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United States Court of Appeals for the Ninth Circuit

SPRINT CORPORATION,

Petitioners,

THE CITY OF NEW YORK and NATOA, *et al.*,

Intervenors,

against

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

On Petitions for Review of Orders of the Federal Communications Commission

JOINT REPLY BRIEF FOR INTERVENORS THE CITY OF NEW YORK, NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, AND OTHER LOCAL GOVERNMENT ASSOCIATIONS

NANCY L. WERNER
General Counsel of NATOA
3213 Duke Street #695
Alexandria, VA 22314
(703) 519-8035
nwerner@natoa.org

GEORGIA M. PESTANA
Acting Corporation Counsel of the City of New York
RICHARD DEARING
CLAUDE S. PLATTON
ELINA DRUKER
Attorney for the City of New York
100 Church Street
New York, New York 10007
212-356-2609 or -2502
edruker@law.nyc.gov

September 6, 2019

(*Complete counsel listing appears on signature pages*)

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INTRODUCTION

As the City of New York and NATOA explained in our opening brief, this Court need not resolve whether the *Orders* are irrational or unconstitutional (which, they are, as local-government petitioners have explained), because the FCC lacks authority to drastically alter the federal-state balance and intrude on the core of traditional local prerogatives as it has done. The constitutional and federalism implications of the *Orders* trigger the clear-statement rule—an interpretive canon that requires plain evidence of congressional intent to authorize the FCC's intrusive and constitutionally problematic interpretation. Without a clear statement from Congress authorizing the sweep of these *Orders*, they are *ultra vires*.

Unable to identify such a clear statement, the FCC attempts to avoid our argument entirely. First, it labors to recharacterize the *Orders* so as to minimize the constitutional problems they present. But, as shown here and in the local-government petitioners' reply, even if these litigation-inspired distortions of the *Orders* were accurate, the FCC's maneuvers do not resolve the *Orders'* constitutional defects or eliminate their deep incursion on federalism principles.

And, second, the FCC tries to sidestep its lack of express authority by falling back on its "general interpretive authority" to reshape the Act. But this argument only confirms that there is no clear statement authorizing the *Orders*' federalism, Takings Clause, or Tenth Amendment implications anywhere in the Telecommunications Act, let alone in the two narrowly tailored preemption provisions the FCC relies on: Sections 253(a) and 332(c)(7)(B). The FCC's broad general interpretive authority comes into play only if there are statutory ambiguities to be resolved by the agency. Here, that authority cannot support the sweep of these *Orders* because there is no ambiguity about whether Congress authorized the FCC to flex the outer edges of federal authority vis-à-vis the states: it did not.

After all, it is an extraordinary step for Congress to exercise its authority in a manner that even approaches effecting a taking of municipal property or intruding upon matters traditionally reserved to states and localities. Congress chose not to take that extraordinary step in the Telecommunications Act. The FCC cannot take it for itself. "Where Congress has established a clear line, the agency cannot go beyond it." *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013).

ARGUMENT

THERE IS NO CLEAR STATEMENT FROM CONGRESS AUTHORIZING THE FCC TO PREEMPT LOCAL MANAGEMENT OF RIGHTS-OF-WAY OR CONTROL OF MUNICIPALLY OWNED PROPERTY

As explained in our opening brief (NYC/NATOA Br. 16–21),[1] the *Orders* have serious federalism implications, dramatically intruding on traditional matters of core local concern involving local governments' management of their own property. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). And beyond that, the *Orders* implicate specific constitutional proscriptions (NYC/NATOA Br. 14–15, 22–24), namely (1) the Fifth Amendment, by compelling access to municipal property without just compensation, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982), and (2) the Tenth Amendment, by potentially commandeering local governments to administer a federal agency's regulatory program, *see Printz v. United States*, 521

[1] For ease of reference, the Opening Brief for Intervenors NYC and NATOA is cited herein as "NYC/NATOA Br." The Opening Brief for Local-Government Petitioners is cited as "LG Br." and their Reply Brief is cited as "LG Reply Br." The Joint Brief for the Federal Communications Commission and Department of Justice is cited herein as "FCC Br."

