

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Updating the Commissions’ Rule for Over-the-) WT Docket No. 19-71
Air Reception Devices)

**COMMENTS OF THE UNITED STATES CONFERENCE OF MAYORS; THE TEXAS
COALITION OF CITIES FOR UTILITY ISSUES; THE CITY OF DALLAS, TEXAS;
THE CITY OF BOSTON, MASSACHUSETTS; THE CITY OF LOS ANGELES,
CALIFORNIA; THE CITY OF FOUNTAIN VALLEY, CALIFORNIA; THE CITY OF
PIEDMONT, CALIFORNIA AND MONTGOMERY COUNTY, MARYLAND**

EXECUTIVE SUMMARY

Commenters, a collection of local government organizations and individual local governments, look forward to the day affordable broadband services are universally available. We appreciate the role Wireless Internet Service Providers (WISPs) are playing in closing service gaps in underserved areas and are pledged to assist them in those efforts, but oppose the Commission’s proposed approach for the following reasons:

1. The record fails to support a predicate for the Commission’s proposed actions;
2. The Commission lacks the legal authority, delegated, implied or ancillary, to expand the OTARD Rule to hub and relay antennas;
3. Hub and Relay antennas fall under the exclusive jurisdiction of state and local government as recognized by Congress in Section 332(c)(7); and

The Commission fails to demonstrate a factual or legal basis to overturn its prior determination that hub and relay antennas are subject to state and local oversight pursuant to Section 332(c)(7).

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PIEDMONT, CALIFORNIA AND MONTGOMERY COUNTY, MARYLAND**

I. INTRODUCTION

Commenters consist of a national local government association;¹ a coalition of Texas municipalities;² the City of Dallas, Texas;³ the City of Boston, Massachusetts;⁴ the City of Los Angeles, California;⁵ the City of Fountain Valley, California;⁶ the City of Piedmont, California;⁷ and Montgomery County, Maryland.⁸

¹ The **United States Conference of Mayors** is the official non-partisan organization of cities with populations of 30,000 or more. The mayors of each member city serve on standing committees and task forces that develop policies and programs related to issues that demand special attention, such as civic innovation, exports, hunger and homelessness, and brownfields.

² The **Texas Coalition of Cities for Utility Issues** ("TCCFUI") is a coalition of more than 50 Texas municipalities dedicated to protecting and supporting the interests of the citizens and cities of Texas with regard to utility issues. The Coalition is comprised of large municipalities and rural villages.

³ Dating to the 1840s, from a settlement in the Three Forks area of the Trinity River, **Dallas, Texas** has grown to the largest urban center of the fourth most populous metropolitan area in the United States. Dallas is the seat of Dallas County, with portions extending into Collin, Denton, Kaufman, and Rockwall counties. With an estimated 2018 population of 1,345,047, it is the ninth most populous city in the United States and third in Texas after Houston and San Antonio. Located in North Texas, the city of Dallas is the main core of the largest metropolitan area in the Southern United States and the largest inland metropolitan area in the United States that lacks any navigable link to the sea.

⁴Dating to 1631, **Boston** is the largest city in New England and capital of the Commonwealth of Massachusetts. Boston is home to approximately 673,184 people from all walks of life, thousands of whom rely upon the Lifeline program. Through the offices of Mayor Martin J. Walsh, Boston strives to ensure the City and all its residents and visitors have competitive, affordable, and robust access to modern communications services. Boston, as home to numerous universities and a robust technology and finance sector, is particularly attuned to the critical importance of broadband access and affordability to enable participation in the digital age.

