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

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, THE CITY OF GAITHERSBURG, MARYLAND, MONTGOMERY COUNTY, MARYLAND, AND HOWARD COUNTY, MARYLAND

EXECUTIVE SUMMARY

The Coalition of Local Governments ("Local Governments") appreciate the role Wireless Internet Service Providers (WISPs) and other wireless service providers are playing in bridging the digital divide. We renew our pledge to assist them, but oppose the Commission's proposed approach for the following reasons:

(1) The Commission lacks the legal authority, delegated, implied, or ancillary, to take the actions it contemplates. The Commission was correct in 2000, and again in 2004, and yet again in 2006 (*Continental Airlines*) when it determined Congress reserved to state and local government the oversight of hub and relay antennas in Section 332(c)(7).

(2) Parties that are supportive of the proceeding fail to demonstrate that there is a predicate for action. Moreover, numerous non-governmental parties offer insights that there is no national movement or scheme to deny OTARD deployments, and the Commission's proposed actions could retard current plans for wireless developments.

(3) Industry beneficiaries make clear that they view OTARD privileges as a means to avoid legitimate local government oversight.

(4) The Commission must reject industry claims that an OTARD sites is eligible for Section 6409 (47 U.S.C. § 1455) relief.

(5) The Wireless Internet Service Providers Association ("WISPA") and other commenters are incorrect that the RAY BAUM'S Act of 2018 ("RAY BAUM'S Act") confers authority on the Commission to act in any matter beyond informing Congress when it feels there is an issue, but as demonstrated, the record fails to establish any such threat.

(6) Should the Commission ignore that it has neither the need to act nor the legal authority to do so, Local Governments offer safeguards that could assist in minimizing the disruption of local oversight.

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I. INTRODUCTION

The parties filing these Reply Comments ("Local Governments") consist of a national local government association; a coalition of Texas municipalities; 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.[1] Joining the coalition for Reply Comments, and associating themselves with the initial Comments filed in this matter, are the City of Gaithersburg, Maryland[2] and Howard County, Maryland.[3]

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[1] A fuller description of the parties can be found in the Local Governments Comments filed June 3, 2019.

[2] **Gaithersburg, Maryland**, with more than 69,000 residents, was incorporated in 1878. It is one of the largest cities in Maryland and has been recognized on a number of "Best Places" lists and as one of the most diverse communities in the nation. Gaithersburg is an internationally recognized center of biotechnology, capitalizing on its close proximity to federal research facilities and regulatory agencies, including the National Institute of Standards and Technology, the National Institutes of Health, and the Food and Drug Administration.

[3] Prior to its incorporation in 1838, **Howard County, Maryland** was populated by the Susquehannock tribes who in 1652 signed a treaty with Maryland providing the property that is today Howard County. Located in the Baltimore-Washington Area, the County has grown to over 300 in population and is frequently cited for its community planning, quality of life, and

Local Governments look forward to the day that affordable broadband services are universally available and appreciate the role Wireless Internet Service Providers ("WISPs") and other providers are playing in closing service gaps and eliminating unserved and underserved areas. Local Governments are committed to working with industry partners in these efforts, but oppose the Commission's proposed approach[4] because:

(1) The Commission lacks the legal authority, delegated, implied, or ancillary, to take the actions it contemplates. The Commission was correct in 2000, and again in 2004, and yet again in 2006 (*Continental Airlines*) when it determined Congress reserved to state and local government the oversight of hub and relay antennas in Section 332(c)(7).

(2) Parties that are supportive of the proceeding fail to demonstrate that there is a predicate for action. Moreover, numerous non-governmental parties offer insights that there is no national movement or scheme to deny OTARD deployments, and the Commission's proposed actions could retard current plans for wireless developments.

(3) Industry beneficiaries make clear that they view OTARD privileges as a means to avoid legitimate local government oversight.

(4) The Commission must reject industry claims that an OTARD sites is eligible for Section 6409 (47 U.S.C. § 1455) relief.

(5) The Wireless Internet Service Providers Association ("WISPA") and other commenters are incorrect that the RAY BAUM'S Act of 2018 ("RAY BAUM'S Act") confers authority on

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commitment to excellent schools. The County is named for Colonel John Eager Howard, an officer in the "Maryland Line" of the Continental Army in the American Revolutionary War.

[4] *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*").

the Commission to act in any matter beyond informing Congress when it feels there is an issue, but as demonstrated, the record fails to establish any such threat.

Should the Commission ignore that it has neither the need to act nor the legal authority to do so, Local Governments offer safeguards that could assist in minimizing the disruption of local oversight. Specifically, any Order must make clear:

(1) Hub and Relay Antenna Deployments Will Still Require an Application to Confirm the Deployment Meets the Public Safety and Historic Preservation Requirements of a Local Government and Specific Eligibility Requirements of an OTARD.

(2) No Changes in Size Requirements Have Been Granted and No More Than a Single OTARD at Any Given Site.

(3) OTARDs are Subject to Radio Frequency Standards and OSHA Safety Requirements.

(4) An OTARD Deployment for a Hub or Relay Meets All Local Rules Concerning Conducting a Business in the Community.

