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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the matter of	)	
	)	
Implementation of Section 207 of the Telecommunications Act of 1996	)	**CS Docket No. 96-83**
	)	
Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services	)	

PETITION FOR RECONSIDERATION

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PETITION FOR RECONSIDERATION

Pursuant to Sections 1.106 and 1.429 of the Commission's rules,[1] WinStar Communications, Inc. ("WinStar"), Teligent, Inc. ("Teligent"), NEXTLINK Communications, Inc. ("NEXTLINK"), Association for Local Telecommunications Services ("ALTS"), and the Personal Communications Industry Association ("PCIA") hereby petition the Commission for reconsideration of the Second Report and Order in the above-captioned docket, released November 20, 1998 (the "Order").[2]

I. INTRODUCTION AND SUMMARY.

This proceeding concerns implementation of Section 207 of the Telecommunications Act of 1996 ("1996 Act"). In Section 207, Congress required the Commission to promulgate rules that prohibit restrictions on viewers' installation of devices that

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1 47 C.F.R. § 1.106 & § 1.429.

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

receive over-the-air video programming. In its Order, the Commission extended its over-the-air reception devices rule to prohibit restrictions that hamper consumer use of television antennas, small satellite dishes, and wireless cable antennas to include viewers who rent or occupy multi-tenant buildings and wish to install and use such devices in areas where they have exclusive use, such as balconies or patios. The Commission declined to extend Section 207's protection to renters or tenants of multi-tenant buildings that do not have property under their exclusive use suitable for the installation of Section 207 devices. The Commission found that it did not have the statutory authority to prohibit restrictions on installation of Section 207 devices in or on common or restricted use areas, such as rooftops of multi-tenant buildings.

Thus, the Commission's new rules would prohibit certain restrictions of highly limited scope, but in practice effectively will deny the benefits of Section 207 to the overwhelming majority of consumers that do not have access to a patio or balcony and line-of-sight to a Section 207 video programming provider. For these consumers, under the FCC's extraordinarily narrow rendering, their building owners, landlords, or condominium associations effectively mandate their choice of video programming service. That result is directly contrary to the 1996 Act.

The purpose of the 1996 Act was to open telecommunications markets for all Americans so that consumers would have the largest possible range of choices for telecommunications

services. It was not Congress' intent to effectively discriminate against and exclude a whole class of consumers, constituting millions of tenants of multi-tenant buildings, from the protections of Section 207, thereby as a practical matter potentially ensuring the creation of a technology-deprived class of consumers. Thus, the Commission should reconsider the Order and revise its rules so as to honor the clear intent of Congress and complete the implementation of Section 207 and protect these consumers. The Commission should prohibit any restriction (other than those clearly justified by safety concerns) that would prevent tenants of a multi-tenant building from having access to common areas and restricted use areas for the installation of Section 207 devices.

Such a prohibition would not be a per se taking of property within the meaning of the Fifth Amendment. Rather, the Commission would be regulating a preexisting contractual arrangement between the building owner, landlord, or condominium association and the tenant. The Supreme Court has held that such regulation does not give rise to a Fifth Amendment "taking" for which compensation would be required, a clear legal red herring raised by certain real estate interests unsupported by the relevant caselaw. Indeed, the public interest compels the full implementation of Section 207 consistent with this petition. Through such implementation, competition in the video programming business will be enhanced and current concentration in the market will be reduced, and Congress' overall policy in the 1996 Act to enhance consumer choice will be promoted.

II. Interest of Petitioners

A. WinStar.

WinStar is a pioneer in offering local telecommunications services using fixed wireless technology, including both 38 GHz facilities and LMDS facilities. Fixed wireless technology has the potential to bring a variety of voice, data, and video services to users and viewers more rapidly and efficiently than competing technologies. However, the competitive potential of fixed wireless services depends heavily on users' and viewers' ability to receive such services, which require installation of antennas with line-of-sight access to other antennas.

