

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

In the Matter of)	
)	
Updating the Commission's Rule for)	WT Docket No. 19-71
Over-the-Air Reception Devices)	

To: The Commission

**COMMENTS OF
THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION**

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June 3, 2019

Table of Contents

SUMMARY	II
I. THE COMMISSION SHOULD UPDATE THE OTARD RULE	5
A. Modernizing The OTARD Rule Would Be Consistent With Its Original Intent	5
B. Extending OTARD Protection To Hub And Relay Antennas Would Promote Broadband Deployment And Competition.....	9
II. THE COMMISSION HAS LEGAL AUTHORITY TO AMEND THE OTARD RULE	12
A. The Commission Has Several Sources Of Statutory Authority	12
1. The Commission Has Direct And Ancillary Authority For Extension Of The OTARD Rule As Cited In The <i>Competitive Networks Order</i>	12
B. The Commission’s Proposed Rule Change Also Is Supported By Other Statutory Authority	14
1. Section 207 Of The Act Provides Direct Statutory Authority For The Proposed Extension Of OTARD Protection	14
2. RAY BAUM’S Act Of 2018 Also Supports The Proposed Rule	15
C. The Commission’s Rule Change Would Be Consistent With Congressional Mandates And Objectives Of The Regulatory Flexibility Act, As Amended.....	17
CONCLUSION.....	17

Summary

The Wireless Internet Service Providers Association (“WISPA”) supports the Commission’s efforts to extend the benefits of its over-the-air reception device (“OTARD”) rule to cover hub and relay antennas.

The Commission’s proposal recognizes the convergence of a number of marketplace developments. First, modern fixed broadband networks, even in rural areas, are densifying to place transmission facilities closer to the consumer to increase capacity. Second, this development is being fueled in part by consumer demand for more capacity for video streaming services, with statistics showing ever-increasing “cord cutting” and “never cords.” Third, while WISPA members generally enjoy good relationships with zoning boards and homeowners’ associations, there is evidence that consumers are being denied access to competitive broadband services that could be provided by wireless Internet service providers (“WISPs”). Fourth, WISPs are operating at a competitive disadvantage relative to other technologies that have statutory benefits not available to standalone fixed wireless broadband providers.

To address these developments and concerns, the Commission appropriately seeks to modernize its OTARD rule so that the zoning laws and homeowners’ association restrictions can no longer prohibit hub and relay antennas at residences. This action would be consistent with the intent of the OTARD rule, which was designed to ensure that consumers have access to a broad range of video programming services, and to foster competition among providers. As such, it is a rule that has evolved in the past – by virtue of an update in 2000 – and should continue to evolve over time to reflect modern technology, viewing habits and competitive changes. WISPA does not propose to make any change in the size limitation of antennas subject to OTARD protection.

The Commission has legal authority to amend the OTARD rule. As it did in the 2000 *Competitive Networks Order*, the Commission can rely on Section 303 of the Communications Act of 1934, as amended. Section 207 of the Act also can be a source of direct authority. The more recent RAY BAUM'S Act, which amended Section 257 of the Act, retained national policy to promote the diversity of media voices, vigorous economic competition and technological advancement, and directed the Commission to consider market entry barriers for entrepreneurs and other small businesses.

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The Wireless Internet Service Providers Association (“WISPA”)¹ hereby submits its Comments in support of the rule change proposed in the Federal Communications Commission’s (“FCC” or “Commission”) Notice of Proposed Rulemaking (“*NPRM*”) in the above-captioned proceeding.²

Introduction

Access to vertical infrastructure is essential to deploying broadband services in rural areas. The Commission has made great strides over the last few years to reduce regulatory barriers to infrastructure deployment, but there are still millions of consumers and businesses in rural America that lack access to fixed broadband services that would benefit from the narrow proposal in the *NPRM*. According to the Commission’s recently released *2019 Broadband*

¹ WISPA is the trade association that represents the interests of wireless Internet service providers (“WISPs”) that provide IP-based fixed wireless broadband services to consumers, businesses, and anchor institutions across the country. WISPA’s members include more than 800 WISPs, equipment manufacturers, distributors and other entities committed to providing affordable and competitive fixed broadband services. WISPs use unlicensed, lightly-licensed and licensed spectrum to deliver last-mile broadband and voice services to more than four million people, many of whom reside in rural, unserved, and underserved areas where wired technologies, such as FTTH, DSL and cable Internet access services may not be available.

