

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

In the Matter of)
Satellite Broadcasting & Communications)
Association)
Petition for Declaratory Ruling Under 47 C.F.R. §)
1.4000) CSR 8541-O

DECLARATORY RULING

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By the Chief, Media Bureau:

TABLE OF CONTENTS

Heading Paragraph #
I. INTRODUCTION.....1
II. BACKGROUND.....2
A. OVER-THE-AIR RECEPTION DEVICES RULE.....2
B. THE ORDINANCE.....5
III. DISCUSSION.....9
A. PROCEDURAL ISSUES.....9
1. Ripeness.....10
2. Local Police Power and Deference.....13
B. PUBLIC SAFETY EXCEPTION.....15
C. IMPAIRMENT OF INSTALLATION, MAINTENANCE, OR USE.....19
1. Multi-Family Buildings.....20
2. Single-Family Buildings.....27
3. Certification.....35
4. Notification of Existence of Antennas and Removal of Antennas No Longer in
Service.....43
5. Painting.....51
6. Penalties.....58
IV. ORDERING CLAUSES.....59

I. INTRODUCTION

1. In this Declaratory Ruling, we grant a Petition for Declaratory Ruling (“Petition”) filed by the Satellite Broadcasting & Communications Association (“SBCA”) and find that certain specific antenna restrictions in an Ordinance adopted by the City of Philadelphia, Pennsylvania (“City” or “Philadelphia”), are prohibited by the Commission’s Over-the-Air Reception Devices Rule, 47 C.F.R. §

1.4000 (“OTARD Rule”)¹, which protects the ability of antenna users to install and use over-the-air-reception devices and thereby ensures greater video choice for consumers. The City states that the Ordinance “addresses the uncontrolled proliferation of satellite signal reception devices on the front of homes throughout the City” by limiting the placement of dishes on the front façades of homes and buildings.² The Ordinance also imposes requirements regarding certification, notification, painting, and removal of satellite dish antennas and establishes legal obligations for “television access providers and installers” as well as penalties.³ The City asserts that the Ordinance is intended to improve the visual appearance, property values, and safety of the City’s residents. We conclude that the Ordinance violates the OTARD Rule and we grant SBCA’s Petition to the extent described below.

II. BACKGROUND

A. OVER-THE-AIR RECEPTION DEVICES RULE

2. Subject to certain exceptions noted below, the OTARD Rule prohibits governmental and private restrictions to the extent that they impair the ability of antenna users to install, maintain, or use over-the-air-reception devices.⁴ It was adopted by the Commission to implement Section 207 of the Telecommunications Act of 1996 (the “Act”).⁵ This provision was intended to advance one of the primary objectives of the Communications Act: “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”⁶

3. The OTARD Rule applies to direct broadcast satellite antennas that are one meter or less

¹ 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 OTARD Rule. 47 CFR § 1.4000(e). On November 22, 2011, the Media Bureau issued a Public Notice seeking comment on SBCA’s Petition. *Media Bureau Seeks Comment on 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*, Public Notice, DA 11-1932, 26 FCC Rcd 16074 (MB 2012). Comments were filed by the City of Philadelphia, Pennsylvania, DIRECTV, Inc. (“DIRECTV”) and DISH Network L.L.C. (“DISH”), City of Boston, Massachusetts (“Boston”), City of Baltimore, Maryland (“Baltimore”), City of Los Angeles, California (“Los Angeles”), the States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors, Inc. (“SCAN”), National Satellite, Inc. (“National Satellite”), DirectSat USA (“DirectSat”), and joint comments were filed by the National Association of Telecommunications Officers and Advisors, the National Association of Counties, the National League of Cities, and the United States Conference of Mayors (“NATOA”).

² Response of the City of Philadelphia to the Petition for Declaratory Ruling, at 2 (Dec. 22, 2011) (“Philadelphia Response”).

³ Ordinance, Amending Title 14 of the Philadelphia Code, § PM-304.3.1(a) (“Ordinance”). The term television access providers and installers is not defined in the Ordinance, or in any provision of the Philadelphia Code.

⁴ 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*, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 11 FCC Rcd 19276 (1996) (“OTARD Report and Order”), recon. granted in part and denied in part, 13 FCC Rcd 18962 (1998) (“Order on Reconsideration”); *Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services*, Second Report and Order, 13 FCC Rcd 23874 (1998) (“Second Report and Order”).

⁵ 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).

⁶ Communications Act of 1934, § 1 as amended, 47 U.S.C. § 151.

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 services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services; and antennas designed to receive television broadcast signals.⁷ The OTARD Rule also applies to antennas used to receive fixed wireless or broadband Internet signals.⁸ For the OTARD 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.⁹ The OTARD Rule does not apply to restrictions on installations in common areas or elements.¹⁰ It 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.¹¹ There are exceptions to the rule for restrictions necessary to address clearly defined, legitimate safety or historic preservation issues, provided such restrictions are as narrowly tailored as possible, impose as little burden as necessary to achieve the foregoing objectives, and apply in a nondiscriminatory manner throughout the regulated area.¹²

4. The OTARD 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.¹³ It places the burden of demonstrating that a challenged restriction complies with the OTARD Rule on the party seeking to impose the restriction.¹⁴

B. THE ORDINANCE

5. On November 2, 2011, the City of Philadelphia enacted amendments to multiple provisions of the City’s Code to restrict placement, installation, and maintenance of certain satellite dishes and antennas (“the Ordinance”).¹⁵ The Ordinance restricts the placement of satellite dish antennas and antennas for fixed wireless signals and local television broadcast signals (collectively, “antennas”) by limiting the placement of antennas between the façade of a single-family or multi-family dwelling and the street. In the case of single-family dwellings, the Ordinance requires that a location other than between the façade of a building and the street must be used for antenna installation, provided this causes no material delay or material reduction in signal reception and imposes no significant additional cost on the

⁷ 47 CFR § 1.4000(a).

⁸ *Id.* § 1.4000(a)(1)(ii)(A). In October, 2000, the Commission amended the OTARD 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*, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, 15 FCC Rcd 22983 (2000).

⁹ 47 CFR § 1.4000(a)(1).

¹⁰ *Second Report and Order*, 13 FCC Rcd at 23891-907, paras. 33-62.

¹¹ 47 CFR § 1.4000(a)(3).

¹² *Id.* § 1.4000(b).

¹³ *Id.* § 1.4000(e).

¹⁴ *Id.* § 1.4000(g).

¹⁵ Specifically, the Ordinance amends Section PM-304.3.1 of Title 4, Chapter 3, Subcode PM (the Philadelphia Property Maintenance Code) of the Philadelphia Code, as well as Section 9-632 of Title 9, Chapter 9-600 of the Philadelphia Code.

owner or tenant.¹⁶ If the antenna is placed between the façade of a single-family dwelling and the street, the installer or television access provider must prepare a certification stating that “based on actual testing conducted at the site,” the antenna could not be placed in a location other than between the façade and street without a material delay, material reduction in signal reception, or significant additional cost.¹⁷

6. In the case of multi-family dwellings, including two-family dwellings, the Ordinance restricts placement of antennas between the façade and the street, except that an antenna is permitted between the façade of such a building and the street if it is wholly within a balcony or patio area that is under the exclusive use or control of the unit owner or tenant.¹⁸ If an antenna is placed between the façade and street, but not within a balcony or patio area, the television access provider or installer of the antenna must prepare a written certification stating that “no alternative location was available as required by § 9-632(3).”¹⁹ The antenna user must maintain a copy of the certification at his or her residence.²⁰

7. The Ordinance also requires television access providers or installers of existing antennas that are located on building façades to notify the City whether the antenna users “intend to continue to maintain” those antennas at their locations.²¹ The Ordinance requires television access providers or installers to remove any such antennas that are no longer in use.²² Additionally, any antenna placed on the façade of a building after enactment of the Ordinance must be painted to match the color of the building.²³ Finally, a television access provider or installer that violates the Ordinance is subject to penalties.²⁴ The City has not yet issued implementing regulations.²⁵

8. Petitioner, SBCA, is a national trade organization representing the interests of all segments of the consumer satellite industry, including manufacturers, distributors, installers, and service providers.²⁶ On November 8, 2011, SBCA filed a Petition for Declaratory Ruling seeking a determination that Philadelphia’s adoption of the Ordinance to restrict placement, installation, and maintenance of certain satellite dishes and antennas is preempted by the Commission’s OTARD Rule. On November 21, 2011, the Commission’s Media Bureau issued an acknowledgement letter in response to the Petition, which stayed enforcement of the Ordinance.²⁷

¹⁶ Ordinance Section 1 (amending Title 4 of the Philadelphia Code at § PM-304.3.1); Ordinance Section 2 (amending Title 9 of the Philadelphia Code at § 9-632).

¹⁷ Ordinance, § 9-632(4).

¹⁸ Ordinance, §§ PM-304.3.1(b), 9-632(3).

¹⁹ Ordinance, § 9-632(4).

²⁰ Ordinance, § PM-304.3.1(d).

²¹ Ordinance, § 9-632(5). Presumably, an antenna user that does not “intend to maintain” an antenna is not using it. Section 9-632(6) of the Ordinance requires the removal of such an antenna.

²² Ordinance, § 9-632(6).

²³ Ordinance, § 9-632(7).

²⁴ Ordinance, § 9-632(8).

²⁵ Philadelphia Response at 30-31; Reply Comments of the City of Los Angeles, California, at 2-3 (Jan. 6, 2012) (“Los Angeles Reply”); Comments of the City of Boston, Massachusetts, at 5-7 (Dec. 22, 2011) (“Boston Comments”); Response of the National Association of Telecommunications Officers and Advisors, the National Association of Counties, the National League of Cities, and the United States Conference of Mayors, at 2-3 (Dec. 21, 2011) (“NATOA Response”).

²⁶ Satellite Broadcasting & Communications Association, Petition for Declaratory Ruling, at 1 (Nov. 8, 2011) (“Petition”).

²⁷ See 47 CFR § 1.4000(a)(4).

III. DISCUSSION

A. PROCEDURAL ISSUES

9. SBCA²⁸ challenges specific provisions of the Ordinance as being prohibited under the OTARD Rule.²⁹ Before proceeding with the arguments on the merits, however, we address the parties' procedural arguments. We find (i) that the Petition is not premature and is properly reviewed now rather than waiting until implementing regulations are issued; and (ii) that ruling on the Ordinance prior to the City's adoption of implementing regulations does not impermissibly interfere with the City of Philadelphia's local police powers.

