Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Updating the Commission's Rule for Over-the-Air Reception Devices	)	GN Docket No. 19-71
	)	
	)	
To: Office of the Secretary	)	
	)	

COMMENTS OF MULTIFAMILY BROADBAND COUNCIL

I. EXECUTIVE SUMMARY

The Multifamily Broadband Counsel ("MBC") is a trade association composed of independent, competitive broadband service providers and their vendors serving the multifamily industry throughout the United States. MBC members deploy a broad spectrum of technology platforms, including wireless, cable modem, DSL, active Ethernet and fiber-to-the-home, to deliver cutting-edge digital communications services to residents of multifamily communities from coast to coast. MBC also represents vendors that support service providers including manufacturers, content providers, distributors, network engineers, equipment suppliers and consultants.

The OTARD rule[1] preempts any local regulation – including municipal zoning and land-use ordinances, owners' association rules and lease restrictions – that "impairs" the installation, maintenance or use of wireless signal antennas that are located on property within the exclusive control of the antenna user insofar as such antennas are one meter or less in diameter. The term "antenna user" generally refers to the customer of the wireless service; hence, the OTARD rule protects from local regulation antenna devices that are located at the customer premises. In the Notice of Proposed Rulemaking (the "*NPRM*"), the Commission proposes to expand the scope of the term "antenna user" to encompass wireless service

[1] 47 C.F.R. § 1.4000.

providers. If implemented, the proposed change would preempt most restrictions not only on customer reception devices but on carrier hub-sites as well, so long as the antenna device is no more than one meter in diameter and located on property that is within the exclusive control of the carrier.

While MBC understands and shares WISPA's concern over the difficulties of deploying wireless infrastructure in rural and other underserved areas, we are concerned that if the proposed rule is adopted, owners of multi-tenant buildings will have less incentive to negotiate access deals with wireless service providers for the siting of wireless facilities on leased private property. To that extent MBC believes that the proposed rule could deter rather than encourage the deployment of advanced wireless networks where they are needed most, to the detriment not only of owners and carriers but also of their customers who live in multi-dwelling unit ("MDU") properties. MBC does not believe there is sufficient evidence on the record to justify an action that risks upsetting business models that have served the market well for decades.

II. INTRODUCTION: REGULATION OF WIRELESS RECEPTION AND TRANSMISSION DEVICES

Following enactment of the Telecom Act of 1996, the FCC established two parallel sets of rules dealing with the placement of wireless devices on private property: one rule for consumer reception devices and another rule for carrier transmission devices. On the consumer side, the OTARD rule[2] preempts almost all restrictions – whether promulgated by local government, an owners' association or contained in leases for multi-dwelling unit buildings – on the installation, use and placement of small customer-end wireless reception devices (initially satellite television and, beginning in 2000, fixed wireless data) located on property controlled by the end-user. On the carrier side, Section 704 of the Telecommunications Act (codified at 47 U.S.C. § 332 (c) (7)) and agency rules interpreting that statute largely preserved the ability of local governments to regulate the placement of the often large and obtrusive structures used in the transmission of wireless telecommunications signals. Indeed, just last year

[2] 47 C.F.R. § 1.4000.

the Commission completed a major overhaul of its "shot clock" and related rules for the purpose of easing the regulatory burdens imposed on the placement of wireless transmission towers and other facilities[3].

Despite pressure from various sources, since 1996 the Commission has been careful to preserve the distinction between consumer reception devices and carrier transmission facilities and the separate regulatory regimes governing each. For example, in the *Competitive Networks Order* issued in 2000, the Commission wrote:

> … the [OTARD] rules apply to antennas that transmit and receive signals, only transmit signals, or only receive signals. We make clear, however, that the protection of Section 1.4000 applies only to antennas at the customer end of a wireless transmission, *i.e.*, to antennas placed at a customer location for the purpose of providing fixed wireless service (including satellite service) to one or more customers at that location. *We do not intend these rules to cover hub or relay antennas used to transmit signals to and/or receive signals from multiple customer locations*.[4]

A few years later, in the *Order on Reconsideration*[5] issued in 2004, the Commission addressed the question of whether dual-use (reception and transmission) wireless devices deployed as part of a mesh network could qualify as protected Section 207 devices under the OTARD rule even though some customers of the carrier were not physically located at the antenna site. This question was answered in the affirmative, but the Commission took pains to limit the scope of its precedent. In particular, the *Order on Reconsideration* makes it clear that the OTARD rule would not provide refuge for carriers that install transmission devices on customer premises for the veiled purpose of evading legitimate regulation by local governments. "In concluding that OTARD protections should extend to such [dual-use] customer-end equipment, we do not intend that carriers may simply locate their hub-sites on the premises of a customer in order to avoid compliance with a legitimate zoning regulation."[6]