(5) Qualifying as an OTARD Deployment Does Not Render an OTARD site an "Existing Site" Under 47 U.S.C. § 1455 and 47 C.F.R. § 1.6100.

(6) The Commission Must Eliminate or Amend the Automatic Stay Component of the OTARD Rule.

II. THE RECORD IS SILENT AS TO A LEGAL BASIS FOR THE ACTIONS THE NPRM PROPOSES TO TAKE.

The courts have made clear that "…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.'"[5] Likewise, passage of Section 332(c)(7) demands the

[5] *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).

Commission ground any action that intrudes on local zoning authority in "unmistakably clear language of the statute."[6] No such language is to be found in the NPRM nor the comments of the various parties to this proceeding, as no such language exists. Local authority to regulate the placement of hub and relay antennas must be preserved.[7]

Some commenters[8] encourage the Commission to rely upon ancillary jurisdiction to act here. But 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."[9] 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

[6] 47 U.S.C. § 332(c)(7). The Multifamily Broadband Council ("MBC") explains it this way: "If implemented, the proposal would undermine the parallel but separate regulatory regimes applicable to reception and transmission devices, respectively, transforming the OTARD rule from a consumer-protection measure into an end-run around local regulation for the exclusive benefit of wireless carriers." Comments of MBC (filed Jun. 3, 2019) ("Comments of MBC") at 5.

[7] Local Governments are happy to be associated with the Comments of the National League of Cities, National Association of Telecommunications Officers and Advisors (NATOA), National Association of Regional Councils filed June 3, 2019; Comments of the City of Costa Mesa filed June 3, 2019; Comments of the City of Nevada City, California filed June 3, 2019; Comments of the League of Minnesota Cities filed June 3, 2019; and Reply Comments of the Washington Association of Telecommunications Officers and Advisors filed June 12, 2019.

[8] *See*, *e.g.*, Wireless Internet Service Providers Association ("WISPA") Comments (filed Jun. 3, 2019) ("WISPA Comments") at 13.

[9] Local Governments addressed the inability of the Commission to proceed upon Section 4(i) ancillary authority unless its action is "reasonably ancillary to the…effective performance of its statutorily mandated responsibilities." *Am. Library Ass'n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005). 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*. (Comments of 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 (filed Jun, 3, 2019) ("Local Governments Comments") at 15).

matter because, as previously explained, the sole OTARD responsibilities conferred on it by Congress relate to consumer equipment designed to receive *video programming*. As the Real Estate Associations wisely note, "The purpose of ancillary authority is to close gaps, not to open new fields for regulation."[10]

In the *Competitive Networks Order* the Commission correctly distinguished the purpose of Section 207 from the amendments to Section 332 of the Communications Act that Congress made at the same time that it adopted Section 207 in the 1996 Act. *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 (2000) *("Competitive Networks Order")* at 23,032-23,033, ¶¶ 108-112). As NMHC summarized the Commission's discussion: "Section 207 protects customer-end antennas, whereas Section 332(c)(7) protects provider antennas. If fixed wireless providers need additional protection, they must either go to Congress, or show the Commission how Section 332(c)(7) can be applied to their situation."[11]

The Commission has also acknowledged in other proceedings that it cannot rely on other provisions of the Act or exercise ancillary authority to "impose *additional* limitations" on local authority "beyond those stated in Section 332(c)(7)." *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, 24 FCC Rcd. 13994, ¶25 (2009) (emphasis in original) ("*2009 Declaratory Ruling*").[12]

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[10] *See* Joint Comments of the National Multifamily Housing Council, the National Apartment Association, the Building Owners and Managers Association International, the Institute of Real Estate Management, Nareit, the National Association of Realtors, and the National Real Estate Roundtable (filed Jun. 3, 2019) at 41 ("*Real Estate Associations Comments*").

[11] Real Estate Associations Comments at 40.

[12] Courts have universally held that while §332(c)(7) imposes "certain substantive and procedural limitations" on local authority, its purpose is "to preserve local land use authorities' legislative and adjudicative authority." *Omnipoint Commc'ns, Inc. v. City of Huntington Beach*, 738 F.3d 192, 195 (9th Cir. 2013). Section 332(c)(7) does *not* entitle a provider "to construct

A. The Commission Cannot Act Absent A Congressional Delegation Of Authority.

Numerous parties seek to infer a power for the Commission to take any action it chooses so long as its actions result in increased broadband deployment and competition.[13] But in crafting this novel standard, the parties cite to no specific delegation of authority for Commission action.[14] They are proposing a legal standard that does not exist and is far too broad to serve any meaningful limit on the Commission's power.

It is an established tenet of delegated authority, understood and quoted by the Commission, that "'an agency literally has no power to act . . . unless and until Congress confers power upon it.' And so [The Commission's]…role is to achieve the outcomes Congress

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any and all towers that, in its business judgment, it deems necessary"; that "would effectively nullify a local government's right to deny . . . a right explicitly contemplated in 47 U.S.C. §332(c)(7)(B)(iii)." *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, (2d Cir. 1999) at 639 (citing *AT&T Wireless PCS, Inc. v. City Council of Va. Beach*, 155 F.3d 423, 427 (4th Cir. 1998)).

