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

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

PETITIONER LOCAL GOVERNMENTS' JOINT REPLY BRIEF

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I. THE COMMISSION'S "CLARIFICATIONS" OF SECTIONS 253 AND 332(c)(7) ARE FATALLY FLAWED.

A. The Orders Rest on Unsupported Assumptions.

As explained in Local Government Petitioners' opening brief, the *Moratorium Order*[1] and *Small Cell Order*[2] are contrary to statute (47 U.S.C. §§253, 332(c)(7)), arbitrary and capricious, unsupported by the record, and raise serious constitutional concerns. Many arguments raised by the Commission and its allies are rebutted by our Opening Brief and will not be repeated here, but certainly, the responding briefs fail to salvage the *Orders*.

First, the Commission's and Industry Intervenors'[3] defense of the *Orders* hinges on a single hypothesis: because of the unique nature of

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[1] *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*").

[2] *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*").

[3] CTIA – The Wireless Association, Competitive Carriers Association, Sprint Corporation, Verizon Communications Inc., and the Wireless Infrastructure Association ("Industry Intervenors") intervened in support of Respondents.

small cells, even small hurdles "effectively prohibit" the provision of covered services.[4] Anything that increases costs—including the time required to understand lawful, local zoning standards—is prohibitory. Anything that "delays" deployment, even where "delay" can be planned for—such as limits on construction in evacuation routes during hurricane season—is prohibitory. Any fee for use of rights-of-way or government property in rights-of-way not limited to localities' direct costs is prohibitory. This "everything prohibits" approach is contrary to Commission precedent and this Court's *en banc* decision in *Sprint Telephony PCS, L.P. v. County of San Diego,* 543 F.3d 571, 578 (9th Cir. 2008) (en banc) ("*Sprint*").

The claim is neither supported by the record nor credible. The Commission predicts a large number of deployments, and multiplies that number by hypothetical fee levels to estimate the potential overall cost of deployment, but the *Orders* provide no rational connection between these estimates and its conclusion that any burden constitutes a prohibition. The impact on providers' rates, revenues, or overall costs

[4] "Covered services" under §253 are telecommunications services; under §332(c)(7) they are personal wireless services. No other services are protected by those provisions.

is never examined, and thus, no conclusion can be drawn as to the *actual* significance of the "hurdles."[5] The Commission assumes wireless providers will use savings from deploying facilities in "must have" markets to fund deployments elsewhere, but ignores evidence that providers have not increased deployments when offered lower fees, and spent more on acquisitions and stock repurchases than on deployment.

Likewise, nothing in the record supports the Commission's conclusion that requiring wireless providers to plan construction to comply with local and state laws like freeze-and-frost laws "effectively prohibits" service provision. The Commission cites complaints by wireless providers, but "[c]onclusory explanations . . . where there is considerable evidence in conflict do not suffice to meet the deferential standards of . . . review." *Genuine Parts Co. v. EPA*, 890 F.3d 304, 312

[5] For example, the record shows that the cable industry makes significant investments while paying congressionally-endorsed rights-of-way fees equal to five percent of gross revenues, estimated at $3 billion per year. LGER-798 (Ex Parte (Sept. 19, 2018), Smart Communities at 20). The Commission offers no basis for concluding that the wireless industry, paying a substantially lesser amount, would be effectively prohibited from providing service. LGER-676-677 (Ex Parte (Sept. 5, 2018), Corning, Inc., Attach. A at 2-3).

(D.C. Cir. 2018) (citation omitted); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Second, just as the D.C. Circuit found in *United Keetoowah Band of Cherokee Indians v. FCC*, No. 18-1129, 2019 WL 3756373, at *7-8 (D.C. Cir. Aug. 9, 2019), the *Orders* rest on a "mischaracterization" of small cell facilities' size and a failure to examine actual impacts of their deployment. The Commission minimizes aesthetic concerns and the benefits of zoning review by implying that small cells are the size of a pizza box, when its rules define them to include facilities the size of a refrigerator and scores of feet tall. As the *Keetoowah* court found, the Commission ignored the cumulative impacts of large-scale deployment. And, the Commission imposes time limits for processing small cell applications without analyzing whether these time limits make sense in light of the anticipated scale of deployment. The Commission justifies limiting "fair and reasonable compensation" to cost reimbursement based on industry's claimed need to deploy a huge volume of small cells in the rights-of-way, ignoring that the more intensive the use is, the greater the "fair and reasonable compensation" for rights-of-way use should be. These are similar to the failures *Keetoowah* found fatal.

Finally, the Commission attempts to disarm arguments by claiming that the *Orders* do not go as far as claimed. But the brief often contradicts the *Orders*:

- The Commission suggests it was merely summarizing examples in the record when discussing freeze-and-frost laws and other general construction restrictions (FCC Br. 51), but the *Moratorium Order* (¶150) states that "we find that these types of conduct are prohibited by section 253(a)."
- The Commission claims that "there is *no* presumption that fee amounts outside the safe harbor are impermissible or preempted" (FCC Br. 86), but the *Small Cell Order* (¶80) sets forth a specific factual showing localities must make to justify fees above the Commission's presumptive fee caps.
- The Commission claims (FCC Br. 82 n.19) that the *Small Cell Order* does not "forbid[ ] [local governments] from recovering the cost of capital," but the footnote in the *Small Cell Order* that the Commission cites says local governments are entitled to recover "only . . . for their maintenance" (¶73

n.217), and the *Order* elsewhere states (¶55) that they may recover only their "actual and direct costs incurred."

- The Commission argues that it "did not foreclose the possibility that, in some circumstances, states and localities may take narrow, proprietary actions concerning access to public rights-of-way, or government-owned structures within them, that do not trigger preemption" (FCC Br. 133-34 (citing *Small Cell Order* ¶97 & n.277)), but the *Small Cell Order*'s principal conclusion (¶¶93-95) is that there is *no* exception for proprietary conduct under §§253 and 332(c)(7).

The *Orders* can be upheld, if at all, only on the bases set forth in them. *SEC v. Chenery Corp.,* 332 U.S. 194, 196-97 (1947) ("*Chenery*"). The Commission's rewriting of select portions of the *Orders* highlights the *Orders*' arbitrariness and inconsistency with the statute.

B. The Commission Decision Is Inconsistent With *Sprint* and Prior Commission Precedent.

1. The *Order* is inconsistent with *Sprint*.

The Commission attempts to square its *Order* with *Sprint* by first, narrowing *Sprint's* holding, and second, arguing that the *Small Cell Order* applied *Sprint's* "actual prohibition" test.

On the first point, *Sprint* did more than interpret the word "may" (as the Commission and its industry allies contend). This Court found that the unambiguous meaning of the phrase "prohibit or effectively prohibit" in §§332(c)(7) and 253 requires that "a plaintiff must establish either an outright prohibition or an effective prohibition on the provision of telecommunications services; *a plaintiff's showing that a locality could potentially prohibit the provision of telecommunications services is insufficient*." *Sprint* at 579 (emphasis added).

This does not mean, and Petitioners have not argued, that the Commission may not assist the courts in defining the circumstances where there is an "actual prohibition." But, as the Commission and Industry Intervenors admit, the agency's interpretive authority is limited by this Court's ruling in *Sprint*. FCC Br. 122. The Commission cannot interpret the statute beyond the scope of the ambiguity (Industry Intervenors Br. 16) and cannot adopt a different standard from this Court's. The Commission never states that it is requiring an

"actual prohibition,"[6] and as Local Government Petitioners demonstrated, it does not (Local Gov'ts' Br. 37-39), a point Industry and the Commission avoid. As the Commission and its allies fail to rebut, the *Orders* draw no principled "lines" between what is, and is not, a prohibition (Local Gov'ts' Br. 40-43).[7] This is particularly important because what the Commission describes as "small local obstacles" (FCC Br. 123)—including costs associated with following local aesthetic standards, or delays attendant on complying with restrictions on rights-of-way work during particular periods—are the sort of "hurdles" Congress intended to protect.

On the second point, the *Order*'s departure from *Sprint* is illustrated in the Commission's discussion of the scope of §253(a). The

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[6] The footnote where it claims to do so (FCC Br. 23 (citing *Small Cell Order* ¶41 n.99)) simply says that in the Commission's view, *Sprint* is not implicated by the *Orders*.

[7] Congress did not guarantee providers an absence of dead spots, *Sprint PCS Assets, L.L.C v. City of Palos Verdes Estates*, 583 F.3d 716 (9th Cir. 2009), and as a result, showing an actual "prohibition" requires demonstrating that the effect on service is both significant and cannot be mitigated by alternatives. The Commission argues this rule has no connection to the "actual prohibition" test, but never explains how there can be a "prohibition" within the meaning of Section 332(c)(7) if effects are not significant, and if they can be mitigated.

Commission argues that §253(a) must be read broadly to reach general laws, including minimum wage laws, traffic ticketing and ticket laws, and health and safety laws. That reading, itself questionable,[8] combined with the *Small Cell Order*'s conclusion that any "hurdle" is prohibitory, would prevent localities from applying such laws to wireless providers, a result Congress could not have intended. By contrast, under *Sprint's* actual prohibition test, the very fact that others can comply with local laws demonstrates that those laws are not *actually* prohibitory merely because they may affect a provider. That result is entirely consistent with *Cablevision of Boston, Inc. v. Public Improvement Commission of Boston*, 184 F.3d 88 (1st Cir. 1999), holding that §253 does not preempt a requirement merely because preemption would make a business more profitable.