WinStar accordingly is directly impacted by any decision bearing on the opportunities for customers of wireless services to obtain access to their service providers, particularly where such access involves use of antennas on the rooftops of multi-tenant buildings. On September 20, 1996, WinStar filed a Petition for Reconsideration of CC Docket 96-98 on the issue of nondiscriminatory access to buildings and rooftop access pursuant to Section 224, a Petition that remains pending more than two and one-half years later. WinStar participated actively in CS Docket 97-151 and CS Docket 95-184, in which the Commission considered issues of building access for providers of wireless services. In May 1998, WinStar supported Teligent's still-pending petition for reconsideration of the Commission's February 1998 Report and Order in that docket, urging the Commission to rule that Section 224(f) of the Communications Act requires access for all carriers to building rooftops where the incumbent telecommunications

utility has access to the rooftop via easement or otherwise. WinStar continues to stand by its outstanding petitions regarding other Sections of the 1996 Act. WinStar, at present, is also deeply concerned about the Commission's decision to so narrowly interpret Section 207 as to virtually render it meaningless in terms of the practical realities of fixed wireless deployment and engineering.

B. Teligent.

Teligent, a leading communications provider using fixed wireless technology, is licensed by the Commission to transmit signals in the 24 GHz band. Teligent provides voice, data and video telecommunications services, including local telephone service, primarily by deploying fixed wireless point-to-multipoint broadband networks in numerous locations throughout the United States. Unlike copper- and fiber-based systems, Teligent's fixed wireless system does not have any physical wires to install and maintain between the customer's antenna and Teligent's base station antenna. Rather, the network equipment necessary to transmit a signal from a customer antenna to Teligent's base station antenna is placed on private property -- most often on rooftops of buildings.

C. NEXTLINK.

NEXTLINK was founded in 1994 to provide local facilities-based telecommunications services to its targeted customer base of small- and medium-sized businesses. Today, NEXTLINK is a rapidly-growing telecommunications company focused on providing high-quality local, long distance, and enhanced

telecommunications services at competitive prices. NEXTLINK operates 21 facilities-based networks providing local and long-distance services in 36 metropolitan areas throughout the country. NEXTLINK provides competitive access provider ("CAP") services in many locations as well. NEXTLINK also offers small- and medium-sized businesses an integrated package of enhanced telecommunications services. In short, NEXTLINK focuses on services that it believes are at the core of the local exchange market -- standard dial tone, multi-trunk services and advanced telecommunications services.

In addition to its fiber network, NEXTLINK owns a 50 percent share of a joint venture with Nextel Spectrum Acquisition Corp. ("Nextel"), called NEXTBAND Communications, L.L.C. ("NEXTBAND"). NEXTBAND obtained 42 LMDS licenses at the Commission's auction in March 1998. LMDS has been designated by the FCC for use in the provision of fixed wireless voice, data and video services. LMDS technology provides the capability for integrated, two-way digital distribution of multimedia services via large, high-quality bandwidth similar to fiber optic cable, but delivered through rooftop antennas without a wire. LMDS spectrum can, therefore, be used to provide a broad range of telecommunications products, including video programming. NEXTLINK announced on January 14, 1999 that it has reached an agreement in principle to acquire Nextel's 50 percent share in NEXTBAND for approximately $137.7 million. If the transaction takes place, the 42 NEXTBAND licenses will be under NEXTLINK's sole control. Also on January 14, 1999 NEXTLINK announced its agreement to acquire WNP

Communications, Inc. ("WNP") for approximately $695 million. Upon FCC approval and consummation of the merger, NEXTLINK will acquire WNP's 40 LMDS licenses. If both transactions are approved by the FCC and closed, NEXTLINK will hold 82 LMDS licenses that cover most of the major U.S. cities.

NEXTLINK believes that the acquisition of the LMDS licenses will provide NEXTLINK new access and transport capabilities to complement its existing local and developing inter-city fiber networks. By reducing NEXTLINK's dependence on incumbent local exchange carrier facilities, NEXTLINK will gain increased efficiencies and control over its costs. Additionally, NEXTLINK will have the ability to offer innovative services that are not possible using ILEC networks. Consumers accordingly will benefit from NEXTLINK's ability to design flexible and cost-effective transmission solutions to suit their needs. Additionally, NEXTLINK will be able to expand its footprint, enter new markets and reach new customers where there is currently little competition for the ILECs. NEXTLINK is therefore directly effected by any decision bearing on the opportunities for customers to obtain access to wireless services.

D. ALTS.

ALTS is the leading national industry association whose mission is to promote facilities-based local telecommunications competition. Located in Washington, D.C., the organization was created in 1987 and represents companies that build, own, and operate competitive local networks. Three of ALTS members are WinStar, Teligent, and NEXTLINK.

