how extreme, in pursuit of a policy, unless Congress tells it to"¹⁵ is an extraordinarily narrow view of the Commission's authority and without merit.¹⁶ Congress' experience in dynamic regulation led it to adopt an approach in which it "define[d] broad areas for regulation and . . . establishe[d] standards for judgment adequately related to their application to the problems to be solved."¹⁷ The Commission's broad authority to act in conjunction with implementation of Section 207 (in which it is given express preemption authority) is beyond dispute.

Indeed, the level of trepidation exhibited in the Second Report and Order represents an unnecessary and harmful limitation on the Commission's power to promote the public interest. States across the country have taken the lead on a similar issue in the telecommunications arena -- building access.¹⁸ The Commission should not hesitate to resolve a simple yet very important

passing the Communications Act in 1934 could not, of course, anticipate the variety and nature of methods of communication by wire or radio that would come into existence in the decades to come. In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry.").

¹⁴ See 47 U.S.C. § 151.

¹⁵ See BOMA Opposition at 6; see also National Association of Realtors' Opposition at 5.

¹⁶ See, e.g., National Broadcasting Co. v. U.S., 319 U.S. at 219 ("While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency.").

¹⁷ Id.

¹⁸ States such as Connecticut, Ohio, and Texas prohibit access restrictions that limit a building tenant's ability to take telecommunications service from the tenant's carrier of choice.

parallel issue for viewers of video programming who lease space in MDUs.¹⁹ The Commission cannot abrogate rights that Congress expressly granted in the Act. The Commission has a statutory obligation to viewers that demands the full exercise of its authority.

The matter of viewer access to competitive sources of video programming cannot be left to the market. BOMA may be correct that some landlords will honor tenants' requests for competitive video programming services. Nevertheless, there is a market imperfection here. The market may provide competitive choices, but not until tenants are legally able and willing to move their residence or business for the sake of competitive choices.²⁰ This is an unacceptably high price to pay for competitive sources of video programming and one that Section 207 was designed to obviate.

Indeed, the 1996 Act's number portability requirement is premised on an analogous proposition.²¹ Prior to enactment of the number portability requirement, customers could switch local exchange providers so long as they were willing to switch their telephone numbers too -- an expensive and inconvenient undertaking, but certainly one much less inconvenient than a physical relocation. Congress believed that the inability to retain one's telephone number when switching carriers presented an extraordinary, often insurmountable impediment to local competition and that customers should not have to choose between their telephone number and competition.²²

¹⁹ Contrary to the National Association of Realtors' claim, the matter of providing a competitive marketplace for video programming is in the public interest. See National Association of Realtors' Opposition at 4. In fact, since 1992, Congress specifically has required the Commission to report on the status of that competition. See 47 U.S.C. § 628(g).

²⁰ Cf. Eastman Kodak Co. v. Image Technical Services, 504 U.S. 451 (1992). In practice, many tenants are captive for significant periods of time due to multi-year leases, and incur extremely high costs if and when they move. See Petition for Reconsideration at 21-22.

²¹ 47 U.S.C. § 251(b)(2).

²² See, e.g., H.R. Rep. No. 204, 104th Cong., 1st Sess., pt. 1, at 72 (1995) ("The ability to change service providers is only meaningful if a customer can retain his or her local telephone number.").

The same should hold true for video programming services: tenants should not have to choose between video programming competition or maintaining their present physical location.

So too, the more general proposition that market forces demand landlords to cater to tenant wishes must fail. Landlords, who may have little or no economic incentive to comply with the video service choices of just one of many tenants in their buildings (particularly individuals or small businesses), should not have the ability to interpose their choice of video service by denying would-be competitive providers access to their buildings. Moreover, this nation unfortunately has seen a history of property owners acting in a manner that runs counter to market incentives. As a result, mandatory federal obligations have been placed on property owners of all kinds to ensure that they act in a socially beneficial manner.²³ In telecommunications, market incentives sometimes prove inadequate to achieve socially beneficial goals, and the Commission has not hesitated to step in when consumers are ill-served.²⁴

IV. PETITIONERS' PROPOSAL WOULD SURVIVE EVEN THE MOST RIGOROUS CONSTITUTIONAL SCRUTINY.

The Property Owners severely misrepresent the Fifth Amendment and takings jurisprudence. Petitioners have explained that their proposal would not effect a taking and will

²³ See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

²⁴ For example, Congress enacted the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA") in response to the "free market" not working properly. See 47 U.S.C. § 226. Specifically, Congress found that because hotels, hospitals, universities, and pay phone owners were entering into arrangements with alternate operator services ("AOS") companies that were charging high rates for operator services and were restricting access to consumers' preferred carriers, the "free market" was not providing interstate operator services at market rates. TOCSIA required the AOS companies to clearly identify themselves, quote their rates upon request and unblock access to other carriers. The Senate's Report which accompanied the bill adopted by the Conference Committee specifically stated that the TOCSIA "measures should permit competitive forces to operate, forcing rates down" See S. Rep. No. 101-439, U.S.C.C.A.N. 1577, 1581 (1990).

not revisit that issue here.²⁵ Nevertheless, even if Petitioners' proposal constitutes a taking, it is fully constitutional. The Property Owners equate a taking with unconstitutionality.²⁶ This reasoning is wrong. Simply because an act may be deemed a taking does not mean it is unconstitutional. Indeed, the Fifth Amendment expressly provides for takings. Takings are a constitutionally-contemplated phenomenon.

