Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Petition of American Hotel & Lodging	)	RM No. 11737
Association, Marriott International, Inc.	)	
and Ryman Hospitality Properties for a	)	
Declaratory Ruling to Interpret 47 U.S.C.	)	
§ 333, or, in the Alternative, for Rulemaking	)	

OPPOSITION OF OPEN TECHNOLOGY INSTITUTE AT NEW AMERICA FOUNDATION AND PUBLIC KNOWLEDGE TO PETITION FOR DECLARATORY RULING OR, IN THE ALTERNATIVE, FOR RULEMAKING

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The Open Technology Institute at New America Foundation (OTI) and Public Knowledge (PK), pursuant to Section 1.405(a) of the Commission's Rules, hereby oppose and request dismissal of the above-captioned "Petition for Declaratory Ruling or, in the Alternative, for Rulemaking" ("Petition") filed jointly by Marriott International, Inc. ("Marriott"), the American Hotel & Lodging Association, and Ryman Hospitality Properties ("Ryman") (collectively, "Petitioners").[1]

I. INTRODUCTION

In this Petition, Marriott and its hotel industry allies assert that Wi-Fi and other radio communications using license-exempt spectrum bands are not "licensed or authorized" within the meaning of 47 U.S.C. § 333 and therefore have no protection from willful or malicious interference by property owners or, apparently, by anyone for any reason. As consumer advocates and longtime proponents of the enormous social and economic value of Wi-Fi and unlicensed innovation more generally, OTI and PK are alarmed that Marriott's Petition might even be considered to raise an unresolved question. Both the Communications Act and the Commission's enforcement advisories are clear that it is unlawful to willfully impair or disable *any* authorized communications by radio, regardless whether the device is operating on "licensed" or "unlicensed" spectrum. OTI and PK urge the Commission to clarify this point in its Order dismissing the Petition.

[1] *See Public Notice*, Report No. 3012 (rel. Nov. 19, 2014).

The essence of Petitioners' argument is that the Commission has no authority under Section 333 to prohibit "willful or malicious" interference with Wi-Fi or other authorized communications on license-exempt bands. However, both the plain language of Section 333 and its legislative history belie Petitioners' claim. The statutory language could hardly be more clear: "No person shall willfully or maliciously interfere with or cause interference to ***any radio communications of any station licensed or authorized by or under this chapter*** or operated by the United States Government."[2] This "licensed or authorized" language must be interpreted to include any lawful radio communications authorized by the Commission. Accordingly, FCC enforcement advisories have made it abundantly clear that that the agency has a longstanding policy that willful interference to any authorized radio service, including Wi-Fi operations, violates federal law.

Contrary to Petitioner's claims, it is irrelevant whether Part 15 devices must "accept" interference. Section 333 does not prohibit interference; it prohibits actions that "willfully or maliciously interfere or cause interference" with radio communications. The operative words are "willfully and maliciously." A literal reading of Section 333, protecting "any radio communications," licensed or unlicensed, from willful interference is entirely consistent with Part 15. At the time Congress enacted Section 333, in 1990, the Commission's expanding authorizations of license-exempt operations in the Industrial Scientific and Medical (ISM) bands, and in other bands, were widespread, well-known and widely-supported.

As a matter of policy, Petitioner's proposed "right to interfere" with Wi-Fi or other Part 15 operations undermines the public interest in multiple ways. First, Petitioner's proposed declaratory order is virtually boundless. It would open the door to the willful blocking or

[2] 47 U.S.C. § 333 (emphasis added).

degrading of Wi-Fi by any venue that decided it could make a profit off its exclusive provision, or benefit in some other way by ensuring quality of service (QoS) for its own network.

