

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

**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
(the “Real Estate Associations”)**

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SUMMARY

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 (the “Real Estate Associations”) respectfully urge the Commission to refrain from extending the Over-the-Air Reception Devices (“OTARD”) rule, 47 C.F.R. § 1.4000 (the “Rule”), to permit the installation of fixed wireless hub or relay antennas on leased property without the consent of the property owner.

The Real Estate Associations strongly support the deployment of broadband infrastructure of all kinds because apartment residents, commercial tenants and their customers need and want the services that the infrastructure supports. The real estate industry has a long history of promoting competition and access to communications services, and property owners enter into mutually beneficial arrangements with broadband providers every day.

Section 207 of the Telecommunications Act of 1996 was enacted as a pro-consumer measure and in its current form the Rule applies only to “customer-end antennas.” The measures proposed in the Notice of Proposed Rulemaking (the “*NPRM*”), however, would convert the Rule into a broad grant of rights to communications providers. Furthermore, the proposed amendments would inadvertently increase the risks and costs to owners of leased property, thereby interfering with existing market mechanisms and harming deployment in ways that the *NPRM* does not consider or intend.

The proposed amendments would appear to create two new classes of OTARD sites. Section 1.4000(a)(1) preempts “any restriction . . . on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest

in the property” The Rule does not distinguish between different type of properties, but its practical effects may differ, based on the characteristics of the leaseholder. One new class of sites would consist of rooftop space, at which entities that typically have no need for customer-end devices would gain the right to install fixed wireless transmitters. The second class would include the apartments and commercial spaces in which residents and tenants install receiving devices today, but with the added possibility that a third party – the fixed wireless provider – would benefit from the placement of hub and relay equipment at those locations. The proposed changes to the Rule raise different concerns in each case.

The proposed amendments would inadvertently interfere with the existing market for rooftop space. Under current law, even though the purpose of the Rule is to allow individual subscribers to install antennas to serve homes and offices, every rooftop in the United States is subject to the Rule. This is significant because mobile wireless carriers hold thousands of rooftop leases all across America. Currently, lessees of rooftop space do not avail themselves of the Rule because they have no need for protected, “customer-end” devices at those sites. If the proposed changes to the Rule are adopted, however, it appears that mobile wireless carriers would be permitted to install fixed wireless transmitting antennas at every one of those sites, regardless of the terms of their leases. Other rooftop lessees, including even companies that are currently not engaged in transmitting fixed wireless signals, would presumably have the same right. The Real Estate Associations believe that exposing all of those leases to preemption in this fashion would cause serious disruption in the market for rooftop space and inadvertently hinder deployment.

Relying on the OTARD Rule to promote mesh networks in leased environments is speculative and premature. Deployment of mesh networks in dense urban areas may offer

substantial benefits in the future. Nevertheless, this is not apparent from the information set forth in the *NPRM*, and the *NPRM* asks few specific questions related to the characteristics of the technology or how the deployment of “provider-end” equipment in leased space would lead to the desired results. For example, the *NPRM* does not define the term “mesh networks,” describe in any detail how such networks would function in different environments, or describe exactly how the proposed changes to the Rule would promote their deployment in a practical or effective fashion. Nor does the *NPRM* ask specific questions that would prompt the submission of answers to those questions. The Real Estate Associations question whether it is necessary or advisable to amend the Rule to promote mesh networks within leased environments, when the broader policy goal of deploying broadband is being met with existing technologies. It would be very unfortunate if existing, functioning markets were disrupted in an effort to advance what may be no more than a short-term experiment.

The Real Estate Associations also challenge the *NPRM*'s assertion that the Commission has the legal authority to adopt the proposed amendments, for several reasons.

The Commission's authority to override the terms of property leases is limited to “customer-end” antennas. The decision of the Court of Appeals for the D.C. Circuit in *Building Owners and Managers Association v. FCC*, 254 F.3d 89 (D.C. Cir. 2001) (“*BOMA v. FCC*”), defines the limits of the Commission's powers. The purpose of Section 207 was to ensure that homeowners could watch television using their preferred devices. In *BOMA v. FCC*, the court found that the Commission was permitted to extend the original Rule to preempt lease terms because Section 207 uses the term “viewers.” The court did not hold that the Commission had any general or inherent authority to override property rights, but only that it could do so if given that power by Congress. The court then turned to the specific reference to “viewers” in Section

207 and found that it was broad enough to justify the Commission’s decision to override leases. Furthermore, when the Commission extended the Rule to fixed wireless antennas, it did so because those antennas are “customer-end antennas,” and therefore analogous to satellite dishes. *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets; WT Docket No. 99-217*, First Report and Order, 15 FCC Rcd 22983, 23027-23028, ¶¶ 98-99 (2000).

The Commission cannot rely on its past legal analyses. The stated purpose of the *NPRM*’s proposed amendments is to benefit providers of fixed wireless service, and hub and relay antennas are “provider-end” equipment, not “customer-end” antennas. In other words, the *NPRM* proposes to invert the pro-consumer rationale for the Rule, but sets forth no legal argument to justify that inversion. The effects of the proposed amendments to the Rule would be so different in nature and extent from the earlier amendments that they require a new and different legal analysis.

The Commission also cannot rely on its ancillary authority, because that authority does not extend to the placement of provider equipment on leased property. The Commission may exercise ancillary authority only if there is a link between the exercise of that authority and an express delegation of power by Congress in the Communications Act. 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 between the amended Rule and its general authority over communications. The only plausible link between the two is Section 207, but Section 207 only addresses the Commission’s power over the placement of customer-end equipment. Congress has not authorized or directed the Commission to take any action with respect to provider-end equipment located on leased property.

Finally, under the Supreme Court's decision in *Loretto v. Manhattan Teleprompter CATV*, any attempt to extend the Rule to grant providers the right to install or operate equipment in premises leased to a third party would constitute a "*per se*" taking.

In short, the Real Estate Associations oppose the expansion of the Rule to include fixed wireless hubs and relay antennas as it relates to leased property. We also oppose defining the term "antenna user" to include fixed wireless providers and the deletion of the word "customer" from the definition of "fixed wireless signals."

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Introduction

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 respectfully submit these Comments in response to the Commission’s Notice of Proposed Rulemaking dated April 12, 2019 (the “*NPRM*”).¹ The Real Estate Associations represent a broad array of real estate industry sectors, including residential and commercial property owners and managers, and developers, investors, and lenders.²

¹ *In the Matter of Updating the Commission’s Rule for Over-the-Air Reception Devices*, WT Docket No. 19-71, Notice of Proposed Rulemaking (rel. Apr 12, 2019) (the “*NPRM*”).

² The individual associations are further described in Exhibit A.

The *NPRM* proposes amendments to the Over-the-Air Reception Devices (“OTARD”) rule, 47 C.F.R. § 1.4000 (the “Rule”), that are intended to promote the deployment of fixed wireless service. The proposed amendments would, among other things, remove the current exception for fixed wireless hubs and relay antennas. This change would allow the placement of fixed wireless transmitting equipment on leased property over the objections of the property owner.

The Rule implements Section 207 of the Telecommunications Act of 1996,³ which was enacted as a pro-consumer measure. In Section 207, Congress directed the Commission “to prohibit 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 satellite services.”

The proposed changes to the Rule, however, would expand the Rule beyond video and consumer choice and convert it into a broad grant of rights to broadband communications providers. The proposed amendments are unrelated to the purpose of Section 207 and are untethered to Commission jurisdiction. Furthermore, the proposed amendments are very likely to interfere with existing market mechanisms, thereby harming deployment in ways that the *NPRM* does not consider or intend. Existing site leases will become mired in Commission proceedings, discouraging new investment and increasing leasing costs, while the Commission’s staff will be taxed with determining the reasonability of rooftop lease rates and covenants on a case-by-case basis.

The Real Estate Associations therefore oppose the expansion of the Rule to include fixed wireless hubs and relay antennas as it relates to leased property. We also oppose defining the

³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the “1996 Act”).

term “antenna user” to include fixed wireless providers and the deletion of the word “customer” from the definition of fixed wireless.

The Real Estate Associations strongly support the deployment of broadband infrastructure of all kinds because apartment residents, commercial tenants, and their customers need and want the services that the infrastructure supports. In fact, we estimate that property owners have invested more than half a billion dollars of their own capital in broadband infrastructure over the past ten years to supplement and aid the work of the communications industry. Furthermore, property owners enter into mutually beneficial arrangements with broadband providers every day. By taking too narrow a view of the market, however, the *NPRM* inadvertently increases the risks and costs to owners of leased property, in ways that are likely to hinder deployment.

I. BUILDING OWNERS VIGOROUSLY SUPPORT THE DEPLOYMENT OF BROADBAND COMPETITION EVERYWHERE IN AMERICA.

Before the Commission pursues further regulation that may affect owners of leased property, the Real Estate Associations urge the Commission to examine the current state of broadband deployment in the United States and the role property owners have taken in promoting deployment. The real estate industry supports the Commission’s efforts to bolster broadband deployment across the nation. With the rise of e-commerce, changes in how consumers access media, and our ever-increasing reliance on the internet for basic functions, broadband connectivity is a top priority for the industry.

Property owners of all kinds place a very high priority on superior broadband deployment at their properties and in their communities. Owners look for solutions that deliver connectivity for the property, commercial tenants, customers, and residents alike. The Real Estate Associations believe strongly that the marketplace is working, and so we urge the Commission to

avoid measures that could prove counterproductive, and thereby harm investment, constrain competition, and limit consumer access to broadband service. We are also concerned that inopportune regulation could raise the cost of developing multifamily housing and commercial real estate.

While the Real Estate Associations strongly support reasonable measures to promote rural deployment, as well as further competition in the many parts of the country that are already well-served, the Associations also believe that all parties would benefit from a balanced approach that takes into account the extent of current deployment and the existing relationships between the various sectors of the economy that have made that deployment possible.

A. Broadband Service in Apartment Buildings, Office Buildings, and Other Commercial Properties Is Ubiquitous.

According to the Commission’s *2018 Broadband Report*, as of the end of 2016, 92.3% of the population of the United States had access to fixed terrestrial broadband service at speeds of 25 Mbps downstream and 3 Mbps upstream.⁴ The same report states that 99.6% of the population had access to 5Mbps/1Mbps mobile service.⁵ When satellite service is included, the percentage of Americans with access to fixed 25 Mbps/3Mbps service rises to 95.6%, “with deployment to 81.7 percent of Americans in rural areas and 99 percent in urban areas.”⁶ Deployment of fixed terrestrial service in the most sparsely populated parts of the country therefore remains a concern, but as a practical matter some form of broadband service is nearly

⁴ *In the Matter of Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 17-199, 2018 Broadband Deployment Report, 33 FCC Rcd 1660, 1681 at ¶ 50 (2018) (“*2018 Broadband Report*”).

⁵ *Id.* at ¶ 52, Table 2a.

⁶ *Id.* at ¶ 51.

ubiquitous in multi-tenant environments. Very few apartment residents or commercial property tenants lack access to broadband service. For example, RealtyCom Partners, a telecommunications asset management consulting firm that represents the owners and managers of over 2000 apartment communities across the United States, reports that 98% of the properties they represent are served by two or more broadband providers.⁷

The Real Estate Associations support efforts to increase competition and close the gap between urban and rural deployment. But we also think it is important to note that existing rates of deployment were achieved with the cooperation of the real estate industry. Regulatory measures that reflect the economic and business conditions that promote cooperation will promote deployment. Conversely, regulation that reduces incentives for cooperation is likely to slow future deployment. Consequently, to the extent that the goal of this proceeding is to close the urban-rural deployment gap, the Real Estate Associations urge the Commission to ensure that any changes to the OTARD Rule are properly tailored. With over 99% of urban Americans already having access to broadband networks and services, the Real Estate Associations believe that overbroad or unduly aggressive regulation raises the prospect of unintended consequences that may harm the existing market, which is successfully providing broadband infrastructure and services.

⁷ Email from Rush Blakely, President, RealtyCom Partners, to Kevin Donnelly, Vice President, Government Affairs, National Multifamily Housing Council (May 24, 2019) (on file with counsel).

