No. 18-9568 (and other cases listed inside cover)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THE CITY OF SAN JOSE, CALIFORNIA, et al.,
Petitioners,
CITY OF NEW YORK,
Intervenor - Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,
CTIA—THE WIRELESS ASSOCIATION, et al.,
Intervenors - Respondents.

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

RESPONDENT FEDERAL COMMUNICATIONS COMMISSION'S OPPOSITION TO MOTION FOR STAY PENDING REVIEW

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[Caption Continued from Front Cover]

No. 18-9571

CITY OF SEATTLE, WASHINGTON, et al.,
Petitioners,

CITY OF BAKERSFIELD, CALIFORNIA, et al.,
Intervenors - Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

No. 18-9572

CITY OF HUNTINGTON BEACH,
Petitioner,

THE CITY OF SAN JOSE, CALIFORNIA, et al.,
Intervenors - Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

TABLE OF CONTENTS

Page

INTRODUCTION

Respondent Federal Communications Commission opposes the motion for stay of the agency *Order* under review,[1] which reasonably interprets Sections 253 and 332(c)(7) of the Communications Act. Movants have not come close to satisfying the stringent requirements for a stay pending review.

Movants' claims that the *Order* will "dramatically change[] the *status quo*" (Mot. 4) and cause "irreversible" (*ibid.*) and "immediate" harms (Mot. 19) misread the *Order* and ignore longstanding case law—including from this Court—recognizing that Sections 253 and 332(c)(7) preempt state laws that materially inhibit wireless services. Movants likewise overlook that the *Order* does not itself require localities to do anything, nor does it compel approval of any particular siting request; it simply articulates standards for courts to apply if and when they are confronted with any future siting disputes that might eventually arise.

In the *Order*, the Commission considered how to apply Congress's preemption of state and local measures that "prohibit or have the effect of prohibiting" wireless services, 47 U.S.C. §§ 253(a), 332(c)(7)(B)(i)(II),

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[1] Declaratory Ruling and Third Report & Order, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, --- FCC Rcd. ---, 2018 WL 4678555 (2018) (*Order*).

given the changing wireless marketplace and the rise of fifth-generation ("5G") wireless technology. Surveying court decisions applying these provisions, the Commission reaffirmed its 20-year-old *California Payphone* standard—which has been approved and applied by this Court—and applied that standard to "small cell" infrastructure used in 5G networks. The Commission concluded that localities may not demand fees that exceed a reasonable approximation of their actual costs, echoing this Court's holding in *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004) (*Santa Fe*)—which Movants acknowledge only in a brief footnote—that substantial fees that had no reasonable connection to actual costs had the effect of prohibiting services. The Commission also adopted new "shot clocks" (*i.e.*, presumptive timeframes) for local authorities to review small-cell siting requests, based on authority already upheld by the Supreme Court and other courts.

Given the Commission's reasonable application of established legal principles, Movants cannot establish a likelihood of success on the merits. Nor do they come close to showing irreparable harm. The *Order* simply clarifies legal standards concerning fees, aesthetics, and shot clocks for courts to apply if and when any siting disputes arise in the future; it does not compel localities to approve any particular siting request, nor does it

prevent localities from recovering all of their actual and reasonable costs. And even if localities were unable to recover compliance or other costs, monetary losses are not irreparable. The motion to stay should be denied.

BACKGROUND

A. Statutory And Regulatory Background

This case concerns the Commission's reasoned attempt, in light of recent technological developments, to faithfully interpret Congress's intent to remove regulatory barriers to the deployment of wireless infrastructure.

In Section 253(a) of the Communications Act, Congress directed that "[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 … telecommunications service," 47 U.S.C. § 253(a), subject to limited exceptions found in Section 253(b) and (c). Congress further directed in Section 253(d) that "the Commission shall preempt the enforcement of such statute, regulation, or legal requirement" that the Commission finds to violate Section 253(a). *Id.* § 253(d). Section 253 represents "a clear expression by Congress of an intent to preempt local ordinances which prohibit the provision of telecommunications service." *Santa Fe*, 380 F.3d at 1269.

