

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

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OFFICE OF THE SECRETARY

In the Matter of )  
)  
Implementation of Section 207 of the )  
Telecommunications Act of 1996 )  
)  
Restrictions on Over-the-Air Reception )  
Devices: Television Broadcast, )  
Multichannel Multipoint Distribution and )  
Direct Broadcast Satellite Services )

CS Docket No. 96-83

To: The Commission

**MOTION TO DISMISS COMMUNITY ASSOCIATIONS  
INSTITUTE'S PETITION FOR RECONSIDERATION**

The Consumer Electronics Manufacturers Association ("CEMA"),<sup>1</sup> by its attorneys, hereby submits its motion to dismiss the "Petition for Reconsideration," filed on December 18, 1998, by the Community Associations Institute ("CAI"). In its petition, CAI seeks reconsideration of the Commission's Second Report and Order in the matter of *Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services*, CS Docket No. 96-83, FCC 98-273 (released November 20, 1998) ("*Second R&O*"). CAI's petition was prematurely filed and must be dismissed.

<sup>1</sup> CEMA is the principal trade association for the nation's consumer electronics industry. CEMA's members design, manufacture, distribute and sell consumer electronics equipment, including television receivers, personal computers, video cassette recorders, digital versatile disk players, direct broadcast satellite equipment, and a wide variety of other products. CEMA members also produce small parabolic antennas used both in individual homes and in multi-dwelling units to receive direct broadcast satellite video programming. CEMA has participated actively in all phases of the FCC's "Over-the-Air-Reception Devices" proceeding implementing Section 207 of the Telecommunications Act of 1996.

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Section 405 of the Communications Act of 1934, 47 U.S.C. § 405, requires that “[a] petition for reconsideration must be filed *within thirty days from the date upon which public notice is given* of the order, decision, report, or action complained of.”<sup>2</sup> The Commission’s Rule, 47 C.F.R. § 1.429, provides the same “window” for filing petitions for reconsideration (*i.e.*, “within 30 days from the date of public notice of such action”). CAI prematurely filed its petition for reconsideration by filing its petition five days *before* the *Second R&O* was placed on public notice in the Federal Register on December 23, 1998.<sup>3</sup> Because the time limit within which petitions for reconsideration may be filed is set by statute -- with which CAI failed to comply -- CAI’s petition should be dismissed with prejudice.

## I. BACKGROUND

The Commission’s Second Report and Order amends the Over-the-Air Reception Devices Rule, 47 C.F.R. § 1.400, 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 direct broadcast satellite services (“DBS”), multichannel multipoint distribution services (“MMDS”), or televised broadcast signals.<sup>4</sup> The Order concludes, *inter alia*, that the Rule will be expanded to apply to antenna restrictions on rental property where the viewer has exclusive use or control. The Commission adopted the Order on October 14, 1998, and released it on November 20, 1998.

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<sup>2</sup> 47 U.S.C. § 405(a) (emphasis added).

<sup>3</sup> *See* 63 Fed. Reg. 71027 (1998).

<sup>4</sup> *See generally* *Second R&O*.

On December 18, 1998, CAI filed a petition for reconsideration of the *Second R&O*. CAI's petition urges the Commission to reconsider its decision to permit tenants in community associations to install individual antennas without the permission of the home or unit owner from whom they rent the home or unit, arguing that this constitutes a deprivation of community association homeowners' private property rights.<sup>5</sup> CAI's petition for reconsideration appeared on public notice in the Federal Register on January 20, 1999.<sup>6</sup> The Commission's *Second R&O* appeared on public notice in the Federal Register on December 23, 1998, five days *after* CAI filed its petition.

As is explained below, application of Section 1.4(b) of the Commission's Rules, 47 C.F.R. § 1.4(b), sets the first day on which petitions for reconsideration of the *Second R&O* may be filed as December 24, 1998; and the last day to file such petitions was on January 22, 1999.<sup>7</sup> CEMA observes that CAI's petition does not reveal any statement explaining why it deviated from the filing requirements set forth under the Communications Act and the Commission's Rules.

