

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
)	
Petition for Rulemaking to Amend the)	MB Docket No. 12-121
Commission's Over-the-Air Reception)	
Device ("OTARD") Rules)	
)	

**COMMENTS OF THE CITY OF PHILADELPHIA
IN OPPOSITION TO PETITION FOR RULEMAKING**

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SUMMARY

The City of Philadelphia opposes the Petition for Rulemaking. The Petition wrongly assumes that the FCC through simple inadvertence allowed local governments to retain their power to regulate satellite dish installation in the common areas of multi-unit dwellings when it amended the OTARD Rule in 1998. To the contrary, Philadelphia believes it is clear that the Commission carefully considered the ramifications of its extension of the OTARD restrictions to rental property, and elected not to include common and restricted-use property while continuing to apply the Rule uniformly to private and governmental regulation. Its reasons included its determination that it lacked authority under Section 207 to do so, and its concern that such an extension would have serious practical implications in its operation. Those significant practical concerns that the Commission discussed are best addressed locally by uniform rules, enacted by a legislative body and enforced by its executive branch through supplemental regulations where necessary, and applied to all common and restricted-use areas of multi-unit dwellings in all areas of the locality.

The Petition also wrongly assumes that local governments' exercise of authority to regulate building uses to any extent goes against the norm, effecting a "taking" of private property or otherwise invading the owners' property rights. But local governments have traditionally possessed such authority—in fact, land and building use regulation has been recognized by the United States Supreme Court as one of the most basic components of the local police power. Local police powers predate the OTARD Rule, and—absent a specific direction by Congress or a perceived need to correct a deficiency in the current Rule—should be given deference. There is no need to amend the OTARD Rule, and the Petition should be denied.

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The Satellite Broadcasting and Communications Association (SBCA) and two of its member organizations, DIRECTV, LLC, AND DISH Network L.L.C. (collectively, “Petitioners”) have petitioned the Commission to further amend its OTARD Rule to remedy what Petitioners believe to be an oversight in the 1998 amendment of the Rule. The Petitioners object to the Commission’s decision there to prohibit restrictions that impair the viewer’s use of a satellite reception device only as to owned or leased property “within the exclusive use or control of the antenna user.” The amended language thereby excluded common use and restricted-use areas in multi-family dwellings—including, as a general rule, the exterior walls of most such dwellings—from the OTARD prohibition. The Commission, as it has done throughout the OTARD rulemaking process, applied the same standard to governmental and private restrictions. Thus, property owners, homeowners’ associations, and local governments remained free to regulate those areas not under the satellite customer’s exclusive use and control,¹ pursuant to state and local property law and building use regulations, just as they traditionally have done in the absence of the unusual situation of federal preemption of such regulations.

Philadelphia’s ordinance, challenged by Petitioners in a separate proceeding,² accordingly applied a different standard to the common areas of multi-family dwellings than to single-family dwellings, where the entire building is subject to the exclusive use of the owner or lessor. It provides that in common areas, where an alternative location is available, an antenna may not be

¹ For convenience, areas of a multi-family dwelling that are not within the antenna user’s exclusive use or control are generally referred to in these Comments as “common areas,” meaning that access to such areas, being controlled by the property owner in the case of tenants, or by condominium or similar documents in other cases, may be subject to restriction and not available to the user without formal permission.

² CSR-8541-O, DA 11-1932 (Nov. 22, 2011).

placed between the façade of the building and the street. Thus, a viewer may still use the front façade for antennas, but only if there is no alternative location to obtain the signal, whether or not the alternative would require more expense or time than might be permitted under the OTARD Rule.³

Petitioners, apparently conceding that Philadelphia’s reliance on a stricter standard for common areas of multi-family dwellings is permissible under the OTARD Rule, now move to change the Rule and further limit the traditional police powers of local governments to regulate building uses for the common good. Their Petition is wrong in its two main premises – (1) its assumption that the Commission forgot about the effect of the amended Rule on local government powers to regulate property use; and (2) its contention that preserving the traditional powers of local governments to exert regulatory authority over the property rental relationship will result in a “taking,” or at least an alarming invasion, of private property rights. Moreover, the result sought by Petitioners is unnecessary for the preservation of robust competition among video service providers, and thus the Commission rightly chose not to exceed its Congressional mandate and extend the Rule’s preemption to local regulation of common areas.⁴

