

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

In the Matter of:	)	
	)	
Michael and Alexandra Pinter	)	
	)	CSR 6245-O
	)	
Petition for Declaratory Ruling	)	
Under 47 C.F.R. § 1.4000	)	
	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 30, 2004**

**Released: September 1, 2004**

By the Deputy Chief, Media Bureau:

**I. Introduction**

1. Petitioners Michael and Alexandra Pinter ("Petitioners") filed a Petition for Declaratory Ruling ("Petition") seeking a determination that the antenna restrictions of the Second Bear Creek Homeowners Association in Boulder, Colorado ("Association") are prohibited by the Commission's Over-the-Air Reception Devices Rule, 47 C.F.R. § 1.4000 ("Rule").<sup>1</sup> The Association filed a response to the Petition and the Community Associations Institute, the National Multi Housing Council, and the National Apartment Association ("CAI") filed a joint response. The Petitioners filed a reply as did the Satellite Broadcasting and Communications Association ("SBCA"). In addition, Sat-Com HookUp, LLC, submitted a letter in response to the Petition and eight homeowners in Second Bear Creek submitted letters in support of the Petitioners.<sup>2</sup> For the reasons discussed below, we grant Petitioners' request in part and deny it in part.

**II. Background**

2. 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<sup>3</sup> was adopted by the Commission to

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<sup>1</sup>Section 1.4000(d) 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).

<sup>2</sup> The following individuals submitted letters in support of the Petitioners: Alice Lecinski (1/25/04); Eleanor Nay-Chiles (1/25/04); Wallace P. Dunlap (1/29/04); Beverley Broom (1/30/2004); Ruth Bittinger (1/31/04); Daniel Buck (1/31/04); Brandon Parkes (2/9/04); Neala Koth (2/12/04).

<sup>3</sup>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 (continued...)

implement Section 207 of the Telecommunications Act of 1996 (the "Act").<sup>4</sup> This provision was intended to advance 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. . . ."<sup>5</sup>

3. The Rule applies to antennas that are one meter or less in diameter and are designed to receive or transmit direct broadcast satellite services; antennas that are one meter or less in diagonal measurement and are designed to receive or transmit video programming services through multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services; and antennas designed to receive television broadcast signals.<sup>6</sup> 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 or leasehold interest in the property" upon which the antenna is located.<sup>7</sup> 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.<sup>8</sup> There are exceptions to the Rule for restrictions necessary to address valid and clearly articulated safety or historic preservation issues, provided such restrictions are as narrowly tailored as possible, impose as little burden as possible, and apply in a nondiscriminatory manner throughout the regulated area.<sup>9</sup>

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.<sup>10</sup> The Rule places the burden of demonstrating that a challenged restriction complies with the Rule on the party seeking to impose the restriction.<sup>11</sup> In addition, no attorney's fees, fines, or other penalties shall accrue against an antenna user while a proceeding to determine validity of a restriction is pending.<sup>12</sup>

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Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking ("*Report and Order*"), 11 FCC Rcd. 19276 (1996) (consolidated), *on reconsideration*, 13 FCC Rcd. 18962 (1998) ("*Order on Reconsideration*"), Second Report and Order, 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).

<sup>4</sup> Section 207 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" certain enumerated services. *Telecommunications Act of 1996*, Pub. L. No. 104-104, § 207, 110 Stat. 56, 114 (1996).

<sup>5</sup> Communications Act of 1934, § 1 as amended, 47 U.S.C. § 151.

<sup>6</sup> 47 C.F.R. § 1.4000(a). In October, 2000, the Commission amended the Rule to apply also to antennas that are used to receive and transmit non-video signals. *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, 15 FCC Rcd 22983 (2000).

<sup>7</sup> 47 C.F.R. § 1.4000(a).

<sup>8</sup> *Id.*

<sup>9</sup> 47 C.F.R. § 1.4000(b).

<sup>10</sup> 47 C.F.R. § 1.4000(d).

<sup>11</sup> 47 C.F.R. § 1.4000(e).

<sup>12</sup> 47 C.F.R. § 1.4000(a)(4).

## II. Discussion

5. In the instant case, the Association, in 1997, adopted a DBS antenna policy for the townhome community<sup>13</sup> of Second Bear Creek that reads, in pertinent part, as follows:

Location: Antennas shall be installed only on individually-owned property as described on the recorded deed and site plan.

Antennas shall not encroach upon Common areas or any other owner's property.