Second, because Wi-Fi has become so ubiquitous and economically valuable, the Commission must guard against the inclination of certain parties to seek competitive advantage – and profit – by achieving QoS for *their* Wi-Fi service while simultaneously disabling competing options and rival Wi-Fi services. It is obvious that what Marriott is after is a means to coerce guests and visitors to pay them for a service (Wi-Fi connectivity) that a rapidly increasing share of consumers already pay for through their mobile carrier (e.g., via tethering apps or a portable router), and/or cable Internet subscription (e.g., Xfinity Wi-Fi), or even through a hotspot aggregation service (e.g., Boingo). It would be both anti-competitive and immensely disruptive if the Commission accedes to Petitioners' proposal and gives every major venue the ability to block rival sources of Wi-Fi. Consumers will pay unnecessary fees. Seamless connectivity will be constrained. And both mobile and wireline ISPs are likely to receive a flood of complaints from subscribers who will assume their Wi-Fi applications are malfunctioning.

Finally, the Commission should acknowledge the critical distinction between inadvertent interference and the sort of knowing and economically-motivated interference that Petitioners seek to legitimate with this Petition. At a time when Wi-Fi is offloading a majority of the exploding demand for mobile data, spurring innovation, encouraging mobile market competition, empowering consumers and generating $200 billion or more per year for the American economy, the nation cannot afford to undermine this proven and immensely popular technology simply because a particular set of companies decides they can extract rents by not only using unlicensed spectrum for their own Wi-Fi networks, but to do so with technology and in a manner calibrated to block, impair or degrade the general public's shared use of Wi-Fi and unlicensed spectrum.

II. THE COMMISSION SHOULD DISMISS THE PETITION AND REAFFIRM THAT SECTION 333 PROHIBITS 'WILLFUL' INTERFERENCE WITH ANY 'AUTHORIZED' RADIO COMMUNICATIONS

Petitioners request a declaratory ruling pursuant to both Section 554(e) of the Administrative Procedure Act and Section 1.2 of the Commission's Rules.[3] Section 554(e) gives the Commission the discretion to "issue a declaratory order to terminate a controversy or remove uncertainty."[4] The Petition must be dismissed, since there is no controversy or uncertainty concerning the Commission's interpretation and enforcement of Section 333 as prohibiting "any person" from "willfully or maliciously interfer[ing] with or caus[ing] interference to *any radio communications of any station licensed or authorized by or under"* the Communications Act.[5] Petitioners attempt to claim that the applicability of Section 333's prohibition against intentional interference to license-exempt users and devices authorized under Part 15 of the Commission's rules is misguided as a matter of both law and policy.

First, Petitioners claim that "the FCC has never interpreted Section 333 to prohibit interference to Part 15 devices or found a violation of Section 333 based upon such interference."[6] This is false. A quick review of the Commission's "Jammer Enforcement" website[7] and FCC enforcement advisories make it abundantly clear that that the agency has a longstanding policy that willful interference to any authorized radio service, including Wi-Fi operations, violates federal law. The language in an alert box displayed prominently in the center of the Commission's "Jammer Enforcement" web page reads:

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[3] *See* 5 U.S.C. § 554(e); 47 C.F.R. § 1.2.
[4] 5 U.S.C. § 554(e).
[5] *See* U.S.C. § 333.
[6] Petition at 14
[7] Federal Communications Commission, "Jammer Enforcement," available at https://www.fcc.gov/encyclopedia/jammer-enforcement (accessed Dec. 19, 2014).

> Federal law prohibits the operation, marketing, or sale of any type of jamming equipment, including devices that interfere with cellular and Personal Communication Services (PCS), police radar, Global Positioning Systems (GPS), ***and wireless networking services (Wi-Fi)***.[8]

The Commission has also stated its intention to prosecute willful blocking of Wi-Fi services in multiple enforcement advisories. A FCC Enforcement Advisory released in February 2011 states: "We remind consumers that it is a violation of federal law to use devices that intentionally block, jam, or interfere with authorized radio communications such as cell phones, police radar, GPS, *and Wi-Fi*."[9] This clause includes a footnote that specifically cites Section 333 as the source of the Commission's authority.

