

Attachments

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

In the Matter of)	
)	
Preemption of Local)	
Zoning Regulation)	IB Docket No. 95-59
of Satellite Earth Stations)	
)	
In the Matter of)	
)	
Implementation of Section 207)	
of the Telecommunications)	CS Docket No. 96-83
Act of 1996)	
)	
Restrictions on Over-the-Air)	
Reception Devices:)	
Television Broadcast Service)	
and Multichannel Multipoint)	
Distribution Service)	

**DECLARATION OF CHARLES M. HAAR
 IN SUPPORT OF REPLY COMMENTS OF
 NATIONAL APARTMENT ASSOCIATION
 BUILDING OWNERS AND MANAGERS ASSOCIATION
 NATIONAL REALTY COMMITTEE
 INSTITUTE OF REAL ESTATE MANAGEMENT
 INTERNATIONAL COUNCIL OF SHOPPING CENTERS
 NATIONAL MULTI HOUSING COUNCIL
 AMERICAN SENIORS HOUSING ASSOCIATION**

I, Charles M. Haar, declare as follows:

I submit this Declaration in support of the Reply Comments of the above-named associations.

I am a Professor of Law at Harvard Law School and have served in this capacity since 1955. I have taught and written on property and constitutional law issues for thirty years. A copy of my resume is attached. I have edited a Casebook on Property and Law (with L. Liebman), and a Land-Use Planning Casebook (5th ed. 1996). The most recent book is Suburbs Under Siege: Race, Space, and Audacious Judges (Princeton U. Press 1996). I was Chief Reporter for the American Law Institute's Model Land Development Code in 1963-1965 Assistant Secretary for Metropolitan Development in the U.S. Department of Housing and Urban Development in 1965-68; Chair of Presidential Commissions on housing and urban development (Presidents Johnson and Carter); and Chairman of the Massachusetts Housing Finance Agency.

Based on the foregoing, I submit to the Commission in this Declaration the following analysis making two points: (1) a regulation that would require placement of antennae on owners' and common private property (by tenants or other occupants, involuntarily by owners or by third parties), or limit restrictions in private agreements on such action, would be a taking under the Fifth Amendment, according to several lines of cases; and (2) because of the Fifth Amendment implications, the Commission must apply a narrow construction of the Section 207 prohibition on certain private restrictions.

I. THE PROPOSED REGULATION IS A TAKING

A. **A "PER SE" TAKING.** Under current United States Supreme Court precedent, "a permanent physical occupation authorized by government is taking without regard to the public interests that it may serve." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982). Loretto involved a New York statute which authorized the installation of cable television equipment on plaintiff Loretto's apartment building rooftop. The Court held that this statute constituted a taking under at the Fifth Amendment as applies to the states under the Fourteenth Amendment. The installation involved the placement of cables along the roof "attached by screws or nails penetrating the masonry," "and the

placement of two large silver boxes along the roof cables installed with bolts. *Id.* at 422. In finding a taking, the Court noted that "physical intrusion by government" is a property restriction of unusually serious character for purposes of the Takings Clause. *Id.* at 426.

In the Commission's Further Notice of Proposed Rulemaking, the Commission seeks comments on a proposed rule in connection with Section 207 of the Telecommunications Act of 1996 (the "Proposed Regulation"). The Proposed Regulation, in requiring that owners allow placement of antennae (by occupants, involuntarily by owners or by third parties) on owners' and common private property, or limit restrictions in private agreements on such action, would directly implement the Loretto rule. Such installation of reception equipment would be precisely the kind of permanent physical occupation deemed as a taking by Loretto and the line of cases which follow its analysis.

The reasoning of Loretto extends from an analysis of the character of property rights and the nature of the intrusion by government. The Court did not look at the justification for the government's physical intrusion, but exclusively at what the government had done to the claimant. It considered the injury to the claimant to be particularly serious not because of the financial loss involved or other factors, but because of the intrusiveness of the government's action. The Court found that the claimant could not use the physical area occupied by the cable equipment and concluded that it is unconstitutional permanently to prevent an owner from occupying her own property. Consequent upon the occupation, the "owner has no right to possess the occupied space himself ... [he] cannot exclude others (from the space, and he) can make no nonpossessory use of the property." *Id.* at 435-36. A permanent physical occupation is an especially severe incursion on the ordinary prerogatives of ownership and constitutes a per se taking of property; this per se rule provides certainty and underscores the constitutional protection of private property.

Subsequent court opinions explicitly reaffirm the Loretto rule; a regulation that has the effect of subjecting property to a permanent physical occupation is a taking per se no matter how trivial the burden thus imposed.¹

In Loretto, the Court addressed the issue of the public benefit of the proposed regulation, finding that: where the character of governmental action 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.²

Following this reasoning, the Proposed Regulation effects a Fifth Amendment taking on a property owner who -- pursuant to a lease or other private agreement -- cannot prevent placement on the owners' or common private property of one or what could be many satellite dishes, microwave receivers, and other antennae. The Court will not entertain any weighing of the relative costs and benefits associated with the regulation in the case of a permanent physical occupation. Therefore, any public benefit or purpose (such as increased competition in video services or the provision of video services with educational and cultural benefit to the consumer) is irrelevant to the analysis of whether a taking has occurred. Once it is established that a regulation authorizes a permanent physical occupation, as the Proposed Regulation would, a taking has occurred and further analysis of importance of public benefits or degree of economic impact on the owner is moot.

B. ASSUMING ARGUENDO THAT CERTAIN RECEPTION EQUIPMENT IS NOT A PERMANENT INSTALLATION, THE PROPOSED REGULATION REMAINS A TAKING.

Some commenters have suggested that some installations of reception equipment pursuant to the Proposed Regulation may not be "permanent" and thus not subject to the Loretto per se takings rule.³

The Court addressed a situation in Nollan in which the occupation (a requirement of public access) was characterized as not permanent yet the Court still found a taking. There is a literal sense in which Nollan's land was not subject to a "permanent" physical occupation as Loretto's was, but the Court dismissed this contention. What is pivotal in the Court's view must be the state of being legally defenseless against invasion at any time. Even for non-permanent antennae installations, Court precedent would render the Proposed Regulation a taking.

A regulation falling outside the per se takings rule for permanent physical occupations would be construed _____ "cancel" in this analysis: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with investment-backed expectations"; and (3) "the character of the

¹ See, e.g., Nollan v. California Coastal Commission, 483 U.S. 825, 831 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 489 n.18 (1987); Yes v. City of Escondido, 503 U.S. 519, 527 (1992).

² Loretto, 458 U.S. at 434-35 (citing Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978)).

³ Perhaps certain equipment could be placed on a balcony and secured by ballast or its own weight, owned by the occupant and removed when the occupant vacated the premises.

governmental action."⁴ An examination of each of these factors in the context of the Proposed Regulation renders the same outcome as under the Loretto rule: the Proposed Regulation works a taking on the property owner.

a. Severe economic impact of the Proposed Regulation on owners. The market for residential as well as commercial property depends in large part on the appearance of the building itself and the area surrounding the building. If occupants (be they condominium owners, apartment tenants, commercial lessees or owners without exclusive use or control of the building) were allowed to install reception equipment at their discretion around the property, the value of the property on the market could decrease substantially.

Moreover, the Proposed Regulation would interfere with the ability of an owner (or association of owners) to manage its property. Effective property management requires an owner to decide on a property-specific basis the physical aspects, facilities (including rapidly evolving communications equipment) and service offerings of its property based on its own complex, multiyear analysis of consumer demands, supply opportunities and costs. Instead of market-oriented management, the Proposed Regulation would require owners to devote substantial resources to implementing the government-imposed rules, including resources associated with, among other things, training property managers on the rules, monitoring whether occupants' requests and actions comply with the Commission's rules as well as applicable health and safety codes, developing and collection charges as allowed by the rules, sorting out interfering requests from multiple occupants or services providers, and implementing procedures and training for various emergency situations.