B. Property Owners Actively Promote Deployment of Competitive Services in their Communities Because Residents and Commercial Tenants Demand It.

As the real estate industry has demonstrated in past proceedings, property owners are keenly aware of the need to make sure that their customers – the millions of Americans who live in apartment buildings and visit or work in commercial buildings of all kinds – have access to advanced communications services.⁸ The real estate industry has a long history of promoting competition and access to communications services by creating densely populated markets for the economically efficient deployment of new services and new providers. Their economies of scale make apartment and commercial properties very attractive to telephone companies, cable operators, SMATV providers, and now broadband providers. Every time a new rental apartment or commercial property is built, the market for communications services expands.

In fact, the goals of the Commission and of commercial property and rental apartment owners are closely aligned. In the past, owners wanted communications services because their residents or consumers demanded it. Today, owners want multiple broadband providers for the same reason: resident and consumer demand.

The real estate industry is highly competitive, with thousands of companies of all sizes seeking to attract and retain residents and commercial tenants. Rental apartment owners must address the particular needs and complaints of every resident, and every interaction between on-site staff and a resident is part of a personal, human relationship. Apartment owners strive not just to satisfy, but to anticipate, resident desires and expectations in order to attract and retain them. Owners of other commercial properties must also anticipate and meet tenant demand, and access

⁸ See, e.g., Comments of the National Multifamily Housing Council (“NMHC”), GN Docket No. 17-142, (filed July 24, 2017); Comments of NMHC, et al., MB Docket No. 07-51, (filed Feb. 6, 2008); Comments of the Real Access Alliance, MB Docket No. 07-51 (filed July 7, 2007); Comments of the Real Access Alliance, WT Docket No. 99-217 (filed Aug. 27, 1999).

to broadband service is a critical capability. It is this competitiveness that has driven property owners to ensure that broadband infrastructure is available in their communities and other buildings. This deployment has taken place without government mandates, and the Real Estate Associations strongly believe that government intervention is not needed.

The market structure of the communications industry is very different. Very large, established companies and smaller, newer competitors seek government intervention in support of their particular business models. Furthermore, providers are primarily interested in selling access to their own particular brand of service, in the locations they have chosen to serve, on standard terms, to a mass market of undifferentiated subscribers. Governmental action may be important in that environment, but this proceeding extends beyond the traditional boundaries of the communications industry.

C. Property Owners Frequently Fund the Deployment of Broadband Facilities.

Property owners are not merely passive participants in the marketplace for broadband services, waiting for providers to deploy. There are approximately 20.8 million apartment units and 5.6 million commercial buildings of all types, including 1 million office buildings, in the United States.⁹ These buildings generally require access to both fixed and mobile broadband service. In many instances, particularly in the case of mobile service, property owners must invest their own capital in broadband infrastructure to make sure that residents, commercial tenants, and visitors have access to the services they want.

⁹ Statistics for commercial and office buildings: U.S. Energy Information Administration, 2012 Commercial Building Energy Consumption Survey (CBECS), Table B1 (revised Dec. 2016), available at <https://www.eia.gov/consumption/commercial/data/2012/bc/cfm/b1.php>. Statistics for apartment units: NMHC tabulations of 2017 American Community Survey microdata.

For example, many property owners have spent substantial sums to ensure access to mobile wireless service, by paying for the construction of in-building distributed antennas systems (“DAS”).¹⁰ The Real Estate Associations are not aware of nationwide, publicly-available information on the total amount of that investment, but we can say that the typical cost of an in-building DAS designed to serve an apartment community or office building can range from a quarter of a million to more than one million dollars.¹¹ The wireless carriers rarely agree to fund the cost of construction of such facilities,¹² even though the purpose of the infrastructure is to serve their customers. The pressure on property owners from their residents and commercial tenants is such, however, that thousands of in-building DAS facilities have been built, almost entirely at the expense of property owners, in the last 10 years. If we assume as a rough, conservative estimate that 1000 DAS’s have been built at an average cost of \$500,000 each, then the real estate industry as a whole has invested \$500 million dollars in broadband infrastructure. We suspect that this number is actually low. While that may be small compared to the overall cost of building multiple wireless and fiber optic networks across the continent, it is by no means trivial, and it is in effect a subsidy by property owners of the communications industry.

¹⁰ See, e.g., Declaration of Greg McDonald, attached as Exhibit C (“McDonald Decl.”), at ¶¶ 9-11. DAS construction costs range from \$500 to \$1000 per unit. *Id.* at ¶ 11. a survey of their members conducted by the National Multifamily Housing Council and the National Apartment Association for the purpose of this proceeding (“2019 NMHC and NAA Survey”), 42% of respondents reported that they had installed a DAS at at least one property.

¹¹ McDonald Decl. at ¶¶ 9-11.

¹² *Id.* at ¶ 9.

Property owners have also invested substantial sums in WiFi systems, fiber optic networks, booster systems, and other types of infrastructure at their properties.¹³ We also note that agreements between fixed wireless providers and property owners often require the property owner to bear a share of the cost of the infrastructure at the property.¹⁴

D. Property Owners and Wireless Providers Are Business Partners, Building, Operating, and Maintaining Rooftop Sites To Mutual Benefit.

Owners of apartment buildings and commercial properties play a critical role in promoting deployment of broadband services by making rooftop space available to communications providers. The Commission's *Twentieth Mobile Wireless Report* states that, as of 2016, there were over 308,000 cell sites in the United States.¹⁵ This number has undoubtedly increased in the intervening years. Many of those sites are collocated and the *Twentieth Report* does not disclose how many discrete sites there are. Nevertheless, a large proportion of these sites are on rooftops. For example, as of 2014, it was reported that 25% of Sprint's sites were located on building rooftops, and that as many as 30% of sites in some large metropolitan areas were on rooftops.¹⁶ Consequently, if we assume as a first approximation that Sprint is typical of the four major carriers, it appears that there are 75,000 or more cell sites on rooftops, nationwide.

¹³ In the *2019 NMHC and NAA Survey*, 25% of respondents reported having deployed property-wide WiFi in at least one apartment community, 33% have deployed booster systems, and 8% have constructed fiber optic networks (other than DAS). See also Austin Decl. at ¶ 9.

¹⁴ McDonald Decl. at ¶ 6.

¹⁵ See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 17-69*, Twentieth Report, 32 FCC Rcd 8968, 9041, Appendix II: Table II.F. (Sept. 27, 2017) (*Twentieth Mobile Wireless Report*).

¹⁶ *Sprint Takes HFC Technology to Rooftops with Help from Department of Energy, Sustainable Brands*, <https://sustainablebrands.com/read/cleantech/sprint-takes-hfc-technology-to-rooftops-with-help-from-department-of-energy> (last visited May 29, 2015).

This means that there are tens of thousands of buildings supporting such sites, and tens of thousands of agreements between property owners and carriers or wireless site operators.¹⁷

These figures do not include rooftop installations of satellite antennas operated by providers of direct broadcast satellite (“DBS”) services. The Commission’s reports do not include information about the number of apartment buildings that are served by a DBS provider, using receiving antennas located on a building roof. The Real Estate Associations do not have such data either, but the number is certainly substantial.

The figures above also do not include fixed wireless operators that have been granted access to rooftops by owners of apartment communities and other buildings. Nevertheless, fixed wireless operators are a significant and growing presence, and property owners are working with them to deploy infrastructure and services. For example, Equity Residential, which is the second largest apartment owner/manager in the United States, reports that eight percent of its communities are currently served by fixed wireless operators, and the company will soon increase that number by an additional ten percent.¹⁸ Greystar Real Estate partners, the seventh largest apartment owner and the largest manager in the country, has entered into more than 150 agreements for fixed wireless providers to serve its buildings, and hosts fixed wireless infrastructure on rooftops at roughly 300 apartment communities.¹⁹

In other words, property owners and communications providers are business partners. Regulation that interferes with existing relationships or creates disruption to those relationships

¹⁷ In the *2019 NMHC and NAA Survey*, 83% of respondents reported that they owned or managed at least one property that supports an antenna or other telecommunications equipment on the roof.

¹⁸ See, e.g., Declaration of Kathleen Austin, attached as Exhibit D (“Austin Decl.”), at ¶ 8.

¹⁹ McDonald Decl. at ¶¶ 6, 12.

in the future needs to be carefully considered. The *NPRM*, however, raises no questions about the possible harm that may result from altering the terms of rooftop leases without the consent of property owners. The Initial Regulatory Flexibility Analysis (“IRFA”) accompanying the *NPRM*²⁰ acknowledges that “lessors of buildings used as residences or dwellings,” including apartment building owners, may be affected by the proposed rule changes. The IRFA does not mention rooftops or commercial properties, however, which reinforces our concern that the *NPRM* does not recognize the full scope of the changes it proposes.

II. THE PROPOSALS IN THE NPRM WOULD HARM THE LONG-STANDING PARTNERSHIP BETWEEN BUILDING OWNERS AND BROADBAND PROVIDERS.

Extending the Rule to include fixed wireless hub and relay antennas and the other changes proposed by the *NPRM* would have significant effects for property owners. The Real Estate Associations believe that many of those effects are unintended and will actually hinder broadband deployment. Consequently, we hope that these comments will assist the Commission in recognizing and avoiding those harmful effects.

To be specific, it appears that the proposed amendments would create two new classes of OTARD sites. One class would consist of rooftop space, at which entities that typically have no need for customer-end devices would gain the right to install fixed wireless transmitters. The second class would include the apartments and commercial spaces in which residents and tenants install receiving devices today, but with the added possibility that a third party – the fixed wireless provider – would benefit from the placement of hub and relay equipment. The *NPRM* does not identify or distinguish these classes, but the application of the Rule would have different effects in each case.

²⁰ *NPRM*, Exhibit B.

A. The Proposed Amendments Would Disrupt the Established Market for Rooftop Space.

As discussed in the preceding section, tens of thousands of buildings in this country are currently serving as support structures for wireless facilities of various kinds. Those buildings are both proof that there is an active, competitive, and extensive market for rooftop space and a critical component of the broadband infrastructure that the Commission seeks to deploy. The market for communications services in the commercial and apartment rental sectors is based on competition and negotiation. With few exceptions, that market, like the one for rooftop space, is functioning as intended and consumers are well served.

Any agency committed to promoting competition and choice, guided by free market principles, must be careful before adopting a rule that would interfere with the workings of an existing marketplace, especially without clear, express authority from Congress. We will address the scope of the Commission's authority in Part III below; our point here is that the failure of the *NPRM* to describe or even to inquire about the possible effects of the proposed OTARD amendments on owners of leased property suggests that considerably more work is required before the Commission can act in this matter.

To help illustrate the risks posed by the proposed amendments, we will begin by reviewing how the Rule works, in the context of leased property.

First, it is essential to recognize that the Rule applies to every lease in the United States. The Rule does not exclude any particular type of property,²¹ nor does it distinguish between different classes of lessors or lessees. Under the current Rule, as it has existed since the

²¹ There is a limited exception for certain historic properties. 47 C.F.R. §1.4000(b)(2).

amendments of 1998²² and 2000,²³ this broad scope presents no significant concerns to property owners. This is because of a second key aspect of the Rule, which is that the Rule applies only to certain types of equipment, the “customer-end” antennas described in the *Competitive Networks Order*.

In other words, even though every lease in the country is subject to the Rule, the benefit conferred by the Rule is the right to install “customer-end” equipment, so if the lessee at a particular location is not the kind of entity that has any need for such equipment, the Rule will never come into play. The NPRM, however, proposes to fundamentally alter the current situation, because there are many existing leased premises that might be attractive sites for fixed wireless transmitting equipment, other than residential apartments or indoor office space. These are sites being used for non-residential purposes and non-office purposes, and where the lessee has never had any need for a device protected by the Rule or any incentive to install such a device. In other words, the proposed amendment would essentially create a whole new class of sites that effectively (although not legally) have never been subject to the Rule before.