1. Ripeness

10. We reject the arguments by Philadelphia, Boston, Los Angeles, and NATOA that the Petition is premature because Philadelphia has not yet issued implementing regulations or enforced the Ordinance and therefore the Commission should defer ruling on the Petition until such regulations are issued.³⁰ Philadelphia states that upon the issuance of an order deferring consideration of the Petition, it would terminate its suspension of enforcement and begin enforcing the Ordinance.³¹ Philadelphia argues that any review of the Ordinance at this time would be in the abstract because the Commission-imposed stay has prevented any opportunity for the Ordinance to be applied to individual fact-specific inquiries and SBCA's concerns may be ameliorated by the regulations written to implement the Ordinance.³² Philadelphia states that even DIRECTV and DISH acknowledge that the OTARD Rule requires a fact-specific inquiry, which supports the argument for deferral of a ruling on the Ordinance so that the Commission can evaluate individual issues that might arise in the Ordinance's application.³³

11. In response, SBCA, DIRECTV, and DISH argue that the Commission should not defer

²⁸ Boston has asserted that the Petition may be "premature" because it was brought by a "commercial interest" – SBCA – rather than an individual "impacted viewer." Boston Comments at 6-8. To the extent that Boston is challenging SBCA's standing to file the Petition, its challenge is misplaced because SBCA is an organization representing the satellite industry and it is long settled that service providers such as the members of SBCA have standing to challenge a city's ordinance restricting the placement of antennas covered by the OTARD Rule. See *OTARD Report and Order*, 11 FCC Rcd at 19308, para. 53 ("Individual antenna users or service providers may seek a determination that a restriction is prohibited by our rule."); *In the Matter of Star Lambert and Satellite Broadcasting and Communications Association of America*, Memorandum Opinion and Order, 12 FCC Rcd 10455 (CSB 1997) ("*Star Lambert*").

²⁹ Petition at 5-6.

³⁰ Philadelphia Response at 30-31; Philadelphia Feb. 17, 2012 *Ex Parte* Filing at 4; NATOA Response at 2-3. See also Los Angeles Reply at 5 ("Certainly at this early stage—when the City has not implemented or enforced the Ordinance—the Commission should defer to Philadelphia's commitment to read and enforce the Ordinance in accordance with federal law."); Boston Comments at 7-9 and n.11 (arguing that the Commission should avoid facial challenges to local ordinances and noting that "Philadelphia has never been given the chance to construe the [O]rdinance to avoid a conflict of laws").

³¹ Philadelphia Response at 31, n.41. The OTARD Rule has a specific injunctive provision that prevents the enforcement of challenged restrictions prior to the completion of the Commission's review unless the restrictions involve safety or historic preservation. 47 CFR § 1.4000(a)(4). Letter from John B. Norton, Deputy Division Chief, Media Bureau, to Lisa Volpe McCabe, Director, Public Policy & Outreach, Satellite Broadcasting & Communications Association (MB Nov. 21, 2011).

³² Philadelphia Response at 31 (citing *Yale Bcstg Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir.), cert. denied, 414 U.S. 914 (1973) (upholding Commission decision not to clarify certain requirements because it was consistent with the Commission's "long standing policy of refusing to issue interpretative rulings or advisory opinions whenever the critical facts are not explicitly stated or there is a possibility that subsequent events will alter them.")); Reply of the City of Philadelphia, at 4 (Jan. 6, 2012) ("Philadelphia Reply").

³³ Philadelphia Reply at 4.

ruling on the Petition because the Ordinance as it is written conflicts with the OTARD Rule and the Commission should not rely on the City's promise that the implementing regulations will comply with the rule.³⁴ DIRECTV and DISH argue that the Commission was directed by Congress to preempt enforcement of state or local statutes and regulations that impair television reception.³⁵ According to DIRECTV and DISH, the plain language of the OTARD Rule places the burden on the municipality – Philadelphia – to defend its Ordinance as it is written, and not as it “might eventually choose to enforce it in individual cases.”³⁶ Further, they argue that Boston's assertion that the Commission should decline to rule on facial challenges has already been rejected by the Commission in its *Star Lambert* decision and that the Commission should not defer ruling on the Ordinance in its current form.³⁷

12. The OTARD Rule provides that parties may petition the Commission or a court of competent jurisdiction to determine if a restriction is permissible or prohibited by the OTARD Rule.³⁸ The OTARD Rule does not require that such parties postpone seeking relief until the restrictions are enforced against an antenna user, nor do they require that parties wait until implementing regulations are adopted. Where we can conclude that any portion of the Ordinance, on its face, is inconsistent with or conflicts with the OTARD Rule, no purpose is served by delaying our review of the Ordinance until such actions are taken. The Commission has broad discretion to “fashion [its] own rules of procedure and to pursue methods of inquiry capable of permitting [it] to discharge [its] multitudinous duties,”³⁹ pursuant to its statutory authority to “conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.”⁴⁰ Although Philadelphia states that it intends to limit or clarify the application of its Ordinance by adopting implementing regulations that will comply with the OTARD Rule, or by declining to enforce provisions that are unlawful, and the facts now before us might be altered by these subsequent events,⁴¹ Philadelphia also seeks to implement and enforce the Ordinance before the Commission considers, on the merits, whether it complies with the OTARD Rule. In the interim, individual consumers are unlikely to know of Philadelphia's plans to construe and enforce the Ordinance to avoid specific outcomes. As a result, they may well be deterred from subscribing to satellite service based on the explicit requirements of the Ordinance, a result that would frustrate the purpose of promoting competition.⁴² Our ruling will advance the pro-competitive goal of the statute by providing guidance to industry, consumers, and local governmental units or other entities that wish to adopt

³⁴ Reply Comments of Satellite Broadcasting Communications Association in Support of the Petition for Declaratory Ruling, at 11 (Jan. 6, 2012) (“SBCA Reply”); Reply Comments of DIRECTV, Inc. and DISH Network L.L.C. in Support of Petition, at 3-6 (Jan. 6, 2012) (“DIRECTV/DISH Reply”).

³⁵ DIRECTV/DISH Reply at 4-5.

³⁶ *Id.*

³⁷ *Id.* at 3-6; *Star Lambert*, 12 FCC Rcd 10455 (granting the petition for declaratory ruling of SBCA and Star Lambert, owner of a subsidiary, Stargate Enterprises, which sold and installed direct-to-home satellite antennas, in their challenge of the City of Meade's ordinance restricting the placement of antennas covered by the OTARD Rule). In *Star Lambert*, the Cable Services Bureau concluded that review of Meade's ordinance was appropriate, even though it had been rescinded and replaced with a new ordinance, because review could provide “valuable guidance in the future to both local authorities and consumers.” *Star Lambert*, 12 FCC Rcd at 10463. The Bureau held that Meade's antenna restrictions violated the OTARD Rule by requiring antenna users to obtain a written permit and the payment of a fee before installing an antenna. *Id.* at 10464.

³⁸ 47 CFR § 1.4000(e).

³⁹ *FCC v. Schreiber*, 381 U.S. 279, 290 (1965).

⁴⁰ 47 U.S.C. § 154(j). See also *Public Utility Commission of Texas*, Memorandum Opinion and Order, 13 FCC Rcd 3460, 3530, para. 147 (1997), review denied sub nom. *City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999) (“*Public Utility Commission of Texas*”).

⁴¹ See *Yale Bcstg*, 478 F.2d at 602.

⁴² See SBCA Reply at 11; DIRECTV/DISH Reply at 7-8.

placement preferences. The terms of the Ordinance provide sufficient facts for this purpose.⁴³ The potentially negative competitive effect of allowing the Ordinance to go into effect pending implementation and enforcement further weighs in favor of ruling on the merits of the Petition now. Thus, it is appropriate for us to consider SBCA's Petition to determine whether the Ordinance is prohibited by the OTARD Rule without first removing the suspension of enforcement and awaiting the issuance of regulations or the initiation of enforcement efforts by the City.

2. Local Police Power and Deference

13. We also disagree with the argument by Philadelphia, Boston, Los Angeles, and NATOA that the Commission should defer ruling at this time because, otherwise, the Commission would be interfering with local police power protections that enable local governments to craft regulations that flexibly address community needs such as neighborhood appearance and quality of life.⁴⁴ This argument is essentially a challenge to the OTARD Rule, and Section 207, themselves. The Commission thoroughly addressed the issue of preemption of local regulations in the *OTARD Report and Order* and concluded that such action was well within its authority and consistent with the U.S. Constitution.⁴⁵ We need not re-address that issue here. Specifically, in the *OTARD Report and Order*, the Commission explained that in order "to promote competition among video service providers and to enhance consumer choice," it was necessary to preempt "governmental regulations and restrictions, and nongovernmental restrictions on property within the exclusive use or control of the viewer in which the viewer has a direct or indirect ownership interest."⁴⁶ The Commission created an exemption only for "regulations and restrictions which are clearly and specifically designed to preserve safety or historic districts."⁴⁷ Consequently, unless regulations and restrictions come under the safety or historic exemption, they are subject to preemption. As explained below, these exemptions do not apply in this case and the Ordinance thus is subject to preemption as impairing installation, maintenance, or use of covered reception facilities.

14. In addition, we reject arguments that we should allow Philadelphia to implement the Ordinance by adopting regulations and enforcing the Ordinance before we review it, based on the Commission's decision in the *Public Utility Commission of Texas*.⁴⁸ In that case, which did not involve the OTARD Rule, the Commission preempted certain provisions of a state statute found to be in conflict with a federal requirement pertaining to telecommunications companies' right of access to previously

⁴³ See *Yale Bcstg*, 478 F.2d at 602.

⁴⁴ Philadelphia Reply at 9; Boston Comments at 5-7; Los Angeles Reply at 4-5; NATOA Response at 3-4.

⁴⁵ See *OTARD Report and Order* at 19282-84, paras. 9-12.

⁴⁶ *Id.* at 19316, para. 69.

⁴⁷ *Id.*

⁴⁸ *Public Utility Commission of Texas*, *supra* note 40; Los Angeles Reply at 4-5; Boston Comments at 6-7. Boston also argues that the OTARD Rule is fundamentally flawed because it invites facial challenges by imposing the burden of proof on the enforcing agency and rewarding the party bringing the challenge with an immediate victory in the form of a restraining order without requiring the petitioner to meet the traditional test for injunctive relief, and because there is no set time for the Commission to act. Boston Comments at 7-8. Boston claims that, if the Commission grants the Petition, the injunctive relief and burden of proof aspects of the OTARD Rule "might be seen as a weapon in the battle between the Dish and cable industries for urban customers" and urges the Commission to "nip this problem in the bud" by "sending a clear signal" to industry and cities that the Commission will not rule on facial challenges in the absence of "as-applied problems." *Id.* at 8-9. To the extent Boston objects to the injunctive relief and burden of proof prescribed by the OTARD Rule, Boston's argument is a challenge to the OTARD Rule itself and is beyond the scope of the Petition for Declaratory Ruling. In adopting the OTARD Rule, the Commission stated very clearly that a challenged restriction cannot be enforced until the Commission or a court of competent jurisdiction issues a ruling that the restriction is not preempted, unless the enforcing authority sought a determination that the restriction was permitted under the safety or historic preservation exceptions. *OTARD Report and Order*, 11 FCC Rcd at 19308, para 53.

closed telecommunications markets.⁴⁹ With regard to certain other provisions at issue in the case, the Commission found that the Texas Public Utilities Commission had interpreted those provisions in ways that avoided or minimized conflict with the Communications Act and concluded that it would not preempt them absent changed circumstances resulting in an interpretation that conflicts with federal law.⁵⁰ Boston and Los Angeles argue that the Commission's decision in the *Public Utility Commission of Texas* case supports the contention that Philadelphia's commitment to interpret and implement its Ordinance in accordance with the OTARD Rule is a sufficient justification for the Commission to defer ruling prior to the adoption of regulations.⁵¹ We do not agree. First, *Public Utility Commission of Texas* involved an entirely different regulatory scheme, one that directed the Commission to preempt state law only "to the extent necessary" to correct a statutory violation.⁵² Section 207, on the other hand, contains no such language; rather, it directs the Commission to "prohibit restrictions" that impair a viewer's ability to receive video programming using covered antennas.⁵³ Further, as explained above, we are reviewing the Philadelphia Ordinance in advance of the City's adoption of implementing regulations because some provisions are, on their face, inconsistent with the OTARD Rule and because consumers may be deterred from installing antennas based on the explicit requirements of the Ordinance.⁵⁴ We will review all provisions of the Ordinance that have been challenged because doing so will provide guidance to the City as well as other municipalities, associations, industry, and consumers.

