Nos. 18-72689 and 19-70490

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF PORTLAND,

Petitioner,

v.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

On Petitions for Review of Orders of
the Federal Communications Commission

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INTRODUCTION

In the *Orders* under review—the *Moratoria Order*[1] and the *Small Cell Order*[2]—the Federal Communications Commission reasonably construed two statutory provisions enacted by Congress in 1996 to preempt state or local measures that "prohibit or have the effect of prohibiting" interstate communications services. 47 U.S.C. §§ 253, 332(c)(7)(B)(i)(II). Congress enacted these provisions as part of watershed legislation designed "to promote competition and reduce regulation" in the telecommunications industry "in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104 pmbl., 110 Stat. 56, 56.

The Commission issued the *Orders* in response to considerable evidence that some states and localities have materially inhibited the

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[1] Third Report and Order and Declaratory Ruling, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Rcd. 7705 (2018) (*Moratoria Order*), *reprinted at* Respondents' Excerpts of Record (RER) 1–120.

[2] Declaratory Ruling and Third Report and Order, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Rcd. 9088 (2018) (*Small Cell Order*), *reprinted at* RER 121–236.

deployment of communications infrastructure that is urgently needed to keep pace with consumer demand for wireless services. Among other things, states and localities have imposed moratoria on siting applications, assessed fees that exceed any actual deployment-related costs the localities must incur, failed to act on siting applications in a timely manner, and imposed conditions on the placement or appearance of facilities that providers cannot ascertain in advance. The Commission found that state and local impediments of this kind are becoming ever-more burdensome due to changes in technology and skyrocketing consumer demand for wireless services: Over the next few years, carriers will need to deploy hundreds of thousands of new small wireless facilities—known as "small cells"—to maintain existing services and to support next-generation innovations.

The administrative record is replete with examples of states and localities that have adopted measures with a prohibitory effect on wireless deployment. In Portland, Oregon—one of the lead Petitioners here—city-imposed access fees of $7,500 per site and recurring fees of $1,200 to $5,500 per site have prevented AT&T and Verizon from deploying small cells. Similarly, Sprint informed the Commission that, because of high costs and long delays imposed by Los Angeles County,

Sprint has yet to deploy a single small cell there. Other jurisdictions have purported to adopt "temporary" moratoria on applications to deploy communications infrastructure, only to extend those measures multiple times over the course of months or even years. Still others have processed or granted applications to deploy small cells, only to halt those deployments later on by imposing previously undisclosed conditions on the look or placement of the proposed facilities.

Not all states and localities impose prohibitory measures of this kind. Indeed, many jurisdictions have encouraged the deployment of wireless infrastructure in their communities—for example, by limiting small cell fees or processing small cell siting applications on an expedited basis. But the prohibitory measures of some jurisdictions are forestalling the deployment of next-generation wireless networks nationwide. For that reason, the Commission issued the *Orders* under review to clarify how Sections 253 and 332(c)(7) apply in the current wireless marketplace.

Reaffirming longstanding agency precedent—which this Court and others have consistently applied—the Commission declared that state and local measures impermissibly prohibit or have the effect of prohibiting covered services when they materially inhibit the deployment of infrastructure used to provide those services. At the same time, the

Commission made clear that states and localities may lawfully recover all actual costs they must incur in connection with the deployment of that infrastructure, and that they retain meaningful control over the placement of each deployment.

The *Orders* do not allow providers to compel access to any particular site. To the contrary, the Commission recognized that states and localities will continue to have legitimate reasons for denying particular siting applications. Whether denials of particular applications violate Sections 253 and 332(c)(7) is a matter that the *Orders* leave for case-by-case adjudication.

Ultimately, the Commission's policy judgments represent a reasonable balancing of competing considerations within the scope of its statutory authority. Neither the Local Government Petitioners nor the Wireless Carrier Petitioners were wholly satisfied with the Commission's decisions. But those determinations represent the agency's measured, expert judgments on matters squarely within its direction, which were lawful in all respects. The petitions for review should be denied.

JURISDICTIONAL STATEMENT

The FCC's *Moratoria Order* includes the declaratory ruling that Petitioner City of Portland now challenges and an accompanying

rulemaking order. A summary of the rulemaking portion of the *Moratoria Order* was published in the Federal Register on September 14, 2018. 83 Fed. Reg. 46812. Within 60 days of that publication, on October 2, 2018, Portland timely filed its petition for review in this Court. *See* 28 U.S.C. § 2344; 47 C.F.R. § 1.4(b)(1).

The remaining petitioners challenge the FCC's *Small Cell Order*, which like the *Moratoria Order* includes both a declaratory ruling and a rulemaking order. A summary of the *Small Cell Order* was published in the Federal Register on October 15, 2018. 83 Fed. Reg. 51867. The relevant parties each timely petitioned for review within 60 days of that publication, on or before December 14, 2018, in an appropriate court of appeals. *See* 28 U.S.C. § 2344; 47 C.F.R. § 1.4(b)(1). The petitions filed in other circuits were later transferred to this Court as provided by 28 U.S.C. § 2112(a)(5).

This Court has jurisdiction pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a), except as to Petitioner Montgomery County's arguments concerning the effects of radiofrequency emissions on natural persons, which (as discussed in Part III.A below) the County lacks standing to assert.

QUESTIONS PRESENTED

1. Did the FCC reasonably interpret the ambiguous phrase "effect of prohibiting" in Sections 253 and 332(c)(7) of the Communications Act to reach state and local measures that materially inhibit the deployment of infrastructure used to provide voice and data communications services?

2. Did the FCC reasonably conclude that states and localities impermissibly prohibit or have the effect of prohibiting service when they (a) adopt express or de facto moratoria on applications to deploy new infrastructure; (b) demand fees for small cells that exceed any reasonable approximation of the actual costs a locality must incur; (c) enforce undisclosed or unduly vague aesthetic restrictions on small cells; or (d) fail to act in a timely manner on applications to deploy small cells?

3. Did the Commission reasonably decline to mandate that applications to deploy small cells be "deemed granted" if a locality fails to act on them within a certain timeframe?

4. Must Montgomery County's separate challenges be dismissed for lack of standing, and if not, did the Commission reasonably decline in the *Small Cell Order* to (a) reconsider whether the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970)

(codified as amended at 42 U.S.C. §§ 4321 *et seq.*), applies to small cells, a question the FCC had already decided in a prior order that is under review in the D.C. Circuit; or (b) reconsider its established technical standards for exposure to radiofrequency emissions, which the agency is studying in a separate proceeding?

5. Do the *Orders* comport with the Fifth and Tenth Amendments?

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the statutory addendum bound with this brief.

STATEMENT OF THE CASE

A. Statutory Background

In the 1996 Act, Congress made sweeping amendments to the Communications Act of 1934 (Communications Act or Act), 47 U.S.C. §§ 151 *et seq.*, "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104 pmbl., 110 Stat. 56, 56; *accord* S. Rep. No. 104-230, at 1 (1996) (Conf. Rep.). As the Supreme Court has recognized, "[o]ne of the means by which [Congress] sought to accomplish these goals was reduction of the impediments

imposed by local governments upon the installation of facilities for wireless communications." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005) (*Abrams*). Removing local barriers to new communications infrastructure allows existing providers to increase the availability and reduce the price of communications services, and it promotes entry into local markets by new providers seeking to expand or develop competing communications networks.

At issue here are two key provisions that expressly preempt state or local measures that impermissibly prohibit or have the effect of prohibiting interstate communications services.

1. Section 253

Section 253 of the Act, entitled "Removal of Barriers to Entry," 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 . . . telecommunications service." 47 U.S.C. § 253(a). The Supreme Court has described this provision as "prohibit[ing] state and local regulation that impedes the provision of telecommunications service." *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 491 (2002) (internal quotation marks omitted). If "a State or local government . . . permit[s] or impose[s] any statute, regulation, or legal

requirement that violates" this provision, Section 253(d) directs that "the Commission shall preempt the enforcement of" the offending requirement. 47 U.S.C. § 253(d).

Section 253 contains two safe harbors allowing for certain state or local regulation. *See Small Cell Order* ¶¶ 52–53 (RER 146–47). Under Section 253(b), "competitively neutral" state requirements are not preempted when they are "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." 47 U.S.C. § 253(b). And under Section 253(c), "a State or local government" may "manage the public rights-of-way" or "require fair and reasonable compensation from telecommunications providers . . . for use of public rights-of-way" if the requirements operate "on a competitively neutral and nondiscriminatory basis" and any "compensation required is publicly disclosed." *Id.* § 253(c).

2. Section 332(c)(7)

Section 332(c)(7) of the Act, which Congress also enacted as part of the 1996 Act, likewise "imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of [wireless] facilities." *Abrams*, 544 U.S.

at 115. In particular, Section 332(c)(7) requires that state and local governments "shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[3] 47 U.S.C. § 332(c)(7)(B)(i)(II). In addition, Section 332(c)(7) requires localities to "act on any request for authorization" of wireless facilities "within a reasonable period of time." *Id.* § 332(c)(7)(B)(ii). It also bars localities from "regulat[ing] the placement, construction, [or] modification of personal wireless facilities on the basis of the environmental effects of radio frequency emissions" if the facilities "comply with the Commission's regulations concerning such emissions." *Id.* § 332(c)(7)(B)(iv). If a state or local government violates any of these limits, a person adversely affected may "commence an action in any court of competent jurisdiction" seeking judicial relief. *Id.* § 332(c)(7)(B)(v).

B. Wireless Infrastructure "Shot Clocks"

In 2009, the FCC gave effect to the "reasonable period of time" requirement of Section 332(c)(7)(B)(ii), 47 U.S.C. § 332(c)(7)(B)(ii), by establishing "shot clocks"—that is, presumptively reasonable timeframes

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[3] "[P]ersonal wireless services" include "commercial mobile [telephone] services, unlicensed wireless services, and common carrier wireless exchange access services." 47 U.S.C. § 332(c)(7)(C); *see id.* § 332(d)(1); *Small Cell Order* ¶ 17 n.20 (RER 126).

within which localities should act—for certain wireless siting applications. *Declaratory Ruling to Clarify Provisions of Section 332(c)(7)*, 24 FCC Rcd. 13994, 14003–15 ¶¶ 27–53 (2009) (*Shot Clock Order*). Under those shot clocks, requests to attach wireless equipment to an existing structure—often referred to as "collocation"—should ordinarily be processed within 90 days, and other siting requests within 150 days. *Id.* at 14012–13 ¶¶ 45–48.

If a locality does not act within those timeframes, the applicant can file suit. 47 U.S.C. § 332(c)(7)(B)(v); *Shot Clock Order*, 24 FCC Rcd. at 14005 ¶ 32. The locality can then rebut the presumptive period by showing that taking additional time was reasonable. *Id.* If the court disagrees, it can fashion an appropriate remedy. *Id.* at 14005 ¶ 32 n.99. Courts have upheld the *Shot Clock Order* as a reasonable exercise of the FCC's authority. *See City of Arlington v. FCC*, 668 F.3d 229, 252–61 (5th Cir. 2012), *aff'd*, 569 U.S. 290 (2013).

In 2014, to implement a separate provision addressing certain "request[s] for modification of an existing wireless tower or base station," 47 U.S.C. § 1455(a)(2), the Commission added a 60-day shot clock for collocation requests that do not substantially change the physical dimensions of an existing structure built for the primary purpose of

supporting wireless equipment. *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd. 12865, 12955–57 ¶¶ 211–216 (2014) (*2014 Wireless Infrastructure Order*). When localities fail to act on eligible requests within the shot clock period, the requests are deemed granted. *Id.* at 12961–64 ¶¶ 226–236; *see* 47 U.S.C. § 1455(a)(1) (requiring that "a State or local government may not deny, and shall approve," such requests). The Fourth Circuit upheld the *2014 Wireless Infrastructure Order* against statutory and Tenth Amendment challenges. *Montgomery Cty. v. FCC*, 811 F.3d 121 (4th Cir. 2015).

C. Developments Leading to the Orders Under Review

In the years since the *2014 Wireless Infrastructure Order*, the United States has arrived "at the brink of another technological revolution." *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Rcd. 3102, 3103 ¶ 1 (2018). Carriers are investing in "fifth-generation" (5G) wireless networks that will deliver vastly improved capacity, coverage, and speed to support not only existing voice and data services, but "once-unimaginable advances, such as self-driving cars." *Id.* "To support these performance improvements" and new services, carriers "will increasingly need to rely on network densification," deploying "more numerous, smaller, lower-

powered [facilities] that are much more densely spaced." *Id.*; *see Small Cell Order* ¶ 3 (RER 122).

Unlike traditional wireless facilities, which use large antennas mounted on towers that may be several hundred feet tall, the "small cells" needed to keep up with growing demand on 4G networks and to support next-generation 5G networks "have antennas often no larger than a small backpack" and can attach unobtrusively to traffic lights, street lamps, and other small structures. *Small Cell Order* ¶ 3 (RER 122). The record contains photographs showing typical small cells deployed by major wireless carriers. *See, e.g.*, Sprint Comments 12–13 (RER 482–83); Wireless Infrastructure Ass'n Comments Attach. 2, at 28–33 (RER 518–23); AT&T 2/23/18 Letter Attach. (RER 573–81).[4]

Although small cells support greater network capacity, with lower lag times and higher speeds, than traditional wireless facilities, they

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[4] We use the common term "small cell" interchangeably with the term "Small Wireless Facility," which is defined in the Commission's rules to encompass facilities that have an antenna volume of no more than three cubic feet, mounted on structures with a height of 50 feet or less (subject to limited exceptions), where all other wireless equipment associated with the structure (often located at ground level or in underground vaults) has a total volume of no more than 28 cubic feet, and where the facility complies with the Commission's radiofrequency emissions limits and certain other requirements. 47 C.F.R. § 1.1312(e)(2); *Small Cell Order* ¶ 11 n.9 (RER 124).

have a more limited range. As a result, carriers "must build out small cells at a faster pace and at a far greater density of deployment than before." *Small Cell Order* ¶ 3 (RER 122); *accord id.* ¶ 47 (RER 144–45). Small cells thus "raise different [regulatory] issues than the construction of large, 200-foot towers that marked . . . deployments of the past." *Id.* ¶ 3 (RER 122).

To address these developments, the Commission in April 2017 issued a notice of proposed rulemaking and notice of inquiry—referred to here as the "*Wireless Infrastructure Notice*"[5]—to "commence[] an examination of the regulatory impediments to wireless network infrastructure investment and deployment" in the current wireless marketplace. *Wireless Infrastructure Notice* ¶ 2 (RER 238). In parallel, the Commission issued a separate notice—the "*Wireline Infrastructure Notice*"[6]—soliciting comment on whether and how to use the agency's "authority under Section 253" to "prevent states and localities from

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5 Notice of Proposed Rulemaking and Notice of Inquiry, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, 32 FCC Rcd. 3330 (2017) (*Wireless Infrastructure Notice*), *reprinted at* RER 237–96.

6 Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 32 FCC Rcd. 3266 (2017) (*Wireline Infrastructure Notice*), *reprinted at* RER 297–360.

enforcing . . . . restrictions on broadband deployment [that] effectively prohibit the provision of telecommunications service." *Wireline Infrastructure Notice* ¶ 101 (RER 328).

The responses to the *Infrastructure Notices* indicated that "many states and localities" have taken steps to "promot[e] the deployment of wireless infrastructure in their communities," *Small Cell Order* ¶¶ 6–7 (RER 123), including by limiting small cell fees, *id.* ¶ 79 n.233 (RER 162), or adopting 45-day shot clocks for processing certain small cell applications, *id.* ¶ 106 n.303 (RER 176).

But the record also shows that some "state and local jurisdictions are materially impeding [communications infrastructure] deployment in various ways." *Small Cell Order* ¶ 25 (RER 129).

