

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

In the Matter of)	
)	
Promotion of Competitive Networks in Local Telecommunications Markets)	WT Docket No. 99-217
)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission’s Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Service)	
)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996)	CC Docket No. 96-98
)	
Review of Sections 68.104 and 68.213 of the Commission’s Rules Concerning Connection of Simple Inside Wiring to the Telephone Network)	CC Docket No. 88-57
)	

To: The Commission

**OPPOSITION OF THE SATELLITE BROADCASTING AND
COMMUNICATIONS ASSOCIATION/SATELLITE INDUSTRY
ASSOCIATION BROADBAND & INTERNET DIVISION TO
PETITION FOR RECONSIDERATION OF THE REAL ACCESS ALLIANCE**

The Satellite Broadcasting and Communications Association/Satellite Industry Association Satellite Broadband & Internet Division (“SBCA/SIA”) hereby submits this Opposition to the Petition for Reconsideration of the Real Access Alliance (“Alliance”), in which the Alliance alleges that the Commission unlawfully extended its rule governing over-the-air reception devices (“OTARD Rule”) to fixed wireless transceivers.¹ As explained in detail below,

¹ Petition for Reconsideration of the Real Access Alliance at 10-11, *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217 (filed Feb. 12, 2001) (“Petition”).

the Petition merely recycles arguments already addressed and rejected by the Commission and, accordingly, the Petition should be denied. The Petition for Partial Reconsideration of the Wireless Communications Association International, Inc. (“WCA”)² should be granted. As requested by the WCA, the Commission should clarify that the safety exception to the OTARD Rule applies to any professional installation requirements adopted by non-federal authorities with respect to fixed wireless transceivers protected by the OTARD Rule.

I. BACKGROUND

The Commission’s OTARD Rule provides that:

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 restrictions 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 . . . [a]n antenna that is designed to receive direct broadcast satellite service, including direct-to-home satellite services . . . [or] [a]n antenna that is designed to receive video programming services via multipoint distribution services . . . is prohibited, to the extent it so impairs . . .³

In an order released on October 25, 2000, the FCC extended the OTARD Rule by amending Section 1.4000 to include customer-end antennas used for transmitting or receiving fixed wireless signals.⁴ The Order defined “fixed wireless signals” as “any commercial non-broadcast

² Petition for Partial Reconsideration of the Wireless Communications Association International, *Promotion of Competitive Networks in Local Telecommunication Markets*, WT Docket No. 99-217 (Feb. 12, 2001) (“WCA Petition”).

³ 47 C.F.R. § 1.4000(a) (1999).

⁴ *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, FCC 00-366 ¶ 97 (rel. Oct. 25, 2000) (“Order”).

communications signals transmitted via wireless technology to and/or from a fixed customer location.”⁵

According to the Alliance, the Commission did not have the authority to apply the OTARD Rule to leased property and thus the amendment extending the OTARD Rule to include customer-end antennas used for transmitting or receiving fixed wireless signals on leased property is also invalid.⁶ For the reasons set forth below, the Alliance’s arguments are without merit.

II. THE COMMISSION HAS STATUTORY AUTHORITY TO EXTEND THE OTARD RULE TO FIXED WIRELESS DEVICES

Contrary to the arguments made by the Alliance in the Petition, the FCC has specific statutory authority to extend the OTARD Rule to fixed wireless transceivers.⁷ Section 303(r) of the Communications Act of 1934, as amended (the “Act”), authorizes the FCC to “make such rules . . . as may be necessary to carry out the provisions of this [Act].”⁸ Section 4(i) of the Act provides that the Commission “may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”⁹ As the Commission stated in the Order, Sections 303(r) and 4(i) confer upon the Commission broad authority to effectuate the statutory goals embodied in the Act.¹⁰ These

⁵ *Id.*

⁶ Petition at ii.

⁷ In the Petition, the Alliance recycles the arguments it has made in *Building Owners and Managers Association et al. v. FCC*, No. 99-1009, the appeal of the OTARD Rule that is currently pending before the U.S. Court of Appeals for the D.C. Circuit. In that appeal, the Alliance challenges the Commission’s authority to prohibit lease provisions that restrict the use of over-the-air reception devices on rental property. Although the issue on appeal is related to the issue in this proceeding, the specific question to be addressed in this proceeding is whether the Commission has the authority to extend the OTARD Rule to fixed wireless devices. Thus, SBCA/SIA will not specifically address the Alliance’s challenges to the original OTARD order in this Opposition.

