A. Congressional or Commission-mandated Wiring of Private Buildings Would be an Impermissible "Permanent Physical Occupation."

The physical requirement that a landlord permit a third party to occupy space on the landlord's premises and to attach wires to the building plainly crosses that clear, bright line between permissible regulation and impermissible takings.

Where the "character of the governmental action," the Supreme Court has said, "is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto, supra*, at 434-35 (emphasis supplied), citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).[8]

B. Forced Carrier Access Satisfies the Legal Test for an Unconstitutional Taking.

No de minimis test validates physical takings. The size of the affected area is constitutionally irrelevant. In *Loretto, supra*, at 436-37, the Court reaffirmed that the "the rights of private property cannot be made to depend on the size of the area permanently occupied." *Id.* at 436-37.

The access contemplated by Congress is legally indistinguishable from the method or use of intrusion in *Loretto*, where the Court found a "permanent physical occupation" of the property where the installation involved a direct physical attachment of plates, boxes, wires, bolts and screws to the building, completely occupying space immediately above and upon the roof and along the buildings' exterior wall. *Id.* at 438.

Loretto settles the issue that government-mandated access to a private property by third parties for the installation of telecommunication wires and hardware constitutes a taking, regardless of the asserted public interest, the size of the affected area, or the uses of the hardware. In takings there is no constitutional distinction between state regulation (*Loretto*) and federal regulation (FCC proposed rulemaking).

C. "Just Compensation" for the Taking Requires Resort to Market Pricing.

The takings objection to mandated access to private property cannot be avoided by requiring the telecommunications service provider benefited thereby to make a nominal payment to the owner for access. In *Loretto* the New York statute at issue provided for a one-dollar fee payable to the landlord for damage to the property. The Court concluded that the legislature's assignment of damages equal to one dollar did not constitute the "just compensation" required by the constitution.

While *Loretto* does not address the question of whether the invalidity of a taking is avoided by payment from a third party, other courts have held that takings to benefit a private telecommunications provider are subject to heightened scrutiny. *See Lansing v. Edward Rose Associates*, 442 Mich. 626, 639, 502 N.W. 2d 638, 645 (1993). AMTRAK's condemnation and conveyance of the Boston & Maine's Connecticut River railroad tracks to the Central of Vermont Railroad after payment of compensation was narrowly upheld on the technicality that the condemnation was under the adjudicatory oversight of the Interstate Commerce Commission. *Nat'l R.R. Passenger Corp. v. Boston & Maine*, 503 U.S. 407, 112 S.Ct. at 1403-04 (1992). That degree of governmental involvement is not contemplated here.

The practical point is this, *viz.*, that government cannot prescribe a nominal amount as compensation for access—the affected property owner is constitutionally entitled to compensation measured against fair market value. *See U.S. v. Commodities Trading Corp.*, 339 U.S. 121, 128 (1950) (current market value); *Bell Atlantic, supra*, at 337 n.3, 24 F.3d at 1445 n.3. Is ascertainment of the disputed market values of differing impingements on large numbers of highly diverse commercial and residential properties something that either the Commission or the courts are ready to handle?

Congress specifically has previously considered a mandatory access provision and the provision was deliberately omitted in the final version of the Cable Act to avoid a taking. There was not then, nor is there now we believe any Congressional intent to support takings of private property. *Id.* at 156-57, citing 130 Cong. Rec. H10444 (daily ed. Oct. 1, 1984) (floor statement of Cong. Fields).

In Century SW Cable TV v. CIIF Associates, 33 F.3d 1068 (1994), the Ninth Circuit, following *Woolley*, reversed the trial court's application of Section 621(a)(2), be-

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[8] In *Penn Central* the Supreme Court had observed that there was no "set formula" for determining whether an economic taking had occurred and that the Court must engage in "essentially ad hoc, factual inquiries" looking to factors including the economic impact and the character of the government action. No such detailed inquiry is required *where there is a permanent physical occupation. Id.* at 426.

cause there was no evidence of an express dedication. The court found that installation of cable to individual units constituted a physical invasion under *Loretto* that was not authorized by the statute. Accord, *TCI of North Dakota*, v. *Shriock Holding Co.*, 11 F.3d 812 (8th Cir. 1993).

The kind of forced-building access contemplated here would largely replicate the provisions for forced building access in S. 1822 in the 103d Congress for forced building access, which died on the floor of the Senate in the fall of 1994. Such provisions would not have been needed if the Commission already had that authority.

APPENDIX TWO

"FORCED ACCESS IS UNNECESSARY AND UNMANAGEABLE"

There are sound and persuasive reasons why the Congress should not attempt to regulate access to private property. Governmental regulation would be unmanageable and it would interfere with effective on-the-spot management.B.Commission Regulation is Undesirable Because it Would Interfere with Effective On-the-Spot Management.

Not only is government intervention unnecessary, since property owners are already taking steps to ensure that telecommunications service providers can serve their tenants and residents, but it is undesirable. Such intervention could have the unintended effect of interfering with effective, on-the-spot property management. Building owners and managers have a great many responsibilities that can only be met if their rights are preserved, including compliance with safety codes; ensuring the security of tenants, residents and visitors; coordination among tenants and service providers; and managing limited physical space. Needless regulation will not only harm our members' interests, but those of tenants, residents, and the public at large as well.

1. Safety considerations; code compliance.

Building owners are the frontline in the enforcement of fire and safety codes, but they cannot ensure compliance with code requirements if they cannot control who does what work in their buildings, or when and where they do it. For government to limit their control would unfairly increase the industry's exposure to liability and would adversely affect public safety.

For example, building and fire codes require that certain elements of a building, including walls, floors and shafts, provide specified levels of fire resistance based on a variety of factors, including type of construction, occupancy classification, and building height and area. In addition, areas of greater hazard (such as storage rooms) and critical portions of the egress system (such as exit access corridors and exit stairways) must meet higher fire resistance standards than other portions of a building. The required level of fire-resistance typically ranges between twenty minutes and four hours, depending on the specific application. These "fire resistance assemblies" must be tested and shown to be capable of resisting the passage of floor and smoke for the specified time.

Over the past 10 years, penetrations of fire-resistance assemblies have been a matter of great concern, as such breaches have been shown to be a frequent contributor to the spreading of smoke and fire during incidents. The problem arises because fire-resistance assemblies are routinely penetrated by a wide variety of materials, such as pipes, conduits, cables, wires and ducts. An entire industry has been built around the wide variety of approaches that must be used to maintain the required rating at a penetration. It is not a simple issue of just filling up the hole—the level of fire resistance required, the type of materials of which the assembly is constructed, the specific size and type of material penetrating the assembly, and the size of the space between the penetrating item and the assembly are all factors in determining the appropriate fire-stopping method.

Mandating access to buildings, without adequate supervision and control by a building's owner or manager, would allow people unfamiliar with a building the opportunity to significantly compromise the integrity of fire-resistance-rated assemblies. Telecommunications service personnel are not trained to recognize the importance of such elements in a building's construction, much less to accurately assess the types of assemblies they are penetrating or assuming any responsibility as to code compliance. Thus, while perfectly competent to drill holes and run wire, they would be unable to determine the appropriate hourly rating of a particular wall, floor or shaft, and would not know how to properly fill any resulting holes or recognize those areas that they should not penetrate at all.

In fact, it is unlikely that a person punching holes and pulling cables would even consider patching the holes after they pulled their cables through. Many of these

penetrations are made above suspended ceilings or in equipment rooms where there is little or no aesthetic concern.

Maintaining the integrity of fire-resistance-rated assemblies is already a challenge for building managers because of the large number of people and different types of service providers that may be working in a building. Nevertheless, currently a building operator can restrict access to qualified companies and can seek recourse, by withholding payment or denying future access, if the work is not done correctly. If building operators were forced to allow unlimited access to alternative service providers, or were prohibited from restricting such access, the level of building fire safety could be significantly jeopardized. It is essential that building owners and managers be able to continue to ensure in the future that those personnel performing work in a building do so in a manner that does not compromise other essential systems, including fire protection features; this has not been a generic problem in the past, where building owners and managers have retained control. We emphasize that these are not merely theoretical dangers—we have received reports of actual breaches of firewalls from our members. The only way fire safety can be assured in the future is by allowing building owners and managers to determine who is permitted to perform work on their property.

The same applies to all other codes with which a building owner must comply. *See, e.g.*, Article 800 (Communications Circuits) of the National Fire Protection Association's National Electrical Code (1993 ed.), specifying insulating characteristics, firestopping *installation*, *grounding* clearances, proximity to other cables, and conduit and duct fill ratios. Technicians of any single telecommunications service do not have all the responsibilities of a building owner and cannot be expected to meet those responsibilities. Yet the building owner is ultimately responsible for any code violations. Congressional or Commission interference in this area could thus have severe unintended consequences for the public safety.

While the Commission presently requires telephone companies to comply with local building and electrical codes, *see* Section 68.215(d)(4) of the rules, 47 C.F.R. § 68.215(d)(4), it could not practically enforce the codes, particularly where competing providers would have unrestricted access to common space.

2. Occupant security.

Building operators are also concerned about the security of their buildings and their tenants and residents, and in certain circumstances may be found legally liable for failing to protect people in their buildings. Telecommunications service providers, however, have no such obligations. Service technicians may violate security policies by leaving doors open or admitting unauthorized visitors; they may even commit illegal or dangerous acts themselves. Of course, these possibilities exist today, but at least building operators have the right to take whatever steps they consider warranted. The commenting associations' concern is that in requiring building operators to allow any service provider physical access to a building, the Commission may *specifically grant*—or be *interpreted* as granting—an uncontrolled right of access by service personnel.

It is simply impracticable for the Commission to develop any set of rules that will adequately address all the different situations that arise every day in hundreds of thousands of building across the country. Consequently, any maintenance and installation activities must be conducted within the rules established by a building's manager, and the manager must have the ability to supervise those activities. Given the public's justifiable concerns about personal safety, building operators simply cannot allow service personnel to go anywhere they please without the operator's knowledge, and the Commission should respect that authority.