In the context of CC Docket No. 96-98, the Commission concluded in August 1996 that a right of access to roofs and riser conduit "could impact the owners and managers of small buildings...by requiring additional resources to effectively control and monitor such rights-of-way located on their properties." (FCC 96-325, at Par.1185.)

b. Substantial interference with investment backed expectations. Any regulation which may interfere with the market value of a piece of property would naturally rally affect any expectations of investors who financed the building as well.

c. Character of the Proposed Regulation authorizes a physical invasion. Even if the structure is temporary, the Proposed Regulation authorizes a physical appropriation of the property as well as a permanent and continuous right to install such a structure. In Nollan, 483 U.S. at 832, the Court stated that a permanent physical occupation occurs "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." Under Nollan, the right to traverse the property, whether or not continually exercised, effected an impermissible taking. It is the "permanent and continuous right" to install the equipment which works the taking, because the right may be exercised at any time without the consent of the owner of the property.

Therefore, the regulation would constitute a taking based on the three-factor analysis set forth in the Penn Central line of cases.

C. CLOAKING THE PROPOSED REGULATION AS A REGULATION OF THE OWNER/OCCUPANT RELATIONSHIP FAILS TO SAVE THE PROPOSED REGULATION FROM THE TAKINGS CLAUSE.

1. The Loretto footnote is not applicable to the Proposed Regulation. Some commenters argues that the holding in Loretto was "very narrow" and applies only to the situation of physical occupation by a third party of a portion of the claimant's property. Moreover, a footnote in Loretto states that "[i] f [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." Loretto, 458 U.S. at 440 n.19. The footnote continues to describe how in this scenario where the owner would provide the service at the occupant's request, the owner would decide how to comply with the affirmative duty required by this hypothetical statute. Further the footnote indicates that the owner would have the ability to control the physical, aesthetic and other effects of the installation of the service.

Reliance on this dicta and footnote is misplaced in the context of the Proposed Regulation. Unlike a hypothetical statute requiring an owner to install a single cable interconnection, the Proposed Regulation may require an owner or association of owners to install multiple (an open-ended number) satellite dishes (DirecTV vs. Primestar vs. C-Band vs. others), microwave receivers (MMDS vs. LMDS vs. others) and other antennae. Such multiple installations may be in ways and areas which may affect the physical integrity of a roof and other building structures, a building's safety, security

⁴ Penn Central, 438 U.S. at 124. See also Kaiser Aera v. United States, 444 U.S. 164, 175 (1979).

and aesthetics, and thus its economic value. Moreover, the Proposed Regulation may require an owner to install the cabling associated with multiple antennae in limited riser space. Under the demands of accommodating multiple video antennae, the ability of an owner to control the physical, aesthetic and other effects of the installation of the service may be far more limited than envisioned in the Loretto footnote for a single installation, and thus a taking would be caused.

2. FCC v. Florida Power is not applicable to the Proposed Regulation. Certain commenters and perhaps the Commission appear to rely on FCC v. Florida Power Corp., 480 U.S. 245, 252 (1987), as further evidence of the limited application of the per se takings rule enunciated in Loretto. However, the holding of Florida Power is inapplicable to the Proposed Regulation and its effects on owners. In particular, Florida Power holds that the Loretto per se takings rule does not apply to that case because the Pole Attachments Act at issue in Florida Power, as interpreted by the Court, did not require Florida Power to carry lines belonging to the cable company on its utility poles. Similarly, the Court in see, 503 U.S. at 528, analyzed a local rent control ordinance and found that Loretto did not apply because the ordinance involved regulation without a physical taking or taking of the property owners' right to exclude: "Put bluntly, no government has required any physical invasion of petitioners property."

In contrast, the Proposed Regulation would do exactly the opposite by requiring owners to install antennae.

D. BUNDLE OF RIGHTS OWNED BY A PROPERTY OWNER.

The recent trend in the Court applies the doctrine of "conceptual severance" in taking cases. By continually referring to an owner's "bundle of property rights," the Court is adopting the modern conceptualization of property as an aggregation of rights rather than a single, unitary thing.⁵ Any regulation that abstracts and impacts one of the traditional key powers or privileges of property rights – use or exclusion, for example – is found to be a taking under the eminent domain clause.

In Kaiser Aetna, 444 U.S. at 179-80, the Court concentrated upon "the 'right to exclude' so universally held to be a fundamental element of the property right."

_____ the power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." Again, Nollan employed this severance approach in broadening Loretto's "permanent occupation" concept. In characterizing the right to exclude as "one of the most essential sticks in the bundle of rights that are commonly characterized as property," it construed a public access easement as a complete thing taken, separate from the parcel as a whole. Nollan, 483 U.S. at 831-32.

Hodel v. Irving, 481 U.S. 704 (1987), is perhaps the clearest exposition thus far of the Court's view of certain fundamental private rights being so embodied in the concept of "property" that their loss gives rise to a right to compensation under the Fifth Amendment. The statute under attack in Hodel provided that upon the death of the owner of an extremely fractionated interest in allotted land, the interest should not pass to devisees but should escheat to the tribe whose land it was prior to allotment. The court conceded a number of factors in favor of validity: the statute would lead to greater efficiency and fairness; it distributed both benefits and burdens broadly across the class of tribal members. However, the particular right affected – denominated by the Court as "the right to pass on property" – lies too close to the core of ordinary notions of property rights; it "has been part of the Anglo-American legal system since feudal times". Id. at 716.⁶

In PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 n. 6 (1980), the Court emphasized:

(T)he term "property" as used in the Taking Clause includes the entire "group of rights inhering in the citizen's [ownership]." It is not used in the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] denote[s] the group of rights inhering in the citizen's relation to the physical things, as the right to possess, use and dispose of it...The constitutional provision is addressed to every sort of interest in the citizen may possess."

⁵ See Hohfeld, Fundamental Legal Conceptions as Applied to Judicial Reasoning, 26 Yale L.J. 710 (1917); Michelman, Discretionary Interests – Takings, Motives, and Unconstitutional Conditions: Commentary on Radin and Sullivan, 55 Alb. L. Rev. 619 (1992).

⁶ Thus, Hodel adds market alienability as another essential strand of property whose attempted abrogation constitutes a per se taking. In effect, the state may not convert fee simple property into a life estate, even if such conversion is conditioned on the owner's failure to alienate during the owner's lifetime. The Court commented, in this fashion, the conceptual severance approach: the Court built onto the "right to exclude others" and the "right to pass on property" as examples of core strands. Both are among "the most essential sticks in the bundle of rights that are commonly characterized as property." See also First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318-19, (1987) (dividing up the time elements of property rights).

The Court is most likely to extend the Hodel doctrine of separate and distinct interests to the Proposed Regulation that would bar an owner's right to exclude an occupant from the roof and other premises owned by the property owner; or that prevents the owner from the use and enjoyment of the space occupied by the antennae. That the Proposed Regulation would erect barriers to what are widely held to be fundamental elements of the ownership privilege renders it vulnerable to constitutional attack. Indeed, the Proposed Regulation stands to erode just these essential powers, to exclude or to use, by forcing owners and homeowner associations to permit the installation of reception equipment on their property wherever and whenever the occupant or other owner without exclusive control or use may wish. Once the property owners lose control over the right to exclude installation of items against their wishes, they lose that which distinguishes property ownership itself, the rights "to possess", use and dispose of it." United States v. General Motors Corp., 323, U.S. 373, 378 (1945).

E. PROPERTY RIGHTS IN AESTHETIC CONTROLS. The Commission's action on the \$1.4000 rule suggests that the Commission would give insufficient weight in analyzing the Proposed Regulation to the recognition in modern law that aesthetic controls are a significant component of property values and property rights.

In the § 1.4000 rule, the Commission has created an exemption for restrictions "that serve legitimate safety goals." (Par. 5(b) (1) and Par.24 of Report and Order.) It has also adopted a rule safeguarding registered historic preservation areas. (Par. 5(b)(2) and Par.26.)

Having gone this far toward accommodating local interests the Commission halts and treats environmental and aesthetic concerns with less consideration. (Par.27.) In so doing, it is acting in accordance with the historic and out-dated treatment of aesthetic controls by ordinance, building restriction, lease, homeowners association agreement, or other private agreement. By not considering the modern trends of legislation and adjudication, however, it is sacrificing significant property values; impeding market decision-making by localities, private builders and owners, and associations; and undercutting sensitive environmental concerns. Indeed, some may discern a Philistine air in the Commission's rule and any similar analysis of the Proposed Regulation that runs the danger of the Commission being branded a scoffer of beauty and a derider of efforts to shape the appearance of the built and natural environments.