U.S. 898, 925–26 (1997); *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476–77 (2018). Because it is presumed that Congress does not delegate authority to an agency to intrude so deeply into areas of traditional state and local concern or test constitutional limits without making its intent unmistakably clear (NYC/NATOA Br. 24–28), and because the Telecommunications Act contains no clear statement of such intent (*id.* 29–40), the FCC's interpretation of the Act must be rejected.

A. The FCC fails to refute that the *Orders* raise serious constitutional and federalism concerns.

In its opposition, the FCC cannot deny that the *Orders* work a profound incursion on traditional local prerogatives and thus present serious federalism implications. And rather than defend the *Orders* against constitutional attack, the FCC mischaracterizes them to avoid their constitutional implications (FCC Br. 154, 159–60). But, as local-government petitioners have explained, the FCC must defend the *Orders* it actually wrote on the grounds it actually provided (LG Reply

Br. 5–6). *See also SEC v. Chenery Corp.*, 332 U.S. 194, 196–97 (1947).[2] In any event, these distortions do not cure the defects that we identified.

First, the *Orders* have serious takings implications. The FCC mistakenly asserts that there is no taking because cities are not required to approve any particular siting application, provided they compile a substantial written record within 60 days justifying the denial.[3] But even if a municipality can deny a particular application,

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[2] The potential constitutional issues were raised during the administrative process, *e.g.* LGER 529 (San Antonio *et al.* Reply Comments, raising Fifth or Tenth Amendments); LGER 283 (San Francisco Comments, same), but the FCC dismissed the concerns, *see* Small Cell Order ¶ 101 ("Our interpretations of Sections 253 and Section 332(c)(7) are likewise not at odds with the Tenth Amendment and constitutional precedent, as some commenters contend.").

[3] This is not as simple an undertaking as the FCC suggests. As the D.C. Circuit recently observed, a new small cell "requires not only new construction but also wired infrastructure, such as electricity hookups, communications cables, and wired 'backhaul,' which connects the new antenna to the core network." *United Keetoowah Band of Cherokee Indians in Okla. v. FCC*, No. 18-1129 *et al.*, 2019 U.S. App. LEXIS 23762, at *26 (D.C. Cir. Aug. 9, 2019). This may require "[l]aying of cables and wires," cutting down trees, *id.* at *26–27, disrupting traffic, interfering with public safety communications systems, or altering the historical character of a block. Municipalities will have a short window to review each request, and, if denial is warranted, compile an adequate record. And, while providers may submit "batched" applications—that is applications "covering multiple sites" across a city (Small Cell Order ¶ 113)—shot clocks are not extended for such applications (*id.* ¶¶ 114–15).

the *Orders* still compel cities to generally make city-owned property available for a "permanent physical occupation" without just compensation in violation of the principles articulated in *Loretto*, 458 U.S. at 430, 440. Under the *Orders*, cities are barred from withholding access to "categor[ies] of structures," whether all of their traffic poles or just poles in front of the United Nations, or from "halt[ing] or suspend[ing] the acceptance, processing, or approval of applications," while they assess, for example, which poles can support both small cells and state-law-mandated speed cameras (Moratorium Order ¶ 149).

Just as it would not have allayed the compulsory nature of the physical occupation in *Loretto* if the challenged law had allowed owners of multiple properties to choose one property to keep free of cables, so too, compelling private access to city-owned property more than meets the Takings Clause's "element of required acquiescence" (FCC Br. 155), even if cities might be allowed to withhold access to a pole here and there. "The right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated." *Loretto*, 458 U.S. at 439 n.17.

Nor do the *Orders* support the FCC's newfound suggestion that "every cent of actual costs" can be recouped by government property-owners (FCC Br. 80, 155). To the contrary, the Small Cell Order provides that cities can recover only "actual and direct costs incurred by the government" (what qualifies as sufficiently "direct" is left unspecified) and only at "objectively reasonable" rates (another term left undefined) (Small Cell Order ¶ 55). In the *Orders*, the FCC acknowledges that the standard excludes certain costs "even though they are an actual 'cost' to the government" (*id.* ¶ 70).