2. The *Order* is inconsistent with *California Payphone*.

The *Small Cell Order* purports to adopt the *California Payphone Ass'n* (12 FCC Rcd. 14191 (1997)) effective prohibition standard—a

[8] *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004)(recognizing the term "ability" in Section 253(a) may limit the scope of the section); *Sprint,* 543 F.3d at 576 (finding §253(a) "preempts state and local regulations that maintain the monopoly status of a telecommunications service provider").

standard this Court found consistent with the unambiguous text of §§253(a) and 332(c)(7). *Sprint* at 578. Under that standard, an entity claiming effective prohibition must show that it will *actually* be prohibited from providing a covered service.[9] That standard requires a showing that a restriction renders the provision of a covered service unviable. Mere cost increases, or the possibility of adverse impacts, are not enough. Local Gov'ts' Br. 36-46.

Having declared that *California Payphone* is the "definitive standard" for effective prohibition, the Commission now says that its "approach to small cells differs from *California Payphone's* analysis of legacy payphone regulation." FCC Br. 121, 123. That confirms the point in Local Government Petitioners' Brief (at 37-39, 41): the Commission departed from the *California Payphone* standard without any explanation or demonstration "that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[9] Where a regulation is claimed to favor one provider over another, *California Payphone* ¶31, says the relevant question is whether the challenged provision "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." The *Orders* do not even apply this standard, instead considering only whether there has been a "material inhibition."

The Commission's arguments on brief cannot repair the *Orders'* shortcomings. *Chenery* at 196-97.

Under both *Sprint* and *California Payphone*, whether a regulation is effectively prohibitory is a fact-specific inquiry. For the *Small Cell Order* to conclude, with a broad brush, that any fee in excess of costs, any non-"objective" aesthetic requirement, any express requirement which delays deployment, or any action that inhibits a provider's efforts to improve services, constitutes a *per se* "effective prohibition," stands in sharp contrast to the fact-based, case-by-case analysis required by the precedent the Commission claims to adopt. *California Payphone*, 12 FCC Rcd. at 14206-09; *In re Pittencrief Commc'ns*, 13 FCC Rcd. 1735, 1752 (1997).

C. Respondents' Defense of the *Moratorium Order* Underlines Its Flaws.

1. The Commission admits it mistakenly relied on Section 253.

The Commission now admits that the *Moratorium Order* cannot be based on §253, and that only §332(c)(7) governs wireless deployments. FCC Br. 144. The Commission claims this error irrelevant, because both sections include the phrase "prohibit or have

the effect of prohibiting." Under *Chenery*, the Commission cannot rely on the wrong provision and then justify its decision by saying the provision it relied on is similar to the provision it should have cited. Further, unlike §253, §332(c)(7) contains a specific provision that requires a locality to act within a reasonable period of time. 47 U.S.C. §332(c)(7)(B)(ii). The courts, not the Commission, have exclusive jurisdiction to consider whether an action was timely under the circumstances. 47 U.S.C. §332(c)(7)(B)(v). By taking action under §253, the Commission avoided considering the impact of §332(c)(7)(B)'s timing and jurisdictional provisions would have on its *Order*. Its reliance on the wrong section is fatal.

2. The *Moratorium Order* rests on unsupported conclusions to which no deference is owed.

As our opening brief showed (at 43-45, 101-06), and as the Commission does not attempt to refute, the record does not support the *Moratorium Order*'s central premise: that any express moratorium, however short, is prohibitory. *Id.* ¶¶145-48. No one seriously claims, for example, that freeze-and-frost laws are actually causing prohibitions.

On brief (at 54), the Commission attempts to sidestep the problem by stating that generally applicable laws fall under *de facto* moratoria,

and therefore *may not* be prohibitory if reasonable. But the *Moratorium Order* is to the contrary, and this rewrite, like others, is barred by *Chenery*.

The *Moratorium Order* (¶¶153-60) also indefensibly ruled that "express moratoria" are generally not rights-of-way-management practices protected under §253(c). On brief, the Commission argues that a refusal to grant access to the rights-of-way at any time is not "management" of the rights-of-way, but a refusal to manage. FCC Br. 50. That is akin to arguing a traffic signal is not a traffic management tool, because it stops traffic sometimes. The Commission has no expertise in rights-of-way management, and its conclusion is owed no deference; the record shows agencies with such expertise have reached contrary conclusions. Local Gov'ts' Br. 104. There is no reasoned basis for the Commission's inapt aphorism.[10]

[10] The Commission defends the Order, arguing (FCC Br. 51) that it may declare "how" localities may manage the rights-of-way. That is plain error. Section 253(c) gives states and localities the right to "manage," and gives no right to the FCC to do so.

3. The Commission's brief demonstrates the *Moratorium Order* is arbitrary and capricious.

After listing examples of alleged moratoria raised in the record, the *Moratorium Order* adopted a broad rule against moratoria. The Commission now claims (at 51) these examples were offered "only in passing" in a "portion" of the *Moratorium Order* that "merely summarizes practices alleged by others to constitute moratoria." But the *Order* states (¶150) that while the Commission "d[id] not reach specific determinations on the numerous examples discussed by parties in our record, we find that these types of conduct are prohibited by section 253(a)."

If the *Moratorium Order* merely summarizes examples from the record without connecting those examples to its rule, the Commission has failed to articulate a basis, grounded in the record, that justifies its actions. But if, as the *Moratorium Order* states, these examples are moratoria, the Commission has adopted a rule so broad as to have no meaningful "limiting standard" a fatal error under *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999). Local Gov'ts' Br. 40-42. In its efforts to distance itself from the *Moratorium Order*'s own words and

examples, the Commission has shown the *Moratorium Order* has no limiting principle.

D. The Commission's Fee Ruling Has No Basis in the Statute or the Record.

1. The Commission substitutes adjectives for analysis.

As Local Government Petitioners explain (at 50-54), the *Small Cell Order* identifies no link between (1) the costs a locality incurs related to deployment of small cells (the Commission's new limit on fees), and (2) the amount of rights-of-way fees that a carrier can afford to incur before being effectively prohibited from providing service. The Commission has no response, other than to repeatedly say above-cost fees are "inflated".[11] Yet this adjective, found nowhere in the *Small Cell Order,* is empty rhetoric. It presupposes the Commission's conclusions are correct: that any charge above cost is "inflated" and "unnecessary," and therefore not "fair and reasonable compensation," *id.* at 60. The Commission's reasoning would mean that all above-cost prices charged in our economy are similarly "inflated," and therefore also not "fair and reasonable." That conclusion would not be rational, and neither is the

[11] FCC Br. 15, 23, 33, 58, 60, 62-64 n.12, 65, 69, 71-77.

conclusion that any above-cost fee is inherently unfair and unreasonable.

Likewise, the Commission fails to "articulate a satisfactory explanation for its actions including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs.*, 463 U.S. at 43 (1983) (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). The Commission's central claims are: "inflated fees increase the cost of deployment," causing carriers to "reduce or forgo deployment in areas where these fees are imposed," and "these fees deprive carriers of revenue that they could otherwise profitably reinvest in other areas . . . but are not yet able to do so due to capital constraints." FCC Br. 60. Both claims ignore the record and are contrary to the statute. At one level, they rest on the unsurprising conclusion that a fee *might* affect a carrier's entry into a market if too high in relation to the carrier's expected revenues and costs. But that does not rationally support the Commission's decision to preempt fees based on their relation to localities' costs.[12]

[12] The disconnect is illustrated in Los Angeles County, one of the localities cited by the Commission, which bases its application fees on a (footnote continued)

The Commission justifies its cost limit on fees by arguing that it is necessary to draw a line between "permissible and impermissible exactions" (FCC Br. 59), but Congress drew that line at the plain meaning of "fair and reasonable compensation", and also decided that courts, not the Commission, should draw that line. *See* Parts I(D)(2) & (3) *infra*. Nor does "simplicity of administration" allow the Commission to limit fees to costs: first, because the FCC does not "administer" §253(c) and second, because the right to charge "fair and reasonable compensation" is not limited by what the Commission thinks is easy to administer.

a. The statute and the record do not support finding non-cost-based fees prohibit wireless services.

The Commission (FCC Br. 61-62) defends the *Small Cell Order*'s ruling that all above-cost fees are necessarily prohibitory under §§253(a) and 332(c)(7)(B)(i)(II) with the claim that any other approach would "foster[ ] wasteful litigation" to determine a particular fee's effect in a particular jurisdiction. But litigation is the course Congress chose

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cost study, and the cost (over $9,000), exceeds levels the *Small Cell Order* (¶¶ 78, 79) presumes are prohibitory. LGER-723 (Ex Parte (Sept. 18, 2018) Los Angeles County at 3).

to determine whether there has been an "actual prohibition."[13] Moreover, the *Small Cell Order* does not minimize litigation: the Commission recognizes its *Order* will cause localities to bear litigation expenses to prove costs, arguing that "the expense and annoyance of litigation is 'part of the social burden of living under government' when necessary to resolve a dispute." FCC Br. 82 n.19 (quoting *Petroleum Exploration, Inc. v. Pub. Serv. Comm'n of Ky.*, 304 U.S. 209, 222 (1938)). Ultimately, the *Order* is simply designed to prevent litigation over the central question under the statute: whether there is an "actual" prohibition.