[13] *See, e.g.* Google Fiber Inc. Comments (filed Jun. 3, 2019) at 1-2 ("Bringing these devices within the protection of the OTARD rules would accelerate the deployment of competitive fixed wireless broadband and align the FCC's rules with the direction of technological growth in the fixed wireless industry." Or "Extending the scope of OTARD protections to hub and relay antennas would give wireless broadband providers such as Webpass greater certainty and predictability as they deploy competitive high-speed wireless broadband to new buildings and markets.") While it is not clear that both statements are accurate, neither cites to any delegation of authority from Congress to take such actions. *See also* CTIA Comments (filed Jun. 3, 2019) at 3 ("Consumers' increasing reliance on wireless networks for Internet access, video programming, and other services warrants an examination of the OTARD Rule to explore the inclusion of connecting antennas."). Again, even if true, CTIA fails to provide a legal basis for the Commission to Act. WISPA Comments at 5-9 ("Extending OTARD …Would Promote Broadband Deployment and Competition.").

[14] In pages 12-15 of its comments, WISPA seeks to argue that Section 207 itself is a delegation of authority and the RAY BAUM'S Act could also be viewed as a delegation of authority. We deal separately with each of these claims in Section II B and II, C respectively.

instructs…not to assume that Congress *must* have given us authority to address any problems the Commission identifies."[15]

In the instant matter, Congress has not only not conferred any power on the Commission to take the actions contemplated, but has actually *prohibited* the Commission from taking the action it proposes in Section 332(c)(7), as explained below.

B. Congress Specifically Prohibited The Actions Contemplated In The NPRM And Did Not Create A "New Technology" Exception.

The only party to even cite to a delegation of authority for the proposed Commission action is WISPA.[16] WISPA claims that Section 207 could be viewed as the legal authority to act:

> Section 207 itself can be a source of direct statutory authority for the extension of the OTARD rule for hub and relay antennas because the proposed rule change meets the congressional mandate 'to promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services' through new technology.[17]

First, Section 332(c)(7) unambiguously states it is the *only* provision of the Communications Act that can "affect" local authority over decisions regarding the placement, construction, and modification of personal wireless service facilities.[18]

Secondly, WISPA contends that the OTARD Rule was designed to ensure that consumers had access to a broad range of video programming services. But this argument ignores the fact that Congress specifically identified the video programming services to which the OTARD Rule

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

[16] WISPA Comments at 14.

[17] *Id.*

[18] "*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." 47 U.S.C. § 332 (emphasis added).

was to apply: television broadcast signals, multichannel multipoint distribution service, and direct broadcast satellite services.[19]

Had Congress intended the OTARD Rule to apply to services not yet in existence, it would have qualified this list with "and similar technologies" or "similar services not yet in existence." Instead, it gave a very clear direction to the Commission, which in no way resembles the proposed expansion in the NPRM.

The other problem with WISPA's suggestion is that it requires the reader to ignore Section 332(c)(7), adopted at the same time as Section 207. Section 207 is meant to protect customer-end antennas, and Section 332(c)(7) is meant to protect provider antennas.[20] Nowhere does the Congress say in Section 332(c)(7) that in the event of new technology being developed, the preservation of local zoning authority shall be reduced. But that is exactly the legal argument that WISPA is making, and it runs counter to the letter, spirit, and history of Section 332(c)(7).

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 exclusive domain of state and local governments.[21] In order to manage the siting process, states enacted their own telecommunications laws, and localities served their traditional roles in zoning and permitting.[22] When Congress drafted the Telecommunications Act of 1996, industry representatives lobbied for the complete preemption of local zoning authority.[23] Congress

[19] Telecommunications Act of 1996, Pub. L. 104-104, § 207, 110 Stat. 56 (1996).

[20] *Real Estate Associations Comments* at 41.

[21] *See* The Communications Act of 1934, 47 U.S.C. §§ 151-613.

[22] *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).

[23] *Id.* at 981.

instead chose to "preserve" local zoning authority,[24] and thus Section 332(c)(7) preserved to state and local government authority over "decisions regarding the placement, construction, and modification of personal wireless service facilities."[25]

As the NPRM acknowledges,[26] the Commission specifically excluded hub and relay antennas from the OTARD Rule in the *Competitive Networks Order*, finding 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*.[27]

The NPRM failed to note that the Commission would reaffirm this position in 2004 in *Continental Airlines*:

> In excluding hub and relay antennas from the OTARD rules, the Commission acknowledged the "well-established rights of state and local governments under Section 332(c)(7) to regulate the placement, construction and modification of carrier hub sites" as "personal wireless service facilities" and made it clear that it was not seeking to circumvent those rights.[28]

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[24] *See* H.R. Conf. Rep. No. 104-458, at 207-08 (1996).

[25] 47 U.S.C. § 332(c)(7)(A).

[26] *NPRM* at ¶ 12.