As recently as December 8, 2014, a new FCC Enforcement Advisory explains that "jammers can . . . prevent your Wi-Fi enabled device from connecting to the Internet."[10] The Advisory describes some of the broader harms that are inflicted by devices "emitting radio frequency waves that prevent the targeted device from establishing or maintaining a connection":

> Jammers also prevent the public, including individuals and businesses, from engaging in any of the myriad lawful forms of communications that occur constantly in all corners of the country—simple one-on-one phone conversations, communication among persons in large groups (such as during lawful rallies and protests), use of GPS-based map applications, social media use, etc.[11]

Moreover, on October 3, 2014, Marriott itself entered into a Consent Decree with the Enforcement Bureau. In the Consent Decree, the Enforcement Bureau reiterates that "[t]he Bureau previously has indicated that the use of jammers to interfere with Wi-Fi transmissions

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[8] *Ibid* (emphasis added).
[9] *FCC Enforcement Advisory*, DA 11-250, Enforcement Advisory No. 2011-04 (released Feb. 9, 2011) ("2011 Advisory"), available at https://apps.fcc.gov/edocs_public/attachmatch/DA-11-250A1.pdf
[10] *FCC Enforcement Advisory*, DA 14-1785, Enforcement Advisory No. 2014-05 (released Dec. 8, 2014) ("*2014 Advisory*"), available at http://www.fcc.gov/document/warning-jammer-use-public-and-local-law-enforcement-illegal.
[11] *Ibid.*

violates Section 333."[12] The Consent Decree goes on to describe how the Bureau's investigation of a 2013 complaint discovered that Marriott's Wi-Fi monitoring system at the Marriott-managed and Ryman-owned Gaylord Opryland facility "includes a containment capability that, when activated, will cause the sending of de-authentification packets to Wi-Fi Internet access points that are not part of Marriott's Wi-Fi system or authorized by Marriott . . . in a manner that the Bureau believes violates Section 333."[13] In signing the Consent Decree, Marriott agreed to a $600,000 fine for its intentional impairment of guest Wi-Fi communications.[14]

It therefore becomes clear that the essence of Petitioners' argument is that the Commission has no authority under Section 333 to prohibit "willful or malicious" interference with Wi-Fi or other authorized communications on license-exempt bands. To support this claim, Petitioners argue that at the time Congress adopted Section 333, legislators intended to include only "licensed" services among the communications protected from intentional interference. However, both the plain language of the statute and the legislative history contradict Petitioners' tortured claim.

The statutory language could hardly be more clear: "No person shall willfully or maliciously interfere with or cause interference to ***any radio communications of any station licensed or authorized by or under this chapter*** or operated by the United States Government."[15] This "licensed or authorized" language must be interpreted to include any lawful radio communications authorized by the Commission. Indeed, in 1990 and presently, the Commission's rules authorize radio communications under a variety of requirements, only some

[12] *Marriott International, Inc., et al.*, 29 FCC Rcd 11762, at 11763 (¶ 2) (2014) ("*Consent Decree*"), citing the Commission's 2011 Advisory, *supra* note __.
[13] *Id*. at 11764 (¶¶ 5-6).
[14] *See FCC Public Notice*, "Marriott to Pay $600,000 to Resolve Wi-Fi-Blocking Investigation," released October 3, 2014 ("It is unacceptable for any hotel to intentionally disable personal hotspots … Marriott must cease the unlawful use of Wi-Fi blocking technology").
[15] 47 U.S.C. § 333 (emphasis added).

of which require individual licensing. For example, the Commission authorizes Citizens Band (CB) radio operation on a license-exempt basis under Part 95 of its rules,[16] and Wi-Fi device operation on a license-exempt basis under Part 15 of its rules.

Petitioners counter that Congress must not actually have intended the plain meaning of the words "any radio communications of any station licensed or authorized by or under this chapter" because, they argue, "at the time of Section 333's enactment [1990], the Communications Act did not address Part 15 devices, let alone authorize their use 'under this chapter.'"[17] If the statutory language was ambiguous, which it is not, this might be a plausible argument if Congress had enacted Section 333 prior to the 1980s. But by 1990 the Commission's expanding authorizations of license-exempt operations in the Industrial Scientific and Medical (ISM) bands, and in other bands, were widespread, well-known and widely-supported.