In Section 332(c)(7) of the Act, Congress likewise directed that state and local governments "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). In addition, Congress directed that localities "shall act on any request for authorization … within a reasonable period of time." *Id.* § 332(c)(7)(B)(ii). If a local government violates these limits, any person adversely affected may "commence an action in any court of competent jurisdiction." *Id.* § 332(c)(7)(B)(v).

The Commission initially construed the Act's "prohibit or have the effect of prohibiting" language in its 1997 *California Payphone* decision. *Cal. Payphone Ass'n*, 12 FCC Rcd. 14191 (1997). As relevant here, a state or local measure impermissibly has "the effect of prohibiting" service if it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Id.* at 14206 ¶31; *see Order* ¶¶16, 37-42.

This Court approved and applied the Commission's *California Payphone* decision in *Santa Fe*, holding that rent and compensation requirements that exceed the city's costs "have a prohibitive effect" and are therefore preempted. *Id.* at 1269-73. The Court explained that,

under *California Payphone*, "an absolute bar on the provision of services is not required." *Id.* at 1271 (citing *RT Commc'ns, Inc. v. FCC*, 201 F.3d 1264, 1271 (10th Cir. 2000), and *Cal. Payphone*, 12 FCC Rcd. at 14206).

In 2009, the Commission gave effect to Section 332(c)(7)'s "reasonable period of time" requirement by establishing "shot clocks"—that is, presumptive timeframes within which localities should act—for two categories of wireless siting applications. *Declaratory Ruling to Clarify Provisions of Section 332(c)(7)*, 24 FCC Rcd. 13994, 14003-15 ¶¶27-53 (2009) (*Shot Clock Order*). Requests to collocate wireless equipment on an existing structure should ordinarily be processed within 90 days, and other siting requests within 150 days. *Id.* at 14012-13 ¶¶45-48. If a locality does not act within these timeframes, the applicant can file suit under 47 U.S.C. § 332(c)(7)(B)(v), but the locality can rebut the presumptive time period by showing that it was reasonable to take additional time. *Id.* at 14005 ¶32 & n.99. If a court determines that the locality failed to act within a reasonable time, it can fashion an appropriate remedy. *Id.* at 14009 ¶39. The *Shot Clock Order* was upheld by the Fifth Circuit. *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 569 U.S. 290 (2013).

In 2014, the Commission added a 60-day shot clock for collocation requests that do not substantially change the physical dimensions of an existing structure. *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd. 12865, 12955-57 ¶¶211-16 (2014) (*2014 Wireless Infrastructure Order*). The Fourth Circuit upheld this order against statutory and Tenth Amendment challenges. *Montgomery Cnty. v. FCC*, 811 F.3d 121 (4th Cir. 2015).

B. The *Order* Under Review

In 2017, the Commission sought comment on how to improve the process for state and local review of wireless infrastructure deployment requests in light of the United States' transition to 5G networks, which will enable a host of new wireless services.

The physical infrastructure needed to support 5G networks is very different from traditional cellular technology. Instead of large antennas typically mounted on 200-foot towers each covering a wide geographic area, 5G networks typically rely on small wireless facilities—known as "small cells"—that are "often no larger than a small backpack." *Order* ¶3. Small cells can be unobtrusively attached to traffic lights, street lamps, utility poles, and other small structures. *Id.* ¶50. Small cells allow 5G networks to support a greater number of devices at lower lag

times and higher speeds, but require carriers to deploy a large number of relatively small and unobtrusive antennas, "build[ing] out small cells at a faster pace and at a far greater density" than in traditional cellular networks. *Id.* ¶3.

In response to considerable record evidence that "legal requirements in [some] state and local jurisdictions are materially impeding [5G wireless] deployment in various ways," *Order* ¶¶25-26, the Commission adopted the *Order* "to reduce regulatory barriers to the deployment of wireless infrastructure and to ensure that our nation remains the leader in advanced wireless services and wireless technology," *id.* ¶29.

