

**DISSENTING STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *M.C. Dean, Inc.*, File No. EB-SED-15-00018428.

Before the FCC can enforce rules, rules must exist. That's why I believe that the FCC should adopt rules that limit Wi-Fi blocking. Wi-Fi blocking occurs when a person uses an unlicensed Part 15 device to intentionally disrupt the operation of another unlicensed Part 15 device, such as a mobile hotspot that a consumer sets up to connect a Wi-Fi-enabled device to the Internet via his or her smartphone. I also believe that those rules should make clear that no person has *carte blanche* to intentionally disrupt another person's Wi-Fi connection.

Over a year ago, parties petitioned the FCC to enact such regulations.¹ They asked the FCC to establish clear rules of the road through an industry-wide rulemaking. As one might expect, commenters responding to the petition offered very different takes on what any such rules should look like. Some argued that Wi-Fi blocking should not be allowed under any circumstance.² Others argued that deauthentication is part of the IEEE 802.11 standard and should be permitted when necessary to ensure network security, such as to shut down access-point spoofing or other cyberattacks.³ Regardless, a broad cross section of groups agreed that the FCC should provide guidance.⁴ But instead of doing so, either in response to that petition or otherwise, Commission leadership made it abundantly clear that such guidance would not be forthcoming,⁵ and the agency ultimately dismissed the petition.⁶

¹ See Petition for Declaratory Ruling or, in the Alternative, for Rulemaking, RM-11737 (Aug. 25, 2014), available at <http://go.usa.gov/ccjxT>.

² See, e.g., Google Opposition, RM-11737, at 1 (Dec. 19, 2014) (“[W]hile 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.”); see also National Cable and Telecommunications Association Opposition, RM-11737 (Dec. 19, 2014).

³ See, e.g., USTelecom Comments, RM-11737, at 2 (Dec. 22, 2014) (“[T]he Commission at the very least should clarify that a Wi-Fi operator does not violate the statute when mitigating network threats.”); see also Cisco Comments, RM-11737, at 2 (Dec. 19, 2014) (“[A]ccess to unlicensed spectrum resources can and should be balanced against the need to protect networks, data and devices from security threats and potentially other limited network management concerns.”).

⁴ See, e.g., Enterprise Wireless Alliance Comments, RM-11737, at 1–2 (“EWA urges the Commission to undertake a rulemaking and adopt rules that clarify this important issue for the benefit of Wi-Fi network operators and consumers.”); Ad Hoc Telecommunications Users Committee Statement, RM-11737, at 2 (Dec. 19, 2014) (“Ad Hoc supports the initiation of a rulemaking in order for the Commission to develop a robust factual record on the basis of which it can then establish clear, generally applicable standards and policies.”); Letter from Harold Feld, Public Knowledge, to Marlene H. Dortch, FCC, RM-11737 (Feb. 13, 2015) (“Where the largest hotel chains, the largest trade associations of network operators, and numerous equipment manufacturers come to different conclusions as to the applicability of Section 333, it is clear that a controversy exists requiring the Commission to issue a definitive statement of policy.”).

⁵ See Remarks of FCC Commissioner Jessica Rosenworcel, State of the Net Conference (Jan. 27, 2015) (calling on the Commission “to dismiss this petition without delay”), available at <http://go.usa.gov/ca5PP>; see also FCC Chairman Tom Wheeler Statement on Protecting Consumers from Hotel Wi-Fi Blocking (Jan. 27, 2015), available at <http://go.usa.gov/ca5mT>.

⁶ *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 Rulemaking*, RM-11737, Order, 30 FCC Rcd 1251 (Wireless Telecomm. Bur. 2015).

Flash forward to today. In this case, the Commission proposes to fine a company \$718,000 for engaging in Wi-Fi blocking. But here's the rub. Because the Commission dropped the ball earlier this year, we do not have any rules that limit Wi-Fi blocking. Indeed, the only relevant rules we have on the books preclude liability in these circumstances.

