Before the
Federal Communications Commission
Washington, D.C. 20554

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

SECOND REPORT AND ORDER

Adopted: October 14, 1998 **Released: November 20, 1998**

By the Commission: Chairman Kennard issuing a statement; Commissioner Furchtgott-Roth dissenting in part and issuing a statement.

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Paragraph No.

I. INTRODUCTION

1. This *Second Report and Order* resolves the issues regarding Section 207 of the Telecommunications Act of 1996 ("1996 Act")[1] on which the Commission sought further comment in its *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking* ("*Report and Order"* and "*Further Notice*")*.*[2] Based on our review of the comments filed in response to the *Further Notice*,[3] we adopt in this *Second Report and Order* an amendment to Section 1.4000 of our rules, 47 C.F.R. § 1.4000 ("Section 207 rules"), that prohibits restrictions on over-the-air reception devices covered by Section 207 ("Section 207 reception devices")[4] on rental property subject to the other terms and conditions of our Section 207 rules. This amendment to our rules serves two federal objectives of promoting competition among multichannel video providers and of providing viewers with access to multiple choices for video programming.[5] The new amendment strikes a balance between the interests of tenants, who desire access to more video programming services, and the interests of landlords, who seek to control access to and use of their property. This *Second Report and Order* does not amend the rules to cover common property and restricted access property, as defined below, because we conclude Section 207 does not authorize us to do so.

2. In practice, under the amendment to our rules, renters will be able, subject to the terms of our Section 207 rules, to install Section 207 reception devices wherever they rent space outside of a building, such as balconies, balcony railings, patios, yards, gardens or any other similar areas. Moreover, for renters who have not leased outside rental space where a Section 207 reception device could be installed, our new rules permit the installation of Section 207 devices inside rental units and anticipate the development of future technology that will create devices capable of receiving video programming signals inside buildings. One such

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[1]Pub. L. No. 104-104, 110 Stat. 114 (1996).

[2]*See* IB Docket No. 95-59 and CS Docket No. 96-83, FCC No. 96-328, 11 FCC Rcd 19276 (rel. Aug. 6, 1996). *In re Preemption of Local Zoning Regulation of Satellite Earth Stations*, IB Docket No. 95-59, and *In re Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*, CS Docket No. 96-83, each involving Section 207, were consolidated into one proceeding.

[3]We received 33 comments and 20 reply comments in response to the *Further Notice*. We also received 1596 informal and *ex parte* comments. A list of parties filing formal comments and the abbreviations used to refer to commenters herein is attached as Appendix A.

[4]Section 207 expressly covers over-the-air reception devices used to receive television broadcast signals, multichannel multipoint distribution service ("MMDS"), and direct broadcast satellite services ("DBS"). In addition, in the *Report and Order*, we ruled that our rules implementing Section 207 should also cover: (1) any type of multipoint distribution service, including not only MMDS but also instructional television fixed service ("ITFS") and local multipoint distribution service ("LMDS"); (2) medium-power satellite services using antennas of one meter or less, even though such services may not be technically defined as DBS elsewhere in the Commission's rules; and (3) DBS antennas of over one meter in Alaska (smaller DBS antennas do not work in Alaska). *Report and Order* at paras. 28-32.

[5]*See Further Notice* at para. 6; *see also* H.R. Conf. Rep. No. 458, 104th Cong., 1st Sess. at 1 (Section 207's purpose is to "provide for a pro-competitive, de-regulatory national policy framework . . . to all Americans. . . .").

device, LMDS, is already capable of receiving signals inside buildings.[6] We find that this amendment to the rules provides video programming alternatives to as many viewers as possible within the boundaries of Section 207's language.

3. Section 207 directs us to remove restrictions on Section 207 reception devices:

> Within 180 days after the date of enactment of this Act, the Commission shall, pursuant to section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.[7]

4. Among other things, the *Report and Order* adopted rules that generally prohibit both governmental and nongovernmental restrictions that impair the installation, maintenance or use of Section 207 reception devices, unless the restriction serves a legitimate safety or historic preservation objective in a non-discriminatory manner that is no more burdensome than necessary to achieve the objective.[8] In addition, the Section 207 rules adopted in the *Report and Order* applied only to property within the exclusive use or control of the viewer where the viewer has a direct or indirect ownership interest in the property.[9]

5. In the *Further Notice*, we sought comment on the question of whether the antenna restriction preemption rules should be extended to the placement of antennas on rental and other property not within the exclusive use or control of a person with an ownership interest.[10] This would include, for instance, the question of whether Section 207 authorizes extending the Section 207 rules to (1) rental housing (e.g., apartment buildings and single family dwellings) where viewers would have possession and exclusive use of the leasehold in which Section 207 reception equipment would be placed; (2) common property -- e.g., common property within condominiums,[11] cooperatives, rental complexes or manufactured housing parks -- where viewers may have access to, but not possession of and exclusive rights to use or control, the areas where Section 207

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[6]CellularVision *Ex Parte* presentation on November 21, 1996.

[7]1996 Act, § 207.

[8]*See* 47 C.F.R. § 1.4000, Restrictions Impairing Reception of Television Broadcast Signals, Direct Broadcast Satellite Services or Multichannel Multipoint Distribution Services, and amending 47 C.F.R. § 25.104, Preemption of Local Zoning of Earth Stations.

[9]*See Report and Order* at paras. 49-52.

[10]*Further Notice* at para. 63.

[11]With regard to condominiums, the term "common property" herein refers to the common elements in which the condominium owner owns an interest with other condominium owners but over which the owner does not exercise exclusive use or control. Our Section 207 rules already cover condominium balconies, decks, patios and similar areas over which the condominium unit owner exercises exclusive use and has a direct or indirect property interest even if he or she does not own 100% of that area. *See* 47 C.F.R. § 1.4000(a) and the *Order on Reconsideration* in this proceeding, FCC 98-214 at paras. 78-79 (rel. September 25, 1998).

reception equipment would be placed; and (3) areas of a building to which viewers generally do not have access or possession, such as the rooftop, on which Section 207 reception equipment would be placed ("restricted access" property).

6. In particular, the *Further Notice* sought comment on the impact of *Loretto v. TelePrompter Manhattan CATV Corp.*[12] and *Bell Atlantic Telephone Co. v. FCC*[13] on any such extensions of our rules.[14] We also invited commenters to "address technical and/or practical problems or any other considerations they believe the Commission should take into account in deciding whether to adopt such a rule and, if so, the form such a rule should take."[15]

7. After analyzing the statute and the comments filed in response to the *Further Notice*, we conclude that, in Section 207, Congress did not direct the Commission to impose affirmative duties on other parties to install Section 207 devices or to grant access to restricted areas to permit the installation of Section 207 reception devices, and in particular, Congress did not direct the Commission to require property owners to subject property to a Fifth Amendment taking. In addition, Congress gave the Commission the discretion to devise rules that would not create serious practical problems in their implementation.[16] We find that Section 207 obliges us to prohibit restrictions on viewers who wish to install, maintain or use a Section 207 reception device within their leasehold because this does not impose an affirmative duty on property owners, is not a taking of private property, and does not present serious practical problems.

8. To effect the above changes, we amend 47 C.F.R. § 1.4000 of our rules as indicated in Appendix B (new language in italics). We also revise the rule to provide the new Commission street address for purposes of filing petitions for waiver or declaratory ruling:

> (a) Any restriction, including but not limited to any state or local law or regulation, including zoning, land-use, or building regulations, or any private covenant, *contract provision, lease provision,* homeowners' association rule or similar restriction, on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership *or leasehold* interest in the property that impairs the installation, maintenance, or use of: . . .

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[12]458 U.S. 419 (1982).

[13]24 F.3d 1441 (D.C. Cir. 1994).

[14]*Further Notice* at paras. 64-65.

[15]*Id.* at para. 63. Finally, we also sought comment on a proposal by CAI that would not prohibit restrictions on individually owned or controlled property if a community association or landlord voluntarily "makes video programming available [through a central reception facility] to any resident wishing to subscribe to such programming at no greater cost and with equivalent quality as would be available from an individual antenna installation." *Id.* at paras. 49, 63. Because we concluded that CAI's proposal is properly analyzed under our current Section 207 rules, it was addressed in the *Order on Reconsideration* in this docket. *See Order on Reconsideration* at paras. 86-89.

[16]Section 207 directs the Commission to promulgate regulations "pursuant to Section 303 of the Communications Act of 1934." Section 303, in turn, authorizes the Commission to promulgate regulations "as public convenience, interest or necessity requires." Communications Act, § 303, 47 U.S.C. § 303.

* * *

(g) All allegations of fact contained in petitions and related pleadings before the Commission must be supported by affidavit of a person or persons with actual knowledge thereof. An original and two copies of all petitions and pleadings should be addressed to the Office of the Secretary, Federal Communications Commission, *445 12th St. S.W., TW-A306*, Washington, D.C. 20554, Attention: Cable Services Bureau. Copies of the petitions and related pleadings will be available for public inspection in the Cable Reference Room in Washington, D.C. Copies will be available for purchase from the Commission's contract copy center, and Commission decisions will be available on the Internet.

9. In light of our decision to allow a tenant to install a Section 207 device within a leasehold without the landlord's permission, we further amend 47 C.F.R. § 1.4000 to delete paragraph (h) which required that the landlord consent to such an installation. We note that the tenant's installation is subject to the terms of the Section 207 rules.

II. SECOND REPORT AND ORDER

A. Application of the Section 207 Rules to Rental Property

1. Scope of Section 207

a. *Comments*

10. The satellite industry, broadcasters and certain public interest groups generally argue that Section 207 is unambiguous, and that Congress' use of the term "viewer" without qualification requires the Commission to extend the protections of Section 207 to all viewers regardless of their ownership interest in their residence or any constitutional difficulties with such an extension.[17] In support of this argument, several commenters argue that this reading of Section 207 is consistent with the purpose of the 1996 Act "to provide

[17] *E.g.*, CEMA Comments at 2-3 ("Treating all viewers equally is essential to fulfill the intent of Section 207."); CFA Comments at 2 ("The language of Section 207 shows that Congress intended it to be an expansive prohibition, applied to all viewers."); CELLULARVISION Comments at 4 ("[T]he explicit intent of Congress clearly would be defeated if the Commission creates arbitrary exemptions to the broad scope of the preemption rule."); NRTC Comments at 4-5; Philips Comments at 4-5; SBCA Comments at 3; USSB Comments at 2-3 (viewers, not property owners, are protected by Section 207); CFA Reply Comments at 12; CELLULARVISION Reply Comments at 3-7 ("To limit the scope of the rules implementing Section 207 only to those viewers who live in single family homes would be inconsistent with the plain language of Section 207. . . ."); DIRECTV Reply Comments at 7; Primestar Reply Comments at 6.

for a pro-competitive, de-regulatory national policy framework . . . to all Americans"[18] and urge the Commission not to distinguish between viewers who own property and those who do not.[19]

11. By contrast, property managers and owners and multichannel video programming distributors not covered by Section 207 generally argue that Congress did not intend to encompass all viewers within the scope of Section 207 and that the statute's scope must be limited by common sense.[20] Moreover, these commenters assert that the legislative history demonstrates that Congress was concerned only with the restrictions affecting property owners, such as zoning restrictions and homeowners association restrictions.[21]

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[18]*See* 1996 Act Conf. Report, S. Rep. 104-230 at 1 (Feb. 1, 1996). *See, e.g.*, CEMA Comments at 3 ("Section 207 of the Telecommunications Act is a critical component of Congress's combined desire to extend communications services throughout the Nation and to promote competition among service providers."); Pacific Reply Comments at 3.

[19]*See* CEMA Comments at 4 ("It is inconceivable that Congress would have instructed the Commission [to act] . . . and, yet, would have sanctioned Commission inaction that would deprive almost a quarter of the viewing public [residents of apartments, condominiums, and other multiple dwelling units] of the benefits of those regulations."); DIRECTV Comments at 6, 12, 14 ("Congress intended that all Americans be offered the protections of Section 207, as reflected by the unqualified use of the term `viewer.'"); NAB Comments at 6-8 ("The language of the statute and the legislative intent indicate that Congress did not envision exceptions for specific classes of residents. . . . [T]he Commission's focus on whether a citizen has a direct or indirect ownership interest in his residence as a basis for drawing a legal distinction in his right to use an antenna to receive over-the-air television signals is conceptually flawed."); Philips Comments at 4-5 ("[T]he Act and the legislative history both clearly state that the purpose of the legislation is to increase access of *all* Americans to telecommunications services."); CELLULARVISION Comments at 4, 7 ("Congress did not discriminate among `viewers' based upon their choice of residence;" Commission erroneously created distinction between three categories of property rights.); CEMA Comments at 10 ("Congress has acted, however, to promote unimpaired access to over-the-air video programming by *all* viewers notwithstanding their status as tenants or condominium owners."); CFA Comments at 3-4 ("[T]he plain language of Section 207 makes no distinction between viewers who own their homes and those who rent."); NRTC Comments at 4 ("The fact that Congress did *not* distinguish between exclusive property owners and others is vitally important."); USSB Comments at 2-3 ("Nothing in the 1996 Act implies that the entitlement of property owners to receive direct broadcast satellite services is any greater than that of renters."); SBCA Comments at 3; CEMA Reply Comments at 2-3; DIRECTV Reply Comments at 7; Primestar Reply Comments at 5-6, 9-10; CELLULARVISION Reply Comments at 4-5.

[20]*See, e.g.*, Optel Comments at 3-4 n. 9 (*citing First United Methodist Church v. United Gypsum Co.*, 882 F.2d 862, 869 (4th Cir. 1989) ("common sense is the `most fundamental guide to statutory construction'"); NAHB Reply Comments at 5-6; Optel Reply Comments at 2 ("As a matter of logic and common sense, there must be some limit to the universe of `viewers' who may benefit from Section 207 preemption.").

[21]*See, e.g.*, NAA Comments at 14-15, 22 ("Congress spoke of preempting zoning laws, homeowners' association rules and restrictive covenants because they were perceived to prevent individual property owners from receiving certain signals -- but Congress said nothing about apartment leases or other restrictions that affect individuals who do not own the premises they occupy."); NAHB Comments at 8-10 ("References to `restrictive covenants' and `homeowners association policies' clearly indicates that Congress was concerned with property that the viewer owns and over which the viewer exercises exclusive control since such terms are generally understood to apply to single family properties, not multiunit properties such as apartment buildings.").

b. *Discussion*

12. The starting point of our analysis is the statute. If Congress has directly spoken to the precise question at issue "that is the end of the matter," and we must give "effect to the unambiguously expressed intent of Congress."[22] If, however, Congress has not spoken to the precise question at hand -- i.e., if "the statute is silent or ambiguous with respect to the specific issue" -- the Commission may exercise its reasonable discretion in construing the statute.[23]

13. As an initial matter, we agree with those commenters that argue that Section 207 applies on its face to all viewers, and that the Commission should not create different classes of "viewers" depending upon their status as property owners.[24] For instance, if a local government imposed a zoning restriction that prohibited a landlord from installing a master antenna system for his tenants to receive over-the-air broadcast signals, such a restriction would be preempted, notwithstanding the fact that the viewers in that situation are renters.

14. Section 207 expressly directs the Commission only to "prohibit restrictions" that impair a viewer's ability to receive covered video programming; Section 207 does not grant the Commission the authority to require property owners or third parties to take affirmative steps to enable a viewer to receive such video programming.[25] Accordingly, the Commission may prohibit restrictions that a property owner or third party may impose upon a viewer (e.g., local zoning ordinances or community association[26] rules), but may not impose affirmative requirements on a property owner or a third party, such as a duty to install Section 207 reception devices for a viewer or give a viewer or video provider possession of restricted access areas or common areas for an installation. This distinction between prohibiting restrictions and imposing affirmative duties is consistent with Section 207's legislative history, which states that "[e]xisting regulations, including but not limited to, zoning laws, ordinances, restrictive covenants or homeowners' association rules, shall be unenforceable to the extent contrary to this section."[27]

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[22]*Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984).