Here is a concrete example. Under current law, every rooftop in the United States that has been leased to a mobile wireless carrier is subject to the Rule. This statement may seem counterintuitive because the Rule does not apply to mobile wireless equipment, but the Rule makes no distinctions based on the underlying scope or purpose of the lease. Section

²² *In the Matter of Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services*, CS Docket No. 96-83, Second Report and Order, 13 FCC Rcd 23874 (1998) (“*Second OTARD Order*”).

²³ *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, First Report and Order, 15 FCC Rcd 22983, 23032-23033 (“*Competitive Networks Order*”).

1.4000(a)(1) preempts “any restriction . . . on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property” Rooftop agreements typically grant the provider the right to occupy three types of space: an equipment area to contain electronic equipment and a power supply, multiple antenna locations, and space for connecting cables. Some of those rights may be non-exclusive, but the right to occupy the equipment area is often exclusive. This means that in those cases the carriers could, if they chose, install DBS dishes and other receiving devices at every one of those sites under the authority of the Rule. In reality, they do not because they have no need for protected devices at those sites. Therefore, as a practical matter the Rule is not a factor in the relationships between those carriers and the owners of the cell sites.

If, however – and this is the critical point -- the proposed changes to the Rule are adopted, all mobile wireless carriers would be permitted to install fixed wireless antennas at every one of those sites, regardless of the terms of their leases. This would apply regardless of geographic region, local population density, availability of other sites, interference to other users of the roof, or any other consideration. The only factors that would seem to restrain application of the Rule to unilaterally amend these agreements in favor of the wireless company would be the physical suitability of each site and the desires of the carrier.

To our knowledge, the Rule has never been interpreted as granting mobile wireless providers the right to install fixed wireless hub or relay antennas on leased property regardless of the terms of their existing agreements with the property owner. As just noted, the carriers could install “customer-end” fixed wireless equipment (as well as DBS dishes and broadcast television receiving antennas) at those sites, but they have no need to. Furthermore, one purpose of the current exclusion of hub and relay equipment from the Rule was to ensure that the Rule remained

the pro-consumer measure it was always intended to be.²⁴ The proposed changes, however, would immediately grant every mobile wireless carrier the right to install fixed wireless backhaul facilities on rooftops, as long as they held an existing lease and there was space within the leased areas for those facilities.²⁵

We find it surprising that the *NPRM* does not address this possibility, because if our reading is correct, the effects would be quite consequential. As we discussed in Part I.D above, there are tens of thousands of rooftop leases across the country. If enacted, the proposed amendments would raise numerous questions and introduce uncertainty into the existing competitive market for rooftop space; the Real Estate Associations believe that the policy goals articulated in the *NPRM* do not justify the disruption that would follow. This is especially so because of another point that the *NPRM* fails to address, which is the effect of the more mechanical provisions of the Rule.

These two points – the new threat of preemption of existing contracts negotiated without any expectation that such preemption would occur, and the way the Rule has actually been applied over the past 20 years – would very quickly have substantial effects on every fixed

²⁴ “We make clear, however, that the protection of Section 1.4000 applies only to antennas at the customer end of a wireless transmission, *i.e.*, to antennas placed at a customer location for the purpose of providing fixed wireless service (including satellite service) to one or more customers at that location. We do not intend these rules to cover hub or relay antennas used to transmit signals to and/or receive signals from multiple customer locations.” *Competitive Networks Order*, 15 FCC Rcd at 23,028, ¶ 99.

²⁵ We have concentrated on the example of rooftop leases because they are common and they are likely sites for fixed wireless facilities. But there are other types of entities that have leasehold interests on rooftops. For example, many owners have entered into lease agreements with solar panel operators. If the proposed amendments are adopted, those companies would presumably have the right to install fixed wireless antennas, either directly or under agreements with fixed wireless operators. If that were to happen, the effect would be to transfer rights from the property to the solar panel operator, with no discernible policy benefit.

wireless provider and every mobile wireless carrier. To begin to explain why, we will now further describe how the Rule operates if there is a dispute and how it has been applied in concrete cases.

The Rule does not, on its face, automatically preempt any or all of the terms of a lease. Section 1.4000(a)(1) preempts restrictions that “impair[] installation, maintenance or use of an antenna,” and Section 1.4000(a)(3) further states that a restriction “impairs” if it: “(i) unreasonably delays or prevents installation, maintenance, or use; (ii) unreasonably increases the cost of installation, maintenance, or use; or (iii) precludes reception or transmission of an acceptable quality signal.” In theory, therefore, any challenged lease restriction remains enforceable, as long as it does not unreasonably delay or prevent installation, maintenance, or use or increase the cost of those activities. Reality is much more complicated than theory, however, for three reasons. First, the mere claim that a lease restriction might be preempted introduces doubt and friction into the relationship between lessor and lessee. Second, Section 1.4000(g) states that the burden of proof is on the entity seeking to enforce the allegedly impairing restriction. Third, the existing decisions that analyze whether a restriction “impairs installation, maintenance or use” are typically unfavorable to any person seeking to enforce a restriction.

As applied, this new rule would involve the Commission in the very difficult job of determining on a case-by-case basis whether fees are “reasonable” or any of the myriad of provisions that makes up a typical commercial lease agreement “impairs” the installation, maintenance, or use of a proposed antenna. If a carrier were to assert the right to install a fixed wireless antenna without an increase in the previously-negotiated rent, the issue of taking without just compensation would be placed before the Commission. The proposed amendments

would tax Commission staff resources, replace marketplace rent negotiations with government rate regulation, and introduce uncertainty and turmoil into the well-established and well-functioning market for rooftop space.

As we discuss in Part III.A, below, the Real Estate Associations are unaware of any case in which the Rule has been enforced against an owner of leased property. Nevertheless, there is a body of law derived from applications of the Rule in other contexts that would presumably guide the Commission and the courts in applying the amended Rule in the future. The existing decisions apply the Rule in ways that would raise many practical questions and opportunities for conflict if extended to rooftop agreements.²⁶

Rooftop agreements typically contain the following kinds of provisions, whose enforceability would appear to be at risk if the proposed amendments are adopted:

Compensation for the right to occupy the space, including monthly rent and reimbursement of the owner's out-of-pocket expenses. The rent for a rooftop site often is tied to the number of antennas to be installed, either expressly or because the installation of additional antennas requires an amendment of the lease and thus raises the possibility of a rent increase. A mobile wireless agreement may permit the installation of a fixed wireless antenna for backhaul

²⁶ One such issue is simply that many agreements that grant rooftop rights take the form of a license, rather than a lease. A licensee is not a tenant, and under the literal language of the Rule, a licensee would have no rights because it has no “ownership or leasehold interest.” In the residential context – which is to say, the context in which Congress enacted Section 207 of the 1996 Act, and in which the Rule was originally adopted – this was not an issue, because homeowners, apartment residents, and office building tenants are not licensees. But this point illustrates both that the Commission is exceeding its mandate in this proceeding, and that pursuing this matter further will only cause confusion and dispute, if carrier licensees attempt to expand the scope of their licenses under the authority of the amended Rule. Furthermore, service agreements, in which the provider has agreed to install infrastructure at a property to serve tenants, may also grant rooftop rights for certain purposes. These agreements are not denominated as leases, and the rights granted are typically licenses.

purposes if the parties have negotiated that right, but if they have not, the wireless provider must negotiate an amendment. Subjecting such terms to the Rule would render thousands of existing leases subject to challenge. Because of the nature of the sites and devices typically at issue in OTARD cases, the question of whether a property owner may charge rent for the installation of an antenna, or increase the rent, has not arisen, at least as far as the Real Estate Associations can tell. In *In the matter of Michael J. MacDonald*, 13 FCC Rcd 4844 (1997), however, the Cable Services Bureau ruled that a \$5.00 permit fee was unreasonable and therefore preempted. In *In the matter of Shadow Wood Condominium Ass'n*, 21 FCC Rcd 339 (2006), the Media Bureau rejected a proposal by a condominium association that was designed to protect the association against recurring roof repair costs. The association had incurred \$37,200 in repair costs that it attributed to damage to common areas and other areas as a result of DBS dish installations. Under the proposal, the association would have installed brackets on the roof to which residents could attach DBS antennas and then have charged the residents a \$75 fee if they wanted to install a dish. Despite evidence that DBS installation fees exceeded \$75, the FCC refused to endorse the proposal and grant a waiver of the Rule because at least some of the time DBS providers offer free installation.

Approval of plans by the property owner before installation of new equipment. Prudent property owners are extremely vigilant about any type of construction or installation conducted by residents, tenants, or contractors. Review and approval of plans is routine and currently collaborative in nature. Under the Rule, however, the Commission has held in numerous cases that requirements for prior approval or permits before installation of a protected device are preempted because they cause unreasonable delay. *See, e.g., In the matter of Michael and Alexandra Pinter*, 19 FCC Rcd 17385 (2004); *In the matter of Daniel and Corey Roberts*, 16

FCC Rcd 10972 (2001); *In the matter of Stanley and Vera Holliday*, 14 FCC Rcd 17167 (1999). Even a notification process will be preempted “if it is implemented so as to delay installation in any way . . .” *In the matter of Philip Wojcikewicz*, 18 FCC Rcd 19523 (2003).

Prohibition on the installation of additional antennas without the consent of the owner.

Because the Rule preempts any restriction that would completely prevent installation of a device, property owners have to assume that any contract term reserving the right to consent to new OTARD antennas of any kind is preempted. *See, e.g., In re Craig Wirth*, 25 FCC Rcd 15583 (2010); *In re Jason Peterson*, 13 FCC Rcd 2501 (1998).

Requirement to comply with all applicable construction and safety codes. Rooftop leases require all work done at a property to be done in compliance with all applicable laws and safety codes, without limitation and without identifying specific provisions of particular codes. Failure to comply is typically an event of default. Again, this is routine and utterly noncontroversial. The Rule includes an exception for safety codes, but the Commission has interpreted this provision very strictly. In *In the matter of Victor Frankfurt*, 18 FCC Rcd 18,431 (2003), for example, the Commission held that a homeowner’s association rule requiring residents to comply with the National Electric Code when installing an antenna was preempted because “[s]uch a general reference is not only insufficient for the Commission to review, but is far too vague for antenna users to follow.” *Id.* at 18 FCC Rcd 18434.

Strict language addressing the method of attachment of any equipment, typically including a prohibition on penetrating the fabric of the roof. Property owners are very careful about allowing third parties access to their roofs, and when they do, they often prohibit any attachment method that involves penetrating the surface of the roof or allow it only under strict conditions. The alternative can be literally disastrous to the structural integrity and habitability

of the building. The *Second OTARD Order* states that the Rule only grants the right to occupy the exterior surface of a building, such as a balcony, and does not permit attachment to the exterior, so roof penetrations ought not to be permitted, but this is not entirely clear.²⁷ For example, in *In re Jordan E. Lourie*, 13 FCC Rcd 16760 (1998), the petitioner challenged a decision of his homeowners' association ("HOA") prohibiting him from attaching an antenna to the chimney of his townhouse. The Media Bureau found that "[t]he fact that the Association has responsibility for the repairs, replacement, and maintenance of the exterior of Lourie's townhouse where the antenna would be mounted is not controlling" *Id.* at 16763. Because the homeowner was the exclusive user of the chimney, he had the absolute right to attach to it.

Insurance and indemnification. Indemnification and insurance requirements are standard elements of rooftop agreements and are often heavily negotiated. In *Lourie*, 13 FCC Rcd 16760, the Cable Services Bureau stated that the HOA could "take reasonable steps to protect itself from liability stemming from the installation of [an antenna on the chimney], provided that the indemnification is not used as an equivalent for prior approval." We must note, however, that *Lourie* did not actually assess a specific indemnification requirement and so offers no guidance on what might actually be permissible. Furthermore, insurance provisions can impose expense on a provider and the Rule preempts requirements that impose unreasonable costs. The Real Estate Associations do not believe the Commission should be evaluating the terms of insurance coverage for activities conducted on private property, but in principle the proposed amendments appear to open the door to that kind of intervention.

²⁷ The *Second OTARD Order* states that "a restriction barring damage to the structure of the leasehold (e.g., the balcony to an apartment or the roof of a rented house) is likely to be a reasonable restriction In addition, tenants could be prohibited from piercing the roof of a rented house" *Second OTARD Order*, 13 FCC Rcd 23,874, at ¶ 32. These statements are encouraging, but the text of the Rule does not mandate that result.