To be sure, the *Notice of Apparent Liability (NAL)* takes a contrary position. It asserts that the Commission did not need to adopt or modify any rules because of section 333 of the Communications Act. That section states that “[n]o person shall willfully or maliciously interfere with or cause interference to any radio communications,” and the agency argues that it has always prohibited the operator of an unlicensed Part 15 device from intentionally disrupting the operation of another unlicensed Part 15 device.⁷ But the Commission's attempt to apply section 333 to interference between Part 15 devices fails as a matter of law.

First, by definition, a Part 15 device cannot cause harmful interference to another Part 15 device.⁸ Under the agency's rules, a Part 15 device can cause harmful interference to a device operating in a licensed service, such as in a cellular band, and such interference is prohibited.⁹ But because of the shared, “commons” model that applies to all unlicensed operations, the Commission has repeatedly held that “interference caused to a Part 15 device by another Part 15 device does not constitute harmful interference.”¹⁰ Whether that *should* be the law is a question worth exploring, as I've noted above. But it *is* the law now. That fact is fatal to the *NAL*'s attempt to apply section 333 to unlicensed operations because it means that the Commission is proposing to fine a company for doing something that the FCC says carries no legal liability—namely, operating a Part 15 device in a manner that intentionally disrupts the operation of another Part 15 device.¹¹

Second, and relatedly, section 333 does not apply because the FCC's Part 15 rules provide that unlicensed devices must accept any and all interference they receive, regardless of the source of that interference.¹² As the Commission has determined, “[i]t does not matter who operates the unlicensed

⁷ Communications Act § 333.

⁸ *See, e.g., Remington Arms Company, Inc. Request for a Waiver of the Part 15 Regulations*, ET Docket No. 05-183, Order, 20 FCC Rcd 18724, 18727 n.12 (2005) (*Remington Order*) (stating that “the requirement to resolve harmful interference caused to other users does not apply to . . . other users of Part 15 transmission systems” because “Part 15 is not a radio service”); *Revision of Part 15 of the Commission's Rules Regarding Ultra-Wideband Transmission Systems*, ET Docket No. 98-153, Order, 17 FCC Rcd 13522, 13524 n.7 (Office of Engineering & Technology 2002) (*Ultra-Wideband Order*) (“Harmful interference consists of interference to a radiocommunications service. *See* 47 C.F.R. § 15.3(m). Part 15 devices are not part of a ‘service.’ Thus, interference caused to a Part 15 device by another Part 15 device does not constitute harmful interference.”).

⁹ *See* 47 C.F.R. § 15.5(b); *see also* 47 C.F.R. § 15.3(m).

¹⁰ *Remington Order*, 20 FCC Rcd at 18727 n.12; *Ultra-Wideband Order*, 17 FCC Rcd at 13524 n.7; *see also Allocations and Service Rules for the 71–76 GHz, 81–86 GHz and 92–95 GHz Bands; Loea Communications Corporation Petition for Rulemaking*, WT Docket No. 02-146, RM-10288, Report and Order, 18 FCC Rcd 23318, 23346, n.185 (2003) (“The ‘commons’ model allows unlimited numbers of unlicensed users to share frequencies, with usage rights that are governed by technical standards or etiquettes but with no right to protection from interference.”).

¹¹ The fact that section 333 prohibits a person from “willfully or maliciously interfer[ing],” whereas the FCC's Part 15 rules provide that unlicensed devices are excluded from the definition of “harmful interference,” does not aid the Commission's case. Since there is no liability for causing harmful interference, there can be no liability for willfully or maliciously causing mere interference.