E. PCIA.

PCIA is an international trade association that represents the interests of the commercial and private mobile radio service communications industries and the fixed broadband wireless industry. PCIA's Federation of Councils includes: the Paging and Messaging Alliance, the PCS Alliance, the Site Owners and Managers Association, the Association of Wireless Communications Engineers and Technicians, the Private Systems Users Alliance, the Mobile Wireless Communications Alliance, and the Wireless Broadband Alliance. As the FCC-appointed frequency coordinator for the Industrial/Business Pool frequencies below 512 MHz, the 800 MHz and 900 MHz Business Pools, the 800 MHz General Category frequencies for Business Eligibles and conventional SMR systems, and the 929 MHz paging frequencies, PCIA represents and serves the interests of tens of thousands of FCC licensees. PCIA's Wireless Broadband Alliance membership includes LMDS licensees, operators, and equipment manufacturers, each of whom have a vested interest in the ability of video service providers to access multi-tenant buildings.

F. Section 1.106(2)(b)(1) Showing.

The Commission released the further notice on which the Order in this proceeding is based in August 1996, with comments and reply comments due in September and October 1996, respectively. At that time, WinStar was a new participant in the telecommunications industry, focused primarily on launching a business devoted to the provision of voice and data telecommunications over fixed point-to-point 38 GHz wireless

facilities, and in fact had yet to launch facilities-based switched local services in even its first market. In 1997, the Commission enabled 38 GHz licensees to provide point-to-multipoint services, and WinStar also acquired LMDS authorizations in 1998. In 1998, WinStar's business plans grew to encompass potential video offerings, primarily using its LMDS facilities. At that time, the issues in this proceeding regarding viewer access to LMDS services via antennas in shared and restricted areas of multi-tenant buildings first became directly relevant to WinStar's business plans. By then, the comment period in this proceeding was long over. WinStar therefore has the "good reason" required by Section 1.106(2)(b)(1) of the Commission's rules for seeking reconsideration of the Order without having formerly participated in this proceeding.

As for Teligent, the further notice requested by the Commission was issued prior to the development of Teligent and its business plan as it is known today. Indeed, Alex Mandl, the Chairman and CEO of Teligent, did not join the company until after the release of the further notice. For this "good reason," Teligent's concerns regarding the Commission's Order should be heard.

Due to NEXTLINK's recent LMDS acquisitions and evolving business plan for wireless services, NEXTLINK could not have been aware that the Commission's proceeding would be relevant to its business at the time the Commission released the further notice.

Thus, NEXTLINK's concerns in this proceeding should be considered fully by the Commission.

As an association whose largest members include WinStar, Teligent and NEXTLINK, ALTS was not in the position to participate in the comment period of the Commission's Order. Due to the serious issues the Order raises regarding these members' interests, ALTS has a "good reason" to join its members in this Petition.

Similarly, PCIA has a "good reason" to seek reconsideration of this Order. PCIA's members include LMDS licensees which did not even have their licenses when the Further Notice was released. In fact, the Commission recently issued a substantial number of new LMDS licenses last year. Thus, it was only at this recent date that these LMDS licensees began expending resources toward the implementation of their service. While LMDS licensees are still planning their systems and services to be offered, it is reasonable and in the public interest for the FCC to hear their concerns regarding the provision of video services to tenants in multi-tenant buildings as it is likely that LMDS licensees may choose to offer video programming services. Thus, in the interest of fairness and towards the promotion of real competition in the video programming business, the Commission should hear the concerns of LMDS licensees as described in this Petition.

III. CONGRESS INTENDED FOR SECTION 207 TO PROMOTE COMPETITION AND PROTECT ALL AMERICAN CONSUMERS FROM RESTRICTIONS THAT IMPAIR THEIR ABILITY TO USE SECTION 207 DEVICES.

The Commission should reconsider and revise its decision to recognize explicitly that it has -- and should exercise -- the statutory authority to prohibit restrictions imposed by building owners, landlords, or condominium associations on installation of Section 207 devices in common areas and restricted use areas. Section 207 provides that the Commission shall:

> promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designated for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.[3]

The statute requires the Commission to promulgate regulations that prohibit restrictions on receipt of video programming from over-the-air-reception devices. Such prohibited restrictions include the refusal of a building owner, landlord, or condominium association to permit a viewer to receive video programming from a device in common areas or restricted use areas.

