

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

**SATELLITE BROADCASTING &
COMMUNICATIONS ASSOCIATION**

CSR-8541-O

**PETITION FOR DECLARATORY RULING
REGARDING APPLICATION OF THE OVER-THE-
AIR RECEPTION DEVICES RULE TO CERTAIN
PROVISIONS OF THE PHILADELPHIA,
PENNSYLVANIA CODE**

**COMMENTS OF DIRECTV, INC. AND DISH NETWORK L.L.C.
IN SUPPORT OF PETITION**

Congress designed the over-the-air reception devices (“OTARD”) regime¹ to prohibit city governments and homeowners’ associations from using aesthetic concerns as a pretext to restrict consumers’ access to satellite television.² Thus the OTARD rules prohibit restrictions on antenna placement:

- if the restrictions concern property within the exclusive use or control of the antenna user, and ...

¹ Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 § 207 (1996); 47 C.F.R. § 1.4000.

² *See, e.g., James S. Bannister*, 24 FCC Rcd. 9516, ¶ 14 (2009) (“Although the Commission has preserved a restricting entity’s right to consider aesthetic factors when promulgating antenna placement restrictions, aesthetic factors alone may not justify a prior approval process.”) (citing *Preemption of Local Zoning Regulation of Satellite Earth Stations and 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*, 11 FCC Rcd. 19276, ¶ 19 (1996)).

- if those restrictions unreasonably delay or prevent installation, maintenance or use, or unreasonably increase the cost of installation, maintenance or use, or preclude reception of an acceptable signal ...
- unless those restrictions are necessary to accomplish a clearly defined, legitimate safety objective or are necessary for historical preservation of a location on or eligible for the National Register of Historic Places.³

Post hoc safety and historical preservation justifications are insufficient,⁴ and even justifiable restrictions cannot be any greater on antennas than those imposed on any similar appurtenances or fixtures.⁵ Such restrictions also cannot be more burdensome than necessary to achieve the safety or historical preservation objectives.⁶

Philadelphia, however, has passed a set of ordinances that defies OTARD in nearly every respect.⁷ The Ordinances restrict placement of satellite antennas in areas under the exclusive use and control of residents; they impose certification, registration, and painting requirements that will hinder installation, increase cost, and preclude reception of an adequate signal; and they do all of these things without a legitimate and clearly articulated public safety or historical justification. Instead, it is clear that aesthetics, not safety or historical preservation, was the

³ See 47 C.F.R. §1.4000.

⁴ See *id.* at §§ 1.4000(b)(1)-(2) (requiring that “clearly defined, legitimate safety objective[s]” be stated in the “text, preamble, or legislative history of restriction” or that the structure affected be listed on or eligible for the National Register of Historic Places).

⁵ *Id.*

⁶ *Id.* at §1.4000(b)(3).

⁷ Subcode PM, Ch. 3, §§ PM-304.0, 304.3, 304.3.1; Title 9, Ch. 9-600, Sec. 9-632 (collectively, the “Ordinances”).

primary concern behind the restrictions, as one Philadelphia Councilman flatly stated that he finds satellite dishes “very unattractive.”⁸

If the OTARD rules mean anything, they mean that municipalities may not restrict antenna placement solely for aesthetic concerns, including aesthetic concerns masquerading as safety or historical preservation concerns.⁹ The Commission should confirm that such restrictions violate the OTARD rules, and prohibit Philadelphia from enforcing the Ordinances.

I. THE ORDINANCES PROHIBIT PLACEMENT OF ANTENNAS IN AREAS UNDER RESIDENTS’ EXCLUSIVE USE AND CONTROL

The OTARD rules apply to antenna placement in any area “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.”¹⁰ This is a fact-specific question, which differs from place to place and dwelling to dwelling. Philadelphia, however, ignores this completely. It has enacted blanket restrictions: one for multiple-family dwellings that restricts all antennas between the façade and the street except for those within balconies and porches; and another for single-family dwellings that restricts all antennas between the façade and the street altogether.¹¹

⁸ Miriam Hill, *Philadelphia Bill Could Regulate Satellite Dishes*, PHILA. INQUIRER, Sept. 22, 2011, available at http://articles.philly.com/2011-09-22/news/30189791_1_satellite-dishes-satellite-association-satellite-companies.

⁹ See, e.g., *James S. Bannister*, ¶ 14 (“Although the Commission has preserved a restricting entity’s right to consider aesthetic factors when promulgating antenna placement restrictions, aesthetic factors alone may not justify a prior approval process”); *Shadow Wood Condo. Ass’n*, 21 FCC Rcd. 339, ¶ 8 (2006) (“[A]esthetic preferences are permissible only insofar as they do not impair installation, maintenance, or use of an antenna.”); *Victor Frankfurt*, 16 FCC Rcd. 2875, ¶ 32 (2001) (“Indeed, the very title of the Application, ‘Architectural and/or Appearance Application,’ suggests that the Application requirement is an impermissible pretext for imposing the Association’s aesthetic preferences.”).

