

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

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

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SUMMARY

There can no longer be any doubt as to what this proceeding is all about. Philadelphia's City Council has decided that satellite dishes are unsightly. They are, to use the city's description, "clutter that, like graffiti, uncollected trash, and broken windows, announces neglect." Philadelphia Comments at 4. Philadelphia thus freely admits that its decision to restrict satellite dishes was really about aesthetics, not health and safety concerns. Indeed, it trumpets its position with photographs.

This is *exactly* the sort of situation the over-the-air-reception-device ("OTARD") rule was designed to prevent. Congress enacted OTARD precisely to prevent cities and homeowners associations from harming video competition based on their distaste for satellite antennas. When Philadelphia and those supporting its Ordinance urge the Commission to balance its preemptive authority with the "local police power" to govern quality of life, they ignore the fact that Congress has already struck this balance. Although they might prefer that things were otherwise, this particular issue has been settled for fifteen years.

Given the congressional mandate implemented by the Commission in the OTARD rule, cities such as Philadelphia may restrict satellite antennas only in limited circumstances, only on the basis of legitimate and explicit public health or safety concerns, and only in a nondiscriminatory manner. As demonstrated in SBCA's petition and in the initial comments filed jointly by DIRECTV and DISH Network, Philadelphia's Ordinance fails on all counts.

In response, Philadelphia and its supporters provide two basic defenses of the Ordinance. The first has to do with timing. The Commission should not address the ordinance now, they argue, both because so-called "facial" challenges are disfavored and because Philadelphia promises to enforce the Ordinance in compliance with the OTARD rule regardless of what the

Ordinance actually says. Of course, such arguments only underscore the shortcomings of the Ordinance itself and essentially concede that it cannot withstand scrutiny as written. In any event, the OTARD rule requires cities such as Philadelphia to justify their “particular governmental . . . restriction.” 47 C.F.R. § 1.4000(g). This, in turn, means that restrictions can be challenged as written when enacted, not as cities might promise to enforce them once challenged. This straightforward interpretation of the law has existed nearly as long as the OTARD rule itself: in the very first OTARD case, the Cable Services Bureau invalidated a city ordinance in the face of similar procedural defenses because there was a “currently effective” local ordinance on the books. *Star Lambert and Satellite Broadcasting and Communications Association of America*, 12 FCC Rcd. 10455, ¶ 20 (CSB 1997).

Were the law otherwise, hundreds of individual Philadelphians would be forced to file complaints in the future seeking to vindicate rights compromised by the Ordinance today. In the meantime, the damage to competition will have been done, as individual Philadelphians likely will have no way of knowing of Philadelphia’s *sotto voce* plans for relaxed enforcement. Even if they had such knowledge, the inconsistency between Ordinance and enforcement would cause confusion and likely deter many consumers who would otherwise choose satellite service. The Ordinance threatens MVPD competition now, and the Commission must consider it in this context.

Philadelphia’s second defense relates to substance. It argues that the Ordinance is consistent with OTARD because it does not really impose unreasonable costs, serves legitimate health and safety goals, and is applied evenhandedly. Yet, even setting aside questions of enforcement, Philadelphia grossly underestimates the costs and burdens imposed by its Ordinance. To take just two examples, painting dishes with specialized paint could cost up to

hundreds of dollars per subscriber, while sending DIRECTV and DISH Network personnel throughout Philadelphia to “register” the location of existing dishes could easily run into the hundreds of thousands of dollars. Moreover, Philadelphia’s half-hearted attempt to discern a health and safety basis for the Ordinance is belied by a lack of substance, by Philadelphia’s own focus on aesthetics, and on its failure to regulate other comparable items (such as air conditioners, trash cans, and cable equipment) in a similar manner.

There is one last matter that DIRECTV and DISH Network feel constrained to point out. Like many cities, Philadelphia derives substantial benefit from the millions of dollars it receives annually in cable franchise fees. It receives no such fees from satellite providers or their subscribers. So every Philadelphian that chooses cable because he does not wish to wait an entire day for his dish to be painted, or because she disagrees with the city’s preferred dish placement, or because a former resident had to remove his dish before moving out, represents additional revenue for Philadelphia’s city government. Recognizing this fact does not impugn the motives of the city or its representatives. Yet the Commission would be remiss were it to ignore the very real financial incentives faced by these cities—and the fact that these incentives may run counter to Congress’s national policy framework favoring competition—as it assesses restrictive ordinances and related promises of “flexible” enforcement policies going forward.