² *Updating the Commission’s Rule for Over-the-Air Reception Devices*, Notice of Proposed Rulemaking, WT Docket No. 19-71, FCC 19-36 (rel. Apr. 12, 2019) (“*NPRM*”). The Federal Register corrected the comment date to June 3, 2019. *See* 84 Fed.Reg. 18757 (May 2, 2019).

Progress Report, as of year-end 2017, approximately 21 million Americans (6.5 percent of the U.S. population) lacked access to fixed broadband at speeds of least 25 Mbps for downloads/3 Mbps for uploads.³ The gap in rural areas remained notable, where more than 26 percent of Americans in rural areas lacked access to fixed terrestrial 25 Mbps/3 Mbps broadband, as compared to only 1.7 percent of Americans in urban areas.⁴

At the same time, it is undisputed that broadband is now a primary source of video programming and streaming services, surpassing over-the-air broadcast signals, DBS services and other video platforms.⁵ In fact, online video consumption is one of the most popular activities worldwide and it is reported as of January 2019 that 50 percent of U.S. Internet users watch video content every day.⁶ Moreover, traditional pay TV subscriptions have declined year-to-year, now representing only 67 percent of U.S. households that still subscribe to cable or satellite video services.⁷ Significantly, cord cutting extends beyond younger consumers, as even older adults are cutting the cord at an increasing pace. Twenty-eight percent of consumers over 50 years old no longer subscribe to a traditional pay TV service,⁸ and overall “[t]hree in five (61 percent) are getting TV content from online sources, up more than 27 percent in two years.”⁹

³ *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 2019 Broadband Deployment Report, GN Docket No. 18-238, FCC 19-44 (rel. May 29, 2019) (“2019 Broadband Deployment Report”), at 16, Fig. 1 and 21, Fig. 4.

⁴ *Id.*

⁵ In 2017, 81.1 percent of U.S. online users accessed digital video content.

<https://www.statista.com/statistics/271612/percentage-of-digital-video-viewers-in-the-united-states/> (last visited May 23, 2019). In 2017, there were an estimated 221.8 million of online users with projections to 239.2 million in 2021. <https://www.statista.com/statistics/271611/digital-video-viewers-in-the-united-states/> (last visited May 23, 2019).

⁶ <https://www.statista.com/topics/1137/online-video/> (last visited May 23, 2019).

⁷ David Bloom, *Cord-Cutting Jumps 10 Points In Two Years As Most Desired Demos Drop Too*, *Forbes* (Jan. 31, 2019) (citing to the 2018 Annual PwC A New Video World Order: What Motivates Consumers? Study) <https://www.forbes.com/sites/dbloom/2019/01/31/cord-cutting-study-pwc-nielsen-2019-pay-tv-statistics/#4f3de8772242> (last visited May 30, 2019). The PwC study also found that “Netflix usage, at 76 percent of those surveyed, has surpassed combined cable and satellite usage for the first time.” *Id.*

⁸ *Id.*

⁹ *Id.*

This upward trend in online video programming services use is expected to continue over the next few years, primarily due to consumers' mobile lifestyles and streaming video-on-demand competition.¹⁰ It is expected that broadband-only households will increase by 75 percent in the next five years, from 23.3 million in 2018 to 40.8 million by 2023.¹¹

Updating the Commission's rule for over-the-air reception devices ("OTARD") will account for technological advancements, help meet the demands of consumer "cord-cutters" and "never cords" and promote rural broadband deployment by lowering barriers to siting fixed wireless base stations closer to consumers' homes. Extending OTARD protection to hub and relay antennas at a consumer's premises is critical for modern fixed wireless networks, especially in rural areas where there is less infrastructure available for deployment.¹² The extension of the OTARD rule will enable WISPs to provide better and more affordable fixed wireless broadband service to more rural consumers.

