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

In the Matter of	)	
	)	
Satellite Broadcasting &	)	CSR-8541-O
Communications Association	)	
	)	
Petition for Declaratory Ruling	)	
That an Ordinance of the City	)	
of Philadelphia, Pennsylvania	)	
Is Preempted By the Commission's	)	
Over-the-Air Reception Devices Rule	)	

COMMENTS OF THE STATES OF CALIFORNIA AND NEVADA CHAPTER OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS (SCAN NATOA, INC.)

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I. Introduction

SCAN NATOA, Inc. ("SCAN") offers these comments in response to the Satellite Broadcasting & Communications Association's ("SBCA" or "Petitioner") Petition for Declaratory Ruling asking the Commission to preempt the City of Philadelphia's ("City") ordinance regulating the installation and placement of over-the-air reception devices ("OTARD").

SCAN is an association with a history spanning over 20 years representing the interests of over 300 members consisting primarily of local government telecommunications officials and advisors located in California and Nevada. Accordingly, SCAN's members have a keen interest and stake in this proceeding and its outcome. SCAN submits these comments in support of the City.

As there are a limited number of Commission OTARD rulings regarding municipalities, SCAN's comments focus on the framework by which the Commission should evaluate the Petition with particular emphasis on the nature and breadth of the municipal police power as it applies to land use and zoning. Specifically, SCAN believes these concepts will help the Commission consider the preemptive reach of 47 C.F.R. Section 1.4000(a)(3), specifically, whether alternative location and aesthetic requirements add unreasonable cost or unreasonable delays to the installation of satellite dishes and antennas.

II. The Commission Should Consider the City's Constitutional Police Power in Evaluating the Reasonableness of its Regulations

As already noted, there have been few Commission rulings on the application of the OTARD rule to municipalities. Challenges under the OTARD rule have mostly involved the regulations of homeowner's associations ("HOAs") and the policies and

practices of private parties. In these prior Commission rulings, private party restrictions have often been contractual, such as the enforcement of an HOA's covenants, conditions and restrictions ("CC&Rs").[1] Municipal ordinances, however, operate differently than do private contracts, whereas a municipality regulates activities through its police power to promote and protect health, safety and welfare.

The Commission should not review the SBCA Petition in a linear fashion and arithmetically apply the OTARD rule to the City's actions. Instead, in the context of the Media Bureau acting in an adjudicatory fashion, the Commission should look to the whole of the action considering the City's constitutionally based police powers and the nature of the legislative act.

Although the OTARD rule is not subject to every maxim of local land use, and although Congress and the Commission have the authority to preempt certain local regulations, the Commission should keep in mind the concepts of local police power, legislative will and changing aesthetic needs, as these values have been interpreted by the courts. The OTARD rule itself only preempts unreasonable local zoning regulations, not reasonable regulations.

The police power is broad and a judicial review of it does not easily lend itself to a strictly based, rule-like application. As the United States Supreme Court stated about the police power:

> An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. . . . .
> Public safety, public health, morality, peace and quiet, law and order-these are some of the more conspicuous examples of the traditional application of the

[1] *See e.g., James S. Banister*, CSR-7861-O, Declaratory Ruling, 24 FCC Rcd 9516 (MB 2009).

> police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. . . . The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[2]

The police power is elastic and allows municipalities to tailor regulations to meet the changing needs of their community.[3] Furthermore, values change from city to city. A region like Orange County, California may favor strong property rights and leave land use decisions to the discretion of an individual property owner while Philadelphia, Pennsylvania may prefer to restrict the same type of development due to the collective need to maintain residential character.

Due to the large, concentrated, and often affluent population, states like California have witnessed explosive demand and deployment of communications and utilities, leading to public concern for the safety and visual impacts from utility poles, fiber optics, aerial lines, satellite dishes, utility boxes and antennas in all shapes and sizes. Where it was once commonplace to maintain a "hands off" approach to municipal regulation, communities now regulate the land use and zoning aspects of such structures and facilities due to their tremendous proliferation. Changing times often necessitate changing regulations based on the desires of the local community. What once may have been arbitrary and unreasonable may now be a sustainable regulation under current complex conditions.[4]

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[2] *Berman v. Parker*, 348 U.S. 26, 32-33 (1954) (citations omitted).