The record is replete, for example, with complaints about inflated fees. AT&T pointed to "localities in Maryland, California, and Massachusetts [that] have imposed fees so high that it has had to pause or decrease deployments." *Small Cell Order* ¶ 25 (RER 130) (citing AT&T 8/6/2018 Letter 2–3 (RER 599–600)); *see also* AT&T 8/10/18 Letter 1 (RER 605) (providing additional examples from Oregon and Nebraska). Another commenter reported that the town of Hillsborough, California, had assessed $60,000 in application fees and over $350,000 in other fees

for a request to deploy a network of 16 small cell sites—even after the town denied the request and the deployment did not proceed. *Small Cell Order* ¶ 25 & n.49 (RER 130) (citing Crown Castle 9/19/18 Letter 1–2 & Exh. A (RER 660–63)). Such fees are especially problematic given estimates that, in just the next few years, carriers will need to deploy hundreds of thousands of small cells—several times more than the total number of traditional wireless facilities built over the past three decades. *Id.* ¶ 47 (RER 145).

The record also shows that jurisdictions have instituted express or de facto moratoria on siting applications that have unreasonably delayed or prevented the deployment of new or improved wireless service. In 2017, for example, Amherst, New York, prohibited its staff from processing requests "relating to the placement or installation of telecommunication towers, facilities and antennae within the Town's public rights-of-way" until the town rescinded the resolution or adopted "a Local Law addressing this matter." *Moratoria Order* ¶ 145 (RER 74) (internal quotation marks omitted). And Fort Lauderdale, Florida, "imposed a 'six-month' moratorium on [rights-of-way] wireless siting that was extended multiple times over two years." AT&T Wireless Comments 14 (RER 364); *see Moratoria Order* ¶ 145 n.534 (RER 74); *see also id.*

¶ 150 (RER 77–78) (collecting examples of similar measures not formally codified).

Commenters also described state and local rules or practices that have the practical effect of prohibiting service in other ways. Numerous commenters complained that, in evaluating siting applications, localities employ "unduly vague or subjective [aesthetic] criteria"—for example, concerning the size or paint color of proposed facilities—"that may apply inconsistently to different providers or are only fully revealed after application, making it impossible for providers to take these requirements into account in their planning." *Small Cell Order* ¶ 84 (RER 164); *see id.* ¶ 84 n.243 (RER 164).

Commenters further complained that some localities have sought to evade the Commission's shot clocks by imposing additional permit or authorization requirements, or mandatory "pre-application" requirements, and claiming that these additional requirements do not count toward the shot clocks. *Small Cell Order* ¶¶ 133, 144–145 (RER 189–90, 195–96); *see, e.g.*, Crown Castle Wireless Comments 15 (RER 390) (identifying several localities that have taken "the position that although the municipality is required to approve or disapprove applications within the shot clock time frames, it is not required to 'issue

permits' within the same timeframes"); AT&T 6/8/18 Letter 2 (RER 584) ("[S]ome municipalities use these [pre-application review] meetings to mandate the submission of voluminous documentation and to impose expensive changes in the proposal in order to delay action, all outside the shot clock."); AT&T 8/10/18 Letter 2 (RER 606) (identifying "municipalities with multi-stage administrative processes, e.g., review by a combination of planning board, zoning board, architectural board, and/or appellate boards").

D. The *Orders* Under Review

Drawing on the extensive record developed in response to the *Infrastructure Notices*, the Commission issued the *Orders* under review to resolve widespread uncertainty in the marketplace and the courts by clarifying how Sections 253 and 332(c)(7) apply to new small cell technology and the evolving communications marketplace. In particular, the Commission clarified how those provisions apply in four contexts: state and local moratoria on infrastructure deployment, *Moratoria Order* ¶¶ 140–168 (RER 71–87); state and local fees for small cell facilities, *Small Cell Order* ¶¶ 43–80 (RER 143–63); aesthetic requirements concerning small cells, *id.* ¶¶ 81–91 (RER 163–67); and timeframes for reviewing proposed small cell deployments, *id.* ¶¶ 103–147 (RER 174–96).

1. The *Moratoria Order*

In the August 2018 *Moratoria Order*, the Commission addressed "some of the most extreme examples of state or local statutes, regulations, or legal requirements that violate [Section] 253(a)": moratoria on the acceptance or processing of applications to deploy telecommunications infrastructure. *Moratoria Order* ¶ 150 n.556 (RER 77).

Some localities have adopted "express" moratoria: "statutes, regulations, or other written legal requirements" that, "by their very terms," bar the acceptance or processing of siting applications. *Moratoria Order* ¶ 145 (RER 73). In addition, localities have adopted "de facto" moratoria that are "not formally codified by state or local governments as outright prohibitions," but that nonetheless "effectively" bar siting applications "in a manner akin to" express moratoria. *Id.* ¶ 149 (RER 76); *see id.* ¶¶ 150–151 (RER 77–78). In either form, the Commission explained, moratoria are "inconsistent with [S]ection 253(a)" and are subject to preemption unless they "fall within the section 253(b) [or] (c) exceptions." *Moratoria Order* ¶¶ 144, 147 (RER 73, 75); *accord id.* ¶ 150 (RER 77).

In reaching that determination, the Commission underscored that the *Moratoria Order* does not "specifically preempt any state or local law." *Moratoria Order* ¶ 164 (RER 85); *see id.* ¶¶ 4, 150 (RER 3, 78). Going forward, the agency will decide requests for preemption on a case-by-case basis. *Id.* ¶¶ 4, 168 (RER 3, 86–87). Thus, although the Commission predicted that instances in which moratoria fall within the safe harbors of Section 253(b) or (c) will be "rare," *id.* ¶ 153 (RER 78), it did not foreclose the possibility that the safe harbors may sometimes apply.

2. The *Small Cell Order*

In the September 2018 *Small Cell Order*, the Commission further clarified its understanding of the phrase "prohibit or have the effect of prohibiting" in Sections 253 and 332(c)(7). *See Small Cell Order* ¶¶ 34–42 (RER 134–43). It then clarified how the effective prohibition standard should apply in particular contexts. *See id.* ¶¶ 43–80, 81–91, 103–147 (RER 143–67, 174–96).

As in the *Moratoria Order*, the Commission emphasized that it was "not dictat[ing] the result or . . . remedy appropriate for any particular case." *Small Cell Order* ¶ 124 (RER 184); *see id.* ¶¶ 32, 66, 83, 97, 119 (RER 133–34, 156, 163, 171, 182). The Commission also made clear that

no part of its analysis in the *Small Cell Order* altered the operation of the agency's existing radiofrequency emissions exposure rules, which apply to small cells and are currently under review in a separate proceeding. *Id.* ¶ 33 & n.72 (RER 134); *see* 47 C.F.R. §§ 1.1307, 1.1310; *Reassessment of FCC Radiofrequency Exposure Limits and Policies*, 28 FCC Rcd. 3498 (2013).

Effective Prohibition. The Commission began by explaining that the "effective prohibition standard" is the same under Section 253(a) and Section 332(c)(7). *Small Cell Order* ¶ 36 (RER 136). Reaffirming the standard articulated in its 20-year-old decision in *California Payphone Ass'n*, 12 FCC Rcd. 14191 (1997), the agency determined that a state or local measure has "the effect of prohibiting" service, in violation of Sections 253 and 332(c)(7), if it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Small Cell Order* ¶¶ 16, 37–42 (RER 125–26, 137–43); *see Cal. Payphone Ass'n*, 12 FCC Rcd. at 14206 ¶ 31. The Commission clarified that this standard applies not only when carriers first deploy service, but also when state or local requirements "materially inhibit[] the introduction of new services or the improvement of existing services." *Small Cell Order* ¶ 37 (RER 138).

Consistent with FCC precedent and decisions from the First, Second, and Tenth Circuits, the Commission also "confirm[ed] . . . that under this analytical framework, a legal requirement can 'materially inhibit' the provision of services even if it is not an insurmountable barrier." *Small Cell Order* ¶ 35 (RER 135); *see P.R. Tel. Co. v. Mun. of Guayanilla*, 450 F.3d 9, 17–19 (1st Cir. 2006); *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002); *RT Commc'ns, Inc. v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000). To the extent some commenters argued that other decisions could be read to support a different test, the Commission sought to resolve any conflict or uncertainty by "issu[ing] a clarifying interpretation . . . that accounts both for the changing needs of a dynamic wireless sector that is increasingly reliant on Small Wireless Facilities and for state and local oversight that does not materially inhibit wireless deployment." *Small Cell Order* ¶ 21 (RER 128); *see also id.* ¶¶ 35, 40 (RER 135–36, 139–41); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–85 (2005).

The Commission's interpretations of Sections 253 and 332(c)(7) in the *Orders* were predicated on record-based findings that certain state and local measures do in fact (not just potentially) prohibit or have the effect of prohibiting service. *See infra* Part II.B.1. Accordingly, the

Commission explained, its approach is consistent with this Court's precedent that "the 'mere possibility of prohibition'" does not meet the standard for federal preemption under Sections 253(a) or 332(c)(7). *Small Cell Order* ¶ 41 n.99 (RER 141) (quoting *Sprint Tel. PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (en banc)).

State and Local Fees. Turning to specific applications, the Commission recognized that inflated fees for the deployment of small cells have the effect of prohibiting wireless services. *See Small Cell Order* ¶¶ 43–80 (RER 143–63). In some cases, the Commission explained, these fees effectively prohibit service in the jurisdiction that charges them. *Id.* ¶ 65 (RER 155–56). In addition, the record shows that inflated fees demanded by large, urban, "must-serve" jurisdictions deplete carriers' capital and force them to delay or forgo deployment in more rural areas, leaving the residents and businesses of small, rural communities on the wrong side of a digital divide. *See id.* ¶ 64 & n.195 (RER 154–55). Given record evidence that capital constraints have caused carriers to reduce, delay, or forgo deployment, the Commission found that inflated fees for small cells in some jurisdictions thus effectively prohibit deployment in other areas. *Id.* ¶ 65 (RER 155–56); *see id.* ¶ 64 & nn.194–195 (RER 155).

In view of those findings, the Commission concluded that state and local fees for small cells have the impermissible effect of prohibiting wireless services when they exceed a reasonable approximation of any actual costs a locality must incur. *Small Cell Order* ¶¶ 50, 55–56, 76 (RER 145–46, 148–50, 161). "[E]ven fees that might seem small in isolation," the agency observed, "have material and prohibitive effects on deployment, particularly when considered in the aggregate given the nature and volume of anticipated [small cell] deployment." *Id.* ¶ 53 (RER 147); *see also id.* ¶ 65 (RER 155–56) (considering "the aggregate effect" of fees for small cells). Thus, the Commission reasoned, "[p]er-facility fees that once may have been tolerable when providers built macro towers several miles apart now act as effective prohibitions when multiplied by each of the many Small Wireless Facilities to be deployed." *Id.* ¶ 48 (RER 145).

At the same time, the Commission made clear that a locality can require wireless carriers to pay all actual and reasonable costs that the locality incurs. *See, e.g.*, *Small Cell Order* ¶ 56 (RER 149–50). Localities may charge carriers all "costs related to processing an application," issuing "building or construction permits," and conducting "street closures." *Id.* ¶ 32 n.71 (RER 133). Localities may likewise charge carriers for access to and maintenance of public rights-of-way—

"including areas on, below, or above public roadways, highways, streets, sidewalks, or similar property." *Id.* ¶ 92 (RER 167); *see id.* ¶¶ 32 n.71, 50 & n.131, 72, 75 (RER 133, 145–50, 158, 160). And localities may charge carriers for use and maintenance of government-owned structures within public rights-of-way—"light poles, traffic lights, utility poles, and similar property." *Id.* ¶ 92 (RER 167); *see id.* ¶¶ 32 n.71, 50 & n.131, 72, 75 (RER 133, 145–46, 158, 160). Fees run afoul of the Act only if they exceed any reasonable approximation of the actual costs a locality must incur. *Id.* ¶ 56 (RER 149–50).

To avoid unnecessary litigation, the Commission established a "safe harbor" under which small cell fees are presumptively reasonable if they do not exceed $500 in application fees and $270 per year for all recurring fees. *Small Cell Order* ¶¶ 78–80 (RER 162–63). The Commission based this safe harbor in part on state small cell laws approving similar fee levels. *Id.* ¶ 79 n.233 (RER 162). At the same time, the Commission made clear that "localities [may] charge fees above these levels upon [a] showing" that their actual and necessary costs exceed the safe harbor amounts. *Id.* ¶ 80 & n.234 (RER 163); *accord id.* ¶ 32 (RER 133–34).

Aesthetic Requirements. The Commission also considered the cumulative impact on small cell deployment of local restrictions on the appearance or placement of communications facilities. The agency recognized that localities have a legitimate interest in ensuring that infrastructure deployments are not unsightly or out of character with the surrounding area. *See Small Cell Order* ¶¶ 12, 85–86 (RER 124, 164–65). But it also acknowledged complaints that some localities have adopted "unduly vague or subjective" limitations on small cell deployment "that may apply inconsistently to different providers," or that are not disclosed until after the locality receives a provider's application. *Id.* ¶ 84 & nn.240–243 (RER 164). In such instances, the agency determined, localities prevent carriers from developing deployment plans and effectively prohibit the provision of service. *Id.* ¶¶ 84, 88 (RER 164–65).

To combat the problem of unduly vague or undisclosed aesthetic requirements frustrating small cell deployment, the Commission determined that, to comply with Sections 253 and 332(c)(7), aesthetic requirements for small cells must be reasonable, objective, and disclosed in advance. *Small Cell Order* ¶¶ 86–88 (RER 165). Published aesthetic standards are permissible under this approach when they are "applied in a principled manner" and include "a sufficiently clear level of detail" for

"providers to design and propose their deployments in a manner that complies" with those standards. *Id.* ¶ 88 n.247 (RER 165–66).

Shot Clocks. Also in the *Small Cell Order*, the FCC updated its existing shot clocks by adopting two new shot clocks specific to small cells. *Small Cell Order* ¶¶ 105–131 (RER 175–188). In doing so, it recognized that small cells pose fewer issues and should therefore require less time to review than traditional wireless towers, and that localities have become more efficient in reviewing wireless siting applications in the decade since the original shot clocks were adopted in 2009. *See id.* ¶ 104 (RER 175).

For requests to collocate a small cell on an existing structure, the Commission determined that localities should ordinarily act within 60 days. *Small Cell Order* ¶¶ 105–106 (RER 175–77). For requests to deploy small cells using new structures, it adopted a 90-day shot clock. *Id.* ¶¶ 105, 111 (RER 175–76, 179–80). As with the shot clocks established in 2009, localities may "rebut the presumptive reasonableness of the [small cell] shot clocks based upon the actual circumstances they face." *Id.* ¶ 109 (RER 178); *accord id.* ¶ 115 (RER 181).

The Commission explained that an unjustified refusal to act on small cell applications within the applicable shot clock not only

constitutes a failure to "act . . . within a reasonable period of time" in violation of Section 332(c)(7)(B)(ii), but has the "effect of unlawfully prohibiting service" in violation of Section 332(c)(7)(B)(i)(II). *Small Cell Order* ¶ 118–119 (RER 181–82). When a siting authority misses the shot clock deadlines, an applicant can "commence an action in any court of competent jurisdiction." 47 U.S.C. § 332(c)(7)(B)(v); *Small Cell Order* ¶ 117 (RER 181). The Commission stated that it "anticipate[s] that the traditional requirements for awarding preliminary or permanent injunctive relief would likely be satisfied in most cases," *id.* ¶ 123 (RER 183); *see id.* ¶¶ 120–123 (RER 182–84), but that determining "the result or the remedy appropriate for any particular case . . . will remain within the courts' domain," *id.* ¶ 124 (RER 184).