³ Of course, any placement on a common area requires the permission of the landlord or homeowners’ association, since such property remains under its ownership and control. And if the landlord wishes to approve such placements, he may do so by granting the tenant exclusive control over such areas in the lease. Then, if the preferred placement would cause any “impairment” under the Rule, the City’s ordinance would not preclude such placements.

⁴ Second Report and Order, CS Docket 96-83, 13 FCC Rcd 23874 (1998) (“Second OTARD Order”).

I. The Amended OTARD Rule Was Intended to Apply to Local Governments in the Same Manner as to Private Property Owners and Associations.

A. The Commission Has Consistently Applied the Same Standards to Governmental and Private Building Use Regulations.

The Petition wrongly assumes that when the Commission amended the OTARD Rule in 1998 to include rental property in its prohibition on restrictions that impair satellite viewing, but only property within the exclusive use or control of antenna users with a direct or indirect ownership or leasehold interest, the FCC somehow overlooked the fact that the amended Rule would apply to local and state government entities as well as to private landlords and homeowner associations. The language of the amended Rule itself belies this assertion. It provides in relevant part:

(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, on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest or leasehold interest in the property that impairs the installation, maintenance, or use of [a § 207 device] ... is prohibited. . . .

47 C.F.R. § 1.4000(a) (emphasis added).

It is absurd to contend that the Commission, having begun the amended Rule with a specific reference to “any state or local law or regulation,” had failed to consider the effect that amending the Rule would have on governmental restrictions applicable to common areas of multi-unit dwellings. The Commission, since its promulgation of the original OTARD Rule in 1996, has consistently applied the same standards to local governments and private property owners and associations. *See, e.g.,* First OTARD Order,⁵ ¶ 7 (“The rule that we adopt applies to governmental regulations and restrictions and to nongovernmental

⁵ *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 19276 (1996) (“First OTARD Order”).

restrictions on property within the exclusive use or control of the viewer in which the viewer has a direct or indirect ownership interest.”). Additionally, the Commission rejected, based on the language of Section 207 and its legislative history, arguments for different treatment of governmental and nongovernmental restrictions. *See id.*, ¶ 51 (“Under our rule, nongovernmental restrictions on antennas installed on [exclusively owned or used] property are limited in the same manner and governed by the same standards as governmental restrictions. . . . In addition, these nongovernmental authorities can enforce the same type of restrictions based on safety or historic preservation that governments can enforce. Finally, these entities can apply for declaratory rulings or waivers of our rule.”).

The Commission again considered and rejected arguments for the imposition of different standards in its Order on Reconsideration,⁶ stating instead that “Section 207 and its legislative history do not distinguish between governmental and nongovernmental restrictions” *Id.* at ¶ 15. In that context, the Commission noted its statutory permission to consider the public interest, convenience and necessity in fashioning rules under Section 207, and that it could appropriately “consider and minimize the impact of our rules on local associations and governments.” *Id.*

Thus, in its Second OTARD Order, amending the OTARD Rule to extend it to rental property controlled by a viewer under the terms of a lease, the Commission naturally again applied the same standards to governmental and nongovernmental restrictions, as set forth in the language of the amended Rule quoted above. The decision not to extend the Rule to property outside a viewer’s exclusive use or control (*i.e.*, to common-use or restricted-use property) was based on the Commission’s conclusion that Section 207 did not authorize it to

⁶ *Order on Reconsideration*, 13 FCC Rcd. 18962 (1998).

impose an affirmative duty on property owners to provide or accept satellite antennas for tenants, as well as on its finding that including common areas within the OTARD Rule’s prohibition would “present serious practical problems.” *Id.* at ¶¶ 7, 46-51. Consistent with its Congressional grant of authority to use its discretion to devise “rules that would not create serious practical problems in their implementation,” *id.* at ¶ 7, therefore, the Commission announced the revised OTARD Rule, applicable to governmental and private entities alike, prohibiting impairing restrictions only as to devices placed on property owned or leased by the device user.⁷

B. Practical Considerations Support the Commission’s Uniform Application of the OTARD Rule’s Extension Only to Exclusively-Owned or Leased Property.