[23]*Id.*

[24]On the other hand, as noted in the *Report and Order*, we believe that we have the discretion not to prohibit all restrictions (*e.g.*, those that serve legitimate safety and historical preservation objectives) because Section 207 directs the Commission to promulgate regulations pursuant to Section 303 of the Communications Act, which authorizes the Commission to issue rules and regulations "as public convenience, interest, or necessity requires." *See Report and Order* at paras. 6, 22. We therefore disagree with those commenters who argue that the Commission has no discretion whatsoever in implementing Section 207. This issue is discussed in the *Order on Reconsideration* at paras. 3-7 and 15.

[25]A "restriction" is "something that restricts: as . . . a limitation on the use or enjoyment of property or a facility." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1997).

[26]Throughout this *Second Report and Order* by "community associations" we intend to include homeowners' associations, townhome or townhouse associations, condominium associations, cooperative associations, planned unit development associations and similar associations and entities.

[27]104th Congress, 1st Session, Rept. 104-204, Part 1 at 123-24 (July 24, 1995).

15. Removing a restriction on installing an antenna within a leasehold does not impose a duty on the landlord to relinquish property because the landlord has already voluntarily relinquished possession of the leasehold by virtue of the lease; therefore, the language of Section 207 permits the Commission to prohibit lease and other restrictions on a viewer's installation, maintenance or use of a Section 207 device within a leasehold subject to the terms and conditions of the Section 207 rules.

2. Constitutional Considerations

a. *Comments*

16. Several commenters argue that extending our rules to require property owners to permit the installation of Section 207 reception devices on their property would constitute a *per se* "taking" requiring just compensation under the Fifth Amendment and the Supreme Court's *Loretto* decision.[28] As CAI argued: "The situation proposed by DBS ["direct broadcast satellite"], television broadcast, and MMDS ["multichannel multipoint distribution services"] providers is no different than that in *Loretto*; tenants and community association residents would be installing telecommunications equipment on property they do not own."[29] With respect to the leasehold itself, property owners argue that expanding our Section 207 rules to cover rental property would impermissibly restrict their property rights and constitute -- if not a *per se* taking[30] -- at least a regulatory taking.[31] By contrast, consumer groups and video service providers argue that no regulatory taking would be involved because of the significant public interest involved and the minimal economic impact on landlords.[32]

[28]*See* ICTA Comments at 5 ("If Section 207 is so interpreted [similar to the New York statute at issue in *Loretto*], the precise parallel between it and the New York statute will be undeniable."); NAA Comments at 4 ("*Loretto* applies equally to facilities owned by tenants and third party service providers and to facilities installed on leased premises and in common areas. . . ."); NAHB Comments at 3-4 ("The access contemplated by the Commission is no different from the method of intrusion in the *Loretto* case."); Optel Comments at 6-7; Rouse Comments at 2-3; WVA Comments at 4; ICTA Reply Comments at 14-15; NAHB Reply Comments at 1-5; Optel Reply Comments at 3-5.

[29]CAI Reply Comments at 2-3.

[30]NAHB Comments at 3 ("Commission mandated access to rental and commonly owned property amounts to a taking in violation of the Fifth Amendment. . . .").

[31]*Id.* at 6 (requiring landlord to install Section 207 devices on rental property would certainly be a regulatory taking).

[32]CEMA Comments at 9 ("The Commission would be advancing a significant public interest that Congress has identified, and it would *not* render use of landlord or homeowner association property economically inviable."); CFA Comments at 12 (preemption would promote the public interest, and the economic impact would be minimal); CFA Reply Comments at 8-11.

b. *Discussion*

17. Under *Bell Atlantic*,[33] where an agency authorizes "an identifiable class of cases in which the application of a statute will necessarily constitute a taking," its authority is construed narrowly to defeat such an interpretation unless the statute grants express or implied authority to the agency to effect the taking.[34] According to the *Bell Atlantic* court, implied authority may be found only where "`the grant [of authority] itself would be defeated unless [takings] power were implied.'"[35] Section 207 does not expressly authorize the Commission to permit the taking of private property,[36] and we do not believe that it is necessary to authorize a taking of private property in order to comply with Congress' direction that we prohibit restrictions that impair a viewer's ability to exercise his or her rights under Section 207. The "takings" clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." In general, there are two types of Fifth Amendment takings: "*per se*" takings and "regulatory" takings.[37] Where the government authorizes the permanent physical occupation of property it constitutes a *per se* taking.[38] Under *Loretto*, a

[33]In *Bell Atlantic*, the court held that the Commission's orders authorizing competitive access providers to place their equipment in the offices of local exchange telephone companies directly implicated the Takings Clause of the Fifth Amendment because the orders authorized a permanent physical occupation of the local exchange carrier's property. *Bell Atlantic*, 24 F.3d at 1445. Because these orders thus raised substantial constitutional questions, the court declined to accord the orders the deference ordinarily applied. *Id.*

[34]*Id.* at 1444-46.

[35]*Id.* at 1146 (*quoting Western Union Tel. Co. v. Pennsylvania R.R.*, 120 F. 362, 373 (W.D. Pa. 1903), *aff'd*, 123 F. 33 (3d Cir. 1903), *aff'd*, 195 U.S 540 (1904)).

[36]Likewise, several courts have held that Section 621 of the Cable Communications Policy Act of 1984 did not give cable operators the right to place their equipment on a landlord's property in order to give the tenants access to cable. *Cable Investments, Inc. v. Woolley*, 867 F.2d 151, 154 (3d Cir. 1989) (finding no support in the statute for cable company's argument that Congress had authorized "cable companies to force their way onto private property over the protests of the property owner, in order to offer cable television service to the tenants of the property owner"); *Media General Cable of Fairfax, Inc. v. Sequoyah Condo. Council of Co-owners*, 991 F.2d 1169, 1173 (4th Cir. 1993) (Section 621 "does not allow cable companies to force landlords or property owners' associations to allow cable companies to use easements on their private property"); *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600, 605 (11th Cir. 1992) (Section 621 does not grant cable operators a right of access to a landlord's property). *But see Centel Cable Television of Florida v. Admiral's Cove Associates, Ltd.*, 835 F.2d 1359, 1363 n.7 (11th Cir. 1988) (once a developer dedicates easements in a development to utilities, cable operators had right of action to place cable in those easements).

[37]*See generally Yee v. City of Escondido*, 503 U.S. 519, 522-23 (1992).

[38]*Loretto*, 458 U.S. at 435; *see also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (in addition to a permanent physical occupation, a *per se* taking is effected by a government action that "denies all economically beneficial or productive use of land.").

permanent physical occupation of property is a taking without regard to the public interest that it may serve,[39] the size of the occupation,[40] or the economic impact on the property owner.[41]

18. Where the government does not authorize a physical occupation of property but merely regulates its use, a court will examine the following factors identified in *Penn Central Transportation Co. v. City of New York* to determine whether a regulatory taking has occurred: (1) the character of the governmental action; (2) its economic impact; and (3) its interference with reasonable investment-backed expectations.[42] Moreover, where the private property owner voluntarily agrees to the possession of its property by another, the government can regulate the terms and conditions of that possession without effecting a *per se* taking.[43] Rather, such regulations are analyzed under the *Penn Central* multifactor inquiry.[44] As the *Florida Power* Court stated:

> [I]t is the invitation, not the rent, that makes the difference. The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license.[45]

19. Applying the above framework to the property at issue here, we agree with DIRECTV that a *per se* takings analysis would not apply to an expansion of our Section 207 rules to a leasehold where a landlord has invited a tenant to physically occupy and possess the property.[46] In *Loretto*, the Court identified

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[39]*Loretto*, 458 U.S. at 426 ("We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.").

[40]*Id*. at 436-37 ("[C]onstitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.").

[41]*Id*. at 434 ("[O]ur 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."). *See also Yee*, 503 U.S. at 527; *Nollan v. California Coastal Comm.*, 483 U.S. 825, 831 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 489 n.18 (1987).

[42]*Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *see also Yee*, 503 U.S. at 523; *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980).

[43]*See FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987). In *Florida Power*, the utility company voluntarily agreed to the physical occupation of its poles by a cable operator's wires at certain lease rates; the utility claimed that a subsequent rate reduction ordered by the Commission for the occupation of its poles constituted a *per se* taking under *Loretto*. *See id.*, 480 U.S. at 251-53; *see also* DIRECTV Reply Comments at 12 (if the landlord grants the tenant the right of occupation, "the government may regulate the terms of that occupation without effecting a *per se* taking") (*citing Yee*, 503 U.S. at 527).

[44]*See Florida Power*, 480 U.S. at 252.

[45]*Id*. at 252-53.

[46]*See* DIRECTV Comments at 9-10 ("Prohibiting lease restrictions that impair a tenant's ability to install an antenna on his or her exclusive use area would not result in a *per se* taking of the landlord's property, as there would be no physical occupation by a third party.") (footnote omitted); DIRECTV Reply Comments at 11-14. DIRECTV argues

three rights "to possess, use, and dispose of" property that are destroyed by an uninvited permanent physical occupation of the property.[47] However, by leasing his or her property to a tenant, the property owner voluntarily relinquishes the rights to possess and use the property and retains the right to dispose of the property. First, within his or her leasehold a tenant is an invitee with a possessory estate interest in the property,[48] not "an interloper with a government license."[49] Second, to a large extent, the property owner relinquishes its right to control the use of its property when it leases the property. For example, tenants have the right to "make changes in the physical condition of the leased property which are reasonably necessary in order for the tenant to use the leased property in a manner that is reasonable under all circumstances."[50] Third, the property owner may retain the right to sell the property even if the property is leased.[51] Thus, none of the property rights *Loretto* said were "effectively destroyed" by a permanent physical occupation of property would be compromised by expanding our Section 207 rules to leased property, because the landlord voluntarily relinquishes two of those rights (possessing and using) and is free to retain the third right (disposing of the

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that commenters failed to ascertain the distinction between rental and common property and accordingly never made arguments addressing this distinction. *Id.* at 5, 10. *Cf. Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp.*, 65 F.3d 1113, 1123 (4th Cir. 1995) (Virginia law prohibiting landlord from receiving a payment for permitting video programming service providers access to tenants was a restriction on the use of the property, not a physical taking of the property).

[47]*Loretto*, 458 U.S. at 435-46.

[48]*See* POWELL ON REAL PROPERTY, Vol. 2, § 16.02[3], at 16-16 (lease "involves the creation of an estate interest"); *Cain Partnership, Ltd. v. Pioneer Investment Services Co.*, 914 S.W.2d 452, 458 (Tenn. 1996) ("[A lease is a conveyance of an interest in real property. . . ."); *see also Thompson Development, Inc. v. Kroger Co.*, 413 S.E.2d 137, 142 (W. Va. 1991) (the landlord "has no right to possess the leasehold until the termination of the lease"); *Barocas v. THC, Inc.*, 549 N.W.2d 86, 87 (Mich. Ct. App. 1996) (landlord has duty to "not interfere with the quiet enjoyment of the tenant's right to possess"); *Siletchnick v. Brookline Rent Control Board*, 1991 Mass. App. Div. 125 (Mass. App. Ct. 1991) (after giving up exclusive possession of the apartment by way of a lease, a landlord has no further possessory rights in the apartment) (*citing Roberts v. Lynn Ice. Co.*, 187 Mass. 302, 406 (1905)).

[49]*See Florida Power*, 480 U.S. at 252-53; *see also* DIRECTV Reply Comments at 12 ("A tenant, on the other hand, is not in any sense a 'stranger' to the landlord's property, but has been specifically granted the right to occupy exclusively the leased property.").

[50]RESTATEMENT (SECOND) OF PROPERTY § 12.2(1) (1977); *see also Forman v. United States*, 767 F.2d 875, 880 (5th Cir. 1985) ("[W]e note that (absent a valid restriction) a tenant may put the leased premises to whatever lawful purpose it so desires consistent with the design and construction of the property."); *Rumiche Corp. v. Eisenreich*, 352 N.E.2d 125, 129 (N.Y. 1976) ("Short of waste, a tenant may also make nonstructural alterations consistent with the use of the premises contemplated by his possession of them."). Moreover, because the landlord no longer controls the leased premises, he or she is generally not liable for negligent or criminal conduct committed therein. *See, e.g, Plott v. Cloer*, 464 S.E.2d 39, 40 (Ga. Ct. App. 1995) (landlord not liable for criminal conduct of third party within leased premises over which the tenant had control); *Masterson v. Atherton*, 179 A.2d 592, 596 (Conn. 1962) (landlord not liable for fire caused by furnace because landlord had relinquished control over furnace to tenants).

[51]A landlord may retain the right in a lease agreement to terminate the lease upon the sale of the building to a new owner or the landlord may simply assign the lease to the new owner. *See, e.g., Conforti v. Guliadis*, 608 A.2d 225, 226 (N.J. 1992) (lessor retained the right in the lease agreement to terminate the lease agreement if he sold the building); *Warren v. Greenfield*, 595 A.2d 1308, 1310 (Pa. Super. 1991) (landlord retained the right to terminate the lease if the building were sold, but nevertheless assigned the lease to the new owner).

property) when entering into a lease. In contrast, in *Loretto*, the physical possession was on the building roof, possession of which was not leased to anyone but was retained by the property owner, Ms. Loretto.

20. Accordingly, we do not believe that it constitutes a *per se* taking to prohibit lease restrictions that would impair a tenant's ability to install, maintain or use a Section 207 reception device within the leasehold. Indeed, we do not believe that prohibiting restrictions on the installation of a satellite dish or other Section 207 device is distinguishable in a constitutional sense from prohibiting restrictions on the installation of "rabbit ears" -- a Section 207 reception device -- on the top of a television set. The *Loretto* Court recognized that its *per se* rule would not apply to regulations affecting a landlord-tenant relationship that did not require the occupation of the landlord's property by a third party; the Court acknowledged that such regulations would be analyzed under the *Penn Central* regulatory takings standard.[52]

21. Contrary to the argument set forth in the dissent, the limits of the *per se* takings doctrine described in *Florida Power* are clearly applicable here. Under that doctrine, any permanent, physical occupation of property, no matter how small, constitutes a *per se* taking. But the right to assert a *per se* taking is easily lost: once a property owner voluntarily consents to the physical occupation of its property by a third party, any government regulation affecting the terms and conditions of that occupation is no longer subject to the bright-line *per se* test, but must be analyzed under the multi-factor inquiry reserved for nonpossessory government activity.[53] In *Florida Power*, for instance, the utility company was not required to lease pole space to cable operators, but once it voluntarily did so, the government could regulate the terms and conditions of that physical occupation (*i.e.*, the rates that the utility company could charge for the pole space) without effecting a *per se* taking.

22. The dissent attempts to muddy this clear dichotomy by arguing that a landlord retains the right to assert a *per se* taking claim whenever the government modifies the terms and conditions set forth in its lease. But this is the very argument that the Supreme Court squarely rejected in *Florida Power*, where it was argued that the utility company's consent to occupation of its pole space was based on the payment of a certain lease rate. Whether the terms and conditions of occupation relate to a lease rate (as in *Florida Power*) or to the ability to place a Section 207 reception device within the leasehold (as here), once a property owner voluntarily consents to the occupation of its property it can no longer claim a *per se* taking if government action merely affects the terms and conditions of that occupation. In other words, the *per se* takings doctrine protects a property owner's right to exclude all others from its property, but it does not protect a property owner's desire to impose conditions on the use of property that it has voluntarily invited others to occupy.

23. The dissent again confuses this crucial distinction by asserting that if the terms of a lease help explain why we are not giving tenants the right to place reception equipment on common and restricted access property, the lease should likewise inform our analysis within the leasehold itself. For takings purposes, the lease is relevant in defining the physical area of consensual occupation (e.g., the apartment but not the roof or exterior walls). Outside of such areas of consensual occupation, the property owner may retain its *per se* right to prohibit permanent occupation by third parties. Within the area of consensual occupation, however, the terms of the lease are no longer relevant to a *per se* analysis. As the *Florida Power* Court put it, it is "the

[52] *Loretto*, 458 U.S. at 440.

