No. 18-72689 (and related cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF PORTLAND,
Petitioner

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
Respondents

BRIEF FOR RESPONDENT-INTERVENORS CTIA – THE WIRELESS ASSOCIATION, COMPETITIVE CARRIERS ASSOCIATION, SPRINT CORPORATION, VERIZON COMMUNICATIONS INC., AND THE WIRELESS INFRASTRUCTURE ASSOCIATION

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All other parties on whose behalf this filing is submitted concur in its content. *See* Cir. R. 25-5(e).

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INTRODUCTION

This case concerns two orders (collectively, the "*Orders*") issued by the Federal Communications Commission ("FCC" or "Commission") addressing barriers to wireless infrastructure deployment by clarifying the scope of federal statutes that expressly limit the ability of state and local governments to impede the deployment of communications services. In August 2018, the Commission adopted a declaratory ruling deeming unlawful state and local moratoria on the acceptance or processing of communications infrastructure siting applications.[1] The following month, the Commission issued an additional order addressing the preemptive scope of Sections 253 and 332 of the Telecommunications Act of 1996, 47 U.S.C. §§ 253, 332.[2]

The Commission adopted these orders following a robust administrative process. The extensive record demonstrated that although telecommunications providers have been able to work in partnership with many localities to make mutually beneficial network upgrades and deploy new infrastructure and services,

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[1] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018) ("*August Order*"), Respondents' Excerpts of Record 1-120, Case No. 18-72689, Dkt. No. 109 ("RER").

[2] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088 (2018) ("*September Order*") (RER 121–236).

"outlier conduct persists." *September Order* ¶ 25 (RER 129). Such conduct includes problematic state and local laws, policies, and practices that have already thwarted the deployment of communications infrastructure and have effectively prohibited the provision of services. The record also illustrated how these practices, if not addressed, pose a unique threat to the deployment of the infrastructure necessary to provide next-generation "5G" wireless services, which will better meet the needs of today's rapidly growing and evolving mobile ecosystem.

Exercising its well-established authority to interpret and apply the Communications Act, the FCC addressed these issues in two ways: First, it clarified the preemptive scope of Sections 253 and 332(c)(7), adopting common-sense interpretations of the statutes as they apply to all telecommunications services, an action clearly within its statutory discretion. Second, having established a general understanding of the statutory language, the agency applied these interpretations to specific state and local barriers in the context of small wireless facility deployment.

As a result of the FCC's actions, consumers across the country will have access to faster, more reliable communications services in an era in which connectivity is central to everyday life. These services will support an increasing array of high-bandwidth, high-speed, innovative applications, from the Internet of Things to autonomous vehicles and beyond. Winning the race to 5G will also afford

the United States a global competitive edge that will drive tremendous economic benefits throughout the country.

A group of municipalities and municipal associations (the "Local Government Petitioners") challenge the *Orders*. Their Petition seeks to revive a *status quo* under which localities could obstruct the deployment of new wireless services, charge thousands of dollars in recurring fees for each individual antenna (even those small enough to fit on a street light) refuse to accept or process applications for telecommunications infrastructure deployment, fail to make decisions on pending applications for years, and require underground placement of all infrastructure even though wireless telecommunications facilities must be above ground to receive and transmit radio signals necessary to provide service. Local Government Petitioners' challenges to the FCC's reasonable, well-supported exercise of its authority—which interprets and implements the Communications Act while balancing legitimate local interests—are unavailing, and their Petitions should be denied.

JURISDICTIONAL STATEMENT

The Intervenors joining on this brief (collectively, "Industry Intervenors") adopt the Jurisdictional Statement included in the brief of Respondents FCC and the United States of America. Dkt. No. 134 at 5-6 ("FCC Brief").

ISSUES PRESENTED

1. Did the FCC reasonably interpret the ambiguous phrase "effect of prohibiting" in Sections 253 and 332(c)(7) of the Communications Act to reach state and local measures that materially inhibit the deployment of infrastructure used to provide voice and data communications services?

2. Did the FCC reasonably conclude that states and localities impermissibly prohibit or have the effect of prohibiting service when they (a) adopt express or de facto moratoria on applications to deploy new infrastructure; (b) demand fees for small cells that exceed any reasonable approximation of the actual costs a locality must incur; (c) enforce undisclosed or unduly vague aesthetic restrictions on small cells; or (d) fail to act in a timely manner on applications to deploy small cells?

3. Did the FCC reasonably interpret the phrases "any request for authorization" and "reasonable period of time" in Section 332(c)(7) of the Communications Act both to require that all authorizations necessary for deployment be granted within federally prescribed processing "shot clocks" and to permit a shorter "shot clock" for processing of requests to place, construct, or modify small cells?

STATUTORY ADDENDUM

Pertinent statutes are set forth in the FCC's statutory addendum. FCC Br. at Add.

STATEMENT OF THE CASE

A. Sections 253 and 332 of the Communications Act.

The Telecommunications Act of 1996, which added Sections 253 and 332(c)(7) to the Communications Act, represented a top-to-bottom reinvention of the way communications services are regulated in the United States. Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act"). Adopted to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies," *id*. at Preamble, the 1996 Act introduced sweeping reforms which, among other things, significantly limited state and local control over telecommunications services.

Under Section 253(a), which applies to all telecommunications services, "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a).

Section 332(c)(7), which applies specifically to personal wireless services, applies the same "effective prohibition" standard to "the placement, construction, and modification of personal wireless service facilities." along with other substantive and procedural limitations on state and local processing of siting requests. *Id*. § 332(c)(7)(B). As relevant here, Section 332(c)(7) requires "[a] State

or local government or instrumentality thereof [to] act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request." *Id*. § 332(c)(7)(B)(ii).

B. Development of Telecommunications Technology Following the 1996 Act.

When the 1996 Act was passed, wireless services were nascent and not widely used by consumers. Wireless service was typically provided using large "macro" cells, located on towers or existing structures built on private property, subject to zoning restrictions. In contrast, then-ubiquitous wireline services generally needed access to locally controlled "rights of way" (or "ROW") to string wires and fiber optic cables aerially or underground, and were typically subject to either administrative permitting or, at most, franchise and other access agreements with local jurisdictions. The differences between these two broad categories of communications technology, combined with the ambiguous nature of the "effective prohibition" language contained in Sections 253 and 332, led to judicial inconsistency in interpretation and application of these statutes, despite nearly identical statutory language and broad overlap in scope between the two provisions. *See, e.g., September Order* ¶ 34 (RER 134).

As wireless service has expanded and evolved, the challenges facing the wireless industry have changed. Wireless service is now a widely relied on direct competitor to wireline services. Over half the households in the Country have "cut the cord" and rely entirely on wireless services for their communications needs. Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey*, National Ctr. for Health Statistics, July-December 2018, at 1. To meet consumer demands for coverage and capacity, wireless providers must more efficiently use spectrum by shrinking both the size and coverage area of their "cells" in a process called "densification." And they must modify existing facilities as new spectrum bands become available. While a single macro-cell might have sufficed to provide coverage and capacity to a wide area in the late 1990s, providers must now deploy substantially more facilities, closer to the customer—particularly in residential and highly congested areas.

Those challenges increase exponentially with the advent of 5G wireless technologies. 5G makes possible a vast range of new services that require high bandwidth and low latency; in many initial deployments, 5G will be provided over high-frequency spectrum that allows for tremendous capacity and speeds but does not propagate well over distances. These factors will result in more and smaller wireless facilities (often called "small cells"), placed closer to where customers expect to access the services. Consequently, right-of-way access has become crucial

for the provision of next-generation wireless services, just as it was for wireline facilities at the time the 1996 Act was adopted. As the record before the FCC demonstrated, "Local ROWs are the best areas to deploy these facilities because of their inventory of existing densely-spaced, low-elevation vertical structures." AT&T Comments at 13 (RER 363). For example, street lights, lampposts, and other municipal right-of-way infrastructure are well-positioned to host small cell facilities—and in fact, some local governments insist that infrastructure be placed on existing facilities before new structures may be built. *See, e.g.*, Sahuarita, AZ, Town Code § 18.60.050(3)(E) ("New communication facilities shall not be permitted unless the applicant demonstrates . . . that no existing tower or structure can accommodate the applicant's proposed antenna.").

Many state and local governments have encouraged the deployment of these new wireless facilities. Across the country, many states have recognized the unique nature of small wireless deployment and enacted laws that limit the fees local jurisdictions can charge and streamline construction approvals. *See, e.g.*, AT&T Comments at 18 n.39 (RER 368) (citing state legislation limiting ROW usage fees charged by municipalities); CTIA *Ex Parte* Letter, WT Docket No. 17-79, at 5 (filed Aug. 30, 2018), Industry Intervenors' Excerpts of Record 102 ("IER"). Today, 28 states and Puerto Rico have adopted similar legislation. But other jurisdictions have thrown up barriers or imposed stratospheric per-site fees in an attempt to cash in on

these new deployments, posing an existential threat to successful broadband deployment. *See, e.g.,* Comments of CTIA, WT Docket No. 17-79 at 30 (filed June 15, 2017) (IER 41) (*e.g.,* "A county in Virginia required a $15,000 application fee per utility pole."); *see also* Section III.B, *infra*. These restrictions can prohibit or effectively prohibit service in numerous ways that are both subtle and sophisticated. Moreover, the resulting material inhibitions on the provision of service are often discriminatory and can choke off new and innovative services or technologies before they are ever deployed. *See September Order* ¶¶ 25-26, 41 (RER 129-30, 141).

C. The Orders.

In light of both the inconsistency in judicial interpretations of the effective prohibition standard and the threats posed state and local barriers to entry, the FCC initiated twin proceedings to clarify the scope of Sections 253 and 332(c)(7) and thereby "accelerate the deployment of next-generation networks and services by removing barriers to infrastructure investment." *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266, ¶ 1 (2017) (RER 298); *see also generally id*. (RER 297-360); *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330 (2017) (RER. 237-96).

Months of deliberations, hundreds of comments, and the development of a robust regulatory record culminated in the *August* and *September Orders*. The *Orders* adopt a number of clarifications to Sections 253 and 332(c)(7). Those clarifications resolve inconsistencies among Circuits and providing much-needed certainty about the limits on state and local authority to take actions that affect telecommunications service and infrastructure providers—regardless of technology used.