B. PUBLIC SAFETY EXCEPTION

15. We find that the Philadelphia Ordinance does not satisfy the requirements for a public safety exception under the OTARD Rule. The OTARD Rule provides exceptions for restrictions that are necessary to address valid and clearly articulated safety 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.⁵⁵ The OTARD Rule is very specific regarding the circumstances under which the safety exception applies, and general statements of safety and welfare interests are not sufficient to qualify for an exception.⁵⁶ Namely, a restriction based on safety concerns must be necessary to accomplish a clearly defined, legitimate safety objective that is either stated in the text, preamble, or legislative history of the restriction or described in a document readily available to antenna users, and it must apply in a non-discriminatory manner to other appurtenances, devices, or fixtures that are

⁴⁹ *Public Utility Commission of Texas*, 13 FCC Rcd at 3465.

⁵⁰ *Id.* at 3464-67. It appears that, in some cases, the Commission also may have relied on interpretations proffered by the Texas Public Utility Commission in the course of the Commission proceeding. *Id.* at 3465 ("Specifically, we do not preempt when the Texas Commission, by its representations in the record of this proceeding or its actions in state proceedings, has interpreted or applied PURA95 in a manner that does not conflict with the federal scheme.").

⁵¹ Los Angeles Reply at 4-5; Boston Comments at 6-7. In this regard, Boston asks us to presume that Philadelphia's implementing regulations and enforcement activities will conform with the requirements of OTARD. Boston Comments at 5-6. Boston's premise, however, is that the City's Ordinance on its face complies with the law. *Id.* at 7. As discussed below, we find that it is not the case.

⁵² *Public Utility Commission of Texas*, 13 FCC Rcd at 3465 (quoting 47 U.S.C. § 253(d)).

⁵³ Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) § 207.

⁵⁴ *See supra* para. 12.

⁵⁵ *Id.* § 1.4000(b). *See, e.g., In the Matter of William Culver*, Declaratory Ruling, 24 FCC Rcd 9522, 9523, para. 3 (MB 2009) ("*Culver*").

⁵⁶ *In the Matter of Victor Frankfurt*, Memorandum Opinion and Order, 16 FCC Rcd 2875, 2885, para. 29 (CSB 2001), *review denied*, 18 FCC Rcd 18431 (2003) ("*Frankfurt*") ("The definition must set forth the specific type of safety concern that the restriction is intended to address. A general, passing statement that the restriction at issue serves a safety objective will not satisfy this element of the Rule, for a 'general statement of safety interests is so broad and ill-defined that it constitutes little more than a pro forma recitation.'") (footnotes and citations omitted).

comparable in size and weight and pose a similar or greater safety risk.⁵⁷

16. Philadelphia argues that the exception for a clearly defined safety objective applies to its antenna restrictions because devices attached to a façade overlooking a public right of way “necessarily” raise a public safety concern.⁵⁸ Philadelphia also contends that “the safety of the public was one of the motivations for this law,” and it relies on wording in one of the Ordinance’s preamble statements – “maintaining and improving property values, and preserving and protecting the public’s health, safety, and welfare”⁵⁹ – to satisfy the OTARD Rule’s requirement for a clearly defined safety objective.⁶⁰ Philadelphia states that it “believe[s] the statements in the cited preamble are a clearly defined safety objective under Section 1.4000(b)(1) and meet the other requirements for this exception.”⁶¹

17. In response, SBCA, DIRECTV, and DISH argue that the OTARD Rule itself and Commission precedent require that safety objectives be clearly defined and stated in the text, preamble, or legislative history of the restriction or described as applying to that restriction in a document that is readily available to antenna users.⁶² These parties argue that Philadelphia’s Ordinance fails to satisfy this standard by failing to clearly define the safety objective.⁶³ SBCA also argues that the Ordinance applies broadly to all antennas placed between a building façade and the street, even those that would pose no harm to public safety because of their location (*e.g.*, antennas placed above a private garden or balcony), and that the City has provided no evidence that satellite dishes installed on street-facing façades have resulted in any injuries or damage.⁶⁴ SBCA, DIRECTV, and DISH argue that the only objective of the Ordinance is aesthetics, which cannot justify restrictions on antenna placement.⁶⁵ Further, they point out that the Ordinance focuses exclusively on satellite dishes and antennas, but does not address the safety of other appurtenances that may extend into the public right of way, and thus does not apply in a nondiscriminatory manner as required by the OTARD Rule.⁶⁶

18. We find that Philadelphia has failed to properly articulate a clearly defined, legitimate basis for a public safety exception under the OTARD Rule. Although the Ordinance’s preamble broadly refers to “preserving and protecting the public’s health, safety, and welfare,” the Ordinance fails to identify any specific public safety concerns that the law is meant to address. The City itself admits that the Ordinance was not based on a specific safety concern, but rather seeks to address broader public

⁵⁷ 47 CFR § 1.4000(b)(1). The OTARD Rule also includes a historic preservation exception. *Id.* § 1.4000(b)(2). Although Philadelphia generally states that the Ordinance was motivated by concerns for historical preservation and protecting public safety, the City “do[es] not contend” that that the Ordinance comes within the historic preservation exception set forth in the OTARD Rule. Philadelphia Response at 3. Thus, there is no need to respond to the argument made by SBCA, DIRECTV, and DISH that the Ordinance cannot satisfy the historic preservation exception because the City has not alleged that the restrictions are necessary to preserve an historic district, site, building, structure, or object included in, or eligible for inclusion on, the National Register of Historic Places. Petition at 8-9; Comments of DIRECTV, Inc. and DISH Network L.L.C. in Support of Petition, at 9-10 (Dec. 22, 2011) (“DIRECTV/DISH Comments”).

⁵⁸ Philadelphia Response at 3.

⁵⁹ Ordinance, § PM-304.3.1(a) (clauses 4 and 5).

⁶⁰ Philadelphia Response at 3-4.

⁶¹ *Id.* at 3.

⁶² See Petition at 7-8; SBCA Reply at 17-19; DIRECTV/DISH Comments at 9-11.

⁶³ *Id.*

⁶⁴ SBCA Reply at 18.

⁶⁵ Petition at 10; SBCA Reply at 18-19; DIRECTV/DISH Comments at 11; DIRECTV/DISH Reply at 1.

⁶⁶ SBCA Reply at 18; DIRECTV/DISH Comments at 11.

welfare concerns, including neighborhood aesthetics and quality of life.⁶⁷ In *Frankfurt*, the Bureau held that the association failed to articulate a clearly defined, legitimate safety objective for its prior approval requirement.⁶⁸ The Philadelphia Ordinance, like the restriction in *Frankfurt*, is a “general statement of safety that fails to set forth the specific safety objectives.”⁶⁹ Absent a clearly articulated and narrowly drawn safety issue, we find that the City’s Ordinance fails to satisfy the OTARD Rule’s safety exception.

C. IMPAIRMENT OF INSTALLATION, MAINTENANCE, OR USE

19. We find that the specific provisions of the Ordinance adopted by the City set forth below impair the installation, maintenance, or use of antennas protected under the OTARD Rule. The OTARD Rule permits associations and municipalities to adopt placement preferences for preferred locations of antennas provided that the placement preference does not impair the installation, maintenance, or use of a covered antenna.⁷⁰ SBCA alleges that the Ordinance impairs the installation, maintenance, or use of an antenna by:

- 1) prohibiting a property owner, tenant, television access provider or installer from installing an antenna between the façade of a multi-family dwelling and the street if an alternative location is available, unless the antenna is installed within a balcony or patio area;
- 2) prohibiting a property owner, tenant, or television access provider or installer from installing an antenna between the façade of a single-family dwelling and the street if an alternative location is available, unless that alternative location will involve the imposition of “material” delay, “material” reduction in signal quality, or “significant” additional cost;
- 3) requiring a television access provider or installer to provide a signed certification based on actual testing conducted at the site that an antenna cannot be placed in a location other than between the façade of a single-family building and the street without a “material” delay, “material” reduction in signal reception, or “significant” additional cost, or cannot be placed in a location other than between the façade of a multi-family building and the street because there is no alternative location available;
- 4) requiring a television access provider or installer to register any existing satellite dish or antenna that is located between the façade of a building and a street with the Philadelphia Department of Licenses and Inspections, to notify the Department whether the user of such antenna intends to maintain the device, and to remove any of its previously installed antennas that are no longer in service;
- 5) requiring the painting of any existing satellite dish or antenna that is installed between the façade of a building and a street after the effective date of the Ordinance to match the color of the building façade; and
- 6) assessing penalties against television access providers and installers for violating the Ordinance.

Philadelphia argues that, with respect to each allegation, the Ordinance does not deprive viewers of their option to choose satellite service, nor does it impair the installation, maintenance, or use of covered

⁶⁷ Philadelphia Reply at 8 (conceding that the Ordinance does not seek “to address a specific concern about satellite dishes’ effect on public safety,” but instead “seeks to address a broader public welfare concern spanning not just public safety . . . but also neighborhood appearance and quality of life”).

⁶⁸ *Frankfurt*, 16 FCC Rcd 2875, 2886, para. 32. See also *id.* 18 FCC Rcd at 18433, para. 8 (“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.”).

⁶⁹ *Frankfurt*, 16 FCC Rcd at 2885, para. 30.

⁷⁰ See *Culver*, 24 FCC Rcd at 9525, para. 10.

reception devices.⁷¹ We address each of the issues raised by SBCA in turn and conclude that each constitutes a violation of the OTARD Rule to the extent discussed below.

1. Multi-Family Buildings

20. We find that Sections PM-304.3.1(b) and 9-632(3) of the Ordinance, which restrict the placement of antennas between the street-facing facades of multi-family buildings and the street, violate the OTARD Rule because they (1) prohibit the placement of antennas in areas even within the exclusive control of the antenna user, and (2) do not limit placement restrictions to those situations where the user will not incur unreasonable delay or unreasonable costs, or will be able to receive an acceptable quality signal.⁷²

21. Section PM-304.3.1(b) provides that “[w]here an alternative location is available, including but not limited to a roof, rear yard or façade, or side yard or façade, no property owner or tenant in a multiple-family or two-family dwelling shall place or permit the placement of a satellite dish or antenna between the façade of the building and the street, unless the device is wholly within a balcony or patio area that is under the exclusive use or control of the unit owner or tenant.”⁷³ Similarly, Section 9-632(3), which applies to television access providers and installers, provides that “[w]here an alternative location is available, including but not limited to a roof, rear yard or façade, or side yard or façade, no television access provider or installer shall place or install a satellite dish or antenna between the façade of a multiple-family or two-family dwelling and the street, unless the device is wholly within a balcony or patio area that is under the exclusive use or control of the unit owner or tenant.”⁷⁴

22. SBCA, DIRECTV, and DISH contend that these provisions flatly prohibit all antenna users in multi-family dwellings from installing an antenna between the façade and street, unless the user has a street-facing balcony or patio. They note that this prohibition applies even if a location between the façade and street is within the exclusive use or control of the antenna user.⁷⁵ The parties argue that this placement limitation is invalid under the OTARD Rule because it incorrectly assumes that the front façade of a multi-family building is categorically a common area, with the exception of balconies and patios.⁷⁶ According to SBCA, DIRECTV, and DISH, Commission precedent requires a factual analysis of individual properties to determine the “exclusive use” areas of such properties, which may be areas other than balconies and patios.⁷⁷ This analysis involves a fact-intensive inquiry of the individual circumstances of each building or community, *i.e.*, review of the individual deeds and leases applicable to the buildings and their residents to determine whether a tenant or owner in a multi-family building has exclusive use or control of particular parts of the property.⁷⁸ SBCA, DIRECTV, and DISH emphasize that the Commission has previously ruled that, based on individual facts and circumstances, features such as exterior walls and roofs are not always common areas and may be within the exclusive use and control of one or more residents.⁷⁹

23. Further, SBCA notes that, unless the antenna can wholly be installed within a street-

⁷¹ Philadelphia Response at 11-12.

