(B) Conducting briefings for potential applicants and application procedures, program eligibility guidance and program deadlines;

(C) Assisting FEMA in determining applicant eligibility;

(D) Participating with FEMA in conducting damage surveys to serve as a basis for obligations of funds to subgrantees;

(E) Participating with FEMA in the establishment of hazard mitigation and insurance requirements;

(F) Processing appeal requests, requests for time extensions and requests for approval of overruns, and for processing appeals of grantee decisions;

(G) Compliance with the administrative requirements of 44 CFR parts 13 and 206;

(H) Compliance with the audit requirements of 44 CFR part 14;

(I) Processing requests for advances of funds and reimbursement; and

(J) Determining staffing and budgeting requirements necessary for proper program management.

(2) The Grantee may request the RD to provide technical assistance in the preparation of such administrative plan.

(3) In accordance with the Interim Rule published March 21, 1989, the Grantee was to have submitted an administrative plan to the RD for approval by September 18, 1989. An approved plan must be on file with FEMA before grants will be approved in a future major disaster. Thereafter, the Grantee shall submit a revised plan to the RD annually. In each disaster for which Public Assistance is included, the RD shall request the Grantee to prepare any amendments required to meet current policy guidance.

(4) The Grantee shall ensure that the approved administrative plan is incorporated into the State emergency plan.

(c) *Audit*—(1) *Nonfederal audit.* For grantees or subgrantees, requirements for nonfederal audit are contained in FEMA regulations at 44 CFR part 14 or OMB Circular A–110 as appropriate.

(2) *Federal audit.* In accordance with 44 CFR part 14, appendix A, para. 10, FEMA may elect to conduct a Federal audit of the disaster assistance grant or any of the subgrants.

[55 FR 2304, Jan. 23, 1990; 55 FR 5458, Feb. 15, 1990]

BILLING CODE 1505–01–D

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[CS Docket No. 96–83; FCC 98–273]

Preemption of Local Zoning Regulation of Satellite Earth Stations and Restrictions on Over-the-Air Reception Devices: Television Broadcast, Direct Broadcast Satellite and Multichannel Multipoint Distribution Services

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This Second Report and Order amends the Over-the-Air Reception Devices Rule, which prohibits governmental and non-governmental restrictions that impair a viewer's ability to receive video programming through devices designed for over-the-air reception of DBS, MDS, or television broadcast signals. This Order concludes that the rule will be expanded to apply to antenna restrictions on rental property where the viewer has exclusive use or control. This Order also concludes that antenna restrictions that apply to common or restricted access areas are beyond the scope of the statutory authority for this rule, and that the rule, therefore, cannot apply to antenna restrictions on common or restricted access.

EFFECTIVE DATES: January 22, 1999.

FOR FURTHER INFORMATION CONTACT: Eloise Gore at (202) 418–1066 or via internet at egore@fcc.gov or Darryl Cooper at (202) 418–1039 or via internet at dacooper@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Second Report and Order, CS Docket No. 96–83, adopted October 14, 1998 and released November 20, 1998. This Order is in response to the Further Notice of Proposed Rulemaking (CS Docket No. 96–83, FCC 96–328, 61 FR 46557). The full text of this decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW, Washington, D.C. 20554, or may be purchased from the Commission's copy contractor, International Transcription Service (''ITS''), (202) 857–3800, 1231 20th Street, NW, Washington, D.C. 20036, or may be reviewed via internet at http://www.fcc.gov/Bureaus/Cable/WWW/csb.html. For copies in alternative formats, such as braille, audio cassette or large print, please contact Sheila Ray at ITS.

Paperwork Reduction Act: This Second Report and Order contains information collection requirements for which the Commission already has clearance from the Office of Management and Budget (''OMB''). The Commission submitted these information collection requirements to OMB for clearance under OMB control 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.

OMB Approval Number: 3060–0707.

Title: Over-the-Air Reception Devices.