Recognizing the unique challenges facing small cell deployment, the essential role small cells will play in the deployment of 5G, and the importance of rights-of-way to small cell deployment, the FCC then applied these clarifications to the small cell context. Relying on specific evidence in the record, and concurring with states that have adopted "small cell" bills to facilitate this type of deployment, the Commission made a number of determinations about policies that violate Sections 253 and 332(c)(7) when applied to small wireless facilities. The Commission's actions were not only within the agency's statutory authority, but the agency could (and should) have gone even further by adopting a remedy pursuant to which a siting application submitted under Section 332(c)(7) would be deemed granted if the reviewing locality failed to act within the time periods prescribed by the FCC's rules. *See* Case No. 19-70123, Dkt. No. 73 ("Wireless Petitioners' Brief").

D. Procedural History

Industry Intervenors adopt the Procedural History set forth in the FCC's Brief. FCC Br. at 29-30.

STANDARD OF REVIEW

This Court applies the familiar two-step *Chevron* test for FCC interpretations of its organic statute. *New Edge Network, Inc. v. FCC*, 461 F.3d 1105, 1110–11 (9th Cir. 2006) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)). If Congress "has not spoken to the precise question" before the Court, the Commission's interpretation stands, so long as it is reasonable. *Id.*; *see also City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296 (2013). Under the Administrative Procedure Act, the Commission's decisions are upheld unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This review is "highly deferential, presuming the agency action to be valid," and is akin to rational basis review. *Agua Caliente Tribe of Cupeño Indians v. Sweeney*, No. 17-16838, 2019 WL 3676342, at *11 n.10 (9th Cir. Aug. 7, 2019) (citation omitted).

SUMMARY OF ARGUMENT

The Commission's Orders represent a reasonable regulatory response to voluminous record evidence showing the challenges facing wireless facilities deployment. The evolution of wireless usage and technology has made high-speed

wireless coverage a critical part of daily life, but certain state and local policies stand as an obstacle to deployment of the facilities necessary to provide the services that Americans expect—and the revolutionary new services that 5G will enable. To address these issues, the FCC took two steps: First, it interpreted and clarified existing, ambiguous language in the Communications Act in a manner applicable to all telecommunications facilities and services. Second, the FCC applied its interpretations to specific types of state and local policies governing small wireless facilities, the type of installations most threatened by the practices in the record. The FCC's approach properly balances its federal statutory obligation to facilitate telecommunications deployment against local interests.

I. The Commission began by examining the language in Sections 253 and 332(c)(7) of the Communications Act, which were added in 1996 to remove barriers to the provision of telecommunications and wireless services, respectively. Consistent with decades of court precedent, the Commission reasonably concluded that the language in these statutes which forbids state and local governments from prohibiting or having the effect of prohibiting services, is ambiguous and subject to construction by the agency. Contrary to the claims made by Petitioners, the *en banc* decision in *Sprint* is not to the contrary—that decision's conclusion about a lack of ambiguity in the Act was narrowly focused on correcting a prior panel's grammatical

error, rather than a sweeping (and counterintuitive) holding that the words of the Act are clear in all respects.

II. In issuing generally applicable interpretations of the statues, the FCC reaffirmed its longstanding *California Payphone* standard, which holds that a prohibition is anything that materially inhibits the ability of a telecommunications provider to compete in a fair and balanced regulatory environment, and harmonized application of this standard to both Sections 253 and 332(c)(7). It then found, based on the record before it, that (1) "materially inhibits" applies to filling a coverage gap, "densifying" a wireless network, introducing new services, or otherwise improving service capabilities, (2) certain conduct constitutes *per se* prohibitory action, (3) both *de jure* and *de facto* moratoria are precluded, and (4) consistent with appellate decisions from around the country, fees imposed by local jurisdictions can and do have a prohibitory effect.

III. The FCC then went on to apply these principles in the specific context of small wireless facilities. The record demonstrated that these facilities are increasingly critical for wireless deployment and have unique characteristics that justify treating them differently as a class. While these characteristics suggest that they should be subject to streamlined, more efficient regulation, the FCC found that instead they faced unique barriers in some places, such as exorbitant fees, discriminatory processes, and lengthy review procedures.

The FCC was thus justified in taking the specific actions that it took to speed small cell deployment. The agency's determination that fees higher than reasonable costs would prohibit the deployment of small cells was amply supported by the record; the large number of small cell deployments means that the aggregate impact of fees levied on each facility would be substantial, and the agency found that the impact of this prohibition would be felt particularly in rural and suburban areas, exacerbating the digital divide. Further, the agency acted reasonably in establishing a "safe harbor" (consistent with the state laws in the record) to reduce potential litigation.

The record also supported the FCC taking steps on aesthetic, minimum spacing, and undergrounding requirements. Here, the agency's action was modest—it acknowledged that local governments have legitimate aesthetic concerns, but found that if aesthetic conditions were not objective, published in advance, and reasonable, they are prohibitive, and that minimum spacing requirements also can rise to the level of material inhibitions. The Commission's determination that undergrounding requirements are prohibitory is dictated by the physics of radio transmissions, and is consistent with this Court's own precedent.

The FCC also reasonably concluded that, in the context of access to the rights of way, local jurisdictions were acting in a regulatory rather than a proprietary capacity, and that local jurisdictions could not circumvent the requirements of

federal law by simply declaring themselves landlords. Both case law and the record supported the conclusion that local jurisdictions hold the rights of way in trust for the public, not in fee simple as property owners.

IV. Finally, the Commission was justified in adopting shorter review periods for small cell applications under Section 332(c)(7)'s mandate that states and localities act on siting requests within a reasonably period of time. The FCC also was well within its authority to clarify the remedies available for all shot clock violations, including presumptions of prohibition and underlining that temporary and permanent injunctive relief may well be appropriate. Indeed, based on the record before it, the Commission should have gone further, and (as argued by the Wireless Petitioners) adopted a "deemed grant" remedy similar to the one it imposed under Section 6409.

For all of these reasons, the Local Government Petitions should be denied.

ARGUMENT

I. THE FCC HAS AUTHORITY TO INTERPRET THE COMMUNICATIONS ACT.

A. The FCC Has Authority to Interpret Ambiguous Terms in the Communications Act, Including Those the Agency Interpreted in the *Orders*.

Congress granted the FCC the authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Communications Act. 47 U.S.C. § 201(b). The Supreme Court has confirmed

that this authorization empowers the FCC to issue declaratory rulings that "clarify the meaning" of "ambiguous" statutory terms. *City of Arlington*, 569 U.S. at 294–95. The FCC's resolution of these "archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests" is controlling, *id*. at 304, so long as the agency remains within "whatever degree of discretion the ambiguity allows," *Marmolejo-Campos v. Holder*, 558 F.3d 903, 917 (9th Cir. 2009) (internal quotation marks and citation omitted). *See also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (deferring, under *Chevron*, to FCC declaratory ruling interpreting ambiguous terms despite prior court decisions construing the same language).

The FCC reasonably exercised its interpretive authority here. The *September Order* clarified what it means for a state or local legal requirement to "prohibit or have the effect of prohibiting" services as that phrase is used in Sections 253(a) and 332(c)(7)(B). Recognizing that "the Commission and different courts over the years have employed inconsistent approaches to deciding what it means for a state or local legal requirement to have the 'effect of prohibiting' services," *September Order* ¶ 34 (RER 134), the FCC "reaffirm[ed], as [its] definitive interpretation of the effective prohibition standard, the test [it] set forth in *California Payphone*," *id.* ¶ 35 (RER 135); *see California Payphone Ass'n*, Memorandum Opinion and Order, 12 FCC Rcd 14191 (1997) ("*California Payphone*").

Under the *California Payphone* test "a state or local legal requirement constitutes an effective prohibition if it 'materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'" *September Order* ¶ 35 (RER 135) (quoting *California Payphone*, 12 FCC Rcd at 14206, ¶31).[3] The *September Order* explained "how this 'material inhibition' standard applies in the context of state and local fees and aesthetic requirements" imposed on small cells, consistent with the evidence in the administrative record. *Id.* And the *August Order* applied it to preempt express and *de facto* moratoria on applications to deploy telecommunications facilities.[4] *August Order* ¶¶ 145–52 (RER 73, 76) (citing, *inter alia*, *California Payphone*). These interpretations of the statute were reasonable and well within the Commission's authority.

[3] Numerous courts of appeals have recognized *California Payphone*'s material inhibition test as the governing standard, although they have not necessarily applied it consistently. *See, e.g.*, *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st. Cir. 2006); *Level 3 Commc'ns, L.L.C. v. City of St. Louis, Mo.*, 477 F.3d 528, 533 (8th Cir. 2007); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004).

[4] The *September Order* also interpreted the terms "any request for authorization" and "reasonable period of time" as used in the procedural limitation in Section 332(c)(7)(B)(ii), and similarly applied the latter phrase to small cells in light of record evidence. These interpretations are addressed in Section IV, *infra*.

B. The En Banc *Sprint* Decision Did Not Purport to Foreclose the Interpretations the FCC Adopted Here.

The Local Government Petitioners contend that the FCC lacked "discretion" "to define what it means to 'prohibit or effectively prohibit' services" because, they believe, this Court removed all of the FCC's interpretive discretion in *Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571 (9th Cir. 2008) (en banc). Local Government Petitioners' Brief, Dkt. No. 62, at 36 ("LGP Br."); *see also id.* at 37–39. They are mistaken.

In *Sprint*, the en banc Court corrected a prior panel decision that rested on an out-of-context quotation from Section 253. Section 253(a) provides that "[n]o State or local statute or regulation . . . may prohibit or have the effect of prohibiting . . . provi[sion of] . . . telecommunications service." 47 U.S.C. § 253(a). "In context, it is clear that Congress' use of the word 'may' works in tandem with the negative modifier '[n]o' to convey the meaning that 'state and local regulations shall not prohibit or have the effect of prohibiting telecommunications service.'" *Sprint*, 543 F.3d at 578. Because the panel had missed this important context, it incorrectly had interpreted the word "may" as meaning "might possibly"—a decision that led numerous subsequent courts astray. *See id.* The en banc Court found that the prior decision rested on a grammatical error, and that the "unambiguous text" of the statute, properly read, foreclosed the "might possibly" standard. *Id.* As a result, it overruled the panel decision. *Id.* Accordingly, after *Sprint*, a plaintiff suing a

municipality under §§ 253(a) or 332(c)(7)(B) "must show actual *or* effective prohibition, rather than the *mere possibility* of prohibition." *Id.* (citation omitted, emphasis added); *see id.* at 579.