TABLE OF CONTENTS

	Page
I. THE COMMISSION MUST CONSIDER THE ORDINANCE AS ADOPTED, NOT AS IT MIGHT LATER BE ENFORCED.....	3
A. There Is No Reason to Defer a Determination of the Ordinance’s Compliance with OTARD.....	3
B. The Commission Must Address The Ordinance As Written.....	6
II. THE ORDINANCE AS WRITTEN VIOLATES OTARD.....	9
A. The Ordinance Will Cause Real Costs, Delays and Signal Degradation.....	10
1. Alternate Placement.....	10
2. Certification.....	11
3. Registration	13
4. Painting	15
B. The Ordinance Is Neither Justified Adequately Nor Applied Evenhandedly	16

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DIRECTV, Inc. (“DIRECTV”) and DISH Network L.L.C. (“DISH Network”) hereby reply to the comments of Philadelphia and its supporters opposing the Petition for Declaratory Ruling recently filed by the Satellite Broadcasting and Communications Association (“SBCA”).¹ In its comments, Philadelphia makes quite clear that its decision to restrict satellite dishes was really about aesthetics, not health and safety concerns.² This is precisely what the over-the-air-reception-device (“OTARD”) rule was designed to prevent.³ Calls for the Commission to

¹ Response of the City of Philadelphia to Petition for Declaratory Ruling at 4 (“Philadelphia Comments”). Unless otherwise indicated, all Comments referenced in this pleading were filed in File No. CSR-8541-O on December 21, 2011.

² Subcode PM, Ch. 3, §§ PM-304.0, 304.3, 304.3.1; Title 9, Ch. 9-600, Sec. 9-632 (collectively, the “Ordinance”); Philadelphia Comments at 5. Needless to say, DIRECTV and DISH Network strongly disagree with Philadelphia’s aesthetic judgment.

³ See, e.g., *James S. Bannister*, 24 FCC Rcd. 9516, ¶ 14 (Med. Bur. 2009) (noting that “aesthetic factors alone may not justify a prior approval process”); *Wireless Broadcasting Systems of Sacramento*, 12 FCC Rcd. 19746, ¶ 11 (1997) (same).

balance its preemptive authority with the “local police power” to govern quality of life,⁴ thus ignore the fact that Congress has already struck this balance with respect to satellite antennas.⁵

Philadelphia and its supporters provide two basic defenses of the Ordinance. They first argue both that so-called “facial” challenges are disfavored and that Philadelphia will enforce the Ordinance in compliance with the OTARD rule regardless of what it actually says. But the OTARD rule requires cities such as Philadelphia to justify their “particular governmental . . . restriction.”⁶ This, in turn, means that restrictions can be challenged as written when enacted, not as cities might promise to enforce them once challenged. Were the law otherwise, hundreds of individual Philadelphians would be forced to file complaints in the future seeking to vindicate rights compromised by the Ordinance today. In the meantime, the damage to competition will have been done. The Ordinance threatens MVPD competition now, and the Commission must consider it in this context.

Philadelphia’s second defense relates to substance. It argues that the Ordinance is consistent with OTARD because it does not really impose unreasonable costs, serves legitimate

⁴ *E.g.*, Comments of the States of California and Nevada SCAN NATOA, Inc. at 3 (“CA NV SCAN NATOA Comments”) (arguing that “[t]he Commission should keep in mind the concepts of local police power, legislative will, and changing aesthetic needs”).

⁵ *See, e.g.*, *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, ¶¶ 11-12 (1996) (“OTARD Order”), *aff’d* 13 FCC Rcd. 18962 (“OTARD Reconsideration”) (rejecting claims that OTARD provision impermissibly operated in areas reserved to the traditional local police power). The *OTARD Order* also fully addresses Boston’s contention that the Commission ought to engage in garden-variety preemption analysis here. Comments of the City of Boston, Massachusetts at 3 (“Boston Comments”). The Constitution, The Communications Act and the Commission’s rules, not the cases cited by Boston, specify the parameters of the Commission’s preemption analysis. U.S. Const. Art. VI, cl. 2. (specifying that federal law “shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990) (describing express preemption).

⁶ 47 C.F.R. § 1.4000(g).

health and safety goals, and is applied evenhandedly. Yet, even setting aside questions of enforcement, Philadelphia grossly underestimates the costs and burdens imposed by its Ordinance. Moreover, Philadelphia's attempt to discern a health and safety basis for the Ordinance is belied by a lack of substance, by Philadelphia's own focus on aesthetics, and on Philadelphia's failure to regulate other comparable items in a similar manner.

