19-70123, 19-70124, 19-70125, 19-70136, 19-70144, 19-70145, 19-70146, 19-70147, 19-70326, 19-70339, 19-70341, and 19-70344

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SPRINT CORPORATION,
Petitioner
v.
FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
Respondents

AMERICAN PUBLIC POWER ASSOCIATION,
Petitioner
v.
FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
Respondents

On Petitions for Review of an Order
of the Federal Communications Commission

Reply Brief of Petitioner The American Public Power Association (Case No. 19-70339)

James Baller
Sean A. Stokes
Baller Stokes & Lide, PC
2014 P Street, NW
Washington, DC 20036
(202) 833-1144 (phone)
Jim@Baller.com

Counsel for the American Public Power Association

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GLOSSARY OF COMMONLY USED ABBREVIATIONS

APPA – The American Public Power Association

APPA-E.R. – American Public Power Association Excerpts of Record

FCC or Commission – Federal Communications Commission

LGP – Local Government Petitioners

INTRODUCTION

In this Reply Brief, Petitioner, the American Public Power Association ("APPA"), on behalf of the nation's government-owned public power electric utilities, responds to the brief filed by the Federal Communications Commission ("Commission") on August 8, 2019, with respect to the application of the Commission's *Order*[1] to public power utility poles. As shown below, the Commission has conceded, ignored, or responded erroneously to all of APPA's points, arguments, and authorities.

In particular, the Commission has failed to refute APPA's showing that the Commission's only express grant of authority to regulate attachments to electric utility poles is Section 224 (45 U.S.C. § 224), and Section 224 clearly and expressly exempts public power utilities from the Commission's authority to regulate utility pole attachments. In its Respondents' Brief, the Commission suggests that the *Order* stops short of regulating the rates, terms, and conditions of access to public power utility poles and merely asserts the Commission's "federal oversight" authority over public power pole attachment practices. FCC Brief, at 136, 138-139. This is pure sophistry. Whether couched in terms of "regulation" or "oversight," the Commission is still attempting to assert jurisdiction that Congress expressly withheld from it over publicly-owned utility poles.

Moreover, the Commission has failed to justify either the *Order's* abandonment of the Commission's oft-repeated understanding that Section 253 and 332 do not apply to government entities acting in a proprietary capacity or the *Order*'s blanket and unsupported presumption that all government-owned facilities, including public power utility poles, are managed in a governmental capacity with regulatory objectives.

ARGUMENT

I. THE COMMISSION DOES NOT HAVE OVERSIGHT AUTHORITY OVER ATTACHMENTS TO PUBLIC POWER UTILITY POLES

A. Section 224 Is the Sole Source of Commission Authority Over Attachments to Electric Utility Poles and Section 224 Exempts Public Power Utilities

It is axiomatic that the Commission cannot exercise authority that it does not have. In its brief, APPA noted that the Commission previously found in its *California Water* decision that the Commission does not have general authority to regulate access to public or private property, even where doing so may be useful for communications. *In Re: California Water and Telephone Co.* 64 F.C.C.2d 753, 1977 WL 38620 (1977) ("*California Water"*). *California Water* is particularly instructive

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[1] *Declaratory Ruling and Third Report and Order*, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79 and WC Docket No. 17-84, FCC 18-133 ("*Order*") (APPA-E.R. 1-116).

because it involved communications attachments to electric utility poles, and the Commission held: "[We] have concluded that this activity does not constitute 'communication by wire or radio,' and is thus beyond the scope of our authority." *Id.*, at 758.

In its Brief, the Commission brushed aside APPA's suggestion that the *Order* should have addressed *California Water*. *California Water* was irrelevant, the Commission insisted, because it predated the adoption of Sections 253 and 332. FCC Brief, at 140. The Commission's argument is flawed on multiple levels.

First, APPA invoked *California Water* because it was, and remains today, the Commission's most detailed and thorough analysis of its jurisdiction over utility poles and because the Commission's findings and conclusions in that case are highly relevant to the issues at hand. Specifically, *California Water* stands for the principle that, absent a specific grant of statutory authority, the Commission does not have jurisdiction over attachments to electric utility poles.