1. The Commission first reaffirmed its *California Payphone* decision construing the phrase "prohibit or have the effect of prohibiting" in Sections 253 and 332(c)(7) and clarified how these provisions apply to the small-cell facilities. *Order* ¶¶34-42. The Commission confirmed this Court's understanding (and that of the First and Second Circuits) that "a legal requirement can 'materially inhibit' the provision of services even if it is not an insurmountable barrier." *Order* ¶35 (citations omitted). The Commission also clarified that these provisions apply "not only when filling a coverage gap[,] but also when densifying a wireless network,

introducing new services[,] or otherwise improving service capabilities." *Id.* ¶37.

2. The Commission then discussed how Sections 253 and 332(c)(7) apply in three contexts.

State and Local Fees. Consistent with many court decisions, *see Order* ¶¶44-45 & n.122; *Santa Fe*, 380 F.3d at 1271-72, the Commission first found that unnecessary fees demanded by localities for the deployment of small cells can have the effect of prohibiting wireless services. *See Order* ¶¶43-80. Indeed, the Commission observed, "even fees that might seem small in isolation have material and prohibitive effects on deployment, particularly when considered in the aggregate given the nature and volume of anticipated Small Wireless Facility deployment." *Id.* ¶53 (footnote omitted); *see id.* ¶¶62-65; *see also P.R. Tel. Co. v. Mun. of Guayanilla*, 450 F.3d 9, 17-19 (1st Cir. 2006). The Commission concluded that state and local fees for small-cell facilities have the impermissible effect of prohibiting wireless services if they exceed a reasonable approximation of the locality's costs. *Id.* ¶¶50, 55-56, 76.

To avoid unnecessary litigation, the Commission established a "safe harbor" that presumes small-cell fees to be reasonable if they do not exceed $500 in application fees and $270 per year for all recurring fees.

Order ¶¶78-80. The Commission based this safe harbor in part on state small-cell bills approving similar fee levels. *Id.* n.233. Nonetheless, the Commission made clear, "localities [may] charge fees above these levels upon [a] showing" that their actual and reasonable costs exceed these amounts. *Id.* ¶80 & n.234; *accord id.* ¶32.

Aesthetic Requirements. The Commission also considered the impact of aesthetic requirements on wireless deployment. The Commission acknowledged that localities have a legitimate interest in ensuring that wireless infrastructure deployments are not unsightly or out of character with the surrounding area. *See Order* ¶¶12, 85-86. It also recognized, however, that overly restrictive or vague and subjective aesthetic standards can prevent carriers from developing deployment plans and have the effect of prohibiting wireless services. *Id.* ¶¶84, 88. Thus, the Commission concluded, if municipalities choose to adopt aesthetic standards, those standards must be reasonable, objective, and published in advance. *Id.* ¶¶86-88.

Shot Clocks. The Commission also adopted two new presumptive timeframes ("shot clocks") for reviewing proposed small-cell deployments, recognizing that localities have become more efficient in reviewing

wireless infrastructure applications and that small cells generally pose fewer issues than larger macro cell structures. *Order* ¶¶105-137. Under the new shot clocks, requests to collocate a small cell on an existing structure are ordinarily to be processed within 60 days, and requests to deploy a small cell using a new structure within 90 days. *Id.* ¶¶105-106, 111. As with the existing shot clocks, localities may "rebut the presumptive reasonableness of the shot clocks based upon the actual circumstances they face." *Id.* ¶109; *see also id.* ¶115.

3. Finally, the Commission addressed the relief available if a locality violates these standards. *Order* ¶¶116-131. Under Section 332(c)(7), if a locality denies or fails to timely act on a siting request, a wireless provider may file suit under 47 U.S.C. § 332(c)(7)(B)(v) and seek judicial relief. The Commission explained that "[t]he framework reflected in this Order will provide the courts with substantive guiding principles in adjudicating Section 332(c)(7)(B)(v) cases, but it will not dictate the result or the remedy appropriate for any particular case; the determination of those issues will remain within the courts' domain." *Order* ¶124 & n.357.

