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

In the Matter of Petition of American Hotel & Lodging Association, Marriott International, Inc., and Ryman Hospitality Properties for a Declaratory Ruling to Interpret 47 U.S.C. § 333, or, in the Alternative, for a Rulemaking	RM-11737

OPPOSITION OF GOOGLE INC.

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Introduction and Summary

The Communications Act and Commission precedent make clear that the network-blocking practices at issue here—which the Enforcement Bureau just recently found illegal—violate Section 333. There is no need for a new proceeding to confirm this. Indeed, while Google recognizes the importance of leaving operators flexibility to manage *their own* networks, this does not include intentionally blocking access to *other* Commission-authorized networks, particularly where the purpose or effect of that interference is to drive traffic to the interfering operator's own network (often for a fee). Congress directed the Commission to prohibit such willful interference, and the Commission has consistently done so.

The Commission's authority to prohibit the interference described by Petitioners is found in the plain language of Section 333 and supported by general grants of power in Section 303, as well as other provisions of the Communications Act. Contrary to Petitioners' allegations, moreover, the Commission's Rule 15.5(b) does not exempt unlicensed devices from protection against intentional, harmful interference. Under its statutory authority, and consistent with its Part 15 rules, the Commission has categorically warned against the use of equipment that blocks or jams authorized communications and recently found against the exact practices described in the petition. There is no reason to revisit these repeated declarations, which manifestly serve the public interest.

Argument

I. Section 333 Prohibits a Property Owner from Willfully Blocking Lawfully Operating Access Points

Section 333 of the Act provides that "[n]o 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."[1] Part 15 of the Commission's Rules, in turn, authorizes the operation of "intentional, unintentional, or incidental radiator[s]" without a license, but subject to rules regulating, for example, the bands of operation, conducted emissions limits, and radiated emissions limits.[2] By its plain language, therefore, Section 333 prohibits willful or malicious interference with communications authorized and regulated by Part 15.

Petitioners, however, suggest that Section 333's reference to unlicensed services "authorized by or under this chapter" cannot cover Part 15 services, because such services are not mentioned specifically in Section 333 or its legislative history.[3] Under Petitioners' puzzling theory, Wi-Fi is not protected because the Act did not include the word "unlicensed" until a few years after Section 333 was enacted in 1990.[4] Section 333, though, speaks broadly of all services that, although not licensed, are "authorized by or under" the Communications Act. Part 15 services plainly fall within that category. Part 15, moreover, was in place for 50 years before Section 333 became law, and

[1] 47 U.S.C. § 333.

[2] 47 C.F.R. 15.1. *See* 47 C.F.R. 15.201 through 15.257 (technical rules).

[3] Petition at 14.

[4] *Id.* at 14-15.

Congress would have been well aware of it.[5] As the Commission acts under authority granted by Congress, Part 15 operations necessarily have been "authorized by or under" the Act since the rules were first established in 1938.[6] The fact that the drafters of a committee report did not specifically include interference with Part 15 operations on a list of contemporaneous concerns does not call for ignoring the statute's clear, broad language in favor of that narrow list.[7]

Other provisions of Title II support the natural reading of Section 333 as reaching unlicensed operations that are within the boundaries set by Part 15. In Section 303, Congress gave the Commission the power to, among other things, prescribe the terms for effective operation within assigned frequencies[8] and make regulations it deems necessary to prevent interference,[9] neither of which is limited in application to licensed services. Section 303(m)(1)(E) provides that the Commission may suspend licenses for operators who "willfully or maliciously interfere[ ] with *any other* radio communications or signals"—not just with licensed communications.[10] To the same effect, Section 302 of the Act authorizes equipment regulations that protect against harmful interference generally, not just interference to licensed services or some other subset of

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[5] *Id.* at 16 n.30.

[6] *In the Matter of Revision of Part 15 of the Rules Regarding Operation of Radio Frequency Devices Without an Individual License,* First Report and Order, 4 FCC Rcd. 3493, ¶ 2 (1989).