[53] *See Florida Power*, 480 U.S. at 252, citing *Loretto*, 458 U.S. at 440. *See also Yee v. City of Escondido*, 503 U.S. 519 (1992).

invitation [*i.e.* whether the occupation is voluntary], not the rent [*i.e.*, the terms and conditions of that voluntary occupation], that makes the difference."[54]

24. Given our conclusion that this expansion of the Section 207 rules does not constitute a *per se* taking, we therefore turn to whether such an expansion of Section 207 rights would constitute a regulatory taking under the *Penn Central* factors: the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. Because the expansion of our Section 207 rules to leased property would not create an identifiable class of *per se* takings, *Bell Atlantic's* narrowing construction of our statutory authority does not apply to this situation.[55] First, we believe that Section 207 promotes the substantial governmental interests of choice and competition in the video programming marketplace.[56] The specific governmental action that we take today -- the expansion of our rules to leased property -- will bring that choice and competition to an additional segment of the population. Further, the expansion of our rules will promote the important governmental interest in enhancing viewers' access to "social, political, esthetic, moral and other ideas."[57] The Supreme Court has "identified a ... 'governmental purpose of the highest order' in ensuring public access to 'a multiplicity of information sources.'"[58]

25. Second, there is no evidence in the record that the economic impact on property owners will be significant.[59] Generally, the amount of money that property owners may derive from restricting the video programming options of their residents is minimal in relation to their other income.[60] Indeed, some commenters argue that a rule prohibiting restrictions on antenna usage enhances the value of the homeowner's property to

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[54]*Florida Power*, 480 U.S. at 252.

[55]*Bell Atlantic*, 24 F.3d at 1446 (the "identifiable class" principle is not applied to "agency orders alleged to constitute a regulatory taking under the factually sensitive standards of *Penn Central*"); s*ee also* CEMA Comments at 5; NRTC Comments at 7 ("The Commission's preemption policy . . . is not analogous to the situation described in *Bell Atlantic* because the preemption regulation permitting viewers access to DBS service does not force the creation of a new commercial relationship but merely modifies an existing, voluntary one"); USSB Comments at 6-8; CELLULARVISION Reply Comments at 13-14; NAB Reply Comments at 16-17 ("Because there is no takings implicated by the extension of Section 207 to MDU property, Bell Atlantic is not relevant to the regulation under consideration in this proceeding."); Philips Reply Comments at 9-11.

[56]*Report and Order* at para. 6. *See Turner Broadcasting System, Inc. v. FCC*, 117 S.Ct. 1174, 1181 (1997) (reaffirming important governmental interest in promoting fair competition in the market for television programming); *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 978 (D.C. Cir. 1996) (promotion of fair competition in the video marketplace furthers an important government interest) (*citing Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994)).

[57]*See Time Warner*, 93 F.3d at 975 (*quoting Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389 (1969)).

[58]*Turner Broadcasting System*, 117 S. Ct. at 1181 (*quoting Turner Broadcasting System*, 512 U.S. at 663).

[59]*See* DIRECTV Comments at 9 n.23 ("[A] tenant's installation of a DBS antenna [within its exclusive use area] has at most a *de minimis* economic impact . . . on a landlord.").

[60]*See Multi-Channel*, 65 F.3d at 1124 (Virginia statute prohibiting landlord from accepting fees for giving a video programming service installer access to property was minimal in comparison to the "greater income" the landlords derived from renting the units).

prospective purchasers who want access to video programming services competitive with cable.[61] Given property owners' ability to continue to use their property to generate rental income, we cannot find that the extension of our Section 207 rules to restrictions on tenants' use of their leasehold would deprive property owners of "all economically beneficial or productive use" of their property.[62]

26. Third, there is no evidence in the record that the expansion of our rules will interfere with reasonable investment-backed expectations. As the Fourth Circuit found in *Multi-Channel* in upholding a state "anti-kickback" statute:

> [I]t would strain credulity to find that the statute's prohibition against deriving income from the allowance of cable television providers to service the MDU [multiple dwelling unit] tenants deprived each MDU owner of its reasonable investment-backed expectations. Indeed, there is no evidence in the record to suggest that at the time MDU owners purchased their respective properties, they expected to derive income from allowing cable television providers access to their tenants; from all accounts, the reasonable investment-backed expectations of the MDU owners were traditional, for example the collection of rent from unit tenants and future appreciation.[63]

27. Moreover, the government has broad power to regulate interests in land that interfere with valid federal objectives.[64] In *Seniors Civil Liberties Ass'n v. Kemp*,[65] the court found no taking in an implementation of the Fair Housing Amendments Act ("FHAA") that declared unlawful age-based restrictive covenants, thereby abrogating the homeowners' association's rules requiring that at least one resident of each

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[61]SBCA *ex parte* presentation June 11, 1996.

[62]*See Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2893 (1992). In *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, (1987), the Court found that a law forbidding coal mining companies from mining 50% of their coal did not deny them all "economically viable use" because the law "did not make it impossible for petitioners to profitably engage in their business. *Id.* at 485; *see also Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (setting threshold at "economically viable use"). Although the Court has not yet decided whether a statute that forbids less than 100% and more than 50% economically viable use of property falls within this test; *see Lucas*, 112 S.Ct. at 2894 n. 7; we find that property owners have not shown that the extension of our Section 207 rules would deprive them of over 50% of the economically viable use of their property.

[63]65 F.3d at 1124; *see also Park Avenue Tower Assoc. v. City of New York*, 746 F.2d 135, 138 (2d Cir. 1984) (rejecting the conclusion that "loss of profit -- much less loss of reasonable return -- alone could constitute a taking. . . . The crucial inquiry . . . is . . . whether the property use allowed by the regulation is sufficiently desirable to permit property owners to `sell the property to someone else for that use.'") (citation omitted).

[64]*See, e.g., Shelley v. Kraemer*, 334 U.S. 1 (1948) (finding racially restrictive covenants judicially unenforceable); *Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972) (per curiam) (the Court of Appeals *en banc* permitted a challenge by homeowners attacking the legality of racially restrictive covenants to proceed).

[65]761 F. Supp. 1528 (M.D. Fla. 1991), *aff'd*, 965 F.2d 1030 (11th Cir. 1992). *See also Westwood Homeowners Ass'n v. Tenhoff*, 745 P.2d 976 (Ariz. Ct. App. 1987) (holding that a state legislative refusal to enforce restrictive covenants against group homes for the developmentally disabled was not a taking).

home be at least 55 years of age and forbidding permanent residence to children under the age of 16.[66] The court found that the FHAA provisions nullifying the restrictive covenants constituted a "public program adjusting the benefits and burdens of economic life to promote the common good," and not a taking subject to compensation.[67]

28. Finally, with regard to the argument of some commenters that this rule will impair exclusive contracts between MDU owners and cable companies, even assuming that this were the case, as we stated in the *Report and Order* with regard to homeowners' associations, condominium associations, and cooperative associations,[68] Congress can change contractual relationships between private parties through the exercise of its constitutional powers, including the Commerce Clause.[69] In *Connolly v. Pension Benefit Guaranty Corp.*,[70] the Court stated:

> Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights in property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.
>
> If a regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights, does not always transform the regulation into an illegal taking.[71]

29. Accordingly, we conclude that interpreting Section 207 to reach rental property, i.e. property within a leasehold over which a tenant has possession, does not constitute an impermissible taking of private property.[72] This rule will prohibit lease or other restrictions (subject to the other provisions of 47 C.F.R. §

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[66]*Kemp*, 761 F. Supp. at 1533.

[67]*Id.* at 1558-59.

[68]*Report and Order* at para. 45.

[69]U.S. CONST. art. I, § 8, cl. 3; *see* Philips Comments at 7-9 ("Congress' power to alter contractual relationships pursuant to its constitutional authority to regulate interstate commerce is firmly established."); CELLULARVISION Reply Comments at 11-12.

[70]475 U.S. 211 (1986).

[71]*Id.* at 223-24 (quotations and citations omitted)**.**

[72]While some commenters have requested that we preempt exclusive contracts between building owners and cable companies (*see* DIRECTV Comments at 18-19 and Reply Comments at 14-18 ("Throughout the country, DIRECTV has been prevented from serving many MDUs because cable operators required building owners to grant exclusivity as a condition to the provision of cable television service to MDU residents."); NRTC Reply Comments at 2-3 ("The use of exclusive contracts by cable operators is a barrier to competition which must be prevented by the Commission in all instances where the cable operator enjoys a monopolistic position in the video programming market."); USSB Reply Comments at 2), we will address this issue in our proceeding *In re Telecommunications Services Inside Wiring*, CS Docket No. 95-184. We note, however, that exclusive contracts are already unenforceable to the extent that they

1.4000, including the safety and historic preservation exceptions) on leased property under the exclusive use or control of the viewer.[73] Typically, for apartments, this will include balconies, balcony railings, and terraces; for rented single family homes or manufactured homes which sit on rented property, it will typically include patios, yards or gardens within the leasehold.[74] This conclusion is similar to the current application of the Section 207 rules to condominiums, cooperatives and manufactured homes.[75]

3. Practical Considerations

a. Comments

30. Commenters did not raise practical objections to the installation of Section 207 reception devices inside buildings.[76] However, commenters did raise safety and liability concerns regarding the placement of antennas outside of an apartment unit, such as on a balcony.[77] Other commenters were concerned that if a

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impermissibly impair a viewer's rights under the currently effective Section 207 rules, and will be further unenforceable to the extent that they impermissibly impair a viewer's Section 207 rights upon the effective date of the revised rules we adopt herein.

[73]On the current record, we decline to extend the protections of our Section 207 rules to college dormitories. Purdue University argues that college housing is unique and, as such, should be exempt from our rules. Purdue Comments at 4. No one responded to Purdue's comments, and because no one has shown that a university has the same relationship to a dormitory resident as a landlord to a tenant, that a dormitory room is a leasehold, that landlord-tenant law applies equally to dormitories, or that the practical problems associated with extending our rules to leaseholds can be similarly resolved with respect to dormitories, we have no basis to cover college dormitories by our Section 207 rules at this time. Where, however, the relationship between a university and a viewer bears sufficient attributes of a commercial landlord-tenant relationship (e.g., where a university leases a single family home to a faculty member), our Section 207 rules will apply.

[74]Generally, the lease of a house includes the land on which the house is situated and the surrounding real estate necessarily incident to its use as a home. *See, e.g., Rowson v. Rowson*, 268 S.W.2d 708, 715 (Tex. Civ. App. 1954) ("A description in a contract of sale or lease of a 'dwelling' or 'house' carries with it by necessary implication the real estate upon which the building is situated and so much of the surrounding real estate as is necessarily incident to the use of the premises as a dwelling."); *Bachenheimer v. Palm Springs Management Corp.*, 254 P.2d 153, 157 (Cal. App.2d 1953) *quoting with approval* 51 C.J.S., Landlord and Tenant, § 289 ("'The general rule is that the lease of an entire building *eo nomine* [under that name] is a lease of the land on which the building stands, at least as far as needed for its support, and adjacent land belonging to the lessor which is used with the building as necessary to its proper occupation for the purpose for which it was intended.'"). Restrictions on placement of antennas on manufactured homes, as raised in WCA Comments at 2-3 and FMHO Comments at 2, are already covered by our current rules. *See Order on Reconsideration* in this proceeding. This new rule expands protection of our Section 207 rules to the leased property on which the manufactured home sits.

[75]*See Order on Reconsideration* at paras. 78-81.

[76]Some commenters requested that we provide an exception to this rule for commercial lessees. NAA Comments at 21, 23. We agree with Pacific Telesis Group that Section 207 does not provide any exceptions for commercial properties. *See* Pacific Reply Comments at 3.

[77]*See, e.g.*, CAI Comments at 27 ("Improper installation could lead to the detachment of the equipment in a windstorm, tornado, or hurricane, potentially causing personal injury and property damage.").

tenant installed an antenna on an apartment balcony that the tenant might damage the walls of the building by running the wire through the walls.[78] According to DIRECTV, however, DBS devices may be installed with "clamping devices for the temporary attachment to balcony railings" and with cables that may be brought into the dwelling under windows or doors without damaging the walls.[79]

b. Discussion

31. We believe that the practical concerns with respect to installation within the leasehold can be resolved under our current Section 207 rules, which permit the enforcement of restrictions that address legitimate safety objectives.[80] In addition, unlike common areas, the leasehold (e.g., an apartment including a balcony or terrace) generally is under the exclusive use or control of one party (i.e., the lessee), thus enabling that party to address liability concerns. Moreover, state landlord-tenant law can address liability issues that may arise from incidents arising on leased property.

32. The current rules resolve concerns regarding damage to the building caused by installation. The rules prohibit restrictions that unreasonably delay or prevent installation. A restriction barring damage to the structure of the leasehold (e.g., the balcony to an apartment or the roof of a rented house) is likely to be a reasonable restriction on installation under 47 C.F.R. § 1.4000(a).[81] Thus, for example, tenants could be prohibited from drilling holes through the exterior walls of their apartments.[82] In addition, tenants could be

[78]*See* CAI Comments at 30 (routing of coaxial cable might have to go through other residents' unit, disturbing them, and "will undoubtedly lead to conflicts between owners"); FROST Comments at 9-10 (because exterior mounted reception devices must be fastened to and penetrate the building to allow cabling, the potential exists for water penetration).

[79]DIRECTV Reply Comments, Declaration of Lawrence N. Chapman at para. 3.

[80]*See Order on Reconsideration* at paras. 10-12 for clarification of our safety rules. *See also* 47 C.F.R. § 1.4000(b)(1).

[81]Upon the termination of the tenant's lease, a landlord may bring a cause of action against the tenant for waste of the property in order to recover for damages to the property. In an action for waste, the landlord may recover damages for "material and permanent injury" to the property, but not for damage caused by "ordinary wear and tear." *Wright v. Vickaryous*, 598 P.2d 490, 501 (Alaska 1979) ("`[I]t is the duty of the tenant . . . not to cause any material and permanent injury [to the rental property] over and above the ordinary wear and tear.'") (citation omitted); *Enchanted Hills, Inc. v. Medlin*, 892 S.W.2d 722, 724 (Mo. Ct. App. 1994) (tenant is liable for material and permanent injury but not for ordinary wear and tear); *Rumich Corp.*, 352 N.E.2d at 179-80 (defining waste as "permanent or lasting damage"); *see also Desciose v. United States*, 34 Fed. Cl. 606, 607 (Ct. Cl. 1995) ("[T]enant is liable for substantial repairs but not for those necessitated by ordinary wear and tear."), *aff'd*, 113 F.3d 1254 (Fed. Cir. 1997); *Sullivan v. Booker*, 877 S.W.2d 370, 372 (Tex. Ct. App. 1994) (tenant not liable for "ordinary wear and tear"); *Boccardo v. United States*, 341 F. Supp. 858, 863 (N.D. Cal. 1972) (same) (*citing United States v. Bostwick*, 94 U.S. 53, 65-64 (1876) ("[T]enants had the free and unrestricted right to use the property for all purposes. . . . Whatever damages would necessarily result from a use for the same purpose by a good tenant must fall upon the lessor.")).

[82]*Avron v. Plummer*, 132 N.W.2d 198, 204 (N.D. 1964). According to DIRECTV, devices exist for sliding glass doors and windows that permit cable "to be brought into the interior of the multiple dwelling unit [from, *e.g.*, a balcony, yard or a window sill] without any need for drilling holes in building walls." DIRECTV Reply Comments, Declaration of Lawrence N. Chapman at para. 3. Such devices would be permissible so long as they did not substantially damage the walls, windows or the building.

prohibited from piercing the roof of a rented house in any manner given the risk of serious damage.[83] On the other hand, it would likely not be a reasonable restriction to prohibit an installation that merely caused ordinary wear and tear (e.g., marks, scratches, and minor damage to carpets, walls and draperies) to the leasehold.[84] We also note that the *Order on Reconsideration* clarifies that a landlord or community association may restrict installation of individual antennas based on the availability of a central or common antenna, provided the restriction does not impose unreasonable delay, unreasonable expense, or preclude reception of an acceptable quality signal, including the particular programming service chosen by the viewer.[85]

B. Application of the Section 207 Rules to Common and Restricted Access Areas

1. Scope of Section 207

a. *Comments*

33. Some commenters argue that the Section 207 rules can be extended to cover common and restricted access property if the Commission requires landlords to purchase and install video programming reception equipment. This approach, they assert, will avoid the Fifth Amendment takings question because such a requirement would simply be a regulation of an existing landlord/tenant relationship.[86] According to CFA,[87] such a requirement would be permissible under *Loretto*, which recognized broad government authority to regulate housing conditions and the landlord-tenant relationship without compensating all economic injuries caused by the regulation.[88] Indeed, several commenters suggested that such a requirement would be no more

[83]*See* comments concerning possible damage to the roof, *infra*, n. 118. We note, however, that there are methods of installing a Section 207 device on a roof that do not require piercing; e.g, securing it to a chimney or using ballast as a non-penetrating roof mount.