4. Several local government entities sought an administrative stay from the Commission, which the agency denied. *See* Order Denying Motion for Stay, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, 2018 WL 6521868 (Wireless Telecomms. Bureau Dec. 10, 2018) (*Stay Denial*).

ARGUMENT

To obtain a stay, Movants must show that (1) they are likely to prevail on the merits, (2) they will suffer irreparable harm absent a stay, (3) a stay will not harm others, and (4) the public interest favors a stay. 10th Cir. R. 8.1, 18.1; *Nken v. Holder*, 556 U.S. 418, 434 (2009). Movants have not come close to satisfying these exacting requirements.

I. MOVANTS HAVE NOT SHOWN THAT THEY ARE LIKELY TO SUCCEED ON THE MERITS.

Movants incorrectly contend that they need only show a "fair prospect of success" (Mot. 4) to obtain a stay. That is incorrect. *See Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016). Instead, Movants "must show [they are] *likely* to succeed on the merits," and a stay "may only be awarded upon a clear showing [of] entitle[ment] to such relief." *Ibid.* (quoting *Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008)) (emphasis added). Movants have not made that showing here.

A. The Commission's Determinations Reasonably Interpret The Statute.

Effective Prohibition Standard. By their terms, Sections 253 and 332(c)(7) apply to local measures that "prohibit *or have the effect of prohibiting*" wireless services, 47 U.S.C. §§ 253(a), 332(c)(7)(B)(i)(II) (emphasis added)—not just when state or local measures impose an "actual prohibition" on wireless services, as Movants would have it (Mot. 6-7). As the *Order* explains, "[t]he 'effectively prohibit' language must have some meaning independent of the 'prohibit' language." *Order* ¶41. This Court has accordingly held that "an absolute bar on the provision of services is not required," *Santa Fe*, 380 F.3d at 1271, and that "[n]owhere does the statute require that a bar to entry be insurmountable before the FCC must preempt it," *RT Commc'ns*, 201 F.3d at 1268.

Nor do the Eighth and Ninth Circuit cases cited by Movants (Mot. 7) support an "actual prohibition" standard. Those cases recognize that preemption applies to an "actual *or effective* prohibition." *Sprint Tel. PCS, L.P. v. Cnty. of San Diego*, 543 F.3d 571, 577-78 (9th Cir. 2008) (en banc) (*San Diego*) (quoting *Level 3 Commc'ns, LLC v. City of St. Louis*, 477 F.3d 528, 532-33 (8th Cir. 2007)) (emphasis added). In any event, to the extent courts might adopt somewhat different approaches to the

open-ended statutory language, the Commission may reasonably exercise its delegated authority to issue an authoritative interpretation that supplies clarity and uniformity on an important issue of national concern. *Order* ¶¶9, 30, 100; *Stay Denial* ¶8; *see Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005).[2]

The Commission also reasonably disagreed with Movants' view (Mot. 9) that "where there is a deployment alternative there is no prohibition." As the *Order* explains, Movants' view "reflect[s] both an unduly narrow reading of the statute and an outdated view of the marketplace" by treating wireless service "as if it were a single, monolithic offering." *Order* ¶40. In fact, "the current wireless marketplace is characterized by a wide variety of offerings with differing service characteristics and deployment strategies," and "'the vast majority of new wireless builds are going to be designed to add network capacity and take advantage of new technologies, rather than plug gaps in network

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[2] Movants contend (Mot. 5-6) that local impediments to small cell deployment should not be analyzed under Section 253, but only under Section 332(c)(7). But the effective prohibition language in the two provisions is identical, and the Commission has reasonably interpreted these provisions "to have the same meaning and to reflect the same standard." *Order* ¶¶36 & n.83, 67-68; *see also San Diego*, 543 F.3d at 579 (courts "need not decide" between these provisions because "the legal standard is the same under either").