WISPs generally enjoy a productive relationship with neighborhoods, multifamily communities and local governments. In many cases, these entities have adopted laws and policies that encourage broadband entry and competition. Nonetheless, there are examples WISPA has cited in the record 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

¹⁰ See <https://www.pwc.com/us/en/industries/tmt/library/global-entertainment-media-outlook.html> (last visited May 30, 2019).

¹¹ Farhan Husain, *Cord-Cutting trend expected to nearly double broadband-only homes in U.S. over the next five years*, S&P Global Market Intelligence.com, Technology, Media and Telecom (Jan. 29, 2019) <https://www.spglobal.com/marketintelligence/en/media-center/press-release/cord-cutting-trend-expected-to-nearly-double-broadband-only-homes-in-us-over-the-next-five-years> (last visited May 30, 2019).

¹² See Letter from Claude Aiken, President and CEO, WISPA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 5-6 (filed Mar. 14, 2019) ("*WISPA Mar. 14, 2019 Ex Parte Letter*") (discussing that "extension of OTARD protections to 'hub sites' is critically important for rural areas, where heavy foliage and undulating terrain can make deployment more difficult.").

where the existing service could be curtailed.¹³ For example, a WISP located in Texas is prohibited by homeowners' association covenants from placing a tower on a residential homeowner's lot in a rural subdivision for the purpose of receiving fixed wireless internet service that could also be used to provide coverage to other residents.¹⁴ WISPA also explained how a homeowner in California who built a tower on his own property in accordance with the local zoning ordinance in order to receive service was later asked to use the same tower as a "hub" to deliver broadband service to nearby homes, but was denied a minor use permit because the County determined that the OTARD rule did not apply to the use of the tower as a point-to-point relay or hub site to transmit to other locations.¹⁵ Another WISP in Michigan was ultimately forced to tear down a tower built on private property and incur significant legal fees and construction costs to find an alternate site after the local Zoning Board of Appeals denied a permit request without citing any of the public safety or historic preservation reasons permitted by the OTARD rule.¹⁶

Against this backdrop, WISPA strongly supports the Commission's effort to modernize and update the OTARD regulatory framework to facilitate the deployment of modern fixed wireless infrastructure to meet consumer demand and provide competition. As described in the *NPRM*, WISPA has requested that the Commission update the OTARD rule to apply to "all fixed wireless transmitters and receivers, regardless of whether the equipment is used for reception, transmission, or both, so long as the equipment meets the existing size restrictions for customer-

¹³ *WISPA Mar. 14, 2019 Ex Parte Letter* at 1-3.

¹⁴ *Id.* at 2.

¹⁵ *Id.* at 2-3.

¹⁶ *Id.* at 3.

end equipment.”¹⁷ WISPA appreciates the Commission’s interest into this matter and supports the Commission’s proposal to “eliminate the restriction [in Section 1.4000 of the Commission’s Rules] that currently excludes hub and relay antennas from the scope of the OTARD provisions.”¹⁸

Discussion

I. THE COMMISSION SHOULD UPDATE THE OTARD RULE

WISPA concurs with the Commission’s conclusion that “revising the OTARD framework would allow fixed wireless providers to deploy hub and relay antennas more quickly and efficiently and would help spur investment in and deployment of needed infrastructure in a manner that is consistent with the public interest.”¹⁹ WISPA has explained that modernizing the OTARD rule to cover all fixed wireless equipment meeting the one-meter size restriction would “lower barriers to siting fixed wireless base stations closer to consumers’ homes, which is critical for modern fixed wireless networks.”²⁰

A. Modernizing The OTARD Rule Would Be Consistent With Its Original Intent

WISPA submits that extending OTARD protection to all fixed wireless equipment, while maintaining the existing size limits and exceptions for safety and historical purposes – regardless of whether the equipment is used for reception, transmission, or both – would be consistent with original intent of OTARD. The OTARD rule was designed to ensure that consumers have access

¹⁷ *NPRM* at ¶ 5 (quoting Letter from Claude Aiken, President and CEO, WISPA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1 (filed Aug. 27, 2018) (“*WISPA Aug. 27, 2018 Ex Parte Letter*”).

¹⁸ *NPRM* at ¶ 5.

¹⁹ *Id.* at ¶ 7.