As Petitioners acknowledge, the FCC's Part 15 rules had been in place since 1938, more than 50 years before Section 333 was enacted in 1990.[18] The authorization of Part 15 devices and services became increasingly commonplace from the 1960s through the 1980s, permitting the license-exempt "operation of equipment such as wireless microphones, telemetry systems, garage door openers . . . field disturbance sensors (e.g., anti-pilferage systems for retail stores), auditory sensing devices, control and security alarm devices, and cordless telephones."[19] In 1985 the Commission first authorized the operation of spread spectrum devices in the ISM bands at

[16] *See* 47 C.F.R. § 95.404 (CB Rule 4): "You do not need an individual license to operate a CB station. You are authorized by this rule to operate your CB station in accordance with the rules in this subpart."
[17] Petition at 14.
[18] *Id.* at 16. For a historical summary of the FCC's authorization of license-exempt communication, *see Revision of Part 15 of the Rules Regarding the Operation of Radio Frequency Devices Without an Individual License*, Report and Order, GEN Docket No. 87-389, 4 FCC Rcd 3493 (1989).
[19] FCC Spectrum Policy Task Force, "Report of the Unlicensed Devices and Experimental Licenses Working Group" (Nov. 15, 2012), at 8.

902-28 MHz, 2400-2483.5 MHz, and 5725-5850 MHz under the Part 15 rules at an operating power (1 watt) that was "significantly higher than previously permitted for unlicensed use in other bands."[20] That historic Report & Order led directly to the development of Wi-Fi. And in 1989 the Commission completed a major revision of the Part 15 rules, establishing "new general emission limits in order to create more flexible opportunities for the development of new unlicensed transmitting devices."[21]

It is therefore not likely, as Petitioners claim, that Congress was either unaware of radio communications "authorized" under Part 15 or that Congress intended to exclude only Part 15 communications from the protection against "willful and malicious" interference, yet somehow neglected to indicate that in either the text or history of Section 333.[22] Nor is it credible for Petitioners to claim that the Communications Act does not authorize Part 15 devices "under this chapter."[23] The Communications Act does not directly license or authorize most radio communications – the Commission does pursuant to its authority under the Act. The Commission has necessarily "licensed and authorized" all lawful wireless operations pursuant to its authority under the same chapter that includes Section 333, since all of the Commission's authority is derived from "this chapter" (Title 47, Chapter 5).[24]

Petitioners further claim that Congress needed to explicitly list Part 15 devices or uses in its relatively brief legislative history. Petitioners observe that the committee reports note the Commission's concern about willful interference to five or six particular types of services,

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[20] *Ibid. See Authorization of Spread Spectrum and Other Wideband Emissions Not Presently Provided for in the FCC Rules and Regulations*, First Report and Order, GEN Docket No. 81-413 (rel. May 24, 1985).
[21] Spectrum Policy Task Force Report, *supra* note 15, at 9.
[22] *See Hernstadt v. FCC*, 677 F.2d 893, 902 n.22 (D.C. Cir. 1980) (Congress is presumed to be cognizant of and legislate against background of existing agency interpretation of law).
[23] Petition at 14.
[24] *See* 47 U.S.C. § 303(r) (Commission empowered to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter").

including "amateur, maritime, and citizens band radio" services, public safety and "private land mobile, and cable television" services.[25] But there were and are many other radio services and devices "*licensed or authorized by or under this chapter"* of the Communications Act. Are Petitioners seriously arguing that the very broad and definitive language of Section 333 was intended to protect only the six services that the Commission reported as suffering recent incidents of willful interference? This would exclude, among many others, both broadcast television and mobile phones, which were already in use in the years before Congress enacted Section 333 in 1990.[26] Moreover, by listing the Citizens Band Radio Service, which authorizes radio communications without the need for an individual license,[27] Congress indicated an awareness of radio communications that are "authorized" without necessarily being "licensed."

