

ORIGINAL

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

IN THE MATTER OF

PETITION FOR RULEMAKING TO AMEND THE  
COMMISSION'S OVER THE AIR RECEPTION  
DEVICE ("OTARD") RULES

MB Docket No. \_\_\_\_\_

FILED/ACCEPTED

APR 18 2017

Federal Communications Commission  
Office of the Secretary

PETITION FOR RULEMAKING

The Satellite Broadcasting and Communications Association, DIRECTV, LLC, and DISH Network L.L.C. (collectively, "Petitioners") hereby petition the Commission to amend its rules governing restrictions on over-the-air reception devices (the "OTARD rules").<sup>1</sup> In deference to the rights of property owners and homeowners' associations ("HOAs"), the Commission has concluded that the governing statute does not dictate property use with respect to devices that are located in "common" areas not within the exclusive use or control of the antenna user. In interpreting the statute to protect the prerogatives of property owners against federal regulation, however, the Commission left unanswered questions about the statute's scope when state and local governments—not property owners—seek to regulate reception devices. Through this omission, the Commission may have inadvertently given state and local governmental agencies the ability to impinge upon the very prerogatives it sought to protect when considering the issue in the first place. In order to clarify that this was not the Commission's intent, Petitioners seek to amend this "exclusive use" provision to apply only to

<sup>1</sup> 47 C.F.R. §§ 1.4000(a)(1) *et seq.* Petitioners file this petition pursuant to 47 C.F.R. § 1.401.

No. of Copies rec'd 0+2  
List ABCDE  
MB-Pchij 12-10

restrictions on reception devices *imposed by property owners or HOAs*, and not to restrictions imposed by state or local governments.<sup>2</sup>

This amendment would bring the exclusive use limitation in line with the concerns that animated it: namely, that applying the OTARD rules in non-exclusive “common” areas would interfere with the rights of property holders. Such concerns may be valid when a property owner or HOA seeks to restrict reception devices in common areas where the user has no ownership or leasehold interest. They make no sense at all, however, when a state or local government seeks to restrict reception devices in such areas even though the property owner has allowed them to be located there.

The Commission has never considered the scope of the OTARD statute as applied to state and local government restrictions. The Commission should consider this issue now, however, because at least one city has taken the position that the OTARD rules do not prevent the imposition of quite literally any governmental antenna regulation with respect to non-exclusive areas. Were other cities to take such a cramped view of the Commission’s rules, the resulting ordinances would have disastrous results for competition in a video marketplace that has problems enough as it is. This is not what Congress intended when it sought to increase video competition by directing the Commission to prohibit restrictions that “impair” television viewing, and would actually conflict with the Commission’s deference to the interests of property owners and HOAs in this context. Accordingly, the Commission should expeditiously clarify the scope of its OTARD rules and thereby give state and local governments much-needed guidance as to what federal law does and does not permit.

---

<sup>2</sup> Petitioners have set forth the text of the proposed rule in Exhibit A hereto. 47 C.F.R. § 1.401(c).

## I. BACKGROUND

### A. The OTARD Statute

Section 207 of the Telecommunications Act of 1996, titled “Restrictions on Over-the-Air Reception Devices,” states:

Within 180 days after the date of enactment of this Act, the Commission shall, pursuant to section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.<sup>3</sup>

This provision, by its terms, governs *all* over-the-air reception devices, regardless of where they might be located.<sup>4</sup> In particular, it makes no distinction between “exclusive use” areas and “common areas.” The exclusive use limitation is a creation of the Commission, not Congress. It is important to understand the genesis of this aspect of the rule in order to appreciate why it cannot apply to restrictions imposed by governmental entities.

---

<sup>3</sup> Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, § 207 (1996). Section 303 of the Communications Act authorizes the Commission to issue rules and regulations “as public convenience, interest, or necessity requires” and, as amended by the 1996 Act, states that the Commission shall “have exclusive jurisdiction to regulate the provision of direct-to-home satellite services.” 47 U.S.C. § 303.