²⁰ *WISPA Mar. 14, 2019 Ex Parte Letter* at 1.

to a broad range of video programming services, and to foster competition among providers.²¹

As discussed above, consumers are increasingly viewing video content exclusively over fixed broadband connections. As the technologies that deliver video programming evolve, the Commission should modernize the OTARD rule to better enable consumers to receive video content.

In 2000, the Commission updated the rule to apply to customer-end antennas for fixed wireless services.²² This reflected the Commission's continuing efforts under the Telecommunications Act of 1996 (the "1996 Telecom Act") to "secure lower prices and higher quality services for American telecommunications consumers and encourage rapid deployment of new telecommunication technologies."²³ In extending OTARD to cover fixed wireless receivers, the Commission concluded that limits on the ability of customers to place antennas "impedes the development of advanced, competitive services."²⁴ It held that the extension of the OTARD rule to antennas used for fixed wireless will promote the deployment of advanced telecommunications services,²⁵ and that "unreasonable restrictions on the placement of [customer premises] antennas almost by definition both effectively prohibit the provision of personal wireless services and disadvantage providers of fixed wireless services as compared to their

²¹ *Preemption of Local Zoning Regulation of Satellite Earth Stations, Report and Order*, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 11 FCC Rcd 19276 (1996).

²² *Promotion of Competitive Networks in Local Telecommunications Markets, et al.*, 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) ("*Competitive Networks Order*").

²³ *See id.* at 23027-28, ¶¶ 97, 101; Telecommunications Act of 1996, Pub. L. No. 104-04, purpose statement, 110 Stat. 56, 56 (1996).

²⁴ *Id.* at 23027, ¶ 97.

²⁵ *Id.* at 23030, ¶ 103.

wireline competitors, thus unreasonably discriminating among providers of functionally equivalent services.”²⁶

Because of this decision to extend the OTARD rule to include customer premises antennas used for transmitting or receiving fixed wireless signals, in many cases WISPs have been able to site qualifying receiving equipment without unreasonable restrictions by local governments or homeowners’ associations. This improves the viability of fixed wireless as a competitive broadband, voice, and video alternative to incumbent wireline providers in markets across the country, consistent with the Commission’s intent.

However, with the proliferation of fixed wireless networks and technological advances over time, competition can be even further enhanced by extending OTARD to cover *all* fixed wireless transmitters and receivers that meet the current size restrictions in the OTARD rule, including base stations or “hub sites” that both receive signals and provide return transmissions.²⁷ This would further lower barriers to siting fixed wireless base stations closer to consumers’ residences, which is critical for modern fixed wireless networks and, in many cases, necessary to provide service to small “pockets” of consumers that do not have access to other terrestrial video platforms.

The Commission initially excluded hub and relay sites because it concluded, in part, that the “inability of a carrier to place a hub site at a specific site will often not result in a denial of wireless service to customers in that area.”²⁸ However, that assumption no longer holds true for modern fixed wireless networks, which often rely on access points that are closer to the

²⁶ *Id.* at 23034, ¶ 114.

²⁷ The Commission did not define “hub” or “hub sites” for the purposes of OTARD. It did, however, refer to them as antennas “used to transmit signals to and/or receive signals from multiple customer locations.” *Competitive Networks Order*, 15 FCC Rcd at 23028, ¶ 99.

²⁸ *Id.* at 23034, ¶ 114.

customer. WISPA concurs with the Commission that the exclusion of hub and relay antennas from the OTARD rule “reflected the infrastructure needs of a previous generation of wireless technologies that relied on larger antennas spread over greater distances to provide service to consumers.”²⁹ Earlier generations of fixed wireless equipment, which was more expensive than modern equipment, were built on a deployment model primarily around maximizing the number of potential subscribers served per base station, without much consideration for capacity per user.

The Commission properly acknowledges, however, that the “wireless infrastructure landscape has shifted toward the development of 5G networks and technologies that require dense deployment of smaller antennas across provider networks in locations closer to consumers.”³⁰ As WISPA has explained, while fixed wireless systems previously relied on relatively large coverage areas that required fewer hub sites per customer, fixed wireless providers began to reduce the size of the area covered per base station as both the cost of technology fell and subscriber data consumption increased.³¹ As data consumption and demand increases, providers will need to re-use frequencies and densify their networks to better serve their customers and ensure that they can continue to access services that require reliable connectivity. Densifying providers’ networks will serve the public interest by enabling more bandwidth to be made available to the customer.