Of course, conditions apply. Namely, to survive constitutional scrutiny, just compensation must accompany any taking. Petitioners concede as much and their proposal would provide for just and reasonable compensation to the property owner. Indeed, the Tucker Act remains the ultimate protection against any finding of unconstitutionality [because it provides the assurance that just and reasonable compensation will be given].²⁷ Hence, insofar as just compensation is provided, there should be no constitutional concerns attending Petitioners' proposal.

The Property Owners read Loretto to prohibit mandatory access requirements.²⁸ Loretto cannot properly be read for that proposition. The sole matter at issue was whether the New York statute constituted a taking; the Loretto Court determined that it did. The court expressly did not

²⁵ See Petition for Reconsideration at 14-17.

²⁶ See, e.g., CAI Opposition at 9 (describing a "constitutional right to prevent the permanent occupation of common property"). This constitutional right extends only to protecting against a taking without just compensation. The Fifth Amendment does not act as an absolute bar to permanent and physical occupations of private property.

²⁷ See 28 U.S.C. 1491(a)(1). See Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194-195 (1985)(quoting Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1013, 1018, n.21)("If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking."); see also Presault v. ICC, 494 U.S. 1, 12 (1990)(noting that Congress must exhibit an "unambiguous intention to withdraw the Tucker Act remedy . . . to preclude a Tucker Act claim")(citations omitted). Nothing in the Communications Act indicates that Congress has foreclosed a Tucker Act remedy. See Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441, 1445, n.2 (D.C. Cir. 1994).

²⁸ See CAI Opposition at 3.

rule on the constitutionality of that taking, since an inquiry into just compensation is required for that determination and the Court did not consider the compensation issue.²⁹ Consequently, far from invalidating or otherwise ruling on the constitutionality of the statute in Loretto, the Court merely passed upon its status as a taking. The distinction is of constitutional significance but apparently was not recognized by the Property Owners.

Moreover, the Property Owners unnecessarily limit the application of Yee. BOMA asserts that the tenants in Yee "had the right to occupy the land and the government had done nothing to expand those rights."³⁰ To the contrary, the government did expand those rights by altering the terms of the tenancy contained in the tenants' leases.³¹ Indeed, the government action restricted the landlords' ability to eject tenants from the property that they otherwise would have had. The principles supported in Yee are analogous to those involved in the situation at hand.³²

²⁹ See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982)("Our holding today is very narrow. . . . [O]ur conclusion that § 828 works a taking of a portion of appellant's property does not presuppose that the fee which many landlords had obtained from Teleprompter prior to the law's enactment is a proper measure of the value of the property taken. The issue of the amount of compensation that is due, on which we express no opinion, is a matter for the state courts to consider on remand."). Although there was no subsequent judicial finding on the adequacy of the compensation (partly because landlords did not apply to the Cable Commission for reasonable compensation following the Supreme Court decision), a State court did characterize it as "altogether improbable [that it would be] eventually judicially determined that the very minimal compensation landlords stand to receive under the Executive Law § 828 compensatory scheme (in most cases \$1.00) does not amount to just compensation" Loretto v. Group W Cable, 135 A.D.2d 444, 448, 522 N.Y.S.2d 543, 546 (1987). As Justice Blackmun noted in his dissent, the practical effect of Loretto's case amounted to "a large expenditure of judicial resources on a constitutional claim of little moment." Loretto, 458 U.S. at 456, n.12.

³⁰ BOMA Opposition at 8.

³¹ See Yee v. Escondido, 503 U.S. 519, 524 (1992)(describing the state law as "limit[ing] the bases upon which a park owner may terminate a mobile home owner's tenancy" and describing the municipal ordinance as "set[ting] rents back to their 1986 levels and prohibit[ing] rent increases without the approval of the city council").

³² BOMA claims that "the implied covenant of quiet enjoyment and related doctrines extend only to matters that are 'necessary and essential to the enjoyment of the premises.'" BOMA Opposition at 10. This is clearly a dynamic concept that changes with developing societal expectations. Indeed, the implied rights of access to heat, light, water and sewer facilities could only have arisen after the technology

V. CONCLUSION.

For the foregoing reasons, the Petitioners respectfully request that the Commission reconsider its Order and adopt amended rules that prohibit all restrictions on installation of Section 207 devices in MDUs that are not necessary for public safety.

Respectfully submitted,

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was developed to make such amenities available and once society's expectations demanded that such amenities not be limited as the luxuries of a few.

CERTIFICATE OF SERVICE

I, Rosalyn Bethke, do hereby certify that on this 24th day of March, 1999, copies of the foregoing Reply to Oppositions to Petitions for Reconsideration were delivered by hand, unless otherwise indicated, to the following parties:

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