The Commission’s decision to continue to apply uniform standards to governmental and private entities in the amended rule encompassing rental property, while based in part on its conclusion that it lacked power under Section 207 to preempt restrictions on common areas, also makes practical sense and appropriately recognizes that local governments are the bodies best suited to make judgments for the community about land and building use rules. When their effect is fully considered, the “significant practical problems” noted in the Second OTARD Order⁸ alone plainly justify the decision to allow local governments to retain their traditional land use regulation authority with respect to the common areas of multi-unit dwellings.

⁷ As noted, Congress in Section 207 of the Act had directed the Commission to promulgate regulations “pursuant to Section 303 of the Communications Act of 1934,” which in turn authorizes the Commission “to promulgate regulations ‘as public convenience, interest or necessity requires.’ Communications Act, § 303, 47 U.S.C. § 303.”

⁸ 13 FCC Rcd. 23874, at ¶¶ 46-48.

The Commission found compelling the suggestions of several commenters that it would not “serve the public convenience, interest and necessity to extend our Section 207 rules to common and restricted access property.” It first noted the concern about “what limits could be set, if any, on the number of reception devices that a viewer could install and maintain on common property.” *Second OTARD Order*, at ¶ 48. As the Commission observed, if landlords and local governments may not restrict reception devices on common property, tenants may install as many separate dishes as they wish, resulting in the uncontrolled proliferation of devices. *Id.* and n. 128 (commenters are concerned that “there would be a farm of antennas in the common elements”). This has already occurred in Philadelphia.⁹

Additionally, disputes over space constraints and repeated demands for access to restricted areas could disrupt relations between tenants and landlords, involving the Commission and local courts in disputes over access and the location and number of devices on a building. *Id.* Finally, the Commission expressed concern about the potential for structural damage and injuries to third parties from the uncontrolled proliferation of reception devices on common property. Because individual tenants might not have access to, or the means to afford, liability insurance for common areas, indemnification for any damage to the building or injuries to persons from the installations could be problematic. *Id.* at ¶ 50.

Petitioners’ request for a change in the OTARD Rule to eliminate local governments’ pre-OTARD ability to restrict reception devices in common areas briefly acknowledges these practical concerns (Petition at 6), but offers no suggestion as to how they would be addressed in the scenario they advocate--where landlords and homeowner associations may restrict

⁹ See Response of City of Philadelphia, No. CSR-8541-O, photos at pp. 4-5.

antenna placement in common areas if and as they wish, but local governments are hobbled. Petitioners' proposed Rule would prevent a city government -- even where an absentee landlord simply has no concern about the number of separate antennas on the front of his building -- from applying uniform rules across the city, and enforcing basic building code regulations akin to anti-graffiti and signage controls that virtually all local governments employ. *See, e.g.*, Boston Comments in Philadelphia Code proceeding, CSR-8541-O, at 10.

Federal courts have consistently emphasized that deference should be shown to such traditional exercise of local government police powers. For example, the Supreme Court opined in *Berman v. Parker*: "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation" 348 U.S. 26, 32 (1954) (comparing police powers of Congress with respect to the District of Columbia to those of a state or local government). The Court expressly noted that housing issues are traditionally and appropriately within the scope of local police powers. *Id.* at 32-33 (. . . disreputable housing conditions . . . may also be . . . a blight on the community . . .).

Thus, the "practical concerns" that also guided the Commission's decision not to extend the Rule to common areas are most appropriately addressed by local governments in the exercise of their traditional police powers. They could not be effectively addressed by a rule that provides one standard for private restrictions, and another, more limiting standard, for those of local governments.