¹⁰ 47 C.F.R. § 1.4000(a)(1).

¹¹ Section PM-304.3.1(b) (restricting antenna placement on the front of a multi-family building to balconies or patios only rather than to all areas within the exclusive use and control of residents).

Perhaps Philadelphia believes that some of the satellite antennas subject to the Ordinances are outside of the resident's exclusive use and control. Yet many, perhaps most, Philadelphia satellite antennas indisputably *are* in areas subject to the resident's exclusive use and control, and thus fall squarely within the OTARD rules' scope. Moreover, Philadelphia must satisfy the burden of demonstrating that the Ordinances satisfy the OTARD rules, and it must do so with respect to every single person affected by the restrictions.¹² It cannot require individual Philadelphians to prove that they are covered by OTARD's protections. Nor can it justify ordinances infringing on the rights of some satellite antenna users on the grounds that they do not infringe on other users' rights.

A. The Ordinances Ignore the Fact-Based Nature of the “Exclusive Use and Control” Inquiry in the Multi-Family Dwelling Context

Whether a tenant or owner-resident in a multiple-family building has exclusive use or control of property is governed by the individual deeds and leases applicable to the building and its residents.¹³ Yet the Ordinances restrict antenna placement on the façade of a multiple-family dwelling to only balconies and patios within the exclusive use or control of residents in every case. This very specific restriction thus violates the OTARD rules insofar as it prohibits a

¹² 47 C.F.R. § 1.4000(g) (providing that, “[i]n 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 . . . shall be on the party that seeks to impose or maintain the restriction”).

¹³ *Philip Wojcikiewicz*, 22 FCC Rcd. 9858, ¶ 7 (2007) (“The Commission has previously found that, as a general matter, roofs or exterior walls may, in some circumstances, be restricted access areas where tenants are not granted exclusive or permanent possession. However, the lease, condominium declaration, deed or other controlling document is dispositive in individual situations.”).

resident from placing an antenna in an area that is not a balcony or patio but that is nonetheless within that resident's exclusive use or control.¹⁴

Thus, for instance, though it may be uncommon for tenants to have exclusive use or control over such features as roofs and exterior walls, it is not universally true that they do not.¹⁵ Though the Commission's OTARD guidance notes that roofs and exterior walls may be common areas and thus not within the ambit of the OTARD rule,¹⁶ it has not made a categorical finding that such features are *always* common areas. Indeed, in prior OTARD proceedings, the Commission has found that, based on the individual facts and circumstances, features such as exterior walls and roofs were not common areas and were within the exclusive use and control of the complaining residents.¹⁷ Similarly, although the Commission's guidance indicates that antennas that extend out beyond a balcony or patio may fall outside of OTARD's protections, that guidance applies only "if such installation is in, on, or over a common area."¹⁸ This will not always be the case; for example, a tenant may have exclusive control over a balcony located above a larger patio she controls, such that an antenna extending beyond the balcony would still be above an area reserved for the tenant's exclusive use.

¹⁴ See, e.g., *id.* ¶¶ 12-13 (finding that resident had exclusive use or control of the roof of his townhome and therefore that OTARD applied to antenna placement on the roof).

¹⁵ See, e.g., *id.* ¶ 7.

¹⁶ FCC, Over-the-Air Reception Devices Rule, <http://www.fcc.gov/guides/over-air-reception-devices-rule> ("FCC OTARD Guidance").

¹⁷ See, e.g., *James S. Bannister*, ¶ 9 (finding that, based on the documents submitted, Petitioner had a property interest in his roof and that he had exclusive use of that area); *Phillip Wojckewicz*, 22 FCC Rcd. 9858, ¶ 7 (2003) (finding that, based on the ownership documents and warranty deed, that petitioner had exclusive use and control of his roof); cf. *James Sadler*, 13 FCC Rcd. 12559, ¶¶ 25-26 (1998) (finding that Petitioner had exclusive use and control of walls and patio).

¹⁸ See FCC OTARD Guidance.

The Ordinances, however, treat the street-facing façade of a building as entirely and always outside the exclusive use or control of any resident of any multiple-family building in Philadelphia. OTARD prohibits this. Moreover, the Ordinances strip the right of building owners and condominium associations to allocate exclusive use or control as desired for a given housing community. If a condominium association wants to apportion exclusive use or control of the building’s façade among residents, it has the power to do so. But the Ordinances would impinge on those apportioned rights by preventing residents from exercising their exclusive use or control to install satellite dishes on the street-facing façade. OTARD also does not permit this.