Petitioners go on to argue that Section 333 "also must be read in the context of the Commission's Part 15 rules."[28] Because "interference must be accepted" by Wi-Fi and other devices authorized under Part 15 of the Commission's rules,[29] Petitioners opine, it would be "anomalous – and legally suspect – for the Commission to interpret Section 333 to prohibit interference to a Part 15 device when such interference is not prohibited by the Part 15 rules under which the device is authorized to operate."[30] Petitioner's argument is wrong twice over.

First, it is irrelevant whether Part 15 devices must "accept" interference. Section 333 does not prohibit interference; it prohibits actions that "willfully or maliciously interfere or cause interference" with radio communications. The operative words are "willfully and maliciously."

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[25] Petition at 15 [citations omitted].
[26] "The Cellular Service dates back to 1981 when the FCC set aside 40 MHz of spectrum for cellular licensing." FCC website, *Cellular Service*, available at http://www.fcc.gov/encyclopedia/cellular-service.
[27] *See* 47 C.F.R. § 95.404 (CB Rule 4): "You do not need an individual license to operate a CB station. You are authorized by this rule to operate your CB station in accordance with the rules in this subpart."
[28] Petition at 16.
[29] 47 C.F.R. § 15.5(b).
[30] Petition at 16.

A literal reading of Section 333, protecting "any radio communications," licensed or unlicensed, from willful interference is entirely consistent with Part 15.

Second, the distinction in the Part 15 rules between *accepting* "interference" (required)[31] and *causing* "harmful interference" (prohibited)[32] suggests that Petitioners have their argument exactly backwards: At their Opryland venue, the scene of Marriott's $600,000 fine, Marriott's Wi-Fi network was both required to accept any incidental "interference" from guest or rival Wi-Fi access points (under Part 15), *and* prohibited from intentionally disabling or otherwise imposing "harmful interference" on other Wi-Fi users (under Section 333). The Enforcement Bureau had such clear evidence that Marriott was "willfully and maliciously" targeting and disabling third-party Wi-Fi access points that it proceeded under Section 333.[33] However, alternatively, the Commission also had the discretion to order Marriott to cease and desist from "causing harmful interference" under 47 C.F.R. §15.5(c).[34] That provision, governing "harmful interference" caused by Part 15 devices, does not by its terms protect only licensed devices from the sort of ongoing harmful interference that Marriott's devices caused at Opryland.

Petitioners also suggest that willful disabling or impairment of Wi-Fi devices by their guests or other third parties is justified if it is intended "to monitor and mitigate threats to the security and reliability of [Petitioner's] network." Unfortunately for Petitioners, there is neither a self-defense nor quality of service (QoS) "right to cause interference" exception in either Section 333 or in the Part 15 rules.

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[31] 47 C.F.R. §15.5(b).
[32] 47 C.F.R. §15.5(c).
[33] *See* Consent Decree at 11764 (¶¶ 5-6).
[34] 47 C.F.R. §15.5(c) provides: "The operator of a radio frequency device shall be required to cease operating the device upon notification by a Commission representative that the device is causing harmful interference."

As a matter of policy, Petitioner's proposed "right to interfere" with Wi-Fi or other Part 15 operations undermines the public interest in multiple ways.

First, Petitioner's proposed declaratory order is virtually boundless. It would open the door to the willful blocking or degrading of Wi-Fi by any venue that decided it could make a profit off its exclusive provision, or benefit in some other way by ensuring quality of service for its own network. At a time when Wi-Fi connectivity is rapidly becoming ubiquitous, seamless and increasingly low-cost or free, consumers and the economy would suffer twice over if Wi-Fi became a patchwork of proprietary and exclusive networks controlled by venues empowered to either operate or accept royalties for an exclusive, quality-of-service Wi-Fi network.