The effect of local regulations need not be, as Petitioners contend, invasive of private property rights in any sense that is not already routinely exercised by local authorities. In

fact, Philadelphia’s restriction as to common areas is far from absolute and certainly does not usurp the rights of property owners. Landlords who desire to offer prospective tenants the choice of using a satellite service have several options available under the City’s ordinance. If, as Petitioners ask the Commission to “imagine” (Petition at 7), a landlord offers space for such installations on the roof, which is generally a common area in a multi-unit dwelling, that is allowed. If tenants have no exclusive-use space such as a balcony or patio, space can also be offered on common property located on the rear, or on a non street-facing side of the building. Landlords are free to install a common antenna for all tenants’ use, on common property except for the street-facing façade. If none of the other options will allow acceptable reception, however, and thus no such “alternative location” is “available” for use, the tenant viewer may, if the landlord permits, install the antenna on the front façade. Finally, the property owner may elect to provide, in the lease or in condominium documents in the case of a homeowners’ association, that the tenant or homeowner has exclusive use or control of the front façade, in which case the restrictions of the OTARD Rule would apply to the tenant’s installation there.

The practical problems discussed by the Commission with respect to installations on common or restricted-use property require the regulatory control of a governmental body to ensure that they are addressed in a fair and uniform manner. Moreover, as discussed below, such regulatory controls are not unusually invasive of private property rights; certainly they do not rise to the level of a “taking” in the constitutional sense.

II. Local Government Regulation of Antenna Placement on Common Areas Does Not Amount to a “Taking” of Private Property by the Governmental Authority.

Petitioners claim that the Commission was wholly concerned in its Second OTARD Order with preventing infringement of private property rights but has inadvertently “allow[ed]

state and local governmental authorities to do just that.” Petition at 9. They suggest—with no case law in support—that regulation of the uses of common area property by ordinances such as Philadelphia’s could constitute a “taking” of property prohibited, without just compensation, by the Fifth Amendment. *Id.* Petitioners’ warning of a regulatory “taking” in this context is baseless.

Local regulation of the sort engaged in by Philadelphia in its ordinance, setting forth placement preferences for satellite dishes and antennas, is clearly not a “taking” under the Supreme Court’s analysis in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).¹⁰ In that case the Court held that determining whether a taking by government regulation has occurred requires an *ad hoc*, factual inquiry, focusing on (1) the character of the governmental action, (2) the economic impact of the regulation on the claimant, and (3) in particular, the extent to which the regulation has interfered with “distinct investment-backed expectations” for the parcel. *Id.* at 124. In *Penn Central* the Court determined that New York’s Landmark Preservation Law, pursuant to which the City had denied the request of the owners of Grand Central Terminal to erect a multistory office building in the space above the terminal, did not effect a “taking” of the property. It found that “New York’s objective of preserving structures and areas with special historic, architectural or cultural significance is an entirely permissible governmental goal.” *Id.* at 129. This conclusion followed from the Court’s numerous other rulings recognizing “that States and cities may enact land-use

¹⁰ Because a governmental regulation such as Philadelphia’s would not authorize or require any physical invasion of an owner’s property, it would not be subject to the analysis of a *per se* taking, under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). It was this type of “taking” with which the Commission was concerned when it declined to order landlords and homeowner associations to allow reception devices to be installed on their property. *Second OTARD Order*, ¶¶ 39-44. A governmental restriction limiting such installations, by contrast, involves no such physical occupation of property.

restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city.” *Id.* (citations omitted).

Thus, it is clear that Philadelphia’s goal of preserving the aesthetic landscape and quality of life of its neighborhoods is also “entirely permissible.” Moreover, a local regulation limiting a multi-unit building’s owner as to the locations on which tenants or unit owners may install satellite antennas will have minimal economic impact on the owner. If such a limitation does appear to put the owner at an economic disadvantage, he or she has all of the options set forth above, including installing one central antenna, or granting use of otherwise common areas to tenants or residents in their operative property documents.