The Commission agrees that Congress intended that it should "consider and incorporate appropriate local concerns," and "to minimize any interference owed to local governments and associations." The Commission also (Par. 19) takes tentative steps toward adopting aesthetics as a full-scale exemption by mentioning: a requirement to paint an antenna so that it blends into the background, screening; and, in general, requirements justified by visual impact.⁷

This hesitant approach to environmental values is a retreat from the advancement and understanding of the goals of community, building and commercial environment appearance. It behooves the Commission to make explicit an exemption for reasonable aesthetic control of dishes and antennae.

The history of aesthetic controls in this country is a useful analogy for the Commission's consideration. At the outset, the courts were out rightly hostile to aesthetic values; they were not recognized as a legitimate government interest.⁸ The modern judicial position accepted in most jurisdictions is that government can regulate solely for aesthetics, as described below.

Aesthetic controls, public or private, over the form and placement of antennae and dishes reflect values representative of community-wide sentiment. Eyesores should not be permitted to undermine coherent community goals. Owners and homeowner associations can define what is attractive and what is ugly about antennae and reception devices, the same way they outlaw junkyards and ragstrewn clotheslines.⁹

⁷ See also Par 37 regarding height and installation restrictions in the BOCA code. Furthermore, the Report and Order states that the Commission does not believe that the rule would adversely affect the quality of the human environment in a significant fashion (Par.26): "While we see no need to create a general exemption for environmental concerns," it argues, it does exempt registered historic preservation areas. Finally, the rule states that the Commission will consider granting waivers where it is determined that the particularly unique environmental character or nature of an area requires the restriction. (Par.27)

⁸ See Haar and Wolf, eds., Land-Use Planning 518-555 (4th ed. 1989). Aesthetic values were deemed too subjective and vague to warrant legal protection; consequently, the courts went so far as to say that the presence of aesthetic motives would taint an ordinance otherwise valid under the traditional health, safety, morals, and welfare components of the police power. As the early Passaic v. Peterson Bill Posting Co., 62 A. 267, 268 (N.J. 1905), put it: "[A]esthetic considerations are a matter of luxury and indulgence rather than of necessity...." This gave way -- not without a struggle -- to intermediate judicial acceptance when it was seen that aesthetic values advanced such traditional goals as the preservation of property values.

⁹ See People v. Stover, 191 N.E. 2d 27 (N.Y. 1963). It is increasingly recognized that community consensus can protect against arbitrary application of regulation or restriction. See United Advertising Corp. v. Borough of Metuchen, 198 A. 2d 447 (N.J. 1964). In a fundamental sense, there is a collective property right to the neighborhood or commercial environment exercised by its owners.

Over the past two decades, aesthetic considerations flourished and became routine on federal as well as state levels. There are numerous examples of legislative assertions of beauty as an appropriate end of government activity.¹⁰ For example, the status of aesthetic values is sharply recognized in the National Environmental Policy Act of 1967, 42 U.S.C. § 4321 (NEPA). Section 4331(b)(2) of NEPA includes, among the purposes of its "Environmental Impact Statements", the assurance of "healthful, productive and aesthetically and culturally pleasing surroundings." See Ely v. Velde, 451 F.2d 1130, 1134 (4th Cir. 1971) ("other environmental... factors" than those directly related to health and safety are "the very ones accepted in ...NEPA").¹¹

Perhaps the most direct acceptance of aesthetic controls on the federal level is that of Justice Douglas in Berman v. Parker, 348 U.S. 26, 33 (1954):

The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled...If those who govern the District of Columbia decide that the nation's Capitol should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in that way.¹²

In light of the Commission's exemption for historic districts, the statement of Penn Central are especially pertinent; there the Court emphasized that "historic conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing – or perhaps developing for the first time – the quality of life for people." Penn Central, 438 U.S. at 108.

The Proposed Regulation would be evaluated in the context of this evolution and progress of aesthetic and environmental goals. The Report and Order in its gingerly handling of roof line controls, may be faulted as out of step with the modern legislative and judicial endorsement of aesthetic values and design review. Certainly Paragraph 46's tentative conclusion that "non-governmental restrictions appear to be related primarily to aesthetic concerns," and the further tentative conclusion "that it was therefore appropriate to accord them less deference than local government regulations that can be based on health and safety considerations" will raise eyebrows in many circles.¹³

Increasingly, private design review is the most effective way for property owners to implement a consensual decision on the aesthetic appearance of their community.¹⁴ Widespread agreement – expressed often in terms of enhanced property values – exists on ensuring that utilitarian objects are hidden from sight on or around buildings. Mechanical equipment on roofs (ventilators, exhaust outlets, air conditioners), as part of the policy for community or commercial environment appearance, is usually not permitted to be visible from the street. Regulating the appearance of a community, building or commercial environment is the proper domain of the community itself and the owner(s) since the local community and owner(s) are the best judges of what is desirable for that community, building or commercial environment. Further, there is a direct line between aesthetics and property values: "economic and aesthetic considerations together constitute the nearly inseparable warp and woof of the fabric upon which the modern city must design the future."¹⁵

So long as the private design review process is conducted along procedural due process requirements it is a legitimate and desirable exercise of property owners' interests which will be upheld by the courts. The design and environmental purposes of public and private restrictions, reasonably limited and nondiscriminatory, should be an exemption extended by the Commission.

¹⁰ The Report and Order itself incorporates elements of the National Historic Preservation Act of 1976 in its use of the National Register for Historic Places in carving out an exemption for historic districts.

¹¹ The aesthetic-environmental language is also found in the so-called Little NEPAs of the states. See e.g. State v. Erickson, 285 N.W. 2d 84 (Minn. 1979). Similarly, the National Highway Beautification Act regulates the manner and placement of billboards along federally assisted highways.

¹² More recently, in Members of City Council of City of Los Angeles v. Taxpayer for Vincent, 466 U.S. 789, 805 (1984), the Court stated "It is well settled that the state may legitimately exercise its police powers to advance aesthetic values." See also Metromedia Inc. v. City of San Diego, 453 U.S. 490 (1981).

¹³ See e.g. Williams, Jr. and Taylor, 1 American Planning Law § 11.10 (1988 Revision): "[n]o trend is more clearly defined in current law than the trend towards full recognition of aesthetics as a valid basis for regulations". The demotion of aesthetics proffered by the Commission is an outdated view of the law.

¹⁴ Reid v. Architectural Board of Review, 192 N.E. 2d 74 (Ohio 1963), is the classic case upholding such controls. Private design review, as an alternative or supplement to local government, controls aesthetics of the physical environment by private agreement, typically through community associations. See Baah, Private Design Review in Edge City in Design Review: Challenging Urban Aesthetic Control 137 (Scheer and Preisiev eds. 1994). In many communities with design review, Baah adds, "unsightly physical features – such as graffiti, billboards, chain-link fences, weeds and overgrown landscaping – are now only found in public property." *Id.* at 196.

¹⁵ Metromedia Inc. v. City of Pasadena, 216 Cal. App. 2d 270 (1963), app. dismissed, 376 U.S. 186 (1964).

Protection against abuse of restrictions on devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution services, or direct broadcast satellite services is afforded by the discipline of the market. Deregulation and the freeing of competitive forces already put in place by the Commission are effective restraint on abuse. Thus, analysis of the Proposed Regulation should give substantial weight to aesthetic control imposed by landlords and owners through private agreements.

F. RELIANCE ON PRUNEYARD IS UNWARRANTED. Several commenters have relied upon PruneYard in supporting the Proposed Regulation. In analyzing the Proposed Regulation to determine whether it violates the Taking Clause, access to video information services does not rise to the level of a colorable constitutional argument based on the First Amendment.

As described in connection with Loretto, government policies and public benefits are irrelevant in per se takings. As to First Amendment concerns, the Loretto Court acknowledged it had no reason to question the finding of the New York Court of Appeals that the act served the legitimate public purpose of "rapid development of and maximum penetration by a means of communication which has important educational and community aspect." Loretto, 458 U.S. at 425. Nevertheless, the Court concluded that a "permanent physical occupation authorized by government is a taking without regard to the public interests it may serve." Id. at 426.

