

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

Petition of WISP Seeking Declaratory)	
Ruling that City of Fountain Valley's)	
Denial of a Conditional Use Permit allowing)	___ Docket No. 19-___
Operation of Wireless Facilities is Precluded)	
By the Commission's OTARD Rule)	
)	
To: Office of the Secretary)	
Attn: Media Bureau)	

PETITION FOR DECLARATORY RULING

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August 15, 2019

EXECUTIVE SUMMARY

Petitioner Rodecker Slater, LLC and Wisp.net (“WISP”) hereby seek a declaratory ruling that the City of Fountain Valley’s (the “City”) denial of a conditional use permit with variance under that City’s Ordinance, FVMC 21.28 (the “Ordinance”), attached as Exhibit B.

The wireless facility for which a conditional use permit was sought is mounted on the rooftop of a building located on Slater Avenue in Fountain Valley, California. As initially installed, the facility consisted of a 40-foot monopole, later replaced with a 40-foot Rohn tower, to which a wireless reception device was attached. That facility qualified for protection from most regulation under the City’s Ordinance under the Commission’s OTARD rule because it was located on property under the exclusive control of the antenna user (Rodecker Slater) and used exclusively to distribute fixed wireless service to tenants of the Slater Avenue building.

Later, David Rodecker, a partner in Rodecker Slater, created a wireless Internet access service (WISP), and added additional radio devices to the existing OTARD-qualifying facility for the purpose of providing fixed wireless service not only to tenants of the Slater Avenue building, but also to customers not located at the antenna site. The additional devices were dual-use devices used to receive wireless signals and relay them to customers, and their attachment to the existing rooftop tower did not substantially alter its physical structure or appearance. The City initially approved a conditional use permit with variance for the upgraded facility but then reversed that approval and has notified RS that it must either modify the facility to conform to requirements of the Ordinance or remove it.

Petitioners believe, based on the language of the OTARD rule and FCC precedents interpreting that rule, that the currently existing dual-use rooftop facilities at the Slater Avenue building continue to qualify for protection under OTARD and respectfully request that the Commission issue an immediate order instructing the City that it may not enforce the Ordinance (other than with respect to safety standards as described in the OTARD rule) against Petitioners.

I. BACKGROUND

A. The Facilities

David Rodecker is Partner and the owner of 50 percent of the shares of Rodecker Slater, LLC (“RS”), a California limited liability company. Relevant Ads, Inc. (“RA”) is also a California corporation of which David Rodecker is the majority owner, and an affiliate of RS. RA is in the business of providing web hosting and other online marketing services to business customers nationwide. In November 2014 RS acquired a three-story multi-tenant building (the “Building”) located at 10175 Slater Avenue, Fountain Valley, CA. RS is headquartered in the Building and leases office space to several commercial tenants including Relevant Ads, Serenity Lodge (aka The District Recovery Center), Q Dermatology and the Southern Californian Indian Center. In April 2016, Mr. Rodecker created a company called Server ISP (“SISP”) for the purpose of supporting server hosting and providing IT support services for RS, RA and other tenants of the Building.

Since November 2011, RA has utilized fixed wireless internet services provided by TPx (formally TelePacific Communications), headquartered in Los Angeles. TPx’s connection relay point is located about ten miles away from the Building in the town of Tustin. In November 2014, RA moved into RS’s Building and established basic internet connectivity with a 40-foot monopole and attached a NanoBeam radio receiver to the pole mounted on the rooftop of the Building.

Exhibit A shows the rooftop facilities as initially installed. However, this structure provided a variable connection speed of 10 Mbps and proved to be less than adequate for the bandwidth needs of RS and its tenants. In order to establish and maintain the unobstructed 1 Gbps wireless connection required for service, the Building required a stronger receiver mounted on a stable structure. Therefore, in January 2017 RS purchased and installed a 3-post Rohn tower, 40 feet tall, on the Building's rooftop and attached to it an Ubiquiti PowerBeam radio reception device. The Rohn tower was installed on a pre-existing steel platform located on the rooftop that had previously been used to house a cellular repeater site. The rooftop tower and antenna were located on property owned and exclusively controlled by RS and used for the purpose of receiving and distributing wireless signals to customers located within the Building, including tenants and RS itself.

In April 2017, SISP, which shared RS's Internet connection began providing wireless (WiFi) Internet access service to the parking area surrounding the Building. For this purpose, SISP purchased a Ubiquiti AirFiber 24 which replaced the PowerBeam device, and an Ubiquiti AM-M-V5G-Ti radio and attached these devices to the rooftop mast. These devices allowed Petitioners to provide high-power WiFi connectivity over a range of up to 12,000 feet. Exhibit C1 is a photograph of the Rohn tower with attached devices.

In 2017 SISP sold its assets to a newly created entity called Wisp.net, referred to herein as WISP, which functioned as RS's fixed wireless Internet service provider (<https://wisp.net/#home>). WISP is a d/b/a of Relevant Ads, Inc., of which David Rodecker is the Managing Partner. As mentioned above, Relevant Ads, doing business as WISP, is customer of TPx's and headquartered in the Building. In June 2017, WISP first began using the rooftop facility to provide fixed wireless service to customers who are located close to the Building but were not tenants. WISP's off-site customers included Silky Sullivan's, a restaurant located across the street from the Building, and

the law office of Dan Hoppy located just down the street at 10221 Slater Avenue. Because both the restaurant and the law office are within the coverage range of WISP's WiFi service, no additional equipment was attached to the mast for the purpose of serving the restaurant and law office customers.

