Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF THE COLORADO COMMUNICATIONS AND UTILITY ALLIANCE

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SUMMARY

The Commission should not adopt the proposed modifications to the OTARD rule because this proposal is counter to the consumer protection purpose of the rule. CCUA urges the Commission not to extend the OTARD rule to small wireless facilities because of the multiple negative unintended consequences of such an expansion. Further, while local governments support the deployment of next generation wireless access for all their citizens, preemption of local authority over wireless siting is not the solution. The Commission should not adopt more restrictions that impermissibly interfere with local control under the rationale of extending service to rural and other underserved areas without imposing concomitant obligations to actually serve those communities.

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On behalf of the Colorado Communications and Utility Alliance ("CCUA") we submit these reply comments in opposition to the Federal Communications Commission's ("Commission's") Notice of Proposed Rulemaking ("NPRM") regarding expanding the Over-the-Air Reception Devices ("OTARD") rule.

I. INTRODUCTION

CCUA was formed as a Colorado non-profit corporation in 2012 and is the successor entity to the Greater Metro Telecommunications Consortium. Its members have been working together since 1992 to protect the interests of their communities in all matters related to local telecommunications issues. CCUA members range from the largest to the smallest local government entities in Colorado, and include towns, cities, counties, school districts, regional government entities and one State agency. The CCUA undertakes education and advocacy in areas such as telecommunications law and policy, cable franchising and regulation, siting of wireless communications facilities, broadband network deployment, public safety communications, rights-of-way management, and operation of cable access channels. CCUA is the Colorado chapter of the National Association of Telecommunications Officers and Advisors ("NATOA") and an affiliate of the Colorado Municipal League.

CCUA believes that the proposed modifications to the OTARD rule will do little more than further restrict a traditional area of local authority without any guaranty that this preemption will result in an expansion of wireless broadband networks. Therefore, CCUA opposes the NPRM. The proposed changes to the OTARD rule subvert the consumer protection purpose of the rule in favor of industry without any sort of realized benefits for consumers, including those in underserved areas. The rule should not be expanded to include small wireless facilities because of the numerous negative unintended consequences of such an expansion.

Should the Commission nevertheless decide to move ahead on this item, we urge the Commission to preserve the existing exception for local regulations of safety and historic preservation, and allow for the local adoption of sensible permitting requirements for these deployments. We urge the Commission not to adopt a rule preempting local authority without imposing significant obligations for the deployment of network facilities and services. Instead we urge the Commission to take concrete steps to expand the existing productive partnerships between providers and local governments to ensure all citizens are served.

Further, the Local Governments believe that the Commission has limited legal authority to take the proposed regulatory action that would limit or preempt local land use authority over this kind of wireless equipment, and we support the arguments about the scope of that legal authority made by our national associations and other local government entities in their comments in this Docket.

II. ARGUMENT

1. This Proposal Subverts The Consumer Protection Purpose Of The OTARD Rule.

As numerous commenters in the record have already noted, the purpose of section 207 is to protect consumers by ensuring that they have the opportunity to receive video services over the

air if they so choose by placing certain limited devices on property they control or own.[1] The NPRM proposes to flip this proposition on its head, and subvert the purpose of the OTARD rule to the benefit of the wireless industry. The receipt of signals by the individual property owner on whose property the facility is located is no longer relevant—restricting local land use control on a wider category of private property to benefit the wireless industry has taken over as the main focus of the proposed rule.

Further, the NPRM queries whether its proposals could help serve rural customers and others who lack services,[2] but the proposed changes contain no obligations to actually deploy in these areas. The Commission is offering a "quid" without imposing a "quo", leaving industry free to cherry pick where they deploy and only serve those that it finds most profitable—as any rational profit maximizing entity would. To answer the NPRM's question—no, the proposed rule makes no guaranty that it will help rural and other customers who lack service. Such a guaranty would require the Commission to dictate that the relaxed, preemptory rule suggested in the NPRM will only be available to providers who make a concomitant commitment to invest a specified amount of additional capital to promote deployment in rural and other underserved areas.

The NPRM proposes to lift local regulations which it summarily characterizes as barriers to deployment,[3] (instead of recognizing the role localities play in ensuring all their citizens are served),[4] and requires nothing from the industry in return. We agree with the comments of NATOA, NLC, and NARC, which note that these proposals will have no meaningful impact on underserved areas.[5]

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[1] *See* Comments of the Multifamily Broadband Council, Docket No. 19-71, p. 5; Comments of the Real Estate Associations, Docket No. 19-71, p. 2; Comments of WISPA, Docket No. 19-71, n. 44; Comments of U.S. Con. of Mayors et al., Docket No. 19-71, p. 3. 47 C.F.R. § 1.4000. NPRM at ¶ 8.
[2] NPRM at ¶ 8.
[3] NPRM, Appendix B, Initial Regulatory Flexibility Analysis, at ¶ 19.
[4] *See, e.g.,* Comments of NATOA, NLC, NARC, Docket No. 19-71, pp. 6-7.
[5] *Id.* at 6.

