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. 12-121
	)	
	)	
	)	

COMMENTS OF THE CITY OF BOSTON, MASSACHUSETTS IN OPPOSITION TO PETITION FOR RULEMAKING

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June 7, 2012

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The City of Boston, Massachusetts, files these comments in opposition to the Petition for Rulemaking[1] ("Petition") filed by the Satellite Broadcasting and Communications Association ("SBCA"), DIRECTV, LLC, and DISH Network L.L.C. (collectively, "Petitioners) in the above-entitled proceeding. Boston files these comments to make clear that Petitioners fail to meet their burden under 47 C.F.R. 1.401 of establishing views, arguments and data that justify their requested action. Boston, therefore, calls on the Commission to reject the Petitioners' request that the Commission amend 47 C.F.R § 1.4000 ("OTARD Rule" or "Rule") to give state and local governments less authority over OTARDs than private property owners. Finally, Boston seeks to associate itself with the Comments filed in this proceeding by the City of Philadelphia and national organizations of local government.[2]

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[1] The Petition is filed pursuant to 47 C.F.R. § 1.401(c), which provides that a petition must "set forth the text or substance of the proposed rule, amendment, or rule to be repealed, together with all facts, views, arguments and data deemed to support the action requested, and shall indicate how the interests of petitioner will be affected."

[2] Comments of the City of Philadelphia in Opposition to the Petition for Rulemaking, MB Docket No. 12-121 (June 7, 2012); Comments of the National Association of Telecommunications Officers and Advisors, the United States

I. BACKGROUND

Boston has been active in the recent OTARD dockets[3] as dish placement has become an important issue for the citizens of Boston. Because of this, on June 6, 2012, the Boston City Council passed an OTARD ordinance that requires an OTARD installation be located within an area under exclusive control of the viewer.[4] The City Council took this action pursuant to its police powers authority to balance the community's need to address visual blight brought about by front-wall deployments of OTARDs while preserving the consumers' ability to seek an alterative to the incumbent cable operators.[5]

II. THE PETITION FAILS TO MEET THE BURDEN UNDER THE FCC RULES.

Section 1.401(c) of the Commission's rules provides that a Petition must "set forth the text or substance of the proposed rule, amendment, or rule to be repealed, together with all facts, views, arguments and data deemed to support the action requested, and shall indicate how the interests of petitioner will be affected." Petitioners fail to meet their burden to justify this change.

A. Petitioners Misunderstand or Misrepresent the Source of a Local Government's Police Powers. It Comes Not From The OTARD Rule.

The Petition states that "[t]he Commission adopted its 'exclusive use' interpretation of the OTARD statute in deference to private regulation of private property interests," and argues that "[i]f extended to state and local government regulation, however, the very language that

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Conference of Mayors, the National League of Cities, and the National Association of Counties, MB Docket No. 12-121 (June 7, 2012).

[3] *See, e.g.,* Comments and Reply Comments of Boston , CSR-8541-O, DA 11-1932.

[4] A report detailing passage of the ordinance is carried in the Boston Globe online. It can be found at: http://www.boston.com/metrodesk/2012/06/06/boston-city-council-passes-plan-cut-satellite-dish-clutter/CZJGtrCYmp5ipMIaY79M4M/story.html

[5] Andrew Ryan, *Boston looks to curb clutter of satellite dishes*, Boston.com, June 1, 2012 ,available at: http://articles.boston.com/2012-06-01/metro/31929608_1_dish-installation-dish-law-satellite-dish

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."[6] This is a misstatement of the law.[7]

Boston like other local governments had the necessary authority to regulate OTARDs prior to passage of the Rule. Such authority was reserved to the states and their political subdivisions under the 10th and 14th Amendment of the Constitution. While there may be a real question as to whether Congress had the right to limit the authority of local governments to regulate the placement of OTARDs, that question is not before the Commission, but it is clear that local government did not need the FCC to grant it the authority to regulate OTARD placement.

Petitioners confuse from whence a local government's police powers arise. They misunderstand the law and somehow believe that a local government's authority to govern common locations or exclusive locations of a property arises from the OTARD Rules.[8] This is wrong.

B. Police Powers Are Not Created By the OTARD Rule.

Prior to enactment of the OTARD Rule, states and local governments had the authority to regulate the location of an OTARD device. Boston is a wonderful working example of the breadth and history of its authority to regulate development.

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[6] Petition at 11.

[7] Petitioners may be correct that Section 303 of the Communications Act,47 U.S.C. § 303, authorizes the Commission to issue rules and regulations dealing with OTARDs (See Petition at 3), but the Petition misses the mark in its assumption that local government lacked police powers over OTARD placements prior to its passage.

