

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

In the Matter of)
Victor Frankfurt)
Petition for Declaratory Ruling) CSR-5238-O
Under 47 C.F.R. § 1.4000)
Application for Review)

MEMORANDUM OPINION AND ORDER

Adopted: August 20, 2003

Released: August 27, 2003

By the Commission:

I. INTRODUCTION

1. The Community Associations Institute (CAI) filed an Application for Review of the Cable Services Bureau’s Memorandum Opinion and Order in the above captioned case.1 The Bureau’s Order granted in part and denied in part a Petition for Declaratory Ruling filed by Victor Frankfurt pursuant to the Commission’s Over-the-Air Reception Devices Rule.2 Based on the record before us, we find that the Bureau’s decision was correct and we therefore deny CAI’s Application for Review.

II. BACKGROUND

2. The Commission’s Over-the-Air Reception Devices Rule prohibits government and private restrictions that impair the installation, maintenance, or use of certain antennas.3 This rule implements Section 207 of the Telecommunications Act of 1996, which required 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.4 A restriction impairs, as defined in the rule, if it unreasonably delays or prevents installation, maintenance, or use; unreasonably increases the cost of installation, maintenance, or use; or precludes reception or transmission of an acceptable quality signal.5 Restrictions otherwise prohibited are allowed if necessary to accomplish a clearly defined, legitimate safety or historic preservation objective and are no more

1 16 FCC Rcd 2875 (CSB 2001) (Order). The Cable Services Bureau is now part of the Media Bureau as a result of the Commission’s reorganization in 2002. New Century Town Townhouse Association No. 2 (New Century) filed a document titled Application for Review, adopting and supporting CAI’s Application.

2 47 C.F.R. § 1.4000.

3 Id.

4 Telecommunications Act of 1996, Pub. L. No. 104-104, § 207, 110 Stat. 56, 114 (1996).

5 47 C.F.R. § 1.4000(a)(3).

burdensome than necessary to achieve such objective.⁶ Parties may petition the Commission for a declaratory ruling to determine whether a particular restriction is prohibited.⁷

3. In this case, Mr. Frankfurt filed two Petitions for Declaratory Ruling requesting preemption of New Century's antenna restrictions under Section 1.4000 of the Commission's rules. In response to his first Petition, the Bureau found that the New Century restriction was prohibited because it created an absolute ban on antenna installation without a showing by New Century that such a ban was necessary for safety or historic preservation reasons.⁸ After release of the Bureau's first Order, New Century adopted new restrictions⁹ and Mr. Frankfurt filed a second petition, asserting that the new restrictions also violated the Commission's rule. The Bureau granted Mr. Frankfurt's second petition in part and denied it in part. The Bureau found that some of New Century's guidelines were based on legitimate safety considerations but that others were more burdensome than necessary to accomplish their safety objectives.¹⁰

4. In its Application for Review, CAI, supported by New Century, challenges three aspects of the Bureau's decision. First, CAI asserts that the Bureau erred in finding that New Century's prior approval process to determine compliance with safety requirements is more burdensome than necessary to accomplish a legitimate safety objective and thus is an impermissible impairment under the Rule. Second, CAI states that the Bureau erred in finding unenforceable the New Century Guideline that required compliance with the National Electric Code (NEC). Finally, CAI asserts that the Bureau erred when it refused to allow New Century to enforce other unspecified "ordinances, laws, regulations and industry standards". The Satellite Broadcasting and Communications Association (SBCA) opposed CAI's Application for Review and CAI and the Wireless Communications Association International, Inc. (WCA) filed replies.

III. DISCUSSION

5. Under our rules, the Commission will grant an Application for Review of an action taken on delegated authority when such action is in conflict with Commission precedent or regulation.¹¹ We find that the Bureau's decision in this case is consistent with Commission precedent and regulation and therefore we affirm the Bureau's Order.