In October 2017, RS installed several point-to-multipoint radio devices on the rooftop mast, including three Ubiquiti PowerBeam 500 AC ISO devices, one Ubiquiti Rocket AC 5Ghz Prism device and one Rocket Dish RD-5G300-LW+ device. These devices were added in order to enable WISP to provide fixed wireless service to customers in southwest Fountain Valley that were neither tenants within the Building nor within range of WISP's WiFi service. In December 2017, WISP added customers to the northwest of the Building, including the City of Fountain Valley's Sports Center. Additional radio devices were attached to the mast for the purpose of providing service to these customers, as well as customers located to the East and the South. As used in this Petition, the term "Facilities" collectively refers to the mast mounted on the pre-existing platform on the rooftop of the Building at 10175 Slater Avenue and all attached devices. The Facilities are owned by RS and leased to WISP, which is, like RS itself, a tenant of the Building. Exhibit C2 shows photographs of the Rohn tower with these attachments taken from the east and west.

B. The City's Involvement

As mentioned in the preceding paragraph, one of WISP's customers was the City of Fountain Valley's Sports Center. In order to receive the wireless signal over an unobstructed line-of-sight, the Sports Center required a 40-foot monopole on its rooftop and attached radio reception devices. See attached Exhibit D entitled "FV Sports Center 40-foot monopole.jpg" and Exhibit E "FVSC – Monopole Google Street View.png." These devices allowed the Sports Center to not

only receive WISP's wireless signal but also to distribute WiFi service to users of the Sports Center's and the Fountain Valley Sports Park facilities. See attached Exhibit F entitled "WISP-FV-City-MOU-Wifi.pdf". A month later, on December 27, 2017, WISP notified the City about the opportunity to improve the quality of Internet service at the City's Park and Sport Center by replacing the existing 40-foot monopole on the Sports Center building with a 40-foot 3-post Rohn tower. WISP offered to provide this upgrade at no cost. The City had not objected to the initial installation of the 40-foot monopole, but in response to WISP's upgrade offer, the City Manager suggested that WISP should offer to pay rent if it intended to attach additional relays to service customers who were not users of the Sports Center and Sports Park area.

On January 19, 2018, the City's Park Director notified WISP that the monopole upgrade at the Sports Center required prior approval by the City Planning department and to expect further communication from that group. See attached Exhibit G entitled "WISP Mail – FVSC tower upgrade.pdf." Then, on February 8, 2018, the City notified RS that WISP's own Facilities at Slater Avenue required a permit as a "Wireless Telecommunication Facility" under the City's Ordinance FVMC 21.28 (referred to herein as the "Ordinance"). See attached Exhibit H entitled "WISP Mail – Wisp – Antenna.pdf."

In response to the City's objection, on April 4, 2018, RS provided the City with design plans describing on how the Building's rooftop Facilities could be modified to conform to aesthetic guidelines provided under the Ordinance. On the following day (April 5, 2018) the City responded that the Facilities would not meet qualifications for a Wireless Telecommunication Facility permit because they did not fully meet the Ordinance's stealth requirements and could not be located on a rooftop unless it was fully screened. See attached Exhibit I entitled "WISP Mail – Rodecker wireless facility.pdf."

On April 12, 2018, RS responded to the City asserting that the Ordinance did not apply because (a) the Ordinance expressly applies to facilities used to transmit or receive “cellular technology,” and WISP’s Facilities were used exclusively for the reception and transmission of fixed wireless service – which is not “cellular technology;” and (b) enforcement of the Ordinance with regard to the Facilities is preempted under the Federal Communications Commission’s (“FCC”) OTARD rule. See attached Exhibit J entitled “Appeal of Citation 20180405.pdf.”

On July 23, 2018, the City’s Planning Commission held an Appeal Hearing to decide the issue. However, a decision was not made by the Appeal Officer at the hearing. Both sides attempted to reach a compromise settlement, but that attempt was unsuccessful because one member of the Planning Commission insisted that none of RS’s proposed modifications were acceptable and that the Ordinance required removal of the Facilities in their entirety unless and until they were properly permitted as a Wireless Telecommunications Facility under the Ordinance.

On September 18, 2018, RS requested assistance from the City Council during a Public Meeting, and the City Council directed the City Manager to take action to resolve the issue. On September 21, 2018, the City Manager notified (*via* e-mail, see attached Exhibit K entitled "City-Continuance.pdf") RS that he would allow RS to continue to operate the Facilities under a Conditional Use Permit with a Variance. Accordingly, RS filed an application for a Conditional Use Permit (“CUP”) with Variance within one week of the City Manager’s request.

On October 8, 2018, the City returned RS’s application and notified RS that the CUP would be issued only after the Planning Department had provided approval and clearances based on a positive vote on the plan from the Planning Commission. See page 1 of attached Exhibit L entitled “Permit Corrections.pdf.” On October 10, 2018, the City Planning Commission held a Public

Hearing on WISP's request for a CUP with Variance. Several members of the public, including all of the neighboring businesses and property owners surrounding the Building, expressed support for WISP's request, with no dissenting opinion.

