18-72689, 19-70123, 19-70124, 19-70125, 19-70136, 19-70144, 19-70145, 19-70146, 19-70147, 19-70326, 19-70339, 19-70341, and 19-70344

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

City of Portland, Oregon,
Petitioner,

City and County of San Francisco, California,
Intervenor,
vs.

Federal Communications Commission and United States of America,
Respondents.

Sprint Corporation,
Petitioner,

City of Bowie, Maryland, et al.,
Intervenors,
vs.

Federal Communications Commission and United States of America,
Respondents.

On Petitions for Review of Orders of the Federal Communications Commission

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PETITIONER LOCAL GOVERNMENTS' JOINT OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENTS

The Corporate Disclosure Statements are provided separately by each law firm on behalf of their clients.

DISCLOSURE STATEMENT FOR PETITIONERS AND INTERVENORS REPRESENTED BY BEST BEST & KRIEGER AND KITCH DRUTCHAS WAGNER VALITUTTI & SHERBROOK

In No. 18-72689, Best Best & Krieger represents Petitioner the City of Portland, Oregon.

In Nos. 19-70144, 19-70341, 19-70136, and 19-70146, Best Best & Krieger represents as Petitioners or Intervenors:

The City of San Jose, California; the City of Arcadia, California; the City of Bellevue, Washington; the City of Burien, Washington; the City of Burlingame, California; Culver City, California; the Town of Fairfax, California; the City of Gig Harbor, Washington; the City of Issaquah, Washington; the City of Kirkland, Washington; the City of Las Vegas, Nevada; the City of Los Angeles, California; the County of Los Angeles, California; the City of Monterey, California; the City of Ontario, California; the City of Piedmont, California; the City of Portland, Oregon; the City of San Jacinto, California; the City of Shafter, California; the City of Yuma, Arizona; City of Albuquerque, New Mexico; National League of Cities; City of Brookhaven, Georgia; City of Baltimore, Maryland; City of Dubuque, Iowa; Town of Ocean City, Maryland; City of Emeryville, California; Michigan Municipal League; Town of Hillsborough, California; City of La Vista, Nebraska; City of Medina, Washington; City of Papillion, Nebraska, City of Plano, Texas; City of Rockville, Maryland; City of San Bruno, California; City of Santa Monica, California; City of Sugarland, Texas; League of Nebraska Municipalities; the City of Austin, Texas; The City of Ann Arbor, Michigan; the County of Anne Arundel, Maryland; The City of Atlanta, Georgia; the City of Boston, Massachusetts; the City of Chicago

Illinois; Clark County, Nevada; the City of College Park, Maryland; the City of Dallas, Texas; the District of Columbia; the City of Gaithersburg, Maryland; Howard County, Maryland; the City of Lincoln, Nebraska; Montgomery County, Maryland; the City of Myrtle Beach, South Carolina; the City of Omaha, Nebraska; The City of Philadelphia, Pennsylvania; the City of Rye, New York; The City of Scarsdale, New York; the City of Seat Pleasant, Maryland; the City of Takoma Park, Maryland; the Texas Coalition of Cities for Utility Issues;

In Nos. 19-70341, 19-70326, 19-70339, and 19-70344, Kitch Drutchas Wagner Valitutti & Sherbrook represents as Petitioners or Intervenors:

Meridian Township, Michigan; Bloomfield Township, Michigan; the Michigan Townships Association; The Michigan Coalition to Protect Public Rights-Of-Way.

The National League of Cities is dedicated to helping city leaders build better communities. Working in partnership with the 49 state municipal leagues, NLC serves as a resource to and an advocate for the more than 19,000 cities, villages and towns it represents.

The Michigan Municipal League is organized to effectively represent the interests of member municipalities to preserve local control and empower municipal officials to shape the destiny of their municipality and improve the quality of life of their citizens.

The League of Nebraska Municipalities is organized to effectively represent the interest of member municipalities to preserve local control and empower municipal officials to shape the destiny of their municipality and improve the quality of life of their citizens.

The Michigan Townships Association promotes the interests of 1,242 townships by fostering strong, vibrant communities; advocating legislation to meet 21st century challenges; developing knowledgeable township officials and enthusiastic supporters of township government; and encouraging ethical practices of elected officials.

The Texas Coalition of Cities for Utility Issues is a coalition of more than 50 Texas municipalities dedicated to protecting and supporting the interests of the citizens and cities of Texas with regard to utility issues.

The Michigan Coalition to Protect Public Rights-of-Way is an organization of Michigan cities that focuses on protection of their citizens' governance and control over public rights-of-way.

None of the foregoing six organizations (National League of Cities, Michigan Municipal League, League of Nebraska Municipalities, Michigan Townships Association, Texas Coalition of Cities for Utility Issues, and Michigan Coalition to Protect Public Rights-of-Way) nor any of their members, issues stock, has any parent company, or has a 10% or greater ownership interest held by any publicly-traded company. These organizations are interested in this litigation by virtue of their dedication to protecting the interests of local governments in managing their communities and public rights-of-way, which are substantially impaired by the Federal Communications Commission rulings being appealed here.

All other Best Best & Krieger and Kitch Drutchas Wagner Valitutti & Sherbrook clients state they are governmental agencies and therefore exempt from Rule 26.1.

Date: June 10, 2019

Best Best & Krieger LLP

s/ Joseph Van Eaton

Kitch Drutchas Wagner Valitutti & Sherbrook

s/ Michael J. Watza

DISCLOSURE STATEMENT FOR
PETITIONERS AND INTERVENORS REPRESENTED
BY SPIEGEL & McDIARMID LLP

In No. 18-72689, Spiegel & McDiarmid LLP represents Intervenor the City and County of San Francisco, California.

In Nos. 19-70123, 19-70145, 19-70326, 19-70339, 19-70341, and 19-70344, Spiegel & McDiarmid LLP represents as Petitioners or Intervenors: the City and County of San Francisco, California; the City of Eugene, Oregon; the City of Huntsville, Alabama; the City of Bowie, Maryland; the County of Marin, California; Contra Costa County, California; the City of Westminster, Maryland; and the Town of Corte Madera, California.

All of the Petitioners and Intervenors represented by Spiegel & McDiarmid LLP are governmental agencies and therefore exempt from Rule 26.1.

Date: June 10, 2019

Spiegel & McDiarmid LLP

s/ Tillman L. Lay

DISCLOSURE STATEMENT FOR
PETITIONERS AND INTERVENORS REPRESENTED
BY TELECOM LAW FIRM, P.C.

Nos. 19-70136, 19-70341 and 19-70344, Telecom Law Firm, P.C., represents as Petitioners or Intervenors: the League of California Cities; the League of Oregon Cities; the League of Arizona Cities and Towns; the City of Rancho Palos Verdes, California; the City of Bakersfield, California; and the City of Fresno, California.

The League of California Cities is a nonprofit corporation which does not issue stock, and which has no parent corporation, nor is it owned in any part by any publicly held corporation.

The League of Arizona Cities and Towns is a nonprofit voluntary membership organization of the 9190 dues-paying incorporated cities and towns across the state of Arizona. The League of Arizona Cities and Towns is not a corporation.

All other Petitioners and Intervenors represented by Telecom Law Firm, P.C., respectfully state that they are each a governmental agency and therefore exempt from Rule 26.1.

Date: June 10, 2019

Telecom Law Firm, P.C.

s/ Robert C. May III

DISCLOSURE STATEMENT FOR
PETITIONERS AND INTERVENORS REPRESENTED
BY KISSINGER & FELLMAN, P.C.

Nos. 19-70136, 19-70341 and 19-70344, Kissinger & Fellman, P.C. represents as Petitioners or Intervenors: the City of Coconut Creek, Florida; the City of Lacey Washington; the City of Olympia, Washington; the City of Seattle, Washington; the City of Tacoma, Washington; the City of Tumwater, Washington; the Town of Yarrow Point, Washington; King County, Washington; Thurston County, Washington; and the Rainier Communications Commission, respectfully state that they are each a governmental agency and therefore exempt from Rule 26.1.

The Colorado Communications and Utility Alliance is a nonprofit corporation organized under the laws of the State of Colorado, which does not issue stock, which has no parent corporation, and is not owned in any part by any publicly held corporation. Its members are comprised of governmental entities in Colorado.

Date: June 10, 2019

Kissinger & Fellman, P.C.

s/ Kenneth S. Fellman

DISCLOSURE STATEMENT FOR PETITIONER
CITY OF HUNTINGTON BEACH, CALIFORNIA

In No. 19-70146, the Office of the City Attorney of the City of Huntington Beach represents Petitioner, City of Huntington Beach, California.

Because the City of Huntington Beach is a governmental entity, FRAP 26.1 does not apply to Petitioner.

Date: June 10, 2019

By: */s/ Michael J. Vigliotta*
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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Petitioners and Intervenors believe that this case raises significant constitutional and statutory issues, and that oral argument may assist the Court in resolving those issues. They respectfully request oral argument, pursuant to 9th Cir. R. 34(a).

JURISDICTIONAL STATEMENT

This appeal seeks review of two Federal Communications Commission orders: *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, WC Docket No. 17-84, WT Docket No. 17-79, 33 FCC Rcd. 7705 (2018) ("*Moratorium Order*"); and *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, WC Docket No. 17-84, 33 FCC Rcd. 9088 (2018) ("*Small Cell Order*"). Case No. 18-72689 seeks review of the *Moratorium Order's* Declaratory Ruling, and this Brief addresses only that ruling.[1]

The FCC bases the *Moratorium Order* on §253 of the Communications Act of 1934,[2] (codified as 47 U.S.C. §253), and the *Small Cell Order* on §332(c)(7) of that Act (codified as 47 U.S.C. §332(c)(7)) and §253.

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[1] The remaining portion, appealed in No. 19-70490, is being briefed separately. Order of Appellate Commissioner Shaw, No. 18-72689 (Apr. 18, 2019), Dkt Entry 55 ("Briefing Order").

[2] Pub. L. No. 73-416, 48 Stat. 1064, as amended.

Both orders are appealable final agency actions. This Court has jurisdiction pursuant to 47 U.S.C. §402(a) and 28 U.S.C. §2342(1).

The Declaratory Ruling within the *Moratorium Order* was released and effective on August 3, 2018. The *Small Cell Order* was released on September 27, 2018; published in the *Federal Register* on October 15, 2018, 83 Fed. Reg. 51,867; became partially effective on January 15, 2019, and fully effective on April 15, 2019.

Each Local Government's petition was timely filed pursuant to 28 U.S.C. §2344 in the following circuits:

- *Moratorium Order*:
  - No. 18-72689: October 2, 2018 (9th Cir.).
- *Small Cell Order*:
  - No. 19-70136: October 24, 2018 (9th Cir.).
  - No. 19-70144: October 24, 2018 (9th Cir.).
  - No. 19-70145: December 14, 2018 (9th Cir.).
  - No. 19-70146: October 25, 2018 (9th Cir.).
  - No. 19-70341: December 11, 2018 (D.C. Cir.).
  - No. 19-70344: December 12, 2018 (D.C. Cir.).

The petitions for review of the *Small Cell Order* were originally assigned to the Tenth Circuit. *In the Matter of Accelerating Wireless Broadband Deployment*, Consolidated Order, MCP No. 155, 2018 WL 6521868 (J.P.M.L. Nov. 2, 2018). On January 10, 2019, the Tenth Circuit transferred all the petitions before it to this Court (Dkt Entry 1-1 in No. 19-70123). Related petitions in the D.C. Circuit and the Fourth Circuit were subsequently transferred to this Court.

ISSUES PRESENTED

1. Did the Commission err in disregarding this Court's "plain language" interpretation of the phrase "prohibit or have the effect of prohibiting" in §§253(a) and 332(c)(7)(B)(i)(II) and adopting a test with no limiting principle for distinguishing between actual prohibitions and restrictions that simply increase cost or inconvenience?

2. Did the Commission act contrary to law when it applied its new test, including to:

   a. find that fees exceeding cost for use of public property are *always* prohibitory under §253(a) and not protected by §253(c), which precludes preemption of

"fair and reasonable compensation" for right-of-way use?

b. rule that §§253 and 332(c)(7) grant access to proprietary state and local property?

c. find that, to avoid a prohibition, aesthetic conditions must be (1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance?

d. establish deadlines for action on applications that provide insufficient time to conduct land-use processes requiring public notice and hearing?

e. find that moratoria that may delay construction of facilities, such as restrictions on use of heavy equipment on frozen roads, are *always* prohibitory and unrelated to right-of-way management?

3. Do the *Orders* violate the Constitution by: (a) limiting compensation to cost reimbursement and (b) requiring localities to choose between managing and leasing proprietary property on terms

and in manner prescribed by the Commission or losing control of that property?

STATEMENT OF THE CASE

A. Background

Petitioners on this Brief are local governments and municipal associations representing them, identified in the Corporate Disclosure Statements. Petitioner-side intervenors represented by the counsel on this Brief (also local governments and their associations) also join this Brief. These petitioners and intervenors, representing a substantial portion of the nation's population, are referred to as "Local Governments," and their excerpts of record as "LGER."

Pursuant to the Briefing Order, the *Small Cell Order* and the Declaratory Ruling portion of the *Moratorium Order* appeal are briefed together, although not consolidated. Each petitioner or intervenor joins in arguments to the extent permitted by their status.

B. Statutory Background

Four statutory provisions are key to evaluating the *Orders*.

1. Sections 253 and 332(c)(7).

Congress enacted the provisions on which the Commission relies, §§253 and 332(c)(7), as part of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

Section 253(a) "ended the States' longstanding practice of granting . . . local exchange monopolies." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 405 (1999) (THOMAS, J., concurring in part, dissenting in part). The statute provides:

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

Even a prohibitory requirement may not be preempted if it is within one of two savings clauses.

Section 253(b) preserves state authority to take competitively neutral actions necessary to "preserve and advance universal service," or "protect the public safety and welfare."

Section 253(c) preserves state and local government authority to "manage the public rights-of-way" and require non-discriminatory "fair and reasonable compensation" for use of the rights-of-way. Section

253(c) "began life as the Barton-Stupak amendment." *N.J. Payphone Ass'n v. Town of W. N.Y.*, 299 F.3d 235, 245 n.7 (3d Cir. 2002). It guarantees local governments "the right to not only control access . . . but also to set the compensation level for the use of that right-of-way." 141 Cong. Rec. H8460 (daily ed. Aug. 4, 1995) (remarks of Rep. Barton).

Section 253(d) permits the FCC to review and preempt legal requirements in cases involving §253(a) or (b), but not §253(c).

A different provision, 47 U.S.C. §332(c)(7), entitled "Preservation of Local Zoning Authority," governs challenges to state and local authority over placement of *wireless* facilities. It provides that no other provision of the Communications Act "shall limit or affect the authority of a State or local government . . . over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. §332(c)(7)(A). Section 332(c)(7)(B) then lists the only federal limits on local authority. It provides that "[t]he regulation" of "personal wireless service facilities" shall not "unreasonably discriminate among providers of functionally equivalent services" or "prohibit or have the effect of prohibiting the provision of personal wireless services." Localities must act within a "reasonable" time upon

a "duly filed" request to place, construct or modify a personal wireless service facility; denials must be in writing and based on "substantial evidence contained in a written record"; and regulations may not be based upon the environmental effects of radio frequency emissions if facilities comply with FCC emissions regulations. 47 U.S.C. §§332(c)(7)(B)(ii)-(iv).

2. Section 224.

The Commission regulates communications by wire and radio but, absent a specific statutory grant, lacks authority to regulate non-carrier property that might be useful for providing wireline or wireless services. *Ill. Citizens Comm. for Broad. v. FCC*, 467 F.2d 1397, 1400-1401 (7th Cir. 1972). Otherwise, the FCC "might be called upon to regulate access and charges for use of public and private roads and right-of-ways essential for the laying of wire, or even access and rents for antenna sites." S. Rep. No. 95-580, at 14 (1977).

One specific grant of authority is 47 U.S.C. §224, which permits the Commission to set rates and terms for access to a "pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C.

§224(a)(4). Government-owned utilities are excluded from the definition of "utility."

3. Section 1455(a).

47 U.S.C. §1455, adopted in 2012, requires local governments to approve certain requests to modify an existing wireless facility, provided the modification "does not substantially change" the facility's physical dimensions.

C. FCC Interpretations Of The Statutory Provisions.

1. Section 253.

The seminal FCC case interpreting §253, and the case relied upon as support for the *Orders*, is *California Payphone Ass'n*, 12 FCC Rcd. 14191 (1997) ("*Cal. Payphone*"). The City of Huntington Park: (1) required payphone operators in the rights-of-way in the central business district to enter a contract with the City; (2) prohibited payphones on private property except within a building; and (3) entered into a payphone contract with Pacific Bell. *Id.* 14191-92. These requirements were challenged under §253(a). *Id.* 14198-99.

The challenged actions were not expressly prohibitory; the issue was whether they "ha[d] the effect of prohibiting" others' ability to provide payphone services. *Id.* 14206. The FCC defined the relevant market as payphone service (whether located outdoors or indoors) in the central business district. *Id.* 14204. The Commission "consider[ed]whether the Ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Id.* 14206. The FCC concluded that complainants needed to show an "actual" prohibitory effect.

