

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

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

COMMENTS OF COMMUNITY ASSOCIATIONS INSTITUTE

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on behalf of

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Summary

CAI Members Support Improved Access to Wireless Broadband Internet Services

Community Associations Institute (CAI) members support Federal policy to increase consumer access to wireless broadband Internet services, including community associations and association residents. The Federal Communications Commission (FCC or Commission) should continue its work to modernize the regulatory framework governing deployment of the next generation of wireless communications services, commonly known as 5G. CAI members do not believe regulatory modernization and protecting the private property rights of community associations in siting 5G infrastructure are mutually exclusive.

CAI Members Support Retention of Existing OTARD Regulatory Framework

In the context of the Commission's proposed rule, CAI members strongly support retention of the underlying regulatory framework for Over-the-Air-Reception-Devices (OTARD). Current OTARD rules prioritize important private property rights protections for community association common property and provide appropriate means for community association residents to receive wireless communications at their residence as Congress intended. CAI members oppose any degradation of private property rights through material changes in the governance of OTARD infrastructure on community association common property or on land and structures subject to a covenant. Community association common property is not "common" in the sense that a municipal park is common property for any person desiring to use that property for permitted purposes. Common property is that part of the community possessed by all owners as a tenant in common with an undivided fractional interest.

Limited Preemption Authority of Section 207 of the Telecommunications Act of 1996

By expanding the OTARD regulatory framework to relay or hub stations, CAI members suggest the Commission strains its statutory authority. The Commission offers no data showing a need to expand the preemption of community association recorded covenants to further 5G infrastructure deployment—neither does the party requesting the Commission expand the OTARD preemption. Commissioners appear to be frustrated with the municipal permitting process, not community associations. CAI members urge the Commission to work cooperatively with Congress and municipalities to achieve effective deployment of 5G wireless infrastructure in a comprehensive manner that does not degrade recorded covenants governing community associations and provides a forward-facing legal framework for communications infrastructure deployment well into the future.

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Community Associations Institute¹ submits these comments in response to a Commission notice in the *Federal Register* (84 FR 18757). These comments are in reply to the request of the Wireless Telecommunications Bureau in the above referenced docket.²

I. Background on Community Associations

Community associations are commonly known as condominium associations, homeowner associations, and housing cooperatives. Generally organized as private non-profit organizations, community associations operate pursuant to various state statutes and certain conventional real estate practices. Housing units and lots in a community association (other than most cooperatives) are subject to a declaration of covenants (sometimes referred to as "CC&Rs") recorded among the

¹ Based in Falls Church, VA, CAI is the only national organization dedicated to fostering competent, well-governed community associations (homeowner associations, condominium associations, and housing cooperatives) that are home to approximately one in every five American households. For more than 40 years, CAI has been the leader in providing education and resources to the volunteer homeowners who govern community associations and the professionals who support them. CAI's more than 40,000 members include community association volunteer leaders, professional managers, community management firms and other professionals and companies that provide products and services to associations.

² *Updating the Commission's Rule for Over-the-Air-Reception-Devices*, WT- Docket No. 19-71 (rel. April 12, 2019).

land records and enforced by a Board of Directors (Trustees or Managers in some states) comprised of homeowner volunteers elected by owners in the community.

In purchasing a lot or unit in a community association, owners agree to be bound by the association's CC&Rs. Community associations are by law required to disclose association covenants to consumers purchasing a home, unit, or lot prior to the consumer closing on a purchase contract.³ Consumers understand community association covenants are legally binding contractual obligations that govern the use of real property (both the common property and the unit owner's property) and establish rights and responsibilities of the association and property owners.⁴ According to national research, 90 percent of community association homeowners assert that association covenants protect and improve the common property and protect and improve the value of their homes, often a household's largest asset.⁵

In 2018 there were an estimated 26.9 million homes in community associations and in 2017 the value of community association housing units was estimated at \$5.88 trillion. To support their communities, association homeowners paid \$90 billion in association assessments in 2017 to fund maintenance and operation of community infrastructure. To meet future needs and promote the efficient use of resources and volunteer services, homeowners have set aside \$25 billion in reserves

³ See *Uniform Common Interest Ownership Act (2008)* Section 4-103. Public Offering Statement; General Provision.; Section 4-108. Purchaser's Right To Cancel.; Section 4-109. Resales of Units. Twelve states have adopted a version of the Uniform Common Interest Ownership Act while most states have adopted statutes based on the Uniform Act.