I. THE COMMISSION MUST CONSIDER THE ORDINANCE AS ADOPTED, NOT AS IT MIGHT LATER BE ENFORCED

Philadelphia and its supporters urge the Commission not to act now. First, they argue, Philadelphia has not yet attempted to enforce its Ordinance, and so-called "facial" challenges are disfavored. They also argue that Philadelphia promises to enforce the Ordinance in a manner consistent with the OTARD rules, and indeed must be presumed to do so. The Commission has never enforced OTARD in this manner. Philadelphia surely could not enact an ordinance prohibiting all satellite dishes within its city limits and claim that the ordinance is facially valid until enforced. Nor could it evade review of such an ordinance by promising to enforce it in compliance with the OTARD rules. The same holds true here: even if Philadelphia can identify some instances in which the Ordinance's restrictions would be permissible, and even if Philadelphia promises to enforce it only in such circumstances, the Commission can and must assess its validity as written.

A. There Is No Reason to Defer a Determination of the Ordinance's Compliance with OTARD

Philadelphia and Boston both argue that the Commission should not rule on what they describe as SBCA's "facial" challenge.⁷ Rather, they argue, if Philadelphia can imagine *any* set

⁷ Philadelphia Comments at 13; Boston Comments at 7.

of circumstances in which the Ordinance would be valid, SBCA must wait until Philadelphia actually seeks to enforce its restrictions against individual subscribers.⁸

Whatever merits the “facial challenge” jurisprudence raised by Philadelphia and Boston may have in other contexts, it has no place here. Congress directed the Commission to “preempt enforcement of State or local statutes and regulations, or State or local legal requirements” that impair television reception.⁹ Heeding this directive, the Commission placed the burden of proof on cities like Philadelphia to demonstrate that “a particular governmental . . . restriction” satisfies the OTARD rule.¹⁰ The plain language of the rule requires Philadelphia to defend its “particular governmental restriction”—*e.g.*, the Ordinance as written, not as Philadelphia might eventually choose to enforce it in individual cases.

In accordance with this plain language, the Commission accepted what was essentially a facial challenge in the very first OTARD case it ever reviewed. In *Star Lambert/SBCA*, petitioners had objected to a city ordinance.¹¹ The city, apparently recognizing the ordinance’s shortfalls, amended it while the case was pending.¹² It then argued that the Commission had no basis to adjudicate the dispute over the new rule. The Cable Services Bureau promptly rejected

⁸ Boston Comments at 7 n.12, *citing United States v. Salerno*, 481 U.S. 739, 745 (1987). It is hard to know what such a standard might mean in this context, as even a blanket prohibition would presumably be permissible as with respect to, for example, a subscriber with no exclusive control over any relevant portion of his or her property.

⁹ H.R. Rep. No. 204, 104th Congress, 1st Sess. at 124 (1995), *quoted in OTARD Order*, ¶ 13.

¹⁰ 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”).

¹¹ *Star Lambert and Satellite Broadcasting and Communications Association of America*, 12 FCC Rcd. 10455, ¶ 20 (CSB 1997) (“*Star Lambert/SBCA*”).

¹² *Id.*, ¶ 16 n.54.

this argument, noting that “[t]his case presents us with an opportunity to evaluate the validity of a currently effective local ordinance under the Rule, and we believe that addressing the issues raised herein will provide valuable guidance in the future to both local authorities and consumers”¹³ It thus invalidated the relevant portions of the ordinance in their entirety. “Facial” review of ordinances is thus not a novelty; it has been accepted as long as the OTARD rules themselves.

Boston describes this longstanding and straightforward reading of the OTARD rule as a “fundamental problem” that must be “nip[ped] . . . in the bud,” speculating that satellite lawyers might sift through municipal regulations, filing facial challenges against municipalities nationwide and taxing Commission resources.¹⁴ Far more problematic than such speculation, however, is the proposed alternative of requiring each and every Philadelphian with a satellite dish to file individual complaints, leaving the Commission to invalidate overbroad rules for some subscribers while leaving them in force for others. Such a process would be cumbersome and costly for subscribers, which is one reason why the Commission chose to require cities to defend their regulations in the first place.¹⁵ Under such a process, moreover, Philadelphia (and other similarly situated municipalities) would potentially have to defend against (and the Commission would have to resolve) hundreds of complaints. This would be a far more significant diversion of resources than that imagined by Boston.

¹³ *Id.*, ¶ 20.

¹⁴ Boston Comments at 7-8. Boston fails to explain why satellite lawyers have not done so in the fifteen years since the *Star Lambert/SBCA* case was decided.

¹⁵ *OTARD Order*, ¶ 54 (“We believe that placing the burden on consumers would hinder competition and fail to implement Congress' directive, as such a burden could serve as a disincentive to consumers to choose TVBS, MMDS, or DBS services.”).