[8] Petitioners assert that "the Commission may have inadvertently given state and local governmental agencies the ability to impinge upon the very prerogatives it sought to protect." Petition at 1.

Courts have found that Massachusetts municipalities derive their police powers to zone from the Commonwealth's constitution and statutes.[9] Article 60 of the amendments to the Massachusetts Constitution authorizes the General Court (the legislature) to establish laws that permit cities and towns to establish districts and regulate buildings within that district.[10]

In 1966, Massachusetts adopted the Home Rule Amendment, which grants broad powers to cities and towns in adopting ordinances and specifically lists zoning powers as a city's or town's independent municipal powers.[11] Under the authority granted by section 6 of the Home Rule Amendment, any city or town may adopt creative and substantive zoning provisions to carry out its zoning purposes as determined by each city or town.

Founded as a township in 1630 and as a City in 1822, the City of Boston is the oldest jurisdiction in the Commonwealth of Massachusetts and the history of its zoning authority is therefore unique. Unlike every other community in the Commonwealth that must look to state statute (Massachusetts Zoning Act, G.L. c. 40A) for authority to zone, the City of Boston has its own zoning authority. Zoning Enabling Act, 1956 Mass. Acts c. 665, entitled "An Act Authorizing the City of Boston to Limit Buildings According to Their Use or Construction to Specified Districts"; *see also Emerson College v. Boston,* 471 N.E.2d 336, 337 (1984).

Therefore, whether the Commission chooses to acknowledge Boston's authority dating back to 1822, or the 1956 statute, or split the difference and employ the United States Supreme

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[9] *CHR General, Inc., v. City of Newton*, 439 N.E.2d 788 (1982) (ruling that zoning, as a police power, may be exercised in order to protect the public health, safety, morals, and general welfare of the state's citizens). *See also* BRIAN C. LEVEY, MASSACHUSETTS ZONING AND LAND USE LAW, § 2-1(b) (1996).

[10] *See* Levey, *supra,* at § 2-1(c).

[11] MASS. CONST., §235 amend. Art. LXXXIX, Section 6; *see supra* note 6. LEVEY, , *supra*, § 2-1(c).

Court's acknowledgement of the authority in 1909,[12] clearly this power existed well before any OTARD Ruling by the Commission.

III. TO AVOID CONFUSION, THE COMMISSION SHOULD EXERCISE ITS DISCRETION AND REFUSE TO ACT ON THIS PETITION.

The seed of the OTARD rules was the intent of Congress that viewers' rights would be clear, uniform, and protected under government, quasi-government, and private real estate rules. SBCA asks the Commission to create a dual standard for OTARD placements: one enforceable by government and one enforceable by private ownership interests. To avoid confusion, and to act consistent with congressional intent, the Commission must, as it has done throughout the OTARD rulemaking process, apply the same standard to governmental and private restrictions. [13] The Commission can avoid this confusion by either rejecting the Petition or simply choosing not to act as the decision to act on a petition for rulemaking is almost always discretionary, and depends on the agency's perceived need for a new rule.[14]

CONCLUSION

The Commission should reject SBCA's petition as it fails to meet its burden under 47 C.F.R. § 1.401(c) of stating facts and law to support the requested relief, not the least of which is the Petition's lack of appreciation of the historic and judicially-acknowledged police powers of local governments to

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[12] *Welch v. Swasey*, 214 U.S. 91 (1909).

[13] *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 statuses 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).

[14] *See Office of Communications of the United Church of Christ v. FCC*, 911 F.2d 813, 818 (D.C. Cir. 1990) ("The Commission's finding that new rulemaking was unwarranted was based on its determination that the reasoning of its prior rulemaking was still applicable and that no new evidence sufficient to warrant reconsideration had been presented. We conclude that the Commission reasonably relied on its prior findings which, in light of petitioners' failure to provide relevant evidence of changed circumstances, offered a sufficient explanation of the Commission's refusal to order a new rulemaking.").

impose zoning requirements in furtherance of the public good that clearly preceded enactment of the OTARD Rule. The Petition's assumption that a local government's authority to limit the placement of satellite dish within an area under the exclusive control of the viewer is found in the OTARD Rule is wrong and runs counter to congressional intent and common sense. The Petition is therefore wrong in its two main premises – it wrongly assumes that authority to regulate the location of an OTARD arises from the FCC Rules, and that changing the Rule would benefit OTARD users. It will not and the Commission should deny.

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June 7, 2012

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Certificate of Service

I hereby certify that I have caused to be mailed this 7th day of June 2012, a copy of the foregoing Comments, by first-class mail, postage prepaid, to the following persons:

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