Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Updating the Commission's Rule for Over-the-Air Reception Devices	WT Docket No. 19-71

REPLY COMMENTS OF THE CITY AND COUNTY OF SAN FRANCISCO
THE NOTICE OF PROPOSED RULEMAKING

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Dated: June 17, 2019

I. INTRODUCTION AND SUMMARY

The City and County of San Francisco ("San Francisco") submits these reply comments on this Notice of Proposed Rulemaking ("NRPM"). The Federal Communications Commission ("Commission") opened this NPRM at the request of the Wireless Internet Service Providers Association ("WISPA") to consider updating its over-air-reception device ("OTARD") regulations to state that they apply to all fixed-wireless devices, including those intended to be used as hub and relay antennas.[1]

The Commission cannot extend the OTARD rule simply because the Commission believes it will be speed-up broadband deployment. Where, as here, the Commission is acting under a directive from Congress, the Commission must show that its actions are consistent with that directive, and are not prohibited by other federal laws. That is simply not the case here.

Nowhere in its NPRM does the Commission identify any legal authority to expand its OTARD rule in this manner. Nor does the Commission discuss other federal laws that may prohibit the proposed action. Rather, the Commission seems to view this proposed action as a means to allow "wireless providers to deploy hub and relay antennas more quickly and efficiently" and to "help spur investment in and deployment of needed infrastructure in a manner that is consistent with the public interest."[2] Whether the proposed OTARD extension would serve these purposes, or is necessary to "keep pace with the fast-changing wireless marketplace" as CTIA argues,[3] are not, standing alone, rationales for the Commission to change its rule. The Commission must have the lawful authority to do so.

San Francisco agrees with those commenters that have questioned the Commission's legal authority to expand its OTARD rule to include hub and relay devices.[4] San Francisco

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[1] *See* NPRM at p.2.
[2] NPRM at 3.
[3] Comments of CTIA at 5.
[4] *See* Comments of the National Association of Telecommunications Officers and Advisors, the National League of Cities, and the National Association of Regional Councils at 2-4; and Comments of the 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 at 8-17.

agrees that nothing in Section 207 of the Telecommunications Act of 1996 authorizes the Commission to extend OTARD protection to hubs and relays, and that Section 332(c)(7) expressly prohibits the Commission from taking this action. San Francisco also questions whether expanding the OTARD rule to include hubs and relays would be good public policy. San Francisco is concerned about the unregulated proliferation of wireless facilities on private property by perhaps hundreds of fixed-wireless providers, particularly in residential neighborhoods, because each provider will only need the permission of a building owner or one occupant of a building to install facilities not intended to serve the consumers on the property. This is not what Congress intended in 1996.

As a technology leader, San Francisco applauds the Commission's efforts to tackle the difficult problem facing wireless carriers and their customers, which is the need for more capacity and better service. These goals must be harmonized with others that are reflected in existing laws. In addition, San Francisco's experience suggests that these rules would not be more efficient in the long run. San Francisco has certain building and zoning requirements for installing wireless facilities on private property. Under San Francisco's Planning Code, and consistent with federal laws, wireless devices that meet OTARD's size limits *do not have* OTARD protection if they would be used to provide service outside of the property where the device would be installed. As discussed below, in 2012 San Francisco started an enforcement proceeding when Towerstream installed some 167 wireless hub facilities on private properties in San Francisco without the required permits. While Towerstream claimed OTARD protection for those facilities, and filed a petition with this Commission for a declaratory judgment to that effect, this Commission did not allow Towerstream's complaint to move forward. San Francisco informed Towerstream, and Commission staff, that it disagreed with Towerstream's claim that the OTARD rule applied to these facilities. Ultimately, Towerstream had to remove all of those facilities.

II. FEDERAL LAW DOES NOT PROVIDE THE COMMISSION WITH THE AUTHORITY TO EXTEND THE OTARD RULE TO INCLUDE HUB AND RELAY DEVICES

In section 207 of the Telecommunications Act of 1996 (the "Act"), Congress required 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."[5] Pursuant to the authority, the Commission in 1996 first adopted the OTARD rule.[6] That rule, contained in 47 C.F.R. § 1.4000, reads in part as follows:

> Restrictions impairing reception of Television Broadcast Signals, Direct Broadcast Satellite Services or Multichannel Multipoint Distribution Services
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> (a) Any restriction, including but not limited to any state or local law or regulation, including zoning, land-use, or building regulation, or any private covenant, homeowners' association rule or similar restriction on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest in the property, that impairs the installation, maintenance, or use of:
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> (1) an antenna that is designed to receive direct broadcast satellite service, including direct-to-home satellite services, that is one meter or less in diameter or is located in Alaska; or
>
> (2) an antenna that is designed to receive video programming services via multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services, and that is one meter or less in diameter or diagonal measurement; or
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> (3) an antenna that is designed to receive television broadcast signals,
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> is prohibited, to the extent it so impairs, subject to paragraph (b).