> Even assuming, *arguendo,* that indoor payphones would generate less revenue . . . the record would have to demonstrate that indoor payphones . . . would generate so little revenue as to effectively prohibit the ability of an entity to provide payphone service.

Id. 14209.

Until the *Orders* under appeal, the FCC construed the *Cal. Payphone* test to require actual prohibitions. It upheld a Texas law imposing a 1.25% gross receipts fee on wireless providers to support a state universal service program, rejecting a provider's claim because

"there is no evidence on this record that these [fee] requirements actually have [a prohibitory] effect." *In re Pittencrief Commc'ns*, 13 FCC Rcd. 1735, 1752 (1997).

2. Sections 332(c)(7) and 1455.

The Commission's first order interpreting §332(c)(7) acknowledged that it could not rely on other provisions of the Act or exercise ancillary authority to "impose *additional* limitations" on local authority "beyond those stated in Section 332(c)(7)." *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, 24 FCC Rcd. 13994, ¶25 (2009) (emphasis in original) ("*2009 Declaratory Ruling*").

The Commission concluded that an "effective prohibition" could exist in areas adequately served by one carrier but where another carrier has no service because the alternative "could perpetuate significant coverage gaps within any individual wireless provider's service area." *2009 Declaratory Ruling,* ¶61. The Commission acknowledged that a single application denial usually would not amount to an effective prohibition unless "it demonstrates a [local]

policy that has the effect of prohibiting the provision of personal wireless services…." *Id.* ¶65.

The Commission also interpreted §332(c)(7)(B)(iii)'s requirement for action within a reasonable time, "taking into account the nature and scope of such request." It found the "reasonable period" to "be the 'usual period' under the circumstances for resolving zoning matters." *Id.* ¶42. But, because §332(c)(7)(B)(v) requires an applicant to file suit within thirty days of a final action or failure to act, the FCC established presumptively reasonable timeframes to mark when the "failure to act" occurred. These "shot clocks" were 90 days for collocations and 150 days for other requests. *Id.* ¶45. The FCC emphasized that the "timeframes do not require State and local governments to give preferential treatment to personal wireless service providers over other types of land use applications," and a locality remained free to rebut the presumption. *Id.* ¶42.

In the Matter of Acceleration of Broadband Deployment, Report and Order, 29 FCC Rcd. 12865 (2014) ("*2014 Order*"), clarified that shot clocks run notwithstanding local moratoria on application processing. The *2014 Order* focused on implementing §1455 by defining when a

modification would not be deemed a "substantial change," requiring a locality to either approve the application, or be preempted from regulating the proposed modification. *Id.* 12926, 12940-41. The Commission required localities to complete their non-discretionary review within 60 days and ruled that, given the unique language in §1455, a failure to meet the deadline resulted in an application being "deemed granted." *Id.* 12951-52, 12959-60.

Throughout these orders, the Commission maintained that its regulations applied only to "[s]tate and local governments acting in their role as land use regulators," and not when "acting in their proprietary capacities." *Id.* 12964. The Commission cited Supreme Court rulings and other court decisions "holding that Sections 253 and 332(c)(7) . . . do not preempt 'non regulatory decisions of a state or locality acting in its proprietary capacity.'" *Id.* 12964-65 (citing *Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I. Inc.,* 507 U.S. 218, 231-32 (1993)("*Boston Harbor*"); *Qwest Corp. v. City of Portland,* 385 F.3d 1236, 1240 (9th Cir. 2004); *Sprint Spectrum v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002)).

3. The National Historic Preservation Act and National Environmental Protection Act Orders.

The Commission has long treated wireless facilities deployments as a "federal undertaking" that implicates the National Historic Preservation Act, Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified in scattered sections of 54 U.S.C.) ("NHPA"), and the National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§4321 *et seq.*) ("NEPA"). Wireless site developers were required to determine whether the proposed facility was categorically exempt or required a more detailed impact assessment.

The FCC's *NEPA/NHPA Order*,[3] issued shortly before the *Orders* on appeal, defined "small wireless facilities" and ruled that their installation does not involve a federal undertaking. *Id.* 19443-44. The Commission found NHPA and NEPA review unnecessary partly because the existence of "state and local review procedures . . . reduces the likelihood that small wireless facilities will be deployed" with adverse environmental and historical preservation effects. *Id.* 19447.

[3] *In the Matter of Accelerating Wireless Broadband Deployment*, Second Report and Order, 83 FR 19440, 19443 (2018).

D. Interpretation By The Courts.

This Circuit and the Eighth Circuit hold that an "effective prohibition" may not be based upon the mere possibility of prohibition – an actual prohibition is required. *Sprint Telephony PCS, L.P. v. Cnty. of San Diego,* 543 F.3d 571, 578 (9th Cir. 2008) (en banc) (citing *Level 3 Commc'ns, L.L.C. v. City of St. Louis*, 477 F.3d 528, 532 (8th Cir. 2007)). Both circuits found this conclusion compelled by the statute's "unambiguous text." Both circuits noted that their decisions were also consistent with the *Cal. Payphone*'s actual prohibition standard, but neither relied upon that ruling. *Sprint Telephony*, 543 F.3d at 578; *Level 3 Commc'ns*, 477 F.3d at 533.

To determine whether an "actual" prohibition has occurred, this and other circuits adopted a framework that, while varying slightly, consistently considered two key factors: first, the materiality of the denial, and second, the absence of alternative means to provide service. The analysis – discussed approvingly in the *2009 Declaratory Ruling* – typically considered whether a local action or requirement perpetuated a "significant gap" in a provider's service coverage and whether the provider proposed the "least intrusive" alternative means to close that

gap. *Small Cell Order* ¶33 n.75, ¶40 n.94 (describing judicial approaches).

E. The FCC Proceedings And The Record.

The *Orders* arose from two closely related proceedings: *Accelerating Wireless Broadband Deployment*, Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 17-79, 32 FCC Rcd. 3330 (2017), and *Accelerating Wireline Broadband Deployment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, WC Docket No. 17-84, 32 FCC Rcd. 3266 (2017). Although the proceedings were technically separated into wireline and wireless components, issues substantially overlapped and commenters typically submitted identical information in each docket.

As their titles suggest and the *Orders* make explicit, the proceedings primarily aimed to accelerate broadband infrastructure deployment, including 5G and wireless broadband data services. *Small Cell Order,* ¶¶2-6, 23-24. The *Small Cell Order* references "5G" 56 times in its text. "Broadband" receives 25 mentions. The *Small Cell Order* foresees deployment of "a vast number of small cell facilities across a metropolitan area" and "nearly 800,000" small cells nationwide

by 2026. *Id.* ¶63. The record showed, for example, that Sprint celebrated "deploy[ing] more outdoor small cells in [its] 2017 fiscal fourth quarter than [it had] in the previous two years combined!" LGER-660(Ex Parte (July 18, 2018), Smart Communities at 1). It also showed that localities facilitated wireless deployment, LGER-703(Ex Parte (Sept. 18, 2018), Seattle at 1); LGER-581-582(Ex Parte (Dec. 19, 2017); Eugene at 3-4; LGER-662-666(Ex Parte (Aug. 22, 2018), San Jose).

While Local Governments supported deployment generally, they noted that because the Commission was considering reclassifying broadband as an information service,[4] the services that the Commission sought to incentivize were not covered by §253 or §332(c)(7). LGER-353(Comments, Smart Communities at 55); LGER-572-574(Reply Comments, Smart Communities at 37-39); LGER-470-474,554-556(Comments, San Antonio, *et al.*, Exh. C, Reply Comments of League of Ariz. Cities and Towns at 13-15).

[4] The Commission subsequently reclassified broadband services as information services. *Restoring Internet Freedom,* Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2017).

The FCC proposed to shorten shot clocks for "small wireless facilities" it believed central to 5G deployment. Local Governments advised the Commission that, as it proposed to define them, "small wireless facilities" are not, in fact, "small" and were not technically necessary to deliver telecommunications services or personal wireless services. LGER-351-352(Comments, Smart Communities at 53-54); LGER-381-383(Comments, Smart Communities, Exh. 1A, Afflerbach Declaration at 9-10). "Small wireless facilities" include new, 50-foot structures in residential neighborhoods, underground neighborhoods, and multiple antennas, each up to three cubic feet in size, plus an additional 28 cubic feet of other equipment. *Small Cell Order* ¶11 n.9. The record demonstrated these dimensions roughly equated to placing large refrigerators in the rights-of-way and could require heights far taller than many adjacent structures. LGER-559-560(Reply Comments, League of Arizona Cities, *et al.* at 20-21); LGER-366-367(Comments, Smart Communities, Exh. 1, Afflerbach Declaration at 6-7). Unrebutted evidence showed these large facilities reduce adjoining property values. LGER-405-415(Comments Smart Communities, Exh. 3, Burgoyne Declaration). The most pronounced harms occur in

residential areas and in communities that have made substantial investments to underground utility facilities for safety, economic development, and aesthetic reasons. LGER-583-659(Ex Parte (Mar. 14, 2018), Myrtle Beach (describing the City's $110 million investment to preserve community's appearance)); LGER-543-547(Reply Comments, Florida Coalition of Local Governments at 8-12 (describing undergrounding efforts in various Florida municipalities)); LGER-529-530(Reply Comments, San Antonio, *et al.* at 13-14). Due to the size of these "small" facilities and the anticipated scale of their deployment, Local Governments told the FCC that "small wireless facility" applications could require at least as much review time as other wireless facilities. LGER-554-557(Reply Comments, League of Ariz. Cities and Towns 13-16). The record also documented risks to life and property from improper use of and attachment to utility poles, highlighting the importance of such review. LGER-257-258(Comments, California Public Utilities Commission at 16-17 (describing risks and damage from misuse and overloading of poles)).

The FCC proposed to limit fees and rents that could be charged for wireless deployments, and to eliminate traditional

proprietary/regulatory distinctions. The record showed that many local governments sought to promote deployment by leasing or licensing space on municipal infrastructure on terms reflecting the value of the property and the burdens on the community as lessor or licensor. San Jose, for example, offered providers tiered pricing, with lower rates in underserved areas. In part to encourage economic development, San Jose also allocated certain proceeds to facilitate connecting underserved areas. LGER-662-666(Ex Parte (Aug. 22, 2018), San Jose). New York, Boston, San Francisco, Eugene, and others have authorized placement of wireless facilities at negotiated, market-based rates, and all have enjoyed widespread wireless deployment. LGER-276(Comments, San Francisco at 8); LGER-485-490(Comments, San Antonio, Exh. D at 5-10).

The record showed that leasing or licensing traffic signal and streetlight poles implicates significant public safety and other right-of-way management concerns. LGER-301(Comments, New York at 12); LGER-380-381(Comments, Smart Communities, Exh. 1A at 8-9); LGER-419(Comments, Smart Communities, Exh. 4, Puuri Declaration at 3). Many existing poles will not safely support additional equipment;

installation often requires replacement poles, necessitating more excavation and new foundations to ensure the pole can support the increased wind and weight loads from the equipment. LGER-365(Comments, Smart Communities, Afflerbach Declaration at 3). These changes require coordination with other rights-of-way users to prevent damage to other facilities, minimize traffic disruption, and protect improvements to beautify the streetscape; the work also has ongoing traffic, pedestrian, and worker safety implications. *See, e.g.*, LGER-416-459(Comments, Smart Communities, Puuri Declaration); LGER-369(Comments, Smart Communities, Afflerbach Declaration at 9).

The record contained evidence, largely unaddressed by the FCC, demonstrating the minimal effect of local requirements on nationwide deployment. *See* LGER-334(Comments (WC Docket No. 17-84), Smart Communities at 26 n.88 referencing *Effect on Broadband Deployment of Local Government Right of Way Fees and Practices* (July 18, 2011)); LGER-396-398(Comments (WT Docket No. 17-79), Smart Communities, Exh. 2 at 12-14); LGER-335(Comments (WC Docket No. 17-84), Smart Communities 27 n.95 (citing studies showing no connection between

fees and deployment)).[5] Other evidence refuted the FCC's assumption that rental fees – an operating expense – impact capital budgets. LGER-716-717(Ex Parte (Sept. 19, 2018), Eugene at 5-6). In addition, the record shows that restricting fees to costs in lucrative areas would not make it any more profitable or likely for providers to deploy in underserved areas. LGER-373(Comments, Smart Communities, Exh. 1 at 19; LGER-681-682(Ex Parte (Sept. 18, 2018), Coalition for Local Internet Choice, Attach. from Blair Levin at 3-4).

F. The Orders On Appeal

1. Moratorium Order.

The *Moratorium Order* applies to wireline and wireless and identifies two categories of moratoria deemed to prohibit, or have the effect of prohibiting, protected services. Express moratoria are actions that expressly "prevent or suspend the acceptance, processing, or approval of applications or permits necessary for deploying telecommunications services and/or facilities." *Moratorium Order* ¶145.

[5] The studies are available at https://ecfsapi.fcc.gov/file/7021693807.pdf and https://ecfsapi.fcc.gov/file/7021712200.pdf, respectively.

Examples of express moratoria included freeze-and-frost laws,[6] refusals to permit installation of facilities during high-traffic periods, temporary moratoria "for planning purposes or government study," and "refus[als] to issue work permits unless a carrier pays" fees. *Id.* ¶¶143, 147-148.

The second category, *de facto* moratoria, are "actions that are not express moratoria, but that effectively halt or suspend the acceptance, processing, or approval of applications or permits for telecommunications services or facilities in a manner akin to an express moratorium." *Id.* ¶149. Any delay that discourages filing or prevents deployment is a *de facto* moratorium. *Id.* ¶150. Where the state or locality leaves open an "alternative means of deployment" "reasonably comparable in cost and ease," §253(a) is not violated. *Id.* ¶152.

The *Moratorium Order* concludes that moratoria are generally not saved by §§253(b) or 253(c). Even in emergencies, §253(b)'s savings clause can justify moratoria only if competitively neutral, necessary to address the emergency, targeted to only the affected areas, and "clearly communicated to applicants" and "identified as such." *Id.* ¶157.

[6] Freeze-and-frost laws limit weights and speeds permitted on roads during seasons when roads are vulnerable to damage.

With respect to §253(c), the Commission declared that "to the extent they implicate rights-of-way issues at all, moratoria bar providers from obtaining approval to access the rights-of-way" and are therefore unrelated to right-of-way management. *Id.* ¶160.

2. Small Cell Order.

a. The *Small Cell Order* (¶41, n.99) interprets the "prohibition/effective prohibition" language in §§253(a) and 332(c)(7)(B) as not requiring proof of an actual prohibition, expressly disregarding the "actual prohibition" standard adopted by this Court. Although the Order (¶37) purports to adopt the *Cal. Payphone* standard, it applies a different test that invalidates any "state or local legal requirement [that] materially inhibits a provider's ability to engage in any of a variety of activities related to its provision of a covered service." The "variety of activities" includes "densifying a wireless network, introducing new services, or otherwise improving service capabilities," and "incorporating the abilities and performance characteristics [the provider] wishes to employ," *id.* ¶37 n.87.

The *Small Cell Order* rejects the "significant gap/least intrusive alternatives" tests, and the decisions of the circuits (including this Court) applying those tests. *Id.* ¶40.

b. The *Small Cell Order* applies the new "prohibition" standard to fees imposed on wireless providers. *Id.* ¶69. Those fees consist of one-time fees, such as application fees; recurring fees for use of the rights-of-way; and recurring fees for use of other government property that may be located in the rights-of-way, such as traffic signals and streetlights. *Id.* The FCC rationalizes its rate regulation based on a voluntary cross-subsidization theory: that fees paid in one market, even if not prohibitory there, are prohibitory because they consume funds for deployment "that could have occurred elsewhere." *Id.* ¶60. The Commission ruled that such fees "violate Sections 253 or 332(c)(7)" unless they: (1) are "a reasonable approximation" of the costs associated with reviewing applications and managing the rights-of-way; (2) only include "objectively reasonable" costs; and (3) are "no higher than the fees charged to similarly-situated competitors in similar situations." *Id.* ¶50.

Based on this framework, the Commission established presumptively reasonable fees: one-time application fees of $500 for up to five sites, plus $100 for each additional site in the same batch, and recurring annual fees of $270 per site to access and occupy any government property within the rights-of-way. *Id.* ¶79. A locality seeking to charge higher fees would be required to prove that its actual costs exceeded these levels.[7]

c. The Commission ruled local aesthetic requirements may be prohibitory unless they are "(1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance." *Id.* ¶86. The Commission neither defined "other types of infrastructure deployments" nor explained why differential treatment of other infrastructure prohibits wireless entry. The *Small Cell Order* declared that aesthetics standards must be objective because non-objective standards make it more costly and difficult to obtain approval of an application. *Id.* ¶88.

[7] The FCC declined to exempt existing agreements from its ruling, but said that those should be addressed on a case-by-case basis. *Small Cell Order* ¶ 66.