<sup>4</sup> As the Commission has recognized, the statute also applies equally to all types of viewers. *See 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*, Second Report and Order, 13 FCC Rcd. 23874, ¶ 13 (1998) (“OTARD Second R&O”) (“As an initial matter, we agree with those commenters that argue that Section 207 applies on its face to all viewers, and that the Commission should not create different classes of ‘viewers’ depending upon their status as property owners.”), *recon. denied*, 14 FCC Rcd. 19924 (1999), *aff’d sub nom. Bldg. Owners and Managers Assoc. Int’l v. FCC*, 254 F.3d 89 (D.C. Cir. 2001).

## B. The Rationale Behind the Commission's Exclusive Use Limitation

The Commission first preempted state and local government regulation of satellite antennas in 1986, ten years before Congress passed the OTARD statute.<sup>5</sup> That rule, which still applies today to antennas of more than one meter in diameter,<sup>6</sup> made no distinction between exclusive use and common areas. Because it preempted only "state or local . . . regulation,"<sup>7</sup> and thus did not limit private property rights, there was never any need to consider such rights in delineating the rule's scope.

Only after Congress enacted the OTARD statute, which applied to both governmental *and private* restrictions on antenna placement, was the Commission forced to consider issues related to property rights. When it first adopted rules implementing the statute,<sup>8</sup> the Commission found that Congress intended to promote two complimentary federal objectives: (1) to ensure that consumers have access to a broad range of video programming services, and (2) to foster full and fair competition among different types of video programming services. The Commission thus concluded that it had authority to preempt private restrictions on the placement of OTARD-qualified antennas and rejected claims that the OTARD rules would exceed the limits of the

---

<sup>5</sup> See *Common Carrier Services; Preemption of Local Zoning and Other Regulation of Receive-Only Satellite Earth Stations*, 51 Fed. Reg. 5519 (1986) ("1986 Order").

<sup>6</sup> See 47 C.F.R. § 25.104.

<sup>7</sup> *Id.* Indeed, that regulation was promulgated in part because of a Chicago ordinance that required the same review of a satellite antenna installation as that for building an airport or a shopping center. *Common Carrier Services; Preemption of Local Zoning and Other Regulation of Receive-Only Satellite Earth Stations*, Notice of Proposed Rulemaking, 50 Fed. Reg. 13986, ¶¶ 17-21 (1985) Section 25.104 remains applicable to satellite antennas that are over 1 meter in diameter.

<sup>8</sup> *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, ¶ 6 (1996) ("OTARD Order"), *recon. granted in part and denied in part*, 13 FCC Rcd. 18962 (1998) ("Reconsideration Order").

Commerce Clause.<sup>9</sup> Yet at the same time, the Commission was sensitive to the effect its rules might have on the rights of property owners and HOAs, and sought to minimize its impact on those interests.<sup>10</sup>

Based on comments received in the proceeding, the Commission identified three categories of property rights for analysis: (1) property within the exclusive use or control of a person who has a direct or indirect ownership interest in the property; (2) property not under the exclusive use or control of a person who has a direct or indirect ownership interest in the property; and (3) residential or commercial property that is subject to a lease agreement.<sup>11</sup> The Commission initially chose to preempt restrictions in the first category, concluding that “other owners will not be directly impacted by the installation.”<sup>12</sup> Accordingly, it “adopt[ed] a rule that prohibits nongovernmental restrictions that impair reception by antennas installed on property exclusively owned by the viewer” or “where an individual who has a direct or indirect ownership

---

<sup>9</sup> *Id.* ¶¶ 9, 12, 41-46.

