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April 14, 1999

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

Dear Ms. Roman Salas:

In accordance with Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206, this is to notify the Commission that on March 30, 1999, Brent H. Weingardt, Vice President of the Personal Communications Industry Association, and I met with William H. Johnson, R. Darryl Cooper, Eloise Gore, and Ronald Parver of the Cable Services Bureau concerning broadband wireless building access issues, including CS Docket No. 96-83.

During the meeting, we discussed the petition for reconsideration of the *Second Report and Order* in this docket filed by PCIA and other parties and the implications of this proceeding for competitive broadband wireless operators. The subjects discussed are set forth in the enclosed materials, a copy of which were provided to each of the meeting attendees.

Two copies of this letter and the associated presentation materials are being filed with the secretary's office, as required by Section 1.1206.

Should you have any questions regarding this matter, please call me.

Respectfully submitted,



Katherine M. Harris

KMH/cet

Enclosures

cc: William H. Johnson
R. Darryl Cooper
Eloise Gore
Ronald Parver

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THE COMMISSION MUST AND CAN TAKE STEPS TO ENSURE BROADBAND WIRELESS OPERATORS HAVE ACCESS TO BUILDINGS

I. BUILDING ACCESS IS CRUCIAL FOR BROADBAND WIRELESS OPERATORS

- Fixed wireless broadband operators (such as LMDS) require access to multi-dwelling units (MDUs) and office buildings in order to fulfill the competitive promise envisioned by the FCC.
- A licensee must first establish several hubs (antennas that serve as switches linked to the PSTN or other wired networks) at several locations in its service area. Hubs are typically located on the roofs of selected buildings with line-of-sight capability to those buildings with identified customers.
- In addition to these hubs, broadband wireless operators must place a small microwave send/receive transmitter (approximately 18 inches in diameter with mounts just above rooftop level) on the top of each building in which they have a customer. Typically, only one transmitter is needed for all customers in a building.
- Within a subscriber's building, the broadband wireless operator must place a wall-mounted network interface device and cables running to its customer(s). This equipment is typically placed in telephone closets, utility closets, risers, elevator shafts and existing rights-of way.
- The earliest broadband wireless operators (such as Teligent and WinStar) are now deploying systems. They are experiencing many instances of being denied access to buildings (where they have potential customers) or facing exorbitant rents that are not consistent with payments made by other telecommunications providers in the building.
- The Commission has ample authority to require the opening of in-building rights-of-way now used by other telecommunications carriers in accordance with Section 224.
- Section 207 is the most explicit means set forth by Congress to eliminate restrictions on antenna placements. However, the Commission also has clear authority under Section 706 to remove barriers to investment in and deployment of advanced communications services such as wireless broadband.
- Without a national building access policy, wireless operators will not be able to compete with the wired alternatives (ILEC, CLEC, cable) that are in the MDUs and office buildings.

II. THE COMMISSION'S INTERPRETATION OF SECTION 207 IS UNDULY NARROW AND MUST BE BROADENED TO COMPORT WITH CONGRESSIONAL INTENT AND THE PUBLIC INTEREST

- The Commission made significant strides in the *Second Report and Order* in CS Docket 96-83 by extending to certain categories of tenants the right to install and use a Section 207 reception device. By limiting access to and use of common property and restricted access property, however, the Commission creates discriminatory divisions among users and potential users of Section 207 reception devices and fails to implement the full benefits and objectives of Section 207.
- Jointly with several other parties, PCIA has sought reconsideration of the *Second Report and Order*, requesting the Commission to adopt amended rules that prohibit *all* restrictions on installation of Section 207 devices in multi-tenant buildings that are not necessary for public safety.
- The action taken in the *Second Report and Order* effectively denies the benefits of Section 207 to an overwhelming number of consumers that do not have access to rented space where they have exclusive use with a line-of-sight transmission path to a Section 207 video programming provider.
 - Section 207 does not permit such “line drawing,” but instead contemplates that the Commission will act to remove — across the board — restrictions on consumers’ access to over-the-air video programming.
 - The *Second Report and Order* instead moves the line for distinguishing between the “haves” and “have nots,” without any sound justification for drawing such a line.
- Reversal of the Commission’s narrow approach is necessary to help achieve the Congressional goal underlying the Telecommunications Act of 1996 of opening telecommunications markets and promoting competition in the over-the-air transmissions available to consumers.
- Implementation of the requested relief would not be a *per se* taking of property under the Fifth amendment or a compelled physical invasion, but would be no more than the permissible regulation of a preexisting contractual arrangement between the building owner, landlord, or condominium association and the tenant. Even if the requested Commission action were deemed a “taking,” it would be permissible if accompanied by just and reasonable compensation.
- The public interest would be served by fully expanding the protections of Section 207 to all tenants, subject only to limitations necessary to promote safety, leading to enhanced competition in video programming and increased consumer choice.

III. GRANTING ACCESS TO COMMON AREAS AND RESTRICTED ACCESS AREAS FOR SECTION 207 DEVICES IS CONSTITUTIONALLY PERMISSIBLE

- Section 207 is a broader grant of authority than recognized in the *Second Report and Order*. This section requires the Commission to prohibit restrictions — apparently *all* such restrictions — that impair a viewer’s ability to receive video programming services. While Section 207 does not directly say that the Commission may “take” property, there is no doubt that, consistent with the standards enunciated by the D.C. Circuit Court of Appeals, Section 207 provides all necessary authority for the Commission to require landlords to permit access for Section 207 devices in common areas and restricted access areas if such requirement is considered to amount to a taking.
 - In *Bell Atlantic*, the Court recognized that takings authority may be implied where necessary to avoid defeating the underlying grant of power.
- It is PCIA’s view that imposing the contemplated access requirement does not constitute a *per se* taking.
- Rather, implementation of the action advocated by PCIA and others would amount to a regulation of the relationship between the landlord and the tenant. In that event, as recognized in the *Second Report and Order*, the determination whether a “regulatory taking” has occurred will be evaluated in light of three factors: (1) the character of the governmental action; (2) its economic impact; and (3) its interference with reasonable investment-backed expectation. Examining these factors in the circumstances at hand here, including the Congressional directive contained in Section 207 as well as the public interest benefits of treating all Section 207 device viewers on an even-handed basis, supports adoption of the requested relief.
- The mere conclusion that a taking is effectuated does not end the inquiry. Rather, the Fifth Amendment requires there be no takings without just compensation. PCIA and the other petitioners have indicated no objection to conditioning the requested access on payment of reasonable compensation amounts.
- The *Loretto* decision does not mean that requiring the access endorsed by PCIA and other petitioners in this proceeding is constitutionally infirm. There are significant differences between the facts of *Loretto* and the facts here. Moreover, the Supreme Court determined that the action at issue in *Loretto* constituted a taking, but then remanded the case for determination of a proper compensation amount — it did not rule that the disputed action was unacceptable in and of itself.
- While the *Second Report and Order* noted a number of practical implementation roadblocks, none of these concerns is insurmountable. Similar sorts of issues have been resolved in the co-location context. Such considerations should not be allowed to stand in the way of Commission adoption of action that is both authorized and required by Section 207.