Common sense suggests that if property owners learn that entities leasing space for non-core purposes (such as rooftop space) will be able to claim broader rights than originally intended, cautious owners will be less likely to enter into those leases. The potential revenue from a rooftop lease is undoubtedly attractive, but it comes with additional management issues, increased risk, and potential liability, so it is not without cost. Adding to that cost would naturally mean that fewer sites would be available for deployment of wireless facilities of all kinds. Furthermore, those owners still inclined to make space available will also be inclined to ask for higher rents or for lease language giving them greater protection against the risk (assuming that language is even enforceable). As a matter of economics, the conclusion is inescapable that if the costs and risk associated with making rooftop space available increase, the compensation demanded by property owners will increase and there are likely to be fewer new leases.

It is very important to note that these changes in the perspectives of owners would not arise simply from the prospect that a fixed wireless antenna might be added without the owner's knowledge or consent. The greater danger is that if property owners come to believe that the Commission can impose broad obligations on owners of leased property, they may also conclude that other federal agencies can do the same, even if Congress has not expressly acted to grant the agency that specific right. This could in turn make them owners wary of entering into lease agreements with an array of third parties that might leave them vulnerable to new obligations. This is not a desirable policy outcome.

Once again, as a matter of economics, if the risk associated with making space available to non-core customers increases, property owners will be less inclined to enter into such agreements, whether for rooftop space or other purposes, or they will charge more. Neither

outcome is good for deployment. In fact, these are exactly the kinds of concerns that underlay the Commission's decision in the *Restoring Internet Freedom* proceeding.²⁸ Consequently, the Real Estate Associations urge the Commission to consider these and other possible unintended consequences carefully before proceeding.

B. Giving Providers New Rights May Reduce the Willingness of Property Owners To Invest in New Communications Infrastructure Within Buildings.

Common sense also suggests that owners will begin to look at the possible effects of the installation of fixed wireless equipment on their own decisions to invest in infrastructure that promotes other broadband technologies. As we discussed above, the Real Estate Associations estimate that the real estate industry as a whole has already invested half a billion dollars or more in DAS facilities alone. For those DAS facilities to be useful, owners must enter into agreements with the carriers allowing them to connect to the DAS, which typically requires the right to grant some space in the building. If it is the Commission's position that it has the power to grant new rights to any person that has entered into any type of lease agreement with a property owners, as the *NPRM* seems to suggest, then it seems reasonable that a certain proportion of cautious owners will be more reluctant to grant communications providers the right to occupy space in their buildings.

²⁸ *In the Matter of Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108, 33 FCC Rcd 311 (2018) ("*Internet Freedom Order*"), at ¶ 101 ("The record confirms that concern about 'regulatory creep'--whereby a regulator slowly increases its reach and the scope of its regulations -- has exacerbated the regulatory uncertainty created by the Title II Order"). The evolution of the OTARD Rule since 1996 is another example.

Here again, nothing in the *NPRM* suggests that the agency has considered this trade-off, or other possible trade-offs. Even if the Commission had the legal authority, which we dispute in Part III below, it would be unwise to exercise that power as broadly as the *NPRM* suggests.

C. The *NPRM*'s Vague References to the Deployment of Mesh Networks Seem to be Based on Speculation About Future Possibilities Rather than Demonstrated Capabilities.

The *NPRM* contains several references to mesh networks and it appears that one goal of the proceeding, perhaps the most important goal, is to promote such networks in dense urban environments.²⁹ The deployment of mesh networks inside buildings by fixed wireless providers may prove to be highly desirable. At this point, the Real Estate Associations understand that mesh networks are being deployed to provide wireless broadband in common areas and public spaces, on a relatively limited scale.³⁰ Their further development could alter the existing economics of providing broadband services in apartment communities and commercial spaces -- and therefore alter the nature and terms of relationships between property owners and broadband providers -- but the Real Estate Associations have no clear view of what might change or how.

Indeed, it appears that the entire subject is speculative in many respects. For example, the *NPRM* does not define the term “mesh networks,” describe in any detail how they would work in different environments, or describe exactly how the proposed changes to the Rule would promote their deployment in a practical or effective fashion. This makes it difficult to respond to the *NPRM* in as complete a fashion as the Real Estate Associations might otherwise have done.

²⁹ *NPRM* at ¶ 8.

³⁰ See McDonald Decl. at ¶ 7. One impediment to the deployment of mesh networks by property owners is that WiFi systems currently cost about one-tenth as much to deploy and are even cheaper to operate over time. *Id.*

Nevertheless, the vague and speculative nature of the references to mesh networks raise several concerns regarding the *NPRM*.

First, the Real Estate Associations question whether it is necessary or advisable to amend the Rule to promote a particular technology, when the broader policy goal of deploying broadband is being met with existing technologies. As outlined in Part I above, broadband technology has been deployed very successfully in this country, with the exception of rural areas. Outside of those rural areas, apartment communities and commercial facilities in this country have access to broadband technology, as do individual homeowners and businesses. In fact, competitive alternatives are widely available in apartment communities and commercial properties.³¹ Our concern is heightened in view of the possible harm to the market for rooftop space discussed in Part II.B.

A related point is that the *NPRM* says little about why fixed wireless service merits regulatory assistance, except to say that fixed wireless providers need more sites because changes in the frequencies they use have reduced the area that can be served by their existing base stations.³² This seems to be a technological problem rather than a regulatory one. Not every technology is necessarily suitable in every environment. Once again, with deployment ubiquitous and competition common in urbanized areas, and given the risks to existing business arrangements that we have already mentioned, we question the need for this proceeding to address any matters beyond rural deployment.

³¹ See discussion at n. 7, *supra*; McDonald Decl. at ¶ 5 (three broadband vendors available in markets where competition exists); Austin Decl. at ¶ 6 (most communities offer choice of providers).

³² *NPRM* at ¶ 6.

The *NPRM* also says nothing about other practical problems related to the deployment of fixed wireless technology to establish mesh networks. We are thinking here primarily about whether using the technology in that fashion is commercially viable. The *NPRM* seems to assume that removing certain legal restrictions will help the fixed wireless providers, but raises no question about any other obstacles the technology or the providers may face. The Real Estate Associations have no particular view of that, based on our understanding at this time, but it would be unfortunate if existing, functioning markets were disrupted in an effort to advance what may be no more than an experiment.

Finally, the Real Estate Associations believe that, before the Commission embarks on a policy of deliberately creating a massive network of wireless nodes that depends on access to the property of owners of apartment communities and commercial buildings across the country, it would be wise to obtain the authorization of Congress, for two reasons. First, as discussed below in Part III, the proposed amendments raise significant questions about the scope of the Commission's authority. Second, fixed wireless mesh devices are not just the passive receivers of television signals that were the subject of Section 207, and the reach of this proceeding could be far greater than the *NPRM* suggests. As we understand them, mesh networks supported by fixed wireless technology could be a very powerful and intrusive technology. This proceeding, with its lack of clarity and detail and limited set of questions, does not seem to be a suitable mechanism for pursuing such an important policy.

Consequently, the Real Estate Associations urge the Commission not to proceed without a clear and specific directive from Congress.

D. Before Proceeding, the Commission Should Clarify the Scope and Full Range of Effects of the Proposed Amendments, the Policy Goals of the Proceeding, Exactly What Kinds of Properties Providers Want To Use, and How the Proposed Amendments Help Those Providers.

The amendments proposed by the *NPRM* would have broad and significant consequences, but the *NPRM* poses few questions directly and asks for very little information. When crafting regulations, the Commission is required to consider all aspects of a problem.³³ In this instance, however, the *NPRM* has not asked what appear to be critical questions. Consequently, the Real Estate Associations believe that the *NPRM* should be substantially amended to clarify the scope of the proceeding, the intended effects of the proposed changes, and the full range of entities likely to be affected. Until that has been done, it is difficult for the public to comment intelligently on the proposed changes.

Some of the questions that the Real Estate Associations believe merit specific inquiry and further exploration before the Commission proceeds include:

- The *NPRM* cites an *ex parte* letter filed by the Wireless Internet Service Providers Association (“WISPA”) in WT Docket No. 17-79 as the genesis of this proceeding,³⁴ but in a later *ex parte* letter, WISPA suggests that it is concerned with HOA rules and local zoning codes governing installation of poles or masts on private property, especially in rural areas.³⁵ The *NPRM*, on the other hand, does not specifically address rural deployment.
 - Is rural deployment in fact a priority of this proceeding?
 - What exactly are the priorities behind the *NPRM*, other than a generalized desire to promote fixed wireless service?

³³ See *Nat’l Lifeline Ass’n v. FCC*, 915 F.3d 19, 27 (DC Cir. 2018) (“Agency action is arbitrary and capricious if the agency “has . . . entirely failed to consider an important aspect of the problem . . .”) (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125, 195 L. Ed. 2d 382 (2016)).

³⁴ Letter from Claude Aiken, President and CEO, WISPA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Aug. 27, 2018).

³⁵ Letter from Claude Aiken, President and CEO, WISPA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1, 5-6 (filed March 14, 2019) (“2019 WISPA Letter”).

- Does the *NPRM* contemplate preempting zoning rules or other restrictions that limit access to rooftops by wireless providers in general, as opposed to rules or restrictions that limit installation of fixed wireless antennas by existing lessees of rooftop space?
- Does the *NPRM* contemplate preempting or directing the terms of contracts negotiated between private commercial entities – such as, but not limited to, property owners and communications service providers – governing the terms of access to rooftops?
- Is one of the Commission’s goals to expand the rights of providers under the existing leases held by providers themselves, as opposed to customers of providers who occupy leased property?
 - For example, if a mobile wireless company has leased rooftop space for a specified number and type of antennas, will the rule change allow the carrier to install a fixed wireless antenna even if its lease requires owner approval of new equipment? If so, will the property owner be permitted to increase the rent now that the provider is getting additional value under the lease?
- Does the *NPRM* contemplate creating new rights for providers under leases held by third parties? If so, do those third parties include apartment residents or office building tenants?
 - Although the text of the *NPRM* does not say anything about the effects of the proposed rule change on leased property (residential or commercial), inserting the phrase “including a hub or relay antenna,” as proposed by the *NPRM*, would apparently permit an apartment resident or commercial tenant to install such an antenna, as long as the antenna was less than 1 meter in diameter or cross-section. Is this an intended effect?
 - Declaring a fixed wireless provider to be an “antenna user” might also permit installation within an apartment or commercial space if a hub antenna was combined with an end-user antenna. Is this an intended effect?
- The *NPRM* refers to “mesh networks” in several places, but does not define the term or offer any technical description.
 - Does the *NPRM* have a specific definition of the term in mind?
 - What are the technical characteristics and requirements of effective mesh networks?
 - Is there evidence that it is possible to deploy such equipment in a fashion that will support an economically-viable business plan?

- What is the effect on such a proposed business plan of the fact that approximately 46.8³⁶ of apartment residents move every year? Is it feasible to maintain an effective mesh network if antennas in the network are constantly being moved or replaced?
- How do the Commission’s RF safety rules apply in this context? Is there an RF safety issue posed by the use of transmitting antennas inside residences? How should property owners advise residents and commercial tenants concerned by the presence of such equipment inside neighboring apartment units or commercial spaces?

To be clear, many of the members of the Associations have entered into agreements with fixed wireless providers.³⁷ The real estate industry as a whole welcomes their participation in the market as valuable business partners. As active participants in a highly competitive industry, property owners know the value of competition. Indeed, for that very reason, we know that to succeed over time in a truly competitive market, every business must develop and implement a sound business plan that does not rely on regulatory intervention in the contract rights of other companies.

III. THE COMMISSION’S AUTHORITY, WHICH IS LIMITED TO THAT GRANTED BY SECTION 207 OF THE TELECOMMUNICATIONS ACT OF 1996, EXTENDS ONLY TO “CUSTOMER-END” DEVICES.