<sup>10</sup> The Commission found that restrictions by property owners and those imposed by homeowners associations should be grouped together—in contrast to restrictions by local governments—because the former are accomplished through private restrictive covenants, which the Commission defined as “an interest in real property in favor of the owner of the ‘dominant estate’ that prevents the owner of the ‘servient estate’ from engaging in an activity that he or she would otherwise be privileged to do.” *Id.* ¶ 41 n. 112. *See also* Restatement (Third) of Property (Servitudes) § 6.2 (2000) (defining “common-interest community” as “a real-estate development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation . . . that [*inter alia*] enforces other servitudes burdening the property in the development or neighborhood.”); *Bd. of Cty. Sup’s. of Prince William Cty. Va. v. United States*, 23 Cl. Ct. 205, 211 (1991) (“The term restrictive covenant universally signifies an agreement between two parties restricting the use of property or prohibiting certain uses.” (citing *Black’s Law Dictionary* 1182 (5th ed. 1979)); *Ahwatukee Custom Estates Management Ass’n, Inc. v. Turner*, 196 Ariz. 631, 634 (2000) (holding that homeowner covenants, conditions, and restrictions “constitute a contract between the subdivision’s property owners as a whole and individual lot owners”).

<sup>11</sup> *See OTARD Order* at ¶ 48.

<sup>12</sup> *Id.* ¶ 52.

interest in the property seeks to install an antenna in an area that is within his or her exclusive use or control.”<sup>13</sup>

The Commission left for later consideration what it viewed as the more difficult question of whether the OTARD rules should also govern restrictions on reception devices in common areas or on rental property.<sup>14</sup> As promised, the Commission revisited those issues two years later.<sup>15</sup> It decided that the OTARD statute extended protection to viewers with leasehold interests, concluding that this would not impose a duty on the landlord to relinquish property because the landlord has already relinquished possession of the leasehold by virtue of the lease.<sup>16</sup>

It reached the opposite conclusion, however, with respect to a landlord’s or HOA’s restrictions of antennas in common areas.<sup>17</sup> Specifically, the Commission worried that, if the OTARD rules were to give a viewer the right to place an antenna in a common area where no provision of its lease or ownership interest has invited her to do so, the viewer would be an “interloper with a government license” for purposes of Fifth Amendment takings analysis.<sup>18</sup> The Commission also raised a series of practical concerns that would arise if the OTARD rules prevented landlords and HOAs from restricting common-area reception devices, such as the potential for countless antennas in common areas; liability, security, and safety concerns if

---

<sup>13</sup> *Id.* ¶¶ 51, 52.

<sup>14</sup> *Id.* ¶¶ 47, 59 *et seq.*

<sup>15</sup> *OTARD Second R&O*, ¶ 7.

<sup>16</sup> *Id.* ¶ 15.

<sup>17</sup> *Id.* ¶ 35. (“[The Telecommunications Act] does not authorize us to permit a viewer to install a [covered] device on common or restricted access property over the property owner’s objection or to require a landlord to provide video programming reception equipment to tenants.”).

<sup>18</sup> *Id.* ¶ 39.

building managers lose control over common areas; and questions of whether application of OTARD could affect ownership of common areas under state law.<sup>19</sup>

Accordingly, the Commission interpreted the OTARD statute as covering viewers with leasehold interests in areas under the exclusive use and control of the viewer. Restrictions imposed by landlords and HOAs with respect to common areas, however, remained exempt from these OTARD protections.

## **II. APPLYING THE COMMON AREA EXEMPTION TO GOVERNMENTAL RESTRICTIONS WOULD COMPROMISE PROPERTY INTERESTS AND UNDERMINE THE PURPOSE OF THE OTARD STATUTE**

When it interpreted the governing statute as limiting the OTARD rules' application in common areas, the Commission considered a variety of concerns that relate to the rights and prerogatives of *property owners* to limit satellite antenna placement. These concerns simply do not apply where a state or local government imposes restrictions on antenna users—restrictions that, by definition, themselves limit the property owner's prerogatives.<sup>20</sup> If anything, concerns about property rights should compel the Commission to interpret the statute exactly as Congress wrote it with respect to government restrictions—that is, to apply no matter where the antenna is installed.

It is not difficult to appreciate why giving property owners and HOAs the ability to dictate the use of common areas has very different consequences from giving governmental entities a similar right. Imagine the owner of a multiple dwelling unit (“MDU”) who, seeking to remain competitive by offering prospective tenants more viewing options, decides to offer space

---

<sup>19</sup> *Id.* ¶ 46.