[7] *See Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last." (internal citations omitted)).

[8] 47 U.S.C. § 303(c).

[9] 47 U.S.C. § 303(f).

[10] 47 U.S.C. § 303(m)(1)(E) (emphasis added).

Commission-approved operations.[11] And Section 324 furthers the broad statutory policy against harmful interference by establishing a general rule that "all radio stations . . . shall use the minimum amount of power necessary to carry out the communication desired."[12]

Finally, of particular interest here, Section 303(m)(1)(D)(1) gives the Commission the power to suspend the license of an operator that "knowingly transmit[s] false or deceptive signals or communications."[13] If such conduct is suspension-worthy for licensed operators, surely unlicensed operators enjoy no statutory right to do the same. Yet the network management equipment at issue in the petition includes "the capability to mitigate access points" by sending de-authentication packets to hotel guest Wi-Fi devices.[14] We understand these de-authentication packets to include a command that the guest Wi-Fi device disassociate from the unaffiliated access point. That command falsely claims to come from the unaffiliated access point.[15] In other words, operators of such network management devices "knowingly transmit" deceptive signals to render the guest device unusable.

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[11] 47 U.S.C. § 302a.

[12] 47 U.S.C. § 324.

[13] 47 U.S.C. § 303(m)(1)(D)(1).

[14] Petition at 9.

[15] *Cf. In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management*," Memorandum Opinion and Order, 23 FCC Rcd. 13028, ¶ 46 (2008) (quoting characterization of Comcast's sending of "reset" packets to terminate the connection of users of file sharing services as a "possible case of consumer fraud.").

Multiple provisions of Title III thus confirm that Section 333 means what it says: intentional interference with Commission-authorized unlicensed operations under Part 15 violates the Communications Act.

II. The Commission Has Consistently Prohibited Willful Interference to Part 15 Communications

Commission rules and decisions are entirely consistent with this understanding of Section 333. Petitioners allege that Rule 15.5(b) requires that all Part 15 device users "accept whatever interference is received,"[16] including the willful, harmful interference caused by the network management practices at issue here. Rule 15.5(b) does no such thing. It provides that operation of unlicensed devices "is subject to the conditions that no harmful interference is caused and that interference must be accepted that may be caused by the operation of an authorized radio station, by another intentional or unintentional radiator, by industrial, scientific and medical (ISM) equipment, or by an incidental radiator."[17] The rule does not purport to sanction *willful or malicious* interference to Part 15 operations that is forbidden by Section 333, as opposed to interference that occurs incidental to authorized operations. To the contrary, Rule 15.15(a) requires that Part 15 devices must minimize interference by suppressing emissions "as much as practicable," showing the Commission policy of requiring interference-avoidance even among unlicensed services.[18]

The Commission has often stated that willful interference to unlicensed services is not allowed. "It is a violation of federal law," the Commission has repeatedly and

[16] Petition at 16.

[17] 47 CFR § 15.5(b).

[18] 47 CFR § 15.15(a).

emphatically declared, "to use a cell jammer or similar devices that intentionally block, jam, or interfere with authorized radio communications such as . . . Wi-Fi."[19] And "it is illegal to use a cell phone jammer or any other type of device that blocks, jams or interferes with authorized communications" including preventing a "Wi-Fi enabled device from connecting to the Internet."[20] The Commission's own consistent understanding that Rule 15(b) does not sanction willful blocking of Wi-Fi is entitled to deference unless contrary to the clear language of the rule, which is not the case here.[21]

The Commission, moreover, consistently cites Section 333 as its authority to prohibit jamming and similar practices.[22] In the recent *Marriott* case, the Enforcement Bureau found a violation of Section 333 based on the same practices that Petitioners propose to have the Commission consider in a rulemaking. After investigation, the Commission's Enforcement Bureau found that "the sending of de-authentication packets

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[19] *FCC Enforcement Advisory: Cell Jammers, GPS Jammers, and Other Jamming Devices*, Enforcement Advisory No. 2011-04, Public Notice, 26 FCC Rcd. 1329 (2011) ("*2011 Enforcement Advisory*").