The Local Government Petitioners misread *Sprint* in two critical ways. First, they overread the en banc Court's statement that its "conclusion rests on the unambiguous text of § 253(a)." *See* LGP Br. 36–37. The Court did not, as these petitioners assert, resolve any and all ambiguities in the phrase "prohibit or have the effect of prohibiting" and place the phrase forever outside the FCC's interpretive authority. Rather, the Court held that *one* mistaken construction—built on a grammatical error made by a prior court—was foreclosed by section 253(a)'s "unambiguous text": the "interpretation of the word 'may' as meaning 'might possibly.'" *Sprint*, 543 F.3d at 578. The FCC did not adopt that foreclosed interpretation in the *Orders*. In fact, the agency expressly avoided that interpretation, *see September Order* ¶ 41 n.99 (RER 141), instead clarifying ambiguities in the effective prohibition language consistent with both *Sprint* and *California Payphone*.

Second, the Local Government Petitioners overlook the en banc Court's confirmation that the statute preempts both "actual" *and* "effective" prohibitions. Their brief repeatedly conflates these terms. *See, e.g.*, LGP Br. 29 ("The FCC's seminal 'effective prohibition' decision … required an actual prohibition."); *id.* at

36 ("An actual prohibition is required."); *id*. at 37 ("The 'actual prohibition' standard is binding"); *id*. at 38–39 ("The new standard erases the 'actual prohibition' required"). The en banc *Sprint* Court was clear, however, that an actual prohibition and an effective prohibition are two different things: "Under both [§§ 253(a) and 332(c)(7)(B)], a plaintiff must establish *either* an outright prohibition *or* an effective prohibition on the provision of telecommunications services." *Sprint*, 543 F.3d at 579 (emphasis added); *see also id.* at 578 ("to be preempted . . . a regulation 'would have to actually prohibit *or* effectively prohibit' the provision of services" (quoting *California Payphone*, 12 FCC Rcd at 14209) (emphasis added)). The Local Government Petitioners are thus wrong when they contend that it was "substantive error" for the FCC, after *Sprint*, not to require an "actual prohibition" in every circumstance. LGP Br. 37. Instead, it is the Local Government Petitioners that urge this Court to adopt an interpretation of *Sprint* that would read words out of the statute entirely. *See Redlin v. United States*, 921 F.3d 1133, 1139 (9th Cir. 2019) (explaining that courts must "give effect to every word of a statute" (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004)).

The FCC's correct reading of *Sprint* is confirmed by the en banc Court's favorable citation to both *California Payphone* and *MetroPCS, Inc. v. City & County of San Francisco*, 400 F.3d 715, 730 (9th Cir. 2005). In *California Payphone*, the FCC gave meaning to the distinction between "actual" and "effective" prohibitions:

"an insurmountable barrier is not required to find an effective prohibition under Section 253(a)" because "[t]he 'effectively prohibit' language must have some meaning independent of the 'prohibit' language." *See September Order* ¶ 41 & n.101 (RER 141) (discussing *California Payphone*). The FCC also indicated that it might determine, in a future proceeding with a more developed record, that particular practices by local governments "effectively prohibit" the ability to provide service. *See California Payphone*, 12 FCC Rcd at 14209–10, ¶¶ 39–41. *Sprint*'s description of its holding as "consistent with" *California Payphone*, 543 F.3d at 578, confirms that the decision could not have been intended to eliminate the FCC's authority to interpret the ambiguity that remained in Sections 253(a) and 332(c)(7)(B), or to cast doubt on the FCC's ability to conduct a proceeding to more fully define an effective prohibition.

The en banc Court's discussion of *MetroPCS* is similarly illuminating. In *MetroPCS*, this Court rejected the Fourth Circuit's view that "[a] city-wide general ban on wireless services … is the only circumstance under which" an impermissible prohibition exists, finding that the statute must be construed to advance "Congress's twin goals of encouraging competition in the wireless services industry and facilitating efficient use of bandwidth." 400 F.3d at 730–31. Thus, *Sprint's* endorsement of *MetroPCS* not only confirms that the FCC has the authority to

interpret the statute, but also suggests that in doing so it should construe the statute broadly to serve Congress's pro-competitive purposes.

In addition to misreading *Sprint*, the Local Government Petitioners ignore the overwhelming number of Supreme Court and appellate decisions recognizing that, like many other parts of the 1996 Act, Sections 253 and 332(c)(7) are "not a model of clarity." *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999). There are many court decisions articulating different interpretations and applications of the effective prohibition language in Sections 253(a) and 332(c)(7)(B). *See September Order* ¶ 35 (RER 135); *see also id.* ¶¶ 30 (RER 133) ("a number of appellate courts have articulated different and often conflicting views"), 98 (RER 172) (noting "substantial uncertainty . . . in connection with Small Wireless Facility infrastructure"). These decisions, taken together, leave no doubt that reasonable judicial minds might disagree on competing reasonable interpretations of the statute. *See, e.g.*, *id.* ¶ 40 nn.94, 95, & 97 (RER 168-69, 171) (collecting cases from the First, Second, Third, Fourth, Seventh, and Ninth Circuits articulating various forms of "coverage gap" analysis); *id.* ¶ 41 nn.99 & 100 (RER 141) (collecting cases from the First, Second, Eighth, Ninth, and Tenth Circuits addressing *California Payphone*'s meaning). Because there is no "single right answer," *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019), the FCC is entitled to resolve this judicial inconsistency in favor of uniform, national standards. *See Brand X*, 545 U.S. at 983.

II. THE COMMISSION ADOPTED REASONABLE GENERALLY-APPLICABLE INTERPRETATIONS OF THE "PROHIBIT OR HAVE THE EFFECT OF PROHIBITING" LANGUAGE IN SECTIONS 332 AND 253.

Duly empowered to interpret the Communications Act, *see Brand X*, 545 U.S. at 980, the Commission issued four clarifying interpretations of the effective prohibition standard that apply broadly to the deployment of all telecommunications facilities: (1) that "effective prohibition" of service must be understood in the context of modern telecommunications networks, which may involve introducing new services or improving existing services in a variety of ways; (2) that state and local conduct can be *per se* prohibitory—in other words, that certain conduct can be predicted to have the effect of prohibiting service in all contexts; (3) that express and *de facto* moratoria have the effect of prohibiting service; and (4) that fees above the state or local government's costs can cause an effective prohibition. Each of those interpretations is consistent with the plain language and intent of the 1996 Act as well as FCC and court precedent—and therefore are reasonable under *Chevron*.

A. The Commission Adopted a Reasonable Interpretation of the Effective Prohibition Standard as Applied to Modern Telecommunications Networks.

The Commission first clarified that the effective prohibition standard must take into account the diversity and complexity of the wireless communications networks of today and the future. Specifically, the Commission determined that "an effective prohibition occurs where a state or local legal requirement materially

inhibits a provider's ability to engage in any of a variety of activities related to its provision of a covered service," including "filling a coverage gap, . . . densifying a wireless network, introducing new services or otherwise improving service capabilities." *September Order* ¶ 37 (RER 137-38). Such an interpretation, the Commission found, "reflects and supports a marketplace in which services can be offered in a multitude of ways with varied capabilities and performance characteristics consistent with the policy goals in the 1996 Act and the Communications Act." *Id*. ¶ 38 (RER 138).

As the Supreme Court has explained, deference to this type of agency interpretation is justified "because of the agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Indeed, "deference is particularly great where, as here, the issues involve a high level of technical expertise in an area of rapidly changing technological and competitive circumstances.". *See Verizon Tel. Cos. v. FCC*, 292 F.3d 903, 909 (D.C. Cir. 2002) (quotation marks and citations omitted).

The record offered robust support for the FCC's conclusion about the changing nature of the network and the implications for the effective prohibition standard. T-Mobile, for example, noted that as reliance on wireless devices has increased, "a provider might need to improve 'signal strength or system capacity to

allow it to provide reliable service to consumers in residential and commercial buildings.'" *September Order* ¶ 37 n.86 (RER 138) (quoting T-Mobile Comments at 43). Similarly, Sprint explained that "[g]iven the rapid growth in customer demand for increased speed and capacity and the fact that this growth cannot be met solely through macro cells, Sprint and other carriers must expeditiously densify their networks in the next few years, both to augment their existing 4G networks and to prepare for the deployment of 5G." Comments of Sprint, WT Docket No. 17-79, at 10 (filed June 15, 2017) (IER 65).

This interpretation is also consistent with the statutory text and intent. Sections 253 and 332(c)(7) preempt actions that effectively prohibit the "ability . . . to provide . . . service" (Section 253) or the "provision of . . . services" (Section 332(c)(7)). These undefined terms leave ample room for Commission interpretation about what it means to "provide service," and what types of state and local actions can materially interfere with those activities. It is also consistent with longstanding Commission precedent holding unlawful under Section 253 local requirements that "restrict the means or facilities through which a party is permitted to provide service." *Public Utility Comm'n of Texas Petition for Declaratory Ruling and/or Preemption*, Memorandum Opinion and Order, 13 FCC Rcd 3460, 3496, ¶ 74 (1997) ("*Texas PUC Order*").

The interpretation chosen by the FCC takes into account the complex and evolving nature of modern telecommunications networks and services and ensures that participation in a balanced regulatory environment includes the ability to design and configure networks, introduce new services, and improve aspects of existing services. This interpretation thus fulfills the 1996 Act's directive to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat 56, Preamble.

B. The Commission Reasonably Determined that Some Conduct Is *Per Se* Prohibitory.

The Commission also found that specific types of state and local conduct are *per se* effective prohibitions. This is reasonable under the statute, which contains no proviso that effective prohibitions can only occur, or must be evaluated on, a case-by-case basis. The agency has the authority to use its predictive judgment to conclude that certain types of actions will materially inhibit the ability to operate in a fair and balanced regulatory environment in all circumstances. As the Supreme Court has observed with respect to the FCC specifically, "the Commission's decisions must sometimes rest on judgment and prediction rather than pure factual determinations. In such cases complete factual support for the Commission's ultimate conclusions is not required, since a forecast of the direction in which future

public interest lies necessarily involves deductions based on the expert knowledge of the agency." *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-95 (1981) (quotation marks and citations omitted).

In fact, multiple courts, including this Court, have held that courts "are to conduct a 'particularly deferential review' of an 'agency's predictive judgments about areas that are within the agency's field of discretion and expertise . . . as long as they are reasonable.'" *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (quoting *EarthLink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006) and citing *Cellnet Commc'ns, Inc. v. FCC*, 149 F.3d 429, 441 (6th Cir.1998) and *W. Fuels–Ill., Inc. v. ICC*, 878 F.2d 1025, 1030 (7th Cir.1989)), *overruled on other grounds by Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

Moreover, it is axiomatic that "the choice made between proceeding by general rule or by individual ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). Using rulemaking as opposed to adjudication not only provides an agency with "an invaluable resource-saving flexibility in carrying out its task of regulating parties subject to its statutory mandate," but also "yield[s] significant benefits to those the agency regulates" and "may actually be fairer to regulated parties than total reliance on case-by-case adjudication." *Nat'l Petroleum Refiners Ass'n v. FTC.*, 482 F.2d 672, 681 (D.C. Cir. 1973).