⁴ 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..."

⁵ *2018 Homeowner Satisfaction Survey*, Zogby Analytics for the Foundation for Community Association Research (June 2018). Available at https://foundation.caionline.org/wp-content/uploads/2018/06/HOMEsweetHOA_2018.pdf.

for the repair, replacement, and enhancement of association assets such as roofs, streets, and elevators and to ensure community compliance with state and Federal land use and environmental requirements.⁶

II. CAI Members Support Improved Access to Wireless Broadband Internet Services

CAI members have a strong interest in consumer access to wireline and wireless broadband Internet services, having embraced emerging technology to more efficiently manage association assets and communicate with residents. These operational efficiencies would not be possible without access to broadband Internet service.

Additionally, CAI members have a keen interest in the accessibility of wireless broadband Internet service because demand by community association homeowners and residents for broadband Internet service is high. Increasingly, housing consumers regard access to broadband Internet service as a necessary utility. As consumers of broadband Internet services, association homeowners expect broadband Internet service to be readily available and to operate as intended. Associations are actively responding to these demands.

A. CAI Members Work to Expand Access to Broadband Internet Service

CAI supports the reasonable expansion of broadband Internet service through installation of both wireless and wireline transmission infrastructure including cell towers, mono poles and other transmission equipment. CAI further supports installation of such infrastructure through placement on an association's common property or structures such as buildings, water towers, fire towers, etc., that will provide wireless telephonic and Wi-Fi service to property owners and

⁶ Foundation for Community Association Research: Statistical Review for 2017 (Summary). [NOTE: The 2018 edition of the Statistical Review is under development.] Available at <https://foundation.caionline.org/wp-content/uploads/2018/06/2017StatsReview.pdf>.

residents, provided the association and its members retain constitutionally protected common property rights.

Any telecommunications infrastructure development on common property must take into consideration the community's Architectural/Design Review Committee guidelines. It is the experience of CAI members that such installations may be controversial, and the Commission must protect proven processes that promote community education and input prior to embarking upon such installations. CAI also supports the use of appropriate techniques approved by community associations to help blend these installations into the surrounding community.

B. Associations Manage Common Property for the Benefit of all Residents

CAI emphasizes the critical importance of coordination and cooperation with community associations on communications infrastructure improvements or buildouts on public rights of way or easements on commonly owned property as well as on commonly owned property not subject to an easement or other public use restriction. Community associations have a duty of care to protect and control common property to the benefit of all owners, including property subject to an easement or right of way. CAI notes that community associations do not cede ownership rights to common property due to the existence of an easement or right of way. Any Commission action that reduces requirements or incentives for communications providers to consult and coordinate with community associations on communications infrastructure deployment should be limited in nature or altogether avoided.

Respect for common property rights—including prior notice of work, opportunity for meaningful collaboration on infrastructure development on public rights of way or easements on common property, and the allocation of risk—remains a vital interest of CAI members. CAI would

oppose further regulation limiting an association's right to negotiate the allocation of risk and the placement of communications infrastructure on common property.

As private entities, community associations routinely negotiate with communications providers to lease land or other common property to site wireless telecommunications facilities. The exercise of these prerogatives is not in form or substance different from the exercise of property rights by any individual or corporate property owner. The Commission should avoid even the appearance of degrading the right of community associations to manage common property, minimize risk, and enforce covenants for the benefit of all property owners and residents to the extent permissible under law.

C. Dynamic Markets are Based on Competition

A dynamic, competitive marketplace based on government overreach or regulation is a rarity, which is why some at the Commission have trumpeted the need for a "light touch regulatory framework" in critical areas of communications policy.⁷ Today's communications marketplace is dynamic, and consumers are forcing changes to communications provider business models every day.⁸ The Commission notes that access to broadband Internet access is improving and the digital divide is closing.⁹

This market experience does not avoid community associations in the least. Communications service providers have innovated and are working to deploy wireless broadband

⁷ *Statement of Chairman Ajit Pai, RE: Restoring Internet Freedom*, WC Docket No 17-108 (Rel. May 11, 2017).

⁸ See, for example, Krouse, Sarah, and Lillian Rizzo. "Cable Answers Cord-Cutters with Half-Price Cellphone Service." *The Wall Street Journal*, May 28, 2019.

⁹ *2019 Broadband Deployment Report*, GN Docket No. 18-238 (Rel. May 29, 2019).

