

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

In the Matter of:)
)
Stanley and Vera Holliday) CSR 5399-O
)
)
Petition for Declaratory Ruling)
Under 47 C.F.R. § 1.4000)

MEMORANDUM OPINION AND ORDER

Adopted: October 6, 1999

Released: October 8, 1999

By the Chief, Cable Services Bureau:

I. Introduction

1. Petitioners Stanley and Vera Holliday ("Petitioners") filed a Petition for Declaratory Ruling (the "Petition") seeking a determination that a provision in the plat covenants for the Crooked Creek Villages development applicable to externally installed over-the-air video programming reception antennas are prohibited by the Commission's Over-the-Air Reception Devices Rule, 47 C.F.R. § 1.4000 (the "Rule").¹ The Crooked Creek Villages Homeowners Association ("Crooked Creek" or the "Association") filed a response to the Petition to which Petitioners filed a reply. For the reasons discussed below, we find that the restriction at issue contravenes the Rule and is prohibited.

II. Background

2. On August 5, 1996, the Commission adopted 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.² The Rule implemented Section 207 of the Telecommunications Act of 1996 (the "Act"), which requires the Commission to "promulgate regulations to prohibit restrictions that impair a viewer's ability to

¹ 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).

² 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 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).

receive video programming services through devices designed for over-the-air reception of" certain enumerated services.³ 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. . . ."⁴

3. The Rule applies to antennas designed to receive direct broadcast satellite services that are one meter or less in diameter; antennas designed to receive video programming services through multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services that are one meter or less in diameter or diagonal measurement; and antennas designed to receive television broadcast signals.⁵ 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.⁶ 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.⁷ There are exceptions to the Rule for valid safety or historic preservation restrictions, which must be as narrowly tailored as possible, impose as little burden as possible, and apply in a nondiscriminatory manner throughout the regulated area.⁸

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.⁹ The Rule places the burden of demonstrating that a challenged restriction complies with the Rule on the party seeking to impose the restriction.¹⁰

5. Petitioners state that they own and reside in a single-family dwelling in Indianapolis, Indiana, which is subject to covenants and restrictions administered and enforced by the Association. Petitioners have installed six masts in the rear of their lot which are secured to the ground by guy wires.¹¹ There are five masts approximately 30 feet in height which are roughly even with Petitioners' roofline, two of which simply provide support to another mast, and one ten foot mast.¹² Petitioners have affixed five television antennas and three satellite dish antennas to these masts.¹³ The antennas provide reception for ten television sets, nine video cassette recorders, and seven satellite receivers.¹⁴

6. The relevant portion of the plat covenants for the Crooked Creek Villages development

³Telecommunications Act of 1996, Pub. L. No. 104-104, § 207, 110 Stat. 56, 114 (1996).

⁴Communications Act of 1934, § 1 as amended, 47 U.S.C. § 151.

⁵47 C.F.R. § 1.4000(a).

⁶*Id.*

⁷*Id.*

⁸47 C.F.R. § 1.4000(b).

⁹47 C.F.R. § 1.4000(d).

¹⁰47 C.F.R. § 1.4000(e).

¹¹Crooked Creek Response at ¶ 7.

¹²*Id.*; Petitioners' Reply ("Reply") at 3.

¹³Crooked Creek Response at ¶ 7; Reply at 3.

¹⁴Joint Affidavit in Support of Petition at ¶ 2.

provides as follows:

Paragraph 11. Architectural Design and Environmental Control. No building, fence, walls or other structure shall be erected, placed or altered on any building lot in this Subdivision until the building plans, specifications and plot plan showing the location of such structures have been approved as to the conformity and harmony of external design with existing structures herein and as to the building with respect to topography and finished ground elevations by an Architectural and Environmental Control Committee ("Paragraph 11").¹⁵

Petitioners have not sought the Association's approval for the installation of the antennas and supporting structures described above.¹⁶ The Association initiated a state court action in which it seeks to force Petitioners to remove these structures, arguing in part that Petitioners failed to obtain the prior approval required under Paragraph 11 and asserting that Petitioners' installation of multiple antennas is "excessive."¹⁷ Petitioners then filed the present petition seeking a determination that Paragraph 11, as applied to their antenna installations, is prohibited by the Rule. The state court stayed its proceedings pending the Commission's disposition of the Petition.