⁵ **Los Angeles, California**, with an estimated population of 3,976,322, is the second most populous city in the United States. The City is home to residents from more than 140 countries, speaking 224 different identified languages, and thousands of whom benefit from the Lifeline program. These comments were prepared on behalf of

Commenters look forward to the day affordable broadband services are universally available and appreciate the role Wireless Internet Service Providers (“WISPs”) are playing in closing service gaps in underserved areas. Commenters are pledged to assist them in those efforts, but oppose the Commission’s proposed approach⁹ because it fails to demonstrate a factual or legal basis to overturn its prior determination that hub and relay antennas are subject to state and local oversight pursuant to Section 332(c)(7). Commenters further assert that (1) the record lacks a predicate for the Commission’s proposed actions; (2) the Commission lacks the legal authority to expand the OTARD Rule to hub and relay antennas; and (3) the Commission’s prior determination that hub and relay antennas are subject to state and local oversight pursuant to Section 332(c)(7) was and is correct.

the Information Technology Agency, which under the leadership of Mayor Eric Garcetti works with agencies and departments across the City of Los Angeles to develop world-class IT infrastructure and applications that provide our citizens, businesses, and visitors with the digital services they expect from a leading global city.

⁶ **Fountain Valley, California** was incorporated in 1957, before which it was known as Talbert. It is named for the many artesian wells in the area. Fountain Valley is a suburban city in Orange County, California with a population approaching 60,000. The area was originally inhabited by the Tongva people, then Spain, Mexico, and then to the United States as part of the Treaty of Guadalupe Hidalgo. Fountain Valley holds an annual Summerfest in June in Mile Square Regional Park. This event has a car show, rides, music, and booths.

⁷ The City of **Piedmont, California** is a charter city of approximately 11,000 residents located in the beautiful Oakland Hills, overlooking San Francisco Bay. The City seeks to provide its residents with modern communication services while maintaining the historic integrity of its high-quality residential architecture, a large percentage of which was constructed prior to 1940.

⁸ **Montgomery County, Maryland**, named for Richard Montgomery, was founded on September 6, 1776. It along with Washington County commenced the effort to name counties and provinces in the thirteen colonies not for British leaders and was viewed as further defiance to Great Britain. Montgomery County is the most populous county in the state of Maryland, located adjacent to Washington, D.C. with an estimated population of 1,052,567 in 2018. The county seat and largest municipality is Rockville, although the census-designated place of Germantown is the most populous place. Montgomery County is included in the Washington–Arlington–Alexandria, DC–VA–MD–WV Metropolitan Statistical Area. Most of the county's residents live in unincorporated locales, of which the most built up are Silver Spring and Bethesda, although the incorporated cities of Rockville and Gaithersburg are also large population centers, as are many smaller but significant places.

⁹ *In re Updating the Commission’s Rules for Over-the-Air Reception Devices*, WT Docket No. 19-71, FCC 19-36 (April 12, 2019). (“*NPRM*”)

II. BACKGROUND

When it passed the Telecommunications Act of 1996 (the “Act”), Congress directed the Commission, in Section 207, to “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.”¹⁰ In Section 332(c)(7) of the Act, Congress preserved state and local government authority over “decisions regarding the placement, construction, and modification of personal wireless service facilities.”¹¹ The relationship between the two sections has been a matter of Commission debate ever since.

A. 1996 and 98 Orders

The Commission responded to Congress’ Section 207 directive by promulgating the OTARD Rule in 1996.¹² The 1996 Order prohibited governmental and non-governmental restrictions on the installation, maintenance, and use of antennas designed to receive direct broadcast satellite service, video programming services, or television broadcast signals. The OTARD Rule’s protection extended only to video reception antennas, including direct-to-home satellite dishes that are less than one meter in diameter, TV antennas, and wireless cable antennas.¹³ Section 332(c)(7) is not even cited in the Order. When the Commission extended the

¹⁰ Telecommunications Act of 1996, Pub. L. 104-104, § 207, 110 Stat. 56 (1996). Section 207 appears in Appendix A in its entirety.

¹¹ 47 U.S.C. § 332(c)(7).

¹² *Preemption of Local Zoning Regulation of Satellite Earth Stations; Implementation of Section 207 of the Telecommunications Act of 1996 Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*, Report and Order, 11 FCC Rcd. 19276 (1996) (“OTARD I”).

¹³ 47 C.F.R. § 1.4000. Commenters are aware of the Alaska exceptions, but exclude them from the debate for clarity’s sake.

