Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

REPLY COMMENTS OF COMMUNITY ASSOCIATIONS INSTITUTE

Community Associations Institute (CAI) submits these reply comments in response to comments filed on the *Public Notice* in the above-referenced proceeding proposing to vitiate leases, community association covenants, and certain State and local law pertaining to wireless communications equipment.

I. COMMENTERS AGREE THE MARKETPLACE FOR WIRELESS BROADBAND INTERNET SERVICES IS COMPETITIVE AND CITE COOPERATION IN DEPLOYMENT OF WIRELESS BROADBAND INFRASTRUCTURE

A. Proponents of and parties opposed to the Commission's proposal cite evidence of competitive wireless communications marketplace

CAI notes that commenters are in general agreement that the market for wireless broadband Internet is competitive and that property owners actively seek to secure broadband Internet service for residents.[1] Further, commenter Wireless Internet Service Providers Association (WISPA) admits

[1] See comments in this proceeding of the Multifamily Broadband Council stating, "…the record does not contain evidence in support of the assumption—evidence showing that the necessity of negotiating access deals with MDU owners constitutes an unreasonable obstacle to the deployment of wireless networks nationwide." See also comments of the National Multifamily Housing Council, et al., stating competition has, "…driven property owners to ensure that broadband infrastructure is available in their communities and other buildings. This deployment has taken place without government mandates…" See also comments of Community Associations Institute stating, "…CAI members have a keen interest in the accessibility of wireless broadband Internet

"[multifamily communities and local governments] have adopted laws and policies that encourage broadband entry and competition."[2]

The Commission inquires if wireless service providers face a competitive disadvantage with respect to deployment of certain wireless network facilities.[3] The record established in this proceeding overwhelmingly demonstrates localities, multi-dwelling unit (MDU) building owners, and community associations are receptive to the deployment of fixed wireless broadband infrastructure. This record contravenes any impetus for preempting a declaration of covenants that establishes architectural controls over the use of property subject to such covenants.

B. Commenters fail to establish a record demonstrating a lack of fixed wireless broadband infrastructure deployment

The instant proceeding appears predicated on the assumption wireless Internet service providers (WISPs) face insurmountable obstacles in deploying fixed wireless Internet broadband infrastructure. This assertion is unproven.

In its proposal, the Commission sought comment on instances of community associations and localities preventing the deployment of fixed wireless Internet infrastructure.[4] As noted, the Commission was supplied with unequivocal statements by MDU owners, community associations, and municipalities that market dynamics in response to consumer demand have resulted in wide

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service because demand by community association homeowners and residents for broadband Internet service is high…Associations are actively responding to these demands." See also comments of the Wireless Internet Service Providers Assn., stating, "…modern fixed broadband networks, even in rural areas, are densifying to place transmission facilities closer to the consumer to increase capacity...this development is being fueled in part by consumer demand for more capacity…:"

[2] Comments of the Wireless Internet Service Providers Association, WT-Docket No. 19-71, submitted June 3, 2019, p. 3.

[3] *Updating the Commission's Rule for Over-the-Air-Reception-Devices*, WT- Docket No. 19-71 (rel. April 12, 2019), ¶. 9.

[4] *Ibid.*, ¶. 10.

access to broadband Internet services, including fixed wireless broadband Internet service. As noted, commenter WISPA admits this is the case.

C. Community association covenant enforcement is an elemental premise of property law

Commenter WISPA—a strong proponent of and petitioner for this proposal—offers only one (1) example of a community association objecting to the siting of a wireless Internet facility.[5] According to the Foundation for Community Association Research, there are an estimated 344,500 community associations in the United States and its territories.[6] On its face, that commenter WISPA can offer the Commission only one example of an association objection evidences that fixed wireless Internet infrastructure deployment is not impeded by community associations in the current market. The burden is on commenter WISPA to show a widespread, pervasive pattern and practice of market disruption—they fail to do so because no such record exists.

In an *ex parte* meeting and letter to the Commission, commenter WISPA further discussed its one example of a WISP being "burdened by *private restrictive covenants."*[7] In these communications, WISPA admits the WISP in question took overt actions *in violation of the community's covenants*. Is a community association to ignore violations of its covenants by an interloper?