Internet access for millions of consumers, including community association residents.¹⁰ Even parties seeking an expansion of the OTARD preemption note that access to a competitive broadband Internet marketplace—that includes wireless broadband Internet providers—currently exists.¹¹ This dynamic marketplace for wireless broadband Internet service did not develop as a result of the Commission expanding the Federal intrusion into the recorded covenants of community associations. This market developed in response to consumer demand, which attracted private capital to fund the infrastructure necessary to provide wireless broadband Internet service.

Light touch regulation does not mean the absence of regulation. It should mean that communications providers can work responsibly and cooperatively with landowners and municipalities to deploy infrastructure. CAI members question if the Commission intends to allow communications providers to install equipment without regard to their customers' property rights and reasonable concerns.¹² A dynamic marketplace creates innovation and competition, even in the deployment of infrastructure, that benefits consumers rather than frustrates them.

¹⁰ See, for example, Reardon, Marguerite. "Starry, Marell see a Wi-Fi onramp to your 5G future—The two companies will offer a blueprint for combining the latest Wi-Fi technologies. The result could be cheaper broadband." C|Net, January 8, 2018. See also, Starry, Inc., Press Release, "*Starry Announces Launch of Starry Internet in Los Angeles and Washington, DC—Starry expands outside of Boston with the launch of its beta program in Los Angeles and DC; Starry will launch more than a dozen new markets in 2018.*"

¹¹ Letter from Claude Aiken, President and CEO, WISPA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1 (filed Aug. 27, 2018) (WISPA Aug. 27, 2018 *Ex Parte* Letter) states, in pertinent part, "...fixed wireless providers generally have been able to site qualifying CPE without unreasonable restrictions by local governments or home owner's [*sic*] associations. This improves the viability of fixed wireless as a competitive broadband...alternative to wireline providers in markets across the country, as the Commission intended."

¹² See, for example, "Baton Rouge mayor asks AT&T to suspend small cell tower construction amid resident outrage" *Baton Rouge Advocate* (May 30, 2019), available at https://www.theadvocate.com/baton_rouge/news/article_08787142-82f9-11e9-835f-53bb203bff58.html.

III. CAI Members Support Retention of Existing OTARD Regulatory Framework

The Commission's current OTARD regulatory framework appropriately balances the lawful interests of community associations, association residents, and communications providers. These regulations have enabled a growing and competitive marketplace for wireless communications.

A. CAI Unequivocally Opposes Forced Entry Policy for Hub and Relay Antennas

The Commission notes current OTARD regulations preempt certain private restrictions on antennas covered by the regulation and seeks comment if a broader preemption for hub or relay antennas is necessary to facilitate improved access to wireless broadband services.¹³ CAI members do not oppose the siting of OTARD-compliant antennas by homeowners or resident tenants on common property reserved for their exclusive use (i.e., a private balcony) to receive 5G communications services. CAI believes the Commission's authority over installation of such end user equipment is well established law.

A.1: Expanding Terms of Exclusive Use Agreements

CAI members do not believe the Commission has authority to alter governance of exclusive use common property to enable third parties to occupy association common property without the association's consent. It is well established property law that easement use rights may not be unilaterally expanded without the consent of both parties. An easement such as the provision of exclusive use common property in a recorded covenant does not deprive the servient party—the association—of ownership rights. The Commission lacks the authority to unilaterally expand exclusive use easement rights to permit the occupation of exclusive use common areas by third parties unless the association expressly consents to the occupation.

¹³ WT Docket No. 19-71, ¶. 10.

CAI opposes any expansion of the limited OTARD preemption to hub and relay antennas that would constitute a policy of forced entry. This includes a policy that would permit the unlawful leasing of exclusive use common property to commercial entities such as wireless broadband Internet service providers without the consent of the association. The Commission lacks statutory authority to enact a forced entry policy and no innovation in communications technology may abrogate community associations' Fifth Amendment rights.

CAI members assert 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. In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Supreme Court held that such forced entry schemes constitute a taking for which compensation must be made.¹⁴ Any such taking of association common property would negatively impact recorded individual ownership interests and mortgagee rights. The Commission possesses neither the statutory nor the ancillary authority to promulgate forced entry regulations in this context. There has been no change in the Commission's authority in this regard, notwithstanding enactment by Congress of significant new telecommunications law.¹⁵

A.2: Existing Commercial Lease, Easement or Right of Way Does Not Permit Occupation of Common Property by Third Parties without Association Consent

CAI asserts that the presence of one service provider which has negotiated an agreement to occupy certain association common property does not extend a right to other entities to

¹⁴ 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982).