Consistent with its authority under the Act, the Commission limited the OTARD protections contained in section 1.4000 to "an antenna that is designed to receive direct broadcast satellite service, including direct-to-home satellite services."[7]

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[5] 47 U.S.C. § 303 (note) (italics added).
[6] See *Preemption of Local Zoning Regulation of Satellite Earth Stations, Report and Order, Memorandum Opinion and Order in IB Docket No. 95-59,* and *Implementation of Section 207 of the Telecommunications Act of 1996 and Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service,* Further Notice of Proposed Rulemaking in CS Docket No. 96-83*,* 11 FCC Rcd. 19276 (1996) *("*OTARD First Report and Order*").*
[7] 47 C.F.R. § 1.4000(a)(1)(i)(A).

In 2000, the Commission decided to extend the protection afforded to consumers under the OTARD rules by amending Section 1.4000 to "include customer-end antennas used for transmitting or receiving fixed wireless signals, as well as multichannel video programming signals that are currently covered by the rules."[8] For this purpose, the Commission defined the term "fixed wireless signals" to mean "any commercial non-broadcast communications signals transmitted via wireless technology to and/or from a fixed customer location."[9] In so doing, the Commission found that:

> Congress intended in the 1996 Act to promote telecommunications competition and the deployment of advanced telecommunications capability. Indeed, Congress included several provisions to limit restrictions on the deployment of facilities used for these purposes. 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.[10]

The Commission addressed in that proceeding the very question that is presented in this NPRM, which is whether it should extend OTARD protections to hubs and relays. The Commission refused to do so:

> 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.*[11]

In that decision, the Commission addressed arguments made by local governments that the extension of the OTARD rule to fixed-wireless antennas would violate 47 U.S.C. § 332(c)(7).[12] Section 332(c)(7) is entitled "Preservation of local zoning authority." It provides in paragraph (A) that: "Except as provided in this paragraph, nothing in this chapter shall limit or

[8] *Promotion of Competitive Networks*, 15 FCC Rcd. at 23028 (footnotes omitted).
[9] *Id.* at 23027 (footnotes omitted).
[10] *Id.* (footnotes omitted).
[11] *Id*. at 23028 (footnotes omitted; italics added).
[12] *Id*. at 23032.

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."[13]

Section 332(c)(7) defines the term "personal wireless services" to mean "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services" and the term "personal wireless service facilities" to mean "facilities for the provision of personal wireless services."[14] Because of these definitions, the Commission was able to find that Section 332(c)(7) did not prohibit its extension of the OTARD rule to fixed-wireless facilities: "[I]in the context of Section 332(c)(7), the term 'personal wireless service facilities' is best read not to include customer-end antennas."[15] The Commission went on to find that, *"[r]ead in context with other provisions of the 1996 Act, Section 332(c)(7) is best construed to apply only to hub sites*."[16]

The Commission provided further guidance on this issue in its *Competitive Networks Reconsideration Order*. One carrier had asked the Commission to clarify whether customer-end antennas used as hubs or relays would be explicitly excluded from the protections of the OTARD rule.[17] The Commission made clear that the answer to that question is an unqualified yes:

> [I]n making the determination in the *Competitive Networks Or*der that the OTARD rules applied to customer-end antennas and not to hubs or relays, the Commission did not consider those network configurations and technologies in which customer-end equipment performs both functions. As demonstrated by the point-to-point-to-point architecture cited by Triton and the mesh architectures being actively developed and deployed . . . share[] the same physical characteristics of other customer-end equipment, distinguished only by the additional functionality of routing service to additional users. . . .
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> *In concluding that OTARD protections should extend to such customer-end equipment, we do not intend that carriers may simply locate their*

[13] 47 U.S.C. § 332(c)(7)(A).
[14] 47 U.S.C. § 332(c)(7)(C)(i)-(ii).
[15] *Promotion of Competitive Networks*, 15 FCC Rcd. at 23032.
[16] Id.
[17] *Promotion of Competitive Networks in Local Telecommunications Markets,* Order on Reconsideration, 19 FCC Rcd. 5637, 5643 (2004).

