

~~CONFIDENTIAL~~

EX PARTE OR LATE FILED
DOW, LOHNES & ALBERTSON, PLLC
ATTORNEYS AT LAW

J.G. HARRINGTON
DIRECT DIAL 202-776-2818
jharrington@dlalaw.com

WASHINGTON, D.C.
1200 NEW HAMPSHIRE AVENUE, N.W. • SUITE 800 • WASHINGTON, D.C. 20036-6802
TELEPHONE 202-776-2000 • FACSIMILE 202-776-2222

ONE RAVINIA DRIVE • SUITE 1600
ATLANTA, GEORGIA 30346-2108
TELEPHONE 770-901-8800
FACSIMILE 770-901-8874

March 3, 1997

RECEIVED

MAR 3 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street
Washington, D.C. 20554

Federal Communications Commission
Office of Secretary

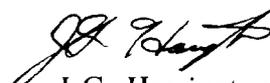
Re: Restrictions on Over-the-Air Reception Devices: Television
Broadcast and Multichannel Multipoint Distribution Service
IB Docket No. 95-59; CS Docket No. 96-83 /
WRITTEN EX PARTE COMMUNICATION

Dear Mr. Caton:

On behalf of the NBC Television Network Affiliates Association, the ABC Television Network Affiliates Association and the CBS Television Network Affiliates Association (collectively, the "Network Affiliated Stations Alliance" or "NASA"), I am submitting the enclosed reply comments, which are being filed on this date in the Commission's proceeding concerning the request of Jay Lubliner and Deborah Galvin for a declaratory ruling regarding the Potomac Ridge Homeowners Association's prohibition on outdoor antenna installations.¹ Because the issues described in the comments are closely related to issues raised in NASA's petition for reconsideration in this proceeding, NASA requests that the comments be included in the record of this proceeding.

In accordance with the requirements Section 1.1206(a) of the Commission's Rules, an original and one copy of this letter are being submitted to the Secretary's office.

Respectfully submitted,


J.G. Harrington

JGH/taf
Enclosure

¹See "Petition Filed Seeking Declaratory Ruling that Certain Provisions of a Homeowners Association Covenant Are Preempted by the Commission's Over-the-Air Reception Devices Rule," Public Notice, DA 97-118 (rel. Jan. 16, 1997).

RECEIVED

MAR 3 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
Federal Communications Commission
Office of Secretary

In the matter of)
)
Petition of Jay Lubliner and Deborah) Case ID CSR-4915-O
Galvin for Declaratory Ruling)
Regarding Restrictions on Outdoor Antenna)
Installations by Potomac Ridge)
Homeowners Association)

REPLY COMMENTS OF THE NETWORK AFFILIATED STATIONS ALLIANCE

The NBC Television Network Affiliates Association, the CBS Television Network Affiliates Association and the ABC Television Network Affiliates Association (together, the "Network Affiliated Stations Alliance" or "NASA") hereby submit their reply comments in response to the Commission's Public Notice in the above-referenced proceeding.¹ As shown below, the facts of this proceeding compel the Commission to issue the declaratory ruling requested by Mr. Lubliner and Dr. Galvin. Moreover, the response of the Potomac Ridge Homeowners Association ("Potomac Ridge") further demonstrates the importance of broader

¹ "Petition Filed Seeking Declaratory Ruling that Certain Provisions of a Homeowners Association Covenant Are Preempted by the Commission's Over-the-Air Reception Devices Rule," DA 97-118 (rel. Jan. 16, 1997). These reply comments also are being submitted as a written ex parte communication in the Commission's over-the-air reception devices proceeding. *Preemption of Local Zoning Regulation of Satellite Earth Stations, Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast Services and Multichannel Multipoint Distribution Service*, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, IB Docket No. 95-59, CS Docket No. 96-83, rel. Aug. 6, 1996 (the "Reception Devices Order").

and more specific Commission action to forbid unlawful restrictions such as those at issue here.

I. Introduction

Most comments in this proceeding, from providers of over-the-air service and homeowners alike, support granting the relief requested by Mr. Lubliner and Dr. Galvin.² Only Potomac Ridge and the Community Associations Institute (“CAI”) do not support the petition. Because the CAI comments are largely duplicative of the Potomac Ridge comments, this reply focuses on the claims made by Potomac Ridge.

