

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

In the Matter of:
Shadow Wood Condominium Association
Petition for Waiver
Under 47 C.F.R. § 1.4000
CSR-6890-O

MEMORANDUM OPINION AND ORDER

Adopted: January 19, 2006

Released: January 23, 2006

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Petitioner Shadow Wood Condominium Association ("Association") filed a Petition for Waiver ("Petition") seeking a determination that it has established good cause for a waiver of Section 1.4000 of the Commission's rules, the Over-the-Air Reception Devices ("OTARD") rule (the "Rule"), to the extent that the Association's proposed placement restriction violates the Rule. The Community Associations Institute ("CAI") filed a response supporting the Petition. No party filed a response opposing the Petition and the Association did not file a Reply. For the reasons discussed below, we find the Association is not entitled to a waiver of the Rule. However, we also conclude that the placement restriction may be implemented in a way that is consistent with the Rule.

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 was adopted by the Commission to implement Section 207 of the Telecommunications Act of 1996 (the "Act"). 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

1 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, 11 FCC Rcd 19276 (1996) ("Report and Order"), recon. granted in part and denied in part, 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).

2 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).

services; and antennas designed to receive television broadcast signals.³ 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.⁴ 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.⁵ There are exceptions in 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.⁶

3. 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.⁷ The Rule places the burden of demonstrating that a challenged restriction complies with the Rule on the party seeking to impose the restriction.⁸ The Rule also provides that a local government or an association "may apply to the Commission for a waiver of this section."⁹

III. DISCUSSION

4. This case presents two questions: (1) has the Association demonstrated circumstances warranting a waiver of the OTARD Rule; and, (2) if no waiver applies, is the proposed restriction nonetheless consistent with the Rule?

A. Waiver

5. The Association represents the collective interests of the residents of the Shadow Wood Condominiums in San Jose, California. The Association "requests a waiver from the prohibition of restrictions on the installation of satellite dishes on exclusive use common area at a condominium association."¹⁰ The Association seeks a waiver so it may implement its proposed restriction on the location of satellite dishes. That placement restriction states:

Proposed Rule: Shadow Wood Condominium Association requires that all homeowners, if they choose to establish satellite dish service, to have [sic] their satellite dish installed in the brackets provided by the Association located on the roof which provide a southeast orientation that is considered best for satellite dish reception. Homeowners are prohibited from installing satellite dishes anywhere else

³ 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*, 15 FCC Rcd 22983 (2000).

⁴ 47 C.F.R. § 1.4000(a).

⁵ *Id.*

⁶ 47 C.F.R. § 1.4000(b).

⁷ 47 C.F.R. § 1.4000(e).

⁸ 47 C.F.R. § 1.4000(g).

⁹ 47 C.F.R. § 1.4000(d).

¹⁰ Petition at 1.

at the Shadow Wood Condominium project, including homeowners' exclusive use common areas (Balconies.)

Homeowners who install satellite dishes will be charged a one-time fee of \$75.00 to help defray the costs of installing the brackets.¹¹

6. The Rule provides that the Commission may grant a waiver “upon a showing by the applicant of local concerns of a highly specialized or unusual nature.”¹² That provision flows from the Commission’s authority to waive its rules if there is “good cause” to do so.¹³ “The FCC may exercise its discretion to waive a rule where *particular facts* would make strict compliance inconsistent with the public interest.”¹⁴ As we stated in our initial *Report and Order* adopting the OTARD Rule, “[p]etitions for waiver should be targeted as narrowly as possible to achieve the desired end.”¹⁵ Without setting forth here an exhaustive definition of “local concerns of a highly specialized or unusual nature,” we conclude that the concerns cited by the Association and CAI in this case are, for the most part, unremarkable and fall short of the Rule’s standard.