Deployment in Public Rights-of-Way. Finally, the Commission confirmed that its statutory interpretations in the *Small Cell Order* "extend to state and local governments' terms for access to public [rights-of-way] that they own or control." *Small Cell Order* ¶ 92 (RER 167). Those interpretations also reach state and local governments' "terms for use of or attachment to government-owned property within such [rights-of-way]." *Id.*

The Commission emphasized that states and localities "hold the public streets and sidewalks in trust for the public." *Small Cell Order* ¶ 96 (RER 170) (internal quotation marks omitted). Similarly, government-owned structures within public rights-of-way—e.g., traffic lights and lampposts—"are frequently relied upon to supply services for the benefit of the public." *Id.* ¶ 97 (RER 171). Taking the public nature of such property into account, the Commission concluded that, when managing public rights-of-way and government-owned structures within them, a locality's role is generally "indistinguishable from its functions and objectives as a regulator." *Id.* ¶ 96 (RER 170); *see id.* ¶¶ 96–97 (RER 170–71). And as the Commission explained, "Congress did not intend" for "states and localities to rely on their ownership of property within [public rights-of-way] as a pretext to advance regulatory objectives that prohibit or have the effect of prohibiting the provision of" telecommunications services or personal wireless services." *Id.* ¶ 97 (RER 171).

E. Prior Appellate Proceedings

The City of Portland petitioned for review of the *Moratoria Order* in this Circuit. Several additional parties then petitioned for review of the *Small Cell Order* in this and other circuits. Following a judicial lottery under 28 U.S.C. § 2112(a), the small cell cases initially proceeded

in the Tenth Circuit. Several local government petitioners in those cases moved for a stay pending review, and some petitioners also moved to transfer those cases to this Court for consolidation with Portland's challenge to the *Moratoria Order*. The Tenth Circuit denied the petitioners' stay request, then transferred their appeals to this Court. This Court ordered that Portland's challenge to the *Moratoria Order* be briefed and argued together with the small cell cases.

In parallel with the appellate proceedings here, the FCC is considering petitions for agency reconsideration of the *Orders* under review. Because those petitions raise many of the same issues now in dispute, the agency asked this Court to place these cases in abeyance until the reconsideration proceedings are completed. The Court denied the agency's request.

STANDARD OF REVIEW

Challenges to the FCC's interpretation of the Communications Act are governed by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron*, if "Congress has directly spoken to the precise question at issue," the Court "must give effect to" Congress's "unambiguously expressed intent." *Id.* at 842–43. But if "the statute 'is silent or ambiguous,' [courts] must defer to a reasonable

construction by the agency charged with its implementation." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (quoting *Chevron*, 467 U.S. at 843). *Chevron* requires the Court "to accept the agency's construction of the statute, even if the agency's reading differs from what the [C]ourt believes is the best statutory interpretation." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *e.g.*, *Medina-Nunez v. Lynch*, 788 F.3d 1103, 1104–05 (9th Cir. 2015) (per curiam).

Constitutional challenges to the *Orders* are reviewed de novo. *See, e.g.*, *Doe v. Rumsfeld*, 435 F.3d 980, 984 (9th Cir. 2006) ("[W]e review challenges to the constitutionality of a . . . federal regulation de novo.").

Petitioners' remaining challenges are governed by Section 706 of the Administrative Procedure Act, which provides that courts must uphold an agency's decision unless the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Review under the arbitrary and capricious standard is deferential . . . ." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007); *accord Friends of Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906, 920 (9th Cir. 2018). A court "will not vacate an agency's decision unless [the agency] has relied on factors which Congress has not intended it to consider, entirely failed to consider an

important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before [it], or is . . . implausible" to a degree that "[cannot] be ascribed to [either] a difference in view or . . . agency expertise." *Id.* at 921 (internal quotation marks omitted).

SUMMARY OF THE ARGUMENT

In the *Orders* under review, the Commission reaffirmed its longstanding view that state and local measures that materially inhibit the deployment of infrastructure used to provide personal wireless or telecommunications services have the impermissible effect of prohibiting service. The application of that principle in today's marketplace presents new regulatory challenges. Today's carriers supply mobile telephone and other communications services in many different ways, with varied capabilities and performance characteristics. And both existing and next-generation services depend on the deployment of small cells on a scale that will far exceed historical deployments of traditional macro cells.

I. In view of that need, the Commission explained how moratoria on new infrastructure deployment, inflated or unnecessary fees, undisclosed or unduly vague aesthetic restrictions, and failures to act on siting applications in a timely manner prohibit or have the effect of prohibiting covered services in today's marketplace.

A. The Commission reasonably determined in the *Moratoria Order* that states and localities prohibit or effectively prohibit the provision of telecommunications services when they adopt moratoria that expressly prevent or suspend applications to deploy infrastructure used to provide those services. The Commission also reasonably found that de facto moratoria, although not formally codified as bans on siting applications, have a similar prohibitory effect. Nowhere in the *Moratoria Order* did the Commission preempt any specific state or local measure. Indeed, the Commission acknowledged the possibility that some specific moratoria may fall within the safe harbors of Section 253(b) or (c).

B. The Commission also recognized, consistent with many court decisions, that charging inflated fees will cause carriers to reduce or forgo deployment. Based on the record before it, the Commission reasonably found that a state or locality has the effect of prohibiting service when it demands fees for small cell deployments that exceed any reasonable approximation of the actual costs it must incur. This is so for two independent reasons. First, these fees increase the cost of deployment and thereby directly reduce or deter new infrastructure deployment in high-cost areas. Second, when must-serve localities impose such fees, it deprives carriers of revenues that they could profitably reinvest

elsewhere, which indirectly prevents or delays deployment in other, mostly rural areas. The Commission also reasonably concluded that fees unrelated to a locality's actual costs are not "fair and reasonable compensation . . . for use of public rights-of-way" under Section 253(c). And there is nothing unreasonable about the Commission's limited safe harbor for fee levels low enough that litigating them would serve no useful purpose.

C. The Commission properly recognized that not all aesthetic restrictions on small cell deployments run afoul of Sections 253 and 332(c)(7). States and localities are free to impose restrictions on the placement or appearance of small cells when those restrictions are reasonably directed to ensuring that proposed deployments complement the surrounding area; when they are applied in a principled, non-discriminatory manner; and when they are published in advance. But in some instances, the Commission found, localities have applied aesthetic requirements that carriers cannot ascertain in advance, which prevents carriers from conforming their small cell applications to any predictable set of rules. The Commission made clear that restrictions of that kind—particularly given their aggregate effect in the context of coordinated small cell deployments—have the effect of prohibiting covered services.

D. The Commission likewise reasonably adopted new shot clocks tailored to small cell deployments. The new shot clocks are only a modest change from the previous shot clocks that courts have repeatedly upheld. They are amply supported by experience with the previous shot clocks, the record in this proceeding, and the Commission's predictive judgment and expertise. The Local Government Petitioners' challenges to the Commission's discussion of available remedies for shot clock violations have no merit, because the *Orders* neither permit nor require courts to order any relief that they could not previously have imposed, nor do they expose localities to any new lawsuits that could not already have been brought. And the Wireless Carrier Petitioners' countervailing challenge to the Commission's decision not to mandate a "deemed granted" remedy at this time fails because the Commission found that its other actions here already provide carriers with substantial relief.

II. Petitioners' statutory arguments offer no basis to disturb the Commission's reasonable exercise of its delegated authority to interpret and administer the limits on state and local authority that Congress imposed in Sections 253 and 332(c)(7).

A. The Commission's approach in the *Orders* is fully consistent with Congress's decision to preserve local zoning authority in Section 332(c)(7)(A). The *Orders* do not compel any locality to approve any particular siting request. Localities retain the right to deny particular siting requests for any reason, so long as they do not transgress the specific limits that Congress imposed in Section 332(c)(7)(B).

B. Nor is the Commission's reasonable interpretation of these provisions foreclosed by any of this Court's decisions. The Local Government Petitioners contend that the *Orders* are contrary to *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008) (en banc), which held that preemption under Sections 253 and 332(c)(7) requires evidence that a challenged practice *does* (rather than *might possibly*) prohibit or have the effect of prohibiting service. But that requirement is satisfied by the Commission's specific, record-based findings that the practices at issue here *do* have the effect of prohibiting service.

The Local Government Petitioners insist that preemption requires a further showing that the challenged measure amounts to a complete and insurmountable bar to service. But *Sprint Telephony* said nothing of the sort, nor was this issue even presented in that case. And every one of

the circuits to have addressed the issue (the First, Second, Eighth, and Tenth Circuits) has explicitly rejected Petitioners' view. Indeed, this Court's decision in *Sprint Telephony* specifically relied on an Eighth Circuit decision expressly holding that "[t]he plaintiff need not show a complete and insurmountable prohibition" for a measure to be preempted under Section 253. Recognizing that the phrase "effect of prohibiting" is facially ambiguous, the Commission reasonably concluded—consistent with the unanimous view of the federal courts of appeals, and with longstanding FCC precedent—that a state or local measure need not be a complete or insurmountable bar to constitute an effective prohibition under Section 253 or 332(c)(7).

The Commission did disagree with cases adopting a "coverage gap" test for effective prohibition claims under Section 332(c)(7). Because that test is not compelled by the text of the statute, but instead is a judge-made standard adopted in the acknowledged absence of any controlling authority, the agency was free to adopt a different interpretation. The Commission reasonably explained why it concluded that a coverage gap test is not a good fit for the current wireless marketplace and why the effective prohibition analysis must instead account for all relevant capabilities and performance characteristics.

C. The Commission reasonably extended its statutory interpretations in the *Orders* to measures of state and local governments concerning public rights-of-way that they own or control, and property within those rights-of-way that is owned or controlled by the same government entity. Public rights-of-way, the Commission reasoned, are not ordinary property: Streets and sidewalks are held in trust for the public, to supply services for the public good. The Commission thus reasonably concluded that, when managing public rights-of-way, or government-owned property within them, to promote public safety, aesthetic, or other similar objectives, states and localities act in their capacity as regulators—not as ordinary landlords.

D. The Commission also reasonably determined that Section 224 of the Act, 47 U.S.C. § 224, does not insulate public power utilities from the statutory interpretations in the *Orders*. Nothing in Section 253 asserts or implies that "State or local legal requirements" cannot include the requirements of public power utilities. And although Section 224(a)(1) excludes government-owned entities from the definition of "utility," 47 U.S.C. § 224(a)(1), that limitation by its terms applies only to "this section"—i.e., Section 224—and the section's implementing regulations, not to other provisions of the Communications Act like

Section 253 or 332(c)(7). The Commission made clear, moreover, that it was not purporting to prescribe specific rates, terms, or conditions for pole attachments. Public utilities remain free, under the *Orders*, to specify their own rates, terms, and conditions, and to deny siting requests for any legitimate reason.

E. The Commission also appropriately considered the effects of its statutory interpretations on the provision of 5G and broadband services. The record confirms that 5G networks and small cells are used for traditional voice calls in addition to advanced services like mobile broadband. State and local actions that materially inhibit small cell deployment thus have the effect of prohibiting covered services. And the Commission was not required to ignore the effect that its interpretations have on broadband and other advanced services when addressing regulatory barriers to covered services provided over the same facilities. To the contrary, in taking those effects into account, the agency heeded Congress's directive to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability" by "remov[ing] barriers to infrastructure investment." 1996 Act § 706(a), 110 Stat. at 153 (codified at 47 U.S.C. § 1302(a)).

F. The Commission reasonably adopted the same approach for both wireline and wireless facilities under Sections 253 and 332(c)(7). As this Court recognized in *Sprint Telephony*, the two provisions use the identical "prohibit or have the effect of prohibiting" language, and nothing suggests that Congress's use of the same language should have different meaning in the two provisions or should apply differently to wireline or wireless facilities.

III. The Commission was not required to reassess the agency's current exposure limits for radiofrequency radiation in the context of the *Small Cell Order*, or to explain why federal environmental assessment requirements do not apply. As a political subdivision, Montgomery County lacks standing to argue otherwise: It may not bring suit to vindicate the interests of individual citizens or any "quasi-sovereign" interest. And the County's claims are unavailing in any event. Its NEPA claim amounts to an untimely collateral attack on a March 2018 FCC order that is currently under review before the D.C. Circuit. *See United Keetoowah Band of Cherokee Indians v. FCC*, Nos. 18-1129 *et al.* (D.C. Cir. argued March 15, 2019). And the FCC reasonably determined that concerns regarding the efficacy of the agency's existing radiofrequency

exposure limits were best addressed in a parallel proceeding that the agency is conducting for that purpose.

IV. Finally, the *Orders* do not raise any significant constitutional concerns.

A. The *Orders* do not implicate the Fifth Amendment's Takings Clause because they do not compel access to any particular state or local property, nor do they require localities to approve any given siting request. Local governments can still deny requests to deploy communications facilities for any legitimate reason, so long as the reasons for denial are supported by substantial evidence.

Even if the *Orders* were construed to effect a taking, they comply with the just compensation requirement by allowing localities to recover any and all actual costs they must incur. The Local Government Petitioners' claim that they are entitled to "market-based rents" is misplaced because there is no competitive "market" for use of public rights-of-way. Local governments hold a legal monopoly over use of these rights-of-way, and there are rarely (if ever) feasible alternatives for small-cell deployment. And because small cells are relatively unobtrusive, they do not meaningfully interfere with other uses of the rights-of-way. As a result, any decrease in useful value due to small cells

is likely nominal, and it is fully compensated by allowing localities to recover all of their actual costs.

B. The *Orders* likewise do not raise any substantial Tenth Amendment concerns. The Tenth Amendment by its terms does not pose any obstacle when Congress acts pursuant to its delegated authority under the Commerce Clause, as it did when enacting and amending the Communications Act. Nor do the relevant provisions conscript local officials to administer a federal regulatory scheme; indeed, these preemption provisions do not require localities to regulate communications services or infrastructure at all, but instead *forbid* localities from regulating in certain impermissible ways. In any event, any Tenth Amendment challenge arises not from the *Orders* under review but instead from the underlying statute, and this Court and others have repeatedly upheld the application of Sections 253 and 332(c)(7) without ever suggesting that these provisions are constitutionally infirm.

ARGUMENT

Based on an extensive record, the Commission found that some states and localities have erected regulatory barriers to the deployment of small cell facilities, which are urgently needed for both current and next-generation wireless services. *See infra* Part I; *Small Cell Order*

¶¶ 25, 28 (RER 132, 129–30). In response, the Commission undertook to "clarify the preemptive scope that Congress intended" in Sections 253 and 332(c)(7) of the Act. *Id.* ¶ 23 (RER 129); *see also Moratoria Order* ¶ 140 (RER 71).

Sections 253 and 332(c)(7) each preempt state and local measures that "prohibit or have the effect of prohibiting" the provision of covered services.[7] Consistent with traditional canons of construction, that phrase should bear the same meaning in both provisions. *See Small Cell Order* ¶ 36 (RER 136); *Sprint Tel. PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571, 579 (9th Cir. 2008) (en banc). But the phrase itself is ambiguous, which has engendered considerable confusion in both the marketplace and the courts. *Small Cell Order* ¶ 35 (RER 135–36).

In its role as interpreter of the Communications Act, *Small Cell Order* ¶ 23 (RER 129); *see Moratoria Order* ¶¶ 166, 168 (RER 85–87), and accounting for regulatory concerns particular to small cells, *e.g.*, *Small Cell Order* ¶ 3 (RER 122), the Commission reasonably concluded in the

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[7] As in the *Orders*, "covered services" here means "telecommunications services" (Section 253) or "personal wireless services" (Section 332(c)(7))—both of which include, among other things, wireless voice service. *E.g.*, *Small Cell Order* ¶¶ 17 n.20, 36 & n.83 (RER 126, 136); *see Moratoria Order* ¶ 142 n.523 (RER 72).

