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

In the Matter of	)	
	)	
Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies	)	WT Docket No. 13-238
	)	
Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting	)	WC Docket No. 11-59
	)	
Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers	)	RM-11688 (terminated)
	)	
2012 Biennial Review of Telecommunications Regulations	)	WT Docket No. 13-32

COMMENTS OF RIVERSIDE COUNTY OFFICE OF EDUCATION

Riverside County Office of Education ("RCOE"), a public agency that provides educational, financial, legislative, and leadership services and support to all 23 K-12 school districts serving approximately 426,000 students in Riverside County, California,[1] hereby

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[1] Originally, founded in 1893 as the Office of the Riverside County Superintendent of Schools, the Riverside County Office of Education (RCOE) is comprised of the elected Riverside County Superintendent of Schools and the array of individuals employed by the County Superintendent to help fulfill their statutory duties and responsibilities. A seven member elected County Board of Education is affiliated with the RCOE. The primary work of the RCOE is divided into the following three areas:

(1) Providing overarching educational goals, support and services leading to high school graduation, college readiness, and career preparedness of all county students enrolled in public education.

(2) Providing financial oversight and support of the school districts in the county to ensure fiscal solvency and compliance with statutes.

(3) Providing credential oversight and support to ensure all teachers in the county are properly authorized for the subject area(s) they are assigned to teach.

For more details about RCOE, see http://www.rcoe.us/ .

submits comments in response to the Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding. RCOE shares the Commission's desire to promote broadband deployment, but urges that Commission not to adopt rules that impinge upon local regulatory authority over wireless siting, or upon local public agencies acting in their proprietary capacity as landowners. These matters are better left for local, community decision-making processes.

I. RCOE RECOGNIZES THE IMPORTANCE OF BROADBAND IN K-12 EDUCATION AND GENERALLY SUPPORTS THE COMMISSION'S EFFORTS AT ACCELERATING BROADBAND DEPLOYMENT.

RCOE has developed a state-wide reputation for first-class services in support of high quality education for all county students. We want every student to have the skills and knowledge they need to have the best opportunity to experience a high quality of life in their future.

RCOE's pledge is: "All students in Riverside County will graduate from high school well prepared for college and the workforce." RCOE recognizes that today being well prepared for college and the workforce necessarily requires broadband as a vital component of K-12 education. Access to broadband at school and at home benefits students and teachers alike. While broadband is not a panacea for education reform, it does serve as an essential means of delivering content, applications and tools that engage students in the learning process, enhance learning outcomes, and facilitate creativity, collaboration and innovation. It also permits access to information, online courses, and research not readily available locally.

RCOE actively supports the deployment of broadband to Riverside County schools by providing a variety of information technology services for its own use and for the use of contracting school districts. RCOE's Network Services unit is charged with keeping RCOE and contracting districts online through the architecture and management of data networks. Currently RCOE's Internet connection at the Riverside, California location consists of 10 GbE circuits,

providing significantly faster download times for school districts using RCOE as their Internet Service Provider. RCOE recently embarked on a full-scale effort to make all our sites WiFi-capable by installing access points at all our locations throughout the county. We are very grateful for the E-Rate program which subsidizes the costs. Because we recognize the benefits of broadband for the educational needs of our students, we generally support the Commission's efforts at accelerating broadband deployment. Nevertheless, we have concerns about the breadth of some of the proposals in the Commission's current rulemaking proceeding, which we discuss below.

II. RCOE URGES THE COMMISSION NOT TO ADOPT NATIONAL RULES THAT WOULD UNDERMINE LOCAL REGULATORY AUTHORITY OVER WIRELESS SITING.

Although RCOE does not itself have zoning-type authority, we are very concerned that the Commission has, in this NPRM, proposed rules that, if adopted, would seriously undermine local regulatory authority over wireless siting. In RCOE's view, a local, community focused approach works well for any decisions that involve many stakeholders. Public education, as an example, has many stakeholders and we strive to work cooperatively with all of them in order to ensure that all students succeed. As a "collaborative" organization RCOE's aim is to listen to, share with, participate in and work together with other educational agencies, professional organizations, community and civic groups, businesses, parents and students and governmental entities. In our view, this approach has served all stakeholders well.

Similarly, RCOE believes that land use issues such as wireless facilities siting are best addressed by local, community-level decision-making and collaboration. RCOE opposes the adoption of national rules that preempt local authority and mandate approval of wireless installations without the involvement of stakeholders in the local community or any consideration of the community's particular aesthetic, environmental, historic preservation,

public safety and similar concerns. We urge the Commission to refrain from adopting any such rules. RCOE would prefer that the Commission focus its efforts on facilitating collaborative solutions at the local level.

III. RCOE AGREES WITH THE COMMISSION'S TENTATIVE CONCLUSION THAT SECTION 6409(A) DOES NOT APPLY TO PROPRIETARY ACTIONS OF PUBLIC AGENCIES.

RCOE is not a zoning authority, but it is the owner of valuable public property. We operate WiFi access points on our property with physical connectivity back to our broadband wired networks. RCOE has been approached on occasion by wireless carriers interested in installing wireless antennas and facilities on our property but we do not currently have any such facilities installed. The Commission's NPRM asks how Section 6409(a) of the *Middle Class Tax Relief and Job Creation Act of 2012*[2] applies to proprietary activities, and proposes to interpret the statute to apply "only to State and local government acting in their role as land use regulators" and not "to such entities acting in their capacities as property owners."[3] RCOE agrees with this interpretation.