Community association covenants constitute a contract that runs with the land, binding property owners and successors concerning the use of all land—*including land reserved for the*

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[5] Comments of the Wireless Internet Service Providers Association, WT-Docket No. 19-71, submitted June 3, 2019, p. 4.
[6] Foundation for Community Association Research, *National and State Statistical Review for 2017—Community Association Data* (CAI Press, Falls Church, Va, June 2018). Available at https://foundation.caionline.org/wp-content/uploads/2018/06/2017StatsReview.pdf.
[7] Letter from Claude Akin, WISPA President/CEO, to Marlene H. Dortch, FCC Secretary, WT Docket No. 17-79 (filed March 14, 2019), p. 2. [*emphasis in original]*

exclusive use of an owner—that is subject to the covenant.[8] A community association's enforcement of covenants is necessary to ensure property owners receive the benefit of the covenant.[9] Community association covenants sustain the value of real estate subject to the covenant to the direct benefit of property owners.[10] Association homeowners have repeatedly expressed a strong belief that association covenants protect and enhance property values.[11]

In none of its communications (either *ex parte* letters or summaries of meetings or in its comments on this proceeding) does WISPA explain its member's willful violation of the community association's covenants. Rather, commenter WISPA offers the violative conduct of its member as a justification for all WISPs to be relieved of obligations to comply with lawful community association covenants.

There is no record evidencing an attempt by the WISP to negotiate with the association to site its infrastructure within the association or on association common property. There is no record the WISP sought prior approval from the association for its installation in the community. There is no

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[8] See, e.g., *Mathis v. Mathis* (1948), 402 Ill. 66, holding in a conveyance of a real estate interest containing a covenant, "the covenant runs with the land and is binding upon subsequent owners." See additionally, *Rosteck v. Old Willow Falls Condominium Assn.*, 899 F.2d 694, "But the condominium declaration is a contract…"

[9] See, e.g., *Village Gate Homeowners Association v. Hales* 219 Va. 321 (1978), "Elementary is the proposition that the right to enforce a restrictive covenant of this type may be lost by waiver, abandonment, or acquiescence in violations thereof." See also, *Aucoin v. Copper Meadows Homeowners Association, Inc.*, No. 18-811 at *12 (La. Ct. App. Apr. 3, 2019), "Building restrictions can terminate by the abandonment of the whole plan set forth in the restrictions, whereby the entire plan is abandoned and the affected area is freed of all restrictions, or by a general abandonment of any particular restriction, causing the affected area to be freed of only that restriction."

[10] Wyatt Clarke and Matthew Freedman, "The rise and effects of homeowners associations," *Journal of Urban Economics*, Vol. 122, July 2019. Clarke and Freedman show homes in homeowner associations sell at a 4 percent price premium—on average $13,500—over non-homeowner association housing.

[11] Foundation for Community Association Research, *2018 Homeowner Satisfaction Survey* (CAI Press, Falls Church, Va., June 2018). Available at https://foundation.caionline.org/wp-content/uploads/2018/06/HOMEsweetHOA_2018.pdf.

record of the WISP having considered any alternatives that might involve installing its equipment on non-association governed property in the immediate vicinity of the association—in rural areas land owned in fee simple and unencumbered by association covenants is abundant.

One part of the record is clear. The record demonstrates the WISP made no attempt to comply with the association's covenant. The WISP simply moved forward with apparent disregard for the consequences of its conduct.

Willful disregard for or ignorance of community covenants and State law is no legitimate cause for Federal preemption of a lawful declaration of covenants. CAI reiterates its comments that community associations, as a matter of routine, negotiate to site infrastructure to provide community residents access to broadband Internet service, including fixed wireless broadband Internet service. WISPs should not be granted special rights over other commercial entities due to a failure to know the laws of the states in which they operate or a failure to understand elementary concepts of property law.

Commenter WISPA asserts that association covenants must be preempted by the Commission due to one of its members persuading a homeowner to take a clear violation of a community covenant while on the other hand admitting associations, MDUs, and localities are adopting policies to facilitate deployment of fixed wireless Internet infrastructure. This is a baseless request.

II. CAI CONCURRS WITH NUMEROUS COMMENTS ESTABLISHING LACK OF STATUTORY AUTHORITY

A. CAI concurs with comments showing the Commission lacks direct or ancillary statutory authority to implement proposal

Other commenters on the Commission's proposal note, "Nothing in Section 207 of the Telecommunications Act of 1996 (the "Act") authorizes the proposed new rules…This language does not support the Commission's assertion of authority to preempt local zoning regulations over the

placement of antennas that have nothing to do with viewing video programing services."[12] Commenters also demonstrate the infrastructure covered by the proposal are personal wireless services facilities, subject to Section 332(c)(7) of the Communications Act, which preserves local zoning authority over such facilities.[13] The Commission lacks the direct preemptive statutory authority to adopt this proposal.