7. First, both the Association and CAI focus on the damage and repair costs associated with the installation of DBS antennas. The Association estimates that it has incurred \$37,200.00 in repair costs for damage to common areas or “exclusive use common areas” as a result of dish installation.¹⁶ Similarly, CAI observes that the total damage amount stated in the Petition works out to roughly \$190 per Shadow Wood resident, regardless whether that resident has a DBS antenna.¹⁷ However, as CAI concedes, it is not entirely clear from the Petition whether the \$37,200 in repair costs resulted from installation of satellite dishes in common areas, in exclusive use areas, or both.¹⁸ The Rule applies to dishes installed only “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.”¹⁹ Thus, to the extent that repair costs result from the improper installation of antennas in common areas, the Association may take appropriate action to restrict such installations, which are not covered by the Rule. A waiver from the Rule’s prohibition is therefore unnecessary. By contrast, if a homeowner installs an antenna in an area within her exclusive use or exclusive control, it is unclear why the homeowner’s association would be obliged to pay for repairs to that area.²⁰ In sum, the repair costs cited by the Association do not constitute an unusual circumstance or good cause for a waiver.

¹¹ *Id.* Because the \$75 fee is intended to defray the cost of a mounting bracket, it as easily could be deemed a “cost” as a “fee.” The precise label is immaterial, however, because the Rule applies the same standard of reasonableness to both cost and fees. *See* 47 C.F.R. § 1.4000(a)(4).

¹² 47 C.F.R. § 1.4000(d).

¹³ 47 C.F.R. § 1.3.

¹⁴ *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (emphasis added).

¹⁵ *See Report & Order*, 11 FCC Rcd at 19309.

¹⁶ Petition at 1-2.

¹⁷ CAI Response at 2.

¹⁸ *Id.*

¹⁹ 47 C.F.R. § 1.4000(a)(1).

²⁰ To the extent that Petitioner’s “exclusive use common areas” and CAI’s “common elements of exclusive use areas” constitute new, hybrid categories of property ownership for purposes of evaluating restrictions under the Rule, we decline to adopt those categories in view of the limited record before us.

8. Next, the Association cites safety and aesthetic considerations in support of its waiver request.²¹ We find that those concerns do not amount to highly specialized circumstances justifying a waiver. Safety is a legitimate concern and the Rule specifically provides a safety exception for restrictions that otherwise would be prohibited, obviating the need to request a waiver.²² However, the Association does not attempt to bring its restriction within that exception, nor would the sparse record support such an attempt. Similarly, aesthetic preferences are permissible only insofar as they do not impair installation, maintenance, or use of an antenna.²³ Were non-specific aesthetic considerations to constitute good cause for a waiver, nearly all restrictions would be exempted from the Rule's coverage

9. Nor do we find that CAI's general concern with the fair balancing of the interests of individual homeowners and homeowners' associations constitutes good cause for a waiver.²⁴ The balance of those interests is struck by the Rule itself, which we adopted to "ensure that consumers have access to a broad range of video programming services," while "minimiz[ing] any interference caused to local governments and associations as a result."²⁵ In view of the Rule's balancing of interests, we have found that proposals similar to the Association's are consistent with the Rule.²⁶ Indeed, the more immediate question posed by this case is not whether a waiver of the Rule's provisions is *warranted*, but whether that waiver is *necessary* to implement the Association's proposal. It is to that question we now turn.

B. The Rule's Application to Placement Restrictions

10. The Association has not sought a declaratory ruling under Section 1.4000(e) to determine whether the restriction is permissible. Nonetheless, we clarify here how proposals such as the Association's can be implemented in a manner consistent with the Rule.²⁷

11. A placement restriction violates the Rule only if it impairs a homeowner's right to install, maintain, or use an antenna.²⁸ A placement restriction may impair by "(1) unreasonably delaying or preventing installation, maintenance, or use of the dish, (2) unreasonably increasing the cost of installation, maintenance or use of the dish, or (3) preventing the reception device from receiving an acceptable quality signal."²⁹

12. The Association does not address whether its placement restriction would prevent or delay the installation, maintenance, or use of satellite dishes. For its part, CAI's Response argues persuasively that the proposed restriction does not prevent the installation of dishes because it invites homeowners to install those dishes in the designated common area on the roof.³⁰ CAI also reasons that because mounting brackets are already in place, there will be no unreasonable delay. As CAI concedes,

²¹ Petition at 2.

²² 47 C.F.R. § 1.4000(b)(1).

²³ *Victor Frankfurt*, 16 FCC Rcd 2875, 2890 (MB 2001), *app. for rev. denied*, 18 FCC Rcd 18431 (MB 2003).

²⁴ CAI Response at 5-6.

²⁵ *Report and Order*, 11 FCC Rcd at 19281.