In PruneYard, which dealt with a state constitutional right to solicit signatures in shopping centers, there was no permanent physical invasion of the property (unlike the Proposed Regulation) and the Court applied the Penn Central three-factor analysis. PruneYard does not support a First Amendment limitation to or weighting in such analysis. In holding that a taking did not occur, a key finding for the Court was that preventing shopping center owners from prohibiting this sort of activity would not reasonably impair the value or use of their property. PruneYard, 447 U.S. at 83. As the concurring opinion of Mr. Justice Marshall (the author of the subsequent Loretto opinion) states, "there has been no showing of interference with appellant's normal business operations." Id. at 94. Indeed, the use of the shopping center's property in PruneYard was consistent with the reasons that the property was held open to the public, namely that it is "a business establishment that is open to the public to come and go as they please." Id. at 87.

The decision quoted from the California Supreme Court's opinion which distinguished this shopping center, with 25,000 persons of the general public daily using the property, from other properties (or even portions of properties, such as roof space) where use is more restricted:

A handful of additional orderly persons soliciting signatures and distributing bandbills in connection therewith, under reasonable regulations adopted by defendant to assure that these activities do not interfere with normal business operations...would not markedly dilute defendant's property rights. Id. at 78.

This situation differs completely from the position of property owners subject to the Proposed Regulation in that the owner's opening of the property to the tenant does not extend an invitation to use the private property of the owner, such as the roof, which is specifically excluded from the demised premises. The notion of implied consent to use the property which the Court relies on so heavily in PruneYard is not applicable here where the owners are careful to delineate the boundaries of the demised property to exclude areas such as the roof and exterior walls.

In particular, the PruneYard Court was careful to distinguish on the Penn Central three-factor grounds the facts and state constitutional right in PruneYard from the findings of unconstitutional takings despite claims of First Amendment protections in Lloyd Corp. v. Tanner, 407 U.S. 551, 569, (1972) (finding against First Amendment claims challenging privately owned shopping center's restriction against the distribution of handbills), and Hudgens v. NLRB, 424 U.S. 507, 517-21 (1976) (finding against First Amendment claims challenging privately owned shopping center's restriction against pickets). PruneYard, 447 U.S. at 80-81.

G. INCREASED EMPHASIS BY COURTS AND LEGISLATURES UPON THE PROTECTION OF PROPERTY RIGHTS. As explained above, the general movement of the Court is to protect private property under the Taking Clause.¹⁶

Along the same lines is Executive Order 12630 of March 15, 1988, "Governmental Actions and Interference with Constitutionally Protected Property Rights." Referring to Court decisions, it states that in reaffirming the fundamental

¹⁶ This trend has been underlined by many experts on constitutional law, including Chief Judge Oakes of the Second Circuit Court of Appeals. Oakes, "Property Rights" in Constitutional Analysis Today, 56 Wash. L. Rev. 583 (1981).

protection of private property rights they have also "reaffirmed that governmental actions that do not formally invoke the condemnation power, including regulations, may result in a taking for which just compensation is required." Section 1(b) requires that government decision-makers should review their actions carefully to prevent unnecessary takings.

Section 3 lays down general principles to guide executive departments and agencies. Section 3(b) cautions that "[a]ctions undertaken by government officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use, may constitute a taking of property." Section 3(e) warns that actions that may have a significant impact "on the use or value of private property should be scrutinized to avoid undue or unplanned burdens on the public fisc." Finally, Section 5(b) requires executive agencies to "identify the takings implication" of proposed regulatory actions.

In addition, several states have passed different forms of takings impact assessment laws and value diminution laws imposing compensation requirements when a taking, variously defined, is imminent.

Loretto and Hodel are judicial inventions for putting some kind of halt to the denaturalization and disintegration of the concept of property. As the Court continues its century-long struggle to define an acceptable balance between individual and societal rights, it is apparent at least to the justices of the Court that this constitutional riddle needs more definite answers. By referring to the common understanding of what property at the core is all about, the settled usage that gives rise to legally recognized property entitlements, the Court is building up trenchant legal tests for a taking.

This is a reaction to its finding how hard it is to maintain an open-ended balancing posture; in the Penn Central case, the Court acknowledged difficulty in articulating what constitutes a taking. A per se rule, whether it be a permanent physical occupation or another core stick of the bundle denominated "property," is a bright line that provides a trenchant legal test for a taking, one that can be understood by a lay person and one that lawyers can utilize in advising clients. The cases laying down hard-and-fast rules are a token of the limitations on popular government by law.

The Court's trend toward defining the Fifth Amendment to set up of a private sphere of individual self-determination, securely buffered from politics by law, militates against the adoption of the Proposed Regulation. Elimination of the private property owner's power of possession, use, and enjoyment of the space used for antennae installations and removal of the power to control entry by an occupant is not likely to survive judicial (or legislative) scrutiny.

II. THE COMMISSION MUST APPLY A NARROW CONSTRUCTION OF THE STATUTORY PROHIBITION ON CERTAIN PRIVATE RESTRICTIONS. The relevant case law is clear that, in light of the substantial Fifth Amendment implications described above in this Declaration, the FCC must narrowly interpret Section 207. The statutory directive "to prohibit restrictions" and the House Report explanation that Congress intended to preempt "restrictive covenants or encumbrances: fall far, far short of a broad statutory mandate to promote various video signal delivery businesses through a requirement that owners allow placement of or place antennae at the sole discretion of occupants on owners' or common private property.

As the D.C. Circuit Court of Appeals held in Bell Atlantic v. FCC, 24 F 3d 1441, 1445 (D.C. Cir. 1994), "[w]ithin the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions."¹⁷ The court went on to state that when administrative interpretation of a statute would create a class of cases with an unconstitutional taking, use of a "narrowing construction" prevents executive encroachment on Congress's exclusive powers to raise revenue and to appropriate funds. Id.

A fair interpretation of Section 207 does not require construing the statutory direction to prohibit certain private restrictions as going beyond the restrictions covered by the implementing rule the Commission adopted in August 1996. That rule — addressing "any private covenant, homeowners' association rule or similar restriction property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest in the property" — encompasses the full extent (and perhaps more) of what the House Report intended as restrictive covenants or encumbrances." The Proposed Regulation — whether as a right to installation by occupants, an obligation on owners, a right to installation by third parties, or other limit on restrictions in private agreements on such action — would be contrary to the narrowing construction of Section 207 required to avoid an unconstitutional taking.

Moreover, the Commission does not contend in its Further Notice (and cannot reasonably contend) that the proposed implied taking power is necessary in order to avoid defeating the authorization in and purpose of Section 207. See

¹⁷ Citing Rust v. Sullivan, 500 U.S. 173, 190-91 (1991); Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575-78 (1988).

Bell Atlantic, 24 F.3d 1446. While the Commission asks whether a further requirement on landlords is authorized under Section 207, the §1.4000 rule does not depend on restrictions on owners' or common private property.

The constitutional demand for a narrowing construction of Section 207 against the Proposed Regulation is particularly strong in light of the contrast between Section 207 and three other sections of the Telecommunications Act of 1996. These other sections clearly and specifically authorize a physical occupation of certain other entities. In contrast, proponents of the Proposed Regulation can only argue that the physical taking for video reception equipment should be promulgated pursuant to a purported implied broad mandate and general policy from Section 207.

1. Section 224 (f) (1) states that a "utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." Sections 224 (d) - (e) address compensation, and Section 224 (f) (2) addresses insufficient capacity, safety, reliability and generally applicable engineering purposes.

Reflecting the huge complexities that would be involved in implementing the Proposed Regulation for landlords, the Commission in its August 8, 1996 interconnection order (cc Docket No. 96-98) concluded that "the reasonableness of particular conditions for access imposed by a utility should be resolved on a case-specific basis." (Par. 1143) In particular, the Commission rejected the request by WinStar Communications to interpret this right of access to include roofs and riser conduit; the Commission recognized that "an overly broad interpretation of ['pole, duct, conduit, or right-of-way'] could impact the owners and managers of small buildings by requiring additional resources to effectively control and monitor such rights-of-way located on their properties."¹⁸

2. Section 251 (b) (4) requires local exchange carriers to "afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services at rates, terms, and conditions that are consistent with Section 224".