The Commission's conclusion that non-cost-based fees effectively prohibit small cell deployments within a jurisdiction is unsupported by the record. The Corning Study on which the Commission relies does not analyze local government's costs *at all*. It compared (1) a reduced fee scenario that assumes a nationwide cap on small cell attachment and application fees, without regard to costs, to (2) a base-case scenario

[13] 47 U.S.C. §332(c)(7)(B)(v); *see infra* Part I.D.3. (discussing legislative history of §253(c), (d)); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1264, 1266 (10th Cir. 2004) (allowing provider to bring a Supremacy Clause challenge to local fees allegedly violating §253); *NextG Networks of N.Y. v. City of New York*, 513 F.3d 49 (2d Cir. 2008) (same).

developed using the fee amounts allowed under state law (if applicable) and fees drawn from recent industry filings. RER 640-644; RER 651-653. The Corning Study explicitly excludes cost-based fees that are not capped under state law. RER 642 n.16. Even if the Corning Study otherwise supported the Commission's conclusion,[14] the only empirical analysis on which the *Small Cell Order* relied is fundamentally disconnected from localities' costs.

The Commission tries to fill the gap with industry's self-interested assertions (FCC Br. 69-72) that they will increase small cell investment in response to lower fees. But the record shows that providers have not increased deployment when offered lower fees. The Commission relies on AT&T's assertion that it has not deployed any small cells in Portland, Oregon, due to the current fee levels. FCC Br. 69. Yet when Portland conducted a pilot project, lasting more than three years, that set lower annual rights-of-way fees, AT&T did not submit a single small

[14] As Local Government Petitioners' brief (at 68-70) explained, the Corning Study does not support the conclusion that the *Small Cell Order* draws from it. The Commission's brief has no response to that.

cell application. LGER-796 (Ex Parte (Aug. 21, 2018), Portland at 1).[15] The Commission cites providers' statements claiming that they are not deploying small cells in Lincoln, Nebraska, due to high fees (FCC Br. 69-70), but it ignores evidence of Lincoln's "strong track record" of deployment resulting in "more than $220 million in privately-owned broadband infrastructure deployed" since 2012. LGER-799 (Ex Parte (Sept. 18, 2018), Lincoln at 1). Moreover, Lincoln offered providers annual fees of just $95, so long as providers commit to deploying in rural areas, but no provider would agree to increase deployment in exchange for lower fees. LGER-685-686 (Ex Parte (Sept. 18, 2018), Coalition for Local Internet Choice, Attach. From Blair Levin at 15-16). Thus, the record contradicts the Commission's assumptions that

[15] The record contains no evidence that AT&T is unable to provide adequate *covered* services in Portland. There is no evidence that "undeployed" cells were needed for that purpose. Moreover, under the Commission's theory, AT&T would have responded to Portland's fees by deploying in other cities or off the rights-of-way. AT&T thus succeeds only in revealing that the Commission's claims about localities' supposed "monopoly power" are unsupported by any real-world market analysis, and contradicted by the evidence on which the Commission relies. If credited, AT&T's Portland example indicates that cities must compete in price if they wish to have not just adequate covered services, but other advanced services for which small cells are purportedly needed.

providers will voluntarily increase deployment in response to lower fees, or that fees are impeding small cell deployment.[16] The Commission's blind eye to evidence that did not support its conclusion is the sort of error that led to reversal in *Keetoowah*.

b. The Commission's defense of the Small Cell Order's "indirect" prohibition argument fails.

The Commission's defense of the *Small Cell Order*'s voluntary cross-subsidization argument misrepresents both the record and what the *Small Cell Order* said. The Commission claims on brief that "the problem is not that investment in rural areas is 'unprofitable' or unattractive'" (FCC Br. 76 n.17), and hence, the issue is not cross-subsidization. But the Commission's brief (at 65) confirms that it was relying on the Corning Study to conclude that lower fees in "must-have" areas would result in deployment "'in areas *that were previously not economically viable*'" (quoting RER 644) (emphasis added); *Small Cell Order* (¶60 n.169).

[16] The Commission's heavy reliance on statements by AT&T (FCC Br. 69-71) ignored evidence that AT&T's decisions "to cancel, reduce, or delay" small cell deployments (*id.* at 69) are more likely shaped by AT&T's decision to spend billions of dollars on unrelated corporate acquisitions. *See* LGER-717-718 (Ex Parte (Sept. 19, 2018), Eugene at 6-7 nn.22-24).

The Commission's brief (at 76) appears to concede that wireless carriers should be expected to behave as rational economic actors in making their investment decisions. That concession dooms the *Orders'* voluntary cross-subsidization theory. Local Gov'ts' Br. 67-70.

First, the undisputed record does not show that local fees constitute a significant constraint on capital budgets, let alone a prohibition. It does show providers have engaged in a host of other activities rather than investing in rural deployment, including corporate acquisitions and increased shareholder dividends and stock buybacks. Local Gov'ts' Br. 68.

Second, the Commission cannot deny that the *Small Cell Order* does not require providers to invest fee savings in deployment. *Id.* The Commission (FCC Br. 75), ignoring the record and economic principles it recognizes elsewhere (Local Gov'ts' Br. 69-70), asserts that providers will irrationally engage in voluntary cross-subsidization.[17]

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[17] Industry Intervenors (at 26-28) claim that the Commission is owed heightened deference for its "predictive judgment" that certain conduct results in *per se* effective prohibitions. While predictive judgments may rely on "incomplete data," *State of New York v. U.S. Nuclear Regulatory Comm'n*, 824 F.3d 1012, 1022 (D.C. Cir. 2016), the agency must "'so state and go on to identify the considerations [it] found persuasive.'" (footnote continued)

Third, the Commission does not dispute that rights-of-way fees are operational costs, not capital costs, and the record shows they do not increase the capital cost of deployment. Local Gov'ts' Br. 66-67. Nor do those fees necessarily deprive the carrier of any revenues. Although the Commission characterizes fees as "a concrete expense that carriers must account for by reducing or forgoing other expenditures," FCC Br. 60, it largely ignores that carriers can and do pass increased costs to

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National Ass'n of Regulatory Util. Comm'rs v. FCC, 737 F.2d 1095, 1140 (D.C. Cir. 1984) (citing *Indus. Union Dep't, AFL-CIO v. Hodgson*, 499 F.2d 467, 476 (D.C. Cir. 1974)). Neither the *Moratorium Order* nor the *Small Cell Order* "so state[s]." Moreover, "predictive judgments" are "no license to ignore the past when the past relates directly to the question at issue." *BellSouth Telecomms., Inc. v. FCC*, 469 F.3d 1052, 1060 (D.C. Cir. 2006). Here, the record demonstrated widespread deployment in cities that authorized placement of wireless facilities at negotiated, market-based rates. LGER-276 (Comments, San Francisco at 8); LGER-485-490 (Comments, San Antonio, Exh. D at 5-10); LGER-662-666 (Ex Parte (Aug. 22, 2018), San Jose); *Moratorium Order* ¶1. Moreover, "predictive" judgments are arbitrary and capricious when founded on economic analysis that makes "little common sense" and is supported by "no statistical data or even a general economic theory," *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 760 (6th Cir. 1995). Predictive judgments cannot be based on "sheer speculation" and mere "common sense." *Sorenson Commc'ns, Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014).

their customers. Local Gov'ts' Br. 66-67 (citing LGER-716-717 (Ex Parte (Sept. 19, 2018), Eugene at 5-6)).[18]

Finally, the emphasis on providers' capital budgets cannot be squared with the statute. Sections 253(a) and 332(c)(7)(B)(i)(II) require only that local governments not effectively prohibit the provision of covered services in their jurisdiction. They do not require local governments and their taxpayers to ensure that providers have sufficient capital budgets to deploy everywhere they want to provide non-covered services. These "indirect" prohibitions are the sort of hypothetical prohibitions the "actual" prohibition test rejects.[19]

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[18] The effect on deployment is tenuous. "Other expenditures" might have nothing to do with deployment (*e.g.*, lobbying expenses). The claim (FCC Br. 64 n.12) that passing on increased costs "would . . . price some consumers out of the market," is not supported by the record, as the Commission never examined the impact of costs on rates. In light of record estimates that there would be 13 billion more connected devices by 2022, and $7.1 *trillion* in market opportunities by 2030, there is no reason to suppose the costs, spread over billions of devices would be more than incidental, or more significant than increases in any other expenses. LGER-800-803 (Ex Parte, 5G Americas, (Sept. 19, 2018)).

[19] Local Gov'ts' Br. at 53-54 showed that the Commission's reliance on *Puerto Rico Telephone Co. v. Municipality of Guayanilla*, 450 F.3d 9, 19 (1st Cir. 2006), to support "indirect prohibitions" is misplaced.

2. The Commission offers a new reading of Section 253(c) to avoid the problems in the *Orders*.

As Local Gov'ts' Br (54-56) showed, the *Small Cell Order*'s fee-related interpretation of §253(a) and 253(c)—that above-cost fees are both a *per se* "prohibition" under §253(a) and not "fair and reasonable compensation" under §253(c)—would render §253(c)'s "fair and reasonable compensation" safe harbor superfluous. Under the Commission's reading, "fair and reasonable" analysis under §253(c) vanishes: all above-cost fees violate §253(a), and §253(c) protects no above-cost fees.

The Commission's response (FCC Br. 80 n.18) is that §253(c) is not a safe harbor, but an explication "of what fees are preempted as an effective prohibition under subsection (a)." This new, *Chenery*-precluded theory conflicts with the *Small Cell Order* itself, which refers to §253(c) as a "savings clause" (¶50 n.132), and states that an action otherwise "subject to preemption under Section 253(a) may be

permissible if it meets [§253(c)'s] criteria" (*id.* ¶ 71). It also conflicts with court precedent cited with approval in the *Small Cell Order*.[20]

3. The Commission mischaracterizes Section 253(c)'s legislative history, and its conclusions are contradicted by the record and precedent.