¹⁵ See, for example, P.L. 115-141 in which Congress reauthorized the Commission, providing new infrastructure deployment authority (particularly regarding Federal facilities) but no expansion of the Commission's OTARD preemption authority.

additionally occupy such property without the association's consent. It appears the Commission's proposal anticipates this very outcome.

Under such a forced entry regulation, communications providers would not be entering association property at the association's invitation, but without the association's knowledge at best or consent at worst. This would constitute an intrusion, not an invitation, and an existing entity on association common property may not invite third parties to occupy such property absent the association's consent.

In *FCC v. Florida Power Corp.*, the Supreme Court noted that an owner's invitation to third party occupation of property is key, stating, "But it is the invitation, not the rent, that makes the difference. The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license."¹⁶ A forced entry policy would permit a tenant to invite such interlopers to physically occupy association property without consent, thereby depriving an association of its ability to control the use of property pursuant to its recorded covenants. This would constitute a taking for which compensation must be paid. As discussed, the Commission possesses neither direct nor ancillary statutory authority to enact such a policy.

B. CAI Supports Retaining Antenna Size Restrictions in Current OTARD Regulation

Concerning many aspects of the current OTARD regulation, the Commission states, "We do not propose to change these aspects of the rule at this time."¹⁷ CAI members concur with this determination. The Commission inquires if existing antenna size limitations are appropriate in rural or underserved areas. In general, CAI members strongly support retaining the existing

¹⁶ *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987).

¹⁷ WT Docket No. 19-71, ¶. 11.

regulatory treatment of antenna size. Community associations are directly governed by the homeowners of the association, who possess ample authority to establish by rule antenna siting and size restrictions under the current OTARD regulation.

IV. Limited Preemption Authority of Section 207 of the Telecommunications Act of 1996

CAI members support the deployment of next generation, 5G telecommunications infrastructure and actively work to secure access to broadband Internet services for residents. The potential revolutionary communications benefits of 5G technology, coupled with association resident demand for access to a competitive communications marketplace, compel community associations to support 5G infrastructure deployment. In addition to retaining current OTARD rules, CAI members urge that the Commission look to the future with respect to deployment of successive generations of wireless communications infrastructure. A forward-facing legal framework for communications infrastructure deployment must be designed and implemented in a way that is appropriate to community associations and local governments.

A. Expansion of Commission OTARD Preemption

In 2004 the Commission granted a petition for reconsideration submitted by Triton Networks Systems, expanding OTARD preemptions to certain “mesh architectures” that enabled an end-user to receive communications services and route such services to other users.¹⁸ In its order on reconsideration, the Commission found its authority hinged on the presence of an end user at the location of the communications infrastructure in question. In so deciding, the Commission opted against extending OTARD preemptions to hub and relay antennas as there would be no end user on site.

¹⁸ WT Docket No. 99-217, Promotion of Competitive Networks in Telecommunications Markets, Order on Reconsideration (rel. Feb. 26, 2004), ¶ 16.

The Commission stated, “...*we do not intend that carriers may simply locate their hubsites on the premises of a customer in order to avoid compliance with a legitimate zoning regulation.*”¹⁹ Nevertheless, the Commission now proposes to do exactly this, apparently out of frustration with permitting processes overseen by local governments and the likelihood that courts will reject other attempts by the Commission to expand its authority over the permitting process for communications infrastructure.²⁰

A. The Commission’s Proposed Rule Stretches Statutory Authority

Congress recently passed substantive telecommunications legislation, including a reauthorization of the Commission.²¹ This legislation did not include any change to the Commission’s authority sufficient to support an expansionary OTARD preemption to cover antennas intended to facilitate communications services for consumers not residing at the property on which the antenna is sited. That Congress made no change to the Commission’s OTARD authority notwithstanding ample opportunity to have done so should not be overlooked.

Additionally, one Commissioner acknowledges that Congress did not intend that the FCC pursue such an expansionary OTARD preemption policy. Commissioner Michael O’Rielly noted in a statement on the Notice of Proposed Rulemaking that “...*this item should be a gentle reminder that exact and precise statutory language is important...*”²² Commissioner O’Rielly doubted that

¹⁹ Ibid., ¶ 17.