3. Section 251 (c) (6) requires incumbent local exchange carriers to provide "physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier." This section also specifies "rates, terms and conditions that are just, reasonable, and nondiscriminatory," and addresses space and other technical limitations.

When Congress intended a taking with compensation in these other circumstances, it clearly and specifically indicated that intention in the Telecommunications Act of 1996. Nothing in Section 207 addresses a taking or compensation for placement of antennae on owners' or common private property, and no such requirement can be implied.

¹⁸ Par. 1185 (emphasis added) & n. 2895; WinStar Communications Petition for Clarification or Reconsideration at 4-5 (Sept. 30, 1996).

Excerpts (without attachments) from the March 28, 1997
 COMMENTS FROM THE RESALE ESTATE INDUSTRY
 FILED WITH THE
 FEDERAL COMMUNICATIONS COMMISSION
 IN CS DOCKET NO. 95-184, MM DOCKET NO. 92-260,
 IB DOCKET NO. 95-59, AND CS DOCKET NO. 96-83

On Behalf Of
 BUILDING OWNERS AND MANAGERS ASSOCIATION, INTERNATIONAL
 INSTITUTE OF REAL ESTATE MANAGEMENT
 INTERNATIONAL COUNCIL OF SHOPPING CENTERS
 NATIONAL APARTMENT ASSOCIATION
 NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS
 NATIONAL MULTI HOUSING COUNCIL
 NATIONAL REALTY COMMITTEE

* * *

II. COMMISSION-MANDATED ACCESS TO PRIVATE PROPERTY VIOLATES THE OWNER'S FIFTH AMENDMENT RIGHTS. Any attempt by the Commission to compel the owners of multi-unit building to allow access to, and occupation of, their buildings by third-party telecommunications providers and their facilities would violate the owners' rights under the Fifth Amendment. Involuntary emplacement of wires would be "taking" within the meaning of the Fifth Amendment subject to the requirement for compensation.²

For the Commission to mandate access for telecommunications providers' cables in and on private buildings would be just as unconstitutional as the New York statute that the Supreme Court held to be unconstitutional because it permitted TelePrompTer to run its coaxial cables in and on Mrs. Loretto's apartment building in New York City. See Loretto v. TelePrompTer Manhattan CATV Corp., 458 U.S. 419 (1982).

A. 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," 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).³

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 the Commission notice 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

² As the Court said in Ramirez de Arellano v. Weinberger, 240 U.S. App. D.C. 363, 387 n.95, 745 F.2d 1500, 1524 n.95 (1984) (en banc), vacated on other grounds, 471 U.S. 1113 (1985), "the fundamental first question of constitutional right to take cannot be evaded by offering 'just compensation'."

³ 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 this 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.

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 Commission-mandated access to private property cannot be avoided by requiring the telecommunications 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. Natl. 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 the Commission cannot prescribe a nominal amount as compensation for access — the affected property owner is constitutionally entitled to compensation measured against fair market values. See U.S. v. Commodities Trading Corp., 339 U.S. 121, 126 (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 impingement's on large numbers of highly diverse commercial and residential properties something that either the Commission or the courts are ready to handle?

III. CONGRESS DID NOT GIVE THE COMMISSION POWER TO COMPENSATE OWNERS FOR TELECOMMUNICATIONS CABLE EMPLACED ON THEIR PROPERTY WITHOUT THEIR CONSENT.

A. Congress Did Not Give the Commission the Power of Eminent Domain. As the D.C. Circuit made clear in Bell Atlantic, supra, the Congress did not confer the power of eminent domain on either the Commission or its regulatees. Indeed, even in the former Post Roads Act,⁴ Congress itself made no attempt to confer such authority on telecommunications providers. In City of St. Louis v. Western Un. Tel. Co., 148 U.S. 92, 13 S.Ct. at 488-89 (1893), the Court made it perfectly clear that even Congressional authorization of carriers' use of public rights-of-way did not carry with it the power to take non-federal property without compensation. See Western Un. Tel. Co. v. Pennsylvania R.R., 195 U.S. 540 (1904), citing Western Un. Tel. Co. v. Ann Arbor Ry., 178 U.S. 239 (1900).

Where a taking of real property for public uses is involved, the usual procedure is for the Department of Justice to initiate judicial proceedings at the request of the agency pursuant to 40 U.S.C. § 257 or § 258a in a U.S. district court under 28 U.S.C. § 1358. Commenters have found no other section of the U.S. Code that would authorize the Commission to deviate from the prescribed procedure.

B. Congress Did Not Give the Commission Implied Authority to Expose the Government to Fiscal Liability in the Court of Federal Claims. The Commission's lack of explicit statutory authority to take private property cannot be rectified by a reliance on implied authority. The courts have long interpreted statutes narrowly so as to prohibit federal officers and personnel from exposing the Federal government under the Tucker Act, 28 U.S.C. § 1491(a), to fiscal liability not contemplated or authorized by Congress. Since the Constitution, Art. I, §§ 8 and 9, assigns to Congress the exclusive control over appropriations, the courts have required a clear expression of intent by Congress to obligate the Government for claims which require an appropriation of money, such as an award of just compensation in the instance of a taking on private property for public use as required under the Fifth Amendment to the Constitution.

The D.C. Circuit in Bell Atlantic, supra, declared that where an administrative application of a statute constitutes a taking for an identifiable class of cases, the courts must construe the statute to defeat such constitutional claims wherever possible. The court further made clear that such a narrow construction of the laws is designed to prevent encroachment on the exclusive authority of Congress over appropriations. In so doing, the court rejected the traditional deference accorded to administrative agency interpretations as required by the Supreme Court in Chevron v. N.R.D.C., 487 U.S. 837 (1984), on the grounds that such deference would provide the Commission with limitless power to use statutory silence or ambiguity on a particular issue to create unlimited liability for the U. S. Treasury.

⁴ The Post Roads Act of 1866, R.S. 5263, *et seq.*, as amended, formerly classified to 47 U.S.C. §§ 1 *et seq.*, was repealed by the Act of July 16, 1947, 61 Stat 327.

In fact, the legislative history of Section 621(a)(2) of the 1984 Cable Act, 47 U.S.C. § 541(a)(2), allowing cable operators to use — upon payment of defined compensation — compatible utility easements across private property, shows that Congress had not intended to give the Commission power to mandate access to multi-unit buildings generally. In 1984—the House deleted from H.R. 4103, as reported, the section of the cable bill that would have directed the Commission to promulgate regulations guaranteeing cable access to multiple-unit residential and commercial buildings and trailer parks.

In Media General Cable of Fairfax v. Sequoyah Condominium, 991 F.2d 1169 (1993), *aff'g* 737 F.Supp. 903 (E.D. Va. 1989), the Fourth Circuit refused to extend Section 621(a)(2) to the installation of cable wires in compatible private easements in common areas of a condominium. Such a construction, the court said, joining the Eleventh Circuit's view earlier in Cable Holdings, infra, would make Section 621(a)(2) equivalent to the section of the bill that became the 1984 Cable Act that Congress deleted. The court went on to agree that, under such facts, Section 621(a)(2) would be indistinguishable from the New York statute in Loretto, Id. at 1175. The Fourth Circuit also recognized that it had a duty to "avoid any interpretation of a federal statute which raises serious constitutional problems or results in an unconstitutional construction." *Id.* at 1174-75.

Other courts have also narrowly construed Section 621(a)(2) of the Cable Act. In Cable Holdings v. Georgia v. McNeil Real Estate Fund, 953 F.2d 600 (11th Cir. 1992), *reh'g en banc denied*, 988 F.2d 1071 (1992), *cert. denied*, 506 U.S. 862 (1992), which raised the issue of a cable franchisee's right to access privately owned residential rental property, the Eleventh Circuit Court held that unless Congress provided for a taking under the Fifth Amendment "with the clearest of language", the court would not construe the statute in a manner which raised such constitutional issues. Where the language of Section 621(a)(2) regarding use of private easements by cable franchisees was ambiguous, the court construed it as requiring access to privately owned easements only in cases where private rental property owners had generally dedicated such easements to public use. The court, citing the long-standing canon governing judicial interpretation of statutes so as to avoid raising constitutional issues, determined that such an alternative interpretation would avoid raising the Fifth Amendment takings issues which were implicated in this case.