Worse yet, considering Philadelphia's Ordinance in this piecemeal fashion would reduce certainty for all involved. Non-lawyer satellite subscribers would have no reasonable prospect of knowing that Philadelphia's Ordinance could be preempted in some circumstances, much less how such preemption would work in their own circumstances. Many would comply with Philadelphia's restrictions without challenging them.¹⁶ Others would simply switch to cable (or not switch to satellite), a result plainly at odds with Congressional intent in enacting the OTARD provision. By contrast, addressing the legality of the Ordinance in this proceeding would produce an efficient, authoritative, and clear resolution to the issue. Accordingly, consistent with the congressional decision "to vest broad authority in the Commission,"¹⁷ the Commission should rule expeditiously on the pending petition.

B. The Commission Must Address The Ordinance As Written

Philadelphia and others also argue that the Commission should address the Ordinance not as it is written, but as Philadelphia promises to enforce it. Boston, in particular, suggests that cities merit a presumption that they will comply with OTARD, no matter what the statutory language actually says.¹⁸ Similarly, Philadelphia now apparently concedes the overbreadth of its Ordinance by promising to enforce it selectively. For example, Philadelphia now promises to adopt regulations expanding an exception to its antenna placement rules to encompass all areas of multi-family residences within the customer's exclusive use and control, not just balconies or

¹⁶ See, e.g., *James Sadler*, 13 FCC Rcd. 12559, ¶ 35 (CSB 1998) (invalidating requirement that the antenna user sign a document that he or she agreed to be bound by Guidelines that themselves are invalid because "many antenna users, when confronted with such a requirement, would be wary of losing any rights they might have or of accepting any obligations for which they should not be held responsible").

¹⁷ *Bldg. Owners and Managers Ass'n Int'l v. FCC*, 254 F.3d 89, 94 (D.C. Cir. 2001).

¹⁸ Boston Comments at 6.

patios as the Ordinance provides.¹⁹ It also promises to enforce its certification, registration, and painting regulations “reasonably,” which appears to mean “other than as written.”²⁰

The Commission cannot depend on such presumptions and promises. As discussed above, Congress enacted OTARD in large part because cities had demonstrated their willingness to hamper the deployment of satellite antennas for aesthetic reasons.²¹ OTARD thus places both substantive restrictions and the burden of demonstrating compliance on cities. It says nothing about any “presumption” of compliance, and the Commission has never interpreted it to provide such a presumption. Indeed, it is difficult to imagine what sort of restriction would *not* be permitted under Boston’s presumption theory.

Philadelphia’s promise of selective enforcement is equally insufficient. The Commission would never, for example, allow a homeowners’ association to justify an otherwise impermissible regulation by submitting the association president’s promise to selectively enforce it. Indeed, it has already refused to do just that.²² Philadelphia’s promises deserve no greater weight.

¹⁹ Philadelphia Comments at 23.

²⁰ See Part II, below.

²¹ *OTARD Order*, ¶ 16 (“The record is replete with examples of various requirements imposed on those who wish to install DBS dishes or MMDS antennas on their property. These range from requirements for permits or other prior approval, to requirements to plant shrubbery to screen the dish, to regulations that the mast and MMDS antenna must look like a tree with leaves, to safety-related restrictions.”).

²² See *CS Wireless Systems, Inc. d/b/a OmniVision of San Antonio*, 13 FCC Rcd. 4826, ¶ 19 (CSB 1997) (refusing to accept homeowner’s association’s explanation of approval process where, “[i]n the absence of specific requirements, we cannot make any determinations with respect to the prior approval process here”).

To begin with, Philadelphia’s promises are, at present, only promises, and vague ones at that.²³ Until it actually enacts regulations, they have no force whatsoever and the Commission can neither evaluate nor depend upon them. Even if ultimately promulgated as promised, moreover, the regulations proffered by Philadelphia would remain problematic. Precisely because such regulations would conflict with the Ordinance itself, questions and litigation about their validity would inevitably arise. And even if their validity was conceded and their meaning fixed, the proposed regulations would by no means resolve all of the Ordinance’s OTARD-related deficiencies identified in this proceeding. For example, Philadelphia’s promised expansion of the “exclusive use and control” exception to its antenna placement rules for multi-unit dwellings would unlawfully place the burden on *satellite users* to demonstrate that the Ordinance should not apply to them, when OTARD places that burden on Philadelphia itself.²⁴ Moreover, this exemption would not apply at all to single-family homes, where the restrictions would apply even in exclusive use areas.