SYNOPSIS OF ORDER ON RECONSIDERATION

Introductory Background

1. This Second Report and Order resolves the issues regarding Section 207 of the Telecommunications Act of 1996 (''1996 Act'') (Pub. L. No. 104–104, 110 Stat. 114 (1996)), 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''). Based on the Commission's review of the comments filed in response to the Further Notice, the Commission adopts an amendment to Section 1.4000 of the rules, 47 CFR 1.4000 (''Section 207 rules''), that prohibits restrictions on over-the-air reception devices covered by Section 207 (''Section 207 reception devices'') on rental property subject to the other terms and conditions of the Section 207 rules. 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 the Report and Order, the Commission concluded that the rules implementing Section 207 should 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'') provided the antenna is one meter or less in diameter or diagonal measurement; (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; (3) DBS antennas that are one meter or less in diameter or over one meter in Alaska (smaller DBS antennas do not work in Alaska); and television (''TVBS'') antennas without size limitation.

2. This amendment to the rules serves two federal objectives of promoting competition among multichannel video

providers and of providing viewers with access to multiple choices for video programming. 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 Section 207 does not authorize the Commission to do so.

3. In practice, under the amendment to the rules, renters will be able, subject to the terms of the 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, the 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 device, LMDS, is already capable of receiving signals inside buildings. This amendment to the rules provides video programming alternatives to as many viewers as possible within the boundaries of Section 207's language.

4. Section 207 directs the Commission 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.

5. 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. 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.

6. In the Further Notice, the Commission 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. This includes, 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, 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 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). 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. The 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.

7. In particular, the Further Notice sought comment on the impact of *Loretto* v. *TelePrompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and *Bell Atlantic Telephone Co.* v. *FCC*, 24 F.3d 1441 (D.C. Cir. 1994) on any such extensions of the rules. The Further Notice 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.''

8. After analyzing the statute and the comments filed in response to the Further Notice, the Commission concludes 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. Section 207 obliges the Commission 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.

9. To effect the above changes, 47 CFR 1.4000 of the rules is amended as follows (new language underlined):

> (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: * * *

10. We also revise the rule to provide the new Commission street address for purposes of filing petitions for waiver or declaratory ruling:

> (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.,* 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.

11. In light of the decision to allow a tenant to install a Section 207 device within a leasehold without the landlord's permission, 47 CFR 1.4000 is further amended to delete paragraph (h) which required that the landlord consent to such an installation. The tenant's installation is subject to the terms of the Section 207 rules.

Application of the Section 207 Rules to Rental Property

Scope of Section 207

12. The starting point of the analysis is the statute. If Congress has directly spoken to the precise question at issue ''that is the end of the matter,'' and the Commission must give ''effect to the unambiguously expressed intent of Congress.'' (*See Chevron, U.S.A., Inc.* v.

NRDC, 467 U.S. 837, 842–43 (1984).) 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.

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. 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. 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 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. (''Community associations'' includes homeowners'' associations, townhome or townhouse associations, condominium associations, cooperative associations, planned unit development associations and similar associations and entities.) 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.''

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.

Constitutional Considerations

16. Under *Bell Atlantic*, 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. 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.' '' Section 207 does not expressly authorize the Commission to permit the taking of private property, 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. (*See generally Yee* v. *City of Escondido*, 503 U.S. 519, 522–23 (1992).) Where the government authorizes the permanent physical occupation of property it constitutes a per se taking. Under *Loretto*, a permanent physical occupation of property is a taking without regard to the public interest that it may serve, the size of the occupation, or the economic impact on the property owner.

17. 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*, 438 U.S. 104, 124 (1978) 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. 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. In *FCC* v. *Florida Power Corp.*, 480 U.S. 245, 252 (1987), 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*. Rather, such regulations are analyzed under the *Penn Central* multifactor inquiry. 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.