⁷² Ordinance, §§ PM-304.3.1(b), 9-632(3). These sections of the Ordinance also apply to two-family dwellings, which we include within the term “multi-family” for purposes of this Declaratory Ruling.

⁷³ Ordinance, § PM-304.3.1(b).

⁷⁴ Ordinance, § 9-632(3).

⁷⁵ Petition at 13; DIRECTV/DISH Comments at 4-6.

⁷⁶ Petition at 14-18; DIRECTV/DISH Comments at 4-6. *See also* SBCA Reply at 9-10.

⁷⁷ Petition at 14-15; DIRECTV/DISH Comments at 4-6.

⁷⁸ *Id.*

⁷⁹ *Id.*

facing balcony or patio,⁸⁰ the Ordinance requires installation in an available alternative location, regardless of whether this may cause an unreasonable delay or increase in installation costs or preclude reception of an acceptable quality signal.⁸¹ According to SBCA, because the placement preference for multi-family dwellings contains no exception for unreasonable delay or unreasonable cost increase or the need to receive an acceptable quality signal, it is invalid under the OTARD Rule.⁸²

24. In response, the City argues that its prohibition on antenna installation in multi-family dwellings is appropriate because “generally” a balcony or patio attached to the unit is an exclusive use area, whereas the exterior walls of such buildings “typically” or “[a]lmost invariably” are common areas not subject to the OTARD Rule.⁸³ Based on this analysis, the City concludes that “the OTARD Rule simply does not apply to such common or restricted areas, and the City may restrict antenna placement there without regard to the provisos of the Rule regarding impairment of installation, maintenance or use of the antenna.”⁸⁴ The City contends that the multi-family building provisions need not be reviewed now because the Ordinance has not yet been implemented or enforced and “that special cases of exclusive use, if properly documented, will be accommodated in pending regulations.”⁸⁵ The City states further that implementing regulations will clarify that a tenant or unit owner in a multi-family building will be allowed to install an antenna on any portion of the property that is under the user’s exclusive use or control, provided the antenna user provides proper documentation showing that an area that the City would ordinarily presume is a common area is actually under a user’s exclusive use or control.⁸⁶ Thus, argues the City, the Ordinance, as implemented and enforced, will not conflict with the OTARD Rule.⁸⁷

25. We find that the provisions of the Ordinance applicable to multi-family dwellings violate the OTARD Rule, which prohibits restrictions that impair installation, maintenance, or use of a satellite dish or antenna 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.”⁸⁸ Whether an area is within the exclusive use or control of an owner or leaseholder is a question of fact to be determined based upon a

⁸⁰ SBCA also argues that the Ordinance requirement that a satellite dish or antenna must be “wholly within” the balcony or patio of an antenna user in a multi-family building constitutes a screening requirement. Petition at 13. The Commission has found that requiring satellite dishes or antennas to be screened or camouflaged to make them less visible is permissible only if there are exceptions to the requirement in situations where it would unreasonably delay or unreasonably increase the cost of installation, maintenance, or use of the antenna, or preclude reception of an acceptable quality signal. See *In the Matter of CS Wireless Systems, Inc. d/b/a OmniVision of San Antonio*, Declaratory Ruling, 13 FCC Rcd 4826, 4832, para. 18 (CSB 1997); *In the Matter of Michael J. MacDonald*, Memorandum Opinion and Order, 13 FCC Rcd 4844, para. 31 (CSB 1997) (“*MacDonald*”). We find the record inconclusive as to whether the requirement in the Ordinance to place a dish or antenna “wholly within” the balcony or patio is intended to make the dish or antenna less visible and is thus akin to a screening requirement. However, the requirement violates the OTARD Rule in any event because it could prohibit the placement of satellite dishes or antennas in areas that are within an antenna user’s area of exclusive use, e.g., attached to a patio fence or balcony railing, regardless of whether this may cause an unreasonable delay or increase in installation costs or preclude reception of an acceptable quality signal.

⁸¹ Petition at 12-13.

⁸² *Id.* See also DIRECTV/DISH Reply at 11.

⁸³ See Philadelphia Response at 21-25.

⁸⁴ *Id.* at 22.

⁸⁵ Philadelphia Reply at 3-4.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ 47 CFR § 1.4000(a)(1).

review of the ownership or leasehold documents.⁸⁹ Sections PM-304.3.1(b) and 9-632(3) of the Ordinance, while permitting the placement of an antenna on a street-facing balcony or patio of a multi-family building, would categorically bar the installation of antennas on all other areas between the façade of the building and the street, without regard to whether those are areas of exclusive use. As the Ordinance is written, even areas of the front façade that are within the exclusive use or control of the antenna user are subject to the prohibition in the Ordinance.

26. Moreover, this restriction violates the OTARD Rule because it would apply to antenna installations in areas of exclusive use regardless of whether it would unreasonably delay or unreasonably increase the cost of antenna installation, maintenance, or use, or whether it would preclude reception of an acceptable quality signal.⁹⁰ The City may establish clearly delineated placement preferences only if installation in the preferred location does not impose such unreasonable delays or costs, or preclude reception of an acceptable quality signal for an antenna subject to the OTARD Rule.⁹¹ In *MacDonald*, the Bureau held that a placement preference could not be enforced because, although it provided an exception if the preferred placement would impair signal reception, it did not provide an exception where preferred placement would impose unreasonable delay or expense.⁹² The Bureau further indicated that “[w]here prospective antenna users cannot receive acceptable signals in the locations preferred by a community association, they have the same rights under the Rule to place their antennas in alternative locations as other users have to place their antennas in preferred locations – that is, *an absolute right of placement absent safety or historic considerations.*”⁹³ In *Culver*, the Bureau held that the association’s placement preference was invalid because the association failed to rebut the petitioner’s claim that he could not receive an acceptable quality signal in the association’s preferred location and that installation would be more costly in the preferred location.⁹⁴ In this case, Philadelphia’s placement preference includes no exceptions that would ensure that the preference would not impair signal reception or impose unreasonable delay or expense for antennas that are installed in exclusive use areas.

2. Single-Family Buildings

27. We find that Sections PM 304.3.1(c) and 9.632(2), which restrict the placement of satellite dishes and antennas between the facades of single-family buildings and the street, violate the OTARD Rule.⁹⁵ Specifically, as discussed below, we agree with SBCA that the provisions contain impairment standards that do not comply with the OTARD Rule.

⁸⁹ *In the Matter of Craig Wirth*, Declaratory Ruling, 25 FCC Rcd 15583, 15587, para. 12 (MB 2010); *In the Matter of James S. Bannister*, Declaratory Ruling, 24 FCC Rcd 9516, 9519-20, para. 9 (MB 2009).

⁹⁰ 47 CFR § 1.4000(a)(3).

⁹¹ *Culver*, 24 FCC Rcd at 9525, para. 10.

⁹² *MacDonald*, 13 FCC Rcd at 4853-54, para. 29. The Bureau went on to state that “the 1996 Act and the [OTARD] Rule require homeowner associations to enforce preferred placement provisions through methods that do not delay or hinder those who have a right to site their antennas at alternative locations.” *Id.* at 4854, para. 30.

⁹³ *Id.* at 4854, para. 30 (emphasis added). *See also Star Lambert*, 12 FCC Rcd at 10466, para. 26.

⁹⁴ *Culver*, 24 FCC Rcd at 9525, para. 11. The City, in its Response and its Reply, suggests several times that it will implement the Ordinance in a manner consistent with the OTARD Rule, regardless of the wording of the Ordinance itself. *See, e.g.*, Philadelphia Response at 22-23; Philadelphia Reply at 3-4. In its Response, the City submits a Declaration of Michael Maenner, Deputy Commissioner for the City of Philadelphia’s Department of Licenses and Inspections, in which Deputy Commissioner Maenner commits to implementing the Ordinance through the adoption of regulations that will be consistent with the OTARD Rule. *See* Philadelphia Response, Attach. 2. As we conclude above, however, we must address the specific terms of the Ordinance before us, not the intentions of those who will administer the Ordinance. *See supra* Section III.A.1. Those terms, on their face, are inconsistent with the OTARD Rule.

⁹⁵ *See* Petition at 18-20.

28. Section PM-304.3.1(c) provides that “[w]here an alternative location is available for placement of a satellite dish or antenna, with no material delay or material reduction in signal reception and at no significant additional cost to the owner or tenant (including but not limited to a roof, rear yard or façade, or side yard or façade), no property owner or tenant in a one-family dwelling shall place, install or maintain, or allow to be placed, installed or maintained, a satellite dish or antenna between the façade of a building and the street.”⁹⁶ In addition, Section 9-632(2), which applies to television access providers and installers, similarly states that “[w]here an alternative location is available for placement of a satellite dish or antenna, with no material delay or reduction in signal reception and at no significant additional cost to the owner or tenant (including but not limited to a roof, rear yard or façade, or side yard or façade), no television access provider or installer shall place or install a satellite dish or antenna between the façade of a one-family dwelling and the street.”⁹⁷

29. SBCA argues that the City of Philadelphia must demonstrate that the owner or tenant would receive an acceptable quality signal at the City’s preferred location and that installation at the preferred location would not impose unreasonable costs or delay before it can prohibit installation of an antenna between the façade of the building and street.⁹⁸ In response, the City acknowledges that it has the burden of demonstrating that the Ordinance complies with the OTARD Rule and does not impair the installation, maintenance, or use of reception devices, but argues that this burden “does not include, however, the far greater one that SBCA poses: that the City prove, in advance, that in any possible installation at any location in the City, the preferred alternate location will not impair the user’s reception.”⁹⁹ According to the City, it must demonstrate only that its placement preference can be implemented without impairment of installation, maintenance, or use as defined by the OTARD Rule.¹⁰⁰

30. The Bureau has held that a placement preference is permitted provided it does not impair the antenna user’s right to install, maintain, or use an antenna covered by the OTARD Rule.¹⁰¹ Thus, the City is permitted to establish a preference for placement of antennas on areas other than between the façade of the building and the street, as long as such restriction does not unreasonably delay or unreasonably increase the cost of installation, maintenance, or use of the antenna and does not prevent the antenna from receiving an acceptable quality signal.¹⁰²

31. However, although we find that the City is permitted to establish a placement preference, we find that the restrictions in Sections PM 304.3.1(c) and 9-632(2) are not compliant with the OTARD

⁹⁶ Ordinance, § PM-304.3.1(c).