[20] *FCC Enforcement Advisory: Jammer Use is Prohibited*, Enforcement Advisory No. 2014-05, Public Notice, DA 14-1785 (2014). *See also Connected & On the Go Broadband Goes Wireless Report by the Wireless Broadband Access Task Force*, 2005 FCC LEXIS 1488, 148-49 (Feb. 2005) ("While the operations of license-exempt WISPs do not receive interference protection for unintentional interference**,** intentional interference (*e.g.,* jamming) from other unlicensed devices is not permissible.").

[21] *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) ("Because the salary-basis test is a creature of the [Secretary of Labor's] own regulations, his interpretation of it is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation." (internal quotation marks omitted)); *Wash. Ass'n for Television & Children v. FCC*, 712 F.2d 677, 684 (D.C. 1983) ("[T]his court gives great deference to an agency's interpretation of its own regulations. . . . Here, deference is enhanced because the Commission has consistently interpreted the Policy Statement, albeit implicitly, not to require regularly scheduled weekday children's programming." (internal quotation marks and citations omitted)).

[22] *See, e.g., 2011 Enforcement Notice*, n.1.

to Wi-Fi Internet access points that are not part of Marriott's Wi-Fi system or authorized by Marriott" violated Section 333.[23] The present petition was filed during the pendency of the Marriott enforcement action. With the settlement of that case, the Commission's position is all the clearer and there is even less need for further action.

Finally, Petitioners cite the Commission's Over-The-Air Reception Devices (OTARD) rule as support for their position that a Part 15 device must accept any and all interference.[24] As directed by Congress in Section 207 of the Telecommunications Act of 1996,[25] the Commission adopted a rule prohibiting restrictions (both governmental and non-governmental) that impair the installation, maintenance, or use of antennas to receive video programming.[26] The OTARD rule protects radio services and users, contrary to the thrust of Petitioners' argument that services should be disruptable. Petitioners' theory seems to be that because the OTARD rule protects only property owners, lessees, and renters, and not guests, the no-jamming principle should have the same less-than-universal coverage.[27] But the OTARD rules are not an implementation of Section 333 or Part 15, and they involve rights to install physical antenna facilities, not rights to use services. The only relevance of the OTARD rule is that it serves as another manifestation of the overarching Congressional and Commission policies of removing barriers to network access as well as promoting competition and the

[23] *Marriott International, Inc., Marriott Hotel Services, Inc., Consent Decree*, 29 FCC Rcd. 11760, ¶¶ 5-6 (2014).

[24] Petition at 18.

[25] *See* 47 U.S.C. § 303 note.

[26] *See* 47 C.F.R. 1.4000.

[27] Petition at 19.

development of new access technologies.[28] Allowing some network owners to block access to competing networks, as requested by Petitioners, would conflict with these foundational policies.

III. Jamming Wi-Fi Is Against the Public Interest

The Commission has consistently recognized the benefits of unlicensed access to spectrum. As the Commission has explained, "[u]nlicensed devices complement licensed services and serve a wide range of consumer needs. They contribute tens of billions of dollars to our economy annually, not only through the sales of unlicensed products themselves, but also through collateral commercial activities that they facilitate."[29] Thus, unlicensed spectrum and services bring "economic and consumer benefits, including greater broadband innovation and increased access for broadband services. Additionally, unlicensed spectrum poses low barriers to entry, allowing any

[28] *See, e.g., 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. 22983, ¶ 97 (2000) ("To the extent a restriction unreasonably limits a customer's ability to place antennas to receive telecommunications or other services, whether imposed by government, homeowner associations, building owners, or other third parties, that restriction impedes the development of advanced, competitive services."). *See also Continental Airlines Petition for Declaratory Ruling Regarding the Over-The-Air Reception Devices (OTARD) Rules*, Memorandum Opinion & Order, 21 FCC Rcd. 13201, n.79 (2006) ("Not allowing Continental to use its own Wi-Fi antenna would harm the competitive position of ISP[s] desiring to provide service to Continental via wire since Continental would be unable to relay service wirelessly within its premises. Continental would in effect be limited to a choice of one provider to obtain wireless Internet service, AWG, instead of having the option of choosing from a multitude of ISPs.").