⁸ 47 U.S.C. § 303(r).

⁹ 47 U.S.C. § 154(i).

¹⁰ *See Order* ¶ 105.

sections provide ample rulemaking authority to effectuate the Congressional directives set forth in other sections of the Act, specifically Section 207 as well as Sections 1, 706, 201(b), 202(a) and 205(a).

Section 207 directs the Commission to promulgate regulations pursuant to Section 303 to remove restrictions that inhibit the ability of viewers to receive multichannel video programming. The House Committee Report accompanying Section 207 specifically addresses private restrictions, directing the Commission to render restrictive covenants or homeowners' association rules unenforceable to the extent they inhibit viewers' ability to use antennas to access multichannel programming.¹¹ Relying on this authority, the Commission applied the OTARD Rule to certain types of leased property in an earlier order.¹²

The goals of Section 207 would not be furthered, however, if the Commission limited the protections of the OTARD Rule to only those devices that receive video programming services. Fixed wireless transceivers, which both receive and transmit signals, are similar in size and technology to the receive-only devices already protected by the OTARD Rule. By extending the OTARD Rule to fixed wireless devices, the FCC simply included within the purview of the Rule all customer antennas and supporting structures of the same physical type, regardless of the nature of the services provided through the antenna.¹³ The Commission has the authority to promulgate regulations to effectuate the goals and accompanying provisions of the Act in the absence of explicit regulatory authority if the regulations are reasonably ancillary to existing Commission statutory authority.¹⁴ The extension of the OTARD Rule to devices that perform

¹¹ H.R. Rep. No. 104-204, at 124 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 91-92.

¹² *See Implementation of Section 207 of the Telecommunications Act of 1996 -- Restrictions on Over-the-Air Reception Devices*, 13 FCC Rcd 23874 (1998).

¹³ *Order* ¶ 99.

¹⁴ *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968); *see also FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

both receive and transmit functions was reasonably ancillary to the explicit statutory directive contained in Section 207.¹⁵

Also, as the Commission stated in the Order, the extension of the OTARD Rule to fixed wireless services signals: (a) furthers the express objectives of Section 1 of the Telecom Act by facilitating efficient deployment of competitive communications services; (b) fosters the deployment of advanced telecommunications services, as directed in Section 706 of the Telecom Act; and (c) furthers the consumer protection purposes of Sections 201(b), 202(a) and 205(a) of the Telecom Act.¹⁶ In addition, the extension of the OTARD Rules falls “within the bounds of established preemption principles.”¹⁷ The FCC’s carefully rendered decision, made pursuant to the authority cited above, clearly was not arbitrary, capricious or an abuse of discretion.

The Alliance contends that the statutory authority cited above somehow does not apply to fixed wireless signals because such signals are not explicitly mentioned in the Act.¹⁸ As an initial matter, the fixed wireless systems at issue here became technically and economically feasible for deployment in the consumer market only within the past year. These advanced systems use two-way satellite broadband technology to offer affordable, extremely high-speed interactive Internet-protocol-based services and streamed and webcast content services to users

¹⁵ Moreover, it is clear that such action was within the Commission’s jurisdiction as established by Sections 1 and 2(a) of the Communications Act of 1934, as amended. 47 U.S.C. §§ 151, 152(a). Section 1 establishes the statutory purpose of the Communications Act as “mak[ing] available . . . to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . .” and creates the FCC for the purpose of carrying out the provisions of the Act. *Id.* § 151. Pursuant to Section 2(a), the Commission’s jurisdiction extends to “all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States.” *Id.* § 152(a). The Act in turn defines “radio communication” as “the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.” *Id.* § 153(33). Thus, the Commission’s statutory jurisdiction plainly extends to apparatus for the transmission and receipt of radio communications, such as the transceivers at issue in this proceeding.

¹⁶ *Order* ¶¶ 102-106.

¹⁷ *Id.* ¶ 107.

nationwide. They present an essential competitive choice for broadband communications that is not constrained by proximity to local wirelines and head-end switches and enable the provision of high-speed Internet services to rural and underserved areas of the United States.