Second, as APPA also explained in its brief, in the wake of *California Water*, Congress adopted Section 224 of the Communications Act to provide the Commission specific and carefully circumscribed authority to regulate attachments to electric utility poles. APPA Brief 14-16. In doing so, Congress made clear in Section 224(a)(1) that the Commission's jurisdiction does not extend to poles owned by state and local government-owned utilities. Thus, as government-owned utilities,

public power utilities are specifically exempt from Section 224 and are therefore outside of the only source of specific jurisdictional authority that the Commission has over attachments to *electric utility poles.*

Third, while not disputing that Section 224 exempts public power utilities from the Commission's jurisdiction, the Commission claims that Section 224 "by its terms applies only to 'this section'—i.e., Section 224—and its implementing regulations, not to other provisions of the Communications Act like Section 253 or 332(c)(7)." According to the Commission, "there is no suggestion in Section 224 that Congress sought to foreclose federal oversight of pole attachments except as provided in Section 224." FCC Brief, at 136. This argument is mistaken.

For one thing, this argument ignores the fundamental conclusion of *California Water* that absent a specific grant of authority, the Commission does not have jurisdiction over electric utility poles. In Section 224, Congress responded to *California Water* by giving the Commission jurisdiction over investor-owned utility poles and expressly withholding jurisdiction over poles owned by entities of state and local government. The Commission suggests that there is a meaningful distinction between prohibited "regulation" and permissible "oversight." This is a distinction without a difference. The real issue is jurisdiction, not degrees of regulation. In Section 224, Congress expressly denied the Commission any and all jurisdiction over publicly-owned poles.

The Commission suggests that Section 253 is a sufficient grant of jurisdiction to satisfy *California Water*. That is incorrect. The broad general language of Section 253 is not specific enough for that purpose. In fact, it is even less specific than the Act's grant of broad authority to the Commission to regulate "all forms of electrical communication, whether by telephone, telegraph, cable, or radio," which the Commission found in *California Water* to be too vague to confer jurisdiction on the Commission to regulate attachments to electric utility poles. While broad, the Commission's authority is "not the equivalent of untrammeled freedom to regulate activities over which the statute fails to confer, or explicitly denies, Commission authority." *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 617 (D.C. Cir. 1976) ("*NARUC*").

The Commission's argument is also inconsistent with the legislative history, as discussed at length in APPA's Brief. APPA Brief at 15-16. That history shows that in enacting the government utility exemption in Section 224, Congress clearly and specifically intended to exempt public power utilities from the Commission's jurisdiction over pole attachments. It makes no difference that this exemption is only found in Section 224, since Section 224 is the only specific grant of authority in the Act over attachments to electric utility poles.

As APPA also showed in its Brief (APPA Brief at 16-20), for over forty years, including the twenty years since the enactment of Section 253, the Commission, the

courts, and Congress have consistently found that the Commission "does not have authority to regulate attachments to poles that are municipally or cooperatively owned." *Report and Order, In the Matter of Implementation of Section 224 of the Act*, WC Docket No. 07-245, Appendix B, ¶ 46, released April 7, 2011 (*2011 Pole Order)*. Nowhere in the *Order* does the Commission address this, let alone try to reconcile it, with its new position that it does have authority over attachments to public power utility poles after all.

If the Commission is suggesting that it has not previously had occasion to analyze the relationship between Section 253 and Section 224 as they apply to attachments to public power utility poles, such a suggestion would not be correct. In its previous efforts to facilitate broadband deployment, the Commission has looked at its existing statutory authority under Section 253 and Section 224 and has found that it did not have authority to regulate public power utility poles attachments, even to effectuate its broadband policy goals. For example, as discussed in APPA's brief, in 2010, as part of its development of a National Broadband Plan ("NBP"), the Commission undertook an exhaustive analysis of existing laws, regulations, and policies impacting broadband deployment, and it made recommendations to Congress for changes in the law where the Commission lacked authority to carry out its policy objectives. APPA Brief, at 17-18. In Recommendation 6.6 of the NBP, which addressed Section 253 and issues related to state and local governments

management of the public rights-of-way, the Commission did not in any way suggest that Section 253 provided a source of authority for the Commission to regulate attachments to public power utility poles. To the contrary, in the immediately preceding section of the Plan, the Commission discussed the Commission's lack of authority over attachments to public power utility poles and recommended that Congress amend Section 224 of the Communications Act as a means to remedy this gap in its authority.[2]