[3] *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

[4] *See id.*

The SBCA Petition is peppered with references to the lone statement of one City councilmember that satellite dishes are "unattractive," as if this opinion is legally irrelevant. The Petition misses the mark. Aesthetics alone is a sufficient justification for an exercise of the police power:

> "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker*, *supra*. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[5]

And, even the Commission has recognized this under the OTARD rule, setting forth a set of definitions only preempting "unreasonable" regulations, as shown in 47 C.F.R. Section 1.4000(a)(3). As such, the Commission should evaluate the nature of the City's exercise of its police power here, as that would inform the Commission's analysis of whether the City's regulations fall within the OTARD rule.

III. Alternative Location Requirements Are Generally Reasonable

In reviewing the City's ordinance, the Commission should balance the City's need to preserve its local zoning authority with any unreasonable costs or unreasonable delay actually demonstrated by SBCA.

The OTARD rule recognizes the preservation of local zoning authority by only preempting restrictions that unreasonably delay installation, unreasonably increase costs or preclude reception of an acceptable signal quality.[6]

Federal limitations on local land use authority over communications facilities have traditionally allowed room for regulating the installation, placement and manner of

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[5] *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

[6] 47 C.F.R. § 1.4000(a)(3).

the communications device or structure. The basic idea of federal limitation is that the municipality cannot regulate the service itself. For example, in the Telecommunications Act, Congress has already provided municipalities with clear and unambiguous guidance as to its intent to respect and preserve local zoning authority where no prohibition or effective prohibition of a telecommunications service will result.[7]

The OTARD rule is no different. In this case, the City imposed a placement restriction that should not in and of itself cause Commission preemption. In order to determine the reasonableness of the City's legislative decision, the Commission needs to specifically examine how installation would be materially delayed. That is, how is a material delay caused when a property owner or tenant must consider another location on his or her roof or facie board? Based on line of sight, is an alternative location requirement not reasonable when multiple locations suffice? In other words, the Commission should look at how the regulations apply when an alternate location is technically feasible at a minimal (and not unreasonable) cost and delay.

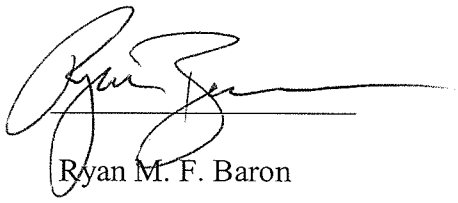
SBCA has set forth an incomplete record through the Petition. SBCA has failed to document and quantify the increased costs and delays it alleges service providers and installers will have by first considering locations other than the street side of the residence. In addition to specific costs, SBCA has not asserted, much less documented, any specific structural barriers that require street side installation. Evidence has not been presented showing the different types of installation available and the costs of custom work.

[7] 47 USC § 332(c)(7).

IV. Conclusion

The Commission should adjudicate this matter holistically, in view of the local zoning authority vested in municipalities, and recognized by the Commission through the OTARD rule, which only preempts "unreasonable" regulations. The Commission's review should examine the reasonableness of the ordinance based on actual installation problems and documented actual costs that would occur with an alternative location requirement. The Commission should also consider whether the ordinance imposes what can truly be considered unreasonable costs and delays, or whether the ordinance simply asks for satellite dishes and antennas at technically alternative sites.

Respectfully submitted,



Ryan M. F. Baron

CERTIFICATE OF SERVICE

I, Ryan M. F. Baron, do hereby certify that, on this the 21st day of December, 2011, a copy of these comments was sent, via first-class U.S. mail, to the following:

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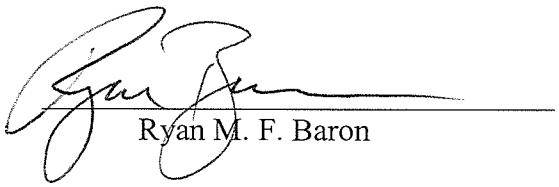

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