On November 12, 2018, the City Planning Commission voted 3-0 to approve and issued to WISP CUP No. 1853 and Variance No. 329, with one member abstaining because he was a WISP customer. See attached Exhibit M entitled "City Planning Commission Minutes 20181128.pdf." However, within two months, the City Council reversed course. On December 4, 2018, the City Council voted to review the Planning Commission's approval of WISP's CUP and Variance by holding another Public Hearing.

On January 22, 2019, the City Council held a Public Hearing on the appeal. Over 50 members of the public, including the OC 405 (County of Orange Freeway) expressed support for the CUP and Variance with no dissenting opinion. Nonetheless, the City Council voted to continue the matter to a later session.

On July 16, 2019, the City Council voted 3-1-0 to deny the CUP and Variance, citing the lack of stealthing required under the Ordinance. (The minutes of the July 16 meeting are not yet posted as of the date of this Petition. Footage of the meeting can be viewed here: <https://www.youtube.com/watch?v=D7hp74moJcw>.) RS received a letter from the City's Planning Director dated July 24, 2019 advising RS that it "may no longer operate a wireless facility that operates as a hub-and-relay antenna on the Rodecker building property (10175 Slater Avenue)" and that it is required, by August 23, 2019, to remove the Facilities in their entirety or remove those portions that operate as a hub and relay system, leaving only the "receive-only antenna" for "personal use at the Rodecker Building." See attached Exhibit N entitled "7.24.19 LTR.pdf".

C. Fountain Valley Municipal Code Chapter 21.28 – Wireless Communications Ordinance

In October 2017, the City amended Municipal Code Chapter 21.28 (the “Ordinance”), dealing with wireless communications facilities. The Preface to the amendment states that the amendment is needed in order to keep up with changes in Federal law dealing with the same topic. “The proposed changes to the wireless ordinance are intended to make the Fountain Valley Wireless Communications Ordinance compliant with federal and state law and to add design standards for wireless telecommunications facilities in the public right of way.” *See* attached Exhibit O entitled “FVMC 21.28 Replacement.pdf”.

The Preface also acknowledges the preemptive effect of Federal law in the area of wireless communication where the Ordinance conflicts with Federal rules. “Federal law significantly limits the City’s ability to regulate wireless telecommunications facilities. Under federal law, a local agency’s decisions cannot have the effect of prohibiting the provision of wireless service ...” The preemptive effect of Federal law is again acknowledged in Section 21.28.020, which excludes from the definition of “wireless telecommunications facilities” “[a]ny wireless telecommunications exempted from this Code by federal law or state law.” These prefatory statements constitute an explicit acknowledgment that where the Ordinance is inconsistent with the FCC’s OTARD rule, those portions of the Ordinance are not enforceable against the Petitioners.

The Ordinance requires that anyone proposing to construct “wireless telecommunications facilities” must file an application with the City and establishes criteria for approval of such application. For example, Section 21.28.030 states that the City may deny a request if the proposed installation “will adversely affect the property or surrounding neighborhood.”

Section 21.28.040 establishes specific substantive criteria with which a proposed installation of wireless facilities must comply, including:

- (e) The facilities must be located, installed and mounted in a manner to minimize, to the greatest extent possible, the visibility of the antenna and equipment;
- (i) Antennas and accessory wireless equipment, if visible, must be screened with a solid wall and/or landscaping to the greatest extent possible; and
- (j) All facilities must be stealth unless exempted by federal or state law. Stealthing includes “concealment of any component of the wireless facility”, for example by use of “monopines”, flagpoles or windmills.

Under Section 21.28.060, rooftop mounted facilities must:

- (a) Be appropriately screened from view with a façade which compliments the architecture of the building to create a balanced integrated edge treatment; and
- (b) Not exceed the maximum height limit for the zone in which the facilities are located; and
- (c) Be architecturally consistent with the building where the rooftop antennas are located, such as having similar style and finish.

Under Section 21.28.090, wireless facilities that are “fully assimilated to surroundings or collocated on an existing antenna-supporting structure” may be approved by Administrative Permit. All permit applications require a public hearing and may be approved only if the Planning Director makes specific findings set forth in subsection (e), including findings that there is no conflict with existing structures on the property, and, that the design and placement of the facilities will not adversely impact the use of the property and surrounding areas.

II. FEDERAL REGULATION OF WIRELESS FACILITIES SITING

Wireless communications in general are regulated by the Federal government under a policy of encouraging and facilitating the deployment of advanced wireless communications infrastructure nationwide. As stated by the Federal Communications Commission in 2014:

Demand for wireless capacity is booming: more consumers are accessing mobile broadband every year, driving more innovation and expanding access to public

safety. But our ability to meet this demand depends on the infrastructure that supports the services. We therefore take concrete steps to facilitate the deployment of the infrastructure necessary to support surging demand, expand broadband access, support innovation and wireless opportunity, and enhance public safety—all to the benefit of consumers and the communities in which they live.¹

In order to achieve the policy goal of facilitating the deployment of wireless infrastructure to meet surging demand, Federal law explicitly preempts regulations at the state and local level that create unreasonable obstacles to the efficient deployment of essential wireless facilities on public and private property. Since enactment of the Telecommunications Act of 1996, the Congress and the FCC have promulgated and developed parallel regulatory regimes governing the placement of wireless reception devices on the one hand, and wireless transmission devices on the other.