¹² *See* 47 C.F.R. § 15.5(b) (“Operation . . . is subject to the condition[] . . . that interference must be accepted[.]”); *see also Remington Order*, 20 FCC Rcd at 18727, para. 10 (“[A]ll Part 15 devices, including WiFi systems, LANs, and meter reading systems, operate on a sufferance basis where the operator is required to accept any interference that is received, regardless of the source of that interference.”).

equipment or the purpose for which the equipment is used—no protection against received interference is provided or available.”¹³ Thus, as Cisco has explained, “[i]t simply cannot be that a Part 15 device is both unprotected against interference under Section 15.5(b) [of the Commission’s rules] but protected against interference under Section 333” of the Communications Act.¹⁴

So how does the *NAL* reconcile its newfound take on section 333 with these longstanding Commission rules and precedents? It doesn’t. It simply recites the part of section 333 that says “[n]o person shall willfully or maliciously interfere with or cause interference to any radio communications” and asserts that, *a fortiori*, the provision prohibits a Part 15 device from interfering with another Part 15 device. But what about the FCC’s decision to define harmful interference in a way that excludes Part 15 devices? What about the agency’s decision to require Part 15 devices to accept any and all interference? These still-binding rules and precedents are ignored entirely.

Moreover, attempting to apply section 333 to unlicensed operations is not just contrary to law, it produces absurd and illogical results. Think about it. By the very nature of their shared use of spectrum, unlicensed devices routinely interfere with each other. When someone at a coffee shop uses Wi-Fi to surf the Internet or someone else relies on a Bluetooth connection to play music over a wireless speaker, they may very well be interrupting or causing harmful interference to another unlicensed device. Does anyone seriously believe that these routine uses of unlicensed technology violate section 333? I would hope not.

Yet that is exactly the result that the *NAL*’s reading of section 333 compels. The provision prohibits any person from “willfully” interfering with covered communications.¹⁵ And recall that both the Communications Act and the FCC define “willful” as the conscious decision to act, irrespective of a person’s motivation or intent to violate the law.¹⁶ So if section 333 applies to unlicensed operations, then that necessarily means that every time a consumer uses Wi-Fi, Bluetooth, or any other unlicensed technology, the FCC could find that they have willfully interfered with another unlicensed device in violation of federal law and thus subject them to millions of dollars in fines. It would make no difference that the consumer did not intend to disrupt lawful communications. This absurd outcome illustrates why the FCC has never read section 333 as applying to interference between unlicensed devices.

At the very least, all of this underscores a final reason why the Commission cannot lawfully apply section 333 in this case—it has failed to comport with due process. As explained above, I believe it is clear that Wi-Fi blocking is currently lawful under the Commission’s rules. But even if I am wrong about that, the Commission’s case would still founder. That is because it is certainly not clear that Wi-Fi blocking is currently unlawful under the Commission’s rules. And a core principle of the American legal system is that the government cannot sanction you for violating the law unless it has told you what the law is.¹⁷ In the regulatory context, due process is protected, in part, through the fair warning rule.

¹³ *Remington Order*, 20 FCC Rcd at 18727, para. 10.

¹⁴ Cisco Comments, RM-11737, at 18 (Dec. 19, 2014).

¹⁵ Communications Act § 333.

¹⁶ See Communications Act § 312(f)(1) (“The term ‘willful’, when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States.”); see also *Playa Del Sol Broadcasters; Licensee of Station K238AK Palm Desert, California*, File No. EB-08-SD-0088, Order on Review, 28 FCC Rcd 2666, 2667–68, para. 4 (2013) (stating that the Commission interprets the term “willful,” as it is used in section 503 of the Communications Act, as “the ‘conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate’ the law” (quoting Communications Act § 312(f)(1)).

¹⁷ See, e.g., *Mullane v. Central Hanover Tr. Co.*, 336 U.S. 306, 313 (1950); see also *TerraCom, Inc. and YourTel America, Inc.*, File No. EB-TCD-13-00009175, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 13325, 13349 n.1 (2014) (Dissenting Statement of Commissioner Ajit Pai) (collecting authorities).

Specifically, the D.C. Circuit has stated that “[i]n the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property.”¹⁸ Thus, an agency cannot at once invent and enforce a legal obligation.

Yet that is precisely what has happened here. Prior to this *NAL*, the Commission never interpreted section 333 as prohibiting interference between unlicensed devices.¹⁹ The 2011 and 2012 Bureau-level Enforcement Advisories to which the *NAL* points certainly didn’t.²⁰ They simply reminded consumers that they cannot use jammers—which are not Part 15 devices and have no lawful application—regardless of whether those jammers interfere with a licensed service or Wi-Fi communications. They have nothing to do with interference *between* Part 15 devices and whether such interference constitutes a violation of section 333. Nor could they, given the full Commission’s determination that Part 15 devices cannot cause harmful interference, as discussed above.

