IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CITY OF SAN JOSE, *et al.*, *Petitioners*, v. FEDERAL COMMUNICATIONS COMMISSION, *et al.*, *Respondents*.	No. 18-9568 (MCP No. 155)
CITY OF SEATTLE, *et al.*, *Petitioners*, v. FEDERAL COMMUNICATIONS COMMISSION, *et al.*, *Respondents*.	No. 18-9571 (MCP No. 155)
CITY OF HUNTINGTON BEACH, *Petitioner*, v. FEDERAL COMMUNICATIONS COMMISSION, *et al.*, *Respondents*.	No. 18-9572 (MCP No. 155)

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JOINT RESPONSE IN OPPOSITION TO MOTION TO STAY[1]

The Court should deny the Motion to Stay Pending Appeal. *See* ECF Doc. No. 010110099162. Movants have not met their burden of demonstrating that the extraordinary relief of a stay is warranted, as the Federal Communications Commission explained in denying their administrative stay request. Movants' arguments fail to demonstrate irreparable harm or likelihood of success on the merits. The balance of equities and the public interest also weigh heavily against a stay.

BACKGROUND

On December 17, 2018, petitioners in *City of San Jose v. FCC*, No. 18-9568 (10th Cir.), *City of Seattle v. FCC*, No. 18-9571 (10th Cir.), and *City of Huntington Beach v. FCC*, No. 18-9572 (10th Cir.), moved this Court for a preliminary stay of the Order issued by the Commission, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, FCC 18-133, 2018 WL 4678555 (rel. Sept. 27, 2018) (App1-116) ("*Order*").

[1] This joint response is submitted by the non-governmental parties opposing stay, which are: (1) defendant-intervenors in the above-captioned matters: CTIA – The Wireless Association®, the Wireless Infrastructure Association, and the Competitive Carriers Association; and (2) the named petitioners in companion-case Nos. 18-9563, 18-9566, and 18-9567: Sprint Corporation, Verizon, and Puerto Rico Telephone Company, Inc.

The *Order* streamlines the process for state and local review of the deployment of small wireless facilities or "small cells"—essential facilities for fifth-generation or "5G" wireless broadband services. The new rules are intended to facilitate and expedite the deployment of a range of new wireless services that will rely on a dense network of small cells deployed in public rights of way. After a proceeding lasting more than a year, and based on a comprehensive record, the Commission concluded that deployment is threatened by some state and local governments' obstruction and rent-seeking. To address these obstacles to deployments, the *Order*: (1) resolved divisions of authority about what it means for a state or local legal requirement to have the "effect of prohibiting" services under 47 U.S.C. §§ 253(a) and 332(c)(7)(B); and (2) established new "shot clocks" for "small wireless facilities." *See* App13-54, *Order* ¶¶ 30-102 (concerning effective prohibition); App54-76*, Order* ¶¶ 103-147 (establishing shot clocks). The *Order* clarifies these legal standards, but does not compel any locality to authorize any particular facility.

Movants sought an administrative stay of the *Order*, which the Commission's Wireless Telecommunications Bureau denied on December 10, 2018. *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Order Denying Motion for Stay, DA 18-1240, 2018 WL

6521868 (rel. Dec. 10, 2018) (App117-26) ("*Denial Order*"). Movants filed the instant Motion one week later.[2]

STANDARD OF REVIEW

A stay pending appeal "is an 'extraordinary and drastic remedy.'" *Warner v. Gross*, 776 F.3d 721, 728 (10th Cir. 2015) (citation omitted). The petitioner must establish (1) "that he is likely to succeed on the merits," (2) "that he is likely to suffer irreparable harm in the absence of preliminary relief," (3) "that the balance of equities tips in his favor," and (4) "that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Nken v. Holder*, 556 U.S. 418, 425-26 (2009). "Under *Winter*'s rationale, any modified test which relaxes one of the prongs for preliminary relief and thus deviates from the standard test is impermissible." *Dine Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016).