> *hub-sites on the premises of a customer in order to avoid compliance with a legitimate zoning regulation*.[18]

Finally, in *In the Matter of Continental Airlines,* an airport owner challenged one of its airline tenant's right to install a Wi-Fi device in its customer lounge to provide services to its customers.[19] The airline claimed that the antenna was protected by the OTARD rule. In finding for the airline, this Commission continued to recognize that OTARD rule only applied to facilities serving the customer's property and not to hubs and relays:

> [U]se of an antenna to route signals strictly within an antenna user's premises does not constitute use of the antenna as a hub for distribution of services. When a leaseholder or property owner uses an antenna to send and receive signals strictly within its premises, and not to "multiple customer locations," the antenna user is using the antenna for its own purposes under the OTARD rules. This is true even if invitees on the premises, such as houseguests or business customers, receive the signals, because the invitees are presumably present at the antenna user's invitation and for the antenna user's own purposes. *In these circumstances, Continental cannot be considered a carrier that is trying to circumvent section 332(c)(7) by locating a hub site on the premises of a customer*. Consequently, we find that the facts presented here -- which involve the sending of signals to and from an OTARD-covered antenna strictly within the premises under the exclusive use and control of the antenna user -- does not turn Continental's Wi-Fi antenna into a hub antenna.[20]

In light of the Commission's repeated statements concerning the scope of the OTARD rule, and its clear lack of authority under Section 332(c)(7) to expand the rule to include hubs and relays, a Commission ruling at this time to completely reverse course on this distinction without a "reasoned explanation" would be arbitrary and capricious.[21] Neither the Commission nor any commenter has shown that extending OTARD protections to hub and relay antennas would be inconsistent with the purpose of Section 207, the Commission's OTARD rule, and its repeated discussion of that rule. The Commission has made clear on many occasions that the purpose of the OTRAD rule is allow consumers to have more choices for video and fixed-

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[18] *Id*. (footnotes omitted; italics added).
[19] *In the Matter of Continental Airlines*, 21 FCC Rcd. 13201 (2006).
[20] *Id*. at 13210 (footnotes omitted).
[21] See *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009). "An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." Id. (citing *United States v. Nixon*, 418 U.S. 683, 696 (1974).

wireless services at their own residences or places of business. The only reason to extend the rule to include hub and relay antennas would to benefit to WISPA and its members who would be able to build out their networks without having to comply with the same local zoning codes that federal law has allowed local governments to apply to wireless carriers since the Act was adopted in 1996.

In 2000, the Commission was able to find that its decision to extend OTARD to fixed-wireless services was "necessary to further the consumer protection purposes of Sections 201(b), 202(a), and 205(a) of the Act. These statutory provisions are intended to ensure that the rates, terms, and conditions for the provision of common carrier service are just, fair, and reasonable, and that there is no unjust or unreasonable discrimination in the provision of such service."[22] There is not a similar consumer-centric reason for expanding the OTARD rule to hubs and relays. Congress simply did not intend Section 207 of the Act to enable satellite providers or fixed-wireless carriers to expand their networks beyond the reach of the properties where they are lawfully allowed to install their facilities. The Commission should reject calls to rely on its "ancillary" authority, vague language in the "preamble" to the Act, or on the mere fact that "broadband has become a primary source of video programming"[23] as authority to ignore the directive Congress gave it in 1996.

III. SAN FRANCISCO'S EXPERIENCE WITH ONE FIXED-WIRELESS PROVIDER DEMONSTRATES THAT EXTENDING THE OTARD RULES TO INCLUDE HUBS AND RELAY DEVICES WOULD NOT BE GOOD PUBLIC POLICY

A. San Francisco Has a Two-Tiered Permitting Process for Wireless Facilities on Private Property

San Francisco's Planning Code establishes permitting requirements for wireless facilities on private property. In parts of San Francisco that are zoned commercial or industrial, the Planning Code generally requires the applicant to obtain only a building permit to install its facility on private property. The building permit process can take 30 to 90 days depending on

[22] *Promotion of Competitive Networks*, 15 FCC Rcd. at 23030 (footnote omitted).
[23] *See* Comments of the Wireless Internet Service Providers Association at 12-13.

whether the initial application is complete and, if not, how long it takes the applicant to respond to the Planning Department's comments concerning the application.