Similarly, in Cable Investments v. Woolley, 867 F.2d 151 (1989), the Third Circuit, in reaching a decision on issue of whether the Section 621(a)(2) effected a taking, found Congress had considered and rejected a provision that would have required access to privately owned multi-family buildings or trailer parks for purposes of installing cable wiring, thereby effecting a taking for which just compensation would be required. The court held that where Congress specifically considered a mandatory access provision and such provision was deliberately omitted in the final version of the Cable Act to avoid a taking, there was no 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. CTF Associates, 33 F.3d 1068 (1994), the Ninth Circuit, following Woolley, reversed the trial court's application of Section 621(a)(2), because 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.

Given the lack of any clear intent by Congress to provide for takings in an area where Congress, as shown in the legislative histories of the 1984, 1992, and 1996 Acts, has been sensitive to such issues, courts are unlikely to uphold the authority of the Commission to promulgate any rules on inside wiring that will effect a taking of private property, thereby subjecting the Government to liability for just compensation.

The general rule on implied takings is similarly given full effect in Exec. Order 12630, 5 U.S.C. § 601n (1988). Executive Order 12630 ("Governmental Actions and Interference with Constitutionally Protected Property Rights") requires executive department agencies to review all federal proposed rulemakings, final rulemakings, legislative proposals, and policy statements that, if implemented, could effect a taking under the Fifth Amendment, in order to protect the U.S. Treasury against unnecessary claims for just compensation. "Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings," published by the Attorney General in June 1988 to implement such Executive Order, requires subject federal agencies to conduct a predecisional Takings Impact Analysis (TIA). The TIA, in part, requires both an assessment of whether the rule or policy in question would effect a taking and also an analysis of alternative policies or rules that would be less intrusive on the rights of private property owners. See generally CIT Group v. U.S., 24 Cl. Ct. 540, 543 (1991).

Section V of the Attorney General's guidelines contains an analysis of "the general principles and assessment factors which inform considerations of whether a takings implication exists". Op. cit. at 11. The guidelines warn that "as a general rule where a physical occupancy exists no balancing of the economic impact on the owner and the public benefit will occur in the taking analysis." Id. at 13, citing Loretto in App. at 6.

C. Any Commission Attempt to Condemn Private Property Would be Unlawful under the Anti-Deficiency Act. Even if the Commission had congressional authorization to effect a taking in this instance, any such taking would be unlawful under the Anti-Deficiency Act because Congress has not appropriated funds to compensate property owners. The Anti-Deficiency Act, as codified in part at 31 U.S.C. § 1341, provides that no officer or employee of the United States Government may

(A) make or authorize an expenditure or obligation exceeding an amount available in appropriation or fund for the expenditure or obligation; or

(B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

Id. A copy of that section is printed full as Attachment I hereto.

The purpose of the Anti-Deficiency Act is to keep all governmental disbursements and obligations for expenditures within the limits of amounts appropriated by Congress. Since the Act applies to "any officer or employee of the United States Government," it applies to all branches of the federal government, legislative and judicial, as well as executive. See 27 Op. At'y Gen. 584, 587 (1909) (applying the Act to the Government Printing Office). The Comptroller General of the United States has interpreted the term "obligations" broadly and has opined that actions under the Anti-Deficiency Act include not just recorded obligations but also "other actions which give rise to Government liability and will ultimately require expenditure of appropriated funds." 55 Comp. Gen. 812, 824 (1975). The Comptroller General has set forth as examples of such other actions those which "result in Governmental liability under clear line of judicial precedent, such as through claims proceedings.

Furthermore, the Comptroller General has said that violation of the Act does not depend on an official's wrongful intent or lack of good faith since such a requirement would in effect make the Act null and void. The extent to which there are factors beyond an agency's control in creating obligations which exceed its appropriations level is considered by the Comptroller General in determining violations of the Act. The greater the control that the agency possesses with respect to such obligation, the greater the risk of violating the Act.

The courts have relied on potential violations of the Anti-Deficiency Act in narrowly construing actions by executive officers that might otherwise have exposed the government to unlimited liability. Only weeks ago, the Supreme Court affirmed the Comptroller General's interpretation that the Anti-Deficiency Act is violated where a government agency enters into indemnity contracts, either express or implied in fact, which expose the Government to unlimited liability. In Hercules v. U.S., 64 U.S.L.W. 4117, 4120 & n.9 (1996), the Court rejected the government contractor's argument of an implied-in-fact indemnity contract, in part on the grounds that the Anti-Deficiency Act bars any government official from entering into contracts for which no appropriations have been made (as in the case at issue) or for which payment exceeds existing appropriations. The Court also reiterated that contracts for such open-ended liability have been repeatedly rejected by the Comptroller General.

Certainly, a rulemaking which exposes the Government to the inevitable filing of claims founded in the Fifth Amendment subjects the Government to the kind of open-ended liability that has been rejected by the Comptroller General and the courts as a violation of the Anti-Deficiency Act and subject to precautionary procedures under Executive Order 12630.

IV. AS A MATTER OF POLICY, THE COMMISSION SHOULD NOT ATTEMPT TO REGULATE ACCESS TO PRIVATE PROPERTY. There are sound and persuasive reasons why the Commission should not attempt to regulate access to private property, even if it had jurisdiction to do so. First, there is a thriving, competitive market for real estate in this country, which is fully capable of meeting, and is responsive to, the needs of building occupants. Second, Commission regulation would interfere with the on-the-spot management needed to effectively address safety and security concerns, assure compliance with building and electrical codes, coordinate the needs of different tenants and service providers, and in general oversee the efficient day-to-day operations of hundreds of thousands of buildings.

A. Commission Intervention is not needed because the market is already providing building occupants with the services they need. Owners, managers, and investors in the nation's commercial and

residential buildings already are feeling the reverberations of the telecommunications revolution. Owners are constantly reminded by market demands (as well as a barrage of industry educational materials) that the failure to grant access to the most-advanced telecommunications will cost them dearly in lost tenants and lost opportunities.

1. Telecommunications is a Factor in Building Marketability. By way of background, businesses typically locate their offices in buildings, and because many businesses depend on access to cutting-edge communications technology, real estate necessarily functions as a part of the on- and off-ramp used by business to travel the information highway. Since technology is constantly changing and, with it, building users' (i.e., our tenants') demand for new products and services, buildings must be equipped to accommodate today's - and tomorrow's - talcum traffic. The decisions that any building owner (commercial or residential) makes regarding the building infrastructure are made within the context of what will make the real estate marketable to the best possible tenants, those that pay market rents and stay for predictable sustained terms.

In the regulated monopoly-controlled markets of the not-too-distant past the economics and management of telecommunications services in the real estate context were simple, if unexciting. Risks to building owners were limited but so were opportunities to make investments in telecommunications infrastructure that could yield competitive advantages. When tenants needed telephone installation or maintenance services, the Bell companies took care of it. The provision of cable television services was similarly straight-forward and predictable. These monopoly providers were common carriers with social responsibilities factored into their rates. In return for providing universal service and other societal benefits, the rules of the market place did not apply to our dealings with their representatives. In fairness, many of the risks of a competitive environment were also lacking. For example, when wire management and ownership were in the hands of one provider there was little reason for building owners to be concerned about issues of access, security, and control - issues with considerable liability consequences to owners of real property. The telephone company was a benign and complementary part of the building infrastructure. Everything in the phone closet belonged to them and was essentially their responsibility.

As the Commission is well aware, this picture has changed radically. Consequently, the market is now generating its own ground rules in response to a new breed of competitive telecommunications providers. These providers are not weighted down by the responsibilities imposed on monopoly carriers, nor do they provide one-stop shopping for building owners seeking services (and wire management) for their buildings. The efforts of competitive access providers (CAPS) to reach untapped (but extremely lucrative markets) for telecommunications services has imposed new risks but also new opportunities for building owners. An owner's failure to work within the new rules of the marketplace results not in monetary fines or sanctions but in the far graver prospect of losing market share in a highly competitive industry.