WISPA also has emphasized that this trend will only continue, especially in urban and suburban areas, where the higher population density requires more capacity – *i.e.*, areas that require more hub sites located closer to customers.³² Advances in fixed wireless technology,

²⁹ *NPRM* at ¶ 7 (citing *Competitive Networks Order*, 15 FCC Rcd at 23034, ¶ 114).

³⁰ *Id.* (citing *WISPA Aug. 27, 2018 Ex Parte Letter* at 2).

³¹ *WISPA Aug. 27, 2018 Ex Parte Letter* at 3.

³² *Id.*

such as those that utilize millimeter wave spectrum, will result in that areas covered by these base stations to shrink even more to overcome significant propagation losses in these higher bands.³³ WISPA therefore reiterates that fixed wireless providers have much less choice in where they can locate hub sites because of these enhancements in technology and network design.³⁴ It is no longer necessarily the case, as the Commission originally stated, that the inability to locate a hub station would not result in the loss of service to that area.

B. Extending OTARD Protection To Hub And Relay Antennas Would Promote Broadband Deployment And Competition

Extending the OTARD rule to fixed wireless hub and relay antennas would spur infrastructure deployment, including the deployment of networks that involve local relaying in rural and other underserved areas and deployment by small providers.³⁵ Access to reliable and affordable high-speed broadband service promotes rural prosperity by enabling efficient, modern communications among rural households, businesses, schools, libraries, healthcare centers, and other important community anchor institutions. WISPs use unlicensed, lightly-licensed and licensed spectrum to deliver last-mile broadband and voice services to more than millions of people, many of whom reside in rural, unserved, and underserved areas. As such, WISPs play an important role in delivering affordable fixed wireless broadband services to consumers and businesses in rural, unserved, and underserved areas of the country.

Like other fixed and mobile wireless communications providers, WISPs require access to towers, buildings, water tanks, grain legs, and other available vertical infrastructure to deliver service. Without access to such infrastructure in a timely and cost-efficient manner, WISPs cannot provide broadband services to rural communities – areas that will be left unserved

³³ *Id.*

³⁴ *Id.*

³⁵ *NPRM* at ¶ 8.

because of the high cost and difficulty of deploying wireline technologies to remote and hard-to-serve areas. As WISPA has previously explained, the “extension of OTARD protections to ‘hub sites’ is critically important for rural areas where heavy foliage and undulating terrain can make deployment more difficult.”³⁶ In those areas, the foliage and terrain imposes line-of-sight problems in certain spectrum bands that will require providers to deploy more sites that are closer to the customer.

Amending the OTARD rule to apply to hub and relay antennas will enable WISPs to more efficiently and economically provide broadband service to suburban and new exurban developments. The example discussed above regarding the WISP that was asked by homeowners residing in a rural subdivision in Texas to provide wireless broadband service illustrates this scenario. In growing exurban areas with new residential developments, homeowners may not have viable alternatives for reliable, affordable high-speed internet service. Because these subdivisions are typically located on the outskirts of major metropolitan areas, the residents face limited choice for high-speed internet access and fixed wireless broadband is often the most cost-effective means of providing such service.³⁷

By modernizing the OTARD rule, the Commission also will facilitate greater competition and create a more level playing field for fixed wireless service providers that are at a competitive disadvantage compared to other providers with respect to the deployment of network facilities.³⁸ Modern fixed wireless networks deployed by WISPs may not qualify for the same streamlined

³⁶ *WISPA March 14, 2018 Ex Parte Letter* at 5.

³⁷ See *The Carmel Group, Ready for Takeoff: Broadband Wireless Access Providers Prepare to Soar with Fixed Wireless*, at 12 & Fig. 6 (2017) available at http://www.wispa.org/Portals/37/Docs/Press%20Releases/2017/TCG's_2017_BWA_FINAL_REPORT.pdf (last visited June 1, 2019).