Orders that "a state or local legal requirement will have the effect of prohibiting wireless telecommunications services if it materially inhibits the provision of such services," *id.* ¶ 37 (RER 137), or the deployment of facilities needed to provide them, *id.* ¶¶ 36–37 (RER 136–38). *See infra* Part II. In doing so, the Commission reaffirmed its long-held understanding, which many courts have adopted and applied, of what constitutes an effective prohibition. And the Commission explained why its approach here is reasonable and consistent with this Court's precedent. *See infra* Part II.B; *Small Cell Order* ¶ 41 n.99 (RER 141).

I. The Commission reasonably clarified how Sections 253 and 332(c)(7) apply to specific problems in the current wireless marketplace.

A. Moratoria on new infrastructure deployment prohibit or effectively prohibit telecommunications services.

The record included "numerous, geographically diverse" complaints that states and localities have imposed moratoria on the deployment of telecommunications infrastructure. *Moratoria Order* ¶ 143 (RER 73); *see id.* ¶¶ 142 & n.523, 147, 167 (RER 72, 75, 86). After thoroughly considering those complaints, the Commission reasonably concluded that moratoria "strike at the heart of the ban on barriers to entry" in Section 253(a). *Id.* ¶ 140 (RER 71).

1. Express moratoria violate Section 253(a).

The Commission first addressed "express moratoria": "statutes, regulations, or other written legal requirements" in which state or local governments "expressly . . . prevent or suspend the acceptance, processing, or approval of applications or permits necessary for deploying telecommunications services" (or the facilities needed to provide them). *Moratoria Order* ¶ 145 & n.531 (RER 73). In 2017, for example, Amherst, New York, passed a "resolution prohibiting town staff from accepting or processing any applications or issuing any permits 'relating to the placement or installation of telecommunications towers, facilities and antennae within the Town's public rights-of-way until the moratorium [was] rescinded and/or a Local Law addressing [that] matter [was] adopted.'" *Id.* ¶ 145 (RER 74) (quoting Resolution 2017-674 (adopted June 5, 2017)). Fort Lauderdale, Florida, "imposed a 'six-month' moratorium on [rights-of-way] wireless siting that was extended multiple times over two years." AT&T Wireless Comments 14 (RER 364); *see* Crown Castle Wireless Comments 15 (RER 390). Bryan, Texas, imposed a similar ban. AT&T Wireless Comments 14 (RER 364); *see also id.* (citing additional examples).

The Commission heard from numerous commenters that express moratoria have prevented carriers from improving or maintaining services. AT&T reportedly "cancel[led] plans to deploy" small cells at "over 120 [sites]" because of Fort Lauderdale's moratorium. AT&T Wireless Comments 14 (RER 364); *see also id.* (the moratorium in Bryan, Texas, "put[] at risk AT&T's small cell deployment in [that] city"). Likewise, the Wireless Infrastructure Association reported that one of its members was "prohibited from deploying approximately eighty-five small wireless facilities in nine jurisdictions," due in part to express (as well as de facto) moratoria. Wireless Infrastructure Ass'n Comments 11 (RER 505). Additional examples abound. *See, e.g.*, AT&T Wireline Comments 74 (RER 375) (moratoria "are blunt instruments that force providers either to delay or cancel their planned deployments"); Mobilitie Comments 7 (RER 446) ("deployment is stonewalled"); Verizon Wireless Comments 6 (RER 495) (moratoria, including in Amherst, New York, are "substantial barriers to deploying small cells").

Consistent with this record, the Commission reasonably concluded that "[e]xpress moratoria are facially inconsistent with [S]ection 253(a)." *Moratoria Order* ¶ 147 (RER 75).

2. De facto moratoria violate Section 253(a).

Some jurisdictions have taken actions or adopted policies that, albeit "not formally codified" as bans on "the acceptance, processing, or approval of applications or permits for telecommunications services or facilities," nonetheless "halt or suspend" that activity. *Moratoria Order* ¶ 149 (RER 76); *see id.* ¶ 145 (RER 73).

Numerous commenters identified policies or practices that they characterized as meeting that description. *See Moratoria Order* ¶¶ 143, 150 (RER 73, 77–78). Mobilitie, for example, referenced "[a] Minnesota locality" that "will not accept small cell applications until it adopts a new ordinance for permitting small cells," which "will take at least another year to enact." Mobilitie Comments Attach. 2, at 12 (RER 464). A group of competitive fiber providers asserted that another jurisdiction's professed "moratorium on competitive deployments[] allow[ed] incumbent phone companies and cable operators to operate without fear" of increased competition. Conterra Broadband et al. Comments 28 (RER 377). And an industry organization reported that "localities [have] refuse[d] to process applications, or [told] applicants to wait until the locality develops siting policies, without making any

commitment as to whether, if ever, [that will happen]." CTIA Comments 24 (RER 416).

As with express moratoria, commenters asserted that prohibitions of this kind have prevented or delayed infrastructure deployment. *See, e.g.*, Crown Castle Wireless Comments 14 (RER 389) (describing an "unwritten, interpretive policy" of the Alabama Department of Transportation that "result[ed] in an absolute prohibition of small c[e]ll deployment in state-controlled [rights-of-way]"); Mobilitie Comments 7 (RER 446) ("deployment is stonewalled"); Wireless Infrastructure Ass'n Comments 11 (RER 505) (describing de facto moratoria "imposed across multiple jurisdictions in Massachusetts and Illinois" that "have resulted in delays ranging from 2.5 to 10 months or, in some cases, indefinite delays").

Consistent with this record—and because, by its terms, Section 253(a) extends not only to "statutes" and "regulations" but also to "other . . . legal requirement[s]," codified or otherwise, 47 U.S.C. § 253(a)—the Commission reasonably concluded that de facto moratoria violate Section 253(a). *Moratoria Order* ¶ 149 (RER 76).

3. Moratoria will rarely implicate Section 253's safe harbors.

In explaining that express and de facto moratoria violate Section 253(a), the Commission did not preempt or otherwise invalidate any specific state or local requirement. *See Moratoria Order* ¶ 150 (RER 78) ("[W]e do not reach specific determinations on the numerous examples discussed by parties in our record . . . ."); *id.* ¶ 164 (RER 85) (the *Order* does "not specifically preempt any state or local law"). On the contrary, it declined to foreclose the possibility that state or local governments might show that some specific moratoria fall within the safe harbors of Section 253(b) or (c). The agency reasonably predicted, however, that such instances will be "rare." *Id.* ¶ 153 (RER 78).

With respect to Section 253(b), the Commission observed that "[w]ith limited exception, moratoria are . . . unlikely to be necessary to 'protect the public safety and welfare,'" or to serve the other specific interests set forth in that provision. *Moratoria Order* ¶ 156 (RER 80); *see id.* ¶ 155 (RER 79–80). The Commission also predicted that "most moratoria" are unlikely to satisfy Section 253(b) because they "are not competitively neutral." *Id.* (RER 79).

"It is even less likely," the Commission reasoned, that the narrow exceptions in Section 253(c) "could shield moratoria . . . from preemption." *Moratoria Order* ¶ 159 (RER 82). "[S]ection 253(c) protects certain activities that involve the actual use of the right of way." *Id.* ¶ 160 (RER 82–83). By contrast, "moratoria bar providers from obtaining approval to access the right-of-way." *Id.* ¶ 160 (RER 83). In the Commission's judgment, a categorical refusal to allow access is not "management" of the public rights-of-way but rather a refusal to partake in management. *See id.*

4. Portland's challenges to the *Moratoria Order* are unavailing.

a. Contrary to Petitioner City of Portland's position,[8] "effective prohibition" within the meaning of Section 253(a) is not limited to measures that directly target the provision of telecommunications services. Neither of Section 253's safe harbors exempt "generally applicable laws." Local Gov't Br. 101; *see* 47 U.S.C. § 253(b), (c). And Section 253(a), by its terms, reaches any "[s]tate or local legal requirement." *Id.* § 253(a).

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[8] Although the Local Government Petitioners have submitted a joint brief addressing both *Orders* under review, Portland is the only party to have appealed the *Moratoria Order*, and we thus attribute arguments specific to that *Order* to Portland.

In challenging that view as "overly broad," Portland incorrectly claims that the *Moratoria Order* "deemed prohibitory" certain generally applicable laws that they regard as benign: "[f]reeze-and-frost laws," "[c]onstruction restrictions during . . . high traffic periods," and restrictions concerning deployment on bridges. Local Gov't Br. 101. On the contrary, as the Commission expressly stated, the *Moratoria Order* "do[es] not reach specific determinations on the numerous examples [of alleged moratoria] discussed by parties in [the] record." *Moratoria Order* ¶ 150 (RER 78). Indeed, the Commission specifically underscored that it was not deciding the validity of restrictions in South Carolina linked to "traffic management" and "hurricane season." *Id.* ¶ 150 n.558 (RER 77); *see* Local Gov't Br. 104. When the Commission referenced freeze-and-frost laws and restrictions concerning deployment on bridges, it did so only in passing, in an introductory portion of the *Moratoria Order* that merely summarizes practices alleged by others to constitute moratoria. *See Moratoria Order* ¶ 143 & n.529 (RER 73). Thus, the premise on which Portland relies is unfounded.

b. Also unfounded is Portland's assertion that the Commission characterized freeze-and-frost laws and other seasonal restrictions on work "as having nothing to do with right-of-way management," in what

Portland claims was an unexplained departure from agency precedent. Local Gov't Br. 104. To the contrary, the Commission reaffirmed in the *Moratoria Order* that "[l]ocal governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, [and] to manage gas, water, cable . . . and telephone facilities that crisscross the streets and public rights-of-way." *Moratoria Order* ¶ 160 (RER 82) (alterations in original; quoting *TCI Cablevision of Oakland Cty., Inc.*, 12 FCC Rcd. 21396, 21441 ¶ 103 (1997)).

c. Portland contends that, because Section 253(d) directs the Commission to preempt violations of subsections (a) and (b), without mentioning subsection (c), the Commission lacks authority to determine how localities may exercise their authority to manage the public rights-of-way. Local Gov't Br. 105. But as the Commission explained, "Congress'[s] inclusion of [one] express mechanism," in Section 253(d), "to consider whether specific state and local requirements are preempted[] does not limit" the agency's general authority to interpret and implement provisions of the Act. *Moratoria Order* ¶ 163 & n.597 (RER 84); *accord id.* ¶ 141 n.519 (RER 72); *see also Small Cell Order* ¶ 99 n.282 (RER 172–73) (rejecting arguments treating "Section 253(d)'s provision for

preemption as more specific than, or otherwise controlling over, other Communications Act provisions enabling the Commission to authoritatively interpret the Act"). That determination is consistent with precedent. *See, e.g.*, *City of Arlington v. FCC*, 668 F.3d 229, 247 & n.83 (5th Cir. 2012) (summarizing the Commission's determination that it could establish shot clocks pursuant to its general authority to implement the Act, and citing 47 U.S.C. §§ 151, 154(i), 201(b), and 303(r) as supporting that authority), *aff'd*, 569 U.S. 290, 293 (2013).

d. There is likewise no basis for Portland's claim that the discussion of delay in the *Moratoria Order* suffers from "self-contradiction." Local Gov't Br. 105.

The Commission reasonably determined that express moratoria will have the effect of prohibiting deployment even when they are "of a limited, defined duration." *Moratoria Order* ¶ 148 (RER 75). If providers are barred under a formally codified law from even applying to deploy infrastructure, or when localities are formally barred from processing or approving applications, providers are necessarily "force[d] . . . either to delay or cancel their planned deployments." *Id.* (RER 76). The Commission reasonably determined that such measures effectively prohibit service—particularly when some localities "continually extend"

the moratoria that they characterize as "temporary." *Id.* (RER 75) (internal quotation marks omitted); *see supra* p. 16. The Commission acknowledged, however, that "there may be limited instances where temporary moratori[a] could fall within" the safe harbors of Section 253(b) or (c). *Id.* ¶ 148 (RER 76).

The Commission reasonably took a more nuanced view of delay when assessing whether state and local measures that do not facially target siting applications, or that are not formally codified, constitute de facto moratoria in the first place. *See Moratoria Order* ¶ 150 (RER 77–78). Whereas codified measures that formally ban siting applications necessarily "delay or cancel . . . deployments," *id.* ¶ 148 (RER 76), informal policies or generally applicable laws may have a lesser deterrent effect and will not always materially inhibit deployment, *see id.* ¶ 150 (RER 77). The Commission therefore explained that such measures do not "cross the line into *de facto* moratoria" unless "the delay [they impose] continues for an unreasonably long or indefinite amount of time[,] such that providers are discouraged from filing applications" as with express moratoria. *Id.* But once a state or local measure does qualify as a de facto moratorium, it is (like an express moratorium) inconsistent with Section 253(a), whatever its length.

e. Finally, the Commission reasonably disagreed with the contention that states may justify almost any effective prohibition on deployment by invoking public safety concerns—so long as the action in question is not "simply . . . a ruse to protect incumbent[]" carriers. Local Gov't Br. 103; *see Moratoria Order* ¶¶ 157–158 (RER 80–81). That expansive interpretation of Section 253(b) is broader than courts have recognized and would all but swallow Section 253(a). *See id.* ¶ 156 & nn.575–576 (RER 80).

The Commission acknowledged that "narrowly tailored" moratoria may, in limited circumstances, be "necessary" and thus may occasionally meet the Section 253(b) safe harbor. *Moratoria Order* ¶ 157 (RER 81). "[S]tate-imposed 'emergency' express moratoria" will be permissible, for example, "if they are (1) 'competitively neutral,' . . . (2) necessary to address the emergency or disaster or related public safety needs, and (3) targeted only to those geographic areas that are affected by the disaster or emergency." *Id.*

But "[m]oratoria are blunt instruments." *Moratoria Order* ¶ 158 (RER 81) (internal quotation marks omitted). And the safe harbor in Section 253(b) reaches only those measures that are "*necessary* . . . to protect the public safety and welfare" (or to serve other enumerated

aims). 47 U.S.C. § 253(b) (emphasis added). In view of the "broad" and "far-ranging" nature of moratoria, *Moratoria Order* ¶ 158 (RER 81), the Commission reasonably construed "necessary" according to its ordinary meaning and found that moratoria, as a general matter, are unlikely to satisfy Section 253(b). *See, e.g.*, *Necessary*, Dictionary of Modern English Usage (2d ed. 1995) ("essential"); *Necessary*, Merriam-Webster's Collegiate Dictionary (10th ed. 1993) ("absolutely needed"); *Necessary*, Oxford English Dictionary (2d ed. 1989) ("Indispensable, requisite, essential, needful; that cannot be done without.").

To be sure, as the Commission acknowledged, "necessary" has a broader meaning in some portions of the Communications Act. *Moratoria Order* ¶ 158 n.584 (RER 82). But the agency reasonably concluded that a strict reading is warranted in the context of Section 253(b) to prevent states from using safety considerations "as a guise for" preventing infrastructure deployment. *Id.* ¶ 157 (RER 81); *see id.* ¶ 158 (RER 81). That determination is consistent with Commission precedent. *See, e.g.*, *New England Pub. Commc'ns Council Petition for Preemption Pursuant to Section 253*, 11 FCC Rcd. 19713, 19725 (1996) ("Employing [broader] interpretations of 'necessary' in the context of 253(b) . . . could thwart the clear intent of Congress by allowing States . . . overly broad discretion to

adopt policies or regulations that 'prohibit or have the effect of prohibiting the ability of any entity' to provide competitive telecommunications services based upon only a minimal showing of need regarding the specified purposes described in [S]ection 253(b).").

Portland seeks to support its expansive view of Section 253(b) by invoking legislative history. *See* Local Gov't Br. 103 (citing S. Rep. No. 104-230, at 126–27 (1996) (Conf. Rep.)). But neither of the two passages in the cited conference report that address Section 253(b) is reasonably construed to suggest that public safety concerns can justify whatever state measure is not a ruse to protect incumbents. *See* S. Rep. No. 104-230, at 126 ("States may not exercise [their] authority in a way that has the effect of imposing entry barriers *or other prohibitions* preempted by [the] new section [253(a)]." (emphasis added)); *id.* at 127 (asserting that states may not explicitly prohibit utilities from providing telecommunications services, but without excluding other limitations on state authority). If anything, the cited legislative history reflects that "entry barriers" are not the only form of "prohibition" subject to preemption under Section 253(a).

B. Fees that exceed the actual costs a locality must incur effectively prohibit small cell deployment.

The Commission reasonably concluded that increasing the cost of providing communications services through inflated fees has caused carriers to reduce or forgo deployment, and that Sections 253 and 332(c)(7) therefore impose limits on the fees that state and local governments may charge. *Small Cell Order* ¶¶ 43–68 (RER 143–57).

Consistent with this common-sense conclusion, "[f]ederal courts have long recognized that the fees charged by local governments for the deployment of communications infrastructure can run afoul of the limits Congress imposed" in Sections 253 and 332(c)(7). *Small Cell Order* ¶ 43 (RER 143); *see id.* ¶¶ 43–45 (RER 143–44). For example, the Tenth Circuit has held that a "substantial increase in costs imposed by [a locality's] excess conduit requirements and [its] appraisal-based rent . . . render[ed] those provisions prohibitive." *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271 (10th Cir. 2004) (*Santa Fe*); *see also id.* at 1272 ("rent required by the Ordinance [that] is not limited to a recovery of costs" is not "fair and reasonable" under Section 253(c)). Similarly, the First Circuit has held that Section 253 preempted a municipality's gross-revenue fee for use of public rights-of-way because the fee "would

constitute a substantial increase in costs" and thereby "place a significant burden on" the plaintiff telecommunications company. *P.R. Tel. Co. v. Mun. of Guayanilla*, 450 F.3d 9, 19 (1st Cir. 2006) (*Guayanilla II*). And the Second Circuit has observed that Section 253 "requires compensation to be reasonable" to protect against "the danger that local governments will exact artificially high rates." *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 79 (2d Cir. 2002) (*White Plains*).[9]

Accordingly, the question here is not *whether* Sections 253 and 332(c)(7) limit state and local fees that effectively prohibit deployment, but instead only *where* to draw the line between permissible and impermissible exactments. On that score, the Commission reasonably concluded that states and localities are entitled to charge any fees necessary to recover actual costs they must incur, but may not inflate

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[9] Multiple district courts have also concluded that "a fee charged by a municipality must be directly related to the actual costs incurred by the municipality," because "a fee that does more than make a municipality whole . . . risks becoming an economic barrier to entry" in violation of Section 253. *XO Mo., Inc. v. City of Maryland Heights*, 256 F. Supp. 2d 987, 994 (E.D. Mo. 2003) (*Maryland Heights*); *accord Bell Atl.-Md., Inc. v. Prince George's Cty.*, 49 F. Supp. 2d 805, 817 (D. Md. 1999), *vacated on procedural grounds*, 212 F.3d 863 (4th Cir. 2000); *AT&T Commc'ns of the Sw., Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 593 (N.D. Tex. 1998), *vacated as moot*, 243 F.3d 928 (5th Cir. 2001).

their fees above that amount. Because fees that exceed the actual costs a locality must incur are unnecessary, they operate solely as an economic barrier to entry—precisely the danger that Sections 253 and 332(c)(7) were designed to eliminate.

A requirement to pay inflated fees that have no basis in a locality's actual costs is not a mere inconvenience or otherwise inconsequential, as the Local Government Petitioners suggest. It is a concrete expense that carriers must account for by reducing or forgoing other expenditures. Based on the administrative record, the Commission reasonably found that these fees have the effect of prohibiting service in two independent ways. First, inflated fees increase the cost of deployment and thereby cause carriers to reduce or forgo deployment in areas where these fees are imposed. *See infra* Part I.B.1.a. Second, these fees deprive carriers of revenue that they could otherwise profitably reinvest in other areas where they wish to increase deployment but are not yet able to do so due to capital constraints, thereby preventing or delaying deployment in those other (mostly rural) areas. *See infra* Part I.B.1.b. And the Commission reasonably explained why even seemingly small fees have a significant prohibitory effect when multiplied across the vast number of small cells needed to keep up with growing consumer demand and to

support next-generation wireless networks. *See Small Cell Order* ¶¶ 48, 65 (RER 145, 155–56).

The Local Government Petitioners nonetheless insist that some inflated and unnecessary fees are permissible because carriers, facing no other choice, ultimately will accede to localities' demands. *See, e.g.*, Local Gov't Br. 50. Put differently, the Local Government Petitioners contend that localities areas are free—indeed, legally entitled—to inflate their fees by some artificial amount, so long as their mark-ups do not exceed what carriers are willing to bear.

The Commission reasonably rejected that position as unprincipled and unworkable. *See Small Cell Order* ¶ 65 n.199 (RER 155) ("[A]lthough one could argue that, in theory, a sufficiently small departure from actual and reasonable costs might not have the effect of prohibiting service in a particular instance, the record does not reveal an alternative, administrable approach to evaluating fees without a cost-based focus."). How much in unnecessary fees is too much? Petitioners seemingly would require individual litigation of each and every fee request, under some vague totality-of-the-circumstances test, in every one of the roughly 89,000 local jurisdictions across the United States to determine how

much carriers are willing to bear in each market.[10] That approach would itself impede new wireless deployment by fostering wasteful litigation and depriving carriers of the certainty needed to plan and coordinate vast small cell deployments to support next-generation wireless networks.

Although the Local Government Petitioners object to the Commission's approach, they offer no administrable or enforceable alternative. Indeed, if Sections 253 and 332(c)(7) permitted any fee levels or practices that the market allows, as Petitioners would have it, there would be no reason for these statutory provisions at all. The Commission's approach, by contrast, offers a simple, sound, administrable test that is both consistent with the statute and well founded in the record, as we explain below.

1. The Commission's conclusion that inflated fees effectively prohibit small cell deployment is reasonable and amply supported by the record.

The Commission reasonably found, based on the record before it, that fees exceeding the actual costs that localities must incur reduce small cell deployment and thereby have the effect of prohibiting wireless

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[10] *See* U.S. Census Bureau, *Census Bureau Reports There Are 89,004 Local Governments in the United States* (Aug. 30, 2012), https://www.census.gov/newsroom/releases/archives/governments/cb12-161.html.

services. That is so for two independent reasons, either of which is sufficient to uphold the Commission's ruling.

First, inflated fees directly impede wireless services by increasing the cost of deployment and thereby reducing or deterring new infrastructure deployment in high-cost areas. That is especially so, the Commission recognized, for new small cell deployments, because "even fees that might seem small in isolation have material and prohibitive effects on deployment, particularly when considered in the aggregate given the nature and volume of anticipated [small cell] deployment." *Small Cell Order* ¶ 53 (RER 147).

Second, inflated fees in must-serve areas indirectly delay and deter deployment in other, generally rural areas. The record reflects that wireless carriers have limited capital budgets and that, as a result, each year they must delay or forgo otherwise profitable investments due to capital constraints. Inflated fees in must-serve areas exacerbate those constraints by depriving carriers of revenues that could otherwise be profitably reinvested in other areas, which thereby prevents or delays new deployment.[11]

[11] By "must-serve" areas, we mean areas where consumer demand—whether from customers who live in that area or from other customers

The Local Government Petitioners resist the economic reality that imposing higher costs on carriers will lead to reduced service, but carriers must recover these costs somewhere—either by reducing expenditures and deployment (and thereby diminishing service) in high-cost areas, or by cancelling or deferring investment in less profitable areas.[12] In either case, "the bottom-line outcome" is "diminished deployment of Small Wireless Facilities critical for wireless service and building out 5G networks." *Small Cell Order* ¶ 65 (RER 156). The Commission therefore reasonably concluded that fees or charges for small cell deployments that exceed a reasonable approximation of a locality's costs, and that therefore are not necessary to cover any actual cost that the locality must incur,

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who expect seamless continuation of service if they visit or pass through the area—is such that a substantial number of consumers will not subscribe to a carrier that lacks service in these areas. This is often the case for large cities or other urban centers. *See, e.g.*, *Small Cell Order* ¶¶ 28, 63–64 (RER 132, 154–55). The need to provide service in an array of must-serve areas is reflected in consumer demand for carriers that provide nationwide service networks. *Cf. id.* ¶ 62 (RER 153–54); *see also id.* ¶ 42 (RER 143) ("The telecommunications interests of constituents . . . are not only local. They are statewide, national and international as well.").

[12] The Local Government Petitioners suggest that these inflated fees alternatively could "be passed on to the provider's customers in the form of higher prices" (Br. 66–67), but the effect of this would be to price some consumers out of the market, effectively prohibiting those customers from obtaining service.

have the effect of prohibiting wireless services and thus violate Sections 253 and 332(c)(7).

a. Inflated fees directly impede wireless deployment in high-cost areas.

i. The Commission first found that when states or localities demand fees that have no basis in any actual costs they must incur, they directly impede small cell deployment because these fees "will lead to reduced or entirely forgone deployment of Small Wireless Facilities in the near term for that jurisdiction." *Small Cell Order* ¶ 65 (RER 155–56). When the cost of deployment rises due to unnecessary fees, the return on investing in new or improved facilities falls, causing carriers to reduce or forgo new deployment and thus diminishing wireless service.

The prohibitive effect of these fees can be significant. In one study relied on by the Commission, *see Small Cell Order* ¶ 7 & n.7 (RER 123–24), a group of economists estimated that eliminating inflated fees would result in carriers' spending an additional $2.4 billion "in areas that were previously not economically viable," because "a lower set of fees [would have] the effect of pushing a large number of slightly negative [investments] toward[] positive [values] over a five-year period." Corning Study Annex 2, at 9 (RER 644); *see* Corning Study 16–32 (RER 553–69)

(detailing study methodology); Corning Study Annex 2, at 4–9 (RER 639–44) (same); Corning Study Annex 3, at 2 (RER 652) (reporting updated figures). "These newly economically viable neighborhoods contain 1.8 million homes and businesses," including many in rural and suburban areas. Corning Study Annex 3, at 2–3 (RER 652–53).

ii. The Commission further found that unnecessary fees have an especially significant and prohibitory effect for the large, dense networks of small cells that are needed to keep up with consumer demand and support next-generation wireless networks. "To support advanced 4G or 5G offerings," wireless carriers "must build out small cells at a faster pace and at a far greater density of deployment than before." *Small Cell Order* ¶ 3 (RER 122). For example, "Verizon anticipates that network densification and the upgrade to 5G will require 10 to 100 times more antenna locations than currently exist." *Id.* ¶ 47 (RER 145). Other carriers similarly report that they will need to deploy tens or hundreds of thousands of small cells in the coming years. *Id.*

The Commission observed that "[t]he many-fold increase in Small Wireless Facilities will magnify per-facility fees charged to providers," and that as a result, "[p]er-facility fees that once may have been tolerable when providers built macro towers several miles apart now act as

effective prohibitions when multiplied by each of the many Small Wireless Facilities to be deployed." *Small Cell Order* ¶ 48 (RER 145). "[B]ased on the record" in this proceeding, the Commission found that "even fees that might seem small in isolation have material and prohibitive effects on deployment, particularly when considered in the aggregate." *Id.* ¶ 53 (RER 147). "[G]iven the nature and volume of anticipated Small Wireless Facility deployment," the Commission concluded, "the record reveals that fees above a reasonable approximation of costs, even when they may not be perceived as excessive or likely to prohibit service in isolation, will have the effect of prohibiting wireless service when the aggregate effects are considered." *Id.* ¶ 65 (RER 155).[13]

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[13] *See also* Mobilitie Comments Attach. 1, at 17 (RER 456) ("[S]mall cell deployments may require dozens or even hundreds of sites to provide needed capacity and coverage, meaning that these fees skyrocket. A $5,000 per-site fee for a 100-site deployment translates into $500,000 in fees per year."); CTIA Comments Attach. 1, at 15 (RER 426) ("Given that wireless providers often need to install dozens or even hundreds of small cell sites to provide sufficient coverage and capacity across a city, a fee on the order of $1,000 per pole . . . can quickly add up to hundreds of thousands of dollars per year . . . ."); AT&T 6/8/18 Letter 2 (RER 584) ("Even fees that only slightly exceed a municipality's costs harm deployment due to the sheer number of expected small cell deployments over the next few years.").

The Commission's conclusion "finds further support when one considers the aggregate effects of fees imposed by individual localities," given "the cumulative effects of state and local fees on service in multiple geographic areas that providers serve or potentially would serve." *Small Cell Order* ¶ 62 (RER 153). As one wireless carrier warned, "[f]or carriers deploying nationwide over thousands of different municipalities, the cumulative effect of these operational constraints and administrative burden[s] is a material barrier to provisioning service." AT&T 8/6/18 Letter 4 (RER 601). The Commission thus "agree[d] with courts that have considered 'the cumulative effect of future similar municipal [fee ordinances]' across a broad geographic area when evaluating the effect of a particular fee in the context of Section 253(a)." *Small Cell Order* ¶ 64 (RER 155) (emphasis omitted); *see, e.g.*, *Guayanilla II*, 450 F.3d at 17–18 (considering the aggregate effect that a municipal fee would have statewide, "[g]iven the interconnected nature of utility service across communities" and the likelihood that "other municipalities will follow [its] lead").

iii. Abundant record evidence supports the Commission's conclusion that inflated fees are impeding small cell deployment in many jurisdictions.

For example, AT&T reports that it "has not deployed any small cell sites in Portland, Oregon"—one of the lead Petitioners here—"due to its annual recurring [right-of-way] access fee of $7,500 per node [i.e., small cell site] plus annual recurring fee[s] to attach to city-owned infrastructure in the [right-of-way] in the amount of $5,500 per node downtown/$3,500 per node in other areas of the City." AT&T 8/10/18 Letter 1 (RER 605). Verizon likewise reports that "Portland wants to charge between $1,200 and $3,500/pole/year and annual right-of-way fees as high as $7,500, resulting in minimal small cell deployment." Verizon 8/10/18 White Paper 9 (RER 618).

AT&T described multiple other examples where it has been forced to cancel, reduce, or delay small cell deployments due to inflated fees:

- In Lincoln, Nebraska, AT&T reports that it "has paused its 2018 small cell deployment plans in large part due to the city's demand for an annual recurring fee of $1,995 per node." AT&T 8/6/18 Letter 2 (RER 599). It further reports that, as a

direct result of high fees and other obstacles to deploying small cells in Lincoln, Omaha, and other Nebraska cities, "AT&T has for now focused more of its small cell operational resources in the region on Des Moines and other Iowa communities, where cost-based fees and other predictable benefits of small cell legislation have created a more favorable environment for small cell deployments." AT&T 8/10/18 Letter 1 (RER 605); *see also* Verizon 8/10/18 White Paper 8–9 (RER 617–18) (reporting that Verizon has likewise forgone deployment in Lincoln and increased deployment in Des Moines due to differences in fees).

- In Oakland, California, "AT&T is at an impasse after nine months of negotiations with the city for an initial deployment of about 60 nodes due to the city's demand for [a] recurring rate of $2300 per node." AT&T 8/6/18 Letter 2 (RER 599).
- In Escondido, California, "AT&T reduced its deployment plans from 98 nodes to approximately 25 nodes" due to "the city's annual recurring fee of $1,650 per node" and related requirements. *Id.* at 3 (RER 600).

- In Lowell, Massachusetts, "AT&T has limited its small cell build to only the few most capacity constrained locations due to the city's demand for a nonrecurring fee of $20,000 and an annual recurring fee of $6,000." *Id.*
- AT&T likewise paused deployments in another California city and three large Maryland jurisdictions due to inflated fees. *See id.* (Citrus Heights, California); *id.* at 2 (RER 599) (Baltimore City, Howard County, and Montgomery County, Maryland).

Another commenter, Crown Castle, reports that it had to reevaluate a planned deployment in Newport Beach, California, after the city demanded excessive fees to use city-owned poles in the right-of-way. Crown Castle Wireless Comments 11 (RER 386). Crown Castle similarly reports that for more than three years it was unable to proceed with a 23-node small cell deployment in Dallas, Texas, because the city demanded a $2,500 annual node fee, even after the company repeatedly "explain[ed] to city staff that the proposed fee was not economically viable." Crown Castle 8/10/18 Letter 3–4 (RER 609–10). Likewise, Sprint reports that "due to the higher costs and longer delays in Los Angeles County, Sprint has yet to activate a single small cell in that jurisdiction,"

whereas it has deployed more than 500 small cells in a neighboring jurisdiction where fees are lower. Sprint 8/13/18 Letter 1–2 (RER 620–21); *see Small Cell Order* ¶ 61 & n.179 (RER 152–53). The record contains numerous other examples of localities demanding fees that exceed any reasonable approximation of actual costs, to the detriment of wireless deployment.[14]

b. Inflated fees in must-serve areas also indirectly impede or delay deployment in other areas.

In addition to finding that fees that exceed the actual costs localities must incur directly impede new deployment, the Commission found as "an additional, independent justification" that such "fees in one place of deployment necessarily have the effect of reducing the amount of capital that providers can use to deploy infrastructure elsewhere." *Small Cell Order* ¶ 60 (RER 151). Because wireless carriers have limited capital budgets available to spend on new deployment each year, smaller and more rural areas often must wait years before carriers have the resources

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[14] *See*, *e.g.*, AT&T Wireless Comments 17–19 (RER 367–69); Crown Castle Wireless Comments 10–20 (RER 385–95); CTIA Comments Attach. 1, at 15–16 (RER 426–27); Mobilitie Comments Attach. 1, at 14–19 (RER 453–58); T-Mobile Comments Attach. B, at 4–6 (RER 490–92); Verizon Wireless Comments 6–7 (RER 495–96); Wireless Infrastructure Ass'n Comments Attach. 1, at 18–22 (RER 510–14).

available to fund new deployment in those areas, even when it would be profitable to do so. For this reason, local officials from small and rural jurisdictions across the country urged the Commission to recognize that inflated fees in large, urban, must-serve areas prevent or delay deployment in other areas. *Id.* ¶¶ 5–6 & n.5 (RER 122–23); *id.* ¶ 28 & nn.67–69 (RER 132); *id.* ¶ 64 & nn.190–195 (RER 154–55).[15]

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[15] *See*, *e.g.*, Sheriff Fred A. Lamphere 9/11/18 Letter 1 (RER 654) ("Reducing development costs will particularly benefit rural areas such as Butte County by freeing up more investment capital which will then be available for those areas."); Chairman Jeff Bohm 8/22/18 Letter 1 (RER 625) ("Smaller communities such as those located in St. Clair County would benefit by having the Commission reduce the costly and unnecessary fees that some larger communities place on small cells as a condition of deployment."); Wallowa Cty. Comm'rs 8/20/18 Letter 1 (RER 623) ("[D]ecreasing the cost of urban deployment will indirectly promote more rural investment, because the capital that is no longer diverted toward buildout in urban areas is available for investment in rural areas."); Rep. Terry Alexander 8/7/18 Letter 1 (RER 603) ("[I]f the investment that goes into deploying 5G on the front end is consumed by big, urban areas, it will take longer for it to flow outward[] in the direction of places like Florence."); Sen. Duane Ankney 7/31/18 Letter 1 (RER 593) ("[T]he problem is[] that most of investment capital is spent in the larger urban areas. . . . This leaves the rural areas out. . . . [R]educing the high regulatory costs in the urban areas would leave more dollars to development in the rural areas."); Comm'r Sal Pace 7/30/18 Letter 2 (RER 592) ("The FCC should take steps this year to ensure capital is being invested in deploying broadband, not being spent on burdensome regulations that make investing in higher cost areas, particularly in rural America, less feasible."); Elder Alexis D. Pipkins, Sr. 7/26/18 Letter 1 (RER 590) ("[I]nstead of each city or state for itself,

The record in this proceeding "is replete with evidence that providers have limited capital budgets that are constrained by state and local fees." *Small Cell Order* ¶ 61 (RER 152). These capital constraints are especially significant for wireless carriers providing nationwide service, because these carriers "must consider the cumulative effects of state or local fees on service in multiple geographic areas that [they] serve or potentially would serve." *Id.* ¶ 62 (RER 153). Even if the additional fees charged in any single locality are low, "the aggregate effects of fees imposed by individual localities" across a carrier's service area would substantially "constrain[] [its] resources for entering new markets or introducing, expanding, or improving existing services." *Id.* The record contains numerous submissions from wireless carriers attesting that capital constraints have delayed, reduced, or prevented new deployment. *Id.* ¶ 65 (RER 156).[16]

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we should be working towards aligned, streamlined frameworks that benefit us all. If we take that approach, investment will more easily flow from one community to the next, and the smaller, rural communities in South Carolina, for example, won't be stuck in line as long while larger communities elsewhere monopolize resources.").

[16] *See*, *e.g.*, Uniti Fiber 10/30/17 Letter 5 (RER 532); Verizon 6/21/18 Letter 2 (RER 588); AT&T 8/6/18 Letter 2 (RER 599); Crown Castle 8/10/18 Letter 2 (RER 608); Verizon 8/10/18 Letter 3 (RER 615); Mobilitie 9/12/18 Letter 2 (RER 656).

When must-serve areas charge inflated fees, they deprive carriers of capital that the carriers could profitably reinvest in other areas where they must otherwise delay or forgo new deployment due to capital constraints. *See Small Cell Order* ¶ 60 n.168 (RER 151) (the "amount of [capital] resources" available for a carrier to invest increases as it "earns a profit above [its] costs"). Thus, "where it is essential for a provider to deploy in a given area, the fees charged in that geographic area can deprive providers of capital needed to deploy elsewhere, and lead to reduced or forgone near-term deployment of Small Wireless Facilities in other geographic areas." *Id.* ¶ 65 (RER 156).

The Local Government Petitioners argue (Br. 65–68) that, in theory, a carrier's decision whether to invest in new deployment should turn solely on whether the expected return from that deployment exceeds its expected cost, so the decision whether to invest in one area should in theory be unaffected by the carrier's costs elsewhere. But that simplistic view ignores that deploying wireless facilities requires a substantial up-front investment that takes many years to recover, and that carriers have limited capital budgets available to invest at any given time, so carriers must prioritize their investments and often must delay or forgo new

deployment in many areas—even when this new deployment would be profitable—because they lack sufficient capital to deploy everywhere at once.

Even assuming that wireless carriers "rationally would account for anticipated revenues [that will be generated by] planned facilities deployment," the Commission explained, "the record does not reveal—nor [is there] any basis to assume—that such revenues would be so great as to eliminate constraints on providers' capital budgets so as to enable full development notwithstanding the level of state and local fees." *Small Cell Order* ¶ 61 n.172 (RER 152). Petitioners thus appear to miss the Commission's point that inflated fees in must-serve areas effectively reduce carriers' available capital, and thereby prevent or delay deployment in other (mostly rural) areas, because these fees deprive carriers of revenues that could otherwise be profitably reinvested in those areas.[17]

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[17] To be clear, the problem is not that investment in rural areas is "unprofitable" or "unattractive" (Local Gov't Br. 66–67), but rather that (as the record reflects) carriers often must delay or forgo new deployment in rural areas *even when it would be profitable to do so* because they are constrained in how much capital they have available to invest at any given time.

2. The Commission reasonably concluded that Section 253(c) does not protect small cell fees that exceed the actual costs a locality must incur.

The Commission also reasonably concluded that state and local governments are not authorized to charge inflated fees under Section 253(c), which provides that "[n]othing in this section affects the ability of a State or local government . . . to require fair and reasonable compensation from telecommunications providers . . . for use of public rights of way." 47 U.S.C. § 253(c). That is so for two independent reasons. First, fees that are not tied to actual costs that a locality incurs in the right-of-way are not compensation "for use of" the right-of-way, and thus fall entirely outside Section 253(c). Second, the Commission reasonably interpreted the "fair and reasonable compensation" that localities may recover to mean all of the actual costs they must incur, but not to entitle them to demand additional fees above that amount. Petitioners offer no sound reason to disturb those conclusions.

a. As a threshold matter, the Commission reasonably concluded that fees that do not correspond to the actual costs or burdens of small cells on the right-of-way "are not a function of the provider's 'use' of the public [right-of-way]," and therefore "are not 'fair and reasonable compensation . . . for *use* of the public rights-of-way' under Section

253(c)." *Small Cell Order* ¶ 76 (RER 161). By its terms, Section 253 does not simply ask whether a fee is "fair and reasonable" in the abstract, but instead asks whether it is fair and reasonable in relation to a provider's "use" of the right-of-way. The Commission's interpretation "is consistent with court decisions interpreting the 'fair and reasonable' compensation language as requiring [that] fees charged by municipalities relate to the degree of actual use of a public [right-of-way]." *Id.* ¶ 76 n.225 (RER 161); *see, e.g.*, *P.R. Tel. Co. v. Mun. of Guayanilla*, 354 F. Supp. 2d 107, 112–13 (D.P.R. 2005) (Section 253(c) "requires that [fees] be directly related to the actual use of the public rights-of-way and the resulting costs from such use"), *aff'd*, 450 F.3d 9 (1st Cir. 2006); *Maryland Heights*, 256 F. Supp. 2d at 993–94 (collecting cases).

The Local Government Petitioners offer no response to this point, and that alone suffices to defeat their argument that Section 253(c) entitles them to charge fees that do not correspond to any reasonable approximation of the actual costs they must incur.

b. Independently, the Commission reasonably concluded that "an appropriate yardstick for 'fair and reasonable compensation' . . . is whether [the fee] recovers a reasonable approximation of a state or local government's objectively reasonable costs" for use and maintenance of

the right-of-way. *Small Cell Order* ¶ 72 (RER 158). Congress did not define what it meant by fair and reasonable compensation, but because "Congress has unambiguously vested the FCC with general authority to interpret and administer the Communications Act through rulemaking and adjudication," and the Commission must apply this provision when carrying out its responsibilities under Section 253(d), Congress necessarily delegated responsibility to the Commission to adopt a reasonable interpretation of this provision. *See City of Arlington v. FCC*, 569 U.S. at 305–07.

In doing so, the Commission recognized that cost-based fees are a familiar and well-accepted method of determining fair compensation for critical infrastructure. *See Small Cell Order* ¶ 73 n.217 (RER 159–60). By contrast, the Commission reasoned, it is "unlikely that Congress would have left providers entirely at the mercy of effectively unconstrained requirements of state or local governments." *Id.* ¶ 74 (RER 160). "Plainly, a fee that does more than make a municipality whole is not compensatory in the literal sense, and risks becoming an economic barrier to entry"—precisely the danger that Section 253 was meant to eliminate. *N.J. Payphone Ass'n Inc. v. Town of West N.Y.*, 130 F. Supp. 2d 631, 638 (D.N.J. 2001), *aff'd*, 299 F.3d 235 (3d Cir. 2002). The

Commission therefore reasonably "interpret[ed] the ambiguous phrase 'fair and reasonable compensation' . . . to allow state or local governments to charge fees that recover a reasonable approximation of [their] actual and reasonable costs." *Small Cell Order* ¶ 72 (RER 158).[18]

As the Commission explained, "while it might well be fair for [wireless carriers] to bear basic, reasonable costs of entry, the record does not reveal why it would be fair or reasonable . . . to require them to bear costs beyond that level." *Small Cell Order* ¶ 55 (RER 149). The *Small Cell Order* permits localities to recover every cent of the actual costs they must incur—including the costs of reviewing applications and issuing permits,

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[18] The Local Government Petitioners insist (Br. 54–56) that Section 253(c) must be read to allow some fees that are forbidden by Section 253(a). In effect, they would read subsection (c) as if it began "Notwithstanding subsection (a) . . ." or "A measure that otherwise violates subsection (a) shall be permitted if . . . ." But the actual statutory language—"Nothing in this section affects . . ."—need not be read that way. The Commission reasonably took a different approach to reconciling these sibling provisions by reasoning that, with respect to state and local fees, the conditions set forth in subsection (c) describe the outer bounds of what fees are preempted as an effective prohibition under subsection (a). *See Small Cell Order* ¶¶ 53–54 (RER 147–48). This interpretation harmonizes the neighboring subsections so that they do not come into conflict, and it is equally consistent with the actual language of Section 253(c). Even if the statute could be read differently, or might be applied differently in other contexts, the Commission's application of these provisions to state and local fees was a reasonable, consistent, and permissible interpretation of the statutory text.

the costs of access to and maintenance of rights-of-way, and costs arising from use and maintenance of government structures in the right-of-way. *See Small Cell Order* ¶ 32 n.71 (RER 133); *id.* ¶¶ 50, 72, 75 (RER 145–46, 158, 160). But Section 253(c) does not give localities an unfettered right to use "high fees . . . to subsidize local government costs in another geographic area or accomplish some public policy objective beyond the providers' use of the [right-of-way]." *Id.* ¶ 76 (RER 161).

Allowing localities to recover the full amount of all actual costs they must incur (but not more) does not result in localities' "subsidizing" carriers, as some localities contend. *See Small Cell Order* ¶ 73 n.216 (RER 159). On the contrary, the Commission's robust support for full recovery of a locality's costs ensures that localities will not need to incur losses for any facilities they authorize. This "approach to compensation ensures that cities are not going into the red to support or subsidize the deployment of wireless infrastructure." *Id.* ¶ 73 (RER 160); *see also id.* ¶ 80 (RER 163) ("Allowing localities to charge fees above these levels . . . recognizes local variances in costs."); *id.* ¶ 80 n.235 (RER 163) ("We emphasize that localities may charge fees to recover their objectively reasonable costs and thus reject arguments that our approach requires

localities to bear the costs of small cell deployment.").[19]

c. The Local Government Petitioners complain (Br. 56–60) that the Commission is preventing them from charging a market-based rent, but there is no competitive "market" for use of public rights-of-way. Nor do carriers have viable market alternatives, because other locations generally lack comparable access to important resources like fiber backhaul, adequate power supply, 360-degree line of sight unobstructed by buildings or other obstacles that could block or degrade wireless signals, and a contiguous pathway where a series of small cells can be located. *See Small Cell Order* ¶ 97 (RER 171) (rights-of-way "are often

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[19] The Local Government Petitioners are incorrect (Br. 108–09 & n.50) that the *Small Cell Order* forbids them from recovering the cost of capital; the Commission said nothing of the sort. On the contrary, the Commission stressed that its interpretations here were "consistent with prior Commission action" where the cost of capital could be included in cost calculations, just like any other cost, and with court decisions recognizing that the Commission "provid[ed] for the recovery of . . . the actual cost of capital." *Small Cell Order* ¶ 73 n.217 (RER 159) (internal quotation marks omitted). The Local Government Petitioners also complain that there is "no clear mechanism for recovery of court costs" (Br. 73), but again, nothing in the *Order* forecloses localities from seeking to recover whatever actual costs they must incur; in any event, "the expense and annoyance of litigation is 'part of the social burden of living under government'" when necessary to resolve a dispute, *Petroleum Exploration, Inc. v. Pub. Serv. Comm'n*, 304 U.S. 209, 222 (1938), and localities are unlikely to be sued if they can produce evidence of the actual costs on which their fees are based.

the best-situated location" for wireless facilities); *In re Petition of the State of Minnesota*, 14 FCC Rcd. 21697, 21709–14 ¶¶ 23–29 (1999) (*Minnesota Preemption Order*) (recognizing the limited practical alternatives to certain rights-of-way); Mobilitie Comments Attach. 1, at 11–12 (RER 450–51) (explaining why access to rights-of-way is "essential" for next-generation networks).

What the Local Government Petitioners really seek is not *market* pricing, but *monopoly* pricing. *See White Plains*, 305 F.3d at 79 ("Section 253(c) requires compensation to be reasonable essentially to prevent monopolistic pricing by towns," because "[w]ithout access to local government rights-of-way," telecommunications service "is generally infeasible, creating the danger that local governments will exact artificially high rates.").[20] Indeed, the record here demonstrates that

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[20] *See also*, *e.g.*, Mobilitie Comments Attach. 3, at 2–3 (RER 471–72) ("The data illustrate that many localities are leveraging the growing demand for [right-of-way] access and their monopoly control over that access to extract monopoly rents. . . . Some localities assert they are simply setting fees at 'market,' but there is no free market for [right-of-way] access. The record information as to fees confirms that localities exercise monopoly control over [rights-of-way] and setting fees."); AT&T 8/6/18 Letter 2 (RER 599) ("[T]he faulty premise [of localities' arguments is] that they are matching the so-called 'market rate' demanded by the large cities. In reality, there is no competitive 'market' for [right-of-way] access, as municipalities have a monopoly over [rights-of-way] and municipally-owned [right-of-way]

market forces have been insufficient to ensure reasonable prices. *Small Cell Order* ¶ 74 n.219 (RER 160). Nothing in Section 253(c) requires the Commission to tolerate that approach, and the Commission reasonably declined to do so.

The Local Government Petitioners also point (Br. 57–59) to different state and local statutes, addressing a different industry, that provide for revenue-based franchise fees. But the fact that other statutory schemes authorize revenue-based fees does not suggest that Congress authorized local governments to do so under Section 253(c), which instead ensures localities only "fair and reasonable compensation," or that the Commission is restricted in how it interprets that ambiguous term. If anything, these examples serve only to undermine Petitioners' position, because they demonstrate that Congress knows how to authorize localities to charge higher fees but did not do so here.

Lacking support in the statutory text, the Local Government Petitioners seek to rely (Br. 63–65) on legislative history supposedly

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infrastructure; these are monopoly rates."); Verizon 8/10/18 White Paper 2 (RER 614) ("state and local governments control an essential input to providing telecommunications—access to rights-of-way and poles within those rights of way"—so "cost-based rates [are needed] to constrain the monopoly power of those entities that control an essential resource").

indicating that some members of the House of Representatives wished to permit localities to charge rent-based fees. But these selective snippets of legislative history do not compel the Commission to adopt such an expansive reading of Section 253(c). To begin with, Petitioners err in relying on statements from "debate in the House of Representatives" (Local Gov't Br. 63) because Congress adopted the *Senate*, not the House, version of Section 253. *See* S. Rep. No. 104-230, at 127 ("The conference agreement adopts the Senate provisions."). And the Senate debate over Section 253 centered on whether localities could require "fees to recover an appropriate share of increased street repair and paving costs that result from repeated excavation"—which instead supports the Commission's view that Section 253(c) should be understood to mean cost recovery. 141 Cong. Rec. S8170 (daily ed. June 12, 1995) (statement of Sen. Feinstein); *id.* at S8172 (quoting Letter from Office of City Attorney, City and County of San Francisco); *see Maryland Heights*, 256 F. Supp. 2d at 994.

More tellingly, even if some individual legislators wanted to preserve an unfettered right "to set the compensation level" or impose "gross revenue assessments" or assess "rent-based fees" (Local Gov't Br.

64–65), that is not the language Congress used in Section 253(c). Instead, Congress used the phrase "fair and reasonable," and it is well established that the Commission is responsible for determining how best to interpret such ambiguous phrases in the Communications Act. *See City of Arlington*, 569 U.S. at 305–07; *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). The unenacted wishes of a few individual legislators offer no basis to overturn the Commission's reasonable exercise of its delegated responsibility.

3. The Commission's limited safe harbor is also reasonable.

Finally, the Commission recognized a safe harbor for fee levels as to which litigation would serve no useful purpose. Fee amounts within that safe harbor are presumptively lawful. *See Small Cell Order* ¶¶ 78–80 (RER 162–63). But contrary to the Local Government Petitioners' repeated statements (Br. 70–76), there is *no* presumption that fee amounts outside the safe harbor are impermissible or preempted. A *safe harbor* is not a *ceiling*.

As the Commission explained, the purpose of the safe harbor is only to "avoid unnecessary litigation" by identifying fee amounts so likely to pass muster that there should be "almost no litigation by providers over

fees set at or below these levels."[21] *Small Cell Order* ¶¶ 32, 80 (RER 133, 163). A safe harbor is not meant to cover every possible circumstance, nor to encompass all fee levels that might be permissible; instead, it simply recognizes a threshold beneath which fees can reasonably be assumed to pass muster, such that litigating them would serve no useful purpose. Some local fees may comply with Sections 253 and 332(c)(7) and yet fall outside the Commission's safe harbor. But that does not make the safe harbor irrational; it reflects that permissible fees may sometimes exceed the threshold beneath which it is safe to presume they are lawful.

Nor do the safe harbors adopted in the *Small Cell Order* constitute a one-size-fits-all "limit" on permissible fees. On the contrary, the Commission repeatedly made clear that "state or local fees that exceed these levels may be permissible if the fees are based on a reasonable approximation of costs" that the locality must incur. *Small Cell Order* ¶ 80 n.234 (RER 163); *see also id.* ¶ 32 (RER 133–34) ("[F]ees above those

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[21] The presumptively reasonable fee levels identified by the Commission, based on a comprehensive review of the record and the Commission's expert policy judgment, were "[i]nformed by . . . information from a range of sources," *Small Cell Order* ¶ 78 (RER 162), including fee levels prescribed in "[m]any different state small cell bills" adopted in states with varying population densities and costs of living, *id.* ¶ 79 n.233 (RER 162).

levels would be permissible under Sections 253 and 332 to the extent a locality's actual, reasonable costs . . . are higher."); *id.* ¶ 80 n.235 (RER 163) ("We emphasize that localities may charge fees to recover their objectively reasonable costs and thus reject arguments that our approach . . . applies a one-size-fits-all standard."). Similarly, that fee levels within the safe harbor are presumed lawful does not logically imply that fees *outside* the safe harbor are presumptively *un*lawful; there is no thumb on the scale against higher fees.

In any event, even if the Local Government Petitioners were correct that the *Small Cell Order* creates a presumption against higher fees, such a presumption would be lawful for the same reasons as the presumptive time limits upheld in *City of Arlington v. FCC*, 668 F.3d 229, 256–57 (5th Cir. 2012), *aff'd*, 569 U.S. 290 (2013). As the Fifth Circuit explained, the "effect of a presumption in a civil proceeding" is merely to require a party to produce some "evidence sufficient to support a finding contrary to the presumed fact." *Id.* at 256. At most, then, a locality would bear only a nominal burden of production to offer evidence showing that its fees are reasonably related to actual costs it must incur. At that point "the presumption evaporates," and at all times "[t]he burden of persuasion with respect to the ultimate question at issue remains with the party on

whom it originally rested." *Id.* Because "the ultimate burden of persuasion remains with the wireless facilities provider" to prove that the fees exceed a reasonable approximation of a locality's actual costs, any presumption would be consistent with the statutory scheme. *Id.* at 257.

C. Unascertainable aesthetic restrictions effectively prohibit small cell deployment.

In addressing the effect of aesthetic restrictions on the deployment of small cells—mandatory paint colors or minimum spacing requirements, for example—the Commission recognized that state and local governments have an interest in ensuring that these facilities are not "out of step with similar, surrounding deployments," *Small Cell Order* ¶ 84 (RER 164), including "in historic districts," *id.* ¶ 12 (RER 124). "[R]easonable aesthetic considerations," the agency underscored, "do not run afoul of Sections 253 and 332." *Id.*; *see also id.* ¶ 87 (RER 165) ("[A]esthetic requirements . . . reasonably directed to . . . unsightly or out-of-character deployments are . . . permissible.").

At the same time, the Commission acknowledged concerns that some localities have applied undisclosed or unduly vague aesthetic requirements that deprive carriers of the ability to conform their small cell applications to a predictable set of rules. *See Small Cell Order* ¶ 84

(RER 163–64). And in some instances, the Commission found, localities have applied such restrictions only to small cell applicants, and not to providers of competing services using similar equipment in similar circumstances. *See id.*

As we have explained, small cell networks rely on a far greater density of facilities than traditional networks, and providers must build them out, to support existing and next-generation services, at a significantly faster pace than has previously been required. *Small Cell Order* ¶¶ 3, 28, 47–48 (RER 122, 132, 144–45). The aggregate effect of restrictions on small cell deployment is thus far greater than for restrictions on the deployment of traditional infrastructure. *See id.* ¶¶ 48, 87 (RER 145, 165). Taking account of that cumulative impact, the Commission found that aesthetic restrictions on small cells effectively prohibit the provision of service 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 (RER 165).

The agency's view reflects a reasonable understanding, well founded in the record, of how Sections 253 and 332(c)(7) apply in the context of small cells. As the Commission recognized, "unduly vague or

subjective [aesthetic] criteria that may apply inconsistently to different providers or are only fully revealed after application[] mak[e] it impossible for providers to take these requirements into account in their planning." *Small Cell Order* ¶ 84 (RER 164). "Providers cannot design or implement rational plans for deploying [small cells] if they cannot predict in advance what aesthetic requirements they will be obligated to satisfy to obtain permission to deploy a facility at any given site." *Id.* ¶ 88 (RER 165).

1. The record supports the Commission's findings concerning aesthetic restrictions.

The Commission's concern was amply supported in the record. *See, e.g.*, Crown Castle Wireline Comments 53 (RER 411) (complaining of frequent "situations where there is no clear articulation of what the local government requires," and "where the local government either refuses to follow its own requirements or arbitrarily changes them as applied to Crown Castle"); AT&T Wireless Comments 17 (RER 367) (aesthetic requirements "are vague and often applied discriminatorily . . . only to equipment of licensed wireless providers, [and] not to other utility equipment, including wireless equipment of cable providers"); Wireless Infrastructure Ass'n Comments Attach. 2, at 9 (RER 516) ("Reflecting a general opposition to new technology or wireless facilities in general,

local governments refuse to follow their own standard right-of-way process and will essentially make up the process on an *ad hoc* basis, changing the demands during the process.").

As one example, the Wireless Industry Association cited "the Town of Hempstead, New York," which it asserted had "recently objected to multiple applications submitted by [one of its] member[s] to collocate [small cell facilities] on existing utility poles in the right-of-way." Wireless Infrastructure Ass'n Comments Attach. 2, at 9–10 (RER 516–17). According to the Association, although its member had already deployed 150 substantially similar small cell facilities in the same town, the town newly asserted in connection with the proposed facilities "that the use of concealment technology [was] required to minimize . . . adverse aesthetic and visual impacts." *Id.* at 10 (RER 517). In another example, the City of Newport News, Virginia, abruptly changed the requirements for small cell installations for which Crown Castle had already received permits and had already constructed—without applying equivalent requirements to local utility equipment that was "similar in size and sometimes larger." *Crown Castle NG Atl. LLC v. City of Newport News*, No. 4:15CV93, 2016 WL 4205355, at *13 (E.D. Va. Aug. 8, 2016); *see* Wireless Infrastructure Ass'n Comments Attach. 2, at 14–15, 34 (RER

508–09, 524). And in the experience of T-Mobile, "eighty percent of jurisdictions . . . treat [Distributed Antenna Systems] and small cell deployments on poles in [rights-of-way] differently than they treat similar installations by landline, cable, or electric utilities." T-Mobile Comments 10 (RER 485).[22]

Several commenters asserted that "fears of [radiofrequency] emissions," which under Section 332(c)(7)(B)(iv) are an impermissible basis for state or local siting decisions, "are a significant driver of local

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[22] *See also* AT&T 8/6/18 Letter 3 (RER 600) ("Some municipalities require carriers to paint small cell cabinets a particular color when like requirements were not imposed on similar equipment placed in the [right-of-way] by electric incumbents, competitive telephone companies, or cable companies."); Crown Castle Wireless Comments 14–15 (RER 389–90) (complaining of aesthetic restrictions that the City of San Francisco imposed "[n]otwithstanding significant negotiations and proposed accommodations," and "even though similar (and larger) designs were approved by the City for Crown Castle installations at other locations"); *id.* at 19 (RER 394) ("In response to Crown Castle's applications for the installation of fiber optics and small cell [facilities], one city required Crown Castle to participate in a 'pilot program' under which it had to provide drawings for specific locations and construct a custom-designed pole . . . ."); Wireless Infrastructure Ass'n Comments Attach. 1, at 14–15 (RER 508–09) ("[O]ne Chicago suburb attempted to revoke a . . . member's already-granted right-of-way permit because [the suburb] did not have a policy or procedure in place for small wireless facilities in particular. . . . Several members have experienced multi-year ordeals where local governments have repeatedly changed the rules mid-stream.").

scrutiny [of] and opposition to small wireless facilities." Wireless Infrastructure Ass'n Comments Attach. 2, at 34 (RER 524). For example, Crown Castle informed the Commission that the Town of Oyster Bay, New York, revoked months-old permits for 22 small cell nodes that Crown Castle had already begun installing "[a]s a result of the outcry of citizens based on unfounded fears over health risks from radiofrequency radiation." Crown Castle Wireless Comments 13 (RER 388).

Arguing that providers have succeeded in deploying small cells in some jurisdictions that impose aesthetic restrictions, *see* Local Gov't Br. 86–87, 91 n.35, Petitioners challenge the Commission's view that unascertainable "aesthetic standards prohibit or effectively prohibit [small cell] deployments," *id.* at 86; *see Small Cell Order* ¶ 86–88 (RER 165–66). But Petitioners have not shown that the examples they identify are anything other than reasonable, ascertainable aesthetic requirements that satisfy the *Small Cell Order*.

In any event, the record shows that small cell deployments to date are merely the front end of the wave anticipated in the coming years. *See Small Cell Order* ¶ 47 (RER 145) ("AT&T estimates that providers will deploy hundreds of thousands of wireless facilities in the next few years alone—equal to or more than the number [that] providers have deployed

in total over the last few decades. . . . Accenture estimates that, overall, during the next three or four years, 300,000 small cells will need to be deployed—a total that it notes is 'roughly double the number of macro cells built over the last 30 years.'"). Petitioners' contention that providers have already succeeded in deploying some small cells does not undermine the Commission's finding that, if localities continue to impose undisclosed or unduly vague aesthetic restrictions, providers will be unable to deploy the hundreds of thousands of small cells now urgently needed.

2. The Commission's approach is consistent with the text and purposes of Section 332(c)(7).

Far from instituting a uniform national zoning policy, *see* Local Gov't Br. 91, the Commission recognized that "different aesthetic concerns may apply to different neighborhoods" and localities, *Small Cell Order* ¶ 88 n.247 (RER 165); *see id.* ¶¶ 12, 85 (RER 124, 164–65). Any requirement for small cells that is "technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments" will be "reasonable" under the terms of the *Order*. *Id.* ¶ 87 (RER 165). But localities run afoul of the *Order* if they apply those requirements in an unreasonably discriminatory manner or

fail to publish them in advance, as providers require to plan their small cell deployments. *Id.* ¶ 86 (RER 165).