In fact, identifying some conduct that is an effective prohibition in all cases provides more certainty to localities and regulated entities than a purely case-by-case regime would allow, facilitating participation in a fair and balanced market consistent with *California Payphone*. By contrast, the standard urged by Petitioners would *only* permit Section 253 or 332(c)(7) challenges on an as-applied basis, where a provider could bring specific evidence of a particular (and absolute) prohibition to the court's attention. *See, e.g.*, Pet. Br. at 52-53. Nothing in the statute requires that these cases be adjudicated on a case-by-case basis, only after the prohibition has occurred. Allowing a start-up company, for example, to bring a challenge only after it has been completely barred from the market (and with no potential for monetary damages) does not promote the rapid deployment of competition or new technologies, and would constitute its own form of prohibition.

C. The Commission Reasonably Interpreted the Effective Prohibition Language to Preclude Both *de Jure* and *de Facto* Moratoria.

In the *August Order*, the Commission also determined that both express and *de facto* moratoria on processing wireless applications are "prohibitions" under Section 253. Both of these decisions are consistent with the statutory text, Commission precedent, and the purpose of the Act.

The Commission first observed that express moratoria—state or local enactments that by their terms prevent or suspend the acceptance, processing, or approval of applications or permits necessary for deployment—are "facially

inconsistent with section 253(a)," because they specifically and openly prevent the deployment of telecommunications facilities. *August Order* ¶ 147 (RER 75). The agency also determined that *de facto* moratoria—policies that, although not formally codified, "effectively halt or suspend the acceptance, processing, or approval of applications or permits for telecommunications services or facilities in a manner akin to an express moratorium"—are similarly prohibited. *Id.* ¶ 149 (RER 76). Prohibiting localities from exercising a pocket veto over deployment is consistent with the effective prohibition language in Sections 253 and 332; indeed, *Sprint* itself acknowledged that an "excessively long waiting period" could "amount to an effective prohibition." *Sprint*, 543 F.3d at 580; *see also, e.g.*, *TCG N.Y., Inc.*, 305 F.3d 67, 76-77 (2d Cir. 2002) (finding that "extensive delays" in municipality's processing of franchise requests violated Section 253(a)).

Contrary to the claims of Local Government Petitioners, *see* LGP Br. at 101-102, the record contained numerous instances of state and local *de facto* moratoria. These included, among numerous others: (i) multiple jurisdictions in Massachusetts and Illinois that suspended processing of all applications while new policies and ordinances concerning small cells are under consideration, *August Order* ¶ 149 n.552 (RER 76) (citing comments of WIA); (ii) four jurisdictions in Arizona that will not process right-of-way siting applications until the state legislature determines whether to enact legislation, *id*. (citing comments of Mobilitie); (iii) two different

Arizona jurisdictions declining to process applications because of the ongoing Commission proceeding, *id.*; (iv) 30 California localities that refused to negotiate right-of-way access agreements because of plans to acquire street lights, *id.*; and (v) an Indiana jurisdiction where siting applications have been pending for three years, *id.* ¶ 150 n. 557 (RER 77) (citing comments of T-Mobile); *see also, e.g.*, CTIA Comments at 22–23 (RER 414-15); AT&T Comments at 14 (RER 364).

At the same time, the FCC recognized that there are some circumstances in which localities may impose limitations on deployment (such as "street cut" requirements) that may resemble moratoria, but are not, *August Order* ¶ 152 (RER 78), along with a small number of reasonable rights of way management practices (such as coordination of construction schedules) that may be permissible under the Act, *id.* ¶ 160 (RER 82). These exceptions show that the agency drew careful lines to distinguish those restrictions that effectively prohibit service from those that "simply entail some delay in deployment" or limit deployment "but allow for alternative means of deployment in a manner that is reasonably comparable in cost and ease." *Id.* ¶¶ 150, 152 (RER 77-78).

D. The Commission Issued a Reasonable Clarification that Fees Can Effectively Prohibit Service.

Finally, the Commission reasonably determined that fees alone can constitute an effective prohibition, and that these impacts can and do extend beyond the jurisdictions imposing the fees. These findings are consistent with the effective

prohibition language, which applies broadly to *all* state and local "legal requirements" and "regulations." 47 U.S.C. § 253(a) (preempting prohibitory "regulation[s]" or "other State or local legal requirement[s]"); *id*. § 332(c)(7)(B)(i) (preempting prohibitory "regulation of the placement, construction, and modification of personal wireless service facilities"). As the FCC observed, "Federal courts have long recognized that the fees charged by local governments for the deployment of communications infrastructure can run afoul of the limits Congress imposed in the effective prohibition standard embodied in Sections 253 and 332." *September Order* ¶ 43 (RER 143); *see id.* ¶¶ 43-45 (RER 143-44) (citing authorities from the 1st, 2nd, and 10th Circuits). Moreover, at least one such court has found that "the inquiry is not limited to the impact that a fee would have on deployment in the jurisdiction that imposes the fee," but also includes "the aggregate effect of fees when totaled across all relevant jurisdictions." *Id*. ¶ 43 (RER 143) (citing *Guayanilla*, 450 F.3d at 17).

The Commission's finding with respect to the prohibitive impact of fees is also consistent with FCC precedent dating back more than 20 years, which has held that a "financial burden" imposed by a state or local requirement can cause an effective prohibition, *Texas PUC Order* ¶ 13, and that "even a neutral contribution requirement might under some circumstances effectively prohibit an entity from

offering a service," *Pittencrieff Commc'ns, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 1735, 1752 ¶ 32 (1997).

III. THE FCC REASONABLY APPLIED ITS LEGAL INTERPRETATIONS TO SMALL CELL DEPLOYMENTS.

After adopting a series of generally applicable clarifications, the Commission went on to find, consistent with the record, that (1) small cells have unique characteristics and face unique burdens that inhibit deployment; and (2) the agency thus needed to act to alleviate those burdens and spur wireless broadband deployment. *See, e.g.*, *September Order*, ¶¶ 11, 47-50, 69 et seq., 84, 90-92 (RER 144-167). The specific measures the FCC adopted—determining what constitutes unreasonable fees in the small cell context, defining limits on aesthetic requirements, preventing undergrounding requirements, and holding that rights of way and municipal facilities therein are subject to the Act and are not exempt because they are "proprietary"—are reasonable and supported by the record.

A. The Record Shows that Particular Burdens Impede Deployment of Small Cells.

The FCC correctly recognized that unique features of small cells create novel deployment challenges. *First*, small cells in general take far up less space than predecessor technology. Unlike the "200-foot towers that marked the 3G and 4G deployments of the past," *September Order* ¶ 3 (RER 122), small cells "are far less visually intrusive [than macro cell towers] and . . . most can be installed on existing

structures with no ground disturbance," CTIA Comments, Attachment at 2-3. They "have antennas often no larger than a small backpack." *September Order* ¶ 33 (RER 122). As CTIA explained, small cells "are designed to blend in to the streetscape with minimal if any visual impact." CTIA Comments at 29 (IER 40). Photographic record evidence confirms these descriptions:

Sprint Comments at 13 (RER 483).

Second, both because they use less power and, often, higher-band 5G spectrum that propagates over short distances, small cells typically cannot disseminate signals nearly as far as traditional macro towers. *September Order* ¶ 90 & n.250 (RER 166); *see also* Comments of CCIA, WT Docket No. 17-19, at 4 (filed June 15, 2017) (IER 17). They thus typically must be placed both closer to the ground, instead of on all towers, and closer to one another. *See* CTIA Comments at 6 (IER 25) (noting "transition from cell towers to numerous, closely spaced small

cells"). And even small cells that use lower-band spectrum have a smaller footprint than macro cells; it is this smaller cell size that allows small wireless facilities to "densify" a network and promotes more efficient use of spectrum.[5] *See* Comments of AT&T, WT Docket No. 17-79, at 5 (filed June 15, 2017) (IER 4) ("[S]ervice providers are shifting to denser, more efficient networks by reusing spectrum in smaller cells, closer to the customer.").

Third, because they cover less space, small cells must be deployed in larger numbers than traditional macro cells. The record validates the FCC's conclusion that "providers must build out small cells at a faster pace and at a far greater density of deployment than before." *September Order* ¶ 3 (RER 122); *id.* ¶ 24 n.46 (RER 129) (quoting Letter from Brett Haan, Principal, Deloitte Consulting, WT Docket No. 17-79, at 2 (filed Sept. 17, 2018) (deploying 5G at scale will "require[] carriers to add ***3 to 10 times*** the number of existing sites to their networks," primarily via small cells (emphasis added)); Comments of Verizon, WT Docket No. 17-79, at 4 (filed June 15, 2017) (IER 79) ("[C]arriers' networks will require an estimated ***10 to 100 times more antenna locations*** than today's 3G or 4G networks.") (emphasis added). There will likely be well over half a million new small cell deployments by

[5] Because each cell can accommodate only a limited number of users, the overall capacity of a network in a given geographic area increases if the area is broken into smaller and smaller cells. The tradeoff is that smaller cells have to operate at lower power, to avoid interfering with neighboring cells.

2026. *See* AT&T Comments at 19–20 (RER 369-70). Balancing out these increased numbers are the lower overall visual impact from small cells and that, in many cases, small cell nodes will share common design characteristics or features. *See* CTIA Comments at 16 (IER 27) ("[S]mall cell deployments typically involve identical or very similar equipment in a discrete area that can be reviewed as a group (for example, the same antenna design may be installed on ten poles of similar height along a single street)"). The type of lengthy, individualized review procedures that have traditionally been applied to tall, standalone macro cells not only are unnecessary given the size of small cells, but also simply do not scale to these kinds of deployments.