[27] *Competitive Networks* Order 15 FCC Rcd 22983 ¶ 99. In its small cell orders, dealing with antennas that are of similar size to OTARDS, the Commission made clear that small wireless facilities are "personal wireless service facilities" within the meaning of Section 47 U.S.C. § 332(c)(7). *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, WT Docket No. 13-238, 11-59, 13-32, 29 FCC Rcd. 12865, 12973-74, ¶ 270-71 (2014).

[28] *In the Matter of Continental Airlines Petition for Declaratory Ruling Regarding the Over-the-Air Reception Devices Rules*, Memorandum Opinion and Order, ET Docket No. 05-247, 21 FCC Rcd. 13201 (2006) ("*Continental Airlines*").

In *Continental Airlines*, the Commission would also seek to future proof the rules to avoid the type of system gaming the operators are asking the Commission to do in the instant matter and the new technology exemption that WISPA seeks to introduce:

> [C]ustomer-end equipment possessing "the additional functionality of routing service to additional users," would not be treated as a hub or relay antenna and thereby lose OTARD protection, so long as the equipment was "*installed in order to serve the customer on [its] premises*" and otherwise complied with all the rules' limitations (*e.g.*, antenna size).[29]

The Commission's prior actions are consistent with not only Section 332(c)(7)'s plain language, but also its legislative history. Congress intended to deny the Commission the authority to interpret Section 332(c)(7), let alone create new exceptions to its coverage even if to promote broadband deployment, competition, or in the face of new technology as the various industry commenters suggest.[30]

And if one seeks a contemporaneous declaration of Congress as to its intent to limit the Commission's authority to interpret Section 332(c)(7) for the types of exceptions the industry now promotes, Congress' record makes it clear. Congress 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."[31]

Even industry commenters agreed in previous filings 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.'"[32] In the

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[29] *Id.* at 13209 (emphasis in original).

[30] *See supra*, nn. 13 and 14.

[31] H.R. Conf. Rep. No. 104-458, at 208 (1996).

[32] *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*, Petition for Declaratory Ruling, WT Docket

instant matter, Congress has not authorized the Commission to usurp local zoning authority over hub or relay antennas, and WISPA's "new technology" waiver is not founded in any legal theory.[33]

C. The RAY BAUM'S Act And The Regulatory Flexibility Act Confer No Authority To Preempt State And Local Governments.

WISPA relies on both the RAY BAUM'S Act and the Regulatory Flexibility Act for legal authority to expand the OTARD Rule.[34] WISPA's argument, however, is defeated by a simple reading of both Acts' plain language.

Local Governments agree with WISPA that the RAY BAUM'S Act "mandated that the Commission assess the state of competition and ***identify*** any law, regulation, or regulatory practice that poses a barrier to entry or to the competitive expansion of existing providers of communications services."[35] This language provides the Commission a very limited delegation, and is also completely irrelevant to preemption of local authority, which as stated above, must be "unmistakably clear."[36]

WISPA also cites 47 U.S.C. § 163(a) as authority to preempt, which states: "In the last quarter of every even-numbered year, the Commission shall publish on its website and submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate a report on the state of the communications marketplace." The rest of Section 163 outlines what needs to be in the report,

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No. 08-165 (July 11, 2008) at 18 (citing *City of Ranchos Palos Verdes v. Abrams*, 544 U.S. 113, 128 (2005) (Breyer, J., concurring)).

[33] WISPA Comments at 12-15.

[34] WISPA Comments at 15-17.

[35] WISPA Comments at 16 (citing 47 U.S.C. § 163(a) and (b)) (emphasis added).

[36] *See supra*, n. 6.

and as WISPA notes, there should be an emphasis on small entities seeking to enter the market, but the action authorized is to file a report, not preempt any authority.

The only action that the RAY BAUM'S Act requires of the Commission is the identification and reporting of rules that are considered barriers. Section 163 provides no authority to actually remove the barriers once identified, especially when that so-called barrier is specifically reserved to local government by Section 332(c)(7).

Finally, WISPA relies on the Regulatory Flexibility Act ("RFA"), but only cites to the Congressional Findings and Declaration of Purpose section of the Act.[37] Somehow WISPA interprets this section as a "congressional mandate…to reduce, if not eliminate, the significant economic impact of any remaining OTARD restrictions on small businesses." This assertion is unusual in that the RFA does not even mention OTARDs, and is purely procedural in nature.[38]

III. THE RECORD CONTINUES TO LACK ANY PREDICATE FOR COMMISSION ACTION.

A. The Comments And The Record Reveal No Evidence In Support Of The Need To Expand The OTARD Rule To Hub And Relay Antennas.

Industry commenters offer platitudes about how expanding the OTARD Rule will result in enhanced broadband deployment and competition,[39] but fail to demonstrate that broad market failures are a result of a regulatory scheme targeting their deployment. On the other hand, a long time player in the OTARD market, the MBC[40] "does not believe there is sufficient evidence on

[37] WISPA Comments at 17 (citing Congressional Findings and Declaration of Purpose, § (a)(4), 5 U.S.C. §§ 601 *et seq.*).

[38] *See* 47 U.S.C. §§ 601-612.

[39] *See supra*, n. 13.