In no conceivable way can a building use restriction such as the partial antenna placement restriction enacted in Philadelphia interfere with “distinct investment-backed expectations” for owners of multi-unit buildings. Such owners presumably acquire the buildings in the expectation of earning rental income from the units, and will continue to earn a reasonable return from the rentals, despite a City ordinance regulating dish placement on common areas. *Cf. Penn Central*, at 136 (New York’s law does not interfere with owners’ primary expectation from the parcel, as a railroad terminal containing office space, despite their inability to make use of air space rights above the terminal). And as the Court also recognized, it is the local government body that is best suited to make the judgments concerning what regulations or restrictions are needed to benefit the city as a whole: “Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole – which we are unwilling to do – we

cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law.” *Penn Central* at 134-35.

Local government judgments as to land use, which balance the interests of diverse elements of the community, are, as clearly expressed in *Penn Central*, entitled to great deference. That principle applies with equal force outside of the historic designation context, in challenges to comprehensive zoning schemes as well as more targeted land use regulations. *See, e.g., Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 387-88 (1926) (upholding city zoning scheme that prohibited the owner of a parcel of land from developing it into an industrial park); *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 530-31 (1917) (upholding Chicago’s ban on all billboards in certain areas of the city, finding the ordinance an exercise of the city’s police power with which the Court would interfere “only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals, or to the general welfare . . . this . . . cannot be said of the ordinance which we have here”); and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 80 (1976) (upholding local restriction on location of adult movie theaters against First Amendment challenge, citing *Euclid*).

The Commission, as set forth in the Second OTARD Order, crafted the amended OTARD Rule to carefully balance community interests, as represented by local governments, community associations and property owners, with its charge under Section 207 to promote and protect public access to a variety of video programming services. In concluding that it was not authorized by Section 207 to require that satellite reception devices be allowed wherever a tenant or occupant of a multi-unit building may desire, on property such occupant does not lease or own, it reasonably and lawfully applied the OTARD Rule to restrictions on

such property by governmental authorities as well as private property owners. There is no reason to change the rule to prevent local government bodies from making judgments concerning property use regulations, an area in which local governments have far more expertise than does the satellite broadcasting industry, simply because that industry would prefer that no restrictions at all be allowed as to satellite dish installation, on any type of property.

III. There Is No Need to Amend the OTARD Rule.

The determination as to whether a rulemaking petition should be granted is within the discretion of the Commission. The Commission has generally, and rightly, declined to exercise its discretion to change an existing rule in the absence of a clear need for the change. *See Office of Communications of the United Church of Christ v. FCC*, 911 F.2d 813 (D.C. Cir.1990) (concluding that the Commission's finding that new rulemaking was unwarranted, based on its determination that the prior rulemaking was still applicable and no evidence of changed circumstances was presented, was sufficient and its refusal to order the new rulemaking should be affirmed).

Petitioners have not shown the need for any new or amended rule; nor could they, because dish customers would not gain anything they do not already have. Since the installation of a dish or other protected antenna in a common area depends on the permission of the landlord in any event, and since the Philadelphia ordinance acknowledges the prerogative of the landlord to extend a tenant's leasehold to provide for access to a common area, the OTARD viewer's position would not be improved by the amended Rule SBCA and its allies request. Petitioners seek to avoid this reality by simply assuming a landlord's permission to use a common area. To the contrary, the only predictable outcome of amending

the Rule is to further encourage the placement of antennas on common property without the landlord's permission—inviting all of the enforcement and liability issues that the Commission sought to avoid. Keeping the Rule as it stands will retain the options of the landlord to work out viewing options with his tenants, while allowing local governments to continue to exercise their traditional police powers as to common areas, to ensure that the interests of the community as a whole are protected. There is no need to change the Rule.

IV. Conclusion.

For all the foregoing reasons, the Commission should deny the Petition for Rulemaking filed by SBCA, DirecTV and Dish Network.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert A. Sutton, do hereby certify that on this 7th day of June 2012, a copy of the foregoing COMMENTS OF THE CITY OF PHILADELPHIA IN OPPOSITION TO PETITION FOR RULEMAKING was sent via first-class U.S. mail, postage prepaid, on Petitioners listed below:

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