[84]*Desciose*, 34 Fed. Cl. at 608 (tenant not liable for nail holes and minor damage to carpets and walls); *Tobin v. McClure*, 493 N.E.2d 1215, 1217 (Ill. Ct. App. 1986) (tenant not liable for nail holes); *Urban Management Corp. v. Ford Motor Credit Co.*, 263 So.2d 404, 409 (La. Ct. App. 1972) ("[S]cratches and marks that could reasonably be expected from the hanging of pictures, installing telephone outlets, placement of file cabinets . . . is not beyond ordinary wear and tear." Tears in drapery were also not beyond ordinary wear and tear.).

[85]*See Order on Reconsideration* at paras. 86-89.

[86]*See* DIRECTV Comments at 15 ("As long as the landlord maintains control over the installation and maintenance of the antenna, the FCC's rule will be a constitutional regulation of the landlord-tenant relationship, not at all implicating the Takings Clause."); CFA Reply Comments at 5-6; DIRECTV Reply Comments at 16; Philips Reply Comments at 4; SBCA Comments at 5-6 ("[T]he Commission should require landlords or community or condominium associations to make available, at the request of their residents, multiple MVPDs."); USSB Comments at 4 ("USSB proposes that . . . community associations and landlords provide the opportunity for DBS to be available to viewers who want it from central reception facilities."); CFA Reply Comments at 5-6.

[87]CFA Reply Comments at 5.

[88]*See also* CELLULARVISION Comments at 9 ("[E]xpress federal powers granted under Section 207 to restrict a landlord's ability to `impair' a viewer's ability to receive video signals . . . cannot be classified as a taking because these are intrinsic to the landlord-tenant relationship."); DIRECTV Comments at 15; NAB Comments at 12-16 ("The nature of the regulation required by Section 207 is analogous to conventional regulations governing the landlord-tenant

a taking than a requirement that landlords provide mailboxes or utility connections to their tenants.[89] These commenters argue that such a requirement would be the type of permissible regulation of the terms of an ongoing commercial relationship that was found not to constitute a *per se* taking in *Florida Power*.[90]

34. In response, property owners and builders argue that Section 207 does not give the Commission the authority to order property owners to install antennas on common property.[91] In addition, these commenters state that Section 207 does not authorize the Commission to compel property owners to provide video services to their tenants.[92]

b. *Discussion*

35. Section 207 does not authorize us to permit a viewer to install a Section 207 device on common or restricted access property over the property owner's objection or to require a landlord to provide video programming reception equipment to tenants. As discussed in Section II.A.1., above, Section 207 authorizes the Commission to remove restrictions; Section 207 does not authorize the Commission to impose independent affirmative obligations on a property owner or a third party to enable the viewer to use a Section 207 device. Interpreting Section 207 to grant viewers a right of access to possess common or restricted access property for the installation of the viewer's Section 207 device would impose on the landlord or community association a duty to relinquish possession of property. Just as the plain language of the statute does not require a property owner to permit his or her neighbor to install a Section 207 reception device on the owner's property (e.g., if the neighbor were unable to receive an acceptable signal on his or her own property), we do

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relationship."); NRTC Comments at 6-9 ("[T]he Commission's incidental regulation of a landlord-tenant relationship is not violative of the Fifth Amendment because a commercial relationship already exists between the landlord and the tenant/viewer."); Philips Comments at 9-11; USSB Comments at 6-7; CFA Reply Comments at 7-8; Pacific Reply Comments at 6; Philips Reply Comments at 7-8.

[89]*See, e.g.,* CELLULARVISION Comments at 8-9 *(Loretto* did not affect requirements that landlords comply with building codes, including providing utility connections and mailboxes).

[90]*See* NRTC Comments at 7-8 (*citing Florida Power* in order to distinguish *Loretto* from the situation in which the FCC was merely regulating an existing commercial relationship). In *Florida Power*, the Court reviewed an FCC order under the Pole Attachments Act setting the rates that a utility company could charge three cable operators using its poles. Since the FCC order set rates significantly lower than the utility company had negotiated with the cable operators, the utility company argued that it suffered a *per se* taking under *Loretto*. The *Florida Power* Court rejected the utility company's claim, holding that the FCC order did not authorize the physical occupation of its property by an outside third party; rather, the utility company had voluntarily entered into a commercial relationship with the cable operators, and the FCC was merely regulating the terms and conditions of that existing relationship. *Florida Power*, 480 U.S. at 252-53.

[91]NAHB Comments at 6 ("[S]ection 207 does not give the Commission the authority to order property owners to install satellite antennas on rental or commonly owned property."); ICTA Reply Comments at 16-17; NAHB Reply Comments at 6-7.

[92]ICTA Comments at 7-8 ("Section 207 certainly does not force any provider -- let alone private property owners -- to provide video services to anyone."); NAA Comments at 15-21 ("Section 207 directs the Commission to exercise only the negative power to limit restrictions and not the affirmative power to command property owners to provide reception services.").

not believe the statute requires a landlord or community association to relinquish possession of common or restricted access property. We see no distinction in this regard between a neighbor's property and a landlord's property that the landlord has not leased to a tenant: both situations would impose affirmative duties not intended by the statute.

36. Likewise, we disagree with commenters that we can require landlords to provide video programming reception equipment to their residents. Requiring property owners to purchase and install reception equipment for their residents' benefit does not remove a restriction, but rather imposes an affirmative duty which is outside the mandate of Section 207. Therefore, under the language of Section 207, we cannot extend the Section 207 rules to reach common and restricted access property.

2. Constitutional Considerations

a. *Comments*

37. As noted above, many commenters argue that extending our rules to require property owners to permit the installation of Section 207 reception devices on common or prohibited access property not within the exclusive use or control of a viewer with an ownership interest in the property would constitute a *per se* "taking" requiring just compensation under *Loretto*.[93] Electronics manufacturers, DBS licensees, broadcasters and consumer groups attempt to distinguish *Loretto* by arguing that: (1) no taking would occur because the tenant's use of the common areas would be temporary, not permanent;[94] and (2) no taking would occur if the Commission granted the tenant, rather than the service provider, the right to own or request the installation of the reception equipment.[95]

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[93]*Loretto*, 458 U.S. at 419; *see* ICTA Comments at 5 ("If Section 207 is so interpreted [similar to the New York statute at issue in *Loretto*], the precise parallel between it and the New York statute will be undeniable."); NAA Comments at 4 ("*Loretto* applies equally to facilities owned by tenants and third party service providers and to facilities installed on leased premises and in common areas. . . ."); NAHB Comments at 3-4 ("The access contemplated by the Commission is no different from the method of intrusion in the *Loretto* case."); Optel Comments at 6-7; Rouse Comments at 2-3; WVA Comments at 4; ICTA Reply Comments at 14-15; NAHB Reply Comments at 1; Optel Reply Comments at 3-5; WCA Comments at 4-5; Silverman Comments at 2-4; Woodbridge Village Association Comments at 4.

[94]*See* NAB Comments at 10-11 ("[T]he regulation at issue here involves only a temporary physical occupation by one who has a property right in the real estate."); DIRECTV Reply Comments at 12 ("[T]he antenna installation is in no way permanent; rather, the antenna will most likely be removed when the tenant moves at the expiration of the lease."); PACIFIC Reply Comments at 4-5 (allowing installers temporary access to property is not a taking).

[95]*See* CEMA Comments at 7; NAB Comments at 9; NRTC Comments at 8-10; USSB Comments at 6-7 ("What distinguishes Section 25.104 from the statute in *Loretto* is the fact that it grants an entitlement to viewer's [sic], not to the providers of DBS service."); CFA Reply Comments at 3-7 (*Loretto* inapplicable where "tenant owns and installs the reception device subject to the landlord's control"); NAB Reply Comments at 13-15; Philips Reply Comments at 4; Primestar Reply Comments at 7-8. *But see* CAI Comments at 16 ("The equipment would be owned by individuals. . . . The [community] association would have no control over the means, method and location. . . . Therefore, *Loretto* would still apply. . . ."); NAA Comments at 5-6, 7 ("[A]lthough *Loretto* did not address the consequences of giving such rights to a tenant rather than to a third party with no prior right to occupy the premises, the result is the same in either case."); CAI Reply Comments at 5-6.

b. *Discussion*

38. As discussed in Section II.A.2 above, Section 207 does not expressly authorize the Commission to permit a taking in order to enable a viewer to install Section 207 reception devices. In the context of common and restricted access property, we do not believe that the statutory directive to prohibit restrictions implies a takings authority given that a taking requires the Commission to impose affirmative duties on third parties which, as discussed in Section II.B.1 above, is not contemplated by Section 207.

39. The commenters raise serious concerns that the extension of the Section 207 rules to common and restricted access property would constitute a taking and assert that the Commission should interpret the statute so as to avoid constitutional issues. While by virtue of a lease a landlord invites a tenant to take possession of property within the leasehold, the landlord does not invite the tenant to take possession of common and restricted access property. If we were to extend our Section 207 rules to permit a tenant to have exclusive possession of a portion of the common or restricted access property where a lease has not invited a tenant to do so, the tenant would possess that property as an "interloper with a government license" thereby presenting facts analogous to those presented in *Loretto*.[96] Similarly in a community association, home and unit owners are not invited to possess restricted access areas, such as the roof or exterior walls, and are not granted exclusive or permanent possession of common areas.

40. Under these circumstances, we agree with those commenters that argue that the permanent physical occupation found to constitute a *per se* taking in *Loretto* appears comparable to the physical occupation of the common and restricted access areas at issue here.[97] In *Loretto*, the physical occupation of the landlord's property consisted of the direct attachment of cable television equipment to the landlord's property, occupying the space immediately above and upon the roof and along the building's exterior.[98] Likewise, the physical occupation here would involve the direct attachment of video reception devices to common areas such as hallways or recreation areas, or to restricted areas such as building rooftops.

41. We do not believe that *Loretto* is distinguishable on the grounds asserted by the commenters. First, we disagree with CEMA that the potential occupation in this instance would be temporary, not permanent.[99] In *Loretto*, the Court found that the cable operator's occupation was "permanent" because so long

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[96] *See Florida Power*, 480 U.S. at 252 ("The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license."); *see also Yee*, 503 U.S. at 527.

[97] *See, e.g.*, CAI Comments at 14-15; NAA Comments at 10 ("Giving one such tenant, occupant, or resident the right to install an antenna in a common area against the wishes of the other owners would be an occupation, and thereby a taking."); Optel Comments at 7; ICTA Reply Comments at 8-12 ("Even further proof that the landlord controls the common area, and that to grant the tenant a permanent interest in it would effect a taking, is that unless the lease states otherwise, a tenant may not prevent the landlord from modifying the common areas as desired."); NAHB Reply Comments at 2.

[98] *Loretto*, 458 U.S. at 438.

[99] *See* CEMA Comments at 8 n.17 ("[T]he comments confirm the common perception that antennas -- especially today's small, state-of-the-art antennas -- are not fixtures which a viewer would want to permanently attach to another's property, but are best characterized as personal property that a viewer will take along whenever he or she moves. That attribute further distinguishes any viewer-installed antenna from the infirmities that the Court found with the statute

as the property remained residential and a cable company wished to retain the installation, the landlord must permit it.[100] We agree that the occupation here would be similarly "permanent" because so long as an individual viewer wished to receive one of the services covered by Section 207, the property owner would be forced to accept the installation of the necessary reception devices.[101]

42. Second, we are not persuaded by those who contend that as long as the entitlement under Section 207 belongs to the tenant and not to a "stranger," *Loretto* does not apply.[102] In advancing this argument, commenters rely primarily upon the following statement in footnote 19 in *Loretto*:

> If [the New York statute] required landlords to provide cable installation if a tenant so desires, the statute might present a different question from the question before us, since the landlord would own the installation. Ownership would give the landlord rights to the placement, manner, use, and possibly the disposition of the installation.[103]

43. We agree with CAI that this argument overlooks a critical aspect of footnote 19: that ownership of the property (i.e., the hypothetically required cable equipment) must rest with the landlord.[104] So long as a tenant owns the reception device placed in a common or restricted access area, and the terms of the tenant's lease, the community association's bylaws, or other agreement do not give the tenant the right to exclusively possess any portion of this property, the landlord's or association's property would be subjected to an uninvited permanent physical occupation. As the *Loretto* Court stated: "[T]he power to exclude has

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at issue in *Loretto*.").

[100]*Loretto*, 458 U.S. at 439.

[101]*See* AOBA Comments at 4 ("The FCC proposals . . . would lead to a permanent physical (possessory) occupation of a landlord's building by government action."); CAI Comments at 15; NAA Comments at 5 ("[T]here can be no doubt that the installation of an antenna is just as permanent as the installation of wires in *Loretto*."); Rouse Comments at 3; CAI Reply Comments at 7 ("The right to install telecommunications equipment is permanent: at all times the landlord or the association would be required to permit installation by the then tenant or resident on rental or common property."); ICTA Reply Comments at 8 ("[A]pplying Section 207 to Unowned or Uncontrolled Properties would not result in a right of transitory access, but instead would result in permanent access, through a forced seizure by a multitude of video service providers of a `hitherto private forum.'"); ICTA Comments at 8-10 (If the Commission were to apply Section 207 to give a resident the right to install device, "once a tenant or resident requests a DBS, MMDS, LMDS, or ITFS provider's service, that provider would be able to install permanently its system on the property owner's private property and occupy that property so long as it is able to maintain at least one subscriber.").

[102]*See* USSB Comments at 7; *see also* CEMA Comments at 5-6, 7; NAB Comments at 9 (*Loretto* "was decided on narrow grounds . . . ; [T]he cable company, not the tenant, owned the installation."); CFA Reply Comments at 5 ("[W]here the landlord owns the equipment and gives every tenant the ability to connect to it, [that case] would fall directly under the exception described in footnote 19.").

[103]*Loretto*, 458 U.S. at 441 n.19.

[104]CAI Comments at 16 ("*[L]oretto* would still apply to any exclusive use of common property by individual owners, as the association would not own the installation or have control over its means, method, and location."); *see* NAHB Reply Comments at 3 ("There is nothing in Footnote 19 that contradicts the holding that granting a tenant the right to install equipment on the landlord's property is a taking of the landlord's property.").

traditionally been considered one of the most treasured strands in an owner's bundle of property rights."[105] This type of "required acquiescence is at the heart of the concept of occupation."[106] Even giving the property owner control over the installation and maintenance of the equipment, as some commenters have suggested,[107] the property owner would still lose the right to possess that space for its benefit or the benefit of its other residents, and would lose the ability to exclude others from that space.[108] In contrast, where the viewer has exclusive use of the property or it is within the viewer's leasehold, the community association or landlord is already excluded from the space and does not have the right to possess or use it.

44. Thus, because there is a strong argument that modifying our Section 207 rules to cover common and prohibited access property would create an identifiable class of *per se* takings, and there is no compensation mechanism authorized by the statute, we conclude that Section 207 does not authorize us to make such a modification.[109]

45. Nor do we believe that *Florida Power* is on point. In *Florida Power*, the Court assumed the utility company had voluntarily agreed to the cable company's physical occupation; thus, the Court found that the Commission's subsequent rate regulation did not effect a *per se* taking but merely regulated the terms and conditions of the agreed-upon occupation.[110] Here, the agreed-upon scope of the physical possession is set forth

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[105]*Loretto*, 458 U.S. at 435-36; *see also Cable Holdings*, 953 F.2d at 604 (if statute mandated cable operator access to private property, such a statute would be "indistinguishable from the New York statute analyzed in *Loretto*" because the government would be appropriating the owner's right to exclude); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (the "right to exclude" is universally held to be a fundamental element of the property right); *see* CAI Reply Comments at 3-4 ("[T]he lease grants no rights to occupy, use, or possess any of the landlord's property outside of the unit."); NAA Comments at 9 ("Requiring landlords to allow the emplacement of antennas, however, would not be a regulation of an existing relationship, but an expansion of the tenant's or resident's property rights."); NAHB Reply Comments at 4.

