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

In the Matter of	)	
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84

ORDER DENYING MOTION FOR STAY

Adopted: December 10, 2018 **Released: December 10, 2018**

By the Chief, Wireless Telecommunications Bureau:

1. On September 27, 2018, the Commission released its Declaratory Ruling and Third Report & Order (*Order*) in the proceedings listed above.[1] On October 31, 2018, the National League of Cities and a group of local governments and associations (collectively, NLC) filed a Motion for Stay of the Order pending judicial review (Motion).[2] For the reasons discussed below, we deny the Motion.

I. BACKGROUND

2. In the *Order*, the Commission determined that certain state and local legal requirements and related governmental actions may be unlawful because they effectively prohibit the deployment and provision of wireless services. It interpreted the term "effect of prohibiting," as used by Congress in both Sections 253 and 332(c)(7) of the Communications Act.[3] Based on this interpretation, the *Order* articulated specific standards for resolving concrete disputes over whether states' or localities' fees in connection with certain types of wireless facility deployments or their requirements or restrictions relating to wireless facilities' aesthetic impact or related concerns are consistent with Sections 253 and 332(c)(7).[4] It further clarified that states' and localities' rates and terms for deployment of wireless facilities in public rights-of-way (ROW) or on government structures within the ROW are subject to the limits Congress imposed in Sections 253 and 332(c)(7).[5] The Commission also considered and rejected various statutory and constitutional challenges to its interpretive authority.[6]

3. In addition, the *Order* addressed the statutory requirement that state and local governments "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time."[7] Among other things, it codified the existing "shot clocks"

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[1] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, *et al.*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79 and WC Docket No. 17-84, FCC 18-133 (released Sept. 27, 2018) (*Order*).

[2] National League of Cities, *et al.* Motion for Stay, WT Docket No. 17-79 and WC Docket No. 17-84 (filed Oct. 31, 2018), https://www.fcc.gov/ecfs/filing/103154366759 (Motion). *See id.* at 1 n.1 (listing parties joining the motion).

[3] *Order* at paras. 34-42 (Part III.A); *see* 47 U.S.C. §§ 253(a), 332(c)(7)(B)(i)(II).

[4] *Order* at paras. 43-80 (Part III.B) (fees), paras. 81-92 (Part III.C) (aesthetic requirements and similar restrictions).

[5] *Id.* at paras. 92-97 (Part III.D).

[6] *Id.* at paras. 98-102 (Part III.E); *see also id.* at paras. 73-77.

[7] 47 U.S.C. § 332(c)(7)(B)(ii).

(*i.e.*, presumptively reasonable periods of time for state and local governments to act on deployment requests) that the Commission adopted in 2009[8] and specified new shot clocks for "small wireless facilities."[9]

4. The full text of the *Order* was released on September 27, 2018; a summary was published in the Federal Register on October 15; and the *Order* is scheduled to take effect on January 14, 2019 (90 days after publication).[10] The *Order* acknowledged that "some localities will require some time to establish and publish aesthetics standards," and therefore the *Order's* aesthetics standards will not take effect until 180 days after Federal Register publication. As a consequence, to the extent localities choose to impose aesthetic requirements on the deployment of covered wireless facilities 180 days after Federal Register publication, the requirements must be "(1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance."[11]

5. Various parties have petitioned for judicial review of the *Order*.[12] Pursuant to 28 U.S.C. § 2112(a), the Judicial Panel on Multidistrict Litigation consolidated the petitions and assigned them to the U.S. Court of Appeals for the Tenth Circuit.[13]

II. DISCUSSION

6. When evaluating a stay request, the Commission considers "(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."[14] "The third and fourth factors merge when the [federal] Government is the opposing party."[15] We conclude that NLC's Motion fails to satisfy these factors.

A. NLC Fails to Show a Likelihood of Success on the Merits

7. NLC contends that aspects of the *Order* conflict with various provisions of the Communications Act,[16] are arbitrary and capricious under the Administrative Procedure Act,[17] and violate local governments' Fifth Amendment and Tenth Amendment rights.[18] None of these arguments is likely to succeed on the merits.[19]

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[8] *See Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994, 14016, para. 56 (2009) (*2009 Declaratory Ruling*), *pet. for review denied*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 569 U.S. 290 (2013).