OTARD Rule’s protections beyond homeowners to occupants of multiple dwelling units (“OTARD 2”), it once again did not address Section 332(c)(7).¹⁴

B. Competitive Networks Order

In 2000, over the objection of Commissioner Harold Furchtgott-Roth, the Commission extended the OTARD Rule to include “customer-end antennas used for transmitting or receiving fixed wireless signals.”¹⁵ The Commission, however, specifically excluded hub and relay antennas from the rule, partially on the basis that such antennas were covered under Section 332(c)(7) of the Telecommunications Act.

We make clear, however, that the protection of Section 1.4000 applies only to antennas at the customer end of a wireless transmission, *i.e.*, to antennas placed at a customer location for the purpose of providing fixed wireless service (including satellite service) to one or more customers at that location. *We do not intend these rules to cover hub or relay antennas used to transmit signals to and/or receive signals from multiple customer locations.*¹⁶

As will be demonstrated in the legal analysis *infra*, much of Commissioner Furchtgott-Roth’s objection to the Commission’s actions in the *Competitive Networks Order* was that the Commission lacked the statutory authority to expand the class of antennas exempt from state and local review, a warning this Commission should heed.¹⁷

¹⁴ *Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services*, Second Report and Order, CS Docket No. 96-83, 13 FCC Rcd 23874 (1998).

¹⁵ *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 99-217, 15 FCC Rcd 22983, 23027–28, ¶¶ 97–100 (2000) (“*Competitive Networks Order*”).

¹⁶ *Id.* at ¶ 99 (emphasis added).

¹⁷ *Id.* at 23123 (Dissenting Statement of Commissioner Harold W. Furchtgott-Roth).

C. 2004 Order

In 2004, this time over the objection of Commissioner Kevin Martin,¹⁸ the Commission again expanded the OTARD Rule to include customer-end equipment that contained the additional capability of routing service to additional users. The Commission sought to create a fictional distinction between customer end antennas as opposed to hub or relay antennas. The difference was that such devices could enjoy OTARD Rule protections so long as the OTARD was “*installed in order to serve the customer on [its] premises.*”¹⁹

In the current proceeding, the Commission proposes to completely contradict its past wisdom and extend the OTARD Rule to the same hub and relay antennas it had specifically excluded from the Rule and jettison the requirement that the OTARD be installed in order to serve its owner at the premises where the device is installed.²⁰

D. Section 332(c)(7)

Section 332(c)(7) of the Act is titled “Preservation of Local Zoning Authority,” and it addresses “the authority of a State or local government . . . over decisions regarding the placement, construction, and modification of personal wireless service facilities.”²¹ Personal wireless service facilities are defined in Section 332(c)(7)(C)(ii) as “facilities for the provision of personal wireless services,”²² and personal wireless services are defined in Section

¹⁸ Commissioner Martin issued a separate statement to voice his concerns that the expansion of the OTARD Rule, no matter how well-intentioned, was not pursuant to a delegation of authority from Congress: “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.’ . . . I appreciate the policy behind extending our rules to telecommunications services. I am concerned with relying solely on our ancillary authority to do so.” *Promotion of Competitive Networks in Local Telecommunications Markets*, Order on Reconsideration, WT Docket No. 99-217, 19 FCC Rcd 5637, 5643–44, ¶16–17 (2004) (statement of Commission Kevin J. Martin).

¹⁹ *Id.* at 5644, ¶ 17.

²⁰ *NPRM* at ¶ 7.

²¹ 47 U.S.C. § 332(c)(7)(A). Section 332(c)(7) appears in Appendix B in its entirety.

²² 47 U.S.C. § 332(c)(7)(C)(ii).

332(c)(7)(C)(i) as “commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services.”²³

The legislative history of Section 332(c)(7) evinces Congressional intent to deny the Commission the authority to interpret Section 332(c)(7), let alone create new exceptions to its coverage. Congress was so intent on limiting the Commission’s authority to interpret Section 332(c)(7) that it directed “any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction, or modification of CM[R]S facilities should be terminated.”²⁴

The Commission itself recognized its limitations in limiting the rights of local government to review applications for personal wireless service facilities placement.