[106]*Florida Power*, 480 U.S. at 252; *see* ICTA Reply Comments at 10 (tenants have no right to occupy common property).

[107]*See, e.g.*, CFA Reply Comments at 6-7 (suggesting we give the property owner the right to exercise discretion over the geographic placement of the antenna, limited of course to locations from which a suitable signal could be received); *see also* NRTC Comments at 9 (proposing application, under these circumstances, of the multifactor analysis used for regulatory takings, which has been applied to regulations concerning rent control and fire escapes).

[108]*See Loretto*, 458 U.S. at 435-36 (physical occupation impermissibly prevents a property owner from occupying his property, since 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").

[109]*See* CAI Comments at 18-22 ("If the FCC were to mandate individual installation on common property, the Commission would create a situation very analogous to that in *Bell Atlantic*." The Commission lacks both explicit and implicit takings power); NAA Comments at 18, 24 (*Bell Atlantic* requires the Commission to interpret Section 207 in a manner that does not raise constitutional questions; Congress did not confer the power of eminent domain on either the Commission or its regulatees); *see also* ICTA Comments at 14-18 ("[S]ection 207 does not have a just compensation clause."); NAHB Comments at 6; Optel Comments at 7-8; Rouse Comments at 4; CAI Reply Comments at 10-13; ICTA Reply Comments at 5; Drummer Reply Comments at 2.

[110]480 U.S. at 252-253.

in the lease or other controlling document; individual residents generally do not have the right to possess and use the common areas for their exclusive benefit over the property owner's objection.[111] While the tenant may have been invited to use the common property for certain purposes (e.g., ingress, egress, use of the exercise room), these rights are voluntary and temporary; the proposal here, by contrast, would be involuntary and -- so long as the tenant wished to keep his or her property in the common areas -- permanent. In any event, there can be no argument that the resident has been invited in any manner to possess and use restricted access areas, such as rooftops.

3. Practical Considerations

a. *Comments*

46. In addition to and apart from the Constitutional issues discussed above, many commenters argue that extending the protections of Section 207 to viewers seeking to place reception devices on common or restricted access property will also cause significant practical problems.[112] Commenters make the following arguments:

(a) If every viewer in an MDU had the right to place an antenna in the common areas or on the roof, the potential would exist for countless numbers of antennas in such areas.[113]

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[111] *See, e.g.*, *Kaplan v. Sessler*, 96 N.Y.S.2d 288, 289 (N.Y. App. Term. 1950) (per curiam) (tenant's maintenance of television antenna on the roof is intrusion or squatting on the property owner's property); *800 Park Avenue Corp. v. Mott*, 374 N.Y.S.2d 21, 22 (A.D. 1975) (cooperative unit owner "has no clearly shown right to use the common roof of this cooperative apartment house for his horticultural enterprise"); *Murphy v. Vivian Realty Co.*, 605 N.Y.S.2d 285, 286 (A.D. 1993) (tenant's right to use part of the roof for her garden was limited to the specific terms set forth in her lease).

[112] *See, e.g.*, NAA Comments at 26-28 (What if residents want more than one signal or each wants a different signal? Where will liability lie? Who will be liable if a tenant installs device? Will property owners be allowed to control access to their roofs and walls? Can the property owner exclude an incompetent installer? Who will bear the costs of installation and maintenance? What happens under state fixture law?); Reston Comments at 3 (Which residents would be permitted to install? Where would they permitted to install? Would the Association be permitted to implement an administrative process? Would that process result in "unreasonable delay?" How would space be apportioned? Would rights to a space be transferred with the unit or would the new resident "go to the end of the line?" Would the Association be permitted to cordon off sections of common areas?).

[113] *See, e.g.*, NAA Comments at 26, 28-29 ("What will happen if residents of a unit with multiple tenants desire to subscribe to more than one service, or if each wants to subscribe to a different service? Will the owner be forced to allow the installation of two or more antennas outside a single unit?"). For instance, not only would every tenant have the right to run wiring to the roof of his or her apartment building to install a DBS, MMDS, LMDS or television broadcast antenna, but he or she may have the right to install the particular antenna of his or her service provider of choice. NAA and others warn that even shared wiring system would have to be capable of receiving signals from at least four sources (cable, free broadcast, DBS, and MMDS) and deliver any or all of each services to every unit in a building. NAA Reply Comments at 40. *See also* Oak Hills Reply Comments at 1 ("The property values would go down if each quadraminium building had 4 satellite dishes on the front of the building."); M. Edward Burns Comments at 2 (concerned that there would be a "farm of antennas in the common elements"); Epsten & Grinnell Comments at 3.

(b) An extension of the rules would implicate liability, security and safety concerns regarding common property.[114] For instance, commenters expressed concern that building owners and managers would lose control over the operation of their buildings if residents had the right to install antennas on roofs or other exterior locations,[115] and potentially expose themselves to liability for injuries to third parties[116] and for criminal acts caused by unfettered access to a building.[117]

(c) It is unclear who would be liable if the installation of an antenna did structural damage to the building.[118]

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[114]*E.g.*, Liability: CAI Comments at 27, 30 (Because "[t]he equipment would be attached to common property, the association may be held liable for the injury or damage, even if the association had no control over installation."); Reston Comments at 2; CAI Reply Comments at 14; Oak Hills Country Reply Comments at 1. Security: NAA Comments at 25; NAHB Comments at 12 ("If such personnel [installers] commit criminal acts themselves, the building owner potentially will face liability even though the building owner had no relationship with or control over such persons."); Optel Comments at 9-10. Safety: CAI Comments at 27 ("Improper installation could lead to the detachment of the equipment in a windstorm, tornado, or hurricane, potentially causing personal injury and property damage."); NAA Comments at 25; NAHB Comments at 10-12 ("Building owners cannot ensure compliance with building code or fire code requirements if they cannot control who comes onto their building to place equipment on the building."); Optel Comments at 10; Rouse Comments at 8 ("Property owners cannot ensure compliance with safety and fire code requirements if they cannot maintain and control the use of the property."); Rapkin Comments at 2.

[115]*See* Chadwick Comments at 4 ("If antenna users are allowed to affect the general common elements, the condominium association['s] ability to control, maintain and promote the integrity of the property, buildings and their components will be seriously undermined."); Mendik Comments at 1-2 ("A rule allowing tenants to install antennas would adversely affect the safety and security of private property rights."); NAA Comments at 25 ("Some of these potential difficulties . . . include. . . overseeing the efficient day to day operations of hundreds of thousands of buildings."); NAHB Comments at 10 ("Effective property management requires that a building owner and manager have complete control over the management and operation of the building.").

[116]*See* Window Comments at 2; Krenger Comments at 1 (Who would be responsible if an antenna falls on someone?); *see also, e.g.*, NAA Comments at 26 (although the installer would be liable, real estate owners and managers are the more likely targets of litigation); Sun Valley Comments at 1 ("The telecommunications industry is not accustomed to dealing with the nature and level of liability that face building owners and managers every day."); NAA Reply Comments at 43, n.35 (even if tenants' security deposits cover damage to unit, they are not adequate to protect the owner against liability to third parties).

[117]*See, e.g.*, NAHB Comments at 12.

[118]*See* CAI Comments at 29 ("The association, as the owner or party responsible for . . . maintenance, would be liable for any damage to the roof, even if an individual owner caused the damage."); NAR Comments at 2 ("Will a tenant who requests installation of an antenna bear all the costs of installation and maintenance?"); NAA Comments at 26-27; NAHB Comments at 10-12; Optel Comments at 10; Rouse Comments at 8 ("Consequences of roof damage are serious given that leaks and structure problems are not readily apparent and only worsen over time."); Optel Reply Comments at 5; *see, e.g.*, Rolling Hills Comment at 1-2. One Minneapolis owner/manager of commercial real estate stated that "post construction attachment of objects to the exterior of the building" can damage the building. Hines Comments at 2 (the installation of an antenna may seriously damage the building by "puncturing the building's vapor barrier" weakening the railings and other structures); Mt. Vernon Comments at 2 (asking who would be responsible for hurricane damage to antennas and dishes and to the common property to which they are attached); *see also* Oak Hills Reply Comments at 1 (The condominium association warned that, "If a proliferation of satellite dish installations

(d) A rule requiring access to common areas might make it more difficult for the property owner to obtain liability insurance for those areas[119] and, even if a tenant had renter's insurance, it is not clear that a renter's insurance policy would cover accidents on or damage to property that the tenant has not leased.[120]

(e) Placing reception equipment on common property raises ownership issues under state law which might require the Commission to examine the laws of the fifty states if the Commission did not simply preempt state law. For example, if an antenna is placed on a roof, it might be arguable that the Commission had granted the tenant an easement under state law. Moreover, commenters argue that some states might treat the reception equipment as fixtures that, once installed, belong to the landlord.[121]

(f) If the Commission were to prohibit restrictions on common property in apartment buildings and thereby possibly create additional duties for landlords, the Commission's rules might conflict with the policies and requirements of HUD Section 8 public housing requirements.[122]

(g) With respect to condominiums and cooperative associations, even though the viewer might have an indirect property interest in the common property at issue, extending the rules to common property presents practical problems that might arise with respect to maintenance, repair, and replacement in

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. . . [creating] . . . holes through the building walls . . . could result in water leaks". . . leading to "an unsafe condition."); Burns Reply Comments at 1 (installation may damage the integrity of a roof because "a minor puncture in the roof membrane can become a superhighway to the lowest layers of [melting] snow").

[119]*See* Chadwick Comments at 4 ("[t]he ability to acquire and maintain property casualty insurance is premised on the assumption that the person or entity responsible for the integrity, maintenance, repair and replacement of the property, especially the building envelope and infrastructure, will maintain it in such a way as to minimize the potential for a loss.").

[120]*See* IREM Comments at 2 (contending that it is unlikely renters will have adequate coverage in the event of damage to the property caused by a dish because "only 41% of renters carry renter's insurance to cover their losses in the event of a disaster"); MVMC Comments at 1 ("A tenant's policy will not automatically extend to roof or exterior landscape damage."); Reston Comments at 2; CAI Reply Comments at 14.

[121]*See* NAA Comments at 27-28 (if a tenant bears installation and maintenance costs, "what happens if the antenna is a fixture under state law and the tenant wishes to remove the antenna to take to his next location?").

[122]NAHB Reply Comments at 7-9 ("Application of Section 207 to rental properties would mean that federally assisted housing would be covered as much as market rate housing since there is nothing in the Telecommunications Act to suggest that the Commission has authority to distinguish between market rate and subsidized housing."); NAA Reply Comments at 18-19 n.16 ("[H]UD Section 8 housing is subject to severe restrictions on the types of expenditures owners may finance under HUD guarantees. HUD rules do not currently include satellite programming delivery systems. . . ."); NAHB Reply Comments at 7-8 ("[U]nlike owners of market rate housing, owners of assisted housing cannot pass such costs onto existing or new residents because federal law precludes owners from raising rents in such projects.").

these areas which are the responsibility of the condominium association and which would be seriously affected by the presence of Section 207 reception equipment.[123]

47. In response, some commenters argue that many of these practical concerns can be addressed under current law.[124] CFA argues that the Commission should devise a rule that would indemnify the owner and place liability on the tenant for injury or damage caused by the installation of a Section 207 reception device.[125] Regarding the number of antennas that must be permitted on a roof, DIRECTV argues that the Commission should adopt a rule requiring landlords to provide residents access to at least two MVPD services, which may require the installation of one or more antennas.[126]

b. *Discussion*

48. We believe that commenters have raised several practical concerns suggesting that, even in the absence of the Constitutional takings issue, it may not serve the public convenience, interest and necessity to extend our Section 207 rules to common and restricted access property.[127] First, it is difficult to discern what limits could be set, if any, on the number of reception devices that a viewer could install and maintain on common property. For instance, not only would every tenant have the right to run wiring through the hallways and on the roof of their apartment building in order to install reception devices, but they would have the right to install the particular device of their service provider (or providers) of choice.[128] With potentially hundreds of separate wires and antennas being installed in a single building, we believe that space constraints could limit

[123]CAI Comments at 29 ("The additional costs incurred in working around this equipment could require a special assessment[,] which would exacerbate problems with owners previously discontented."); Chadwick Comments at 3-4 (the installation of an antenna on general common elements may invalidate the manufacturer's or installer's warranties); Frost Comments at 5-6 (damage to buried cable, underground utilities and irrigation systems); NAA Comments at 25 (compliance with building and electrical codes); NAHB Comments at 11 ("Such attachments [penetrating a roof or exterior wall] create new maintenance and repair costs that will ultimately fall on the owner."); Reston Comments at 2; CAI Reply Comments at 14; Optel Reply Comments at 5-6.

[124]DIRECTV Comments at 11 ("Landlord tort immunity is the rule, and while there are exceptions, they are not applicable to items installed by the tenant on leased property within the tenant's exclusive control."); USSB Comments at 8-9 (tenant remains liable); DIRECTV Reply Comments at 10; NAB Reply Comments at 17-18 ("The answer to NAA's question is simply that the Commission will not preempt reasonable health and safety requirements."); USSB Reply Comments at 4-6 (property managers select installers).

[125]CFA ex parte presentation.

[126]DIRECTV Comments at 13, 17.

[127]Section 207 directs the Commission to promulgate regulations "pursuant to Section 303 of the Communications Act of 1934." Section 303, in turn, authorizes the Commission to promulgate regulations "as public convenience, interest or necessity requires." Communications Act, § 303, 47 U.S.C. § 303.

[128]*See* CAI Comments at 31-32. NAA and others warn that a shared wiring system would have to be capable of receiving signals from at least four sources (cable, free broadcast, DBS, and MMDS) and deliver any or all of each services to every unit in a building. NAA Reply Comments at 39-40. *See also* Oak Hills Reply Comments at 1 ("The property values would go down if each quadraminium building had 4 satellite dishes on the front of the building."); M. Edward Burns Comments at 2 (concerned that there would be a "farm of antennas in the common elements").

the number of residents that would be able to install Section 207 devices, and involve the Commission and local courts in countless disputes about the feasibility of installing additional reception devices in a building. Moreover, it would be difficult to determine whether any limit could be set on how often a viewer could reasonably switch service providers and require the property owner to suffer another disruption of the common or restricted access areas. Any limits on these rights, such as DIRECTV's proposal to require property owners to accommodate only two MVPDs on the property, seem arbitrary and unsupported by the statutory language.

49. These difficulties would not be solved by relying on the common antenna option originally proposed by CAI. As clarified in the *Order on Reconsideration*, a landlord or community association may prohibit residents from installing individual antennas as long as this prohibition does not impose unreasonable delay, unreasonable expense or preclude reception of an acceptable quality signal, including the programming an individual could obtain with an individual antenna.[129] The common antenna option is purely voluntary; a landlord or community association could choose not to establish a common antenna and simply permit any resident who wished to receive a Section 207 service to install an individual antenna on the resident's own property. Giving residents the right to use the common or restricted access areas, by contrast, could require the association to maintain as many separate antennas as there are service providers, without the option of simply requiring the resident to install individual reception equipment on his or her own property.

50. We are also concerned about the potential for structural damage and injuries to third parties. It is not clear from the record that an individual tenant could obtain liability insurance for common or restricted access areas, and, even if it were possible, that such insurance would be affordable. Further, we are not persuaded that all of these issues can be resolved by devising a rule that would indemnify the owner and place liability on the tenant for injury or damage caused by the installation of a Section 207 reception device.[130]

51. We therefore believe that in the context of a statutory provision that simply provides for elimination of restrictions, the practical difficulties inherent in giving viewers the right to install Section 207 reception devices on common or restricted access property weigh heavily against an extension of our rules to cover such property.

C. First Amendment and Equal Protection Claims

1. First Amendment

a. *Comments*

[129] *See Order on Reconsideration*, FCC 98-214 (rel. September 25, 1998) at paras. 86-89.

[130] We believe that some of the other practical problems raised by commenters can be addressed under our current rules. For instance, with regard to security concerns, landlords could enforce reasonable restrictions on when and how access is obtained to the building so long as such restrictions did not create an unreasonable delay and therefore impair a viewer's rights under Section 207. In addition, our current rules permit the enforcement of valid safety restrictions even if they impair a viewer's ability to exercise his or her Section 207 rights. Thus, for legitimate safety reasons, a landlord may be able to require that a certain method of installation be used or that the antenna be installed in a particular location.