The Commission applied the same standards to both undergrounding and minimum-spacing requirements. *Id.* ¶¶90-91.

d. The *Small Cell Order* extended its rulings to "terms for access to public [rights-of-way] that [local governments] own or control" and to "terms for use of or attachment to government-owned property within such [rights-of-way]." *Id.* ¶92. The *Small Cell Order* rejects any distinction between "regulatory" and "proprietary" property in the rights-of-way. *Id.* ¶¶92-97.

e. The *Small Cell Order* adopted new "shot clock" rules establishing 60- and 90-day shot clocks for collocations and new installations, respectively, of "small wireless facilities." *Id.* ¶105; 47 C.F.R. §1.6001. Those were based on timelines in several state laws that essentially repealed land use-style permitting for small wireless facilities. *Small Cell Order* nn.303-04. If the shot clock is missed, a local government is presumed to have effectively prohibited service, *Id.* ¶118. In "most cases and in most jurisdictions," this will result in "preliminary or permanent injunctive relief." *Id.* ¶123. The Commission anticipates localities may only rebut the presumption where there are "unforeseen" or "exceptional circumstances." *Id.* ¶127.

The *Small Cell Order* then addressed issues related to all shot clocks, first by declaring that §332(c)(7)(B)(ii) requires localities to act on "all authorizations" required to deploy, including not only land use approvals, but also any related construction, electrical, excavation, traffic, or other permits, and any authorizations related to access to or use of municipal property (such as a license or franchise). *Id.* ¶132. The record showed it is not possible to apply for many of these permits – much less issue them – until well after the application for placement is submitted. LGER-726-727(Ex Parte (Sept. 19, 2018), Smart Communities at 7-8).

SUMMARY OF THE ARGUMENT

1. 47 U.S.C. §§253(a) and 332(c)(7)(b) preempt local laws and requirements that "prohibit or have the effect of prohibiting" the provision of certain services. In *Sprint Telephony*, this Court ruled *en banc* that the statute unambiguously requires more than the *mere possibility* of a prohibitory effect; complainants must show an *actual* prohibitory effect. The FCC's seminal "effective prohibition" decision, *Cal. Payphone*, also required an actual prohibition. That decision held

that increased costs or greater inconvenience are not an "effective prohibition" unless they render service commercially unviable.

2. Every Commission action in the *Small Cell Order*, and in the *Moratorium Order,* depends on the assumption that an actual prohibition is not required. It is enough, for example, if a provider is prevented from improving existing services or deprived of extra profits that it *might* use to fund deployment. This "[u]nexplained inconsistency" with *California Payphone* is sufficient to find the *Orders* arbitrary and capricious, *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2126 (2016). More importantly, under *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), the FCC must apply the unambiguous meaning of the statute, as defined by the Courts of Appeal; this Court's "actual prohibition" standard controls. Because the FCC disregarded that standard, The *Orders* must be vacated.

3. The specific applications of the FCC's new effective prohibition standard fare no better when examined separately. The fee ruling of the *Small Cell Order* rests on the thesis that, while a provider can be required to absorb all the costs it actually causes a locality to

incur when reasonably regulating, any additional costs a locality imposes are prohibitory. The Commission extends this thesis, by analogy, to develop aesthetics and other non-fee requirements. The Commission posits that any additional burden or cost subtracts resources available to a provider, which *might* underwrite deployments elsewhere. Under this interpretation, a fair market rental rate for attachments to streetlights in Portland is prohibitory – whether it impacts providers in Portland or not – because those providers *could possibly* use additional profits to invest elsewhere. This is miles away from an "actual prohibition." Even on its own merits, the hypothesis fails. The only evidence in the record to support this hypothesis simply speculated that one *possible* use of extra profits from one area *might* be deployment elsewhere, which is simply observing the obvious. Substantial record evidence (largely ignored or summarily dismissed) debunked this hypothesis, leaving the decision "without substantial basis in fact." *FPC v. Florida Power & Light Co.*, 404 U.S. 453, 463 (1972).

4. The fee limitations improperly construe "fair and reasonable compensation," protected by §253(c) and conspicuously absent from by

the FCC's purview under §253(d), as limited to cost reimbursement. Congress intended to give localities a wide berth in setting compensation levels to reflect the value of their property, and it equally clearly intended to keep the FCC out of such matters.

5. The fee limitations and other rulings were extended to reach states' and localities' proprietary property. The FCC effectively declared that, because municipal streetlights and traffic signals may be useful for wireless deployment, they must be made available to providers on regulated terms. The elimination of the distinction conflicts with this Court's precedent, prior FCC decisions, and §§253 and 332(c)(7)'s text, which do not reach proprietary activities.

6. Section 332(c)(7) preserves local land use authority over wireless facilities, subject exclusively to enumerated limitations. The FCC improperly expanded those limitations to the point where the "permissible" aesthetic review bears no resemblance to the land use Congress intended to preserve. Section 332(c)(7) prohibits only "unreasonable discrimination" among providers of "functionally equivalent" services; the FCC rewrites this to prohibit discrimination between wireless and "other infrastructure." Section 332(c)(7) envisions

providers will go through land-use processes just like everyone else; the FCC declares that aesthetic standards applicable to the wireless industry must be "objective" and published in advance. The new limitations lack any statutory basis. Their validity depends on the Commission's abandonment of an actual prohibition standard, as the Order recites no credible information suggesting wireless providers are unequipped to continue to manage land-use processes under which they have thrived for decades.

7. The FCC's reduced "shot clocks" for "small wireless facilities" effectively exempt them from traditional land use hearings, appeals and public participation. Under §332(c)(7), the FCC cannot prescribe the land-use review process for wireless facilities, nor shorten the timelines to effectively achieve the same result.

8. While the *Moratorium Order* did not expressly apply the new effective prohibition standard, the FCC recognized (*Small Cell Order* ¶37 n.87) that the ruling was consistent with the new standard. The *Moratorium Order* finds prohibitions in almost any potential delay or inconvenience, no matter how slight or inconsequential. For example, the *Order* lists as moratoria freeze-and-frost laws that close roadways to

heavy equipment when that equipment may cause significant damage. The FCC had *no* evidence that telecommunications deployments required heavy machinery and *no* evidence suggesting construction could not be planned to avoid roadway restrictions. Undeterred, the FCC not only suggests those laws are prohibitory, it also suggests that those (and other, similar requirements) have nothing to do with right-of-way management protected under the Act.

9. The FCC cannot, consistent with the Fifth Amendment, limit compensation to cost reimbursement. It cannot, consistent with the Tenth Amendment, force states and localities to respond to demands for access to proprietary property or require contribution of resources to a federal regulatory scheme. The *Orders* do both.

ARGUMENT

I. STANDARD OF REVIEW

The two-step *Chevron* framework applies to review of the Commission's statutory interpretation. The Court determines "whether Congress has directly spoken to the precise question at issue," in which event it must "give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467

U.S. 837, 842-843 (1984). If the statute is silent or ambiguous regarding an issue, the Court generally defers to the agency's interpretation if it is based on a "permissible construction of the statute." *Id.*

The FCC's decision-making process and regulations are examined under the Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) ("APA"), to determine if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "contrary to constitutional right, power, privilege or immunity," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. §706(2)(A)-(C); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Managed Pharm. Care v. Sebelius*, 716 F.3d 1235, 1244, 1250 (9th Cir. 2013).

II. THE COMMISSION'S "EFFECTIVE PROHIBITION" DEFINITION IS INCONSISTENT WITH THE LAW

A. The Commission Improperly Disregards This Circuit's Plain Language Interpretation Of The Phrase "Prohibit Or Effectively Prohibit"

1. An actual prohibition is required.

Both *Orders* depend upon an assumption that the FCC has broad authority to define what it means to "prohibit or effectively prohibit"[8] services covered by §§253(a) and 332(c)(7).[9] All its rulings rest upon its new interpretation of that phrase.

The FCC's discretion is not that broad. Under *Nat. Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) an appellate court's prior judicial construction of a statute, where based on the unambiguous text of the statute, trumps an agency's construction otherwise entitled to *Chevron* deference. *Accord, Garfias-Rodriguez v. Holder*, 702 F.3d 504, 512 (9th Cir. 2012) (en banc). Sitting *en banc,* this Court held that the "unambiguous text" of §253(a) requires a

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[8] The difference between the two is that one set of laws is explicitly prohibitory while the other "produce the unwanted effect, even if they do not advertise their prohibitory agenda on their faces," *Nixon v. Missouri Mun. League*, 541 U.S. 125, 139 (2004).

[9] Section 253(a) protects only telecommunications services, while Section 332(c)(7) protects only personal wireless services.

plaintiff suing a municipality to show either an express prohibition, or that challenged provisions "actually have the effect of prohibiting the provision" covered services. *Sprint Telephony* at 578 (citing *Metro PSC, Inc. v. City of S.F.*, 400 F.3d 715, 731-35 (9th Cir. 2005)). The "actual prohibition" standard is binding; the *Orders* therefore rest on the wrong foundation.

2. The failure to adopt the "actual prohibition" test is substantive error.

This Court's "actual prohibition" standard "is consistent" with the original *Cal. Payphone* standard, *Sprint Telephony*, 543 F.3d at 578. But the *Orders* are not consistent with the original *Cal. Payphone* standard.

Rather than requiring a showing of material, actual impacts as compelled by *Cal. Payphone*, the *Orders* focus on *possible* effects that *might* follow if a provider is not permitted to do what it prefers, or if it faces additional costs. The *Orders* repeatedly find a "prohibition" where a regulation imposes costs on providers based on the *possibility* that providers might use additional profits to serve other markets. But under *Cal. Payphone* and its pre-*Orders* progeny, that a regulation

increases costs, without more, is insufficient; *Cal. Payphone* requires a showing that a regulation makes provision of service so unprofitable as to be commercially unviable. Similarly, the *Small Cell Order* (¶57) finds that local fees must be restricted to cost recovery to ensure providers can compete in "a 'balanced' legal environment for a covered service," by which it means that the interests of communities and providers must be weighed. But *Cal. Payphone*'s balancing test refers to "balance" among competitors. Balance between local governments and providers is not guaranteed by statute or prior Commission precedent; all that is required is the avoidance of prohibition.

Under *Cal. Payphone,* potential cost and inconvenience do not rise to the level of an effective prohibition. Yet, under the *Small Cell Order*, local aesthetics requirements must be objective rather than subjective, merely because subjective standards may require more time and money to understand. Likewise, the *Moratorium Order* finds that delays associated with waiting for roads to unfreeze are "prohibitory" without considering whether it is common practice, or possible, to stage construction to occur in spring rather than mid-winter. The new

standard erases the "actual prohibition" required by both *Sprint Telephony* and *Cal. Payphone.*

3. The structure of the Act compels the "actual prohibition" standard.

The FCC's new standard is inconsistent with the statutory provisions, particularly §332(c)(7)(B)(i)(II). Courts have universally held that while §332(c)(7)(B) imposes "certain substantive and procedural limitations" on local authority, its purpose is "to preserve local land use authorities' legislative and adjudicative authority." *Omnipoint Commc'ns, Inc. v. City of Huntington Beach*, 738 F.3d 192, 195 (9th Cir. 2013). Section 332(c)(7) does *not* entitle a provider "to construct any and all towers that, in its business judgment, it deems necessary"; that "would effectively nullify a local government's right to deny . . . a right explicitly contemplated in 47 U.S.C. §332(c)(7)(B)(iii)." *Sprint Spectrum L.P. v. Willoth,* 176 F.3d 630, (2d Cir. 1999) at 639 (citing *AT&T Wireless PCS, Inc. v. City Council of Va. Beach*, 155 F.3d 423, 427 (4th Cir. 1998)). The *Orders,* which focus on potential effects on business decisions, are inconsistent with the language and purpose of §332(c)(7).

B. The FCC Fails To Distinguish "Prohibitions" From "Inconveniences"

The *Small Cell Order* (¶40) displaces the "significant gap" and "least intrusive means" tests used by courts to determine the significance of the impact of a government action on personal wireless services. Even if the Commission has free rein to replace these tests, to distinguish prohibitory and non-prohibitory acts it must nonetheless "apply *some* limiting standard rationally related to the goals of the Act…." *AT&T Corp. v. Iowa Utils. Bd.,* 525 U.S. 366, 388 (1999).

Instead, the Commission simply asserts (¶¶37, 60, 88, 90-91) that any action is prohibitory if it (a) "materially inhibits" a provider from engaging in "any of a variety of activities," including simply improving existing service; or (b) imposes what the Commission says are undue costs or inconveniences, Statement of the Case, Part F.2. In contrast to *Cal. Payphone,* which described the sorts of demonstrations required to distinguish mere inconveniences from actual prohibitions, the *Orders* offer no explanation as to how to draw a line between actions which do, and do not, meet this threshold. That leaves only two possible readings of the *Small Cell Order*: either the new standard entitles providers to take almost any action if it advances a business objectives; or it is

meant to provide an alternative for determining whether there has been an "actual" prohibition. If the former, the FCC's new construction is inconsistent with *Cal. Payphone's* "actual prohibition" test, and its departure from a prior policy sub silentio renders its decision arbitrary and capricious, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, at 514 (2009). If the latter, the Commission has adopted an arbitrary test that fails to actually explain how to determine whether there has been an actual prohibition.

The defect is like the one the Supreme Court identified in its reversal of the Commission's initial regulations implementing 47 U.S.C. §251, requiring incumbents to provide access to elements of their networks. Section 251(d)(2) requires the Commission to determine where access is "necessary" to enable competition, and whether limitations on access would "impair" the ability of a provider to offer services. The FCC initially interpreted these terms solely from the new entrant's perspective, and essentially found that where denial of access to a network element increased costs, the denial "impaired" entry. The Supreme Court rejected this interpretation, holding that mere increases in cost did not render a facility "necessary," nor did it necessarily

"impair" an entrant's ability to provide service. *Iowa Utils. Bd.* at 392. The Court rebuked the FCC for an interpretation which "simply failed" to "apply *some* limiting standard." *Id.* 388. The Court reasoned that a reduction in profits from 100% to 99% might impair the "ability to amass earnings" but would not *ipso facto* impair the ability to provide services. *Id.* 390. The Court directed the FCC to provide some substance to the "necessary" and "impair" standards, that did not "regard[ ] *any* 'increased cost or decreased service quality' as establishing a 'necessity' and an 'impair[ment]' of the ability to 'provide…services.'" *Id.* 392.

The *Orders* repeat the errors in *Iowa Utilities Board*: the Commission's elimination of the "least intrusivemeans" test exemplifies the problem. If there is an alternative way to provide services, that alternative, unless actually unviable, by definition means that there is no effective prohibition. *Cal. Payphone,* 14209-10, ¶40. The *Small Cell Order* (¶¶40-42) instead suggests that "least intrusive means" may by definition have lesser functionality than what the provider desired – a point which, even if true, does not help determine where differences in functionality are sufficient to amount to an "effective prohibition" under

Sprint Telephony or *Cal. Payphone*. This failure to "articulate a satisfactory explanation for its action," *State Farm* at 30, renders the *Orders* arbitrary and capricious, and the vagueness raises "two connected but discrete due process concerns": namely, that those subject to regulation should know what is required; and the vagueness creates a risk of arbitrary and discriminatory enforcement.[10]

C. The Commission Never Connects The Standard It Adopts To Specific Determinations It Makes.

The "definitive" test the *Small Cell Order* (¶35) adopts invalidates actions that "materially limit[ ] or inhibit[ ] the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." But the Commission actually applies the very different "material inhibition" test quoted at Statement of the Case, Part F.2. The FCC, for example, never explains how freeze-and-frost laws that apply to all trucks of a certain weight "materially inhibit" the ability of wireless providers to compete. The best explanation the Commission manufactures is that the rules differentially affect those who need to use the roads to install facilities, while favoring those

[10] *Id.* (citing *Grayned v. City of Rockford,* 408 U.S. 104, 108-9 (1972).

whose facilities are already installed. *Id.* ¶155. But that distinction has nothing to do with maintaining a "fair and balanced" playing field, since (as far as the Commission's analysis shows), incumbents faced similar restrictions when they installed facilities. *See, e.g.*, MICH. COMP. Laws §257.722, L. §257.722 (freeze-and-frost law adopted in 1949).

Moreover, if the Commission's argument depends on the assumption that it is unfair for new entrants to face obstacles that those with facilities already in place do not face, its conclusion proves too much. *Of course*, a new entrant must obtain building, electrical, and other permits that need not be obtained by someone whose facilities are already in place, but how that translates to an unlawful competitive advantage conferred by government (which is §253's concern) is never explained. The courts have recognized that §253 does not require government to eliminate barriers created by later entry into a market.[11]

Similarly, the Commission never explains why rent-based fees for use of government-owned structures in the rights-of-way materially inhibit the ability to compete in a "fair and balanced" marketplace. If

[11] *Cablevision of Boston, Inc. v. Pub. Improvement Comm'n of the City of Boston*, 184 F.3d 88, 98 (1st Cir. 1999).

charges are non-discriminatory for the same type of use, no one is advantaged. However, by compelling access to one class of property (government-owned structures in the rights-of-way) and limiting charges to costs, not fair market value, the *Small Cell Order* favors those who build networks on government property, over those who use private property – the sort of unbalanced competitive treatment the FCC claims to abhor.