coverage.'" *Ibid.* If a wireless carrier determines that a particular siting request best meets its service needs, and local regulators have no independent basis for opposing that request, they may not deny the request solely because there might be an alternative location—especially one that may not offer the same performance, capacity, capability, or robustness. *Id.* ¶40 & n.95. Such denials would "essentially allow actual or effective prohibition of [services requiring] additional or more advanced characteristics." *Ibid.*

Excessive Fees. The Commission recognized that imposing excessive or unnecessary fees on wireless providers will have the effect of prohibiting wireless services, and it thus reasonably concluded that localities violate Sections 253 and 332(c)(7) if they demand fees that exceed a reasonable approximation of their costs. *Order* ¶¶43-80. In *Santa Fe*, this Court similarly rejected the view "that a mere increase in cost cannot be prohibitive," holding that a "substantial increase in costs imposed by [Santa Fe's] excess conduit requirements and [its] appraisal-based rent … render[ed] those provisions prohibitive." 380 F.3d at 1271; *see also id.* at 1272 ("rent required by the Ordinance [that] is not limited to a recovery of costs" is not "fair and reasonable" under Section 253(c)'s savings clause).

Movants resist the economic reality that imposing higher costs on carriers will lead to reduced service (Mot. 9-10), but carriers must recover these costs somewhere. Because wireless carriers face capital constraints, the Commission found that carriers will respond to higher fees by reducing expenditures—and thus diminishing service—in lower-profit areas. *Order* ¶¶62-65. Alternatively, carriers might reduce deployment where costs are inflated, again diminishing service. *Id.* ¶65 & n.200. In either case, "the bottom-line outcome" is "diminished deployment of Small Wireless Facilities critical for wireless service and building out 5G networks." *Id.* ¶65. The record is replete with evidence (including carrier submissions and an independent study) that excessive fees materially inhibit wireless deployment. *See id.* ¶¶60-65.

Movants are likewise incorrect (Mot. 10-12) that localities are entitled to charge excessive fees under Section 253(c)'s savings clause—a position this Court already rejected in *Santa Fe*. Section 253(c) allows localities to seek "fair and reasonable compensation" for "use of public rights-of-way." 47 U.S.C. § 253(c). The *Order* permits localities to recover every cent of their actual and reasonable costs—including application fees, fees for access to the right of way, and fees for use of government property in the right of way, *Order* ¶¶32 n.71, 50 & n.131, 56, 72, 75—

but unnecessary fees that have no reasonable connection to actual costs are not "fair and reasonable." *Id.* ¶¶73-75; *see Santa Fe*, 380 F.3d at 1272. Nor can it be said that fees with no reasonable connection to right-of-way costs are incurred "for use of" the right-of-way. *Order* ¶76; *see P.R. Tel. Co. v. Mun. of Guayanilla*, 354 F. Supp. 2d 107, 112-13 (D.P.R. 2005), *aff'd*, 450 F.3d 9 (1st Cir. 2006). Finally, the *Order*'s safe harbor for recurring fees up to $270 per small cell per year is not a "limit o[n] compensation" above that amount, as Movants wrongly assert (Mot. 16); rather, the *Order* makes clear that localities may charge higher fees if a reasonable approximation of their costs exceeds that amount. *Order* ¶80 & n.234; *Stay Denial* ¶18.

There is no substance to Movants' claim (Mot. 12-13) that the *Order* contravenes Section 224 of the Act, which allows the Commission to prescribe specific rates, terms, and conditions for pole attachments. 47 U.S.C. § 224. Section 224(a)(1) exempts government-owned utilities from "this section," *id.* § 224(a)(1), but that exempts government-owned utilities only from regulations adopted under Section 224—not from other sections of the Communications Act, like Sections 253 and 332(c)(7). *See Order* n.253. Nor are movants correct that the *Order* "undo[es] the limits established by Section 224" (Mot. 13), as the *Order* refrains from

prescribing any specific rates, terms, or conditions. *See Order* n.132 ("we are not asserting a 'general ratemaking authority'"); *id.* ¶76 (declining to require "any specific accounting method").