Not only is the Commission's newfound position inconsistent with its statutory authority and its prior conclusions, but the only substantive reference to Section 224 in the entire *Order* is found in a single cursory footnote – footnote 253. It was arbitrary and capricious for the Commission to abruptly reverse its prior determinations without a meaningful and thorough explanation. As the Supreme Court has held, "unexplained inconsistency" is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). This is particularly true given the detailed

[2] As noted in its opening brief, APPA disagrees with the Commission's suggestion that the pole attachment practices of publicly-owned utilities have had an adverse impact on broadband deployment. APPA does, however, agree with the Commission's conclusion in its NBP that Congress would have to amend the federal Communications Act to give the Commission the authority that it seeks over attachments to public power utility poles.

and substantive arguments that APPA and others raised in their comments on this issue that the Commission did not even acknowledge, let alone address, as well as the fact that the Commission's action is not merely the adoption of a new policy or revised policy but a dramatic reinterpretation and expansion of its existing statutory authority. The Commission's attempted post hoc rationalizations in its brief do not (and cannot) remedy this fatal defect. "We do not, of course, substitute counsel's *post hoc* rationale for the reasoning supplied by the [Commission] itself." *National Labor Relations Board v. Kentucky River Community Care, Inc*, 532 U.S. 706, 711, n. 1 (2001), quoting *NLRB v. Yeshiva Univ*.; 444 U.S. 672, 685, n. 22 (1980).

B. Section 253 Does Not Apply to Public Power Utility Poles

The Commission's insistence that Section 224 gives it jurisdiction over attachments to public power electric utility poles is also flawed for several other reasons. To these we now turn.

1. The *Order* Violates Well-Established Principles of Statutory Construction

In Section 224, Congress explicitly stated that the Commission has no jurisdiction over poles owned by public power utilities. The Commission does not deny that this is what Section 224 says, but it suggests that Section 253 implicitly enables the Commission to do precisely what Section 224 expressly prohibits it from doing – exercising jurisdiction over attachments to public power electric utility poles. In attempting to defend its actions the Commission argues that Sections 224

and 253 are two different sections of the Communications Act with different purposes and that "nothing in Section 224 suggests that Section 253 (or 'any other portion of the Act') does not 'apply to poles or other facilities' owned by public power utilities." FCC Brief, at 135, quoting the *Order* at ¶ 92 fn.253 (APP-E.R. 170) (internal quotation marks omitted).

Again, the flaw in this reasoning is that nothing in the language or legislative history of Section 253 suggests, let alone explicitly states, that Congress intended to grant the Commission jurisdiction over attachments to public power utility poles, as is required by *California Water* and *NARUC*. This lack of explicit authority has to be read in the context of the explicit denial of authority for the Commission to regulate attachments to public power utility poles in Section 224.

Moreover, in attempting to argue that the more specific language in Section 224 exempting public power utility poles from the Commission's pole attachment jurisdiction does not trump the more general grant of authority in Section 253 to remove state and local government regulatory activities that prohibit competition, the Commission upends two traditional canons of statutory construction.

One of these canons is that the specific controls the general. For example, the Commission asserts that there is no basis for the contention that Section 224 is more specific than Section 253, arguing that the "two provisions address different topics—prohibitions (or effective prohibitions) on the provision of

telecommunications services, on the one hand, 47 U.S.C. § 253(a), and "rates, terms, and conditions for pole attachments" on the other." FCC Brief, at 138.

This argument turns logic on its head. As an initial matter, as discussed in greater detail below, attempting to distinguish the two sections by characterizing Section 224 as being only related to pole attachment "regulations" while characterizing Section 253 as being focused on prohibitions elevates form over substance. The implicit authority that the Commission is claiming under Section 253 with respect to public power utilities is the authority to exercise "*oversight*" (FCC Brief, at 136) over access to utility poles – i.e., the authority to regulate pole attachments – which is precisely what the Section 224 exemption explicitly prohibits. It is the lack of statutory authority to regulate attachments to public power utility poles that is the issue, not the reason why the Commission is seeking to invoke such authority.