The endemic failure to articulate a "rational connection between the facts found and the choices made" is fatal to the *Orders*. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

D. The Commission Cannot Use 5G and Broadband As Justifications for Its Rulings.

The *Small Cell Order* recognizes that §§253 and 332(c)(7) protect only "telecommunications services" and "personal wireless services," respectively – what the Commission calls "covered services." *Small Cell Order,* ¶37 n.85. The *Small Cell Order* identifies no "covered service" whose deployment is prohibited, or even inhibited, absent the Commission's new rules, Statement of the Case, Part E. However beneficial 5G and broadband may be, no next-generation wireless

service has been classified by the Commission as a "personal wireless service." In 2017, the Commission reclassified broadband internet access service as an information service rather than a "covered" telecommunications service, see n.4 *supra*.

Where no covered service is prohibited or effectively prohibited, the statutes do not apply, and rules cannot be based on the need to deploy facilities to provide non-covered services. Because the *Orders'* "effective prohibition" standard is based upon factors which Congress has not intended [the agency] to consider, *State Farm* at 43, it is arbitrary and capricious.

III. THE FCC'S SPECIFIC APPLICATIONS OF ITS NEW STANDARD CANNOT SURVIVE REVIEW

A. The *Orders* Improperly Use Section 253 to Limit Local Authority Over Wireless Siting.

Section 332(c)(7) unambiguously states it is the *only* provision of the Communications Act that can "affect" local authority over decisions regarding the placement, construction, and modification of personal wireless service facilities.[12] Because §253 is part of the

[12] While in shorthand the section is sometimes phrased as if it protects only state or local decisions, textually, the language refers to state or local "authority" over decisions.

Communications Act, it cannot be applied to "limit" or even "affect" state and local siting authority over personal wireless service facilities.[13]

In the *2014 Order,* ¶¶270-71, the FCC made clear that small wireless facilities are "personal wireless service facilities" within the meaning of Section 47 U.S.C. §332(c)(7). The *Orders* assert that §253 applies to local decisions regarding the placement of wireless facilities, §332(c)(7)(A) notwithstanding. *Moratorium Order* ¶142 n.523; *Small Cell Order* ¶36 n.83. While §253 could apply where a particular challenge does not seek relief that would "limit or affect" state or local siting authority, the *Orders* unquestionably "limit or affect" the authority of every state and locality, including those which have no wireless applications pending. That is their very purpose: to alter state and local standards to make it simpler and cheaper for industry to apply and harder for localities to deny applications. *see, e.g.*, *Small Cell Order* ¶¶2, 11-13.

[13] 47 U.S.C. §1455 establishes additional restrictions, but is not part of the Communications Act.

Because the declaratory ruling in the *Moratorium Order* (¶142 n.523, 161) is based solely on §253, it cannot apply to local authority over the siting of personal wireless service facilities.

The Commission purports to base its *Small Cell Order* on both §§253 and 332(c)(7). However, the Commission did not base its conclusions solely on the language common to both sections, relying instead on elements unique to §253.[14] Most notably, the Commission based its interpretation of §253(a) on "the observation of courts that when a preemption provision precedes a narrowly-tailored savings clause, it is reasonable to infer that Congress intended a broad preemptive scope." *Id.* ¶53. While the §253 conclusion is itself incorrect, *see infra* at 105, critical here is that §332(c)(7) takes *the opposite approach*: it begins with a savings clause and then makes the savings clause subject to exceptions. *Omnipoint Commc'ns*, 738 F.3d at 195. By the Commission's reasoning, §332(c)(7)(A)'s savings clause

[14] Petitioners are not claiming that the phrase "prohibit or have the effect of prohibiting" has different meanings under §§253(a) and 332(c)(7)(B)(i)(II). This Court found they had the same meaning in *Sprint Telephony,* 543 F.3d at 578-79. But, there are differences between the sections in other respects which may affect their application.

must be read broadly, and §332(c)(7)(B)'s preemptive scope must be read narrowly. Because the Commission relies on §253(a)'s ostensibly broad preemption as grounds for its Order, this Court cannot assume that the FCC would reach the same result were it to interpret §332(c)(7)(B) or rely solely on the language common to both sections. *Pinto v. Massanari*, 249 F.3d 840, 847 (9th Cir. 2001) ("[W]e cannot affirm the decision of an agency on a ground that the agency did not invoke in making its decision.") (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

B. The Commission's Application Of Sections 253 And 332(c)(7) To Fees Is Contrary To The Statute And Arbitrary And Capricious.

Part III.B of the *Small Cell Order* adopted rulings construing when state and local government fees associated with the installation and operation of small wireless facilities on public property and infrastructure are preempted by §§253(a) and 332(c)(7)(B)(i)(II). As described in the Statement of the Case, the limits apply to application and police-power type fees, and also to rents and license fees for use of publicly owned rights-of-way, and other publicly-owned structures in the rights-of-way, including utility poles of municipal utilities. All such

fees are limited to recovery of "objectively reasonable costs," and may be no higher "than the fees charged to similarly situated competitors in similar situations," *id* ¶ 50.

1. *The Commission fails to tie its rate regulatory scheme to a plausible interpretation of "effective prohibition."*

Any fee will impose a cost on a provider, but for the fee to be preemptable under §§253(a) or 332(c)(7)(B)(i)(II), the cost must be proven to be significant enough to actually have the effect of prohibiting the complaining provider's provision of covered services, *see* Part II.A.

The Commission's fee rulings, however, do not focus on the degree of burden fees actually impose on providers; they focus instead on the methods state and local governments use for setting fees and the degree to which fees permit state and local governments and their taxpayers to benefit from private commercial use of public property. There is no connection between whether a fee is limited to cost reimbursement and whether that fee has the effect of prohibiting service. Under the Commission's logic, a higher cost-based fee would not be prohibitory, while a lower non-cost-based fee would. Moreover, the cases the Commission relies upon in arguing that fees "can run afoul of the limits

Congress imposed in the effective prohibition standard embodied in Sections 253 and 332," *Small Cell Order* ¶43, confirm that the relevant issue is the fee's impact on the provision of service, not how the fee is derived. *P.R. Tel. Co. v. Mun. of Guayanilla*, 450 F.3d 9, 23 (1st Cir. 2006) ("the burdens of the ordinance on the telecommunications providers . . . is the focus of the §253(a) analysis"); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271 (10th Cir. 2004) ("Given the substantial costs generated by this Ordinance, it meets that [material inhibition] test and is prohibitive under 47 U.S.C. §253").[15] The Commission's interpretation of the "effective prohibition" standard as limiting fees to cost-reimbursement is therefore not a reasonable interpretation of the

[15] The Commission also cites to *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002), but that case did not decide whether a gross revenue-based fee, standing alone, violated §253(a). Rather, the court held that "the Ordinance as a whole violates §253(a)," *id.* at 76-77, and concluded that the White Plains' fee provision was not saved by §253(c) because it was not competitively neutral and nondiscriminatory. The court declined to reach the question of whether a gross revenues-based fee could be considered fair and reasonable compensation. *Id.* at 79-81.

statute. And it is also flatly at odds with this Court's precedent, as the Commission concedes.[16]

Furthermore, nothing in the language of §§253(a) or 332(c)(7)(B)(i)(II) supports the *Small Cell Order*'s thesis that whether a fee imposed in one local jurisdiction has a prohibitory effect is based *not* on its effect in that jurisdiction, but on its purely hypothetical potential effect on a provider's business decisions in jurisdictions in faraway rural areas in faraway states. *See Small Cell Order* ¶¶60-66. The Commission's construction would read into §§253(a) and 332(c)(7)(B)(i)(II) a federal mandate that states and municipalities whose fees cannot be shown to have any prohibitory effect within their jurisdiction nevertheless must, through preemption of their above-cost fees, subsidize wireless providers because those providers *might* potentially use this subsidy to deploy facilities in other places.

The "effect of prohibiting" language of §§253(a) and 332(c)(7)(B)(i) provides no basis for concluding that Congress intended to empower the

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[16] *Small Cell Order* ¶53 n.143 ("reject[ing] the view" of this Court in *Qwest v. City of Berkeley*, 433 F.3d 1253, 1257 (9th Cir. 2006), which "decline[d] to read" prior Ninth Circuit precedent "to mean that all non-cost-based fees are automatically preempted").

Commission to create a nationwide, federally-compelled local government property rate regulation scheme whereby urban localities and their taxpayers must subsidize rural and low-density localities.[17] Congress "does not . . . hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (citing *MCI Telecomm. Corp.* v. *Am. Tel. & Tel. Co.,* 512 U.S. 218, 231 (1994); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000)).

Nor can the Commission's municipal property cross-subsidization rate regulation scheme be defended as "[c]onsistent with the First Circuit's analysis in *Municipality of Guayanilla*." *Small Cell Order* ¶60. That court's ruling was not based solely, or even primarily, on "the notion that all other municipalities will follow the Municipality of Guayanilla's lead by enacting gross revenue fees." *Mun. of Guayanilla*, 450 F.3d at 17. Rather, it was based on the court's finding that Guayanilla offered no evidence to rebut the plaintiff's factual showing

[17] Although the Commission denies that this nationwide cost-reimbursement regime constitutes "'general ratemaking authority'" (*Small Cell Order* ¶50 n.132), that is nonsense. If the Commission were to restrict service providers' rates to cost reimbursement on a similar cross-subsidization theory, no one would seriously deny that constitutes rate regulation.

about the adverse fiscal impact of the fee on the company (including an "86% decline" in overall profits, *id.*) and the court's findings regarding the impact of the fee on "the profitability of PRTC's operations *within the Municipality itself*," *id.* (emphasis added). The court reasoned "it generally costs more to provide services in rural or less heavily populated areas [like Guayanilla] than it does in large urban centers," so "PRTC's profit margin on services that it sells within [Guayanilla] is likely to be *lower* than the company's overall, island-wide margins." *Id.* (internal quotations omitted). That is, Guayanilla could not justify its own fees by suggesting that the costs could be subsidized by profits from other areas — the reverse of the Commission's theory.

2. *The Commission erred in construing Section 253(c)'s "fair and reasonable compensation" language as limited to cost-reimbursement fees.*

a. The Commission's interpretation renders the structure of Section 253(c) meaningless.

Even if a fee actually has a prohibitory effect, §253(c) precludes preemption if the fee is "fair and reasonable compensation" levied "on a competitively neutral and nondiscriminatory basis, for use of the rights of way on a nondiscriminatory basis." *See, Level 3 Commc'ns,* 477 F.3d at 532. The *Small Cell Order* (¶¶50 n.130, 53, 55) seemingly concedes

that point. Yet the Commission construes §253(a) and (c) so that what is preempted, and what is saved, are identical: §253(a) "is circumscribed to permit states and localities to recover a reasonable approximation of their costs related to the deployment of Small Wireless Facilities" (¶56), and §253(c)'s phrase, "fair and reasonable compensation" only allows "state or local governments to charge fees that recover a reasonable approximation of the state or local governments' actual and reasonable costs" (¶72).

This violates basic cannons of statutory interpretation. Statutes must be interpreted "as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991). That "is particularly true when interpreting a statute that includes a savings clause." *Aguayo v. U.S. Bank*, 653 F.3d 912, 920 (9th Cir. 2011) (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47-51 (1987)). If, as the *Small Cell Order* concludes, §253(a) preempts all fees that exceed cost reimbursement, then there would be no reason for Congress to include a savings clause in §253(c) that only protects cost-

reimbursement fees. To give meaning to the phrase "fair and reasonable compensation" in §253(c), it must protect fees that might otherwise be preempted by §253(a).

The Commission ignores this point, interpreting the safe harbor not from the viewpoint of the entity that is meant to be protected (the state or locality), but from the viewpoint of providers. The Commission limits fees primarily because it concludes that small cell providers cannot *afford* to pay more than cost.[18] But, the whole point of §253(c)'s savings clause is to "preserv[e] certain state and local laws that might otherwise be preempted under § 253(a)." *Cablevision, supra* at 98.

b. The plain meaning of "fair and reasonable compensation" does not limit recurring compensation to cost-reimbursement fees.

The *Order* is inconsistent with §253(c)'s plain language, "fair and reasonable compensation," which includes rent-based rights-of-way compensation. The common and ordinary meaning of "compensation" is not limited to mere cost reimbursement. *Black's Law Dictionary*, for

[18] This conclusion lacks record support. The Commission points out that providers may require many small cells, but never examines the revenues that small cell providers anticipate generating, and hence has no possible basis for concluding that higher fees would have the sort of actual prohibitory effect required under *Cal. Payphone*.

instance, defines "compensation" as "[r]emuneration and other benefits received in return for services rendered." *Compensation*, Black's Law Dictionary (10th ed. 2014). The term "fair and reasonable" likewise provides no basis for blanket prohibition of rent-based fees. Similar phrases are uniformly understood not to be limited to cost reimbursement. *See Just Compensation*, Black's Law Dictionary (10th ed. 2014) ("[usually] the property's *fair market value*, so that the owner is theoretically no worse off after the taking") (emphasis added); *Adequate Compensation*, Black's Law Dictionary (10th ed. 2014) (same); *Fair and Reasonable Value*, Black's Law Dictionary (10th ed. 2014) (cross-referencing definition of "fair market value").[19]

Longstanding precedent supports rent-based fees as a permissible form of compensation for private commercial use of public property. In the analogous context of fees paid by providers of cable television service for the use of rights-of-way, the Fifth Circuit held that the five percent franchise fee permitted by 47 U.S.C. § 542 is "essentially a form of rent: the price paid to rent use of public right-of-ways." *City of Dallas*

[19] *See* also Part IV below, showing that a the FCC's narrow construction of "fair and reasonable" compensation also runs afoul of the Fifth Amendment's Takings Clause.

v. FCC, 118 F.3d 393, 397 (5th Cir. 1997). This Court recently noted that the gross revenue-based fees on video service providers authorized under California's Digital Infrastructure and Video Competition Act are "a form of rent for…use of public rights-of-way." *Comcast of Sacramento I, LLC v. Sacramento Metro. Cable TV Comm'n*, Nos. 17-16847, 17-16923, 2019 U.S. App. LEXIS 13716, at *7 (9th Cir. May 8, 2019). And for over a hundred years, courts have consistently reached the same conclusion in the context of municipal right-of-way. *See, e.g.*, *City of St. Louis v. W. Union Tel. Co.*, 148 U.S. 92, 98 (1893) (explaining that the city "is seeking to collect rent" in "mak[ing] the telegraph company pay for appropriating to its own and sole use a part of the streets and public places of the city"); *see also* LGER-534(Reply Comments, San Antonio, *et al.* at 21 n.40) (listing additional cases)).[20]

Congress is presumed to be aware of previous judicial interpretations of language similar to the statutory language which it uses. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). If Congress

[20]These cases show that gross revenues-based fees are recognized as valid rent for use of public property, and are being paid (without prohibitory effect) by companies that have deployed millions of miles of facilities in rights-of-way.

had intended §253(c) to prohibit, rather than permit, the long-accepted practice of reasonable rent-based fees for right-of-way use by private commercial enterprises, it would not have used the term "fair and reasonable compensation." That phrase demonstrates Congress' intention to allow the sort of rent-based compensation long permitted in similar contexts. This precedent also demonstrates the flaw in the Commission's claim that its "interpretation limiting states and localities to the recovery of a reasonable approximation of objectively reasonable cost also takes into account state and local governments' exclusive control over access to the [rights-of-way]." *Small Cell Order* ¶56 n.155. State and local control over access to their rights-of-way and government-owned property is equally "exclusive" in the context of the installation of cable system facilities,[21] yet Congress authorized gross

[21]State and local control over rights-of-way is, if anything, less "exclusive" than a cable operator's use of the rights-of-way, because wireless facilities, can be, and often are, placed outside the rights-of-way. Notably, and in contrast to *Cal. Payphone,* the *Small Cell Order* never assesses the claimed monopoly power of localities over locations where wireless facilities may be placed. Such an analysis would need to have examined the alternatives to the rights-of-way, and since the FCC also sets prices for municipally-owned property within the rights-of-way, like streetlights, it would also have had to consider whether there are private structures in the rights-of-way that can be used for

revenue-based fees for those facilities' use of the rights-of-way. 47 U.S.C. §542(b).

Moreover, in permitting fair and reasonable compensation, Congress did not, as the Commission suggests, leave "providers entirely at the mercy of effectively unconstrained requirements of state or local governments." *Small Cell Order* ¶74. In addition to the requirement that right-of-way compensation must be "fair and reasonable" under §253(c), state and local governments, unlike private for-profit businesses, are also constrained by democratic checks, as this Court has recognized. *See Charter Commc'ns, Inc. v. Cnty. of Santa Cruz*, 304 F.3d 927, 935 (9th Cir. 2002) (explaining in the context of cable television franchises that deference is due to local franchising authorities because "methods exist to promote self-correction in the future: citizens can vote out their local representatives").

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placement. Considering that private utilities serve much of the country and own millions of utility poles the Commission's *ipse dixit* claim is so implausible it cannot be justified as "a difference in view or the product of agency expertise." *State Farm* at 43. What it does suggest is that the Commission granted the industry's wish for subsidized access to public property so that it could avoid the market prices of private property.

The *Small Cell Order*'s argument is even weaker with respect to compensation for use of poles and other municipal infrastructure in the rights-of-way. Construing §§253 and 332(c)(7) to reach that property would require the Court to find that (a) the Commission may properly eliminate the proprietary/regulatory distinction (see *infra* Part III.C.); and (b) the Commission can regulate rates for access to any infrastructure in the rights-of-way merely because it is there, and convenient for use by wireless providers. Nothing in the Communications Act gives the Commission authority over non-carrier government property merely because it is convenient to communications providers, or requires a locality to take affirmative action to assist in deployment, either through making its property available, or making it available cheaply. *Cablevision of Boston,* 184 F.3d at 98.