The *NPRM* addresses the Commission’s legal authority to adopt the proposed amendments in a single sentence: “We propose to rely on the legal authority the Commission relied on originally in the 2000 Competitive Networks Order in extending the OTARD rule to apply to antennas used in connection with fixed wireless service.” This sentence is insufficient, and the asserted legal authority is inadequate, for two reasons. First, as we will show, the

³⁶ National Apartment Association, *Survey of Operating Expenses and Income in Rental Apartment Communities* (2018), <https://www.naahq.org/news-publications/units/september-2018/article/survey-operating-income-expenses-rental-apartment>, (last visited June 3, 2019).

³⁷ *See, e.g.*, McDonald Decl. at ¶ 6; Austin Decl. at ¶ 8.

Commission has no authority beyond what was granted by Congress in Section 207. The Commission's ancillary authority, which was used to justify the 2000 expansion of the Rule, has since been circumscribed by the D.C. Circuit. Second, extending the Rule to protect non-customer-end equipment is a fundamental and important difference. The effects of the proposed changes are so extensive and different in nature from the 1998 and 2000 amendments of the Rule that they require a new and different legal analysis.

A. Property Owners Do Not Object to the OTARD Rule In Its Present Form.

Property owners in general have no objection to allowing apartment residents and commercial tenants of all kinds to install and operate the kinds of devices currently protected by the Rule. In fact, there are very few formal decisions interpreting the Rule in the context of leased property; this suggests that there are equally few disputes over the installation of protected devices.³⁸ In fact, the real estate community is well aware of the obligations of property owners under the Rule and the Real Estate Associations support the ability of consumers to receive broadband services using OTARD equipment, including fixed wireless antennas.

In *Building Owners & Managers Ass'n Int'l v. FCC*, 254 F.3d 89 (D.C. Cir. 2001) ("*BOMA v. FCC*"), the court held that the Rule does not interfere in any significant way with the legal rights of owners and operators of leased property and the industry long ago accommodated

³⁸By our count, there are 55 reported decisions that cite or interpret the Rule. See Exhibit B for a list of those decisions. Of those cases, only seven involved lease restrictions in apartment buildings or commercial properties. Furthermore, in none of those seven cases was the property owner found to have violated the Rule. This is very strong evidence that property owners have not been a significant obstacle to the Commission's policy goals, to the extent that the purpose of the Rule has always been to help consumers.

itself to the Rule and the court's decision.³⁹ Consequently, property owners do not dispute that residents and tenants have the right to install and operate, for their own purposes, DBS dishes, WiFi antennas, boosters, and other wireless consumer devices. These are low power, short range devices intended for consumer use, and any effects outside the leased premises are very limited.

We are aware that in certain instances some service providers may take advantage of the presence of consumer devices used by their subscribers to enhance their services at a property. For example, we understand that cable operators that make WiFi routers available to their subscribers may configure those devices so that they support two networks, one for the subscriber's personal use, and another to support the cable company's external network. We do not believe that the operation of the second network in a multitenant environment is protected by the Rule without the consent of the property owner. On the other hand, if operation of the second network is permitted by the owner, either expressly or through acquiescence, then it makes no difference whether the Rule actually applies.⁴⁰ Indeed, these activities are permitted routinely, in just that way. Nevertheless, one should not assume that new uses of fixed wireless equipment that are analogous to existing activities would be protected by the Rule if the proposed amendments are adopted.

³⁹ This is not to say that the Real Estate Associations waive any legal arguments relevant to the pending proceeding.

⁴⁰ We also question whether the cable subscribers are always aware that what they think of as "their" devices are being used for this dual purpose. That issue lies outside the scope of this proceeding, but it adds weight to the question of whether the OTARD Rule and this proceeding are appropriate vehicles for what appears to be a much farther-reaching set of policy decisions.

B. In Section 207 of the Telecommunications Act of 1996, Congress Directed the Commission To Adopt a Rule for the Benefit of “Viewers,” Not Service Providers.

The OTARD Rule was created at the direction of Congress. Congress enacted Section 207 to make sure that Americans were able to watch television: “the Commission shall . . . promulgate regulations to prohibit 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 satellite services.”⁴¹ Nothing in Section 207 gives service providers any rights. Neither does the Rule: the Rule only protects “users” of antennas designed to “receive” certain services. Indeed, the Commission justified its expansion of the original Rule to include leased property specifically by citing Section 207’s reference to “viewers.”⁴²

Furthermore, when the D.C. Circuit upheld the expansion of the Rule to leased property, it did so because of the Congressional directive to protect the rights of viewers. The decision in *BOMA v. FCC* turns on two key statements:

1. “Where the Commission has been instructed by Congress to prohibit restrictions on the provision of a regulated means of communication, it may assert jurisdiction over a party that directly furnishes those restrictions, and, in so doing, the Commission may alter property rights created under State law.” *BOMA v. FCC*, 254 F.3d at 96. The court also noted that, in Section 303(v) of the Communications Act, “Congress has expressly vested the Commission with

⁴¹ 1996 Act, Section 207.

⁴² *Second OTARD Order*, 13 FCC Rcd at 23880, ¶ 13.

exclusive jurisdiction and authority to ensure that all viewers may access direct-to-home satellite services.”⁴³

2. “[W]e hold that the Commission could reasonably construe 207 to apply to all ‘viewer[s],’ including tenants, and to obligate the Commission to prohibit ‘[a]ny restriction,’ including lease provisions, ‘that impairs the installation, maintenance, or use of [a 207 device].’” *Id.*

In other words, the Commission is able to regulate owners of leased property in this narrow context (i) because Congress gave the Commission the power to regulate entities that impede the installation of certain devices; and (ii) because the word “viewers” is broad enough to encompass renters.

The 2000 expansion to include fixed wireless antennas was justified as necessary to promote deployment of advanced services and to prevent distortion in the market for different services that can be delivered to “customers” using the same “customer-end equipment.”⁴⁴ In doing so, the Commission went well beyond the original intent of Congress as set forth in Section 207. Nevertheless, once we accept the logic of allowing “viewers” to install antennas that receive video programming, granting “customers” the right to install “customer-end equipment” that receives other types of transmissions is a small step and easy to accept.

This does not mean, however, that the Commission has the authority to expand the scope of the Rule for the newly proposed purpose, or any other purpose. The Rule was first authorized,

⁴³ *BOMA v. FCC*, 254 F.3d at 96. The *Competitive Networks Order* asserts that the reference to Section 303 in Section 2017 means that the Commission has always had the authority to regulate OTARD facilities, but this ignores the court’s reference to Section 303(v). The Commission surely has the authority to regulate DBS services, but this does not mean it can do anything it chooses, especially with regard to property rights; its actions must be intended “to ensure that all viewers may access direct-to-home satellite services.”

⁴⁴ *Competitive Networks Order*, 15 FCC Rcd at 23028, ¶ 97-99 (“We make clear, however, that the protection of Section 1.4000 applies only to antennas at the customer end of the wireless transmission . . .”).

then enacted, and later amended, to help consumers. The amendments proposed by the *NPRM*, however, have a very different purpose and different effects and therefore require a different rationale.

C. The FCC’s Authority Under Section 207 To Override Property Leases Is Limited to that Described by the Court of Appeals for the D.C. Circuit in *Building Owners and Managers Association International v. FCC*.

The Commission does not have broad authority to regulate property owners. “[T]he Communications Act does not . . . explicitly grant the Commission jurisdiction over the real estate industry, an area that is normally outside the Commission’s scope of authority.”⁴⁵ In fact, the Commission’s authority over the terms of property leases is limited by the language of Section 207, as interpreted by the Court of Appeals. As stated at III.B above, the court’s reasoning required two steps and both steps are critical.

First the court found that the Commission was permitted to alter property rights granted under state law, because it had been directed to do so by Congress. The court did not hold that the Commission had any general or inherent authority to override property rights, but only that it could do so if given that power by Congress. Only then did the court turn to the specific reference to “viewers” in Section 207 and find that it was broad enough to justify the Commission’s decision to override leases.

We will address the Commission’s claim of ancillary authority in Part III.D, below, but understanding the reasoning of *BOMA v. FCC* is actually all that is required to demonstrate the limits on the Commission’s authority. The Commission has no authority beyond that defined by the court.

⁴⁵ *BOMA v. FCC*, 254 F.3d at 94.

Aside from the narrow logic of the D.C. Circuit’s statutory analysis, there is another reason that the Real Estate Associations urge the Commission to recognize the limits of its authority. In addition to challenging the Commission’s statutory authority, the petitioners in *BOMA v. FCC* had argued that preempting the terms of leases would violate the Takings Clause of the Fifth Amendment, citing the prohibition on “*per se*” takings of *Loretto v. Manhattan Teleprompter CATV*.⁴⁶ The basis for the claim was that to allow tenants to install equipment otherwise prohibited by the lease amounted to the grant of a property right that had been retained by the lessor. The court rejected that claim because “the landlord affected by the amended OTARD rule will have voluntarily ceded control of an interest in his or her property to a tenant. Having ceded such possession of the property, a landlord thereby submits to the Commission’s rightful regulation of a term of that occupation.” *BOMA v. FCC*, 254 F.3d at 98. There was no *per se* taking, said the court, because in *Loretto* the property owner had not given the cable company any rights in the first place: “The *Loretto* court emphasized that the *per se* taking rule is ‘very narrow’ and applies only to regulations that ‘require the landlord to suffer the physical intrusion of his building by a third party.’” *BOMA v. FCC*, 254 F.3d at 97.

But this case is different. The proposed amendments would create two new classes of OTARD sites. One would be those described in the discussion of rooftop leases in Part II.B above, in which entities that typically have no need for customer-end devices would gain the right to install fixed wireless transmitters. The second class would be apartment units and commercial office space, in which the residents and tenants would have the right to install hub and relay equipment. Under the D.C. Circuit’s interpretation of *Loretto* in *BOMA v. FCC*, the

⁴⁶ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (New York statute granting cable operator right to attach cable to building exterior without owner’s consent violated Fifth Amendment).

first class seems to present no new Fifth Amendment issues because the lessee and the user of the antenna would be the same entity. The second class of cases is different, however, because the antennas to be installed would not be “customer-end” equipment. While they would presumably meet the needs of end customers, they would also have other features that meet only the needs of the third party service provider. Consequently, if the Commission adopts a rule that requires property owners to accept the installation to such equipment, the Commission will have moved past the boundary set by *BOMA v. FCC*, and stepped into *Loretto* territory.

Under either scenario, the Commission would become entangled in disputes over just compensation and the reasonableness of lease covenants of various kinds, while there is no showing of a marketplace failure that might justify extending regulation into a well-functioning, competitive commercial environment.

The Real Estate Associations respectfully ask that the Commission acknowledge and respect the critical importance of private property rights in this context. As we describe in Part I above, the real estate industry has been an active and effective partner in the deployment of broadband infrastructure and protection of private property rights is an essential attribute of our market economy. Over time, allowing property owners to manage their property and interact with providers in the marketplace will yield better results than government intervention.

Nevertheless, the *NPRM* proposes to violate the Fifth Amendment, because the proposed amendments to the Rule would give fixed wireless providers the ability to install and operate equipment without the consent of the owner of the property. The Rule would not grant that right on its face, to be sure, but that would be the effect. Nothing in the Rule would prevent a fixed wireless provider from arranging with an apartment resident or office building tenant to install equipment capable of serving as a hub or relay facility, whether in return for free or discounted

service or some other compensation. Even if the hub or relay equipment were combined with a “customer-end” antenna, it would no longer be merely customer-end equipment. Indeed, because the whole point of a hub or relay facility is to expand the reach of a network to serve many more sites, the primary purpose of the equipment would be to serve the network needs of the service provider.

Furthermore, to the extent such equipment were to be used to transmit signals for the benefit of the service provider and other customers, and not just for the customer who had the right to occupy the space, we must presume that the fixed wireless service provider would retain some control over that equipment. After all, the equipment would most likely be using licensed frequencies, subject to the Commission’s RF emission regulations, and form an integral part of the provider’s mesh network. Buried in the fine print of the agreement between the service provider and the customer there would undoubtedly be numerous provisions intended to protect the provider. To put it another way, the proposed amendments would have the same effect as allowing any leaseholder to sublease a portion of the leasehold to a fixed wireless provider. The legal form might be different, but the effect would be the same.