3. Effective coordination of occupants' needs.

A building owner must have control over the space occupied by telephone lines and facilities, especially in a multi-occupant building, because only the landlord can coordinate the conflicting needs of multiple tenants or residents and multiple service providers. Although this has traditionally been more of an issue for commercial properties, such coordination may become increasingly important in the residential area as well. Large-scale changes in society—everything from increased telecommuting to implementation of the new telecommunications law—are leading to a proliferation of services, service providers, and residential telecommunications needs. With such changes, the role of the landlord or manager and the importance of preserving control over riser and conduit space is likely to grow.

Building owners must retain maximum flexibility over the control of inside wiring of all kinds. If a building operator chooses to retain complete ownership and control over its property—including inside wiring—it should have that right. Presumably,

if this proves to be a good business practice, the market will reward building owners who decide to retain control over coordinating such issues.

On the other hand, other building operators may find that their tenants' needs require less hands-on management and control by the operator. There may be a market for buildings in which tenants and service providers work these issues out themselves. If there is, property owners will respond by letting the market grow on its own, simply because it is in their interests to serve their tenants as efficiently as possible.

Indeed, it is likely that there is demand for both approaches to managing a building. If so, any governmental action is likely to distort the market and interfere with the efficient operation of the real estate industry. Thus, to serve tenants' needs most effectively, building owners should be allowed to make their own decisions regarding the most efficient way to coordinate the activities of multiple service providers and tenants.

4. Effective management of property.

A building has a finite amount of physical space in which telecommunications facilities can be installed. Even if that space can be expanded, it cannot be expanded beyond certain limits, and it can certainly not be expanded without significant expense. Installation and maintenance of such facilities involves disruptions in the activities of tenants and residents and damage to the physical fabric of a building. Telecommunications service providers have little incentive to consider such factors because they will not be responsible for any ill effects.

As with the discussion of fire and building codes above, telecommunications service technicians are also unlikely to take adequate steps to correct all the damage they may cause in the course of their work. They are paid to provide telecommunications service, and as long as the tenant has that service they are likely to see their job as done. Since they do not work for the building operator, he has little control over their activities. If building management cannot take reasonable steps in that regard, building operators and tenants will suffer financial losses and increased disruption of their activities.

In one instance reported by a member, a cable operator installed an outlet at the request of a tenant but without notifying building management. To do so, the operator drilled a hole in newly-installed vinyl siding and strung the cable across the front of the building. Not only was this unsightly (affecting the marketability of the property), but the hole in the siding created a structural defect that allowed water to collect behind the siding. The building owner was able to resolve the matter under the terms of its carefully-negotiated agreement with the operator. If the Congress grants operators the right of access, however, building owners may find that they cannot rely on such agreements any longer.

5. Physical and electrical interference between *competing providers*.

Allowing a large number of competing providers access to a building raises the concern that service providers may damage the facilities of tenants and of other providers in the course of installation and maintenance. It also poses a significant threat to the quality of signals carried by wiring within the building. Competitive pressures may induce service providers to ignore shielding and signal leakage requirements, to the detriment of other service providers and tenants in the building, or they may accidentally cut or abrade wiring installed by other service providers or occupants.

The building operator is the only person with the incentive to protect the interests of all occupants in a building. Individual occupants are only concerned with the quality of their own service, and service providers are only concerned with the quality of service delivered to their own customers. Neither the Congress nor the Commission can possibly police all of these issues effectively. Consequently, building operators must retain a free hand to deal with service providers as they see fit. If one company consistently performs sloppy work that adversely affects others in the building, the building owner should have the right to prohibit that company from serving the building. Otherwise, the building owner will be unable to respond to occupant complaints and will face the threat of lost revenue because of matters over which it has little control.

Mr. TAUZIN. Thank you, Mr. Bitz.

And, now, Mr. Andy Heatwole from Virginia Beach, Virginia. Andy.

STATEMENT OF ANDREW HEATWOLE

Mr. HEATWOLE. Thank you, Mr. Chairman. Mr. Chairman, Mr. Markey, members of the subcommittee. My name is Andy Heatwole. I am speaking on behalf of the National Association of Realtors, who represent nearly 730,000 realtors nationwide who are involved in all aspects of the real estate business and their affiliate, the Institute of Real Estate Management, whose members manage 24 percent of the Nation's conventionally financed apartments and 44 percent of the Nation's office buildings. I am a realtor from Virginia Beach, Virginia. My partners and I manage approximately 18,000 multi-family units throughout Virginia and have built approximately 3,000 multi-family. I am honored to speak before this committee today about telecommunications access.

We recognize the changing and evolving telecommunications industry and the need to promote competition in the marketplace. Our customers, residents, and tenants demand new and sophisticated telecommunications capabilities and such services increase the marketability of our property. Consequently, we have an incentive to establish policies that promote the well-being of all residents. Mr. Bitz just alluded to that. If we don't provide the product, our residents go somewhere else, whether or not it is a commercial tenant or a residential tenant.

However, we strongly oppose efforts, such as those being discussed today, which would permit unrestricted access to private property for the installation of telecommunications services. We oppose mandatory access for a variety of reasons.

First, legitimate reasons exist for building owners and managers to maintain control over access to building space. Unrestricted access could prohibit owners and managers from properly operating their properties. It would undermine their ability to responsibly manage complex building systems in order to ensure tenant safety.

I want to take a moment and read the grant of easement and access rights from a telecommunications agreement that was presented to us and if you would allow free and open access on the same terms and conditions which is what Winstar asked for in Virginia. Somebody signed this.

This is the easement you would be giving: "The easement extends throughout the premises both land and improvements close in including raceways, common areas, equipment rooms, equipment buildings, utility areas, and other spaces on, in, and over the premises as reasonably necessary or useful for the location, relocation, installation, maintenance repair, upgrading, monitoring, operation, and removal of the distribution system, subject to the limitations of this agreement, on the location of the distribution system. Permitter further agrees to grant blank free right of access, ingress, and egress to and from the premises for marketing of services at the premises, including door-to-door sales activities and the placement of literature in the management office located on the premises, subject to the limitations contained in this agreement," which was approval of any of their advertising.

"The terms of this agreement shall be deemed to be covenants running with the land, constituting the premises. The provisions of this section two shall survive the expiration or earlier termination of this agreement." That would mean that any service provider, re-

gardless of their ability to perform many of the people here today are extremely sophisticated. And you can reach a negotiated agreement with them and be pretty sure that you are going to get what you pay for and that your residents are going to receive it.

But with language like this and what people generally want is, No. 1, we don't know if our tenants will receive the service they are promised. We have people trenching over our property. We have people running lines over our property. We have people drilling holes in our property. We have people running wires along the baseboard inside the units of our property. And we would have no control over it, plus people going door-to-door and advertisements all over our club house.

The second point is that evidence shows that mandatory access laws actually may lessen competition. Large incumbent service providers are able to block small innovative often less expensive providers from entering the marketplace due to the time and expense it take to recoup their investment in the wiring of the property. It will also place building owners who offer these services to their tenants at a competitive disadvantage. Owners often plan their properties with their own wiring and, in many instances, the entire system. They should not be penalized for providing state-of-the art facilities to our tenants and residents.

We have in three properties provided cable TV service to our residents. The way we recently got involved in it is because the cable TV company refused to run the wiring inside. We said, okay, we are going to run the wiring inside, we will own the system. We provide, for $28 a month, the same service that the cable TV virtually the same service that the cable TV company charges about $44 in our area for. We have to be able to recoup the cost of our investment in these instances.

Third, mandatory access will invalidate contractual agreements already in place, further eroding competition in the marketplace. Many owners and telecommunications providers have exclusive agreements to provide services to their residents. Without exclusive contracts, many small innovative providers would not be able to enter into the marketplace. Mandatory access would violate these contracts.

And, last, we believe that mandatory access laws violate the private property rights of building owners and constitute a taking under the Fifth Amendment. Under Loretto v. Teleprompter Manhattan CATV, 58 U.S. Corp 1987, the Supreme Court stated that, "to the extent that the government permanently occupies physical property, it effectively destroys the owners right to possess, use, and dispose of the property."

I would also mention that, in that same ruling, it says, "A taking does not depend on whether the volume of space it occupies is bigger than a bread box." It is slightly bigger than a bread box, but a taking is a taking, period.

And just a couple of brief personal observations. I am a pretty simple guy and I don't know a whole lot but I know a couple of things. And one is that we appear that we may actually have some property left at this point, private property right. If this type of legislation is passed, we are going to lose that right, plainly and simply.

We are the individuals that take the risk to build the property in the first place. We are getting ready to start 120-unit apartment project in Virginia Beach. We have put $6.5 million in land and another $2 million in equity into that property. We are the ones taking the risk. If we don't provide, whether or not negotiated, multiple access for things to residents we won't rent the property out. The marketplace is working, as Mr. Bitz said. But to require this mandatory access I think is preposterous. We are the ones taking the risk.

The only other thing I have that I know is that any time I am in a discussion such as this and there is a group of experts and lawyers on the other side who are telling me that I don't have a problem and it is in my best interests to do this, that is when I really know I have a problem.

I was concerned when I came up here to testify today and that is why. But having heard some of the testimony, I am scared to death at this point. I believe the marketplace is beginning to work. I believe, as owners and managers of properties, we realize the necessity of having the best available services available to our residents. But please do not make this a mandatory access. Thank you.

[The prepared statement of Andrew Heatwole follows:]

PREPARED STATEMENT OF ANDREW HEATWOLE ON BEHALF OF THE NATIONAL ASSOCIATION OF REALTORS® AND THE INSTITUTE OF REAL ESTATE MANAGEMENT

Hello. My name is Andrew Heatwole. I am speaking on behalf of the NATIONAL ASSOCIATION OF REALTORS® who represents nearly 730,000 REALTORS® nationwide who are involved in all aspects of the real estate business, and their affiliate, the Institute of Real Estate Management, whose members manage 24 percent of the nation's conventionally financed apartment units and 44 percent of the nation's office buildings. I am a REALTOR® from Virginia Beach, Virginia. My partners and I manage 1800 multifamily units throughout Virginia, and have built approximately 3000 multifamily units. I am honored to speak here before the committee on the very important issue of telecommunications access.