Above all, the Commission cannot depend on presumptions and promises of selective enforcement because customers and potential customers will not have any reason to know about or heed such presumptions and promises. They will instead make the quite reasonable assumption that restrictive ordinances as written are the law they must follow, unless and until told otherwise by the Commission should they choose to undertake the burden of an OTARD complaint proceeding. And they will make their choice about MVPD provider accordingly, reducing competition in a manner Congress specifically meant to prevent.

²³ See Maenner Decl., ¶ 5 (stating that “[i]t is the intent of the Department to draft implementing regulations which will comply with the OTARD rule, *but also meet the objectives of the Ordinance to protect safety and to preserve the ‘city of neighborhoods’ and its unique streetscape from the blighting effects of unnecessary, excessive attachments to street facing facades*”) (emphasis added).

²⁴ 47 C.F.R. § 1.4000(g).

Had Philadelphia wished to comply with the OTARD rules, it could have very easily done so. At a minimum, it could have done more than simply been “aware”²⁵ of the OTARD rule when drafting its Ordinance and instead drafted rules that comply with OTARD in all respects, not just those Philadelphia unilaterally deems “significant.”²⁶ Having failed to write an OTARD-compliant ordinance, Philadelphia cannot now defend its work product with extra-statutory presumptions, promised-but-unenacted “implementing regulations” and similar devices. The Ordinance must stand or fall as Philadelphia chose to enact it.

II. THE ORDINANCE AS WRITTEN VIOLATES OTARD

Philadelphia’s second defense of its Ordinance is more substantive. It cannot, of course, deny that it seeks to restrict the placement of at least some antennas in areas under the exclusive use and control of the subscriber.²⁷ The question, then, is whether the Ordinance unlawfully impairs satellite service to such customers and, if so, whether Philadelphia has justified such action adequately and implemented it evenhandedly. Philadelphia claims that its Ordinance complies with OTARD on all counts. It is mistaken.

²⁵ Philadelphia Comments at 11.

²⁶ *Id.* at 12.

²⁷ Philadelphia will plainly regulate antenna placement in such areas for single-family homes. Ordinance, § PM.3043.1(c). Moreover, as written, the Ordinance will even more strictly regulate dish placement in at least some such areas for multi-family homes. *Id.* § PM-304.3.1(b); Philadelphia Comments at 8. Painting, registration, and other requirements will also apply to antennas in areas under the exclusive use and control of the customer.

A. The Ordinance Will Cause Real Costs, Delays and Signal Degradation

In their initial Comments, DIRECTV and DISH Network demonstrated that a variety of the Ordinance's requirements threaten "unreasonable" costs, delays, and signal degradation.²⁸

Nothing in Philadelphia's Comments adequately addresses these concerns.

1. Alternate Placement

Philadelphia suggests that its alternate placement requirements for single-family homes do not "significant[ly]" differ from the standards set forth in OTARD.²⁹ DIRECTV and DISH Network respectfully disagree. OTARD prohibits restrictions that "unreasonably" delay or increase costs.³⁰ The Ordinance's provisions governing multi-family dwellings, by contrast, speak of "material" delay and "significant additional" cost.³¹ Philadelphia says that these words really mean the same thing as "unreasonable."³² But basic canons of statutory interpretation suggest otherwise.³³ As Philadelphia was aware of OTARD in its drafting, its decision to use words other than those in the rule itself could be read to suggest a different standard—one that would allow restrictions in more cases.

²⁸ Comments of DIRECTV, Inc. and DISH Network L.L.C. in Support of Petition at 7-9 ("DIRECTV and DISH Network Comments").

²⁹ Philadelphia Comments at 12.

³⁰ 47 C.F.R. § 1.4000(a)(3)(i)-(iii).

³¹ Philadelphia Comments at 12.

³² *Id.* at 13.

³³ See, e.g., *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) ("identical words used in different parts of the same act are intended to have the same meaning"); *Maxwell on the Interpretation of Statutes* 282 (12th Ed. 1969), reprinted in Eskridge, *et al.* Legislation 834 (3d ed. 2001) ("From the general presumption that the same expression is presumed to be used in the same sense throughout the Act or a series of cognate Acts, there follows the further presumption that a change of wording denotes a change in meaning."); *Lindh v. Murphy*, 521 U.S. 320 (1997) (reasoning by negative implication that new rules restricting prisoner access to the courts were not applicable to then-pending cases).