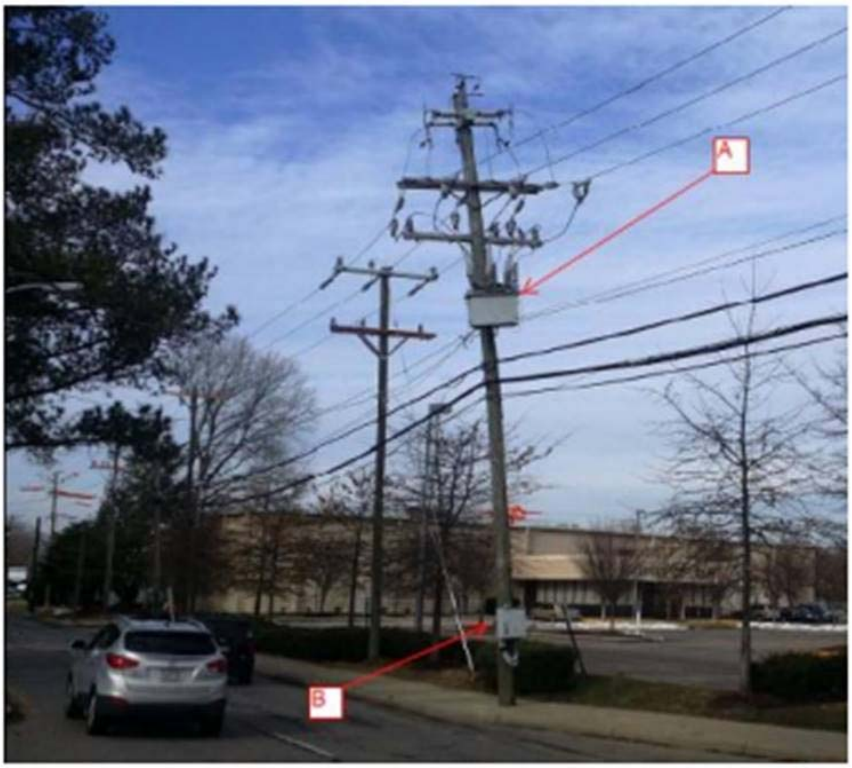
While these features suggest that small calls should be subject to *less* stringent and more efficient review processes,[6] the Commission found the status quo to be just the opposite in many localities. The record is replete with evidence that some communities are subjecting small cells to unique or disproportionate burdens, including (1) unreasonable fees; (2) cumbersome site-by-site reviews; and (3) lengthy application and review processes.

[6] "It is precisely because providers will need to deploy large numbers of wireless cell sites to meet the country's wireless broadband needs and implement next-generation technologies that the Commission has acknowledged an urgent need to remove any unnecessary barriers to such deployment, whether caused by Federal law, Commission processes, local and State reviews, or otherwise." *September Order*, ¶ 24 (citations, quotations, and alterations omitted).

First, providers are often subject to exorbitant application fees. Crown Castle explained that the record was "replete with examples of the imposition of unreasonable fees and review procedures precluding the deployment of infrastructure to support advanced wireless services." Crown Castle *Ex Parte* Letter, WT Docket No. 17-79, at 7 (filed June 7, 2018) (IER 96). AT&T noted that it was "at an impasse after nine months of negotiations with [Oakland, CA] for an initial deployment of about 60 nodes due to the city's demand for recurring rate of $2300 per node," among other similar examples. AT&T August 6, 2018 *Ex Parte* Letter at 2–3 (RER 599-600); *see also* CTIA Comments at 29–30 (IER 40-41) (collecting examples). Moreover, "[h]igh per-site fees are particularly burdensome because providers may need to deploy dozens or even hundreds of small cell sites in an area to provide sufficient coverage and capacity." *Id*.

Second, jurisdictions regularly subject small cell deployments to discriminatory processes that are ostensibly for "aesthetic" purposes but that do not apply to other ROW users like wireline telecommunications providers. As the Commission explained, "the need to site so many more 5G-capable nodes leaves providers' deployment plans and the underlying economics of those plans vulnerable to increased per-site delays and costs." *September Order* ¶ 48 (RER 145). As Crown Castle explained, municipalities "apply[] onerous zoning requirements on small cell installations when other similar right of way utility installations are erected with

simple building permits." Crown Castle June 7, 2018 *Ex Parte* Letter at 7 (IER 96). T-Mobile notes that "eighty percent of jurisdictions . . . treat DAS and small cell deployments on poles in ROWs differently than they treat similar installations by landline, cable, or electric utilities." T-Mobile Comments at 10 (RER 485). T-Mobile notes that this differential treatment often subjects small cells to procedures such as "zoning review," "aesthetic review," "specific form factor guidelines," and "unreasonable minimum distances between wireless facilities . . ." Comments of T-Mobile, WT Docket No. 17-79, Attachment A at 7 (filed June 15, 2017) (IER 75). WIA provided photographs in the record, demonstrating that these discriminatory procedures are not justified by visual impact given that similar or even larger facilities are allowed to be installed with no such burdensome oversight:



Comments of the Wireless Infrastructure Association, WT Docket No. 17-79, WC Docket No. 17-82, at 43 (filed June 15, 2017) (IER 87) ("A and B in the picture . . . are equipment installed by an electric company in Newport News that did not go through zoning for these electrical deployments."). ExteNet reported that many communities imposed burdensome processes and standards on small cells that were not imposed on entities that do not use wireless equipment, even though the other right of way users often employed facilities that are the same size or larger than those deployed by ExteNet. Comments of ExteNet Systems, Inc., WT Docket No. 17-79 at 17-18 (filed June 15, 2017) (IER 54-55).

Third, the record shows that lengthy application and review processes impede the provision of wireless service. Sprint explained that "excessive delays to small cell deployment" typically take two forms: (1) "[s]ome cities will not consider any siting applications until there is a master agreement with the city;" and (2) "post-application delay by violating the shot clock timelines." Sprint Comments at 44 (IER 67). CTIA reiterated the point, noting that some municipalities require providers to "negotiate a franchise or city-wide license agreement as a prerequisite to filing individual site applications," which "cause[s] exceedingly long delays." Reply Comments of CTIA, WT Docket No. 17-79, at 9 (filed July 17, 2017) (IER 91); *see also* Verizon Comments at 6, 35 (RER 495, IER 82 ("A large Southwestern city requires applicants to obtain separate and sequential approvals from three different governmental bodies before it will consider issuing a temporary license agreement to access city rights-of-way . . . . For example, many localities, such as Duluth, Minnesota, Amherst, New York, and Pasco, Washington, require special use permits involving multiple layers of approval to locate small cells in some or all zoning districts.").

B. The FCC Was Justified in Directly Tackling Obstacles to Small Cell Deployment.

The Commission took three steps to correct the unreasonable and disproportionate restrictions on small cell deployment evident in the record: (1) designating the level at which fees constitute effective prohibitions; (2) providing

guidance on aesthetic requirements, including minimum spacing requirements; and (3) prohibiting undergrounding requirements.

1. The FCC's conclusion that unreasonable, above-cost, and discriminatory fees for small cells are effective prohibitions was reasonable.

Recognizing that fees can effectively prohibit service and the unique characteristics of small cell deployment, the Commission reasonably determined that *all* fees imposed by state or local governments "violate Sections 253 or 332(c)(7) unless . . . (1) the fees are a reasonable approximation of the state or local government's cost, (2) only objectively reasonable costs are factored into those fees, and (3) the fees are no higher than the fees charged to similarly-situated competitors in similar situations." *September Order* ¶ 50 (RER 145-46). That determination is reasonable and entitled to deference.

First, Section 253's text entitles the Commission to substantial deference on what constitutes "fair and reasonable compensation." Section 253(c) provides that the bar on prohibitions of service under Section 253(a) does not "affect[] the authority of a State or local government to . . . require fair and reasonable compensation from telecommunications providers . . . ." 47 U.S.C. § 253(c). The phrase "fair and reasonable compensation" in this savings clause is ambiguous, so the FCC is entitled to "substantial deference" in its interpretation. *See Metrophones Telecomms., Inc. v. Glob. Crossing Telecomms., Inc.*, 423 F.3d 1056, 1067 (9th Cir.

2005), *aff'd,* 550 U.S. 45 (2007) ("Because 'just,' 'unjust,' 'reasonable,' and 'unreasonable' are ambiguous statutory terms, courts normally owe substantial deference to the interpretation the Commission accords them." (cleaned up)). The FCC thus acted well within its authority under *Chevron* to resolve the meaning of this key statutory term, especially in the context of small wireless facilities. *See September Order* ¶ 46 n.121 (RER 141) (comparing cases coming to different conclusions about fees more than a decade earlier).

Second, FCC precedent and case law support the interpretation that fees above reasonable costs are unfair and unreasonable. *California Payphone* and *Texas PUC* stand for the proposition "that state or local legal requirements such as fees that impose a 'financial burden' on providers can be effectively prohibitive." *September Order* ¶¶ 57–58 (RER 150-151). And courts have recognized fees that do not bear a relationship to costs are impermissible under Section 253. *See, e.g.*, *City of Santa Fe*, 380 F.3d at 1273 (finding that "allowing the City to recoup its processing costs" is not prohibitive); *Guayanilla*, 450 F.3d at 22 ("[F]ees should be, at the very least, related to the actual use of rights of way and that the costs of maintaining those rights of way are an essential part of the equation."). Here, the Commission determined that restricting municipal fees to cost-recovery for small wireless facilities best harmonized the goals of Section 253(a) (barring prohibitions on broadband deployment and encouraging widespread broadband buildout) with those

in Section 253(c) (ensuring that localities can recover "fair and reasonable" compensation for the right-of-way burdens imposed by that buildout). Interpreting the Act to give municipalities the ability to impose higher fees at the expense of broadband deployment would have been at odds with Act's overriding goal of encouraging the development of new services and facilities.

The legislative history of the Act further demonstrates that Congress's concern with Section 253(c) was the recovery of *costs*. *September Order*, ¶ 59 (floor debate gave "'examples of the types of restrictions that Congress intended to permit under Section 253(c), including to require a company to pay fees to *recover an appropriate share of the increased street repair and paving costs* that result from repeated excavation.'" (emphasis in original) (citations, alterations, and some quotation marks omitted)).

Further, the record showed that fees above reasonable costs would materially inhibit service in violation of Section 253(a) by limiting the reach of finite capital resources. *See September Order*, ¶¶ 60–66 (RER 150-151). "If . . . small-cell deployments reach nearly 800,000 by 2026, a ROW fee of $1000 per year (a modest sum relative to current ROW access and attachment fees) would result in nearly $800 million *annually* in foregone investment. This lost investment would harm consumers and materially inhibit or limit a service provider's ability to provide wireless services." AT&T Comments at 19–20 (RER 369-70); *see also* Comments

of the Competitive Carriers Association, WT Docket No. 79-79, at 18 (filed June 15, 2017) (IER 12) ("The record is replete with evidence that siting fees are in fact prohibitive, directly impacting the evolution to 5G networks and threaten[ing] the economics of deployment.").

The Commission also explained that the impacts of increased costs on small cell deployment should be considered "in the aggregate." *September Order* ¶ 61 RER 152) (citing *Guayanilla*, 450 F.3d at 19). "The many-fold increase in Small Wireless Facilities will magnify per-facility fees charged to providers," meaning that "[p]er-facility fees that once may have been tolerable when providers built macro towers several miles apart now act as effective prohibitions when multiplied by each of the many Small Wireless Facilities to be deployed." *September Order* ¶ 48 (RER 145); *see also, e.g.*, CTIA Comments at 29–30 (IER 40-41) ("High per-site fees are particularly burdensome because providers may need to deploy dozens or even hundreds of small cell sites in an area to provide sufficient coverage and capacity.").