52. Several commenters argue that not extending Section 207 rules to viewers who need access to rental or common property would directly impact these viewers' First Amendment right to access to information.[131] Indeed, some commenters argue that these viewers' First Amendment rights trump the property owner's rights under the Fifth Amendment.[132]

53. In response, ICTA and NAA argue that there can be a First Amendment violation only where the government has taken action to infringe that right, and that it is the conduct of private property owners and not state action that has restricted the viewers' rights.[133] ICTA and NAHB also dispute the contention that the Commission is required by the First Amendment to extend its Section 207 rules to common property, regardless of the effect on Fifth Amendment property rights.[134]

b. *Discussion*

54. As discussed above,[135] the Supreme Court has found that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."[136] Additional sources of information enhance a viewer's access to "social, political, esthetic, moral and other ideas."[137] Based in part on these important government purposes, we

[131]*See* CFA Comments at 3-4, 7, 9-10 ([The] decision here directly impacts the First Amendment right of viewers to have access to a multiplicity of sources of news and information. . . . [R]enter's First Amendment interests will be compromised. . . . If the Commission allows restrictions [on renters,] . . . such a decision would be a direct affront to the `paramount' right of these citizens, as viewers, to receive news and information via broadcasting.") (citing *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969)); NRTC Comments at 10 ("In order to preserve this most basic foundation of our American democracy, the Commission should enable all viewers to access information *via* DBS -- regardless of whether they are homeowners, MDU occupants, or renters."); Philips Comments at 12-14 ("Section 207 is entirely consistent with a long line of legal precedent which provides that *viewers* have a `paramount' First Amendment right to receive a variety of information from diverse sources."); Pacific Reply Comments at 6-7.

[132]NRTC Comments at 9 ("[P]ublic's interest in unfettered dissemination of information should outweigh private property interests."); Philips Comments at 12 (property interests "do not outweigh the countervailing rights that their tenants and unit owners possess under the First Amendment as viewers of electronic video programming services.").

[133]ICTA Reply Comments at 2-4 ("[T]here can be no viable claim for impairment of First Amendment rights absent a showing of state action."); NAA Reply Comments at 27-28 ("The First Amendment . . . does not protect private parties against freely entered into private limitations on their use of another's property."); *see also* Optel Reply Comments at 3 ("[R]equiring tenants and property owners to abide by their contractual obligations in no way violates the First Amendment.").

[134]*See* ICTA Reply Comments at 4, 18 ("There is no language in the Fifth Amendment providing for an exception to the just compensation requirement if First Amendment rights are also involved, and therefore if First Amendment rights somehow required the taking of private property they could not obviate the need for just compensation."); NAHB Reply Comments at 8 ("The Commission has no authority to take private property on the grounds that Fifth Amendment property rights are outweighed by First Amendment rights.").

[135]*See* Section II.B.1.b.

[136]*Turner Broadcasting System*, 114 S.Ct. at 2470.

[137]*See Time Warner*, 93 F.3d at 975 (*quoting Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389 (1969)).

extended our Section 207 rules to prohibit certain restrictions, subject to the terms and exceptions of our Section 207 rules, on the placement of Section 207 devices within rental property.

55. Despite our regard for these important government purposes, we are not persuaded by the record that the First Amendment compels us to interpret Section 207 without regard to the impact on third parties' property rights, the creation of affirmative duties not intended by Section 207, and the legitimate and serious practical concerns. To the contrary, as noted above, *Loretto* held that a permanent physical occupation of property is a taking without regard to the public interest that it may serve.[138]

56. We disagree with the argument that *Red Lion Broadcasting Co. v. FCC*[139] requires us to interpret Section 207 in such a way as to guarantee viewers' access to the video programming service of their choice.[140] *Red Lion* does not require the Commission to promulgate regulations to ensure that every viewer has access to every available video programming service regardless of the constitutional and practical burdens imposed on third parties.

57. Likewise, we disagree that *Pruneyard Shopping Center v. Robins*[141] provides authority that would permit the Commission to issue a rule superseding a property owner's property rights.[142] Pruneyard was a 21-acre shopping center in which a group of students, acting under color of a California state constitutional provision providing access to shopping centers, placed a card table and began soliciting petition signatures.[143] Performing a *Penn Central* takings analysis, the Court held that because the center was "open to the public at large" and could adopt time, place and manner restrictions to minimize any interference with the center's operations, Pruneyard's property rights had not been unconstitutionally infringed: "In these circumstances, the fact that [the students] may have `physically invaded' appellants' property cannot be viewed as determinative."[144] The *Loretto* Court explicitly distinguished *Pruneyard* from the permanent occupation in *Loretto* by noting that "the invasion [of the shopping center] was temporary and limited in nature, and . . . the owner had not exhibited an interest in excluding all persons from his property."[145] Likewise, *Pruneyard* is

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[138]*Loretto*, 458 U.S. at 426 ("We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.").

[139]395 U.S. 367 (1969).

[140]Philips Comments at 14 ("The Commission cannot and must not subordinate `this important and substantial federal interest' to the dubious claims of landlords in implementing Section 207.").

[141]447 U.S. 74 (1980).

[142]*See* NAB Comments at 14. As an initial matter, the issue decided in *Pruneyard* was not whether the First Amendment required access to the shopping mall, but rather whether a provision in the California state constitution permitting access to shopping malls impermissibly infringed the mall's Fifth Amendment property rights. 447 U.S. at 76.

[143]*Id.* at 77.

[144]*Id.*

[145]*Loretto*, 458 U.S. at 434; *see also* ICTA Reply Comments at 5-8*; Cox Cable*, 195 Cal. App. 3d at 29-30 (rejecting a cable operator's reliance on *Pruneyard* to obtain access to multiple dwelling unit over the property owner's objection):

distinguishable here because the evidence in the record does not persuade us that rental buildings have taken on a "public forum" character, that the owners have invited an occupation of their common property, or that the occupation would be temporary instead of permanent.[146]

58. The facts are altogether different regarding leaseholds. In *Pruneyard*, because the students were invited to the shopping center, the California constitution could require the shopping center to allow the students to bring a card table with them for the duration of their visit without infringing the shopping center's Fifth Amendment property rights. Similarly, when a landlord invites a tenant to possess a leasehold for the duration of the lease, permitting the tenant to have a Section 207 device within the leasehold during the lease term does not infringe the landlord's Fifth Amendment property rights.

2. Equal Protection

a. *Comments*

59. At least some commenters appear to argue that by not extending Section 207 to common and restricted access property, the Commission is denying viewers who rent the equal protection of the law.[147] Other commenters present statistics that appear to demonstrate that minorities and lower-income persons comprise a disproportionate percentage of the country's renters and MDU residents.[148] On the other side,

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> The cases on which Cox relies all involve, at most, transitory trespasses by leafletters and speakers. None involve the sort of physical occupation sought here. In none of the cited cases were the individuals seeking to erect a permanent structure. Those cases would be more similar to Cox's situation if, in those cases the individuals were given the right to build a permanent kiosk to disseminate information or to erect a permanent stage with attached amplification equipment for speeches. Cox's requested right of access here is analogous to a publisher seeking a right to cut slots in apartment doors so it can deliver its newspapers directly. The First Amendment has yet to be extended so far.

[146]*Cox Cable*, 195 Cal. App.3d at 29-30; *see Cable Investments*, 867 F.2d at 161-62 (rejecting "company town" argument that tenant had First Amendment right to receive particular cable service over property owner's objection); *Cox*, 195 Cal. App. 3d at 29 (rejecting argument that multiple dwelling unit was a quasi-public forum like a shopping mall; the public is generally not invited to set up communications equipment on the property). *See also* CAI Reply Comments at 15 ("Rental or community property is not open to the public for purposes of free speech, and having access to information over every form of broadcast reception is not a First Amendment right.").

[147]*See* Philips Comments at 5 ("[S]uch distinctions [between homeowners and renters] would be invidiously discriminatory."); CELLULARVISION Comments at 6 ("[L]imiting the applicability of the preemption rule solely to single family homes is discriminatory and would defeat the intent of Congress in adopting Section 207.").

[148]*See* Philips Comments at 6-7 ("The impact on minority households of any home ownership distinction in implementing Section 207 is fundamentally at odds with Section 104 of the 1996 Act -- the newly enacted nondiscrimination provision which prohibits discrimination in the implementation of the Communications Act of 1934."); DIRECTV Reply Comments at 6-10 ("[T]hese so-called `issues' [safety and liability] do not justify discrimination against renters, as they are just as relevant to residents who own their apartment units."); CEMA Comments at 4 and Reply Comments at 2; CFA Comments at 6, 8 ("Allowing landlord restrictions will widen the disparity between information haves and have-nots. . . ."); DIRECTV Comments at 7-8, 14 ("Perhaps the most pernicious effect of the Commission's exclusion of renters from Section 1.4000 is its disproportionate impact on both

commenters argue that the Commission should focus on the legal and practical difficulties associated with extending the Section 207 rules, not on the identities of viewers.[149]

b. *Discussion*

60. We recognize that, because Section 207 does not provide access rights to common and restricted access property, renters whose individual leaseholds cannot accommodate a Section 207 device will be unable to gain access to the full range of video programming providers. As a result, Section 207 may unintentionally have a disproportionate effect upon low income and minority viewers, to the extent they may comprise a disproportionate percentage of renters. However, we note that we have eliminated any *per se* distinction between viewers who own and those who rent and that many renters may avail themselves of our Section 207 rules by either installing a Section 207 reception device on a balcony or any other outside area included in their leasehold or installing an LMDS-type device inside their dwelling. While we are sympathetic towards those renters who are unable to take advantage of the Section 207 rules, no Fifth Amendment equal protection violation results from applying Section 207 according to its terms and not extending its coverage to common and restricted access property.

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minority and lower-income viewers."); NRTC Comments at 4-5 ("To deny this huge segment of society access to information which is transmitted via DBS is contrary to the democratic ideals upon which this Nation was founded and the express language of Section 207 of the 1996 Act."); SBCA Comments at 3-4 ("It is these viewers/renters who stand to benefit the most from the lower prices that inevitably result from vigorous competition in the marketplace."); USSB Comments at 9 ("Members of the Congressional Black Caucus have [stated] . . . that drawing a line between viewers who own and viewers who rent would not only create a spurious distinction, but it would inflict a disparate hardship on poorer Americans who cannot afford to own their own homes [and] that arguably amounts to redlining to many low-income neighborhoods."); CELLULARVISION Reply Comments at 8-10; CFA Reply Comments at 13 ("But it would consign the remaining one-third to inferior status, including a disproportionate percentage of minorities and lower income citizens, for no reason other than a financial inability or a choice not to own their own homes."); NRTC Reply Comments at 2; Pacific Reply Comments at 2-3; Primestar Reply Comments at 4, 6-9; USSB Reply Comments at 2-3; CELLULARVISION Comments at 5 ("Many of these viewers, whose incomes on average are less than the incomes of consumers who can afford single family housing, are in special need of competitive video alternatives from a cost standpoint."); CFA Comments at 5-8 ("[R]enting Americans tend to be minorities, lower income Americans, and single mothers, groups that are already most at risk of being left behind in the information age."); Philips Comments at 5-6 ("Two-thirds of single mothers must rent their housing."); SBCA Comments at 4 ("Data from the Census Bureau also reveals that members of minority groups rent their homes in disproportionate numbers in comparison to the rest of the population.").

[149]CAI Reply Comments at 16-17 ("The issue in this proceeding is the integrity of common property, which would be destroyed by individual installation of telecommunications equipment on the property without regulation by the landlord or community association."); ICTA Reply Comments at 17-18 ("Property owners have rights that tenants do not have because the former own the property where they reside whereas the latter do not. Those rights certainly do not depend on the percentages of minority and white households renting apartments."); NAA Reply Comments at 16 n.13 ("Section 207 has nothing to do with the status . . . of tenants." A disproportionate adverse impact on minorities is unconstitutional only if traced to a discriminatory purpose (*citing Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 172 (1979)); NAHB Reply Comments at 5-7 ("[T]he Commission has no general authority to implement a policy not committed to it by Congress, even if the policy promotes the general welfare."); Optel Reply Comments at 3; Primestar Reply Comments at 6-7.

61. A statutory classification that does not proceed along "suspect lines" or infringe upon a fundamental right will receive a "strong presumption of validity" and will be examined under a "rational basis" equal protection analysis.[150] Commenters have not adduced any authority that recognizes renters or MDU residents as a protected class. Moreover, even if minorities, who are a protected class,[151] comprise a significant portion of MDU residents, in a case alleging that a protected class is harmed by the disparate impact of a facially neutral regulation, the regulation will not be examined under strict scrutiny unless it can be shown that the disparate impact was intentional.[152] We do not believe that such an intent has been alleged or demonstrated here. As noted above, the distinctions made in this *Second Report and Order* were not made based on race, but on the limitations on the authority granted to us by Section 207. Moreover, any disparate impact on renters has been mitigated by our new rules permitting renters to install Section 207 reception devices within their leaseholds.

62. Under the rational basis equal protection scrutiny, a classification need only be rationally related to a legitimate governmental interest.[153] We believe that the Section 207 rules clearly satisfy this standard because the language of Section 207 supports our conclusion not to extend our rules to cover common and restricted access property.

III. FINAL REGULATORY FLEXIBILITY ANALYSIS

63. As required by the Regulatory Flexibility Act ("FRA"),[154] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Further Notice*.[155] The Commission sought written public comment

[150]*Heller v. Doe*, 509 U.S. 312, 319 (1993); *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993). The Due Process Clause of the Fifth Amendment contains an Equal Protection component, which is applicable here because the Commission is a federal agency. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *see Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995).

[151]*See, e.g., Loving v. U.S.*, 388 U.S. 1, 10 (1967).

[152]*See, e.g., Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977). In rare cases, intent may be inferred where "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the effect of the governing legislation appears neutral on its face." *Id.* at 266; *see also McCleskey v. Kemp.*, 481 U.S. 279, 294 n.12 (1987). Otherwise, in disparate impact cases, the court will look to other evidence of intent. *See McClesky*, 481 U.S. at 294; *Arlington*, 429 U.S. at 266 (absent a stark pattern, "the Court must look elsewhere for evidence"); *Washington v. Davis*, 426 U.S. 229, 246 (1976) (police department verbal skills exam disproportionately impacting minorities analyzed under rational basis because no proof that test was intentionally designed to produce racially disproportionate results); *Personnel Administrator*, 442 U.S. at 281 (even where the legislature realized that a facially neutral statute would impact females adversely, there is no equal protection violation absent some showing of discriminatory intent by legislature).

[153]*See, e.g. Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988).

[154]*See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

[155]*Further Notice* at Attachment D.

on the proposals in the *Further Notice*, including comment on the IRFA.[156] The comments received are discussed below. This Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.

A. Need for, and Objectives of, this *Second Report and Order*

64. The rulemaking implements Section 207 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56. Section 207 directs the Commission to promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through certain devices designed for over-the-air reception, including MMDS, LMDS, DBS, TVBS and ITFS ("Section 207 devices").[157] This action is authorized under the Communications Act of 1934 § 1, *as amended*, 47 U.S.C. § 151, pursuant to the Communications Act of 1934 § 303, *as amended*, 47 U.S.C. § 303, and by Section 207 of the Telecommunications Act of 1996.

65. On August 6, 1996, the Commission implemented part of Congress' directive by releasing rules set forth in 47 C.F.R. § 1.4000 ("Section 207 rules") that prohibit restrictions that impair a viewer's ability to install, maintain and use devices designed for over-the-air reception of video programming through Section 207 devices on property within the exclusive use or control of the viewer in which the viewer has a direct or indirect ownership interest. Our rule exempts regulations and restrictions which are clearly and specifically designed to preserve safety or historic districts, allowing for the enforcement of such restrictions even if they impair a viewer's ability to install, maintain or use a reception device.

66. The rule adopted in this *Second Report and Order* prohibits the same types of restrictions on a viewer who desires to place Section 207 devices on property that the viewer has leased and is within the exclusive use or control of the viewer. The same exemptions applicable to the initial Section 207 rules apply to this rule.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

67. The Commission, in its *Report and Order*, invited comment on the IRFA and the potential economic impact the proposed rules would have on small entities.[158] The only comment submitted was a joint response filed by the National Apartment Association, et al. (collectively "NAA").[159] NAA argues that removing restrictions on a viewer's use of a Section 207 device in the viewer's leased dwelling constitutes a Fifth Amendment taking of the property owners' rights.[160] In addition, NAA argues that, due to the small staffs and limited resources of small businesses, the rules would interfere with the ability of small businesses to

[156] *Report and Order* at Attachment D.