A. Prior approval

6. New Century's Guidelines require an antenna user to submit an application for prior approval before installing an antenna.¹² The application is titled an "Appearance or Architectural Change or Improvement Application" and requires, among other things, a sketch of the installation including colors, construction materials and location, a property survey, and a legal description of the property. In addition, the applicant must agree to record the application with the recorder of deeds and agree to obtain and comply with applicable building codes.¹³ Under our rule, a prior approval requirement will only be enforceable if it is necessary to accomplish a legitimate safety or historic preservation objective and is no

⁶ 47 C.F.R. §1.4000(b).

⁷ 47 C.F.R. §1.4000(e).

⁸ See *In re Victor Frankfurt*, 12 FCC Rcd 17631 (CSB 1997).

⁹ Referred to herein as "Guidelines".

¹⁰ *Order*, 16 FCC Rcd at 2875.

¹¹ See 47 C.F.R. §1.115; *In Re Lubliner*, 13 FCC Rcd 16107 (1998).

¹² *Order*, 16 FCC Rcd at 2885.

¹³ See *Order*, 16 FCC Rcd at 2896, Appendix B.

more burdensome than necessary to accomplish that objective.¹⁴ In this case, the Bureau found that New Century's prior approval requirement did not fall within the safety exception because it did not have a clearly defined safety objective, was not necessary to accomplish a safety objective, and contained a 30 day waiting period for Association action that was unnecessarily burdensome.¹⁵

7. CAI challenges the Bureau's finding, stating that it has effectively converted a prohibition on *unreasonable* delay or expense to a prohibition on *any* delay or expense. In addition, CAI asserts that the Bureau's suggested alternative to a prior approval, inspection after notification of installation, would be more burdensome to antenna users than New Century's process and would be ineffective in promoting safety unless an association could enforce a post-installation notification requirement with appropriate penalties. SBCA and WCA argue that the Bureau was correct in finding that New Century's approval process did not meet the safety exception and that it caused unreasonable delay.

8. We uphold the Bureau's decision. As the Commission has stated, blanket permit requirements (which include pre approval requirements like those at issue here) impose an unreasonable delay on antenna users and can only be enforced to further safety or historic preservation goals.¹⁶ As we have previously recognized, provisions requiring the approval of community associations prior to the installation of DBS antennas "can, in practical terms, 'prevent' the viewer's access to video programming signals as surely as outright prohibitions, by creating an extra hurdle for consumers to overcome."¹⁷ Thus, we must determine whether New Century's restrictions meet the criteria for a valid safety restriction. First, we find that New Century's failure to articulate a clearly defined, legitimate safety objective for its prior approval requirement raises serious concerns about its relation to safety, especially when coupled with the text of the restrictions. Not only is the prior approval application titled "Appearance or Architectural Change or Improvement," but most of the actions¹⁸ required of antenna users pursuant to the application are unrelated to safety concerns. Neither the requirement for a sketch, including colors, nor a recordation requirement¹⁹ can arguably be termed safety regulations. Although our rule carves out an exception for appropriate safety restrictions, a homeowners' association or other restricting entity cannot use this exception to legitimize otherwise impermissible aesthetic restrictions.

9. In addition, rather than attempting to demonstrate why New Century's prior approval requirement is permissible, CAI attacks as unjustified the Bureau's suggestion that a post installation notification would assure that antennas were installed in a safe manner. The Bureau merely offered this as a way to comply with the Commission's rule. It was not obligated to offer any suggested alternative approaches and the fact that it did does not shift the burden from New Century. The burden is always on

¹⁴ See §1.4000(b); *Preemption of Local Zoning Regulations of Satellite Earth Stations*, 11 FCC Rcd 19276, 19286 - 87 (1996) (*1996 Order*); *Implementation of Section 207 of the Telecommunications Act of 1996*, 13 FCC Rcd 18962, 18981 (1998) (*Reconsideration Order*).

¹⁵ *Order*, 16 FCC Rcd at 2886-7.

¹⁶ *1996 Order*, 11 FCC Rcd at 19286-87; *Reconsideration Order*, 13 FCC Rcd at 18981. New Century did not assert the exception for historic preservation.