Finally, the *Order* does not impermissibly interfere with a locality's "authority over proprietary property" (Mot. 12-14). As the *Order* explains, when localities manage public rights-of-way and government structures within the right-of-way (such as lampposts and traffic lights), they act in a regulatory rather than proprietary capacity. *Order* ¶¶96-97; *see*, *e.g.*, *N.J. Payphone Ass'n Inc. v. Town of West N.Y.*, 130 F. Supp. 2d 631, 638 (D.N.J. 2001), *aff'd*, 299 F.3d 235 (3d Cir. 2002). And even if this were proprietary activity, the Commission reasonably found that, in light of the "sweeping" language and preemptive goals of Sections 253 and 332(c)(7), these provisions are best read to preempt impediments to wireless services regardless whether the impediments are imposed in a regulatory or proprietary capacity. *Order* ¶¶94-95. Consistent with the *Order*, this Court has upheld the FCC's conclusion that Section 253 encompasses any state or local measures "that relate to the 'management of rights-of-way,'" finding this approach "appropriate in light of [Congress's] intent to create open competition." *Santa Fe*, 380 F.3d at 1271-72.

Aesthetic Standards. Movants likewise fail to show that they are likely to prevail in their challenge (Mot. 8) to the *Order*'s "approach to aesthetics." The Commission determined that "reasonable aesthetic considerations do not run afoul of Sections 253 and 332," *Order* ¶12, but also recognized that aesthetic requirements can in some circumstances have the effect of prohibiting wireless service—such as when localities rely on secret, shifting, or subjective standards that do not allow carriers to reasonably predict what they must do. *Id.* ¶¶84, 88; *cf. T-Mobile Cent., LLC v. Unified Gov't of Wyandotte Cnty.*, 546 F.3d 1299, 1308 (10th Cir. 2008) (*Wyandotte Cnty.*) ("'Governing bodies cannot simply arbitrarily invent new criteria in order to reject an application.'"). The Commission thus reasonably declared that localities imposing aesthetic standards must ensure that these criteria are objective, nondiscriminatory, and published "at a sufficiently clear level of detail as to enable providers to design and propose their deployments. *Id.* ¶¶86-88 & n.247. Movants offer no basis to conclude that this is not a permissible reading of the statute.

B. The Commission's Determinations Do Not Intrude Upon Localities' Fifth Or Tenth Amendment Rights.

Movants also fail to support their claims that the *Order* violates the Fifth or Tenth Amendments. Mot. 14-17.

Movants fail to show any Tenth Amendment violation (*id.* at 14-15) because the *Order* does not require localities to take any action or to approve any given siting application. *Order* ¶101 & n.217; *Stay Denial* ¶12. The *Order* simply "bar[s] states from interfering with the expansion of wireless networks" through practices that effectively prohibit wireless services. *Montgomery Cnty.*, 811 F.3d at 128. Movants' speculation that a "[c]ourt may order access" to a site (Mot. 15) if an application is unjustifiably denied is "a challenge to the [statute] itself" (and to judicial enforcement) rather than the *Order*, *Stay Denial* ¶12, but the Supreme Court and this Court have repeatedly upheld application of Sections 253 and 332(c)(7) without ever suggesting these provisions could be constitutionally infirm. *See T-Mobile South, LLC v. City of Roswell*, 135 S. Ct. 808 (2015); *City of Arlington*, *supra*; *Wyandotte Cnty.*, *supra*; *Santa Fe*, *supra*. And if a court does order that an application be granted, it is "granted only by operation of federal law," so "the imprimatur of any [such order] is federal, and not local." *Montgomery Cnty.*, 811 F.3d at 129.