We read the legislative history [to Section 332(c)(7)] as intending to preclude the Commission from maintaining a rulemaking proceeding to impose *additional* limitations on the personal wireless service facility siting process beyond those stated in Section 332(c)(7).²⁵

In the Shot Clock Order, the Commission defended its actions as they did “...not preempt State or local governments from reviewing applications for personal wireless service facilities placement, construction, or modification. State and local governments will continue to decide the outcome of personal wireless service facility siting applications pursuant to the authority Congress reserved to them in Section 332(c)(7)(A).”²⁶ Adoption of the OTARD expansion rules would result in the very loss of the fundamental authority preserved to state and

²³ 47 U.S.C. § 332(c)(7)(C)(i). “Unlicensed wireless service” is defined as “the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v)).” 47 U.S.C. § 332(c)(7)(C)(iii).

²⁴ H.R. Conf. Rep. No. 104-458, at 208 (1996).

²⁵ *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, Declaratory Ruling, WT Docket No. 08-165, 24 FCC Rcd 13994, ¶ 25 (2009) (“Shot Clock Order”).

²⁶ *Id.*

local government by Congress in Section 332(c)(7). The OTARD rule would bar state or local governments from reviewing applications for personal wireless service facilities placement, construction, or modification.

III. THE RECORD LACKS ANY PREDICATE FOR COMMISSION ACTION

Putting the legality of the various OTARD Orders aside, the Commission has always predicated its prior expansion of the OTARD Rule on a review of the marketplace to identify a market need to justify such expansion.

In the 1996 Order, the Commission first established that action was warranted, even though it was acting under a direct delegation of authority from Congress. The Commission stated that the record was replete with examples of various requirements imposed on those who wish to install DBS dishes or MMDS antennas on their property.²⁷

In the *Competitive Networks Order*, the Commission dedicated a whole section to outlining the “State of the Market.”²⁸ And only after collecting a robust record of what the Commission felt was a demonstration that building owners and incumbent LECs were exercising market power did the Commission act.²⁹

In the Further Notice that accompanied the *Competitive Networks Order*, the Commission again made it clear that before it would take any OTARD Rule expansions in the future, it would be “... essential to have up-to-date market information when evaluating the necessity of ... [Commission action].”³⁰

²⁷ *OTARD I* at ¶ 16. The 1998 OTARD Order extending the protection of 47 CFR 1.400 to renters incorporated the market analysis from the 1996 Order.

²⁸ *Competitive Networks Order* at ¶¶ 23-24.

²⁹ *Id.*

³⁰ *Id.* at ¶ 127.

It is therefore extremely disappointing that the current NPRM deviates from its predecessors in failing to examine the marketplace and inquire as to the need for Commission action—a predicate that would appear even more essential given the Commission’s self-acknowledged conflict with Section 332(c)(7).³¹ It is perhaps even more troubling that this action is taking place after this very Commission created an Office of Economics and Analytics³² to ensure that the Commission’s action are data-driven.

A review of the record reveals few if any complaints about the deployment of OTARDs or the need for an expansion of the rules that will result in challenges to its legality and constitutionality. In other words, there is no evidence that zoning or private restrictive covenants have hindered the deployment of hub and relay antennas. The Wireless Internet Service Providers Association (“WISPA”), in an ex parte letter, offers three anecdotal examples of zoning restrictions and private restrictive covenants that have impacted the installation of hub and relay antennas.³³ These anecdotes, however, are simply examples of infrastructure that failed to meet applicable community standards. The NPRM and the record both fail to establish any evidence that an extension of the OTARD Rule to hub and relay antennas will significantly advance deployment. This lack of evidence makes the associated legal risks, and likely resulting litigation, completely unjustified.

IV. THE COMMISSION LACKS THE LEGAL AUTHORITY TO EXTEND THE OTARD RULE TO HUB AND RELAY ANTENNAS

Prior to passage of Section 332(c)(7), federal communications law was silent on the issue of federal siting rules for wireless devices. It was understood that siting rights were the

³¹ *Id.* at ¶ 97.

³² See <https://www.fcc.gov/economics-and-analytics> for a fuller description of the Office of Economics and Analytics.

