

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

In the Matter of:)	
)	
)	
Daniel and Corey Roberts)	
)	CSR 5531-0
)	
Petition for Declaratory Ruling)	
Pursuant to 47 C.F.R. § 1.4000)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: May 22, 2001

Released: May 24, 2001

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Daniel and Corey Roberts (“Petitioners”) filed a Petition for Declaratory Ruling (“Petition”) against The Canada Vistas Community Association (the “Association”), located in Scottsdale, Arizona. Petitioners seek a determination that the Association’s Covenants, Conditions, Rules and Regulations (“CC&Rs”) 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 The Association filed a response to which the Petitioners replied. Thereafter, the Association filed a supplemental response. For the reasons discussed below, we find that the Association’s restriction contravenes the Rule and is prohibited and unenforceable.

II. BACKGROUND

2. 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 to implement Section 207 of the Telecommunications Act of 1996 (the “Act”).² Section 207 requires the

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) (continued....)

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. It also applies to 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 restrictions necessary to achieve a valid and clearly articulated safety or historic preservation purpose. Such restrictions must be as narrowly tailored as possible, impose as little burden as possible, and apply in a nondiscriminatory manner throughout the regulated area.⁸ On October 25, 2000, the Commission amended the rule so that it also will apply to customer-end antennas that receive and transmit non-video information through fixed wireless signals.⁹

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.¹⁰ The Rule places the
(Continued from previous page) _____
 (“*Second Report and Order*”). The Rule became effective on October 14, 1996. Public Notice DA 96-1755 (Oct. 23, 1996).

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 See *Promotion of Competitive Networks in Local Telecommunications Markets Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission’s Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services*, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket 88-57, 15 FCC Rcd 22983 (2000). This amendment will become effective upon approval by the Office of Management and Budget.

¹⁰ 47 C.F.R. § 1.4000(d).

burden of demonstrating that a challenged restriction complies with the Rule on the party seeking to impose the restriction.¹¹

III. THE PETITION

5. Petitioners ask the Commission to rule on the validity of the antenna installation restrictions found in Section 3.25 of the Association's CC&Rs, which provides:

No television, radio, shortwave, microwave, satellite or other antenna, pole, tower or dish shall be placed, constructed or maintained upon any lot (including, but not limited to, upon the roof of exterior walls of any Living Unit or other structure) unless: (i) the antenna, pole, tower or dish is fully screened and not Visible From Neighboring Property due to a parapet wall which conforms architecturally with the structure of the Living Unit or other structure; or (ii) the antenna, pole, tower or dish is otherwise fully and attractively screened or not Visible From Neighboring Property. Any means of screening or concealment shall be subject to the Architectural and Landscaping Guidelines adopted by the Committee and shall be subject to approval by the Committee in accordance with Article 4 of this Declaration.¹²

6. Petitioners reside in a single family home located in the Canada Vistas subdivision. They installed a multichannel multipoint distribution service ("MMDS") antenna in an area within their exclusive use and control. Petitioners argue that the present location of the antenna is the only site on the property where the required line-of-sight to receive an acceptable signal can be had.¹³ In support of the chosen location and manner of installation, Petitioners amended their petition by submitting a letter from their Internet and video service provider, who stated that the present location of the antenna is the only place it can receive an acceptable signal.¹⁴ According to Petitioners, in compliance with Section 3.25 of the CC&Rs, they sought approval from the Association to "keep antenna for digital T.V. and Internet reception."¹⁵ Petitioners note that the Association's Board of Directors (the "Board") denied their request. The Board's denial stated that 1) the antenna was for Internet service only;¹⁶ 2) there was no documentation to support Petitioners' contention that the antenna could not be relocated; 3) Petitioners failed to submit a proposal for screening or camouflage; and 4) Petitioners did not follow the Association's

¹¹ 47 C.F.R. § 1.4000(f).

¹² Petition at 3.

¹³ Petition at 1.

¹⁴ Supplement at 2.

¹⁵ Petition at Attachment 1.