The OTARD rules require a fact-intensive inquiry of the individual circumstances of each building or community. The Ordinances ignore that requirement. By prohibiting placement in specified areas based on assumptions as to which building features residents typically have exclusive use or control over, the Ordinances, on their face, are overbroad and violate the OTARD rules.

B. The Ordinances Impose Restrictions on Single-Family Homeowners That Are Even Farther Reaching Than on Residents of Multi-Family Units

Single-family homeowners generally have greater exclusive use and control over their property than do residents of multi-family units. In particular, they control the entire façade of their homes, whether that façade faces the street or not. The Ordinances, however, are even *more* restrictive with respect to single-family homes than multi-family dwellings. They prohibit single-family homeowners from any dish placement on the front of a house—including placement inside a patio or balcony, on the roof or eaves, or in the front yard—unless the owner complies with a variety of onerous restrictions.¹⁹ In other words, while the Ordinances’ multi-

¹⁹ The Ordinances do permit placement on the façade of a single-family home if alternative placement is not available “with no material delay or material reduction in signal reception and at no significant

family provisions would regulate areas within the exclusive use or control of the subscriber some of the time, the single-family provisions would regulate such areas most of the time. They thus fall within the scope of the OTARD rules even more clearly.

II. CERTIFICATION, REGISTRATION, AND PAINTING REQUIREMENTS WILL CAUSE DELAYS, INCREASED COSTS, AND MAY PROHIBIT SOME RESIDENTS FROM BEING ABLE TO RECEIVE AN ACCEPTABLE SIGNAL

The Ordinances impose several requirements on antenna users and installers, each designed to ensure that subscribers and installers comply with Philadelphia’s (invalid) restrictions on antenna placement. The Ordinances require installers to certify that an alternative placement is unavailable before installing a dish between the façade and the street; they require installers to register the locations of preexisting antennas between the façade and the street; and they require antennas installed in such locations to be painted to match the façade of the building.²⁰

Though the certification requirement only applies when an alternative location is not available, in practice it is likely to have the effect of unreasonably increasing delays and costs and may preclude reception of an acceptable signal by many subscribers. Under the Ordinances, installers must determine by “actual testing” that alternative placement is not available. Such testing will incur costs by the installer, which are likely to be passed on to the subscriber, violating OTARD’s prohibition of restrictions that unreasonably increase costs. It is even

additional cost.” Section PM-304.3.1(c). However, the Ordinances also require that installers must certify, after testing, that alternative placement will result in material delay, reduction of signal quality, or cost—a requirement that, in itself, is almost guaranteed to increase delay and cost (discussed in further detail below). Section 9-632(4). Thus, even the conditioned language of the restrictions on antenna placement on single-family homes is insufficient to bring the Ordinances within the scope of the OTARD rules.

²⁰ *Id.* at 9-632(4)-(5), (7).

possible that some installers might refuse to place antennas between the façade and the street at all, in order to avoid the testing and certification requirements altogether.

Second, the Ordinances make no provision at all for subscribers who might wish to install their own antennas. Those subscribers must comply with the placement restrictions, as set forth in the Ordinances, which state that “no property owner or tenant in a multiple-family or two-family dwelling *shall place* or permit the placement of a satellite dish or antenna between the façade of the building and the street”²¹ and “no property owner or tenant in a one-family dwelling *shall place, install or maintain*, or allow to be placed, installed or maintained, a satellite dish or antenna between the façade of the building and the street.”²² Yet those subscribers will not have the recourse of certification under Section 9-632 to protect them if they must install an antenna between the façade and the street in order to acquire an acceptable signal.²³ In order to avail themselves of that provision, they will have to hire a professional installer, incurring a cost OTARD was designed to prevent.

The registration requirement is equally problematic. The requirement applies only to previously installed antennas²⁴ but will, as with the certification requirement, cause installers and providers to incur costs as they research whether previously installed antennas are still in use.

²¹ Section PM-304.3.1(b) (emphasis added).

²² Section PM-304.3.1(c) (emphasis added).

²³ The Philadelphia City Law Department issued a “Frequently Asked Questions” (FAQ) regarding the Ordinances, in which it asserts that the legislation applies “ONLY to dish installers.” *Satellite Broadcasting & Communications Association Petition for Declaratory Ruling Regarding the Application of the Over-the-Air Reception Devices Rule to Certain Provisions of the Philadelphia, Pennsylvania Code, CSR-8541-O, Attachment B* (filed Nov. 8, 2011). Though Section 9-632 is directed solely at “Television Access Providers and Installers,” that is not the case for PM-304.3.1, which, as described above, specifically prohibits property owners and tenants from installing or permitting the installation of antennas on the front façade of their buildings.

