

**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

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

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Summary

The record in this proceeding reflects strong support for a limited expansion of Section 1.4000 of the Commission's Rules so that hub and relay antennas are subject to protections the Commission has afforded to other over-the-air reception devices ("OTARD"). The Wireless Internet Service Providers Association ("WISPA") supports this change for the benefit of consumers that will have more choice in how they can receive video services in their residences.

As WISPA and other commenters demonstrated, consumers are increasingly receiving video services over broadband connections, a trend that will continue as more consumers cut the cord or never have a cord. At the same time, modern broadband networks are becoming densified with transmission infrastructure being placed closer to the consumer to create more capacity. Despite these market developments, however, the Commission's current interpretation of its OTARD rule is limited – the protections afforded to fixed wireless and other technologies permit establish protection for small antennas for the reception of video services, but not for the re-transmission of those same signals from the same-sized antenna to nearby residences. The proposed extension of OTARD protection would solve this regulatory disparity that gives other technologies and service providers a competitive advantage over small fixed wireless providers that often are required to navigate lengthy delays as they negotiate rights with homeowners' associations or suffer the burdens of anachronistic local zoning laws.

The Commission has multiple sources of authority to implement the change to the OTARD rule. As it did before in extending OTARD protection to fixed wireless services in the *Competitive Networks Order*, the Commission can exercise its ancillary authority and its direct authority under Section 207 of the Communications Act of 1934, as amended ("Act"), to amend the rule. The Commission also can rely on the recently enacted RAY BAUM's Act, which re-

codified and expanded the provisions of Section 257 of the Act in further recognition of the need to “consider all forms of competition, including the effect of intermodal competition, facilities-based competition, and competition from new and emergent communications services, including the provision of consent and communications using the Internet.” Opponents do not effectively contest the Commission’s authority to adopt the proposed rule and extend OTARD protection to hub and relay antennas.

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To: The Commission

The Wireless Internet Service Providers Association (“WISPA”) hereby submits its Reply Comments in support of the rule change proposed in the Notice of Proposed Rulemaking (“*NPRM*”) in the above-captioned proceeding.¹

¹ *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*”).

Discussion

I. UPDATING THE OTARD RULE TO INCLUDE HUB AND RELAY ANTENNAS WOULD SERVE THE PUBLIC INTEREST

The comments submitted in this proceeding support the Commission's assessment 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."² As WISPA explained in its Comments, the Commission can promote rural broadband deployment, enhance competition, and lower barriers to siting fixed wireless base stations 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.³

CTIA concurred that updating the OTARD rule "to recognize the rapid evolution of wireless networks would enable the Commission to advance the public interest by lowering regulatory barriers that impede the infrastructure that is essential for consumers to receive the benefits of advanced wireless services."⁴ CTIA added that "[m]odernizing the OTARD Rule also has the potential to promote the Commission's longstanding policy objective of promoting competition among broadband and video providers, because it would lower the regulatory barriers that impede competitors from installing necessary antennas."⁵

Google Fiber Inc. ("Google Fiber") likewise explained that the proposed amendment to the OTARD rule "would lower regulatory barriers to deployment and spur investment in

² *Id.* at ¶ 7.

³ Comments of WISPA, WT Docket No. 19-71 (filed June 3, 2019) ("WISPA Comments") at 7-11.

⁴ Comments of CTIA, WT Docket No. 19-71 (filed June 3, 2019) ("CTIA Comments") at 1.

⁵ *Id.* at 5.

competitive fixed wireless broadband in markets across the country.”⁶ Google Fiber, which provides point-to-point high-speed wireless broadband service through its affiliate Webpass, Inc. using millimeter wave signals and fiber optic cables, stated that extending the OTARD protections to hub and relay antennas would provide it and other wireless broadband providers with “greater certainty and predictability as they deploy competitive high-speed wireless broadband to new buildings and markets.”⁷

Several individual fixed wireless broadband providers, including a number of WISPs, commented that the Commission’s proposal to update the OTARD rule would enable them to improve fixed broadband connectivity and increase broadband competition in their respective communities. For example, Starry, Inc. (“Starry”) estimated that it would be able activate 25% to 30% more sites to pass more than one million additional households with a gigabit-capable signal this year if its base stations are protected under OTARD as proposed in the *NPRM*.⁸ Based on this estimated impact to its network, Starry indicated that the limited rule change “would have a dramatic and positive impact on the ability of fixed wireless providers to expand competitive broadband access across the country.”⁹