ARGUMENT

Movants have not met their burden of demonstrating that a stay is warranted. The non-governmental parties filing this joint response agree with the Commission

[2] A motion for stay was also filed in the Eighth Circuit. *See City of North Little Rock v. FCC*, No. 18-3678 (8th Cir.). Because the petition in that case was filed after the Judicial Panel on Multidistrict Litigation consolidated the above-captioned petitions in this Court, the Commission has moved to transfer the case here. The arguments against granting a stay in that matter are essentially the same as those articulated here.

that the Movants have not shown that the *Order* exceeded the Commission's authority, and that Movants therefore are not likely to succeed on the merits.[3] Beyond their failure to show a likelihood of success, Movants have failed to demonstrate irreparable harm, and the balance of equities and public interest factors also weigh heavily against a stay. This Court should deny the Motion.

I. Movants Have Failed To Demonstrate That They Are Likely To Suffer Irreparable Harm If A Stay Is Not Granted.

Where a moving party fails to demonstrate irreparable harm, this Court "need not address the other preliminary injunction factors." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1266 n.8 (10th Cir. 2004). "Demonstrating irreparable harm is 'not an easy burden to fulfill.'" *First W. Capital Mgmt. Co. v. Malamed*, 874 F.3d 1136, 1141 (10th Cir. 2017) (quoting *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003)). "To constitute irreparable harm, an injury must be certain, great, actual and not theoretical." *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1267 (10th Cir. 2005) (quoting *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003)). An injury that is "merely serious or substantial" does not meet this standard. *Dominion Video Satellite*, 356 F.3d at 1262-63 (citation omitted). And "simply showing some 'possibility of

[3] As explained in their petitions for review, Sprint Corporation, Verizon, and Puerto Rico Telephone Company, Inc. believe that the Commission erred in refusing to adopt a "deemed granted" remedy. However, that issue is not implicated in the Motion, and there is no need for the Court to address it now.

irreparable injury'" likewise "fails to satisfy the [irreparable harm] factor." *Nken*, 556 U.S. at 434-35.

Movants have not demonstrated irreparable injury. They abandon many of the supposedly irreparable harms they advanced before the Commission, *see* App122-125, *Denial Order* ¶¶ 16-22 (rejecting arguments abandoned here concerning speculative "revenue losses," "future lawsuits," "aesthetics," "property values," and "traffic hazards"), replacing them with less than a page of conclusory allegations unsupported by affidavit or relevant citation to the administrative record. *Cf.* Fed. R. App. P. 18(2)(B)(ii) ("The motion must also include . . . originals or copies of affidavits or other sworn statements supporting facts subject to dispute").

The supposed "harms" that Movants do articulate here fail to carry their heavy burden. *First*, Movants assert that the *Order* creates irreparable harm because it requires them to "respond to requests" to site wireless facilities on "publicly-owned assets" or be "presumed to have violated the law." Mot. 19. But this duty is not new. The Communications Act "requires state or local governments to act on wireless siting applications 'within a reasonable period of time after the request is duly filed'"—an obligation the Commission defined and the Supreme Court upheld. *See City of Arlington v. FCC*, 569 U.S. 290, 294 (2013) (quoting 47 U.S.C. § 332(c)(7)(B)(ii)); *see also T-Mobile S., LLC v. City of Roswell*, 135 S. Ct. 808, 817 (2015). Responding to requests within presumptively reasonable timeframes does

not "harm" state or local governments—managing public policy is their obligation. And there is likewise no harm that can be inferred from Movants' characterization of public rights-of-way as "publicly-owned assets." Even if rights-of-way were "owned" in the traditional sense,[4] the *Order* "does not compel any locality to authorize any particular facility" in a right-of-way or anywhere else. App124-25, *Denial Order* ¶ 22.