The NATIONAL ASSOCIATION OF REALTORS® and the Institute of Real Estate Management recognize the changing and evolving telecommunications industry and the need to promote competition in the marketplace. Our customers, residents and tenants, demand new and sophisticated telecommunications capabilities and such services increase the marketability of our properties. Consequently, we have an incentive to establish policies that promote the well being of all residents.

Overview

We strongly oppose efforts such as those being discussed today, which would permit unrestricted access to private property for the installation of telecommunications services. We oppose mandatory access for a variety of reasons. First, legitimate reasons exist for building owners and managers to maintain control over access to building space. Unrestricted access could prohibit owners and managers from properly operating their properties. It would undermine their ability to responsibly manage complex building systems in order to ensure tenant safety. Second, evidence shows that mandatory access laws actually lessen competition. Large incumbent service providers are able to block small, innovative, often less expensive providers from entering the marketplace, due to the time and expense it takes to recoup their investment in the wiring of a property. It will also place building owners who offer these same services to their tenants at a competitive disadvantage. Owners often plan their properties with their own wiring, and in many instances, the entire system installed. We should not be penalized for providing state-of-the-art facilities to our tenants and residents. Third, mandatory access will invalidate contractual agreements already in place, further eroding competition in the marketplace. Many owners and telecommunications providers have exclusive and perpetual agreements to provide services to their tenants. Mandatory access would violate these contracts. Last, we believe that mandatory access laws violate the private property rights of building owners, and constitute a taking under the Fifth Amendment.

Managers and Owners Must Maintain Control Over Access To Building Space

Mandatory access to private property by large numbers of communications companies may adversely affect the conduct of business. It will undermine the property owners' and managers' ability to responsibly manage complex building systems; ensure service reliability and tenant safety' compliance with safety codes; as well as needlessly raise legal issues. To require that property owners and managers guarantee building access to a potentially unlimited number of service providers will most certainly result in associated costs and liabilities. Existing buildings have limited space available for installation and maintenance of telecommunications systems. Unlimited access could force owners to incur exorbitant costs for expansion and renovation of riser cable space. Property damage is another issue of concern. What protections will be granted to building owners against property damage from unlimited installations and removals? It is important that property owners and managers maintain control over the space occupied by telecommunications lines, especially in a multi-occupant building. Only the property owner or manager can coordinate the conflicting needs of multiple tenants and multiple service providers.

Private property owners of residential and commercial buildings should have the right to choose and control the telecommunications systems serving their tenants and residents. For all forms of telecommunications system installation, maintenance and service, entry into private property should be provided pursuant to a negotiated agreement between the property owner/manager and the service provider—not by legislative fiat. Negotiation on a competitive basis will allow for consideration of the level of expertise, professionalism, and reputation of the service provider. Owners should have the right to negotiate mutually accepted terms and conditions for granting access to building space and the valuable tenant markets contained within. Building owners negotiate agreements with vendors for *all* of the services they provide to their tenants such as coin operated washer/dryers, vending machines and pay telephones. Telecommunications services should be afforded the same negotiating privileges and controls. The effect of mandatory access will be a decrease in service reliability, tenant safety, and building code compliance.

Mandatory Access Actually Lessens Competition

If allowed unrestricted access, large incumbent service providers could block small, innovative, and less expensive providers from entering the marketplace. The initial investment of time and money required to wire a building for telecommunication services is great and therefore is factored into the negotiated agreement between building owner and provider. Exclusive contracts assist the small provider in recouping costs associated with initial wiring.

Some telecommunications providers argue that with mandatory access, consumers will have the opportunity to purchase local phone service at lower prices and improved service. This is simply not true. The overhead costs of putting a dish on the roof and running phone lines throughout a home are cost prohibitive for single family homes, small businesses and all but the largest of multifamily housing complexes. The costs are too high for these technologies to serve individual consumers and small businesses. In fact, it appears that these providers want mandatory access simply to "cherry pick" those properties that demand the highest volume of services, while ignoring those clients who require less service. Owners of buildings who house these lucrative markets should not be forced to provide access to these tenants upon demand.

Another unfair competitive scenario created by mandated access can arise as more and more property owners include high-tech wiring in the design of their buildings. They own and invest in this wiring, and install it themselves. If property owners have to let competitors run their own lines, it will be very difficult to recover the costs involved in the original wiring. Or how about the scenario where a telecommunications provider refuses to install the wiring but instead waits until the building owner installs it himself or through a competitor and then expects to get access to use the wiring to connect to their cable signal when a tenant subscribes to their service? Some landlords own the cable wiring in their buildings, and rent them to cable providers under a revenue sharing agreement based upon tenant participation. With mandatory access, the owners would have to allow competitors in to compete against their own revenue sharing agreement. Property owners who have invested in technology should not be penalized by legislative action allowing mandatory access. These scenarios are just a snapshot of the potential abuses and unfair practices that can result in a mandatory environment.

Mandatory Access Will Invalidate Contractual Agreements

Property owners often enter into exclusive fixed term or perpetual contracts with telecommunications providers in order to allow them the ability to recoup their in-

vestment over time. To permit access to these properties will create a conflict in which these existing agreements would be undermined and even violated. This would place an unreasonable infringement upon the free-market and could spawn numerous lawsuits. Without the ability to recoup costs through exclusive contracts, many of these businesses would not have the financial ability to enter the marketplace, thus limiting competition for these services. Mandatory access laws prohibit these arrangements, and allow big providers to push the small businesses out of the way. Exclusive contracts allow property owners to negotiate the best possible contracts for both price and level of service, and enable new providers to enter the marketplace and economically compete with established big companies.

Mandatory Access Jeopardizes Private Property Rights

Private property rights are integral to this discussion. There are several court decisions that have shown that mandatory access violates the Fifth Amendment to the Constitution. In *Loretto v. Teleprompter Manhattan CATV Corp* (58 U.S. 419 (1987)), a New York statute provided that a landlord must permit a cable television company to install its wiring on its property, and can only demand payment up to an amount determined by a state commission to be reasonable. In New York, this amount was determined to be $1.00. The property owner brought a class action suit against the city stating the wiring was a taking without just compensation. The case came before the Supreme Court, who ruled that the State of New York could not require such use of private property without just compensation. They ruled that, "when the character of a governmental action is a permanent physical occupation of real property, there is a taking to the extent of the occupation without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." They further stated, that "to the extent that the government permanently occupies physical property, it effectively destroys the owner's rights to possess, use, and dispose of the property." Lastly, they ruled that "the cable installation on the appellant's building constituted a taking under the traditional, physical occupation test, since it involved a direct physical attachment of plates, boxes, wires, bolts and screws to the building." In *Lucas v. South Carolina Coastal Council* (505 U.S. 1003 (1992)), the court similarly ruled that "physical occupations by third parties are more likely to effect takings than other physical occupations."

Furthermore, requiring property owners to provide "non-discriminatory access" is problematic because owners may already be using their valuable property for other purposes. Many building owners already lease space on their roofs to cellular and digital phone companies. In these cases, the lease often involves a monthly payment, and may even include a revenue sharing agreement. Legislation to allow for mandatory access would violate a private owner's right to generate revenue in this manner.

Conclusion

I thank you for this opportunity to present the views of NAR and IREM on this very important issue. As you can see, we have very grave concerns over the prospect of federal legislation permitting the unlimited and unrestricted access to private property for the installation of telecommunication services. Furthermore, the Congress delegated the authority for telecommunications reform to the Federal Communications Commission. The Commission reviewed the issue of mandatory access through a public comment process, and chose not to create a federal policy in this regard. I strongly urge you to reconsider the need for such legislation at this time.

Mr. TAUZIN. Thank you, Mr. Heatwole. You can be scared of them, but don't be scared of us.

We are pleased to welcome the manager of ancillary services Ms. Jodi Case, Avalon Bay Communities Incorporated, here in Alexandria, Virginia. Ms. Case.

STATEMENT OF JODI CASE

Ms. CASE. You should be frightened of me, however.

Actually, I am Jodi Case. I am a manager of ancillary Services for Avalon Bay communities. Avalon Bay is the leading provider of quality affordable apartment living. Our firm owns and manages and actually has in the development pipeline more than 50,000 apartment units that would be combined; not 50,000 in the devel-

opment pipeline in 17 different States. We clearly take pride in providing what we consider legendary service to the people who live in our communities.

I, too, am frightened. I am here today to actually augment what has been discussed previously. Virginia is not a mandatory access area where you currently operate. Avalon Bay does have communities that are currently operating in forced access States. I come to you with examples, the real problems, the real issues.

You had mentioned earlier that you thought that this might be some type of mud wrestling, which is very appropriate since I have, typically, mud all over my face because I am in mud. I am in middle. I am in the trenches every single day. The residents, the community managers. I am not a CEO. I am a manager of the telecommunications services for our communities. One person. I am not compensated by any amount of revenue that is generated, because, clearly, with contracts that have just been described, we spend a lot more on attorney fees to try to get that language out.

I am here today on behalf of three principal trade associations representing the private apartment industry: the National Multi Housing Council; its affiliate, the American Seniors Housing Association; and the National Apartment Association. A written statement has been submitted to the subcommittee, so I will limit my comments fortunately for you to some of the specific examples and observations on the key issues of forced access.

I don't have any props and I wish that that well, I don't have any props, but I do have I don't want I wish that wasn't a prop.

While there are extremely important constitutional and private property rights issues associated with implementing forced access for telecommunication providers, my comments will only focus on the practical market and physical effect of such policies. Remember, I am in the mud. I am knee deep in the trench of this. When choosing an apartment, most residents demand the best available telecommunications at the level they can afford, along with other issues. They will not consider communities that don't have telephone, video, Internet service. As a result, apartment owners face a very dynamic and competitive environment and telecommunications services are part of that market.

At Avalon Bay, we confront this challenge every day. The 120 units that are being built in Virginia Beach, they can go across the street and choose another community. With a great deal of choice in the marketplace, we hope that they choose our communities for the key stones of Avalon Bay, being high quality of living experience and outstanding customer service.

We, too, like competition, reality contracts. We know, unfortunately, from direct, first-hand experience, that forced access statutes mean less competition and less choice for residents. Why? The threat of a large established provider being able to come onto the property drives away the smaller competitors who do not believe it is worth the economic risk. The economics just aren't there and our residents suffer because of the lack of competition.