Second, because Wi-Fi is rapidly becoming so ubiquitous and economically valuable, there will be a natural inclination for certain parties to seek competitive advantage – and profit – by achieving QoS for *their* Wi-Fi service while simultaneously disabling competing options and rival services. Behind the rhetoric about "rogue access points" that might "spoof" guests and steal their credit card information, it is obvious that what Marriott and its fellow Petitioners are after is a means to coerce guests and visitors to pay them for a service (Wi-Fi connectivity) that a rapidly increasing share of consumers already pay for through their mobile carrier (e.g., via tethering apps or a portable router), and/or cable Internet subscription (e.g., Xfinity Wi-Fi), or even through a hotspot aggregation service (e.g., Boingo). It would be both anti-competitive and immensely disruptive if the Commission accedes to Petitioners' proposal and gives every major venue the ability to block rival sources of Wi-Fi Internet access. Consumers will pay unnecessary fees. And both mobile and wireline ISPs are likely to receive a flood of complaints from subscribers who will assume their Wi-Fi applications are malfunctioning.

Third, Petitioners are advancing a dangerous and antiquated theory that the license-exempt communications of the general public – using Wi-Fi and other unlicensed technologies – is inherently less valuable and underserving of the same protections that apply to communications using licensed spectrum. As discussed above, there is no question that Part 15 devices and users must accept incidental or inadvertent interference, including harmful interference, that results from the shared, opportunistic use of bands such as 2400-2483.5 MHz. However, there is a critical distinction between inadvertent interference and the sort of knowing and anti-competitive, economically-motivated interference that Petitioners seek to legitimate with this Petition. At a time when Wi-Fi is offloading a majority of the exploding demand for mobile data, spurring innovation and generating $200 billion or more per year for the American economy, the nation cannot afford to undermine this proven and immensely popular technology simply because a particular set of companies decides it can extract rents by not only using unlicensed bands for its own Wi-Fi, but doing so with technology and in a manner calibrated to block, impair or degrade the general public's shared use of Wi-Fi and unlicensed spectrum.

III. NEITHER SECTION 333 NOR THE COMMISSION'S OTARD RULES INCLUDE AN EXCEPTION PERMITTING PROPERTY OWNERS TO WILLFULLY IMPAIR AUTHORIZED RADIO COMMUNICATIONS ON THEIR PREMISES

To the extent that Petitioners propose a limiting principle for their claimed "right to interfere" with authorized but license-exempt communications, it is that property owners have a right to quality of service for their own Wi-Fi on their own premises – and they can block or impair other Wi-Fi devices or networks at their sole discretion. Petitioners assert that even "assuming Section 333 governs interference to Part 15 devices," the Commission "should clarify that a Wi-Fi network operator does not violate Section 333 when any interference (i) results from

the use of FCC-authorized equipment in managing its network *on its premises* and (ii) affects part 15 devices used by guests *on the operator's premises*."[35] After all, Petitioners argue, "multiple Wi-Fi access points can adversely affect the performance of the hotel's Wi-Fi network" and "if a hotel is powerless to . . . ensure the security and reliability of its Wi-Fi network on its premises, both the hotel and the guests would suffer."

In essence, Petitioners are asking the Commission to break with all precedent and create a new "property right" in the spectrum based on land ownership, thereby delegating to venue owners and operators (e.g., Ryman and Marriott or, perhaps, Logan Airport and the Massachusetts Port Authority) the regulatory authority to grant or deny access to the spectrum within their private domain. Petitioners offer several irrelevant and unconvincing arguments for this rather radical proposition.

First, Petitioners claim that because the FCC has certified equipment marketed to hotels that "can be configured to identify and contain unauthorized access points,"[36] the hotel "has a reasonable expectation that it would be acting lawfully when using such equipment in the manner intended."[37] For example, Petitioners allege that "the Aruba Networks platform will send de-authentification packets which prevent the [guest or other third-party Wi-Fi] connection from being completed."[38]

We agree with Petitioners that the Commission has created a problem if, in fact, it is continuing to certify equipment manufactured by Aruba Networks or any other company that is