18. 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 the Section 207 rules to a leasehold where a landlord has invited a tenant to physically occupy and possess the property. In *Loretto*, the Court identified three rights ''to possess, use, and dispose of'' property that are destroyed by an uninvited permanent physical occupation of the property. 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, not ''an interloper with a government license.'' 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.'' Third, the property owner may retain the right to sell the property even if the property is leased. Thus, none of the property rights that *Loretto* held were ''effectively destroyed'' by a permanent physical occupation of property would be compromised by expanding the 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 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.

19. Accordingly, it does not constitute 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, prohibiting restrictions on the installation of a

satellite dish or other Section 207 device is not 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.

20. 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. 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.

21. 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.

22. 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 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.''

23. Given the 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 the Section 207 rules to leased property would not create an identifiable class of per se takings, *Bell Atlantic*'s narrowing construction of the statutory authority does not apply to this situation. First, Section 207 promotes the substantial governmental interests of choice and competition in the video programming marketplace. *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). The specific governmental action that we take today—the expansion of the rules to leased property—will bring that choice and competition to an additional segment of the population. Further, the expansion of the rules will promote the important governmental interest in enhancing viewers' access to ''social, political, esthetic, moral and other ideas.'' The Supreme Court has ''identified a * * * 'governmental purpose of the highest order' in ensuring public access to 'a multiplicity of information sources.' ''

24. Second, there is no evidence in the record that the economic impact on property owners will be significant. 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. Indeed, some commenters argue that a rule prohibiting restrictions on antenna usage enhances the value of the homeowner's property to prospective purchasers who want access to video programming services competitive with cable. Given property owners' ability to continue to use their property to generate rental income, extension of the Section 207 rules to restrictions on tenants' use of their leasehold would not deprive property owners of ''all economically beneficial or productive use'' of their property. Third, there is no evidence in the record that the expansion of the rules will interfere with reasonable investment-backed expectations.

25. Moreover, the government has broad power to regulate interests in land that interfere with valid federal objectives. In *Seniors Civil Liberties Ass'n* v. *Kemp*, 761 F. Supp. 1528 (M.D. Fla. 1991), aff'd, 965 F.2d 1030 (11th Cir. 1992), 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 home be at least 55 years of age and forbidding permanent residence to children under the age of 16. 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.

26. 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, Congress can change contractual relationships between private parties through the exercise of its constitutional powers, including the Commerce Clause (U.S. CONST. art. I, § 8, cl. 3). In *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), 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.

27. 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. This rule will prohibit lease or other restrictions (subject to the other provisions of 47 CFR 1.4000, including the safety and historic preservation exceptions) on leased property under the exclusive use or control of the viewer. Typically, for apartments, this new ruling 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. 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. This conclusion is similar to the current application of the Section 207 rules to condominiums, cooperatives and manufactured homes. In addition, while restrictions on placement of antennas on manufactured homes are already covered by the current rules, this new rule expands protection of the Section 207 rules to the leased property on which the manufactured home sits.

28. Because the record does not contain evidence 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 the rules to leaseholds can be similarly resolved with respect to dormitories, the Section 207 rules will not apply to college dormitories 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), the Section 207 rules will apply. In addition, in response to commenters who requested an exception to the rule for commercial lessees, note that Section 207 does not provide an exception for commercial properties.

29. While some commenters have requested that the Commission preempt exclusive contracts between building owners and cable companies, this issue will be addressed in In re Telecommunications Services Inside Wiring, CS Docket No. 95–184. Exclusive contracts are already unenforceable to the extent that they 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 adopted herein.

Practical Considerations

30. The practical concerns with respect to installation within the leasehold can be resolved under the current Section 207 rules, which permit the enforcement of restrictions that address legitimate safety objectives. 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.

31. 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 CFR 1.4000(a). Thus, for example, tenants could be prohibited from drilling holes through the exterior walls of their apartments. In addition, tenants could be prohibited from piercing the roof of a rented house in any manner given the risk of serious damage, and 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. 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. 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.

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

Scope of Section 207

32. Section 207 does not authorize the Commission 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, 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 not believe the statute requires a landlord or community association to relinquish possession of common or restricted access property. There is 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.