¹⁶ At the time of the Board's denial, the Rule applied only to antennas used to receive video services. Although subsequently the Commission revised the Rule to apply also to antennas used for reception and transmission of Internet information, much of the dispute in this case turned on contentions about the service provided by the antenna. These contentions are essentially moot at this time and it appears the parties ultimately dropped this issue. See Association's Reply ("Reply").

prior approval procedure.¹⁷ Petitioners argue, in response to the Association and in their petition, that the Association's screening requirement represents an unreasonable increase in the cost of the antenna installation, and that Speedchoice, the antenna provider, has verified that only the current location will afford an acceptable signal.¹⁸

7. In opposition, the Association argues that the instant petition was filed by a person other than the owner and states that it will not deal with anyone other than the owner of record.¹⁹ Thus, the Association contends that it cannot authorize or negotiate the antenna installation with Mr. Roberts.²⁰ In a letter dated March 29, 2000, the Association's attorney informed Petitioner that the "entire matter concerning your placement of your Speedchoice satellite dish can go away" if "you simply would provide the [Power of Attorney] which you claim you have."²¹ The Association requests that the Commission dismiss the instant petition because Mr. Roberts is not the owner of record, or in the alternative, declare that the restriction in question is within the guidelines set forth in Section 1.4000 of the Commission's rules.²² The Association contends that the screening requirement is legitimate and that Petitioner has not shown how it would be too expensive.²³

8. Sprint Corporation ("Sprint") filed comments supporting the Petition.²⁴ As part of its Comments, Sprint attached the Declaration of Sprint's Program Manager for its Broadband Wireless Group ("Sprint BWG") serving the Phoenix and Scottsdale, Arizona area, which states that "[t]he current location of Mr. Roberts' antenna is the only one on his property that assures that he will receive a line-of-sight signal from Sprint BWG."²⁵ Sprint's Program Manager notes that several of Sprint's supervisors visited Mr. Roberts' residence on several occasions, and that they have verified that the antenna in question cannot get a line-of-sight at the alternative locations demanded by Association.²⁶ Sprint's Program Manager points out that "it is impossible for Mr. Roberts to comply with the [Association's] screening

¹⁷ Petition at 1 and Board of Directors Canada Vista Homeowners Association letter dated May 20, 1999 ("May 20th letter"). The letter from the Board also indicated that it would seek independent verification that the antenna could not be relocated. *Id.*

¹⁸ Supplement at 2.

¹⁹ Reply at 3.

²⁰ *Id.* at 1. According to Association, it "cannot be a party to any changes to to any home without permission of the homeowner(s) of record." *Id.*

²¹ *Id.* at Attachment J.

²² Reply at 3.

²³ *Id.* at 1.

²⁴ Sprint is the parent corporation of the service provider formerly known as Speedchoice. Sprint Comments at 1.

²⁵ Comments at Attachment A.

²⁶ *Id.*

requirements and still receive a line-of-sight signal.”²⁷ Sprint argues that it is clear that the Association’s actions are motivated by its aesthetic concerns rather than by a legitimate safety objective, and are meant to deter viewers such as Mr. Roberts from exercising their rights pursuant to Section 1.4000 of the Commission’s rules.

IV. DISCUSSION

9. The sole issue before us is whether this Association’s antenna installation restriction is permissible under the Rule.²⁸ The Association’s regulation, as submitted for the record in this proceeding, requires prior approval by its Architectural and Landscape Control Committee (“ALCC”) if the antenna is placed so that it is visible from neighboring property. Such prior approval, even if only required when a user installs the antenna beyond a parapet wall or otherwise visible from neighboring property, has the same effect as if the ALCC required prior approval prior to any antenna installation. The Association’s prior approval requirement compels those potential antenna users who must install the antenna in a manner that requires screening or that is visible to first prepare and submit a detailed drawing or blueprint for the proposed screening or installation. In the *Report and Order*, the Commission stated that procedural requirements might act as a barrier between the new technology and the potential consumer because of the administrative delay and the myriad regulatory obstacles that the potential antenna user must hurdle before being able to utilize the new technology.²⁹ 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.