Potomac Ridge’s comments are a catalogue of efforts to avoid the plain meaning of Section 207 of the Telecommunications Act of 1996 and of the Commission’s rules.³ Potomac Ridge misconstrues the statutory language and the legislative history; purposefully distorts the Commission’s rules; and relies on a flawed engineering study to argue that there is no impairment of reception. Indeed, the Potomac Ridge study by its own terms shows that outdoor antennas are necessary to receive “acceptable” signals from all tested stations at five of the six locations tested. If Potomac Ridge had any intention of acting in good faith, it would have conceded that its regulations impair reception after it received the results of its tests. Instead, Potomac Ridge’s intransigence provides further evidence that, as NASA and

² See, e.g., Comments of National Association of Broadcasters; Comments of Richard W. Hayman. BellSouth supports relief for the petitioners, but asks the Commission to act on a pending petition for reconsideration of the *Reception Devices Order* rather than in this proceeding. Comments of BellSouth at 1.

³ Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (the “1996 Act”); 47 C.F.R. § 1.4000.

other parties have requested, the Commission must modify its rules to broadly preempt restrictive regulations such as those at issue here.

II. Potomac Ridge Distorts the Plain Meaning of Section 207.

Potomac Ridge's most fundamental error is that it misconstrues Section 207 of the Communications Act. Section 207 required the Commission to adopt regulations that "prohibit restrictions that impair a viewer's ability to receive video programming services" via over-the-air reception devices.⁴ Potomac Ridge argues that this language reaches only regulations that prevent reception of television signals and does not reach rules that prohibit placing antennas outdoors.⁵ These claims are contrary to the language of the statute, the legislative history and common sense.

First, as described in NASA's initial comments, the plain language of the statute contradicts Potomac Ridge's claim. The statute says "impair," not "prevent," and the words have distinct meanings.⁶ Where the plain meaning of the statute is evident, the Commission may not make any further inquiry.⁷

⁴ 1996 Act, § 207.

⁵ Potomac Ridge Comments at 3.

⁶ MERRIAM-WEBSTER, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 603, 933 (1987) (defining "impair" as "to damage or make worse by or as if by diminishing in some material respect" and "prevent," in relevant part, as "to keep from happening or existing"); *see also* BLACK'S LAW DICTIONARY 677 (5th ed. 1979) ("prevent" defined as "To weaken, to make worse, to lessen in power, diminish or relax, or other affect in an injurious manner.")

⁷ *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984) ("If the intent of Congress is clear, that is the end of the matter").

Second, even if the plain meaning were not clear, the legislative history demonstrates that Congress did not intend “impair” to mean “prevent.” Potomac Ridge quotes the House Report to support this theory, but the House Report is not controlling. Rather, the final expression of Congressional intent, and the one that binds the Commission on this issue, is found in the Conference Report.⁸ The Conference Report says that Section 207 is intended to apply to restrictions that “inhibit” — not “prevent” — reception of over-the-air broadcast signals.⁹ Thus, the controlling legislative history is consistent with a plain meaning interpretation of Section 207.

Finally, common sense demands that the Commission reject Potomac Ridge’s interpretation of the statute. Potomac Ridge argues that, because it does not prohibit the use of indoor antennas, it has complied with the mandate of Section 207.¹⁰ This is ridiculous. Potomac Ridge does not point to a single bit of evidence, statutory or otherwise, to indicate that Congress had any intent to address only the rights of homeowners to have indoor antennas. Because MMDS and DBS antennas are only placed outdoors, it is obvious that the statute could not have been intended to protect only the right to have an indoor antenna.

⁸ See, e.g., *PSC of New York v. Mid Louisiana Gas Co.*, 463 U.S. 319 (1983) (Conference report interpretation of statute controls over dissent’s citation to House report).

⁹ H.R. REP. NO. 458, 104th Cong., 2d Sess., at 166 (1996). The Conference Report is particularly significant because the language of Section 207 was modified by the Conference Committee. *Id.*

¹⁰ Potomac Ridge Comments at 3 (Covenant is consistent with Section 207 because it “does not prevent use of antennas,” but “merely regulates placement of antenna [sic] by requiring installation on the interior of homes”).