[40] The MBC describes itself as wireless service providers that are all non-franchised, independent companies and their vendors that provide broadband-related services to Multifamily communities. More information about the MBC may be found at https://www.mfbroadband.org/. MBC has been active in every OTARD proceeding.

the record to justify an action that risks upsetting business models that have served the market well for decades."[41] If there is any new evidence in the record, it is that a number of WISPs have refused to comply with local zoning rules,[42] or find that the rules are too expensive.[43]

This lack of a predicate for action is important not just from a policy standpoint, but also from a legal standpoint. In following Congress' directive, the Commission chose to apply the OTARD Rule only to those regulations and restrictions that *unreasonably* delayed or prevented antenna installation.[44] The Commission understood that its instructions from Congress were not to preempt any regulation or restriction that merely *affected* antenna deployment, but only those that *impaired* a viewer's ability to receive programming. It explained, "By limiting the prohibition of local restrictions to those that 'impair' -- the statutory term -- rather than applying the prohibition to all restrictions that 'affect,' it is more faithful to Section 207 and intrudes less into local governance."[45]

The Telecommunications Act House Report concerning Section 207 explained that Congress sought to preempt restrictions and regulations that "prevent" the use of antennas.[46] WISPA, in essence, advocates for preempting restrictions and regulations that possibly effect antenna deployment. It does not offer any data to support the notion that regulations and restrictions concerning hub and relay antennas "prevent" consumers from receiving service.

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[41] Comments of MBC at 2, 7-8

[42] *See, e.g.*, WISPA Comments at 4.

[43] *See, e.g.*, New Wave Net Corp Comments; Cherry Capital Connection, LLC Comments (filed Jun. 3, 2019).

[44] *See* 47 C.F.R. § 1.4000.

[45] *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, 19282, ¶ 7 (1996).

[46] H.R. Rep. No. 204, 104th Congress, 1st Sess. at 124 (1995).

Instead, it summarizes three anecdotes it already raised before the Commission in an *ex parte* letter.[47] Considering WISPA still has proffered no data or statistical evidence and, as other parties astutely noted, the record is otherwise replete of such evidence,[48] it would seem that such evidence simply does not exist.

In addition, the FCC has been very active in addressing deployment of wireless devices under both Sections 253 and 332. If the local rules were as onerous as the industry commenters claim, they have access to their local federal district courts to preserve their rights. But what they really seek is complete freedom from local zoning requirements.

B. Comments Reveal That Expanding The OTARD Rule Could Actually *Decrease* Broadband Deployment And Competition.

The record not only lacks evidence in support of the proposed expansion of the OTARD Rule, it even contains evidence that expanding the Rule will *harm* broadband deployment and competition. For example, Starry, Inc.'s ("Starry") comments reveal that it works directly with building owners to bring its service to their buildings.[49] Both parties' incentives are aligned because building owners want their tenants to have a choice in service, even when there are already existing options.[50] This partnership with building owners also extends to providing low cost service in affordable and public housing.[51] It would be counterproductive to remove the building owner from this equation, as the Commission proposes to do.

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[47] Letter from Claude Aiken, President and CEO, WISPA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-71 at 2 (filed Mar. 27, 2018).

[48] *See, e.g.*, Comments of MBC at 7-8; *Real Estate Associations Comments* at 29.

[49] Comments of Starry, Inc. (filed Jun. 3, 2019) at 3.

[50] *Id.*

[51] *Id.*

The MBC's comments present a similar theme. They explain that their provider members view their relationship with property owners as mutually beneficial, and that expanding the OTARD Rule as proposed would threaten negotiated deals for access to rooftops.[52] MBC is right to point out the "veil of uncertainty" that will be cast over the numerous rooftop leases in the nation if the OTARD Rule is expanded to cover hub and relay antennas.[53]

Starry's and MBC's sentiments are echoed by the Real Estate Associations. They explain that the NPRM's proposal would introduce uncertainty into the already-competitive market for rooftop space.[54] It would also disrupt the collaborative nature of antenna deployment between providers and property owners.[55]

So it appears that the Commission not only lacks a predicate to act, but that there is superior evidence in the record that supports Commission restraint.

IV. STEPS THE COMMISSION SHOULD TAKE TO MINIMIZE THE DENIAL OF LOCAL ZONING AUTHORITY RESERVED TO LOCAL GOVERNMENTS BY CONGRESS.

As outlined above, Local Governments believes that there has been no predicate for action, and that the Commission lacks the legal basis for its expansion of the OTARD Rule to hub and relay deployments. To the extent that the Commission chooses to proceed regardless of these legal stop signs, Local Governments strongly urge that any order makes the following clear as a means to limit the denial of local zoning authority over hub and relay antennas as reserved by Congress in Section 332(c)(7).

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[52] Comments of MBC (filed Jun. 3, 2019) at 5.

[53] *Id.* at 7.

[54] *Real Estate Association Comments* at 15.

[55] *Id.* at 18.

A. Any Order Must Make Clear Hub And Relay Antenna Deployments Will Still Require An Application To Confirm The Deployment Meets The Public Safety And Historic Preservation Requirements Of A Local Government And Specific Eligibility Requirements Of An OTARD.