## **II. THE COMMISSION MUST DISMISS CAI'S PETITION AS PREMATURELY FILED.**

Commission review of petitions seeking reconsideration of a decision, action, report, or order in a notice and comment proceeding is unavailable until the date the Commission gives "public notice" in the Federal Register. Because CAI filed its petition for reconsideration five days before the Commission's *Second R&O* was placed on "public notice," the Commission

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<sup>5</sup> *Id.* at 1, 4-5.

<sup>6</sup> *See* 64 Fed. Reg. 3104 (1999).

<sup>7</sup> *See* note 15, *infra*.

is without jurisdiction to reach the merits of the petition. Accordingly, the petition for reconsideration should be dismissed with prejudice.

The Commission's jurisdiction to review CAI's petition is defined by Section 405 of the Communications Act of 1934, 47 U.S.C. § 405, which provides that "[a] petition for reconsideration must be filed *within thirty days from the date upon which public notice is given* of the order, decision, report, or action complained of."<sup>8</sup> Under Section 1.429 of the Commission's Rules, any interested person may file a petition for reconsideration of a final action in a notice and comment rulemaking proceeding, but that the "petition for reconsideration and any supplement thereto shall be filed *within 30 days from the date of public notice of such action*, as that date is defined in § 1.4(b)."<sup>9</sup> According to Section 1.4(b), for documents in notice and comment rule making proceedings, the term "public notice" means "the date of publication in the Federal Register."<sup>10</sup> Further, Section 1.4(b) states that the first day to be counted when a period of time begins with an action taken by the Commission "is the day after the day on which public notice of that action is given."<sup>11</sup> Thus, the first date a petition for reconsideration could have been timely filed on the Commission's *Second R&O* was December 24, 1998. CAI's petition, however, was prematurely filed on December 18, 1998.

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<sup>8</sup> 47 U.S.C. § 405(a) (emphasis added).

<sup>9</sup> 47 C.F.R. § 1.4 (b) (emphasis added). Similarly, in final Commission actions other than notice and comment rulemaking proceedings, the Commission's Rules demarcate the exact same period in which to file petitions for reconsideration: "The petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of the final Commission action, as that date is defined in § 1.4(b) of these rules, and shall be served upon parties to the proceeding." 47 C.F.R. § 1.106(f).

<sup>10</sup> 47 C.F.R. § 1.4(b).

<sup>11</sup> *Id.*

The applicable statute and Commission regulations combine to demarcate a precisely defined period within which CAI's petition (or other petitions for reconsideration of the *Second R&O*, for that matter) was required to have been filed, beginning on December 24, 1998, the day after publication of the Order in the Federal Register, and ending thirty days later or on January 22, 1999.<sup>12</sup> Because that thirty-day period is jurisdictional in nature, it may not be enlarged or altered.

While the Commission has repeatedly addressed the question of the timeliness of petitions for reconsideration filed *after* the thirty-day period -- holding that it has no authority to extend the time limit imposed by Section 405 of the Communications Act<sup>13</sup> -- it does not appear that the Commission has addressed the seemingly diametric situation at issue here: whether an interested party can file a petition for reconsideration of a Commission order *before* commencement of the prescribed period. As described below, the U.S. Court of Appeals for the District of Columbia Circuit has addressed this question and has concluded that statutory time limits for filing petitions for reconsideration establish a clear jurisdictional "window" with which parties must comply.

In *Western Union Telegraph Co. v. FCC* (opinion by Scalia, J.),<sup>14</sup> the D.C. Circuit dismissed petitioner's appeal of an FCC order for lack of jurisdiction, pursuant to 28 U.S.C. § 2344 and 47 U.S.C. § 405, which provide that review is unavailable until the date the

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<sup>12</sup> CEMA notes that the petitions for reconsideration separately filed by Winstar Communications, Inc., *et al.*, and the National Association of Broadcasters, *et al.*, apparently were timely filed on the last day within which to file a petition for reconsideration of the subject Order -- *i.e.*, both parties filed their petitions on January 22, 1999.