A. Parallel Regulatory Regimes for Wireless Reception and Transmission Facilities Siting

With regard to the placement of wireless *reception* devices, Section 207 of the 1996 Act required that the Commission promulgate rules that “prohibit restrictions that impair a viewer’s ability to receive video programming services” via antennas.² The rules promulgated by the FCC pursuant to Section 207 are known as the over-the-air-reception device or OTARD rules, found at 47 C.F.R. § 1.4000. The OTARD rules prohibit any state or local law or regulation or any private contract or other restriction of any kind that impairs the ability of an antenna user to install, operate and maintain certain antenna devices (one meter or less in diameter) on property over which the antenna user has exclusive control and a direct or indirect ownership or leasehold interest.

As originally issued, the OTARD rule was intended to facilitate the use of dish antennas used to receive direct broadcast satellite television signals. The rule did *not* apply to antennas

¹ *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, WT Docket No. 13-238, (rel. Oct. 21, 2014) ¶ 2

² Telecommunications Act of 1996, Pub.L. No. 104-104, § 207, 110 Stat. 56 (1996), 47 U.S.C. § 303.

carrying telecommunications traffic. In year 2000, however, in response to concerns expressed by CLECs and Commercial Mobile Wireless Radio (CMRS) operators, the FCC revised the OTARD rule to include “all customer end antennas and supporting structures of the physical type currently covered by the rule, regardless of the nature of the services provided through the antenna.”³ The revised rule specifically covers devices used to receive fixed wireless signals, meaning, any commercial non-broadcast communications signals transmitted via wireless technology to and/or from a fixed customer location.⁴ The rule also generally prohibits any governmental or private restrictions on any mast or support for an antenna covered by the rule, although a mast that is more than 12 feet high is subject to limited safety-related regulation.

With regard to the placement of wireless *transmission* devices, Section 704 of the Telecommunications Act of 1996, codified at 47 U.S.C. § 332 (c) (7), provides for limited preemption of state and local zoning authority over the siting of personal wireless service facilities such as cell towers and other structures designed to provide wireless services to end-users. State or local rules governing the placement, construction, and modification of personal wireless service facilities may neither “unreasonably discriminate among providers of functionally equivalent services”, nor “prohibit or have the effect of prohibiting the provision of personal wireless services.” Subject to these two limitations, local zoning authority is preserved. Section 332 (c) (7) “prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement.”⁵ State or local governments may not regulate wireless facilities based on the environmental effects of radio frequency emissions to the

³ *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22983, ¶ 99 (2000) (“*Competitive Networks First Report and Order*”).

⁴ 47 C.F.R. § 1.4000 (a) (2).

⁵ H.R. Rep. No. 104-458, at 207-08 (1996), reprinted in 1996 U.S.C.A.N. 222 (“Conference Report”).

extent that a facility complies with FCC regulations on such emissions. State and local governments are also required to act facilities siting requests within a reasonable period of time, and denials must be in writing and supported by substantial evidence, subject to judicial review.

As described above, these parallel regulatory regimes draw a clean distinction between local regulation of *consumer-end antenna facilities* on the one hand, and *carrier hub antenna facilities* on the other hand. Local regulation of consumer-end reception devices is strictly limited under the FCC's OTARD rules, but local authority over carrier-end transmission devices is for the most part preserved under Section 332 (c) (7). There is thus a large disparity between the regulatory treatment of wireless reception devices vis-à-vis wireless transmission devices, respectively. Because restrictions on the placement of reception devices are in effect restriction on the customer's right and ability to receive wireless service altogether, local regulation of those devices is for the most part preempted. On the other hand, usually large and wealthy wireless carriers typically have the capacity to access multiple alternative locations for transmission facilities, such that Federal preemption of local regulation (subject to limits stated in Section 332 (c) (7) and associated rules) is unjustified.

While this disparity in regulatory treatment is the understandable result of historical events, the clean distinction between wireless reception devices and wireless transmission devices is increasingly difficult to maintain as wireless technology changes in ways that dramatically increase the efficiency of wireless communications technology. As the evolution of technology tends to blur the distinction between reception and transmission devices, industry professionals, consumers, as well as Federal, state and local regulators are confronted with the question of which rules apply to the placement of dual-use devices that are designed to both receive wireless signals at the device location, and to relay signals to customers located elsewhere.

B. The OTARD Rule

One of the expressly preemptive Federal rules facilitating wireless infrastructure deployment is the FCC's Over-the-Air-Reception-Device ("OTARD") rule, 47 C.F.R. § 1.4000. The OTARD rule prohibits laws, regulations or restrictions imposed by State or local governments (or private entities) that impair the ability of antenna users to install, maintain, or use over-the-air reception devices.⁶ The rule prohibits restrictions that unreasonably delay or prevent installation, maintenance or use of an antenna; unreasonably increase the cost of installation, maintenance or use; or preclude reception of an acceptable quality signal.

As originally promulgated, the OTARD rule applied only to antennas used to receive video programming signals. However, in the 2000 *Competitive Networks First Report and Order*, the Commission expanded its coverage to apply to "customer-end antennas used for transmitting or receiving fixed wireless signals."⁷ The FCC amended the OTARD rule to include "all customer end antennas and supporting structures of the physical type currently covered by the rule, regardless of the nature of the services provided through the antenna."⁸ The Commission indicated that the extension of the OTARD rule would apply "only to antennas at the customer end of the wireless transmission, *i.e.*, to antennas placed at a customer location for the purpose of providing fixed wireless service ... to one or more customers at that location."⁹ The Commission did not intend that the rules cover hub or relay antennas used to transmit signals to and/or receive signals from multiple customer locations.¹⁰

C. Treatment of Dual-Use Antenna Devices under the OTARD Rule

⁶ 47 C.F.R. § 1.4000.

