

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

In the Matter of:)	
)	
Bell Atlantic Video)	
Services Company)	CSR 5398-0
)	
Petition for Declaratory Ruling)	
Pursuant to 47 C.F.R. § 1.4000)	
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: April 24, 2000

Released: April 26, 2000

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Bell Atlantic Video Services Company (“Bell Atlantic”) filed a Petition for Declaratory Ruling (“Petition”) seeking a determination that The Meadow Community Service Association’s (“MCSA” or “The Meadow”) covenants, conditions, and restrictions that prohibit or restrict the use of externally mounted over-the-air video programming reception antennas are prohibited by 47 C.F.R. § 1.4000, the Commission’s Over-the-Air Reception Devices Rule (the “Rule”).¹ MCSA did not file a response to the Petition. For the reasons discussed below, we find that MCSA’s restrictions contravene the Rule and are prohibited and unenforceable.

II. BACKGROUND

2. On August 5, 1996, the Commission adopted the Rule, which prohibits governmental and private restrictions that impair the ability of antenna users to install, maintain, or use over-the-air reception devices.² The Rule implemented Section 207 of the Telecommunications Act of 1996 (the “Act”), which

¹ The Rule provides that parties may petition the Commission for a declaratory ruling under Section 1.2 of the Commission’s rules to determine whether a particular restriction is permissible or prohibited under the Rule. 47 C.F.R. § 1.4000(d).

² See *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*, IB Docket No. 95-59 and CS Docket No. 96-83, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking (*Report and Order*”), 11 FCC Rcd 19276 (1996) (consolidated), *on reconsideration*, CS Docket No. 96-83, 13 FCC Rcd 18962 (1998) (“*Order on Reconsideration*”), Second Report and Order, CS Docket No. 96-83, 13 FCC Rcd 23874 (1998) (“*Second Report and Order*”). The Rule became effective on October 14, 1996. Public Notice DA 96-1755 (Oct. 23, 1996).

requires the Commission to “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 ... multichannel multipoint distribution services. ...”³ The Congressional directive to the Commission promotes one of the primary objectives of the Communications Act of 1934: “to make available, so far as possible, to all the people of the United States ... a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges ...”⁴

3. The Rule applies to antennas designed to receive direct broadcast satellite services that are one meter or less in diameter; antennas designed to receive video programming services via multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services that are one meter or less in diameter or diagonal measurement; and antennas designed to receive television broadcast signals.⁵ For the Rule to apply, the antenna must be installed “on property within the exclusive use or control of an antenna user where the user has a direct or indirect ownership in the property” upon which the antenna is to be located.⁶ The Rule provides that a restriction impairs installation, maintenance, or use of a protected antenna if it: (1) unreasonably delays or prevents installation, maintenance, or use; (2) unreasonably increases the cost of installation, maintenance, or use; or (3) precludes reception of an acceptable quality signal.⁷ There are exceptions to the Rule for valid safety or historic preservation restrictions, which must be as narrowly tailored as possible, impose as little burden as possible, and apply in a nondiscriminatory manner throughout the regulated area.⁸

4. The Rule provides that parties who are affected by antenna restrictions may petition the Commission to determine if the restrictions are permissible or prohibited by the Rule.⁹ The Rule places the burden of demonstrating that a challenged restriction complies with the Rule on the party seeking to impose the restriction.¹⁰

³ Telecommunications Act of 1996, Pub. L. No. 104-104, § 207, 110 Stat. 56, 114 (1996).

⁴ Communications Act of 1934, § 1 as amended, 47 U.S.C. § 151.

⁵ 47 C.F.R. § 1.4000(a).

⁶ *Id.*

⁷ 47 C.F.R. § 1.4000(a)(2)

⁸ 47 C.F.R. § 1.4000(b).

⁹ 47 C.F.R. § 1.4000(d).

¹⁰ 47 C.F.R. § 1.4000(f).

III. THE PETITION

5. Bell Atlantic, an alternative video service provider,¹¹ challenges two MCSA restrictions. The first restriction is found in Article VII, Section 9(o) of MCSA's Protective Covenants, which provides in pertinent part:

No outside television aerial or radio antenna, or other aerial or antennae for either reception or transmission which may be viewed from the front yar[d] of the Lot, or which projects above the roof ridge line, shall be maintained upon the Property of Lot, except as addressed by a Standing Resolution.¹²

The second restriction is a Standing Resolution adopted by MCSA's Environmental Preservation Committee ("EPCOM"), which provides:

Whereas the size and placement of TV antennas and satellite reception dishes are subject to regulation and approval by the Meadow Community Service Association (MCSA) Environmental Preservation Committee (EPCOM) and

Whereas the EPCOM is authorized by the MCSA Declaration of Protective Covenants to adopt a Standing Resolution that permits the placement of such reception devices in locations other than on the rear roof surface of a home, if located in accordance with the guidelines of a Standing Resolution adopted by the EPCOM.