7. In the Petition, Petitioners argue that the Association has provided no justification for the prior approval requirement based on permissible safety or historic preservation concerns and that Paragraph 11 therefore is prohibited.¹⁸ In its response, the Association states that although Paragraph 11 does not address multiple antennas directly, it is the Association's policy to permit the installation of only one satellite dish that is one meter or less in diameter and one television antenna that extends no more than 12 feet above the roof line.¹⁹ It further states that in light of this policy, it would not approve Petitioners' installations even if Petitioners were to seek approval.²⁰ The Association states that its policy is justified by general safety concerns and the need "to retain the appearance and value of other homes in the neighborhood."²¹ The Association argues that the Rule speaks only of "an antenna" in the singular and that nothing in the Rule or related Commission orders dictates that an entity cannot impose reasonable restrictions on the number of antennas a party is permitted to erect.²² The Association concludes by asking the Commission to rule that an entity covered by the Rule may limit the number of antennas an individual is allowed to install and impose reasonable restrictions on supporting structures.²³ The Association did not address the prior approval requirement contained in Paragraph 11.

8. In their reply, Petitioners argue that the antenna structures and guy wires are safe and that in

¹⁵Petition at Appendix B.

¹⁶Joint Affidavit in Support of Petition at ¶ 3.

¹⁷*Crooked Creek Villages HCA v. Holliday*, No. 49D06-9807-CP-1018 (Marion County Superior Court, filed July 30, 1998).

¹⁸Petition at 1.

¹⁹Crooked Creek Response at ¶ 8.

²⁰*Id.*

²¹*Id.* at 9.

²²Memorandum in Support of Crooked Creek Response at 3.

²³Crooked Creek Response at ¶ 10.

any event they are located entirely on their property.²⁴ Petitioners further argue that the Association's aesthetic concerns cannot justify restrictions on Petitioners' right to maintain these antennas.²⁵

III. Discussion

9. As applied by the Association, Paragraph 11 prohibits exterior installation of satellite dishes and other antennas covered by the Rule absent prior written authorization from the Association. The Association also has an unwritten policy limiting a homeowner to the installation of one satellite dish antenna and one television antenna extending no more than 12 feet above the roof line. Under the Rule, the burden is on the Association to demonstrate that its restrictions do not impair the installation, maintenance, or use of over-the-air reception antennas or that its restrictions qualify for either the safety or historic preservation exceptions to the Rule.²⁶ The Association has not met its burden.

10. We find that the Association's written restriction and its implementation thereof with respect to Petitioners' antennas create an impermissible prior approval requirement for antennas covered by the Rule. Paragraph 11 requires a homeowner to obtain the permission of the Architectural and Environmental Control Committee prior to the installation of external "structures." As construed by the Association, this prior approval requirement applies to antennas covered by the Rule, including those Petitioners have erected. The Commission has held that a requirement of prior authorization is prohibited unless it is justified by legitimate safety or historic preservation considerations.²⁷ Here, historic preservation concerns are not implicated since Crooked Creek Villages is a new development. For the safety exception to apply, the restriction must clearly define the safety objective in either (1) the text, preamble or legislative history of the restriction or (2) a separate document readily available to antenna users.²⁸ In this case, there is no written statement in the restriction itself or related materials which sets forth a safety rationale for the restriction. The Association's generalized reference to safety concerns contained in its response does not cure this omission. Thus, we find that Crooked Creek's antenna restriction is prohibited by the Rule due to its unjustified prior approval requirement.