Second, Movants assert that wireless facilities deployments authorized pursuant to the *Order* "cannot be remedied" because restoration of the *status quo* following this appeal might require removal of facilities "with attendant costs and disruption of public and private infrastructure." Mot. 20. Movants do not elaborate on this conclusory statement or support it with affidavits or citations to the record. Movants' mere assertion of harm cannot meet the standard for a stay. *See, e.g.*, *Schrier*, 427 F.3d at 1267. Even if better wireless service and placement of associated facilities were a "harm" to be remedied, Movants have not shown either that the removal of facilities would be necessary, or that the costs of the removal would be borne by localities. Concerns about "disruption" are equally misplaced. Nothing in the *Order* preempts generally applicable local processes for issuing construction permits. Moreover, because the *Order* "does not compel any locality

[4] Public rights-of-way are easements held in trust by local governments, and telecommunications and utility companies are typically authorized to deploy facilities there. *See, e.g.*, Cal. Pub. Util. Code § 7901.

to authorize any particular facility," App124-25, *Denial Order* ¶ 22, any harms that did exist would be traceable only tangentially to the *Order*.

Third, Movants assert that they are irreparably harmed by the *Order* because "the record showed" that compliance costs "could total over a hundred thousand dollars a year for smaller communities" and these communities might not "recover costs associated with work required to comply with the Order." Mot. 20. The speculative nature of this argument is disqualifying. *See Nken*, 556 U.S. at 434-35 ("simply showing some 'possibility of irreparable injury' fails to satisfy the [irreparable harm] factor"). Beyond that, the claim is unsupported. Movants rely solely on a two-page *ex parte* letter submitted by Gaithersburg, Maryland. But that letter says *nothing* about compliance costs, much less that they could total "over a hundred thousand dollars a year." *See* App179-180. In all events, the argument fails because the *Order* does not require local governments to undertake any particular compliance measures or prevent them from recovering their reasonable costs—it merely underscores that local jurisdictions cannot apply their existing requirements in a way that violates federal law.

Finally, Movants assert that a traditional showing of irreparable injury is unnecessary because their Motion asserts "a deprivation of a constitutional right." Mot. 19. They are mistaken. It is true that "the loss of *First Amendment freedoms*, for even minimal periods of time, unquestionably constitutes irreparable injury."

Heideman, 348 F.3d at 1190 (emphasis added) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality)). But that presumption does not apply to all invocations of constitutional rights. Takings, by definition, are compensable. And the Tenth Amendment, which "renders express" the implicit reservation of powers in Article I, *see Printz v. United States*, 521 U.S. 898, 919 (1997), does not guarantee any substantive rights. Not surprisingly, Movants do not cite a single case where this Court or the Supreme Court applies *Elrod* outside the First Amendment context, and no case that applies its presumption of harm to the Takings Clause or the Tenth Amendment.[5] Nor can the *Elrod* presumption apply where, as here, the constitutional claims are unlikely to be successful on the merits. *See Schrier*, 427 F.3d at 1266 (holding movant "not entitled to [*Elrod*'s] presumption of irreparable injury" where he "has failed to demonstrate the requisite likelihood of success"). Invocation of *Elrod*, therefore, cannot spare Movants from the burden of demonstrating that their alleged harms are irreparable. Because they have failed to do so, the Motion should be denied.

[5] Movants rely on a single Ninth Circuit case which cited *Elrod* in the Fourth Amendment context, but which did not explain that extension of *Elrod*'s presumption. A few of this Court's decisions have stated that the presumption applies to "constitutional rights." But review of those cases shows that each in fact involves First Amendment rights. *See Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016) (political speech and association); *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012) (establishment); *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (free exercise).

II. Movants Have Failed To Demonstrate That The Balance Of Equities Tips In Their Favor.

Movants have likewise failed to demonstrate that the balance of equities tips in their favor. Movants offer the blanket assertion that "[h]arm to other parties is unlikely when the *status quo* would be preserved by a stay but substantially altered by a denial." Mot. 21. This theory assumes that the *status quo is not actively harmful to those parties*, a proposition the Commission squarely rejected and that the extensive record in this proceeding contradicts.