The Real Estate Associations urge the Commission to stay within the clear limits established by the D.C. Circuit’s ruling in *BOMA v. FCC*. Extending the rule as proposed would violate the *per se* taking rule of *Loretto* and exceed the Commission’s authority under Section 207.

D. The Commission’s Ancillary Authority Does Not Permit A Complete Inversion of Congress’s Original Pro-Consumer Rationale for the OTARD Rule.

The *NPRM* states that the Commission can adopt the proposed amendments under the same authority cited by the Commission in the *Competitive Networks Order*.⁴⁷ In that *Order*, the Commission did not rely on Section 207, but instead cited its ancillary jurisdiction, citing Sections 303 and 4(i) of the Communications Act, the policy goals of Section 706 of the 1996 Act, and the “consumer protection purposes” of Sections 201(b), 202(a) and 205(a) of the Communications Act.

The *NPRM*’s reliance on the *Competitive Networks Order* is inadequate, for three reasons.

First, the *Competitive Networks Order* ignored *BOMA v. FCC*, which explicitly found that the source of the Commission’s authority to modify leases was Section 207.⁴⁸ The Commission was obligated to accept that reasoning because it was on that basis that the *Second OTARD Order* was upheld. To put it another way, the holding of *BOMA v. FCC* is the law and the Real Estate Associations do not believe that the expansion of the Rule to include fixed wireless receiving antennas in 2000 was permissible.⁴⁹

In fact, the Commission presumably felt the need to rely on ancillary authority in the *Competitive Networks Order* precisely because it could not extend the scope of the Rule to

⁴⁷ *NPRM* at ¶ 12.

⁴⁸ *BOMA v. FCC*, 254 F.3d at 96.

⁴⁹ Note that in challenging the Commission’s claim of ancillary authority in this instance we are not relitigating the *Competitive Networks Order* or asserting that the extension of the Rule to fixed wireless equipment in that *Order* is invalid. That *Order* is settled law and the Rule as it stands today is enforceable. Our argument is that, because the original reasoning was flawed, it cannot be relied on now to further extend the Rule.

include fixed wireless antennas under *BOMA v. FCC*. But this merely emphasizes the problem. The Commission only has the power to preempt property rights because of Section 207. Section 207 was necessary because Congress correctly believed that without it the Commission could not preempt zoning laws and HOA rules, much less lease terms. Section 207 is the outer limit of the Commission's power in this area.⁵⁰

The second reason that the Commission cannot rely on the *Competitive Networks Order* is that it depends on an outdated ancillary jurisdiction analysis. The D.C. Circuit has substantially clarified and narrowed the scope of the Commission's ancillary authority in the years since 2000, so any claim of ancillary authority must be evaluated under that new framework. Furthermore, the Commission itself has recently ruled that Section 706 is only a hortatory statement rather than a grant of authority.⁵¹ The ancillary jurisdiction analysis in the *Competitive Networks Order* relied explicitly on Section 706 as a grant of authority,⁵² and therefore is no longer valid.

⁵⁰ Ancillary authority does not permit the Commission to regulate an activity that is not directly related to the transmission of communications. *See, e.g., Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (Commission could not regulate terms of Internet service); *American Library Ass'n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005) (Commission cannot regulate consumer electronic products when devices are not actually engaged in transmission); *GTE Service Corp. v. FCC*, 474 F.2d 724, 735-36 (2d Cir. 1973) (Commission cannot regulate data processing services provided by regulated entities); *Illinois Citizens Committee for Broadcasting v. FCC*, 467 F.2d 1397, 1400 (7th Cir. 1972) (Commission cannot regulate construction of office building).

⁵¹ *Internet Freedom Order*, 33 FCC Rcd 311 at ¶ 268 (“We conclude that the directives to the Commission in section 706(a) and (b) of the 1996 Act to promote deployment of advanced telecommunications capability are better interpreted as hortatory, and not as grants of regulatory authority”).

⁵² *Competitive Networks Order*, 15 FCC Rcd at 23,030, ¶ 103.

Third, the *NPRM*'s proposals would fundamentally modify the scope and purpose of the Rule to address issues that were never discussed in the *Competitive Networks Order*. 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. For example, the *Competitive Networks Order* justified the expansion of the Rule to include customer end fixed wireless antennas in part on consumer protection grounds, so that consumers who wanted only to purchase fixed wireless service would not have to pay "unjust and unreasonable charges in connection with unwanted video programming."⁵³ Assisting fixed wireless operators in obtaining hub and relay sites is a long way from any concern about subscriber rates.

Consequently, some effort must be made to justify the change in focus of the Rule. Section 207 clearly does not apply and, under the D.C. Circuit's current test for evaluating claims of ancillary authority, the Commission cannot stretch its authority far enough to cover the new situation.

For example, just as a matter of common sense, it is hard to see how the Commission might have ancillary authority over real property leases when its power to regulate Internet services provided by entities over which it clearly has oversight has been so uncertain.⁵⁴ In fact, it does not have that authority. The Commission may exercise ancillary authority only if three

⁵³ *Id.* at ¶ 104.

⁵⁴ *See, e.g., Restoring Internet Freedom*, 33 FCC Rcd at ¶¶ 14-18, 267-296; Arielle Roth, *A Communications Reform Priority: Curtailing FCC Ancillary Jurisdiction Under Telecom Act §706*, Washington Legal Foundation, Critical Legal Issues Working Paper Series, No. 200 (Feb. 2017); Christopher J. Wright, *The Scope of the FCC's Ancillary Jurisdiction After the D.C. Circuit's Net Neutrality Decisions*, 67 FED'L COMM'NS L. J. 19 (2014).

conditions apply: (1) the subject matter of the regulation must fall within the scope of Title I of the Communications Act, which authorizes regulation of “interstate and foreign communications by wire or radio;” (2) there must be a link between the exercise of ancillary authority and an express delegation of jurisdiction by Congress; and (3) the regulation must not be inconsistent with some principle embodied in the Communications Act.⁵⁵ In this instance, what is being regulated is not “communications by wire or radio,” but the placement of consumer equipment. The Rule does not say anything about the terms or characteristics of any service or type of communication and therefore fails to meet the first test. Furthermore, there is no link between the proposed amendments and any delegation by Congress. The only plausible delegation is Section 207, and Section 207 only pertains to “viewers” and “video programming.” There is no link between making sure all Americans can watch television and giving fixed wireless providers the right to install hub and relay equipment. Consequently, the proposed changes to the Rule fail the second test.

The discussion of the Commission’s legal authority in the *Competitive Networks Order* does remain relevant in one important respect. The Commission correctly distinguished the purpose of Section 207 from the amendments to Section 332 of the Communications Act that Congress made at the same time that it adopted Section 207 in the 1996 Act.⁵⁶ Section 207 protects customer-end antennas, whereas Section 332(c)(7) protects provider antennas. If fixed wireless providers need additional protection, they must either go to Congress, or show the Commission how Section 332(c)(7) can be applied to their situation.

⁵⁵ *Verizon v. FCC*, 740 F.3d 623, 629-634 (D.C. Cir. 2014).

⁵⁶ *Competitive Networks Order* 15 FCC Rcd at 23,032-23,033, ¶¶ 108 -112.

The purpose of ancillary authority is to close gaps, not to open new fields for regulation. In Section 207, Congress gave the Commission the power to make sure that “viewers” could watch television. This was a narrow and specific grant. Giving apartment residents and homeowners the same ability to watch television was a reasonable interpretation of that grant. Regulating the terms of every lease in the country for the benefit of a favored class of service providers is a completely different matter.

E. The FCC Does Not Have the Authority To Define “Antenna User” to Include Fixed Wireless Providers.

The NPRM asks whether the Commission should define “antenna user” to include fixed wireless providers. As noted above, such a change would convert the Rule from a pro-consumer to a pro-provider measure. It would completely change the character of the Rule. This alone suggests that the Commission does not have the authority, because the Rule is grounded in Section 207. Furthermore, to declare that the fixed wireless provider is also a user of an antenna located on property leased by an apartment resident or office tenant would strengthen the Fifth Amendment takings argument in Part III.B, above. Designating a provider as an “antenna user” would give the provider specific rights under the Rule that currently only apply to the leaseholder, precisely because the property owner has given the right of possession to the leaseholder. If the leaseholder and the provider have the same rights under the Rule, but the owner has not granted the provider the right of possession, the *Loretto per se* taking claim now has new force.

In fact, it is only in the third-party leasehold case that defining “antenna user” to include providers would matter. In the direct leasehold case, such as the rooftop leases discussed in Part II.B, there is no doubt that the occupant of the space would be the antenna user. Consequently, the change only makes sense if the goal is to give providers new rights, even in cases in which

they have neither a leasehold nor ownership interest. The question should not be whether the Commission should change the definition. It should be under what authority would such a change be even remotely permissible.

In its present form, the Rule allows leaseholders to install protected devices. The Rule is predicated on the assumption that those devices are to be used for the benefit of the leaseholder. In fact, it should not be forgotten that the only reason we are discussing installation of equipment on leased property is that the Commission determined that Congress did not want to distinguish between people who own their homes and people who rent them. That is the only reason leased property was brought under the OTARD umbrella. Consequently, the Commission has no power to adopt a rule that would allow service providers to enter into agreements with apartment residents or commercial tenants to use equipment on leased premises to transmit signals to and from those premises that are not selected by the resident or tenant. There is no justification for such a rule, because the Commission does not have general authority to regulate lease terms or how a building owner manages its property.

F. Deleting the Word “Customer” From the Definition of “Fixed Wireless Signals” Would Not Grant the Commission New Authority Over Lease Terms.

The Commission presumably has the power to define “fixed wireless signals” essentially any way it chooses. The Real Estate Associations have no view of that question. But for all the reasons discussed in these comments, merely changing that definition cannot be read as granting the Commission new authority over lease terms or giving fixed wireless providers new rights to use or occupy leased property.

IV. FURTHER REGULATION OF LEASED PROPERTY IS NOT NEEDED TO PROMOTE RURAL DEPLOYMENT.

The record to date suggests that one goal of the proposed amendments may be to promote deployment in rural areas.⁵⁷ The Real Estate Associations fully support reasonable measures to promote deployment of broadband in every type of environment. Indeed, given the clear showing in the *2018 Broadband Deployment Report* that access to broadband services in rural areas lags availability in more densely-populated areas, it may be appropriate for the Commission to take steps to close that gap. Those measures, however, should be tailored to meet that specific goal without causing collateral injury.

If local zoning regulations and homeowners' association rules are impeding rural deployment of fixed wireless service, perhaps some action is required. We take no position on the merits of any particular course of action that may be available or appropriate in that case. We do note, however, that the examples cited in the *2019 WISPA Letter* did not include lease restrictions, and owners of leased property have no history of impeding fixed wireless deployment.

Any action taken should be considered carefully. The lease restrictions that were preempted in the *Second OTARD Order* were found to be analogous to zoning and HOA rules because they prevented consumers from using equipment designed for consumer use, on property that they have the exclusive right to use. Preempting those lease restrictions did not grant new rights to commercial entities. The proposed amendments, however, would grant new rights to non-consumers in all cases, including lease terms, zoning laws, and homeowner's association rules. Much of the legal analysis set forth in Part III, above, applies to the

⁵⁷ *2019 WISPA Letter*.

Commission's authority under Section 207, regardless of the nature of the restriction.

Consequently, the Real Estate Associations question whether the Commission has any authority at all to proceed.

CONCLUSION

For all the foregoing reasons, the Commission should refrain from extending the OTARD Rule to protect fixed wireless hub or relay antennas installed on leased property.

Respectfully submitted,



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EXHIBIT A

The Real Estate Associations

Building Owners and Managers Association International (“BOMA”):

BOMA is a federation of 88 BOMA U.S. associations and 18 international affiliates. Founded in 1907, BOMA represents the owners and managers of all commercial property types including nearly 10.5 billion square feet of U.S. office space that supports 1.7 million jobs and contributes \$234.9 billion to the U.S. GDP. Its mission is to advance a vibrant commercial real estate industry through advocacy, influence and knowledge.

