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

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

JOINT REPLY 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")

The Real Estate Associations respectfully submit these Reply Comments to address issues raised by other parties in response to the Commission's Notice of Proposed Rulemaking.[1] The *NPRM* proposes to extend the Over-the-Air Reception Devices ("OTARD") rule, 47 C.F.R. § 1.4000 (the "Rule"), to include fixed wireless hub and relay antennas. The Real Estate Associations oppose the proposed amendments.

The record strongly supports the following key points made in our opening comments:

1. The Commission has no express statutory authority to expand the Rule to protect fixed wireless hub and relay antennas and the Commission's ancillary jurisdiction does not permit the Commission to extend the Rule beyond its original purpose of allowing consumers to use "customer-end" equipment.

[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 most effective way to promote the rapid deployment of fixed wireless infrastructure is to harness market forces and foster the partnerships between service providers and property owners that are currently promoting such deployment.
3. The proposed amendments would cause serious collateral harm to the existing market for rooftop space, thereby also harming all types of wireless providers.
4. There is no factual support in the record for either the principle that fixed wireless providers are facing undue difficulties in deploying facilities, or the idea that the proposed amendments are a rational means of addressing the alleged problem.
5. Any rule that grants service providers the right to operate for their own purposes any component of equipment installed on property in which they themselves have no ownership or leasehold rights would constitute a *per se* physical taking of property under *Loretto*, and thus violate the Fifth Amendment.

I. THE RECORD DEMONSTRATES THAT THE COMMISSION DOES NOT HAVE THE AUTHORITY TO ADOPT THE PROPOSED AMENDMENTS.

The local government commenters[2] argue that the distinction between Section 207 (preempting local authority over customer-end antennas) and Section 332(c)(7) (preserving local authority over provider-end antennas), which the Commission laid out very clearly in the *Competitive Networks Order*,[3] is not only still valid, but clearly the intent of Congress.[4] If

[2] The United States Conference of Mayors, *et al.* ("USCM *et al.*"), and the National Association of Telecommunications Officers and Advisors, *et al.* ("NATOA *et al.*").

[3] *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, 23,032-23,033

[4] Comments of USCM *et al.*, WT Docket No. 19-71 (filed June 3, 2019) at 8-10; Comments of NATOA *et al.*, WT Docket No. 19-71 (filed June 3, 2019) at 2-4.

Congress intends to preempt local authority, it must make its intention unmistakably clear, but Section 332(c)(7) instead shows that Congress did not delegate to the Commission the power to exempt all antennas from local laws.[5] The Real Estate Associations agree with this analysis.

In addition, the local government commenters and the Community Associations Institute ("CAI") concur with the basic analysis of our opening comments, which is that Section 207 alone is insufficient to constitute express authority over transmission equipment because Section 207 only refers to "viewers."[6] Furthermore, the Commission cannot rely on ancillary jurisdiction because the reasoning of the *Competitive Networks Order* has been superseded.[7]

The Wireless Internet Service Providers Association ("WISPA"), on the other hand, argues that expanding the scope of the Rule to include hub and relay antennas is consistent with the original intent of Section 207 because "consumers are increasingly viewing video content exclusively over fixed broadband connections" and consumers should be able to use any technology to receive video programming.[8] Of course, the Rule currently allows consumers to view video programming over fixed broadband connections. What WISPA actually wants is to allow service providers to take advantage of the presence of their customers on leased property to operate equipment for the provider's benefit. This is something different, so it requires different authority. As we explained in our opening comments, Section 207 only grants the right to install customer-end equipment, and hub and relay antennas are not customer-end equipment.

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[5] USCM *et al.* Comments at 10-11.

[6] Comments of the Community Associations Institute, WT Docket No. 19-71 (filed June 3, 2019) at 11-12.

[7] USCM *et al.* Comments at 10-11.

[8] WISPA Comments at 5-6; 14-15.

In the alternative, WISPA argues in cursory fashion that the Commission has ancillary authority for the same reasons stated in the *Competitive Networks Order*.[9] But WISPA does not acknowledge that the test for ancillary jurisdiction has changed substantially in the last nineteen years, much less actually try to apply that test.

Finally, WISPA seems to assert that the recent amendment of Section 257 and the requirements of the Regulatory Flexibility Act, both of which address restrictions on the ability of small businesses to compete, justify the proposed amendments.[10] These provisions do not grant express authority to regulate leased property, however, nor do they provide the link to such authority that would be needed to create ancillary jurisdiction.

II. STARRY CORRECTLY EMPHASIZES THAT BUILDING OWNERS AND SERVICE PROVIDERS WORK AS PARTNERS TO DEPLOY BROADBAND SERVICE AND INFRASTRUCTURE.

The Real Estate Associations agree with much of what Starry, Inc. ("Starry") says about relationships between Starry and property owners. For example, when Starry states that "building owners recognize that consumers want and deserve choice, even when they have one or two existing options,"[11] we could not agree more.

Starry also states that "Starry Connect [low cost service in public/affordable housing] is offered in partnership with building owners and local authorities . . . ."[12] This illustrates how providers, property owners, and local governments can cooperate to reach shared goals, for their mutual benefit.

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[9] WISPA Comments at 12-13.

[10] WISPA Comments at 15-17.

[11] Comments of Starry, Inc. WT Docket No. 19-71 (filed June 3, 2019) at 3.

[12] *Id.*

In principle, we agree that "the property owner should have the right to choose to place [Starry's] base stations . . . on their building."[13] We disagree, however, when Starry suggests that local regulation is limiting access to rooftops. Government restrictions rarely prevent the installation of communications facilities on apartment or office building rooftops. Starry's principal complaint is that local permitting causes delays, but a delay is not the same thing as a prohibition. We also disagree when Starry states that "[t]here is nothing in the [proposed amendments] that inhibits this right or infringes on a property owner's right to control their property."[14] As discussed in our opening comments, the proposed OTARD amendments would put tens of thousands of existing rooftop leases at risk of preemption.[15]

The Real Estate Associations support deployment by Starry and other fixed wireless providers. We do not, however, support Commission intervention when it is not needed. Starry's record is ample proof that a provider with a sound business plan can succeed without government help.

III. THE REAL ESTATE ASSOCIATIONS SHARE THE MULTIFAMILY BROADBAND COUNCIL'S CONCERNS REGARDING THE EFFECTS OF THE PROPOSED AMENDMENTS ON EXISTING MARKET RELATIONSHIPS.

The Multifamily Broadband Council ("MBC") describes extremely well the value of cooperation between property owners and broadband providers, and the dangers posed by the proposed amendments. Not only do the Real Estate Associations agree that the relationship

[13] *Id.* at 7.

[14] *Id.*

[15] Comments of the Real Estate Associations, WT Docket No. 19-71 (filed June 3, 2019) at 11-22.

between property owners and MBC's provider members has been mutually beneficial,[16] but we see that relationship as a model for further cooperation that the Commission should encourage.

In our opening comments, the Real Estate Associations described the collateral harm that the proposed amendments would cause to existing rooftop leases and further deployment of all kinds of rooftop infrastructure.[17] MBC's comments very clearly illustrate how expanding the Rule threatens both existing agreements for access to rooftops and future negotiations. We agree entirely with MBC's observation that casting doubt on existing leases "would almost certainly deter [multiple dwelling unit] owners from negotiating new rooftop leases."[18] By introducing government coercion into the current market-based relationship, the proposed amendments to the Rule would reduce the incentive of building owners to negotiate access agreements with WISPs.[19] This would benefit nobody.

MBC's comments also illustrate the wisdom of the Community Associations Institute when it urges the Commission to apply a "light touch" regulatory framework in connection with the OTARD Rule, as it has in other areas.[20]

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[16] Comments of the Multifamily Broadband Council, WT Docket No. 19-71 (filed June 3, 2019) at 5.

[17] Real Estate Associations Comments at 11-22.

[18] MBC Comments at 5-7.

[19] *Id.* at 2.

[20] CAI Comments at 5.

IV. THE LOCAL GOVERNMENT COMMENTERS AND THE MULTIFAMILY BROADBAND COUNCIL CORRECTLY POINT TO THE SPARSENESS OF THE RECORD: THERE WAS NO JUSTIFICATION FOR THE PROPOSED AMENDMENTS IN THE NPRM AND THE COMMENTS HAVE ADDED NOTHING THAT WOULD JUSTIFY ACTION BY THE COMMISSION.

USCM *et al.* correctly point out that, unlike previous OTARD-related orders, the Commission has not developed a factual record that would justify preemption.[21] At this point, we have the three examples of denials cited in WISPA's comments, which appear to be the same three referred to in their *ex parte* letters, and three complaints from rural providers regarding permit fees.[22] Google Fiber offers no actual examples, and CTIA says only that the Commission "should explore" whether to amend the Rule. This is not a well-developed record.

MBC also points to the lack of evidence. The *NPRM* essentially assumes that providers are unable to negotiate reasonable access to buildings, but there is no evidence of a problem in the record, whereas the proposed solution could actually create a problem.[23] Nothing in the record justifies the risk of upsetting current successful business models.

USCM *et al.* make another excellent point: The Commission recently created the Office of Economics and Analytics to ensure that its decisions are data-driven.[24] This proceeding raises precisely the kinds of issues that the new office should examine, particularly in light of the risk of collateral damage identified by MBC and the Real Estate Associations. The Commission must gather much more complete data about a broader range of actors and activities before it can

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[21] USCM *et al.* Comments at 7-8.

[22] WISPA Comments at 4; Comments of Interstate Wireless Inc., WT Docket No. 19-71 (filed June 3, 2019) at 3; Comments of Cherry Capital Connection, LLC, WT Docket No. 19-71 (filed June 3, 2019); Comments of New Wave Net Corp., WT Docket No. 19-71 (filed June 3, 2019).

[23] MBC Comments at 7-8.

[24] USCM *et al.* Comments at 8.

say it truly understands the likely effects of the proposed amendments. The Real Estate Associations have offered a list of the questions that seem relevant to us,[25] and a thorough analysis aimed at assessing not just the hypothetical benefits to one class of providers, but the complete range of effects on all market participants, would undoubtedly add to that list.

Finally, the record says virtually nothing about mesh networks, even though the *NPRM* suggests that promoting them is a significant goal. No party has offered a definition or explained how mesh networks would be deployed effectively in the current legal, business, and physical environments.

Now that the first round of comments has been filed, the weakness of the record is evident. The proposed amendments are a solution in search of a problem.

V. ANY RULE THAT GRANTS PROVIDERS THE RIGHT TO OPERATE EQUIPMENT ON PROPERTY THEY DO NOT DIRECTLY OWN OR LEASE RAISES A FIFTH AMENDMENT TAKING CLAIM UNDER *LORETTO*.

CAI correctly argues that a rule requiring the leasing of exclusive use common property to providers would amount to a forced entry policy and abrogate the Fifth Amendment rights of homeowners' associations, under *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982).[26] But the decision in *Loretto* has implications beyond a rule that directly mandates access. The fixed wireless carriers seek to install provider transmitting equipment without even the knowledge of property owners, much less their consent; they justify this because the equipment is small, nonintrusive, and also serves the resident. Any order or rule that provides

[25] Real Estate Association Comments at 26-28.

[26] CAI Comments at 8.

for such installations, however, raises a Constitutional claim because it amounts to a *per se* taking.[27]

In fact, Google Fiber Inc. clearly states that changing the definition of "antenna user" would protect providers, "not just property owners or residents."[28] WISPA, on the other hand, attempts to avoid the *per se* taking problem by saying that it is not necessary "to define the fixed wireless service provider as the 'antenna user' for purposes of the OTARD rule with respect to hub or relay antennas. The antenna user should be the resident that has a direct or indirect ownership or leasehold interest in the property . . . ."[29] But amending the Rule in a way that would allow providers indirectly – through their customers – to place hub or relay equipment on property owned by third parties, without the consent of the third party, does not eliminate the Constitutional issue. The provider in such a case would effectively operate at least some component of the equipment and thus would have a physical presence on the property, even if its employees never set foot there.

Starry claims that, because the same equipment can be a receiver, repeater or relay, or base station, it is not practical for the Commission to try to distinguish between consumer-end and provider-end equipment and that there is no reason to do so.[30] Starry would therefore delete the word "customer" from the definition of fixed wireless service.[31] But this, too, begs the

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[27] Real Estate Association Comments at 34-36, 41-42.

[28] Comments of Google Fiber Inc., WT Docket No. 19-71 (filed June 3, 2019) at 3-4.

[29] WISPA Comments at 11-12.

[30] Starry Comments at 9.

[31] *Id.* at 7-8.

question of the Commission's underlying authority, and ignores the Fifth Amendment rights of property owners.

The takings problem is compounded by the observation of Interstate Wireless, Inc., which notes that the Rule does not limit the number of antennas that can be installed on a property.[32] Under the logic of Google Fiber, WISPA, and Starry, if a fixed wireless subscriber can install one piece of equipment, it can install ten, or a hundred. Granted, the typical subscriber may only need or want one such item, but the legal principle would be the same: the Commission would be forcing owners to accept the occupation of their property by a third party. This violates the principle of *Loretto*.

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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[32] Interstate Wireless, Inc., Comments at 5.

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