I want you to consider the language that was just read. In a forced access State, where there is no competition, we have no option. We must abide by that language or we don't have cable or telephone or Internet, which actually occurred in one of our Mel-

ville, New York, communities. It was a brand-new construction. We sent several RFPs out, had a lot of interested parties, some of which are here. Unfortunately, being a forced access State, it just wasn't economically feasible. The number of units, et cetera. The cable company was certainly had the upper hand and used tactics such as: Here is our agreement. If you would like us to provide service to your community, you must sign this agreement. And it contained language that was amazingly onerous. We had the PUC involved. 90 days went by and new residents moved in without cable television. Cable television; 90 days.

In New Jersey it is the same type of scenario. Because of forced access there, the private cable operator has not been able to sign up enough residents and have turned their attention to States that do not have forced access.

By the way, this particular private operator has approached the multiple system operator, the franchise operator, about selling their systems. They are completely removing themselves from mandatory access.

I could go into more details on these and other examples, but I do know my time is limited, even though I could speak as much as you would like me to.

Some telecommunications providers have begun seeking forced access to apartment properties in the name of opening the market. Fortunately, the legislatures in Florida, Georgia, Indiana, Iowa, and Virginia have recently resisted the lobbying pressures of the telecommunications providers and rejected forced access proposals. Faced with defeat on a State level, some of these providers are turning their efforts aggressively, pursuing either the State public service commission route or asking the Federal Government for help.

Why do the telecommunication providers say that they need forced access? Landlords are not opening their doors? On the one hand, they complain to the State and Federal legislative and regulatory bodies that commercial property owners are blocking the use of new technologies. On the other hand, however, we hear in press releases the signing of one new customer after another.

You had invited landlords to come today, those that are the gatekeepers and none were available. I believe because there are zero landlords out there that are gatekeepers, there are none to be found. We would ask why they simultaneously tell policymakers that they don't have market entry and then tell the shareholders and potential new investors that the marketplace is gobbling up their products. It would believe that they believe that forced access would make the market for their products even better or very possibly some may want to sign up just enough of a market so they can sell to the larger companies before the harsh economic realities of forced access are realized.

The providers who are pushing forced access have also changed the materials to call for this is a nice one resident and consumer rights, instead of forced access, assuming that no one would be against resident rights. We say, please don't be fooled.

Avalon Bay will never lose sight of the larger field of opportunity. We will stick to our core competencies: sales and customer service. We will continue to create communities where the Telecom

Act initiatives are enhancements that make choosing in Avalon Bay an even more attractive and compelling choice. Remember, if we lose one resident and that rent, any deal that could have been struck was not worth it.

Thank you and I will be pleased to answer any questions.

[The prepared statement of Jodi Case follows:]

PREPARED STATEMENT OF JODI CASE, MANAGER OF ANCILLARY SERVICES, AVALONBAY COMMUNITIES, INC. ON BEHALF OF AMERICAN SENIORS HOUSING ASSOCIATION, NATIONAL APARTMENT ASSOCIATION, AND THE NATIONAL MULTI HOUSING COUNCIL

Chairman Tauzin and Members of the Subcommittee: I am Jodi Case, Manager of Ancillary Services for AvalonBay Communities, Inc. of Alexandria, Virginia. AvalonBay is a leading provider of quality, affordable apartment living. Our firm owns and manages more than 50,000 apartment units in 17 different states. We take great pride in providing "legendary service" to the people who live in AvalonBay communities.

I am here today on behalf of three principal trade associations representing the private apartment industry: the National Multi Housing Council (NMHC), its affiliate the American Seniors Housing Association (ASHA), and the National Apartment Association. The National Multi Housing Council represents the apartment industry's largest and most prominent firms with the principal officers of these organizations serving as members. ASHA firms, similarly, are the leading providers of assisted living in the United States. The National Apartment Association is the largest national federation of state and local associations of apartment industry professionals, comprised of 150 affiliates which represent more than 25,000 professionals who own and/or manage more than 3.3 million apartments. NMHC, ASHA and NAA jointly operate a federal legislative program and provide a unified voice for the private apartment industry. Our combined memberships are engaged in all aspects of the development and operation of apartments, including ownership, construction, finance, and management.

The U.S. apartment industry provides homes for approximately 15 million families and individuals nationwide, representing the full spectrum of America's population. Apartments account for about 15 percent of the entire housing stock, and they generate more than $75 billion annually in rental revenues and $16 billion in new construction value. Approximately 400,000 jobs are provided through apartment management and operation, while new apartment construction has created jobs for an additional 200,000 workers.

We are here today to talk about telecommunications and forced building access. While there are extremely important Constitutional and private property rights issues associated with implementing forced access for telecommunications providers, my comments will focus on the practical market and physical affects of such policies.

To understand the impact of forced access legislation on the apartments, one must first understand how the apartment industry operates. To begin with, apartment owners are very concerned about the viability of the telecommunications marketplace. Our residents have a wide selection of apartment communities from which to choose, and it is not unusual for 50 percent of our apartment residents to turnover in a given year. When choosing an apartment, most residents will demand the best available telecommunications at the level they can afford. They will not consider communities that do not have the telephone, video or Internet services they are seeking. As a result, apartment owners face a very dynamic and competitive environment, and telecommunications services are an important part of that market.

Telecommunications and Apartments

Until just recently, each new apartment community was routinely wired for phone, and if they were lucky, cable service by the local providers. Where cable wasn't available, a satellite master antenna system was used. In the past few years, however, we have witnessed the advent of competing systems and rapid changes in the technologies that are available. Some telecommunications providers began seeking "forced access" to apartment properties in the name of "opening the market." There are now approximately 15 states that have enacted forced access statutes in one form or another, although the pace of enactment by other states has slowed to a crawl. Just recently, legislatures in Florida, Georgia, Indiana, Iowa, and Virginia resisted the lobbying pressure of the telecommunications providers and rejected forced access proposals. Faced with defeat on a state level, some of these providers

are turning their effort to aggressively pursuing either the state Public Service Commission route or asking the Federal government for help.

Why do the telecommunications providers say they need "forced access?" On the one hand, they complain to state and federal legislative and regulatory bodies that commercial property owners are blocking the use of new technologies. On the other hand, however, their own press releases trumpet the signing of one new customer after another.

We would ask why they simultaneously tell policymakers that they don't have market entry and then tell their shareholders and potential new investors that the marketplace is gobbling up their product? It would appear that they believe that "forced access" would make the market for their products even better. The providers who are pushing forced access have also changed their materials to call for "resident and consumer rights" instead of "mandatory access," assuming that no one would be against "resident rights." We say, don't be fooled. Whatever you call it, mandatory or forced access will actually harm competition and the residents of our buildings by driving a number of new competitors out of the market.

Forced Access Legislation will Actually Stifle Competition

Basic economics says that monopolies are bad. And when it comes to granting a telecommunications provider a monopoly to serve a *geographic* region, traditional economics is right. Those types of monopolies are bad for competition. But, when you consider granting telecommunications providers exclusive rights for a limited time period to service a specific property, you actually help foster competition. These property-exclusive contracts enable new providers the time required to recoup the investment required to wire a property and expand their operations. When multiple telecommunications companies compete toe-to-toe on a single property, new competitors often lack the financial muscle to win. Apartment owners can also leverage exclusive contracts with telecommunications providers to ensure that residents receive good and reliable service.

The truth is that mandatory access states have, in many cases, unwittingly given the big incumbent service providers a competitive edge because the big incumbent provider can always threaten to come into a building that a small, new provider is trying to serve. This actual or implied threat has driven competition out of many markets.

If Forced Access " Why Not a Two-Way Street?

The dollar value of the telecommunications market is huge and growing everyday. At the same time, the costs associated with providing service are also large and vary depending upon the service being provided, the affluence of the market being served, and the geographic area to be served. As a result, many telecommunications providers gravitate to the more lucrative areas and properties. This tendency to "cream" the best of the market can severely limit the choices of more moderate income households.

If legislators are truly concerned with the rights of residents, why not make forced access a two-way street. That is, if you allow any telecommunications provider to service a given property without the owners consent, then telecommunications providers should also be required to offer service to any resident who requests it. Otherwise, telecommunications providers are receiving a special privilege without having the responsibility to provide service to those who request it. Some have argued that the incumbent provider, usually the Bell System, must be a provider of last resort, but that is not the same as requiring a two-way street for all providers.

Forced Access Can Compromise Building Safety

Apartment and seniors housing communities are designed and maintained to comply with very strict fire and safety codes to protect their residents. The constant wiring and rewiring of a property that occurs when forced access is granted to providers compromises the ability of the property manager to adequately address building safety and fire hazards.

Where do you start and where do you end with "forced access"? Apartment property owners and managers have to be concerned with many different and competing priorities. It is simply not practical to allow numerous telecommunications providers to come and go from a property. Allowing several or more telecommunications competitors onto a given property will result in damage to the property and chaos as wiring is constantly installed and removed as residents move in and move out.

A recent rulemaking by the Federal Communications Commission has given rights to tenants to install a satellite dish receiver on their balcony without the prior approval of the apartment owner/manager. Under the mistaken doctrine that a resident has rights that go beyond a mutually agreed lease and heat, light, and power, the Commission has shrugged aside the practical implications of residents

mounting a dish on a balcony railing. No credit is given to the fact that the dish might be mounted in an unsafe manner. No credit is given to the fact that it might be a high-rise building in a dangerously high-wind and storm location in the country. A satellite dish is "similar to a deck chair or a bicycle on a balcony," is what we have heard. We assure you, bicycles and deck chairs are not mounted on the top of balcony railings. When a high wind blows one of these dishes off onto a young child, we doubt that the FCC will be there to pay all of the legal and medical damages.

Will "New" Service Actually be Provided?

The ability of a telecommunications provider to assign a contract to another provider should be of great concern as you analyze the multi dwelling unit market. Many providers do not actually provide programming or service the properties with which they contract. Instead, they turn around and assign their recently acquired contracts to other providers. This transaction, which is encouraged by forced access laws, does not actually further the competitive process or create a more vibrant marketplace.

Conclusion

Apartment community owner/managers must be able to choose the best service for a given community from a broad array of reliable providers. Forced access actually creates less competition in the marketplace.