⁷ *Competitive First Report and Order*, ¶¶ 97-100.

⁸ *Competitive Networks First Report and Order*, ¶ 99.

⁹ *Id.*

¹⁰ *Id.*

The *Competitive Networks First Report and Order* did not address the question of how to determine whether a dual-use antenna facility, which is used both to receive and to transmit fixed wireless signals, should be treated as a customer-end antenna under the OTARD rule or a carrier hub under Section 332 (c) (7). The question was first explicitly addressed in the *Competitive Networks Order on Reconsideration* issued in 2004.¹¹ In that proceeding, Triton Network Systems sought “reconsideration and clarification of the Commission’s determination in the *Competitive Networks First Report and Order* that customer-end antennas used as hubs or relays are explicitly excluded from the protections of the OTARD rule.”¹² Triton deployed its networks using a “point-to-point-to-point” architecture in which each customer reception device *also* serves as a relay device to transmit the signal to other customer devices. The Commission acknowledged that in the *Competitive Networks Order*, it “did not consider those network configurations and technologies in which customer-end equipment performs both functions. As demonstrated by the point-to-point-to-point architecture cited by Triton and the mesh architectures being actively developed and deployed, other types of deployment of advanced services may no longer rely on the traditional configurations addressed in the *Competitive Networks Order*.”¹³

In the *Competitive Networks Order on Reconsideration*, the FCC concluded that Triton’s dual-use antenna devices *are* Section 207 devices protected under the OTARD rule from all but minimal safety regulations at the local level. The crucial consideration supporting this conclusion was the fact that the *dual-use antenna devices did not significantly differ, in terms of their physical structure and appearance*, from consumer-end antennas that are exclusively as reception devices. It was only in their more advanced and efficient *functionality* that the new dual-use devices differed

¹¹ *Promotion of Competitive Networks in Local Telecommunications Markets*, Order on Reconsideration, 19 FCC Rcd 5637, 5643-44 ¶¶ 13-18 (2004) (“*Competitive Networks Reconsideration Order*”).

¹² *Competitive Networks Reconsideration Order*, ¶ 13.

¹³ *Competitive Networks Reconsideration Order*, ¶ 16.

from the customer-end reception antennas under consideration when the OTARD rule was originally promulgated in 2000.

For the purposes of the OTARD protections, 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 customers. We do not believe that our rules should serve to disadvantage more efficient technologies.¹⁴

Nonetheless, the FCC did worry about the possibility that unscrupulous wireless carriers could misuse this precedent to escape local regulation (preserved under Section 332 (c) (7)) by deliberately locating carrier hub facilities at one or more customer locations.¹⁵ The Commission addressed this worry by focusing on the original intent and purpose of the facilities when initially installed: “...[I]n order to invoke the protections of the OTARD rule, the equipment *must be installed in order to serve the customer on such premises...*”¹⁶ As explained in a footnote, radio antenna devices that are *primarily designed and installed as transmission facilities* may not hide behind OTARD’s protective shield. “Thus, the OTARD protections would apply to installations serving the premises customer that also relay signals to 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 service.”¹⁷

The precedential significance of the *Competitive Networks Order on Reconsideration* may be summarized as follows: Dual-use antenna facilities that are installed at a customer premises with the original intention and purpose of receiving and distributing fixed wireless service to

¹⁴ *Competitive Networks Reconsideration Order*, ¶ 16.

¹⁵ “In concluding that OTARD protections should extend to such consumer-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.” *Competitive Networks Reconsideration Order*, ¶ 17.

¹⁶ *Competitive Networks Reconsideration Order*, ¶ 17 (emphasis in original).

¹⁷ *Competitive Networks Reconsideration Order*, ¶ 17, footnote 42.

customers located at the antenna site, and that otherwise meet OTARD requirements (*e.g.*, do not include dish antennas more than one meter in diameter), then the facilities are protected under the OTARD rule, and the subsequent addition of dual-use equipment relaying wireless signals to customers at other locations does not remove the facilities from OTARD's protections.

The *Competitive Networks Order on Reconsideration* leaves many ambiguities in its wake, and recent innovations in technology since 2004 have only magnified the need for clarity if the Commission is to continue advancement of its goal of promoting the deployment of advanced wireless networks. For example, Triton Networks' "point-to-point-to-point" and similar "mesh" networks qualify for OTARD protection, but the Commission did not expressly define those terms, and wireless technology is evolving at a rate that may soon render those terms anachronistic. Similarly, although Triton's OTARD-protected devices clearly provided signal coverage to customers not located at the antenna site, the Commission did not elucidate how the number of such remote customers, nor their geographical distance from the antenna site might affect the OTARD analysis. Further, the *Competitive Networks Order on Reconsideration* distinguishes between wireless facilities that are "primarily designed for use as hubs" (not covered by the OTARD rule) and those, like Triton's, that are not so designed (covered under OTARD), but this distinction seems to rely on the original intentions of network engineers, which can be difficult if not impossible to determine for evidentiary purposes. Furthermore, a distinction based on differences in the original purposes of alternative network designs can be difficult to draw in the real world and will likely become non-viable in the future as multiple functionalities are seamlessly integrated into multi-use devices as wireless technology advances.

