

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

In the Matter of)
Craig Wirth)
Petition for Declaratory Ruling Under 47 C.F.R. §)
1.4000) CSR 7861-O

DECLARATORY RULING

Adopted: November 5, 2010

Released: November 5, 2010

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. In this Declaratory Ruling, we grant a Petition ("Petition") filed by Craig Wirth ("Petitioner") and find that the antenna restrictions of Westchester LLC Condominium Homeowners Association, Nashville, Tennessee are prohibited by the Commission's Over-the-Air Reception Devices Rule, 47 C.F.R. § 1.4000 ("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"). 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. . . ."

3. The Rule applies to direct broadcast satellite antennas that are one meter or less in diameter or any size in Alaska; antennas that are one meter or less in diameter or diagonal measurement and are designed to receive or transmit video programming services through multipoint distribution

Section 1.4000(e) 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(e).

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).

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 television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services." Telecommunications Act of 1996, Pub. L. No. 104-104, § 207, 110 Stat. 56, 114 (1996).

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

services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services; and antennas designed to receive television broadcast signals.⁵ The Rule also applies to antennas used to receive fixed wireless or broadband Internet signals.⁶ For the Rule to apply, the antenna must be installed “on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property” upon which the antenna is located.⁷ The Rule does not apply to restrictions on installations in common areas or elements.⁸ 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.⁹ 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.¹⁰

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.¹¹ The Rule places the burden of demonstrating that a challenged restriction complies with the Rule on the party seeking to impose the restriction.¹²

5. The Petitioner filed an amended petition dated January 5, 2010. The Westchester LLC Condominium Homeowners Association (“Association”) filed a response to the Petition, Petitioner filed a reply, and the Association filed a supplemental response. DIRECTV, Inc. and DISH Network LLC (“Satellite Providers”) filed joint comments in support of the Petition.

III. DISCUSSION

6. Petitioner leases and resides in a condominium located at the Westchester complex in Nashville, Tennessee. His home is in a group of adjoining condominiums.¹³ Petitioner contends that his antenna is covered by OTARD because his porch, where he has installed a satellite dish antenna, is a limited common element reserved for his exclusive use.¹⁴ He bases his contention on language in the controlling legal documents governing the condominiums. The Association contends that the Petitioner

⁵47 C.F.R. § 1.4000(a).

⁶47 C.F.R. § 1.4000(a)(1)(ii)(A). In October, 2000, the Commission amended the Rule to apply to antennas that are used to receive and transmit fixed wireless 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).

⁷47 C.F.R. § 1.4000(a)(1).

⁸*Second Report and Order* at para 62.

⁹47 C.F.R. § 1.4000(a)(3).

¹⁰47 C.F.R. § 1.4000(b).

¹¹47 C.F.R. § 1.4000(e).

¹²47 C.F.R. § 1.4000(g).

¹³Petition at 4.

¹⁴*Id.* at 3.

does not have exclusive use of his porch.¹⁵ The Satellite Providers support the Petitioner's arguments.

A. Application of the OTARD Rule to Petitioner's Porch

7. In order to be covered by OTARD, an antenna must be installed on property within the exclusive use or control of an antenna user where he has a direct or indirect ownership or leasehold interest in the property.¹⁶ In adopting the rule, the Commission stated that "viewers who have exclusive use or control of property in which they have a direct or indirect ownership interest cannot be prohibited from installing antennas on this property where such a prohibition would impair reception, absent a safety or historic preservation purpose."¹⁷ The Commission further clarified the meaning of "exclusive use" in its *Order on Reconsideration*, stating that "the rule protects a viewer who has either exclusive use or exclusive control of property in which the viewer has a direct or indirect ownership interest. It is not necessary for a viewer to have exclusive control over the property to be protected by our Section 207 rules."¹⁸ The Media Bureau has ruled that in determining the area of exclusive use or control, it would rely upon the property description set forth in the lease or other controlling document.¹⁹

8. The Westchester Condominiums is a planned unit development governed by a Master Deed and Bylaws that address, among other aspects of the development, the areas designated as "common elements." The Master Deed, adopted in 2007, describes the Limited Common Elements as follows: "The Limited Common Elements are reserved for the exclusive use of all Co-owners of the type of Unit in the Condominium Project or the specific Unit to which they are appurtenant, as the case may be, and include the following: a) any porches attached to or accessible from a particular Unit are Limited Common Elements reserved for the exclusive use of such Unit"²⁰

