

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

In the Matter of
Policarpio & Lourdes Medios
Petition for Waiver
& Declaratory Ruling
Under 47 C.F.R. § 1.4000
CSR-8302-O

MEMORANDUM OPINION AND ORDER

Adopted: November 5, 2010

Released: November 8, 2010

By the Chief, Media Bureau:

I. INTRODUCTION

1. Petitioners Policarpio and Lourdes Medios ("Petitioners") filed a Petition for Waiver and Declaratory Ruling ("Petition") with respect to antenna installation restrictions of the Gentry Waipo Community Association ("Association" or "Community"). The Petition first seeks a waiver of the size limitation for antennas that are protected by Section 1.4000 of the Commission's rules, the Over-the-Air Reception Devices ("OTARD") rule, and are installed in the Community. In addition, the Petition seeks a declaratory ruling that the Association's rules, as applied, operate to require a prior approval for antenna installation and as such violate the OTARD rule. The Association opposed the Petition, the State of Hawaii ("Hawaii") filed comments opposing the Petition, and DIRECTV filed reply comments in support. The Petitioners did not file a reply. For the reasons discussed below, we find the Petitioners are not entitled to a waiver of the Rule's size limitation of one meter or less. However, to the extent that the Association's restrictions operate as a prior approval requirement for satellite antennas one meter or less in diameter, these restrictions are invalid and unenforceable. Accordingly, we deny the Petition for Waiver and grant the Request for Declaratory Ruling.

II. BACKGROUND

2. OTARD applies to satellite antennas one meter or less in diameter, or of any size in Alaska, as well as television broadcast antennas and antennas used to transmit or receive wireless signals that are not delivered by satellite, including broadband and high speed Internet. The rule addresses governmental and non-governmental restrictions and prohibits restrictions that impair installation, maintenance or use of covered antennas by causing unreasonable delay, increasing the cost, or precluding reception of an acceptable quality signal. A restriction otherwise prohibited is permitted if it is

1 47 C.F.R. §1.4000.

2 47 C.F.R. §1.4000(a)(1)(i)(B).

3 47 C.F.R. §1.4000(a)(3).

necessary to accomplish safety or historic preservation goals.<sup>4</sup> The rule applies to restrictions on property within the exclusive use or control of the antenna user where the antenna user has direct or indirect ownership or leasehold interest in the property.<sup>5</sup> The Commission has ruled that restrictions requiring prior approval for installation of antennas covered by the rule are invalid unless such restrictions are based on valid safety or historic preservation concerns.<sup>6</sup>

3. When the rule was originally adopted in 1996, the Commission received comments from antenna installers in Alaska that indicated antennas larger than one meter were necessary to receive DBS service there.<sup>7</sup> Thus, as indicated, the rule applies to satellite antennas of any size in Alaska. Nothing in the record of that proceeding indicated that a similar situation existed in Hawaii, so no size exception was adopted for that state.<sup>8</sup>

4. The Rule provides that parties who are affected by antenna restrictions may petition the Commission for a declaratory ruling to determine if the restrictions are permissible or prohibited by the Rule.<sup>9</sup> The burden to show that the challenged restrictions are not prohibited by the rule lies with the enforcing entity.<sup>10</sup>

### III. DISCUSSION

#### Petition

5. This OTARD petition was filed by an owner of a house in Waipahu, Hawaii on behalf of his tenants who installed two satellite dish antennas on property located within their exclusive use area in order to receive DIRECTV service.<sup>11</sup> The Petitioner does not indicate that there is anything unusual about his community as compared to other communities in Hawaii, but instead states that he thinks it is unfair that all 200 homes in the development are forced to use one satellite provider (Dish Network, which does not require receiving antennas greater than one meter) because of the Association's restrictions.<sup>12</sup> One of his tenants' antennas measures approximately 1.2 meters and the other, used for international programming and only in conjunction with the larger antenna, is approximately 36 inches (less than 1 meter) in diameter.<sup>13</sup> The homeowner's association insists that the larger antenna must be removed because it is not protected by federal law.<sup>14</sup>

6. In addition, Petitioner states that his tenants discussed the possibility of switching satellite providers and using a smaller antenna. According to the Petition, the association's representative

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<sup>4</sup> 47 C.F.R. §1.4000(b).

<sup>5</sup> 47 C.F.R. §1.4000(a)(1).

<sup>6</sup> See *Preemption of Local Zoning Regulation of Satellite Earth Stations ("First Report & Order")*, 11 FCC Rcd 19276, 19286-7 (1996).

<sup>7</sup> *First R&O* at 19295.

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

<sup>9</sup> 47 C.F.R. § 1.4000(e). The Rule also provides that local governments or associations may apply for waiver of the rule. Because Petitioners are not within this group, we will consider their request under the general waiver provisions of 47 C.F.R. §1.3.

<sup>10</sup> 47 C.F.R. §1.4000(g).

<sup>11</sup> Petition at 1.

<sup>12</sup> Petition at 2.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

indicated that a prior approval was necessary for even a smaller antenna that would be covered by OTARD.<sup>15</sup>

7. This case presents two questions: (1) has the Petitioner demonstrated circumstances warranting a waiver of the size limitation in the OTARD Rule for antennas installed in the Community; and, (2) are the antenna installation restrictions as enforced by the Association valid under the OTARD rule?