²⁴ Section 9-632(5).

These costs, as with the certification requirement, are likely to be passed on to subscribers. And as with the certification requirement, subscribers who self-install their antennas will not have the protection of registration. Self-installers will face whatever ramifications come along with having an unregistered satellite dish installed between the façade and the street, which could include having their antennas removed by the city because of the lack of a registration on file.

Finally, the requirement under the Ordinances that any antennas on the front of a building be painted to match the façade also imposes costs that violate OTARD. The OTARD rules require that “any fee or cost imposed on a user...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.*”²⁵ But as noted above, the Ordinances do not apply to any other appurtenances or fixtures on the façade of buildings. Satellite antennas and dishes are singled out for regulation, including the requirement that they be painted. Nor do the Ordinances make any exception for situations in which the painting requirement would unreasonably increase costs, delay installation, or preclude reception of an acceptable signal.

The certification, registration, and painting requirements each impose a burden on subscribers that is unreasonable as applied and as compared to the (nonexistent) treatment of comparable devices. Each is therefore disallowed under OTARD.

III. THE ORDINANCES DO NOT EXPRESSLY ARTICULATE PUBLIC SAFETY OR HISTORICAL RATIONALE FOR THEIR RESTRICTIONS

The OTARD rules establish very specific and narrow circumstances under which a municipality may impose the kind of restraints on satellite antenna placement and use found in the Ordinances. Such restrictions are permitted only if they are “necessary to accomplish a

²⁵ 47 CFR § 1.4000(a)(4) (emphasis added).

clearly defined, legitimate safety objective”²⁶ or “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.”²⁷ In the first case, the safety objectives must be “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.”²⁸ In both cases, the restriction must not be greater than that imposed on other, comparable devices.²⁹

The Ordinances do not meet these requirements. As to historical preservation, the Ordinances make no attempt to claim that every building in Philadelphia is of historical significance such that they would be eligible for placement on the National Register of Historic Places. Numerous references in the Ordinances to Philadelphia’s “historical, cultural and architectural lineage”³⁰ are therefore irrelevant.

As to safety concerns, the Ordinances fail to articulate the “clearly defined, legitimate safety objectives” that Philadelphia seeks to accomplish. Although the Ordinances refer to “conditions that could substantially interfere with...preserving and protecting the public’s health, safety and welfare” and to Philadelphia’s “interest in ensuring the structural integrity and safety of building appurtenants,”³¹ they do not describe the particular safety concerns presented by installation of satellite dishes between the façade of a building and the street, nor how the Ordinances themselves address any such safety concerns.

²⁶ *Id.* § 1.4000(b)(1).

²⁷ *Id.* § 1.4000(b)(2).

²⁸ *Id.* § 1.4000(b)(1).

²⁹ *Id.* § 1.4000(b)(1)-(2).

³⁰ *See* PM-304-3.1(a).

³¹ *Id.*

As further evidence of the lack of a legitimate historical or safety justification, the Ordinances focus exclusively on satellite antennas. The OTARD rules require that, under either exception, any restrictions on placement must be no greater than those imposed on other appurtenances presenting either the same safety concerns or the same concerns for historical preservation.³² If Philadelphia is truly concerned about the safety of appurtenances “that extend into the public right of way”³³ or that might compromise the structural integrity of a building, one would expect the Ordinances to address all such appurtenances and not just “satellite dishes and antennas.”³⁴ In the absence of comprehensive treatment of all devices that might be installed between the façade of a building and the street, it is clear that Philadelphia is not genuinely interested in “preserving and protecting the public’s health, safety and welfare” or in “ensuring the structural integrity and safety of building appurtenants,” but is instead concerned about aesthetics. As noted above, aesthetic concerns, without more, are not sufficient to justify such sweeping restrictions on antenna placement.³⁵

* * *

OTARD was designed to ensure that aesthetic concerns do not prevent consumers from subscribing to competitive multichannel video services, including satellite direct-to-home services. Accordingly, restrictions on satellite dish or antenna placement in areas under the exclusive use or control of subscribers are only permitted if a municipality, condominium

³² 47 C.F.R. §§ 1.4000(b)(1)-(2).

³³ PM-304.3.1(a).

³⁴ PM-304.3.1.

³⁵ See, e.g., *James S. Bannister*, ¶ 14; *Shadow Wood Condo. Ass'n*, 21 FCC Rcd. 339, ¶ 8 (2006); *Victor Frankfurt*, 16 FCC Rcd. 2875, ¶ 32 (2001).

CERTIFICATE OF SERVICE

I certify that on this 21st day of December 2011, I have caused a true and correct copy of these Comments to be served by U.S. mail, postage prepaid, upon:

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