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[3] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, WC Docket No. 17-84 (rel. Sept. 27, 2018).
[4] *Competitive Networks Order*, ¶ 99 (emphasis added).
[5] *Promotion of Competitive Networks in Local Telecommunications Markets*, *Order on Reconsideration*, WT Docket No. 99-217, 19 FCC Rcd 5637, 5643-44 ¶¶ 13 (2004) ("*Competitive Networks Reconsideration Order*").

[6] *Competitive Networks Reconsideration Order*, ¶ 17 (emphasis added). Footnote 42 says: "Thus, the OTARD protections would apply to installations serving the premises customer that also relay signals to

III. PREEMPTION AND SCARCITY

Preemption of local regulation is justified in the case of consumer devices but not in the case of carrier hubs because the concept of scarcity applies differently in each case. A *consumer* receiving wireless service needs it at a specific location – namely, the customer's home or business, where the service is actually used. If he or she doesn't receive the signal at that specific location, he or she doesn't receive the service at all. Federal preemption of otherwise applicable legal restrictions is justified *only* because denial of access to the specific customer location is equivalent to denying wireless service to the customer altogether. On the other hand, a carrier delivering wireless service generally has multiple options for the placement of transmission devices. Denial of access to a specific site for placement of a carrier hub does *not* in the ordinary case amount to a denial of service altogether because, unlike the customer, the service provider has more than one option for the location of facilities – not just because carriers tend to have (relative to individual consumers) significantly more resources to devote to facilities siting decisions, but also because carriers are in the business of deploying networks to deliver services to customers wherever they may be located. In the *Competitive Networks Order*, the FCC described the difference as follows:

> In order for a customer to receive fixed wireless service at home or at the office, that customer must be able to place an antenna at a fixed site. To a much greater degree than is the case with a carrier hub site, there is little flexibility to place the antenna at another location. Thus, the inability of a customer to place an antenna at the customer's fixed site will result, with few exceptions, in the denial of fixed wireless service to that customer, whereas 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.[7]

In the *NPRM* the nexus between Federal preemption and scarcity of siting locations has disappeared. Under the proposed expansion, preemption under OTARD is said to be needed not

other customers, such as is typical in mesh networks, but would not apply to *installations that are designed primarily* for use as hubs for distribution of services."

[7] *Competitive Networks Order*, ¶ 114.

because denial of access of any particular site would amount to denial of service to the customer(s) located at that site but because more sites are needed and it would be more convenient for carriers if they didn't have to negotiate with building owners for access to private property. If implemented, the proposal would undermine the parallel but separate regulatory regimes applicable to reception and transmission devices, respectively, transforming the OTARD rule from a consumer-protection measure into an end-run around local regulation for the exclusive benefit of wireless carriers.

IV. VALUE OF NEGOTIATED ACCESS DEALS

Members of MBC that are wireless service providers view their relationship with the owners of multi-dwelling unit ("MDU") properties not as irrelevant or adversarial but as a mutually beneficial partnership that encourages healthy competition among service providers. The negotiation of property access deals provides the foundation for the mutually productive partnership relationship between wireless providers and MDU owners. Accordingly, MBC believes that there is real, tangible value in negotiated deals between carriers and property owners with respect to the siting of wireless facilities, for example on the rooftops of buildings. How would expansion of the OTARD rule to include carrier hub-sites affect existing and new rooftop lease agreements?

The current OTARD rule preempts "[a]ny restriction, including but not limited to any state or local law or regulation, including zoning, land-use, or building regulations, or any private covenant, contract provision, *lease provision*, homeowners' association rule or similar restriction, 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 that *impairs* the installation, maintenance, or use of" fixed wireless antennas that are one meter or less in diameter.[8] A restriction "impairs" the installation, maintenance, or use of an antenna if it "unreasonably increases the cost" of such

[8] 47 C.F.R. § 1.4000 (a) (1) (emphasis added).

installation, maintenance, or use; a cost increase is judged to be reasonable (or not) "*in light of the cost of the equipment or services and the rule, law, regulation or restriction's treatment of comparable devices.*"[9] In the *NPRM* the Commission asks: "Should the Commission clarify that it will interpret 'antenna user' to include fixed wireless providers? For example, if a fixed wireless service provider leases space for a hub antenna on private property, should the commission clarify that the service provider becomes the 'antenna user' with respect to that property?"[10] If the term "antenna user" includes wireless providers, we must consider the implications of that change on both existing rooftop leases and newly negotiated leases.