³³ Letter from Claude Aiken, Wireless Internet Service Providers Association, to Marlene Dortch, Secretary, FCC, WT 19-71 (filed Mar. 14, 2019).

exclusive domain of state and local governments.³⁴ In order to manage the siting process, states enacted their own telecommunications laws, and localities served their traditional roles in zoning and permitting.³⁵ When Congress drafted the Act, industry representatives lobbied for the complete preemption of local zoning authority.³⁶ Congress instead chose to “preserve” local zoning authority,³⁷ and thus Section 332(c)(7) made clear that state and local governments retain authority over “decisions regarding the placement, construction, and modification of personal wireless service facilities.”³⁸

As recently acknowledged by the Commission: “[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.’ And so our role is to achieve the outcomes Congress instructs...not to assume that Congress *must* have given us authority to address any problems the Commission identifies.”³⁹ In the instant matter, Congress has not authorized the Commission to usurp local zoning authority over hub or relay antennas.⁴⁰

Passage of Section 332(c)(7) demands the Commission ground its actions in a clear statement of authority whenever the Commission’s proposes rules that intrude on local zoning authority. Congress preserved state and local authority in Section 332(c)(7). It made its feelings

³⁴ See The Communications Act of 1934, 47 U.S.C. §§ 151-613.

³⁵ See Sara A. Evans, *Wireless Service Providers v. Zoning Commissions: Preservation of State and Local Zoning Authority Under the Telecommunications Act of 1996*, 32 GA. L. REV. 965 (1998).

³⁶ *Id.* at 981.

³⁷ See H.R. Conf. Rep. No. 104-458, at 207-08 (1996).

³⁸ 47 U.S.C. § 332(c)(7)(A).

³⁹ *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, WC Docket No. 17-108, 33 FCC Rcd 311, 407, ¶ 160 (2018).

⁴⁰ The Wireless industry agrees that “Section 332(c)(7) ‘created a framework in which states and localities could make zoning decisions ‘subject to minimum federal standards – both substantive and procedural – as well as federal judicial review.’” *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165, *Petition for Declaratory Ruling*, (July 11, 2008) at 18 (citing *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 128 (2005) (Breyer, J., concurring)).

known “unmistakably clear in the language of the statute”⁴¹ that local authority to regulate the placement of the hub and relay antennas was preserved. All the creative writing and good intentions of the Commission cannot overcome Section 332(c)(7)’s preservation of local authority.

A. The Narrow Exception to Preservation of Local Siting Authority Provided in Section 207 was Not an Invitation to Cover All Antennas, Let Alone Network Hubs

While Congress preserved local zoning authority in the Act, it did carve out a narrow exception to this authority in Section 207 when it instructed the Commission to:

“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.*”⁴²

This simple and limited instruction, when measured against the backdrop of Section 332(c)(7), makes clear that Congress did not delegate to the Commission the authority to exempt all antennas, or even of a certain size, from compliance with local laws, let alone network hubs, which Congress had just reaffirmed were subject to local rules. In Section 207, Congress referred to “viewer[s]” instead of “consumers” and added the explicit designation of “television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.” It is clear that Congress intended only to protect consumer equipment designed to receive broadcast and satellite signals. Congress did not intend to create a jurisdictional arm wrestling contest with state and local government, which the current proposal promotes. Finally, the legislative history behind Section 207 evidences that Congress was concerned only with

⁴¹ *City of Dallas v. FCC*, 165 F.3d 341, 347-48 (5th Cir., 1999) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (internal quotation omitted)). (For if Congress intends to preempt a power traditionally exercised by a state or local government, “it must make its intention to do so unmistakably clear in the language of the statute.”)

⁴² Telecommunications Act of 1996, Pub. L. 104-104, § 207, 110 Stat. 56 (1996) (emphasis added).

“video programming and off-the-air reception of television broadcast signals or of satellite receivers designed for receipt of DBS services.”⁴³

The preservation of state and local government in Section 332(c)(7) has been taken seriously by others in the past. We hope the current Commission will be guided by their observations.