⁹⁷ Ordinance, § 9-632(2).

⁹⁸ Petition at 19-20 (citing *In re Jay Lubliner and Deborah Galvin, Potomac, Maryland*, Memorandum Opinion and Order, 13 FCC Rcd 4834, 4840, para. 18 (CSB 1997), *app. for review denied*, 13 FCC Rcd 16107 (1998)). SBCA also argues that requiring an antenna user to determine whether installation at a location preferred by the City would cause a material delay, material reduction in signal reception, or significant additional cost “is burdensome in a manner that violates the OTARD Rule” because “it would require an unreasonable investment of time and expense to make the[se] determinations.” Petition at 20-21. *See also* SBCA Reply at 6-8. We believe these claims are more appropriately raised in the context of the certification requirement, and we address them in Section III.C.3, *infra*.

⁹⁹ Philadelphia Response at 14.

¹⁰⁰ *Id.* at 15.

¹⁰¹ *See, e.g., In the Matter of CS Wireless Systems, Inc. d/b/a OmniVision of San Antonio*, Declaratory Ruling, 13 FCC Rcd 4826, 4832, para. 18 (CSB 1997); *MacDonald*, 13 FCC Rcd at 4853-54, para. 29; *Culver*, 24 FCC Rcd at 9525, para. 10; *Shadow Wood*, 21 FCC Rcd 339, 342, para. 11 (MB 2006).

¹⁰² *See Culver*, 24 FCC Rcd at 9525, para. 10. Of course, if a permissible preferred placement restriction is enforced in a manner that creates an impairment, an antenna user would be able to challenge the specific application of the restriction, and the enforcing authority would bear the burden of proving that the restriction does not impair the installation, maintenance, or use of a covered antenna. *See Shadow Wood*, 21 FCC Rcd at 343, para. 13.

Rule because these provisions, as written, could permit restrictions on the placement of satellite dishes and antennas that would be impermissible under the OTARD Rule. In particular, these sections prohibit an antenna user or installer from placing an antenna between the façade of a single-family dwelling and the street if “an alternative location is available for placement of a satellite dish or antenna, with *no material delay or material reduction in signal reception* and at *no significant additional cost* to the owner or tenant.”¹⁰³ The OTARD Rule, on the other hand, defines impairment as an antenna placement that would *unreasonably delay* or prevent installation, maintenance, or use; *unreasonably increase the cost of* installation, maintenance, or use; or *preclude reception of an acceptable quality signal*.¹⁰⁴

32. Citing the Ordinance terms “material” delay and “material” reduction” in signal reception and “significant additional” cost, SBCA states that it is unclear whether the Ordinance intends to introduce a new and different standard for evaluating impairment, but asserts that the use of these terms could allow the City to apply the Ordinance in a manner more restrictive than the test set forth in the OTARD Rule.¹⁰⁵ In its reply comments, SBCA goes farther and contends that the City’s use of the terms “material” and “significant” were intended to establish “a different and clearly more heightened standard” than required by the OTARD Rule.¹⁰⁶ In particular, SBCA outlines three scenarios related to cable rate increases to demonstrate generally “that ‘significant’ requires a higher standard than ‘material’ and a much higher standard than ‘unreasonableness.’”¹⁰⁷ DIRECTV and DISH Network agree with SBCA that the City’s “decision to use words other than those in the rule itself could be read to suggest a different standard—one that would allow restrictions in more cases.”¹⁰⁸

33. In response, the City contends that the language used in the Ordinance “mirrors” the language in the OTARD Rule, and claims that the argument that the Ordinance could be applied in a more restrictive manner than the Commission intended is speculative because implementing regulations have not yet been adopted, much less applied.¹⁰⁹ According to the City, “the terms ‘material’ and ‘unreasonable’ are virtually identical in weight and meaning,” and the term “material reduction in signal reception” is “[i]f anything . . . *more* protective of signal quality than the OTARD Rule, since any material reduction in quality, even if the result is still an ‘acceptable’ signal, would excuse use of the alternative location.”¹¹⁰

34. We find that the Ordinance improperly relies on a standard for impairment that is inconsistent with the standard set forth in the OTARD Rule. Although the meanings of the terms used in the Ordinance are not clear, we are persuaded by SBCA’s arguments that the impairment standard in the

¹⁰³ Ordinance, §§ PM-304.3.1(c), 9-632(2).

¹⁰⁴ 47 CFR § 1.4000(a)(3).

¹⁰⁵ Petition at 22-23; SBCA Reply at 4-6.

¹⁰⁶ SBCA Reply at 4-8.

¹⁰⁷ In particular, SBCA gives three hypotheticals in which Comcast increases its cable rates for subscribers in Philadelphia to illustrate the difference between “material,” “significant,” and “unreasonable” standards. *See id.* at 5-6. In the first hypothetical, Comcast increases the cost of its programming by four percent, which SBCA argues would not be a material or significant increase in cost, but could be an unreasonable increase (*e.g.*, if no other pay TV provider was increasing its rates or if it more than doubled Comcast’s typical annual rate increase). *Id.* at 5. In the second hypothetical, Comcast increases the cost of its programming by eight to ten percent, which SBCA argues would likely be an unreasonable and material increase in cost, but would not be a significant increase because it amounts to only a few extra dollars per month for the average subscriber. *Id.* at 5-6. In the last hypothetical, Comcast increases the cost of its programming by 25 percent, which SBCA argues would be an unreasonable, material, and significant additional cost to subscribers. *Id.* at 6.

¹⁰⁸ DIRECTV/DISH Reply at 10.

¹⁰⁹ Philadelphia Response at 12-13.

¹¹⁰ *Id.* at 13 (emphasis in original).

Ordinance has the potential to be more burdensome to antenna owners than is permissible under the OTARD Rule and could permit restrictions on the placement of satellite dishes and antennas that would be impermissible under the OTARD Rule. In its implementing order, the Commission set forth specific language to define what constitutes an impairment covered by the OTARD Rule and interpreted each of these terms, “[r]ecognizing that effective implementation of our rule hinges on the clarity of our definition of impair.”¹¹¹ The Commission was clear that a regulation will be found to impair a viewer’s ability to receive video programming signals if it *unreasonably* delays or prevents antenna installation, maintenance, or use, and it gave examples of restrictions, such as certain procedural requirements, that would “‘prevent’ the viewer’s access to video programming signals as surely as outright prohibitions, by creating an extra hurdle for consumers to overcome.”¹¹² Similarly, the Commission specified that a regulation will be found to impair a viewer’s ability to receive video programming signals if it *unreasonably* increases the costs of installation, maintenance, or use of reception devices, and it explained that this standard should be interpreted in light of the cost of the equipment or services and the visual impact of the antenna.¹¹³ Finally, the Commission found that a regulation will be deemed to impair a viewer’s ability to receive video programming signals if it *precludes reception of an acceptable quality signal*, and it specified that under this criteria, “our rule would invalidate a requirement that an antenna be placed in a position where reception would be impossible or would be substantially degraded.”¹¹⁴ Whereas the Commission has an established body of law regarding the meaning of its impairment standard, it is not clear what the terms “material” or “significant” mean as those terms are used in the Ordinance. We find that including in the Ordinance language at variance with the protections afforded by the OTARD Rule could reduce such protections.¹¹⁵ Further, uncertainty regarding the scope of these standards could create a disincentive for consumers to subscribe to satellite service, thereby frustrating the purpose of the OTARD rule.¹¹⁶ For the reasons set forth above,¹¹⁷ we will not rely on the City’s assurances that it will interpret a “material” delay or cost increase as one that is “unreasonable,” or that it will interpret a signal reduced below an acceptable quality level to be a “material reduction in signal quality.”¹¹⁸ Under the OTARD Rule, if placement of an antenna in the City’s preferred locations would result in unreasonable delay or increase in cost, or would preclude reception of an acceptable quality signal, the antenna user has the right to place the antenna in a non-preferred location, but the Ordinance is inconsistent with this standard.¹¹⁹ Therefore, we find that Sections PM 304.3.1(c) and 9.632(2) as

¹¹¹ *OTARD Report and Order*, 11 FCC Rcd 19285-86, paras. 14, 17.

¹¹² *See id.* at 19286-87, para. 17. For example, the Commission stated that “requirements for permits and/or fees may provide a disincentive for potential consumers, if those requirements apply to one programming signal provider but not another.” *Id.*

¹¹³ *Id.* at 19287-88, paras. 18-19.

¹¹⁴ *Id.* at 19288, para. 20.

¹¹⁵ In response to Philadelphia’s claim that its signal reception standard is at least as favorable to consumers as the Commission’s standard, if not more favorable, *see supra* note 110 and accompanying text, the City may adopt a more favorable standard as long as it clearly incorporates the Commission’s standards as a minimum threshold in the Ordinance.

¹¹⁶ For example, if antenna installation is typically free to a subscriber, an increase in installation costs of \$5 or \$10 may be considered “unreasonable,” even though it may not be a “significant additional cost.” *See, e.g., Shadow Wood*, 21 FCC Rcd at 345, para. 21 (“Where a DBS provider offers a homeowner free installation, we would be hard-pressed to conclude that any fee would be reasonable because that fee effectively would negate the incentive of free installation.”).

¹¹⁷ *See supra* para. 12.

¹¹⁸ *See Philadelphia Response* at 13.

¹¹⁹ *See, e.g., MacDonald*, 13 FCC Rcd at 4853-54, para. 29; *In re Victor Frankfurt*, Memorandum Opinion and Order, 16 FCC Rcd 2875, 2891-92, para. 52.

currently formulated violate the OTARD Rule.¹²⁰

3. Certification

35. We find that the certification requirement in Section 9-632(4), which requires a television access provider or installer to provide a written certification before installing an antenna between the building façade and street, violates the OTARD Rule. We agree with SBCA that this certification requirement will impose unreasonable delays and unreasonable costs on the antenna user, either directly or through costs passed on to the user through the antenna installer.¹²¹

36. Section 9-632(4) of the Ordinance provides that “if the television access provider or installer ascertains, at the time of installation, that a satellite dish or antenna cannot be placed at a one-family dwelling in a location other than between the façade of a building and the street without a material delay, material reduction in signal reception or significant additional cost, or cannot be placed on a multiple-family or two-family dwelling in compliance with § 9-632(3) hereof, the provider or installer shall provide the user of the device with a signed statement certifying that, based on actual testing conducted at the site, the satellite dish or antenna cannot be placed in a location other than between the façade of the building and the street without a material delay, material reduction in signal reception or significant additional cost. In the case of a multiple-family or two-family dwelling, the certification shall state that no alternative location was available as required by § 9-632(3). A copy of the certification form shall be provided to the Department, and a copy shall be maintained at the office of the installer or provider.”¹²² In addition, the property owner or tenant is required to keep a copy of the certificate and produce it upon request by a City inspector.¹²³

37. SBCA argues that the certification requirement will result in unreasonable delays and unreasonable costs because the Ordinance requires “actual testing” at the property site, which involves an analysis to determine if there would be a “material reduction in signal reception” or “significant additional cost” if the antenna is installed in an area other than between the building façade and the street.¹²⁴ SBCA maintains that the requirement would impose burdensome costs that would not be incurred as part of a routine installation because installers will have to conduct multiple signal tests around the premises to rule out alternative locations and that some providers and installers may not have the capability to undertake signal testing as part of their routine installation procedures.¹²⁵ According to SBCA, these costs would likely be passed on to antenna users and would serve as a disincentive to potential DBS subscribers.¹²⁶ DirectSat, National Satellite, DIRECTV, and DISH agree with SBCA that

¹²⁰ Because we find that the sections of the Ordinance that regulate the placement of antennas on both multiple-family dwellings and single-family dwellings violate the OTARD Rule, we find it unnecessary to address SBCA’s argument that the Ordinance improperly discriminates between multiple-family and single-family dwellings because it exempts street-facing balconies and patios for the former, but not for the latter. *See* Petition at 23-24.