Interstate Wireless Inc. d/b/a Az Airnet (“Az Airnet”), a WISP in Arizona, commented that there “is a vast public need, especially in rural areas, for the use of small rooftops, or towers to bring internet service to those that can not currently get it, or can only get substandard service.”¹⁰ Az Airnet emphasized that “[c]hanging the OTARD rules would allow us to construct and install the needed infrastructure locations going forward in providing service to

⁶ Comments of Google Fiber, Inc., WT Docket No. 19-71 (filed June 3, 2019) (“Google Fiber Comments”) at 2.

⁷ *Id.*

⁸ Comments of Starry, Inc., WT Docket No. 19-71 (filed June 3, 2019) (“Starry Comments”) at 5-6.

⁹ *Id.* at 8.

¹⁰ Comments of Interstate Wireless Inc. d/b/a Az Airnet, WT Docket No. 19-71 (filed June 3, 2019) at 1.

these customers and areas.”¹¹ Az Airnet explained that it would be able to expand its coverage into new areas and provide better coverage into existing areas if its hub and relay antennas were covered by OTARD because of the significant cost savings it would achieve.¹²

Ionia Unlimited, LLC (“Ionia Unlimited”), a WISP serving rural Ionia County, Michigan and surrounding areas, observed that modifying the OTARD rule “to allow the placement of small broadcast devices at a customer’s property would allow WISPs to provide high speed broadband services to customers that currently can not be reached by other means due to terrain or vegetation.”¹³ Ionia Unlimited indicated that “[z]oning and landlord restrictions prevent the installation of equipment that would allow the relay of fixed wireless signals to nearby residents.”¹⁴ Therefore, Ionia Unlimited stated that the proposed rule change “would improve the ability of service providers to provide affordable high speed internet access to a greater number of under-served customers,”¹⁵ a result that would be consistent with congressional and Commission policy.

Other WISPs also stated that adopting the proposed rule change to include hub and relay antennas would serve the public interest by enabling them to provide fixed wireless broadband service to more consumers. WavSpeed Inc. reported that it has received inquiries from potential customers in areas where reliable high-speed internet is not available and stated that “[o]pening up the OTARD rules to allow wireless relay or hub sites could make the difference in allowing me to service these customers and provide them with the educational, vocational, and

¹¹ *Id.* at 3.

¹² *Id.* (discussing that the local county planning and zoning ordinance exempts OTARD equipment from the wireless permitting fee that it otherwise charges for fixed wireless relay sites).

¹³ Comments of Ionia Unlimited, Inc., WT Docket No. 19-71 (filed June 3, 2019) (“Ionia Unlimited Comments”) at 1.

¹⁴ *Id.*

¹⁵ *Id.*

entertainment benefits that a modern internet connection will afford.”¹⁶ Similarly, MJM Telecom Corp. stated that is hampered by current state and local regulations and has “turned down thousands of potential customers due to the fact that we can not put up a small relay hub site allowing them to receive these services.”¹⁷ It explained that being able to install hub or relay antennas on customer supplied towers and homes “would give greater coverage and accessibility to many needed things such as basic phone and remote medical services in rural areas surrounding our cities.”¹⁸ NETEO Internet encouraged the FCC “to approve the proposed changes to the OTARD rules to allow Wireless ISPs to utilize customer supplied towers and homes for the purpose of expanding service to consumers by way of relay sites.”¹⁹ NETEO Internet further asserted that the proposed rule change “will enable a cost-effect means for companies to provide high speed service to consumers in many cases have no viable alternatives and where large commercial towers or sites and not possible.”²⁰ New Wave Net, a WISP operating in rural Illinois, stated that updating OTARD to include hub and relay sites “can be a major help in expanding coverage to unserved rural areas.”²¹ In sum, as Cherry Capital Connection, LLC commented, the “update to the OTARD laws to include hub and relay sites for fixed wireless service is desperately needed.”²²

WISPA and other commenters also explained that the Commission’s proposal to update the OTARD rule would properly recognize the convergence of marketplace developments,

¹⁶ Comments of WavSpeed Inc., WT Docket No. 19-71 (filed June 3, 2019) at 1.

