



BEST BEST & KRIEGER
ATTORNEYS AT LAW

Indian Wells
(760) 568-2611

Irvine
(949) 263-2600

Los Angeles
(213) 617-8100

Ontario
(909) 989-8584

2000 Pennsylvania Avenue, NW, Suite 4300, Washington, D.C. 20006
Phone: (202) 785-0600 | Fax: (202) 785-1234 | www.bbklaw.com

Riverside
(951) 686-1450

Sacramento
(916) 325-4000

San Diego
(619) 525-1300

Walnut Creek
(925) 977-3300

James R. Hobson
(202) 370-5305
james.hobson@bbklaw.com

February 17, 2012

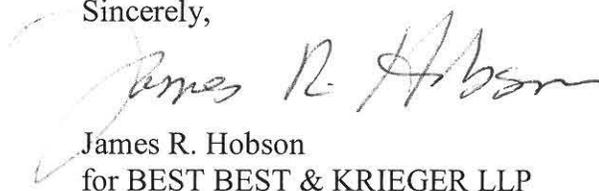
Secretary
Federal Communications Commission
Washington, DC 20554

Re: CSR-8541-O, Petition of SBCA
Ex parte communication pursuant to Section 1.1206 of the Rules

Dear Madame Secretary:

Submitted herewith for filing in the captioned proceeding is the City of Philadelphia's response to statements placed on the record earlier this month by Petitioner and its allies. The response also is being submitted electronically to Docket 11-187. Please direct any questions to the undersigned.

Sincerely,



James R. Hobson
for BEST BEST & KRIEGER LLP

cc: Ken Lewis, Media Bureau
51044.00003\7318465.1

CSR-8541-O
Ex Parte Response Of The City Of Philadelphia
To SBCA, DirecTV and Dish Network *Ex Parte* Handout Titled
“SBCA SATELLITE OPERATOR CONCERNS RE PHILADELPHIA ORDINANCE”

Pursuant to Section 1.1206 of the Rules, the City of Philadelphia submits the following comments in response to the statement of “concerns” provided to the FCC by SBCA, DirecTV and Dish Network at their *ex parte* visit of February 2, 2012, posted to Docket 11-187 on February 3rd. For convenience, industry statements in the handout are reproduced in italics below and are followed by the City’s responses.

Appended to this Response in further support of the City’s Ordinance is the Declaration of David Herres.

- I. The Commission must act now*
- *The OTARD rules require Philadelphia to justify its Ordinance now, not later.*

City Response:

The Administrative Procedure Act, FCC rules and applicable case law all provide that the Commission’s issuance of declaratory rulings is discretionary. See Response of the City of Philadelphia to Petition for Declaratory Ruling, *In re Satellite Broad. & Comm. Assoc.*, F.C.C., C.S.R. 8541-O (December 22, 2011) at 30-31 (hereinafter cited as “Response at ___”). With no implementing regulations, no record whatsoever of enforcement, and the City’s express commitment to implement the Ordinance in compliance with the OTARD Rule, preemption is inappropriate and the Commission may exercise its discretion not to rule at this time.

- *The mere presence of Philadelphia’s Ordinance is causing real harm right now, including depressing subscribership, encouraging copycat bills and harming installers.*

City Response:

The record contains no evidence of any of these allegations.

- II. The Commission must examine the Ordinance as written*
- *Philadelphia has promised to rewrite its Ordinance through regulation and enforcement.*

City Response:

Regulations implementing the City’s Ordinance will be enacted according to a formal, public process prescribed by the City Charter and will have the force of law, binding on the City as well as on antenna users and service providers. Regulations cannot and will not “rewrite” the governing ordinance. Notwithstanding SBCA’s innuendos, regulations are a standard and entirely legitimate means used by Philadelphia, and most governments, to clarify and apply ordinances, and to ensure they are enforced in compliance with applicable state and federal laws.

- *This is nothing more than promise, and not properly before the Commission. Even if additional explanatory regulations are enacted, questions remain about legality, sufficiency, and impact.*

City Response:

The Commission recognizes implementing regulations as a legitimate means for ensuring that local laws will comply with federal law, and has declined to preempt a State or local rule where, as here, the local entity clarifies that it will not enforce the rule in violation of federal law [Response, at 16, n. 23; citing *In re Public Utility Commission of Texas*, 13 FCC Rcd. 3460, ¶¶ 7& 8 (1997)].

III. This is a simple case of express preemption

- *Commission cannot balance OTARD rules with municipal “police power” or aesthetic choices. Congress has already made that choice.*

City Response:

As recognized by Commission precedent (Response, at 12, n.15), neither Congress’ direction in the 1996 Act nor the OTARD Rule preempts the City from exercising its police powers to regulate antenna placement for aesthetic, safety and other legitimate reasons where, as here, regulation complies with the Rule. Section 207 of the Act directs the Commission to “promulgate regulations to prohibit restrictions that impair a viewer’s ability to receive video programming services” through over-the-air reception devices. Congress did not “make that choice.” Congress left it to the Commission to define “impair” in the OTARD Rule. Under the Commission’s definition, the City’s ordinance does not “impair” reception and is fully consistent with Congress’ direction.

