

FCC MAIL SECTION

Federal Communications Commission

FCC 99-360

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

DISPATCHED BY

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

**ORDER ON RECONSIDERATION**

**Adopted: November 19, 1999**

**Released: November 24, 1999**

By the Commission:

1. Before the Commission are three petitions seeking reconsideration of the *Second Report and Order on Preemption of Local Zoning Regulation of Satellite Earth Stations and Restrictions on Over-the-Air Reception Devices* ["OTARD"]; *Television Broadcast, Direct Broadcast Satellite and Multichannel Multipoint Distribution Services* ("*Second Report and Order*")<sup>1</sup> filed by the Community Associations Institute ("CAI") (the "CAI Petition"); the Personal Communications Industry Association (PCIA), Teligent, Inc., Association for Local Telecommunications Services, WinStar Communications, Inc. ("WinStar"), and Nextlink Communications, Inc. (collectively, "PCIA Petition"); and by the Association for Maximum Service Television ("MSTV") and the National Association of Broadcasters ("NAB") (collectively, "NAB Petition").<sup>2</sup>

2. The CAI Petition asks the Commission to reconsider the decision to permit tenants who live in community associations to install individual antennas without the permission of the home or unit owner from whom they rent.<sup>3</sup> CAI contends that the individual homeowner's assent is

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<sup>1</sup>13 FCC Rcd 23874 (1998).

<sup>2</sup>The Satellite Broadcasting and Communications Association ("SBCA"), Winstar, and the United States Satellite Broadcasting Company ("USSB") filed Oppositions to the CAI Petition. CAI and the National Association of Housing Cooperatives filed Replies to these Oppositions. CAI filed an Opposition to the PCIA and NAB Petitions, as did the Building Owners and Managers Association International, the National Apartment Association and the National Multi-Housing Council (filing jointly as "Real Estate Associations"). SBCA filed a Reply in support of the PCIA and NAB Petitions. The PCIA petitioners filed a Reply to the CAI and Real Estate Associations' Oppositions.

<sup>3</sup>CAI does not challenge the longstanding Commission decision to prohibit the association from requiring prior approval of antenna installations by home or unit owners or their tenants. CAI's focus is, rather, on the relationship

necessary to prevent damage to the property. The Satellite Broadcasting and Communications Association ("SBCA"), WinStar, and the United States Satellite Broadcasting Company, Inc. ("USSB") filed Oppositions to the CAI Petition, to which CAI responded. The Consumer Electronics Manufacturers Association ("CEMA") filed a motion to dismiss the CAI Petition on the grounds that it was filed prematurely. CEMA contends that CAI filed its petition five days before the *Second Report and Order* appeared in the Federal Register, which is outside the time period for filing petitions for reconsideration. CAI did not respond to CEMA's motion.

3. Reconsideration of Commission decisions is permitted by Section 405(a) of the Communications Act of 1934.<sup>4</sup> Petitions for reconsideration in a rulemaking proceeding are governed by section 1.429 of the Commission's rules.<sup>5</sup> We conclude that the CAI Petition for Reconsideration was prematurely filed,<sup>6</sup> but we will consider the merits on our own motion.<sup>7</sup> CAI argues that the *Second Report and Order* considers commercial landlords and does not address the problems faced by individual homeowners who offer one or a very few homes or units for lease.<sup>8</sup> CAI states that community associations do not have direct authority over viewers who rent from an individual home or unit owner. CAI contends that if a tenant installs an antenna and in some manner violates an association's permissible antenna restrictions, the association can take action against the homeowner to enforce the restriction, and the homeowner would then be required to take some type of action against the tenant. CAI asserts that this chain of responsibility will prevent associations from protecting property from damage.<sup>9</sup> CAI argues that "the only way for homeowners to prevent damage to their own property is through prior approval of tenants' antenna installations," and, without prior approval, the homeowner is "in the untenable position of being responsible for damage [to the association's common elements] caused by alterations that the homeowner could not control" because the Commission's rules prohibit prior approval of a tenant's antenna installation.<sup>10</sup> CAI asserts, alternatively, that community associations can be financially

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between the home or unit owner who acts as the lessor to the tenant/viewer who rents from him or her. In these situations the association is not the landlord; the tenant rents an individual home or unit from a homeowner, who, in turn, is subject to the restrictions imposed by the association. CAI's petition appears to be limited to restrictions imposed by community associations insofar as they apply to a tenant who rents from a home or unit owner.

<sup>4</sup>47 U.S.C. § 405(a).

<sup>5</sup>47 C.F.R. § 1.429.

<sup>6</sup>The *Second Report and Order* was released on November 20, 1998, and appeared in the Federal Register on December 23, 1998 (63 Fed. Reg. 71027). The time for filing petitions for reconsideration is "within 30 days from the date of public notice of such action, as that date is defined in § 1.4(b)." 47 C.F.R. § 1.429(d). See also 47 U.S.C. § 405(a). Section 1.4(b) provides that "public notice" in rulemaking proceedings means "the date of publication in the Federal Register." 47 C.F.R. § 1.4(b)(1). See also *Second Report & Order*, 13 FCC Rcd at 23914, specifying that the rule will be published in the Federal Register. The CAI Petition was filed on December 18, 1998, which was five days prior to publication in the Federal Register and the commencement of the time period for filing petitions for reconsideration.