¹⁷ Comments of MJM Telecom Corp., WT Docket No. 19-71 (filed June 3, 2019) at 1.

¹⁸ *Id.*

¹⁹ Comments of NETEO Internet, WT Docket No. 19-71 (filed June 3, 2019) at 1.

²⁰ *Id.*

²¹ Comments of New Wave Net, WT Docket No. 19-71 (filed June 3, 2019) at 1.

²² Comments of Cherry Capital Connection, LLC, WT Docket No. 19-71 (filed June 3, 2019) at 1.

including that broadband has quickly become the primary source of video programming and streaming services²³ and the densification of modern fixed broadband networks.²⁴

CTIA stated that this *NPRM* is “an ideal opportunity for the Commission to modernize its rules to match the fast-evolving wireless marketplace and ensure that wireless networks can be successfully densified to meet consumers’ evolving needs.”²⁵ Providing historical context, CTIA explained that the current OTARD rule was last substantively amended in 2000 – “a virtual lifetime ago given the revolutionary pace of wireless technology developments.”²⁶ It added that infrastructure must be densified to accommodate the rapid expansion in wireless services and supply capacity for 5G technologies, including the use of millimeter wave bands.²⁷ In particular, CTIA indicated that wireless facility densification is important in the high-band spectrum because high frequencies mean more limited signal propagation and is becoming more critical in low- and mid-band frequencies, which propagate further than high-band spectrum but which also carry much of the capacity burden for providers’ networks.²⁸ Google Fiber agreed that including hub and relay antennas within the OTARD protections would “align the FCC’s rules with the direction of technological growth in the fixed wireless industry.”²⁹ It added that the Commission’s *NPRM* “recognizes the industry’s shift toward dense deployment of smaller hub and relay antennas sited close to consumer residences to account for the infrastructure needs of next-generation wireless technologies.”³⁰

²³ WISPA Comments at 2-3.

²⁴ *Id.* at 8.

²⁵ CTIA Comments at 2.

²⁶ *Id.* at 3.

²⁷ CTIA Comments at 2.

²⁸ *Id.* at 3-4.

²⁹ Google Fiber Comments at 1.

³⁰ *Id.* at 1.

Starry commented that modern fixed wireless antennas can serve multiple purposes within a fixed wireless network and that its transceivers can serve as transmitters and as receivers on a customer premises.³¹ Starry explained that this “multi-mode functionality allows us to extend and densify our networks at a lower cost”³² As a result of these advances in technology, Starry effectively demonstrated that the distinctions in the OTARD rule between base stations and receivers no longer apply and that it does not makes sense to exclude hub and relay antennas from the OTARD protections, so long as they meet the current size restrictions.

CTIA provided additional evidence that consumers are increasingly relying on wireless services for video streaming, citing an NTIA Internet Use Survey indicating that the proportion of Internet users watching video online as grown from 45 percent in 2013 to 70 percent in 2017.³³ CTIA explained that video streaming across wireless networks requires multiple antennas to receive programming, including antennas that connect to other antennas or serve other customer locations.³⁴ Therefore, CTIA agreed that “hub and relay antennas are becoming increasingly important to customers receiving service”³⁵ and that this “warrants an examination of the OTARD rules to explore the inclusion of connecting antennas.”³⁶

II. THE PROPOSED UPDATE TO THE OTARD RULE IS LIMITED IN SCOPE AND WOULD NOT IMPEDE PRIVATE PROPERTY RIGHTS OR LOCAL CONTROL

The concerns raised by some commenters that the proposal to include hub and relay antennas in the OTARD rule will trample on private property rights or interfere with local control are overblown and unfounded. First, the Commission does not propose to change the

³¹ Starry Comments at 7.

³² *Id.* at 8.

³³ CTIA Comments at 4 (citing NTIA Internet Use Survey); *see also* WISPA Comments at 2-3.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 5.

aspect of the OTARD rule that limits its applicability to fixed wireless antennas measuring one meter or less in diameter or diagonal measurement.³⁷ WISPA supports maintaining this size limitation. Second, the Commission does not propose to eliminate or alter the ability to adopt State, local, or private restrictions that are necessary to accomplish a clearly defined, legitimate safety objective, or to preserve prehistoric or historic places that are eligible for inclusion in the National Register of Historic Places, provided such restrictions impose as little burden as necessary to achieve the foregoing objectives, and apply in a nondiscriminatory manner.³⁸ WISPA supports maintaining this existing provision in the OTARD rule as well.