Local Governments request that the Commission clarify that hub and relay antennas deployments not be automatically eligible for OTARD status and benefits. Carriers deploying hub and relay antennas must still file applications with the applicable locality to document that they meet OTARD Rule eligibility and comply with local rules to the extent the FCC's rules permit.[56] To this end, the Commission should clarify that the local laws, rules, and ordinances dictating local permitting processes do not constitute restrictions on a user's ability to install, maintain, or use qualifying devices.

This clarification is important in that it preserves local governments' rightful role as zoning authority within their own communities. In addition, the permit process provides local governments a mechanism for determining whether a proposed deployment is potentially hazardous to public safety or a threat to the preservation of prehistoric and historic places.[57]

This is particularly important as WISP members seek permission not only for a small dish on an antenna on the top of a home, they want permission in their own words to deploy "Towers" at a customer location to "get [the] signal above the trees."[58]

B. Any Order Must Make Clear There Are No Changes In Size Limitations And There Is A Limitation To One OTARD Per Site.

The NPRM requests that parties comment on whether the Commission should alter the size of the OTARDs and the number of such devices at any given site.[59] Local Governments

[56] The OTARD Rule only applies to antennas that are one meter or less in diameter or diagonal measurement. 47 C.F.R. § 1.4000(a)(1)(ii).

[57] Under the OTARD Rule, localities are allowed to impose restrictions on qualifying devices that relate to public safety and historic preservation objections. 47 C.F.R. § 1.4000(b).

[58] Comments of New Wave Net (filed Jun. 3, 2019) at 1.

oppose any increase in the eligible size of an OTARD. We agree with the League of Minnesota Cities that a limit per site "would protect against rooftops full of antennas and transmitters which would alter the character of a neighborhood…."[60] and recommend a limitation of single OTARD per site.[61]

1. Size

Industry conceded there is no need for an increase in the size of the OTARD. "Most of the existing WISP antennas comply with being under the 1 meter measurement requirement,"[62] and "[f]ixed wireless antennas…can meet the one meter diameter or diagonal measurement size restriction in the current rules…"[63] Thus, this issue appears to be settled.

2. Number

WISP commenters have been very honest in their assessment that they plan to use any expansion of the OTARD rule, in combination with the Spectrum Act to grow individual sites in numbers of devices and size of equipment.[64] There should be no more than a single OTARD at any given site. Such a limitation is in in line with the original intent of Section 207. Congress never contemplated that any homeowner would need more than one dish or antenna to receive their over-the-air programming.

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[59] *NPRM* ¶ 11.

[60] Comments of Minnesota Cities (filed Jun. 3, 2019) at 4.

[61] The vision of hubs on a single home described by the League of Minnesota Cities at page 4 rings true: "A homeowner could have [an] OTARD for Sprint, Verizon, AT&T, and T-Mobile, in addition to [an] OTARD for satellite television, and another for internet use."

[62] Comments of Interstate Wireless Inc. (filed Jun. 3, 2019) at 4.

[63] Comments of Starry, Inc. at 8.

[64] *See, e.g.*, Comments of Interstate Wireless Inc. (filed Jun. 3, 2019); Comments of New Wave Net Corp (filed Jun. 3, 2019); Comments of Craig Oliver, WaveSpeed Inc. (filed Jun. 3, 2019), Letter of Crown Castle International Corp. to Marlene H. Dortch, Secretary, FCC at 1 (filed May 23, 2019)

That this question even need be answered reflects just how far afield the NPRM has strayed from Section 207. The nature of a hub presents a new complexity to the OTARD Rule because it presents the possibility of more than one antenna at a single location.

Local Governments request that the Commission clarify that there is no increase in size of eligible instruments and that there be no more than a single instrument at any location.

C. Any Order Must Make Clear That OTARDs Are Subject To Radio Frequency Standards And OSHA Safety Requirements.

A review of the docket reveals that parties are worried about the RF emissions of OTARDs[65] and expect the FCC to update its rules to ensure that OTARD deployments are subject to such standards.[66] In fact, as of June 14, more than half of all comments (47 out of 87) address concerns of RF emissions that will result from the proliferation of OTARD deployments based on the proposed expansion.

While local governments cannot establish RF standards,[67] they nevertheless play an important role in enforcing the FCC's RF emissions for telecommunications equipment. Accordingly, Local Governments join with the numerous other parties that call upon the

[65] *See* Comments of Cathy Cook (filed Jun. 13, 2019) ("I am health care practitioner and concerned with the over 28,000 studies showing negative biological impact from our wireless devices."); Reply Comments of Chalene McFarland (filed Jun. 12, 2019) ("Though the telecoms may turn their deaf ears toward any complaint about health effects (1996 Telco Act which the CT supreme court says indemnifies them), the private landowners are not so indemnified against lawsuits by neighbors and public passers-by based on nuisance, disability, assault, and many other legal factors. This is, of course, as the telcos and their abetting FCC want it, i.e., to "externalize" the liabilities created by 5G as they disseminate it without restraint."). *See also* Comments of the Environmental Health Trust (filed Jun. 3, 2019).