Even if actual costs were truly recoverable under the *Orders*, there would still be serious Takings Clause implications, because "just" compensation under the Fifth Amendment should equal the property's value, not merely the government's costs of compliance with the federal regulatory regime. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2170 (2019) ("[C]ompensation must generally consist of the total value of the property when taken, plus interest from that time."); *Horne v. Dept. of Agric.*, 135 S. Ct. 2419, 2432 (2015) (it is well-settled that "just compensation normally is to be measured by the market value of the property at the time of the taking" (quotation marks omitted)).

The FCC attempts to avoid this well-settled rule by incorrectly stating that deploying in the rights-of-way is "nonrivalrous," so that recoupment of "marginal or incremental costs" is sufficient (FCC Br. 156). But as local-government petitioners have shown on reply, access to municipally owned poles is indeed rivalrous (LG Reply 48). Any given pole can be put to only a finite number of uses. Indeed, as explained in our opening brief (at 17–18), New York City only permits one electrified attachment per municipally owned traffic pole, to protect the electrical grid supporting the City's traffic management system. Thus, a small-cell deployment precludes the municipality from putting the pole to other important (and often safety-enhancing) uses—such as affixing police cameras or Internet-of-Things facilities to those poles. The reality of the situation undermines the FCC's entire argument against market-based fees, because with a small-cell deployment—unlike with the mere running of above-ground wires between utility-owned poles—there's a

"higher valued use" for city-owned poles being blocked. *Alabama Power Company v. FCC*, 311 F.3d 1357, 1368–71 (11th Cir. 2002).[4]

Second, the FCC mistakenly asserts in its opposition that there is no Tenth Amendment issue because local regulatory agencies have the option not to regulate small-cell siting at all (FCC Br. 160). The *Orders* do not afford municipalities such a choice. To be sure, the *Orders* allow a city to exempt 5G-related construction from laws of general application that concern matters at the heart of its police powers—that is, substantive requirements such as landmarks, environmental, zoning, utilities undergrounding, sidewalk opening, and pole-attachment reviews. But a hypothetical city that exempted 5G-related construction from its time-intensive regulatory reviews would still be required to

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[4] Contrary to the FCC's claim (FCC Br. 82), cities do not hold a monopoly on sites for small-cell attachments (*see* LG Reply Br. 28–29). Indeed, as the FCC has previously acknowledged, there are millions of privately owned poles and properties available for small-cell deployment. *See Implementation of Section 224 of the Act: A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5281, ¶ 89 (April 7, 2011). The fact that providers would prefer to use city-owned poles, instead of private buildings or privately owned poles, is not a reason to deprive cities of market-based compensation, just as a homeowner who holds property along a proposed highway cannot be denied market-based compensation merely because his property is the best situated for the development.

affirmatively administer the FCC's regulatory agenda by quickly processing and largely approving siting applications (*see* Moratorium Order ¶ 149) in order to "urgent[ly] … streamline regulatory requirements to accelerate the deployment of wireless infrastructure" (Small Cell Order ¶ 28).

Moreover, the option to *not* substantively regulate represents a false choice. Unlike in a case of "cooperative federalism," under which "federal law *allow[s]* but d[oes] not *require* the States to implement a federal program," there is no mechanism to shift onto the federal government the "'full regulatory burden'" of ensuring that 5G-related street openings not conflict with other claims to the rights-of-way, such as permitted parades or sewer maintenance. *Murphy*, 138 S. Ct. at 1479 (quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981) (emphasis in original)). Without someone to pick up the regulatory slack, it would be a profound derogation of a municipality's duty to protect public health and safety to rubberstamp 5G siting applications on municipal property or in the rights-of-way. Indeed, deciding how to best order competing demands on a city's rights-of-way are precisely the kind of inherently local decisions that

are entrusted to state and local governments by our dual-federalist system. *See Gregory v. Ashcroft*, 501 U.S. 452, 457–60 (1991).

Nor does the FCC's suggestion that the *Orders* merely "*forbid* localities from regulating or interfering with deployment in certain impermissible ways" dispel the potential Tenth Amendment implications (FCC Br. 160 (emphasis in original)). Being forced to not regulate under a federal mandate is still impermissible under established Tenth Amendment precedent, because "Congress cannot issue direct orders to state legislatures," whether affirmative or prohibitory. *Murphy*, 138 S. Ct. at 1478; *see id.* (rejecting argument that only federal acts "command[ing] 'affirmative' action as opposed to imposing a prohibition," violate the Tenth Amendment).