WISPA stated in its Comments that it does not believe it is necessary to define the fixed wireless provider as the “antenna user” for purposes of the OTARD rule with respect to hub or relay antennas, but rather 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.³⁹ While some commenters raise hypothetical scenarios regarding the placement of hub or relay antennas in common areas⁴⁰ or restricted areas,⁴¹ WISPA reiterates that this *NPRM* would not change the OTARD regulatory regime as it applies to those areas. WISPA does not suggest, nor does the Commission propose, to extend the OTARD rule beyond its current applicability to those areas within the exclusive use or control of the resident where the resident has a direct or indirect ownership or leasehold interest in the property where the antenna is located.

³⁷ *NPRM* at ¶ 10.

³⁸ *Id.* at ¶ 10.

³⁹ WISPA Comments at 11-12.

⁴⁰ Common areas include areas where residents may have access to, but not possession of and exclusive rights to use or control.

⁴¹ Restricted areas include areas where residents generally do not have access or possession, such as a building rooftop.

WISPA concurs with Starry that the property owner should continue to have the right to choose to place base stations that meet all of the OTARD requirements on their building and that there “is nothing in the proposed modernization of OTARD that inhibits this right or infringes on a property owner’s right to control their property.”⁴² WISPA also agrees with Starry that “the Commission’s proposed changes to OTARD would generate a significant benefit to building owners while protecting their rights to their property.”⁴³

Starry commented that “with respect to potential concerns about this rule change resulting in a significant increase in the number of fixed base stations deployed, we point out that this proposed rule change is not targeted at increasing the amount of infrastructure that can be deployed in a community, but is simply focused reducing delays for deploying infrastructure that should generally be approved anyway.”⁴⁴ As discussed above, Starry noted that fixed wireless antennas have evolved such that the base stations and transceivers are fully integrated into the same unit and can be used to both extend service to residents of the building and make that building part of the fixed wireless network infrastructure. Starry explained that “the same antenna could be a receiver, repeater or relay, or base station.”⁴⁵ To the extent that receivers can also be used as a hub or relay antenna, WISPA submits that it no longer makes sense to exclude those fixed wireless antennas from the OTARD protections.

III. THE COMMISSION HAS STATUTORY AUTHORITY TO UPDATE THE OTARD RULE

Congress’ overriding statutory mandate is “to make available, so far as possible, to all the people of the United States” communication by wire and radio,⁴⁶ and to foster competition.⁴⁷

⁴² Starry Comments at 7.

⁴³ *Id.*

⁴⁴ *Id.* at 9.

⁴⁵ *Id.*

⁴⁶ 47 U.S.C. § 151.

Further, “Congress intended ‘to confer upon the Commission sweeping authority to regulate in a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding.’”⁴⁸

The Commission has broad authority to execute this mandate.⁴⁹

A number of commenters question the Commission’s authority under the Communications Act of 1934, as amended (“Act”), as further amended by the Telecommunications Act of 1996 (“1996 Act”), to interpret the OTARD rule more expansively. Their arguments generally fall into two categories: (1) that the Commission does not have any direct or ancillary statutory authority, inferred or otherwise, to regulate access to hub and relay antennas for fixed wireless services; and (2) that the Commission does not have the legal authority to preempt local or state governments as provided for in Section 332 of the Act. Each of these arguments is refuted below.

A. The Commission Has Direct And Ancillary Authority To Adopt The Proposed Rule Changes

1. The Proposed Rule Meets Congressional Intent and the Overall Purpose of Section 207 to Benefit Viewers

Certain parties contend that the Commission lacks direct or ancillary statutory authority to further expand the OTARD rule to regulate hub and relay antenna access.⁵⁰ A coalition of

⁴⁷ See 47 U.S.C. § 309(j).