None of the Commission's arguments in favor of limiting compensation to costs withstands scrutiny.

The Commission asserts (at 77-78) that fees that "do not correspond to the actual costs or burdens . . . are not a function of the provider's 'use' of the public [rights-of-way]." But this formulation is nonsensical *ipse dixit*: in our economy rent is a fee "for use of" property, yet rent is not limited to cost. Court precedent has long established

[20] *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 77 (2d Cir. 2002) (because §253(c) is a "savings clause," court must analyze whether local government actions are "saved" even where actions otherwise violate §253(a)); *Cablevision of Boston, Inc. v. Pub. Improvement Comm'n of Boston*, 184 F.3d 88, 98 (1st Cir. 1999) (holding that §253(b) and 253(c) "take the form of savings clauses, preserving certain state or local laws that might otherwise be preempted under §253(a)."); *Level 3 Commc'ns, L.L.C. v. City of St. Louis*, 477 F.3d 528, 532 (8th Cir. 2007) ("[S]ection 253(a) states the general rule and section 253(c) provides the exception…functioning as an affirmative defense to that rule."); *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1187 (11th Cir. 2001) (subsections (b) and (c) are 'safe harbors,' precluding "preemption of state or local exercises of authority that would otherwise violate (a)."). *See Small Cell Order* ¶53 n.138 (citing, *inter alia*, *City of St. Louis* and *Town of Palm Beach*).

that fees for rights-of-way use are rents. Local Gov'ts' Br. 57-58. It is the Commission, not Local Government Petitioners, that "offer[s] no response to this point." FCC Br. 78.

The Commission claims (at 78-79) that cost recovery is "an appropriate yardstick for 'fair and reasonable compensation,'" because "cost-based fees are a familiar and well-accepted method of determining fair compensation for critical infrastructure" (quoting *Small Cell Order* ¶73 n.217). The Commission cites one district court case for this proposition, FCC Br. 79 (citing *N.J. Payphone Ass'n Inc. v. Town of West N.Y.*, 130 F.Supp. 2d 631, 638 (D. N.J. 2001)), but ignores the long line of precedent to the contrary cited by Local Government Petitioners, Local Gov'ts' Br. 57-58; LGER-534 (Reply Comments, San Antonio, *et al.* at 21 n.40).[21] Courts have suggested that compensation may be

[21] The Commission tries to sidestep this problem by claiming that rights-of-way fee precedent cited by Local Government Petitioners dealt with "different state and local statutes." FCC Br. 84. But the Commission, perhaps intentionally, misses the point. Section 253 was enacted against the longstanding principle that franchise fees for use of rights-of-way are a form of rent, and contrary to the Commission's claim, nothing in §253(c)'s "fair and reasonable compensation" language or legislative history suggests any intent to depart from that longstanding principle. Local Gov'ts' Br. 58 (citing *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978)).

appropriately assessed by looking to other commercial arrangements, a point the Commission ignores.[22] That the *Order* is inconsistent with appellate court precedent is reflected in the Commission's explicit "reject[ion]" of this Court's view in *Qwest Communications, Inc. v. City of Berkeley*, 433 F.3d 1253, 1257 (9th Cir. 2006), that §253 does not preempt all non-cost-based fees. *Small Cell Order* ¶53 n.143. The Commission's claim that local fees reflect "monopoly pricing" ignores record evidence that, unlike the case with wireline facilities, private property alternatives to rights-of-way and rights-of-way infrastructure exist for locating wireless facilities (Local Gov'ts' Br. 44-45, 59-60 n.21; LGER-274-275 (Comments, San Francisco at 6-7) ("San Francisco has

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[22] The Commission (FCC Br. 83) cites *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 79 (2d Cir. 2002), for the proposition that §253(c) is intended to "prevent monopolistic pricing by towns." But the Second Circuit also observed that "payment of rent as 'compensation' for the use of property does not strain the ordinary meanings of any of the words," "commercial rental agreements commonly use gross revenue fees as part of the price term," and "Congress's choice of the term 'compensation' may suggest that gross revenue fees are permissible" under §253(c). *White Plains*, 305 F.3d at 77. The only example that *White Plains* gave for "compensation" being tied to costs—"'compensatory' damages in tort are designed to precisely offset the costs . . . inflicted by the tort," *id.*—supports Local Government Petitioners' reading of "compensation," since compensation may include a wide range of costs ignored under the Commission formulation. *E.g.*, *Humetrix, Inc. v. Gemplus S.C.A.*, 268 F.3d 910, 918-19 (9th Cir. 2001).

permitted over 700 wireless facilities on private property.")) LGER-800-803 (Ex Parte, 5G Americas, (Sept. 19, 2018)(projecting substantial indoor wireless deployments). It also overlooks this Court's recognition in *Charter Communications, Inc. v. County of Santa Cruz*, 304 F.3d 927, 935 (9th Cir. 2002) (cited in Local Gov'ts' Br. 60), that unlike private businesses, local governments are accountable to voters with interests beyond profit maximization.

The Commission (FCC Br. 84-86) unsuccessfully tries to rebut the clear legislative history that Congress intended §253(c) to protect gross revenue-based and other rent-based fees. Far from being "selective snippets" or "[t]he unenacted wishes of a few individual legislators" (FCC Br. 85, 86), the House floor debate cited in Local Government Petitioners' brief (at 63-65) was between the successful amendment's co-sponsors (Reps. Barton and Stupak) and their opponents (who were the underlying bill's managers). *Both sides* agreed the amendment permitted rent-based rights-of-way fees, including gross revenue-based fees. The House floor debate on the Barton-Stupak amendment is the only place where the meaning of "fair and reasonable compensation" under §253(c) was discussed. As precedent relied on by the Commission

recognizes, §253(c) "began life as the Barton-Stupak amendment." *N.J. Payphone v. Town of W. N.Y.*, 299 F.3d 235, 245 n.7 (3rd Cir. 2002).

Senate debate on what became §253 did *not*, as the Commission contends, "center[ ] on" whether localities could require "'fees to recover an appropriate share of increased street repair and paving costs that result from repeated excavation.'" FCC Br. 85 (quoting 141 Cong. Rec. S8170 (daily ed. June 12, 1995) (remarks of Sen. Feinstein). Rather, Senator Feinstein was speaking in support of an amendment that would have removed what is now §253(d), and thus removed the Commission's preemption authority under §253 entirely. 141 Cong. Rec. S8170 (daily ed. June 12, 1995) (describing Feinstein/Kempthorne amendment). Subsequently, a compromise amendment, sponsored by Senator Gorton, was adopted, and instead of §253(d) giving the Commission either complete or no preemption authority under §253, §253(d) was amended to exclude §253(c) rights-of-way matters from the scope of the Commission's jurisdiction. 141 Cong. Rec. S8213 (daily ed. June 13, 1995) (remarks of Sen. Gorton). Thus, as amended and ultimately enacted, §253(d) was designed to "preserve[ ] to local governments control over their public rights of way [and] [a]ccept[ ] the

proposition . . . that these local powers should be retained locally, that any challenge to them take place in the Federal district court in that locality and that the Federal Communications Commission not be able to preempt such actions." *Id* The debate on which the Commission relies therefore shows Congress intended §253(d) to prevent the very sort of Commission intrusion into rights-of-way compensation that the *Small Cell Order* represents.[23]

4. The Commission's presumptive fee caps are arbitrary and capricious.

The Commission's only rebuttal to our argument (at 70-76) that the *Small Cell Order*'s one-size-fits-all presumptive fee caps are arbitrary and capricious is to inaccurately claim that the *Small Cell Order* contains no such presumptive limits (FCC Br. 86-88). The Commission admits that a presumption "require[s] a party to produce some 'evidence sufficient to support a finding contrary to the presumed fact.'" *Id.* at 88 (quoting *City of Arlington v. FCC*, 668 F.3d 229, 256

[23] The Conference Report, H.R. Rep. No. 104-458, at 127 (1996), states that the relevant Senate and House provisions of what became §253 are "identical or similar," except that the "House amendment does not have a similar provision (d)," further confirming that the Senate debate was about §253(d), not §253(c).

(5th Cir. 2012), *aff'd*, 569 U.S. 290 (2013)). That is precisely what the presumptive fee caps do. *Small Cell Order* ¶¶79-80. No one seriously argues that the costs associated with the rights-of-way are the same from San Francisco to Tupelo, much less that fees above the presumptive caps are likely to be prohibitory everywhere. The result of the presumptions is to arbitrarily shift significant costs to localities.

It is true, but irrelevant, that the Commission's earlier presumptive shot clocks under §332(c)(7)(B) were upheld in *City of Arlington v. FCC*, 668 F.3d 229, 256-57 (5th Cir. 2012), *aff'd*, 569 U.S. 290 (2013). Rebutting the time limits simply required a locality to show that under its circumstances, consideration of an application takes more time. The presumptions here trigger a duty to perform a detailed cost analysis, and it is unclear that analysis's cost can be recovered.[24] Because the impact of the presumptions is not comparable, using obviously inaccurate "one-size-fits-all" caps is indefensible. *See* Local Gov'ts' Br. 70-76.

[24] The Commission alternatively seems to suggest litigation costs can be recovered, and that they are a cost a City must bear. If the latter, the City can never be fully compensated for even its costs associated with use of the rights-of-way.