[9] *Order* at paras. 104-30. *See id.* at para. 11 n.9, & App. A, 47 CFR § 1.6002(*l*) (defining "small wireless facilities").

[10] 83 FR 51867 (Oct. 15, 2018); *Order* at paras. 152-53.

[11] *Order* at para. 89.

[12] In addition, one petition for reconsideration of the *Order* has been filed. The present order should be not construed as expressing any view on the merits of that petition.

[13] *In re Federal Communications Commission, In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Consolidation Order, MCP No. 155 (U.S. Judicial Panel on Multidistrict Litig., Nov. 2, 2018), https://docs.fcc.gov/public/attachments/DOC-354923A1.pdf.

[14] *Nken v. Holder*, 556 U.S. 416, 425-26 (2009); *see also Winter v. Natural Resources Defense Council*, 555 U.S. 7, 22 (2008).

[15] *Nken*, 556 U.S. at 435.

[16] Motion at 2-3, 12-16.

[17] *Id.* at 16-22.

[18] *Id.* at 5-9 (Tenth Amendment), 9-11 (takings), 11 (due process).

8. *Communications Act*. We find unpersuasive NLC's assertions that the Commission's interpretation of Sections 253 and 332(c)(7) and its application of those provisions to local governments' fees and restrictive requirements unambiguously conflict with the statute.[20] NLC argues that the Commission's *Order* is in tension with and must follow the Eighth and Ninth Circuits' precedents establishing that "evidence of an existing or complete inability to offer a telecommunications service is required" to show that a locality violated Section 253(a).[21] Assuming, *arguendo*, that NLC's characterization of the Eighth Circuit and Ninth Circuit's precedents is correct, NLC nonetheless does not establish likelihood of success on the merits. As the *Order* explains, the Commission's decision is consistent with conclusions endorsed by the First, Second, and Tenth Circuits, as well as longstanding Commission precedent, that the statute's "effect of prohibiting" standard does not "require that a bar to entry be insurmountable before the FCC must preempt it."[22] It is axiomatic that reviewing courts must defer to the Commission's interpretation of "gaps" not clearly resolved by ambiguous terms in the Communications Act.[23] Here, the statutory term at issue—"effect of prohibiting" in Sections 253 and 332(c)(7)—is undeniably ambiguous; indeed, inasmuch as there is a contrast between the Eighth and Ninth Circuits' precedents, upon which NLC relies, and those of the First, Second, and Tenth Circuits, the contrast reinforces this conclusion. The Commission acted well within its authority to "address and reconcile this split" among the courts' potentially "conflicting views."[24]

9. The Commission's interpretation of these provisions also "makes considerable sense in terms of the statute's basic objectives" and is confirmed by its "consisten[cy] with the agency's own longstanding interpretation."[25] The *Order* explains that the narrow "coverage gap"-based interpretation of the term "effect of prohibiting," developed by some courts in the late 1990s,[26] is incompatible with the public's demand for mobile data and technological changes. Wireless providers must not only fill coverage gaps as they did in the 1990s, but now they must exponentially increase their networks' data capacity to maintain service and lay the groundwork for the deployment of 5G.[27] The Commission's rejection of the "coverage gap" interpretation is also driven by its expert policy judgment regarding the urgent need to ensure that "the deployment of wireless infrastructure, particularly Small Wireless

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[19] Notably, while NLC recites the "likely to succeed" element of the stay standard, it does not contend that any of its claims are actually likely to succeed, but only that they are "significant" or "serious and have a fair prospect of success" (*id.* at 5), or that they raise "substantial concerns" or "substantial questions" of statutory or constitutional violations (*id.* at 9, 11, 16).

[20] *Compare* Motion at 2, 13-15 *with Order* at paras. 34-42.

[21] *Order* at para. 41; *cf.* Motion at 13-14 (citing *Level 3 Communications LLC v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007), and *Sprint Telephony PCS, LP v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008)).