[35] Petition at 17 (emphasis added).
[36] *Id.* at 9. Petitioners refer repeatedly – and erroneously – to "unauthorized" Wi-Fi access points. This conflates the legal issue presented by the Petition – *i.e.*, whether Part 15 devices are "authorized" within the meaning of Section 333 – with whether third-party communications are authorized by Marriott. Of course, any Wi-Fi access point or Part 15 device that is certified and operating in compliance with Part 15 technical requirements is authorized. Contrary to its claims, Marriott has no legal authority to authorize or not authorize radio communications within its venue or anywhere else.
[37] *Id.* at 18.
[38] *Id.* at 9.

intended and marketed for the purpose of blocking the Wi-Fi access points and transmissions of other individuals and firms, thereby apparently misleading companies like Marriott into believing that operating this equipment is not violation of Section 333. OTI and PK urge the Commission to *immediately stop certifying equipment, such as the Aruba Networks platform identified by Petitioners*, if in fact it is either marketed as a Wi-Fi jamming device or can easily be configured to jam third-party Wi-Fi transmissions, as Petitioners allege. On the other hand, the fact that Wi-Fi jammers are available on the market and *could* be used to jam third-party communications – whether or not that capability escaped the scrutiny of the FCC device certification process – provides no rationale for an exception to Section 333 that permits its use to block the radio communications of others.

Second, Petitioners claim that "interpreting Section 333 to prohibit interference to Part 15 devices operated by guests on the premises of a hotel or similar venue would be "inconsistent" with the Commission's rules concerning Over-the-Air Reception Devices ("OTARD")."[39] Petitioners go so far as to claim that denying venue owners the ability to disable or cause harmful interference to Part 15 devices on their property would somehow give guests and visitors "superior rights as compared to owners or lessors."[40] It is difficult to take this argument seriously.

As an initial matter, the Enforcement Bureau's interpretation and application of the protections mandated by Section 333 do not give guests and visitors the right to "willfully or maliciously" disable or cause harmful interference to a hotel Wi-Fi network. The guest's right to operate a Part 15 device in compliance with the Commission's rules is exactly the same as the hotel's right – it is in no way "superior." As it does throughout its Petition, Marriott and its allies

[39] *Id.* at 18.
[40] *Id.* at 5-6 & 19.

try to ignore the operative language of Section 333, which is "willfully or maliciously." Either party may end up causing incidental or inadvertent interference – and it might prove to be harmful interference at certain times or places, however fleeting – but absent any specific knowledge or intent to interfere, all parties are on an equal footing and blameless vis-à-vis Section 333 and the Part 15 rules.

Petitioner's reliance on the Commission's OTARD rules is equally misplaced.[41] Section 333 and the OTARD rules address entirely distinct situations and behavior. The OTARD rules protect the specific rights of property owners or leaseholders to install communications equipment in the face of arbitrary restrictions, such as zoning laws, lease contract provisions and homeowners' association covenants.[42] The OTARD rules concern restrictions on the physical installation of antennas, routers and related infrastructure that have the effect of precluding or impairing fixed wireless signals.[43] The rules do not address the 'willful or malicious' interference with radio signals. For example, in 2005 the Massport Authority (which operates Logan Airport) demanded that Continental Airlines remove its airport lounge Wi-Fi system on the basis that it was prohibited by the terms of Continental's lease, which barred tenants from operating Wi-Fi networks. Massport claimed it had the right to put restrictions on the installation and operation of Part 15 routers on the airport's Wi-Fi backbone. The Commission disagreed, granting Continental's petition. Massport never sought to disable or impair the Wi-Fi transmissions of its tenants or airport visitors, which is the distinct behavior that Section 333 prohibits.

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[41] *Id.* at 18-19.
[42] *See* 47 C.F.R. § 1.4000.
[43] *See Continental Airlines Petition for Declaratory Ruling Regarding the Over-the-Air Reception Devices (OTARD) Rules*, Memorandum Opinion and Order, 21 FCC Rcd 13201, at ¶¶ 2, 12 (2006) (*Continental Airlines Ruling)* (finding that the operator of a Wi-Fi backbone composed of Part 15 devices (Massport) has no "right" to operate it free from interference from other Part 15 devices deployed by Continental Airlines).