Had Congress intended to grant the Commission rate regulation authority over property convenient for the provision of telecommunications or personal wireless services, it knew how to do so. In §224, Congress granted the Commission authority to "regulate the rates, terms, and conditions for pole attachments," where not regulated

by the state. 47 U.S.C. §224(b)(1). Congress, however, defined "pole attachment" as something attached to property "owned or controlled by a utility." Section 224 regulates only *utility* property, not non-utility property, like traffic signals, and Congress specifically defined "utility" to exclude municipal utilities.[22] Implying a broad right to regulate municipal property and infrastructure from §253 or 332 is inconsistent with the more specific provision in §224 that Congress did adopt.

Having declared that carrier rates must be just and reasonable in §201, Congress gave the Commission authority to set rates in §205. That Congress did not grant rate authority in §§253 and 332(c)(7), along with its exclusion of municipal utilities from §224, reaffirms Congress's intention to grant state and local governments flexibility and autonomy to establish fees for the use of the rights-of-way and other government property, subject only to court review, unconstrained by a Commission-established rate regulation regime.

At most, §253(c) can be read to limit localities to charging *any* rate that falls within the bound of reasonableness, and the notion that the only "reasonable" compensation is cost-based, is rebutted by the normal

[22]47 U.S.C. § 224(a)(1), (4).

meaning of the term, other provisions in the Communications Act setting right-of-way fees, and the Commission's own precedent. For example, the Commission has recognized that gross revenues-based charges for access to property, declared "unreasonable" here, are reasonable and pro-competitive in other contexts. *In re Telephone Tel. Number Portability*, 13 FCC Rcd. 11701 ¶109 n.354 (1998).

c. The legislative history of Section 253(c) confirms that Congress intended to preserve, local authority to set rents.

The meaning of "fair and reasonable" right-of-way compensation was addressed in debate in the House of Representatives over the Stupak-Barton amendment to the Telecommunications Act of 1996, which became §253(c). Statement of the Case Part B.1. That debate leaves no doubt that both supporters and opponents of the amendment shared the common understanding that "fair and reasonable compensation" permitted rent-based fees, including gross revenue-based fees.

Representative Barton began the debate, explaining that the primary purpose of the amendment was to:

> [E]xplicitly guarantee[] that cities and local governments have the right to not only control access within their city limits, but also *to set the compensation level* for the use of that right-of-way. . . . The Federal Government has absolutely no business telling State and local governments *how to price access to their local-right-of-way*.

141 Cong. Rec. H8460 (daily ed. Aug. 4, 1995) (remarks of Rep. Barton) (emphasis added). He framed the requirement that "companies should have to pay a fair and reasonable rate to use public property" in the context of "our free market society." *Id.*

When Representative Fields rose to oppose the amendment, he too recognized that it allowed rent-based fees, arguing that the amendment should be rejected because "large gross revenue assessments bear no relation to the cost of using a right-of-way." *Id.* at H8461 (remarks of Rep. Fields). In response, the amendment's other sponsor, Representative Stupak, defended gross revenue assessments:

> Mr. Chairman, we have heard a lot from the other side about gross revenues.... The other side is trying to tell us what is best for our local units of government. Let local units of government decide this issue.... Washington should keep their nose out of it . . . . This is a local control amendment....

Id. (remarks of Rep. Stupak). Representative Bliley also spoke in opposition, noting that negotiations on a compromise had focused on the *level* of rent-based compensation local governments would be permitted to impose. *Id.* (remarks of Rep. Bliley).

Thus, both proponents and opponents of the amendment that became §253(c) agreed that it permitted rents that were not tied to cost, such as those calculated by a percentage of a company's gross revenue. Both also understood the amendment as allowing local governments flexibility to determine rent-based fees, subject only to court review, and eliminating Commission second-guessing of how these fees are calculated. The Commission's construction of §253(c) as limited to cost reimbursement subverts these clear congressional purposes.

3. *The Commission's decision to limit fees to cost reimbursement is arbitrary and capricious and not supported by substantial evidence.*

The Commission justifies its ruling on fees with a voluntary cross-subsidization hypothesis: "fees imposed by localities, above and beyond the recovery of localities' reasonable costs, materially and improperly inhibit deployment that could have occurred elsewhere." *Small Cell Order* ¶60. The Commission's reasoning rests on three premises: (1)

providers have limited capital budgets; (2) above-cost fees deplete these budgets; and (3) therefore high fees in some localities (e.g., larger, urban municipalities) deprive providers of funds they would otherwise use to deploy facilities and services in other financially unattractive (e.g., rural) areas. *Id.* ¶61. But the latter two premises are unsupported and contradicted by the record.

The second premise of the Commission's reasoning is doubly flawed. As the record makes clear,[23] recurring fees for use of the rights-of-way and municipal infrastructure are operational expenses, not capital investments, so they do not affect capital budgets. Any reduction in recurring operational expenses resulting from preemption of rent-based fees should be passed on to customers if (as the Commission has elsewhere claimed[24]) the market is competitive, just as the amount of any increase in recurring fees should be passed on to the

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[23]LGER-671(Ex Parte (Aug. 29, 2018), Corning, Inc., Attach. A at 4) (reductions in attachment fees and application fees primarily affect operating expenses, not capital expenses); LGER-681(Ex Parte (Sept., 2018), Coalition for Local Internet Choice, Attach. from Blair Levin at 3).

[24]*In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, WT Docket No. 17-69, Twentieth Report, 32 FCC Rcd. 8968, 9037 (Sept. 27, 2017).

provider's customers in the form of higher prices.[25] Either way, the funds available to the provider for capital investment are unaffected.

The Commission's third premise depends on the faulty assumption that if higher, non-cost-based right-of-way fees in lucrative markets are preempted, providers would voluntarily divert the extra profits gained from that preemption to other areas that are less dense and therefore less profitable, or unprofitable, to serve. *Small Cell Order* ¶63. In other words, providers would use increased profits from lucrative markets to cross-subsidize investment in areas in which they previously found unattractive to invest, even though greater profitability in the lucrative areas would affect neither the level of anticipated capital costs nor the level of expected revenues and profits associated with serving these less attractive areas.[26]

This assumption is not supported by substantial evidence. It is contrary to basic economic theory about rational profit-maximizing

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[25] LGER-716-717(Ex Parte (Sept. 19, 2018), Eugene at 5-6).

[26]Evidence in the record shows that rural areas generally have no or minimal fees, and thus the Commission's declaratory ruling would not affect fees in those areas. LGER-373(Comments, Smart Communities, Exh. 1 at 19)

behavior, presented to, but largely ignored by, the Commission.[27] If a provider obtains reaps greater profits in San Francisco, Eugene or New York City as a result of preemption of those cities' current right-of-way or infrastructure attachment fees, those increased profits do not make it more attractive or profitable for the provider to invest in deploying infrastructure in rural Mississippi. The Commission's order does not require any amount of additional profits resulting from the preemption of San Francisco's or Eugene's fees to go towards providing service in other areas. Providers are free to use such additional profits to engage in corporate acquisitions, increase shareholder dividends, or repurchase stocks, which the record shows they have done rather than invest in deployment. *See* LGER-717-718(Ex Parte (Sept. 19, 2018), Eugene at 6-7 nn.22-24) (citing recent examples of each).

The only empirical analysis (as opposed to non-binding, self-serving suggestions in providers' filings) relied on by the Commission to defend its voluntary cross-subsidization hypothesis is a CMA Strategy Consulting supplemental sensitivity analysis attached to a Corning

[27] "Substantial evidence" is test for reviewing the adequacy of agency's fact-fining, *Info. Providers' Coal. for Def. of First Amendment v. FCC*, 928 F.2d 866, 869-70 (9th Cir. 1991).

Incorporated *ex parte* filing. *Small Cell Order* ¶¶7-8, 60 n.169 (citing LGER-676-677(Ex Parte (Sept. 5, 2018), Corning, Inc., Attach. A at 2-3)). The Commission claims this study shows that:

> [O]ur action would eliminate around $2 billion in unnecessary costs, which *would stimulate* around $2.4 billion of additional buildouts. And that study shows that such new service *would be deployed where it is needed most*: 97 percent of new deployments *would be in rural and suburban communities that otherwise would be on the wrong side of the digital divide*.

Small Cell Order ¶7 (citing LGER-676-677 (Ex Parte (Sept. 5, 2018), Corning, Inc., Attach. A at 2-3)) (emphasis added).

That is not what the Corning letter says. It says only that preemption of above-cost fees "*could reduce deployment costs* by $2.0 billion over five years," and that "[t]hese cost savings *could lead to an additional $2.4 billion in capital expenditure*."[28] In other words, the conclusion rests on an unproven assumption directly contrary to the economic theory on which the FCC's own telephone universal service program is based. LGER-718(Ex Parte (Sept. 19, 2018), Eugene at 7 (citing Parsons & Stegeman, *Rural Broadband Economics: A Review of*

[28] LGER-676(Ex Parte (Sept. 5, 2018), Corning, Inc., Attach. A at 2) (emphasis added).

Rural Subsidies at 14 (rev. July 13, 2018); Parsons, *Cross-Subsidization in Telecommunications*, 13 J. Reg. Econ. 157 (1998)); and Faulhaber, *Cross-Subsidization: Pricing in Public Enterprises*, 65 Am. Econ. Rev. 966-77 (1975)). Additional evidence in the record shows that reducing local fees will have marginal impact on deployment in rural areas. LGER-370-373(Comments, Smart Communities, Exh. 1 at 16-19); LGER-685-686(Ex Parte (Sept. 18, 2018), Coalition for Local Internet Choice, Attach. from Blair Levin at 15-16).

The *Small Cell Order* does not acknowledge, much less attempt to refute, any of the record evidence demonstrating the fallacy of its voluntary cross-subsidization hypothesis, and that failure to address key, contradictory evidence renders its decision arbitrary and capricious.

4. *The Commission's one-size-fits-all presumptive limits on fees are arbitrary and capricious.*

The *Small Cell Order* sets presumptive limits on both non-recurring application fees and recurring fees for use of government property. It establishes a presumption that recurring fees above $270 per small wireless facility per year are preempted by §§253 or 332(c)(7),

and a presumption that non-recurring fees, such as application fees, are preempted if they are greater than $500 for a single application that includes up to five small wireless facilities, with an additional $100 for each facility beyond the first five, or $1,000 for a new pole intended to support one or more small wireless facilities. *Id.* ¶79. Even assuming the Commission had authority to interpret §§253 and 332(c)(7) as limiting state and local governments to cost-recovery fees, the presumptions are irrational, and therefore arbitrary and capricious. Perhaps more importantly, the presumptions appear to be structured in a way that ensures that localities *can never* truly recover costs.

On their face, the presumptions have no relation to cost. The primary justification the Commission offers for the uniform nationwide fee caps it chose is that twenty or more states have recently enacted small cell legislation containing fee caps, and the Commission's nationwide fee caps are "higher than what many [of those] states already allow." *Small Cell Order* ¶79 n.233. That some states have imposed fee caps lower than the caps the *Small Cell Order* adopts, however, is not a reasoned justification for uniform nationwide caps. Those FCC caps are not in any way a proxy for cost: States that limited

fees did not claim to be basing the fees on an analysis of costs; the fee caps instead reflect a state legislative decision to limit fees for use of its political subdivisions' property.

The disconnect between cost and the fee caps can be seen by examining the fee structure. The *Small Cell Order* permits a city to charge the same presumptive fee for a facility installed on a utility pole owned by a third party as it may charge for placement on a pole that the city owns and must maintain. This is so even though the record indicates placement of wireless facilities on municipally-owned traffic signals and streetlights, raises highly complex technical issues, presenting significant operational and safety risks, and thus can involve significant upfront and ongoing costs (including the cost of negotiating a contract for use of the facility).[29] Likewise, the *Small Cell Order* recognizes that the placement of new poles in the rights-of-way imposes additional burdens on a community, justifying a higher non-recurring application fee for new structures, but it counterintuitively assumes, without basis, that a city's ongoing costs for a new pole in its

[29] *See, e.g.*, LGER-276 (Comments, San Francisco at 8); LGER-523 (Reply Comments, San Francisco at 13); LGER-706-709 (Comments, Howard County at 3-6).

right-of-way are no greater than the ongoing costs associated with collocating facilities on an existing utility pole.

Given the wide variations in government staffing, the number and scope of applications filed, the cost of labor, materials, property, and other local costs, the costs of processing applications and managing ongoing use will inevitably vary considerably locality-by-locality. It is irrational to conclude that a single nationwide presumptive fee bears any relation at all to the costs incurred by San Francisco or Boston, on the one hand, and by Bismarck, North Dakota, or Tupelo, Mississippi, on the other. Yet that is the assumption underlying the *Small Cell Order*'s presumptive caps.

The *Small Cell Order*'s answer is that the inaccuracy of the presumptive fees is irrelevant, because a community can establish a higher fee so long as it carries its burden of proving that the higher fee is cost-justified. In the first place, the creation of this new burden is significant, as it alters the normal rules that apply where fees are concerned. Second, the *Small Cell Order* provides no clear mechanism for recovery of court costs, and if a locality must bear those costs, it can never be fully made whole. Third, a regulated utility could normally

recover the cost of justifying rates through the rates charged to consumers, and presumably, the Commission's logic would permit localities to conduct, and charge providers for, a cost study used to establish fees. But there is no obvious way to recover those costs, because different providers will apply at different times for different facilities. There is no way for a locality to ensure that the costs can ever be recovered, and of course, no way to conduct a study specific for any particular provider or location within the sort time frame set by the *Small Cell Order*'s shot clocks. Thus, even the cost recovery the Commission finds *should* be permitted would, as a practical matter, not be permitted under the constraints imposed by the *Small Cell Order*.

The Commission ignored obvious alternatives in the record. Under most state and local laws and practice, non-recurring application fees—not just for wireless facilities but for right-of-way, building and land use permits generally—already are designed only to recover the costs of reviewing and processing an application. *See*, *e.g.*, LGER-403-404(Comments, Smart Communities, Exh. 2A at 2-3 (explaining that "a fee commonly covers costs that a municipality incurs, and is separate from "rent that reflects, in effect, the value of the property occupied"));

LGER-248(Comments, Colorado Communications and Utility Alliance at 19 (noting that "[a]pplication fees are based upon recovery of costs incurred by localities.")); LGER-723(Comments, Los Angeles County at 3 (as required by California law, the [conditional use permit ("CUP")] fee is already established to only recover the costs to provide review of the CUP.")). The Commission never explains why cost-based fees set in accordance with those current requirements should be deemed presumptively unlawful or shift a burden to states and localities.

The *Small Cell Order*'s single nationwide presumptive fee caps are also inconsistent with the Commission's prediction of substantial growth in future small cell applications. The Commission estimates there could be nearly 800,000 small cell deployments by 2026, more than five times as many deployments as expected in 2018. *Small Cell Order* ¶126. Although the Commission accurately characterizes this as a dramatic increase, its ruling regarding non-recurring fee caps evinces no consideration as to how this explosive growth will impact local governments' costs in reviewing and processing the predicted flood of new applications. Instead, the Commission's presumption establishes fixed amounts that do not vary based on the total number of

applications received,[30] or the burden on a given state or local government to process these applications (particularly within the new shot clocks established in the *Small Cell Order*). It is arbitrary and capricious for the Commission simply to assume without any reasoned justification that the anticipated explosive growth of small cell deployments will not have a similarly explosive effect on local governments' costs of reviewing and processing the concomitant growth in small cell applications.

C. The Commission's Erasure Of The Regulatory/Proprietary Distinction Is Contrary To Law.

The *Small Cell Order* erases the distinction between proprietary and regulatory activities with respect to §§253 and 332(c)(7), ruling that those provisions compel local governments to grant small cell facilities providers access to not only local rights-of-way, but also municipally-owned property (such as streetlights and traffic poles), and to do so at

[30] The Commission does impose a different fee level for the first five small wireless facilities included in a single application compared to those beyond those first five. *Small Cell Order* ¶79. This refers to the number of facilities included in a single application, not the total number of applications or facilities that must be processed.

cost and within time deadlines set by the Commission. *Small Cell Order* ¶¶11-13.

That ruling interprets §§253 and 332(c)(7) in a manner that ignores their text and established interpretive principles. This Court and the Supreme Court have held that Congress is presumed to recognize the regulatory/proprietary distinction when it enacts federal laws like §§253 and 332(c)(7) that preempt state law. "In general, Congress intends to preempt only state regulation, and *not* actions a state takes as a market participant." *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1022-23 (9th Cir. 2010) (emphasis added) (citing *Boston Harbor* at 227). "In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests . . . this Court will not infer such a restriction." *Boston Harbor*, 507 U.S. at 231-32; *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

Neither §§253 or 332(c)(7) evinces any indication that Congress intended to preempt state or local proprietary actions. The reverse is true: Section 332(c)(7)'s proviso that state and local governments "shall not prohibit or have the effect of prohibiting the provision of personal

wireless services" expressly applies to "[t]he *regulation* of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof." 47 U.S.C. § 332(C)(7)(B)(i) (emphasis added).

