

**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)

**COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS
OFFICERS AND ADVISORS, THE NATIONAL LEAGUE OF CITIES AND
THE NATIONAL ASSOCIATION OF REGIONAL COUNCILS**

A. INTRODUCTION

The National Association of Telecommunications Officers and Advisors (“NATOA”),¹ the National League of Cities (“NLC”),² and the National Association of Regional Councils (“NARC”),³ (the “Municipal Organizations”) submit these comments in response to the Notice of Proposed Rulemaking (“NPRM”) released by the Federal Communications Commission (“Commission”) on April 12, 2019, in the above-captioned proceeding.⁴

The Municipal Organizations support the Commission’s goal of advancing broadband deployment. We also appreciate the unique role of Wireless Internet Service Providers (WISPs), which have stepped up to fill service gaps in rural and low-income communities with limited wireline infrastructure investment and have sometimes even been created within or by those communities themselves. However, we disagree with the Commission’s proposed approach, which

¹ 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.

² 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.

³ NARC represents more than 500 councils of government, metropolitan planning organizations, and other regional planning organizations throughout the nation.

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).

represents a serious misinterpretation of its statutory authority, would unnecessarily harm local governments, and is unlikely to achieve the desired goal of increasing broadband access for un- and underserved residents.

B. DISCUSSION

1. The Commission Lacks Authority to Implement the Proposed Rules

As the Commission recently noted, “[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.’ And so our role is to achieve the outcomes Congress instructs, invoking the authorities that Congress has given us—not to assume that Congress must have given us authority to address any problems the Commission identifies.”⁵ Though the Commission’s goal of facilitating the deployment of 5G and other advanced wireless technologies is laudable, Congress has not authorized the Commission to usurp local zoning authority over hub or relay antennas.

Nothing in Section 207 of the Telecommunications Act of 1996 (the “Act”) authorizes the proposed new rules. Section 207 states: “[T]he Commission shall, pursuant to Section 303 of the Communications Act of 1934, 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.”⁶ 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 programming services.⁷

⁵ *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, FCC 17-166 at ¶ 160 (2018).

⁶ 47 U.S.C. § 303 (note) (emphasis added).

⁷ For the same reason, we question whether the Commission had the authority to extend the OTARD rules to fixed wireless services as they did in 2000 in *Promotion of Competitive Networks in Local Telecommunications Markets*,

Indeed, the Commission previously found that Section 207 did not reach such hub sites. In the *2000 Order*, the Commission justified the extension of the OTARD rules to customer-end antennas used for fixed wireless services. At the same time, the Commission expressly rejected the inclusion of hub or relay antennas in the expanded rule. It did so because the Commission found that these antennas are “personal wireless services facilities” as defined in Section 332(c)(7), and Section 332(c)(7)(A) precludes the Commission from impairing local authority to regulate the placement of such facilities.⁸

For the same reason, no other portion of the Act cited in the *2000 Order* supports the Commission’s assertion of authority. Section 332(c)(7)(A) states: “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.” (Emphasis added.) The Commission has recognized 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.”⁹ Given this understanding that hub and relay sites fall under Section 332(c)(7), the Commission lacks authority under any other provision of the Act to usurp local authority preserved in Section 332(c)(7)(A).

The NPRM seems to concede that the Commission does not have authority to interfere with local regulation of the placement of antennas that are “personal wireless service facilities” as defined in the Act.¹⁰ The NPRM goes on to suggest the rules would target “those relay antennas and hub sites that are not ‘personal wireless service facilities’—i.e., those that fall into the gap

First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22983, FCC 00-366 (2000) (“*2000 Order*”).

⁸ See *2000 Order* at ¶ 109.

⁹ See *id.*

¹⁰ NPRM at ¶ 12.

between our current OTARD provisions and the protections of section 332(c)(7) of the Act.”¹¹ Antennas that fall into this “gap” appear to be limited to antennas that do not provide telecommunications services.¹² The question remains, what is the source of the Commission’s power to preempt local zoning authority with respect to facilities that do not fall under Section 207 and are not used to provide telecommunications services? The NPRM leaves this question unanswered, and there is no clear provision of the Act authorizing this action.¹³

The lack of any clear statement of authority is particularly troubling here, where the Commission’s proposed rules intrude on local zoning authority. “[I]f 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.’”¹⁴ Far from clearly articulating an intent to preempt, Congress instead expressly preserved local authority to regulate the placement of the hub and relay antennas.

2. Even if the Commission Has Authority to Do So, It Should Not Adopt the Proposed Rules

Putting aside the significant issue of Commission authority, the proposed change to the OTARD rules will have significant, negative consequences on local communities. While the Commission does not intend to alter the exceptions for historic places and safety issues, these narrow exceptions are not sufficient to protect local residents.

¹¹ NPRM at ¶ 12.

¹² *See id.* We note that the text of the proposed new rules simply add a reference to “hub or relay antennas” without definition or limitation. The NPRM is therefore ambiguous regarding the facilities to which the proposed new rules would apply. We assume the Commission intends to exempt hub and relay antennas that provide personal wireless services and, if it proceeds with this ill-advised rule change, will clarify this matter.

¹³ In addition to the question of authority, the NPRM is silent on practical questions, such as how this preemption could be enforced where it applies only to antennas that do not provide telecommunications services. How can that be verified? What happens if the antenna owner adds telecommunications services sometime after installation under the OTARD rules?

¹⁴ *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).