33. Likewise, we disagree with commenters that the Commission 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, the Commission cannot extend the Section 207 rules to reach common and restricted access property.

Constitutional Considerations

34. As discussed 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 above, is not contemplated by Section 207.

35. 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 the Commission were to extend the 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.* 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.

36. 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. 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. 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.

37. Loretto is not distinguishable on the grounds asserted by the commenters. First, we disagree that the potential occupation in this instance would be temporary, not permanent. In *Loretto,* the Court found that the cable operator's occupation was ''permanent'' because so long as the property remained residential and a cable company wished to retain the installation, the landlord must permit it. 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.

38. 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. 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.

39. 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. 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 traditionally been considered one of the most treasured strands in an owner's bundle of property rights.'' This type of ''required acquiescence is at the heart of the concept of occupation.'' Even giving the property owner control over the installation and maintenance of the equipment, 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. 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.

40. Thus, because there is a strong argument that modifying the 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, the Commission concludes that Section 207 does not authorize us to make such a modification.

41. Nor is *Florida Power* 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. Here, the agreed-upon scope of the physical possession is set forth 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. 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.

Practical Considerations

42. 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 the Section 207 rules to common and restricted access property. 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. With potentially hundreds of separate wires and antennas being installed in a single building, we believe that space constraints could limit 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.

43. 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. 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.

44. 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, not 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.

45. 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 the rules to cover such property.

First Amendment and Equal Protection Claims

First Amendment

46. As discussed, 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.'' *Turner Broadcasting System,* 114 S.Ct. at 2470. Additional sources of information enhance a viewer's access to ''social, political, esthetic, moral and other ideas.'' *See Time Warner,* 93 F.3d at 975 (quoting *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 389 (1969)). Based in part on these important government purposes, the Commission extended the Section 207 rules to prohibit certain restrictions, subject to the terms and exceptions of the Section 207 rules, on the placement of Section 207 devices within rental property.

47. 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.

48. We disagree with the argument that *Red Lion* requires the Commission to interpret Section 207 in such a way as to guarantee viewers' access to the video programming service of their choice. *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.

49. Likewise, we disagree that *Pruneyard Shopping Center* v. *Robins,* 447 U.S. 74 (1980) provides authority that would permit the Commission to issue a rule superseding a property owner's property rights. 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. 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.'' 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.'' Likewise, *Pruneyard* is 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.

50. 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.

Equal Protection

51. 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, the amended rule eliminates any per se distinction between viewers who own and those who rent and that many renters may avail themselves of the 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.

52. 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. *Heller* v. *Doe,* 509 U.S. 312, 319 (1993); *FCC* v. *Beach Communications, Inc.,* 508 U.S. 307, 314 (1993). 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, 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. 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 by Section 207. Moreover, any disparate impact on renters has been mitigated by the new rules permitting renters to install Section 207 reception devices within their leaseholds.

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

FINAL REGULATORY FLEXIBILITY ANALYSIS

54. As required by the Regulatory Flexibility Act (''FRA'') (5 U.S.C. 603), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Further Notice. The Commission sought written public comment on the proposals in the Further Notice, including comment on the IRFA. The comments received are discussed below. This Final Regulatory Flexibility Analysis (''FRFA'') conforms to the RFA.

Need for, and Objectives of, This Second Report and Order

55. 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''). 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.

56. On August 6, 1996, the Commission implemented part of Congress' directive by releasing rules set forth in 47 CFR 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. The 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.

57. 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.

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

58. 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. The only comment submitted was a joint response filed by the National Apartment Association, et al. (collectively ''NAA''). 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. 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 ensure compliance with safety codes, to protect the safety of other tenants, and to prevent damage to the building. Finally, NAA argues that Congress did not intend for Section 207 to preempt lease restrictions.

59. The Commission has 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, the 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.

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

61. 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, 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.

62. Although local governments did not file comments on the IRFA contained in the Further Notice, they did file joint comments in response to the IRFA's contained in International Bureau (IB) Docket No. 95–59 (DBS Order and Further Notice) and in Cable Services Bureau (CS) Docket No. 96–83 (TVBS–MMDS Notice), and we will consider those comments with respect to the new rule. National League of Cities (''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. 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.''