The record amply supports the Commission's conclusion that "legal requirements in place in [some] state and local jurisdictions are materially impeding . . . deployment in various ways," App9-10, *Order* ¶ 25, thereby causing ongoing harm to the providers seeking to deploy and the consumers that depend on those providers' services. For instance, one carrier has been forced to pause or decrease deployments in jurisdictions across the country due to excessive right-of-way use or access fees, including fees in eight jurisdictions across four different states involving some combination of annual recurring charges of $1,000-$5,000 per node or pole; one-time fees of $10,000 plus $1,800 per permit, or $20,000; and annual recurring fees of $6,000, $25,000, or 5% of the provider's gross revenues. *Id*. (citing Letter from Henry Hultquist, Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2-3 (filed Aug. 6, 2018)). These amounts are far exceed the $270 per node annual fee (or even the

$1000 one-time fee for a new pole) that the Commission, relying on record evidence and numerous state small cell bills, determined was presumptively reasonable. App42, *Order* ¶ 79. Another telecommunications provider recently was assessed $60,000 in application fees for applications covering a relatively small 16 node deployment in one California jurisdiction. After denying the applications, the jurisdiction invoiced the provider $351,773, most which appeared to be related to outside counsel fees, "all for equipment that was not approved and has not yet been constructed." App9-10, *Order* ¶ 25 n.49 (quoting Letter from Kenneth J. Simon, Senior Vice President and General Counsel, Crown Castle International Corp., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 19, 2018)).

In addition to excessive fees, the Commission found, and the record demonstrates, that certain local jurisdiction conduct also frustrates deployment, such as refusal to allow small cell placement on any right-of-way structures; requirements for special permits with multiple layers of subjective, discretionary approval to locate small wireless facilities in public rights-of-way (even though other telecommunications equipment installations are not subject to similar burdens or oversight); and lengthy delays that, in the worst cases, have stalled approvals for *years*. App9-10, *Order* ¶¶ 25-26 (citing Comments of AT&T 6-7; Reply Comments of T-Mobile 7-9; Reply Comments of CCA 12; Reply Comments of CTIA 18; Reply

Comments of WIA 22-23; Comments of Verizon 7, 35; Comments of WIA 8-9; Comments of GCI 5-6; Comments of T-Mobile 21; Comments of Lightower 5-6). This record cannot be reconciled with Movants' contention that "the existing regulatory framework does not prohibit personal wireless services[.]" Mot. 21.

Movants offer three rationales for why a stay would not harm interested parties, each of which falls well short. *First*, Movants argue that deployment will not suffer because the *Order* states that "[m]any states and localities have acted to update and modernize their approaches to . . . promote deployment . . . ." Mot. 21-22 (quoting *Order* ¶ 5). This disregards the entire purpose of the *Order*, which was to address the problematic activity of *the other* jurisdictions.

Second, Movants state the City of Seattle "has licensed infrastructure to service providers since 2005" and its municipal-owned electric utility was Verizon's "Partner of the Year" in 2017. *Id*. at 21 (citing Letter from the City of Seattle, WT Docket No. 17-79, at 1 (Sep. 18, 2018)). But the conduct of a single jurisdiction cannot negate the barriers other jurisdictions present that prompted Commission action. Localities that are already facilitating the rapid deployment of small cells will not be affected by the *Order*.

Third, Movants claim a quote from a Verizon earnings call about the *Order* suggests interested parties will not experience harm in the event of a stay. But Verizon made abundantly clear "[t]hat claim is wrong." Letter from William H.