[22] *RT Communications v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000). *See Order* at para. 35 & n. 79 and para. 41 & n.100 (citing *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002); and *RT Communications*, *supra*). *See also Order* at para. 41 & n.101 (citing prior Commission rulings reaching consistent conclusion).

[23] *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-45 (1984); *City of Arlington*, 569 U.S. at 290; *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 377-78 (1999).

[24] *Order* at para. 9.

[25] *Barnhart v. Walton*, 535 U.S. 212, 219 (2002); *see Order* at paras. 35-39 (explaining consistency with *California Payphone Ass'n*, 12 FCC Rcd 14191 (1997), and other longstanding Commission precedents).

[26] Under this standard, a locality's denial of a facility siting application was deemed to have the "effect of prohibiting" service only if that decision effectively prevented a carrier from filling a gap in its coverage and precludes the carrier from providing *any* service in a geographic area. *See Order* at para. 34 & notes nn.74-75, para. 40 & n.95, and cases cited therein.

[27] *Order* at para 40 & n.97.

Facilities, not be stymied by unreasonable state and local requirements."[28] That NLC or others might prefer different outcomes or would select alternative interpretations of the statute does not mean that the Commission's choices are impermissible or that NLC's arguments are likely to prevail on the merits.

10. We need not refute in detail each of NLC's other challenges[29] to various other determinations in the *Order* given the Commission's extensive legal analyses in support of its conclusions, which we believe will be sustained on judicial review. And principles of *Chevron* deference fortify our view that NLC's challenges to the Commission's interpretation and application of the Communications Act are likely to fail.[30]

11. *Arbitrary and Capricious.* NLC fails to show that the Commission's decisions are "arbitrary and capricious" in violation of the Administrative Procedure Act.[31] NLC contends that the Commission should have discounted some of the record evidence that it relied on and should have paid greater heed to materials that it claims the Commission ignored;[32] but courts accord the greatest deference to agencies' assessments of the reliability of disparate evidence, factual conclusions, and predictive judgments.[33] NLC fails to show that the Commission's assessments lack any support in the record or that

[28] *Id.* at para. 23; *see generally id.* at paras. 23-28 (discussing policy factors that necessitate Commission action). *See also id.* at para. 11 n.9 (defining "Small Wireless Facilities"); *id.* at App. A, new rule § 1.6002(*l*) (same).

[29] *See, e.g.*, Motion at 13 (challenging the *Order*'s analysis of the relationship between Sections 253 and 332(c)(7)); *but see Order* at paras 35-36 & n.83 (refuting that argument). *See also* Motion at 17 (characterizing as "beyond the bounds of reasonable interpretation" the *Order*'s analysis of the interplay between Section 253(a) and (c), without providing any contrary analysis to refute the Commission's conclusion); *but see Order* at paras. 71-74 (explaining analysis supporting Commission's conclusion). *See also* Motion at 2, 15 (objecting to *Order*'s standards for assessing whether localities' aesthetic requirements and similar restrictions are lawful as unauthorized by statute); *but see Order* at paras. 87-91 (explaining basis for these standards—to prevent state or local requirements that are unreasonably discriminatory or have the "effect of prohibiting" deployment, in violation of Sections 253(a) and 332(c)(7)(B)(i)(I) and (II)). *See also* Motion at 7, 16 (suggesting, in passing, that the *Order* violates Section 224 by requiring municipal utilities to allow access to utility poles at regulated rates); *but see Order* at para. 92 n.253 (explaining that Section 224's exclusion of publicly-owned utilities from the definition of utility, "[a]s used in this section," does not necessarily preclude the application of Section 253 to poles or other facilities owned by such entities). *See also* Motion at 21 (disputing *R&O*'s treatment of "exceptional circumstances" as basis for rebutting shot clocks' presumption of reasonableness); *but see Order* at paras. 115, 119, 121-22 (explaining bases for localities to rebut shot clocks' presumption of reasonableness). *See also* Motion at 21 (characterizing as "too flimsy to pass muster" the *R&O*'s reliance on recently-enacted state laws to justify applying shot clocks to batched applications); *but see Order* at paras. 105-15 (discussing factors, including but not limited to state laws, justifying shot clock rules).

