

1 tenants, but if the rule were to say to the providers
2 of the satellite service, "You have the right to come
3 onto any -- onto rental property and affix your dishes
4 and affix your associated hardware," then you've got
5 a Loretto case.

6 But here is what you had is simply an
7 entitlement of the tenant, who is already there by
8 permission and by contract, and it's he who decides,
9 not the provider of the video service, it's the tenant
10 who decides to bring this hardware and affix it to his
11 balcony. And that's why there cannot be a per se
12 taking in this case.

13 Your Honor, unless there are further
14 questions, I will yield --

15 THE COURT: Well, are you asking us to
16 decide whether there is a taking? Whether this
17 statute is --

18 MR. CHRISTOPHER: We are not. They are.
19 They have asked you --

20 THE COURT: Are you asking us to decide
21 there would be no taking under this regulatory regime?

22 MR. CHRISTOPHER: That's a very good
23 question, Your Honor. I mean, the Petitioners have
24 raised that issue.

25 THE COURT: And you defended on the --

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1 MR. CHRISTOPHER: I think the answer is
2 yes, Your Honor, because I --

3 THE COURT: You defended on the basis that
4 this is not a taking.

5 MR. CHRISTOPHER: Yes. It seems to me
6 that this is a case sort of like, I suppose, Florida
7 Power. There have been a lot of courts of appeal
8 cases in which regulations have been challenged as
9 being an unconstitutional taking, and the courts of
10 appeals have said, "We have jurisdiction to decide
11 this issue." And either yes or no, there is or is not
12 a taking.

13 Honestly, I didn't follow your line of --

14 THE COURT: Not unless it's necessarily a
15 taking, right?

16 MR. CHRISTOPHER: I'm sorry, sir.

17 THE COURT: Do you mean not unless it's --

18 MR. CHRISTOPHER: There's not a per se
19 taking. That's correct.

20 THE COURT: But you agree, do you not,
21 that we don't have any jurisdiction to decide whether
22 this regulation amounts to a taking of private
23 property?

24 MR. CHRISTOPHER: I'm sorry, Your Honor.
25 I don't understand that. I don't understand -- I

1 don't know this Court could not do what the 11th
2 Circuit did in the Florida Power case, which was, as
3 it turned out, wrong. It was reversed by the Supreme
4 Court.

5 But the 11th Circuit in the Florida Power
6 case, the poll attachment cases, said this is a
7 taking. And I -- their jurisdiction to do that was
8 never challenged, never questioned, and so I don't
9 understand your concern here.

10 THE COURT: Well, you know, you rely on or
11 you've mentioned Bell Atlantic. What do you do with
12 footnote 1 of Bell Atlantic?

13 MR. CHRISTOPHER: Your Honor, I don't have
14 the decision printed out right here at the table. Can
15 you read that to me?

16 THE COURT: I'll read it to you.
17 "Petitioner's brief in places appears to argue that
18 even if the Commission had the authority to impose
19 physical collocation, we must, nevertheless, decide
20 whether that imposition inflicted a taking. In fact,
21 we have no power to do so," citing the Pressault v.
22 ICC case. So we don't have jurisdiction to make that
23 distinction.

24 MR. CHRISTOPHER: That may well be, Your
25 Honor. I -- all I can say, I have to punt on that and

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1 say it wasn't briefed, and --

2 THE COURT: It's jurisdictional.

3 MR. CHRISTOPHER: Yes.

4 THE COURT: You may punt, but we can't,
5 unfortunately.

6 MR. CHRISTOPHER: Well --

7 THE COURT: Okay.

8 MR. CHRISTOPHER: All right, Your Honor.
9 Thank you.

10 ORAL ARGUMENT OF RICHARD P. BRESS, ESQ.

11 ON BEHALF OF INTERVENORS

12 May it please the Court, my name is
13 Richard Bress. I represent DIRECTV. I'm here today
14 to present argument on behalf of all of the parties
15 who have intervened on behalf of the Commission in
16 this proceeding.

17 The Intervenors, as providers and
18 suppliers of equipment for satellite and terrestrial
19 wireless video programming services, are uniquely well
20 placed to address the context behind Section 207 as it
21 affects the scope of that section.

22 The video programming market has for a
23 long time been a concentrated market and been
24 dominated largely by the cable industry. Among other
25 things, state and local restrictions, restrictions in

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1 homeowners association rules and in leases, that have
2 forbid or restricted the use of satellites and other
3 sorts of dishes.