The ambiguities described above – and consequently, the issue raised in this Petition – would be definitively resolved were the Commission to implement proposals outlined in a Notice

of Proposed Rulemaking released on April 12, 2019 entitled “*Updating the Commission’s Rule for Over-the-Air Reception Devices*.”¹⁸ The *OTARD NPRM* responds to a request from the Wireless Internet Service Providers Association (WISPA) 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-end equipment.”¹⁹ By way of the *OTARD NPRM* the Commission proposes to “eliminate the restriction that currently excludes hub and relay antennas from the scope of OTARD provisions,” and states its expectation 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.”²⁰ Needless to say, adoption of the proposals outlined in the *OTARD NPRM* would resolve all issues raised in this Petition.

III. ARGUMENT

At the outset, it is important to note that It is important to emphasize that WISP may not avail itself of the streamlined siting review guidelines established under Section 332 (c) (7) because Section 332 (c) (7) only applies to “personal wireless service facilities” – which are defined to include only facilities that provide “telecommunications services.”²¹ Section 332 (c) (7) does *not* apply to customer-end antennas,²² nor does it apply to facilities that are not used to provide “telecommunications services.”

¹⁸ *Updating the Commission’s Rule for Over-the-Air Reception Devices*, Notice of Proposed Rulemaking, WT Docket No. 19-71, rel. April 12, 2019 (“*OTARD NPRM*”).

¹⁹ *OTARD NPRM*, ¶ 5.

²⁰ *Id.*

²¹ See 47 U.S.C. § 332 (c) (7) (C) (defining “personal wireless services” to include only “commercial mobile services,” “common carrier wireless exchange access services” and “unlicensed wireless services,” with the last term in turn defined to include only “offering[s] of telecommunications services”).

²² “Thus, again, the balance among Congress’ goals is different for customer-end antennas than for hub sites. For all these reasons, we conclude that customer-end antennas are not personal wireless service facilities within the meaning

Section 332 (c) (7) provides no regulatory relief for WISP for several reasons. First, insofar as RS's rooftop Facilities are used to provide wireless services to customers located within the Slater Avenue Building, which is the antenna site, those Facilities *are* in fact customer-end antennas, and are therefore *not* covered under Section 332 (c) (7). Second, WISP provides *only* wireless Internet access services to customers. Since June 11, 2018, the date on which the FCC's *Restoring Internet Freedom Order* took effect, broadband Internet access services ("BIAS") are *not* "telecommunications services."²³ Although WISP's BIAS includes voice-over-IP services, with limited exceptions not relevant here, the FCC has *never* classified VOIP as a "telecommunications service" Therefore, the streamlined siting review procedures established under Section 332 (c) (7) are not available to WISP.

Since Section 332 (c) (7) is of no help to WISP, if Federal preemptive relief from heavy-handed local regulation is available, it must be found in the provision of the OTARD rule. Analysis of local restrictions on a fixed wireless antenna installation under the OTARD rule requires two steps: (1) a determination whether or not the antenna or mast facilities meet the criteria for a covered device under the OTARD rule; and (2) a determination of whether the restriction in question "impairs the installation, maintenance or use of" the device.²⁴ The burden of proof rests on the City to demonstrate that the challenged restriction(s) comply with the OTARD rule.²⁵

of Section 332(c)(7), and thus that Section 332(c)(7) does not preserve state and local authority over these antennas." *Competitive Networks First Report and Order*, ¶ 115.

²³ "The Commission has consistently held that categories of telecommunications service and information service are mutually exclusive; thus, because it is an information service, Internet access cannot be a telecommunications service. On its face then, this language strongly supports our conclusion that, under the best reading of the statute, broadband Internet access service is an information service, not a telecommunications service." *Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order*, WC Docket No. 17-108, rel. Jan. 4, 2018.

²⁴ 47 C.F.R. § 1.4000.

²⁵ 47 C.F.R. § 1.4000 (g); *see Continental Airlines; Petition for Declaratory Ruling Regarding the Over-the-Air Reception Devices (OTARD) Rules*, Memorandum Opinion and Order, 21 FCC Rcd 13201 ("Continental Airlines Ruling"), ¶ 7 (2006) ("... the burden of demonstrating that a challenged restriction complies with the rule is on the party seeking to impose the restriction.")

Regarding (2), there is no doubt that the City’s reversal of its prior decision on September 12, 2018 to approve Wisp’s CUP No. 1853 and Variance No. 329 “impairs the installation, maintenance and use” of the Facilities because the decision requires that all components of the Facilities that are not purely signal reception devices be removed no later than August 23, 2019. According to FCC precedent including the *Competitive Networks Order on Reconsideration*, the OTARD’s preemptive effect applies to relay and transmission devices that are “not purely signal reception devices”; therefore, enforcement of the Ordinance against WISP would impair the installation, maintenance and use of RS’s dual-use Facilities and therefore violate the OTARD rule as interpreted by the Commission.