²⁶ *See, e.g., Order on Reconsideration*, 13 FCC Rcd at 18999 (endorsing a "Central Antenna Proposal," subject to certain conditions related to cost, delay, and nondiscrimination among MVPDs).

²⁷ We have authority under 47 C.F.R. § 1.2 to issue a declaratory ruling on our own motion. *See, e.g., Cingular Interactive, L.P.*, 16 FCC Rcd 19200 (2001) (issuing a declaratory ruling on our own motion to provide guidance on the meaning of certain terms in the Commission's rules).

²⁸ 47 C.F.R. § 1.4000(a).

²⁹ *James Sadler*, 13 FCC Rcd 12559, 12568 (MB 1998).

³⁰ CAI Response, at 3-4.

however, it is “not familiar with the procedures that might be required for a resident or an installer hired by a resident to obtain access to the rooftop brackets.”³¹ Neither CAI nor the Association addresses whether wiring a roof-mounted dish to the homeowner’s receiver would involve greater expense or delay than that incurred when a homeowner installs a dish in an exclusive use area. Assuming that there is no excessively burdensome procedure or cost involved, we agree with CAI that the placement restriction does not prevent or delay the installation, maintenance, or use of satellite dishes.

13. Similarly, it appears from the record that placing the dishes in the Association’s preferred location will not preclude reception or transmission of an acceptable quality signal. Because the dishes would be mounted on the roof, it is likely that the dishes will receive at least as good a signal as dishes installed in homeowners’ exclusive use areas.³² Moreover, the Association states that the southeast-facing roof-mounted brackets “will allow for homeowners to receive the best reception from their satellite dishes.”³³ Thus, assuming that there is no signal attenuation, physical obstruction, or similar impediment, the Association’s proposal most likely complies with the Rule in this respect. Of course, where such impediments do exist, homeowners would remain free to challenge the specific application of the proposed restriction on a case-by-case basis.

14. Whether the placement restriction imposes unreasonable costs on homeowners presents a close question which cannot be resolved on the current record. CAI argues that the \$75.00 bracket fee that the Association proposes to charge homeowners for satellite installation is not unreasonable or excessive, reasoning that homeowners should be able to negotiate a discount from any professional installer because the mounting bracket is already provided and installed by the Association.³⁴ CAI also contends that a \$75 fee is reasonable in light of the \$190 per-unit repair costs that have already been incurred as a result of satellite dish installations and notes that additional repair costs may arise from future installations.³⁵

15. In our *Order on Reconsideration* we declined to flatly prohibit the imposition of a fee by homeowner’s associations “because a reasonable fee, in connection with a permissible requirement, may be within the standards of the Section 207 rules.”³⁶ Instead, we modified the Rule to clarify that the “standard for determining reasonable fees and costs is whether the expense imposed is reasonable in light of the cost of the equipment or services and the rule, law, regulation, or restriction’s treatment of comparable devices.”³⁷ As the Rule clarifies elsewhere, the party seeking to impose the fee or cost bears the burden of demonstrating its reasonableness.³⁸

16. In the *Order on Reconsideration*, we applied that reasonableness standard to the specific context of a central antenna proposal. We noted that the installation of a central antenna, and a concomitant restriction on the installation of individual antennas, “can be extremely useful in accommodating both the interests of communities in protecting the aesthetic quality of the local environment and the interests of individual residents in having unimpeded access to satellite, broadcast, or

³¹ *Id.* at 4.

³² CAI Response at 5.

³³ Petition at 2.

³⁴ CAI Response at 5.

³⁵ *Id.*

³⁶ *Order on Reconsideration*, 13 FCC Rcd at 18991.

³⁷ *Id.*; 47 C.F.R. § 1.4000(a)(4).

³⁸ 47 C.F.R. § 1.4000(g).