[30] *See, e.g.*, *City of Arlington*, 569 U.S. at 296, 307 (reaffirming that "because Congress has unambiguously vested the FCC with general authority to administer the Communications Act," courts must defer under *Chevron* to the Commission's authoritative interpretations of the Act).

[31] *See* 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (standard of review of claims that agency actions are "arbitrary and capricious").

[32] *See, e.g.,* Motion at 17 (*Order* ignores evidence about size of Small Wireless Facilities); *id.* at 18 (characterizing certain economic assertions as "unsubstantiated" and claiming that evidence supporting contrary conclusion was "completely ignored"); *id.* at 19 (heading) ("The Order Ignored Economic Evidence in the Record Prior to Setting Presumptively Reasonable Rates."); *id.* at 20 (one of the arguments discussed in the *Order* "was rebutted by ample economic evidence the Commission ignored"); *id.* at 20 (challenging conclusion that excessive rates may discourage deployment); *id.* at 21-22 (evidence of state legislation in support new shot clocks as "too flimsy to pass muster").

[33] *See, e.g.*, *FERC v. Electric Supply Ass'n*, 136 S. Ct. 760, 781 (2016) ("The scope of review under the arbitrary and capricious standard is narrow," and a court "must uphold a rule if the agency has examined the relevant considerations and articulated a satisfactory explanation for its action") (internal quotation marks and alterations omitted); *Citizens Telecomms. Co. of Minn., LLC v. FCC*, 901 F.3d 991, 1011 (8th Cir. 2018) ("[T]he FCC may

the Commission failed to articulate a reasoned explanation between the facts found and the choice made, and its disagreements with the Commission's conclusions on these matters cannot justify reversal of the *Order*.

12. *Tenth Amendment.* NLC's contention that the *Order* contravenes the Tenth Amendment's "prohibition against compelling the states [or their local subdivisions] to implement . . . federal regulatory programs"[34] is, at bottom, a challenge to the Communications Act itself.[35] Through Section 253 and 332(c)(7) of the Act, Congress barred localities from "prohibit[ing] or hav[ing] the effect of prohibiting" service. The *Order* interprets those provisions to bar certain local requirements that effectively prohibit service. While the Commission strongly encourages states and localities to implement "forward-looking policies" that "facilitate the deployment of . . . infrastructure" needed to "bring greater connectivity to their communities,"[36] neither Sections 253 and 332(c)(7) nor the Commission's interpretations of those provisions require states or localities to carry out any specific policies or to approve any particular siting request.[37] These are state and local decisions that are merely conditioned pursuant to the terms Congress specified in Sections 253 and 332(c)(7).[38]

13. *Uncompensated Takings.* We are not persuaded by NLC's mischaracterization of the *Order* as "depriv[ing] . . . local governments of their proprietary powers as owners of property."[39] The *Order* does not implicate local governments' actions in their role as property-owners; rather, it focuses on preventing them from violating federal law when they engage in "managing or controlling access to property within public ROW" for wireless facility deployment and when they make "decisions about where [such] facilities may be sited."[40] These regulatory functions are entirely distinguishable from transactions involving purchases or sales of property or services for a municipal government's own use.[41]

14. Nor are we persuaded by NLC's portrayal of the *Order*'s protections against excessive fees as "takings" of local governments' "private property" without just compensation.[42] First, the *Order* does not give "providers any right to compel access to any particular state or local property."[43] Rather, the *Order* requires that when access is provided, fees charged be a reasonable approximation of the

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rationally choose which evidence to believe among conflicting evidence in its proceedings, especially when predicting what will happen in the markets under its jurisdiction.").

[34] Motion at 5; *see generally id.* at 5-7.

[35] *See Order* at para. 101 & n.290.

[36] *Order* at para. 25.

[37] NLC is incorrect that the *Order* "requires localities to publish aesthetic standards" or "specifies their form or contents." Motion at 6. Nothing in the *Order* requires localities to adopt aesthetic or any other standards, much less dictates their contents. The *Order* simply concludes that if a state or local government chooses to enforce aesthetic requirements, those requirements must be reasonable, non-discriminatory, objective, and published in advance, otherwise they would have the effect of prohibiting the provision of service, in violation of Sections 253 and 332(c)(7). *Order* at paras. 84-89.