High fees are particularly pernicious because they have impacts beyond the jurisdictions that impose them. As the Commission noted, because wireless providers have limited capital budgets, fees charged in one jurisdiction will "materially and improperly inhibit deployment that could have occurred elsewhere," because the resources that could have gone to deployment will instead go to payment of fees. *September Order* ¶ 60 (RER 151). As Corning explained, cost savings from

reduced fees could result in $2.4 billion of additional capital expenditure, 97 percent of which is likely to occur in suburban or rural areas. Corning Sept. 5, 2018 *Ex Parte* Letter (RER 648). The record thus supports the Commission's determination to rein in fees applied to small cells.

Moreover, as the agency observed, any other interpretation would have been impossible to administer. *September Order* ¶ 65 n.199 (RER 155). The reasonableness inquiry under *Chevron* Step Two clearly allows agencies to consider whether alternative interpretations would be administrable. *See, e.g.*, *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 58–59 (2011) (finding that rule "easily satisfies the second step of *Chevron*" after the agency "reasonably concluded that [the rule] would 'improve administrability.'" (citing agency's Federal Register publication)).

To further streamline the process and reduce litigation-related delays, the Commission adopted "safe harbor" amounts for fees, which it characterized as "presumptively reasonable" under Section 253. These are not fee caps, but rather amounts that municipalities can use without doing an exhaustive investigation of costs. As the Commission observed, these presumptive amounts were based "on a number of different sources of data," including the fee decisions made by state legislatures across the country in their small cell bills. *See September Order*, ¶ 79 n. 233 (RER 162) (noting that "[m]any different state small cell bills, in particular,

adopt similar fee limits despite their diversity of population densities and costs of living, and we expect that these presumptive fee limits will allow for recovery in excess of costs in many cases.").

Local Government Petitioners' argument that Section 224 limits the Commission's authority over fees charged for use of rights of way is unavailing. Petitioners argue that (1) Congress precluded Commission authority over government property in Section 224; and therefore (2) in separate parts of the statute—Sections 253 and 332—it would be inappropriate to imply "a broad right to regulate municipal property and infrastructure . . . [that] is inconsistent with the more specific provision in §224 that Congress did adopt." LGP Br. 61–62. However, Congress's decision not to grant the FCC authority over government property in one statutory provision does not preclude that authority in *an entirely different provision*. In fact, the presumption is just the opposite: because Congress explicitly foreclosed regulation of government property in Section 224, its failure to do so indicates that such regulation is not foreclosed in another section. *See In re Failla*, 838 F.3d 1170, 1176–77 (11th Cir. 2016) (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 170 (2012)) ("The presumption of consistent usage instructs that a word or phrase is presumed to bear the same meaning throughout a text and that *a material variation in terms suggests a variation in meaning*." (emphasis added) (internal quotations and alterations omitted)). It is entirely reasonable for the FCC

to conclude that Congress intended Section 224 to cover privately-owned poles and that public poles fall within the ambit of Section 253, which expressly addresses state and local regulation.

2. The record supports the FCC's guidance on aesthetic and minimum spacing requirements.

The Commission recognized that state and local jurisdictions have legitimate interests in aesthetic review. At the same time, it determined that aesthetic reviews have sometimes been used in ways that unreasonably prevent providers from offering service. To balance these interests, the Commission determined that aesthetics requirements—including minimum spacing 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." *September Order* ¶¶ 86, 91 (RER 165-66). The record supports that conclusion, which not only removes barriers to 5G deployment, but also provides guidance to "help localities develop and implement lawful rules." *Id.* ¶¶ 85–86 91 (RER 164-65).

First, the Commission made a valid determination that aesthetic requirements must be "reasonable" to comport with Sections 253 and 332. As the Commission explained, to be reasonable aesthetic requirements must be both "technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments." *September Order* ¶ 87 (RER 165). Requirements that do not meet these criteria materially inhibit service, either by

imposing compliance costs that are unrelated to mitigating a public harm, or by requiring technically infeasible measures, which has the effect of prohibiting the use of a provider's technology.[7]

Second, the Commission acted reasonably in prohibiting discriminatory aesthetics requirements, on the grounds that "such discriminatory application evidences that the requirements are not, in fact, reasonable and directed at remedying the impact of the wireless infrastructure deployment." *Id.*; *see also, e.g.*, T-Mobile Comments at 40 (IER 70) ("San Francisco, for example, has adopted an ordinance that singles out wireless facilities in public ROWs for discretionary predeployment 'aesthetic' review not imposed on similarly-sized landline or utility facilities." (citation omitted)). Imposing differing requirements on similar infrastructure deployments is clear evidence that the more burdensome requirement is a mere pretext and not reasonably directed to avoiding or remedying an aesthetic harm. *Cf. Hawn v. Exec. Jet Mgmt., Inc.*, 615 F.3d 1151, 1158 (9th Cir. 2010) (explaining that "a comparison to similarly situated individuals may be relevant . . . [to] proof of pretext" (citation and quotation omitted)). Indeed, the Commission has long

[7] It is well-established that local governments are preempted from dictating technology choices. *See, e.g., New York SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 106 (2d Cir. 2010) ("Federal law has preempted the field of the technical and operational aspects of wireless telephone service, and there is 'no room' for [local ordinances] that give a preference to 'alternate technologies.'") (quoting *Bastien v. AT & T Wireless Servs., Inc.*, 205 F.3d 983, 989 (7th Cir.2000)).

recognized that discriminatory regulatory requirements constitute an effective prohibition, and baked this conclusion into the language of *California Payphone* 22 years ago. *See September Order* ¶ 39 (RER 139) (explaining that "[t]his conclusion is consistent with both Commission and judicial precedent recognizing the prohibitory effect that results from a competitor being treated materially differently than similarly-situated providers").

Third, the Commission acted reasonably in deciding that aesthetic requirements must be objective and published in advance. Substantial record evidence shows that municipalities inconsistently impose vague, ad hoc aesthetics requirements. *See, e.g.*, *id*. ¶ 84 n.243 (RER 164); CTIA Comments at 28–29 (RER 417-18) ("Some localities grant reviewing agencies discretion to deny a siting application based on vaguely worded or subjective visual or other aesthetic interests."); AT&T Comments at 17 (RER 367) ("[Aesthetic] restrictions are particularly problematic because they are vague and often applied discriminatorily."). And, as the Commission explained, non-objective and/or unknown aesthetics requirements effectively prohibit service because "[p]roviders cannot design or implement rational plans for deploying Small Wireless Facilities if they cannot predict in advance what aesthetic requirements they will be obligated to satisfy . . . ." *September Order* ¶ 88 (RER 165); *see also* CTIA Comments at 29 (RER 418) ("In any event, a 'we know it when we see it' standard is no standard at

all, because it unlawfully fails to supply sufficient advance notice to providers as to the restrictions they must build to."). An inability to effectively plan complex deployments will materially inhibit the deployment of wireless services, delaying when and whether consumers gain access to advanced wireless services. *See September Order* ¶ 47 RER 144-45) (citation omitted).

Applying the same three-part test for aesthetics to minimum spacing requirements was also reasonable. Minimum spacing requirements—generally imposed for aesthetic reasons—can materially inhibit service. As CCIA explained, the high-band spectrum targeted for 5G only propagates over short distances, meaning that "a local requirement of, for example, a thousand-foot minimum separation distance between small cells would unnecessarily forestall any network provider seeking to use higher band spectrum with greater capacity when that provider needs to boost coverage in a specific area of a few hundred feet." CCIA Comments at 15 (IER 21). Minimum spacing requirements that would flatly prohibit the use of higher-band spectrum could have been declared *per se* prohibitory because such requirements preclude providers from improving their service. *See* Section II.B, *supra*. The Commission's decision to simply apply its aesthetics standard to minimum spacing requirements is actually *less* than would have been supported by the evidence in the record.

Local Government Petitioners are wrong in asserting that *Sprint* somehow demonstrates "that aesthetic requirements [that] impose costs [are] insufficient to show an actual prohibition." LGP Br. at 86. The *Sprint* Court was not applying the Commission's material inhibition standard and did not have before it the FCC's detailed record evidence showing the prohibitory impact of unpublished, ad hoc standards. It thus does not address this issue.[8]

3. The FCC's prohibition on undergrounding is amply supported by the record.

The Commission determined that requiring "*all* wireless facilities be deployed underground would amount to an effective prohibition given the propagation characteristics of wireless signals," *September Order* ¶ 90 (emphasis in original) (RER 166), a technical finding that lies in the heartland of agency deference. *See Verizon Tel. Cos.*, 292 F.3d at 909. That determination is clearly supported by *Sprint*, which used undergrounding as an example of a requirement that could act as an effective prohibition. *See September Order* ¶ 90 (RER 166) (quoting *Sprint*, 543

[8] Moreover, *Sprint* did not hold that the statute *unambiguously* foreclosed preemption of any aesthetics requirements. *See* 543 F.3d at 580 ("If an ordinance required, for instance, that all facilities be underground and the plaintiff introduced evidence that, to operate, wireless facilities must be above ground, the ordinance would effectively prohibit it from providing services."). Thus, to the extent that *Sprint* conflicts with the FCC's interpretation, the FCC's interpretation controls. *Brand X*, 545 U.S. at 982–83 ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.").

F.3d at 580) (internal quotations omitted). And here, the record shows that these requirements effectively prohibit the deployment of small cells. *See, e.g.*, CTIA Comments at 24–25 (IER 35-36) ("A western city required equipment cabinets to be placed underground, with few exceptions. A city in California required all facilities to be underground and would not allow for the installation of new poles or small cells on existing poles. Two localities in Michigan required all facilities to be installed underground and would not allow Mobilitie to deploy any small cells.").

C. The FCC Correctly Determined that Sections 253 and 332 Apply to All Government Actions Regarding Public Rights-Of-Way.

The Commission determined that the *September Order* applied to state and local governments' terms for accessing the public ROW and government-owned property within such ROW (such as poles). *September Order* ¶ 92 (RER 167). It rejected arguments that governmental entities' regulation of public ROW or government-owned structures in the ROW rendered them mere "market participants," immune from preemption. *Id.* The Commission's interpretation as to this critical issue for small cell deployment is reasonable and thus controls.