Antennas shall be located in a place shielded from view from the street/driveway and other homes to the maximum extent possible.

The preferred location is to place the antenna directly under the roof edge on a front or back wall.

Roof mounting of antennas is discouraged due to environmental (wind, snow, and ice) conditions

Note: 1. Nothing in this policy requires a DBS antenna installation in a location where an acceptable quality signal cannot be received.

### Notification Process

Any owner desiring to install an (sic) a DBS antenna shall prepare a plan addressing the items in this policy and submit it to the Association's Architectural Committee.

Note: If the installation conforms to the items defined in this policy, the installation may begin immediately.

### Policy Enforcement

The Association reserves the right to inspect all antenna installations and to be shown copies of City of Boulder building code inspection compliance documentation, when required.

If any aspect of this policy is violated, the Association shall require the immediate correction of the situation. ... If legal action is necessary, the Association shall be entitled to reasonable attorney fees, costs, and expenses incurred in the enforcement of this policy.<sup>14</sup>

6. The Petitioners state that in June 2002 they decided to install two satellite antennas, one to receive domestic programming and the other for international programming. They notified the Association of their intent to install,<sup>15</sup> and proceeded with installation in a non preferred location because the installer determined that the preferred location would not receive an acceptable quality signal.<sup>16</sup> One antenna was installed on the roof step between Petitioners' and their neighbor's house (east facing antenna) and the other

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<sup>13</sup> Ownership documents show that the homeowners in this community own the building and the land on which it is built. *See* Deed dated March 15, 1974 attached as an exhibit to the Petition.

<sup>14</sup> Association's DBS Antenna Policy.

<sup>15</sup> *See* June 25, 2002 document attached to the Petition.

<sup>16</sup> *See* Letter from Sat-Com HookUp, LLC (6/24/02).

antenna was installed on the fascia board near the roof on petitioners' property (south facing antenna).<sup>17</sup> After considerable discussion, debate, and correspondence, the Petitioners received a letter from the Association's attorneys stating that they had violated the Association's antenna policy and asking them to move one of the antennas (south facing) to a preferred location that would accommodate reception. The letter stated that the other antenna (east facing) could remain where it was installed because that was the only place where it could receive an acceptable signal. The letter indicated that the Association's preferred location for both antennas was the roof step near the east facing antenna.<sup>18</sup>

7. Although Petitioners state that they were willing to relocate the antenna as requested,<sup>19</sup> it was determined that the location for both antennas preferred by the Association was at the site of the east facing antenna and not on Petitioners' property.<sup>20</sup> Petitioners offered to move the east facing antenna from their neighbor's property, as well as the other antenna, to another location acceptable to the Association.<sup>21</sup> The move was eventually accomplished on March 12, 2003. Both antennas are now installed on the Petitioners' roof.<sup>22</sup> On April 24, 2003, Petitioners were notified that they had been charged \$1876.60 for legal fees to "bring both DBS antenna installations into compliance with the Association's Direct Broadcast Satellite Antenna Policy".<sup>23</sup>

#### East Facing Antenna

8. With respect to the antenna referred to by the parties as the "east facing antenna", we find that this installation is not covered by our rule because it was not installed on Petitioners' exclusive use area or property.<sup>24</sup> The rule applies to installations where the antenna user has a "direct or indirect ownership or leasehold interest in the property" and the property is within the user's exclusive use or control.<sup>25</sup> Although we therefore take no position on actions taken or fees incurred by the Association in connection with this installation, it appears that the dispute between the parties was not about the placement of this antenna. The Association's objections which gave rise to attorney's fees were primarily, if not totally, directed to the south facing antenna which was in a location covered by our rule, as discussed below.

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<sup>17</sup> Association Response at 5.

<sup>18</sup> Letter from Wells, Love & Scoby, LLC, counsel for the Association (Attorneys) (12/2/02). *See also* Letter from the antenna installer, Jersey Hamersley, (10/12/03).

<sup>19</sup> Letter from Petitioners to Attorneys (12/10/02) stating they were willing to remove or relocate the antenna but needed direction as to its placement given that the location chosen by the Association was on their neighbor's property.