Movants' Fifth Amendment claim (Mot. 15) also fails. The *Order* "does not … 'compel access to any particular state or local property"; it simply "requires that when access is provided, fees charged [must] be … reasonable[.]" *Stay Denial* ¶14 (quoting *Order* n.217). Localities may still deny siting requests for any legitimate reason. *Ibid.* Nor does the Takings Clause apply when localities manage public rights-of-way, because they act in a regulatory capacity rather than as proprietors. *Id.* ¶13; *see Order* ¶¶96-97. In any event, the *Order* provides just compensation by allowing localities to recover all actual and reasonable costs, which is an appropriate measure of compensation when there is no competitive market price. *Order* n.217 (citing *FCC v. Fla. Power Corp.*, 480 U.S. 245, 254 (1987); *United States v. 564.54 Acres of Land*, 441 U.S. 506, 513 (1979); *Ala. Power Co. v. FCC*, 311 F.3d 1357, 1368, 1370-71 (11th Cir. 2002)); *Stay Denial* ¶14 & n.47. Movants' contention that localities do not have "control over a bottleneck facility" (Mot. 16) misses the mark because rights-of-way generally have superior access to essential resources like access to fiber backhaul and sufficient power supply, so alternative locations often are not ready substitutes for use of the right-of-way. *See Order* ¶97 (rights-of-way "are often the best-situated locations" for wireless facilities); *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d

67, 79 (2d Cir. 2002) (Section 253 is "essential[] to prevent monopolistic pricing" because "[w]ithout access to local government rights-of-way," telecommunications service "is generally infeasible"); *In re Petition of the State of Minnesota*, 14 FCC Rcd. 21697, 21709-14 ¶¶23-29 (1999) (recognizing the limited practical alternatives to certain rights-of-way). Indeed, the administrative record shows that market forces have been insufficient to ensure reasonable prices. *Order* n.217.

C. The New Shot Clocks Are Reasonable.

Finally, Movants challenge (Mot. 17-19) the new shot clocks for small cells. The Supreme Court has already held that the Commission has authority to prescribe shot clocks for particular categories of infrastructure. *See City of Arlington*, 569 U.S. at 307. To the extent Movants contend that the shot clocks for small cells are arbitrary and capricious, they are unlikely to prevail under that deferential standard. *See Sorenson Commc'ns, Inc. v. FCC*, 659 F.3d 1035, 1046 (10th Cir. 2011).

The new shot clocks are firmly based on "experience with the previously adopted shot clocks, the record in this proceeding, and [the Commission's] predictive judgment," including similar time periods successfully employed in several jurisdictions. *Order* ¶110; *see id.* ¶¶105-112. Movants offer no basis to disturb the Commission's expert

determination, based on a comprehensive examination of the record, that small-cell deployments—which are smaller and simpler than traditional macro cells—can be processed in less time than the existing shot clocks provide for larger facilities. Movants object that shorter shot clocks are not "sufficient to complete a discretionary land use process" (Mot. 18), but neglect that they must already comply with 60- and 90-day shot clocks for other siting requests and that many jurisdictions already impose similar or shorter review periods. *Order* ¶¶106, 111. The fact that similar siting requests can successfully be reviewed through more efficient hearings shows that more cumbersome proceedings are unnecessary. In any event, the shot clocks are only presumptions, and localities may "rebut the presumpt[ion]" by explaining why they need additional time. *Id.* ¶¶109, 115.

II. MOVANTS HAVE NOT SHOWN THAT THEY WILL SUFFER IRREPARABLE HARM.

Movants also fail to show they will suffer irreparable harm without a stay—which alone is enough to defeat their motion. *N.M. Dep't of Game & Fish v. U.S. Dep't of the Interior*, 854 F.3d 1236 (10th Cir. 2017). "To constitute irreparable harm, an injury must be certain, great, actual 'and not theoretical.'" *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189

(10th Cir. 2003). Movants "must show that the injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Ibid.* (internal quotation marks omitted).

Movants cannot show any imminent harm because the *Order* does not, on its own, require localities to do anything or compel approval of any particular siting request. The *Order* simply clarifies the standards for courts to apply under Sections 253 and 332(c)(7) when a local government denies or fails to act on a request and the applicant seeks further review. When the *Order* takes effect, the only consequence is that carriers may submit new requests to be processed under these standards. If a locality does not timely grant a request, the carrier must allow at least sixty days to elapse before seeking judicial review. *See Order* ¶¶103-112. A court must then determine whether the locality has violated the statute under the particular facts presented and whether relief is warranted—determinations that "remain within the courts' domain." *Order* ¶124; *see id.* ¶¶116-131; *Stay Denial* ¶18. The *Order* will thus have no compulsory effect until the affected locality has an opportunity to justify its decision before a "court of competent jurisdiction." 47 U.S.C. § 332(c)(7)(B)(v).