⁴⁸ *Building Owners and Managers Association v. FCC*, 254 F.3d 89, 94 (D.C. Cir. 1998) (affirming the FCC’s Second OTARD Order, 13 FCC Rcd 23874 (1998)) (“*BOMA*”) (citations omitted).

⁴⁹ *Id.* (citations omitted).

⁵⁰ See, e.g., Joint Comments of the National Multifamily Housing Council, the National Apartment Association, the Building Owners and Managers Association International, the Institute of Real Estate Management, Nareit, the National Association of Realtors, the National Real Estate Investors Association, and the Real Estate Roundtable, WT Docket No. 19-71 (filed June 3, 2019) (“Real Estate Associations Joint Comments”) at iv and 28-42; Comments of the United States Conference of Mayors; The Texas Coalition of Cities for Utility Issues; The City of Dallas, Texas; The City of Boston, Massachusetts; The City of Los Angeles, California; The City of Fountain Valley, California; The City of Piedmont, California and Montgomery County, Maryland, WT Docket No. 19-71 (filed June 3, 2019) (“Local Governments Comments”) at 1 and 8-16; Comments of the National Association of Telecommunications Officers and Advisors, The National League of Cities and The National Association of Regional Councils, WT Docket No. 19-71 (filed June 3, 2019) (“NATOA et al. Comments”) at 2-6;

municipal organizations claim that “[n]othing in Section 207 of the Telecommunications Act of 1996 . . . authorizes the proposed new rules . . . [and] no other portion of the [1996] Act cited in the 2000 Order supports the Commission’s assertion of authority.”⁵¹ Their rationale is that the text of Section 207 is specifically limited to fostering viewership of over-the-air (“OTA”) television signals, and does not give the Commission authority to preempt local zoning regulations over the placement of antennas *that have nothing to do with viewing video programming services*.⁵² This claim is without merit. WISPA has illustrated that the proposed rules are consistent with the congressional intent of Section 207, which is to foster access to video programming services via new technology.⁵³ The primary benefit of fixed wireless antennas is to secure better access to broadband services for viewers, which is the world’s largest distributor of video programming services, including those of traditional television stations and networks.⁵⁴ Contrary to commenters that object to the proposed rule change, there is an obvious and important link between a viewer’s access to video programming services and reducing restrictions on the use of fixed wireless hub and relay equipment. As CTIA observed, “[t]here

Comments of Community Associations Institute, WT Docket No. 19-71 (filed June 3, 2019) (“CAI Comments”) at 10-13; Comments of Multifamily Broadband Council, WT Docket No. 19-71 (filed June 3, 2019) (“MBC Comments”) at 4-5; City of Nevada City Comments, WT Docket No. 19-71 (filed May 31, 2019) (“Nevada City Comments”) at 2; and City of Costa Mesa Comments, WT Docket No. 19-71 (filed May 31, 2019) (“Costa Mesa Comments”) at 2.

⁵¹ NATOA et al. Comments at 2-3.

⁵² *Id.* at 2 (emphasis added).

⁵³ WISPA Comments at 14-15. Some opposing commenters implicitly provide support for WISPA’s position that the proposed rule furthers the congressional intent to foster access to video programming services. For example, Local Government Association Comments cite to one dissenting Commissioner to the Commission’s *Competitive Networks Order* who “concluded that the Commission only had authority to extend the OTARD Rule to devices used to receive video programming.” Local Government Comments at 11 (citing to Dissenting Statement of Commissioner Harold Furchtgott-Roth). Another Commissioner stated that “[t]he statutory basis for our OTARD rules applies explicitly to ‘restrictions that impair a viewer’s ability to receive video programming services. . . .’” *Id.* at 11-12 (citing to Dissenting Statement of Commissioner Kevin Martin).