For that matter, there is no need to protect the right to have an indoor antenna because, historically, there have been no restrictions on that right in covenants or municipal ordinances. The emptiness and illogic of Potomac Ridge's argument are most obvious by that fact alone. It must be presumed that Congress believed the adoption of Section 207 was necessary to protect some intended conduct of homeowners in the placement of television antennas. Municipal ordinances and homeowner association covenants never have impaired the placement of antennas in the attics of homes or indoors. The only restrictions about which Congress could have been aware, and that required federal preemption, were restrictions that prevented the placement of antennas on rooftops. Potomac Ridge's bizarre interpretation of Section 207, if left uncorrected by the Commission, would mean that homeowners receive the protection of federal legislation and Commission rules only where it has never been needed. Congress did not intend, and the Commission cannot condone, such a silly result.

III. Potomac Ridge Distorts the Commission's Regulations

Potomac Ridge seeks to justify its improper prohibition on over-the-air antennas by distorting the Commission's Rules. First, it argues that requiring indoor antennas is permissible because they are cheaper than outdoor antennas. Potomac Ridge also attempts to use aesthetic grounds to support the prohibition.

Potomac Ridge's claim that indoor antennas are less expensive than outdoor antennas is wrong but more importantly misconstrues Section 1.4000. A restriction is impermissible under Section 1.4000 if it unreasonably increases the cost of installing the particular antenna

the homeowners wishes to use.¹¹ Rather than making the apples-to-apples comparison required by Section 1.4000, Potomac Ridge compares the costs of outdoor antennas generally to the costs of set-top antennas.¹² The correct comparison would be between the cost of installing a particular type of outdoor antenna, such as a rotating antenna, to the same type of antenna at the most appropriate indoor location, probably in the attic. If this comparison were done, then it would be evident that requiring indoor installation would increase the cost significantly.¹³ If the Commission were to adopt Potomac Ridge's interpretation, no restriction would be deemed to unreasonably increase the cost of installing an antenna, since almost every television comes with an indoor antenna at no extra charge.

More fundamentally, however, Potomac Ridge bases its restriction on impermissible grounds. As the Potomac Ridge comments repeatedly state, its prohibition is purely for aesthetic reasons.¹⁴ Aesthetic considerations are not within the limited range of grounds to restrict antenna placement under Section 1.4000.¹⁵ Not only that, but the restriction discriminates against over-the-air antennas because other appurtenances that might raise

¹¹ 47 C.F.R. 1.4000(a)(ii).

¹² Compare Potomac Ridge Comments, Exhibit 3 with *id.*, Exhibit 4.

¹³ As described in NASA's comments and below, requiring indoor installation also would reduce the received signal strength, thereby unlawfully impairing reception.

¹⁴ See, e.g., Potomac Ridge Comments at 3, 5.

¹⁵ 47 C.F.R. § 1.400(b). Even when a restriction is permitted, it must be "no more burdensome to affected antenna users than is necessary to achieve" the permitted objectives. 47 C.F.R. § 1.400(b)(3). The Potomac Ridge prohibition would fail this test as well because it plainly is more burdensome than any alternative.

aesthetic issues (such as woodpiles) are permitted under some circumstances.¹⁶ In light of these facts, the Potomac Ridge restriction plainly must be preempted.

IV. Even Under Potomac Ridge's Interpretation, Its Covenant Contravenes Section 207 and the Commission's Rules.

Potomac Ridge provides a study that purports to show no impairment of reception at the site of Mr. Lubliner's and Dr. Galvin's house. That study actually shows, however, that the prohibition prevents reception of one or more signals at five of the six sites tested. Thus, Potomac Ridge's own study demonstrates that the Commission should grant the petition.

The Potomac Ridge study tested signal strength at two outdoor and six indoor locations in the Potomac Ridge development.¹⁷ Reception of eight channels was tested at each site. (Although Potomac Ridge is within the Grade B contours of several Baltimore stations, only Washington, D.C. stations were tested.) According to the methodology used in the study, reception of each of the eight channels was "acceptable" at both of the outdoor sites.¹⁸ That was not the case for the indoor sites. Of the six indoor sites, only one had acceptable reception of all eight signals. The other five indoor sites each could not receive at

¹⁶ Potomac Ridge Comments at 5, Exhibit 5.

¹⁷ These reply comments do not address technical issues concerning the Potomac Ridge study. NASA notes, however, that the study does not appear to meet the Commission's basic standards. Among other things, the individual who conducted the study did not provide a statement of his qualifications and the study does not specify the equipment used to conduct it or describe how that equipment was calibrated.