Regarding (1), the OTARD rule requires that the antenna be no more than one meter in diameter,²⁶ and must be installed “on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property” upon which the antenna is located.²⁷ Applying these criteria to the Slater Avenue rooftop Facilities, as originally installed in November 2014, the following are undisputed facts:

- (a) the receiver antennas attached to the mast – first a Nanobeam radio receiver, later replaced with a Powerbeam radio reception device – were less than one meter in diameter;
- (b) the Nanobeam and Powerbeam antennas were used to receive or transmit fixed wireless signals as defined in 47 C.F.R. § 1.4000 (a) (2);
- (c) the mast and attached antennas were mounted on the rooftop of the Building at 10175 Slater Avenue. The rooftop, along with the rest of the Building, was under the exclusive control of its owner, RS. ;

²⁶ 47 C.F.R. § 1.4000 (a) (1) (i) (B).

²⁷ 47 C.F.R. § 1.4000 (a) (1).

- (d) Rodecker Slater LLC was an “antenna user” because WISP uses the antenna facilities to receive and distribute fixed wireless signals not only to RS but also to tenants within the Building, including WISP itself, Relevant Ads, Q Dermatology, Serenity Lodge and the Southern California Indian Center.
- (e) All of the above-mentioned tenants at the Building are, like RS itself, “antenna users” under the OTARD rule because where the owner (RS) of a multi-tenant building has arranged for the placement of a rooftop antenna, a tenant “has the property owner’s permission to ... use a Section 207 reception device on the property,” and should “be treated as a covered viewer with regard to third-party restrictions under” the OTARD rule.²⁸

It is therefore beyond dispute that *as originally designed and installed*, the Facilities constituted a Section 207 device shielded from local regulation (except with regard to relevant safety standards) by OTARD’s preemptive purpose and effect.

Following initial installation of the Facilities, as new wireless technology and associated opportunities became available, Petitioners attached additional devices to the mast to expand and upgrade its fixed wireless service. The additional devices were dual-function devices capable not only of receiving but also of relaying fixed wireless signals to end-users located outside of the

²⁸ *Implementation of Section 207 of the Telecommunications Act of 1996*, Order on Reconsideration, 13 FCC Rcd 18962, 18995 ¶ 77 (1998) (For the purposes of our Section 207 rules, a renter, tenant, or any other person residing on a property owner’s property with the property owner’s permission (‘tenant viewer’), who has the property owner’s permission to install, maintain and use a Section 207 reception device on the property, shall be treated as a covered viewer with regard to third party restrictions under our Section 207 rules. In this connection, the tenant viewer shall have the same rights under Section 207 rule as would the owner vis-à-vis restrictions enacted by a ... government and/or any other third party. Thus, if an owner residing on the property were entitled to install a Section 207 device on the property under our rules, then a tenant occupying the property is also entitled to a Section 207 device on the property provided the property owner consents.”). See also *Continental Airlines Ruling*, ¶ 21 (“When a leaseholder or property owner uses an antenna to send and receive signals strictly within its premises, and not to ‘multiple customer locations,’ the antenna user is using the antenna for its own purposes under the OTARD rule.”)

Building. The question presented in this Petition is whether the addition of dual-use reception and relay devices to the Facilities located on the Building's rooftop removes the Facilities from OTARD's protection.

As described in the Background section of this Petition, additional devices were attached to the rooftop mast *incrementally* for the purpose of enhancing the efficiency and functionality of the Facilities by expanding their capacity to provide fixed wireless service to new customers located in a wider geographical area. In April 2017, SISP attached an Ubiquiti AM-M-V5G-Ti radio to the mast allowing high-power WiFi coverage at a range of up to 12,000 feet, including the parking area surrounding the Building. In May 2017, WISP was created and in June and July of that year began providing wireless Internet access services to a restaurant and a law firm located in the same neighborhood, using the existing WiFi equipment. According to the precedent established with the *Continental Airlines Ruling*, Petitioners' use of the Facilities to provide WiFi service to these additional customers did not remove the Facilities from coverage under the OTARD rule.

Only in October 2017 did WISP attach additional point-to-multipoint devices on the existing mast, including three Ubiquiti PowerBeam 500 AC ISO devices, one Ubiquiti Rocket AC 5Ghz Prism device and one Rocket Dish RD-5G300-LW+ device. None of these devices exceeded one meter in diameter, and none of them substantially altered the physical characteristics of Facilities that – as originally designed and installed – clearly qualified for protection under the OTARD rule according to the plain language of the rule and the FCC's own long-standing precedents. The only real purpose and effect of attaching point-to-multipoint devices to the pre-existing mast was to increase the functionality of the rooftop equipment, allowing WISP to provide fixed wireless service not only to tenants of the Building and the immediately surrounding area,

but also to additional customers outside the range of its WiFi service, including the City of Fountain Valley’s Sports Center.

In the *Competitive Networks Order on Reconsideration*, discussed above, the Commission ruled that Triton Networks’ point-to-point-to-point network, which utilized dual-use devices designed to both receive and to relay wireless signals to other remote customers, was protected under the OTARD rule. The ruling is based on the fact that Triton’s dual-use devices did not substantially alter the physical characteristics of otherwise-qualifying facilities, but served only to enhance the efficiency of the network:

For the purposes of the OTARD protections, 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 customers. We do not believe that our rules should serve to disadvantage more efficient technologies.²⁹

The observation quoted above is equally true of the point-to-multipoint devices added by WISP to the Slater Avenue Facilities in October 2017. If Triton’s dual-use devices were protected under the OTARD rule in 2006, there is no legal or policy-based reason why RS’s addition of point-to-multipoint devices to its existing Section 207 Facilities should not be also protected under the OTARD rule in 2019, consistent with the precedent established in the *Competitive Networks Order on Reconsideration*.