[66] Reply Comments of Kimberly Modesitt (filed Jun. 10, 2019) ("The responsible act for Commissioners is to revoke this ruling and focus its money and efforts on updating the 1996 outdated standards that are well overdue. As well if the FCC is not looking at health effects, they need to require the agency responsible to look at the health effects of their products before they are deployed. You can't just deploy something that isn't tested. This basic standard needs to be an FCC requirement before any deployment.")

[67] 47 U.S.C. § 332(c)(7)(B)(iv).

Commission to clarify that local laws, regulations, and ordinances regarding compliance with FCC RF emissions do not constitute restrictions on a user's ability to install, maintain, or use qualifying devices.

D. Any Order Must Make Clear That An OTARD Deployment For A Hub Or Relay Meets All Local Rules Concerning Conducting A Business In The Community.

Support for the proposed expansion in the record is not from consumers, nor consumer interest groups. In fact, the traditional voices of OTARDs are absent from the record.[68] The proponents of this expansion are corporate giants like Google and Crown Castle.[69] Therefore, should the Commission choose to issue an order in this matter, it must make clear that obligations required of a business enterprise in a community are not the types of regulations that the OTARD order forgives.

Parties note that the Commission's proposed expansion of the OTARD Rule to hub and relay antennas will represent a shift in incentives for real estate owners and tenants alike. [70] Antennas located on private property will no longer be solely dedicated to consumer uses, opening a new market for carriers and tower companies alike. Tenants and property owners now will likely view extra space within their premises as an opportunity to earn extra income by renting out space to carriers for their antennas. This proposition becomes more enticing than

[68] Not present in this docket is the Satellite Broadcasting and Communications Association ("SBCA"). SBCA has been involved in every prior OTARD proposal when the issue was consumer interests. SBCA describes itself as the advocate "…for consumer access to the best in satellite delivered services and assurance of its availability at a fair price." *See* http://www.sbca.org/pages/Home.cfm (last visited Jun. 14, 2019.).

[69] *See* Comments of Google Fiber Inc. (filed Jun. 3, 2019) *in passim*; Letter of Joshua Turner to Marleen H. Dortch, Secretary, FCC, at 1 (filed May 23, 2019). Ex parte letter of Crown Castle advocating for the rules change claiming "…the potential benefits for 5G deployment that modification of the OTARD rule might present." Letter of Crown Castle International Corp. to Marlene H. Dortch, Secretary, FCC at 1 (filed May 23, 2019).

[70] *Real Estate Associations Comments* at 5, 13.

other uses of the extra space given localities' inability to enforce land use and zoning restrictions on the antenna per the NPRM. The League of Minnesota Cities understands and explains the threat the NPRM poses this way: "A homeowner could have [an] OTARD for Sprint, Verizon, AT&T, and T-Mobile, in addition to [an] OTARD for satellite television, and another for internet use."[71]

Local Governments urge the Commission to clarify that property owners and tenants will still be subject to all rules regarding conducting a business within a community, including the requirement to obtain a business license and pay any and all associated fees. For these obligations are imposed upon the party, not as an OTARD host, but as an ongoing business concern.

E. Any Order Must Make Clear That Qualifying As An OTARD Deployment Does Not Render An OTARD An "Existing Site" Under 47 U.S.C. § 1455 And 47 C.F.R. § 1.6100.

Starry claims that local governments do not understand Section 6409, and for that reason Starry's sites are not being granted the growth permitted under the Commission's Rules in a timely manner.[72] Local Governments might suggest that Starry does not appreciate the requirements of Section 6409, specifically the requirements that a site be an existing site that has undergone a prior regulatory review. In the 6409 Order, the Commission made it very clear: "[I]f a tower or base station was constructed or deployed without proper review, was not required to undergo siting review, or does not support transmission equipment that received another form of affirmative State or local regulatory approval, the governing authority is not obligated to grant a

[71] Comments of the League of Minnesota Cities (filed Jun. 3, 2019) at 4.

[72] Comments of Starry, Inc. at 5. Since the Starry base station is only 18 inches by 18 inches, Local Governments are hard pressed to understand why Starry needs a 6409 growth pattern, even if it were a permitted deployment.

collocation application under Section 6409(a)…[This] guarantees that the structure has already been the subject of State or local review."[73] It appears that Starry wants both a regulatory free deployment grant pursuant to the OTARD Rule, as well as eligibility for 6409 growth without ever once obtaining regulatory review of the site.

Not unlike Starry, a number of WISPs make clear it is not just OTARD relief that they seek, it is also eligibility to grow their sites as provided by the Spectrum Act, i.e., 47 U.S.C. § 1455 AND 47 C.F.R. § 1.6100. The Commission must avoid any such result.