[157] 1996 Act, § 207.

[158] *Report and Order* at Attachment D.

[159] Joint Comments were filed by the National Apartment Association, the Building Owners and Managers Association, the National Realty Committee, the Institute of Real Estate Management, the International Council of Shopping Centers, the National Multi Housing Council, the American Seniors Housing Association, and the National Association of Real Estate Investment Trusts.

[160] NAA IRFA Comments at 3.

ensure compliance with safety codes, to protect the safety of other tenants, and to prevent damage to the building.[161] Finally, NAA argues that Congress did not intend for Section 207 to preempt lease restrictions.[162]

68. We have taken the arguments and views of NAA into account in this *Second Report and Order*. NAA's comments on behalf of small businesses in response to the IRFA essentially track its objections to the rule overall, which we have already fully addressed. As analyzed in the *Second Report and Order*, our rules removing use restrictions on Section 207 devices from leases do not constitute a taking under the Fifth Amendment. Removing the use restrictions does not constitute a *per se* possessory taking under *Loretto* because the landlord has voluntarily entered into a commercial relationship with the tenant and has given the tenant possession of the leased property. Furthermore, removing restrictions on the use of leased property does not constitute a *Penn Central* regulatory taking, given, as discussed above, the character of the government action, the minimal economic impact on the landlord, and the minimal impact on the landlord's reasonable investment-backed expectations.

69. Regarding the practical concerns of small businesses, as set forth in the *Second Report and Order*, these practical concerns may be addressed under our current rules. For example, safety restrictions are permitted exceptions to our Section 207 rules. Likewise, a restriction barring substantial damage to the building would likely be a reasonable restriction under 47 C.F.R. § 1.4000.

70. Finally, we disagree with NAA's last argument that Congress did not intend for Section 207 to cover lease restrictions. The express language of Section 207 contains no such limitation. Moreover, as discussed in Section II.A.2 above, the legislative history of Section 207 demonstrates that Congress acknowledged that there might be restrictions that would be covered by Section 207 that it had not considered when adopting Section 207 into law.

71. Although local governments did not file comments on the IRFA contained in the *Further Notice*, they did file joint comments[163] in response to the IRFA's contained in International Bureau (IB) Docket

[161] *Id.* at 4.

[162] *Id.*

[163] National League of Cities; The National Association of Telecommunications Officers and Advisors; The National Trust for Historic Preservation; League of Arizona Cities and Towns; League of California Cities; Colorado Municipal League; Connecticut Conference of Municipalities; Delaware League of Local Governments; Florida League of Cities; Georgia Municipal Association; Association of Idaho Cities; Illinois Municipal League; Indiana Association of Cities and Towns; Iowa League of Cities; League of Kansas Municipalities; Kentucky League of Cities; Maine Municipal Association; Michigan Municipal League; League of Minnesota Cities; Mississippi Municipal Association; League of Nebraska Municipalities; New Hampshire Municipal Association; New Jersey State League of Municipalities; New Mexico Municipal League; New York State Conference of Mayors and Municipal Officials; North Carolina League of Municipalities; North Dakota League of Cities; Ohio Municipal League; Oklahoma Municipal League; League of Oregon Cities; Pennsylvania League of Cities and Municipalities; Municipal Association of South Carolina; Texas Municipal League; Vermont League of Cities and Towns; Virginia Municipal League; Association of Washington Cities; and Wyoming Association of Municipalities (collectively, "NLC").

No. 95-59 (*DBS Order and Further Notice*)[164]and in Cable Services Bureau (CS) Docket No. 96-83 (*TVBS-MMDS Notice*),[165] and we will consider those comments with respect to our new rule. NLC commented that the proposed preemption of restrictions on property where the viewer had a direct or indirect property interest and over which the viewer exercised exclusive use or control would have a "substantial economic and administrative impact" on over 37,000 small local governments.[166] NLC states that the proposed rule would require "local governments to amend their laws and to file petitions at the FCC . . . for permission to enforce those laws."[167]

72. In the *Report and Order*, we addressed these concerns:

> The Commission has modified its proposed rule and has addressed the concerns raised by NLC by providing greater certainty regarding the application of the rule, and by clarifying that local regulations need not be rewritten or amended. The Commission recognizes that some regulations are integral to local governments' ability to protect the safety of its citizens. The rule that we adopt exempts restrictions clearly defined as necessary to ensure safety, and permits enforcement of safety restrictions during the pendency of any challenges. In addition, limiting the rule's scope to regulations that "impair," rather than the proposed preemption of regulations that "affect," will minimize the impact on small local governments, while effectively implementing Congress' directive. Finally, the inclusion in the *Report and Order* of examples of permissible and prohibited restrictions will minimize the need for local governments to submit waiver or declaratory ruling petitions to the Commission, decreasing the potential economic burden.

We do not believe that preempting government restrictions on viewers residing on rental property will have any greater impact than preempting government restrictions on viewers residing on property that they own.

73. The Commission also notes the positive economic impact the new rule will have on many small businesses. The new rule will allow small businesses that use video programming services to select from a broader range of providers, which could result in significant economic savings; because providers will be competing for customers, more services will be available at lower prices. In addition, small business video programming providers will be faced with fewer entry hurdles, and will thus be able to develop their markets and compete more effectively, achieving one of the purposes of Section 207.

C. Description and Estimate of the Number of Small Entities To Which Rules Will Apply

74. The Regulatory Flexibility Act defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction," and "the same meaning

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[164]Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Docket No. 95-59, Report and Order and Further Notice of Proposed Rulemaking, Appendix III, 11 FCC Rcd 5809 (1996).

[165]Implementation of Section 207 of the Telecommunications Act of 1996: Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service, Notice of Proposed Rulemaking, Appendix B, CS Docket No. 96-83, 11 FCC Rcd 6357 (1996).

[166]NLC DBS IRFA Comments at 2.

[167]*Id.*

as the term ‹small business concern' under Section 3 of the Small Business Act."[168] The rule we adopt today applies to small organizations, small governmental jurisdictions, and small businesses.

75. The term "small governmental jurisdiction" is defined as "governments of . . . districts, with a population of less than fifty thousand."[169] There are 85,006 governmental entities in the United States.[170] This number includes such entities as states, counties, cities, utility districts and school districts. We note that restrictions concerning antenna installation are usually promulgated by cities, towns and counties, not school or utility districts. Of the 85,006 governmental entities, 38,978 are counties, cities and towns; and of those, 37,566, or 96%, have populations of fewer than 50,000. The NLC estimates that there are 37,000 "small governmental jurisdictions" that may be affected by the proposed rule.[171]

76. Section 601(4) of the Regulatory Flexibility Act defines "small organization" as "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[172] This definition includes homeowner and condominium associations that operate as not-for-profit organizations. The Community Associations Institute estimates that there were 150,000 associations in 1993.[173] Given the nature of a neighborhood association, we assume for the purposes of this FRFA that all 150,000 associations are small organizations.

77. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[174] NAA argues that its members fall into three areas of SIC Codes 6512 (operators of nonresidential buildings), 6513 (operators of apartment buildings), and 6514 (operators of dwellings other than apartment buildings). The SBA defines a small entity in each of these codes as one with less than $5,000,000 in gross annual revenues. Based on census data that lists businesses according to these SIC codes and their total revenue, NAA states that there are 28,089 operators of nonresidential buildings and 39,903 operators of apartment buildings. NAA states the Bureau of Census includes operators of dwellings other than apartment buildings in the same category as other types of businesses; thus, NAA would not provide the data, presumably because it would not be useful; however, NAA states that the figures for this category as a whole show that the number of operators of dwellings other than apartment buildings are similar to the numbers of operators covered by SIC codes 6512 and 6513.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

[168]Regulatory Flexibility Act, 5 U.S.C. § 601(3) (1980).

[169]5 U.S.C. § 601(5).

[170]United States Dept. of Commerce, Bureau of the Census, *1992 Census of Governments*.

[171]NLC IRFA Comments at 2.

[172]5 U.S.C. § 601(4).

[173]Community DBS Comments at 2.

[174]Small Business Act 15 U.S.C. § 632 (1996).

78. The rules adopted will result in no changes to reporting, recordkeeping, or other compliance requirements beyond those already required under our Section 207 rules.

E. Steps Taken to Minimize the Significant Economic Impact on Small Entities and Significant Alternatives Rejected

79. In the *Report and Order*, the Commission analyzed steps to minimize the impact on small entities, and because we believe the steps the Commission took in the *Report and Order* also minimize the impact on the small entities impacted by our new rule, we reiterate here the steps taken in the *Report and Order*:

> The Commission considered various alternatives that would have impacted small entities to varying extents. These included a rebuttable presumption approach, the use of the term "affect" in the rule, and a rule that allowed for adjudicatory proceedings in courts of competent jurisdiction, all of which were adopted in the *DBS Order and Further Notice* and proposed in the *TVBS-MMDS Notice*. The rule we adopt today replaces the rebuttable presumption with a simpler preemption approach, adheres to the statutory language by using the term "impair" rather than "affect" in the rule, and allows for adjudication at the Commission.[[175]] . . . We believe that we have effectively minimized the rule's economic impact on small entities.
>
> In the *DBS Order and Further Notice* and the *TVBS-MMDS Notice*, we adopted and proposed, respectively, a rebuttable presumption approach to governmental regulations,[176] and proposed strict preemption of nongovernmental restrictions.[177] We acknowledged in the *DBS Order and Further Notice* that a rule relying on a presumptive approach would be more difficult to administer than a rule based upon a *per se* prohibition,[178] and we sought comment in the *TVBS-MMDS Notice* on less burdensome approaches.[179] Under the rebuttable presumption approach, local governments would have been required to request a declaratory ruling from the Commission every time they sought to enforce or enact a restriction; and neighborhood associations would not have been able to enforce or enact any restrictions that impaired a viewer's ability to receive the signals in question. The rebuttable presumption approach was adopted to ensure the protection of local interests, including local governments. Based on the record, the Commission recognizes that the burden of rebutting a presumption could strain the resources of local authorities. The Commission has rejected the rebuttable presumption approach for a less burdensome preemption approach. In addition we have provided recourse for both neighborhood associations and municipalities. The rule we adopt today provides for a *per se* prohibition of restrictions that impair a viewer's ability to install, maintain or use devices designed for over-the-air reception of video programming services. Our Report and Order

[175] *See Order on Reconsideration* (explaining why a Commission proceeding is less burdensome than a court proceeding).

[176] *DBS Order and Further Notice* at para. 28 and Appendix II; *TVBS-MMDS Notice* at para. 8 and Appendix A.

[177] *DBS Order and Further Notice* at para. 62 and Appendix II; *TVBS-MMDS Notice* at para. 10 and Appendix A.

[178] *DBS Order and Further Notice* at para. 25.

[179] *TVBS-MMDS Notice* at para. 8.

provides examples of reasonable regulations that can be enforced without a waiver application. The Commission believes that the Report and Order provides such clarity as will make the enforcement of the rule the most efficient and least burdensome for local governments, neighborhood associations, and this Commission.

In adopting the new rule, the Commission rejected the alternative of preempting all restrictions that "affect" the reception of video programming services through devices designed for over-the-air reception of TVBS, MMDS and DBS services. The new rule prohibits only those local restrictions that "impair" a viewer's ability to receive these signals and exempts restrictions necessary to ensure safety or to preserve historic districts. In defining the term "impair" we reject the interpretation that impair means prevent[180] because that definition would not properly implement Congress' objective of promoting competition. We find that a restriction impairs a viewer's ability to receive over-the-air video programming signals, if it (a) unreasonably delays or prevents installation, maintenance or use of a device used for the reception of over-the-air video programming signals by DBS, TVBS, or MMDS; (b) unreasonably increases the cost of installation, maintenance or use of such devices; (c) precludes reception of an acceptable quality signal. The use of the term impair will decrease the burden on small entities while implementing Congress' objective. . . .

Waiver proceedings will be paper hearings, allowing the Commission to alleviate the negative potential economic impact from costly litigation. Further, any regulations necessary to the safeguarding of safety will remain enforceable pending the Commission's resolution of waiver requests. The Commission believes that the rule we adopt today effectively implements Congress' intent while minimizing any significant economic impact on small entities.[181]

Report to Congress: The Commission will send a copy of this *Second Report and Order*, including this FRFA, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this *Second Report and Order* and this FRFA (or summary thereof) will also be published in the Federal Register, pursuant to 5 U.S.C. § 604(b), and will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

IV. PAPERWORK REDUCTION ACT OF 1995 ANALYSIS

80. This *Second Report and Order* contains information collection requirements for which the Commission already has clearance from the Office of Management and Budget ("OMB") to sponsor. The Commission submitted these information collection requirements to OMB for clearance under OMB control

[180] *See, e.g.*, Caughlin TVBS-MMDS Comments at 2 (nongovernmental restrictions should be preempted only if they preclude reception); Reston TVBS-MMDS Comments at 3 (restrictions that "do not operate as complete bans" or that do not "limit reception" are not inconsistent with Section 207); NLC TVBS-MMDS Comments at 3-4; NAA TVBS-MMDS Comments, Attachment 2 at 5 (only restrictions that completely prevent); Community TVBS-MMDS Reply at 10; NAA DBS Comments at 13; NLC DBS Reply at 5; NLC DBS Petition at 2-3 (impair means prevent). *But see* DIRECTV DBS Opposition at 6 (opposing NLC's claim that impair means prevent); SBCA *ex parte* presentation June 11, 1996.

[181] *Report and Order* at paras. 53-58.

number 3060-0707 upon the August 6, 1996 release of the *Report and Order*. OMB subsequently issued its clearance to sponsor these requirements by means of a Notice of Action dated October 14, 1996.

V. ORDERING CLAUSES

81. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303, and Section 207 of the Telecommunications Act of 1996, that the amendments to 47 C.F.R. § 1.4000 discussed in this *Second Report and Order* and set forth in Attachment B ARE ADOPTED. These amendments shall become effective 30 days after publication in the Federal Register.

82. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Second Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C.A. § 601 *et. seq*.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Secretary

APPENDIX A

Comments Filed in this Proceeding

Comments

Alliance for Higher Education ("Alliance")
Apartment and Office Building Association of Metropolitan Washington ("AOBA")
CellularVision USA, Inc. ("CellularVision")
Chadwick, Washington, Olters, Moriarty & Lynn, P.C. ("Chadwick")
Community Associations Institute, with American Resort Development & National Association of Housing Cooperatives ("CAI")
Consumer Electronics Manufacturers Association ("CEMA")
Consumer Federation of America, League of Latin American Citizens, Minority Media Telecom. Council, Office of Communications of the United Church of Christ and Writers Guild of America East ("CFA")
DIRECTV, Inc. ("DIRECTV")
Epsten & Grinnell ("Epsten")
Federation of Mobile Home Owners of Florida, Inc. ("FMHO")
First Centrum Corporation ("First Centrum")
Frost, Christenson & Associates ("Frost")
Hughes Network Systems, Inc. ("Hughes")
Hyatt & Stubblefield, P.C. ("Hyatt")
Independent Cable & Telecommunications Association ("ICTA")
Manufactured Housing Institute ("MHI")
Mendick Company ("Mendick")
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, National Association of Real Estate Investment Trusts ("NAA")
National Association of Broadcasters ("NAB")
National Association of Home Builders ("NAHB")
National Association of Realtors ("NAR")
National Rural Telecommunications Cooperative ("NRTC")
OpTel, Inc. ("OpTel")
Pacific Telesis Group ("Pacific Telesis")
Philips Electronics North America Corporation and Thomson Consumer Electronics, Inc. ("Philips")
Rapkin, Gitlin & Moser ("Rapkin")
Reston Home Owners Association ("Reston")
Rouse Company and Columbia Association, Inc. ("Rouse")
Satellite Broadcasting and Communications Association of America ("SBCA")
Silverman & Schild, LLP ("Silverman")
United States Satellite Broadcasting Company, Inc. ("USSB")
Wireless Cable Association International, Inc. ("WCA")
Woodbridge Village Association, Irvine, California ("Woodbridge")

Reply Comments

Alphastar Television Network, Inc. ("Alphastar")
CellularVision USA, Inc. ("CellularVision")
Community Associations Institute, American Resort Development Association and National Association of Housing Cooperatives ("CAI")
Consumer Electronics Manufacturers Association ("CEMA")
Consumer Federation of America, League of United Latin American Citizens, Minority Media Telecommunications Council, and Office of Communication of the United Church of Christ ("CFA")
DIRECTV, Inc. ("DIRECTV")
Drummer Boy Homes Association, Inc. ("Drummer")
Independent Cable & Telecommunications Association ("ICTA")
National Apartment Association, Buiding 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, and National Association of Real Estate Investement Trusts ("NAA")
National Association of Broadcasters ("NAB")
National Association of Home Builders ("NAHB")
National Rural Telecommunications Coopertive ("NRTC")
Oak Hills Condominium I Association ("Oak Hills Condo")
Oak Hills Country Club Village Community Association Board ("Oak Hills Country")
OpTel, Inc. ("Optel")
Pacific Telesis Group ("Pacific Telesis")
Philips Electronics North America Corporation and Thomson Consumer Electronics, Inc. ("Philips")
Primestar Partners, L.P. ("Primestar")
The Promenade ("Promenade")
United States Satellite Broadcasting Company ("USSB")

APPENDIX B

AUTHORITY: 47 U.S.C. 151, 154, 207, 303, 309(j).