Furthermore, as with Triton Networks, there is no evidence or other reasonable basis to believe that WISP has deliberately located “carrier hub” facilities at a customer location for the veiled purpose of evading local regulation – a strategy that would remove those facilities from OTARD’s protection according to the *Competitive Networks Order on Reconsideration*. Rather, the evidence indicates that the mast and attached devices were originally designed and installed in

²⁹ *Competitive Networks Reconsideration Order*, ¶ 16.

November 2014, shown in Exhibit A, for the sole purpose of providing fixed wireless service to end-users located at the antenna site on Slater Avenue. Subsequent attachment of dual-use devices to the existing, OTARD-qualifying Facilities allowed WISP to increase the efficiency of its wireless network without significantly altering the physical characteristics of the Facilities. It follows that according to the precedent established in the *Competitive Networks Order on Reconsideration*, the Facilities as they are constructed and operated today qualify for protection under the OTARD rule.

IV. RELIEF SOUGHT

The Petitioner seeks a declaratory ruling from the Commission that the Slater Avenue Facilities constitute a protected Section 207 device under the OTARD rule such that enforcement of the Ordinance is preempted to the extent that such enforcement would impair the installation, operation and maintenance of the Facilities as described in this Petition. In practical terms, such a declaratory ruling would require that the City of Fountain Valley reverse its decision to revoke CUP No. 1853 and Variance No. 329 previously granted to WISP on November 1, 2018. Furthermore, WISP seeks an immediate declaration from the Commission that enforcement of the Ordinance during the pendency of this Petition and during the pendency of the OTARD NPRM is suspended.

Except in circumstances not relevant here, “if a proceeding is initiated” challenging a restriction under the OTARD rule, “the entity seeking to enforce the antenna restrictions in question must suspend all enforcement efforts pending completion of review,” and “[n]o attorney’s fees shall be collected or assessed and no fine or other penalties shall accrue against an antenna user while a proceeding is pending to determine the validity of any restriction.”³⁰ Thus, the

³⁰ 47 C.F.R. § 1.4000 (a) (4). The only exceptions are for restrictions “pertaining to safety and historic preservation.” *Id.*

Ordinance “may not be enforced until the Commission ... issues a ruling that [the Ordinance] is not preempted,” and “a viewer may install, use and maintain an antenna while [this] proceeding is pending.”³¹ The Commission has consistently taken an expansive view of the automatic suspension of restrictions and penalties during the pendency of an OTARD challenge.³²

An immediate suspension is especially justified in this case due to the severe consequences of enforcement of the Ordinance. The first consequence would be the immediate and likely permanent cessation of WISP’s business and the termination of fixed wireless services being used by all of WISP’s customers. In addition, the Ordinance authorizes the award of attorneys’ fees and costs to any party obtaining relief under its enforcement provisions, as well as civil penalties calculated on a daily basis. Given the punitive effect of the harsh penalties and costs imposed under the Ordinance, WISP requests that the Commission notify the City immediately that the pendency of this proceeding automatically suspends all enforcement actions, including the assessment of civil penalties and attorneys’ fees – at the very least during the pendency of this proceeding, but more appropriately until the Commission has finally determined whether to adopt and implement expansion of OTARD’s scope as proposed in the pending *OTARD NPRM*.

Suspension of enforcement actions against WISP for as long as the *OTARD NPRM* is pending is appropriate because the primary issue in that proceeding is whether to “eliminate the restriction that currently excludes hub and relay antennas from the scope of OTARD provisions.”³³

³¹ *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, 19308 ¶ 53 (1996) (“*First OTARD Order*”).

³² See, for example, *Petition for Declaratory Ruling Regarding the Application of the Over-the-Air Reception Devices Rule to Certain Provisions of the Philadelphia, Pennsylvania Code*, CSR-8541-O (filed Nov. 8, 2011); *James Sadler*; *Petition for Declaratory Ruling under 47 C.F.R. § 1.4000*, Memorandum Opinion and Order, 13 FCC Rcd 12559, 12572 ¶ 41 (CSB 1998); *Michael and Alexandra Pinter*; *Petition for Declaratory Ruling under 47 C.F.R. § 1.4000*, Memorandum Opinion and Order, 19 FCC Rcd 17385, 17386 ¶ 4 (MB 2004); *Otto and Ida M. Trabue*; *Petition for Declaratory Ruling under 47 C.F.R. § 1.4000*, Memorandum Opinion and Order, 14 FCC Rcd 8602, 8603 ¶ 2 (CSB 1999).

³³ *OTARD NPRM* ¶ 7.

If the Commission ultimately decides eliminate that restriction and include hub and relay antennas within the scope of OTARD provisions, the City will be preempted from forcing WISP to remove the Facilities from the Slater Avenue Building pursuant to the Ordinance. It follows that for the Commission to allow *any* enforcement efforts until final resolution of the *OTARD NPRM* would be inconsistent with the Commission's essential purposes in promulgating the current OTARD rule and in proposing to expand its coverage in the *OTARD NPRM*.

Respectfully submitted,

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Dated: August 15, 2019