E. The Commission Fails to Justify Its Aesthetic Limitations.

Respondents' and Industry Intervenors' briefs fail to address a central flaw in the aesthetics analysis: as in *Keetoowah,* 2019 WL 3756373 at *7, the *Small Cell Order*'s aesthetics tests were adopted based on a "mischaracterization of small cells' footprint, the scale of the deployment it anticipates" and a failure to "satisfactorily consider the benefits of review." The standards adopted cannot be upheld because the process by which they were established was not "logical and rational." *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015). The Commission failed to consider "important aspect[s] of the problem," *Motor Vehicle Mfrs.* , 463 U.S. at 43 (1983).

The Commission compares small-cell antennas to "small backpack[s]," FCC Br. 13 (quoting *Small Cell Order* ¶3), and pizza boxes,[25] when in fact, the definition of "small wireless facilities", 47 C.F.R. §1.6002(l), permits installation of refrigerator-sized facilities, and multiple antennas of three-cubic-feet each.[26] The antennas can be mounted on new poles in the rights-of-way as tall as adjacent buildings,

[25] *See Small Cell Order* ¶107 n.309.
[26] FCC Br. n.4 misstates the rule.

permitting "198-foot towers, as long as they are located near 180-foot adjacent structures." *Keetoowah*, 2019 WL 3756373 at *7. Under 47 C.F.R. §1.6100, small-cell facilities can be expanded as a matter of right, vertically and horizontally (multiple six-foot arms, supporting cabinets, can be added to a pole subject to structural limits).

The record contained substantial evidence that small wireless facilities in large numbers, often on enlarged existing structures or new freestanding poles, impose significant costs on local communities, including reducing property values, and harming historic areas.[27]

Industry Intervenors' Brief (at 33) includes a few pictures of small-cell facilities, but the Commission's rules embrace far larger

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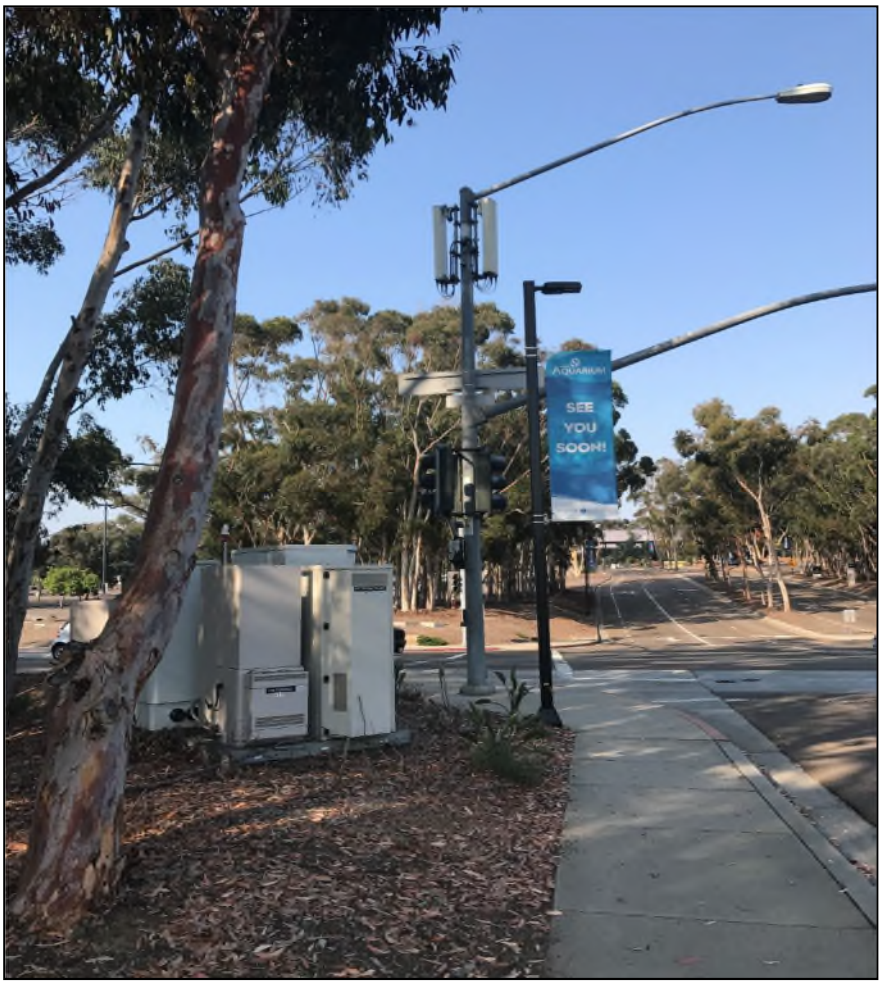
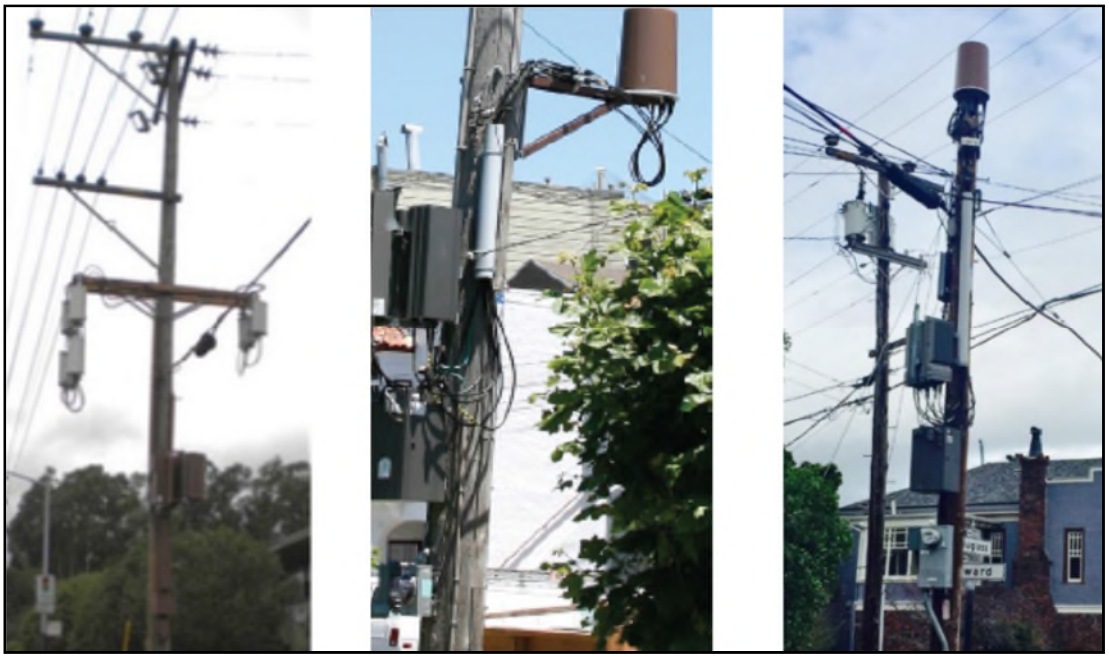
[27] *See, e.g.*, LGER-763-771 (Comments, League of Arizona Cities and Towns, Exh. 1 at 12-20); LGER-744-751 (Comments, Smart Communities at 28, 44-50); LGER-791-793 (Reply Comments, Smart Communities at 29-30, 82 n.245); LGER783-787 (Reply Comments, CCUA at 7-10); LGER-738-740 (Comments, Bellevue at 3-4); LGER-735-737 (Comments, League of Minnesota Cities at 19 n.64 ("Some small cells have noisy cooling fans for computers; some ground equipment, like cabinets, can equal the size of a coffin or a refrigerator; some small cell facilities have back up batteries mounted on sidewalks or lawns and others use messy diesel generators for their backup.")); LGER-777 (Reply Comments, Baltimore at 7); LGER-742 (Comments, APPA at 16); LGER-773 (Comments, Philadelphia at 4); LGER-405-415 (Comments, Smart Communities, Exh. 3, Burgoyne Declaration); LGER-795 (Comments, Colorado State Historic Preservation Office at 3).

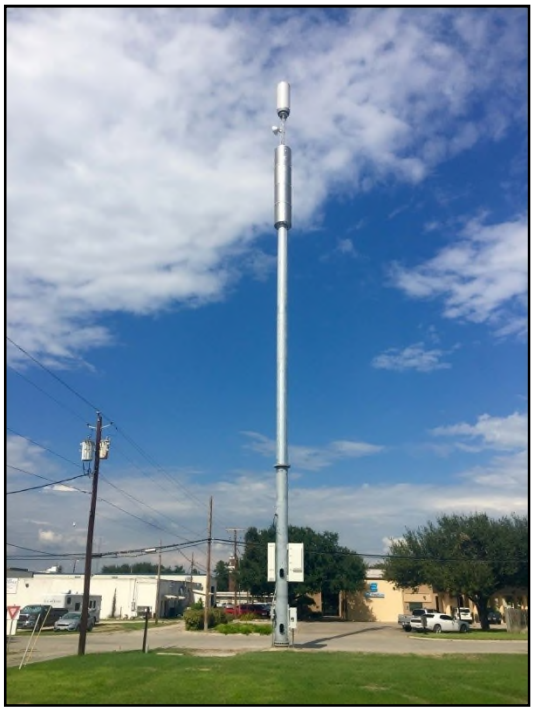
facilities. The record shows the impact of new cabinets on areas with otherwise-undergrounded utilities, LGER-782 (Reply Comments, League of Arizona Cities and Towns at 32):



Where the attachments are to existing poles, the additions can have dramatic effects LGER-279 (Comments, San Francisco at 11):



The Commission (FCC Br. 46-48) and Industry Intervenors (Industry Intervenors Br. 29, 51, 62) cite the alleged tribulations faced by Mobilitie, a company that was proposing 200-foot structures for sidewalks. LGER-414 (Comments, Smart Communities, Exh. 3 §V.B.).