Immediately after conceding that it is acting directly on local governments, the FCC retreats, claiming that the *Orders* do not directly regulate localities, but merely confer rights on private parties (FCC Br. 161). The FCC pivots to try to bring itself within *Murphy*'s teaching—that a federal prohibition of local regulation can only be a valid exercise of preemption if it serves "a federal law that regulates the conduct of private actors, not the States." 138 S. Ct. at 1481. But the *Orders* do not

regulate any private conduct. Rather, they directly command municipalities to promptly allow private parties to occupy municipal property and rights-of-way, with Tenth Amendment implications.

The *Orders*' constitutional implications arise not from choices deliberately made in the Act by Congress—as the FCC suggests (Br. 161–62)—but from the FCC's highly strained interpretation of the statute that finds no basis in text. This leads to the core point of our opening brief: the Act contains no clear statement of congressional intent to compel state and local governments to undertake regulatory approval of private access to government property at below-value rates.

B. The FCC fails to show clear congressional authorization for the *Orders*' grave constitutional and federalism implications.

The FCC's opposition confirms that there is no clear statement in the Telecommunications Act authorizing the *Orders*' sweeping preemption of local management of rights-of-way and control of municipally owned property. The FCC implicitly concedes that Congress never authorized the *Orders*' grave implications when it declares that its authority to alter the balance of federal and state power in the *Orders* derives from

"general authority to interpret and implement provisions of the Act," rather than an express statutory provision (FCC Br. 52).

This argument is unavailing because the FCC's "power to act … is authoritatively prescribed by Congress[.]" *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013). While "Congress may legislate in areas traditionally regulated by the States," this is an "extraordinary power in a federalist system" and one that "we must assume Congress does not exercise lightly." *Gregory*, 501 U.S. at 460. If it chooses to exercise this power, Congress must be "clear and manifest" in expressing the intent to shift the traditional balance of federal and state power or test constitutional limits. *Id.* at 461 (internal quotation marks omitted).

In the absence of such a clear statement, it should be presumed that Congress did not intend to approach—or to delegate authority to an agency to approach—the outer edges of federal legislative authority over the states. *Id.* In other words, had Congress intended to allow the FCC to issue orders that authorize an intrusion into state and local authority as deep as that wrought by the *Orders*, or even arguably effect a taking of municipal property or commandeer local regulatory officials and legislatures, it would have made that intent clear in the Act. But,

as explained in our opening brief (NYC/NATOA Br. 29–40), it did not, and it is beyond the authority of the FCC to take the statute further than Congress did. The FCC cannot rely on its general interpretive authority to give itself powers that Congress withheld.

Faring no better than this "general authority" argument is the FCC's claim that Congress "clearly and expressly" gave it authority to issue the *Orders* (FCC Br. 115). Far from containing a clear statement authorizing an interpretive ruling with Fifth and Tenth Amendment implications, the Act's plain language suggests that Congress intentionally withheld from the FCC the authority to legislate sweeping interference with local governments' rights-of-way management. As explained in our opening brief, the very sections on which the FCC relies—Sections 253(a) and 332(c)(7)—themselves contain express preservations of local rights-of-way regulation and local zoning authority (NYC/NATOA Br. 30–34).

Rather than respond to this argument, the FCC's opposition focuses on a passing reference in our opening brief to the interpretive canon known as the presumption against preemption (FCC Br. 115). The presumption is one of many interpretive canons that can eliminate

ambiguities, and thereby limit deference to an agency's statutory interpretation at *Chevron*'s first step. We cited the presumption as one such canon under the umbrella of clear-statement rules. But whether or not the presumption against preemption figures into this case (and it does, as explained next), the FCC does not even attempt to dispute that other canons—such as the presumption that Congress does not lightly authorize a federal agency to adopt measures with significant constitutional implications—trigger the clear-statement rule here.