[38] *See Montgomery County v. FCC*, 811 F.3d 121, 128 (4th Cir. 2015) (rejecting Tenth Amendment challenge to a related provision of the Communications Act); *see also Order* at para. 101 nn.289, 290 (showing Tenth Amendment cases cited by NLC are inapposite).

[39] Motion at 8. NLC characterizes the Commission's determinations on this issue, *see Order* at para. 92-97, as a "departure from prior precedent [that] is never explained," Motion at 8, but does not cite any prior precedents, much less explain why it thinks the *Order* departs from them.

[40] *Order* at para. 96.

[41] *Id.* at para. 96 & nn.268, 269, 272 and cases cited therein.

[42] Motion at 9-11.

[43] *Order* at n.217.

localities' costs and that they be "no higher than those fees charged to similarly-situated competitors in similar situations."[44] For example, it may be the case that localities that do not offer access to their poles still may comply with Sections 253 and 332(c)(7).[45] Second, localities' obligation not to charge fees that exceed a reasonable approximation of their costs is not analogous to a regulation that deprives a private proprietor of its "investment-backed expectations."[46] Allowing wireless deployments on public ROW and associated structures does not prevent localities from using their ostensible "property" in a manner consistent with their "investment-backed expectations." Moreover, even if requiring localities to allow such access were construed as depriving them of the use of their property, they would not necessarily be entitled to compensation for such purported deprivation in amounts that exceed their reasonable costs.[47]

15. *Due Process.* The *Order* does not deprive local governments of their due process rights. NLC merely argues that "there is no way to implement this Order" within 90 days and that it established "effective dates that *preclude* compliance," but provides no basis for that assertion.[48] Moreover, even assuming *arguendo* that the argument had any merit, it would not justify an indefinite stay on Constitutional due process grounds. We are not persuaded that the drastic remedy of an indefinite stay is warranted for theoretical harm that many or most jurisdictions may never sustain.[49]

B. Local Governments Will Not Suffer Irreparable Harm

16. NLC also fails to justify a stay pending judicial review because it has not shown that local governments are *likely* to suffer irreparable harm absent a stay of the *Order*, and "simply showing some '*possibility* of irreparable injury' fails to satisfy the second factor" of the test for granting a stay pending judicial review.[50] "[T]he 'possibility standard is too lenient."[51] Here, NLC's alleged injuries fall far short of establishing a likelihood of irreparable harm, because none of its purported harms is plausible, legally cognizable, and irreparable.

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[44] *Order* at para. 50.

[45] *Id.* at para. 73 n.217 ("There may well be legitimate reasons for states and localities to deny particular placement applications, and adjudication of whether such decisions amount to an effective prohibition must be resolved on a case-by-case basis."); *see also id.* at para. 97.

[46] *Id.* at 10 (quoting *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978)).

[47] NLC asserts that "fair market value" must be used to measure just compensation for takings purposes, but there is no "market value" of assets that are not freely bought and sold in a free "market"; and in such cases, use of actual costs or other readily-discernable amounts are not unreasonable proxies for estimating a market value that would be "fair" if a market existed. *See United States v. 564.54 Acres of Land*, 441 U.S. 506, 513 (1979) (recognizing that alternative measure of compensation might be appropriate "with respect to public facilities such as roads or sewers"); *see also Order* at para. 73 n.217 ("cost-based recovery of the type we provide here has been approved as just compensation for takings purposes in the context of such facilities") (citing *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002)). NLC is likewise wrong to assume that the "fair market value" for placing small wireless facilities on government structures in the ROW necessarily exceeds a reasonable approximation of costs associated with that infrastructure. Only monopolists can presume—as NLC apparently does—that the "full . . . market value" will exceed "actual and direct costs," *id.* at 9; and neither private property-owners nor local governments are entitled to recover monopoly profits. *See Order* at para. 73 (finding that "local fees designed to maximize profit are barriers to deployment"). The "actual and reasonable cost" standard in the *Order* does not prescribe any specific accounting method or cost-allocation methodology and does not preclude recovery of any category of costs that the locality reasonably incurred and that are reasonably attributable to the provider's use of the public ROW or other facility. *See Order* at para. 76.