Johnson, Senior Vice President, Legal and Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket. No. 17-79, at 1 (filed Nov. 16, 2018), https://www.fcc.gov/ecfs/filing/1116090384850. "Verizon's public statements about the FCC Order have consistently emphasized . . . that FCC action to eliminate cost and other barriers will allow finite capital expenditure budgets to go farther and reach more places." *Id*. at 2; *see also* Letter from Kenneth J. Simon, Senior Vice President and General Counsel, Crown Castle Int'l Corp., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-2 (filed Nov. 15, 2018), https://www.fcc.gov/ecfs/filing/1115289115253 (explaining that the *Order* will have an "immediate positive impact on our small cell deployments"). The Commission agreed and did not "credit [Movants'] assertion that statements by [a] Verizon . . . executive[] confirms that a stay of the Order would not harm deployment." App. 119-20, *Denial Order* ¶ 9 n.74 (quotation marks and citation omitted). Neither should this Court.

III. Movants Have Failed To Demonstrate That The Public Interest Favors A Stay.

Movants have also failed to meet their burden to show a stay is in the public interest. Because Congress enacted the Telecommunications Act of 1996 "to 'encourage the rapid deployment of new telecommunications technologies,'" *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005) (quoting 110 Stat. 56), avoiding delays in that deployment serves the public interest. *See Petition for*

Declaratory Ruling to Clarify Provisions of section 332(C)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253, Declaratory Ruling, 24 FCC Rcd 13994, 14008, ¶ 37 (2009) (interpreting terms of Section 332 in light of "evidence of unreasonable delays [in application processing] and the public interest in avoiding such delays"). Here, denying the stay and allowing the *Order* to go into effect will serve the public interest by eliminating existing, ongoing barriers to deployment of new technologies and services.

New wireless technology and services, including those enabled by 5G, will bring significant benefits that touch every aspect of American society. They will enable a range of applications that can transform how we live, work, and communicate, and unlock opportunities for all Americans, including low-income individuals, people with disabilities, and those living in rural areas. Indeed, "5G can enable increased competition for a range of services—including broadband—support new healthcare and Internet of Things applications, speed the transition to life-saving connected car technologies, and create jobs." App2, *Order* ¶ 2.

These new services will also contribute substantially to the U.S. economy. "It is estimated that wireless providers will invest $275 billion over the next decade in next-generation wireless infrastructure deployments, which should generate an expected three million new jobs and boost our nation's GDP by half a trillion dollars." *Id*. (citing Accenture Strategy, *Accelerating Future Economic Value from*

the Wireless Industry 2 (2018) ("Accenture Report"), https://www.ctia.org/news/accelerating-future-economic-value-from-the-wirelessindustry, and Accenture Strategy, *Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities* (2017) http://www.ctia.org/docs/default-source/default-document-library/how-5g-can-help-municipalities-becomevibrantsmart-cities-accenture.pdf). And the *Order* promises to maximize these economic benefits, both by streamlining deployment and ensuring that finite buildout budgets are used as efficiently as possible. A recent report by Accenture estimates that reducing regulatory review timelines to accelerate deployment by just 12 months would lead to an additional $100 billion in economic growth over the next three years. App2, *Order* ¶¶ 2-3 (citing Accenture Report at 2). A Corning analysis considered by the Commission estimates that the presumptively reasonable fees established by the *Order* could reduce deployment costs by $2 billion over five years ($7,500 per small cell built), which could lead to an additional $2.4 billion in capital expenditure, 97% of which is expected to go towards investment in rural and suburban areas. App3-4, *Order* ¶ 7 (citing Letter from Thomas J. Navin, Counsel to Corning, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1, Attach. A at 2-3 (filed Sept. 5, 2018)).

The benefits of such deployment are precisely why, after a lengthy proceeding resulting in a voluminous record, the Commission found an "urgent need to

streamline regulatory requirements to accelerate the deployment of wireless infrastructure for current needs and for the next generation of wireless service in 5G." App12, *Order* ¶ 28. Just as the Commission—the federal agency charged with reducing barriers to infrastructure deployment "in a manner consistent with the public interest, convenience, and necessity," 47 U.S.C. § 1302(a)—found the *Order* is necessary to serve the public interest, this Court should find that a stay of that *Order* disserves that interest. *See Coastal Bend Television Co. v. FCC*, 231 F.2d 498, 500-01 (D.C. Cir. 1956) (denying stay in part because "[i]t is, after all, the public interest which must govern," and "[t]he Commission . . . has affirmatively found that the additional VHF service which intervenors will provide is required in the public interest").