### Waiver

8. We deny the Petition for Waiver.<sup>16</sup> Section 1.3 of the Commission's Rules provides that any provision of those rules may be waived for good cause shown.<sup>17</sup> Further, the U.S. Court of Appeals for the District of Columbia has held that "the FCC may exercise its discretion to waive a rule where *particular facts* would make strict compliance inconsistent with the public interest."<sup>18</sup> In this case, the Petition does not meet this standard.

9. The Petition does not address or set forth any "particular facts" that describe the Community in terms that are different from other communities in Hawaii.<sup>19</sup> The fact that residents who want to subscribe to DIRECTV service need antennas larger than one meter is a situation common to all or most residents of the state.<sup>20</sup> Absent any unique or unusual circumstances warranting a deviation from the general rule, a waiver is not warranted. Contrary to DIRECTV's assertions, the fact that its subscribers need larger antennas in Hawaii does not qualify as an unusual circumstance justifying a waiver for residents of Gentry-Waipio.<sup>21</sup> Such a grant could lead to piecemeal enforcement of the OTARD rule in the state and could result in a rule change without a rulemaking.<sup>22</sup> DIRECTV's arguments are more appropriate in a rulemaking proceeding addressing all of Hawaii and thus are not persuasive in this proceeding requesting a waiver of the size limitation for one community.<sup>23</sup>

10. Because we find that the Petition does not specify any unusual circumstances as required to justify a waiver, we do not reach the question of Hawaii's assertions that high winds in the state create

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<sup>15</sup> Petition at 3; Letter from Association's management company to Petitioners dated February 9, 2010 attached as exhibit to Petition.

<sup>16</sup> We do not address Hawaii's request to impose administrative sanctions on DIRECTV for failure to serve the state with smaller antennas as this issue is beyond the scope of this proceeding. See Comments of Hawaii at 3.

<sup>17</sup> 47 C.F.R. §1.3.

<sup>18</sup> *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (emphasis added). See also *Wait Radio v FCC*, 418 F.2d 1153, 1159 (DC Cir. 1969). The OTARD Rule, in addressing waiver requests filed by restricting entities, provides that the Commission may grant a waiver "upon a showing by the applicant of local concerns of a highly specialized or unusual nature." 47 C.F.R. §1.4000(d).

<sup>19</sup> See *Shadow Wood Condominium Association*, 21 FCC Rcd 339 (MB 2006).

<sup>20</sup> DIRECTV Comments at 6. DIRECTV explains that its use of Ka-band satellites to deliver HD signals combined with a less favorable look angle and tropical rains all combine to necessitate larger receiving antennas for subscribers located in Hawaii.

<sup>21</sup> DIRECTV Comments at 6-7.

<sup>22</sup> See *In the Matter of Access Charge Reform*, 23 FCC Rcd 2556,2560 (2008), where the Commission cautioned that wholesale waiver grants could lead to a situation where waivers would swallow the applicable rule.

<sup>23</sup> As noted above, when the original OTARD Rule was adopted in 1996, the Commission had evidence indicating that larger antennas were necessary in Alaska to receive DBS service. No similar information was submitted concerning Hawaii and, since that time, no Petition for Rulemaking on this issue has ever been filed.

greater risks if antennas larger than one meter are used.<sup>24</sup> DIRECTV has disputed this claim.<sup>25</sup>

### Declaratory Ruling

11. In addition to a request for waiver, the Petition requests a declaratory ruling that the Association's restrictions as applied or administered violate the OTARD rule because they require prior approval for antenna installation. We grant the Request for Declaratory Ruling. The Association asserts that its rules require approval of antennas only if they are to be installed in common areas.<sup>26</sup> However, in a letter dated February 9, 2010, a representative of the Association stated that a "Design Request application" was required prior to installation of a "smaller dish," presumably one that is covered by OTARD, that is installed within an antenna user's exclusive use area.<sup>27</sup> To the extent that the Association applies a prior approval requirement to any antenna covered by OTARD, such a requirement is invalid and unenforceable.<sup>28</sup> Petitioner's tenants are free to install a satellite antenna that is one meter or less in diameter in a location within their exclusive use or control without first seeking approval of the Association.

### IV. ORDERING CLAUSES

12. 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 Policarpio & Lourdes Medios **IS DENIED**.

13. **IT IS FURTHER ORDERED** that the Request for Declaratory Ruling with respect to the restrictions of the Gentry Waipo Community Association **IS GRANTED as discussed herein**.

14. This action is taken by the Chief, Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's rules.<sup>29</sup>

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake  
Chief, Media Bureau

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<sup>24</sup> Comments of Hawaii at 3-4.

<sup>25</sup> Comments of DIRECTV at 8.

<sup>26</sup> Opposition of Association at 2-3.

<sup>27</sup> Letter from Association's management company to Petitioners dated February 9, 2010, attached as exhibit to Petition.

<sup>28</sup> *First Report & Order* at 19286-7.

<sup>29</sup> 47 C.F.R. § 0.283.