Nor is the *NAL* right to rely on two Bureau-level consent decrees to satisfy the fair-warning rule. By their very terms, those documents state that they “do[] not constitute either an adjudication on the merits or a factual or legal finding or determination regarding any compliance or noncompliance with the Communications Law.”²¹

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There is widespread agreement that we should take action to limit Wi-Fi blocking. The disagreement is over how we should go about doing that. I believe that we should adopt rules that clearly set forth when Wi-Fi blocking is unlawful and when, if ever, it is lawful. And I stand ready to work with my colleagues to craft such rules and then enforce them. But I cannot support taking enforcement action against a party that has not violated any statutory provision or Commission rule.

In the end, this decision is the latest evidence that the FCC’s enforcement process has gone off the rails. Instead of dispensing justice by applying the law to the facts, the Commission is yet again

¹⁸ *General Electric Co. v. U.S. Environmental Protection Agency*, 53 F.3d 1324, 1328 (D.C. Cir. 1995); *see also United States v. Chrysler*, 158 F.3d 1350, 1354–55 (D.C. Cir. 1998) (discussing the “well-established rule in administrative law that the application of a rule may be successfully challenged if it does not give fair warning that the allegedly violative conduct was prohibited”).

¹⁹ *See, e.g., R&N Manufacturing, Ltd. Houston, Texas*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 3332 (2014) (proposing fine for causing interference to cellular and PCS communications).

²⁰ *Cell Jammers, GPS Jammers, and Other Jamming Devices; Consumers Beware: It is Unlawful to Use “Cell Jammers” and Other Equipment that Blocks, Jams, or Interferes with Authorized Radio Communications in the U.S.*, Public Notice, 26 FCC Rcd 1329 (Enf. Bur. 2011); *Cell Jammers, GPS Jammers, and Other Jamming Devices; Consumer Alert: Using or Importing Jammers is Illegal*, Public Notice, 27 FCC Rcd 2309 (Enf. Bur. 2012).

²¹ *Marriott Int’l, Inc., Marriott Hotel Services, Inc.*, File No.: EB-IHD-13-00011303, Order and Consent Decree, 29 FCC Rcd 11760, 11768 (Enf. Bur. 2014); *Smart City Holdings, LLC and its Wholly-Owned Subsidiaries, Smart City Networks, LP, and Smart City Solutions, LLC*, File No.: EB-SED-15-00018248, Order and Consent Decree, 30 FCC Rcd 8382, 8390 (Enf. Bur. 2015). Likewise, the *NAL*’s statement that *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236 (3d Cir. 2015), held that consent decrees provided fair warning misses the mark. *See NAL* at para. 33, n.101. Among other things, *Wyndham* held no such thing. Rather, the Third Circuit stated: “We agree with *Wyndham* that the consent orders, which admit no liability and which focus on prospective requirements on the defendant, were of little use to it in trying to understand the specific requirements imposed by” the applicable statute. *Wyndham*, 799 F.3d at 257 n.22. So too here. In fact, the most the *NAL* actually says about the *Marriott* and *Smart City* consent decrees is that they show that the Commission “could consider” Wi-Fi blocking a violation of section 333. *See NAL* at para. 33. But that’s not the test. Again, the *NAL* appears to be relying on *Wyndham* for this “could consider” language, but in doing so it ignores that *Wyndham* did not involve the fair warning rule at all. It involved a different test that applies when a court—not an agency—is called upon to interpret a statute in the first instance. *See, e.g., Wyndham*, 799 F.3d at 253 (“[T]his case involves ordinary judicial interpretation of a civil statute, and the ascertainable certainty standard does not apply.”).

focused on issuing headline-grabbing fines. And while I have no doubt that this *NAL* will generate plenty of press, I cannot support this lawless item. Therefore, I respectfully dissent.