<sup>20</sup> *See* Letter from Attorneys to Petitioners (12/19/02) stating that an Association representative will contact Petitioners' neighbor for permission to install the antenna on the roof riser; letter from Attorneys to Dale T. Colclasure discussing the Association's request that Mr. Colclasure permit relocation of Petitioners' antenna to Mr. Colclasure's property; letter from Dale T. Colclasure to Attorneys (1/27/03) refusing permission to relocate Petitioners' antenna to his property; letter to Association President from Petitioners (1/27/03) indicating that they would not install their antenna on their neighbor's roof.

<sup>21</sup> Letter to Kitty Ferguson from Petitioners (1/27/03).

<sup>22</sup> Association Response at 5.

<sup>23</sup> Letter to Petitioners from Association President (4/24/03).

<sup>24</sup> *See* Association Response at 5. The Petitioners do not concede that this area is their neighbor's property but they acknowledge that the Association believes this. Petitioners Reply at 2.

<sup>25</sup> *See* 47 C.F.R. §1.4000(a)(1).

### South Facing Antenna

9. The second antenna was installed on property owned by the Petitioners and within their exclusive use or control.<sup>26</sup> We therefore find that this antenna installation is covered by our rule and that any restriction imposed by the Association may not impair its installation, maintenance or use.<sup>27</sup> For purposes of our rule, restrictions impair if they unreasonably delay or prevent installation, maintenance or use, unreasonably increase the cost of installation, maintenance or use or preclude reception or transmission of an acceptable quality signal.<sup>28</sup>

10. We find that the Association's antenna policy ("policy") on its face and as applied to the Petitioners' "south facing antenna" violates the Rule. Among other provisions, the Association's antenna policy contains a "notification" requirement. Although a notification process is not per se invalid under our rule, in this case the Association attempted to use the process as an impermissible prior approval requirement.<sup>29</sup> The policy on the one hand requires submitting a plan to the Association's Architectural Committee while stating that if the installation conforms to the "items defined in this policy", installation may begin immediately. The policy further describes locations where antennas may be installed, giving as the preferred location, the area directly under the roof edge on a front or back wall. The policy also states that roof mounting is discouraged. As a note to this section, the policy states that nothing in its restrictions requires an antenna installation in a location where an acceptable quality signal cannot be received.

11. Here, Petitioners arranged for installation of the antenna and were told by the installer that, with respect to the "south facing antenna", an acceptable signal could not be received in the Association's preferred location.<sup>30</sup> The antenna was therefore installed in an alternate location, as permitted by the Association's policy, but not on the roof as this was specifically discouraged by that same policy. At this point, the burden shifted to the Association to show that the antenna could be placed in a preferred location and still receive an acceptable signal.<sup>31</sup> In fact, the Association did not meet this burden and expended significant time and expense in negotiating with Petitioners to move the antenna to an area not on his property.<sup>32</sup> When this solution proved unsuccessful, the Association ultimately chose a location on the Petitioners' roof that was specified as a non preferred location in the Association's policy.<sup>33</sup> It thus appears that the Association's guidelines were ineffectual in this situation and that the only way the Petitioners could

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<sup>26</sup> See Deed, attached as an exhibit to Petition. The Association acknowledges this in its Response at 5. CAI is therefore incorrect that the second antenna was on common property or on Petitioners' neighbor's property. See CAI Response at 4-6.

<sup>27</sup> 47 C.F.R. §1.4000(a)(1).

<sup>28</sup> 47 C.F.R. §1.4000(a)(3).

<sup>29</sup> See *Report & Order*, *supra* note 2 at 19286-7; see also Philip Wojekewicz, DA 03-2971, MB2003) at par. 13 which states "[I]f a notification process is implemented so as to delay installation in any way, we will consider it to be a prior approval requirement and impermissible under the Rule."

<sup>30</sup> Sat Com letter, January 20, 2004.

<sup>31</sup> Lubliner, DA 97-2188 (CSB1997) at para 18.

<sup>32</sup> See Letter from Attorneys to Dale Colclasure (1/17/03) urging him to allow installation of both of Petitioners' antennas on his property.