In any event, Philadelphia includes no such language with respect to its restrictions for *multi-family* dwellings. It instead states that this provision “requires a placement other than the streetfront façade of the building as long as *any* alternative location is available—even if such location would require some material delay or additional material expense for the antenna location.”³⁴ There can be no doubt that this rule, on its face, violates the provisions of OTARD relating to delay, cost, and signal degradation.

2. Certification

In their initial comments, DIRECTV and DISH Network noted that the Ordinance’s certification requirement would unreasonably increase delays and costs and may preclude reception of an acceptable signal by many subscribers.³⁵ They noted both that requiring installers to conduct “actual testing” before certifying that alternative locations are not available would be costly, and that some installers may find it easier to forego the process altogether.³⁶ They noted further that the Ordinance would have the practical effect of making self-installation impossible, because self-installers must comply with the placement rules but have no recourse to certify that alternate locations were necessary.

Philadelphia concedes that the Commission had invalidated similar certification restrictions in the past.³⁷ It seems to argue instead that its own certification requirement is

³⁴ Philadelphia Comments at 9 (emphasis added).

³⁵ DIRECTV and DISH Network Comments at 7-9.

³⁶ *Id.*

³⁷ See *Star Lambert/SBCA*, ¶ 29 (invalidating antenna placement requirement in which city “allow[ed] deviation from [the requirement] only if an antenna user or installer demonstrates to a Building Official that the installation of the antenna at the location specified by the Ordinance precludes reception of an acceptable signal”); *Michael J. MacDonald*, 13 FCC Rcd. 4844, ¶ 27 (CSB 1997) (invalidating requirement of “a certificate from the dealer or installer certifying that installation in a location other than that preferred by Savannah . . . is necessary to avoid impaired reception”).

reasonable because, unlike earlier ones, it does not require “pre-approval.”³⁸ This argument is curious. A certification provision with penalties for noncompliance cannot reasonably be characterized as anything other than “pre-approval,” even if (as presumably was the case in both *Star Lambert/SBCA* and *MacDonald*) installers can submit such certifications after actually installing the antenna.

Philadelphia also argues that it will apply its rules “as a flexible standard,” which it believes is a standard with which installers should comply already.³⁹ Since Philadelphia “does not specify a particular test,”⁴⁰ it asserts that satellite carriers and their customers can have no cause to complain. Even with this promise, Philadelphia’s registration requirement violates OTARD, as interpreted in *Star Lambert/SBCA* and *MacDonald*. It is also worth noting yet another problem with Philadelphia’s extra-statutory defense of its statute. Had the Ordinance itself specified, for example, that installers could use simple line-of-sight testing (*i.e.*, the sort of testing they now use to determine whether potential subscribers can receive satellite signals at all), DIRECTV and DISH Network would have less reason to object.⁴¹ As written, however, the Ordinance would allow Philadelphia to require installers to physically mount a dish in various locations and engage in signal testing using equipment similar to that used for distant signal eligibility.⁴² That kind of “testing” would cost up to hundreds of dollars per subscriber. Given

³⁸ Philadelphia Comments at 17.

³⁹ *Id.* at 18.

⁴⁰ *Id.*

⁴¹ Even such a rule, however, could impose unreasonable costs and delay if interpreted, for example, as requiring testing of every nook and cranny of the yard or the use of a bucket truck and crane.

⁴² 47 C.F.R. § 73.686 (setting forth rules for field strength measurements).

the broad wording of the Ordinance, a vague and non-binding promise to regulate “flexibly” is simply insufficient.

Philadelphia’s response with respect to self-installation is more comforting, but still ultimately inadequate. DIRECTV and DISH Network had read the law to mean that, since certification is required to install dishes between the façade and the street, and because certification is only available to professional installers, self-installers could never install dishes between the façade and the street.⁴³ Philadelphia, however, seems to suggest that its certification requirement does not apply to self-installation, and thus is less onerous than requirements the Commission had previously struck down.⁴⁴ Philadelphia thus apparently reads its Ordinance as permitting self-installers to install antennas in the contested area without certification. Such a reading would certainly address this particular concern. But here once more, the Ordinance would be more defensible if it actually said this clearly rather than leaving consumers to guess at their peril.

3. Registration

DIRECTV and DISH Network raised several concerns with the Ordinance’s requirement to register previously-installed antennas. Apart from general issues of cost and delay—which Philadelphia ignores on the specious and impermissible ground that *it* will not charge people to

⁴³ Those subscribers must comply with the placement restrictions, as set forth in the Ordinance, 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” Section PM-304.3.1(b) (emphasis added), 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.” Section PM-304.3.1(c) (emphasis added). 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.