Craig Oliver of WaveSpeed Inc.[74] explains WaveSpeed, and their fellow WISPs' business plans, in this way: adoption of the NPRM "…in combination with the *Spectrum Act* …[would result in WISPS]… rightfully plac[ing] additional relay equipment at their installation sites."[75] And in this way, Oliver explains, WISPs, and one could infer Starry, will gain a regulatory advantage over traditional mobile or cellular providers, who WaveSpeed explains, unlike themselves, can be regulated by "City jurisdictions."[76]

[73] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, WT Docket No. 13-238, 11-59, 13-32, 29 FCC Rcd. 12865, 12937-38, ¶ 174 (2014). Local Governments appreciate Starry's claim that "fixed wireless networks have a very small aesthetic impact on a community" (Starry at 6) but if that is the case, it is unclear why they seek Section 6409 growth permission to increase a base station from 18 inches by 18 inches to at least 10 feet tall and 6 feet wide, as supposedly permitted by 47 U.S.C. § 1455, and can have a very big impact in terms of connecting unconnected residents or providing a new competitive force in the local broadband market.

[74] Comments of Craig Oliver, WaveSpeed Inc. (filed Jun.3, 2019).

[75] *Id.* at 1(emphasis added).

[76] *Id.*

The Commission should clarify that, by bestowing OTARD status to hub and relay antennas, those antennas do not become "existing" sites for purposes of Section 1.6100 of the Commission's rules.[77]

A basic tenet of the "6409 Growth" collocation rights established in Section 1.6100 is that a local government has had at least one opportunity to review and "permit" the site.[78] Such a site, once reviewed by a local government then becomes "existing" for eligibility purposes under Section 1.6100.

Under the NPRM, local governments are afforded no zoning or permitting discretion with regards to the OTARD deployment. Such a site cannot therefore meet the definition of an "existing" tower or base station eligible for modification that does not involve a substantial change.[79]

Local Governments urge the Commission to clarify that hub and relay antennas deployed pursuant to new OTARD eligibility do not qualify under Section 1.6100 as "existing."

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[77] 47 C.F.R. § 1.6100. "(5)Existing. A constructed tower or base station is existing for purposes of this section if it has been reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process, provided that a tower that has not been reviewed and approved because it was not in a zoned area when it was built, but was lawfully constructed, is existing for purposes of this definition."

[78] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, WT Docket No. 13-238, 11-59, 13-32, 29 FCC Rcd. 12865, 12937-38, ¶ 174 (2014). ("Thus, if a tower or base station was constructed or deployed without proper review, was not required to undergo siting review, or does not support transmission equipment that received another form of affirmative State or local regulatory approval, the governing authority is not obligated to grant a collocation application under Section 6409(a)…[This] guarantees that the structure has already been the subject of State or local review.").

[79] *Id.*

F. The Commission Must Eliminate Or Amend The Automatic Stay Component Of The OTARD Rule.

In its current form, the OTARD Rule allows consumers to file a complaint at the Commission if they feel that a local rule or ordinance restricts its ability to install, maintain, or use a qualifying device. Such a complaint forces a local government or homeowners association to suspend all enforcement action until the Commission processes the complaint. Local Governments request the Commission reconsider the fairness of this provision of the rule, particularly in light of the fact that the Commission has taken years to review complaints filed by providers against cities challenging particular ordinances.[80] The Commission can, and should, strike a better balance of equities between providers and localities, as the automatic stay component of the OTARD Rule represents a trampling of localities' rights.

In 2013, the Intergovernmental Advisory Committee ("IAC") released an advisory recommendation to the Commission regarding the automatic stay mechanism of the OTARD Rule.[81] The IAC highlighted the significant delays in processing complaints pending at the Commission. In the case of Philadelphia, the Commission took *six years* to decide whether an ordinance violated the OTARD Rule.[82] For the cities of Chicago and Boston, the Commission has never put the petitions out for public comment.[83] Throughout these delays, localities remain

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[80] *See, e.g., Satellite Broadcasting & Comm. Assoc.*, Declaratory Ruling, DA 18-393 (2018) (decided more than six years after the Commission sought comment on whether the City of Philadelphia's ordinance violated the OTARD Rule). See also OTARD petitions filed against the Cities of Chicago and Boston petitions. DA 12-663. In the case of Boston, the Petition has never been put out for public comment. *See infra*, n. 81.

[81] INTERGOVERNMENTAL ADVISORY COMMITTEE, *Intergovernmental Matters Respecting the Commission's Over-the-Air Reception Devices Rule*, Mar. 18, 2013 (*available at* https://transition.fcc.gov/statelocal/recommendation2013-04.pdf).

[82] *Satellite Broadcasting & Comm. Assoc.*, Declaratory Ruling, DA 18-393 (2018).

[83] While the City of Chicago agreed to hold the matter in abeyance, the City of Boston did not.

unable to enforce lawful ordinances, solely because complaints were filed. And these complaints were not filed by consumers, but rather by industry stakeholders.[84]

The IAC recommended that the Commission "limit any substantive preemption with respect to the ordinances in question to cases of demonstrated impairment of antenna installation or use." Local Governments call the recommendation of the IAC to the Commission's attention, adopt its logic, and incorporate the recommendation of the IAC by reference.

V. CONCLUSION

For the legal, policy, and practical reasons expressed above, Local Governments 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 Local Governments assert that this legal authority does not exist.

Respectfully submitted,

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[84] The SBCA filed all three petitions. *See supra*, n. 68.