Section 253 contains no express or implied indication that Congress specifically intended to include proprietary actions within the scope of §253(a)'s preemption. Congress is therefore presumed to have intended to preempt only state and local regulatory actions, not proprietary ones. [31]

This Court has recognized that §§253 and 332(c) are intended to maintain the distinction between regulatory and proprietary state and local government actions, and preempt only the former. *Omnipoint Commc'ns,* 738 F.3d at 201, held that requiring voter approval for structures costing more than a certain amount on city-owned property did not fall within the preemptive scope of the Telecommunications Act of 1996. "[T]he [Telecommunications Act of 1996] applies only to local zoning and land use decisions and *does not address a municipality's*

[31] Any other construction runs into the same interpretive problems the Supreme Court noted in *Nixon*: effectively every term of a contract would be subject to debate and revisions.

property rights as a land owner. Because the [voter-approval requirement] fall[s] outside the [Act's] preemptive scope, the city charter provision is not preempted by § 332(c)(7)(B)." *Id.* at 201 (emphasis added). The same conclusion was reached in *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1241 (9th Cir. 2004) (recognizing that §253(a) preempts only "regulatory schemes"), *overruled on other grounds by Sprint Tel. PCS, LP v. Cnty. of San Diego*, 543 F.3d 571 (9th Cir. 2008). Other courts have agreed. *See, e.g.*, *Superior Commc'ns v. City of Riverview*, 881 F.3d 432, 444-45 (6th Cir. 2018) (finding that "the negotiated License Agreement cannot be properly characterized as a statute, regulation, or legal requirement within the meaning of § 253"); *Mills,* 283 F.3d at 421 (2d Cir. 2002) ("[W]e conclude that the Telecommunications Act does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity.").

"'[W]hen an agency claims to discover in a long-extant statute an unheralded power to regulate' a significant portion of the American economy,'" *Brown & Williamson*, 529 U.S., at 159, 120 S.Ct. 1291, "[courts] typically greet its announcement with a measure of skepticism.

[The courts] expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014). Congress has not so spoken in either §253 or §332(c)(7).

The *Small Cell Order* offers two justifications for expanding its authority over state and local government proprietary actions, but both fail.

First, the Commission claims that §§253(a) and 332(c)(7)(B) reach proprietary actions because neither statute "carves out an exception for proprietary conduct." *Id.* ¶93. But as shown above, the argument is textually mistaken and flips *Boston Harbor*, 507 U.S. at 231-32, on its head: "In the *absence of any express or implied indication by Congress* that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction."

The *Small Cell Order* (¶94) points to the phrase "other . . . legal requirements" in §253(a), which is absent in §332(c)(7), as an indication of Congress' intent for a broad preemptive scope. But as the Commission admits, even read in a way most favorably to it, this phrase

"makes no distinction between a state or locality's regulatory and proprietary conduct," *id.*, and thus, cannot rebut the presumption that Congress intended to preempt only regulatory conduct. Basic statutory construction rules require this phrase be read in context with its neighbors, "State or local statute or regulation." 47 U.S.C. §253(a). The *noscitur a sociis* canon cautions against ascribing a meaning to "requirements" broader than its neighbors, and the *esjudem generis* canon counsels that general words should be construed to embrace only the same subject as preceding specific words. *See Yates v. United States*, 135 S.Ct. 1074, 1085-1087 (2015). The phrase "other . . . legal requirement" makes sense as a catch-all for the many ways in which state and local governments engage in regulatory conduct, such as charters, resolutions, ordinances, codes, policies, guidelines, and the like.

Second, the *Small Cell Order* (¶96) states that "even if [§§253(a)] and Section 332(c)(7) were to permit leeway for states and localities acting in their proprietary role, the examples in the record would be excepted because they involve states and localities fulfilling regulatory objectives." It goes on to claim that state and local government

"decisions *could* be based on a number of regulatory objectives, such as aesthetics or public safety and welfare, *some of which*, as we note elsewhere, would fall within the preemption scheme envisioned by Congress." *Id.* (emphasis added).

First, the Commission confuses the identity of the property owner with whether the action is proprietary or not. A rational property owner can often be concerned about the "aesthetics" or "public safety" (and associated increased risk of liability) of structures a tenant proposes to place on the property.[32] Based on those concerns, the property owner may either place restrictive terms in the lease or refuse to lease the property at all. That the property owner making these types of decisions with respect to its property is a government does not make those concerns any less proprietary. In *Omnipoint Commc'ns,*

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[32] San Francisco imposes aesthetic requirements on carriers using streetlight and other poles owned by San Francisco to install wireless facilities. *See* LGER-285-290(Comments, San Francisco, Exh. A, Master License for Outdoor Distributed Antenna System Pole Installation, §6.1.3, Exh. B, Master Outdoor Distributed Antenna System Pole License Agreement, §6.1). San Francisco's requirements have resulted in a streamlined design, which is significantly better than San Francisco can require when regulating the installation of wireless facilities on utility poles. *See* LGER-280-281(Comments, San Francisco at 12-13).

738 F.3d at 201, this Court held that a city's "exercise of its property rights" was "non-regulatory behavior akin to an action by a private land owner" and thus fell outside the reach of § 332(c)(7), even though the purpose of the referendum requirement at issue was to put city park lands "out of the reach of developers and special interest groups," *id.* at 196, a seemingly aesthetic or public welfare concern. Likewise, in *Mills*, 283 F.3d at 420-21, the Second Circuit held that a school district's decision not to allow a provider to erect an antenna on school district property due to radio emission safety concerns was a "proprietary" decision outside the reach of §332(c)(7)(B). The Sixth Circuit in *City of Riverview* reached the same conclusion when a broadcaster challenged the city's refusal to allow an increase in transmission power pursuant to a license agreement that authorized the broadcaster's use of city-owned property. *See* 881 F.3d at 445-46. In declaring that a locality's control over any of its property in the right-of-way is regulatory because it involves "managing or controlling access" to that property the *Small Cell Order* (¶96) ignores the obvious: if there is one quintessential proprietary activity, it is "managing and controlling access" to property.

Moreover, that specific proprietary actions could be construed to be "tantamount to regulation," (*Small Cell Order* ¶96 n.269), and thus subject to preemption, does not support the *Small Cell Order*'s blanket elimination of any distinction between regulatory and proprietary actions. *Wis. Dep't of Indus., Labor, and Human Relations v. Gould, Inc.*, 475 U.S. 282, 289 (1986), is not to the contrary. In *Gould*, the Supreme Court held that a Wisconsin statute disbarring certain repeat violators of the National Labor Relations Act from doing business with the state was preempted by that Act. *Gould* at 287-89. The Court made clear that "[w]e do not say that state purchasing decisions may never be influenced by labor considerations" without being preempted by the National Labor Relations Act; the Wisconsin statute was preempted because its "manifest purpose and inevitable effect . . . is to enforce the requirements of the [National Labor Relations Act]. *Id.* 291. The FCC's reliance on *Petition of the State of Minnesota for a Declaratory Ruling*, Memorandum Opinion and Order, 14 FCC Rcd. 21697 (1999) ("*Minnesota Order*") is likewise misplaced. The *Minnesota Order* involved a state request for a declaratory ruling that exclusive contracts, preventing the state from allowing any other entity to access

public highways, could *not* violate §253(a). The FCC declined the state's request and found only that under the unusual circumstances of the case, where the state effectively prevented itself from using regulatory powers to grant others access, the normal regulatory/proprietary distinction did not necessarily apply. *Id.* ¶19. That is a far cry from construing §253 as erasing proprietary/regulatory distinctions.

Indeed, fifteen years after the *Minnesota Order*, the *2014 Order* at 12865 ¶239 reaffirmed that "lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property" are not subject to preemption. The *Small Cell Order* (¶94 n.265) tries to explain away the *2014 Order* as dealing only with 47 U.S.C. §1455. But the *2014 Order* applied the proprietary/regulatory distinction to §1455 precisely because it saw no distinction between it, and §§253 and 332(c)(7). The FCC's departure from precedent without reasoned explanation renders its decision arbitrary and capricious.

D. Aesthetic Limitations in the *Small Cell Order* Cannot Pass Muster.

1. *The Aesthetic Limitations are Not Tied to an Actual Prohibition.*

The *Small Cell Order* (¶87) justifies its aesthetic limitations on the ground that "aesthetic requirements impos[e] costs on providers, and the impact on their ability to provide service is just the same as the impact of fees." But the Commission's conclusions with respect to aesthetic requirements[33] are just as arbitrary and capricious as its conclusions regarding fees. See Part III.B.3, *supra*.

Under *Sprint Telephony* and *Cal. Payphone*, that aesthetic requirements impose costs is insufficient to show an actual prohibition. The record does not support a claim that existing aesthetic standards prohibit or effectively prohibit deployments, or that absent FCC standards, prohibitions will result. For more than two decades, wireless facilities have been successfully deployed nationwide those existing aesthetic standards. LGER-271-273,277-281(Comments, San Francisco at 3-5, 9-13); LGER-711(Ex Parte (Sept. 19, 2018), Chicago at

33 The same is true of undergrounding and spacing requirements, which merely repeat the aesthetic standards, and are subject to the same flaws.

2, showing at least 1,677 small cells have already been deployed in the city)); LGER-298-299(Comments, New York at 8-9 (noting one provider alone has deployed over 800 small cells)).

2. *The Commission's aesthetic limitations directly contradict the plain text and purpose of Section 332(c)(7).*

Even setting aside the improper reliance on §253(a), and the history of deployment, the new standards cannot pass muster. They render meaningless both the general limitation on additional restrictions in §332(c)(7)(A), Statement of Facts Part B.1. and §332(c)(7)(B)'s "exclusive list" of restrictions on that authority.

First, the "reasonableness" standard simply restates the Commission's new test for an "effective prohibition" without addressing its flaws. The closest the *Small Cell Order* comes is in a footnote (¶91 n.250) where the Commission cites a provider's complaint that compliance with aesthetic regulations may preclude "the best available technolog[y] to serve a particular area." But if that is the guidepost for reasonableness, it merely underscores that the FCC's standards are tied to provider preference, not to prohibition.

Second, the *Small Cell Order* (¶87), states that aesthetic requirements give rise to an effective prohibition claim if they are "more burdensome" than those applied to other infrastructure deployments. However, §332(c)(7)(B)(i)(I) already contains an express prohibition on "unreasonable discriminat[ion]" among functionally equivalent service providers. The statute "explicitly contemplates that some discrimination . . . is allowed." *MetroPCS*, 400 F.3d at 727. The Commission's "no more burdensome" limitation either adds a new limitation on a local land use authority, which §332(c)(7)(A) forbids, or prohibits reasonable discrimination otherwise permitted by §332(c)(7)(B). "[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013).

The "objectivity" requirement suffers from similar defects. Section 332(c)(7)(B)(i)(I) "provide[s] localities with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently . . . ." H.R. REP. NO. 104-458 AT 208 (1996) (CONF. REP.) Aesthetic regulations reflect "aesthetic judgments [that] are inherently

subjective." *Protect Niles v. City of Fremont*, 236 Cal. Rptr.3d 513, 527-28 (Ct. App. 2018). Aesthetic regulations, including those upheld by this Court, typically contain general standards that must be applied to varying local neighborhood characteristics. *Am. Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1054-55 (9th Cir. 2014) (upholding permit denials under local requirement that facilities be "minimally invasive"); *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 994 (9th Cir. 2009)(denial based on "factors including . . . the nature of uses on adjacent and nearby properties, the surrounding topography, and the surrounding tree coverage and foliage"). If the FCC's "objectivity" requirement bars that, it would eviscerate §332(c)(7)(B)'s general preservation of local zoning authority.[34]

The FCC's requirement that municipalities publish their requirements in advance impermissibly adds another new limitation not found in §332(c)(7)(B). *Small Cell Order* (¶87). Section 332(c)(7)(B)(iii) contains the statute's only "writing" requirement, but it

[34] The Commission errs, and departs from the "preservation" intended by the statute when it suggests that the validity of a standard depends not on whether it is valid under law, but whether providers might have trouble interpreting it.

applies only to application denials. Congress knew how to impose a writing requirement when it wanted one, and one cannot be inferred lightly, *cf. T-Mobile S., LLC v. City of Roswell*, 135 S.Ct. 808, 820-21 (2015) (Roberts, C.J., dissenting) (collecting writing-requirement examples from the Act).

As importantly, the Commission fails to explain why "publication" is essential to avoid an effective prohibition. The "substantial evidence" test, as applied by the courts, already prevents decisions on invented standards. *See, e.g.*, *Am. Tower Corp.* 763 F.3d at 1053–1054.

What appears to concern the Commission is new or different standards might be adopted after an application is submitted but before a final action. *Small Cell Order* ¶84 n.243. The right to adjust standards prior to any vested development right is merely another feature in land use authority common in many states. *See, e.g., Davidson v. Cnty. of San Diego*, 56 Cal. Rptr. 2d 617, 620 (Ct. App. 1996). Nothing in the Act empowers the Commission to create a nationwide vested rights doctrine specially for wireless providers. Nothing in the record suggests that wireless carriers are unequipped to

navigate the zoning process without such rights; as noted above, they have done so successfully.[35]

3. *The Aesthetic Limitations are Arbitrary, Capricious and Counter to the Evidence in the Record.*

Section 332(c)(7) is intended to promote competition while at the same time preserving local zoning authority. *Anacortes*, 572 F.3d at 991-92. Congress recognized state and local authority to establish and enforce "generally applicable zoning requirements" without "preferential treatment to the personal wireless service industry" and specifically rejected a proposal to empower the Commission to "develop a uniform policy" for wireless facilities deployment. H.R. REP. NO. 104-458 at 207-09 (1996) (Conf. Rep.). Congress had good reason to protect local land use authority, both within and outside the rights-of-way, and

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[35]LGER-502(Comments, T-Mobile at 2 (promoting its nationwide network that consists of 66,000 total cell sites and 6,000 in the ROW in 24 different states)); LGER-500Comments, Sprint at ii (promoting its deployment of small cells across the nation and being in the process of deploying tens of thousands more)); LGER-492(Comments, AT&T at 1 (promoting that its wireless network has supported 250,000% growth since 2007)); LGER-504-505(Comments, Verizon at 3-4 (describing the evolution of 3G networks to 5G networks)); LGER-494-496(Comments, Crown Castle at 3-5 (promoting that since 1994 Crown Castle has deployed 40,000 towers, 25,000 small cells, 26,500 miles of fiber)); LGER-498(Comments, Mobilitie at 5).

to require providers to follow local land use policies and procedures: "the public rights-of-way are the visual fabric from which neighborhoods are made." *Sprint PCS Assets, LLC v. City of Palos Verdes Estates*, 583 F.3d 716, 724 (9th Cir. 2009).[36]

Aesthetic harms involve more than "intangible public harm," ¶87; they can result in real financial and other harms. San Francisco spends between $1 million to $4 million per mile to underground utilities.[37] Myrtle Beach, South Carolina, spent $30 million in undergrounding since 1999 and may spend another $2 billion in street improvements.[38] Gulf Stream, Florida, approved a $6.5 million spending measure on similar projects.[39] These investments are essential to local economies.[40]. Congress' choice to preserve state and local standards,

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[36] *See* 23 U.S.C. § 131(a) (providing that infrastructure deployment should be "controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty").

[37] LGER-521(Reply Comments, San Francisco at 10 n.34).

[38] LGER-321(Comments, Smart Communities at 71-75).

[39] LGER-354-358(Reply Comments, Florida Coalition of Local Governments at 11).

[40] LGER-354-358(Comments, Smart Communities at 71-75); LGER-239,240-245(Comments, Washington Cities at 5, 16-21).

and to forego a single federal standard, recognizes that state and local standards are critical to protecting those investments.

The *Small Cell Order* (¶88 n.246) seeks to justify its "objectivity" standard based on some states' adoption of that standard. That some state legislatures have chosen to limit their political subdivisions' land use review authority does not prove that those limitations are necessary to avoid an "effective prohibition" within the meaning of §332(c)(7). The notion that the FCC can transform policies in one state into a national standard is inconsistent with §332(c)(7)'s guiding principle that state and local policies should be preserved as much as possible.

The *Small Cell Order* (¶67 n.247) also specifically declined to create an exception from its limitations for deployments on or near historic resources despite record evidence that these deployments often require mitigation conditions tailored to site-specific circumstances.[41] While localities and states are now expected to protect the environment and historical sites, *NEPA/NHPA Order* at 19447, the FCC's

[41] *See Small Cell Order* ¶67 n.247; LGER-330(Comments, League of Arizona Cities, *et al.* Exh. 1, Joint Comments, League of Arizona Cities, *et al.* at 19); LGER-565-566(Reply Comments, League of Arizona Cities, *et al.* at 31-32); LGER-292-293(Comments, Chicago at 5-6).

restrictions prevent them from undertaking the investigations or developing site-specific measures required.

Because the Commission failed to consider relevant facts, and imposed requirements inconsistent with the statute, the *Small Cell Order*'s aesthetic requirements are arbitrary and capricious. *State Farm at* 43; *Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1054 (9th Cir. 2013); *Managed Pharm. Care*, 716 F.3d at 1244, 1250.