Movants assert in a single paragraph that a stay serves the public interest because "the Order will necessarily result in large-scale regulatory compliance efforts by local public agencies," which in turn will "alter the frameworks under which communications providers have thus far flourished and may be ultimately wasted." Mot. 22. But altering the frameworks makes sense because, as the Commission explained, the physical infrastructure needed to support 5G and other new wireless services is different; smaller, but more numerous antennas must be deployed. The past deployment of earlier network technologies thus says little or nothing about what is needed for new wireless services. Moreover, the *Order* is

specifically designed to "alter the frameworks" only to preempt problematic practices, while retaining those that facilitate deployment and comply with federal law, including almost all "provisions passed in recent state-level small cell bills." *See* App3, *Order* ¶ 6. If there is a public interest harmed by a particular locality undertaking "large-scale regulatory compliance efforts," Mot. 22, which Movants have not shown, such harm would pale in comparison to the public interest benefits of the *Order*: eliminating barriers to deployment, advancing the race to 5G, and improving the U.S. economy. Accordingly, Movants have failed to demonstrate that a stay is in the public interest.

IV. Movants Have Failed To Demonstrate Likelihood Of Success On The Merits.

The *Denial Order* rejects all of Movants' claims of legal error, including those alleging conflict with the Communications Act, App119-20, *Denial Order* ¶¶ 8-10, violation of the Administrative Procedure Act's prohibition of arbitrary and capricious conduct, App120, *Denial Order* ¶ 11, and breach of the Fifth, Tenth, and Fourteenth Amendments, App121-22, *Denial Order* ¶¶ 12-15. The Commission's analysis of each of those issues is persuasive and establishes that Movants do not have a likelihood of success.

A. The Provisions Of The Order Challenged By Movants Are Consistent With The Commission's Statutory Authority.

Contrary to Movants' suggestion, there is nothing new about the Commission's exercise of its interpretive authority to resolve differing interpretations of ambiguous terms in the Communications Act. *See, e.g.*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-86 (2005); *Arlington*, 569 U.S at 290. Movants' complaints about the Commission's exercise of that authority here—authority the Commission exercised, in part, by endorsing the reasoning of this Court in cases interpreting the Communications Act—cannot establish a likelihood of success on the merits.

Movants begin by objecting to the Commission's decision to interpret the statutory phrase "effect of prohibiting" as having the same meaning in 47 U.S.C. §§ 253(a) and 332(c)(7)(B). But that decision is consistent with basic canons of statutory construction and with the interpretations of courts that have examined these provisions—including the Ninth Circuit decision that Movants cite elsewhere with approval. *See, e.g.*, *Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571, 579 (9th Cir. 2008) (en banc) ("Our holding . . . harmonizes our interpretations of the identical relevant text in §§ 253(a) and 332(c)(7)(B)(i)(II)."). There is therefore no merit to Movants' contention that unreasonable fees are an effective prohibition under § 253(a), but not under § 332(c)(7)(B). *See also* App16, 36-37, *Order* ¶¶ 36 n.83, 67-68.

Movants next object to the Commission's determination that under *California Payphone* "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.'" App15, *Order* ¶ 35 (quoting *California Payphone Ass'n*, 12 FCC Rcd 14191, 14206, ¶ 31 (1997)). Movants assert that this explication of *California Payphone* contravenes the plain language of § 253(a), Mot. 7-12, but, as the Commission explained, its application of *California Payphone* follows "the interpretation of the First, Second, and Tenth Circuits." App21-22, *Order* ¶ 41; *see also* App14-15, *Order* ¶¶ 34-35 (citing *RT Commc'ns v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000), and *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004)), App23-43, *Order* ¶¶ 43-80 (applying test to fees), App45-46, *Order* ¶¶ 87-91 (applying test to aesthetics).