63. 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.

64. 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.

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

65. 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 as the term 'small business concern' under Section 3 of the Small Business Act.'' The rule applies to small organizations, small governmental jurisdictions, and small businesses.

66. The term ''small governmental jurisdiction'' is defined as ''governments of * * * districts, with a population of less than fifty thousand.'' There are 85,006 governmental entities in the United States. 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. One commenter estimates that there are 37,000 ''small governmental jurisdictions'' that may be affected by the proposed rule.

67. 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.'' This definition includes homeowner and condominium associations that operate as not-for-profit organizations. An industry association estimates that there were 150,000 associations in 1993. Given the nature of a neighborhood association, we assume for the purposes of this FRFA that all 150,000 associations are small organizations.

68. 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). Industry sources estimate that the following SIC codes apply to this industry: 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, industry sources state that there are 28,089 operators of nonresidential buildings and 39,903 operators of apartment buildings. Industry sources state the Bureau of Census includes operators of dwellings other than apartment buildings in the same category as other types of businesses, but 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.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

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

Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Rejected

70. In the Report and Order, the Commission analyzed steps to minimize the impact on small entities, and because the steps the Commission took in the Report and Order also minimize the impact on the small entities impacted by the 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. * * * 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, and proposed strict preemption of nongovernmental restrictions. 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, and we sought comment in the TVBS–MMDS Notice on less burdensome approaches. 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. The Report and Order 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 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.

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).

Ordering Clauses

71. Accordingly, it is ordered that, pursuant to authority found in 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 CFR 1.4000 discussed in this Second Report and Order are adopted. These amendments shall become effective 30 days after publication in the **Federal Register**.

72. 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. 601 et. seq.

List of Subjects in 47 CFR Part 1

Antenna, Satellite, Telecommunications, Television.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

Rule Changes

Part 1 of Title 47 of the Code of Federal Regulations is amended to read as follows:

PART 1—PRACTICE AND PROCEDURE

1. The authority citation for Part 1 is revised to read as follows:

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303(r), 309.

2. Section 1.4000 is revised to read as follows:

§ 1.4000 Restrictions impairing reception of television broadcast signals, direct broadcast satellite services or multichannel multipoint distribution services.

(a)(1) 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:

(i) An antenna that is designed to receive direct broadcast satellite service, including direct-to-home satellite services, that is one meter or less in diameter or is located in Alaska;

(ii) An antenna that is designed to receive video programming services via multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services, and that is one meter or less in diameter or diagonal measurement;

(iii) An antenna that is designed to receive television broadcast signals; or

(iv) A mast supporting an antenna described in paragraphs (a)(1)(i), (a)(1)(ii) or (a)(1)(iii) of this section;

is prohibited to the extent it so impairs, subject to paragraph (b) of this section.

(2) For purposes of this section, a law, regulation or restriction impairs installation, maintenance or use of an antenna if it:

(i) Unreasonably delays or prevents installation, maintenance or use,

(ii) Unreasonably increases the cost of installation, maintenance or use, or

(iii) Precludes reception of an acceptable quality signal.

(3) Any fee or cost imposed on a viewer by a rule, law, regulation or restriction must be reasonable in light of the cost of the equipment or services and the rule, law, regulation or restriction's treatment of comparable devices. No civil, criminal, administrative, or other legal action of any kind shall be taken to enforce any restriction or regulation prohibited by this section except pursuant to paragraph (c) or (d) of this section. In addition, except with respect to restrictions pertaining to safety and historic preservation as described in paragraph (b) of this section, if a proceeding is initiated pursuant to paragraph (c) or (d) of this section, the entity seeking to enforce the antenna restrictions in question must suspend all enforcement efforts pending completion of review. No attorney's fees shall be collected or assessed and no fine or other penalties shall accrue against an antenna user while a proceeding is pending to determine the validity of any restriction. If a ruling is issued adverse to a viewer, the viewer shall be granted at least a 21-day grace period in which to comply with the adverse ruling; and neither a fine nor a penalty may be collected from the viewer if the viewer complies with the adverse ruling during this grace period, unless the proponent of the restriction demonstrates, in the same proceeding which resulted in the adverse ruling, that the viewer's claim in the proceeding was frivolous.