Part 1, Subpart S, Section 1.4000 of Title 47 of the Code of Federal Regulations is amended to read as follows:

Paragraph (a) of Section 1.4000 is amended to read as follows:

> (a) Any restriction, including but not limited to any state or local law or regulation, including zoning, land-use, or building regulations, or any private covenant, contract provision, lease provision, homeowners' association rule or similar restriction, on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property that impairs the installation, maintenance, or use of: . . .

Paragraph (g) of Section 1.4000 is amended to read as follows:

> (g) All allegations of fact contained in petitions and related pleadings before the Commission must be supported by affidavit of a person or persons with actual knowledge thereof. An original and two copies of all petitions and pleadings should be addressed to the Office of the Secretary, Federal Communications Commission, 445 12th St. S.W., TW-A306, Washington, D.C. 20554, Attention: Cable Services Bureau. Copies of the petitions and related pleadings will be available for public inspection in the Cable Reference Room in Washington, D.C. Copies will be available for purchase from the Commission's contract copy center, and Commission decisions will be available on the Internet.

Paragraph (h) of Section 1.4000, as amended by the Commission Order on Reconsideration on September 25, 1998, is deleted.

SEPARATE STATEMENT OF CHAIRMAN WILLIAM E. KENNARD

In the Matter of Implementation of Section 207 of the Telecommunications Act of 1996: Preempting Restrictions on Over-the-Air Reception Devices

Today we complete our proceeding to remove restrictions on consumers' ability to access video programming offered by means other than cable. I am proud of the Commission's work to expand the Over-the-Air Reception Devices rule up to the limits of the authority Congress gave us in Section 207 of the Telecommunications Act of 1996.[182]

As a result of Section 207 and our rules, thousands of consumers now are able to receive television programming through small satellite dishes, wireless cable or traditional "stick" antennas. The action we take today extends that ability to consumers who rent their homes or apartments and have a place within their rental property to install an antenna. Our rule brings choice to renters who live in high-rise buildings and have a balcony on which to install an antenna, just as owners of condominium units may install an antenna on their balconies and owners or renters of townhouses may have an antenna on their patios. The Commission has thus eliminated the have-and-have-not distinction that gave homeowners access to the competitive video market but denied it to all apartment dwellers.

I am disappointed that Section 207 did not permit us to go as far as we might have to promote competition and eliminate barriers for all consumers. In my view, it is vitally important that all consumers have the ability to select the video programmer of their choice. However, Section 207 directed us only to "prohibit restrictions" on the receipt of video programming and, as this Second Report and Order describes, prohibiting restrictions can only take us part of the way. Section 207 does not authorize the Commission to impose an affirmative duty on landlords to provide access for competitive video providers, and the statute does not clearly address the Constitutional requirement for "just compensation" that may be necessary to give consumers access to the roof or common areas of the landlord's property. Nonetheless, I am committed to working toward a complete solution to this problem.

When we released the Fourth Annual Competition Report at the beginning of this year, I mentioned my hope that Congress and the Commission would work together to evaluate statutory proposals to eliminate barriers to competition. I am especially interested in working with Congress to find ways to provide access to competitive video services for more consumers.

[182] 1996 Act, § 207, 110 Stat. 114 (1996).

Statement of Commissioner Harold Furchtgott-Roth, Dissenting in Part

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

I fully concur in the Commission's excellent decision not to extend our section 207 rules to cover common and restricted access property.[183] For the well-articulated reasons that such property should not be governed by these rules, however, neither should rental property. I therefore respectfully dissent from that part of today's Report & Order ("R&O") which subjects leased property to regulation under section 207.

In deciding that application of our over-the-air reception device ("OTARD") regulations to common and restricted access property would raise grave questions under the Takings Clause, the R&O reasons that, as in *Loretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. 419 (1982), "the physical occupation here would involve the direct attachment of video reception devices to" the property. *Supra* at para. 40. Such an attachment, the R&O continues, would constitute a "permanent physical occupation" and consequently a *per se* taking. *Id.* But the very same "direct attachment of video reception devices" to property would occur in the rental property context. Thus, the attachment of reception devices to rental property is as much a "permanent physical occupation" within the meaning of the Takings Clause as the attachment of such devices to common and restricted access property.

Nevertheless, the R&O concludes that extension of the OTARD rules to rental property would occasion no *per se* taking. For this conclusion, the R&O relies on the proposition that when "the private property owner voluntarily agrees to the possession of its property by another, the government can regulate the terms and conditions of that possession without effecting a *per se* taking." *Supra* at para. 18 (citing *FCC v. Florida Power*, 480 U.S. 245 (1987)).[184]

I must doubt the applicability of *Florida Power*, however, and for this fundamental reason: *the particular occupation to which the landlord has "voluntarily agree[d]" is necessarily defined by the terms of the lease*. That legal document is the primary determinant of the property rights that have, or have not been, transferred from owner to tenant, and there are myriad allocations of property rights to which landlords and tenants might agree.[185] Where a landlord has expressly included lease provisions prohibiting the attachment

[183]I also join in the conclusions reached with respect to the Equal Protection Clause and First Amendment. *See supra* at paras. 49-59.

[184]Although the Commission attempts to frame this rule in terms of "possession," *Florida Power* clearly speaks in terms of the "occupation" of the relevant property. *See* 480 U.S. at 252; *see also Yee v. Escondido*, 503 U.S. 519, 527 (1992). Thus, the Commission's emphasis on possession does not exist in the relevant case law. It is the *occupation*, *i.e.*, the "required acquiescence," *Florida Power*, 480 U.S. at 252, that counts under the Takings Clause. It is that act that could theoretically slice through an owner's bundle of property rights -- rights that include the ability not just to possess, but also to use and dispose of property. *See Loretto*, 458 U.S. at 435.

[185]For this reason, I think the R&O goes too far when it states that "[t]ypically, for apartments, [leased property under the exclusive possession of the viewer] will include balconies, balcony railings and terraces" and that for "rented

of certain equipment to rental property, it cannot be said that he has consented to such an occupation of his property.

In other words, if the landlord has not agreed to a certain occupation or use of his property, *there can be no theory of consent with respect to the prohibited occupation or use that would prevent application of the Takings Clause*. *Cf.* Declaration of Charles M. Haar in Support of Reply Comments of National Apartment Association *et al.*, at 24-25 ("The notion of implied consent to use the property . . . 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."). Admittedly, a tenant who occupies property subject to certain contractual limitations is not a complete stranger to the property, but as far as contractually restricted uses of that property are concerned, the law does indeed deem him "an interloper." *Florida Power*, 480 U.S. at 252.

Indeed, the R & O repeatedly recognizes this very point -- namely, that the government can regulate property use only within the boundaries of the property rights that have actually been conferred upon the tenant -- in the discussion of common and restricted access property. For instance, in rejecting the argument that the Commission could strike down lease provisions limiting tenant usage of, or access to, common and other property, the R & O correctly explains that "[s]o long as a tenant owns the reception device placed in a common or restricted access area, *and the terms of the tenant's lease . . . or other agreement* do not give the tenant the right to exclusively possess any portion of this property, the landlord's . . . property would be subjected to an uninvited permanent physical occupation." *Supra* at para. 43 (emphasis added). If placement of a reception device on property such as a balcony or exterior wall adjoining a tenant's apartment is barred by the rental contract, however, then the landlord would be equally subject to an "uninvited" invasion of his property -- the forced introduction of the prohibited attachment -- if the tenant nevertheless affixed a device on that property. Just as "the landlord does not invite the tenant to take possession of common and restricted access property," *supra* at para. 39, so too the landlord has not invited the tenant to use the property for the attachment of reception devices.[186]

Similarly, in declining to rely on *Florida Power* in the context of restricted and common property, the R & O notes that "the agreed-upon scope of the physical possession is set forth in the lease or other controlling document." *Supra* at para. 45.[187] As discussed above, the same is true in the rental property situation.

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single family homes or manufactured homes which sit on rented property, it will typically include patios, yards or gardens within the leasehold." *Supra* at para. 29. We cannot prescribe general federalized lease terms (although I fear that may be the logical implication of this decision), and the very nature of contracts is that their terms can be customized to suit the particular circumstances in which the parties find themselves.

[186]Accordingly, to say that the attachment of devices to rental property is like the attachment of "rabbit ears" to a television set, *see supra* at para. 20, does not advance the ball in this game: the critical question is whether the person who owns the equipment is the same person who owns the property to which it is permanently affixed, which the R&O makes clear in its section on restricted access property. *See supra* at para. 43 (noting "critical" issue that "ownership of the property (*i.e.*, the hypothetically required cable equipment) must rest with the landlord"). And, if the rabbit ears are the property of some third party and their placement is mandated by the government, that would raise the issue of a *per se* Taking.

[187]As noted *supra* note 2, it is the permanent, physical *occupation* of the owner's property (which could be a number of different kinds of invasions), not just the extent of the *possession* of the property (which is only one of several kinds of property rights that might be adversely affected by an occupation of the property), that triggers the Takings Clause.

Location of a reception device on an exterior wall when such action is barred by the lease is no more "agreed-upon" than placement of a reception device on a rooftop when that particular action is prohibited by the lease. In both cases, what matters is the "agreed-upon scope" of the tenant's legal rights with respect to the property in question.[188]

Given the primacy of the lease agreement in defining the respective property rights of landlords and tenants in leased property, the standard adopted in this Order -- namely, that tenants can attach devices to property "within their leasehold," *supra* at para. 7 -- is entirely circular. The property rights that are "within a leasehold" can only be ascertained by reference to the lease, but this item prohibits any lease restrictions that impair attachments, and so it is impossible to limit our regulation in this area to property rights actually possessed by the leaseholder. Accordingly, it is hard to see, as a matter of black letter contract law, what it means for attachment to be authorized "within a leasehold" and yet undertaken "without the landlord's permission." *Supra* at 9.

I question the force of *Florida Power* in the context of this R&O for another reason: that case was about what the Supreme Court called "economic regulation" of commercial agreements. As the Court explained, "statutes regulating the *economic relations* of landlords and tenants are not *per se* takings" under *Loretto*. 480 U.S. at 252 (emphasis added). While it is certainly true that simple price regulation would fall within this standard -- and those were the facts in *Florida Power* -- this item, by contrast, does not involve the regulation of the economic status of landlords with respect tenants. Rather, it involves the regulation of their respective property rights; it transfers from the landlord to the tenant a previously unpossessed and intentionally retained aspect of the right to use the property. And it does so without providing for any compensation to the landlord, much less "just" compensation.[189]

If the foregoing does not create a Takings Clause problem, then *at least* the circularity of the amendment adopted today indicates that, as a structural matter, section 207 was probably never intended to apply to viewers who had no ownership interest in the relevant property. When section 207 is limited to governmental and homeowners' association limits on reception devices, as opposed to lease restrictions, this problem of circularity disappears.

Finally, I note that in erecting its distinction between the legal significance of attaching devices to rental property and to common/restricted access property, the R & O appears to assume that just because a landlord

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[188]Although the majority counters that "[f]or takings purposes, the lease is [only] relevant in defining the physical area of consensual occupation (*e.g.*, the apartment but not the roof or exterior walls)," *supra* at para. 23, no support for that assertion is provided.

[189]What I question here, primarily, is the logic of the distinction that the majority has drawn in concluding that the application of OTARD rules presents a *per se* taking in one area where a tenant lacks the necessary property rights but not in the other. Even if there is no *per se* Taking in these situations, however, the extension of section 207 to rental property certainly creates a potential regulatory taking. *See* Declaration of Charles M. Haar in Support of Reply Comments of National Apartment Association *et al.*, at 6-9 (arguing that, under the factors set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), subjecting rental property to OTARD regulation would occasion a regulatory taking).

has agreed to the *exclusive possession* of certain property by a tenant, he has thereby transferred to the tenant an *absolute right to use* that property. This is in error.

A landlord is not obliged to turn over to a tenant the entire "use" strand in his bundle of property rights. If he chooses, and the tenant agrees, he can confer a limited right to use upon the tenant.[190] In fact, use restrictions on property that tenants have the exclusive right to occupy and possess are commonplace. For example, I may possess the exclusive right to occupy the patio adjacent to my apartment, and I may also have an exclusive right generally to use it. But the landlord can, by power of private contract, restrict my use of the balcony: that is, notwithstanding my exclusive right to occupy and generally use the balcony, I may not be legally entitled to, say, hang laundry on its rails or store my bicycle there. The landlord has chosen not to bargain away those aspects of his right to use the property and thus retains them.

I do not think that section 207 authorizes us to deprive landlords of their right to retain aspects of the right to use their property. Conversely, I do not think that section 207 authorizes us to bestow new property rights upon tenants -- here, the right to use property for certain purposes -- at the expense of landlords. Although the item reasons that the statute does not "direct the Commission to impose affirmative duties on" non-viewers "to grant access to restricted areas to permit the installation of" reception devices, *supra* at para. 7, that is exactly what the rules governing rental property do. They require landlords to transfer certain usage rights to tenants in order to allow them to attach devices; that is surely an affirmative act and, now, a federal obligation.

To be sure, the language of section 207 is exceedingly broad, obliging us to adopt regulations "to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception" of services. But we should always read these kinds of statutes against the backdrop of the Takings Clause, as *Bell Atlantic Co. v. FCC* teaches. *See* 24 F.3d 1441 (D.C. Cir. 1994). Because of the Takings issues that are at least arguably raised here, I would stop short of extending these rules to viewers who lack an ownership interest in the property to which they wish to affix reception devices. There is no question but that the Commission met its obligation under section 207 in the first R & O by outlawing governmental and homeowners' association rules that impair viewers' abilities to employ reception devices. There is no statutory need to go further and create constitutional problems by extending the rules to property in which viewers lack any ownership interest.

* * *

To sum up, it is not clear to me that there is a significant difference, for purposes of Takings Clause analysis, between lease provisions that prohibit the installation of reception devices in common/restricted access areas and lease provisions that do so in other rental property areas. Under *Florida Power*, the constitutionality of the OTARD rules in either context turns on the question of consent and, thus, on the terms of the particular agreement between the landlord and the tenant. It seems to me that if one of these situations presents Takings problems, as this item concludes, then so does the other. Moreover, the circularity of the standard adopted

[190]Even the language of the R & O belies this fundamental premise. *See, e.g.*, para. 19 (noting that "*to a large extent* [but not entirely, if contractual usage limitations exist!], the property owner relinquishes its right to control the use of its property when it leases the property") (emphasis added); *id.* note 50 (noting "that *(absent a valid restriction)* a tenant may put the leased premises to whatever lawful purpose it so desires") (emphasis added) (citation omitted).

today suggests that section 207 was never meant to apply outside the context of property in which the viewer has an ownership interest. For these reasons, and because the decision to extend OTARD rules to leased property is a generally unnecessary incursion on private property rights, I respectfully dissent.