The telecommunications marketplace is highly competitive and innovative products are coming along every day. Apartment communities are taking advantage of these new products whenever and wherever appropriate. But just as auto makers do not put new and untried products in cars, apartment owner/managers need to make sure that a given product will work and that the service will be there when the product breaks down. Just because someone claims to be a telecommunications provider does not mean that the products of that company should have an automatic license to come into a given apartment community in the name of "tenant rights."

We repeat our previous statement which is based upon actual experience in the marketplace: exclusivity in a geographic area results in less competition. However, exclusive contracts for a given community actually work to the benefit of the resident because it allows an apartment community owner/manager to negotiate the best possible contract for both price and level of service and it enables new providers to economically enter a geographic market and compete with established providers.

Mr. TAUZIN. Thank you, Ms. Case.

The last two witnesses represent cable and then broadcasters. So we are pleased now to welcome Mr. Larry Pestana, vice president of engineering for Time Warner Cable for your discussion. Mr. Pestana.

STATEMENT OF LARRY PESTANA

Mr. PESTANA. Thank you, Mr. Chairman, members of the subcommittee. My name is Larry Pestana. I am the vice president of engineering for Time Warner Cable in New York City and I appear today solely on behalf of Time Warner Cable and not on the behalf of the cable industry in general.

Time Warner Cable's New York City's system serves perhaps the greatest concentration of multiple dwelling units or MDU buildings anywhere in this country. In Manhattan alone, Time Warner's cable system serves over 30,000 MDU buildings, accounting for 850,000 residential units. Time Warner is currently engaged in a massive upgrade of its New York City system. Upon completion, Time Warner will be able to provide additional tiers of digital service, including high definition television as well as high-speed cable service.

Time Warner Cable has invested millions of dollars to install its broad-band distribution facilities in MDU buildings in Manhattan alone. Continued ownership of these facilities is crucial for us to offer a wide array of services to our customers.

I would first like to speak to you about the access to premises issue. As you may know, in many States, including New York, certain video providers enjoy statutory access to premises rights. Most States, in enacting access to premises laws, have limited their benefits to locally franchised cable operators. This is because unique public interest responsibilities on franchise cable operators such as public access channels and universal service. By contrast, unfranchised operators do not have similar obligations. In fact, they make no secret of their policy to serve only upscale and high-density areas, a strategy often referred to as cherry picking or cream skimming.

It has been suggested that a national access to premises law is necessary for video service competition to flourish within the Nation's MDU buildings. Such legislation raises thorny issues relating to taking of private property without just compensation and promotion of competition. Congress has declined to adopt such legislation in the past. We believe that the best approach is to continue to allow each State to adopt any appropriate legislation tailored to address the unique situation faced in that particular State.

Let me turn now to the related but distinct issue of access to wiring. An incumbent provider has invested many thousands of dollars to install and maintain the internal distribution system within any building it serves. Allowing a competitor, carte blanche, to highjack Time Warner's property for its own use and benefit does not constitute legitimate competition. Furthermore, if Time Warner is forced to turn over its wiring to a competitor for a particular unit or building, then it is precluded from using the wiring itself, not just for video, but also for high-speed modem service, telephony, and other alternative services. Any competitor that wishes to compete within a particular building should be required to construct and pay for its own facilities.

In the 1992 Cable Act, Congress directed the FCC to adopt rules the positioning of wiring inside a subscriber premises upon termination of cable service. As the legislative history makes clear, in an MDU context, this provision was intended to apply exclusively to wiring within the four corners of an individual resident's unit, not to the internal wiring installed in the common areas of the building. In constructing the rules, the FCC was wise not to move the cable demarcation point to the location of the current telephone demarcation point. Otherwise, cable operators' abilities and incentives to offer non-video services to MDU residents would have been destroyed.

Unlike in a narrow-band telephony context, a broad-band provider such as a cable operator must retain exclusive control over its entire internal broad-band distribution infrastructure if it is to offer any combination of voice, video, data transmission services to MDU residents. In the spirit of the new FCC rules, Time Warner is actively working to resolve the often contentious issues in this arena, such as shared use of building molding, coordinating installations in newly constructed buildings, developing policies to properly handle customer changes in buildings where we compete unit by unit.

Finally, allow me to briefly address the issue of exclusive contracts. Exclusive contracts inhibit the ability of MDU residents to

obtain services from competing providers. There is no consensus on this issue of exclusive contracts to serve MDUs. Various cable operators, incumbent telephone companies, and competing providers have taken positions, both for and against exclusive contracts. Groups representing MDU owners understandably oppose any restrictions on exclusivity. Time Warner is prohibited from entering into exclusive contracts in New York City, which has led to significant competition. We would favor a ban on exclusive contracts, so long as such a restriction applies to all providers equally and recognizes the sanctity of contracts.

There is just no legitimate, pro-consumer reason to discriminate between providers when it comes to exclusivity. Similarly, any ban on exclusivity should apply to all communications services equally. For example, if the exclusive agreements between landlords and video service providers are banned, then exclusive agreements between landlords and telephone service providers also should be banned. Moreover, any ban on exclusivity must not interfere with existing contracts. Accordingly, any such restriction should operate on a prospective basis only.

Time Warner fully agrees that landlords are often the greatest impediment to competitive alternatives for MDU residents. If landlords were banned from accepting consideration from telecommunication providers beyond the nominal for the space occupied by the providers' facilities, then the landlord would have a great incentive to accept providers based on the quality of services offered to MDU residents, rather than the provider offering the largest piece of the action to the landlord.

I thank you very much for your attention and I look forward to your questions.

[The prepared statement of Larry Pestana follows:]

PREPARED STATEMENT OF LARRY PESTANA, VICE PRESIDENT OF ENGINEERING, TIME WARNER CABLE OF NEW YORK CITY

Mr. Chairman, members of the subcommittee, my name is Larry Pestana, Vice President of Engineering of Time Warner Cable of New York City. In this capacity, I am responsible for issues relating to the design and construction of Time Warner Cable's distribution infrastructure. In New York City, much of this plant is installed inside multiple dwelling unit, or MDU, buildings, ranging in size from brownstones with just a few units to high-rises with hundreds of units. Time Warner Cable must constantly attempt to coordinate with other video providers in New York City who offer competitive alternatives to MDU residents. I am here to communicate to you Time Warner's, as well as my own individual perspective, on issues relating to access to buildings and inside wiring. I appear today solely on behalf of Time Warner Cable, and not on behalf of the cable industry generally.

Time Warner Cable's New York City system serves perhaps the greatest concentration of MDU buildings anywhere in the country. In Manhattan alone, Time Warner's cable system serves over 30,000 MDU buildings accounting for over 850,000 residential units. Time Warner is currently engaged in a massive upgrade of its New York City system, which, upon completion, will allow us to provide additional tiers of digital cable service, including HDTV, as well as high speed cable modem service.

Cable system architecture in an MDU generally involves three basic elements. First, there are the riser cables which typically run vertically throughout the height of the building. At each floor, there is usually a junction box or lockbox. From the lockbox, separate home run cables are installed running to each unit on that floor, although a home run is sometimes shared by more than one unit. At the demarcation point, the home run enters the individual unit, where the inside wiring then runs to each TV set or other device in the subscriber's premises.

In most buildings in New York City, the home runs are installed in hallway moldings which can be snapped open for easy access. In some buildings, riser cables and home runs are installed in metal tubes or conduits.

Time Warner Cable has invested millions of dollars to install its broadband distribution facilities in MDU buildings in Manhattan alone. Landlords are required to pay to have telephone wiring installed in their buildings, and accordingly they immediately own that wiring. On the other hand, landlords are typically unwilling to pay the cost of cable installation, and indeed often expect payments from the cable operator for the right to wire the building. In New York, cable operators are prohibited from making such payments to landlords, although such restrictions do not apply to our competitors. With such a significant up-front investment, and the crucial nature of the ownership of these facilities to offer a wide array of services to our customers, it should be apparent why Time Warner and other cable operators must take appropriate steps to protect their right to continued use of their distribution plant in MDU buildings. Otherwise, their investment would be for naught.

ACCESS TO PREMISES

I would first like to speak to you about the access to premises issue. As you may know, in many states, including New York, certain video service providers enjoy statutory access to premises rights. These laws have generally been upheld by the courts, following the analysis of the U.S. Supreme Court in the *Loretto* decision. In that case, the Supreme Court found that the installation of wiring on a landlord's property constitutes a "taking" for which the property owner is entitled to just compensation. The New York State access to premises law was amended to include such a compensation mechanism. These laws ensure that MDU residents have a real choice between the franchised cable operator and the competing video service provider, whose interests are often aligned with the financial interest of the landlord.

Most state legislatures enacting access to premises statutes have limited their benefits to locally franchised cable operators because they recognize the unique public interest responsibilities franchised cable operators shoulder. Indeed, franchised cable operators must meet public interest obligations far beyond those imposed on any competing providers. For example, locally franchised cable operators are typically required to support local public, educational and governmental access channels within the community. In addition, locally franchised cable operators must construct their facilities throughout their franchise territories, offering services to high income and low income neighborhoods alike. By contrast, unfranchised operators, such as RCN, do not have similar obligations and, in fact, make no secret of their policy to serve only upscale and high-density areas, a strategy often referred to as "cherry-picking" or "cream-skimming."

There is an easy solution for those complaining about the right of access laws. In the 1992 Cable Act, Congress expressly directed that all cable franchises must be non-exclusive and cannot be unreasonably denied. Thus, any competitor can enjoy the benefits of any state access to premises statute merely by obtaining a cable franchise. Indeed, many competing video providers, including RCN, now routinely obtain cable franchises. It is entirely appropriate for an entity seeking the benefits of a local cable franchise be required to assume the attendant responsibilities.

It has been suggested that a national access to premises law is necessary for video service competition to flourish within the nation's MDU buildings. Conversely, representatives of landlords will likely argue that such laws interfere with their property rights and are confiscatory. Without question, such legislation raises thorny issues relating to taking of private property without just compensation and promotion of competition, and Congress has declined to adopt such legislation in the past. We believe that the best approach is to continue to allow each state to adopt any appropriate legislation, tailored to address the unique situation faced in a particular state.