IV. The Ordinance plainly violates OTARD

- *It covers antennas within exclusive areas.*

City Response:

The industry’s *ex parte* comments overreach. As the City’s filings repeatedly point out, and contrary to industry misrepresentations, the OTARD Rule does not categorically prohibit restrictions on antenna placement in exclusive-use areas. It prohibits *only* restrictions in exclusive-use areas that “impair[] the installation, maintenance or use” of satellite antennas. In common-use areas, the Rule does not prohibit restrictions on antenna placement at all. The Ordinance’s placement preference expressly does *not* apply where there is no location alternative to a street-side facade that does not so impair satellite service (Response generally, at 11-21 § III A, B). And to the extent there may be ambiguity in the Ordinance, the City will clarify by regulation to ensure full compliance with the OTARD Rule. Reply of the City of Philadelphia to Comments Filed in *In re Satellite Broad. & Comm. Assoc.*, F.C.C., C.S.R. 8541-O at 3-4 (hereinafter cited as “Reply at ___”). The Ordinance’s placement preference complies with the Rule.

- *It unreasonably increases costs, delays installation, and degrades signals.*
 - *Single family home antenna placement and certification*
 - *Requires placement in back of house unless “material” delay or degradation, or “significant” cost. This is not the OTARD standard. Also requires certification by installer, which could cost hundreds of dollars.*

City Response (in addition, see attached Declaration of David Herres):

This is ridiculous. Nowhere does the City’s Ordinance “require placement in back of house.” The Ordinance restricts placement on the street-side facade where (and only where) there is no alternative location that does not “impair” service in the special meaning of the OTARD Rule. Philadelphia houses have roofs, back walls, and in many cases, side walls and yards. The common practice of using a short mast on the back wall to raise an antenna above the roof is also available in most cases. The industry’s claim that the City dictates back wall placement is a gross misrepresentation.

- *Multiple family residence antenna placement*
 - *Requires placement in back of house (other than porches and balconies) no matter what the cost.*

City Response:

Multi-family residences in Philadelphia also have roofs and back walls. In many cases, they also have sidewalls and side yards. Often the short mast described above can also be used.

- *Dish painting*
 - *Could cost hundreds of dollars, contrary to Commission’s dicta, and greatly complicates installation (heat, cold, rain).*

City Response:

See generally, Response, at 28-30 § III.D. It is not unheard of in the communications industry to paint antennas. And the City will implement this provision to simplify compliance. (Response, at 30). To the extent “heat, cold, rain” is an issue, the dishes can be painted in a standard color before installation. We note again that the Commission has stated clearly that a painting requirement may fit within the OTARD Rule.

- *Notification of existing dishes, and removal of unused/non-notified dishes*
 - *Satellite carriers do not have this information, which will cost enormous sums to recreate.*

City Response:

Although commenters complain that they do not keep records, it does not follow that they could not do so going forward.

As to existing antennas, the satellite provider could notify its customers, e.g. by e-mail and/or billing insert, to advise the provider of their intent to keep an antenna located between the facade and the street in service. The City will accept the provider’s good faith effort to determine customer intent.

- *Satellite providers do not have legal right to seize “unused” dishes.*

City Response:

Implementing regulations will assure that neither satellite providers nor installers will be required to act without an owner’s permission. Going forward, service contracts could provide for the right to remove abandoned dishes.

- *It has neither been adequately justified nor applied evenhandedly*
 - *City admits this is about aesthetics; health and safety justifications are pro forma and not sufficient.*
 - *City treats no other similar devices in this way – not air conditioners, not wires, and certainly not cable equipment.*

City Response:

- **Placement restrictions based on “aesthetics” are permissible under the OTARD Rule where, as here, they do not “impair” satellite service in the Rule’s special meaning of that term. The City has explained that the aesthetic quality of a neighborhood directly impacts property values, quality of life, and public safety (Response at 3-6; Reply at 8). The City has an important interest in preserving its neighborhoods that the Commission should respect in construing the Rule.**
- **The industry claim that the ordinance has not been “applied evenhandedly” again overreaches since, obviously, it has not been applied at all. It reinforces, however, the City’s point that this challenge is premature until the Ordinance is implemented by regulations and enforced. Until then, industry speculation as to non-compliance and unequal application are just that, speculation.**
- **The industry complaint that the Ordinance does not apply equally to air conditioners, wires and cable equipment ignores the obvious fact that wires and cables simply are not comparable to dish antennas - in bulk, in visual impact, in potential safety risk, or otherwise (Response at 19-20). For window air conditioners, the user does not have the location choice available to satellite dish users since only a window in the room, street-side facade or not, will work. Where the same applies to a dish, the Ordinance permits location on a street-side facade.**

