

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of )  
 )  
Updating the Commission’s Rules for Over- ) WT Docket No. 19-71  
the-Air Reception Devices )

**REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF  
TELECOMMUNICATIONS OFFICERS AND ADVISORS  
AND THE NATIONAL LEAGUE OF CITIES**

**A. INTRODUCTION**

The National Association of Telecommunications Officers and Advisors (“NATOA”)<sup>1</sup> and the National League of Cities (“NLC”)<sup>2</sup> (the “Municipal Organizations”) submit these reply comments in the Notice of Proposed Rulemaking (“NPRM”) released by the Federal Communications Commission (“Commission”) on April 12, 2019, in the above-captioned proceeding.<sup>3</sup>

As stated in our Comments, the Municipal Organizations support the Commission’s goal of advancing broadband deployment. Local governments understand that broadband is essential to the economy and the quality of life for residents and businesses and have long worked with providers to address broadband needs. However, the record in this docket does not support the Commission’s authority to enact the proposed rules nor that the rules would have any meaningful impact on broadband deployment. Wireless providers’ desire to have the unfettered ability to

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<sup>1</sup> NATOA’s membership includes local government officials and staff members from across the nation whose responsibility is to develop and administer communications policy and the provision of such services for the nation’s local governments.

<sup>2</sup> NLC is the oldest and largest organization representing cities and towns across America. NLC represents 19,000 cities and towns of all sizes across the country.

<sup>3</sup> *In re Updating the Commission’s Rules for Over-the-Air Reception Devices*, WT Docket No. 19-71, FCC 19-36 (April 12, 2019).

mount over-the-air reception devices (“OTARDs”) without regard to local zoning regulations, lease restrictions or any number of other preexisting (and often mutually agreed upon) limitations is not sufficient to support the proposed rules.

## **B. DISCUSSION**

### ***1. The Record Does Not Establish that the Commission has Authority to Implement the Proposed Rules***

The comments filed in this docket have not provided support for the proposition that the Commission has broad authority to nullify any state, local or private rules or restrictions on hub and relay antennas. Aside from one commenter’s strained attempts to cite statutory support,<sup>4</sup> most commenters either questioned the Commission’s authority to act or, tellingly, ignored the question entirely.

As explained in the Municipal Organizations’ Comments, the comments of other commenters,<sup>5</sup> and as previously acknowledged by the Commission, hub and relay antennas fall squarely under the umbrella of Section 332(c)(7). As such, no other provision of Chapter 5 of the Communications Act can be used to support an action that “limit[s] or affect[s] the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of” these facilities.<sup>6</sup>

In an attempt to get around the clear roadblock of Section 332(c)(7), WISPA claims that some OTARDs may not be used to provide personal wireless services and thus are not personal wireless services facilities subject to Section 332(c)(7). Not only is there no record evidence to support this hypothetical, it does not provide support for Commission authority to act. As we

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<sup>4</sup> Comments of the Wireless Internet Service Providers Association, filed June 3, 2019 (“WISPA Comments”).

<sup>5</sup> See, e.g., Comments of The United States Conference of Mayors, *et al.*, filed June 3, 2019 at p. 12-13; Joint Comments of the National Multifamily Housing Council, *et al.*, filed June 3, 2019 at p. 40.

<sup>6</sup> Section 332(c)(7)(A).

previously explained, Section 207 was not intended to and does not reach hub and relay facilities.<sup>7</sup> WISPA attempts to rewrite the statute, arguing that Section 207 covers any OTARD that receives “new technologies.”<sup>8</sup> Congress expressly limited that Section to devices that receive “television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.” WISPA’s reference to “new technologies” is nowhere in Section 207.

Nor does the RAY BAUM’S Act’s “Communications Marketplace Report” requirement provide authority to preempt a wide swath of ordinances or private covenants and leases. To the contrary, Congress asked the Commission to “*assess* whether laws, regulations, regulatory practices ... pose a barrier to competitive entry into the communications marketplace ... .” (emphasis added).<sup>9</sup> Had Congress intended to delegate to the Commission broad authority to preempt not only state and local laws but also privately agreed upon restrictions, it would have (and must have) said so directly rather than merely asking for a report.<sup>10</sup>

## ***2. The Record Does Not Support the Proposed Rules***

In addition to the sparse record on legal authority, the record shows scant factual support for the need to extend the OTARD rules. What the record shows is that providers simply do not want to have to follow local zoning requirements or honor lease or homeowner associations’ covenants and restrictions. One commenter makes clear that its support for the expanded OTARD rules is based on a desire to avoid the already streamlined process set forth in the Section 6904 rules.<sup>11</sup> Another commenter noted it is “very interested” in deployment on buildings “without the potential of burdensome restrictions imposed by local and private entities.”<sup>12</sup> The desire to avoid

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<sup>7</sup> Comments of NATOA, NLC and NARC, filed June 3, 2019 at p. 2-3 (“Municipal Organizations’ Comments”).

<sup>8</sup> WISPA Comments at p. 14.

<sup>9</sup> 47 U.S.C. § 163(b)(3)

<sup>10</sup> See *City of Dallas v. FCC*, 165 F.3d 341, 347-48 (5th Cir., 1999); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

<sup>11</sup> Comments of Starry, Inc. at p. 5.

<sup>12</sup> Comments of Google Fiber, Inc., filed June 3, 2019 at p. 3.

legal requirements—without any facts alleging these restrictions “impair a viewer’s ability to receive video programming services”<sup>13</sup>—does not create a record on which the Commission can or should act. And while WISPA cites several examples of alleged denials of antenna deployment,<sup>14</sup> they both involve *towers* to which a provider wanted to add additional facilities. Congress surely did not intend that Section 207 would allow unlimited equipment to be placed on towers without regard to local zoning requirements or homeowner association restrictions.

On this record, the Commission does not have a reasonable basis to extend the OTARD rules as proposed in the NPRM.

### ***3. If the Commission Proceeds, It Must Clarify and Limit the Rules***

As noted in the Municipal Organizations’ Comments, there will be significant, negative impacts should the proposed rules be adopted.<sup>15</sup> While we do not believe the Commission can or should adopt the proposed rules, should the Commission choose to move forward, the rules must be clarified and limited. The Municipal Organizations support the steps to limit the denial of local zoning authority proposed in the Reply Comments of the United States Conference of Mayors, *et al.*

## **C. CONCLUSION**

The Municipal Organizations strongly urge the Commission to reject the proposed changes to the OTARD rules. The record does not demonstrate the legal authority or factual predicates needed to support the sweeping expansion of what was intended to be a limited preemption.

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<sup>13</sup> 47 U.S.C. § 303 (note).

<sup>14</sup> WISPA Comments at p. 4.

<sup>15</sup> *See* Municipal Organizations’ Comments at p. 4-6.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Nancy L. Werner', with a long horizontal flourish extending to the right.

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