<sup>20</sup> This is why the Commission's prior preemptive efforts said nothing about “exclusive use areas.” Questions about exclusive use are entirely irrelevant to a rule that, by its terms, preempts only government regulation.

in a common area (such as the roof<sup>21</sup> or the building façade) for installation of antennas by tenants that lack the necessary line-of-sight to a satellite distributing video programming. In such a case, rather than being a government-imposed interloper, the tenant would be an invited guest. As the Commission has recognized, where a tenant has the property owner's permission to install, maintain, and use a covered antenna on the owner's property, the tenant has all of the rights to use that space that the owner would have.

In this connection, the tenant viewer shall have the same rights under the Section 207 rules as would the owner vis-à-vis restrictions enacted by a homeowners' association, condominium association, townhome association, manufactured housing park owner, government and/or any other third party. Thus, if an owner residing on the property were entitled to install a Section 207 device on the property under our rules, then a tenant occupying the property is also entitled to a Section 207 device on the property provided the property owner consents.<sup>22</sup>

Accordingly, because the property owner would have the right to install an antenna on his property, a governmental authority would have no right to prevent a tenant's installation of an OTARD-qualified antenna in an otherwise common space if the owner of the building has given his permission for such installation.<sup>23</sup>

In this situation, the viewer would not be an "interloper with a government license" for purposes of Fifth Amendment analysis, but would be a guest invited by the property owner.<sup>24</sup>

---

<sup>21</sup> By offering this example, Petitioners do not mean to imply that a roof should be presumed to be a common area. *See, e.g., Philip Wojcikiewicz*, 22 FCC Rcd. 9858 (2007) (finding that the roof of a townhome was an exclusive use area that could not be regulated by the HOA).

<sup>22</sup> *Reconsideration Order*, ¶ 77.

<sup>23</sup> Such an approach would be a slight variation on the installation of a community antenna in a common area. *See id.* ¶ 87 (discussing potential advantages of offering a central antenna for the benefit of those "residents not able to take advantage of the rules and install their own equipment because of line-of-sight or other problems with antenna placement").

<sup>24</sup> *OTARD Second R&O*, ¶ 39. It is also worth noting that any property owner or HOA that granted the rights to use common areas for antenna installation would have worked through the practical concerns identified by the Commission. *Id.* ¶ 46.

Conversely, a state or local government that sought to deny the MDU owner's right to allow such antenna placement would limit the exercise of property rights by regulatory fiat. That could be deemed to be a Fifth Amendment taking of precisely the sort the Commission sought to avoid by adopting an exclusive use requirement. Indeed, in the context of government restrictions, applying the protections of the OTARD rules in common areas not only raises no Fifth Amendment takings concerns, but may well *prevent* such takings by city and local governments. Even if such regulation does not rise to a constitutional violation, it would nonetheless limit the property owner's prerogatives, and do so in a manner inconsistent with the pro-consumer and pro-competitive goals of the OTARD statute.

Thus, the interpretation of the OTARD statute specifically adopted to avoid infringing upon the prerogatives of property owners and HOAs with respect to common areas would, if applied to government restrictions, have the unintended consequence of allowing state and local governmental authorities to do just that. Petitioners are aware of no basis for such a disparate outcome. Certainly, none appears in the statutory text, which directs the Commission to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through [covered] devices."<sup>25</sup> This categorical mandate does not carve out common areas as uniquely suited to state and local regulation, nor does the legislative history reveal any Congressional intent to give state or local governments authority over common areas that supersedes the property owners' rights. To the contrary, Congress directed that "existing

---

<sup>25</sup> Telecommunications Act of 1996, § 207.

regulations, *including but not limited to zoning laws, ordinances, restrictive covenants or homeowners' associations rules*, shall be unenforceable to the extent contrary to this section.”<sup>26</sup>

At the same time, the existing formulation could permit municipalities to promulgate regulations contrary to the pro-consumer and pro-competitive intent of the OTARD statute. Philadelphia, for example, recently enacted broad restrictions of reception devices in *all* areas, and now argues (incorrectly) that it is up to the subscriber to demonstrate that her reception device is located in an exclusive-use area.<sup>27</sup> Indeed, as Philadelphia interprets the OTARD rules, “[a]s long as the area is clearly one of common ownership, there should be no argument that the city can legislate restrictions without observing the provisos of the OTARD rule as to increased cost, delay, or acceptable signal.”<sup>28</sup> If Philadelphia’s position were correct, state and local governmental authorities would have a *carte blanche* to regulate antennas in common areas without limitation. A city could, for example, find that it is in the municipal interest to increase franchise fees by increasing cable subscribership, and enact an ordinance restricting satellite dishes in common areas on that basis alone.