[48] Motion at 3, 11 (emphasis in original). *See also id.* at 23 ("Exposing localities to liability without even a reasonable opportunity to comply violates Due Process.").

[49] As noted below, many localities' requirements may already comply with the *Order*, and they will not need to make any changes to their requirements. *See infra* para. 20.

[50] *Nken*, 556 U.S. at 434-35 (emphasis added).

[51] *Id.* at 435.

17. *Reduced Fee Revenues.* First, NLC contends that irreparable harm will result from the "reduction in the fees that local governments [may] charge . . . to process applications" and asserts that they will not be able to recoup these losses later if the *Order* is overturned on appeal.[52] But as NLC concedes, monetary losses generally do not qualify as "irreparable."[53]

18. Most significantly, the ostensible revenue losses caused by the *Order*'s fee standards are hypothetical and speculative at this point.[54] The *Order*'s determinations about how Sections 253 and 332(c)(7) apply to state or local fees do not resolve the permissibility of any specific local government's fees or other requirements, and any disputes must be adjudicated through future litigation or regulatory proceedings. Moreover, the presumptively reasonable fee levels identified in the *Order* are only safe harbors and do not preclude a given locality from demonstrating that a higher fee is reasonable under the circumstances.[55] Absent a concrete dispute regarding a specific fee, NLC has no basis for speculating that "[t]he presumptively reasonable amount is far less than the record suggested would be required" or "deprives localities of resources that could have been devoted to other projects."[56]

19. Localities' alleged "*risk* of being hauled into court"[57] likewise offers no basis for a stay. Contrary to NLC's claims,[58] the cost of defending against unknown future lawsuits does not justify a stay; it is well established that "mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."[59] And the mere possibility that a locality may need to explain and justify its fees to a court is not the same as an order to lower its fees; no local government will be compelled to reduce any fee unless and until an aggrieved provider challenges the fee and successfully demonstrates to a court or the Commission that the fee violates the *Order's* standards. There is no telling when and whether such a lawsuit or petition will be filed—and no reason to assume local governments will lose such cases. In future cases, "when harm is more imminent and more certain," localities "will have an ample opportunity" to argue that their fees comply with Sections 253 and 337(c)(7).[60]

20. *Administrative Burdens of Overhauling Siting Review Procedures.* NLC's allegations that local governments will be required to overhaul their siting authorization requirements within a short time are overstated and premised on assumed administrative burdens that bear little resemblance to the *Order's* actual requirements. For instance, as to aesthetics, the *Order* simply requires that if a locality chooses to impose aesthetic requirements on covered Small Wireless Facilities applications, such requirements be published in advance and provide sufficient information to enable applicants to understand how their siting applications will be evaluated, without requiring extensive details.[61] Indeed,

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[52] Motion at 27.

[53] *Id.*

[54] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (purely "conjectural or hypothetical" injuries are not sufficiently "concrete and particularized" to rise to the level of "injury-in-fact" necessary to satisfy the "irreducible constitutional minimum of standing" under Article III of the Constitution).

[55] *Order* at paras. 79-80 & nn.233-34.

[56] Motion at 27.

[57] *Id.* at 25 (emphasis added).

[58] *See* Motion at 24 ("The Order exposes Movants to a Hobson's choice: they will face a significant risk of litigation or be forced to comply with an Order they are challenging as unlawful in court.").

[59] *Standard Oil Co. of Calif. v. FTC*, 449 U.S. 232, 244 (1980).

[60] *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 734 (1998).