Suppose that a fixed wireless service provider (referred to as "SP") has signed a 10-year lease with a multi-tenant building owner under which SP maintains a mast and wireless transmission facilities on the rooftop of the latter's building, paying monthly rent of $1,500.00. Although the lease gives SP "exclusive use or control" over the leased rooftop area, SP is not an "antenna user" under the FCC's current interpretation of the OTARD rule. Since SP has no customers in the building, the mast and antenna devices are considered a "carrier hub" and are not protected under the OTARD rule. Let us also suppose that the lease provides that if additional devices or functionality are added to the mast, the rent increases by $500 per month.[11]

If the term "antenna user" is interpreted to include wireless providers, SP's rooftop equipment immediately becomes a protected Section 207 device under the OTARD rule, notwithstanding the fact that SP has no customers at the antenna location. Accordingly, SP's rooftop lease immediately becomes a "restriction" that under 47 C.F.R. § 1.4000 (a) (1) may not "impair" the installation, maintenance or use of SP's equipment. Now suppose that SP attaches additional wireless transmitters to the mast but refuses to pay the increased rent required under the lease on the ground that the amount of the rent increase is not cost-based and is therefore

[9] 47 C.F.R. § 1.4000 (a) (3) and (4) (emphasis added).
[10] *OTARD NPRM*, ¶ 10.
[11] This hypothetical is plausible because rooftop leases for MDU buildings typically provide for rent increases in the event that additional equipment is installed in the leased area.

unreasonable under the expanded OTARD rule. Or let us suppose that SP learns that the building owner also leases space on the same rooftop to a different fixed wireless service provider at a lower monthly rent – say, $1,200 per month. Because the "reasonableness" of SP's costs under OTARD is determined "in light of the cost of the equipment or services and the …. restriction's treatment of comparable devices," may SP refuse to pay the rent specified in the lease on the ground that another similarly situated rooftop lessor is charged a lower monthly rent? Endless variations on this hypothetical are plausible, the common thread being that if the scope of the OTARD rule is expanded to include hub-sites, placement of wireless transmission devices on rooftops will be governed not by negotiated agreements between private parties but by Federal mandate.

The point of the hypothetical is to illustrate the implications of OTARD expansion on existing rooftop leases; the effect would be to cast a veil of uncertainty over the enforceability of tens of thousands of rooftop leases that are now in place across the country. If OTARD expansion would cast doubt upon the enforceability of existing leases, it would almost certainly deter MDU owners from negotiating new rooftop leases. Expansion of OTARD coverage to encompass carrier hubs as proposed in the NPRM may actually make it *more* difficult for MBC's members to obtain access to private property for their antenna devices.

V. INSUFFICIENT EVIDENCE ON THE RECORD

The basic assumption behind the OTARD expansion proposal that *carriers are not capable of negotiating reasonable access deals with MTB owners*. Were this assumption not operative, there would be no reason for regulatory intervention by the Federal government. There are two significant problems with this assumption. First, the record does not contain evidence in support of the assumption – evidence showing that the necessity of negotiating access deals with MDU owners constitutes an unreasonable obstacle to deployment of wireless networks nationwide. Second, the solution proposed in the *NPRM* – expansion of OTARD coverage to include carrier hub-sites – could undermine the very possibility of negotiated access deals between carriers and MDU owners. In fact, the *NPRM*'s proposal goes beyond

simply correcting a perceived (but unproven) imbalance in existing property access negotiations, because the new rule would effectively *prevent* property owners from working with telecom carriers at all. Returning to the hypothetical described above, why would an MDU building owner wish to grant rooftop access to *any* wireless carrier knowing that negotiated lease terms, including rent, may be preempted under expanded OTARD? MBC believes that expansion of OTARD coverage as proposed in the *NPRM* could undermine access negotiations generally because by depriving property owners of the one effective tool they possess in their dealings with carriers, which is the power to withhold – and *therefore* to grant – access to real property for the siting of wireless broadband facilities. To that extent, the effect of the proposed rule would not be to encourage but, on the contrary, to deter the deployment of advanced wireless networks.

Respectfully submitted,

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