The Institute of Real Estate Management (“IREM”):

IREM[®] is an international force of nearly 20,000 individuals united to advance the profession of real estate management. Through training, professional development, and collaboration, IREM[®] supports our members and others in the industry through every stage of their career. Backed by the power that comes with being an affiliate of the National Association of REALTORS[®], we add value to our members, who in turn add value to their teams, their workplaces, and the properties in their commercial and residential portfolios. Our memberships empower college students, young professionals, and industry veterans who are committed to career advancement. Earning our credentials, including the CPM[®], ARM[®], ACoM, and AMO[®], demonstrates a commitment to, and passion for, good management. These credentials, along with our courses and array of resources, all exist with one goal in mind – to make a difference in the careers of those who manage.

Nareit:

Nareit serves as the worldwide representative voice for REITs and real estate companies with an interest in U.S. income-producing real estate. Nareit’s members are REITs and other real estate companies throughout the world that own, operate, and finance income-producing real estate, as well as those firms and individuals who advise, study, and service those businesses.

The National Apartment Association (“NAA”):

NAA is a trade association for owners and managers of rental housing. NAA is comprised of 150 state and local affiliated apartment associations. NAA encompasses over 81,000 members representing more than 9.6 million rental homes throughout the United States, Canada, and the United Kingdom. NAA, which is the leading national advocate for quality rental housing, is also the largest trade organization dedicated solely to rental housing. As part of its business, NAA advocates for fair governmental treatment of rental housing businesses nationwide, including advocating the interests of the rental housing business community at large.

The National Association of REALTORS® (“NAR”):

NAR is America's largest trade association, representing 1.3 million members. Our membership is composed of residential and commercial brokers, salespeople, property managers, appraisers, counselors, and others engaged in the real estate industry. Members belong to one or more of approximately 1,200 local associations/boards and 54 state and territory associations of REALTORS®. The term REALTOR® is a registered collective membership mark that identifies a real estate professional who is a member of the National Association of REALTORS® and subscribes to its strict Code of Ethics.

The National Multifamily Housing Council (“NMHC”):

Based in Washington, D.C., the NMHC is a national nonprofit association that represents the leadership of the apartment industry. Our members engage in all aspects of the apartment industry, including ownership, development, management and finance, providing apartment homes for the 39 million Americans who live in apartments today and contributing \$1.3 trillion annually to the economy. NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information and promotes the desirability of apartment living. Over one-third of American households rent, and nearly 19 million U.S. households live in an apartment home (buildings with five or more units).

The National Real Estate Investors Association (“National REIA”):

The National REIA is a 501(c)6 trade association. We are a federation made up of local associations or investment clubs throughout the United States. We represent local investor

associations, property owner associations, apartment associations, and landlord associations on a national scale. Together we represent the interests of approximately 40,000 members across the U.S. As such, we are the largest broad based organization dedicated to the individual investor.

The Real Estate Roundtable (“RER”):

RER brings together leaders of the nation’s top publicly-held and privately-owned real estate ownership, development, lending and management firms with the leaders of major national real estate industry trade associations to jointly address key national policy issues relating to real estate and the overall economy. By identifying, analyzing, and coordinating policy positions, The Roundtable’s business and trade association leaders seek to ensure a cohesive industry voice is heard by government officials and the public about real estate and its important role in the global economy. Collectively, RER members’ portfolios contain over 12 billion square feet of office, retail and industrial properties valued at more than \$2 trillion; over 1.5 million apartment units; and in excess of 2.5 million hotel rooms. Participating trade associations represent more than 1.5 million people involved in virtually every aspect of the real estate business.

EXHIBIT B

Decisions Citing 47 C.F.R. § 1.4000

Apartments and Commercial Leased Property

1. *Frintzilas v. DIRECTV, LLC*, 2017 U.S. Dist. LEXIS 194415 (S.D. N.Y. 2017) (mentioning 47 C.F.R. §1.4000 but dismissing complaint on other grounds), *aff'd*, *Frintzilas v. DirecTV, LLC*, 731 Fed. Appx. 71 (2d Cir. 2018).
2. *Warren Hous. Dev. Corp. v. Northeast Cable TV*, 2017-Ohio-5513 (Ohio Ct. App. 11th Dist. 2017) (mentioning 47 C.F.R. §1.4000 but affirming trial court grant of summary judgement on other grounds).
3. *Boughton v. Kristek*, 2016 U.S. Dist. LEXIS 191814 (D.N.M. March 21, 2016), *dismissed without prejudice*, *Boughton v. Kristek*, 2016 U.S. Dist. LEXIS 49880 (D.N.M. April 12, 2016) (holding no private cause of action under 47 C.F.R. §1.4000).
4. *Vann Nelson v. Pennrose Mgmt. Reg'l*, 2014 U.S. Dist. LEXIS 146089 (W.D. Pa. 2014) (holding 47 C.F.R. §1.4000 does not apply to tenant seeking placement of dish in common area).
5. *2682 Kingsbridge Assocs., LLC v. Martinez*, 4 Misc. 3d 111, 782 N.Y.S.2d 496 (N.Y. App. Div. 2004) (holding landlord's reliance upon lease prohibition is not precluded by 47 C.F.R. §1.4000 because tenants' dish installed in an area to which tenant “had access, but not exclusive rights of use or control”).
6. *Urban Horizons Tax Credit Fund v. Zarick*, 195 Misc.2d 779, 761 N.Y.S.2d 795 (Civ. Ct City of NY 2003) (holding 47 C.F.R. §1.4000 does not apply to tenant seeking placement of dish in common area but finding landlord waived right to object).
7. *Kansas ex rel. Stovall v. Home Cable Inc.*, 35 F. Supp. 2d 783 (D. Kan. 1998) (finding plaintiff failed to establish 47 C.F.R. §1.4000 preemption claim and remanding to state court).

Condominium and Homeowner Associations

1. *Sastin 2, LLC v. Hemingway Ass'n*, 2018 U.S. Dist. LEXIS 109317 (W.D. Okla. 2018) *dismissed without prejudice by Sastin 2, LLC v. Hemingway Ass'n*, 2018 U.S. Dist. LEXIS 196819 (W.D. Okla. 2018).
2. *Watson v. Northshore I Ass'n*, 196 Vt. 643, 93 A.3d 1057 (2014), *on remand*, *Watson v. Vill. at Northshore I Ass'n*, 2016 Vt. Super. LEXIS 22 (Vt. Super. Ct. 2016), *aff'd in part and rev'd in part by, remanded by Watson v. Vill. at Northshore I Ass'n*, 2018 Vt. 8, 184 A.3d 1133 (Vt. 2018).

3. *In re Beumel*, 31 FCC Rcd 1220 (2016).
4. *Oronoque Shores Condo. Ass'n v. Smulley*, 2012 Conn. Super. LEXIS 3028 (Conn. Super. Ct. December 14, 2012), *aff'd*, *Oronoque Shores Condo. Ass'n No. 1 v. Smulley*, 309 Conn. App. 908, 968 A.2d 662 (Conn. Super Ct. 2013), *summ. judgment denied*, *Oronoque Shores Condo. Ass'n No.1 v. Smulley*, 2015 Conn. Super. LEXIS 1948 (Conn. Super. Ct. July 27, 2015)
5. *In re Corey & Juanita Walker*, 26 FCC Rcd 10531 (2011).
6. *In re Craig Wirth*, 25 FCC Rcd 15583 (2010).
7. *In re Policarpio & Lourdes Medios*, 25 FCC Rcd 15870 (2010).
8. *In re Constance M. Lane and Daniel F. Lane*, 24 FCC Rcd 13219 (2009).
9. *In re William Culver*, 24 FCC Rcd 9522 (2009).
10. *In re James Bannister*, 24 FCC Rcd 9516 (2009).
11. *In re Richard Rhoad*, 24 FCC Rcd 9527 (2009).
12. *Ferolito v. Park Hill Ass'n*, 2007 N.J. Super. Unpub. LEXIS 655 (N.J. Super. Ct. Ch. Div. Nov. 27, 2007) *on appeal*, *Ferolito v. Park Hill Ass'n*, 408 N.J. Super. 401, 975 A.2d 473 (N.J. Super. Ct. App. Div. 2009).
13. *Oronoque Shores Condo. Ass'n, No. 1, Inc. v. Smulley*, 2008 Conn. Super. LEXIS 877 (Conn. Super. Ct. April 10, 2008), *aff'd*, *Oronoque Shores Condo. Ass'n No. 1 v. Smulley*, 114 Conn. App. 233, 233, 968 A.2d 996 (Conn. App. Ct. 2009).
14. *In the Matter of Philip Wojcikiewicz; Application for Review*, 22 FCC Rcd 9858 (2007).
15. *In the Matter of Shadow Wood Condominium Association; Petition for Waiver, Under 47 C.F.R. § 1.4000*, 21 FCC Rcd 339 (2006).
16. *Scott v. Lantern Park Condo. Ass'n*, 2006 U.S. Dist. LEXIS 13256 Slip Op. 232569 (D. Conn. March 9, 2006).
17. *Meadowwood Park Ranch Estates, Inc. v. Smith*, 2006 U.S. Dist. LEXIS 81315 (N.D. Tex. 2006).
18. *Bd. of Managers of Holiday Villas Condo. I v. Bautista*, 7 Misc. 3d 1029(A), 801 N.Y.S.2d 230, 2005 N.Y. Misc. LEXIS 1092, 2005 NY Slip Op 50814(U), 233 N.Y.L.J. 100 (N.Y. Civ. Ct., May 5, 2005).
19. *River Oaks Place Council of Co-Owners v. Daly*, 172 S.W.3d 314, 2005 Tex. App. LEXIS 7154 (Tex. App. 2005).

20. *In the Matter of Michael and Alexandra Pinter; Petition for Declaratory Ruling Under 47 C.F.R. § 1.4000*, 19 FCC Rcd 17385 (2004).
21. *Woodbridge Condos. Owners' Ass'n v. Jennings*, 2002-Ohio-7148 (Ohio Ct. App. 2002)
Appeal after remand at Woodbridge Condos. Owners' Ass'n v. Jennings, 2004-Ohio-5317 (Ohio Ct. App. 2004).
22. *In the Matter of Philip Wojcikewicz; Petition for Declaratory Ruling Under 47 C.F.R. § 1.4000*, 18 FCC Rcd 19523 (2003).
23. *In the Matter of Victor Frankfurt; Petition for Declaratory Ruling Under 47 C.F.R. § 1.4000; Application for Review*, 18 FCC Rcd 18431 (2003).
24. *Belle Terre Lakes Home Owners Ass'n v. McGovern*, La. App. 01-722, 805 So. 2d 1286, (La.App. 5th Cir 2002).
25. *Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang*, 2002 U.S. Dist. LEXIS 14240 (N.D. Cal. 2002) *aff'd*, *Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang*, 376 F.3d 831 (9th Cir. 2004).
26. *Northview Terrace Ass'n v. Mueller*, 2002 Wash. App. LEXIS 584 (Wash. Ct. App. 2002) *reh'g denied*, 2002 Wash. LEXIS 735 (Dec. 3, 2002).
27. *Daly v River Oaks Place Council of Co-Owners*, 2001 Tex App LEXIS 5423 (Tex. App. Houston 1st Dist 2001) *op withdrawn, substituted op, on reh, remanded*, *Daly v River Oaks Place Council of Co-Owners*, 59 SW3d 416 (Tex. App. Houston 1st Dist 2001).
28. *In the Matter of Stephen Yusi; Petition for Declaratory Ruling Pursuant to 47 C.F.R. § 1.4000*, 16 FCC Rcd 21337 (2001).
29. *Holliday v. Crooked Creek Villages Homeowners Assoc.*, 759 N.E.2d 1088 (Ind. App. 2001).
30. *In the Matter of Daniel and Corey Roberts; Petition for Declaratory Ruling Pursuant to 47 C.F.R. § 1.4000*, 16 FCC Rcd 10972 (2001).
31. *In the Matter of Victor Frankfurt*, 16 FCC Rcd 2875 (2001).
32. *In the Matter of Bell Atlantic Video Services Company; Petition for Declaratory Ruling Pursuant to 47 C.F.R. § 1.4000*, 15 FCC Rcd 7366 (2000).
33. *In the Matter of Irvin and Barbara Guterman; Petition for Declaratory Ruling Pursuant to 47 C.F.R. § 1.4000*, 15 FCC Rcd 24538 (2000).
34. *In the Matter of Stanley and Vera Holliday; Petition for Declaratory Ruling Pursuant to 47 C.F.R. § 1.4000*, 14 FCC Rcd 17167 (1999).
35. *In the Matter of Otto and Ida M. Trabue; Petition for Declaratory Ruling Under 47 C.F.R. § 1.4000*, 14 FCC Rcd 8602 (1999).