<sup>7</sup>See 47 U.S.C. § 405, 47 C.F.R. § 1.108; *Central Florida Enterprises v. FCC*, 598 F.2d 37, 48 n. 51 (D.C. Cir.), cert. dismissed, 441 U.S. 957 (1979) (Commission rules permit it to set aside on its own motion any action within 30 days after release of an order, and it is Commission practice that the filing of a petition for reconsideration tolls the running of the 30 day period.).

<sup>8</sup>CAI and National Association of Housing Cooperatives ("NAHC") Joint Reply to Oppositions ("CAI Reply") at 2. CAI contends that traditional landlord-tenant law will not apply to protect the homeowner because the community association, which makes the restrictions, is not a party to the lease. *Id.* at 2-3.

<sup>9</sup>CAI Petition at 4.

<sup>10</sup>*Id.* at 3-4.

harm if a tenant's improper antenna installation damages the common elements and the homeowner escapes liability because he or she did not approve the installation.<sup>11</sup> In opposition, SBCA states that CAI's arguments were addressed in the *Second Report and Order* where the Commission considered the issue of damage and concluded that restrictions barring damage are likely to be reasonable restrictions that property owners and community associations can enact to prevent the type of harm feared by CAI.<sup>12</sup>

4. CAI's argument does not justify excluding from the protection of the OTARD rule viewers who rent from an owner of one or a few houses or units in a community association. CAI does not justify this distinction either in the statute or as a matter of policy. We therefore deny CAI's petition for reconsideration. The fundamental argument raised in the CAI Petition relates to the threat of property damage arising in connection with the antenna installation,<sup>13</sup> which was discussed at length in the *Second Report and Order*.<sup>14</sup> The issue of prior approval by the property owner was also amply considered and decided in the *Order on Reconsideration* of the (First) *Report and Order in the Over-the-Air Reception Devices Rule*.<sup>15</sup> CAI asks the Commission to create a special exception to the rule to allow property owners who rent out "one or a small number" of units or houses -- rather than an entire building -- to require prior approval of antenna installations. We do not believe there is sufficient justification for such an exception. A homeowner/lessor's responsibility for his or her tenant's noncompliance with an antenna restriction does not differ from the homeowner/lessor's responsibility for noncompliance with any other association restriction. When an individual homeowner offers property for rent, there is always a responsibility to assure that the tenant obeys the valid regulations of the association. Where an association has a permissible antenna restriction, a tenant should comply, just as a resident-owner should comply. Accountability for a tenant's violation of an antenna restriction is no different from the case of a tenant's violation of some other restriction. To the extent CAI expresses legitimate concern for preventing property damage, the Commission addressed this concern by recognizing in the *Second Report and Order* the likely reasonableness of restrictions barring structural damage.<sup>16</sup>

5. The PCIA Petition seeks reconsideration of the Commission's legal conclusions in the *Second Report and Order*<sup>17</sup> that prohibiting antenna restrictions in common or restricted access areas is beyond the authority granted to the Commission by Section 207 of the Telecommunications Act<sup>18</sup> because Section 207 authorizes neither the imposition of affirmative duties on property owners nor the compensation mechanism necessary to avoid a potentially

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<sup>11</sup>*Id.* at 4.

<sup>12</sup>SBCA Opposition at 4-5. *See also* USSB Opposition at 5.

<sup>13</sup>CAI Petition at 1-5.

<sup>14</sup>*Second Report and Order*, 13 FCC Rcd at 23890-01 and 23898-902.

<sup>15</sup>*Order on Reconsideration*, 13 FCC Rcd 18962, 18981 (1998). *See also* *Star Lambert and SBCA Declaratory Ruling*, 12 FCC Rcd 10424 (1997) and *Michael J. MacDonald Declaratory Ruling*, 13 FCC Rcd 4844 (1997).

<sup>16</sup>*Second Report and Order*, 13 FCC Rcd at 23891-92.

<sup>17</sup>The PCIA Petitioners cite section 1.106 of the Commission's rules as governing their petition for reconsideration. PCIA Petition at 8-10. However, section 1.106(a)(1), which governs petitions for reconsideration of some Commission actions, provides that section 1.429 governs petitions for reconsideration in rulemaking proceedings. 47 C.F.R. §§ 1.106(a)(1) and 1.429. Notwithstanding petitioners' procedural pleading error, we will exercise our discretion to accept the PCIA Petition and review the merits pursuant to section 1.429.

<sup>18</sup>Pub. L. No. 104-104, 110 Stat. 114 (Feb. 8, 1996).

unconstitutional taking of private property.<sup>19</sup> The PCIA Petitioners disagree with the Commission's analysis of the cases cited in the *Second Report and Order*, but they do not offer evidence or arguments that were not thoroughly considered and discussed in the Commission's order.<sup>20</sup> In a footnote, the PCIA petitioners argue for a Commission requirement that building owners provide "nondiscriminatory access" to all providers when one provider is already present.<sup>21</sup> We have requested comment on the potential imposition of a nondiscriminatory access requirement on multiple unit premises in another proceeding,<sup>22</sup> and nothing in this order on reconsideration is intended to consider or prejudge questions, including questions of statutory and constitutional authority, raised therein.