The *Order*'s justification for its aesthetic limitations is that compliance with local zoning regulations "substantially increase[s] providers' costs without providing any public benefit or addressing any public harm." *Small Cell Order* ¶88. Yet the record showed far more than an "intangible

public harm" (FCC Br. 95; Industry Intervenors Br. 46). It showed that deployments can significantly impact local economies. *E.g.*, LGER-804 (Comments, Middleburg at 1); LGER-789 (Reply Comments, Florida Coalition of Local Governments at 20). Damage is particularly heavy in areas where local taxpayers spent millions of dollars to underground overhead utilities. Local Gov'ts' Br. 19-20, 92-93, 110-11. Because it developed its aesthetics rule based on a "cost-benefit" analysis which did not account for the deployments anticipated, the Commission failed to engage in reasoned decision-making. The failure to consider the effects of the deployment volume is particularly uneven-handed and arbitrary given the Commission's repeated solicitude for the "aggregate effects" of regulations on wireless providers, FCC Br. 60.

As to the standards adopted: the Commission grudgingly concedes (at 98) that its "publication" requirement creates a type of vested right, but fails to point to any authority to create such rights. It does argue that where a locality fails to specify in advance its preferred paint colors, deployment is prohibited (FCC Br. 34; Industry Intervenors Br. 48), but that argument shows what little relationship the rules bear to actual prohibitions. That wireless providers *might* be forced to reduce

or cancel future deployments because they *might* not know in advance which color paint a city prefers does not pass the smell test. Wireless providers are not "babe[s] in the legal woods" whose business would collapse if faced with uncertainty or inconvenience, however slight. *Cf. T-Mobile S., LLC v. City of Roswell*, 135 S.Ct. 808, 822 (2015) (Roberts, J. dissenting). The justification for the "objectivity" test suffers from the same infirmity. It also rests on confusing "undue vagueness" (whether a law is understandable) with objectivity. FCC Br. 95. No law (wireless or otherwise) can be unduly vague, but it improperly alters land use decision-making to suggest that aesthetics standards must be "objective," rather than involving fact-specific judgments.

The infirmities in the "reasonableness" test are illustrated by Industry Intervenors' brief (at 46, 51), which suggests it preempts anything that would interfere with providers' business plans.[28] That is

[28] Undergrounding is an example. Localities argue, before putting up new structures in an area where they have paid to underground utilities, the applicant should at least consider alternative locations, including off the rights-of-way, and show that the facility is actually needed to provide wireless services. Industry Intervenors suggest this is not "reasonable."

not the "actual prohibition" test that *Sprint* and *California Payphone* require.

The Commission's defense of the "other infrastructure" standard is that it applies only to "similar infrastructure" in "analogous circumstances," FCC Br. at 96. Contradictorily, the Commission (at 90) suggests the standard refers to "traditional infrastructure." The standard is either meaningless or, in ignoring the scale and scope of small cell deployment, arbitrary. The Commission does not seriously respond to our argument that the standard is inconsistent with Section 332(c)(7)'s non-discrimination provisions.

F. The Commission's New Shot Clocks Are Not Reasonable.

The Commission characterizes the *Small Cell Order*'s tightened shot clocks as "modest" (FCC Br. 101). They are not.

Once again, the Commission ignores the anticipated scale of deployment and the burden that will place on local governments, *see supra*, p.37, and hence ignores the time necessary to process multiple applications at once.

The Commission argues that because localities have experienced processing wireless facilities, they should be able to complete reviews

under the new rules more quickly. FCC Br. 102. But that "experience" hardly translates into an ability to resolve dozens or hundreds of applications within a shortened period.[29]

Second, the Commission ignores the expanded reach of the new shot clocks. The Commission misleadingly asserts the new shot clocks "simply extend a rebuttable 60-day shot clock to small cells on other existing structures." FCC Br. 101. Previously, the term "existing" meant locating a wireless facility on a structure that already had wireless equipment on it. LGER-767-69 (Reply Comments, League of Arizona Cities and Towns at 16-18). The Commission's new "collocation" definition encompasses collocating on *any* existing structure, *Small Cell Order* ¶140, even those, like municipal streetlights, that were not designed to support additional structures.

Previous shot clocks applied only to action on a land use application.[30] They did not apply to other kinds of approvals necessary

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[29] The Commission's argument (FCC Br. 106-107) that localities must abandon "cumbersome" procedures, shows it is using shot clocks as a guise for doing what it cannot do under Section 332(c)(7): regulate local zoning processes

[30] *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt* (footnote continued)

to commence construction (e.g., building, electrical, traffic control management). The record did not show that 60 days was reasonable for such permits, and the only record evidence was that extending the shot clocks to those permits and all contracts (including franchises and leases) was impractical, would add to costs, and preclude negotiation of terms. Local Gov'ts' Br. 97-99. A change that imposes those costs and burdens is anything but "modest."

The Commission's defense of its new "remedy" for shot clock violations is first, to argue that there is no change, and then to argue it can make any change it desires. FCC Br. 107, 108. The first is rebutted by the language of the *Order,* Local Gov'ts' Br. 100, and the second in Local Gov'ts' Intervenors' Br. 3-8.

Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, Declaratory Ruling, WT Docket No. 08-165, FCC 09-99, ¶45 (2009). *See also* 47 U.S.C. §332(c)(7)(B)(v).

II. THE COMMISSION EXCEEDED ITS DELEGATED AUTHORITY IN ADOPTING THE RULES.

A. The Commission Cannot Eliminate the Proprietary Conduct Preemption Exemption, and Has Provided No Rational Basis For Doing So.

1. The Commission ignores precedent that preserves the regulatory/proprietary distinction.

As noted in our opening brief (at 77-80), the Supreme Court and this Court have made clear that Congress is presumed to recognize the regulatory/proprietary distinction when it enacts statutes that preempt state and local law and that "[i]n the absence of any express or implicit indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests," preemption will not be inferred. *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*"); *accord Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1022-23 (9th Cir. 2010). Neither the Commission nor supporting Industry Intervenors can even bring themselves to discuss *Boston Harbor* or its holding. This is so even though the *Small Cell Order* (¶93) purported to rely on *Boston Harbor*. The silence is understandable: the *Small Cell Order* rests on a mischaracterization of *Boston Harbor*'s holding, assuming silence implies no

regulatory/proprietary distinction. Local Gov'ts' Br. 80. That is an error neither can correct now.

2. That rights-of-way may be held in trust for the public hurts, rather than helps, the Commission's position.

The Commission (FCC Br. 125-29) and Industry Intervenors (Industry Intervenors Br. 52-56) argue that local governments have no proprietary interest in the rights-of-way because they hold the rights-of-way "in trust for the public". *Small Cell Order* ¶96. This assertion has two fatal flaws.

First, that rights-of-way may be held "in trust for the public" means just that—for the *public*, not just for the private commercial benefit of the telecommunications industry *See*, *e.g.*, 12 Eugene McQuillan, *The Law of Municipal Corporations* §34.25 (3d ed. rev. 2006) (streets are "h[e]ld . . . in trust for public use" not "private use from which neither the municipality nor its citizens nor the public receive any consideration or benefit."). Part of the public trust obligation is to ensure that the public is adequately compensated for private profit-making use of public property. *See id.* §§34.43 and 34.53. As the Supreme Court long ago recognized, a municipality may "exact compensation, in the nature of rental," from a private corporation

seeking to install poles in the rights-of-way, and that is "pecuniary compensation *to the general public*" for the corporation's use of the public's rights-of-way. *City of St. Louis v. W. Union Tel. Co.*, 148 U.S. 92, 99, 101 (1893) (emphasis added).

Moreover, like rights-of-way, municipal parks are also generally held "for the benefit of, and are held in trust by the municipality for, the public." 10 Eugene McQuillan, *The Law of Municipal Corporations* §28.65 (3d ed. rev. 2009). That dooms the Commission's effort (FCC Br. 128) to distinguish this Court's holding in *Omnipoint Commc'ns, Inc. v. City of Huntington Beach*, 738 F.3d 192, 201 (9th Cir. 2013), on the ground that a park, rather than the rights-of-way, was at issue there.

Second, the Commission and its industry allies ignore that the scope and nature of the government's property interest in the rights-of-way is a matter of state, not federal law.[31] Whether particular rights-of-

[31] *See Heller Ehrman LLP v. Davis Wright Tremaine LLP (In re Heller Ehrman LLP)*, 830 F.3d 964, 969-70 (9th Cir. 2016) (holding in the context of bankruptcy law that [s]ince property interests are created and defined by state law, [courts] look to state law to determine property interests' of the debtor.); *Vandevere v. Lloyd*, 644 F.3d 957, 963 (9th Cir. 2011) (holding that this Court "look[s] to state law to determine what property rights exist and therefore are subject to 'taking' under the Fifth Amendment.") (citing *Richmond Elks Hall Ass'n* (footnote continued)

way or particular actions with respect to the rights-of-way are subject to a municipality's proprietary control, and the extent of such proprietary control, are matters of state law that can vary state-to-state, locality-to-locality, and even street-to-street.[32] Where localities lack a proprietary interest in the rights-of-way, that is the result of state law, *not* federal law or Commission edict.[33] The Commission lacks authority under

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v. Richmond Redev. Agency, 5461 F.2d 1327, 1330 (9th Cir. 1977); *United States v. Puget Sound Power & Light Co.*, 147 F.2d 953, 954-55 (9th Cir. 1945)).