(b) Any restriction otherwise prohibited by paragraph (a) of this section is permitted if:

(1) It is necessary to accomplish a clearly defined, legitimate safety objective that is either stated in the text, preamble or legislative history of the restriction or described as applying to that restriction in a document that is readily available to antenna users, and would be applied to the extent practicable in a non-discriminatory manner to other appurtenances, devices, or fixtures that are comparable in size and weight and pose a similar or greater safety risk as these antennas and to which local regulation would normally apply; or

(2) It is necessary to preserve a prehistoric or historic district, site, building, structure or object included in, or eligible for inclusion on, the National Register of Historic Places, as set forth in the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470, and imposes no greater restrictions on antennas covered by this rule than are imposed on the installation, maintenance or use of other modern appurtenances, devices or fixtures that are comparable in size, weight, and appearance to these antennas; and

(3) It is no more burdensome to affected antenna users than is necessary to achieve the objectives described in paragraph (b)(1) or (b) (2) of this section.

(c) Local governments or associations may apply to the Commission for a waiver of this section under § 1.3. Waiver requests must comply with the

procedures in paragraphs (e) and (g) of this section and will be put on public notice. The Commission may grant a waiver upon a showing by the applicant of local concerns of a highly specialized or unusual nature. No petition for waiver shall be considered unless it specifies the restriction at issue. Waivers granted in accordance with this section shall not apply to restrictions amended or enacted after the waiver is granted. Any responsive pleadings must be served on all parties and filed within 30 days after release of a public notice that such petition has been filed. Any replies must be filed within 15 days thereafter.

(d) Parties may petition the Commission for a declaratory ruling under § 1.2, or a court of competent jurisdiction, to determine whether a particular restriction is permissible or prohibited under this section. Petitions to the Commission must comply with the procedures in paragraphs (e) and (g) of this section and will be put on public notice. Any responsive pleadings in a Commission proceeding must be served on all parties and filed within 30 days after release of a public notice that such petition has been filed. Any replies in a Commission proceeding must be served on all parties and filed within 15 days thereafter.

(e) Copies of petitions for declaratory rulings and waivers must be served on interested parties, including parties against whom the petitioner seeks to enforce the restriction or parties whose restrictions the petitioner seeks to prohibit. A certificate of service stating on whom the petition was served must be filed with the petition. In addition, in a Commission proceeding brought by an association or a local government, constructive notice of the proceeding must be given to members of the association or to the citizens under the local government's jurisdiction. In a court proceeding brought by an association, an association must give constructive notice of the proceeding to its members. Where constructive notice is required, the petitioner or plaintiff must file with the Commission or the court overseeing the proceeding a copy of the constructive notice with a statement explaining where the notice was placed and why such placement was reasonable.

(f) In any proceeding regarding the scope or interpretation of any provision of this section, the burden of demonstrating that a particular governmental or nongovernmental restriction complies with this section and does not impair the installation, maintenance or use of devices designed for over-the-air reception of video programming services shall be on the party that seeks to impose or maintain the restriction.

(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 Secretary, Federal Communications Commission, 445 12th St. S.W., 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.

Note: The following statements will not appear in the Code of Federal Regulations:

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.

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.

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. I also join in the conclusions reached with respect to the Equal Protection Clause and First Amendment. 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. 36. 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. 17 (citing *FCC* v. *Florida Power,* 480 U.S. 245 (1987)). 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.

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. 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 single family homes or manufactured homes which sit on rented property, it will typically include patios, yards or gardens within the leasehold.'' *Supra.* 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. Where a landlord has expressly included lease provisions prohibiting the attachment 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. 39 (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. 35, so too the landlord has not invited the tenant to use the property for the attachment of reception devices. 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. 19, 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. 39 (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.