While the Commission has promulgated rules of relatively limited practical impact that, for example, prohibit civic associations from restricting landowners' use of Section 207 devices, and protect renters from landlords' restrictions on installation of Section 207 devices on property under renters' exclusive use, the overwhelming majority of the public entitled to the protection of Section 207 was left absolutely unprotected

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[3] Section 207 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 114 (1996).

by the Commission's rules. These are the consumers that cannot receive over-the-air signals using Section 207 reception devices on property under their exclusive use due to lack of line-of-sight or lack of a balcony or patio, or due to other physical restrictions. It is critical to note that the FCC's reliance on the installation of reception devices on a tenant's patio or balcony appears predicated virtually entirely on the ex parte presentations of Cellularvision in late 1996,[4] a failed company now in bankruptcy. The real life deployment experience of WinStar and Teligent, among others, collectively in more than 30 major markets over the past three years has proven conclusively that, as a practical engineering matter, the realities associated with a line-of-sight technology cannot be supported -- given the necessities of widespread deployment -- by anything other than rooftop access. Under the subject ruling, these consumers in practice are now limited to purchasing video programming sanctioned by their building owners, landlords, or condominium associations.

In its Order, the Commission states that Section 207 "applies on its face to all viewers," and that it "should not create different classes of 'viewers' depending upon their status as property owners."[5] However, the Order does not apply Section 207 to all viewers, and it creates classes of viewers by disparately treating consumers that occupy multi-tenant

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[4] See Order, at ¶ 2, note 6.

[5] Order, at ¶ 13.

buildings. Under the rules adopted in the Order, those viewers in multi-tenant buildings that have a balcony or patio within their exclusive use and can achieve line-of-sight to their provider receive the protection of Section 207; however, those viewers in multi-tenant buildings who do not have a balcony or patio or do not have line-of-sight do not receive Section 207 protection.[6]

The Commission's finding that Section 207 by its very terms applies to all viewers is correct. It naturally follows that Section 207 protections via implementing regulation of necessity must be extended to all viewers -- including the millions in multi-tenant buildings that do not have the ability to use a Section 207 device from within their private space. This is consistent with and effectively mandated by the procompetitive purposes of the 1996 Act. Congress specifically intended that the 1996 Act would provide for:

> a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . . .[7]

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6 In paragraph 2 of the Order, the Commission relies upon the fact that LMDS devices will be capable of receiving signals inside buildings. Indeed, it cites to a representation made by a party that it already had such a device. Pursuant to the knowledge of the parties to this Petition, such a device does not exist, and it is very uncertain whether such a device is technically feasible. Order, at ¶ 2, note 6.

7 S. Rep. No. 230, 104th Cong., 2d Sess 1 (1996).

If the Commission extends Section 207's protection to include all viewers in multi-tenant buildings, not just the limited number that have balconies and unimpeded line-of-sight capabilities, the Commission will be promoting consumer welfare and competition and effectuating the mandate of the 1996 Act. And, those viewers will then have real choice among video programming providers, not one granted in name but absent in practice.

IV. PROHIBITING LANDLORD RESTRICTIONS ON SECTION 207 DEVICES IN COMMON AREAS AND RESTRICTED USE AREAS IS CONSISTENT WITH THE CONSTITUTION.

In its Order, the Commission found that its statutory authority to prohibit restrictions by landlords on installation of Section 207 devices in common areas or restricted use areas was limited by the Fifth Amendment "takings" clause.[8] The Order distinguished common areas and restricted use areas from areas under the exclusive possession of the viewer based upon its analysis of cases concerning Fifth Amendment "takings." However, a review of the pertinent cases demonstrates that permitting all viewers in multi-tenant buildings to receive Section 207 protection, including those that need access to common areas or restricted use areas, is not a Fifth Amendment taking.

Section 207 requires the Commission to promulgate regulations that prohibit restrictions on viewers' reception of video programming via certain devices. It is within the Commission's authority, and it is the Commission's obligation, to implement Section 207 fully, including permitting all viewers in

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[8] Order, at ¶¶ 17-29.

multi-tenant buildings access to a Section 207 device in common areas and restricted use areas. Contrary to the Commission's radically narrow interpretation, requiring access to these areas does not amount to a compelled physical invasion like the one at issue in Loretto v. Teleprompter Manhattan CATV Corp.[9] Rather, it entails the regulation of rights and duties that already exist between building owners and their tenants.[10]

Regulatory modification of the relative rights between building owners, landlords, and condominium associations on the one hand, and tenants on the other, is not a per se taking.[11] The Commission recognized this in its Order -- "where the private property owner voluntarily agrees to the possession of its property by another, the government can regulate the terms and conditions of that possession without effecting a per se taking."[12] The contractual relationship for viewers to occupy a multi-tenant building already is in place. By prohibiting building owners, landlords, and condominium associations from restricting tenants' access to video programming providers that

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9 458 U.S. 419 (1982) (holding that a permanent physical occupation is a per se taking and remanding for a determination of just compensation).

10 The Commission is not restricted by the court's findings in Bell Atlantic because it is not a per se taking for the Commission to regulate the terms and conditions of a contractual arrangement.

11 See Loretto, 458 U.S. at 441 ("We do not . . . question . . . the authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property.").

12 Order, at ¶ 18.

use Section 207 devices, the Commission will only be adjusting that contractual relationship.

Indeed, Section 207 access to common areas and restricted use areas is fully analogous to the regulation at issue in Yee v. City of Escondido.[13] In Yee, the Supreme Court considered a rent control ordinance that restricted the termination of mobile home park tenancies. 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."[14] The Court went on to explain that:

> [w]hen 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.[15]

By prohibiting building owners, landlords, and condominium associations from denying tenants access to video programming companies, the Commission would similarly be adjusting existing contractual obligations to comply with Section 207 and the public interest. Like the rent control ordinance in Yee, Section 207 access would only alter the relative rights existing under a contract and would not constitute a per se taking. Indeed, the rights under a contract would be altered by the Commission only

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13 503 U.S. 519 (1992).

14 Id. at 528 (emphasis in original).

15 Id. at 529 (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964)).

to the extent that it gives viewers their rights pursuant to Section 207 to receive video programming through certain devices.[16] Thus, a Commission-imposed Section 207 access requirement merely regulates a voluntarily executed contract and is not a per se taking.

This conclusion is also supported by the holding in Federal Communications Comm'n v. Florida Power Corp..[17] In that case, the Supreme Court limited Loretto to those situations where the element of "required acquiescence" is present. In other words, where the Commission is not requiring an initial physical occupation, but merely regulating a condition of occupation, it is not a Fifth Amendment "taking."[18] Imposition of Section 207 protections would merely be a condition to an already existing occupation.

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16 A regulation that is not a per se taking but rather a "public program adjusting the benefits and burdens of economic life to promote the common good" is analyzed by balancing the public and private interests involved. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); see also Agins v. Tiburon, 447 U.S. 255, 260-61 (1980). Under this analysis, the public interest -- as defined by the pro-competitive goals of the 1996 Act, including Section 207 -- as well as the competitive benefits for viewers, outweigh perceived burdens on building owners, landlords, and condominium associations to justify the provision of access.

17 Federal Communications Comm'n v. Florida Power Corp., 480 U.S. 245 (1987).

18 Indeed, many, if not all, multi-tenant buildings already have Section 207 devices on their common or restricted use areas. Certainly, a Commission requirement that building owners provide nondiscriminatory access to all Section 207 providers when one provider already is present would not be a per se taking.

This is further supported by the fact that contractual arrangements between building owners, landlords, condominium associations and their tenants are already governed by laws that establish certain rights, either explicitly or implicitly.[19] For example, absent an express provision to the contrary, tenants have the implicit right to enter and use certain building common areas, for example as a way of necessity between the "landlocked" unit and the street outside.[20] Public policy goals led to the establishment of implicit rights for tenants -- such as ingress and egress. Moreover, tenants also are entitled to an implied right of necessity for the use of conduits and pipes through a enlargement.[21] Thus, a tenant's access to the video programming of his or her choice is a natural recognition of the realities of modern occupancy, and a tenant's ability to choose providers

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19 See, e.g., 49 Am. Jur. 2d *Landlord and Tenant* § 625 (1995)("The implied covenant of quiet enjoyment in every lease extends to those easements and appurtenances whose use is necessary and essential to the enjoyment of the premises."). In Loretto, the Supreme Court declined to opine as to the respective rights of the landlord and tenant under state law, prior to the passage of the law at issue, to use the space occupied by the cable installation. 458 U.S. at 439 n.18.

20 49 Am. Jur. 2d *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 exit . . . may constitute a constructive eviction, especially in case of the lease of rooms or apartments in a building.").

21 Id. at § 632.

should not be based on whether he or she has a balcony that has a line-of-sight to the video programming provider of choice.

Finally, Section 207 is far more like the Virginia statute upheld in Multi-Channel TV Cable Company v. Charlottesville Quality Cable Corp., 65 F.3d 1113 (4th Cir. 1995) ("Multi-Channel"), than the statute at issue in Loretto v. TelePrompter Manhattan CATV Corp., 458 U.S. 419 (1982). The statute at issue in Multi-Channel forbade -- as does Section 207 -- restrictions imposed by landlords on tenants' access to competitive providers of video services. The Fourth Circuit found (1) that the statutory prohibition on such restrictions prohibited a use of the property and did not amount to a physical invasion, (2) that the statutory prohibition did not deny landlords the economically viable use of their land, (3) that the statutory prohibition did not deprive landlords of the rental income and appreciation on which their investment-backed expectations were presumably based, and (4) that a legitimate governmental interest was promoted by the statute. Each of these findings can and should be made with respect to Section 207's prohibition on restrictions of Section 207 devices in common and restricted areas.

V. IT IS IN THE PUBLIC INTEREST TO EXTEND SECTION 207 PROTECTION TO ALL VIEWERS IN MULTI-TENANT BUILDINGS.

Action by the Commission fully and effectively implementing Section 207 consistent with Congress' intent would not only fulfill the minimally permissible statutory mandate but also would promote the public interest. As demonstrated in Section II above, the full implementation of Section 207 is aligned with and advances Congress' goal to promote competition in all telecommunications markets. In particular, the full implementation of Section 207 will promote competition in the video programming business. Indeed, the Commission's recently released Fifth Annual Report on the status of competition in the MVPD market found that "downstream local markets for the delivery of video programming remain highly concentrated."[22] It is axiomatic that complete implementation of Section 207 to protect all viewers in multi-tenant buildings will give those viewers more video programming choices. As tenants in multi-tenant buildings have more choices for the provision of video programming services, this will tend to exert downward pressure on prices, thereby promoting competition and reducing concentration.[23]

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22 In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fifth Annual Report, CS Docket No. 98-102, at ¶ 128 (rel. Dec. 23, 1998) ("Fifth Annual Report").

23 Indeed, by dramatically limiting implementation of Section 207, video programming providers that offer their services through Section 207 devices may not reach economies of scale as quickly as they would if they had access to all viewers. This has the effect of hampering these providers from reaching their economic threshold that would allow their

Specifically, by allowing viewers in multi-tenant buildings to choose from among all video service providers, the Commission will be encouraging a competitive marketplace. Currently, building owners, landlords, and condominium associations choose the video programming provider for their tenants. Such choices are typically based on which provider is willing to pay the most for such access, not which provider has the best service at the least cost. Building owners, landlords, and condominium associations should not be rewarded for allowing one video programming provider to have access to the building at the exclusion of all others, which is the direct marketplace effect of the Commission's Order. This skews marketplace conditions and overwhelmingly favors incumbent competitors who have the financial means to meet such demands. Thus, the Commission should promulgate regulations that in reality will allow all viewers in multi-tenant buildings to make their video programming choices based on quality and cost; this will encourage a competitive marketplace.

In Eastman Kodak Co. v. Image Technical Services, Inc., the Supreme Court recognized that consumers can get locked in and exploited because of their inability to assess the long-term costs of a contractual arrangement.[24] Similarly, tenants do not realize that the landlord will preclude their choice of video

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unit costs to fall, thereby preventing them from competing more effectively with incumbent providers.

[24] 504 U.S. 451, 476-478 (1992).

service vendors when they sign leases. It is sound public policy to prevent or ameliorate the exploitation of those tenants that are locked-in, and concomitantly to give competing vendors affected by the lock-in appropriate opportunities to compete.