E. The New Shot Clocks Contorts The Statute Beyond Reason.

1. The FCC's new shot clocks impermissibly frustrate state and local land use review.

The time constraints imposed by the Commission interfere with local governments' ability to administer traditional land use processes.

The Commission based the new 60-day and 90-day shot clocks for small wireless facilities on some states' new laws, which treat the installation of small wireless facilities as a permitted use, subject only to ministerial permitting. But §332(c)(7) does not give the Commission the power to confine local land-use authority to ministerial-only processes. Where Congress intended to do that, it did so specifically, 47 U.S.C. §1455.

The record makes clear that for many jurisdictions, the new shot clocks are too short to allow localities to satisfy state or local notice, hearing, and administrative appeals requirements associated with traditional discretionary land use processes, LGER-575(Reply Comments, Smart Communities at 23). *Small Cell Order* ¶¶105, 111; LGER-551-553(Reply Comments, League of Arizona Cities, at 10-12); LGER-271-274(Comments, San Francisco, at 3-6).[42] Commenters described necessary public processes, additional costs imposed by shorter shot clocks, and special issues raised by deployments in the rights-of-way. LGER-585(Reply Comments, Smart Communities at 77); LGER-315-316 (Comments, League of Arizona Cities, at 24-26); LGER-351-352(Comments, Smart Communities at 53-54, n.79).[43]

The Commission ignored differences between even the state laws on which it relied and its standards, undercutting the FCC's reliance on

[42] Courts have interpreted the FCC's shot clocks for applications subject to Section 332 as running from the date of application until the final administrative appeals are exhausted. *T-Mobile Northeast LLC v. City of Wilmington*, 913 F.3d 311, 322-23 (3d Cir. 2019).

[43] Commenters pointed out that the problems were compounded by the FCC's rules implementing Section 1455, which permit facilities to expand well beyond the size the Commission considers "small" and unobtrusive. Nonetheless, the Commission did not even consider altering its rules as suggested by commenters.

them. Many state laws do not encompass all permits necessary to authorize a site; they include only land use authorization. *See e.g.* N.H. Rev. Stat. Ann. § 12-K:10 (2016). Several exclude facilities that would be subject to more stringent review requirements - for example, in historical or environmentally protected areas. *See Small Cell Order* at ¶88 n.246; *see also* Mo. Rev. Stat. §67.5112(3),(7); N.C. Gen. Stat. §160A-400.55(h); Ohio Rev. Code Ann. § 4939.0314(H); Okla. Stat. tit. 11,, § 36-504.D.8. Another state law makes small cells a use by right but preserves local police powers to impose height, aesthetic, setback, and other traditional zoning restrictions over siting and includes a 90-day shot clock. LGER-250(Comments, Colorado Communications and Utility Alliance, at 23; n.49. The FCC failed to take these critical differences into account in crafting its own shot clocks.

Beyond the mere existence of the state laws the FCC offers no justification for its shot clocks and no reason for determining that discretionary review processes can and must be shortened.

2. Applying the shot clock to all permits is arbitrary and capricious.

Previously, shot clocks applied only to land use applications, not to permits that may be required before construction can begin, such as traffic control plans and electrical permits, and certainly not to applications to install facilities on municipal rights-of-way or other property. *Id.* The *Small Cell Order* (¶¶132, 136) expands their applicability to anything that may be required for construction, including franchises, lease or license agreements for use of public light poles, and similar requirements. The record demonstrates that some permits required for small cell installation, especially for installation in the rights-of-way or on municipal infrastructure therein, involve a variety of complex issues, including vehicular and pedestrian safety, whose impact can vary considerably depending on the scale, location, and timing of the work. LGER-558-561(Reply Comments, League of Arizona Cities, at 19-22). Short-changing the time to review the applications could therefore have significant adverse effects on public health and safety.[44] The *Small Cell Order* (¶137) summarily dismisses

[44] LGER-560-561(Reply Comments, League of Arizona Cities, *et al.* at 21-22). *See also, Small Cell Order* ¶132 n.382.

these concerns, saying that safety reviews for electrical and building purposes can be done within the same shot clocks as applied to land use review. *Small Cell Order*, ¶137. This presumes that all of these processes can run concurrently and be completed within the time the FCC specifies.

The record showed that applications for public safety permits occurs only *after* a design and site have been approved for use, and after final engineering is completed. LGER-571(Reply Comments, Smart Communities at 28, n.71). There was no basis for the Commission's conclusion that excavation, construction and traffic control permits can be processed and completed concurrently with zoning, environmental and historic review. *Small Cell Order* ¶¶135-36. Indeed, the Commission's *NHPA/NEPA Order* (¶71) suggests that environmental and historical reviews can require significant amounts of time.[45]

[45] Given that the Commission now requires municipalities to do more with less time and fewer resources, its decision to count pre-application consultations between applicants and officials against the shot clock makes little sense. *Small Cell Order* ¶145. The record shows that these informal discussions facilitate better understanding as to local requirements and streamline the formal review process. LGER-306(Comments League of Arizona Cities at 4), LGER-248(Comments, CCUA at 14); Restrictions on pre-application procedures are just more

The shot clock rules exacerbate the problems presented by the unprecedented expansion of Commission authority over not just regulatory siting, but also access to local governments' property. *Util. Air,* 573 U.S. at 310. Extending the scope of the shot clock to cover a locality's negotiations with a provider to install facilities on rights-of-way and public infrastructure throughout the locality renders the shot clocks woefully inadequate. LGER-507-508(Reply Comments, CCUA at 4-5.) There is no reason to suppose, and the Commission had no record to suggest, that a lease or license agreement can be negotiated and approved within 60 days of an application.

3. The new shot clock remedy is unsupported.

The Fifth Circuit upheld the Commission's earlier (and longer) shot clocks in the *2009 Declaratory Ruling* because they were mere presumptions, and did not require preferential treatment of wireless applications. *Arlington, Tex. V. F.C.C.,* 668 F.3d 229, 259-260 (5th Cir. 2012), *aff'd*, 569 U.S. 290 (2013). The Fifth Circuit construed the shot clocks to merely incorporate a "bursting bubble" presumption that only

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evidence that the FCC's rules frustrate a meaningful opportunity to review wireless applications, and allow applicants to game the system by submitting incomplete applications, which run the shot clock.

shifted the burden of production. *Id.* at 256, with the court noting that "[a] state or local government that has failed to act within the time frames" might rebut "by pointing to reasons why the delay was reasonable… It might do so by pointing to… the necessity of complying with applicable state or local environmental regulations." *Arlington,* 668 F.3d at 259.

While the *Small Cell Order* gives lip service to the notion that its new, shorter shot clocks are mere presumptions, it departs from prior precedent by declaring that exceeding the new shot clocks would be permissible only in "unforeseen" or "exceptional" cases, and in ruling that a local government's failure to meet the new (shorter) shot clocks would "amount to a presumptive prohibition on the provision of personal wireless services within the meaning of §332(c)(7)(B)(i)(II)," (¶118), justifying immediate relief (¶¶120-121;127). The reference to "exceptional" on its face means the new presumption is not merely a "bursting bubble," and cannot be rebutted by showing that generally applicable state or local land use requirements (such as appeals rights) cannot be vindicated in sixty 60 days. This is contrary to the *2009 Declaratory Ruling* and *Arlington*; that is fatal to the new shot clocks.

F. The Commission's Treatment Of "Moratoria" Is Arbitrary And Capricious.

The tests adopted in the *Moratorium Order* rest on the Commission's conclusion that any possible delay in deployment – even a delay that is borne in common with other rights-of-way users – is a "legal requirement" that prohibits or has the effect of prohibiting provision of telecommunications services.[46] But §253(a) was not intended to preempt generally applicable laws. At the very least, that the law applies to other businesses indicates it is not prohibitory absent special circumstances.

The specific examples of moratoria the Commission provides confirm its tests are overly broad and bear little relation to true prohibitions. As explained above, Part II.A.2, "Freeze -and-frost laws" are deemed prohibitory without any explanation or sound reason. Construction restrictions during high high-traffic periods can be avoided by planning construction during low traffic periods. The *Moratorium Order* (¶143 n.529) suggests that "refusing to issue a permit to place conduit on a bridge" is a prohibitory moratorium, even

[46] The FCC ignores distinctions between proprietary and non-proprietary property.

though denial appears to be a final decision, not a moratorium, and the validity and impact of that denial are unexamined. These and other requirements may result in inconvenience, but the *Moratorium Order* invalidates laws or even decisions where there is no reason to suppose there is an actual prohibition.

The *Moratorium Order*'s treatment of §253's savings clauses also cannot pass muster. The Commission argues that §253(a) should be read broadly and §253(b)'s preservation of "necessary" police powers should be read narrowly. That conflicts with the holding of *Sprint Telephony,* 578 F.3d at 578, that §253(a) must be construed narrowly, not broadly.

Applying its "broad preemption" test, the *Moratorium Order* establishes new requirements that state and local governments must satisfy in times of disaster, *Moratorium Order* ¶157. When, for example, the State of California is fighting wildfires that disrupt *all* activity, not just telecommunications deployment, the *Moratorium Order* requires the State to continue permitting and allowing for telecommunications construction everywhere, except in areas where (a) the State can show that it is essential to close off access, and (b)

providers are given adequate notice as to what areas are affected. The State's emergency actions are then subject to court or FCC review and second-guessing. It is hard to imagine Congress intended to permit the FCC to place such demands on public safety, or to require preferential public safety rules for wireless, but that is the effect of the FCC's reading of §253(b). The legislative history shows that result is both unlikely (the proverbial elephant in a mousehole) and inappropriate. The "necessary" term in §253(b) was intended to distinguish between those provisions which served simply as a ruse to protect incumbents, and those which do not. S. Rep. No. 104-230 at 126-27 (1996) (Conf. Rep.).

The Commission's §253(c) analysis is equally defective. It concludes, without explanation, that moratoria do not constitute rights-of-way management. *Moratorium Order* ¶161. Yet the Commission previously had recognized that right-of-way management includes the right to "regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts," among other things. *In the Matter of Classic Telephone, Inc.*, Petition for Preemption, Declaratory Ruling and Injunctive Relief, 11

FCC Rcd. 13082, 13103 (1996). These previously permissible rights-of-way management practices describe several practices the *Moratorium Order* now declares prohibitory. As with other parts of the *Orders,* the departure from precedent is not explained or acknowledged, and reversal is therefore required, *Encino Motorcars*, 136 S.Ct. at 2125-2126.

The practices the Commission declares as having nothing to do with right-of-way management are recognized as related to right-of-way management by agencies with expertise in the matter. Seasonal weight limitations like freeze-and-frost laws have been approved by the Congress and the Department of Transportation, which have granted exceptions to weight limitations to deal with spring load restrictions.[47] South Carolina's law restricts work in the rights-of-way during peak tourist seasons and along hurricane evacuation routes to manage traffic flow; it is hard to imagine a more paradigmatic right-of-way management function.

As another example, the *Moratorium Order* (¶143) declares that a prohibition results where localities "refuse to issue work permits unless

[47] *See e.g.* 23 U.S.C. § 127(a)(1); 23 C.F.R. §657.

a carrier pays" permit fees. The Commission never explains why an applicant's decision to refuse to pay a fee (which is the applicant's decision) is somehow a "legal requirement" subject to preemption, or why requiring payment is unrelated to sound (and non-discriminatory) management.

The problems with the *Order* are compounded by self-contradiction. Moratoria are deemed prohibitory even where they have a "limited, defined duration," *Id.* ¶148, yet "state and local actions that simply entail some delay in deployment" are "distinguish[ed]" from *de facto* moratoria. *Id.* ¶150."

Assuming the FCC may have some authority to define the scope of §253(c)'s phrase "right-of-way" management, it has no authority to decide how that authority preserved may be exercised (that is the point of the savings clause). The FCC is not even given authority to rule on challenges to right-of-way management, 47 U.S.C. §253(d); *see also TCG Detroit v. City of Dearborn,* 206 F.3d 618, 624 (6th Cir. 2000). The Commission's attempt to limit right-of-way management authority, given the departure from prior precedent, its lack of expertise, and its

failure to explain the basis for its decision, cannot stand, *State Farm* at 43.

IV. THE *ORDERS* ARE UNCONSTITUTIONAL

The *Orders* raise grave constitutional issues, suggesting the agency's overall approach cannot stand. *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 818-19 (9th Cir. 2016); *Bell Atlantic Telephone Companies v. F.C.C.,* 24 F.3d 1441, 1445 (D.C. Cir. 1994).

A. The *Small Cell Order*'s Limiting Recovery Of Right-Of-Way And Infrastructure Fees To Cost Reimbursement Violates The Fifth Amendment.

Compelling state and local governments to grant providers access to rights-of-way and other government-owned property creates permanent, physical intrusions that constitute a taking for which state and local governments are entitled to just compensation under the Fifth Amendment. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). The *Small Cell Order* deprives local governments of just compensation by restricting compensation for installing facilities on local governments' right-of-way and infrastructure therein to cost reimbursement. *Small Cell Order* ¶¶50 n.191, 55.

Just compensation within the meaning of the Fifth Amendment generally means fair market value, not cost reimbursement. *United States v. 50 Acres of Land,* 469 U.S. 24, 29 (1984) (*quoting Olson v. United States*, 292 U.S. 246, 255 (1934) ("The Court has repeatedly held that just compensation normally is to be measured by 'the market value of the property at the time of the taking.…")). Fair market value is consistent with the guiding principle of just compensation: an owner of taken property must be made whole. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 515 (1979).

The FCC's ruling compels local governments to allow small cell facility providers to install facilities on their property and infrastructure at cost, even if the locality would prefer not, or even if its state constitution forbids a below-market-price gift of public property.[48] Likewise, the *Small Cell Order* compels local governments to allow the installation of new poles and other fixtures in rights-of-way where

[48] *See e.g.*, LGER-276,284(Comments, San Francisco at 8, 30 (citing Cal. Const. art. XVI, § 6; Mich. Const. art. IX, § 18; N.D. Const. art. X, § 18; N.Y. Const. art. VIII, § 1; Tex. Const. art. III, § 52; Wash. Const. art. VII, § 7)) (citing Ariz. Const. art. IX, §7; Cal. Const. art. XVI, §6; N.M. Const. art. IX, §14; LGER-254-255(Reply Comments, Bellevue, Washington at 10-11.)

poles and other utility facilities have been placed underground (often at significant costs to local governments) if such a prohibition would "materially inhibit[ ] wireless service."[49]

The *Small Cell Order*'s suggestion (¶73 n.217) that "[t]here may well be legitimate reasons for states and localities to deny particular placement applications," ignores that the Order bars a local government from forbidding all access, always requires approval at cost, and requires review in accordance with the FCC's directives. The *Small Cell Order "require[s]"* the local government "to suffer the physical occupation" of its infrastructure in these circumstances. That is a physical taking under *Loretto*, 480 U.S. at 449, and *Ala. Power Co. v. FCC*, 311 F.3d 1357, 1368 (11th Cir. 2002).[50] Indeed, the *Small Cell*

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[49] *Small Cell Order* ¶90;*See* LGER-354-357(Comments, Smart Communities at 71-74); LGER-294(Comments, Chicago at 15).

[50] Even if construed as a regulatory taking rather than a physical taking, the Commission limits what localities may charge for permanent physical occupation of their property to the "actual and direct costs incurred by the government," and only if those costs "are themselves objectively reasonable" (¶55) and "specifically related to and caused by the deployment" (¶50 n.131). That formula is confiscatory. Unlike the Commission's pole attachment rules, the *Small Cell Order*'s ruling does not allow for a return on capital, *FCC v. Fla. Power Corp.*, 480 U.S. 245, 254 (1987); *Ala. Power*, 311 F.3d at 1368-69. We feel confident, for instance, that if the Commission were to disallow any

Order purports to compel the same sort of access to municipal property that the Supreme Court found would justify the municipality's charging rent in *City of St. Louis v. W. Union Tel. Co.*, 148 U.S. 92, 99-100 (1893).

The Commission argues that "cost-based recovery of the type we provide here has been approved as just compensation for takings purposes in the context of such facilities." *Small Cell Order* ¶73 n.217 (citing *Ala.Power,* 311 F.3d at 1368, 1370-71; *United States v. 564.54 Acres of Land*, 441 U.S. at 513). The *Small Cell Order* misreads those cases.

As an initial matter, *Ala. Power* noted that the FCC pole attachment rules at issue, unlike the *Small Cell Order*'s cost reimbursement-only standard, allowed for a return to capital. 311 F.3d at 1368-69. Moreover, the Eleventh Circuit addressed the Fifth Amendment in the context of another provision of the Communications Act, 47 U.S.C. § 224, which unlike §§253 or 332(c)(A7), grants cable

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rates charged by communications service providers in excess of cost reimbursement under 47 U.S.C. §202(b), that would be found to be confiscatory. *Cf. Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n of W.Va.,* 262 U.S. 679 (1923) (addressing utility's argument that the rate of return set by a state commission was too low and therefore confiscatory).

television companies the right to attach to investor-owned utility poles at rates established by the Commission. *Id.* at 1369. The court emphasized the "unique nature of this case," given that pole space on a utility pole (at least on a non-crowded pole) may be nonrivalrous—meaning "that use by one entity [e.g., a cable company] does not necessarily diminish the use and enjoyment of others [e.g., a power company]." *Id.* In this "unique" circumstance, recovery of marginal costs *could* be sufficient compensation under the Fifth Amendment. *Id.* at 1369-71.