³⁸ See *NPRM* at ¶ 9 (seeking comment on the extent to which extending OTARD protections would address any competitive disparity between fixed wireless service providers and providers whose deployments are subject to Sections 253 or 332 of the Communications Act).

treatment as other wireless communications infrastructure under Section 332 of the Communications Act of 1934, as amended (the “Act”).³⁹ If a fixed wireless site is using unlicensed spectrum or does not provide a commercial wireless service, it will not qualify as a “personal wireless service facility” under Section 332 because the definition of “unlicensed wireless service” requires the offering of “telecommunications service” – and many providers offer standalone broadband, without an interconnected voice service, that is not classified as “telecommunications service.”⁴⁰ Amending Section 1.4000 will help alleviate the negative consequences of this statutory disparity.

The Commission’s proposal to amend the OTARD rule to include hub and relay antennas will reduce the barriers to infrastructure deployment, increase competition, and would be consistent with the intent of the OTARD rule. WISPA supports the Commission’s proposal not to change the aspects of the OTARD rule that limit its applicability to fixed wireless antennas measuring one meter or less in diameter or diagonal measurement or that allow for limited restrictions necessary to accomplish a clearly defined, legitimate safety objective or preserve historic properties.⁴¹

The Commission also seeks comment on whether it is necessary to clarify how it interprets certain definitions to ensure the OTARD rule applies to hub and relay antennas.⁴²

WISPA does not believe it is necessary to define the fixed wireless service provider as the

³⁹ 47 U.S.C. § 332(c)(7).

⁴⁰ Similarly, because fixed wireless broadband services deployed by WISPs may not be considered to be “telecommunications services,” they are not entitled to regulated access to pole attachments under Section 224 of the Communications Act, which provides that a utility must provide a “cable television system” or any “telecommunications carrier” with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by the utility and that the rates, terms, and conditions must be just and reasonable. WISPA acknowledges that addressing this issue is beyond the scope of this proceeding.

⁴¹ *NPRM* at ¶ 11.

⁴² *Id.* at ¶ 10.

“antenna user” for purposes of the OTARD rule with respect to hub or relay antennas. The antenna user should be the resident that has a direct or indirect ownership or leasehold interest in the property where the antenna will be located, regardless of whether that person is a resident in an apartment rental complex, condominium, single family home, or commercial property.

II. THE COMMISSION HAS LEGAL AUTHORITY TO AMEND THE OTARD RULE

A. The Commission Has Several Sources Of Statutory Authority

In the *NPRM*, the Commission proposed to rely on the same legal authority it cited in the *Competitive Networks Order*.⁴³ WISPA agrees with the Commission’s assessment that the legal authorities relied on in the *Competitive Networks Order* also govern the rule change proposed in the *NPRM*, along with other sources of authority as described below.⁴⁴

1. The Commission Has Direct And Ancillary Authority For Extension Of The OTARD Rule As Cited In The *Competitive Networks Order*

In its *2000 Competitive Networks Order*, the Commission acknowledged that “when Congress enacted Section 207, it recognized that Section 303 is a source of authority to promulgate regulations like the [OTARD extension] we are adopting today.”⁴⁵ Section 207 explicitly states that Commission regulations prohibiting restrictions on devices used to receive video programming are to be promulgated “pursuant to Section 303 of the Communications Act.”⁴⁶ The Commission interpreted Congress’ reference to Section 303 as congressional

⁴³ *NPRM* at ¶ 12.

⁴⁴ In the *Competitive Networks Order*, the Commission also cited the preamble of the 1996 Telecom Act and Sections 201(b), 202(a), and 205(a) of the Act as statutory authority for its OTARD rule extension. *Competitive Networks Order* at 23028, ¶ 101 & 23030, ¶ 104. To the extent that fixed wireless providers also provide interconnected Voice over Internet Protocol (“VoIP”) services, WISPA agrees that the proposed rule change supports the Commission’s statutory mandate “to further the consumer protection purposes” of Title II, *id.* at 23030, ¶ 104 and “to promote competition . . . and encourage the rapid deployment of new telecommunications technologies” under the 1996 Act. *Id.* at 23028, ¶ 101 (*citing* Pub. L. No. 104-104, purpose statement, 110 Stat. 56, 56 (1996)).