<sup>13</sup> The Commission has long held that it has no authority to extend the time limit imposed by Section 405 of the Communications Act. *See Enterprise Broadcasting, Inc.*, 38 RR 2d 215 (1976); *see also Sonderling Broadcasting Corp.*, 40 RR 2d 835 (1977).

<sup>14</sup> 773 F.2d 375 (D.C. Cir. 1985).

Commission gives “public notice” of the challenged order or decision.<sup>15</sup> Section 405(a) provides that “[t]he time within which a petition for review must be filed in a proceeding to which section 402(a) applies, or within which an appeal must be taken under section 402(b) in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.”<sup>16</sup> Similar to what CAI did in the instant matter, the petition for review in question in *Western Union* had been filed one week after release to the public, but six days before publication of the contested order in the Federal Register. The court acknowledged that the statutory time limit could be viewed as either establishing a “deadline” or a “window.”<sup>17</sup> It concluded that both the language of the statute and the interest in establishing clear and certain jurisdictional boundaries weighed heavily in favor of the latter approach.<sup>18</sup> Accordingly, the court held that it had no jurisdiction over the petition filed before the FCC because the petition had been filed before the subject order was put on public notice.

The strict filing requirement of Section 405 applies even if the Commission action that is the object of the Reconsideration request becomes effective and ripe for review before public notice of that action. The court in *Western Union* rejected petitioner’s argument that it

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<sup>15</sup> The court notes (*id.* at 376):

Our jurisdiction to review this order is defined by 28 U.S.C. § 2344 (1982), which provides that the petition for review must be filed within sixty days after “entry” of the order. FCC orders like that at issue here are deemed to be “entered” for purposes of § 2344 on “the date upon which the Commission gives public notice of the order,” 47 U.S.C. § 405 (1982). An FCC regulation defining the time of public notice of agency action provides that, with respect to orders of this type, public notice occurs at “3 P.M. Eastern Time on the day after . . . the date of publication in the FEDERAL REGISTER.” 47 C.F.R. § 1.4(b) (1984).

<sup>16</sup> 47 U.S.C. § 405(a). *Cf.* 28 U.S.C. § 2344 (“On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules.”).

<sup>17</sup> 773 F.2d at 377.

<sup>18</sup> *Id.* at 377-78.

was not required to wait until commencement of the prescribed period to seek review, because the order was effective immediately upon its release to the public and was therefore ripe for review on that date. The court stated: “Even if the premise of effectiveness and ripeness is correct . . . , the conclusion of immediate reviewability does not follow. It is not a principle of law that all agency action must be reviewable as soon as it is effective and ripe – or indeed that all agency action need be reviewable at all.”<sup>19</sup>

Moreover, the court in *Waterway Communications Systems, Inc. v. FCC*<sup>20</sup> made clear that there are no mitigating circumstances that justify departure from the holding in *Western Union*. The court in *Waterway Communications* observed that some of the rigor behind rejection of premature appeals derived from the fact that statutory deadlines created a “race to the courthouse” where timely appeals were filed in different courts of appeal with respect to the same agency order. The court noted: “If time limits were construed as deadlines only, parties would file progressively earlier, necessitating judicial invention of some threshold.”<sup>21</sup> The court points out, however, that “*Western Union* itself did not actually involve a race, so the court clearly did not regard the absence of a race as justifying mitigation of the rule. Nor was it explicitly founded upon the existence of the race problem as a general matter.”<sup>22</sup> In this case, the fact that the “race to the courthouse” scenario does not occur with respect to Commission decisions does not undermine the underlying rationale that the court reached in dismissing the petition at issue in *Western Union*. The statutory language at issue in the instant case (“within

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<sup>19</sup> *Id.* at 377.