Congress cannot possibly have meant such a result. If a state or local government seeks to restrict reception device placement *anywhere* within in its boundaries, it should have to justify such restrictions under the factors established by Congress and implemented by the Commission in its OTARD rules (*i.e.*, public health and safety or historic preservation). Such governmental

---

<sup>26</sup> H.R. Rep. No. 204, 104th Congress, 1st Sess. at 124 (1995) (emphasis added).

<sup>27</sup> Response of the City of Philadelphia to Petition for Declaratory Ruling, File No. CSR-8541-O, at 4 (filed Dec. 22, 2011).

<sup>28</sup> *Id.* at 24 n. 37.

authorities should not be allowed to impose restrictions in derogation of private property rights simply because such restrictions apply only to common areas.

\* \* \*

The Commission adopted its “exclusive use” interpretation of the OTARD statute in deference to private regulation of private property interests. If extended to state and local government regulation, however, the very language that preserves a property owner’s prerogatives with respect to common areas he controls would also subject those prerogatives to divestiture at the hands of state and local governmental authorities. Such a regime is not only indefensible as a matter of logic. It is also to be found nowhere in the OTARD statute—and, indeed, runs contrary to congressional intent underlying the statute. Accordingly, Petitioners respectfully request that the Commission grant this Petition commence a rulemaking proceeding to clarify the interplay between governmental regulation and common areas.

Respectfully submitted,

/s/

---

Lisa Volpe McCabe  
Director, Public Policy & Outreach  
**SATELLITE BROADCASTING &  
COMMUNICATIONS ASSOCIATION**  
1100 17th Street NW, Suite 1150  
Washington, D.C. 20036  
(202) 349-3640

/s/

---

Jeffrey H. Blum  
Senior Vice President &  
Deputy General Counsel  
Alison A. Minea  
Corporate Counsel  
**DISH NETWORK L.L.C.**  
1110 Vermont Ave NW, Suite 750  
Washington, DC 20005  
(202) 293-0981

/s/

---

Susan Eid  
Executive Vice President,  
Government Affairs  
Andrew Reinsdorf  
Senior Vice President, Government Affairs  
Stacy R. Fuller  
Vice President, Regulatory Affairs  
**DIRECTV, LLC**  
901 F Street, NW, Suite 600  
Washington, DC 20004  
(202) 383-6300

William M. Wiltshire  
Michael Nilsson  
Kristine Laudadio Devine  
**WILTSHIRE & GRANNIS LLP**  
1200 Eighteenth Street, NW  
Washington, DC 20036  
(202) 730-1300  
*Counsel for DIRECTV, LLC*

April 18, 2012

## Exhibit A: Proposed Modification

47 C.F.R. 1.4000(a)

(1) 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 restriction, **that is either issued by a state or local government or operates** 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 **and** that impairs the installation, maintenance, or use of:

(i) An antenna that is:

(A) Used to receive direct broadcast satellite service, including direct-to-home satellite service, or to receive or transmit fixed wireless signals via satellite, and

(B) One meter or less in diameter or is located in Alaska;

(ii) An antenna that is:

(A) Used to receive video programming services via multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services, or to receive or transmit fixed wireless signals other than via satellite, and

(B) That is one meter or less in diameter or diagonal measurement;

(iii) An antenna that is used to receive television broadcast signals; or

(iv) A mast supporting an antenna described in paragraphs (a)(1)(i), (a)(1)(ii), or (a)(1)(iii) of this section; is prohibited to the extent it so impairs, subject to paragraph (b) of this section...