[32] *See, e.g.*, LGER-756-759 (Comments, Delaware Department of Transportation at 3 ("DelDOT has both proprietary and regulatory authority over the State's rights of way (ROW) in Delaware. All the State-owned ROW in Delaware was acquired by DelDOT in fee simple on behalf of the State of Delaware through Delaware Code, Title 17, §137 (a) (1).")); Tex. Transp. Code, §202.052 (authorizing Texas Department of Transportation to lease a highway asset or space above or below a highway provided the asset is not needed for highway purposes and the department received fair market value for the asset subject to authorized exceptions); Ga. Code Ann. §32-4-92 (describing "[t]he powers of a municipality with respect to its municipal street system"). *See also* LGER-755 (Comments, San Antonio, *et al.*, Exh. A at 15).

[33] *See, e.g.*, *AT&T Co. v. Village of Arlington Heights*, 620 N.E.2d 1040, 409 (Ill. 1993) ("While numerous powers and rights regarding public streets have been granted to municipalities *by the [Illinois] General Assembly*, they are all regulatory in character, and do not grant any authority to rent or to lease parts, or all, of a public street.") (emphasis added) (quoting *Village of Lombard v. Ill. Bell Tel. Co.*, 90 N.E.2d 105, 110 (1950)).

§§253 and 332(c)(7) to rewrite the state property law status of municipal rights-of-way to mandate that "states and localities act as regulators when setting 'terms for access to the public [rights-of-way] that they own or control.'" FCC Br. 126 (quoting *Small Cell Order* ¶92).

The cases cited by the Commission (FCC Br. 127-28) are not to the contrary. *Palos Verdes Estates*, 583 F.3d 722-724, confirms that cities' interests in the rights-of-way are determined by state law.[34] Both *Olympia Pipe Line Co. v. City of Seattle*, 437 F.3d 872 (9th Cir. 2006), and *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052 (9th Cir. 1987), involved a fact-specific review of the municipal action, not a blanket rule that all interests in the rights-of-way are regulatory. Indeed, in *Shell Oil Co.*—which did not actually decide the "close questions" necessary to resolve whether the "municipal-proprietor exemption from

[34] The Commission also points to cases in the T-Mobile Comments cited for "the proposition that 'municipal [rights-of-way . . . are property held in trust for the public.'" (FCC Br. 127 (quoting Comments, T-Mobile at 50 (RER 486)). All of these state court cases (Comments, T-Mobile at 50 n.210 (RER 486)) only further confirm that the status of the rights-of-way is a matter of state, not uniform federal, law.

preemption" applied[35]—this Court noted that "our inquiry would involve a pragmatic judgment" of the specific actions at issue. *Id.* at 1062-63. And *Olympia Pipe Line*, 437 F.3d at 880-82, had nothing to do with rights-of-way access or fees; it involved public safety actions that the city itself justified under its "police and regulatory powers" and which lost *Boston Harbor* protection because they were explicitly preempted by federal law.

3. The Commission's claim that government-owned facilities in the rights-of-way are not proprietary is unsupported.

The Commission provides no rational basis for extending its elimination of the proprietary/regulatory distinction to government-owned facilities in the rights-of-way. "The Commission's interpretations in the *Small Cell Order* rest on the special character of public rights-of-way," FCC Br. 124,[36] yet the Commission fails to show how government-owned facilities share this unique character. Traffic

[35] The court separately rejected Santa Monica's argument that it acted as a market participant in the setting of franchise fees for easements under public streets for dormant commerce clause purposes. *Id.*

[36] *See also id.* at 126-27, 129 (emphasizing the "special character" of the rights-of-way).

signals and streetlights, for instance, are not "recognized transportation corridors for commerce." *Shell Oil Co.*, 830 F.2d at 1057. To the contrary, the uncontroverted record shows those facilities to be primarily single-purpose, and that placing additional structures on them can adversely impact their function, integrity, safety, and aesthetics, all valid concerns for localities as property owners. Local Gov'ts' Br. 21-22; LGER-301(Comments, New York at 12); LGER-365 (Comments, Smart Communities, Afflerbach Declaration at 3); LGER-369 (Comments, Smart Communities, Afflerbach Declaration at 9); LGER-380-381(Comments, Smart Communities, Exh. 1A at 8-9); LGER-416-459 (Comments, Smart Communities, Puuri Declaration). The Commission's suggestion (FCC Br. 130) that the facilities were constructed to benefit the public is irrelevant. The capacity in which, or the *reason*, a community enters a market is not determinative, *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809 (1976)(Maryland program designed to protect the environment by buying abandoned cars proprietary). The point is that in choosing to construct the facilities, and more importantly, making them available for lease, localities enter

a market (which also includes private utilities and adjacent property owners.)

The two decisions in *NextG Networks of N.Y., Inc. v. City of New York* cited by the Commission (FCC Br. 131-32) provide it no support. Although the Second Circuit used the phrase "regulatory scheme," it neither ruled on the merits of NextG's §253 claim nor made any reference at all to the proprietary/regulatory distinction. *NextG Networks of N.Y. v. City of New York*, 513 F.3d 49 (2d Cir. 2008). And the district court's decision in that case directly undermines the Commission's argument, holding that the "[t]he Telecommunications Act *does not preempt nonregulatory decisions* of a local government entity or instrumentality *acting in its proprietary capacity*," *NextG Networks of N.Y., Inc. v. City of N.Y.*, No. 03-Civ-9672, 2004 WL 2884308, at *5 (S.D.N.Y. Dec. 10, 2004) (quoting *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002)) (emphasis added) (internal quotation marks omitted).[37]

[37] The *NextG* district court did *not*, as the Commission suggests, "[c]redit[] [NextG's] theory" that streetlights are held in trust for the public in the same manner as rights-of-way. FCC Br. 131. It simply found, *accepting NextG's allegations as true*, that NextG had
(footnote continued)

Perhaps sensing the weakness of its position, the Commission's brief claims that the *Small Cell Order* "did not foreclose the possibility that, in some circumstances, states and localities may take narrow, proprietary actions concerning access to the public rights-of-way, or government-owned structures within them, that do not trigger preemption." FCC Br. 132-33 (citing *Small Cell Order* ¶97 & n.277). If so, it has abandoned the *Small Cell Order*'s primary reason for rejecting the regulatory/proprietary distinction.[38] And if it merely intended to provide guidance, the *Order* also fails: Just as the Commission lacks authority to entirely erase the proprietary conduct exemption, it likewise lacks authority to "guide how preemption should apply in fact-specific scenarios." *Small Cell Order* ¶97 n.277. That analysis turns on state law, which the Commission has no expertise or authority to interpret.

"adequately alleged that the City's actions" at issue "are not of a purely proprietary nature" for purposes of surviving a motion to dismiss. *NextG Networks of N.Y., Inc.*, 2004 U.S. Dist. LEXIS 25063, at *18.

[38] The *Small Cell Order* provides "two alternative and independent reasons" for rejecting the proprietary/regulatory distinction under §§253 and 332(c)(7), the first of which is that neither provides for any exception for proprietary conduct. *Small Cell Order* ¶¶92-95. The defense on brief misrepresents ¶97, and *Order* itself.

B. Section 253 Cannot Override Section 224's Limits.

We join in the arguments and reply of the American Public Power Association. The Communications Act of 1934's only affirmative grant of authority with respect to regulation of access to utility poles and similar structures is §224, and it does not reach municipal property. While §224's exemptions only apply to that section, it does not follow that the Commission therefore *has* authority to regulate the terms and conditions for access to municipal property like utility poles and streetlights. There is no response to our argument that the Act gives the Commission no general roving authority to regulate private or public property merely because it is convenient or even necessary for use in telecommunications.

Neither §253 nor §332(c)(7) provides that authority because those provisions are preemptive only, *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 96 (2d Cir. 2000), and hence cannot empower the Commission to command a property owner to grant access not otherwise available as of right. The Commission argues it is merely preempting "legal requirements," but never responds to our argument that the Commission is not just preempting, but is requiring development of

contractual terms for property access; it also fails to rebut the showing that contracts permitting access to structures like streetlights and utility poles are not "legal requirements." Local Gov'ts' Br. 78-80. The Commission also asserts that §253 was adopted as a complement to §224, but in fact, §224 was adopted in 1978, and has been amended three times since—the last in 1996. Until this proceeding, the Commission has never suggested that §253 was intended as the companion to §224, or intended to permit the Commission to use "preemption" to declare what terms can be included in a municipal property contract.