Section 253 and the current version of Section 224 are contained within Title II of the federal Communications Act. They were enacted at the same time as part of the Telecommunications Act of 1996. While Section 224 was originally enacted in 1978, it was amended in 1996 as part of the Telecommunications Act to provide cable and telecommunications carriers non-discriminatory access to utility poles owned by covered utilities. At the same Congress extended and carried forward the existing exemption for public power utilities and electric cooperatives. Thus, there

can be no suggestion that Congress intended that the more general language of Section 253 was intended to trump the more specific language of the public power exemption in Section 224. Having specifically exempted attachments to public power utilities from the Commission's jurisdiction in Section 224 there was no reason for the Commission to contain any such exemption in 253.

In analogous case, *Bonneville Power Administration v. FERC*, 422 F.3d 908 (9th Cir. 2005), this Court interpreted a provision of the Federal Power Act ("FPA") that unambiguously exempted government-owned utilities from federal rate regulation (i.e., the rates, terms, and conditions of wholesale electric service) by the Federal Energy Regulatory Commission ("FERC") as overriding a more general grant of authority to FERC under the FPA over wholesale energy sales. "FERC's attempt to order refunds based on its *general* jurisdiction over wholesale sales of electric energy in interstate commerce contained in § 201(b)(1) contravenes the more *specific* provisions of the FPA that limit FERC's authority over governmental entities. *Id.*, 920 (*emphasis* in original). In adopting this finding, the court in *Bonneville* relied on "the basic principle of statutory construction, [ ] that the specific prevails over the general." *Id*., 916. See also, *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974), "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."

Here, Congress set forth very specific limitations in Section 224 on the Commission's jurisdiction over attachments to public power utility poles and there is no clear statement to the contrary in Section 253. Accordingly, the specific exemption from pole attachment regulation of public power utilities in Section 224 is not overridden by the broad general grant of authority under Section 253.

The other canon that the Commission's argument violates is that a court must assume that Congress intends that every provision of its laws be given effect. *United States v. Menasche*, 348 U.S. 528, 538 (1955); *Wilshire Westwood Assocs. v. Atl. Richfield Corp.*, 881 F.2d 801, 804 (9th Cir. 1989); *United States v. LKAV*, 712 F.3d 436, 440 (9th Cir.2013). The Commission's new interpretation of Section 253 would effectively eviscerate Section 224. As interpreted by the Commission, Section 253 empowers the Commission to oversee or regulate the very same public power utility poles that Section 224 expressly puts beyond its reach. Thus, to uphold the Commission's interpretation, the Court would have to read the public power exemption out of Section 224.

2. Characterizing the Commission's Actions As "Oversight" Rather Than Regulation Does Not Protect or Legitimize Them

The Commission's brief argues that its *Order* does not nullify the Section 224 exemption for public power utilities by attempting to distinguish Section 224 and Section 253, by characterizing the former as imposing detailed regulations on utility

pole attachments governing "rates, terms and conditions," (FCC Brief, at 137) and the later as merely imposing "federal oversight of [public power] pole attachments" (FCC Brief, at 137) in order to avoid prohibitions on the provision of telecommunications services. In drawing this distinction, the Commission claims that while Section 224 directs it to adopt detailed regulations on what constitutes reasonable rates, terms, and conditions for pole attachments by covered utilities, its assertion of authority under Section 253 over public power utilities leaves public power utilities "free to specify their own rates and terms for pole attachments, and to deny siting requests for any legitimate reason. What they cannot do is demand fees so high that they effectively prohibit small cell deployment in violation of Sections 253(a) and 332(c)(7) of the Act." FCC Brief at 138-139.

First, the Commission's central thesis is incorrect. It is true that Section 224 directs the Commission to develop detailed regulatory rates, terms, and conditions for pole attachments and that Section 253 does not contain similar prescriptive language. But that does not mean that the Commission's assertion of statutory "oversight" authority over public power utility pole attachments under Section 253 is not also an assertion of regulatory authority – authority that the Commission does not possess.