¹²¹ *Id.* at 24-28.

¹²² Ordinance, § 9-632(4).

¹²³ Ordinance, § PM-304.3.1(d).

¹²⁴ Petition at 24-26; SBCA Reply at 7. In addition, SBCA argues that these standards are ambiguous and that the Ordinance “gives no indication of whether any particular testing methodology or procedure would be treated by the City as sufficient to constitute ‘actual testing’ that produces accurate and reliable results.” Petition at 27.

¹²⁵ *See* Petition at 26; SBCA Reply at 7-8. According to SBCA, it may be necessary for installers to install temporary mounts to undertake signal strength tests, to schedule a second visit to install the dish, and, in some instances, they may need to rent a bucket truck and crane to access a non-street facing location, which would increase the costs of installation “exponentially.” *Id.* More specifically, SBCA alleges that “the cost of alternative installation could run anywhere from \$25 to \$275 for each satellite dish, and could skyrocket to \$750 per dish if bucket trucks and cranes are needed.” SBCA Reply at 7-8.

¹²⁶ Petition at 25-27.

the certification requirement is likely to cause unreasonable delays and costs in violation of the OTARD Rule.¹²⁷ In particular, DirectSat asserts that the certification requirement would require installation companies to do more work than a standard installation and would raise the costs of installation to account for employee training, additional labor, and mounting equipment, which would ultimately be borne by the satellite users.¹²⁸ Likewise, DIRECTV and DISH argue that the requirement to conduct actual testing for certification will increase installer costs by “up to hundreds of dollars per subscriber” and that these costs are likely to be passed on to the subscriber.¹²⁹

38. Further, DIRECTV and DISH contend that requiring certification and imposing penalties for noncompliance would constitute a pre-approval requirement of the type prohibited under *Star Lambert* and *MacDonald* even though installers would not have to submit the certification until after the antenna was actually installed.¹³⁰ They reject any promise by the City to apply the requirement flexibly, arguing that the requirement as it is written violates the OTARD Rule and Commission precedent by requiring a more onerous testing procedure than the standard “line-of-sight” test.¹³¹ Furthermore, DIRECTV and DISH argue that the provision makes no exception for self-installers if the antenna is installed between the façade of the building and the street in order to acquire an acceptable signal, and those individuals might have to hire a professional installer, incurring a cost the OTARD Rule was designed to prevent.¹³²

39. Philadelphia argues that the certification requirement is not an impairment because it involves a very simple statement, on a City-provided form, to ensure that alternate sites were considered prior to installing an antenna between the street and facade.¹³³ The City cites our decision in *MacDonald* in support of its argument that a certification requirement is reasonable.¹³⁴ According to the City, the “actual testing” requirement would not impair installation because it “will be applied as a flexible standard, requiring consideration of the preferred location,” and it is something that professional installers should do for any installation as a matter of course.¹³⁵ In later filings, the City asserts that the actual testing requirement in the Ordinance is nothing more than the current line-of-sight testing used by installers throughout the industry.¹³⁶ The City contends that any cost of compliance with the certification requirement is not likely to be unreasonable and it is a business decision whether the installers pass it on to the customers.¹³⁷ Further, Philadelphia argues that self-installers are exempt from the certification requirement and implementing regulations will clarify how the provision applies to self-installers.¹³⁸

¹²⁷ Comments of DirectSat USA in Support of Petition, at 5-6 (Jan. 6, 2012) (“DirectSat Comments”); Comments of National Satellite, Inc. in Support of Petition, at 3 (Jan. 6, 2012) (“National Satellite Comments”); DIRECTV/DISH Comments at 7-8.

¹²⁸ DirectSat Comments at 6.

¹²⁹ DIRECTV/DISH Comments at 7-8; DIRECTV/DISH Reply at 12.

¹³⁰ DIRECTV/DISH Reply at 11-12 (citing *Star Lambert*, 12 FCC Rcd 10455, and *MacDonald*, 13 FCC Rcd 4844).

¹³¹ *Id.* at 12. Professional installers currently use a hand held device to obtain an area where an acceptable quality signal can be received by the satellite dish. See Philadelphia Feb. 17, 2012 *Ex Parte* Filing, Declaration of David Herres at 3, para. 4.

¹³² DIRECTV/DISH Comments at 8. See also DIRECTV/DISH Reply at 13.

¹³³ Philadelphia Response at 16-17; Philadelphia Reply at 5.

¹³⁴ Philadelphia Response at 16.

¹³⁵ *Id.* at 18. See also Philadelphia Feb. 17, 2012 *Ex Parte* Filing.

¹³⁶ See Philadelphia March 5, 2012 *Ex Parte* Filing. See also Comments of the States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors, Inc., at 6 (Dec. 22, 2011).

¹³⁷ See Philadelphia Response at 17-19; Philadelphia Reply at 5-6.

¹³⁸ Philadelphia Reply at 6.

40. We find that the Ordinance’s “actual testing” requirement is ambiguous. The phrase “actual testing” is not defined in the Ordinance. However, Philadelphia asserts that the term refers to the current industry standard for determining placement of a satellite dish—“line-of-sight testing.”¹³⁹ To support its position, Philadelphia provided the declarations of two individuals familiar with the installation of satellite dishes.¹⁴⁰ However, these declarations do not explain or define the term “actual testing,” but only confirm that satellite installers use line-of-sight assessment as part of the installation process and procedures.¹⁴¹ SBCA contends that a literal interpretation of the term “actual testing” could mean that installers will have to conduct multiple signal tests around the premises to rule out alternative locations in a process that is more onerous than using line-of-sight to determine placement during an antenna installation.¹⁴² According to SBCA, “actual testing” could also be interpreted to require that the satellite dish be mounted before testing in each location, which could increase cost and delay the installation of satellite dishes.¹⁴³ Although Philadelphia asserts that its intent was to codify the current industry standard, we believe that Philadelphia’s use of the term “actual testing” rather than the industry standard “line-of-sight testing” creates ambiguity as to what type and extent of testing would satisfy the requirement.

41. Because the phrase “actual testing” is ambiguous, consumers and installers could reasonably interpret it to require more onerous procedures, as SBCA claims. Despite the City’s assertion that line-of-sight testing is all that is needed to satisfy the “actual testing” requirement, for purposes of the OTARD rule we take account of the plain language of the Ordinance. Consumers may hesitate to choose satellite service if they interpret the Ordinance to mandate more extensive and time-consuming testing and installations than those required for other types of video service providers. This, combined with the threat of penalties,¹⁴⁴ could “prevent” the installation of antennas, resulting in an impairment under the OTARD Rule.¹⁴⁵ The ambiguity is also likely to impair the installation, use, or maintenance of antennas by imposing unreasonable costs resulting from installers’ unwillingness to certify a location based on

¹³⁹ See Philadelphia March 5, 2012 *Ex Parte* Filing, Declaration of John Herkaler at 2, paras. 2-3; Philadelphia Feb. 17, 2012 *Ex Parte* Filing, Declaration of David Herres at 2-3, paras. 3-5. In his declaration, David Herres, a licensed master electrician and technical writer on the subject of installation and repair of communications equipment, explains: “Standard practice for competent installers is to survey the site for alternative locations that will provide acceptable reception. The installer will know the general direction a dish must face and will take into account the land, surrounding trees, and nearby buildings. Direct line of sight to the satellite is confirmed using an inclinometer and compass, standard instruments carried by professional installers.” Philadelphia Feb. 17, 2012 *Ex Parte* Filing, Declaration of David Herres at 2, para. 3.

¹⁴⁰ *Id.*

¹⁴¹ The declarations describe a four step installation process: 1) the installer initially determines the line-of-sight with the satellite to determine where the satellite dish should be placed; 2) the location is confirmed by testing with an inclinometer and compass; 3) the satellite dish is mounted; and 4) the satellite dish undergoes fine tuning with a signal strength meter. *Id.*

¹⁴² See Petition at 26; SBCA Reply at 7-8.

¹⁴³ See Petition at 26-28; SBCA Reply at 7.

¹⁴⁴ See *infra* note 203.

¹⁴⁵ See 47 CFR § 1.4000(a)(3)(i) (an impairment “[u]nreasonably delays or prevents installation, maintenance, or use” of antennas); *OTARD Report and Order*, 11 FCC Rcd at 19286-87 (antenna restrictions can “prevent” access to video programming “by creating an extra hurdle for consumers to overcome,” and this type of “impairment can impede a service provider’s ability to compete, since customers will ordinarily select a service less subject to uncertainty and procedural requirements.”). See also *Star Lambert*, 12 FCC Rcd at 10468 (“We believe that penalties of this magnitude are likely to deter installation. . . . [T]his provision imposes an unreasonable risk of financial penalty that impairs installation, maintenance and use of the antenna because the mere prospect of a continuing \$500 per day fine may prevent antenna installation altogether.”).

existing line-of-sight practices due to the risk of penalties.

42. As the Bureau stated in *Star Lambert*, “[t]he Act and the [OTARD] Rule require the City to enforce its preferred placement provisions through methods that do not burden those who have a right to site their antennas at alternative locations.”¹⁴⁶ Even in instances where antenna users have a right under the OTARD Rule to place their antenna between the building façade and the street, Philadelphia’s Ordinance requires the completion of a written certification that there would be a “material delay,” “material reduction in signal reception,” or “significant additional cost” if the antenna is installed in an area other than between the building façade and the street in the case of single-family dwellings, or that there is no alternative location in the case of multi-family dwellings. In *MacDonald*, the Bureau stated that the entity imposing a placement restriction may ask the user to justify installation in a non-preferred location, but the requirement of such a justification may not operate to delay or prevent the installation, and it may not impose an unreasonable cost.¹⁴⁷ As the satellite industry commenters¹⁴⁸ point out, the actual testing required by the Ordinance could impose additional costs beyond those of a routine installation that would be passed on to consumers and could delay installation. For these reasons, we find that the City’s certification requirement imposes burdens on antenna users that are unenforceable under the OTARD Rule.

4. Notification of Existence of Antennas and Removal of Antennas No Longer in Service

43. We find that provisions of the Ordinance that require notification of existing antennas and removal of antennas no longer in service violate the OTARD Rule. We agree with SBCA that Sections 9-632(5) and 9-632(6) of the Ordinance, which impose notification and antenna removal requirements on television access providers and installers, would unreasonably increase the costs of using satellite dishes and antennas that are located in areas of exclusive use.