6. Similarly, the NAB Petition reasserts arguments made in the comments filed and considered by the Commission in the rulemaking proceeding.<sup>23</sup> The NAB petition reiterates its position that the Commission should interpret Section 207 to apply to antennas installed on common and restricted access property and that such an interpretation is consistent with the statute and does not constitute a "taking" of private property.<sup>24</sup> The NAB disagrees with the Commission decision interpreting Section 207 but does not offer new arguments or evidence.

7. After careful consideration of the pleadings filed in this proceeding, we find that the parties have presented no new arguments or facts that cause us to change our prior determination. Reconsideration is warranted only if the petitioner cites material error of fact or law or presents new or previously unknown facts and circumstances which raise substantial or material questions of fact that were not considered and that otherwise warrant Commission review of its prior action.<sup>25</sup> The

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<sup>19</sup>See *Second Report and Order*, 13 FCC Rcd at 23894-97.

<sup>20</sup>*Id.*

<sup>21</sup>PCIA Petition at n. 18.

<sup>22</sup>*Promotion of Competitive Networks in Local Telecommunications Markets Notice of Proposed Rulemaking and Notice of Inquiry*, FCC 99-141 (rel. July 7, 1999), at ¶¶ 52-63.

<sup>23</sup>See, e.g., NAB Petition at 11 and *Second Report and Order*, 13 FCC Rcd at 23891-92, n. 88 and 23893-94, n. 95.

<sup>24</sup>NAB Petition at 10-13. The NAB and MSTV do not agree with the Commission's conclusion that pursuant to the Supreme Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the physical occupation of common or restricted access property by a resident's antenna would constitute a *per se* taking. These petitioners contend that the implied right of a tenant to walk down a common area hallway is analogous to a right to install an antenna on a common area or restricted access roof. *Id.* at 12. Petitioners also disagree that in Section 207 Congress gave the Commission discretion to consider practical problems. *Id.* at 13-14.

<sup>25</sup>See, e.g., *800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services*, 12 FCC Rcd. 5188, at n. 84 (1997) ("The standard for reconsideration of a Commission Order is that reconsideration is appropriate where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters."); *Amendment of Section 73.202(B), Table of Allotments, FM Broadcast Stations*, 10 FCC Rcd. 7727 (1995) (CCB, Policy and Rules Div.) ("Reconsideration is warranted only if the petitioner cites error of fact or law, or he presents facts or circumstances which raise substantial or material questions of fact which warrant Commission review of its prior action. The Commission will not reconsider arguments that have already been considered." citing *Eagle Broadcasting Co. v. FCC*, 514 F.2d 852 (D.C. Cir. 1975)); see also *Amendment of Part 97 of the Commission's Rules Concerning the Establishment of a Codeless Class of Amateur Operator License*, 7 FCC Rcd. 1753 (1992) ("petitions for reconsideration must show changed facts or circumstances, or facts that were unknown to the petitioner until after the petitioner's last opportunity to present them to [the Commission]"); In *Southwestern Bell Telephone Company v. FCC*, 180 F.3d 307 (D.C. Cir. 1999) and *Beehive Telephone Company Inc. v. FCC*, 180 F.3d 314 (D.C. Cir. 1999), the D.C. Circuit recently upheld two Commission orders denying petitions for reconsideration. The court found nonreviewable

Commission is not required to reconsider arguments that have already been considered.<sup>26</sup> We therefore deny the petitions for reconsideration and affirm the *Second Report and Order* adopted by the Commission in the above-captioned matter.

8. Accordingly, **IT IS ORDERED**, that the petitions for reconsideration filed by the Community Associations Institute; by the Personal Communications Industry Association, Teligent, Inc., the Association for Local Telecommunications Services, Winstar Communications, Inc., and Nextlink Communications, Inc.; and by the Association for Maximum Service Television and the National Association of Broadcasters **ARE DENIED**.

9. This action is taken pursuant to statutory authority found in Sections 1, 4(i), 5(c), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§151, 154(i), 155(c), and 405.

FEDERAL COMMUNICATIONS COMMISSION  
  
Magalie Roman Salas  
Secretary

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"the agency's refusal to go back over ploughed ground." *Southwestern Bell*, 180 F.3d at 311 (quoting *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 282-84 (1987)).

<sup>26</sup>See, e.g., *Elimination of Telephone Company-Cable Cross Ownership Rules, Sections 63.54-63.56, for Rural Areas*, 91 FCC 2d 622 (1982) (Petitions for partial reconsideration denied where: "The major arguments raised by the petitioners here were raised and considered by the Commission in response to the NPRM in this proceeding. The petitioners have raised no new arguments now which warrant reversal of our decision."); and *Amendment of Section 73.636(a) of the Commission's Rules (Multiple Ownership of Television Stations)*, 82 FCC 2d 329 (1980).