¹⁷ *1996 Order*, 11 FCC Rcd at 19286-87; *see also*, *In the Matter of Michael MacDonald*, Memorandum Opinion and Order, 13 FCC Rcd 4844, 4852-53 (CSB 1997) ("procedural requirements might act as a barrier between the new technology and the potential customer because of the administrative delay and myriad regulatory obstacles that the potential antenna user must hurdle before being able to utilize the new technology.") *approved in Reconsideration Order*, 13 FCC Rcd at 18981 n. 114.

¹⁸ The requirement to agree to obtain and comply with applicable building codes could be related to safety issues but see discussion *infra* at ¶ 14.

¹⁹ New Century, in its filing in support of CAI's Application for Review, stated that the recordation requirement "had been waived." This statement is irrelevant to our consideration of the Guidelines as they are written.

the restricting entity to justify its regulations under our rule and in this case, CAI has failed to show how New Century's prior approval with requirements for sketches, colors, and recordation furthers a safety objective.²⁰

10. Further, CAI argues that the Bureau applied the wrong standard when it determined that the New Century requirement for a sketch of an installation in its prior approval application was "unnecessary" to accomplish a safety objective. CAI asserts that the correct standard is "unreasonable" delay or cost. However, CAI's argument fails to recognize that Section 1.4000(b)(1) of our rules will allow a restriction that impairs only if it is "necessary" to accomplish a safety objective. Because prior approval requirements have been found to cause unreasonable delay unless they are related to safety or historic preservation, our rule by its terms will only permit prior approvals necessary to accomplish those goals.²¹ Neither CAI nor New Century has met the burden of showing how the prior approval requirement is necessary to accomplish a legitimate safety objective.

11. Finally, CAI argues that the Bureau erred when it found that a 30 day review period is unreasonable. CAI asserts that thirty days may in fact be too short a time for Association management or a committee of homeowners to review antenna applications. Because New Century and CAI have failed to demonstrate how New Century's prior approval process meets the criteria for a valid safety requirement, New Century's thirty day waiting period is also impermissible. In addition, CAI's justification for the thirty-day waiting period fails to show how it furthers any safety objective. The fact that Association management or homeowners' committees might need 30 days or more for review is unrelated to the time a qualified technician might need for a safety review.

B. National Electric Code

12. CAI claims that the Bureau's refusal to allow New Century to enforce the National Electric Code (NEC) was arbitrary and capricious. In the Order, the Bureau stated that because the specific requirements of the NEC were not presented for review, it could not determine whether those requirements met the criteria of our rule. CAI argues that the Bureau should have asked New Century for the NEC or should have found a copy at a public library. In addition, CAI states that because the NEC is a nationally recognized code, antenna users are obligated to find out its requirements.

13. We find that the New Century restriction that requires general compliance with the NEC is unenforceable under our rule. Such a general reference is not only insufficient for the Commission to review but is far too vague for antenna users to follow. If a community association wants to require compliance with a particular provision of the NEC and will enforce such requirement through specific penalties, the association must clearly articulate the specific provisions and penalties at issue. In addition, the association must specify how that requirement is necessary to achieve the association's articulated safety objective and be no more burdensome than necessary to achieve that objective.

C. Other Ordinances, Laws, Regulations and Industry Standards

14. The requirement in New Century's restrictions to comply with "all ordinances, laws, regulations and industry standards" is even vaguer than the requirement to comply with the NEC. CAI argues that it is every citizen's duty to comply with the law and that it is within the authority of a community association to enforce compliance.²² We agree with the Bureau that without specific

²⁰ 47 C.F.R. §1.4000(g).

²¹ *1996 Order*, 11 FCC Rcd at 19286-87.

²² CAI's Application for Review at 6.

requirements, the Commission cannot evaluate the validity of this particular aspect of New Century's restrictions. We also agree that antenna users should not have to collect all possible requirements, including those vaguely described as "industry standards" and guess at those that might be enforced by their community association in connection with antenna installation.

IV. CONCLUSION

15. Based on the record before us, as discussed above, we find that the Bureau's decision in this matter was correct and in accord with Commission precedent and regulation.

V. ORDERING CLAUSE

16. Accordingly, **IT IS ORDERED**, that the Applications for Review filed by the Community Associations Institute and New Century Town Townhouse Association No. 2 **ARE DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary