

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of
Promotion of Competitive Networks in Local Telecommunications Markets
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services
WT Docket No. 99-217

ORDER ON RECONSIDERATION

Adopted: February 26, 2004

Released: March 24, 2004

By the Commission: Commissioner Martin issuing a statement.

I. INTRODUCTION

1. In this Order on Reconsideration, we address four Petitions seeking Reconsideration and/or Clarification of the Commission's determination to extend to users of fixed-wireless telecommunications antennas the same protections previously available to customers of multi-channel video service. Specifically, we: (1) deny Real Access Alliance's Petition, which asserted that the Commission lacked the statutory jurisdiction to extend those protections, to the extent they applied to antennas on leased property; (2) grant the Wireless Communications Association International's Petition for Partial Reconsideration, and the Petition for Clarification and Partial Reconsideration of the Satellite Broadcasting and Communications Association and the Satellite Industry Association, Broadband and Internet Division, which requested that the Commission reconsider and clarify that the limitations of the "safety exception" to the OTARD (Over-the-Air Reception Devices) rule apply to any professional installation requirement; (3) we also grant SBCA/SIA's Petition for Clarification and Partial Reconsideration, which further requested that the Commission clarify that its radiofrequency emission safety standards preempt any non-federal third party from imposing different standards; and (4) grant Triton's Petition for Reconsideration and clarify that these protections do apply to customer-end antennas that function to relay service to other customers.

1 Petitions for Reconsideration were filed by: The Real Access Alliance (RAA), Triton Network Systems, Inc. (Triton), Wireless Communications Association International, Inc. (WCA), and the Satellite Broadcasting Industry Association and Satellite Industry Association, Broadband and Internet Division (SBCA/SIA). In addition, the Commission received eight Oppositions to the filed petitions from various parties.

## II. BACKGROUND

2. In 1996, certain protections, referred to as the OTARD rules,<sup>2</sup> were enacted by the Commission in compliance with Section 207 of the Telecommunications Act of 1996, which directed the Commission, pursuant to the authority in Section 303 of the Communications Act of 1934 (47 U.S.C. § 303), to prohibit restrictions that “impair a viewers ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.”<sup>3</sup> In the *OTARD First Report and Order*, the Commission prohibited actions by state and local governments, zoning boards, home owners associations, and other third parties (“non-federal third parties”) that restricted the installation and use of antennas (under one meter in diameter) and related equipment by users on their own property.<sup>4</sup> Subsequently, the Commission extended the same protections to antennas installed by renters in areas over which they exercise an exclusive leasehold interest.<sup>5</sup>

3. On October 25, 2000, the Commission released the Competitive Networks First Report and Order and Further Notice of Proposed Rulemaking.<sup>6</sup> In the *Competitive Networks Order*, the Commission found that goals expressed by Congress in the Telecommunications Act would be frustrated if the OTARD protections were applied to video and not to telecommunications services. The Commission found that: “To the extent a restriction unreasonably limits a customer’s ability to place antennas to

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<sup>2</sup> 47 C.F.R. § 1.4000. Section 1.4000 prohibits restrictions that impair the installation, maintenance or use of: (1) any antenna designed to receive direct broadcast satellite service, or to receive or transmit fixed wireless signals via satellite and that is one meter or less in diameter or is located in Alaska; (2) any antenna designed to receive video programming services via multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services, or to receive or transmit fixed wireless signals other than via satellite and that is one meter or less in diameter; (3) any antenna designed to receive television broadcast signals; or (4) any mast supporting an antenna described in the Section. For the purposes of Section 1.4000, a law, regulation, or restriction impairs installation, maintenance, or use of an antenna if it: unreasonably delays or prevents installation, maintenance, or use; unreasonably increases the cost of installation, maintenance, or use; or precludes reception of an acceptable quality signal. Section 1.4000 also sets forth principles governing fees or costs that may be imposed for placement of covered antennas and enforcement of covered regulations. Restrictions that would otherwise be forbidden are permitted if they are necessary for certain safety or historic preservation purposes, are no more burdensome than necessary to achieve their purpose, and meet certain other conditions set forth in the rule.

<sup>3</sup> Section 207 of the 1996 Act states that “[w]ithin 180 days after the date of enactment of this Act, the Commission shall, pursuant to Section 303 of the Communications Act of 1934, 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, or direct broadcast satellite services.” 47 U.S.C. § 303 note (1996 Act, Section 207).

<sup>4</sup> See Preemption of Local Zoning Regulation of Satellite Earth Stations, *Report and Order, Memorandum Opinion and Order in IB Docket No. 95-59*, and Implementation of Section 207 of the Telecommunications Act of 1996 and Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service, *Further Notice of Proposed Rulemaking in CS Docket No. 96-83*, 11 FCC Rcd 19276 (1996) (*OTARD First Report and Order*).

<sup>5</sup> See Preemption of Local Zoning Regulation of Satellite Earth Stations, *Report and Order, Memorandum Opinion and Order in IB Docket No. 95-59*, and Implementation of Section 207 of the Telecommunications Act of 1996 and Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service, *Report and Order, CS Docket No. 96-83*, 13 FCC Rcd 23874 (1998) (*OTARD Second Report and Order*).

<sup>6</sup> Promotion of Competitive Networks in Local Telecommunications Markets, *First Report and Order in WT Docket No. 99-217, the Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and the Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57*, 15 FCC Rcd. 22,983 (2000) (*Competitive Networks Order*).

receive telecommunications or other services, whether imposed by government, homeowners associations, building owners, or other third parties, that restriction impedes the development of advanced, competitive services.”<sup>7</sup> The Commission concluded therefore that “distinguishing in the protection afforded based on the service provided through an antenna produces irrational results”<sup>8</sup> and amended section 1.4000 of its rules to include customer end antennas used for transmitting or receiving fixed wireless signals.<sup>9</sup>

4. In order to promote the availability of advanced telecommunications services to customers within multi-tenant environments (MTE) the Commission adopted several measures to remove obstacles to competitive access to this important portion of the telecommunications market. Specifically, the *Competitive Networks Order*: (1) prohibited carriers from entering into contracts that restrict or effectively restrict owners and managers of commercial MTEs from permitting access by competing carriers; (2) clarified rules governing control of in-building wiring; (3) concluded that the access mandated by Section 224 of the Communications Act (the “Pole Attachments Act”)<sup>10</sup> includes access to conduits or rights-of-way that are owned or controlled by a utility within MTEs; and (4) concluded that parties with a direct or indirect ownership or leasehold interest in property, including tenants in MTEs, should have the ability to place antennas one meter or less in diameter used to transmit and receive fixed wireless in addition to multi-channel video service in areas within their exclusive use or control, and prohibited most restrictions on parties’ ability to do so. Each of the relevant petitions for reconsideration here focuses only on the fourth issue.

### III. DISCUSSION

5. The Real Access Alliance Petition. The Real Access Alliance<sup>11</sup> argues that the Commission “had no power to extend the original OTARD rule to leased property . . . consequently the amendment promulgated in the (*Competitive Networks*) order is also invalid, to the extent it applies to leased property.”<sup>12</sup> RAA contends that the Commission lacked the authority to extend the OTARD rules to leased property as it did in the *OTARD Second Report and Order*,<sup>13</sup> and that any further extension predicated on that authority is similarly invalid. The RAA argues that because Section 207 does not expressly extend or grant the Commission any jurisdiction over building owners that did not previously exist, the Commission lacked the authority to affect the landlord-tenant relationship. RAA further argues that the Commission’s reliance on “ancillary authority” fails because there is no reasonable nexus between the exercise of that authority and underlying statutory provisions.<sup>14</sup>

6. At the time RAA’s petition was filed, a challenge to the *OTARD Second Report and Order* was pending in the D.C. Circuit. The litigation was commenced by BOMA, one of the RAA’s constituent

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<sup>7</sup> *Competitive Networks Order* at para. 97.

<sup>8</sup> *Id.* at para. 98.

<sup>9</sup> For the purposes of the OTARD rule, “fixed wireless signals” are any commercial non-broadcast communications signals transmitted via wireless technology to and/or from a fixed customer location. 47 C.F.R. § 1.4000 (a)(2).

<sup>10</sup> 47 U.S.C. § 224.

<sup>11</sup> The Real Access Alliance is a consortium of real estate interests, including Building Owners and Managers Association International (BOMA), Institute of Real Estate Management, International Council of Shopping Centers, Manufactured Housing Institute, National Apartment Association, National Association of Home Builders, National Association of Industrial and Office Properties, National Association of Real Estate Investment Trusts, National Association of Realtors, National Multihousing Council, and the Real Estate Roundtable.

<sup>12</sup> Petition for Reconsideration of the Real Access Alliance, filed Feb. 12, 2001.

<sup>13</sup> *OTARD Second Report and Order*.

<sup>14</sup> RAA Petition at p. 14.

groups.<sup>15</sup> RAA's petition before us incorporates by reference BOMA's brief in that case. On July 6, 2001, the U.S. Court of Appeals for the D.C. Circuit denied BOMA's challenge to the *OTARD Second Report and Order*, finding that it was clearly within the Commission's discretion to protect all viewers from restrictions on access to multi-channel video regardless of whether they own or rent.<sup>16</sup>

7. Specifically, the Court found that in granting the Commission the authority to "perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions," Congress clearly intended the Commission to have jurisdiction over any party imposing restrictions that the Act sought to eliminate.<sup>17</sup> The Court also found that the Commission was entitled to deference in the interpretation of a statutory provision that did not speak to the exact issue at hand.<sup>18</sup> The Court looked to the authority conferred upon the Commission in the Communications Act of 1934, the Telecommunications Act of 1996, and the specific legislative history of Section 207. The Court found that the Commission acted reasonably in protecting customers who lease property in the *OTARD Second Report and Order* due to the broad authority granted to the Commission by Congress to "perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions,"<sup>19</sup> and the stated mandate to "make communications services available . . . to all the people of the United States."<sup>20</sup> One of the principal goals of the 1996 Act was "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."<sup>21</sup> While Section 207 was specifically directed to multichannel video reception, the Commission relied upon the same underlying authority and policy in extending those protections to fixed wireless telecommunications services.<sup>22</sup> Because the D.C. Circuit has held that the Commission has broad authority to regulate in this area, RAA's argument that the Commission lacks jurisdiction over leased property fails and the petition is therefore denied.

8. In addition, to the extent that RAA argues that the Commission acted outside the scope of its authority in extending the protections of OTARD to fixed wireless services, we conclude that the Commission's provision of these important consumer protections to fixed wireless customers serves goals articulated by Congress in Sections 1, 706 and Title II of the Communications Act. As such, the Commission's decision is within the ancillary authority delegated to the Commission by Congress in Sections 1, 4(i), 201(b) and 303(r) of the Act to make regulations necessary to carry out the Act's provisions. We concluded in the *Competitive Networks Order* that our extension of the OTARD protections furthers the express objectives of Section 1 to "make available, so far as possible, to all people of the United States, . . . a rapid, efficient, Nation-wide, and world-wide, wire and radio communications service with adequate facilities at reasonable charges."<sup>23</sup> The *Competitive Networks Order* also found that

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<sup>15</sup> Building Owners and Managers Association et al. v. FCC, No. 99-1099, Brief for Petitioner BOMA.

<sup>16</sup> Building Owners and Managers Association et al. v. FCC, 254 F.3d 89 (D.C. Cir. 2001).

<sup>17</sup> *Id.* (quoting *Office of Communication of the United Church of Christ v. F.C.C.*, 707 F.2d 1413, 1423 (D.C. Cir.1983) (quoting *National Broad. Co. v. United States*, 319 U.S. 190, 219 (1943))

<sup>18</sup> See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

<sup>19</sup> 47 U.S.C. §§ 154(i), 303(r).

<sup>20</sup> 47 U.S.C. § 151.

<sup>21</sup> Telecommunications Act of 1996, Pub. L. No. 104-04, purpose statement, 110 Stat. 56, 56 (1996) (*1996 Act Preamble*).

<sup>22</sup> See *Competitive Networks Order* at para. 110.

<sup>23</sup> *Competitive Networks Order* at para. 102 (quoting 47 U.S.C. § 151).

the extension of OTARD rules to fixed wireless facilities is consistent with Section 706 of the Telecommunications Act of 1996, which directed the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity . . . measures that promote competition in the local telecommunications market, and other regulating methods that remove barriers to infrastructure investment.”<sup>24</sup> Further, the Commission determined in the *Competitive Networks Order* that its action was necessary to further the consumer protection goals of Sections 201(b), 202(a) and 205(a) of the Act, which ensure that the rates, terms and conditions for the provision of common carrier service are just, fair and reasonable, and that there is no unjust or unreasonable discrimination in the provision of such service. Given these clear Congressional goals, the Commission determined that it was appropriate to exercise its ancillary authority to extend OTARD protections to fixed wireless customers, and that it would be illogical for the Commission to protect one group of consumers (*i.e.*, multi-channel video) but deny such protections to another group of consumers (*i.e.*, fixed wireless) based solely on the nature of the equipment in use. We are not dissuaded from this conclusion by any of RAA’s arguments.

9. Wireless Communications Association (WCA) and Satellite Broadcasting and Communications Association/Satellite Industry Association (SBCA/SIA) Petitions. WCA and SBCA/SIA seek reconsideration of the Commission’s treatment of professional installation requirements for fixed-wireless and satellite transceivers under the “safety exception” to the OTARD rule.<sup>25</sup> When the OTARD rule was promulgated, the Commission specifically excepted from the general prohibition any restrictions that are “necessary to accomplish a clearly defined, legitimate safety objective.”<sup>26</sup> The rule requires any such restrictions be non-discriminatory, in that they apply not only to antennas but also to other items of similar size and weight that could pose a similar potential safety risk. Allowable restrictions would also have to be explained in writing and made available to the user. In extending the OTARD rule to cover devices which transmit as well as receive, the Commission recommended in the *Competitive Networks Order* that such devices be professionally installed. It further stated that “to the extent that local governments, associations, and property owners elect to require professional installation for transmitting antennas, the usual prohibition of such requirements under the OTARD rules will not apply.”<sup>27</sup>

10. WCA contends that the above language is ambiguous and that, unless clarified, would allow third parties to require professional installation for all transmitting devices regardless of whether there is any legitimate safety interest concerning that particular device.<sup>28</sup> WCA requests that the Commission clarify that professional installation requirements must meet the same criteria as other safety-related restrictions, *i.e.*, that they be narrowly tailored, clearly defined, with the justification available in writing to those users potentially affected. SBCA/SIA also requests that the Commission reconsider these aspects of the *Competitive Networks Order* that recommend professional installation or specific locations for antennas and allow local governments, property owners or homeowners associations to impose such a condition.<sup>29</sup> SBCA/SIA also requests that the Commission clarify that issues of radiofrequency exposure (RFE) are properly decided by the FCC and that local standards relating to RFE are invalid insofar as they are inconsistent with the guidelines established by the Commission.

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<sup>24</sup> *Id.* at para. 103 (quoting Pub. L. No. 104-104 § 706, 110 Stat. 153 (reproduced in the notes under 47 U.S.C. § 157)).

<sup>25</sup> *Id.* at para. 117.

<sup>26</sup> See 47 C.F.R. § 1.4000(b)(1).

<sup>27</sup> *Competitive Networks Order* at para. 119.

<sup>28</sup> Petition for Partial Reconsideration, filed by WCA on Feb. 12, 2001, at p. 4.

<sup>29</sup> Petition for Clarification and Partial Reconsideration of SBCA/SIA, filed Feb. 12, 2001, at 10-12.

11. We agree with WCA and SBCA/SIA that professional installation requirements should meet the same criteria as other safety-related restrictions.<sup>30</sup> With regard to RF safety, we stress here that Congress has long vested in the Commission exclusive jurisdiction over radio communications, and that includes preemption of local jurisdictions in matters concerning RF safety.<sup>31</sup> The Commission has established guidelines for evaluating radiofrequency exposure limits, which apply to “all FCC-regulated transmitters.”<sup>32</sup> When professional installation is appropriate to ensure safety from RFE hazard, the FCC places such a restriction on the certification or blanket license pertinent to the subject equipment, and this requirement is included in the instructions and labeling for the device, as appropriate.<sup>33</sup> When professional installation is required, non-federal third parties are free to ensure that such requirements are followed. Similarly, where installation instructions relating to placement, direction, and distance, inclusion of additional equipment or devices, or any other parameters are required by the Commission for purposes of RF safety,<sup>34</sup> non-federal third parties are again free to ensure that any such requirements are followed. In the absence of FCC-mandated professional installation requirements, however, non-federal third parties may not impose such restrictions for reasons of RF safety. Professional installation or installation restrictions for other safety reasons can be required if the restricting entity meets the OTARD criteria for safety requirements.<sup>35</sup> The Commission also retains the authority to impose professional-installation requirements for customer-premised satellite earth stations and other radio frequency devices when the Commission deems it required by interference considerations or for other reasons necessary to implement its rules.

12. As with other safety related restrictions, we believe that where a legitimate safety concern is present, and articulated in writing, a narrowly tailored professional installation requirement should be enforceable. We note that in order to be eligible for the protections of the OTARD rule, a device must be properly labeled to give notice of potential RF safety hazards, including minimum separation distances from users.<sup>36</sup> We recommend that manufacturers and service providers provide users with adequate information accompanying antennas regarding proper installation, including admonitions to employ professional installers when necessary. Such information regarding emission levels and installation techniques, in conjunction with established FCC RF emission guidelines may be used by third parties in justifying any requirement for professional installation. As such, we grant WCA’s petition, and grant in part SBCA/SIA’s petition and clarify that safety-related restrictions, including professional installation

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<sup>30</sup> Clearly-defined, legitimate safety restrictions are permitted even if they impair installation, maintenance or use, provided they are necessary to protect safety and are no more burdensome than necessary to ensure safety. The safety reason for the restriction must be written in the text, preamble or legislative history of the restriction, or in a document that is readily available to antenna users, so that a person wanting to install an antenna knows what restrictions apply.

<sup>31</sup> See e.g. In the Matter of Petition for Declaratory Ruling filed by Cingular Wireless LLC that Provisions of the Anne Arundel County Zoning Ordinance are Preempted as Impermissible Regulation of Radio Frequency Interference Reserved Exclusively to the Federal Communications Commission, *Memorandum Opinion and Order*, 2003 WL 2151783 (WTB/2003).

<sup>32</sup> See Office of Engineering and Technology, *Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields* (1997) (“OET Bulletin 65”). See also 47 C.F.R. 15.247(b)(5). See also <http://www.fcc.gov/oet/rfsafety>.

<sup>33</sup> Of course, where the Commission requires professional installation, non-federal third parties are free to make explicit in their rules a reference to this requirement. See, generally, 47 C.F.R. §§ 1.1307 (Table 1) and 1.1310.

<sup>34</sup> *Id.*

<sup>35</sup> See 47 C.F.R. § 1.4000(b),(c). See also paragraph 9, *supra* and *In the Matter of Victor Frankfurt*, 16 FCC Rcd 2875 (CSB 2001), affirmed on review, 18 FCC Rcd. 18,431 (2003) (Petition for Declaratory Ruling under 47 C.F.R. § 1.4000). Legitimate safety requirements may satisfy the exception.

<sup>36</sup> See 47 C.F.R. § 1.4000(c).

requirements, are limited by the established parameters of the “safety exception” to the OTARD rule.<sup>37</sup>

13. Triton Network Systems Petition. Triton seeks reconsideration and clarification of the Commission’s determination in the *Competitive Networks Order* that customer-end antennas used as hubs or relays are explicitly excluded from the protections of the OTARD rule. Triton deploys its networks using a “point-to-point-to-point” architecture in which each customer device also serves as a relay device.

14. In the *Competitive Networks Order*, the Commission determined that Section 332(c)(7) of the Telecommunications Act of 1996, which preserves local authority to regulate placement of personal wireless service facilities, does not apply to customer-end antennas. Section 332(c)(7) was intended by Congress to protect the authority over zoning traditionally vested in local governments, so long as the exercise of that authority is non-discriminatory and does not effectively prohibit wireless service. However, local authority is limited to those facilities used for the *provision* of “personal wireless service.” In the *Competitive Networks Order*, the Commission concluded that local authority pursuant to section 332(c)(7) does not include customer-end equipment, noting that the legislative history of section 332(c)(7) refers to non-customer-end equipment such as “50 foot towers” as an example of “personal wireless service facilities.”<sup>38</sup>

15. In enacting Section 332(c)(7), Congress expressed a concern with preserving for local governments the important role of zoning authority so that visible and potentially obtrusive facilities, such as towers, were constructed and located in a manner consistent with the interests of the local community.<sup>39</sup> It was also the stated goal of Congress that consumers have access to their choice of services.<sup>40</sup> Congress, in the case of multi-channel video, chose to remove from the Commission the discretion to decide not to preempt local restrictions by mandating the enactment of the OTARD rules for those services. The Commission retained the discretion to take similar action *vis-a-vis* other services. Indeed, as was pointed out in the *Competitive Networks Order*, Sections 207 and 332(c)(7) were enacted concurrently, leading the Commission to conclude that it was unlikely that Congress would either preserve or limit local authority over a device based simply on the service for which a customer was using it when elsewhere the Act sought to promote all forms of advanced services.

16. However, in making the determination in the *Competitive Networks Order* that the OTARD rules applied to customer-end antennas and not to hubs or relays, the Commission did not consider those network configurations and technologies in which customer-end equipment performs both functions. As demonstrated by the point-to-point-to-point architecture cited by Triton and the mesh architectures being actively developed and deployed, other types of deployment of advanced services may no longer rely on the traditional configurations addressed in the *Competitive Networks Order*. For the purposes of the OTARD protections, the equipment deployed in such networks shares the same physical characteristics of other customer-end equipment, distinguished only by the additional functionality of routing service to additional users. We do not believe that our rules should serve to disadvantage more efficient technologies.

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<sup>37</sup> Clearly-defined, legitimate safety restrictions are permitted even if they impair installation, maintenance or use provided they are necessary to protect safety and are no more burdensome than necessary to ensure safety. The safety reason for the restriction must be written in the text, preamble or legislative history of the restriction, or in a document that is readily available to antenna users, so that a person wanting to install an antenna knows what restrictions apply. See 47 C.F.R. § 1.4000(b). See also *Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices*, Report and Order, 11 FCC Rcd 19276 at ¶¶ 24, 25, and 37 (1996), *affirmed*, *Order on Reconsideration*, 13 FCC Rcd 18962 at ¶¶ 8, 15, 34-36.

<sup>38</sup> S. Conf. Rep. No. 104-230, 104<sup>th</sup> Cong., 2d sess. at 91 (1996).

<sup>39</sup> *Id.*

<sup>40</sup> See generally *Telecommunications Act of 1996*.