⁵⁴ See WISPA Comments at 2; see also Gallagher Flinn, *Why don't all TV networks stream their shows online?*, HowStuffWorks.com (Feb 23, 2015), <https://entertainment.howstuffworks.com/tv-networks-stream-shows-online.htm> (last visited June 15, 2019).

has been rapid growth in consumers' reliance on commercial wireless services for video streaming, including in their homes."⁵⁵ And the Internet is the increasingly means of distribution for such video programming.⁵⁶

Local government organizations and individual local governments claim that Section 207 applied only to OTA television reception devices and was "not an invitation to cover all antennas."⁵⁷ In support of this argument, the comments stated that the legislative history of 207 was "evidence[] that Congress was concerned *only with* 'video programming and off-the air reception of television broadcast signals or of satellite receivers designed for receipt of DBS services.'"⁵⁸ But this statement regarding the legislative history is incomplete, as illustrated in WISPA's Comments. Only the House Bill H.R. 1555 included Section 308 as the precursor to Section 207 and it referred only to DBS and OTA signals.⁵⁹ There was no companion provision in the Senate Bill S. 652, but at conference to reconcile the two bills, Section 207 was adopted to also include multichannel multipoint distribution service ("MMDS") technology.⁶⁰ MMDS was at that time a relatively new wireless technology used to distribute video programming signals and was added by Congress late in the deliberations while spectrum for MMDS was being auctioned by the Commission.⁶¹ This illustrates Congress' focus on ensuring that the OTARD rules included the latest technology. Today, Internet streaming is the latest technology and the most popular distributor of video programming services.⁶²

⁵⁵ CTIA Comments at 4.

⁵⁶ *Id.*

⁵⁷ Local Governments Comments at 10.

⁵⁸ *Id.* at 10-11 (emphasis added).

⁵⁹ WISPA Comments at 14, n.55 (citing H. R. Rep. No.104-204 (1995)).

⁶⁰ *Id.* (citing to S. Conf. Rep. No. 104-230 (1996)).

⁶¹ WISPA Comments at 14, n.55. The MMDS Auction (#6) started on November 13, 1995 and closed on March 28, 1996. See <https://www.fcc.gov/auction/6> (last visited June 12, 2019).

⁶² See WISPA Comments at 3, 15. Netflix is the #1 video programming service, over traditional broadcast and cable programming services. Todd Spangler, *Netflix Is No. 1 Choice for TV Viewing*,

Other commenters raise objections based on the perceived congressional intent under Section 207 to protect and/or benefit viewers, not service providers or corporate entities.⁶³ They argue that the past legal analyses interpreting the Commission’s authority to new technologies are not appropriate.⁶⁴ But they ignore the possibility – and here, the near certainty – that rules and regulations benefiting viewers and those benefiting service providers and corporate entities are *not* necessarily mutually exclusive. Where there is increased competition among service providers due to the elimination of regulatory barriers that restrict entry or growth, consumers, i.e., viewers, have increased choices, making viewers the ultimate beneficiaries.⁶⁵ And consumers clearly want choices.⁶⁶

Another similar argument is that Section 207 applies to “viewers,” not “devices” or “equipment.”⁶⁷ “In this instance, what is being regulated is the placement of equipment, not ‘communications by wire or radio,’ so the Commission must show that there is a connection

Beating Broadcast, Cable and YouTube (Study), Variety (July 3, 2018), <https://variety.com/2018/digital/news/netflix-tv-survey-broadcast-cable-youtube-1202864459/> (last visited June 15, 2019).

⁶³ Real Estate Associations Joint Comments at 39 (“The proposed amendments would convert the Rule from a pro-consumer measure into a pro-provider measure so the Commission cannot assume that the same rationale and authority apply.”); *see also* MBC Comments at 5 (claiming that the proposed rules “transform[] the OTARD rule from a consumer-protection measure into an end-run around local regulation for the exclusive benefit of wireless carriers”); Local Governments Comments at 14 (“The beneficiary under the NPRM would no longer be a viewer or a user present at the site enjoying the service that the antenna makes possible.”); and CAI Comments at 12 (“The proposed rule seeks to permit a corporation or natural person to install an antenna not for the purpose of individually utilizing or receiving communication services, but rather one that serves the pecuniary interests of communications services providers.”).

⁶⁴ Real Estate Associations Joint Comments at iv and 29.

⁶⁵ *See* CTIA Comments at 5 (“Modernizing the OTARD Rule also has the potential to promote the Commission’s longstanding policy objective of promoting competition among broadband and video providers, because it would lower the regulatory barriers that impede competition from installing necessary antennas.”).

⁶⁶ Starry Comments at 3 (“Starry works directly with building owners to bring our service to their buildings, and building owners recognize that consumers want and deserve choice, even where they may have one of two existing options.”).