10. In this case, although the Association’s preference for an installation that is not visible from neighboring property may be a permissible preference, the Association may not implement its preference by delaying installation while its ALCC examines the required screening proposal. These approval procedures are time-consuming and likely to deter potential antenna users. Where prospective antenna users cannot receive an acceptable signal in the locations preferred by a community association, they have the same rights under the Rule to place their antennas in alternative locations as other users have to place their antennas in preferred locations.³⁰ In the case of the former class of users, alternative locations become *per se* approved locations.³¹ The 1996 Act and the Rule require homeowner associations to enforce preferred placement provisions through methods that do not delay or hinder those who have a right to site their antennas at alternative locations.³² Also, we note that the burden of demonstrating that the placement restrictions do not impair the installation, maintenance or use of the antennas lies with the

²⁷ *Id.*

²⁸ We have been only asked to rule on Section 3.25 of the Association’s CC&Rs as it applies to the installation of antennas. This Order expresses no opinion on other provisions of the Association’s regulations.

²⁹ *Report and Order* at 19286-19287; 47 C.F.R. § 1.4000(a)

³⁰ *Michael J. MacDonald*, 13 FCC Rcd 4844 (1997).

³¹ *Id.* at 4854.

³² *Id.*

Association.³³ Here, the Association has provided no evidence to meet this burden, even after it indicated that it would seek independent verification that the antenna could not be relocated. Mr. Roberts, on the other hand, submitted a letter from Speedchoice, which supports his contention that he can get an acceptable signal only from the antenna's current location. Moreover, the letter from Sprint's Program Manager clearly indicates that it is impossible for Mr. Roberts to comply with the Association's screening requirements and still receive a line-of-sight signal. The Association did not respond to Sprint's contentions. In the instant case the record reveals neither a safety nor historic preservation justification for the Association's prior approval requirement. Thus, based on the record before us, we conclude that the Association's prior approval requirement is prohibited by the Rule because it can impose an unreasonable delay.³⁴

11. As a procedural matter, the Association questions at length Petitioner Daniel Roberts' habitation of his son's property and his relationship with the Association. The Association requests that this Petition be dismissed because Daniel Roberts is not the owner of record.³⁵ In that regard, we reiterate that an antenna user need not be the owner of the property, nor have the owner's permission to install an antenna.³⁶ This proceeding applies to the Association's antenna restriction as challenged by Petitioners, and we conclude that this restriction is preempted and unenforceable with respect to anyone residing within this community regardless of whether the resident owns the property. The Association's questions about the nature of Petitioner Daniel Roberts' residence in the community and the legitimacy of his service for the Association are outside the scope of this proceeding. To the extent the Association initially raised an issue concerning the legitimacy of Daniel Roberts' residence on the property that could cast doubt on his standing to file a Petition,³⁷ we note that he is the father of the owner of record, and that he submitted to the Association a power of attorney authorizing him to act for his son with respect to the property in question.³⁸

³³ 47 C.F.R. § 1.4000(f).

³⁴ See *Report and Order* at 19286-19287; *Order on Reconsideration* at 18983; *Star Lambert and SBCA*, 12 FCC Rcd 10424 (CSB 1997); *McDonald*, 13 FCC Rcd 4844 (CSB 1997); and *OmniVision*, 13 FCC Rcd 4826 (CSB 1997).

³⁵ Reply at 1-3.

³⁶ *Second Report and Order*, 13 FCC Rcd at 23894-23897; *Second Order on Reconsideration, Petitions for Reconsideration of the Second Report and Order, Implementation of Section 201 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast Service, Direct Broadcast Satellite, and Multichannel Multipoint Distribution Service*, 14 FCC Rcd 19924 (1999).

³⁷ See Association's Response of April 19, 2000 at 2.

³⁸ See Reply at 1 and Attachment E.

V. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED**, pursuant to Section 1.4000(e) 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 the Petition for Declaratory Ruling filed by Daniel and Corey Roberts on May 20, 1999, **IS GRANTED** with respect to preemption of Section 3.25 of the Canada Vista Community Association's antenna regulations, as discussed herein.

13. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules.³⁹

FEDERAL COMMUNICATIONS COMMISSION

W. Kenneth Ferree
Chief, Cable Services Bureau

³⁹ 47 C.F.R. § 0.321.