Three or four years ago, many owners had no experience whatsoever with these "CAPS." By today, however, it is not uncommon for commercial office building owners in major metropolitan markets to find themselves facing some variation of the following scenario:

The owner of an office building is contacted during the same week by representatives from four different telecommunications service providers with news that each has just reached an agreement to provide telecom services (telephony, cable and wireless) to major ("anchor") tenants throughout the building. The building owner is advised that installation of the new systems on eleven floors must begin within the next few days and will require access to a variety of "common areas" throughout the building, including already crowded riser space.

Though the building owner has received short notice of the work order - and, in fact, only now learned of the contracts between the four service providers and building tenants - the real estate owner fails to comply with these requests (and to sustain much of the associated costs and liabilities associated with such building access) at his or her own economic peril.

While an initial reaction to this kind of scenario may be nostalgia for the days of monopoly providers, building owners are recognizing opportunities in the face of these new risks and challenges. In reaction to (or in preparation for) situations like these, building owners have felt considerable pressure to manage their building's infrastructure to allow for maximum access to their buildings while, at the same time, retaining traditional control over the terms of entry and use of their real estate asset.

From the perspective of the building industry, these new telecom service providers are a "new" form of tenant service only in the sense that they are different in kind from monopoly providers of the past. In fundamental respects they are comparable to other service companies seeking access to the tenant/customer base in which the owner has invested thousands, if not millions, of dollars.⁵ Like other merchants in a building complex, telecom companies seek access to

⁵ Attached as Attachment 2 are selected charts excerpted from the February 5, 1996, issue of Local Competition Report. These charts illustrate the tremendous growth in this deployment of fiber optic cable by competitive access providers in the last two-three years. Of particular interest in the

markets within the building for a profit-driven enterprise. If the building is not or cannot be made a profit center for the telecom company, they will bring their services elsewhere. As in the case with such diverse services as restaurants, retailers, or even laundry services, they are attracted to a particular building only when there is a sizable, essentially captive customer base. These merchants recognize that but for the landowners marketing and management success, this potential customer base would not have collected in large (and profitable) numbers in that building. Indeed, they might have sought office or residential space in a different urban center. The service providers - including telecom providers - as the witting beneficiaries of the owner's core business skills, including his or her ability to provide secure, well-managed office, retail or residential space.

2. Owners act on market demand for optimum access. Building owners are well aware of this market dynamic and they welcome the opportunities it presents. Indeed, owners and managers of America's real estate increasingly are focused on improving wire management within buildings and targeting investments in what is sometimes called "smart building" technology. The highly competitive office market demands no less of owners, who by nature are inclined to satisfy their tenants by providing ample access to the expansive array of telecommunications products and services needed to facilitate information flows. In acknowledgment of this investment prerequisite, a number of real estate owners have even devise systems on a building-specific basis that provide cabling (copper or fiber optic) that is accessible to any and all telecommunications providers; this approach is one of the most cost-effective means of ensuring that tenants have the widest possible access to the ever-proliferating number of service providers.

For example, the thirty-one-story, 400,000-square-foot office building located 55 Broad Street in lower Manhattan used to be a "hollow headstone for the Eighties ("If you wire it, will they come?") Metropolis, October 1995 p. 35). It was vacant for more than five years following the bankruptcy of its anchor tenant in the late 1980s. New York City's moribund downtown real estate market left little hope that the building could ever return to life again. ("Real Estate" The New York Times, Wednesday, January 10, 1996). That was before it was retrofitted by its owner (at a cost of more than fifteen million dollars) with fiber optic and high-speed copper wire as well as ISDN, T-1, and fractional T-1 lines to enable Internet, LAN and WAN collectively; voice, video and data transmissions; and satellite accessibility. The building owner suggests that prospective tenants need only "plug in," and this message has been getting the attention of potential tenants as far away as the West Coast ("...high tech building a plug for downtown plan" Crain's New York Business, October 16-22, 1995).

Dubbing the building the New York Information Technology Center (ITC), the owner has highlighted a trend in technology investments by building owners aimed at attracting up and coming high tech companies. It is, in fact, part of a larger plan by the city to promote the lower Manhattan financial district as silicon alley." ("Trendlines: Smart Buildings." CIO, January 1996). Copies of articles demonstrating the high level of interest in this new breed of office building are attached hereto. Perhaps the most persuasive argument, that these kinds of investments will pay dividends, is the success the ITC's owner has had in renting space. According to the owner's Chief Operating Officer, six months earlier "you couldn't give this building away" ("Silicon Alley- puts NYC atop cyber world", Boston Globe, page 1). By January it was a "deal a week," and the owner expects the building to be fully leased by the end of the summer of 1996. (The New York Times, supra).

Building owners are developing showcase buildings on the high-end commercial market that will not only afford tenants access to the latest telecommunications technologies, but do so in an efficient, integrated manner. Other technologies that are being built into such buildings are videoconferencing facilities, speech recognition devices to enhance security, and software and electronics that allow tenants to reduce their costs through more efficient use of electrical and HVAC systems.

Of course, many other building owners prefer not to get into the business of owning or operating telecommunications facilities. But this does not mean they ignore the occupants' needs. The simple facts are that commercial tenants have considerable leverage when negotiating lease terms and that no commercial building owner will refuse a technically and financially feasible request from a tenant that conforms to the owner's business plan for the property. Even during the lease term, it is important for building owners and managers to keep their customers satisfied. Happy tenants are more likely to renew their leases and less likely to break them - and building operators have a strong incentive to reduce the administrative costs and disruption that accompany high turnover rates.

Access to efficient telephone and cable systems is no less important to occupants of multi-unit residential buildings. Residents of coops, apartments buildings and condominiums not only demand these services for home entertainment; they demand these services as part of the trend toward telecommuting. Meeting these tenants needs is also a matter of financial survival for building owners and managers. Attachment 4 is a segment of a report funded by NMHC and

last chart, which shows that between 1994 and 1995 Teleport Communications Group increased the number of buildings it serves from 1,223 to 3,100, an increase of 250% in only one year. Clearly, building operators are not standing in the way of competition in telecommunications.

NAA entitled "The Future of the Apartment Industry." This recent report notes the many changes that information technology is bringing to the apartment industry. For example, the report notes that some buildings already use cable television to allow residents to see who is buzzing them at the front door of the building. Buildings also offer internal medical or emergency alert lines so the front desk can take immediate action. The report also discusses the increase in the number of Americans who work at home and the implications this has for apartment owners. Ever larger numbers of apartment residents are operating fax machines and personal computers, requiring additional telecommunications capacity, even if they are not running businesses out of their apartments.

In sum, the industry is aware of the importance of telecommunications in the home and the office, and is already acting to address it out of its own self-interest. There is no evidence that mandating access or regulating the service packages provided by owners and operators of real property is necessary.

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 services 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.

1. Safety considerations: Code compliance. Building owners are the front-line 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 the Commission 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. See Declaration of Lawrence G. Perry, AIA, Attachment 5 hereto. In addition, areas of greater hazard (such as storage rooms) and critical portions of the egress system (such as exit access corridors and exit stairway") 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 ten 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 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. Commission regulation 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 buildings 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.

Therefore, the commenting associations submit that the best approach to the issues raised in the NPRM is to allow building owners to 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 Commission 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 Commission 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. The Commission cannot 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.

In short, the associations' members are fully capable of meeting their obligations to their tenants and residents. As keen competitors in the marketplace, they will continue to make sure they have the services they need. It is unnecessary for the government to interject itself in this field, and any action by the government is likely to prove counterproductive.

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

In the Matter of)	IB Docket No. 95-59
)	DA 91-577
Preemption of Local Zoning Regulation of Satellite Earth Stations)	45-DSS-MISC-93

**DECLARATION OF STANLEY R. SADDORIS
IN SUPPORT OF COMMENTS OF
NATIONAL APARTMENT ASSOCIATION,
BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL,
NATIONAL REALTY COMMITTEE,
AND INTERNATIONAL COUNCIL OF SHOPPING CENTERS**

I, Stanley R. Saddoris, declare as follows:

1. I submit this Declaration in support of the Comments of the National Apartment Association; the National Building Owners and Managers Association International; the National Realty Committee; and the International Council of Shopping Centers. I am fully competent to testify to the facts set forth herein, and if called as witness, would testify to them.