VI. SECTION 207 MUST BE VIEWED IN LIGHT OF THE 1996 ACT'S PURPOSE TO ENHANCE COMPETITION AND CONSUMER CHOICE.

As discussed in Section II above, Congress intended that the 1996 Act would promote competition for consumers in all telecommunications markets. The Commission has recognized this numerous times and has stated its intent to adopt policies that promote consumer choice.[25] Indeed, in the context of the video programming business, the Commission has stated that the 1996 Act contains provisions "that focus on removing barriers to competitive entry and on establishing market conditions that promote competitive firm rivalry."[26] Moreover, the Commission concluded in the first Report and Order in this proceeding that the public interest is served by promoting competition among

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25 See, e.g., In re Implementation of Section 304, Report and Order, 13 FCC Rcd 14775, 14776 (1998) ("[C]ompetition . . . is central toward encouraging innovation in equipment and services, and toward bringing more choice to a broader range of consumers at better prices. "); In re Subscriber Carrier Selection Changes, Second Report and Order and Further Notice of Proposed Rulemaking, 1998 FCC LEXIS 6545, at ¶ 108 (1998) ("In fulfilling the Congressional mandate to promote competition in all telecommunications markets, the Commission helps to ensure that the American public derives the full benefit of such competition by giving them the opportunity to choose new and better products and services at affordable rates and by giving effect to such choices.").

26 In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Third Annual Report, 12 FCC Rcd 4358, ¶ 5 (1997).

video programming service providers, enhancing consumer choice, and assuring wide access to communications facilities.[27]

The overall policy goal of the 1996 Act was to maximize consumer choice. This presumes, however, that such choice is made available to consumers. In order to ensure consumer choice, Congress enacted specific provisions to promote competitive services. The statutory mandate that common carriers provide communications services to all who seek such service at just and reasonable rates,[28] the requirement that such service be provided without unreasonable discrimination,[29] the requirement that such carriers interconnect with their competitors,[30] and the requirement that utilities provide access to certain areas owned or controlled by them[31] are just a few examples of Congress' effort and intent to ensure consumers would have competitive choices. The Commission's implementation of Section 207 must carry out rather than frustrate the statute's clear, ubiquitous effort to enhance consumer choice. Implementation of Section 207 to prohibit all restrictions on installation of Section 207 devices in common and restricted areas (other than those

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27 See In re Local Zoning Regulation Of Satellite Earth Stations, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 11 FCC Rcd 19276, 19315 (1996).

28 47 U.S.C. § 201(a).

29 47 U.S.C. § 202.

30 47 U.S.C. § 251(a)(1).

31 47 U.S.C. § 224(f).

necessary to promote public safety) is essential to advance Congress' goal to enhance consumer choice in numerous businesses.

VII. CONCLUSION.

For the foregoing reasons, the parties to this Petition respectfully request that the Commission reconsider its Order in Docket No. 96-83 and adopt amended rules that prohibit all restrictions on installation of Section 207 devices in multi-tenant buildings that are not necessary for public safety.

Respectfully submitted,

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January 22, 1998

WF&G
STAMP IN

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the matter of	)	
	)	
Implementation of Section 207 of the	)	
Telecommunications Act of 1996	)	CS Docket No. 96-83
	)	
Restrictions on Over-the-Air	)	
Reception Devices: Television	)	
Broadcast, Multichannel Multipoint	)	
Distribution and Direct Broadcast	)	
Satellite Services	)	

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REPLY

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March 24, 1999

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the matter of	)	
	)	
Implementation of Section 207 of the Telecommunications Act of 1996	)	**CS Docket No. 96-83**
	)	
Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services	)	

REPLY

WinStar Communications, Inc., Teligent, Inc., NEXTLINK Communications, Inc., Association for Local Telecommunications Services, and the Personal Communications Industry Association (collectively the "Petitioners") hereby reply to the Oppositions[1] to the Petition for Reconsideration the Petitioners filed regarding the Second Report and Order in the above-captioned docket.[2]

I. INTRODUCTION.

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

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

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

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

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

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

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

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

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

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

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

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

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

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[5] National Association of Realtors' Opposition at 2.

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

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

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

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

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

[8] Order, at ¶ 13.

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

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

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

[12] See BOMA Opposition at 6, 10.

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

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

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

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

[14] See 47 U.S.C. § 151.

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

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

[17] Id.

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

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

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

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

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

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

[21] 47 U.S.C. § 251(b)(2).

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

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

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

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

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

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

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

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

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

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

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[25] See Petition for Reconsideration at 14-17.

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

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

[28] See CAI Opposition at 3.

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

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

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

[30] BOMA Opposition at 8.

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

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

V. CONCLUSION.

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

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March 24, 1999

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

CERTIFICATE OF SERVICE

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

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