Further, we are concerned that there are unintended consequences that will flow from the proposed modifications to the OTARD rule that would not only subvert the pro-consumer purpose of the rule, but potentially remove existing incentives to serve the customer at the site. Under the current rule, providers are obligated to serve the property holders who install facilities.[6] Under the new proposed definitions providers are no longer obligated to serve the customer at the site of installation,[7] and can bypass the occupants of the building where the facility is sited to cherry pick customers at more convenient and profitable locations.

Commenter Starry appears to claim that they will not be encouraged to increase deployment by the change in the OTARD rule—the proposed changes would only affect their timeframe for deployment.[8] We are not surprised, and the Commission should take note. Complying with local land use to address appropriate siting requirements related to aesthetics, public health, and safety is important, and yes, it takes some time to comply. Eliminating the ability of localities to protect community aesthetics, public health and safety will certainly speed deployment in areas in which a company wishes to deploy but it will have no impact on whether it increases deployment in other less profitable or harder to serve environments. This is no reason to preempt substantive local oversight over the permitting and siting of these facilities.

2. The OTARD Rule Should Not Be Expanded to Include Small Wireless Facilities.

The NPRM "seek[s] comment on whether updating the OTARD rule could help facilitate the deployment of other 5G infrastructure, such as small wireless facilities."[9] CCUA is concerned

[6] *See* NPRM at ¶ 4.
[7] *See* NPRM at ¶ 10; Comments of NATOA, NLC, NARC, Docket No. 19-71, p. 5; Comments of U.S. Con. of Mayors et al., Docket No. 19-71, pp. 13-14.
[8] Comments of Starry, Docket No. 19-71, p. 9: "This rule change will improve timelines for deployment, but it will not necessarily result in any net increase in the quantity of infrastructure deployed in a community."
[9] NPRM at ¶ 8.

that there are multiple, negative unintended consequences of extending the OTARD rule to small cell wireless facilities.

First, if the OTARD rule is extended to "small wireless facilities" (as that term has been recently defined by the Commission) the size of the facilities covered would significantly increase. The rule currently covers only facilities that are one meter or less in diameter, with certain exceptions for Alaska.[10] However the Commission recently adopted a definition of "small wireless facility" that defines such facilities as up to 28 cubic feet.[11] Should the Commission expand the OTARD rule to encompass such facilities, an action which we do not believe the Commission has the legal authority to take under section 207,[12] this would be a significant increase in the size of facility potentially covered, which would no longer be subject to local land use authority. This interpretation stretches the statute too far.[13] Wireless industry commenters have made clear that they are not advocating for any change to the current size limits of the rule.[14]

Another area not sufficiently addressed by the Commission is how the mast allowance under the current rule would apply if size limits are changed. As the comments of the U.S. Conference of Mayors et al., pointed out, there are flaws with applying the mast part of the rule to hub and relay antennas.[15] Should the Commission expand the definition of equipment covered under the rule to include small wireless facilities, the mast portion of the rule becomes logically incoherent. Does the Commission propose to allow small cell facilities of 28 cubic feet to be

[10] 47 C.F.R. § 1.4000.
[11] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, WT Docket No. 17-79, FCC 18-30 (rel. Mar. 30, 2018), ¶¶ 74-76 (hereinafter "NHPA/NEPA Order").
[12] *See* Comments of U.S. Con. of Mayors et al., Docket No. 19-71.
[13] *See Util. Air Regulatory Grp. v. E.P.A.,* 573 U.S. 302, (2014): "An agency has no power to "tailor" legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." *Id.* at 325-26.
[14] Comments of WISPA, Docket No. 19-71 p. ii: "WISPA does not propose to make any change in the size limitation of antennas subject to OTARD protection." Comments of Starry, Docket No. 19-71, p. 8: "Starry does not believe the Commission can or should change the existing size limitation…". *See also* Comments of Community Associations Institute, Docket No. 19-71, pp. 9-10.
[15] Comments of U. S. Con. of Mayors et al., Docket No. 19-71, pp. 14-15.

mounted on 12 foot tall masts without any permitting?[16] That's the equivalent of mounting a large refrigerator on a tetherball pole.[17]

Further, should small wireless facilities be deployed under the OTARD rule, other legal consequences would necessarily follow from that choice. The mandatory collocation rules could be construed to apply to these deployments and mandate not just one, but multiple antennas at the same site. How does the Commission propose to treat the interaction of these rules?