11. We further find that Paragraph 11 as implemented by the Association contravenes the Rule in other respects. First, the Association has stated that its policy is to prohibit the installation of a television antenna that rises more than 12 feet above the roof line.²⁹ Such a limitation is prohibited because it establishes a *per se* bar to antennas over 12 feet without articulating a legitimate safety concern and tailoring the restriction to be no more burdensome than necessary to achieve a legitimate safety purpose.³⁰

12. In addition, the Association has clearly stated a policy of limiting homeowners to the installation of one satellite dish antenna and one television antenna. We note that the Association's absolute limit appears to be based solely on aesthetic concerns and not on a valid safety basis. In the absence of a

²⁴Reply at 3.

²⁵*Id.* at 2.

²⁶47 C.F.R. § 1.4000(e).

²⁷*Order on Reconsideration*, 13 FCC Rcd. at 18981.

²⁸47 C.F.R. § 1.4000(b)(1).

²⁹Crooked Creek Response at ¶ 8.

³⁰47 C.F.R. § 1.4000(b)(1). *See also Order on Reconsideration*, 13 FCC Rcd. at 18969 and 18980 ("If a local authority created a *per se* bar to antennas over a certain height, the restriction would be prohibited."); *Report and Order*, 11 FCC Rcd. at 19299 ("we would find unenforceable any restriction that establishes specific *per se* height limits.").

valid safety justification, an arbitrary limit can impair use of video antennas in violation of the Rule if a viewer needs more than the number of antennas allowed by the Association in order to receive an acceptable quality signal.³¹ Consequently, an Association or other restricting entity cannot impose an arbitrary limit on the number of antennas a viewer may install provided they are necessary to receive the video programming³² available for reception in the viewer's viewing area.³³ A restricting entity may prohibit the installation of equipment that is merely duplicative and not necessary for the reception of video programming. However, the record in this proceeding does not contain sufficient information to enable us to determine whether it is necessary for Petitioners to maintain five television antennas and three satellite dish antennas in order to receive the video programming available in their viewing area.

13. Finally, in their response, Petitioners reference a new antenna restriction enacted by the Association which provides that no satellite dishes over 30 inches in diameter are permitted and that "antennas [are] allowed inside the attic."³⁴ This restriction was not addressed in the Petition and we will not rule on its validity in this Order.³⁵ We note, however, that the Rule applies to satellite dishes up to one meter or approximately 39.37 inches in diameter.³⁶ As a result, a restricting entity could not apply a prohibition on antennas over 30 inches in diameter to devices covered by the Rule unless exempted by the safety or historic preservation exceptions. In addition, a restriction that requires antennas to be placed inside an attic, without allowance for the fact that a user may require external installation in order to receive an acceptable quality signal, would be prohibited.³⁷

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 Paragraph 11 of the plat covenants for the Crooked Creek Villages development is hereby prohibited and unenforceable to the extent that it impairs the installation, maintenance, or use of over-the-air reception antennas protected by 47 C.F.R. § 1.4000 as discussed herein.

³¹See *Report and Order*, 11 FCC Rcd. at 19281 (The Rule is intended in part to achieve the federal objective of ensuring that consumers have access to "a broad range of video programming services."). For example, a viewer may need to have a TVBS antenna for local broadcast television as well as two DBS dishes to receive programming from each of the satellite carriers, Echostar and DirecTV.

³²The term "video programming" refers to "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(20).

³³The Rule does not protect viewers "seeking to install, maintain, or use antennas designed to receive distant TVBS signals." *Report and Order*, 11 FCC Rcd. at 19288, n.46.

³⁴Reply at 3. The provision also is set forth in Exhibit F to the Reply, which is a summary of various restrictions prepared by the Association for informational purposes. It is unclear whether the actual provision is more detailed than reflected in this summary. The Association did not reference the provision in its response or provide information regarding the provision.

³⁵The parties dispute whether this provision was in effect at the time Petitioners filed the Petition. Reply at 5.

³⁶47 C.F.R. § 1.4000(a).

³⁷See *Jay Lubliner and Deborah Galvin*, 13 FCC Rcd. 4834, 4841 (1997).

15. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Deborah A. Lathen
Chief, Cable Services Bureau