9. Despite this language, the Association argues that Petitioner's satellite antenna is not covered by OTARD because it is not installed in an area within Mr. Wirth's exclusive use or control. It argues that although it does not dispute that the porch outside Mr. Wirth's unit is a limited common element, it claims that it does not follow that he has exclusive use or control of this area based on this designation.²¹ The Association alleges that the Master Deed's definition of Limited Common Element, when read in conjunction with the Tennessee Horizontal Property Act's definition of Limited Common Element,²² anticipates that some Limited Common Elements will be appurtenant to more than one but less than all units and thus are not within the exclusive control of one unit.²³ The Association argues further that Petitioner "does not have 'exclusive use or control' of the porch" because the occupants of the four adjoining units served by the porch also have the right to use it.²⁴ The Association asserts that the

¹⁵Response at 2-3. The Association also filed a supplemental response. While the Association did not properly request permission to file a supplemental response, in the interest of a full and complete record, we will consider the supplemental response. See 47 C.F.R. § 1.4000(e).

¹⁶The Association does not dispute that the petitioner has a leasehold interest in his porch area.

¹⁷*Report and Order* at 19307.

¹⁸*Order on Reconsideration* at 18995.

¹⁹*In the Matter of Phillip Wojcikiewicz*, 18 FCC Rcd 19523, 19525 (MB 2003); *In the Matter of James S. Bannister*, 24 FCC Rcd 9516 (MB 2009).

²⁰Exhibit B, Master Deed, ¶ 5.

²¹Response at 3.

²²Tennessee Horizontal Property Act, Tenn. Code Ann. § 66-27-101, *et seq.*

²³Response at 2.

²⁴*Id.* at 3.

Wojcikiewicz case,²⁵ relied on by the Petitioner and Satellite Providers, does not apply to this situation.²⁶ In *Wojcikiewicz*, the Bureau held that the Petitioner had a property interest in his roof even though it adjoined other townhouse roofs because it was specifically designated as an area within his exclusive use by the governing documents of the association.²⁷ According to the Association Petitioner here “*neither owns nor* has exclusive use or control of the porch.”²⁸ The Association argues that in this case, if Petitioner actually owned or had exclusive use of the porch, then he could exclude the occupants of the adjoining units.²⁹

10. Further, the Association claims that the “exclusivity” language referencing the porch and Limited Common Element in the Association’s governing document means that the residents of all the units served by the porches have the right to use the porches to the exclusion of residents of units that are not served by the porch.³⁰ While conceding that residents have placed personal property on the porch, the Association contends that neither the Petitioner’s nor other residents’ use of the porch creates a legal right to exclusivity where one does not already exist.³¹ Thus, the Association argues, neither the Petitioner nor other residents have converted the porch to exclusive use by placing personal property on it.³² Furthermore, the Association argues that its failure to seek removal of personal property does not constitute a waiver of the Association’s right to enforce its rules against the Petitioner.³³ The Association asserts that since Petitioner’s porch is a Limited Common Element that he does not exclusively control, his satellite dish antenna is not covered by the *Rule*.³⁴

11. We find that for purposes of determining application of the OTARD rule, the Association has not demonstrated that Mr. Wirth’s porch is an area not within his exclusive use or control. Mr. Wirth relies on the language from the Association’s own governing documents to support his claim. The Association, however, asserts that the plain language of the Master Deed is changed by the THPA.³⁵ The Association’s reliance on the THPA is misplaced. The THPA is state legislation with broad and general applicability to condominium developments as well as apartments.³⁶ It offers guidance on how governing documents for such developments should be drafted,³⁷ but its definitions are meant to be merely examples

²⁵*In the Matter of Phillip Wojcikiewicz*, 18 FCC Rcd 19523, 19525 (MB 2003).

²⁶Response at 4.

²⁷*Wojcikiewicz*, 18 FCC at 19525-26

²⁸Response at 4. In attempting to distinguish the *Wojcikiewicz* case, the Association also asserts that the Petitioner does not own his porch. It is unclear whether the Association is arguing that the owner/renter of the unit does not own the porch or whether it is challenging the Petitioner’s right to bring this action as a renter. To the extent that the Association would challenge the Petitioner’s rights to have an antenna under the Rule based on his status as a renter, it would be rejected since the Rule applies “where the user has a direct or indirect ownership or leasehold interest in the property.” 47 C.F.R. 1.4000(a)(1). The Petitioner as a renter, would have a leasehold interest in the property at issue.

²⁹Supplemental Response of Association at 1.

³⁰*Id.*

³¹*Id.*

³²*Id.* at 2.

³³*Id.*

³⁴*Id.*

³⁵Response at 3-4.

³⁶Tenn. Code Ann. §§ 66-27-101, et seq.; Prohibiting Yard Signs in Subdivision, Opinion No. 04-041 Att’y Gen. (2004).

³⁷*Id.*

for drafting specific governing documents for individual developments.³⁸ It is the Master Deed that sets out the specific legal parameters for the Westchester condominiums and defines Limited Common Elements as those attached to or accessible from a particular unit.³⁹ In this case, the Master Deed for the development specifically defines the porch as an exclusive use area and it is this specificity that controls.

12. Further, while some particular areas of the residence may be restricted access areas where tenants are not granted exclusive or permanent possession, as the Bureau has noted in the *Wojcikewicz* case, the agreed-upon scope of physical possession is set forth in the lease or other controlling document covering the property in question.⁴⁰ We agree with the petitioner and the Satellite Providers⁴¹ that the Association's argument is inconsistent with the language of the Master Deed.⁴² In coming to this conclusion we are following established Commission precedent that we rely upon the property description set forth in the lease or other controlling document.⁴³ In this case, the plain language of the Master Deed reserves the porch area for the exclusive use of the unit to which it is appurtenant – Mr. Wirth's unit.⁴⁴ Because there is only one area appurtenant to this unit that could be considered a porch, the language in the documents could not be referring to another area. In light of this language, we conclude that the porch in question is expressly reserved for the Petitioner's exclusive use. But for this express language, we might have reached a different conclusion. Based on the Association's Master Deed and Bylaws, we find that for purposes of application of the Rule, Petitioner has a property interest in his porch and that he has exclusive use of that area. As the Rule requires either exclusive use or exclusive control of the property in which an antenna user has leasehold, ownership, or other property interest, this finding, in itself, is sufficient to conclude that the Rule applies to Petitioner's porch.

B. The Association's Antenna Restrictions

13. Because we find Petitioner's antenna installation is covered by the Rule, we examine the Association's antenna restrictions and find that they are impermissible when applied to an area covered by the Rule. Section 7.5 of the Association's Bylaws provides: "No exterior radio, television, microwave, or other antennae or antennae dish or signal capture or distribution device shall be permitted outside any Unit. The Developer or the Association may establish one or more exterior audio, television, microwave or other antennae or antennae dish or signal capture and distribution device for the Condominium Project."⁴⁵ Because the Association's restriction is an outright ban on individual antennas, even those installed in an area covered by our rule, it certainly impairs installation and use and thus is invalid and unenforceable.

³⁸Tenn. Code Ann. §§ 66-27-101, et seq.

³⁹Exhibit B, Master Deed, ¶ 5.

⁴⁰*Wojcikewicz*, 18 FCC at 19525; *Second Report and Order*, 13 FCC Rcd at 23897; *In the Matter of James Bannister*, 18 FCC Rcd 9516 (MB 2009).

⁴¹Petition at 1; Reply at 1; Comments of DIRECTV, Inc. and DISH Network LLC at 4-6.

⁴²*Id.*

⁴³*In the Matter of Philip Wojcikewicz*, 18 FCC Rcd 19523 (MB 2003), *Application for Review Denied*, 22 FCC Rcd 9858 (2007); *In the Matter of James S. Bannister*, 24 FCC Rcd 9516 (MB 2009).

⁴⁴Although the outcome of this case is based on the plain language in the Master Deed, which is the controlling document here, the Commission is not foreclosed in appropriate cases from considering, in addition to documentary language, the nature and use of an area in question.

⁴⁵Exhibit C, Condominium Bylaws, § 7.5

IV. 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 the Petition for Declaratory Ruling filed by Craig Wirth **IS GRANTED** with respect to antenna restrictions of the Westchester LLC Condominium Homeowners Association, Nashville, Tennessee as discussed herein.

15. This action is taken by the Chief, Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's rules.⁴⁶

FEDERAL COMMUNICATIONS COMMISSION

Michelle M. Carey
Deputy Chief, Media Bureau

⁴⁶47 C.F.R. 0.283.