HUBACHER AMES & TAYLOR, PLLC

ATTORNEYS

***Arthur S. Hubacher**
ahubacher@hatlegal.com

***Matthew C. Ames**
mames@hatlegal.com

*Member of VA & DC Bars

11350 Random Hills Road, Suite 800
Fairfax, Virginia 22030
Phone 703-279-6535
Facsimile 703-279-6536

https://HATLEGAL.COM

J. Kirk Taylor
200 S Wacker Drive
Suite 3100
Chicago IL 60606
Phone 817-917-4074
kirk@hatlegal.com
Member of TX & IL Bars

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Via Electronic Filing

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
45 L Street, NE
Washington, DC 20554

Re: *Updating the Commission's Rule for Over-the-Air Reception Devices,* WT Docket No. 19-71.

Dear Ms. Dortch:

This law firm represents the Real Estate Associations, a coalition of trade associations constituting a broad spectrum of the real estate industry, in the above-described docket.[1] We understand that a proposed order is being considered by the Commission on circulation. Although we have no knowledge of the contents of the draft order, for the reasons stated in the Comments and Reply Comments of the Real Estate Associations,[2] the changes to 47 C.F.R. § 1.4000 (the "OTARD Rule") set forth in the Notice of Proposed Rulemaking (the "NPRM") would significantly affect relationships between property owners and wireless service providers. In addition, although the amendments proposed in the NPRM are controversial, a notice of an *ex parte* presentation made by the Wireless Internet Service Providers Association ("WISPA") dated December 7, 2020 (the "*WISPA Notice"*), suggests that it may be possible to resolve at least some of the controversy concerning the proposed order. I write today to respectfully request that the Commission defer action at least until the item can be placed on the agenda for a regular meeting of the Commission and interested parties can better understand and discuss exactly what is proposed at this stage.

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[1] The members of the coalition are: the Building Owners and Managers Association International, the Institute of Real Estate Management, Nareit, the National Apartment Association, the National Association of Realtors, the National Multifamily Housing Council, the National Real Estate Investors Association, and the Real Estate Roundtable.

[2] Comments of the Real Estate Associations, WT Docket No 19-71 (filed June 3, 2019) (the "Real Estate Association Comments"); Reply Comments of the Real Estate Associations, WT Docket No 19-71 (filed June 17, 2019).

Appendix A to the NPRM proposes to add the phrase "including a hub or relay antenna" at the end of 47 C.F.R. § 1.4000 (a)(1)(i)(A) and 47 C.F.R. § 1.4000 (a)(1)(ii)(A). The Real Estate Associations are concerned primarily with two issues raised by these proposed changes: (i) the effect on existing and future rooftop leases; (ii) the scope of the Commission's authority to expand the rule in this fashion.

The *WISPA Notice* suggests that the concerns of the Real Estate Associations are unfounded, stating that "property owners should continue to have the right to determine access to common areas and restricted areas such as building rooftops." If, indeed, WISPA's members do not seek to use the OTARD rule to obtain access to rooftop space, then at least some of the controversy regarding the proposed changes could be resolved by adding language to that effect as part of the amendment.

Such language is necessary because the OTARD Rule protects antennas and antenna users, not physical locations. If hub and relay equipment is added to the list of protected antennas, all users of such antennas will have the right to install them, regardless of the location of the antennas. As explained in the Real Estate Association Comments, the OTARD Rule does not currently affect installations on rooftops because the classes of antennas covered by the rule are all customer-end devices and therefore are installed in end-user premises, such as single-family homes, office buildings, apartments, and condominiums.[3] WISPA, however, seems to believe that the rule protects residents or residential locations. It is true that the rule preempts restrictions on "property within the exclusive use or control of the antenna user;" it is also true that the antennas currently protected by the rule are only useful to their users if installed at the end-users' premises. What WISPA does not acknowledge is that the amendments proposed in the NPRM would grant the right to install hub or relay antennas to every leaseholder in the country, including entities that already hold rooftop leases. Thus, a wireless provider would have the right to install fixed wireless backhaul facilities even if its original cell site lease prohibited installation of equipment other than the permitted cell facility. Furthermore, a lease granted to a fixed wireless provider for use as a hub or relay site would be subject to preemption if, for example, the provider sought to add an additional antenna despite a prohibition in the lease. As explained in detail in the Real Estate Association Comments, this would result in a radical change in the scope and effect of the OTARD Rule. Our concern is heightened because we believe that, in general, hub and relay sites are most effective when installed outdoors and rooftops would seem to be ideal locations.

If the draft order goes beyond the language proposed in the NPRM and limits the definition of an "antenna user" with respect to hub and relay antennas to owners or lessees of residential property, then WISPA may be correct as to the effect of the order. But the draft is not public, and this is not the approach taken in the NPRM. In fact, the NPRM asks several questions that seem to indicate a desire to further broaden or strengthen the applicability of the rule in favor of fixed wireless providers. For example, the NPRM asks whether the Commission should "clarify that it will interpret 'antenna user' to include fixed wireless service providers." NPRM, ¶ 10. That change, however, would not be needed to create the complications regarding rooftop leases discussed at length in the record.

[3] Real Estate Association Comments at 11-22.

Nevertheless, WISPA has indicated that it has no desire to extend the scope of the OTARD Rule to include rooftops. If this is indeed the case, the Real Estate Associations believe that this issue can be resolved through appropriate wording of any amendment.

This is not to say that the Real Estate Associations agree that the Commission has the power to grant rights to service providers under the authority of Section 207 of the Telecommunications Act of 1996. Section 207 directs the Commission to "promulgate regulations to preempt restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, and direct broadcast service." The statute has always been understood to grant rights to "viewers" and not to providers. It was the use of the word "viewers" that led the D.C. Circuit to uphold the expansion of the OTARD Rule to leased property and that justified adding other types of end-user equipment to the statutory list of devices.[4] This is also a key difference between Section 207 and Section 332(c)(7).

The proposal in the NPRM is therefore unsupported by the language of Section 207. WISPA attempts to justify the change by arguing that consumers would benefit from the amendments because it would make it easier for fixed wireless providers to install their equipment. *WISPA Notice* at 4. The trouble with this theory is that it would allow the Commission to preempt any contract term that imposes any cost or burden on a provider of video programming services. What would prevent the Commission from regulating the prices that equipment manufacturers charge fixed wireless providers for their antennas? Or from regulating the rents charged by the owners of office space occupied by such providers? The term "viewers" indicates that Congress meant only to preempt restrictions that directly interfere with the reception of programming by such persons and that is the limiting principle that constrains the Commission's authority. If Congress had meant to grant providers rights, it would have said so.

In conclusion, this proceeding is very controversial for the real estate industry because it raises serious questions about the validity of numerous terms in existing rooftop leases, and would affect future negotiations between property owners and wireless companies, as well as other users of rooftop space. If we understand the *WISPA Notice* correctly, however, WISPA is not seeking such an outcome and it may be possible to craft regulatory language that meets WISPA's needs and the Commission's goals without harming the interests of property owners. The Real Estate Associations would prefer that the Commission refrain from further expansion of the OTARD Rule. Nevertheless, if the Commission feels compelled to proceed, we request that any amendments be carefully drafted to prevent intrusions on private property and the terms of freely-negotiated leases. We also respectfully request that any action on the item be deferred at least until a public draft can be released and the actual effects of any amendments can be assessed.

Very truly yours,

HUBACHER AMES & TAYLOR, P.L.L.C.

Matthew C. Ames

[4] *Building Owners and Managers Association v. FCC,* 254 F.3d 89, 96 (D.C. Cir. 2001).