[61] *Order* at para. 88 n.247 ("[T]he aesthetic requirements to be published in advance need not prescribe in detail every specification to be mandated for each type of structure in each individual neighborhood. Localities need only set forth the objective standards and criteria that will be applied in a principled manner at a sufficiently clear level of

as noted above, many localities' existing rules may already comply with the *Order*.[62] Moreover, the Commission already has taken into account concerns about the difficulty some localities might face in establishing and publishing aesthetic standards within a short time frame and, in part to address those concerns, has taken significant steps to alleviate any such difficulties.[63]

21. NLC's protestations about the administrative burdens of complying with the *Order's* new shot clocks for Small Wireless Facility applications[64] are also unfounded. The Commission's 2009 and 2014 orders already require localities to complete their review and act on some types of facility applications within 60 days and others within 90 days.[65] The new 60-day and 90-day shot clocks established for certain types of Small Wireless Facilities should require no major changes to localities' implementation procedures but may simply entail use of existing procedures already in place for review of applications that are already subject to those deadlines. Of course, if local governments have not already established whatever procedures are needed to comply with the existing 60-day and 90-day deadlines, any burdens they now face are caused by their non-compliance with existing rules rather than any new burdens imposed by the present *Order*.

22. *Aesthetics, Property Values, and Traffic Hazards.* Finally, NLC's claim that local governments will suffer immediate harm due to the construction of Small Wireless Facilities that the *Order* will compel them to permit[66] is likewise unfounded. As NLC concedes, the *Order* does not compel any locality to authorize any particular facility.[67] Nothing in the *Order* prevents localities from exercising their authority to deny applications to install facilities that are aesthetically inappropriate,[68] much less facilities that pose *bona fide* traffic hazards or other risks to public safety, so long as they do not wield

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detail as to enable providers to design and propose their deployments in a manner that complies with those standards.").

[62] As the *Order* points out, "[t]he fact that our approach here (including the publication requirement) is consistent with that already enacted in many state-level small cell bills supports the feasibility of our decision." *Id.* This fact also indicates that the Commission's rulings may not cause localities in those states *any* burdens because, pursuant to state law, they may have already implemented any changes needed to comply with the Commission's decisions.

[63] The *Order* provides that it will become effective 90 days after Federal Register publication and localities will have an additional 90 days (i.e., 180 days after Federal Register publication in total) to comply with the *Order's* aesthetics standards. *See Order* at paras. 89, 153. *Cf.* Letter from Clarence E. Anthony, CEO and Executive Director, National League of Cities, *et al.*, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 6-7 (filed Sept. 19, 2018) ("[W]e ask the Commission to delay the effective date for at least six months after publication in the Federal Register to give local governments a sufficient transition period to amend their codes consistent with the Order and new rules. This is especially important given the requirement that, to be applicable, aesthetic requirements must be in place prior to application submission. . . . A delayed effective date is needed to provide sufficient time for local governments to implement thoughtful requirements that balance local processes and concerns with providers' deployment needs, which is best achieved where there is time for input from the public and wireless providers.").

[64] Motion at 21, 25-26.

[65] *See Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report & Order, 29 FCC Rcd 12865, 12957, para. 216 (2014), *aff'd*, *Montgomery County v. FCC*, *supra* (60-day deadline for review of "eligible facility requests" subject to Section 6409 of the Spectrum Act, 47 U.S.C. § 1455(a)); *2009 Declaratory Ruling*, 24 FCC Rcd at 14012, para. 46 (90-day deadline for collocation applications pursuant to Section 332(c)(7)).

[66] Motion at 26. According to the Motion, such compelled construction will cause "immediate aesthetic harm," immediate "effect on property values," and "immediate hazard to traffic and during storms" that could be mitigated or avoided only if the *Order* is stayed or vacated. *Id.*

[67] *Id.* at 7.