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. 41. As noted, *supra,* 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. As discussed above, the same is true in the rental property situation. 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. 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. 22, no support for that assertion is provided.

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. 8—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 11.

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 to 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. 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).

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 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. Even the language of the R&O belies this fundamental premise. *See,* e.g., para. 18 (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''); id. (noting ''that (absent a valid restriction) a tenant may put the leased premises to whatever lawful purpose it so desires'') (citation omitted). 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,* 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 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.

[FR Doc. 98–33869 Filed 12–22–98; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 26

[ET Docket No. 94–32; FCC 98–212]

Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use

AGENCY: Federal Communications Commission.

ACTION: Final rule; petitions for reconsideration.

SUMMARY: The Federal Communications Commission has adopted a Memorandum Opinion and Order (MO&O) responding to petitions for reconsideration of the First Report and Order and Second Report and Order regarding the General Wireless Communications Service (GWCS). The MO&O grants in part a petition for reconsideration of the Second Report and Order filed by the Wireless Cable Association International (WCAI), to the extent that it modifies the rule on antenna structure clearance procedures to conform with streamlined rules applicable to all services. The MO&O dismisses in part and denies in part a petition for reconsideration of the First Report and Order filed by several organizations (Joint Petitioners), and a petition for reconsideration of the Second Report and Order filed by the Association for Maximum Service Television, Inc. (MSTV).

EFFECTIVE DATE: January 22, 1999.

FOR FURTHER INFORMATION CONTACT: Peter G. Wolfe, Policy Division, Wireless Telecommunications Bureau, (202) 418–1310.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Memorandum Opinion and Order in ET Docket No. 94–32, FCC 98–212 , adopted on August 26, 1998, and released on November 25, 1998. The complete text of this decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C., and also may be purchased from the Commission's copy contractor, International Transcription Service, (202) 857–3800, 1231 20th Street, N.W., Washington, DC 20036.

Synopsis of Memorandum Opinion and Order

1. The Commission adopts a Memorandum Opinion and Order (MO&O) which grants in part a petition for reconsideration of the Second Report and Order (Second R&O) in this proceeding (60 FR 40712, August 9, 1998), filed by the Wireless Cable Association International (WCAI). The MO&O denies WCAI's request that all GWCS licensees be permitted to partition their service areas because the Commission intends to address this issue in another proceeding. The MO&O denies a request by WCAI to license GWCS in Basic Trading Areas (BTAs) rather than Economic Areas (EAs), and denies in part and dismisses in part a petition for reconsideration of the First Report and Order (First R&O) (60 FR 13071, March 10, 1995) filed by the Association for Maximum Service Television Inc. (MSTV) and several other organizations (Joint Petitioners) and a petition for reconsideration of the Second R&O filed by MSTV. The latter two petitions both claim that the Commission exceeded its statutory authority in creating GWCS and therefore that the Commission should revisit its decision to establish a licensing structure for the service.

2. The MO&O first considers a petition for reconsideration of the First R&O filed by the Joint Petitioners, claiming that the general allocation of the 4660–4685 MHz band to the Fixed and Mobile services is overly broad because it will permit an unidentified mix of services to operate in the band. The Commission disagrees with this argument, finding that the petitioners merely restate the issues examined and decided in the First R&0. The MO&O also dismisses the Joint Petitioners' argument that the specific allocation of the 4660–4685 MHz band to GWCS is not in the public interest, because the Commission had not designated the frequency band for GWCS at the time the petition was filed, and that the Commission subsequently found in the Second R&O that the designation to GWCS is in the public interest.

3. The MO&O also denies MSTV's petition for reconsideration of the Second R&O dealing with the specific designation of the band for GWCS. MSTV contends that the Commission should suspend this allocation and related assignments pending the resolution of assignment of spectrum to the Broadcast Auxiliary Service in other