**Before the
Federal Communications Commission
Washington, D.C. 20556**

In the Matter of)	
Satellite Broadcasting &)	
Communications Association)	
)	
Petition for Declaratory Ruling)	CSR-8541-O
Regarding the Application of the)	
Over-the-Air Receptions Devices Rule)	DECLARATION OF DAVID HERRES
To Certain Provisions of the)	
Philadelphia, Pennsylvania Code)	

I, David Herres, declare as follows:

1. I am a licensed master electrician working in this field since the 1970s. Since 2006, I have also worked as a technical writer on the subject of proper installation and repair of electrical equipment and systems, including communications equipment and satellite dish antennas. I have published over fifty-five articles in eleven publications, including *Electrical Construction & Maintenance Magazine* and *Elevator World*. Among these is “The Dish on Successful Satellite Installations,” which was published in the February 1, 2007 issue of *Electrical Construction & Maintenance Magazine*. In 2011, McGraw-Hill Books published my textbook, *2011 National Electrical Code Chapter-By-Chapter*, which is oriented toward electricians who are interested in upgrading their skills and preparing for tests to qualify for higher licensing credentials. One chapter of this textbook deals with communications equipment, including proper installation of satellite dish antennas.

2. From 2000 through 2010, I worked as a maintenance electrician for the Balsams Grand Resort Hotel in Dixville Notch, New Hampshire, a ski and golf resort of over 300 rooms. During the course of my employment there, I worked with satellite dish installers to implement a satellite dish antenna system for the hotel, including equipment placement. The master antenna used by the hotel was the same standard type and size ordinarily used for residential satellite antenna installations. Following installation, I worked on troubleshooting and repair and maintenance of the satellite dish system. Since 2010, in addition to my writing, I continue to work as an electrician. I am familiar with the procedures for satellite dish installation and I have on numerous occasions reviewed satellite dish installation requirements and procedures with professional dish installers. I have frequently inspected residential dish installations by professional installers on behalf of property owners. I am competent to testify and have personal knowledge of the facts stated in this Declaration, based upon my review of the records and/or my personal experience of the matters referenced herein. If called as a witness, I could testify thereto.

3. Satellite dish antenna installations typically take about two hours to complete, excluding travel, depending on the experience of the installer, the presence of a helper, and the physical characteristics of the customer's residence. Standard practice for competent installers is to survey the site for alternative locations that will provide acceptable reception. The installer will know the general direction a dish must face and will take into account the land, surrounding trees, and nearby buildings. Direct line of sight to the satellite is confirmed using an inclinometer and compass, standard instruments carried by professional installers. Confirming direct line of

sight to the satellite is sufficient to predict that an acceptable quality signal will be available at the location by “fine tuning” the antenna after installation with the help of a standard signal strength meter.

4. Using the inclinometer and compass, a trained installer can check a candidate site for acceptable reception in a few minutes, and can check several alternative locations in a short period of time, without significantly delaying the installation. In a standard installation, installers routinely check multiple locations to ensure acceptable quality reception, typically consult the customer as to location preferences, and will accommodate the preference after confirming acceptable quality reception. A trained installer should be able to check three or more different locations within about fifteen minutes, plus the few additional minutes that may be needed to access the roof or other prospective antenna location.

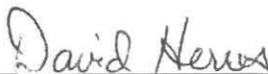
5. If an installer determines that the front façade of a property is the only feasible location for a satellite dish antenna, it would not be burdensome to complete and submit to the City a simple form certifying that alternative locations were evaluated for direct line of sight and only installation on a street-facing facade will provide acceptable reception

6. Installers typically are independent contractors who cover the cost of some of the basic materials such as wire and cabling used for installations. Customers are generally not charged if an installer must return to the site to correct or complete an installation, although some specialized installations--such as those requiring erection of a tall pole or extensive excavation for underground connections-- may be subject to payment of additional charges by the customer. Any additional costs the installer incurs for a standard installation typically are borne by the

installer, not the customer. It is unlikely that the minimal cost of determining the feasibility of alternate dish locations would be passed on to the consumer, given the business relationship between the installers and the satellite companies.

7. Satellite companies typically pay installers a flat fee per installation, creating an incentive to complete each installation in a minimum amount of time in order to maximize the income for a day's work. Although installation contractors are strongly motivated to get a good signal, they also have an incentive not to evaluate alternative locations such as a roof or side yard or short mast at the rear of a roof, but to install the satellite provider-supplied equipment out of the box in locations that are most readily accessible in order to minimize installation time. This is regrettable, in my opinion, because as stated above evaluation of alternative sites is not unduly time consuming.

I declare under penalty of perjury that the foregoing is true and correct and that I have signed this Declaration in COLEBROOK, NH, _____ on February 16, 2012.



David Herres
Master Electrician