For instance, when the Commission justified its extension of the OTARD Rule to fixed wireless antennas in the *Competitive Networks Order*, the action was not without compelling dissent.⁴⁴

Commissioner Harold W. Furchtgott-Roth opined that the claimed basis for expanded authority was flawed because it rendered all of Section 207, except the deadline for the Commission to promulgate the OTARD Rule, as an unnecessary exercise.⁴⁵ He found the expansion also contradicted the most basic premise of the Commission’s administrative scheme: “the Commission possesses only those powers granted by Congress, not all powers except those forbidden by Congress.”⁴⁶ Commissioner Furchtgott-Roth concluded that the Commission only had authority to extend the OTARD Rule to devices used to receive video programming.⁴⁷

Commissioner Kevin J. Martin shared Commissioner Furchtgott-Roth’s concerns. When the Commission expanded the OTARD Rule to fixed wireless antennas that could also route service to additional users, Commissioner Martin wrote: “The statutory basis for our OTARD rules applies explicitly to ‘restrictions that impair a viewer's ability to receive video

⁴³ 104th Congress, 1st Session, Report 104-204, Part 1 (July 24, 1995).

⁴⁴ *Competitive Networks Order* at 23031, ¶ 106.

⁴⁵ *Id.* at 23123 (Dissenting Statement of Commissioner Harold W. Furchtgott-Roth).

⁴⁶ *Id.* at 23125.

⁴⁷ *Id.* at 23126.

programming services...’ I am concerned with relying solely on our ancillary authority to [extend the rules].”⁴⁸

Commenters ask today’s Commission to recognize the concerns of Commissioners Furchtgott-Roth and Martin, who while they may have been outnumbered by their fellow commissioners, nevertheless voiced common-sense legal concerns. Rather than add to the usurpation of Congressional authority seen in prior Commission decisions as proposed in the NPRM, the Commission must reexamine the legal foundations upon which prior legal decisions were based.⁴⁹

B. The Commission Correctly Decided in the *Competitive Networks Order* that Hub and Relay Antennas are Personal Wireless Service Facilities Subject to Section 332(c)(7).

In the *Competitive Networks Order*, the Commission denied industry’s request to extend the OTARD Rule relief to hub and relay antennas based upon limited delegation. The Commission found that hub and relay antennas qualified as “personal wireless service facilities,” thereby preserving localities’ jurisdiction over them pursuant to Section 332(c)(7).⁵⁰ And that was only after the Commission engaged in legal somersaults to distinguish customer-end antennas from hub and relay antennas, in order to argue that the former were not covered by Section 332(c)(7).⁵¹

The Commission now claims that hub and relay antennas no longer are subject to Section 332(c)(7) because not all hub sites for fixed wireless broadband “necessarily” include an offering

⁴⁸ *Promotion of Competitive Networks in Local Telecommunications Markets*, Order on Reconsideration, WT Docket No. 99-217, 19 FCC Rcd 5637, 5646 (2004) (statement of Commissioner Kevin J. Martin).

⁴⁹ Commenters would note that this Commission has not taken at face value the precedential nature of prior decisions, but has measured each against the current Commission’s understanding of the law. *See e.g. Restoring Internet Freedom*, Declaratory Ruling, Report and Order, WC Docket No. 17-108, 33 FCC Rcd 311 (2018).

⁵⁰ *Competitive Networks Order* at 23032-33, ¶¶ 108-11.

⁵¹ *Id.*

of “telecommunications services.”⁵² The Commission, presumably, attaches importance to this point because Congress made clear in Section 332(c)(7) that state and local government authority over “personal wireless facilities” is preserved.⁵³ But if the Commission believes that only *some* hub and relay antennas will not qualify as offering a “telecommunications service” (i.e., those that do not offer a telecommunications service), it cannot justify the application of OTARD Rule’s protections to *all* hub and relay antennas. That is exactly what the NPRM proposes to do. The Commission must explain this drastic change of course and how it aligns with the Congressional intent behind Section 332(c)(7).⁵⁴

C. Hub and Relay Antennas by Their Nature are Not Customer-End Antennas, Thereby Taking Away an Essential Eligibility Element of Section 207