⁴⁴ Philadelphia Comments at 17, *citing MacDonald*, ¶ 28 n.52 (“The Commission has previously ruled that, as long as a certification is not required of homeowners or tenants who install their own antennas . . . such a certification requirement is reasonable).

submit such registrations⁴⁵—the parties raised issues related to who must do the registering. The Ordinance specifies that the “access provider or installer”⁴⁶ must submit the registration. This, in turn, appears to mean that, unless they use their satellite provider for registration, individuals would be required to move even antennas that otherwise could remain in their current location.⁴⁷

Philadelphia responds that this is the proper allocation of responsibility, because providers maintain records for billing purposes.⁴⁸ Yet this response raises another and far more troubling issue of cost that DIRECTV and DISH Network had not fully considered. Neither DIRECTV nor DISH Network keeps records of where individual installers happen to have placed receive antennas. The only way for them to obtain such information would be to call or visit thousands of subscribers. Since each truck roll costs roughly \$100, such a project could easily run into the hundreds of thousands of dollars. Philadelphia’s claim that doing so would “perhaps be a small, one-time business expense incurred from reviewing records” that need not be passed along to customers is simply wrong.

⁴⁵ Philadelphia Comments at 27. *See Star Lambert/SBCA*, ¶ 24 (“While some might argue that the application for a permit is simple, the fee is small and the period of time for permit issuance is mandated to be short, the fact remains that a potential user is required to take these steps in circumstances in which the City has previously determined (by enacting the Ordinance) that it has no quarrel with the proposed placement.”)

⁴⁶ Ordinance, Section 9-632(5).

⁴⁷ Philadelphia seems to suggest that the requirement to move pre-installed antennas applies only in multi-unit dwellings. Philadelphia Comments at 26. Here once again, however, Philadelphia’s support for this contention is not the Ordinance itself, but a contemporaneous document “prepared and issued by the cosponsoring Councilman’s office.” *Id.* at 26 n. 40.

⁴⁸ *Id.* at 27.

4. Painting

DIRECTV and DISH Network also addressed the burden of the Ordinance’s requirement that antennas be painted to match the façade.⁴⁹ In particular, they noted that the painting requirement, unlike some of the other requirements, is not subject to any “unreasonable cost or delay” language at all. Here once more, however, Philadelphia suggests that the requirement is less onerous than the statutory language provides.⁵⁰ It asserts that a “reasonableness” standard will apply, and “providers will not be required to maintain a full array of colors” so long as there is “an effort to match basic house colors.”⁵¹

The Commission has already held that Philadelphia’s solution is no solution.⁵² Moreover, the Commission should not continue to labor under the misimpression, expressed in its two *OTARD Orders*, that “a requirement to paint an antenna in a fashion that will not interfere with reception so that it blends into the background against which it is mounted would likely be acceptable.”⁵³ In reality, any dish-painting requirement would prove extraordinarily costly.

- Neither DIRECTV nor DISH Network antennas are available in multiple colors. Installers or subscribers would have to paint standard grey antennas.
- Only non-metallic, non-reflective spray paint could be used without ruining reception, and then only if such paint were carefully and evenly applied.
- Each technician would have to be supplied with a significant palate of colors, because such paints cannot be mixed.

⁴⁹ DIRECTV and DISH Network Comments at 8.

⁵⁰ Philadelphia Comments at 30.

⁵¹ *Id.* at 30.

⁵² See *CS Wireless Systems*, ¶ 18 (holding that a screening requirement violated OTARD where, “as written, Section 3.14 does not allow for exceptions,” (emphasis added).

⁵³ *OTARD Order*, ¶ 19; *OTARD Reconsideration*, ¶ 45.

- Each work truck would have to be equipped to store such paint, which could include hazardous storage.
- The costs for additional site prep materials alone (*e.g.*, plastic, painters' tape, cleaner, *etc.*, could be as high as \$10 per installation.
- Each technician would have to be trained as a painter; and not merely a painter, but one that can recognize when an antenna is painted in such a way as to not hamper reception.
- Painting could not take place in many weather conditions in which installation can otherwise take place, such as direct sunlight. For instance, paint requires four to eight hours to dry, making the weather "window" for installation much more difficult to achieve.
- Each installation truck roll costs approximately \$100. If painting cannot be accomplished on the initial trip, an additional truck roll would be required.