In any event, the FCC ignores that this Court relied on the presumption against preemption in this very context, holding that the unambiguous text of Section 253(a) has a "narrow … preemptive effect" and that, even if it were ambiguous, a narrow reading would be required by the presumption that "'express preemption statutory provisions should be given a narrow interpretation.'" *Sprint Telephony PCS, L.P. v. Cnty. of San Diego,* 543 F.3d 571, 578 (9th Cir. 2008) (en banc) (quoting *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n,* 410 F.3d 492, 496 (9th Cir. 2005)). Thus, there is no merit to the FCC's claim that its interpretive authority

allows it to stretch Section 253(a)'s grant of narrow preemptive authority to authorize the *Orders*' constitutionally troubling effects.

Indeed, Congress expressly removed from the preemptive scope of Section 253(a) the conduct contemplated in Section 253(c)'s safe-harbor: "manag[ing] the public rights-of-way [and] requir[ing] fair and reasonable compensation … for use of public rights-of-way" (*see* NYC/NATOA Br. 30–32). And Congress further cabined the preemption authorized by Section 253(a) in the express preemption clause set forth in subsection (d) of the same section. Subsection (d) confirms that the FCC may preempt only after a notice and comment period and only "to the extent necessary" to abate an actual violation of subsections (a) or (b).[5] The FCC fails to mention this limiting language in its brief.

Similarly, Section 332(c) provides no support for the FCC's sweeping assertion of preemption, as local-government petitioners have shown (LG Reply 54–55). It imposes narrow limits on local authority

[5] Conspicuously absent from subsection (d)'s text is any reference to preemption for purposes of effectuating subsection (c). This is likely because subsection (c) was not conceived as imposing any limitations on local authority (*see* LG Reply 13, 30–31), as the FCC now mistakenly claims (FCC Br. 77–78). It is a shield, not a sword.

over the siting of wireless facilities, confined to those limitations enumerated in subparagraph (7) of that section. But that subparagraph, entitled "preservation of local zoning authority," expressly provides that nothing else in the Act "shall limit or affect" local authority over decisions regarding the placement, construction or modification of personal wireless facilities. 47 U.S.C. § 332(c)(7)(A). As explained in our opening brief (NYC/NATOA Br. 7–8, 33), Congress declined to directly regulate wireless siting at the national level, instead preserving local authority. Far from respecting the lines that Congress drew, the FCC now endeavors to impose national uniformity at the cost of the very public hearings and other local land use procedures that Section 332(c)(7) was explicitly crafted to preserve (FCC Br. 106).

Given this statutory context, there is no basis for the FCC's claim that the Act's narrowly tailored preemption provisions somehow authorize the *Orders*' problematic effects. Indeed, if the FCC were correct that its having "general interpretive authority" could authorize the dramatic incursions on local prerogatives proposed here (FCC Br. 79, *see also id.* 52), in the face of narrowly tailored preemption clauses and a broad safe-harbor provision preserving state and local authority,

it is unclear how Congress could ever rein in federal regulatory agencies. This is the "fox-in-the-henhouse syndrome" that the *Arlington* Court cautioned should be avoided "by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority." *City of Arlington*, 569 U.S. at 307. When that admonition is followed, it becomes clear that the *Orders* exceed the FCC's authority.

CONCLUSION

The orders should be vacated.

Dated: New York, NY
September 6, 2019

Respectfully submitted,

NANCY L. WERNER
General Counsel
Attorney for NATOA

By: /s/ Nancy L. Werner
NANCY L. WERNER
3213 Duke Street #695
Alexandria, VA 22314
(703) 519-8035
nwerner@natoa.org

GEORGIA M. PESTANA
Acting Corporation Counsel
of the City of New York
Attorney for the City of New York

By: /s/ Elina Druker
ELINA DRUKER
RICHARD DEARING
CLAUDE S. PLATTON
100 Church Street
New York, NY 10007
212-356-2609
edruker@law.nyc.gov

CHARLES W. THOMPSON, JR.
Attorney for the International
Municipal Lawyers Association
and the International City/County
Management Association

By: /s/ Amanda Kellar
AMANDA KELLAR
CHARLES W. THOMPSON, JR.
51 Monroe Street, Suite 404
Rockville, MD 20850
(202) 466-5424
akellar@imla.org

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,460 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in Century School Book, 14-point font.

Dated: New York, NY
September 6, 2019

/s/ Elina Druker
ELINA DRUKER

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: New York, NY
September 6, 2019

/s/ Elina Druker
ELINA DRUKER