For example, the proposed rule change does not address the number of antennas that could be placed on a given structure. Freed from the current obligation that the antenna be used for the owner or tenant to receive services, a property owner or tenant could affix an unlimited number of antennas anywhere on its property (under its exclusive control) without any effective ability for local governments, homeowners' associations or landlords to limit or condition these deployments. Even if the Commission retains the current size limits, multiple deployments on a single property render those limits potentially meaningless.

The proposed rule also would, in essence, permit commercial activity at any premises including in residential areas, by allowing owners and tenants to rent out their balconies, railings, patios and other spaces to an unlimited number of providers solely for profit rather than for receiving video programming services. Municipalities often regulate commercial uses of property to protect the health, safety and welfare of all residents. In addition, landlords might reasonably preclude unauthorized subleases or the use of a residential building for commercial enterprises, yet the proposed new rules presents exactly that opportunity for tenants. Such lease restrictions and general municipal regulation of commercial activity would be preempted, significantly intruding on local police powers and private property rights without regard for the impact on nearby residents and other tenants.¹⁵

The extended rule also would harm local governments by allowing carriers—not just local property owners and tenants—to allege an OTARD rule violation triggering a stay of all enforcement actions pending action by the Commission. The Commission previously found Congress did not intend to provide that remedy to service providers: “Requiring aggrieved parties

¹⁵ We question whether the revised OTARD rules would be able to withstand Fifth Amendment scrutiny. The D.C. Circuit rejected such a challenge to the current rules (*see Building Owners & Managers Assoc. v. FCC*, 254 F.3d 89 (D.C. Cir. 2001)), but extending OTARD protections to third party commercial use (as opposed to the tenant's personal use) is a far different scenario that the D.C. Circuit did not address.

(usually service providers) to seek a judicial remedy against an adverse local zoning decision involving a hub site was intended as an additional measure to preserve local authority.”¹⁶ The Commission went on to conclude, “... the balance among Congress’ goals is different for customer-end antennas than for hub sites.”¹⁷ We see no authority for the Commission to upset that balance.

3. *The Proposed Rule Would Not Meaningfully Impact Deployment in Rural, Tribal and Other Underserved Areas*

The Commission’s proposal does not indicate a substantial problem with local regulations preventing competition or market entry, particularly in rural and underserved communities, that would lead to a substantial growth in private investment if the proposal were finalized. Instead, rural communities, often neglected by incumbents, are particularly welcoming to WISPs. Preempting local governments is not going to spur further investment or competition in these places.

For example, the City of Wildwood, Missouri, a suburb of St. Louis, has struggled with broadband access, particularly in rural parts of the 68-square-mile city. In response to these challenges, the City formed a Rural Internet Access Committee, and works closely with two WISPs, WisperISP and Bays-ET.¹⁸ The City has worked closely with these WISPs to install poles to facilitate WISP deployment further into more neighborhoods. The City is also in the process of exploring public-private partnerships with their WISPs, particularly those that are exploring additional fiber broadband investment.

¹⁶ 2000 Order at ¶ 115.

¹⁷ *Id.*

¹⁸ City of Wildwood Rural Internet Access Committee, <https://www.cityofwildwood.com/172/Rural-Internet-Access-Committee>

In Howard County, Maryland, a jurisdiction stretching from the outskirts of Baltimore and Ellicott City to the rural Town of Mount Airy, the local government provides bandwidth and other support to Freedom Broadband, a local WISP. Howard County extended a loop of the Inter-County Broadband Network, a 10-jurisdiction fiber project connecting anchor institutions, to a water tower in the Town of Mount Airy, and allowed Freedom Broadband to connect to that fiber infrastructure.¹⁹ This partnership has dramatically improved Freedom Broadband's service by replacing a previous wireless backhaul with a fiber backhaul and allowed Freedom Broadband to extend into Howard County from the adjacent Carroll County.

4. Alternative Suggestions

The FCC requests comment on what other steps the Commission could take to spur fixed wireless deployment. As previously stated by our organizations and allies, there are a number of policies the Commission has authority to and should pursue that can help achieve this goal of improved broadband availability, including that provided by fixed wireless providers:

- ***Improve broadband mapping and data.*** As the Commission is well aware, publicly available data about broadband infrastructure and service availability is insufficient for federal, state, local, and even private entities to make wise planning decisions about new infrastructure investments.
- ***Support local flexibility and authority.*** Local governments are eager to invest in broadband and ensure ubiquitous, affordable service in their communities. This has become a top-tier quality of life and economic development concern for local officials. Therefore, the Commission should support local broadband efforts,

¹⁹ "New partnership will bring high-speed internet to underserved western Howard County," *The Baltimore Sun*, February 8, 2016. <https://www.baltimoresun.com/news/maryland/howard/ellicott-city/ph-ho-cf-broadband-0211-20160208-story.html>

including municipal broadband investment, and by limiting federal preemption – such as that in the extreme August and September wireless orders.

- ***Support federal investment in consumer demand.*** Small ISPs, which many WISPs are, rely on the ability and interest of individual consumers and households to purchase service. Programs such as Lifeline help ensure that finances do not prevent broadband subscription and should not be capped or limited by the Commission if they wish to ensure that WISPs are as viable as possible in low-income neighborhoods.

C. CONCLUSION

The Municipal Organizations urge the Commission to reject the proposed changes to the OTARD rules. The Commission does not have the authority to enact the proposed rules, which would not help close the digital divide even with that authority. We urge the Commission to instead pursue policies within the bounds of its statutory authority that eschew preemption in favor of the creative and collaborative approaches used by Wildwood, Missouri and Howard County, Maryland—just two examples of the many local governments working with wireless providers to meet the broadband needs of their communities.

Respectfully submitted,



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