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March 14, 2019

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment***
WT Docket No. 17-79
Ex Parte Communication

Dear Ms. Dortch:

The Wireless Internet Service Providers Association ("WISPA") submits this letter to provide additional guidance on how the Commission can modernize its Over-the-Air Reception Devices ("OTARD") rule[1] to accelerate the deployment of competitive broadband services and accelerate the closing of the digital divide.

In its August 27, 2018 ex parte letter, WISPA asked the Commission to clarify that the OTARD rule covers all fixed wireless equipment, including base stations and "hub sites" used to both transmit and receive signals to and from multiple customer locations, so long as the equipment meets the existing size restrictions for customer-end equipment.[2] WISPA explained that modernizing or clarifying the interpretation of the OTARD rule would lower barriers to siting fixed wireless base stations closer to consumers' homes, which is critical for modern fixed wireless networks.

As further support for this objective, WISPA writes to provide examples of where the limits of the existing OTARD rule are precluding the provision of fixed wireless broadband service to areas where access is limited or non-existent, or where existing service could be curtailed. WISPA also explains how modernizing the OTARD rule in the manner suggested is consistent with prior Commission decisions regarding the extension of OTARD preemption to fixed wireless. Finally, WISPA offers a definition of "rural area" where modernizing OTARD would be particularly beneficial for rural broadband deployment.

[1] 47 C.F.R. § 1.4000. The rule limits the size of antennas to one meter or less in diameter or diagonal measurement. *See* 47 C.F.R. § 1.4000(a)(1)(ii)(B).

[2] *See* Letter from Claude Aiken, WISPA President/CEO, to Marlene H. Dortch, FCC Secretary, WT Docket No. 17-79 (filed Aug. 27, 2018) ("August 2018 Letter"). *See also* Letter from Stephen E. Coran, WISPA Counsel, to Marlene H. Dortch, FCC Secretary, WT Docket No. 17-79 (filed Sept. 10, 2018); Letter from Stephen E. Coran, WISPA Counsel, to Marlene H. Dortch, FCC Secretary, WT Docket No. 17-79 (filed Sept. 11, 2018).

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Examples of OTARD Limitations

Texas Home Owner Association Covenants

A WISP was asked by homeowners residing in a rural subdivision in Texas to provide wireless broadband internet to several homes within the subdivision. The subdivision and the adjacent subdivision are made up of approximately 20 residential lots, each containing approximately three acres of land. The area has few alternatives for acceptable internet service, which include slow, data-capped DSL service that is being phased out, and possibly satellite service, which also comes with data limits and high latency. Neither of these alternatives provides the constant speed and affordability of fixed wireless broadband internet service. This subdivision area is typical of many exurban subdivisions on the outskirts of a major city as it relates to limited choice for high-speed internet access.

After being approached by some homeowners in the subdivision, the WISP determined the best location within the subdivision for its access point. Due to the low-lying and heavily treed nature of the general area, it was advisable (even necessary to prevent the need for a 40 to 60 foot mast on the roof of a home) to place a tower on an owner's lot in the subdivision, to which the owner of the lot agreed. The tower and antennas on the tower are located on land owned by and under the exclusive control of the homeowner. In summary, fixed wireless is the most reasonable alternative for homeowners to be able to receive high-speed internet, and the homeowner's access point can be, and is, used for service to others in the area. This additional use allows a broader coverage area to homes in the subdivision so that each homeowner can obtain access to high-speed internet from the single mast.

The land in the subdivision is burdened by *private restrictive covenants* that include the following restrictions: (1) a structure limitation that could be used as a basis to threaten the homeowner upon whose lot the tower has been placed with a lawsuit compelling removal of the tower; (2) a building line limitation that could be used as a basis to threaten the homeowner with a lawsuit to compel removal of the tower; and (3) a residential-only use restriction, which *is currently* being used to threaten the owner of the lot with a lawsuit to compel removal of the tower. The homeowners association is arguing that providing fixed wireless internet service from the tower on the lot to other homes in the subdivision allegedly constitutes operation of a business on the lot.

The compelled removal of the tower under these circumstances would unreasonably delay or prevent the use of OTARD-compliant antennas to receive or transmit an acceptable quality fixed wireless signal and deny the residents of the subdivision access to much-needed high-quality broadband.