The Commission has not shown here that the rights-of-way, streetlights, traffic light poles and other government owned property to which the *Small Cell Order* grants cost reimbursement-only access are similarly nonrivalrous. It is one thing to attach to spare space on an uncrowded utility pole; it is quite another to erect a new pole on a street, or to install small cell facilities on a streetlight or traffic light pole to which no additional attachments have ever been made. The damage caused by placement of new aboveground facilities in areas where residents have just paid millions of dollars to underground

utilities[51] is an essential element of "just compensation" under the *Alabama Power* test. The *Small Cell Order* authorizes wireless providers to cause that damage to a municipality's investment without payment for those damages.

Moreover, the interests served by public rights-of-way, streetlights, and traffic light poles -- ensuring safe and efficient vehicular and pedestrian traffic -- are broader and quite different in kind than a commercial electric utility company's use and enjoyment of utility poles.[52] In fact, the record reveals significant adverse consequences from such occupation.[53]

564.54 Acres of Land, *supra*, also does not justify the Commission's position. While the Court stated that market value might be "too difficult to ascertain" where the property is "of a type so

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[51] See Part III.D.3, *supra* discussing record on underground investments.

[52] *See* LGER-276(Comments, San Francisco at 8); LGER-523-524(Reply Comments, San Francisco at 13-14); LGER-583-659(Ex Parte Letter (Mar. 14, 2018), Myrtle Beach); LGER-732-734(Motion for Stay, National League of Cities, Strong Aff.).

[53] LGER-276(Comments, San Francisco at 8; LGER-523(Reply Comments, San Francisco at 13); LGER-419(Comments, Smart Communities, Exh. 4 at 3).

infrequently traded," 441 U.S. at 513, it did not suggest that restricting compensation to cost reimbursement would be an appropriate "alternative measure of compensation," *Small Cell Order* ¶73 n.217. Moreover, recurring fees for the right to install facilities in the right-of-way or to attach small cell facilities to municipal infrastructure bear little or no resemblance to appraising the value of "roads or sewers." 441 U.S. at 513. To the contrary, the record before the Commission is replete with evidence of fees actually charged by municipalities for use of these properties, and providers' voluntary agreements to pay those fees.[54] The municipal property to which the *Small Cell Order* grants access is *not* infrequently leased, as the *Small Cell Order* concedes (¶97); industry would just prefer that the federal government grant it subsidized, preferential access to that property.

The *Small Cell Order* also fails to provide a constitutionally adequate process for a municipality to obtain just compensation. Unlike the Commission's pole attachment regulations implementing 47

[54]*See, e.g.*, LGER-282-284(Comments, San Francisco at 28-30); LGER-301-303(Comments, City of New York at 12-14); LGER-536-539(Reply Comments, City of San Antonio at 23-25); LGER-662-663(Ex Parte (Aug. 22, 2018), San Jose at 1-2).

U.S.C. § 224, the *Small Cell Order* provides no process through which a municipality can seek a rate that provides compensation beyond cost reimbursement. *See Ala. Power*, 311 F.3d at 1372 (noting that the Commission adopted a pole attachment complaint process which allowed a utility company to obtain compensation above marginal cost" if it made certain showings). That a local government may have recourse to the courts (*Small Cell Order* ¶124), is no answer. Per the *Order*, the court can only permit the local government to recoup the costs specified by the FCC and nothing more.

For Fifth Amendment purposes, it is also irrelevant whether, as the *Small Cell Order* suggests (¶73 n.217), Congress intended to preempt state and local governments from imposing excessive fees. Assuming Congress intended to empower the Commission to do that (which it did not), it could not constitutionally prevent municipalities from receiving just compensation. As the Supreme Court stated in *W. Union Tel. Co.*, 148 U.S. at 101, no matter how broad of a right Congress may confer, it must still be "subordinate to the right of the individual not to be deprived of his property without just compensation."

B. The *Orders* Violate the Tenth Amendment.

U.S. Const. amend. X prevents Congress from regulating the states qua states, or directly compelling states or their political subdivisions to enact, enforce or administer a federal regulatory program. *See, e.g.*, *Printz v. U.S.*, 521 U.S. 898, 925 (1997); *New York v. U.S.*, 505 U.S. 144, 161 (1992).

As a result of the *Moratorium* and *Small Cell Orders*' expansion to reach state and local governments' proprietary property in the rights-of-way, a locality's staff must respond to a request for use of its property and provide necessary authorizations "including license or franchise agreements" within prescribed periods. *Small Cell Order* ¶132. A failure to respond can result in an injunction to force access.[55] That is, localities must respond to a request, or risk immediate and likely loss of control of their property, with attendant safety and other risks.[56]The harm cannot be mitigated by, as the FCC suggests, "simply acting—one

[55] *Small Cell Order* ¶118 (failure to act within the shot clock presumptively causes an effective prohibition); ¶119 (remedy is generally an injunction); ¶132 (providing that the shot clock applies to license and lease agreements for use of government property.

[56] Because the new aesthetic standards also apply to publicly owned streetlights and utility poles, a locality faces an effective prohibition claim unless it acts to adopt standards in advance of any application.

way or the other—within the . . . shot clocks". *Id.* ¶120. The Order blesses injunctive remedies for denials.

This threat exerts the sort of pressure that "turns into compulsion" in contravention of the Tenth Amendment. *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 567 U.S. 519, 577 (2012). Unlike virtually any other property owner, municipalities cannot ignore or simply refuse a prospective wireless tenant's lease application without substantial risk. That the *Small Cell Order* drags municipalities and their assets into interstate commerce against their will, on a common-carrier basis, compounds the constitutional problems. *See id.*; *Frost v. R.R. Comm'n of Cal.*, 271 U.S. 583, 592-93 (1926). What is more, as discussed in Part III.C, New York is required to contribute its assets at a below-market rates to encourage deployment in North Dakota.[57] The only "choice" is between the "easy way" or the "hard way". This is no choice at all. *See New York*, 505 U.S. at 176.

The Commission claims (¶73 n.217) that it "has not given providers any right to compel access to any particular state or local

[57] This "compelled transfer" from one sovereign to another cannot be adduced from the Communications Act.

property" because effective prohibition claims will be resolved case-by-case. *See Small Cell Order* ¶73, n.217. This argument misses the point. Under *Printz,* the Tenth Amendment violation occurs by the federal government's very act of compelling state and local governments to respond to provider requests for access to their property, and to take other immediate actions to establish conditions for access; or to risk loss of control over their property; that is what intrudes on their reserved sovereignty. *Printz*, 521 U.S. at 928. The right to defend "no" in court is still a requirement to participate in a federal regulatory program.

CONCLUSION

The Court should grant the Local Governments' Petitions for Review and vacate the *Moratorium Order* and the *Small Cell Order* in their entirety.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The *Orders* on appeal have not previously been the subject of review by this Court or any other court. All petitions for review of these *Orders* have been consolidated before this Court under either *City of Portland v. FCC,* No. 18-72689, or *Sprint Corp. v. FCC,* No. 19-70123, as appropriate, and are being briefed pursuant to the Briefing Order for the cases.

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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 21,288 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 2010 and Century Schoolbook 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 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.

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STATUTORY APPENDIX

47 U.S. Code § 253 - Removal of barriers to entry

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers

Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

(f) Rural markets. It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply—

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214(e)(1) of this title; and

(2) to a provider of commercial mobile services.

(June 19, 1934, ch. 652, title II, § 253, as added Pub. L. 104–104, title I, § 101(a), Feb. 8, 1996, 110 Stat. 70.)

47 U.S. Code § 332(c)(7) - Preservation of Local Zoning Authority

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph—

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

(June 19, 1934, ch. 652, title III, § 332, formerly § 331, as added Pub. L. 97–259, title I, § 120(a), Sept. 13, 1982, 96 Stat. 1096; renumbered § 332, Pub. L. 102–385, § 25(b), Oct. 5, 1992, 106 Stat. 1502; amended Pub. L. 103–66, title VI, § 6002(b)(2)(A), Aug. 10, 1993, 107 Stat. 392; Pub. L. 104–104, § 3(d)(2), title VII, §§ 704(a), 705, Feb. 8, 1996, 110 Stat. 61, 151, 153.)

47 U.S. Code § 332(d) – Definitions

(d) Definitions

For purposes of this section—

(1) the term "commercial mobile service" means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B); and

(3) the term "private mobile service" means any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

(June 19, 1934, ch. 652, title III, § 332, formerly § 331, as added Pub. L. 97–259, title I, § 120(a), Sept. 13, 1982, 96 Stat. 1096; renumbered § 332, Pub. L. 102–385, § 25(b), Oct. 5, 1992, 106 Stat. 1502; amended Pub. L. 103–66, title VI, § 6002(b)(2)(A), Aug. 10, 1993, 107 Stat. 392; Pub. L. 104–104, § 3(d)(2), title VII, §§ 704(a), 705, Feb. 8, 1996, 110 Stat. 61, 151, 153.)

47 U.S.C. § 1455 – Wireless facilities deployment

(a) Facility modifications

(1) In general

Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104-104) or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.

(2) Eligible facilities request

For purposes of this subsection, the term "eligible facilities request" means any request for modification of an existing wireless tower or base station that involves--

(A) collocation of new transmission equipment;

(B) removal of transmission equipment; or

(C) replacement of transmission equipment.

(3) Applicability of environmental laws

Nothing in paragraph (1) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act or the National Environmental Policy Act of 1969.

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(Pub.L. 112-96, Title VI, § 6409, Feb. 22, 2012, 126 Stat. 232; Pub.L. 115-141, Div. P, Title VI, § 606(a), Mar. 23, 2018, 132 Stat. 1101.)

47 CFR Subpart U - State and Local Government Regulation of the Placement, Construction, and Modification of Personal Wireless Service Facilities

§ 1.6001 Purpose.

This subpart implements 47 U.S.C. 332(c)(7) and 1455.

§ 1.6002 Definitions.

Terms not specifically defined in this section or elsewhere in this subpart have the meanings defined in this part and the Communications Act of 1934, 47 U.S.C. 151et seq. Terms used in this subpart have the following meanings:

(a) **Action** or to act on a siting application means a siting authority's grant of a siting application or issuance of a written decision denying a siting application.

(b) **Antenna**, consistent with § 1.1320(d), means an apparatus designed for the purpose of emitting radiofrequency (RF) radiation, to be operated or operating from a fixed location pursuant to Commission authorization, for the provision of personal wireless service and any commingled information services. For purposes of this definition, the term antenna does not include an unintentional radiator, mobile station, or device authorized under part 15 of this chapter.

(c) **Antenna equipment**, consistent with § 1.1320(d), means equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with an antenna, located at the same fixed location as the antenna, and, when collocated on a structure, is mounted or installed at the same time as such antenna.

(d) **Antenna facility** means an antenna and associated antenna equipment.

(e) **Applicant** means a person or entity that submits a siting application and the agents, employees, and contractors of such person or entity.

(f) **Authorization** means any approval that a siting authority must issue under applicable law prior to the deployment of personal wireless service facilities, including, but not limited to, zoning approval and building permit.

(g) **Collocation**, consistent with § 1.1320(d) and the Nationwide Programmatic Agreement (NPA) for the Collocation of Wireless Antennas, appendix B of this part, section I.B, means -

(1) Mounting or installing an antenna facility on a pre-existing structure; and/or

(2) Modifying a structure for the purpose of mounting or installing an antenna facility on that structure.

(3) The definition of "collocation" in § 1.6100(b)(2) applies to the term as used in that section.

(h) **Deployment** means placement, construction, or modification of a personal wireless service facility.

(i) **Facility** or personal wireless service facility means an antenna facility or a structure that is used for the provision of personal wireless service, whether such service is provided on a stand-alone basis or commingled with other wireless communications services.

(j) **Siting application** or application means a written submission to a siting authority requesting authorization for the deployment of a personal wireless service facility at a specified location.

(k) **Siting authority** means a State government, local government, or instrumentality of a State government or local government, including any official or organizational unit thereof, whose authorization is necessary prior to the deployment of personal wireless service facilities.

(l) **Small wireless facilities**, consistent with § 1.1312(e)(2), are facilities that meet each of the following conditions:

(1) The facilities -

(i) Are mounted on structures 50 feet or less in height including their antennas as defined in § 1.1320(d); or

(ii) Are mounted on structures no more than 10 percent taller than other adjacent structures; or

(iii) Do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;

(2) Each antenna associated with the deployment, excluding associated antenna equipment (as defined in the definition of "antenna" in § 1.1320(d)), is no more than three cubic feet in volume;

(3) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume;

(4) The facilities do not require antenna structure registration under part 17 of this chapter;

(5) The facilities are not located on Tribal lands, as defined under 36 CFR 800.16(x); and

(6) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in § 1.1307(b).

(m) **Structure** means a pole, tower, base station, or other building, whether or not it has an existing antenna facility, that is used or to be used for the provision of personal wireless service (whether on its own or comingled with other types of services).

§ 1.6003 Reasonable periods of time to act on siting applications.

(a) *Timely action required.* A siting authority that fails to act on a siting application on or before the shot clock date for the application, as defined in paragraph (e) of this section, is presumed not to have acted within a reasonable period of time.

(b) *Shot clock period*. The shot clock period for a siting application is the sum of—

(1) The number of days of the presumptively reasonable period of time for the pertinent type of application, pursuant to paragraph (c) of this section; plus

(2) The number of days of the tolling period, if any, pursuant to paragraph (d) of this section.

(c) *Presumptively reasonable periods of time*—

(1) *Review periods for individual applications.* The following are the presumptively reasonable periods of time for action on applications seeking authorization for deployments in the categories set forth in paragraphs (c)(1)(i) through (iv) of this section:

(i) Review of an application to collocate a Small Wireless Facility using an existing structure: 60 days.

(ii) Review of an application to collocate a facility other than a Small Wireless Facility using an existing structure: 90 days.

(iii) Review of an application to deploy a Small Wireless Facility using a new structure: 90 days.

(iv) Review of an application to deploy a facility other than a Small Wireless Facility using a new structure: 150 days.

(2) *Batching.*

(i) If a single application seeks authorization for multiple deployments, all of which fall within a category set forth in either paragraph (c)(1)(i) or (iii) of this section, then the presumptively reasonable period of time for the application as a whole is equal to that for a single deployment within that category.

(ii) If a single application seeks authorization for multiple deployments, the components of which are a mix of deployments that fall within paragraph (c)(1)(i) of this section and deployments that fall within paragraph (c)(1)(iii) of this section, then the presumptively reasonable period of time for the application as a whole is 90 days.

(iii) Siting authorities may not refuse to accept applications under paragraphs (c)(2)(i) and (ii) of this section.

(d) *Tolling period.* Unless a written agreement between the applicant and the siting authority provides otherwise, the tolling period for an application (if any) is as set forth in paragraphs (d)(1) through (3) of this section.

(1) For an initial application to deploy Small Wireless Facilities, if the siting authority notifies the applicant on or before the 10th day after submission that the application is materially incomplete, and clearly and specifically identifies the missing documents or information and the specific rule or regulation creating the obligation to submit such documents or information, the shot clock date calculation shall restart at zero on the date on which the applicant submits all the documents and information identified by the siting authority to render the application complete.

(2) For all other initial applications, the tolling period shall be the number of days from—

(i) The day after the date when the siting authority notifies the applicant in writing that the application is materially incomplete and clearly and specifically identifies the missing documents or information that the applicant must submit to render the application complete and the specific rule or regulation creating this obligation; until

(ii) The date when the applicant submits all the documents and information identified by the siting authority to render the application complete;

(iii) But only if the notice pursuant to paragraph (d)(2)(i) of this section is effectuated on or before the 30th day after the date when the application was submitted; or

(3) For resubmitted applications following a notice of deficiency, the tolling period shall be the number of days from—

(i) The day after the date when the siting authority notifies the applicant in writing that the applicant's supplemental submission was not sufficient to render the application complete and clearly and specifically identifies the missing documents or information that need to be submitted based on the siting authority's original request under paragraph (d)(1) or (2) of this section; until

(ii) The date when the applicant submits all the documents and information identified by the siting authority to render the application complete;

(iii) But only if the notice pursuant to paragraph (d)(3)(i) of this section is effectuated on or before the 10th day after the date when the applicant makes a supplemental submission in response to the siting authority's request under paragraph (d)(1) or (2) of this section.

(e) *Shot clock date.* The shot clock date for a siting application is determined by counting forward, beginning on the day after the date when the application was submitted, by the number of calendar days of the shot clock period identified pursuant to paragraph (b) of this section and including any pre-application period asserted by the siting authority; provided, that if the date calculated in this manner is a "holiday" as defined in § 1.4(e)(1) or a legal holiday within the relevant State or local jurisdiction, the shot clock date is the next business day after such date. The term "business day" means any day as defined in § 1.4(e)(2) and any day that is not a legal holiday as defined by the State or local jurisdiction.*****

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