There is also "no reason to assume" that, should any dispute arise, localities will necessarily lose such cases. *Stay Denial* ¶19; *cf. Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1267 (10th Cir. 2005) ("speculative harm" associated with litigation "does not amount to irreparable injury") (internal quotation marks omitted). Fees exceeding the *Order*'s safe harbors "may be permissible if the fees are based on a reasonable approximation of costs and the costs themselves are objectively reasonable." *Order* n.234; *see also Stay Denial* ¶18. Similarly, if particular localities are unable to act within the new shot clocks, they may "rebut the presumptive reasonableness of the shot clocks based upon the actual circumstances they face." *Order* ¶109. And the modest requirements for any aesthetic standards will not even take effect for another several months. *Id.* ¶89; *Stay Denial* n.63.

Movants also "ha[ve] offered no evidence demonstrating the type of loss that satisfies the element of irreparable harm." *Port City Props. v. Union Pac. R.R.*, 518 F.3d 1186, 1190 (10th Cir. 2008); *see Stay Denial* ¶¶16-22. Movants claim that "no further showing of irreparable injury is necessary" because they have "alleged deprivation of a constitutional right" (Mot. 19), but the Supreme Court has held that "the mere possibility of erroneous initial application of constitutional standards will

usually not amount to the irreparable injury necessary to justify" a stay. *Dombrowski v. Pfister*, 380 U.S. 479, 484-85 (1965). Movants further complain of "costs associated with work required to comply with the Order" and other costs (Mot. 20), but "[u]nder Tenth Circuit law, it is well established that 'economic loss is usually insufficient to constitute irreparable harm.'" *Coal. of Concerned Citizens to Make Art Smart v. FTA*, 843 F.3d 886, 913 (10th Cir. 2016) (citation omitted); *accord Heideman*, 348 F.3d at 1189; *see also Stay Denial* ¶¶17-18. And if localities incur greater compliance costs, the *Order* allows them to recover those actual and reasonable costs as part of the fees they are permitted to charge.

III. ANY STAY WOULD HARM WIRELESS CONSUMERS AND CARRIERS AND CONTRAVENE THE PUBLIC INTEREST.

The balance of equities also weighs heavily against Movants' stay request. The *Order* will bring immediate regulatory relief to consumers across the country, who increasingly depend on access to modern wireless communications, and to wireless carriers, who must make substantial infrastructure investments to support modern wireless services. *See* Intervenors' Joint Resp. in Opp. to Mot. for Stay at 9-16. Movants concede (Mot. 22) that "investments in broadband infrastructure serve the public interest," and the *Order* seeks to fulfill "the urgent need to

streamline regulatory requirements to accelerate the deployment of wireless infrastructure for current needs and for the next generation of wireless service in 5G," *Order* ¶28; *see also*, *e.g.*, *id.* ¶¶23-24, 48; *Stay Denial* ¶23. Despite Movants' plea to "maintain[] the status quo" (Mot. 22), the record in this proceeding shows that the status quo has allowed many local siting authorities to effectively prohibit wireless carriers from meeting the nation's urgent need for advanced wireless communications and is not serving the public interest. *See*, *e.g.*, *Order* ¶¶25-26, 40, 48, 53, 84, 106.

CONCLUSION

The motion for a stay pending review should be denied.

Dated: January 2, 2019

Respectfully submitted,

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I hereby certify that on January 2, 2019, I caused the foregoing Opposition to Motion for Stay Pending Review to be filed with the Clerk of Court for the United States Court of Appeals for the Tenth Circuit using the electronic CM/ECF system. I further certify that all participants in the case, listed below, are registered CM/ECF users and will be served electronically by the CM/ECF system.

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