⁶⁷ *See, e.g.,* Real Estate Associations Joint Comments at iv and 40.

between the amended Rule and its general authority over communications.⁶⁸ Both arguments are inconsistent with the real world, as well as previous Commission and court precedents. The reality is that consumers do not have access to communications by radio or wire, nor can a viewer use a video programming service, without equipment or devices. Moreover, previous OTARD rulemakings have prohibited local zoning restrictions regarding the placement of devices and/or equipment designed for receiving video programming services on property where the user (i.e., viewer) has a direct or indirect ownership interest,⁶⁹ and on leased property.⁷⁰

In fact, the *BOMA* Court affirmed the extension of the OTARD Rule in 1998 and interpreted Section 207 to apply to benefit “all viewers,” which included viewers subject to a leased property, and not just viewers receiving access to video services through only some technologies.⁷¹ The *BOMA* Court first looked to the plain language of the statute to determine whether Congress explicitly addressed the landlord-tenant relationship and, finding that Congress did not, then determined whether the Commission reasonably interpreted its statutory authority.⁷² This analysis is helpful in the instant rulemaking. The Act, the 1996 Act, and *BOMA* do not explicitly address – and thus do not preclude – a finding that equipment or a device used to provide access to video programming services, or any communication by wire or radio, for one viewer cannot be used by another viewer to also access such services or communications. The ultimate beneficiary continues to be the viewer.

⁶⁸ *Id.* at 40.

⁶⁹ See generally *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 and Multichannel Multipoint Distribution Service*, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 11 FCC Rcd 19276 (1996), *recon. granted in part and denied in part*, 13 FCC Rcd 18962 (1998).

⁷⁰ See generally *BOMA*.

⁷¹ *Id.* at 96.

⁷² *Id.* at 94-96.

**2. The Commission's Reliance On Ancillary Authority Under The
Competitive Networks Order Is Not Misplaced Or Outdated**

Some commenters assert that the Commission can no longer rely on its Sections 1, 4(i), 303, or 706 ancillary authority as stated in the *Competitive Networks Order*⁷³ because the Commission's analysis was flawed.⁷⁴ For example, the Local Governments Comments argue that the Commission cannot rely on general policy statements in the 1996 Act for its ancillary authority, such as Sections 1 and 706.⁷⁵ It explains that under *Comcast*, only statutes that confer powers or responsibilities on the Commission would qualify for ancillary authority.⁷⁶ These arguments, however, appear to address concerns about extending OTARD protection to "common areas" and "common rooftops," not the narrow change proposed in the *NPRM* to extend the OTARD rules to hub and relay antennas as a logical next step in promoting consumer access to video programming. As such, their claims about the reach of ancillary authority are unfounded.

Moreover, the RAY BAUM's Act confers substantive powers and responsibilities on the Commission. Congress mandated that the Commission assess the state of competition and identify any tribal, state (or state political subdivision), federal or foreign laws, regulations, regulatory practices, or demonstrated marketplace practices that "pose a barrier to competitive entry into the communications marketplace or to the competitive expansion of existing providers

⁷³ *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking, Fifth Report and Order and Memorandum Opinion and Order, Fourth Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 22983, 23027-28 (2000) ("*Competitive Networks Order*").

⁷⁴ Real Estate Associations Joint Comments at 37 and n.49 (claiming that the Commission's "original reasoning [in the *Competitive Networks Order*] was flawed [and] cannot be relied on now to further extend the Rule."); and Local Governments Comments at 15.

⁷⁵ Local Governments Comments at 15-16 (citing *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010)); see also Real Estate Associations Joint Comments at 38.

⁷⁶ Local Government Comments at 16 (citing *Comcast* at 654-55).

of communications services,”⁷⁷ to take actions to address such assessments, and to report on those actions to Congress.⁷⁸ Moreover, as a special requirement for assessing the state of competition under Section 163(b), Congress mandated that the “Commission shall consider all forms of competition, including the effect of intermodal competition, facilities-based competition, and competition from new and emergent communications services, *including the provision of content and communications using the Internet.*”⁷⁹ Unlike previous Section 257(c) of the Act, the Commission has to do more than just issue a report.⁸⁰ The Commission has ample statutory authority under the RAY BAUM’s Act to adopt the limited change proposed in the *NPRM*.