Additional commenters note, "The Commission may exercise ancillary authority only if there is a link between the exercise of that authority and an express delegation of power by Congress in the Communications Act."[14] Commenters note the only link to the Commission lawfully exercising its ancillary authority is Section 207, but Section 207 does not extend the Commission's preemption authority to hub or relay antennas in the manner the Commission proposes. Commenters write, "Section 207 was necessary because Congress correctly believed that without it the Commission could not preempt zoning laws and HOA rules, much less lease terms. Section 207 is the outer limit of the Commission's power in this area."[15]

B. Commenters support CAI assertion that Commission's proposal constitutes a taking

In comments on the proposal, CAI noted, "a rule allowing commercial communications equipment to be sited on common property without the association's explicit consent is a compelled physical occupation of such property."[16] CAI further noted occupation of association common

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[12] Comments of the National Association of Telecommunications Officers and Advisors, the National League of Cities, and the National Association of Regional Councils, WT-Docket No. 19-71, submitted June 3, 2019, p. 2.
[13] 47 U.S.C. § 332(c)(7)
[14] Comments of the National Multifamily Housing Council, et al., WT-Docket No. 19-7, submitted June 3, 2019, p. iv.
[15] *Ibid., p. 38.*
[16] Comments of Community Associations Institute, WT- Docket No. 19-71, p. 8.

property—even property reserved for an owner's exclusive use—by an interloper without the invitation of the association would be an intrusion.[17] The same extends to all property governed by an association covenant, including homes and lots of property owners in the association.

Other commenters note that because hub and relay antennas installed in units or other land subject to lease (CAI also asserts a covenant) are not customer end equipment, the proposed rule illegally impairs important property rights protected by the United States Supreme Court in *Lorretto v. Manhattan Teleprompter CATV Corp.*[18] The commenters note the antennas installed on property subject to restrictions would "presumably meet the needs of end customers, [but] they would also have other features that meet only the needs of the third party service provider. Consequently, if the Commission adopts a rule that requires property owners to accept the installation of such equipment, the Commission will have…stepped into *Loretto* territory."[19]

C. Absent clear Congressional authorization the Commission lacks authority

Commenter WISPA asserts that Congress somehow grants new authority to the Commission through refined reporting requirements in Section 402 of the RAY BAUM'S Act of 2018.[20] Commenter WISPA stretches a consolidation of burdensome and duplicative reporting requirements to a general grant of authority to eliminate, "any restriction or impediment that hampers infrastructure deployment for an existing fixed wireless provider…"[21]

Reporting requirements do not convey new statutory authority. More specifically, Congress was explicit that reporting requirements in the RAY BAUM's Act do not expand the Commission's authority. Section 403 of the RAY BAUM's Act directly addresses amendments to reporting

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[17] *Ibid., p. 9.*
[18] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).
[19] Comments of the National Multifamily Housing Council, et al., p. 35.
[20] P.L. 115-141, Title IV, Section 402.
[21] Comments of the Wireless Internet Service Providers Association, p. 16.

requirements cited by commenter WISPA, stating, "Nothing in this title or the amendments made by this title shall be construed to expand or contract the authority of the commission."[22]

Commenters have demonstrated (1) that Section 207 of the Telecommunications Act of 1996 is limited to consumer end user antennas, not antennas hub or relay antennas used by entities for general commercial activities; (2) that Section 332(c)(7) of the Communications Act of 1934 unambiguously preserves local zoning authority over the siting of hub and relay antennas; and, (3) that Congress has not expanded Commission authority in the manner proposed to be exercised.

III. Conclusion

Based on these comments and the comments of other interested parties, CAI respectfully urges the Commission (1) undertake no changes to the existing OTARD rule and (2) seek new authority from Congress concerning deployment of communications infrastructure, including fixed wireless broadband Internet infrastructure, if future study produces empirical data demonstrating a policy requirement for additional statutory authority.

Respectfully submitted,

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[22] P.L. 115-141, Title IV, Section 403.