44. Section 9-632(5) states that “[a] television access provider or installer of an existing satellite dish or antenna located between the façade of the building and the street shall, within 60 days after the date this ordinance is signed into law, notify the [City], in a form satisfactory to the [City], of the existence of the device, if the owner or tenant of the building at which the satellite dish or antenna is installed intends to continue to maintain the device at that location.”¹⁴⁹ Section 9-632(6) requires television access providers and installers to “remove all satellite dishes or antennas that it previously installed, when such dish or antenna is no longer in service.”¹⁵⁰

45. SBCA and industry commenters argue that the notification provision will unreasonably increase the costs of installation, use, and maintenance of covered antennas and dishes in violation of the OTARD Rule because installers and providers will be required to incur significant expenses to notify the City of any antennas located between the façade and the street and these costs will be passed on to

¹⁴⁶ *Star Lambert*, 12 FCC Rcd at 10466, para. 27.

¹⁴⁷ *MacDonald*, 13 FCC Rcd at 4853, para. 28 n.52. In *MacDonald*, the Bureau concluded that a certification requirement was permissible as applied to antenna users who used a professional installer (the associated permit requirement, on the other hand, was impermissible). There is no indication in *MacDonald* that the certification requirement would require any particular type of testing and no finding or other indication that the requirement would affect installation costs. *Id.* at 4852, para. 25 & n.48. The Bureau concluded that a permit requirement was invalid because such time-consuming procedures are likely to deter potential antenna users and to impose an unreasonable delay in violation of the OTARD Rule. *MacDonald*, 13 FCC Rcd at 4853, para. 27.

¹⁴⁸ SBCA Reply at 7-8; DIRECTV/DISH Reply at 11-13; Comments of DirectSat USA at 5-6.

¹⁴⁹ Ordinance, § 9-632(5).

¹⁵⁰ Ordinance, § 9-632(6).

consumers.¹⁵¹ SBCA, DIRECTV, and DISH explain that installers and providers may not have the records sufficient to identify the precise location of previously installed antennas.¹⁵² Thus, according to these parties, installers and providers will be required to contact all of their customers to ascertain whether they have a street-facing antenna and whether they intend to maintain such antenna and may need to inspect dwellings to determine the precise installation locations.¹⁵³ DIRECTV and DISH estimate that each truck roll to ascertain the location of an antenna and the intention of users will cost roughly \$100 and that the totals for all such trips could cost hundreds of thousands of dollars.¹⁵⁴ SBCA characterizes the time, money, and manpower involved in the notification effort mandated by the Ordinance as “truly staggering,” observing that it “could easily cost satellite subscribers hundreds of thousands of dollars.”¹⁵⁵ SBCA adds that installers will be subject to penalties and additional costs if they fail to notify the City and, therefore, the requirement is more akin to a registration requirement rather than a simple notification.¹⁵⁶ SBCA also suggests that the notification provision will lead to users of existing satellite dishes and antennas being forced to move their satellite dishes and antennas to alternative locations unless they can satisfy the restrictive placement provisions of the Ordinance.¹⁵⁷

46. Philadelphia argues that the provision does not violate the OTARD Rule because it is nothing more than a simple, post-installation notification that does not delay or otherwise impair the use of covered antennas.¹⁵⁸ According to the City, the notification is a necessary step to accomplish the goal of having out-of-service satellite dishes and antennas removed by the entities that installed them.¹⁵⁹ Philadelphia contends that the notification requirement is not onerous and does not impose a fee, but would require only “a small, one-time business expense” to review records and provide notification, and that any penalties for non-compliance would apply only to the provider or installer and not the antenna user.¹⁶⁰ The City alleges the provision is consistent with decisions that support notification requirements because it provides a lawful means for the City to inspect for compliance with restrictions, but does not require removal of antennas or dishes for failure to provide this notification.¹⁶¹ The City states that it intends to address the process by which self-installers can voluntarily provide notification when it adopts implementing regulations.¹⁶² Moreover, the City argues that street-front antennas that are not within the exclusive use or control of the unit owner or tenant are not protected by the OTARD Rule.¹⁶³

¹⁵¹ Petition at 28-32; SBCA Reply at 12-14; DIRECTV/DISH Comments at 8-9; DIRECTV/DISH Reply at 13-14; DirectSat Comments at 5-6. *See also* National Satellite Comments at 2-3.

¹⁵² SBCA Reply at 13; DIRECTV/DISH Reply at 14.

¹⁵³ Petition at 29; SBCA Reply at 13-14; DIRECTV/DISH Reply at 14.

¹⁵⁴ DIRECTV/DISH Reply at 14.

¹⁵⁵ SBCA Reply at 12, 14.

¹⁵⁶ Petition at 30-31; SBCA Reply at 12-13.

¹⁵⁷ Petition at 28-29.

¹⁵⁸ *See* Philadelphia Response at 25-28; Philadelphia Reply at 6-7.

¹⁵⁹ Philadelphia Response at 27.

¹⁶⁰ Philadelphia Response at 27; Philadelphia Reply at 6-7.

¹⁶¹ *See* Philadelphia Response at 26-28 (citing *In re Victor Frankfurt*, Memorandum Opinion and Order, 16 FCC Rcd 2875 (CSB 2001); *In re Michael and Alexandra Pinter*, Memorandum Opinion and Order, 19 FCC Rcd 17385, para. 10 (MB 2004); and *In re Philip Wojcikewicz*, Memorandum Opinion and Order, 18 FCC Rcd 19523, para. 13 (MB 2003)); Philadelphia Reply at 6-7.

¹⁶² Philadelphia Reply at 7.

¹⁶³ Philadelphia Response at 26.

47. Despite Philadelphia’s arguments to the contrary,¹⁶⁴ the notification requirement imposed in the Ordinance is unlike any other notification requirement we have addressed previously. For example, the cases cited by the City in support of its argument that the Commission has approved such notification requirements all involve a simple notification by an antenna user that the user was about to install, or had just installed, an antenna.¹⁶⁵ In the instant case, in contrast, television access providers and installers must canvas all of their customers and/or inspect the location of all of their antennas, no matter when installed – be it a week ago or ten years ago – to determine if the users’ antennas are located between the façade of a building and the street and to ascertain whether the “owner or tenant of the building . . . intends to continue to maintain [the antenna].”¹⁶⁶ Given the complexities of ascertaining the location of street-facing antennas and dishes subject to the notification requirement and the resulting significant costs that likely would be passed on to consumers, we find that the provision would unreasonably increase the cost of installation, use, or maintenance of covered devices and is therefore unenforceable.

48. SBCA also challenges Section 9-632(6) of the Ordinance, which requires television access providers and installers to “remove all satellite dishes or antennas that it previously installed, when such dish or antenna is no longer in service.”¹⁶⁷ In particular, SBCA argues that this section violates the OTARD Rule because (i) providers and installers cannot enter upon a customer’s property without the customer’s permission, much less remove an antenna from that property, and (ii) the antennas are legally owned by the customer once they are installed on a customer’s premises, and an installer cannot simply take the antenna.¹⁶⁸ According to SBCA, if providers and installers were to remove antennas from a customer’s property, they would be subject to legal liability for trespassing and trespass to chattels.¹⁶⁹ SBCA also argues that a removal requirement would unfairly harm customers who, for financial or other reasons, subscribe to satellite service on an intermittent basis.¹⁷⁰ According to SBCA, the Ordinance would require low income and poor credit customers to pay for a new antenna each and every time they want to resume service, which is the type of unreasonable cost the OTARD Rule was designed to prevent.¹⁷¹ Finally, SBCA argues that there is no similar requirement for cable providers, who do not face the same legal mandate to remove inactive equipment, such as “drop lines from telephone poles to inactive customer homes.”¹⁷²

49. The City, noting that SBCA did not object to the Section 9-632(6) removal requirement in its Petition, explains that it “wants out-of-service dishes and antennas removed by the providers or the installers who put them up.”¹⁷³ It states that such antennas constitute a safety hazard “because they encroach over the public footway.”¹⁷⁴

50. We find that the removal provision is unenforceable under the OTARD Rule. Philadelphia has included this provision in the Ordinance without regard to the fact that satellite providers and installers are not the legal owners of an antenna after installation and do not have a legal

¹⁶⁴ *See id.* at 28.

¹⁶⁵ *See id.*

¹⁶⁶ Ordinance, § 9-632(5).

¹⁶⁷ Ordinance, § 9-632(6); SBCA Reply at 14-16.

¹⁶⁸ SBCA Reply at 15.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 15-16.

¹⁷¹ *Id.* at 16.

¹⁷² *Id.*

¹⁷³ Philadelphia Response at 27.

¹⁷⁴ *Id.*

right to enter a customer's property without permission. To comply with this provision, installers would need to obtain customers' permission to remove antennas or face potential liability for trespass, and failure to comply would expose them to the penalties established by the Ordinance.¹⁷⁵ Further, the Ordinance does not specify how the City, installers, or consumers can determine whether an antenna is "no longer in use" and therefore subject to the removal requirement. As applied to intermittent users, for example, the removal requirement would unreasonably increase the cost of installation by necessitating re-installation of a removed antenna prior to resumption of service.¹⁷⁶ This uncertainty could deter consumers from subscribing to satellite service, thereby frustrating the purpose of the OTARD Rule. Moreover, the City has other means to address its concern that out-of-service dishes and antennas may present a safety issue by encroaching over a public footway because antennas and dishes that extend into a public area are not protected by the OTARD Rule. And, although we have found that the Ordinance does not fall within the public safety exception to the OTARD Rule,¹⁷⁷ the OTARD Rule does not prohibit Philadelphia from enforcing other, valid local safety regulations that address such safety concerns.¹⁷⁸ Further, the Commission has stated that procedural requirements are a "disincentive for potential consumers, if those requirements apply to one programming signal provider but not another" and "can impede a service provider's ability to compete, since customers will ordinarily select a service less subject to uncertainty and procedural requirements."¹⁷⁹ The Ordinance's removal requirement applies only to services that are provided by an antenna, such as satellite service and over-the-air broadcast signals, and Philadelphia does not rebut SBCA's claim that there is no similar requirement for cable providers to remove inactive equipment. For the foregoing reasons, we find that the removal requirement violates the OTARD Rule.

5. Painting

51. We find that the Ordinance's painting requirement constitutes an impairment under the OTARD Rule. We agree with SBCA that Section 9-632(7), which requires television access providers and installers to paint antennas installed between the streets and façades of buildings, would impose unreasonable costs and burdens on the installation and use of antennas. Specifically, Section 9-632(7) provides that "no television access provider or installer shall place or install a satellite dish or antenna between the façade of a building and the street . . . unless the installer has painted the dish to match the color of the building façade as closely as possible."¹⁸⁰

52. SBCA argues that the painting requirement is prohibited under the OTARD Rule because it would increase the cost of installation, maintenance, and use of covered antennas, regardless of whether the increase in cost is considered unreasonable, and because there is no legitimate public safety or historic preservation justification for imposing such costs.¹⁸¹ SBCA acknowledges that the Commission has found painting requirements could be acceptable under the OTARD Rule in certain circumstances;

¹⁷⁵ The City has subsequently indicated that it "does not intend and will not require installers to violate property laws." See Philadelphia May 17, 2012 *Ex Parte* Filing at 2, para. 4. For the reasons stated in paragraph 12, *supra*, this does not negate our determination that the provision is unenforceable.