<sup>20</sup> 851 F.2d 401 (D.C. Cir. 1988).

<sup>21</sup> *Id.* at 406 (citing *Western Union*, 773 F.2d at 378).

<sup>22</sup> *Id.* at 406.

thirty days from the date upon which public notice is given,” 47 U.S.C. § 405) mirrors that construed in *Western Union*, and no other factors distinguish the issue here from that faced by the court. Therefore, resolution of the instant case compels the same result – *i.e.*, CAI’s petition must be dismissed because the Commission has no jurisdiction to pass upon a petition that is filed prematurely.

The clear holding in *Western Union* is fatal to CAI’s petition. Even if the law were not clear, there is no compelling public interest at issue here (and CAI offered none in filing its petition) that would serve to justify CAI’s failure to comply with the statutory and regulatory “window” for filing petitions for reconsideration. Rather, CEMA believes that public interest considerations weigh heavily against deviating from the commencement period for filing petitions for reconsideration, and in favor of maintaining the orderliness and predictability of administrative actions; further, adherence to the Commission’s Rules regarding filing windows avoids confusion and treats fairly all parties that are similarly situated.<sup>23</sup> A waiver of the period within which to file petitions for reconsideration in this case would run counter to all of those factors.<sup>24</sup> CEMA points out that the Commission has repeatedly stated that “it lack[s] the authority to extend or waive the 30-day period specified in section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405.”<sup>25</sup> The same result should apply in situations, such

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<sup>23</sup> As the court so artfully and appropriately stated, in reviewing an FCC action that attempted to justify departure from its rules, “therein lies the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action.” *Reuters Ltd. v. FCC*, 781 F.2d 946, 951(1986).

<sup>24</sup> In denying a motion to accept a late-filed pleading, the Commission reasoned: “Although we understand that difficulties are sometimes encountered by parties trying to meet [the deadline for filing petitions for reconsideration in Section 1.106], a strict policy as to the official close of business avoids confusion, establishes consistency and treats fairly all parties that are similarly situated.” *Mary R. Krupis*, 5 FCC Rcd 5142, 5142 (1990).

<sup>25</sup> *Id.* (The Commission has recognized its statutory obligation under Section 405 and observes that “case law has consistently held that [it] lack[s] the statutory authority to waive the statutory filing

as here, where a party *prematurely* files a petition for reconsideration, and thus implicitly seeks to enlarge the filing period beyond its initiation date. Orderly administration of the Commission's filing procedures, as dictated by the Communications Act, requires nothing less.

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requirements.”) (citing *Reuters Ltd.*, 781 F.2d at 951-52 (D.C. Cir. 1986); *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976). *See also Richardson Independent School District*, 5 FCC Red 3135 (1990).

### III. CONCLUSION

Under the express terms of the Communications Act, petitions for reconsideration must be filed "within thirty days upon which public notice is given" of the challenged order or decision. Here, CAI prematurely filed its petition five days before public notice of the challenged action appeared in the Federal Register. For the reasons stated herein, CAI's petition for reconsideration must be dismissed with prejudice.

Respectfully submitted,

**CONSUMER ELECTRONICS  
MANUFACTURERS ASSOCIATION**

By:

Handwritten signature of Gary S. Klein in cursive, followed by a horizontal line and the initials "BEB".

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March 3, 1999

## CERTIFICATE OF SERVICE

I, Benigno E. Bartolome, hereby certify that a true and correct copy of the foregoing "Motion to Dismiss Community Associations Institute's Petition for Reconsideration" was sent by hand delivery this 3rd day of March, 1999, to each of the following:

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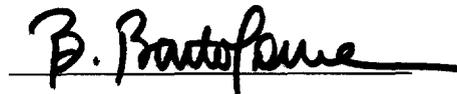
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March 3, 1999