4 THE COURT: Can I ask you some -- one
5 technical question -- and maybe it might lead to a few
6 more -- with respect to the installation of the
7 dishes. If you have an apartment building where --
8 suppose the dish has to be aimed into the southwest
9 sky, right? And the apartment building obviously has
10 -- if it's square, no restrictions around it, it can
11 -- one side can aim into the southwest sky.

12 But the opposite side can't do that. The
13 people can't put out on their little balcony a little
14 satellite dish that gets there. What do they do?

15 MR. BRESS: Your Honor, they -- under
16 current technology, they would be unable to receive
17 DBS signals. Some of the other wireless technologies
18 that are used here are actually point-to-point signals
19 that don't require access to the southwest sky.

20 THE COURT: But for DIRECTV --

21 MR. BRESS: For DIRECTV, they would be out
22 of luck under this --

23 THE COURT: So why isn't that
24 discrimination against tenants? Only the tenants on
25 the southwest corner get to install their dishes.

1 MR. BRESS: Your Honor, DIRECTV did argue
2 in these proceedings that the Commission should have
3 gone farther than it did.

4 THE COURT: And require one to be
5 installed on top of the building that would connect
6 with everybody or --

7 MR. BRESS: Well, to require landlords to
8 allow their tenants to place equipment in common
9 areas. The Commission declined to go that far in this
10 rule.

11 THE COURT: Is it also true that in places
12 like where there's close -- where there are high rises
13 and they are close together -- for example, in New
14 York and Chicago and some of the major cities -- that
15 even people on the -- to take the -- even people
16 residing in apartments on the southwest are blocked by
17 other buildings?

18 THE COURT: That can happen, Your Honor.
19 It could raise, I take it, an issue not that
20 dissimilar from the Sears Tower case.

21 (Whereupon, a two-minute gap
22 exists between the end of
23 Tape 1 and the beginning of
24 Tape 2 on the tapes recorded by
25 USCA.)

1 MR. AMES: On page 237 of the Joint
2 Appendix -- no, 239, I'm sorry -- and then following
3 240, 241, and 242, we should see some photographs on
4 240 and 241.

5 Right in front of the photographs is a
6 letter -- this was attached to our comments below --
7 describing a situation where a resident had attached
8 a satellite dish by means of nailing it onto a two by
9 four, sticking the two by four out the window, and
10 then putting a counterweight on the other side. And
11 that's what the photographs show, and you can see it's
12 up on the third floor.

13 THE COURT: Right.

14 MR. AMES: And --

15 THE COURT: Safety exception?

16 MR. AMES: Beg your pardon?

17 THE COURT: Does that fall within the
18 safety exception?

19 MR. AMES: Well, it might, Your Honor.
20 The problem with the safety exception, and that leads
21 me actually to the most recent decision enforcing the
22 rule -- this is Victor Frankfort, released February 7,
23 2001, by the Cable Services Bureau.

24 The safety exception has to be very
25 clearly and plainly laid out under the Commission's

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1 rules. And what happened in Victor Frankfort was that
2 Frankfort had not properly grounded his satellite
3 dish, and the homeowners association objected.

4 The city inspector came by twice and said,
5 "It's not properly grounded. If you don't ground it
6 properly, and lightning strikes, it's going to blow up
7 your television." He was fined by the homeowners
8 association, among other reasons, because he had not
9 followed the safety requirements.

10 And the association had incorporated the
11 National Electric Code. They said, "If you install a
12 dish, you have to comply with the National Electric
13 Code." The Commission, in deciding the case, said
14 that neither the grounding requirement nor the
15 comments set forth verbatim the specific requirements
16 of the National Electric Code of any applicable local
17 codes.

18 Without the language of the National
19 Electric Code and local code sections before us, we
20 cannot decide whether those sections contain clearly
21 defined legitimate safety objectives. So it's very
22 difficult for a building owner to apply that --

23 THE COURT: Give him the language.

24 MR. AMES: I beg your pardon?

25 THE COURT: Give him the language.

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1 MR. AMES: Well, that's what we have to do
2 now. But the thing is, one would think that we could
3 say you have to -- if you put up a dish you have to
4 comply with the local law, rather than identify the
5 specific sections. And --

6 THE COURT: Is your reference to page 240,
7 whatever it was, is that designed to show how ugly
8 these things can be?

9 MR. AMES: Well, aesthetics is certainly
10 an issue. But, again, if -- we're concerned that --
11 the way the rule works is that they can put one up as
12 soon as they want to put one up. They don't have to
13 give notice. We talked about economic considerations
14 earlier.