Now Therefore Be It Resolved that TV satellite dishes/antennas may be located within the rear yard of any home, without the necessity of securing formal EPCOM approval provided that:

- i) the dish/antenna diameter does not exceed 24 inches and
- ii) the distance from the top of any pole-mounted dish/antenna to the ground beneath the dish shall not exceed 72 inches
- iii) subject to the above limitations as to dish size and height above ground, such [TV] reception devices also may be located on any rear corner or rear wall surface of any home.¹³

6. Bell Atlantic argues that MCSA violates Section 1.4000 of the Commission rules, and that MCSA uses the two restrictions jointly to unreasonably delay or prevent Bell Atlantic's prospective clients at The Meadow from installing, maintaining, and using television antennas and satellite reception devices on their respective properties. Bell Atlantic contends that MCSA's restrictions prohibit visible outdoor antennas, require homeowners at The Meadow to obtain prior approval from the Association before

¹¹ According to Bell Atlantic, it "provides consumers a new, competitive choice in multi-channel video programming . . . that includes programming packages of DirecTV, Inc. and United States Satellite Broadcasting Company, Inc., and the installation and maintenance of antennas and other equipment designed to receive *both* the satellite-delivered programming *and*, off-air via antenna, locally available television broadcast channels." (Emphasis in original). Petition at 2-3.

¹² *Id.* at 4 and Attachment C at 15.

¹³ Petition at 4-5 and Attachments C and D.

installing any satellite dish or television antenna over 24 inches in diameter, dictate specific placement location of the antennas, and restrict the height of the dish/antenna.¹⁴ Bell Atlantic points out that MCSA does not apply the restrictions to cable television equipment.¹⁵ Bell Atlantic contends that MCSA's actions contravene Congressional policy to promote competitive choice in video services, and negatively affect the choices that Bell Atlantic's prospective customers in The Meadows can make when offered alternative video services. As an example, Bell Atlantic relates the case of one of its customers, Ms. JoAnn Bradshaw, a single-family homeowner at The Meadow who chose to replace her cable television service with Bell Atlantic's video service, but because of MCSA's restrictions, faced additional costs and unreasonable delays.¹⁶

7. According to Bell Atlantic, it professionally installed an 18-inch satellite dish and a broadcast antenna on Ms. Bradshaw's property, constituting the outside equipment Ms. Bradshaw needed to receive the type of programming she elected.¹⁷ Bell Atlantic notes that because of the "multi-ridged" structure of the roof in Ms. Bradshaw's house and the need for continued reception of over-the-air broadcast signals, Bell Atlantic installed the reception devices in a location and at a height other than the preferences articulated in the MCSA restrictions.¹⁸ In support of its chosen location for the installation and manner in which the devices were installed, Bell Atlantic cites the Declaratory Rulings issued in *Star Lambert and Satellite Broadcasting and Communications Association of America*¹⁹ and *Michael J. MacDonald*.²⁰

8. Bell Atlantic notes that on January 28, 1999, Mr. D. Stephen Seawright, Chairman of EPCOM, wrote a letter to Ms. Bradshaw, in which he requested that the "satellite dish and antenna installed on the roof ridge of your home be removed and relocated so as to conform to the requirements of the Community Association's protective covenants and the Standing Resolution of the EPCOM pertaining to TV dishes."²¹ Mr. Seawright then noted that if Ms. Bradshaw did not remove and relocate her antenna

¹⁴ Petition at 5-9.

¹⁵ *Id.* at 5.

¹⁶ *Id.* at 10. Bell Atlantic points out that MCSA neither explains the approval process nor specifies the length of time required to obtain such approval. *Id.*, note 23.

¹⁷ Bell Atlantic notes that the two reception devices can be installed as a single unit to minimize its obtrusiveness. Petition at 3.

¹⁸ Bell Atlantic notes that the preferred locations include the rear roof, rear wall, rear corner, or backyard. The last three locations are subject to a six-foot height limitation. *Id.* 9-10.

¹⁹ 12 FCC Rcd 10455, 10466-67 (Cab. Serv. Bur. 1997). In *Star Lambert*, Petitioner points out, the "required approval for the installation of antennas in excess of 14 foot was held to be arbitrary and an 'unacceptable impairment' absent a clearly stated and defined safety objective." (Emphasis in original). Petition at 9.

²⁰ 13 FCC Rcd 4844 (Cab. Serv. Bur. 1997). In *MacDonald* ("*MacDonald*"), the Commission reiterated that placement preferences are enforceable where they do not impair the installation, maintenance or use of antennas covered by the Rule.

²¹ Petition at 6 and Exhibit G.

by February 28, 1999, MCSA would take “further action.”²² Bell Atlantic objects to MCSA’s interference with Ms. Bradshaw’s right to install the dish where she needed to place it.²³

9. Bell Atlantic asks the Commission to issue an order preempting MCSA’s restrictions because they are invalid, unenforceable and do not fall under either of the two exceptions to the Rule. Bell Atlantic argues that the restrictions are neither “necessary to accomplish a clearly defined, legitimate safety objective” nor intended to protect a historic area. DIRECTV, Inc. (“DIRECTV”) filed comments supporting the Petition. DIRECTV argues that the sole purpose of MCSA’s restrictions is to impair a viewer’s ability to install, maintain or use a satellite dish, and to deter viewers “from choosing an alternative to cable service that would require installation of an antenna or satellite dish.”²⁴ DIRECTV contends that MCSA’s regulations in question are invalid, unenforceable, and do not fall under either the safety or historic exceptions.²⁵