Second, contrary to the Commission's argument, the *Order* does in fact seek to regulate rates, terms, and conditions for access to public power utility poles. While the *Order* does not specify a particular rate calculation methodology, it does require that public power utility pole attachment fees and charges for small cell access be cost-based rather than market-based. *Order*, at ¶¶ 72-79 (APPA-E.R. 39-42). Much like the Commission's Section 224 pole attachment make-ready regulations applicable to private investor-owned utilities, the *Order* requires that public power utilities process, review, and respond to pole attachment applications within specific time frames (shot clocks), including detailed requirements as to when they are required to notify a prospective wireless attaching entity whether the pole attachment application is complete. *Order*, at ¶ 143 (APPA-E.R. 75). Similarly, under its companion *Moratorium Order*,[3] the Commission concluded that Section 253 prohibits state and local government entities from imposing actual or *de facto* moratoriums on reviewing or granting permit applications. As a result, if the Court upholds the Commission's effort to extend its Section 253 public power utility poles, public power utilities will be subject to restrictions on their ability to

[3] *Third Report and Order and Declaratory Ruling*, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, FCC 18-111, WC Docket No. 17-84, WT Docket No. 17-79 (re. Aug. 3, 2018) ("*Moratorium Order*").

manage attachments to their facilities as they believe necessary to ensure safety, security, and reliability of both electric and communications services.[4]

While the Commission has attempted in its brief to downplay the sweep of the *Order*'s requirements with respect to public power utilities, arguing that public power utilities "remain free to specify their own rates and terms for pole attachments, and to deny siting requests for any legitimate reason" (FCC Brief, at 139), the requirements nevertheless remain applicable to public power utilities and therefore exceed the Commission's authority. Moreover, the *Order* itself does not actually say that public power utilities are free to specify their own reasonable rates, terms and conditions for pole attachments. Nor does the *Order* suggest such a measured, light regulatory touch as the Commission's brief attempts to convey.

Indeed, in the *Order* the Commission admonished state and local governmental entities of all sorts, including public power utilities, that it expected full compliance with its announced rules and indicated that its intent was that the *Order* would act as a guide for federal district courts addressing Section 253 and 332 complaints. The *Order* went so far as to declare that exceeding the new shot clocks would be permissible only in "unforeseen" or "exceptional" cases, and that a failure

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[4] As the Northern California Power Agency ("NCPA") warns, the Commission's shot clocks and other requirements "will hinder the ability of public power utilities to take all appropriate actions to reduce and mitigate the risk of catastrophic wildfires" and/or maintain electric system integrity in the face of hurricanes. NCPA *Et Al*, Amicus Brief, at 17.

to meet the shot clocks would "constitutes a presumptive prohibition." *Order*, at ¶ 13 (APPA-E.R. 5). The *Order* even indicates that it could be utilized to preempt and unwind existing wireless small cell pole attachment agreements. *Order*, at ¶ 66 (APPA-E.R. 36).

All of this demonstrates that, contrary to what the Commission's brief suggests, the *Order* is asserting authority and imposing regulatory requirements on public power utility pole attachment matters that Congress specifically exempted in Section 224.

3. Sections 253 and 332 Only Apply to Regulatory Activities

Section 253(a) applies to state or local "statutes," "regulations," or "legal requirements." For twenty years the Commission and courts have consistently held that these provisions relate to state and local governments when they are acting in their regulatory capacity as opposed to when they are acting in a proprietary capacity. Similarly the Commission has interpreted Section 332 being inapplicable to state and local governments acting in a regulatory capacity. *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, ("*Wireless Siting Order*") 29 FCC Rcd. 12865 (F.C.C.), 30 FCC Rcd. 31, 2014 WL 5374631, released October 21, 2014.

In its *Order*, the Commission has abruptly reversed twenty years of prior pronouncements and court determinations and held that Sections 253 and 332 apply

to both governmental and proprietary activities, thereby allowing the Commission to regulate proprietary activities undertaken by government entities. In support of this position, the Commission argued that the "market participant doctrine," does not apply to Sections 253 or 332.

As demonstrated by the briefs of APPA (APPA Brief, at 42-48) and the Local Government Petitioners (LGP Brief, at 76-81), the Commission's conclusions are based on a faulty application of the market participant doctrine as articulated by the Supreme Court in *Boston Harbor* and subsequent cases. *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218 (1993) ("*Boston Harbor*"). It is clear that Section 253 is aimed at governmental regulatory activities or as this Court has held "regulatory schemes." *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004). As APPA's brief noted, while public power utilities are governmental entities, they are not local governments and do not have regulatory authority or control over the use of public rights-of-way.