15 The Commission has issued a decision
16 saying that a \$5 permit application fee is an
17 unreasonable expense. So that if you have some kind
18 of an initial review process, a permit requirement,
19 all of that has been struck down by the Commission.
20 So that --

21 THE COURT: Let me -- aren't all of those
22 things appealable?

23 MR. AMES: They are. But, in fact --

24 THE COURT: Each of these decisions sounds
25 nutty. I mean, it sounds like you're right. It

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1 sounds like the FCC is acting in an arbitrary and
2 capricious fashion. And that doesn't make the whole
3 rule broad, but it may mean that if they have a
4 procedure that puts landlords in this position, that
5 procedure is arbitrary and capricious.

6 Or if they have a procedure that allows
7 somebody to put out a satellite dish which acts as a
8 lightning attracter, and they permit that, that they
9 ought to be overturned. So isn't the answer to that,
10 when they do something stupid like that, then appeal
11 and a court either decides it is stupid or not.

12 If you get me, I'll say it's stupid. If
13 you get somebody else, maybe they'll say it isn't.
14 But that -- isn't that the right -- why isn't that the
15 solution to this problem?

16 MR. AMES: That's all true, Your Honor,
17 except that I think the point I wanted to make was
18 that under the operation of the rule we have lost all
19 control over management of the property. And that
20 takes us, first of all, to Loretto. And, secondly, it
21 raises a whole host of state law issues and practical
22 issues that the Commission is not in a position to
23 adjudicate. And that gets to the question of its
24 authority.

25 THE COURT: Unless you can control how the

1 property -- I mean, certainly you can allow satellite
2 dishes, right? But you're saying we also have the
3 right to refuse. But under your theory, I wonder --
4 there are a lot of cases dealing with rental signs,
5 and local jurisdictions refusing to allow property
6 owners, rental property owners, to put out rental
7 signs. Right?

8 MR. AMES: That's correct.

9 THE COURT: Now, you lose, as a property
10 owner, a valuable right in that situation. Is that --
11 are those local laws takings under your theory?

12 MR. AMES: No. We're not -- but that's --
13 they're not interfering -- they're not significantly
14 interfering with the management of the property.
15 They're not creating a safety hazard because of --
16 getting back to Judge Rogers' question about the
17 safety exception, the minute one of these goes up they
18 have the right to put it up. And it stays there until
19 the FCC reaches a decision.

20 And, in fact, we have a case pending at
21 the Commission where a resident drilled through a
22 firewall and created a Fire Code violation, and it's
23 been pending for a year and a half, and without
24 resolution. So --

25 THE COURT: You can't get quicker relief

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1 in the local court?

2 MR. AMES: Once it's at the Commission,
3 they've got jurisdiction, and --

4 THE COURT: Who took it to the Commission?

5 MR. AMES: The resident. So just
6 practically speaking, it's more than just on an as
7 applied versus facial case, because by its operation
8 they have the right to put these things up, and
9 they've created, you know, the taking. It's sitting
10 out there on the deck or out the window or -- or
11 wherever immediately.

12 THE COURT: I mean, I understand the
13 Commission has exclusive jurisdiction as to certain
14 things. But does that oust the court of landlord and
15 tenant jurisdiction?

16 MR. AMES: Yes, I don't know. That's --
17 I'm not sure of the answer to that.

18 My time has expired. I'd love to stay,
19 but --

20 THE COURT: Thank you, Mr. Ames. The case
21 is submitted.

22 (Whereupon, the proceedings in the
23 foregoing matter were adjourned.)
24
25

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MATTER: BUILDING OWNERS AND MANAGERS
ASSOCIATION INTERNATIONAL, ET AL,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
ET AL,

Respondents.

DATE: March 5, 2001

I hereby certify that the attached transcription of pages 1 to 60 inclusive are to the best of my belief and ability a true, accurate, and complete record of the proceedings as recorded on tape provided to us by the U.S. Court of Appeals for the D.C. Circuit.



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