Clearly, the Act does not have to specify each type of device (or each potential new technology that may be developed in the future) in order to govern the provision of such technology. Fixed wireless signals fall within the purview of Section 207’s “devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services”¹⁹ As explained above, the Commission is authorized to extend the OTARD Rule to transceivers that receive and transmit fixed wireless signals because such an extension is sufficiently ancillary to its express statutory authority.

The Alliance criticizes the Commission for an allegedly “inconsistent” approach to Section 207 and Section 332(c)(7).²⁰ Specifically, the Alliance argues that the Commission read the law closely to discern whether fixed wireless transceivers constitute “personal wireless facilities” for purposes of Section 332(c)(7) while “freely breach[ing]” Section 207’s limitation to receive-only devices.²¹ The Alliance again is mistaken – the Commission carefully considered both provisions and reached a reasonable conclusion consistent with the statute. As the Commission explained in the Order, Section 332(c)(7), read in context with other provisions of the Act, applies to hub sites rather than customer-end equipment.²² Section 207, which clearly applies to customer-end antennas, is reasonably construed to encompass transceivers as well as receive-only devices.

¹⁸ Petition at 12.

¹⁹ Telecommunications Act of 1996, Pub. L. No. 104-104 1996 U.S.C.C.A.N. (110 Stat.) 56, 114 (1996).

²⁰ Petition at 12-13.

²¹ *Id.*

²² *Order* ¶¶ 109-113.

III. THE ALLIANCE'S REITERATION OF ITS TAKINGS ARGUMENT IS UNPERSUASIVE

With respect to whether the extension of the OTARD Rule is an unconstitutional taking of property, the Petition merely recites a summary of its prior arguments but does not advance any particular arguments on the issue.²³ In response, the SBCA/SIA notes that the position taken by the FCC in prior rulemaking proceedings and appeals applies with equal force here. The OTARD Rules: (a) do not effect a *per se* taking of the property of landlords; rather they regulate the terms of a voluntary and pre-existing landlord-tenant relationship; and (b) do not effect a regulatory taking. The Commission, after careful consideration, properly found the Alliance's arguments to the contrary unpersuasive in prior rulemakings with respect to the OTARD Rules. The Alliance's undifferentiated citation to its prior arguments does not make them somehow more persuasive in this proceeding.

IV. THE WCA PETITION SHOULD BE GRANTED

The WCA Petition and SBCA/SIA's own Petition for Clarification and Partial Reconsideration²⁴ ask the Commission to review the following language in the Order:

. . . it is recommended that two-way fixed wireless subscriber equipment be installed by professional personnel, thereby minimizing the possibility that the antenna will be placed in a location that is likely to expose subscribers or other persons to the transmit signal at close proximity and for an extended period of time. To the extent that local governments, associations, and property owners elect to require professional installation for transmitting antennas, *the usual prohibition of such requirements under the OTARD rules will not apply.*²⁵

The italicized language could be interpreted to mean that professional installation requirements would fall outside the scope of the OTARD Rule, such that non-federal entities

²³ Petition at 10-11.

²⁴ Petition for Clarification and Partial Reconsideration of the Satellite Broadcasting and Communications Association/Satellite Industry Association Broadband & Internet Division, *Promotion of Competitive Networks in Local Telecommunication Markets*, WT Docket No. 99-217 (Feb. 12, 2001).

²⁵ Order ¶ 119 (*emphasis added*).

may adopt and enforce such requirements “without regard to the limitations set forth in the ‘safety exception’ to the Rule.”²⁶ In other words, the statement is susceptible to being misapplied by local governments, property owners and homeowner associations in a manner that may unduly constrain the deployment of satellite antennas by imposing obsolete requirements on the next generation of consumer satellite technology for which more advanced protective mechanisms may be developed. As requested by WCA and SBCA/SIA, the Commission should clarify that the safety exception to the OTARD Rule *does* apply to any professional installation requirements as well as other restrictions imposed by non-federal authorities and entities upon the use of fixed wireless devices.

V. CONCLUSION

For the reasons set forth above, the Commission should deny the Alliance’s Petition and grant the WCA Petition.

Respectfully submitted,

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²⁶ WCA Petition at 5.

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2001, I caused a true and correct copy of the foregoing Opposition of the Satellite Broadcasting and Communications Association/Satellite Industry Association Satellite Broadband & Internet Division to the Petition for Reconsideration of the Real Access Alliance to be served by U.S. first-class mail, postage prepaid, upon the following:

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