2. I am the Senior Vice President, Director of Operations for General Growth Management, Inc., and I have served in this capacity since July 1981. General Growth operates 105 shopping centers across the country and is the second largest owner and operator of shopping centers in the United States. I have a total of 27 years of experience in the management and operation of real estate.

3. In my capacity as head of operations for General Growth, I have become very familiar with issues related to the installation and operation of satellite systems in shopping malls. The access and use of satellite network systems is important for us, as well as our tenants for several reasons. A number of the national retail chains that lease space in our shopping centers use satellite communications extensively to transmit data to and from their national headquarters, as well as for financial services. The primary use of satellite communications is for the reporting of sales and inventory data on a daily basis. Satellite networks are also used to conduct credit card and check verification by retailers. Some national retailers use the satellite network for video conferencing to either conduct meetings or training sessions. The regional and local tenants in our malls also rely on satellite network systems for the same purposes, although to a lesser degree. General Growth also uses the satellite network technology to communicate with our mall management teams to communicate data and information. General Growth and our tenants have all benefitted from this technology because it has increased the speed of communications, and reduced communications expenses, as well as increased revenues.

4. The use of satellite network communications for the purposes described above began to grow sharply about three (3) years ago. More and more of our tenants sought permission to install antennas and run cable connections throughout the mall.

We were concerned that our roofs would become a field of satellite dishes and a number of concerns had to be considered.

5. Our primary concern regarding the installation and use of satellite network systems on our buildings centers on management, structural integrity, maintenance, safety, liability, security and costs. In some cases aesthetics has been an issue, but with the new technology in satellite dish construction, they have become smaller and weigh less. We still, however, want to reserve the right as to placement of a satellite dish on our roofs to prevent a visual distraction. Our biggest concern, however, is with controlling the integrity of the building, management, liability, structural damage, and maintenance costs, and protecting the safety and personal security of our employees, our tenants and their employees, and our customers. All of these concerns require that we control access to our property and the placement of satellite network equipment

6. The installation of a satellite dish on a shopping center roof can create serious structural, maintenance and property damage if not installed correctly. As an example, penetrating a roof to connect a cable to a satellite dish and a user's location can lead to leaks and water damage if the penetrations are not done correctly. Maintenance of the roof is one of the largest single maintenance concerns we have. Large flat roofs are prone to leak and deteriorate at a faster rate if not protected by good management techniques and preventive maintenance. The consequences of causing a leak by improper roof

penetration can be a serious issue, as the leaks may not be immediately detected, and may cause damage to the roofing material, the building structure, and other property damage. The responsibility for repairing such damage is the responsibility of the building owner. We are also concerned about the proliferation of satellite network equipment on roofs because of the increase in foot traffic to service and install such equipment. Roofs are not designed to carry a lot of equipment requiring penetrations and a lot of foot traffic. Any increase in these two (2) areas causes an increase in maintenance problems, and can cut the useful life of the roof in half. For these reasons, we require that all satellite dish and cabling installation be performed by certified personnel and in the presence of one of our staff members. We also prohibit the use of any satellite dish mounting system that requires penetration of the roof to stabilize the dish. Improperly installed satellite dishes and accompanying supports, if not done properly, can cause serious damage to a roof during a wet storm. For this reason, we have developed installation specifications that must be followed by any satellite dish installation.

7. We are also concerned about the integrity of our buildings. We are concerned primarily with contractors for tenants who drill holes in walls, ceilings, and the roof to run the cable connection from their store to the satellite dish. Local and national fire codes require that certain building assemblies, including walls and floors, provide specified levels

of fire resistance based on a variety of factors, including type of construction, occupancy classification building size, etc. Breaches of such fire codes have been shown to be a frequent contributor to smoke and fire spread. Only trained and knowledgeable people can determine whether the fire code permits a particular wall to be breached or how a hole should be filled in a wall that may be breached.

8. Preempting lease restrictions and building codes regarding antenna installation would raise a number of management issues. We maintain strict access to the roofs of our buildings. Contractors must sign in before being allowed to gain access to the roof. Also, unless we are familiar with a particular service contractor, we require them to be accompanied by one of our staff members while on the roof or in the building. In addition, our roof entrances are locked at all times. These rules apply to all contractors wanting to gain entrance to our roof. This could include heating, ventilating, and air conditioning contractors to service tenant and mall units, satellite dish — an antenna service personnel and installers, or electricians servicing or troubleshooting the electrical system for a tenant or the mall. Generally speaking, out of our concerns for the safety of our tenants and our customers and to limit our and our tenants' liability in cases of an incident, we try to limit the number of service personnel who have access to our building and to our building systems and to control and monitor their activities. As an example, as much as possible, we generally contract with only

one cleaning crew and one HVAC contractor for the common areas and the nondepartment store tenants. We encourage our tenants to use those contractors that are on our approved contractor list to help reduce the number of contractors needing access and negotiate to include such requirements in our leases with our tenants. Allowing tenants to install their own antennas at will makes it much more difficult and costly to limit and control such access.

9. Out of concern for such issues, we have developed a leasing policy to regulate and limit the number and use of satellite dishes on our roofs. If a tenant can show that it has special needs or requirements or that its level of use warrants its own satellite dish, we will allow a tenant to install such equipment. They must, however, install it based on our approval of the location and by our specific specifications. We also require that any roof penetrations be completed by the mall roofing contractor. To assist us in controlling the number of satellite dishes on our roofs, we have contracts with two (2) national service providers that offer retailers satellite network communications to facilitate the transmission of data and services. If a tenant can be serviced through either of the two (2) national service providers, we ask that they do so. This reduces additional satellite dishes on the roof and protects the integrity of our building systems.

10. This process is the same that we use in leasing space and other rights to our tenants and other service providers,

i.e., negotiations and agreements between parties in a competitive market regarding the space and services to be provided and leased and the allocation of the obligations, limitations, rights, and costs between the parties. Service providers compete for the right to provide service in our centers, and like our tenants and other service providers, are chosen based on the nature, quality and cost of the service provided and must meet our requirements regarding financial stability, insurance, etc. Our policies regarding the regulation and limitation of antennas are a subject of negotiations with our tenants and are reflected in our lease agreements with them and the rules and regulations of the center. Under our standard policy, tenants are free to chose between the competing designated providers, and, as beneficiaries of the competition between them, usually are able to obtain services from them at an equal or lower price than they could elsewhere on their own. Thus, there is competition between service providers at two levels. First, they compete to become designated providers, and then they compete to sign up and provide services to individual tenants. Our tenants benefit from the competition in terms of price and service, while avoiding the disruption and costs that would occur if the owner did not have the ability to control his property.

11. Our agreement with satellite service providers is very similar in terms to our usual retail tenant leases. Our retail leases provide for a base rent, plus a percentage of tenants'

revenues over a specified break point. We treat satellite dish space in the same way, by changing a small base rent plus a percentage of revenue once enough retailers are using the antenna to cover the satellite provider's basic costs. If we did not provide satellite service in this way so as to recover the costs associated with the installation, maintenance, and use of the antennas, all of our tenants, whether or not they use satellite services, would have to pay for the additional maintenance and management costs resulting from the presence of satellite dishes through their share of the Common Area Maintenance ("CAM") expenses paid by all tenants, based on their gross leasable area in addition to their monthly rent. In other words, by leasing antenna space, we reduce the Common Area Maintenance expenses of all tenants, and allocate expenses arising from the antennas only to those tenants that use the satellite services. This is particularly beneficial to small, local, and regional retailers who do not rely on satellite communications as extensively as national tenants.

12. I am unaware of any complaints from tenants arising out of our satellite dish network policies. They understand our concerns and recognize that we are trying to hold down everyone's costs and maintain order and security in the center. We make every effort to assure that the needs of all our tenants are met and to accommodate tenants who have special needs in terms of satellite network communications. It is in our economic

interests to accommodate them in any way possible to increase their sales and their profits.

13. Because of the issues I've raised, I am very concerned over the prospect of FCC preemption of our leases. Allowing tenants to set up satellite dishes wherever they want, without any control or supervision by our personnel, would present serious safety, maintenance, security, management and cost allocation problems that would far outweigh any benefit to such tenant rights.