Additionally, the NPRM asks whether to change the size limits for rural or underserved areas.[18] We do not believe there is anything in the record that demonstrates that increased size limits would guarantee increased deployment in underserved areas. That being said, why should local authority to determine land use siting and imposition of aesthetic standards be subject to broader preemption in Montrose, Colorado, a rural city in western Colorado, than in Denver, Colorado? There has been no policy reason articulated to support differential treatment. The Commission should never preempt local authority based on the assumption that it might theoretically lead to more broadband deployment in hard to serve areas.

At a minimum, whenever the Commission considers creating broader preemption to spur deployment, it should only do so if it is willing to impose concomitant obligations on providers; to take advantage of these federal preemptions of local control, providers must commit to investing a significant amount of capital to deploy networks in rural and other hard to serve areas for a period

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[16] *See* Comments of U.S. Con. of Mayors et al., Docket No. 19-71, n. 55. *See also* FED. COMM. COMM'N., *Over-the-Air Reception Devices Rule*, https://www.fcc.gov/media/over-air-reception-devices-rule. (last visited June 13, 2019): "In addition, antennas covered by the rule may be mounted on 'masts' to reach the height needed to receive or transmit an acceptable quality signal (e.g. maintain line-of-sight contact with the transmitter or view the satellite). Masts higher than 12 feet above the roofline may be subject to local permitting requirements for safety purposes."

[17] *See, e.g.,* SAMSUNG, *28 cu. ft. 4-Door French Door with 21.5 in. Connected Touch Screen Family Hub™ Refrigerator*,https://www.samsung.com/us/home-appliances/refrigerators/4-door-french-door/28-cu--ft--4-door-french-door-with-21-5-in--connected-touch-screen-family-hub--refrigerator-rf28nhedbsr-aa/.(last visited June 13, 2019); SCHOOL SPECIALTY, *Kelpro In-Ground Tetherball Pole, 12 Feet x 1-1/2 Inches, Steel*, https://www.schoolspecialty.com/kelpro-in-ground-tetherball-pole-087948. (last visited June 13, 2019).

[18] NPRM at ¶ 11.

of at least ten years. The Commission should further create review and enforcement mechanisms to determine if these obligations are complied with.

The Commission should not repeat the mistake it made in the Small Cell Order and assume with no economic basis that if a provider can save money in one market, it will invest the savings in unprofitable or hard to service markets.[19] Any time the Commission considers preempting traditional areas of state and local control to promote deployment, and only if federal law authorizes it to do so, it must do two things: first, the Commission's office of economics must demonstrate, why as a matter of sound economic theory the proposed preemption will increase deployment; second, any preemption must include imposition of a quid pro quo that only companies that promise to invest are able to take advantage of preemptory rules.

3. The Commission Should Not Adopt More Restrictions That Impermissibly Interfere With Local Control.

Localities are charged with regulating the public safety and aesthetics of their communities. While we appreciate some industry commenters representing a collaborative approach to working with local governments on siting issues,[20] empowering wireless companies to site significantly sized wireless facilities wherever they can obtain the consent of the private property holder is not working together with local governments to ensure deployment happens in a manner respectful of local control—it is wholesale preemption of local government oversight.

The anecdotes in the record of local governments impairing the deployment of service are insufficient to support preemption of local authority. For instance, commenter Starry raised the

[19] *Accelerating Wireless Broadband by Removing Barriers to Infrastructure Investment,* Declaratory Ruling and Third Report and Order, FCC 18-133 (rel. Sep. 27, 2018) (hereinafter the "Small Cell Order"), ¶¶ 60-62.

[20] Comments of Starry, Docket No. 19-71, p. 4: "Starry endeavors to work collaboratively with local governments to bring competitive service to their communities, and has had many positive experiences working with local officials." WISPA Comments, Docket No. 19-71, p. 3: "WISPs generally enjoy a productive relationship with neighborhoods, multifamily communities and local governments. In many cases, these entities have adopted laws and policies that encourage broadband entry and competition."

issue of pre-application conferences in respect to permitting delays.[21] We respectfully disagree that such requirements delay the deployment of facilities. These conferences are designed to facilitate and even speed up deployment by ensuring that localities have a chance to clearly explain their application process to applicants, thus ensuring more complete applications are filed, and facilitating faster processing times. They are not unique to wireless deployment, and are often found with all kinds of development including housing, commercial and industrial projects. Characterizing such requirements as barriers to deployment ignores the realities of the interactions between industry and local governments, and suggests that the wireless industry is entitled to special exemptions from rules that all other categories of property owners must follow.