First, the Commission reasonably interpreted the express preemption provisions of Sections 253 and 332 as encompassing all terms for accessing the public ROW and property located therein. Section 253 explicitly preempts both statutes and regulations, as well as other "legal requirement[s]." 47 U.S.C. § 253(a). That broad catch-all evinces an intent "to capture a broad range of state and local

actions that prohibit or have the effect of prohibiting entities from providing telecommunications services." *September Order* ¶ 94 (RER 168) (quotation omitted). And if Section 253(a) does not include activities within the public ROW within its scope, Section 253(c)'s limited reservation of authority "to manage the public rights-of-way" would be rendered meaningless. *Id.* ¶ 94 n.264 (RER 168). Likewise, Section 332's invocation of "*any* request for authorization to place, construct, or modify personal wireless service facilities" suggests an expansive scope. 47 U.S.C. § 332(c)(7)(B)(ii); *see also September Order* ¶ 95 (RER 169-70) (interpreting same).

The Commission found that allowing state and local governments to escape preemption as to certain conduct in the public ROW would frustrate Congress's purpose in enacting Sections 253 and 332.[9] *September Order* ¶¶ 94–95 (RER 168-70) ("A more restrictive interpretation . . . easily could permit state and local restrictions on competition to escape preemption based solely on the way in which state action was structured. We do not believe that Congress intended this result." (citation and quotation omitted)). And that conclusion was amply supported by the record. *See, e.g.*, Comments of Mobilitie, WT Docket No. 17-79, at 21 (filed June

[9] In fact, the Commission has taken this position for 20 years, dating back to when the Telecommunications Act of 1996 was only recently passed. *See Petition of the State of Minnesota for a Declaratory Ruling regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights of Way*, 14 FCC Rcd 21697, ¶ 18 (1999).

15, 2017) (IER 60) (explaining that a "proprietary" exception for public ROW would "create[] a gaping loophole because, if it were correct, cities would be immune from complying with the requirements of the Act that apply to rights of way, undercutting one of the Act's key objectives"); *September Order* ¶ 97 (RER 171); CTIA Comments at 43 (IER 44) ("[M]any localities are failing to act on these requests and have no legal incentive to do so in the absence of clarity about whether granting access to public poles and ROWs is a regulatory function."). Because "Congressional purpose is of course the ultimate touchstone of pre-emption analysis," the Commission reasonably concluded that Congress did not "intend[] to allow States to interfere with the . . . federal scheme" by simply recasting the nature of their activity. *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 290 (1986) (quotations and citation omitted).

Second, state and local governments managing their ROW and associated structures act as regulators, not "market participant[s] with no interest in setting policy." *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 70 (2008) (citation and quotation omitted). This interpretation is thoroughly supported by case law. *See, e.g.*, Comments of Verizon, at 27 n.87 (RER 500) (citing *Liberty Cablevision of P.R., Inc. v. Municipality of Caguas*, 417 F.3d 216, 221-22 (1st Cir. 2005) (citing *City of Denver v. Qwest Corp.*, 18 P.3d 748, 761 (Colo. 2001) (en banc)); *Am. Tel. & Tel. Co. v. Vill. of Arlington Heights*, 620 N.E.2d 1040, 1044 (Ill. 1993); *City of*

N.Y. v. Bee Line, Inc., 284 N.Y.S. 452, 457 (App. Div. 1935), aff'd, 3 N.E.2d 202 (N.Y. 1936)); *see also City of Zanesville v. Zanesville Tel. & Tel. Co.*, 59 N.E. 781, 785 (Ohio 1901); *Hodges v. W. Union Tel. Co.*, 18 So. 84, 85 (Miss. 1895)); *see also* Respondent Brief at 127–28 (discussing cases in this Court). For example, in *NextG Networks of New York, Inc. v. New York*, the Southern District of New York found that a city's actions to manage small wireless facility access to the ROW by controlling access to city-owned poles were "not of a purely proprietary nature, but rather, were taken pursuant to regulatory objectives or policy." Case No. 03-cv-9672 (RMB), 2004 WL 2884308, at *5 (S.D.N.Y. Dec. 10, 2004). This interpretation is also supported by the record, which demonstrates that localities manage the ROW "in trust for the public . . . subject to state law." AT&T Comments at 11 (IER 7). Indeed, the state and local governments' opposition to the Commission's actions confirms that they are acting as regulators, not private market participants, "precisely because [they] need to balance the benefits of providing wireless technology with the impact of the placement of wireless facilities on aesthetics and other municipal interests." *See* Verizon August 23, 2018 *Ex Parte* Letter at 6 (RER 631). Deciding when and how to undertake these management tasks are regulatory, policy-oriented decisions that bear no resemblance to the motivations of purely private actors.

Tellingly, Local Government Petitioners' own ordinances show that managing access to public ROW is a fundamentally regulatory activity governed by public interest considerations, including health and safety. Bellevue, Washington, for example, must consider "[t]he public interest in minimizing the cost and disruption to the city" and "[t]he effect, if any, on the public health, safety and welfare" when determining whether to permit telecommunications use of the ROW. *See e.g.*, Bellevue, WA, City Code § 6.04.030. Plano, Texas must manage its ROW to "establish a public policy for enabling the city to discharge its public trust" and "further the public health, safety, and welfare of the citizens of the city." Plano, TX, Code of Ordinances § 19-59(b). And Albuquerque, New Mexico manages small cells in its ROW to "[p]revent interference with the use of streets, sidewalks, alleys, parkways and other public ways and places," "[p]rotect against environmental damage, including damage to trees," and "[p]reserve the character of the neighborhoods in which facilities are installed"). Albuquerque, NM, Code of Ordinances, § 5-10-2.

Local Government Petitioners have not shown that the Commission's interpretation is unreasonable. They argue that the 1996 Act gave no "indication that Congress intended to preempt state or local proprietary actions." LGP Br. 77. However, as explained above, the FCC explicitly premised its decision on longstanding interpretations of congressional intent based on the text, structure, and

purpose of the Act which show that Congress *did* intend Section 253 to reach ROW management. Petitioners also point to case law that recognizes the regulatory and proprietary distinction when analyzing the Telecommunications Act. *Id*. at 78–79. However, as the FCC explained, the circumstances analyzed in Petitioners' case law "bear closer resemblance to private property and raise none of the public policy issues that follow from the special character of public rights-of-way." FCC Br. at 128–29.

Moreover, even if this precedent presented a conflict, it would not control because the Commission's interpretation is reasonable—evidenced by its thorough analysis and the fact that other courts have come to similar conclusions—and is thus the authoritative interpretation of its organic statute. *See Brand X*, 545 U.S. at 984. Ultimately, Petitioners would have preferred the Commission adopt *a different* interpretation of the statute. But even assuming that Petitioners reading of the statute would also be reasonable, an additional plausible interpretation does not render the FCC's reading unreasonable. That resolves this issue because the Commission's "view governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009) (citing *Chevron*, 467 U.S. at 843–44).

IV. THE COMMISSION REASONABLY REJECTED ARGUMENTS THAT IT SHOULD NOT AMEND ITS SHOT CLOCKS.

In addition to interpreting the "effective prohibition" standard, the Commission also clarified the state and local obligations to process siting applications pursuant to that statute. As set forth above, Section 332 imposes procedural limitations on state and local processing of siting applications. These procedural requirements include acting on "any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time." 47 U.S.C. § 332(c)(7)(B)(ii). The *September Order*'s clarifying interpretations of the statutory phrases "any request for authorization" and "reasonable period of time" reasonably rejected suggestions by commenters that no changes to the shot clocks were necessary.

A. The FCC's Decision To Adopt Shorter "Shot Clocks" For Review Of Small Cell Decisions Was Amply Supported By The Record.

The Supreme Court has already upheld shot clocks similar to those in the *September Order*. In 2009, the Commission interpreted Section 332's "reasonable period of time" to mean "90 days to process a collocation application (that is, an application to place a new antenna on an existing tower) and 150 days to process all other applications." *City of Arlington*, 569 U.S. at 295 (citing *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, Declaratory Ruling, 24 FCC Rcd 13994, 14005 (2009) ("2009 Shot Clock Order")); *see also T-*

Mobile S., LLC v. City of Roswell, Ga., 135 S. Ct. 808, 817 (2015). The Commission had before it evidence "that unreasonable delays in the personal wireless service facility siting process have obstructed the provision of wireless services and that such delays impede the promotion of advanced services and competition that Congress deemed critical in the Telecommunications Act of 1996." *City of Arlington*, 569 U.S. at 294–95 (quoting 2009 Shot Clock Order at 14006, 14008) (citations and quotations omitted). The Supreme Court upheld these shot clocks as reasonable exercises of the Commission's interpretive authority. *Id.* at 307; *see also Rowell*, 135 S. Ct. at 817 (citing *id.*) ("In an interpretation we recently upheld, the [FCC] has generally interpreted this provision to allow localities 90 days to act on applications to place new antennas on existing towers and 150 days to act on other siting applications.").

Here, the Commission established 60-day shot clocks for small cell collocations and 90-day shot clocks for the construction of new Small Wireless Facilities. *September Order* ¶ 105 (RER 175-76). The Commission based these specific shot clocks on the "nature and scope" of small cell deployments. *Id.* ¶¶ 105, 130 (RER 175-76, 188) (citing 47 U.S.C. § 332(c)(7)(ii)). As it did in 2009, here the Commission relied on compelling record evidence for setting these timeframes, including:

- The need for more rapid deployment of telecommunications infrastructure. *Compare September Order* ¶ 106 n.301 (RER 176) (citing numerous comments explaining the need for more rapid deployment of small cells) *with* 2009 Shot Clock Order ¶ 35 ("Delays in the processing of personal wireless service facility siting applications are particularly problematic as consumers await the deployment of advanced wireless communications services, including broadband services, in all geographic areas in a timely fashion.").
- Evidence of widespread and significant delays in the deployment of telecommunications infrastructure. *Compare September Order* ¶ 66 (RER 156) (citing, *inter alia*, comments of Lightower Fiber Networks) (for example, "Lightower provides examples of long delays in processing siting applications.") *with* 2009 Shot Clock Order ¶ 34 ("[W]e find that the record amply establishes the occurrence of significant instances of delay.").
- Evidence that it is feasible to process applications within the shot clock timeframe. *Compare September Order* ¶¶ 106, 111 (RER 176, 179) ("Indeed, many localities already process wireless siting applications in less than the required time and several jurisdictions require by law that collocation applications be processed in 60 days or less.") *with* 2009 Shot Clock Order ¶ 46–47 ("We find that collocation applications can reasonably be processed

within 90 days. . . . Several State statutes already require application processing within 90 days.").

Just as these rationales supported the Commission's finding of presumptively reasonable timeframes in the order reviewed in *City of Arlington*, they do here, as well.