California County Zoning

A homeowner in California had obtained a building permit to construct a 50-foot tower on his own property for personal use. The County land use ordinance allows uninhabited structures of 50 feet or less, including radio and television receiving antennas, which are the type customarily used for home radio and television receivers, as well as amateur and commercial transmitting antennas. Over time, to meet consumer demand in an area where other broadband

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options are not available, neighbors asked the homeowner to use the tower as a "hub" to deliver broadband service to their nearby homes. The homeowner agreed, and thus became a WISP. This is an example – not uncommon among WISPs – of members of a community taking it upon themselves to start a small business to improve their own access to broadband. The 50-foot tower also acts as a point-to-point relay site to transmit to other locations as part of a growing local operation.

Last Fall, following the filing of a complaint from another resident, the WISP applied to the County for a minor use permit to allow the 50-foot tower to be used for the ongoing commercial purpose of providing fixed wireless broadband service. The County determined that the minor use permit was not subject to OTARD preemption, stating that the rationale for OTARD "does not support the assertion that the County is preempted from regulating the commercial aspect with the new antennas that transmit the wireless signal offsite to multiple customers."

Michigan Township Zoning

A Michigan-based WISP attempted to expand service by seeking zoning approval to construct a new 128-foot tower on a farmer's land. The WISP applied for a special land use permit with the township, which reviewed a site plan for the tower for compliance with the local zoning ordinance, and issued the permit.

An adjacent property-owner disagreed with the township's decision and appealed to the Zoning Board of Appeals ("ZBA"), effectively staying the permit. The ZBA reversed the township and denied the request for the permit without citing any of the public safety or historic preservation reasons permitted by the OTARD rules. The WISP then appealed the ZBA's decision to the Circuit Court. A settlement agreement was reached with the WISP offering to erect the tower for visual inspection, and the judge remanded the case back to the township ZBA to decide if the settlement terms responded to the ZBA's concerns. The WISP constructed the tower, but the ZBA decided it did not meet their concerns and denied a permit for the tower. The WISP then was forced to tear down the tower.

At this point, the WISP had spent more than $40,000 in legal fees, an amount equivalent to its cost to construct six towers. If the County does not allow a handful of higher towers, and instead insists on thousands of smaller individual towers, it would increase the cost of deployment to reach 1,000 households by an aggregate amount of $750,000. Ultimately, the WISP applied for a special land use permit at another location and received a permit to construct a new tower. But this new location is more than 3,200 feet from the nearest on-grid power source, which requires an additional $20,000 to deliver electrical service.

Consistency With Prior Decisions

In 2000, the FCC extended the OTARD rules to apply to customer-end antennas used for transmitting or receiving fixed wireless signals.[3] The Commission stated that its action was "necessary to further consumer protection purposes of Sections 201(b), 202(a), and 205(a) of the

[3] *See Competitive Networks Order*, 15 FCC Rcd 22983 (2000).

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Act."[4] The Commission explained that "[t]o the extent devices used for multichannel video programming services are protected from unreasonable restrictions under the OTARD rules and the same devices when used only for fixed wireless services are not, consumers who want only fixed wireless service may inexorably be forced to pay unjust and unreasonable charges in connection with unwanted video programming. Thus, if we fail to extend the OTARD principles, we would effectively undermine the policies against unreasonable charges and discriminatory policies that are codified in Sections 201(b), 202(a), and 205(a)."[5]

The Commission explained that the extension of OTARD preemption is necessary to achieve these statutory goals, stating that "[s]ections 303(r) and 4(i) provide the basis for [its] exercise of ancillary jurisdiction."[6] The Commission noted that when Congress enacted Section 207, it recognized that Section 303 is a source of authority to promulgate regulations like the ones the Commission was adopting to extend the OTARD rule.[7] Section 207 directs the Commission to promulgate regulations prohibiting restrictions affecting devices used to receive the specified video programming services pursuant to Section 303 of the Communications Act. The Commission explained that this "statutory language reflects Congress' recognition that, pursuant to Section 303, the Commission has always possessed authority to promulgate rules addressing OTARDs."[8] The Commission stated that "[a]lthough Section 207 *directed* us to take action in the context of devices designed to receive the named services, nothing in Section 207 precludes us from exercising our power under Section 303 and other provisions to protect the placement of similar antennas that receive or transmit signals."[9] The Commission therefore concluded that "the scope of the Section 207 directive to exercise our authority under Section 303 does not limit our independent exercise of the same authority under Section 303 and other provisions in a broader context and, in fact, affirmatively supports our use of Section 303 to extend the OTARD rules to fixed wireless services."[10]