17. In concluding that OTARD protections should extend to such customer-end equipment, we do not intend that carriers may simply locate their hub-sites on the premises of a customer in order to avoid compliance with a legitimate zoning regulation.<sup>41</sup> Rather, in order to invoke the protections of the OTARD rule, the equipment *must be installed in order to serve the customer on such premises*,<sup>42</sup> and it must comply with all of the limitations of the rule, such as the restriction in antenna size to one meter or less in diameter or diagonal measurement.<sup>43</sup>

18. We also find support for this reconsideration in the very definition of “customer premises equipment” (CPE) established by Congress in the 1996 Act. CPE is defined as “equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications.”<sup>44</sup> By including the routing function in the definition of CPE, the Act clearly does not intend to limit CPE to that which is used solely to originate or terminate telecommunications. Therefore, we grant Triton’s Petition for Reconsideration and apply our OTARD rules to cover any customer-end device that would have been covered by our rules were it not for the device’s routing/relaying functionality.

#### IV. CONCLUSION

19. For the reasons listed above, we; (1) deny RAA’s Petition for Reconsideration which had challenged the Commission’s authority to extend the OTARD protections in the *Competitive Networks Order*; to the extent they applied to antennas on leased property; (2) grant WCA’s Petition for Partial Reconsideration, and grant in part the Petition for Clarification and Partial Reconsideration of the SBCA/SIA, and clarify that the limitations of the “safety exception” to the OTARD rule apply to professional installation requirements; (3) grant the SBCA/SIA’s Petition for Clarification and Partial Reconsideration, which further requested that the Commission clarify that its radiofrequency emission safety standards preempt any non-federal third party from imposing different standards; and (4) grant Triton’s Petition for Reconsideration by clarifying that the protections of the OTARD rule apply to customer-end devices that incorporate relaying/routing functions to other customers.

#### V. PROCEDURAL MATTERS

##### A. Regulatory Flexibility Act

20. A Regulatory Flexibility Analysis<sup>45</sup> is not required because this order does not promulgate or revise any rules.

##### B. Authority

21. This action is taken pursuant to Sections 4(i), 303, and 405 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. §§ 154(i), 303, and 405.

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<sup>41</sup> Because this rule applies *only* to customer-end equipment, the provider’s backhaul and hub or relay equipment is not covered.

<sup>42</sup> Thus, the OTARD protections would apply to installations serving the premises customer that also relay signals to other customers, such as is typical in mesh networks, but would not apply to installations that are designed primarily for use as hubs for distribution of service.

<sup>43</sup> See e.g. 47 C.F.R. § 1.4000(a)(1)(ii)(B). See also *Competitive Networks Order* at ¶100 & note 258 (allowing safety permit requirements for masts extending more than 12 feet above the roof of a building).

<sup>44</sup> 47 U.S.C. § 153(14).

<sup>45</sup> See 5 U.S.C. § 604.

**VI. ORDERING CLAUSES**

22. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Real Access Alliance, Inc., IS DENIED.

23. IT IS FURTHER ORDERED that the Petition for Partial Reconsideration filed by the Wireless Communications Association, Inc., IS GRANTED.

24. IT IS FURTHER ORDERED that the Petition for Clarification and Partial Reconsideration filed by the Satellite Broadcasting Industry Association and Satellite Industry Association, Broadband and Internet Division, IS GRANTED.

25. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by Triton Network Systems, Inc., IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

**STATEMENT OF  
COMMISSIONER KEVIN J. MARTIN**

*Re: Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking To Amend Section 1.4000 of the Commission's Rules To Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services, Order on Reconsideration, WT Docket No. 99-217*

I have reservations with the Commission's decision to extend our rules for over-the-air reception devices (OTARD rules) to cover devices used to receive services other than video programming. The statutory basis for our OTARD rules applies explicitly to "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, or direct broadcast satellite services." 47 U.S.C. § 303 note (Telecommunications Act of 1996 Section 207). I appreciate the policy behind extending our rules to telecommunications services. I am concerned with relying solely on our ancillary authority to do so.