²⁰ In a statement (FCC-19-36A5) released concurrent with the Commission’s adoption of the Notice of Proposed Rulemaking, Commissioner Rosenworcel noted, “...*it seems increasingly likely that the courts will return some part of our small cell infrastructure decisions back to this agency with a remand. This could send us right back to the starting line of the 5G race with respect to infrastructure reform—and should that happen, we will need new ideas that are ready to go.*”

²¹ See footnote 15.

²² Statement of Commissioner Michael O’Rielly concerning WT Docket No. 1971, (FCC-19-36A3).

Congress intended for the Commission use its statutory authority in the manner now proposed, writing, *“To be clear, I’m all for this interpretation and believe it’s consistent with the law even if Congress didn’t actually intend for the provision to extend to broadband mesh networks when the statute was passed.”*²³ In general, CAI members take the view that congressional intent be a foremost consideration of any Federal agency in the development and promulgation of rules and urges the Commission to carefully consider congressional intent.

The Commission’s proposed rule fundamentally alters the use of preemption authority in Section 207 of the Telecommunications Act of 1996. The proposed rule seeks to permit a corporation or natural person to install an antenna not for the purpose of individually utilizing or receiving communication services, but rather one that serves the pecuniary interests of communications services providers. This is a material departure from prior Commission policy.

In the Commission’s 2004 report and order on reconsideration, the Commission expressly relied on the presence of an end user at the location where the antenna in question was sited to justify its decision to expand OTARD preemptions to mesh network antennas. The Commission wrote that *“...in order to invoke the protections of the OTARD rule, the equipment must be installed in order to serve the customer on such premises, and it must comply with all of the limitations of the rule, such as the restriction in antenna size to one meter or less in diameter or diagonal measurement.”*²⁴ The Commission now proposes to dismiss its clear requirement that OTARD antennas *“serve the customer on [the] premises.”*²⁵ This is a sharp departure from Congress’ intent when enacting Section 207 of the Telecommunications Act of 1996 and the 2004

²³ Ibid. (emphasis added).

²⁴ WT Docket No. 99-217, ¶ 17 (emphasis by the Commission).

²⁵ Ibid.

order is a thin reed upon on which the Commission relies in proposing to relieve communications providers of permitting and siting processes at the local level of government.

B. Commission Should Rely on Clear Statutory Authority to Promulgate 5G Rules

The deployment of 5G telecommunications infrastructure is too important to be based on an interpretation of statute that Commissioners themselves acknowledge is beyond the intent of Congress. The proposed rule is expansionary in nature and strains hard boundaries the Commission has adopted to ensure its regulations are lawful.

There is ample evidence that community associations work with communications services providers to ensure residents have access to a competitive marketplace. In many cases, in urban areas particularly, it is not uncommon for condominiums and housing cooperatives to work with wireless Internet service providers to provide a combined wireless/wireline option for residents.²⁶ This delivers reliable broadband Internet to residents and facilitates a competitive market. Competitive pressures are requiring established communications service providers to respond to disruptors in the market for broadband Internet service. Market forces are more powerful than any Commission rule that risks legal jeopardy. CAI members urge the Commission not to disregard the fundamental truths of competitive markets and innovation—disruptors change consumer expectations and in so doing change institutional behaviors from the micro-level (i.e., community associations) to the Federal government.

²⁶ Fella, Adlane. “5G Fixed Wireless Gigabit Services Today—An Industry Overview.” Maravedis, October, 2017. Available at <https://shop.maravedis-bwa.com/products/5g-fixed-wireless-gigabit-services-today-an-industry-overview>. In this White Paper, Fella offers numerous examples of combined wireless broadband Internet deployment in densely populated areas of San Francisco and makes the business case for a combined wireless/wireline broadband Internet deployment in a homeowner association with single family homes.

V. Conclusions and Recommendations

CAI members are supportive of 5G infrastructure deployment—community associations and association residents desire access to the next generation of broadband Internet service. Community associations will continue to work with communications services providers to site infrastructure necessary to ensure access to 5G services. However, this must occur within well-established boundaries that protect the property rights of community associations and association residents.

Based on the foregoing commentary, CAI urges the Commission to:

- Retain all aspects of the existing OTARD regulatory framework as it applies to forced entry, size and location, exclusive use areas, historic preservation, health, safety, and other considerations regarding covered antennas in community associations.
- Continue to examine the marketplace for quantitative, verifiable evidence supporting the need for additional Commission authorities to advance deployment of 5G infrastructure and work to secure such authorities, if required, from Congress.

Respectfully submitted,

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June 3, 2019