Throughout each version of the OTARD Rule, there has been a single constant: there has been a party present at the premises that is the primary beneficiary of the antenna deployed. In the 1996 Order, the beneficiary was a homeowner that obtained video programming. When the Commission expanded the rule to multiple-dwelling-units, the beneficiary was a tenant that would be able to obtain video programming. In the *Competitive Networks Order*, the beneficiary stayed the same, but the services grew to include wireless services. And in the 2004 Order, the Commission ensured that the local beneficiary did not lose his or her protection to install an OTARD if it happened to have ancillary capabilities. Whether or not each of these orders was legal in terms of expanding into Section 332(c)(7) areas, in each order, the Commission could claim to be consistent with the intent of Section 207: an individual that sought to obtain a service by means of a small wireless device, with certain limitations, could.

⁵² NPRM at ¶ 6.

⁵³ 47 U.S.C. § 332(c)(7)(C).

⁵⁴ “[I]f Congress intends to preempt a power traditionally exercised by a state or local government, ‘it must make its intention to do so unmistakably clear in the language of the statute.’” *See City of Dallas v. FCC*, 165 F.3d 341, 347-48 (5th Cir., 1999) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (internal quotation omitted)).

The proposed expansion of the OTARD Rule in the NPRM would fail to meet this obligation of Section 207. The beneficiary under the NPRM would no longer be a viewer or a user present at the site enjoying the service that the antenna makes possible. The beneficiary is some far off corporate entity that has worked out a deal with the property owner or renter. Under the FCC's prior determination therefore, the antenna would no longer be a customer-end device, something that justified in the Commission's opinion exemption from 332(c)(7) oversight in the 2004 Order. Because there is not a local user, the deployment of such a device cannot be outside the review of state and local zoning authority as preserved in Section 332(c)(7).

D. The Commission's Current Proposal Does Not Address Inevitable Mast Height Issues

The Commission's current proposal fails to take into account the fundamental difference between antennas that serve an individual consumer and antennas that serve an entire network of consumers. Mast height was not an issue under previous versions of the OTARD Rule because an antenna could only serve a single customer, and thus an antenna only had to be high enough to *receive* service. For that reason, mast height limitations were previously not necessary, but hub sites by their very nature will consist of multiple antennas and without restrictions, the height of masts will be dictated by the coverage needs of carriers.

This is a reality that the Commission's current proposal does not address. Previously, the Commission recognized that masts that exceed twelve feet in height represent a public safety hazard.⁵⁵ But the Commission's current proposal contradicts this finding by opening the door for masts that will have to be that height or taller in order to meet coverage requirements, and that will contain an unlimited number of antennas. The different types of facilities that now must be

⁵⁵ See *Implementation of Section 207 of the Telecommunications Act of 1996*, Order on Reconsideration, CS Docket No. 96-83, 13 FCC Rcd. 18962, 18979-80, ¶¶ 34-36 (1998).

accounted for under the OTARD Rule are illustrative of how far the Commission has strayed from Congress' original intent.

E. The Extension of the OTARD Rule is Contrary to Section 4(i) Ancillary Authority

With Section 207 not an option to justify the Commission's actions, the NPRM proposes to proceed upon its Section 4(i) ancillary authority, the same authority it relied upon in the *Competitive Networks Order*.⁵⁶ Commenters believe that the Commission improperly applied its Section 4(i) ancillary authority in the *Competitive Networks Order*, and its underlying reasoning should therefore have no precedential value.

The Commission may only proceed upon Section 4(i) ancillary authority if its action is "reasonably ancillary to the...effective performance of its statutorily mandated responsibilities."⁵⁷ In other words, the Commission's ancillary authority must be in furtherance of one of the responsibilities already prescribed to it by statute. It cannot make any such claim in the instant matter because, as previously explained, the sole OTARD responsibilities conferred on it by Congress relate to consumer equipment designed to receive *video programming*.