The Commission's brief does not defend or even reference the *Order's* conclusion that Sections 253 and 332 apply to both governmental and proprietary activities. It is not clear whether the Commission has now abandoned this position. In any event, this Court should affirm twenty years of precedent and find that Sections 253 and 332 apply only to state and local governmental entities acting in a governmental capacity.

4. Public Power Utilities Operate in a Proprietary Capacity and the Commission's Presumptions Should Reflect That Understanding

In its *Order*, the Commission indicated that the record supported its adoption of a sweeping conclusion that essentially all government-owned property located within the public rights-of-way is controlled in a regulatory capacity and/or is managed to advance a regulatory objective and is therefore subject to Section 253. *Order*, at ¶¶ 96-97 (APPA-R.E. 51-52). Perhaps recognizing the weakness of this argument, the Commission's brief attempts to downplay the scope and impact of this conclusion, arguing that the *Order* "did not foreclose the possibility that, in some circumstances, states and localities may take narrow, proprietary actions concerning access to public rights-of-way, or government-owned structures within them, that do not trigger preemption." and that it "concluded only that 'the examples' and 'situations' presented in the record show that, as a general matter, the terms and conditions that governments impose on access serve regulatory aims. FCC Brief, at 132-133.

With respect public power utilities in particular, the Commission's brief goes on to state,

> As to the claim that public power utilities are always, necessarily acting in a proprietary capacity, Public Power Comments 14 (RER 475), the *Small Cell Order* permits the Association (or individual public utilities) to raise that claim in future preemption cases, *see Small Call Order* ¶ 97 (RER 171). The Commission was not obliged in the context of the *Order* to address every circumstance in which there might arise "factual questions" concerning whether a government entity is disguising regulatory acts as proprietary ones. *Id.*

FCC Brief, at 135.

The Commission's efforts to defend the *Order*'s conclusions are not successful, and its attempt to minimize the scope and impact of its conclusions are insufficient and problematic at best.

First, the Commission is simply wrong when it says that it only concluded that "'the examples' and 'situations' presented in the record show that, as a general matter, the terms and conditions that governments impose on access serve regulatory aims." FCC Brief, at 132. As detailed in APPA's brief, APPA provided extensive and detailed comments and reply comments – all part of the record – demonstrating that public power utilities operate in a proprietary capacity and do not have regulatory authority over the public rights-of-way. APPA's comments and brief demonstrated that public power utilities construct, own, and maintain their electric utility facilities as market participants in a commercial activity, not to advance a regulatory agenda or policy. In other words, APPA demonstrated that public power

utilities act in precisely the manner that the Supreme Court in *Boston Harbor* and the Commission have characterized as proprietary activities. The *Order* neither reflects nor even mentions these comments when adopting its sweeping conclusion that as a "general matter" all of these activities, including access to utility poles, are governmental activities.

Second, the fact that public power utilities have the ability to challenge these presumptions in court is little comfort and an unreasonable burden. The Commission's action places a heavy thumb on the scale in support of the notion that public power electric utility operations are governmental rather than proprietary in nature. That presumption is not only contrary to the record, but it is also outside of the Commission's authority and expertise.

5. The Commission Needs to Clarify the Intended Scope of the Order with Respect to Public Power Utilities

In response to APPA's argument in its brief that public power utilities are often different corporate governmental entities than the local government entities that own and control the public rights-of-way where the public power utilities are operating and therefore do not have any regulatory authority over the public rights-of-way, the Commission's brief has clarified that,

> The Commission has nowhere sought to extend its statutory interpretations in the *Small Cell Order* to property within public rights-of-way except when the property in question is controlled by the same government entity that controls the rights-of-way. *See Small Cell Order* ¶ 92 (RER 167) ("We confirm that our interpretations today

> extend to state and local governments' terms for access to public rights-of-way that *they* own or control, . . . as well as *their* terms for use of or attachment to government-owned property within such [rights-of-way] . . . ." (emphasis added)).

FCC Brief, at 135.