The Commission's tentative conclusion—that Section 6409(a) should *not* apply to the acts of property owners like RCOE—is correct as both a matter of law and policy. While Section 6409(a) may appear broad enough to reach any activity of a state or local government or agency, the phrase "request" in Section 6409(a) suggests that what is at issue is the response to an application for regulatory permission. Thus, the essence of the provision (that the local authority "may not deny" the request) can only be understood as preemptive.

As a legal matter, federal preemption applies only to "state regulation," not to proprietary

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[2] 47 U.S.C. § 1455(a).

[3] NPRM at ¶ 129.

actions.[4] Just as the Telecommunications Act "does not preempt nonregulatory decisions of a state or locality acting in its proprietary capacity,"[5] neither does Section 6409(a). Commission rules dictating how RCOE (or any public agency) must contract for the use of its property would raise serious constitutional issues under the Takings Clause and the Tenth Amendment.

The Commission also seeks comment on "how to ensure in which capacity governmental action is requested and in which capacity a governmental entity is acting" and "whether we need to address how Section 6409(a) applies to requests seeking a government's approval in both capacities."[6] In RCOE's view, the Commission does not need to develop any rules to ensure in which capacity a government is acting. When a government is leasing its property like a private landlord, it is acting in a proprietary capacity, even if the property is also subject to land-use approvals. This is certainly true for RCOE. It has no regulatory authority over land use, and has no zoning powers, and is thus necessarily exercising authority just as a private landowner would, even if facilities placed on its property may be subject to land-use review by other California authorities.[7]

The Commission's tentative conclusion that Section 6409(a) should not apply to proprietary acts of public entities like RCOE is also correct as a matter of policy, as RCOE's own experience demonstrates. RCOE's core functions are educational. It is not in the business

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[4] *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 219 (1993); *American Airlines v. Dept. of Transp.*, 202 F.3d 788, 810 (5th Cir. 2000) (recognizing that in "determining whether government contracts are subject to preemption, the case law distinguishes between actions a State entity takes in a proprietary capacity—actions similar to those a private entity might take—and its attempts to regulate. The former is not subject to preemption; the latter is.").

[5] *Sprint Spectrum v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002); *American Airlines v. Dept. of Transp.*, 202 F.3d 788, 810 (5th Cir. 2000); *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (recognizing that Section 253(a) preempts only "regulatory schemes"); *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 219 (1993) ("[P]re-emption doctrines apply only to state regulation"); *Omnipoint Communications v. City of Huntington Beach*, No. 10-56877 (9th Cir. Dec. 11, 2013).

[6] NPRM at ¶ 129.

[7] Cal. Gov't Code § 53091.

of leasing space to wireless carriers and RCOE does not currently have any wireless facilities installed by wireless carriers on any of its property. However, it does have its own WiFi facilities and is concerned that these facilities may be swept up inadvertently by a broad interpretation of Section 6409(a).

For example, the discussion in paragraphs 103 and 104 of the NPRM suggest that Section 6409(a) may be interpreted broadly to include "collocation, removal, or replacement of equipment used in connection with any Commission-authorized wireless transmission, licensed or unlicensed, terrestrial or satellite, including commercial mobile, private mobile, broadcast, and public safety services, as well as fixed wireless services such as microwave backhaul or fixed broadband." RCOE is concerned that a broad interpretation of the scope of facilities covered Section 6409(a), together with a determination that Section 6409(a) applies to proprietary activities, would potentially subject its WiFi facilities to collocation requests pursuant to Section 6409(a). The Commission will need to be very clear about what types of facilities are covered and not covered by Section 6409(a) to avoid unintended consequences.

However the Commission interprets the facilities covered by Section 6409(a), it should not attempt to regulate RCOE's proprietary actions. The Commission asks: "[W]ould Section 6409(a) impose no limits on such a landlord's ability to refuse or delay action on a collocation request?"[8] In RCOE's view it would not impose any limits, nor should it. A rule mandating that RCOE, as property owner, be *required* to approve any modifications to any of its sites, or be required to lease or license the site to collocators of wireless facilities—would undermine the Commission's goal of accelerating broadband deployment. It would make RCOE, and others like it, hesitant to install wireless facilities for their own core purposes or to agree to license or

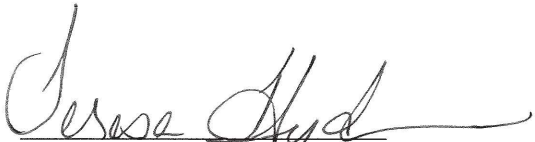
[8] NPRM at ¶ 129.

lease space to wireless service companies at all for fear that doing so would force the agency to take on the burden of managing third party activities on its property that are not desired and do not serve its core functions.

III. CONCLUSION

The Commission should encourage collaborative ways to accelerate broadband deployment, not adopt rules that undermine local land use and zoning authority. The Commission should affirm its tentative conclusion that Section 6409(a) only affects state, local, and tribal land-use regulation—not proprietary or contractual activity. Interfering with RCOE's decisions about whether or how to use, lease or license its property would conflict with well-established legal and constitutional principles. It would also undermine the Commission's policy goals by making it unlikely that RCOE would consider opening its property to wireless service companies at all.

Respectfully submitted,



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February 3, 2014