CABLE HOME WIRING

Let me turn now to the related but distinct issue of access to wiring. This topic has to do not with service providers' rights to access a building, but their efforts to use pre-existing wiring and other equipment already installed in the building by the incumbent provider. Obviously, any video service provider, as they initiate service to a new building, would love to have the ability to access or take over pre-existing wiring located within the building and avoid the significant cost of building such a system . Where the landlord has paid the full cost of the installation of the wiring, there is typically little dispute over the landlord's right to select the service provider authorized to use such facilities. But where the incumbent provider has borne the

costs of installing its distribution infrastructure in an MDU, it should not be forced to give up ownership or control of its property solely for the benefit of a competitor.

An incumbent provider has invested many thousands of dollars to install and maintain the internal distribution system within any building it serves. Indeed, Time Warner has spent many millions of dollars to wire the buildings of Manhattan alone, and it is clear that Time Warner must retain ownership of the wiring and related equipment in order to protect its investment. Allowing a competitor carte blanche to hijack Time Warner's property for its own use and benefit does not constitute legitimate competition. Furthermore, if Time Warner is forced to turn over its wiring to a competitor for a particular unit or building, then it is precluded from using the wiring itself, not just for video, but also for high speed cable modem service, telephony, and other alternative services. Any competitor that wishes to compete within a particular building should be required to construct, and pay for, its own facilities.

In the 1992 Cable Act, Congress directed the FCC to adopt rules governing the disposition of wiring inside a subscriber's premises upon termination of cable service. As the legislative history makes clear, in the MDU context, this provision was intended to apply exclusively to wiring installed within the four corners of an individual residents' unit, not to the internal wiring installed in the common areas of the building. In its initial implementation of this provision, the FCC was true to legislative intent. It established rules that prevent a cable operator from removing the wiring inside a tenant's unit, when that resident terminates cable service, without first offering to sell the wiring to the MDU resident at a reasonable price.

More recently, the FCC has expanded the scope of this provision well beyond its initial intent. The FCC improperly adopted procedural requirements relating to "home run" wiring—the wiring in the MDU extending from the riser or junction box, through the common areas of the building, to the residents' actual dwelling unit. These "home run" rules provide that the after receiving notice from the property owner that it desires unit-by-unit or building-by-building competition, the cable operator must choose one of three options: one, remove the wiring; two, abandon the wiring; or three, sell the wiring to the landlord or the new provider.

On their face, these rules do not apply where the cable operator has a legal right to retain its facilities in a building after a particular customer discontinues service, as is the case in New York State. In practice, however, the FCC has improperly shifted the burden such that cable operators could be forced to obtain injunction from a court every time the ownership of the cable operator's property is questioned. These new rules also operate such that if an incumbent provider's home run wiring is installed within certain categories of building material, it is automatically deemed inaccessible and the individual unit resident has the right to acquire ownership of the cable operators' facilities, which sometimes extend hundreds of feet outside that resident's unit. Time Warner is confident that the courts will ultimately determine that these rules were not authorized by Congress in the 1992 Cable Act.

The FCC was wise not to move the cable demarcation point to the location of the current telephone demarcation point, the minimum point of entry (typically somewhere in the basement of the MDU). Had the FCC moved the broadband point of demarcation to the minimum point of entry, cable operators' ability and incentives to offer non-video services to MDU residents would have been destroyed. Unlike in the narrowband telephony context, a broadband provider such as a cable operator must retain exclusive control over its entire internal broadband distribution infrastructure if it is to offer any combination of voice, video and data transmission services to MDU residents. Once it is forced to turn over its entire distribution network, there is no way for it to provide any of these services to the MDU's residents.

In the spirit of the new FCC rules, Time Warner is actively working to resolve the often contentious issues in this arena such as shared use of building molding, coordinating installations in newly constructed or refurbished buildings, and developing policies to properly handle customer changes in buildings where we compete unit by unit.

EXCLUSIVITY

Finally, allow me to briefly address the issue of exclusive contracts. The FCC is currently considering whether and to what extent it should allow MDU owners to enter into exclusive agreements with cable operators and other video providers to offer service in their buildings. Landlords have argued that a ban on exclusive contracts would interfere with their ability to manage and maximize the value of their property. On the other hand, exclusive contracts inhibit the ability of MDU residents to obtain services from competing providers. But even such an exclusive contract cannot preclude the inevitable onslaught of competition. In its recent proceed-

ing dealing with the installation of off-air reception devices, the FCC made clear that MDU residents have the right to install DBS reception equipment in their units, for example, even in the face of an exclusive contract between the landlord and a cable operator.

There is no consensus on the issue of exclusive contracts to serve MDUs. Some cable operators have argued that exclusive agreements are necessary or useful for the efficient marketing of service and should be permitted. Other cable operators favor competition on a subscriber-by-subscriber basis and have argued that MDU owners should not be permitted to limit access to buildings by selling exclusive rights.

Similarly, alternative providers have taken divergent positions on this issue. Many argue that long-term exclusive agreements are necessary to enable them to successfully challenge incumbent cable operators, so they should be allowed to enter into exclusive contracts, but cable operators should not. Others oppose all exclusive contracts, arguing that exclusivity is not necessary to promote competitive entry. Still others favor allowing all providers to enter in to short-term exclusive contracts of no more than five years, but would ban longer term exclusive contracts. Groups representing MDU owners understandably oppose any restrictions on exclusivity.

Time Warner is prohibited form entering into exclusive contracts in New York City. We would favor a ban on exclusive contracts, so long as such a restriction applies to all providers equally and recognizes the sanctity of contracts. There is just no legitimate, pro-consumer reason to discriminate between providers when it comes to exclusivity. Similarly, any ban on exclusivity should apply to all communications services equally. For example, if exclusive agreements between landlords and video service providers are banned, then exclusive agreements between landlords and telephone service providers also should be banned. Moreover, any ban on exclusivity must not modify or abrogate existing contracts, so as not to violate the Constitution. Accordingly, any such restrictions should operate on a prospective basis only.

Time Warner fully agrees that landlords are often the greatest impediment to competitive alternatives for MDU residents. If landlords were banned form accepting consideration form telecommunications providers, beyond the nominal rent for the space occupied by the providers facilities, then the landlord would have a greater incentive to select providers based on the quality of services offered to MDU residents, rather than the provider offering the largest "piece of the action" to the landlord.

Thank you very much for your attention, and I look forward to your questions.

Mr. TAUZIN. Thank you, Mr. Pestana.

And, finally, Mr. Mark Prak, special counsel to the National Association of Broadcasters, a partner of Brooks, Pierce, McLendon, Humphrey, and Leonard in Raleigh, North Carolina. Mr. Prak.

STATEMENT OF MARK J. PRAK

Mr. PRAK. Thank you, Mr. Chairman, ranking member, members of the committee. It is a pleasure to be here with you this morning.

I am going to focus a little more narrowly in my comments this morning. As perhaps the chairman was indicating, this issue gets described broadly as forced access or competitive access. And it is certainly true that you can listen to adjectives and figure out where people are coming from. I guess if I were asked to engage in that process, I would say that I am the only panelist here talking to you this morning who can be fairly characterized as talking to you about universal lifeline access, because I represent the NAB, which represents the Nation's television industry, among other things.

And we are here to talk to you about a provision of the law that we thought already fixed this problems. It is a much narrower fix, from our point of view, because there is no question that section 207 of the Telecommunications Act of 1996 was designed to allow every American citizen, regardless of their income or place of residence, to be able to receive the signals of our free, over-the-air, local television stations. And, as you know, section 207 required the

FCC to promulgate rules to prohibit restrictions on the use of good old fashioned television antennas for that purpose.

The FCC, after a couple of years, adopted some rules and, in fairness to the Commission, they go pretty far, but they don't go far enough. Where you really get down to focusing in on the rules, is that they do leave some persons in our country, who reside in multiple unit dwellings, apartment or condominiums, I guess we have come to call them multiple unit dwellings, for those folks, there are situations occurring now where they are being denied access to free, over-the-air local television.

Why should you care about that? Well, I think every member of the committee should be concerned about that for a couple of reasons. The first is that when you understand how people receive video in our country we know that 67 percent of the country is connected to cable; 33 percent of the country does not choose to subscribe to cable; and when you think about that universe of people, I think it likely that, for many of those people, they either can't afford cable or they choose not to purchase cable. But for those people in that universe of folks who reside in MDUs, we are now looking at a situation where such people can be denied access to what has become the universal lifeline service. And I say that not as an exaggeration.

I was looking this morning, before coming over here to Capitol Hill, at electronic media and I see pictures of the tornadoes in Oklahoma. And I see headlines that say: Twister takes toll but TV warnings helped. Well, when you get right down to it, we have a Federal interest and a national telecommunications policy that calls for the existence of an emergency alert system. It calls for a means by which, if the President needs to, he can communicate with everyone in our country. It allows local television stations and also local cable systems to participate in letting people know when there is a tornado coming, an earthquake, or other natural disaster or unusual weather that requires people to take cover and look out for things. And that is where free, over-the-air television comes in.

As many of you know in your districts, there are television stations who operate street-level accurate Doppler weather radar. I mean, it is amazing when you watch the weather at night, and that is one of the things almost all of us do, is you can see the ability of local weather personnel to predict where things are going and, even as things are happening, they can show you down in my market where I live in North Carolina, they can show you what streets the storm is coming toward. So it is very helpful in letting people know to get out of the way.

It seems to me imprudent to have a national system of this type and to have people who can be excluded from it by virtue of choices made by landlords. I don't think this was a problem, frankly, if you go back and think to way telecommunications has grown so explosively. Prior to the early 1980's, when cable was really growing and hitting its stride, most landlords had a master antennae for all of their residents. They wanted to be able to provide this. It was only after they had been going to seminars on there's money for you in video provision to your tenants that we start having these problems with seeing even local television signals delivered to residents of MDUs.

So how shall we solve this problem? Well, we have got another component of the problem I don't think it is as complicated as the landlords make out but we are also engaged right now in this country in building out a new digital television system throughout the United States. That system and all of the congressional and FCC policy judgments that have been made are based on the assumption that every American citizen, if they need to, can use and access a rooftop antennae for the purpose of receiving local television signals. So we have got a significant Federal interest, an interest that I know is of concern to this committee, in seeing that this not become a problem.