⁴⁵ *Competitive Networks Order* at 23031, ¶ 106.

⁴⁶ 47 U.S.C. § 303 note.

recognition that the Commission has always possessed the authority to regulate OTARDs, notwithstanding that Section 207 “*directed* [the Commission] to take action in the context of devices designed to receive the named services.”⁴⁷ The Commission further recognized that Section 207 did not restrict or prohibit any further regulation “to protect the placement of similar antennas that receive or transmit other signals.”⁴⁸ In fact, it concluded in 2000 that the scope of the congressional directive in Section 207 does not limit its “independent exercise of the same authority under Section 303 and other provisions.”⁴⁹ WISPA agrees with this assessment, and submits that the Commission has general powers to regulate radio transmissions under Section 303, which provides ample authority to extend the OTARD rule, as proposed in this proceeding.⁵⁰

In addition, in 2000 the Commission identified extensive precedent granting authority to the Commission to promulgate regulations that effectuate the goals and accompanying provisions of the Act “in the absence of explicit regulatory authority if the regulations are reasonably ancillary to existing Commission authority.”⁵¹ WISPA also agrees with the Commission that Sections 1 and 4(i) of the Act provide the basis for the Commission’s exercise in ancillary jurisdiction to fulfill specific statutory goals.⁵²

⁴⁷ *Competitive Networks Order* at 23031, ¶ 106 (emphasis in original).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 23030, ¶ 105 (citing 47 U.S.C. § 303(r)).

⁵¹ *Id.* at 23029, ¶ 101 and n. 261.

⁵² *Id.* at 23030, ¶ 102 (citing 47 U.S.C. § 151 and 47 U.S.C. § 154(i)). Section 1 of the Act sets forth the purpose for which the Commission was created: “to regulate[] interstate and foreign commerce in communications by wire and radio so as to the make available, so far as possible, to all people of the United States, . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges.” 47 U.S.C. § 151. Under Section 4(i) “[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.” 47 U.S.C. § 154(i).

As it did in 2000, the Commission can determine that updating its OTARD rule is necessary to accommodate the technology changes in fixed wireless architecture and, therefore, it has the legal authority to preempt local and state restrictions that restrict or hamper the deployment of hub and relay antennas of one meter or less under federal court precedent.⁵³

B. The Commission’s Proposed Rule Change Also Is Supported By Other Statutory Authority

1. Section 207 Of The Act Provides Direct Statutory Authority For The Proposed Extension Of OTARD Protection

WISPA also submits that Section 207 itself can be a source of direct statutory authority for the extension of the OTARD rule for hub and relay antennas because the proposed rule change meets the congressional mandate “to promulgate regulations to prohibit restrictions that impair a viewer’s ability to receive video programming services” through new technology.⁵⁴ When the 1996 Telecom Act was enacted, devices designed for OTA reception of television broadcast signals, multi-channel multipoint distribution services (“MMDS”), and direct broadcast satellite (“DBS”) services were the new technologies of the time.⁵⁵ Broadband, then

⁵³ *Id.* at 23031-32, ¶ 107 (citing *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355 (1986)).

⁵⁴ 47 U.S.C. § 303 note.

⁵⁵ Section 207 as enacted was added at conference during the 1996 Act deliberations. S. Conf. Rep. No. 104-230, 104th Cong., 2d sess. at p. 61 (Feb. 1, 1996) (“S. Conf. Rep.”). Only the House of Representatives bill, H.R. 1555, included a provision (Section 308) to prohibit restrictions that inhibit a viewer’s ability to receive video programming services through DBS services and OTA devices for traditional television. H.R. Rep. No. 104-204, 104th Cong., 1st sess. at p. 43 (July 24, 1995). MMDS, also known as “wireless cable,” was added at conference likely due to increased interest in new applications for the service. *See* S. Conf. Rep. at p. 61. Not long after the passage of the 1996 Act, the FCC completed the initial MMDS spectrum auction in March 1996. FCC Auction # 6. <https://www.fcc.gov/auction/6> (last visited May 30, 2019).

called “advanced telecommunications services,”⁵⁶ was in the nascent stages of development and Congress clearly intended to increase the development and access to such services.⁵⁷

In the last 20 years, broadband has become a primary source of video programming and streaming services, with more than half of U.S. Internet users streaming video content every day. Consumers should be able to select any technology for watching video programming and not be disadvantaged because local regulations and homeowners’ association covenants limit access to programming services depending on the type of technology used to deliver the programming. Congress surely did not intend for the Commission to only protect consumers using older or lesser used technology to access video programming services.