B. The Commission Has Clear Authority To Preempt State And Local Restrictions On Non-Personal Wireless Service Facilities

A number of commenters claim that the Commission has no preemption authority pertaining to “personal wireless services” and therefore, have no statutory authority for the proposed rules.⁸¹ They state that hub and relay antennas are classified as “personal wireless services” and therefore, such facilities are subject to the exclusive authority of state and local governments, as preserved in Section 332(c)(7)(A) of the Act.⁸²

These arguments are entirely misplaced and, in fact, the Commission has already spoken directly to the question of the relationship between Section 207 and Section 332(c)(7) in previously extending OTARD protection to fixed wireless signals. In the 2004 *Competitive Networks Reconsideration Order*, the Commission stated that:

⁷⁷ 47 U.S.C. § 163(b); *see also* WISPA Comments at 16 (citing 47 U.S.C. § 163(a) and (b)).

⁷⁸ *See* 47 U.S.C. § 163(b).

⁷⁹ *Id.* § 163(d)(1) (emphasis added). Congress also mandated as a special requirement that the Commission consider small business and entrepreneurs in its assessment of competition and regulatory barriers. *Id.* at § 163(d)(3). Almost all WISPs are small businesses.

⁸⁰ *See Comcast* at 659-60.

⁸¹ NATOA et. al Comments at 3; *see also* Nevada City Comments at 2; and Costa Mesa Comments at 2.

⁸² NATOA et al. Comments at 3; *see also* Nevada City Comments at 2; and Costa Mesa Comments at 2.

Congress, in the case of multi-channel video, chose to remove from the Commission the discretion to decide not to preempt local restrictions by mandating the enactment of the OTARD rules for those services. The Commission retained the discretion to take similar action *vis-a-vis* other services. Indeed, as was pointed out in the *Competitive Networks Order*, Sections 207 and 332(c)(7) were enacted concurrently, leading the Commission to conclude that *it was unlikely that Congress would either preserve or limit local authority over a device based simply on the service for which a customer was using it when elsewhere the Act sought to promote all forms of advanced services.*⁸³

This interpretation is consistent with the earlier *Competitive Networks Order*, where the Commission had extended OTARD protection to fixed wireless signals, concluding that distinguishing the protection based solely on the nature of services provided through an antenna would produce “irrational” results.⁸⁴ The Commission there cited a scenario in which a consumer desiring to receive only Internet service via an antenna would be forced to receive both Internet service and video programming to be protected by the prior OTARD rule, which would distort the competitive market. Accordingly, the Commission held that the OTARD rule should not distinguish among services based on their nature (*e.g.*, voice, video, data) or among antennas based on their function (*i.e.*, transmit or receive, or both).

Subsequently, in the *Competitive Networks Reconsideration Order*, the Commission observed that its earlier decision did consider network configurations and technologies in which customer-end equipment acts as hubs or relays. The Commission correctly acknowledged, however, that “the equipment deployed in such networks shares *the same physical characteristics of other customer-end equipment, distinguished only by the additional functionality of routing service to additional users.* We do not believe that our rules should serve to disadvantage more efficient technologies.”⁸⁵

⁸³ *Promotion of Competitive Networks in Local Telecommunications Markets*, Order on Reconsideration, 19 FCC Rcd 5637, 5643-44 (2004) (“*Competitive Networks Reconsideration Order*”).

⁸⁴ *Competitive Networks Order*, 15 FCC Rcd at 23027 (emphasis added).

⁸⁵ *Competitive Networks Reconsideration Order* at 5643 (emphasis added).

Thus, consistent with Congressional intent, the Commission correctly determined that Section 332(c)(7) does not act as a bar to OTARD protection when the same customer-end antenna is used to receive and deliver video, voice and data services. In fact, the Commission *must* preempt. Adopting the rule proposed in the *NPRM* would be a logical and limited extension of OTARD to reflect evolving trends in the video distribution marketplace and modern network architectures, and would promote competition.

Conclusion

The record demonstrates the public policy benefits of extending OTARD protection to hub and relay antennas. The Commission has clear authority to make the limited rule change it proposes. WISPA therefore requests that the Commission take action in this docket consistent with the views expressed herein.

Respectfully submitted,

**WIRELESS INTERNET SERVICE
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