What do we ask you to do? Well, we say the FCC got a little timid on us, with all due respect to Mr. Sugrue and Bill Johnson, folks at the agency. We think that the landlords cowed the agency. If you read section 207, it is pretty straightforward. It doesn't say: prohibit restrictions that would inhibit the use or impair a viewer's access to television if you think it is a good idea and if there aren't any complexities involved. It says do it. And what we got was a solution to virtually everything that I think is a good workable rule for which they are to be congratulated, but they didn't get over the last hump, which is the MDUs, which, as both the chairman and the ranking member have noted in their opening statements, are critical to the system working the way it is intended.

So I guess I would say is that one of the things we would ask you to do, we think the rule we proposed to the commission was simple, reasonable, and straightforward. They did not adopt our rule. There are petitions for rulemaking pending or for reconsideration of the final order, pending. I guess, Mr. Chairman, if I could tell you what we at the NAB would like to have you do, is we would like to have you put your arms around the representatives of the FCC and tell them to go back and it is all right to go ahead and adopt the approach that we have advocated.

And I might just say at the ending here, before we get to questions, that the fact is the rule we have taken and proposed was designed to leave the status quo, in terms of individual buildings, as much as possible, in the hands of the individual building owner. If they use a master antennae, they have to. First the tenant has the right to use an antennae. If the building owner doesn't like that, they can provide a master antennae, which we all know for many years was no big controversy. If they already have an arrangement with cable television to provide we know that local broadcast signals are carried on cable television then that would be good enough as well.

The key point, at the end of the day, should be that every American citizen, regardless of whether they live in an MDU or stately Wayne Manor have the ability to access free, over-the-air local television. So I will say that. I will leave it at that. I don't think it is near as complicated as my friends who are real estate interests make out and I will be happy to respond to questions.

[The prepared statement of Mark J. Prak follows:]

PREPARED STATEMENT OF MARK J. PRAK, SPECIAL COUNSEL TO THE NATIONAL ASSOCIATION OF BROADCASTERS

Good morning. My name is Mark Prak, and I appear on behalf of the National Association of Broadcasters. NAB is a non-profit, incorporated association of tele-

vision stations and radio stations located throughout the country. NAB serves and represents the American broadcast industry.

My testimony will be focused on the implementation of Section 207 of the Telecommunications Act of 1996 by the Federal Communications Commission (FCC). Presently, the FCC has pending before it petitions for reconsideration of its *Second Report and Order* issued last November which adopted final rules designed to implement the mandate of Section 207. Suffice it to say that, with all due respect, the agency's rule has segregated Americans into two classes: those who live in single family homes and are able to receive the signals of free over-the-air television stations and those who cannot receive free over-the-air television signals merely because they reside in apartments, condominiums, or other multiple-un it dwellings.

This result is unacceptable from a public policy standpoint. It must not be accepted by this Subcommittee, the parent Commerce Committee or the Congress.

The Commission has extended 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. But, it has failed to extend its Section 207 rules to "common or restricted areas" of rental property. In so doing, the Commission fell well short of fulfilling the statutory mandate or 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 created a "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.

I. BACKGROUND

The FCC instituted a rule making proceeding in response to the passage of the Telecommunications Act of 1996 (the "1996 Act").[1] Section 207 of the 1996 Act requires the FCC to adopt regulations prohibiting state and local restrictions on the use of over-the-air television antenna to receive television transmissions. Specifically, this provision, titled "Restrictions on Over-the-Air Reception Devices," (OTARD) provides as follows:

Within 180 days after the date of enactment of this Act, the Commission shall, pursuant to Section 303 of the Communications Act, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devised designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.

In its initial *Report and Order and Memorandum Opinion and Order* shortly after the Act's passage, the Commission adopted a single rule to implement Section 207. The rule prohibits any state law or regulation, local law or regulation, or any private covenant, homeowner's association rule or similar restriction that impairs the "installation, maintenance, or use" of antennae designed to receive over-the-air television, DBS, or MDS signals. Out of what it described as "concern with the state of the record before it," however, the Commission limited the application of the rule to property "within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest in the property."[2] In issuing a *Further Notice of Proposed Rule Making (FNPR)* and requesting further comment, the Commission concluded that the record before it was "incomplete and insufficient to extend our rule to situations in which antennae may be installed on common property for the benefit of one with an ownership interest or on a landlord's property for the benefit of a renter."[3] The Commission offered no rationale for drawing this distinction.

In its *FNPR*, the Commission asked for comment, among other things, on: (1) the application of the preemption rule to rental property and to common property which a citizen does not own but instead has rights in common with others; (2) the FCC's legal authority to prohibit nongovernmental restrictions that impair reception by citizens that do not have exclusive use or control and a direct or indirect ownership interest in the property and, specifically, whether this implicates the Takings Clause of the United States Constitution; and (3) the proposal of a satellite DBS provider that community associations should be allowed to make video programming

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).
[2] *FNPR* at ¶5.
[3] *FNPR* at ¶63.

available to any resident wishing to subscribe to such programming at no greater cost and with equivalent quality as would be available from an individual antenna installation.

NAB provided comments and reply comments to the FCC on these points. On September 25, 1998, the FCC issued an Order denying reconsideration of its original rule regarding the use of antennas and other OTARD equipment by persons other than those in MDU's and that the MDU issue would be addressed in a subsequent order.

On November 20, 1998, the FCC issued its Order creating "video haves" and "have-nots" based on a citizen's residence in an MDU. NAB and others petitioned the FCC in January of this year to reconsider its decision. Those petitions for reconsideration remain pending.

The following argument explains why the Commission's final rule fails to fulfill the intent of Congress in adopting Section 207.

II. THE COMMISSION WAS DUTY BOUND TO ADOPT AN ANTENNA PREEMPTION RULE WHICH APPLIES TO MULTIPLE DWELLING UNITS AND OTHER SIMILARLY SITUATED PROPERTIES

The right of all citizens, no matter where they reside, to have access to video programing services of their choosing is fundamental to Congressional communications policy. Indeed, a primary objective of the Communications Act of 1934, as amended, (the "Communications Act"), is to "make available, so far as possible, to all the people of the United States... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[4] Section 1 of the Communications Act does not exempt persons living in apartments, condominiums or other such residences. For decades, the Commission has sought to implement the Congressional policy reflected in Section 1 of the Communications Act by allocating television frequencies to communities throughout the nation. In so doing, the Commission's first priority has been to assure the availability of at least one television service to all of the people of the United States.[5] A second priority has been to make competing television signals available to all people.[6] The nation's television broadcast service is now mature, ubiquitous and competitive; virtually all citizens receive at least four competing over-the-air television services and most receive many more. Los Angeles, for example, receives service from 17 television stations.[7]

The right of citizens to enjoy uninhibited access to video programming takes on special importance with respect to over-the-air television broadcasting. Over-the-air television remains the cornerstone of the nation's video delivery system, a system that has been expanded in recent years by cable television, VCRs, DBS, MMDS and other video delivery technologies.[8] Nevertheless, terrestrial over-the-air television is the nation's free, universal television service, and it remains the means by which all Americans, regardless of financial means, can receive television news, information, entertainment and sports programming. Accordingly, Congress determined, in adopting Section 207, that all citizens, whether they own or rent a home, condominium, townhouse or apartment, should be able to employ a simple roof-top television antenna to receive the terrestrial television stations in the local market where they live.

Our national communications policy is premised on the notion that citizens may, by use of a conventional roof-top antenna, have access to local broadcasting tele-

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[4] Communications Act of 1934, as amended, § 1, 47 U.S.C. § 151.

[5] *Sixth Report and Order*, 41 FCC 148, 167 (1952); *see also, WITN-TV, Inc. v. FCC*, 849 F.2d 1521, 1523 (D.C. Cir. 1988).

[6] *Id.*

[7] *TV & Cable Factbook (Warren 1996 ed.)*, p. A-99.

[8] *Second Annual Report (Video Competition)*, FCC 95-491 (Released: December 11, 1995), at p. 2, ¶3.

vision stations.[9] Thus, the residents of multiple dwelling units[10] cannot be relegated to a video programing service of their landlord's or homeowner association's choosing. Instead, they must be free to select the television programming service of their own choice. The failure of the FCC to extend its rules implementing Section 207 to all residents of MDUs means that residents of many such dwellings do not have access to the nation's free, universal, over-the-air television service.

Moreover, Congress and the FCC, by statute and regulation, require television broadcasters to provide certain programming deemed to be in the public interest. Political programing and children's educational programming are examples.[11] It would be illogical in the extreme for Congress to require the broadcast of such programming without prohibiting restrictions—wherever imposed—on antennae and devices necessary to receive that programming.

Accordingly, the NAB proposed that the Commission adopt the following rule to implement Section 207:

> Any private restriction on the placement of television receiving antennae imposed by deed, covenant, easement, homeowner's association agreement, lease or any similar instrument shall be deemed unenforceable, provided, that a reasonable restriction on the placement of television receiving antenna in or on a multiple dwelling unit shall be enforceable if the signals of all television stations placing a predicted Grade B contour (as that term is defined in sections 73.683 and 73.684 of this chapter) or an actual Grade B signal as measured under the provisions of this chapter over the premises are transmitted without material degradation to all dwelling units subject to the restriction via a common antenna or other means without separate charge to the owners or tenants of those dwelling units.

III. THE COMMISSION'S RULE AND ORDER EXPLAINING THE RULE 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).

The FCC's 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 thus eliminated the have-

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[9] Congress' concern that citizens have access to their local broadcast stations is also reflected in the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992. Public Law No. 102-385, 106 stat. 1460, *codified at* 47 U.S.C. §534. In addition, out of concern for those who live in areas that, because of terrain obstructions or other interference, cannot receive broadcast television network programming from a local station, Congress in 1988 enacted the Satellite Home Viewer Act ("SHVA"), P.L. 103-369, 17 U.S.C. §119. The SHVA created a special exemption from conventional copyright law to provide satellite carriers a statutory copyright to enable them to retransmit the signal of a distant network station and deliver that signal by satellite to home dish owners who are unable to receive a signal of at least Grade B intensity from a local affiliate of that network. The SHVA gives a blanket compulsory copyright for satellite delivery of independent television stations. The SHVA is a truly extraordinary intrusion into the traditional free market in copyrights and reflects a longstanding Congressional concern for assuring access by the American people to television broadcast programming. That concern was reflected again in The Cable Television Consumer Protection and Competition Act of 1992, *supra*, which exempts from that Act's retransmission consent provisions the retransmission by satellite of distant network stations to home dish owners who are beyond the reach of a local network affiliate.