The NPRM seeks comment on whether to change the exceptions to the OTARD rule that allow for "State, local, or private restrictions that are necessary to accomplish a clearly defined legitimate safety objective or to preserve prehistoric or historical places that are eligible for inclusion on the national register of historic places."[22] While we do not agree that the OTARD rule should be expanded as proposed in this NPRM, we nonetheless urge the Commission not to further infringe on the powers of state and local governments by interfering with their powers to regulate to protect the health and safety of their communities. As the Commission has recently recognized state and local governments play an important role in preserving local history in their communities.[23] The Commission should not circumscribe the exception to the OTARD rule. This approach is supported by industry as well as local government commenters.[24]

[21] Comments of Starry, Docket No. 19-71, p. 5.
[22] NPRM at ¶ 11.
[23] NHPA/NEPA Order at ¶77: "The existence of state and local review procedures, adopted and implemented by regulators with more intimate knowledge of local geography and history, reduces the likelihood that small wireless facilities will be deployed in ways that will have adverse environmental and historic preservation effects."
[24] Starry Ex Parte Letter, June 11, 2019, Docket Nos. 14-177, 10-112, 19-71, p. 1: "In addition, Starry reiterated its support for maintaining the existing exception within OTARD for restrictions that are necessary to accomplish a clearly defined, legitimate safety objective, or to preserve prehistoric or historic places." Comments of Starry, Docket

Should the Commission nevertheless move forward with its proposal to expand the preemptions of the OTARD rule, we recommend concurrently clarifying that industry at minimum, must obtain a permit from the locality to confirm that the facility meets local public safety, historic preservation, and radio frequency emissions requirements, as other commenters have proposed.[25]

We recognize that this NPRM is in part, an attempt to redress some of the infirmities of the Small Cell Order released by the Commission last September,[26] and we applaud the Commission for considering how to incentivize the deployment of next generation services to those who need them most. But local control extends past the right-of-way. As Commissioner Rosenworcel noted in her dissent in the Small Cell Order, "we have a long tradition of local control in this country," and that is something we need to deal with as we examine how to move forward with the deployment of these services.[27] Local control includes zoning oversight, and citizens rely on their local governments to have a voice in the choices we make about how our communities look and feel even as technology continues to evolve.

We respectfully encourage the Commission to continue to work together with its state and local partners to develop ways to facilitate service. We agree with Commenter NATOA, NLC, NARC's proposals to improve broadband mapping and data, support local flexibility and authority, and support federal investment in consumer demand.[28] Other ideas include developing voluntary model ordinances to streamline deployment, and seeking input from the Commission's Intergovernmental Advisory Committee for how best to work together to promote deployment, especially in hard to serve areas.

No, 19-71, p. 8. Comments of WISPA, Docket No. 19-71, p. 11. *See* Comments of NATOA, NLC, NARC, Docket No, 19-71, p. 4.

[25] Comments of Costa Mesa, Docket No. 19-71, p. 2; Comments of Nevada City, Docket No. 19-71, p. 2.

[26] NPRM at p. 20 (Statement of Commissioner J. Rosenworcel, approving).

[27] Small Cell Order at p. 114 (statement of Commissioner J. Rosenworcel, approving in part, dissenting in part).

[28] Comments of NATOA, NLC, NARC, Docket No. 19-71, pp. 7-8.

One additional significant step the Commission can take to assist local governments in promoting the development of 5G infrastructure is to complete the update to the Commission's Radiofrequency Exposure Limits and Policies that has been pending since 2013.[29] Since the adoption of the Small Cell Order last September, local governments have been faced with an increase in citizen concerns about the potential health effects of 5G given that small wireless facilities will be located in closer proximity to humans compared to macro sites. CCUA has had citizens seek to present to our organization, asking for our assistance in assuring that any new deployment is safe, and many of our individual members are having these concerns raised on a more regular basis before elected and appointed bodies.

Presumably, updated Commission rules will demonstrate that 5G is safe. Until such time as updated rules are released, one of the most significant challenges for local governments is to explain to a concerned public how these facilities are safe given that the Commission has exclusive jurisdiction to regulate in this area.[30] The Commission can provide a powerful tool to local governments by completing that proceeding and providing definitive new rules demonstrating the safety of this new technology.

III. CONCLUSION

For the preceding legal and policy reasons, we ask the Commission not to adopt the proposed changes to the OTARD rule.

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[29] *Reassessment of Federal Communications Commission Radiofrequency Exposure Limits and Policies; Proposed Changes in the Commission's Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields*, ET Docket No. 13-84, 03-137 (Mar. 29, 2013).
[30] *See* 47 332(c)(7)(B)(iv).