¹⁷⁶ The City also states that it will enforce the Ordinance to require removal of "abandoned" antennas but not antennas that are used intermittently (a situation the City refers to as a "soft disconnect"). *Id.* The Ordinance, however, includes no such distinction, and this statement does not negate our finding of unenforceability. See *supra* para. 12 and note 175.

¹⁷⁷ See *supra* Section III.B.

¹⁷⁸ 47 CFR § 1.4000(b)(1).

¹⁷⁹ *Id.*

¹⁸⁰ Ordinance, § 9-632(7).

¹⁸¹ Petition at 32-34. See also SBCA Reply at 8-9; DIRECTV/DISH Comments at 9; DIRECTV/DISH Reply at 15-16; DirectSat Comments at 2-5; National Satellite Comments at 2.

however, it argues that the Ordinance would mandate painting without exception regardless of the costs, which would be significant and which would likely be passed on to antenna users.¹⁸² In addition, SBCA contends that the costs of this requirement could increase substantially if painting were to void the manufacturer's warranty and that the City could construe the Ordinance to require the painting of mounting materials, accessories, or cabling, in addition to the antenna itself, which would further increase the resulting costs.¹⁸³

53. Likewise, DIRECTV and DISH argue that it could be “extraordinarily costly” for installers and providers to comply with the City’s painting requirement, explaining that: (i) only non-metallic, non-reflective spray paint, which is expensive, could be used without ruining reception and voiding the warranty; (ii) each truck would have to carry a significant palette of colors because such paints cannot be mixed; (iii) installers would have to be trained to properly paint antennas in a manner that would not hamper reception; (iv) installers would be required to purchase site prep materials; (v) each truck would have to be equipped to store the paint, which could involve hazardous storage; and (vi) there are only limited times when painting can be done, so installers would have to adjust installation times and schedules in order to accommodate painting, which cannot be applied in rain, snow, cold, or extreme heat.¹⁸⁴ According to DIRECTV and DISH, these costs would increase the cost of installation by at least \$10 per installation, but an additional trip if necessary due to weather problems or other conditions would increase costs by \$100.¹⁸⁵ Further, SBCA emphasizes that because there are “only a few windows of opportunity” for an installer to paint an antenna based on weather conditions, this could unreasonably delay the installation of antennas.¹⁸⁶ DIRECTV and DISH argue that these additional costs are not reasonable and could cause existing subscribers to abandon satellite services and prevent potential subscribers from signing up because any such additional costs are likely to be passed on to the satellite antenna user.¹⁸⁷

54. SBCA, DIRECTV, and DISH also point out that the City of Philadelphia does not apply a painting requirement to other appurtenances or fixtures on the façade of buildings.¹⁸⁸ Moreover, National Satellite argues that when service is purchased, the antenna becomes the property of the user, and if the user subsequently relocates within Philadelphia, he would not be able to use his antenna if it does not match the color of the building to which he is relocating.¹⁸⁹

55. Philadelphia asserts that the painting requirement is consistent with Commission precedent and will not unreasonably delay or unreasonably increase the cost of installation, maintenance, or use of antennas in violation of the OTARD Rule.¹⁹⁰ Philadelphia states that the installers will be required only “to match the basic house colors, in order to help make the dish less intrusive in the streetscape,” rather than to maintain a fully array of colors, and contends that any costs to comply with the painting requirement would not be unreasonable.¹⁹¹ In addition, Philadelphia notes that it has enacted other ordinances addressing the appearance of building front façades and their impact on the aesthetic

¹⁸² Petition at 33.

¹⁸³ *Id.*

¹⁸⁴ DIRECTV/DISH Reply at 15-16. *See also* DirectSat Comments at 3-5 (outlining similar costs).

¹⁸⁵ DIRECTV/DISH Reply at 15-16.

¹⁸⁶ *See* SBCA Reply at 9.

¹⁸⁷ DIRECTV/DISH Reply at 16. *See also* DirectSat Comments at 4-5; National Satellite Comments at 2.

¹⁸⁸ *See* SBCA Reply at 9; DIRECTV/DISH Comments at 9.

¹⁸⁹ *See* National Satellite Comments at 2.

¹⁹⁰ *See* Philadelphia Response at 28-30; Philadelphia Reply at 7-8.

¹⁹¹ Philadelphia Response at 29-30.

quality of neighborhoods.¹⁹² Philadelphia also states that the Ordinance does not require attached cables and accessories to be painted, that implementing regulations would not impose such a requirement, and that the City will apply a “reasonableness” standard when enforcing this section of the Ordinance.¹⁹³

56. The Commission initially addressed the painting of antennas in the *OTARD Report and Order*.¹⁹⁴ There, the Commission stated that costs of complying with governmental and nongovernmental restrictions on the installation, maintenance, and use of antennas must not be unreasonable and set out examples of restrictions that may or may not be permissible.¹⁹⁵ With regard to the painting of antennas, the Commission said that “a requirement to paint an antenna in a fashion that will not interfere with reception so that it blends into the background against which it is mounted *would likely be acceptable*.”¹⁹⁶ Then, in the subsequent *Order on Reconsideration*, the Commission declined to reconsider its statement on painting of antennas but clarified that a regulation or restriction that required painting in a manner “that unreasonably increases costs or impairs the ability of [an antenna] to receive a signal . . . *would be impermissible*.”¹⁹⁷ These two statements, taken together, support the notion that regulators may require the painting of antennas so long as such requirements do not impair the installation, maintenance, or use of covered antennas.

57. We find that the Ordinance’s painting requirement constitutes an impairment under the OTARD Rule because it requires installers and providers to paint covered satellite dishes and antennas without exception, even in instances where painting could unreasonably delay or increase the cost of installation or use of such device for the user. If a regulation requires painting of a covered antenna in a manner that unreasonably increases costs, unreasonably delays installation, or impairs the ability of the device to receive a signal, then the regulation is impermissible under the OTARD Rule.¹⁹⁸ Although the City cites the decision in *Trabue* to support its position, that case is distinguishable.¹⁹⁹ In *Trabue*, there was no evidence in the record that the homeowners’ association’s painting requirement would impose an unreasonable expense or otherwise impair installation, maintenance, or use of antennas covered by the OTARD Rule because the association had offered to pay for the satellite dish to be painted.²⁰⁰ Here, however, the record shows that Philadelphia’s painting requirement applies to all satellite dishes and antennas within the city that are located on the front façade of a building and imposes significant costs on installers and providers that will likely be passed on to antenna users, as well as the potential for delays in installation. In particular, the satellite industry has documented a number of expenses that would result from the painting requirement that could increase the costs from \$10 to \$100 per installation, including costs for training, equipment, storage, and additional truck rolls, and the City has not rebutted them.²⁰¹ While there is no *per se* prohibition against painting, the City has not met its burden of proving that the Ordinance’s painting requirement does not impair the installation or use of a covered antenna.

¹⁹² Philadelphia Reply at 7-8.

¹⁹³ Philadelphia Response at 29-30.

¹⁹⁴ *OTARD Report and Order*, 11 FCC Rcd at 19288, para. 19.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* (emphasis added).

¹⁹⁷ *Order on Reconsideration*, 13 FCC Rcd at 18983, para. 45 (emphasis added). See also *In re Otto and Ida M. Trabue*, Memorandum Opinion and Order, 14 FCC Rcd 8602 (CSB 1999) (“*Trabue*”).

¹⁹⁸ *Id.*

¹⁹⁹ See Philadelphia Response at 29.

²⁰⁰ *Trabue*, 14 FCC Rcd at 8609, paras. 19-20.

²⁰¹ The Bureau suggested in *Star Lambert* that even a \$5 fee imposed on an antenna user may be enough to be “a disincentive for potential antenna users, effectively ‘preventing’ access to video programming signals that Congress sought to protect under Section 207 of the Act.” *Star Lambert*, 12 FCC Rcd at 10464, para. 23.

6. Penalties

58. Finally, SBCA challenges Section 9-632(8), which imposes penalties on any television access provider or installer found to be in violation of the Ordinance.²⁰² Section 9-632(8) does not specify the penalties for violating the Ordinance, but refers to the penalties contained in Section 9-105 of the Philadelphia Code.²⁰³ SBCA states that the penalties are impermissible “because they are premised on restrictions and requirements that violate the OTARD Rule.”²⁰⁴ We agree.²⁰⁵ To the extent the penalties are applied to provisions of the Ordinance that are inconsistent with the OTARD Rule, they must be preempted.

IV. ORDERING CLAUSES

59. Accordingly, **IT IS ORDERED**, pursuant to Section 207 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 207, 110 Stat. 56, 114 (1996), 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 the Satellite Broadcasting & Communications Association **IS GRANTED** with respect to Sections PM-304.3.1(b)-(d) and 9-632(2)-(7) of the Philadelphia Code and with respect to Section PM 9-632-(8) as applied to the foregoing provisions.

²⁰² Ordinance, § 9-632(8). (“A television access provider or installer who is found to be in violation of any of the provisions of this section may be assessed a penalty as provided in § 9-105.”).

²⁰³ *Id.* Section 9-105 of the Philadelphia Code was not submitted in the record, but the current version can be accessed online. *See* Philadelphia Code, Title 9 (Regulation of Businesses, Trades and Professions), Chapter 9-100 (General Provisions), § 9-105 (Penalties), *available at* [http://library.amlegal.com/nxt/gateway.dll/Pennsylvania/philadelphia_pa/thephiladelphiacode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:philadelphia_pa](http://library.amlegal.com/nxt/gateway.dll/Pennsylvania/philadelphia_pa/thephiladelphiacode?f=templates$fn=default.htm$3.0$vid=amlegal:philadelphia_pa). Section 9-105 states “Except as otherwise provided . . . any person who violates any provision of this Title or any regulation adopted hereunder shall, in addition to any other penalty indicated in this Title, pay a fine of no less than one hundred fifty (150) dollars nor more than three hundred (300) dollars.” *Id.* With regard to repeat violations, Section 9-105 provides that “Any person who, on more than one (1) occasion, violates any provision of this Title, . . . shall be guilty of a separate offense of Repeat Violation, and for each such Repeat Violation, shall be subject to a fine of not more than three hundred (300) dollars, or imprisonment for not more than ninety (90) days, or both. A person shall be guilty of a Repeat Violation regardless whether the second or subsequent violation occurs before or after a judicial finding of a first or previous violation. Each violation, after the first, shall; constitute a separate Repeat Violation offense.” *Id.*

²⁰⁴ Petition at 34. SBCA does not challenge the amount of the penalty but rather its applicability in the first instance.

²⁰⁵ For this reason, we do not need to address application of the penalties to any section of the Ordinance that SBCA does not challenge. We note, however, to the extent that penalties include imprisonment for a violation or multiple violations of an antenna restriction, they would be highly problematic under the OTARD Rule, as such penalties would deter consumers from installing, maintaining, or using covered antennas. Further, the Bureau has found that imposing a fine of \$500 per day violates the OTARD Rule because “penalties of this magnitude are likely to deter installation” and “the mere prospect . . . may prevent antenna installation altogether.” *Star Lambert*, 12 FCC Rcd at paras. 32-33.

60. This action is taken by the Chief, Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's rules.²⁰⁶

FEDERAL COMMUNICATIONS COMMISSION

Michelle M. Carey
Chief
Media Bureau

²⁰⁶ 47 CFR § 0.283.