To succeed, therefore, Movants must show, among other things, that a number of this Court's prior decisions conflict with the language of § 253(a). However, Movants fail even to discuss this Court's relevant decisions, let alone show they are wrong. With regard to fees, for example, Movants complain about the Commission's interpretation of "Section 253(c)'s 'fair and reasonable compensation' provision" as referring "to fees that represent a reasonable approximation of actual and direct costs incurred by the government." App28, *Order* ¶ 55; *see* Mot. 11 & n.26. But that interpretation mirrors this Court's

reasoning in *Santa Fe*. There, a telecommunications carrier argued charges related to deployment in the rights-of-way were an effective prohibition of services. This Court agreed the city's $6,000 per-foot rental fee was "prohibitive because [it] create[d] a massive increase in cost" for the carrier, 380 F.3d at 1271, but found certain "cost-based fees" did not prohibit provision of services, *id.* at 1269.

Movants also assert that the Commission erred by requiring municipal utilities to allow access to government-owned utility poles at regulated rates. Mot. 12-14. But, as the Commission carefully explained, its statutory interpretation is reasonable under the market-participant doctrine because §§ 253(a) and 332(c)(7)(B)(i)(II) expressly address preemption and neither carves out an exception for proprietary conduct. *See* App47-50, *Order* ¶¶ 92-95. Alternatively, that result is reasonable because the record showed that the allegedly proprietary actions at issue here in fact "involve states and localities fulfilling regulatory objectives." App50-51, *Order* ¶¶ 96-97. Movants ignore the Commission's thorough analysis and simply assert that the Commission's interpretation is blocked by § 224's definition of the term "utility," which excludes "any person owned by . . . any state." 47 U.S.C. § 224(a)(1). However, the Commission addressed this issue in the *Order*, observing that § 224's definitions are limited by their text to application "in this section." App47, *Order* ¶ 92 n.253 (quoting 47 U.S.C. § 224(a)). Movants have no answer to

the Commission's reasoning and thus have failed to show a likelihood of success with this argument.

B. The Adoption Of 60- And 90-Day Shot Clocks Was Reasonable.

Movants also object to the Commission's exercise of its interpretive authority to establish shot clocks for "small wireless facilities." *See* App54-76, *Order* ¶¶ 103-47. The Supreme Court confirmed the Commission's authority to establish shot clocks in *Arlington*. *See* 569 U.S at 290; *see also Roswell*, 135 S. Ct. at 817 (discussing *Arlington*'s affirmation of 150- and 90-day shot clocks); *Montgomery Cty. v. FCC*, 811 F.3d 121, 124-26 (4th Cir. 2015) (upholding 60-day shot clock established under analogous provision of the Spectrum Act). The new shot clocks established by the *Order* follow the now familiar 60- and 90-day framework used by the Commission in prior orders. App55-60, *Order* ¶¶ 105-12.

Movants are wrong that the 60- and 90-day timeframes were not adequately supported by the administrative record. The Commission cited extensive record evidence in support of these timeframes. For example, the Commission found imposition of 60- and 90-day shot clocks was consistent with the recommended timeframes in the Broadband Deployment Advisory Committee's Model Code for Municipalities, "which utilize this same 60-day and 90-day framework for collocation of Small Wireless Facilities and new structures." App55-56, *Order* ¶ 105. Movants concede they are already required to meet a 60-day shot clock for

eligible facilities requests pursuant to 47 U.S.C. § 1455(a), and the Commission cited examples of similar requirements imposed on local authorities by state governments. *See* App59, *Order* ¶ 111. The Commission also noted some local governments process small-cell siting applications in as little as ten days. *See* App59, ¶ 111 n.323. Indeed, there was substantial evidence in the record that would have supported timeframes much shorter than those adopted by the Commission. *See* App56-57, 59-60, *Order* ¶ 106 & n.304, ¶ 111 nn.322-25.