36. *Brier Lake v. Jones*, 710 So. 2d 1054 (La. 1998).
37. *In the Matter of James Sadler, Petition for Declaratory Ruling Pursuant to 47 C.F.R. § 1.4000*, 13 FCC Rcd 12559 (1998).
38. *In re Jordan E. Lourie, Petition for Declaratory Ruling Pursuant to 47 C.F.R. § 1.4000*, 13 FCC Rcd 16760 (1998).
39. *In re Jason Peterson, Petition for Declaratory Ruling Pursuant to 47 C.F.R. § 1.4000*, 13 FCC Rcd 2501 (1998).
40. *In re Wireless Broadcasting Systems of Sacramento Inc., Petition for Declaratory Ruling Pursuant to 47 C.F.R. § 1.4000*, 12 FCC Rcd 19746 (1997).
41. *In re Jay Lubliner and Deborah Galvin, Potomac, Maryland, Petition for Declaratory Ruling Pursuant to 47 C.F.R. § 1.4000*, 13 FCC Rcd 4834 (1997).
42. *In the Matter of Michael J. McDonald, Petition for Declaratory Ruling Under 47 C.F.R. § 1.4000*, 13 FCC Rcd 4844 (1997).
43. *In re Wireless Broadcasting Systems of Sacramento, Inc.; Petition for Declaratory Ruling Under 47 C.F.R. § 1.4000*, 12 FCC Rcd 19746 (1997).
44. *In the Matter of: Ray and Mary Thweatt; Petition for Declaratory Ruling Under 47 C.F.R. § 1.4000*, 12 FCC Rcd 19755 (1997).
45. *In re CS Wireless Systems, Inc. d/b/a OmniVision of San Antonio, Petition for Declaratory Ruling Under 47 C.F.R. § 1.4000*, 3 FCC Rcd 4826 (1997).

Local Ordinances

1. *In the Matter of Satellite Broadcasting & Communications Association; Petition for Declaratory Ruling Under 47 C.F.R. § 1.4000*, 33 FCC Rcd 3797 (2018).
2. *In the Matter of: Star Lambert and Satellite Broadcasting and Communications Association of America Petition for Declaratory Ruling Under 47 C.F.R. § 1.4000*, 12 FCC Rcd 10455 (1997).

Miscellaneous

1. *In the matter of Continental Airlines, Petition for Declaratory Ruling*, 20 FCC Rcd 13833 (2005) (upheld right of airline to install WiFi antenna in club room in municipal airport).

EXHIBIT C

Declaration of Greg McDonald

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

In the Matter of

Updating the Commission's Rule for Over-the-Air
Reception Devices

WT Docket No. 19-71

**DECLARATION OF GREG MCDONALD IN SUPPORT OF
COMMENTS OF THE REAL ESTATE ASSOCIATIONS**

I, Greg McDonald, declare as follows:

1. I submit this declaration in support of the Comments of the Real Estate Associations in response to the Commission's Notice of Proposed Rule Making in the above-captioned matter.

2. I currently serve as Director of Telecom Support for Greystar Real Estate Partners ("Greystar"), the seventh largest apartment owner in the United States and the largest apartment manager in the United States, according to the National Multifamily Housing Council's most recent survey data. *See* "Top 50 Apartment Owners (Rankings)" reported on NMHC's website at: <https://www.nmhc.org/research-insight/the-nmhc-50/top-50-lists/2019-owners-list/>

3. I have served as Director of Telecom Support since 2011. I have previously served in comparable positions since 1996, and I have over 35 years of experience in the delivery of video, broadband, and other communications services in multitenant environments. In this position, I am responsible for managing and coordinating the provision of communications services in Greystar apartment buildings. This includes soliciting proposals from providers to provide these services to existing buildings, negotiating the terms of the service and related agreements, monitoring the performance of the agreements, and negotiating any renewals.

4. Greystar currently owns a total of approximately 200 apartment communities 54,000+ units located in 18 states and the District of Columbia. Greystar currently operates/manages a total of 1,789 apartment communities (495,000+ units) located in 42 states and the District of Columbia.

5. The typical Greystar community has 3 broadband vendors available to residents in markets where competition exists. These deals typically include the Franchised Cable Operator, Public Telephone Company and one, or sometimes two, independent Internet Service Providers.

6. Greystar has business deals in place with Fixed Wireless Operators in at least 8 major metro markets, New York City, Boston, Chicago, Denver, Los Angeles, San Francisco, Seattle and Portland. The typical agreement with the ISP is an access agreement that includes marketing rights. Greystar has 150+ access agreements with Fixed Wireless Service Providers in markets where these vendors are available to provide service. The Fixed Wireless Provider business deal typically requires the property owner to install a portion of the infrastructure which will be utilized by the Fixed Wireless Service Provider to deliver service to residents. The additional investment costs the property owner approximately \$200 per unit. The Franchised Cable Operators and Public Telephone Companies typically deliver the broadband services to the community via a fiber optic cable network. The most common deployment method for the Fixed Wireless Service Providers to provide service to the community is fixed wireless, but a small number are served via a fiber optic cable network. The Fixed Wireless Providers generally provide a tiered retail service from 100Mb and up to 1Gb. The primary Greystar Fixed Wireless Service providers include Starry, Wave G, Google by Webpass and Boingo.

7. There are very few Mesh wireless networks today within the Greystar portfolio. The number of Mesh Wireless Networks at Greystar communities is expected to increase in the future

as smart business and residential technologies are developed. The most common type of wireless network at Greystar communities today is a Wi-Fi Hotspot. The Wi-Fi Hotspots are typically built by a Fixed Wireless Service Provider and paid for by the property owner. The Wi-Fi Hotspot systems are much cheaper to build and operate than a Mesh Network. Estimated property owner capital costs for a Wi-Fi Hotspot system is under \$10,000. The operating costs for a Wi-Fi Hotspot system is approximately \$300 per month. The estimated capital cost for a Mesh Network in a typical community is in excess of \$100,000. The estimated operating costs for the Mesh Network is \$5,000 per month.

8. Greystar residents want quality telecom service first and cost is secondary. The option to choose their vendor is also very popular at communities where multiple broadband vendors provide service. The younger demographics tend to want the high bandwidth data packages while the older demographics still want the video, data and voice bundle options.

9. In-building cellular coverage is a growing problem for the apartment industry as a whole. The newer energy efficient buildings tend to impede the wireless carrier's signals. None of the cellular carriers are willing to pay the cost to install a cellular signal enhancement system, so the capital and operating costs for the cellular signal enhancement system have to be paid by the owner. The capital cost for a cellular signal enhancement system starts in the \$300,000 range and can exceed \$1,000,000 in extreme cases. The primary solution for cellular reception problems is the Distributed Antenna System, but it is very expensive. There are other solutions available, but they are all still very expensive (\$200,000+) and don't always fully correct the problem. There have been discussions about installing Mesh Wireless systems for cellular signal reception problems, but none have been installed to date.

10. The average cost to install a Distributed Antenna System at a typical Greystar community is approximately \$500,000. Greystar has paid to have Distributed Antenna Systems at many of its new development projects where cellular reception problems exist. The number of Distributed Antenna Systems in Greystar communities is currently below 10%, but is growing rapidly.

11. The capital cost to construct the low voltage infrastructure at a Greystar community ranges from \$500 to \$1,000 per unit. These capital costs are typically for structured wiring, conduit systems and infrastructure to support the broadband systems that will be providing service to our residents.

12. The precise number of Greystar rooftops which have some type of fixed wireless infrastructure is estimated to be around 300 communities. This includes both communities that the Fixed Wireless Providers are serving and buildings where they are just using the rooftop to relay their signal. It does not include mobile wireless cell sites. Greystar actively pursues all types of Fixed Wireless Providers in an attempt to increase the number of rooftop leases in its portfolio.

13. I declare under penalty of perjury that the facts stated herein are true and correct to the best of my knowledge and belief.

This declaration was executed on the 3rd day of June, 2019, at Houston, Texas.



Greg McDonald

EXHIBIT D

Declaration of Equity Residential

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

In the Matter of

Updating the Commission's Rule for Over-the-Air
Reception Devices

WT Docket No. 19-71

**DECLARATION OF EQUITY RESIDENTIAL IN SUPPORT OF
COMMENTS OF THE REAL ESTATE ASSOCIATIONS**

I, Kathleen B Austin, declare as follows:

1. I submit this declaration in support of the Comments of the Real Estate Associations in response to the Commission's Notice of Proposed Rule Making in the above-captioned matter.

2. I currently serve as Assistant Vice President for Equity Residential ("Equity"), the 2nd largest apartment owner/manager in the United States, according to the National Multifamily Housing Council's most recent survey data. *See* "Top 50 Apartment Owners (Rankings)" reported on NMHC's website at: <https://www.nmhc.org/research-insight/the-nmhc-50/top-50-lists/2019-owners-list/>

3. I have served as an Assistant Vice President since 2000 and I have over 11 years of experience in the delivery of video, broadband, and other communications services ("Communications Service(s)") in multitenant environments. In this position, I am responsible for managing and coordinating the provision of Communications Services in 310 apartment communities. This includes soliciting proposals from providers to provide these Communications Services to existing buildings, negotiating the terms of the service and related agreements, monitoring the performance of the agreements, and negotiating any renewals.

4. As of March 31, 2019 Equity owns a total of 310 apartment properties consisting of 80,061 units, located in six (6) states and the District of Columbia.

5. Equity always seeks to provide residents with a choice of high quality providers of Communications Services, including internet, video, wifi and telephony services. We generally seek out providers with a proven track record who will provide high-quality, consistent Communications Service. We have entered into both marketing and access agreements with our provider partners.

6. With the majority of our communities there are choices of providers of Communications Services for our residents. When we enter into an agreement with a service provider, we require competitiveness commitments, insurance obligations (protecting not only our property, but also our residents), and requirements for service level standards, wiring maintenance, upgrade, and replacement, and complimentary common area service accounts (including video, data, and WiFi).

7. With regard to Communications Service, our residents are most concerned about fast, reliable service. Equity has been able to leverage our agreements with our Communications Service partners to not only provide competitive service, but more importantly, to help ensure timely response to customer orders, service requests, and any service disruptions.


8. Included in the providers of Communications Services are several fixed wireless operators. Currently, Equity has approximately 8% of our communities serviced by a fixed wireless operator. And, we are also in the midst of working with several fixed wireless operators to add up to an additional 10% more communities in offering a fixed wireless operator as a choice for our residents.

9. Cell phone coverage is also a concern of our residents. Building infrastructure and efforts to make structures utilize less energy sometimes creates issues with cell coverage. Therefore, we have installed common-area wifi in most of our communities. This, coupled with wifi calling capabilities has alleviated most challenges with cell coverage.

10. Approximately thirty-three (33), or 11%, of our properties support some type of rooftop antenna operator. Further, a number of these properties support multiple rooftop vendors with several properties supporting as many as four (4) different operators. Currently, Equity has 48 existing rooftop antenna operator agreements, with approximately ten (10) additional potential operator antenna projects in the exploratory phase. These operators include cellular, fixed wireless and satellite providers.

11. I declare under penalty of perjury that the facts stated herein are true and correct to the best of my knowledge and belief.

This declaration was executed on the 3rd day of June, 2019, at Chicago, IL.


Kathleen B Austin