[10] Apartments, condominiums, townhouses and other forms of multiple dwelling units which, under state laws and/or private contracts, provide common areas for the benefit of residents are referred to as "MDUs."

[11] *See* 47 U.S.C. §§312(a)(7), 315 (political programming); Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. §303a, 303b, 394; 47 C.F.R. §73.1930, 73.1940, 73.1941, 73.1942, 73.1943, 73.1944 (political rules); 47 C.F.R. §83.670, 73.671 (children's TV rules).

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. 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 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 exactly the sort of distinction that Congress sought to eliminate in 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.

IV. 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 pays lip service to the preservation of over-the-air broadcasting and the diversification of video programming services. 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.[12] 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 encourage broadcasters to offer digital television as soon as possible.[13]

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, Nationwide, and world-wide wire and radio communication service."[14] It is also a reflection of the undeniable fact that "broadcast television has become an important part of American life."[15]

Section 207 preemption 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

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[12] *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 (Released: April 21, 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 (Released: April 21, 1995) ("*Fourth Further Notice/Third Inquiry*"), at 10541.

[13] *Fifth Report and Order*, ¶6.

[14] Communications Act of 1934, as amended, §1 (47 U.S.C. §151).

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

Commission has left a gaping hole in the implementation of Section 207 to the degradation of over-the-air broadcasting which, of course, depends on viewers being able to install and use antennas.

V. 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 in complying with the directive of Section 207 is symptomatic of its fundamental misunderstanding of the nature of the task before it. 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 application of the three-part test yields.

With respect to each element of the Commission's three-part test, the Commission bends over backwards to avoid the straightforward interpretation that the plain language of Section 207 compels.[16] As shown below, when properly analyzed, even the factors considered by the 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.

This reading is a hyper-technical parsing of Section 207 which cannot be sustained. 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.[17] In the end, however, it is clear that the Commission's concern with mandating "affirmative obligations" by third parties conflates into its "takings" analysis. The Commission

[16] *See, e.g., Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694, 717 (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, 105 S.Ct. 1785, 1793, 85 L.Ed.2d 64 (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)).

[17] 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 dissolves into a matter of semantics and characterization which must give way to the clear intent of the statute.

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 plainly errs by introducing 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 construed, directs the 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 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 committed plain and obvious error by concluding 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 im-

pose 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.

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 Erred In Placing Reliance On What It Termed "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 so-called "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*, ¶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 erred in concluding that it discretionary authority extended to overriding 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 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 authorizes the installation 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.

VI. THE COMMISSION IS WITHOUT AUTHORITY TO REVIEW THE CONSTITUTIONALITY OF SECTION 207 OF THE 1996 ACT

As acknowledged by the Commission in its order accompanying the *FNPR*,[18] Section 207 of the 1996 Act is mandatory. Section 207 provides that the Commission "shall" promulgate regulations to prohibit restrictions which the ability of citizens to use antennae to receive over-the-air signals. The language of the statute and the legislative intent indicate that Congress did not envision exceptions for specific classes of residents. Nothing in the legislative history suggests that Congress' concern extended only to those citizens who own their own single-family, detached dwelling. To the contrary, the Conference Report makes clear that the Commission is required to apply Section 207 to restrictions which "inhibit" reception of over-the-air television signals.[19] Private contracts, leases and homeowner's association rules which restrict the ability of a lessee or unit owner are impressible under Section 207. Any attempt to draw a distinction between whether a citizen possesses a direct or indirect ownership in a residence as a basis for determining whether the citizen may use an antenna to receive over-the-air television service is without support in the statute or legislative history.

The Commission is without authority to declare the Congressional mandate to be unconstitutional.[20] To the extent that policy judgments must be made concerning the scope of the regulation, Congress has already made those judgments. Thus, the Commission must implement the will of Congress in such a way as to ensure that all citizens who choose to do so may avail themselves of access to the nation's free, over-the-air television system. It is hornbook law that one who leases real property from another possesses a non-freehold estate in the land itself.[21] This is true whether the lease runs for a term of years, from year to year, from month to month, or from day to day.[22] Thus, the Commission's focus on whether a citizen has a direct or indirect ownership in his residence as a basis for drawing a legal distinction in his right to use an antenna to receive over-the-air television signals is conceptually flawed. Section 207 requires the Commission to ensure that all citizens—whether they own or rent—are free to use an antenna to secure access to the over-the-air television service.

VII. THERE IS NO "TAKING" CREATED BY THE EXTENSION OF THE ANTENNA PREEMPTION RULES TO MULTIPLE DWELLING UNITS

The "Takings Clause" of the Fifth Amendment to the United States Constitution requires the government to compensate a property owner if it "takes" the owner's property. A taking may involve either the direct appropriation of property or a government regulation which is so burdensome that it amounts to a taking of property without actual condemnation or appropriation. A regulation results in a *per se* regulatory taking if it requires the landowner to suffer a permanent physical invasion of his or her property by a third party or "denies all economically beneficial or productive use of land."[23] It is well settled that if a regulation does not result in a *per se* taking, courts will engage in an "ad hoc" inquiry to examine "the character of governmental action, its economic impact, and its interference with reasonable investment-backed expectations."[24] When properly analyzed, the regulation proposed here does not constitute a "taking" by the Commission.

A. *Loretto And Bell Atlantic* Are Not Dispositive

The Commission requested comment on the application of *Loretto v. Teleprompter Manhattan CATV Corp.*[25] and *Bell Atlantic Telephone Companies v. FCC*[26] to Section 207.

As noted by the Court in *Loretto* as well as in subsequent Supreme Court decisions, that case was decided on narrow grounds and is limited to the specific facts

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[18] *See FNPR* at ¶43 ("the statute requires that we prohibit restrictions that impair viewers' ability to receive the signals in question...").

[19] *H.R. Rep. No. 485, 104th Cong. 2d Sess., p. 166 (1996).*

[20] *FNRP, at ¶43 (citing GTE California, Inc. v. FCC*, 39 F.3d 940, 946 (9th Cir. 1944) and *Johnson v. Robison*, 415 U.S. 361, 368 (1974)).

[21] *See* Smith & Boyer, *Survey of the Law of Property*, 2d ed. 1971, West, p. 16.

[22] *Id.*

[23] *Penn Central Transp. Comp. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631, reh. den., 99 S.Ct. 226, 58 L.Ed.2d 196 (1978); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014-15 (1992).

[24] *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980).

[25] 458 U.S. 419 (1982).

[26] 24 F.3d 1441 (D.C. Cir 1994) ("Bell Atlantic").

of the case.[27] 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 in *Loretto* 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.[28] This fact was deemed dispositive in *Loretto*; the Court expressly declined to opine concerning the respective property rights of landlords versus tenants, which, of course, is the precise issue here.[29] The Court in *Loretto* went on to note:

> 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.[30]

Moreover, the holding in *Loretto* was premised on the Court's finding that the state law at issue constituted a permanent physical occupation and deprivation of the owner's property by a third party with no legal interest in the property. In contrast, the regulation at issue here involves only a temporary physical occupation by one who has a property right in the real estate. As noted above, a lease is an estate in land.[31] The Court in *Loretto* affirmed the broad public power of states to regulate housing conditions in general and the landlord-tenant relationship in particular without necessarily being required to pay compensation for all economic effects that such regulation may entail. The Court concluded:

> Consequently, our holding today in no way alters the analysis governing 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. So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to non-possessory governmental activity.[32]

The regulation proposed by NAB is, indeed, a permissible regulation of the landlord-tenant relationship. Moreover, if states have latitude to regulate property rented by landlords, then there can be no question but that Congress may, as it has done in enacting Section 207, impose such restrictions on the use of property as it deems appropriate to ensure the availability to all citizens of the nation's system of television broadcasting.[33]

The decision of the D.C. Circuit Court of Appeals in *Bell Atlantic* is also irrelevant to the takings issue. In *Bell Atlantic*, the court struck down two Commission orders requiring Local Exchange Companies ("LECs") to set aside a certain portion of their central offices for occupation and use ("co-location") by competitive access providers ("CAPs"). The sole question before the court was whether the Commission's order compelling LECs to provide co-location orders for CAPs was authorized by statute.[34] Of course, no such question arises here because Congress, in Section 207 of the 1996 Act, has explicitly directed the Commission to promulgate the regulation in question. Because the FCC had no such authorization in *Bell Atlantic*, the court construed the FCC's power narrowly.[35] Such construction was necessary, the court concluded, because the co-location orders raised "substantial" constitutional questions under the Takings Clause in light of the Supreme Court's holding in *Loretto*. Again, the regulation under consideration in this proceeding is distinguishable from the *Bell Atlantic* and *Loretto* facts because (1) no "stranger" to the owner is granted rights with respect to an owner's property, and (2) the regulation does not authorize a permanent interference with the owner's property interests. In *Bell Atlantic*, the CAPs had no ownership or contractual interest in the land used by the LECs for

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[27] *See* 458 U.S. at 441, 73 L.Ed.2d at 886 ("Our holding today is very narrow."); *FCC v. Florida Power Corp.*, 480 U.S. 245, 251, 107 S.Ct. 1107, 94 L.Ed.2d 282, 289 (1987) (Acknowledging, "We characterized our holding in *Loretto* as "very narrow.").

[28] *Id.* At 339.

[29] *Id.*

[30] *Id.* At 440 n. 19.

[31] *Smith & Boyer, supra*

[32] *Id.* At 440 (emphasis added).

[33] 47 U.S.C. §151.

[34] *Id.* at 1444 n.1 ("The only question we consider is whether the order under review are indeed duly authorized by law.").

[35] The *Bell Atlantic* court did not rest its decision on a Takings Clause analysis. *Id.* at 1444, n.1 ("The only question we consider is whether the orders under review were indeed duly authorized by law.")