In parts of San Francisco that are zoned residential or neighborhood-commercial, the Planning Code requires a conditional use authorization ("CUA") to install a wireless facility on private property. The CUA process takes a bit longer, depending on how complete an application is when submitted and how long it takes the applicant to respond to the Planning Department's comments.

B. At Least One Fixed-Wireless Provider Violated San Francisco Law by Installing its Facilities on Private Property without Obtaining the Required Permits

In 2012, the San Francisco Planning Department learned that Towerstream had installed some 167 wireless facilities on private property throughout San Francisco without obtaining any required building or conditional use permits. Some of these were in buildings listed in the National and California Registers of Historic Properties. Others were parts of San Francisco that the Planning Commission had identified as "disfavored locations" for wireless facilities including residential neighborhoods.

At that time, Towerstream described itself as a "competitive entrant in the wireless broadband market . . . [that] provides affordable wireless high speed point-to-point Internet access to business customers, as well as Wi-Fi services."[24] Towerstream claimed that its "point-to-point Internet services provide a low-cost alternative to services provide by industry giants such as AT&T and Verizon."[25] To provide its services in San Francisco, Towerstream claimed that it used "Part 15 unlicensed devices, microwave and unlicensed point-to-point links."[26] Towerstream urged this Commission to find that its fixed-wireless devices in San Francisco met

[24] *In the Matter of Towerstream Corporation*, *Petition for Declaratory Ruling Regarding Application of Over-the-Air Reception Devices Rule to San Francisco Zoning Ordinances and Antenna Siting Procedures* ("Towerstream Petition") at p. 2. A copy of the Towerstream Petition is attached hereto as Exhibit A. While Towerstream filed the Towerstream Petition with the Commission, the Commission never published notice of the petition as required for the proceeding to commence. *See* 47 C.F.R. § 1.4000(e).
[25] Towerstream Petition at p. 2.
[26] Towerstream Petition at p. 8.

the OTARD size limits because they were "one meter or less in diameter or diagonal measurement."[27]

When San Francisco's Planning Department became aware that Towerstream had installed these devices on private property without any permits, the department's Enforcement Division started a proceeding against the property owners that had allowed Towerstream to use their buildings. In response to that action, Towerstream filed the Towerstream Petition with the Commission and claimed that its fixed-wireless devices were eligible for OTARD protection because they "are installed 'on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership of leasehold interest in the property.'"[28]

At that time at least, this Commission had expressly held that the OTARD rule did not "cover hub or relay antennas used to transmit signals to and/or receive signals from multiple customer locations."[29] The Commission never acted on the Towerstream Petition. Ultimately, the Planning Department required Towerstream to remove all of the devices that it had unlawfully installed.

San Francisco's experience with Towerstream should be instructive for the Commission. According to WISPA, there are at least 800 fixed-wireless service providers operating in the United States.[30] If the Commission were to expand the OTARD rule as suggested in the NPRM, San Francisco and cities throughout the United States could see dozens of fixed-wireless providers installing these antennas in their business districts and residential neighborhoods without complying with local zoning regulations or building codes. Nothing in those rules would require the property owners or tenants allowing an OTARD-compliant antenna to be installed on their properties to take the services offered by the providers. They could allow it

[27] Towerstream Petition at p. 7 (*quoting* 47 C.F.R. § 1.4000(a)(1).)
[28] Towerstream Petition at p. 5.
[29] *In re Promotion of Competitive Networks*, 15 FCC Rcd. 22983, 23028 (2000).
[30] *See* http://www.wispa.org/About-Us/Mission-and-Goals.

just for the revenue or other benefits that providers would offer as incentives. This is not what Congress intended when it allowed consumers to install satellite facilities at their residences and business properties.

IV. CONCLUSION

San Francisco joins with other local governments filing comments in this proceeding to urge the Commission to reject proposed changes to the OTARD rule that would allow fixed-wireless carriers to use the rule to install hubs and relays on private property. Such changes would exceed the Commission's authority under federal law and are simply not good public policy.

Dated: June 17, 2019

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