¹⁸ All information provided in this paragraph is based on the last three pages of Exhibit 7 to the Potomac Ridge Comments, which consist of a description of the study, a map showing the locations of the readings and a chart showing the results. The description of the study indicates that a reading of 0 was considered acceptable, even though "the picture may be grainy."

least one signal. In one house, acceptable signals could not be received on three of the seven channels tested.¹⁹ Altogether, of the 47 tests at indoor locations, there were nine tests that showed plainly unacceptable reception and two that showed borderline reception. In other words, approximately 20 percent of all signals could not be received with acceptable quality by indoor antennas.²⁰

These results speak for themselves. While Potomac Ridge claims that its study shows acceptable reception at the Lubliner/Galvin residence, the opposite is true. To receive all local over-the-air signals, five out of six of the tested homes would need outdoor antennas. In other words, the Potomac Ridge covenant not only impairs the reception of over-the-air signals, as shown in NASA's initial comments, but actually prevents it. Thus, even by Potomac Ridge's own, extremely narrow interpretation of Section 207 and the Commission's Rules, its covenant is impermissible and must be preempted.

¹⁹ Channel 50 was not tested in this house. It should be noted, however, that only two of the five remaining houses had "acceptable" reception of this channel, and that one of those two houses had a reading of 0, which would indicate, at best, borderline reception.

²⁰ In addition, as is apparent from the results at the two locations that were tested both indoors and outdoors, there generally is a reduction in signal strength when testing is conducted indoors. This result is consistent with the Commission's own findings. See NASA Comments at 3 citing UHF Comparability Task Force, Office of Plans and Policy, *Comparability for UHF Television: Final Report*, Federal Communications Commission, Sep. 1980 at 46. The reduction in signal strength is likely to have an effect on the quality of the signal received.

V. Conclusion

For all these reasons, the Commission should adopt an order that is consistent with these reply comments and NASA's comments in this proceeding.

Respectfully submitted,

THE NETWORK AFFILIATED STATIONS ALLIANCE

By: 
WERNER K. HARTENBERGER
J.G. HARRINGTON
DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 776-2630
*Counsel to the NBC Television
Network Affiliates Association*

By: 
KURT A. WIMMER
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, DC 20044-7566
(202) 662-5278
*Counsel to the CBS Television
Network Affiliates Association*

By: 
WADE H. HARGROVE
MARK J. PRAK
BROOKS PIERCE MCLENDON
HUMPHREY & LEONARD, L.L.P.
P.O. Box 1800
Raleigh, NC 27602
(919) 839-0300
*Counsel to the ABC Television
Network Affiliates Association*

March 3, 1997

CERTIFICATE OF SERVICE

I, Tammi A. Foxwell, a secretary at the law firm of Dow, Lohnes & Albertson, do hereby certify that on this 3rd day of March, 1997, I caused copies of the foregoing "Reply Comments of The Network Affiliated Stations Alliance" to be served via first-class U.S. mail, postage prepaid, to the following:

Deborah M. Galvin
Jay I. Lubliner
13820 Ranch Place
North Potomac, MD 20878

Peter S. Philbin
Paul Joseph Miller
REES, BROOME & DIAZ, P.C.
8133 Leesburg Pike, Ninth Floor
Vienna, VA 22182
(Counsel for Potomac Ridge Homeowners
Association)

Robert M. Diamond
COMMUNITY ASSOCIATIONS INSTITUTE
1630 Duke Street
Alexandria, VA 22314

Paul M. Gargiullo
3911 Gladney Drive
Atlanta, GA 30340

Richard W. Hayman
15 Arlive Court
Rockville, MD 20854

Frank J. Bloom
7 Bentana Court
Rockville, MD 20850

Peggy P. Kelly
48 Windbrooke Circle
Gaithersburg, MD 20879

Robert B. Jacobi
COHN AND MARKS
1333 New Hampshire Ave., NW
Suite 800
Washington, DC 20036
(Counsel for Golden Orange
Broadcasting, Inc.)

Henry L. Baumann
Barry D. Umansky
NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N Street, NW
Washington, DC 20036

Gary Klein
CONSUMER ELECTRONICS
MANUFACTURERS ASSOCIATION
2500 Wilson Boulevard
Arlington, VA 22201-3834

William B. Barfield
Michael A. Tanner
Thompson T. Rawls, II
BELLSOUTH CORPORATION
Suite 1800
1155 Peachtree Street, NE
Atlanta, GA 30309

David G. Frolio
David G. Richards
BELLSOUTH CORPORATION
Suite 900
1133 21st Street, NW
Washington, DC 20036



Tammi A. Foxwell