In 2004, the Commission denied a Petition for Reconsideration of the extension of the OTARD protections to leased property.[11] Among other things, the Commission reiterated that such extension furthered the express objectives of Section 1 of the Communications Act and was necessary to further the consumer protection goals of Sections 201(b), 202(a) and 205(a) of the Act. The Commission held that "[g]iven these clear Congressional goals, the Commission determined that it was appropriate to exercise its ancillary jurisdiction to extend OTARD protections to fixed wireless customers, and that it would be illogical for the Commission to protect one group of consumers (*i.e.*, multi-channel video) but deny such protections to another group of consumers (*i.e.*, fixed wireless) based solely on the nature of the equipment in use."[12]

The Commission also cited a 2001 decision by the U.S. Court of Appeals for the D.C. Circuit finding that it was within the Commission's discretion to protect all viewers from

[4] *Id.* at 23030, ¶ 104.
[5] *Id.*
[6] *Id.* at 23030, ¶ 105.
[7] *See id.* at 23031, ¶ 106.
[8] *Id.*
[9] *Id.* (emphasis in original).
[10] *Id.*
[11] *See Competitive Networks Order on Reconsideration*, 19 FCC Rcd 5637 (2004).
[12] *Id.* at 5641, ¶ 8.

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restrictions on access to multi-channel video regardless of whether they own or rent.[13] In discussing the case, the Commission stated that the Court found that the Commission had acted reasonably "due to the broad authority granted by the Commission" pursuant to Sections 154(i), 303(r), and 151. The Commission explained that "[w]hile Section 207 was specifically directed to multichannel video reception, the Commission relied on the same underlying authority and policy in extending those protections to fixed wireless telecommunications services."[14]

Finally, as WISPA explained in its August 2018 Letter, when the Commission extended OTARD to fixed wireless, it justified its decision to exclude "hub sites" on its opinion at the time that fixed wireless hubs were covered under Section 332, and that the inability to place a hub site at a specific location would not result in a denial of service.[15] As WISPA noted, neither of these predicates necessarily hold true today. Fixed wireless networks may in fact not qualify for robust protections under Section 332(c)(7) because the statutory definition of "unlicensed wireless service" requires the offering of "telecommunications services" that excludes providers of "information services." Further, fixed wireless systems increasingly need to be located at sites that are closer to their customers, especially in a subdivision or in a densely populated area.[16]

Definition of Rural Area

As reflected above, extension of OTARD protections to "hub sites" is critically important for rural areas, where heavy foliage and undulating terrain can make deployment more difficult.

To define a "rural area," WISPA proposes a definition adopted by the Broadband Deployment Advisory Committee ("BDAC") in its State Model Code for Accelerating Infrastructure Deployment and Investment (Draft 12/06/18) ("Model Code").[17] The Model Code was developed after significant debate and approved unanimously by BDAC's diverse membership. It defines "rural" as a county with an average population density of less than 300 persons per square mile, excluding the incorporated communities of 20,000 people or greater within the county."[18]

This definition excludes larger communities so that a single large town doesn't eliminate an area that is otherwise rural. For example, in Pulaski County, there are two large cities (Little Rock and North Little Rock) and unserved, sparsely populated areas. If the large cities in Pulaski County are eliminated from the definition, then the remainder of the county qualifies as rural, as it should.

The definition also takes into account population density in addition to total population to better reflect the rural" nature of some counties that are dominated by a single community of

[13] *See id.* at 5639-40, ¶¶ 6-7 (citing *Building Owners and Managers Association, et al. v. FCC*, 254 F.3d 89 (D.C. Cir. 2001)).
[14] *Competitive Networks Reconsideration Order*, 19 FCC Rcd at 5640, ¶ 7.
[15] *See* August 2018 Letter at 2-4.
[16] *See id.*
[17] The Model Code is available at https://www.fcc.gov/sites/default/files/bdac-12-06-2018-model-code-for-states-approved-rec.pdf (last visited March 13, 2019).
[18] *Id.* at 10. The Model Code definition is qualified with the phrase "if not otherwise defined by the State." Use of this modifier would defeat the preemptive intent of OTARD and therefore is not appropriate here.

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20,000 or more. The exclusion of larger communities, such as Phoenix, would have the effect of blocking the remainder of Maricopa County from qualifying as "rural."

Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter is being filed in ECFS and provided to the Commission participants. Please do not hesitate to contact the undersigned with any questions.

Respectfully submitted,

/s/ Claude Aiken
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