<sup>33</sup> Association Response at 6; Antenna Policy at 6.

comply with the policy was to seek prior approval for their installation. This conclusion is supported by a statement in a letter from the Association to homeowners that "...it is important for members to involve the HOA's Architectural Committee in the antenna location process" to avoid future conflict.<sup>34</sup> We find that this aspect of the policy operates as an unreasonable delay and is thus invalid. Similarly, any attorney's fees incurred in connection with identifying a location acceptable to the Association for this antenna and fees incurred in its relocation unreasonably increased the cost of installation and may not be charged to the Petitioners. The Association's reliance on the Commission's rule to support its ability to impose attorney's fees in this instance is misplaced.<sup>35</sup> The rule addresses fees imposed more than 21 days after a ruling adverse to a petitioner is released.<sup>36</sup> Here we find that the Association's antenna policy on its face and as applied to Petitioners' south facing antenna is invalid. We also disagree with the Association that the prohibition on unreasonable costs does not apply to attorney's fees imposed "post installation".<sup>37</sup> Such a result would unfairly expose antenna users to expenses associated with invalid restrictions that could not be enforced initially. We note that the record shows that Petitioners expressed their willingness to move the antennas and therefore it might not have been necessary for the Association to incur legal fees in connection with this move.<sup>38</sup>

### Procedural Issue

12. CAI urges us to deny the petition on the ground that it is not supported by affidavit.<sup>39</sup> SBCA, on the other hand, argues that denying the petition on this basis would be patently unfair, especially because the Petitioners prepared the petition without assistance of an attorney. SBCA suggests that if an affidavit is necessary, the Commission should direct Petitioners to supplement the record by filing one.<sup>40</sup> Petitioners, in their Response to the Association's filing, submitted a sworn affidavit attesting to the accuracy of the information in the Petition, the Response, and the related attachments. We find that this affidavit comports with our rule and we decline to deny the Petition on this procedural ground.<sup>41</sup>

### Notice

13. CAI claims that the Petition and the public notice thereof does not give adequate notice of what aspects of the Association's antenna policy it was challenging, other than the assessment of attorney's fees.<sup>42</sup> We find this argument without merit. There is no question that the Commission's Public Notice

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<sup>34</sup> 12/20/02 letter from Association to members. *See also* CAI Response at 3-4 stating that this situation resulted from the Bureau's ban on prior approval requirements and supporting the Association's position that its policy required review and approval of installations. We note that the prohibition of prior approval requirements not related to safety or historic preservation is well established by Commission, not Bureau precedent. *Report and Order, supra* note 2 at 19286-7; *Order on Reconsideration, supra* note 2 at 18981.

<sup>35</sup> Association's Response at 10.

<sup>36</sup> *See* 47 C.F.R. §1.4000(a)(4) which gives a petitioner 21 days to comply with a restriction deemed valid by the Commission unless the petition is deemed frivolous. *See also* James Sadler, DA 98-1284 (CSB 1998).

<sup>37</sup> *See* Association's Response at 13.

<sup>38</sup> *See* SBCA Reply at note 15.

<sup>39</sup> *See* 47 C.F.R. §1.4000(h). CAI Response at 11.

<sup>40</sup> SBCA Reply at note 27.

<sup>41</sup> *See Star Lambert*, 12 FCC Rcd 10455, 10463-4 (CSB 1997).

<sup>42</sup> CAI Response at 9.

accurately identified the Petition and directed interested parties to comment on the issues raised by Petitioners. In their petition, the petitioners specifically challenge sections of the Association's Antenna Policy regarding prior approval, the requirement of a 30 day waiting period, and the requirement for a site survey.<sup>43</sup> The record also shows that the Association knew that several aspects of its antenna policy were inconsistent with Commission rules and policies.<sup>44</sup> The Association discussed its policy with Commission staff and has committed to revise its policy after the instant order is released.<sup>45</sup> Among the problematic items noted by the Association is the fact that the policy appears to require prior approval, requires professional installation, and limits the number of antennas permitted.<sup>46</sup> We expect the Association to honor its commitment to address these aspects of its policy as they do not comport with our rule. The cases cited by CAI do not support its argument that there was insufficient notice. The Commission's public notice and the Petition provide adequate notice of the issues in this case.

### III. Ordering Clauses

14. 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 with respect to the antenna originally installed on Petitioner's neighbor's property, (east facing) the Petition is **DENIED**. With respect to the antenna originally installed in the Petitioner's exclusive use area (south facing), the Petition is **GRANTED**.

15. This action is taken by the Deputy Chief, Media Bureau, pursuant to authority delegated by Section 0.283, 47 C.F.R. §0.283, of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson  
Deputy Chief, Media Bureau

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<sup>43</sup> Petition at 2.

<sup>44</sup> Letter from Board President, Kathryn Ferguson, to Petitioners (5/12/03); Association Response at 4.

<sup>45</sup> Association Response at 4.

<sup>46</sup> *Id.*