[68] The *Order* makes clear that localities retain their authority to enforce objective aesthetic requirements that are "reasonable in that they are technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments." *Order* at para. 87.

such authority in a manner that is arbitrary or that improperly "prohibits or has the effect of prohibiting" the provision of wireless service. Likewise, the new shot clocks for Small Wireless Facilities require local governments to act on siting requests within specified periods of time but do not compel them to approve such requests.[69]

C. A Stay Would Harm Wireless Consumers and Providers, and the Public Interest Requires that the Order Take Effect Promptly

23. The Commission has repeatedly recognized "the urgent need to streamline regulatory requirements to accelerate the deployment of wireless infrastructure for current needs and for the next generation of wireless service in 5G."[70] It is important for the Commission to remove unnecessary regulatory barriers to such deployment to prevent harm to consumers who increasingly depend on access to wireless communications, and whose rapidly growing demand for wireless services and technologies can be met only if providers can rapidly "deploy large numbers of wireless cell sites to meet the country's wireless broadband needs and implement next-generation technologies."[71] For these reasons, the potentially extended delay that would result from NLC's requested stay would harm both consumers and providers of wireless services and would be contrary to public policy.[72]

24. Moreover, we reject NLC's assertion that a stay would benefit wireless industry applicants by reducing uncertainty.[73] To the contrary, allowing the *Order* to take effect as scheduled will give wireless providers, as well as the consumers they seek to serve, greater certainty due to the clear and objective standards that will govern local governments' review of proposed new deployments going forward, as well as the reduction of investment barriers caused by excessive fees or unduly restrictive land-use requirements. Given the weight of the record support for the Commission's determination that the *Order*'s requirements must be implemented promptly to accelerate deployment of the next generation of wireless facilities, we find that a stay of the *Order* would disserve the public interest.[74] We therefore deny NLC's Motion.

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[69] Motion at 7 & n.23 (citing *Order* at para. 73 n.217).

[70] *Order* at para. 28.

[71] *Id.* at paras. 23-24.

[72] *Cf. FCC v. Radiofone, Inc.*, 516 U.S. 1301, 1301-02 (Stevens, J., in chambers) (because "the harm to the public caused by a nationwide postponement of the auction would outweigh [any] possible harm to" movants, the public interest weighs heavily against granting a stay), *mot. to vacate denied*, 516 U.S. 938 (1995).

[73] Motion at 32.

[74] We do not credit NLC's assertion that statements by Verizon and Crown Castle executives "confirm that a stay of the Order would not harm deployment." Motion at 30 & n.100; *see also id* at 4 & n.8. Both companies submit that NLC mischaracterizes those statements. *See* Letter from William H. Johnson, Senior Vice President, Legal and Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-2 (filed Nov. 16, 2018) (quoting Verizon's Chief Financial Officer's public statements that the *Order* is "hugely important" because requiring municipalities to "get 5G site approvals done within a certain time frame and at a certain cost that's lower than where a lot of them have been" will help with "getting 5G built out as quickly as possible" and "help ensure that more Americans gain access more quickly to 5G services," and explaining that NLC mischaracterized another executive's statement made in a different context); Letter from Kenneth J. Simon, Senior Vice President and General Counsel, Crown Castle Int'l Corp., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-2 (filed Nov. 15, 2018) (explaining that the "18 to 24 month deployment cycle for Crown Castle's facilities is a nationwide average and is driven by a wide variety of factors[;]"emphasizing that some localities' "onerous regulatory requirements and prohibitory fee demands can substantially delay or even prevent wireless buildout, stretching the deployment in [such] jurisdictions well past the nationwide average or, in some cases, keeping facilities from being built at all[;]" and pointing out Crown Castle's Chief Executive Officer's public statement that the *Order* will have an "immediate positive impact on our small cell deployments across the US"). In any event, extensive record evidence outweighs whatever probative value the statements quoted by NLC might have.

III. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1, 4(i), 4(j), 201, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 201, and 303(r) and the authority delegated pursuant to sections 0.131 and 0.331 of the Commission's rules, 47 CFR §§ 0.131 and 0.331, this Order Denying Motion for Stay in WT Docket No. 17-79 and WC Docket No. 17-84 IS ADOPTED.

26. It is FURTHER ORDERED that the Motion for Stay pending judicial review of the Declaratory Ruling and Third Report & Order in this proceeding, filed by the National League of Cities, *et al.*, IS DENIED.

27. It is FURTHER ORDERED that this Order Denying Motion for Stay SHALL BE EFFECTIVE upon its release.

FEDERAL COMMUNICATIONS COMMISSION

Donald K. Stockdale
Chief
Wireless Telecommunications Bureau