MMDS service.”³⁹ We concluded that such proposals are permissible under the Rule so long as they do not impair installation, maintenance and use.⁴⁰

17. Crucial to the issue whether a central antenna location impairs installation, maintenance, or use is the cost associated with the use of a central antenna and the removal of a homeowner’s individual antenna. We noted that a restriction based on the availability of a central antenna generally will be permissible provided that, among other factors, “the costs associated with the use of the central antenna are not greater than the cost of installation, maintenance and use of an individual antenna.”⁴¹ In other words, “a restriction that imposes additional costs that total more than the viewer would pay for installation, maintenance and use of an individual antenna in an exclusive use area is not permitted under the Section 207 rules.”⁴²

18. We find that the standard announced for evaluating the costs associated with central antenna proposals may be applied equally to proposals, like the Association’s, which provide a designated common area for the installation of individual antennas while restricting the installation of antennas in exclusive use areas. With respect to new installations of individual antennas, a requirement that the antenna be installed in a designated common area is reasonable so long as it does not involve installation costs that exceed those that a homeowner would incur if installing the antenna in an exclusive use area. To the extent that greater costs are involved, a homeowners’ association would be able to enforce its restriction only if it pays the difference in those costs. Similarly, a restriction requiring homeowners to relocate existing satellite dishes from exclusive use areas to a common area is permissible only if the association pays for any costs associated with relocation. As we stated in the *Order on Reconsideration*, “[i]f . . . an association requires a viewer to remove an individual antenna at the viewer’s expense, then such a requirement would impose both an unreasonable delay and an unreasonable expense.”⁴³ It follows that, in most cases, a requirement that a viewer relocate an individual antenna at the viewer’s expense is unreasonable.

19. Indeed, we reached precisely that conclusion in our order in *James Sadler*. In *Sadler*, the homeowner challenged a placement restriction that, not unlike the Association’s, required him to remove his antenna and relocate it to the roof. The homeowner demonstrated that it would cost between \$250 and \$350 to move a satellite dish from his patio to the roof, as required by the placement restriction under review. On that showing, we determined that the restriction “unreasonably increases the cost of installation.”⁴⁴ We also concluded that it was unreasonable to require the homeowner “to install his Dish on the common area roof and then require him to sign an agreement indemnifying the Association” for any damage or liability stemming from that installation.⁴⁵ Similarly, it would be unreasonable for the Association to require homeowners to install antennas in a designated common area and then hold those homeowners liable for any damage to that area as a result of the installation.

20. Applying the standard announced in the *Order on Reconsideration* and *Sadler* to the Association’s petition, we first note that neither the Association nor CAI has addressed the issue of costs. In view of that silence in the record, we cannot determine whether the cost of installing a dish in the

³⁹ *Order on Reconsideration*, 13 FCC Rcd at 18998.

⁴⁰ *Id.* at 18998-99.

⁴¹ *Id.* at 18999.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Sadler*, 13 FCC Rcd at 12568.

⁴⁵ *Id.* at 12571.

location specified by the Association would exceed the cost of installing a dish in a homeowner's exclusive use area. Accordingly, we cannot determine whether those costs are reasonable on the record before us.

21. The incompleteness of the record also prevents us from determining if the \$75 fee is reasonable "in light of the cost of the equipment or services." Where a DBS provider offers a homeowner free installation, we would be hard-pressed to conclude that *any* fee would be reasonable because that fee effectively would negate the incentive of free installation. Where installation is not free, the reasonableness of a \$75 fee charged by the homeowners' association would depend in part on other incidental costs imposed by a proposed restriction. As the combined costs and fees approach or exceed the total cost of installation that otherwise would apply, the likelihood that those combined costs and fees would be found reasonable diminishes. Finally, CAI's comparison of the \$75 fee with the per-unit repair costs incurred by the Association is unavailing because those costs have no relation to the "equipment or services" contemplated by the Rule.⁴⁶

22. Notwithstanding the incompleteness of the record in this case, it is entirely possible that the Association's proposed restriction can be implemented in a way that is fully consistent with the Rule. In view of that possibility, we believe that it is unnecessary and improvident to grant the Association's petition for a waiver.

IV. ORDERING CLAUSES

23. 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 1.3 of the Commission's rules, 47 C.F.R. § 1.3, that the Petition for Waiver filed by Shadow Woods Condominium Association **IS DENIED**.

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

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Media Bureau

⁴⁶ CAI contends that a typical installation of a DBS antenna would cost \$99, according to the website of one installer. See CAI Response at 5, quoting ACC Satellite TV website, <http://accsat.com/legal.htm> (last visited Oct. 12, 2005). For two reasons, we are reluctant to adopt that figure as a benchmark in this case. First, the installer in question does not serve San Jose, California, where the Shadow Wood Condominiums are located. Second, the installer appears to offer free installation in many instances.

⁴⁷ 47 C.F.R. § 0.283.