Perhaps for this very reason, the Commission did not claim that its first extension of the OTARD Rule to fixed wireless antennas was ancillary to its responsibilities under Section 207. Rather, it claimed to be exercising authority ancillary to portions of the Telecommunications Act that lay out general policy, namely Sections 1 and 706,⁵⁸ as well as three other statutes that pertain to carriers' obligations to provide just, fair, and reasonable service.⁵⁹

⁵⁶ *Id.* at ¶ 12.

⁵⁷ *Am. Library Ass'n v. FCC*, 406 F.3d 689, 692 (D.C.Cir.2005).

⁵⁸ Sections 1 and 706 are now codified as 47 U.S.C. §§ 151, 1302.

⁵⁹ 47 U.S.C. §§ 201(b), 202(a), 205(a).

The Commission cannot rely upon these general policy statements in the Act for its ancillary authority. Ten years after the Commission released the *Competitive Networks Order*, the D.C. Circuit decided *Comcast Corp. v. F.C.C.*, 600 F.3d 642 (D.C. Cir. 2010), another case where the Commission claimed ancillary authority based on stand-alone policy statements in the Act. The D.C. Circuit held that policy statements alone are not delegations of regulatory authority, and therefore agencies cannot derive ancillary authority from them.⁶⁰ Instead, the Commission only possesses ancillary authority with regard to those statutes that confer *powers or responsibilities* on it. General policy statements do not qualify because they do not actually bind the Commission to act in a particular way, or empower it to take any sort of action; they are mere guiding principles as opposed to sources of substantive authority.⁶¹

For this reason, the Commission can no longer rely on general statements of policy, as it did in the *Competitive Networks Order*. Sections 1 and 706,⁶² the policy statements relied on by the Commission in the *Competitive Networks Order*, are not sufficiently substantive to bestow the Commission with ancillary authority. Section 1 merely sets forth the purpose of the Act, and Section 706 requires the Commission to “encourage” the deployment of advanced telecommunications capability. These are the exact types of laws the D.C. Circuit found insufficient for ancillary authority in *Comcast*.

The Commission also cannot continue to rely upon Sections 201(b), 202(a), or 205(a). Sections 201 and 202 set forth responsibilities for carriers, not the Commission.⁶³ Section 205(a) gives the Commission the power to determine just and reasonable rates for carriers, but this

⁶⁰ *Id.* at 654-55.

⁶¹ *Id.*

⁶² 47 U.S.C. §§ 151, 1302.

⁶³ 47 U.S.C. §§ 201, 202.

power is in no way relevant to antenna deployment. The *Competitive Networks Order* claimed ancillary authority from Sections 201(b), 202(a), or 205(a) based on their general policy of preventing unjust and unreasonable charges for services, but ancillary authority may not be “grounded in policy alone.”⁶⁴ Were the Commission able to claim ancillary authority from such vague policy objectives, its power to promulgate regulations would be near limitless.

For the aforementioned reasons, Commenters assert that the Commission lacks authority from Section 207, and also lacks ancillary authority from the statutes relied upon in the *Competitive Networks Order*, to expand the OTARD Rule’s protections to hub and relay antennas.

V. CONCLUSION

For the legal, policy, and practical reasons expressed above, Commenters urge the Commission not to proceed with its proposed expansion of the OTARD Rule. Should the Commission choose to do so anyway, it must identify legal authority different from that identified in the *Competitive Networks Order*. But Commenters assert that this legal authority does not exist.

Respectfully submitted,

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⁶⁴ *Comcast*, 600 F.3d at 657.

APPENDIX A
Section 207 of the Telecommunications Act

SEC. 207. RESTRICTIONS ON OVER-THE-AIR RECEPTION DEVICES.

Within 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.

APPENDIX B
47 U.S.C. § 332(c)(7)

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

- (i)** The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--
- (I)** shall not unreasonably discriminate among providers of functionally equivalent services; and
- (II)** shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
- (ii)** A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.
- (iii)** Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.
- (iv)** No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.
- (v)** Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph--

- (i)** the term “personal wireless services” means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;
- (ii)** the term “personal wireless service facilities” means facilities for the provision of personal wireless services; and
- (iii)** the term “unlicensed wireless service” means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).