C. Unless They Are Covered Services, 5G And Broadband Service Deployment Cannot Justify the *Orders*.

Industry Intervenors and the Commission repeatedly argue on brief that the *Orders* are critical to the rollout of 5G, emphasizing that 5G will allow the provision of all sorts of advanced services. FCC Br. 2, 12-13, 66; Industry Intervenors Br. 2, 7-8, 10. Although local governments recognize that 5G is important, that cannot cure the legal flaws in the Commission's reliance on 5G to justify its Orders. Only covered services are protected by Sections 253, and §332(c)(7). *See* n.4 *supra*, and the only covered service that the Commission identifies is

voice service. FCC Br. 141; *Small Cell Order* ¶¶28, 36 n.84, 40. Neither the Commission nor its industry allies suggests that the thousands of small cells required for 5G and broadband service are needed to provide voice service.[39] Instead, we are told that widespread 5G deployment is necessary to support data service (not a personal wireless or telecommunications service) and the Internet of Things (also not a personal wireless or telecommunications service).[40]

[39] The Commission's argument that small cell "facilities are used to provide not just mobile broadband and other advanced services, but also traditional covered services like voice calls" misses the point. FCC Br. 141. The statute only precludes state and local governments from effectively prohibiting *the provision of covered services*, not facilities that may be used, but are not necessary, to provide covered services. *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014) does not help the Commission: it involved a provision that permitted the FCC to promote broadband in carrying out statutory goals.

[40] *E.g.*, *Small Cell Order* ¶¶2, 23, 24, n.66; FCC Br. 12. The Commission's brief relies (FCC Br. 39) on §706 of the Telecommunications Act of 1996 (47 U.S.C. §1302) as additional justification for the *Order*. The *Order* did not rely on §706, so it is barred by *Chenery*. In any event, §706 cannot be used to amend and expand §§253 or 332(c)(7).

D. The Commission Misunderstands the Objection to Reliance on Section 253 to Regulate Wireless Placement.

The Commission (FCC Br. 143-45) misses the point of Local Government Petitioners' argument about the relationship between §253 and §332(c)(7). Section 332(c)(7)(A) makes clear that §332(c)(7), not §253, applies to wireless facility placements. While both provisions may require a showing of an "actual prohibition," both cannot be applied to wireless siting decisions. There is no general rule which suggests that if two different statutory provisions contain a similar phrase, both provisions apply. Section 332(c)(7), for example, prohibits only a certain type of discrimination (discrimination against providers of functionally equivalent services), while the Commission reads "prohibit or have the effect of prohibiting" to prevent discrimination more broadly, a point it admits on brief. FCC Br. 96. But that admission suggests the Commission's interpretation of "effective prohibition" sweeps more broadly than Congress intended; it amends the scope of the discrimination provision in §332(c)(7)(B)(i). The Commission's admixture of §§332(c)(7) and 253 is prohibited by §332(c)(7)(A)'s

unambiguous language, and it led to the Commission's errors in interpretation.

III. THE COMMISSION CANNOT CORRECT THE *SMALL CELL ORDER*'S CONSTITUTIONAL INFIRMITIES.

A. The *Order* Effects a Taking That Requires More than Nominal Compensation Under the Fifth Amendment.

The Commission and Industry Intervenors try to claim that the *Small Cell Order*'s mandated access to local government infrastructure is consistent with the Fifth Amendment. Their efforts fail.

The Commission argues that "the *Orders* do not amount to a *per se* taking," claiming Local Government Petitioners cannot show "the 'element of required acquiescence.'" FCC Br. 155 (quoting *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987)). As explained in our opening brief (at 108), and the Commission does not dispute, the *Small Cell Order* precludes local governments from prohibiting all small cell access to the rights-of-way and to government-owned property therein. Where there is a "prohibition," the *Order* leaves a local government no choice: it cannot say "no" to occupation of its property by providers. The situation here is therefore unlike *FCC v. Florida Power Corp.*, where the statute at issue "authorizes the FCC . . . to review the rents charged

by public utility landlords who *have voluntarily entered into leases with cable company tenants* renting space on utility poles." *Florida Power Corp.*, 480 U.S. at 251-52 (emphasis added). Instead, the *Small Cell Order* resembles the "statute [the Court] considered in *Loretto*," which "specifically *required* landlords to permit permanent occupation of their property by cable companies." *Id.* at 251. It is a *per se* taking when the government "require[s] [a property owner] to suffer the physical occupation of a portion of [its property] by a third party." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982). That is the case here.

The Commission retreats to the claim that "[f]or relatively unobtrusive equipment like small cells, which cause little interference with other uses of the rights-of-way, any decrease in useful value is likely nominal and fully compensated by allowing localities to recover all of their actual costs." FCC Br. 157. But the "small cell" facilities that the *Small Cell Order* requires localities to permit are not "small" either in size or in numbers. *See*, *supra;* Local Gov'ts' Br. 17-20; *Keetoowah*, 2019 WL 3756373, at *7-8.

The Commission's attempt to analogize municipalities' interest in the rights-of-way and government-owned property to a railroad company's interest in a single railroad right-of-way crossing is inapposite.[41] While *Chicago Burlington, & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 242 (1897), upheld nominal compensation for a single right-of-way crossing as just compensation where the taking "did not unduly interfere with the [railroad] company's use of the right of way for legitimate railroad purposes," the Court emphasized the particular property owner's limited use of the property.[42] Likewise, the treatise cited by the Commission on brief focuses on the specific, and limited, interests of railroad companies in railroad rights-of-way.[43]

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[41] The Commission also cites *United States v. 564.54 Acres of Land*, 441 U.S. 506 (1979) and *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002). FCC Br. 155-56. Local Government Petitioners showed in their opening brief (at 109-10, 111-12) that these cases are inapposite, and the Commission has no response.

[42] The Court stated that had the railroad company used the property for other purposes, such as a site for buildings, "it would have been necessary for the jury, in ascertaining the just compensation to be awarded, to take into consideration the value of such buildings." *Chicago Burlington*, 166 U.S. at 251.

[43] 4A Julius L. Sackman, *Nichols on Eminent Domain* §15.15 (3d ed. rev. July 2013) (explaining that damage is measured by "the extent to which the value of the use of that part of the right of way between the (footnote continued)

Unlike *Chicago Burlington*, local governments' property interests at stake here are not limited to a single rights-of-way crossing, but instead encompass occupation of municipal rights-of-way, streetlights, traffic light poles, and other municipally-owned infrastructure in the rights-of-way by thousands of not-so-small cell installations, with adverse consequences the Commission ignores. Local Gov'ts' Br. 111.

To the extent *Chicago Burlington* has any bearing here, it supports Local Government Petitioners' position that the *Small Cell Order* would effect a Fifth Amendment taking. The Commission nowhere explains how, consistent with its plain language and legislative history, §253 could be construed not only to authorize the Commission to effect such a nationwide taking of state and local government property, but also to establish a nationwide cost-reimbursement-only ceiling on compensation for that taking. That is too large of an elephant to squeeze into a mousehole. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (citations omitted).

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poles and under the wires *for railroad purposes* is diminished by its use by the telegraph company") (quoting *Atl. Coast Line R.R. Co. v. Postal Tel. Cable Co.*, 48 S.E. 15, 18 (Ga. 1904)) (internal quotation marks removed) (emphasis added).

B. The Commission Does Not Shield the Commission from the Tenth Amendment.

The Commission misconstrues the law and the *Small Cell Order* in its attempt to escape Tenth Amendment scrutiny.

The Commission incorrectly asserts that because §§253 and 332(c)(7) may not violate the Tenth Amendment on their face, the Commission's interpretation of them cannot violate the Tenth Amendment. FCC Br. 159, 162. Under the Tenth Amendment "'*[t]he Federal Government*' may not 'command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.'" *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1477 (2018) (quoting *Printz v. United States*, 521 U.S. 898, 935 (1997)) (emphasis added). This Court should reject the radical idea that a constitutionally valid statute licenses a federal agency to interpret that statute in an unconstitutional way.

The Commission's reliance on *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015), is misplaced. FCC Br. 161-62. There, the Commission interpreted a provision in a different statute, 47 U.S.C. §1455(a), providing that state and local governments "may not deny, and shall approve" permits for certain modifications to existing wireless

facilities. *Montgomery Cty.*, 811 F.3d at 126. The Fourth Circuit found that the Commission's "deemed granted" remedy "does not require the states to take any action at all . . . ." *Id.* at 128. Although the court ultimately held both the statutory mandate and the Commission's remedy permissible, *id.* at 128-29, the court did not, as the Commission asserts, dismiss Tenth Amendment arguments on the grounds that only the underlying statute can cause a Tenth Amendment injury. FCC Br. 162.

Montgomery County's conclusion that §1455 "does not require the states to take any action at all" was based on the fact that §1455 only limits state and local *zoning* authority over existing wireless facilities on *private* property. Here, the Commission seeks to commandeer state and local governments' property, against their will, to serve a federal policy. Nothing in either §253 or §332(c)(7) suggests Congress ever intended such a result.

The Commission also cannot escape Tenth Amendment scrutiny by misconstruing the nature of the compulsion the *Small Cell Order* foists upon state and local governments. Contrary to the Commission's claim (FCC Br. 160 n.36), a local government's decision about whether,

and on what terms, to convey property rights to local street and traffic lights is not a "zoning decision."

Likewise, the Commission incorrectly asserts that the *Small Cell Order* operates as a regulation conferring federal rights on providers without a direct command to state and local governments. FCC Br. 161 (citing and quoting *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1481 (2018)). The *Small Cell Order* certainly seeks to confer a federal right on providers: a federal right to install their facilities on municipal facilities that belong to neither the federal government nor the provider. But that is the point: The Commission's action is an impermissible command to state and local governments to hand over their assets and resources to serve a federal policy. "[T]here is no way in which this provision can be understood as a regulation of private actors." *Murphy*, 138 S. Ct. at 1481.

CONCLUSION

The petitions should be granted and the *Small Cell Order* and *Moratorium Order* vacated in their entirety.

Respectfully submitted,

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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 12,054 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 September 4, 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.

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