APPA is glad to see this clarification and requests that this Court reflect this clarification in its decision.[5]

In its brief APPA argued, as it did in its comments and reply comments to the Commission, that public power utilities, while government entities, do not have regulatory authority over the use of the public rights-of-way. This is especially so when they provide utility services outside of their local jurisdictions. In its brief the Commission appears to be agreeing with this position by stating that "if public utilities have no regulatory authority over the public rights-of-way in which they own poles, the *Small Cell Order* does not purport to reach that circumstance." FCC Brief, at 136.

Again, APPA is glad to see this clarification, and it urges this Court to include in its decision a finding that Section 253 does not apply to public power utility poles

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[5] While it is true that paragraph 92 of *Order* suggests that Section 253 applies only to government-owned facilities that are owned by the same governmental entity that manages the public rights-of-way, other references to government-owned facilities in the public rights-of-way do not clearly reflect this limitation. For example, footnote 253 of the *Order* states, "We conclude that our interpretation of effective prohibition extends to fees for all government-owned property in the ROW, including utility poles."

wherever the utility does not have regulatory control over the public rights-of-way, irrespective of whether the public power utility is part of the same municipal government that owns and controls the public rights-of-way.

II. SECTION 253(a) REQUIRES AN ACTUAL OR EFFECTIVE PROHIBITION AND THE COMMISSION'S CONCLUSIONS DO NOT SATISFY THIS STANDARD

In its brief APPA argued that the Commission has adopted an overly broad interpretation of what constitutes a "barrier to entry" under Section 253(a). APPA noted that the Commission's interpretation improperly prohibits state and local government actions that merely have the potential to create a barrier to entry rather than an actual prohibition, and that this interpretation runs counter to the specific findings of this Court that "a plaintiff suing a municipality under Section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition." *Sprint Telephony PCS, L.P. v. County of San Diego,* 543 F.3d 571, 578 (9th Cir. 2011).

In its brief, the Commission defends its *Order* by advancing the novel theory that the *Order* satisfies the requirement of *San Diego County* that an actual or effective prohibition be shown, based on its "findings" and "policy judgments" that particular practices constitute a barrier to entry. FCC Brief, at 117.

This argument attempts to elevate conjecture about possible future small cell deployments, market study projections, and anecdotal statements into a

determination that the practices at issue constitute "actual" prohibitions. None of this is grounded in reality and at best suggests a "mere possibility" that the practices, if allowed to occur, would act as prohibitions, rather than a demonstration of an actual prohibition, as is required under Section 253.

III. THE ORDER'S COMPENSATION REQUIREMENTS

In the interest of judicial economy and avoidance of repetition, as requested by the Case Management Conference Order of April 18, 2019 (Doc 55), APPA continues to stand by and agrees with the arguments challenging the *Order*'s fee and compensation provision made by the LGP in their initial brief and reply brief.

CONCLUSION

For all of the foregoing reasons, the Court should reverse the Commission's *Order* in its entirety, and in particular with respect to its application to public power utility facilities. Absent such reversal this Court should order the Commission to make the clarifications requested herein with respect to the application of its Order to government entities, such as public power utilities, that do not have regulatory authority over the public rights-of-way.

Respectfully Submitted,

Jim Baller
Sean A. Stokes
Baller Stokes & Lide, P.C.
2014 P St. NW Suite 200
Washington, D.C. 20036
(202) 833-5300
(202) 833-1180 fax

Counsel for the American Public Power Association

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 19-70123, 19-70124, 19-70125, 19-70136, 19-70144, 19-70145, 19-70146, 19-70147, 19-70326, 19-70339, 19-70341, and 19-70344
(Petitioners Case No. is 19-70339)

I am the attorney or self-represented party.

This reply brief contains 5,288, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature /s/Sean A. Stokes **Date** **09/04/2019**
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CERTIFICATE OF SERVICE

I hereby certify that, on September 4, 2019, I filed the foregoing in the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. I further certify that all parties are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

/s/Sean A. Stokes

Sean A. Stokes
BALLER STOKES & LIDE, P.C.
2014 P St. NW, Suite 200
Washington, D.C. 20036
office: 202/833-5300
fax: 202/833-1180

Counsel for the
American Public Power Association