2. RAY BAUM’S Act Of 2018 Also Supports The Proposed Rule

In legislation designed to foster increased competition among various platforms and bring more consumer choice for affordable services, Congress was concerned about small communications businesses and adopted Section 257 as part of the 1996 Act.⁵⁸ Section 257 required, *inter alia*, that the Commission identify and eliminate market entry barriers and report such efforts to Congress every three years.⁵⁹ Congress continues to be concerned about the ability of small businesses and entrepreneurs to compete on a more level playing field, as

⁵⁶ See Section 706 of the 1996 Telecom Act, 47 U.S.C. § 1302. WISPA also acknowledges that Section 706 was a cited source of authority in the *Competitive Networks Order*. *Competitive Networks Order* at 23030, ¶ 103 (“We believe that the extension of OTARD protections to antennas used for the transmission or reception of fixed wireless signals will foster the deployment of advanced telecommunications services.”).

⁵⁷ See, e.g., Sections 254 (mandating universal service fund support to schools and libraries for telecommunications) and 706 of the 1996 Telecom Act. “Section 706 directs the Commission to ‘encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans’” *Competitive Networks Order* at 23030, ¶ 103.

⁵⁸ 47 U.S.C. § 257.

⁵⁹ See *id.* at § 257(c).

illustrated by its recent amendment of Section 257 of the Act with Section 402 of RAY BAUM'S Act of 2018.⁶⁰

Under RAY BAUM'S Act, Congress repealed the Commission's triennial congressional report under Section 257(c)⁶¹ and replaced it with a more comprehensive "Communications Marketplace Report" due every even numbered year. Among other requirements, Congress mandated that the Commission assess the state of competition and identify any law, regulation, or regulatory practice that poses a barrier to entry or to the competitive expansion of existing providers of communications services.⁶² Significantly, Congress retained the national policy under Section 257(b) to promote the diversity of media voices, vigorous economic competition and technological advancement, and in the fulfillment of this new biennial report, the Commission is also directed to take special consideration of market entry barriers for entrepreneurs and other small businesses.⁶³

The Commission recognized in the *NPRM* that there is a need to modernize and update the OTARD framework "to reflect the current technological landscape."⁶⁴ The Commission's elimination of any restriction or impediment that hampers infrastructure deployment for an existing fixed wireless provider or a new entrant would certainly meet the congressional mandate under the RAY BAUM'S Act to reduce barriers to entry and promote competition for small businesses.

⁶⁰ Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. P, title IV, §§ 401, 402(f), 132 Stat. 1087-89 (2018) (codified at 47 U.S.C. § 163).

⁶¹ RAY BAUM'S Act, § 402(f).

⁶² 47 U.S.C. § 163(a) and (b).

⁶³ *See id.* at § 163(d)(3).

⁶⁴ *NPRM* at ¶ 7.

C. The Commission's Rule Change Would Be Consistent With Congressional Mandates And Objectives Of The Regulatory Flexibility Act, As Amended.

This extension of the OTARD rule also will eliminate unreasonable restrictions that hinder the ability of small fixed wireless providers to site and install networks, and invest in infrastructure that will allow the provider to continue to serve underserved and unserved communities. In its adoption of the Regulatory Flexibility Act ("RFA"), Congress acknowledged that "the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity."⁶⁵ To this end, the proposed rule change meets the congressional mandate under the RFA to reduce, if not eliminate, the significant economic impact of any remaining OTARD restrictions on small businesses.⁶⁶

Conclusion

WISPA respectfully requests the Commission to take action in this docket consistent with the views expressed herein.

Respectfully submitted,

**WIRELESS INTERNET SERVICE
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June 3, 2019

⁶⁵ Congressional Findings and Declaration of Purpose, § (a)(4), 5 U.S.C. §§ 601 *et seq.*

⁶⁶ *Id.*