C. The Order Is Constitutional And Movants' Claims Are Premature.

The Commission thoroughly examined the constitutional arguments advanced by Movants and found them wholly without merit. *See* App29-30, 38-39, 50-51, 54, *Order* ¶¶ 56, 73, 96, 101 & nn.289-90; App121, *Denial Order* ¶¶ 12-15. In addition, Movants' claims are premature and provide no basis for granting preliminary relief.

As to the Tenth Amendment, Movants concede the *Order* does not compel localities to approve any particular siting application. Mot. 14. In an attempt to avoid the obvious conclusion that there is therefore no Tenth Amendment violation, *see, e.g.*, *Montgomery Cty.*, 811 F.3d at 127-29 (holding shot clock coupled with deemed granted remedy did not violate Tenth Amendment), Movants assert they may be commandeered through a court order enforcing the presumptively reasonable timeframes established in the *Order*. *See* Mot. 14-15. Such arguments have already been rejected. *See Arlington*, 569 U.S. at 305 (rejecting as "faux-federalism"

argument that Commission interpretation of "within a reasonable period of time" intrudes on state authority). Even if a court order could be characterized as a Tenth Amendment violation, one is in no way imminent.

Movants' Takings Clause claim is also premature. A regulatory-takings claim ordinarily "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). Takings for public use are authorized by the Constitution so long as the government provides "just compensation." U.S. Const. amend. V. That is why these claims must wait, to see whether "a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions" concerning valuation. *Williamson Cty.*, 473 U.S. at 187 (citation omitted); *see Verizon Communications Inc. v. FCC*, 535 U.S. 467, 524 (2002) ("this Court has never considered a taking challenge on a ratesetting methodology without being presented with specific rate orders alleged to be confiscatory"). Here, that rationale is underscored by the nature of Movants' claims, which amount to little more than theoretical dissatisfaction with the cost-based recovery mechanism adopted by the Commission. Even if Movants were correct that their preference for fair market value was constitutionally required in this context—which they are not, *see Alabama*

Power Co. v. FCC, 311 F.3d 1357, 1368, 1370-71 (11th Cir. 2002) (approving cost-based recovery for just compensation purposes)—any harm could be adequately remedied by monetary damages after the taking had occurred.

CONCLUSION

For the forgoing reasons, the Court should deny the Motion.

Respectfully submitted,

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January 1, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify:

This motion complies with the type-volume limitation of Rule 27(d)(2)(A) of the Federal Rules of Appellate Procedure because this motion contains 5,200 words, excluding the items authorized by Rule 27(a)(2)(B) and Rule 32(f) of the Federal Rules of Appellate Procedure.

This motion complies with the typeface and type-style requirements of Rule 27(d)(1)(E), Rule 32(a)(5), and Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this motion has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman.

Respectfully Submitted,

/s/ Joshua S. Turner
Joshua S. Turner

January 1, 2019

CERTIFICATE OF DIGITAL SUBMISSION

In accordance with the Court's CM/ECF User Manual, I hereby certify that (1) all required privacy redactions have been made pursuant to Federal Rule of Appellate Procedure 25(a)(5) and Tenth Circuit Rule 25.5; (2) hard copies of this pleading that may be required to be submitted to the Court are exact copies of the ECF filing; and (3) this submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Cylance PROTECT version 2.0.1490.27, last updated on December 17, 2018, and, according to the program, is free of viruses.

Respectfully Submitted,

/s/ Joshua S. Turner
Joshua S. Turner

January 1, 2019

CERTIFICATE OF SERVICE

I, Joshua S. Turner, hereby certify that on January 1, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Respectfully Submitted,

/s/ Joshua S. Turner
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