This is not "reasonable" additional cost. It is additional cost and hassle sufficient to cause existing subscribers to abandon satellite services, to prevent potential subscribers from signing up, and quite possibly to deter DIRECTV and DISH Network from actively seeking new subscribers in Philadelphia. As such, it is prohibited by the OTARD rules.⁵⁴

B. The Ordinance Is Neither Justified Adequately Nor Applied Evenhandedly

Not all restrictions that "impair" television reception in areas under the exclusive control and use of the subscriber necessarily violate OTARD. Rather, as all parties seem to agree, cities can impose such restrictions if they are adequately justified on health, safety, or historic preservation grounds *and* applied evenhandedly. As Philadelphia's Comments demonstrate, however, the city can make neither of these showings.

⁵⁴ *OTARD Reconsideration*, ¶ 45 ("If a regulation or rule required painting a Section 207 reception device in a manner that unreasonably increases costs or impairs the ability of the device to receive a signal, then the regulation would be impermissible under our Section 207 rules.").

The OTARD rule permits restrictions only if they are “necessary to accomplish a clearly defined, legitimate safety objective”⁵⁵ 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.”⁵⁶ 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.”⁵⁷

As discussed in the Introduction, however, Philadelphia has made quite clear that its interests are in the appearance of satellite antennas, not in health, safety, or historic preservation. Indeed, Philadelphia’s scant attempts to discuss the health and safety factors specified in OTARD are, quite frankly, little more than *post hoc* rationalizations.⁵⁸ The mere *pro forma* recitation of generalized health and safety objectives in the Ordinance’s preamble, for example, is plainly insufficient, as the Commission has already specifically held.⁵⁹ Such recitations, without more, are neither “clearly defined” nor “legitimate.”⁶⁰ So too with Philadelphia’s

⁵⁵ 47 C.F.R. § 1.4000(b)(1).

⁵⁶ *Id.* § 1.4000(b)(2).

⁵⁷ *Id.* § 1.4000(b)(1).

⁵⁸ *See* Philadelphia Comments at 3.

⁵⁹ *Star Lambert/SBCA*, ¶ 36 (“[The city ordinance in question] provides a general statement of ‘health, safety and welfare interests,’ but does not provide the type of specific guidance and clear purpose that we believe is required by the Rule. In particular, we do not believe that the city has sufficiently identified the type of safety concern it intends to address, and are concerned that the general statement of safety interests is so broad and ill-defined that it constitutes little more than a *pro forma* recitation.”).

⁶⁰ *See, e.g., OTARD Order*, ¶ 25 (distinguishing between legitimate and non-legitimate safety concerns); *OTARD Reconsideration*, ¶ 10 (noting that the “legitimate” and “clearly defined” language was intended to address concerns that “the safety exception will be abused”).

generalized explanation that “public safety is necessarily a concern whenever devices are attached to a façade overlooking a public right of way.”⁶¹

Were there any remaining doubt as to Philadelphia’s proffered health and safety justification, its failure to regulate other comparable devices would resolve it.⁶² As far as DIRECTV and DISH Network are aware, Philadelphia has enacted no similarly comprehensive regulatory scheme for “similar devices, such as air conditioning units or trash receptacles.”⁶³ It does not regulate electrical wires, which appear to raise even more serious health and safety issues,⁶⁴ nor equipment installed on building façades by Philadelphia-franchised cable operators. Philadelphia does regulate graffiti, trash, and for-sale signs.⁶⁵ But these things are not similar to satellite antennas, and Philadelphia does not regulate them similarly.⁶⁶

* * *

OTARD was designed to ensure that aesthetic concerns do not prevent consumers from subscribing to competitive multichannel video services, including satellite services. Philadelphia, however, has enacted an Ordinance that strikes at the very heart of the OTARD rule, and no presumption, promise, or *post hoc* rationalization can change that fact. Accordingly, the Commission should declare that the Ordinance violates OTARD and is therefore unenforceable.

⁶¹ Philadelphia Comments at 3.

⁶² 47 C.F.R. § 1.4000(b)(1)-(2).

⁶³ *OTARD Order*, ¶ 19.

⁶⁴ Philadelphia Comments at 20 n. 30 (noting that “‘live’ electrical wires pose a risk if they fall” but then arguing that the risk is not comparable to that of satellite antennas because live wires are equally risky wherever they might be located).

⁶⁵ *Id.* at 5 n.8.

⁶⁶ Philadelphia does not, for example, require anyone to register trash cans, as far as we are aware. Nor does it require graffiti to match houses.

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January 6, 2011

CERTIFICATE OF SERVICE

I, Laura Merkey, do hereby certify that, on this the 6th day of January, 2012, a copy of these Reply Comments in Support of Petition was sent, via first-class U.S. mail, hand delivery, or electronic mail, to the following:

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* Denotes that an original and two copies were served upon the recipient, pursuant to 47 C.F.R. § 1.4000(h), and that service was made via hand delivery.