IV. DISCUSSION

A. Prior Approval of Antennas

10. MCSA’s Standing Resolution requires prospective users of “TV antennas and satellite reception dishes” at The Meadows to obtain prior approval from MCSA’s EPCOM. A prior approval process is impermissible unless it is necessary for bona fide safety or historic preservation considerations.²⁶

In the instant case, the record reveals neither a safety nor historic preservation justification for MCSA’s Section 9(o) prior approval requirement. Although the Commission has preserved a restricting entity’s right to consider aesthetic factors when promulgating antenna placement restrictions, aesthetic factors standing alone may not justify a prior approval process.²⁷ Accordingly, we find MCSA’s prior approval requirement impermissible under the Rule.²⁸

B. Size and Height Restrictions

11. MCSA’s restrictions prohibit the installation of satellite dishes 24 – 39.37 inches in

²² *Id.*

²³ Citing *MacDonald*, 13 FCC Rcd at 4854 (1997).

²⁴ DIRECTV Comments at 4-5.

²⁵ *Id.*

²⁶ For a detailed analysis of prior approval, see *Star Lambert*, 12 FCC Rcd at 10466-10467 (1997); *Order on Reconsideration*, 13 FCC Rcd at 18980-18981.

²⁷ *Report and Order* at 19288.

²⁸ In the *Report and Order*, the Commission stated that procedural requirements might act as a barrier between new technology and the potential consumer because of the administrative delay and the myriad regulatory obstacles that the potential consumer must hurdle before being able to utilize the new technology. The Commission specifically concluded that requirements for approval by community associations might prove to be a disincentive for potential antenna users, effectively “preventing” access to the video programming signals that Congress sought to protect under Section 207 of the 1996 Act. *Id.* at 19286-19287.

diameter as well as outside television aerial antennas (“TVBS antennas”) projecting over the “roof ridge line.” The satellite dish restriction violates the Rule because the Rule specifically allows the installation of satellite dishes of up to one meter (39.37 inches) in diameter or diagonal measurement. Concerning the size of TVBS antennas, the Rule does not limit the size of a TVBS antenna that a user may install.²⁹ Therefore, MCSA’s restrictions effectively prohibit the installation of antennas that are protected by Section 1.4000.³⁰

12. The MCSA/EPCOM size and height restrictions include certain placement preferences that allow the installation of antennas that: 1) are not visible from the homeowner’s front yard; 2) do not project “above the roof ridge line;” and 3) are pole-mounted in a homeowner’s rear yard, “rear corner or rear wall surface of any home,” and do not exceed 72 inches from the ground up.³¹ Those preferences would be in compliance with the Rule if they did not “unreasonably delay installation, add unreasonably to the cost of installation, maintenance or use [of an antenna], or impair the reception of an acceptable quality signal.”³² In the instant case, however, the MCSA/EPCOM placement preferences delay the installation, maintenance and use of the satellite dish-TVBS antenna combination that Ms. Bradshaw needs to receive the alternative video programming Bell Atlantic provides, add to Mrs. Bradshaw’s installation expenses, and impair signal reception. These restrictions violate the Rule because if a user deviates from the placement preferences, the user must comply with a prior approval process, which, as discussed above, is impermissible under the Rule. Furthermore, the requirement that antennas and dishes not be visible from the front yard and the height restrictions contravene the Rule by establishing a *per se* bar to antennas that extend over the roof line and those installed in the rear yards that exceed the 72-inch height limitation.³³ Finally, the burden of demonstrating that its placement restrictions do not impair the installation, maintenance or use of the antennas lies with MCSA.³⁴ MCSA has not responded to the instant Petition and has provided no evidence to meet this burden. For all the foregoing reasons, we find that the MCSA restrictions are preempted by the Rule.

²⁹ In the *Report and Order*, the Commission declined to limit the size or shape of TVBS antennas that a user may install. *Report and Order* at 19301.

³⁰ 47 C.F.R. § 1.4000(a).

³¹ See Standing Resolution quoted above.

³² *Star Lambert* at 10466; See *Report and Order* at 19286-19287.

³³ *Order on Reconsideration*, 13 FCC Rcd at 18980 (“[i]f a local authority created a *per se* bar to antennas over a certain height, the restriction would be prohibited.”) *Report and Order*, 11 FCC Rcd at 19299 (we would find unenforceable any restriction that establishes specific height limits.”).

³⁴ 47 C.F.R. § 1.4000(f).

V. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED**, pursuant to Section 1.4000(d) of the Over-the-Air Reception Devices Rule, 47 C.F.R. § 1.4000(d), and Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, that Article VII, Section 9(o) of MCSA's protective covenants and MCSA/EPCOM's Standing Resolution and restrictions are hereby prohibited and unenforceable, as discussed herein.

14. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules.³⁵

FEDERAL COMMUNICATIONS COMMISSION

Deborah Lathen
Chief, Cable Services Bureau

³⁵ 47 C.F.R. § 0.321.