In contrast, Petitioners here are not claiming they should be allowed to prohibit the physical installation of Wi-Fi equipment by transient third parties on their property, or its interconnection with their broadband backhaul network; indeed, they presumably could legally do that. Petitioners instead are claiming that simply because they are venue owners – and guests and visitors are not "leaseholders" – that the OTARD rules permit hotels and similar venues to disable or impair the lawful Wi-Fi transmissions of guests and visitors at their discretion.[44] However, while the OTARD rules prohibit certain restrictions on antennas or other equipment that impede communications, they clearly create no affirmative right for property owners to interfere with the radio transmissions of third parties.

On the other hand, the Commission's *Continental Airlines Ruling* is relevant for an entirely different reason. As the Commission observed, it was "the first time the Commission has addressed a petition that involves the application of the OTARD rules to unlicensed devices that operate under Part 15 of our rules."[45] And contrary to Petitioners claims here that Part 15 devices and users should be presumed to be excluded from the protections of Section 333, the Commission concluded that "[t]he OTARD rules make no distinction between radio devices using licensed technologies and those using unlicensed technologies. Hence we conclude that OTARD applies to the antennas of unlicensed devices operating under Part 15 of our rules to the same extent as to the antennas of licensed services."[46]

There are additional policy reasons why the Commission should reject the notion that property owners should be exempted from the strictures of Section 333. If the Commission permits hotels and other venues to target and block Wi-Fi, or any other authorized radio transmissions on its premises, this could lead to unforeseen (and even unintended) interference to

[44] *See* Petition at 18.
[45] *Continental Airlines Ruling* at ¶ 8.
[46] *Ibid*.

Wi-Fi access points and users located nearby and cause severe disruptions to the Wi-Fi ecosystem. Even if Marriott's proposed "right to interfere" is limited to indoor use, the signals can readily pass through windows and otherwise disrupt other lawful Wi-Fi networks and devices as well. Since Wi-Fi is now offloading a majority of mobile device data traffic onto nearby wireline networks, any reduction in either the actual or perceived ubiquity or reliability of Wi-Fi due to blocking by venues would in aggregate reduce the connectivity options, throughput and affordability of mobile data for consumers.

The Commission is in the process of providing an option for venues that want the QoS of a licensed, small cell offload network – the proposed Citizens Broadband Radio Service at 3.5 GHz, with small area Priority Access licenses. But whether or not Priority Access licenses meet the needs of venues like Marriott's Opryland, Wi-Fi network operators – whether they are big hotels or individuals using a MiFi hotspot on a business trip – simply cannot expect the same QoS that comes with an exclusive license. If Marriott wants to sell Wi-Fi services with guaranteed QoS, it should buy a license, not seek to upend the immensely successful shared spectrum ecosystem of unlicensed Wi-Fi and spectrum sharing.

IV. CONCLUSION

Both Section 333 and the Commission's enforcement advisories are clear that it is unlawful to willfully impair or disable *any* authorized communications by radio, regardless whether the spectrum is "licensed" or "unlicensed." There is clearly no controversy or uncertainty concerning the scope of Section 333. OTI and PK urge the Commission to clarify this in its Order dismissing the Petition. There is a critical distinction between inadvertent interference and the sort of knowing and anti-competitive, economically-motivated interference that Petitioners seek

to legitimate with this Petition. At a time when Wi-Fi is offloading a majority of the exploding demand for mobile data, spurring innovation, encouraging mobile market competition, empowering consumers and generating $200 billion or more per year for the American economy, the nation cannot afford to undermine this proven, vital and immensely popular technology simply because a particular set of companies decides they can extract rents by not only using unlicensed bands for their own Wi-Fi networks, but to do so with technology and in a manner calibrated to block, impair or degrade the general public's shared use of Wi-Fi and unlicensed spectrum.

Respectfully Submitted,

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