Petitioners' arguments to the contrary are unavailing. Local Government Petitioners argue that the Commission offered no justification for the shot clocks "[b]eyond the mere existence of state laws." LGP Br. at 96. However, as noted above, the Commission put forward multiple justifications for the shot clocks, each of which had an identical analogue in the 2009 Shot Clock Order upheld by the Supreme Court. Moreover, the "existence of state laws" helps demonstrate the feasibility of complying with the shot clocks, demonstrating the reasonableness of the FCC's decision.

Petitioners also erroneously assert that the new shot clocks are "too short" for discretionary review. This second-guessing of the agency's judgment is wrong. The FCC cited ample record evidence to support its conclusion that the 60- and 90-day shot clocks are adequate for review. *See September Order* ¶¶ 106, 111 (RER 176, 179). For example, the Commission explained that many state and local governments process all small cell siting applications—collocations and new constructions—well within 60 days. *See id.* ¶ 111 n.323 (RER 179) ("[I]n Houston,

Texas, the review process for small cell deployments usually takes 2 weeks, but no more than 30 days to process and complete the site review. In Kenton County, Kentucky, the maximum time permitted to act upon new facility siting requests is 60 days. Louisville, Kentucky generally processes small cell siting requests within 30 days, and Matthews, North Carolina generally processes wireless siting applications within 10 days" (internal quotations omitted) (quoting CCA Comments at 14 n.52)). The record thus shows that jurisdictions that impose lengthy, multi-layered review procedures do so out of choice, not necessity. And to the extent that some applications take longer to review, the Commission provided for just such a contingency by "allowing siting agencies to rebut the presumptive reasonableness of the shot clocks based upon the actual circumstances they face." *September Order* ¶ 109 (RER 178).

Finally, the Commission's interpretation of a "reasonable period of time" is consistent with the statutory bar on effectively prohibiting service. *Sprint* recognized that "a zoning board could conceivably use these procedural requirements to stall applications and thus effectively prohibit the provision of wireless services," by, for example "impos[ing] an excessively long waiting period that would amount to an effective prohibition." 543 F.3d at 580. Accordingly, *Sprint* explicitly left open the possibility that a sufficiently lengthy delay could constitute an effective prohibition.

B. The Commission Reasonably Required All Authorizations Necessary for Deployment Be Issued Within the Commission's Prescribed Shot Clock Periods.

The Commission also concluded that "any request for authorization" in Section 332 applies broadly to "all authorizations necessary for the deployment of personal wireless services infrastructure." *September Order* ¶ 132 (RER 188). The Commission reached this conclusion in light of the record evidence of the numerous authorizations that a locality may require to deploy a facility, including "license or franchise agreements to access ROW, building permits, public notices and meetings, lease negotiations, electric permits, road closure permits, [and] aesthetic approvals," among others. *Id*. (citing comments of CTIA, Mobilitie, WIA, T-Mobile, CCA, and Sprint). As Verizon explained, carriers often face "multiple layers of approval," such as individual site-by-site review, zoning requirements, "special use permits," "engineering consultant review requirements," and others. Verizon Comments at 35–36 (IER 82-83). This interpretation of "any request for authorization" is consistent with the language and intent of the statute and with numerous court holdings regarding municipal siting process subject to Section 332.

As the Commission rightly observed, the text of Section 332 requires processing within a reasonable period of time for "any" request for authorization, which by its terms "encompasses not only requests for authorization to *place* personal wireless service facilities, e.g., zoning requests, but also requests for

authorization to *construct* or *modify* personal wireless service facilities," thus applying to a "variety of authorizations." *September Order* ¶ 133 (RER 189) (emphasis in original). Further, "[t]he expansive modifier 'any' typically has been interpreted to mean 'one or some indiscriminately of whatever kind,' unless Congress 'add[ed] any language limiting the breadth of the word." *Id*. (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)); *HUD v. Rucker*, 535 U.S. 125, 131 (2002)).

As the Commission also observed, the purpose of the statute supports the Commission's interpretation. If some authorizations necessary to the deployment of facilities fell outside the purview of Section 332, localities would have free rein to "erect impediments to the deployment of personal wireless service facilities by using or creating other forms or authorizations," *September Order* ¶ 134 (RER 190), which would run directly counter to the 1996 Act's purpose to promote the deployment of telecommunications technologies and to "reduc[e] 'the impediments imposed by local governments upon the installation of facilities,'" *id*. (quoting *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005)). Continuing to afford localities control over wireless facilities siting also "remains faithful to the purpose of Section 332(c)(7)," which seeks to "balance Congress's competing desires to preserve the traditional role of state and local governments in regulating land use and zoning,

while encouraging the rapid development of new telecommunications technologies." *Id*. ¶ 135 (citing *City of Arlington*, 668 F.3d at 234).

Finally, the Commission's interpretation that Section 332's "reasonable period of time" limitation must apply to all authorizations necessary to complete deployment is consistent with court decisions on the breadth of the standard, which have found that excavation permits, "requisite building permits," zoning variances, and "any other municipal approval or permission required" fall within Section 332's purview as a covered "authorization." *September Order* ¶ 136 (RER 190) (discussing *Cox Commc'ns PCS, L.P. v. San Marcos*, 204 F. Supp. 2d 1272 (S.D. Cal. 2002), *USCOC of Greater Mo., LLC v. Cty. of Franklin*, 636 F.3d 927, 931-32 (8th Cir. 2011), *Ogden Fire Co. No. 1 v. Upper Chichester TP*, 504 F.3d 370, 395-96 (3d Cir. 2007), and *Upstate Cellular Network v. City of Auburn*, 257 F. Supp. 3d 309, 319 (N.D.N.Y. 2017)).

C. The FCC's Remedy for Shot Clock Violations Is Easily Justified By The Record, and in Fact the Commission Could Have Gone Further and Imposed a Deemed Grant Remedy.

The FCC's shot clock remedy is directly analogous to that upheld in *City of Arlington*. The *September Order* provides that failing to act within the prescribed shot clocks is a "Section 332(c)(7)(B)(v) failure to act" and "a presumptive prohibition on the provision of personal wireless services within the meaning of Section 332(c)(7)(B)(i)(II)," thus allowing providers to pursue judicial remedies.

September Order ¶¶ 118–123 (RER 181-89). The FCC also provides that siting agencies may "rebut the presumptive reasonableness of the shot clocks based upon the actual circumstances they face." *Id.* ¶ 109 (RER 178). In the 2009 Shot Clock Order, the Commission explained that, if a state or local government did not act within the prescribed shot clocks, "a 'failure to act' ha[d] occurred and personal wireless service providers [could] seek redress in a court of competent jurisdiction within 30 days, as provided in Section 332(c)(7)(B)(v)." 2009 Shot Clock Order ¶ 32. As in the *September Order*, the 2009 Shot Clock Order also provides that "[t]he state or local government . . . [would] have the opportunity to rebut the presumption of reasonableness." *Id.* Like the shot clock remedy in *City of Arlington*, this remedy is reasonable.

Local Government Petitioners erroneously argue that the remedy in the *September Order* somehow goes so far beyond what the Commission has done elsewhere that it creates unprecedented burdens on municipalities. It does not. This is not to say that there are no differences between the two remedies. In particular, the *September Order*'s remedy for small cells includes a presumption that a shot clock violation is a "presumptive prohibition of personal wireless services within the meaning of Section 332(c)(7)(B)(i)(II)." *September Order* ¶ 118 (RER 181-82). Moreover, the FCC emphasized that "[g]iven the relatively low burden on state and local authorities of simply acting—one way or the other—within the Small Wireless

Facility shot clocks, we think that applicants would have a relatively low hurdle to clear in establishing a right to expedited judicial relief," and that the various factors supporting the right to a preliminary injunctive should presumptively be easy to meet. *Id.* ¶ 120 (RER 182).

However, these differences are (1) not material from an administrative law perspective; and (2) justified by the unique features of small cells. *First*, Local Government Petitioners assert that the 2009 Shot Clock Order was merely a "bursting bubble" presumption that shifted the burden of production, whereas the *September Order* presumption can be rebutted only in "unforeseen" or "exceptional" cases. LGP Br. at 99–100. This argument is not merely a distinction without a difference—it is a distinction without a distinction. The entire point of a presumption is to establish a general rule that will apply, absent some unforeseen showing to the contrary. *See Office of Commc'n of United Church of Christ v. FCC*, 911 F.2d 813, 814 (D.C. Cir. 1990) ("This policy created a *presumption* . . . To implement this policy, the Commission adopted a rule whereby an applicant . . . would be put to a full hearing unless it could make a *compelling showing of unforeseen circumstances or hardship*." (emphasis added)); *Upstate Cellular Network v. City of Auburn*, 257 F. Supp. 3d 309, 315 (N.D.N.Y. 2017) (quoting 2009 Shot Clock Order ¶¶ 42, 44) (explaining that the 2009 shot clock presumption can be rebutted based on "the *unique circumstances* in individuals [sic] cases."

(emphasis added) (internal citations omitted)). Accordingly, the 2009 Shot Clock Order and the *September Order* utilize presumptions that can be rebutted in the same manner—a showing of unforeseen or exceptional circumstances. Moreover, the Petitioners' theory that any "generally applicable state or local land use requirements" should be sufficient to rebut the presumption, LGP Br. at 100, would undermine the shot clocks for the exact reason the FCC applied the shot clocks to all aspects of local review: preventing siting agencies from frustrating the purpose of the statute by adopting generally applicable review processes outside Section 332. *See September Order* ¶ 134 (RER 190).

Second, the record supports the adoption of the Commission's remedy. Indeed, the Wireless Petitioners are correct in arguing that the Commission should have gone even further and adopted a "deemed grant" remedy, such as the one upheld by the Fourth Circuit in the Section 6409 context. *See* Wireless Pet. Br. at 23–35. As they explain, the record shows that the projected number of small cell deployments multiplied by an estimated rate of shot clock violations would result in violations in excess of "the number of civil cases filed in all federal district courts *combined* in 2018." *Id*. at 23 (emphasis in original). The scope of this problem clearly supports a sweeping remedy to avoid a torrent of litigation, up to and including the "deemed grant" remedy. The Commission's decision to take a more moderate tack is thus more than justified by the record.

CONCLUSION

In light of the foregoing, Local Government Petitioners' petition should be denied.

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STATEMENT OF RELATED CASES

Industry Intervenors adopt the Statement of Related Cases set forth in the FCC's Brief. FCC Br. at 164-65.

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All other parties on whose behalf this filing is submitted concur in its content. *See* Cir. R. 25-5(e).

UNITED STATES COURT OF APPEALS
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9th Cir. Case Number(s) 18-72689 (and related cases)

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Date: August 15, 2019

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