[29] *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions,* Report and Order, 29 FCC Rcd. 6567, ¶ 271 (2014).

party to operate unlicensed devices or provide wireless broadband services."[30] Conversely, limiting user access to unlicensed services diminishes the utility of Part 15 devices and their associated economic and consumer benefits. In particular, allowing hotels or other property owners deliberately to block third parties' access to Wi-Fi signals would undermine the public interest benefits of unlicensed use.

Further, allowing hotels and other property owners to block communications with lawfully operated Wi-Fi access points could endanger guests on those properties. Consumers increasingly rely on Wi-Fi and VoIP technologies to make calls when carrier voice service is not available, and this includes calls to emergency services. Especially in a place of public accommodation, disconnecting network connections on which users rely puts health and safety at risk.[31]

To support their argument for permission to interfere willfully, Petitioners describe network management practices of a number of public and private universities. The petition states that "many large universities operating networks that include Wi-Fi employ various techniques to ensure network performance" and includes a table listing the network management policies at 22 schools.[32] In every single policy cited, the university reserves the right to limit use of *its own* network. For instance, Duke places restrictions on users of excessive bandwidth on its network; Georgetown prohibits the use of its proprietary network for illegally sharing music or consuming excessive

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[30] *Id.*

[31] *Cf. 2011 Enforcement Advisory* ("Use of jamming devices can place you or other people in danger. For instance, jammers can prevent 9-1-1 and other emergency phone calls from getting through or interfere with law enforcement communications (ambulance, fire, police, etc).").

[32] Petition at 12, Appendix 1.

amounts of storage; and Northwestern reserves the right to disconnect a problematic device from its own network.[33] Such practices, which involve preventing unauthorized use of a university's *own* network, are an entirely different matter than the network blocking at issue here. None of the schools prohibit students, faculty, or guests from accessing other networks not managed by the university itself, as Petitioners seek permission to do. Nothing in the Commission's decisions or guidance under Section 333 and Part 15 casts doubt on the universities' legitimate network practices, and there is no need to commence a rulemaking in order to confirm that they remain lawful.

Nor is there any inconsistency between the Commission's settled anti-jamming policy and private property rights, as the Petitioners suggest. Prohibiting intentional harmful interference to Commission-authorized transmissions does not mean that property owners must allow transmissions to originate on their property. A hotel could, for instance, implement a rule against bringing unapproved Wi-Fi access points onto its premises. Petitioners admit as much.[34] Although operators in the hotel and conference business are discouraged from such policies because of the loss of customer goodwill and patronage that would ensue, and instead would prefer to engage in secret jamming, that merely confirms that they recognize the importance their guests attach to having unrestricted access to Wi-Fi. The Commission should not consider adopting a rule that contravenes the public interest, solely to insulate Petitioners from the business consequences of publicizing unpopular policies.

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[33] *Id.*

[34] Petition at 21.

Conclusion

The language of Section 333 protects Part 15 users from willful or malicious interference. The Commission, under this clear direction from Congress, has been very clear that intentional interference of the type proposed by Petitioners is illegal. Allowing property owners to block guests' access to unaffiliated networks would be inconsistent with the goals of promoting competition and development of technologies in the market for Internet access. There is no need for further clarification: The Commission should dismiss Petitioners' request for a rulemaking as inconsistent with settled, and sound, law.

Respectfully submitted,

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Certificate of Service

I, Sybil Anne Strimbu, hereby certify that on this 19th day of December 2014, a copy of the foregoing Opposition of Google Inc. was sent via first-class mail to the following:

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