Contrary to Petitioners' assertions (Local Gov't Br. 87–91), the Commission's test for permissible aesthetic requirements implements limitations that Congress itself provided in Section 332(c)(7)(B)(i). As Petitioners acknowledge, Section 332(c)(7)(B)(i)(I) "contains an express prohibition on 'unreasonable discriminat[ion]' among functionally equivalent service providers." Br. 88. The agency's determination that aesthetic requirements for small cells should not be "more burdensome than those that the state or locality applies to similar infrastructure deployments" in analogous circumstances, *Small Cell Order* ¶ 87 (RER 165), is fully consistent with that requirement.

There is likewise no basis for Petitioners' challenge (Local Gov't Br. 89–90) premised on the statutory requirement that denials of wireless applications be "in writing." 47 U.S.C. § 332(c)(7)(B)(iii). That requirement serves to ensure that localities explain their siting decisions once made, so as to permit judicial review. By contrast, the *Small Cell Order*'s publication requirement ensures that localities provide sufficient information for wireless providers to "predict in advance what aesthetic requirements they will be obligated to satisfy." *Id.* ¶ 88 (RER 165).

Without that information, the Commission reasonably determined that small cell deployments will be effectively prohibited within the meaning of Sections 253(a) and 332(c)(7)(B)(i)(II).

3. Petitioners overstate the burdens of compliance.

a. Contrary to the Local Government Petitioners' suggestion (Br. 89), the Commission's interpretation that aesthetic requirements must be "objective and published in advance" does not require localities to "prescribe in detail every specification to be mandated for each type of structure in each individual neighborhood."[23] *Small Cell Order* ¶ 88 n.247 (RER 165–66). The *Small Cell Order* prescribes only that requirements be published in advance, so that providers may consult them, with a "sufficiently clear level of detail as to enable providers to design and propose their deployments in a manner that complies with those standards." *Id.*

b. Contrary to Petitioners' claim, the *Small Cell Order* also does not improperly impose "a nationwide vested rights doctrine." Br. 90.

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[23] The Commission also did not prevent localities from developing site-specific aesthetic requirements, including to protect environmental or historical sites, Local Gov't Br. 93–94, so long as any such requirements are reasonable, applied in a nondiscriminatory way, and ascertainable in advance, *Small Cell Order* ¶ 86 (RER 165).

To combat the "harsh result" of retroactively applying new regulations to parties that have already submitted land-use applications or received permits, some states and localities have adopted "vested rights" laws. *Davidson v. Cty. of San Diego*, 49 Cal. App. 4th 639, 646 (1996) (cited at Local Gov't Br. 90). At least as a general matter, such laws only reinforce the principles articulated in the *Small Cell Order*, and the *Order* thus does not displace them.[24]

It is true that, under the *Small Cell Order*, localities may not claim unfettered discretion to apply new or shifting aesthetic requirements for small cells to providers whose applications are already pending. But if that amounts to a federal vested rights doctrine, there was nothing improper about imposing it. The principles that aesthetic restrictions on small cells "must be published in advance," and "applied in a principled manner," *Small Cell Order* ¶ 88 (RER 165), follow from the Commission's determination that numerous, coordinated small cell deployments are

[24] For example, a local ordinance gave the plaintiff in *Davidson* a "vested right to have [his] building permit application reviewed and considered in light of the regulations existing on the date of application." 49 Cal. App. 4th at 648. San Diego County could not lawfully impair that right, the California Court of Appeal held, without showing that doing so was "directly related to danger or potential danger to the health and safety of the public." *Id.* at 649; *see also id.* at 650 (routine zoning regulations are unlikely to meet that standard).

effectively prohibited when providers cannot foretell the aesthetic requirements they must satisfy. And as we have explained, that determination reflects a reasonable application of Sections 253(a) and 332(c)(7).

c. Finally, there is no substance to Petitioners' claim (Local Gov't Br. 92) that the *Small Cell Order* frustrates their supposed interest and investment in undergrounding requirements. The *Order* applies only to small wireless facilities. And as the Commission explained, wireless antennas necessarily cannot be deployed underground (because wireless signals are transmitted over the air and cannot pass through the ground). *See Small Cell Order* ¶ 90 (RER 166). The Commission's determination that undergrounding requirements for small cells would effectively prohibit the deployment of those facilities is thus fully consistent with this Court's recognition of the same point in *Sprint Telephony*. *See* 543 F.3d at 580 (plaintiff could demonstrate effective prohibition from a local undergrounding ordinance by showing that "wireless facilities must be above ground"). And the *Small Cell Order* does not purport to foreclose undergrounding requirements for other facilities, so long as those requirements would not materially inhibit providers' ability to compete in a fair and balanced regulatory environment.

D. Failing to act on small cell applications in a timely manner violates the "reasonable period of time" requirement and, in addition, effectively prohibits small cell deployment.

1. The Commission reasonably adopted new shot clocks tailored to small cell deployments.

It is well established that the Commission has authority to adopt presumptive shot clocks to implement Section 332(c)(7)(B)(iv)'s "reasonable period of time" requirement. *See, e.g.*, *Small Cell Order* ¶¶ 104–105 & n.300, 117 (RER 175–76, 181); *City of Arlington*, 668 F.3d at 247–52, *aff'd*, 569 U.S. at 305–07. In addition, the *Small Cell Order* explains, failing to act on small cell applications in a timely manner has the effect of prohibiting small cell deployment under Section 332(c)(7)(B)(i)(II). *Small Cell Order* ¶¶ 118–119 (RER 181–82). To implement each of these two provisions, the Commission reasonably adopted two new shot clocks for small cells. *Id.* ¶¶ 104–112 (RER 175–80).

These new shot clocks—60 days for a small cell deployed on an existing structure, 90 days for a small cell deployed using a new structure—represent only a modest change from the Commission's preexisting rules that courts have repeatedly upheld. Requests to deploy small cells on structures built for the primary purpose of supporting wireless equipment were *already* subject to an unrebuttable 60-day shot

clock. *See Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd. 12865, 12955–57 ¶¶ 211–216 (2014) (*2014 Wireless Infrastructure Order*). The new shot clocks in the *Small Cell Order* simply extend a rebuttable 60-day shot clock to small cells on other existing structures. Similarly, requests to deploy wireless equipment on new structures were *already* subject to a 150-day shock clock under the 2009 *Shot Clock Order*, even for large macro towers, and the new shot clocks simply shorten that timeframe to 90 days for the far smaller and lighter structures used to support small cells.

These modest changes were firmly supported by "experience with the previously adopted shot clocks, the record in this proceeding, and [the Commission's] predictive judgment," including similar time periods successfully employed in several jurisdictions. *Small Cell Order* ¶ 110 (RER 179); *see id.* ¶¶ 104–112 (RER 175–180). Most significantly, the record reflects that small cells pose fewer issues than large macro towers and other traditional wireless facilities, so "states and localities should be able to address the siting of Small Wireless Facilities in a more expedited review period than needed for larger facilities." *Id.* ¶ 105 (RER 176); *see also id.* ¶ 111 (RER 179) ("Small Wireless Facilities have far less visual and other impact than [traditional wireless towers] . . . and should

accordingly require less time to review."); *cf. id.* ¶ 139 (RER 192–93) (retaining the longer, preexisting shot clocks for larger structures).

In addition, the Commission recognized, localities have become substantially more efficient at reviewing wireless siting applications in the decade since the shot clocks were first instituted, and thus "can complete reviews more quickly than was the case when the existing Section 332 shot clocks were adopted" in 2009. *Id.* ¶ 106 (RER 176). Indeed, the record reflects that localities "have worked to gain efficiencies in processing siting applications" over the past decade, and that "[m]any localities already process wireless siting applications in less time than required" by the original shot clocks. *Id.* ¶ 104 (RER 175); *see, e.g.*, *id.* ¶¶ 105 n.299, 106 n.303 (RER 176). And a review of state small cell laws demonstrates that a wide array of jurisdictions have been able to require review of small cell requests in similar—or, in some cases, even shorter—periods of time as the new shot clocks. *See id.* ¶ 106 & n.304 (RER 176–77); *id.* ¶ 111 & n.323 (RER 179).

The Commission also reasonably concluded that the applicable shot clock applies to "all authorizations necessary for the deployment" of a wireless facility—including not only land use or zoning permits, but also any "building permits, road closure permits, and the like." *Small Cell*

Order ¶¶ 132–133 (RER 188–89); *accord id.* ¶ 95 (RER 169–70); *id.* ¶ 144 (RER 195). This conclusion follows from the text of Section 332(c)(7)(B)(ii)'s "reasonable period of time" requirement, which encompasses not only requests "to place" wireless facilities (i.e., zoning requests), but also to "construct or modify" such facilities. 47 U.S.C. § 332(c)(7)(B)(ii); *Small Cell Order* ¶ 133 (RER 189) (emphasis omitted). By contrast, the Commission explained, interpreting this provision to cover only zoning permits "would frustrate [its] purpose" because "states and localities could delay their consideration of other permits (e.g., building, electric, road closure or other permits) to thwart the proposed deployment." *Id.* ¶ 134 & n.390 (RER 190). And the Commission observed that "[a] number of courts have either explicitly or implicitly adopted the same view, that all necessary permits are subject to Section 332." *Id.* ¶ 136 (RER 190); *see, e.g.*, *Ogden Fire Co. No. 1 v. Upper Chichester Twp.*, 504 F.3d 370, 395–96 (3d Cir. 2007) (ordering locality to issue any and all necessary permits, including building permit).

For similar reasons, the Commission reasonably determined that "mandatory pre-application procedures and requirements do not toll the shot clocks," because "requiring pre-application review would allow for a complete circumvention of the shot clocks by significantly delaying their

start date." *Small Cell Order* ¶ 145 (RER 195–96). Considerable record evidence corroborates the Commission's concerns that some localities were using separate authorization requirements or "pre-application review" requirements to evade or nullify the Commission's shot clocks.[25]

2. Petitioners' objections to the new shot clock periods for small cells are meritless.

The Local Government Petitioners claim (Br. 29) that "it is not possible to apply for many of these permits—much less issue them—until well after the application for placement is submitted." But the submission on which they rely concedes that it *is* possible to conduct these reviews concurrently, and argues only that "it is far more efficient economically" to proceed sequentially because "if, for example, a proposed site's initial location does not pass zoning or land use review, the engineering work and traffic plan . . . will have to be re-done." *See* Smart Communities 9/19/18 Letter 2–3 (Local Gov't ER 726–27). Given the Commission's conclusion that localities can recover all of these actual costs from the wireless carrier, the Local Government Petitioners have

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[25] *See*, *e.g.*, Crown Castle Wireless Comments 15, 21 (RER 390, 396); CTIA Comments 15 (RER 413); Lightower Wireline Comments 20–21 (RER 438–39); Mobilitie Comments 6 (RER 445); Crown Castle 11/10/17 Letter 3–4 (RER 536–37); AT&T 6/8/18 Letter 2 (RER 584); AT&T 8/10/18 Letter 2 (RER 606).

no basis to object that concurrent review could sometimes be more costly. And in any event, "in the rare case where officials are unable to meet the shot clock," they may rebut the presumptive time period by showing that additional time is necessary under the particular circumstances they face. *Small Cell Order* ¶ 137 (RER 192); *see id.* ¶¶ 109, 127 (RER 178, 186).

The Local Government Petitioners also challenge the Commission's reliance on state and local small cell laws in crafting the shot clocks. They observe (Br. 95–96) that not all of the state and local small cell laws considered by the Commission when designing the new shot clocks are identical in every respect to each other or to the agency's new shot clocks. But that does not mean the Commission could not reach an informed conclusion based on an overall review of many different state and local regimes and its long experience addressing wireless infrastructure deployment. Petitioners offer no basis to disturb the Commission's expert determination, based on a thorough examination of the record, that small cell deployments—which are smaller and simpler than traditional macro cells—can be processed in less time than the existing shot clocks provide for larger facilities.

The Local Government Petitioners also object (Br. 94–95) that the new shot clocks supposedly "are too short to allow localities to satisfy state or local notice, hearing, and administrative appeals requirements associated with traditional discretionary land use processes." But the record reveals that "many jurisdictions do not require public hearings for approval of [small cell] attachments," which "underscor[es] that such attachments do not implicate complex issues requiring a more searching review." *Small Cell Order* ¶ 107 (RER 177); *see also id.* ¶ 106 n.304 (RER 177) ("By not requiring hearings, collocation applications in these states can be processed in a timely manner."). And the record further reflects that many states already require small cell applications to be reviewed in similar or shorter periods of time as the new shot clocks, further demonstrating that cumbersome procedures are unnecessary. *See id.* ¶ 106 & n.304 (RER 176–77); *see also id.* ¶ 105 n.299 (RER 176) (the City of Chicago "on average processed small cell applications last year in 55 days").

The Local Government Petitioners also neglect to acknowledge that they must already review other siting requests within similar periods of time—including an *unrebuttable* 60-day shot clock for collocating small cells on certain structures, *see Small Cell Order* ¶ 108 (RER 177–78)—

and they fail to explain why they cannot comply with the new shot clocks by using the same procedures.

The Local Government Petitioners' separate concern that more time may be required in particular circumstances (Br. 97–98) likewise offers no basis to disturb the new shot clocks. To begin with, the shot clocks are only presumptions, and they "take into account the varied and unique" situations that may arise by "allowing siting agencies to rebut the presumptive reasonableness of the shot clocks based upon the actual circumstances they face." *Small Cell Order* ¶ 109 (RER 178). As the Fifth Circuit reasoned with respect to the Commission's original shot clocks, "[t]he time frames are not hard and fast rules," and a locality may "attempt to rebut the presumption" by, for example, "pointing to extenuating circumstances" or showing "that the application was particularly complex in its nature or scope." *City of Arlington*, 668 F.3d at 259–60. And nothing in the *Orders* necessarily requires a locality to approve the siting request; the locality remains free to reject the request for any legitimate reason—it need only act one way or the other within the applicable time period.

Similarly, if a locality does not act within the shot clock period, the only consequence is to allow the carrier to file suit under Section 332(c)(7)(B)(v), at which point a court still must determine whether the locality violated the statute under all the circumstances and retains flexibility to fashion an appropriate remedy. The *Small Cell Order* does "not dictate the result or the remedy appropriate for any particular case; the determination of those issues will remain within the courts' domain." *Small Cell Order* ¶ 124 & n.357 (RER 184–85). Thus, "in cases where a siting authority misses the deadline, the opportunity to demonstrate exceptional circumstances provides an effective and flexible way for siting agencies to justify their inaction if genuinely warranted." *Id.* ¶ 130 (RER 188). The Commission's approach therefore "tempers localities' concerns about . . . inflexibility" by "account[ing] for the breadth of potentially unforeseen circumstances that individual localities may face and the possibility that additional review time may be needed" in particular circumstances. *Id.* ¶ 127 (RER 186).

3. The Commission reasonably declined, for now, to materially change the shot clock remedies.

Both the Local Government Petitioners and the Wireless Carrier Petitioners challenge the Commission's discussion of the available

remedies for shot-clock violations, with the Local Government Petitioners arguing that this discussion is too stringent and the Wireless Carrier Petitioners arguing that the Commission did not go far enough. Neither challenge has merit.

a. Contrary to the Local Government Petitioners' protests (Br. 99–100), they face no dire consequences from the Commission's conclusion that a failure to act within a reasonable period of time under Section 332(c)(7)(B)(ii) also amounts to an effective prohibition under Section 332(c)(7)(B)(i)(II). Both provisions allow aggrieved parties to "pursue equitable judicial remedies," *Small Cell Order* ¶ 120 (RER 182), and under either provision a court would apply the same "traditional requirements for awarding preliminary or permanent injunctive relief," *id.* ¶ 123 (RER 183). Because the same legal standards apply under either provision, the Commission's determination neither permits nor requires courts to order any relief that they could not previously impose, nor does it expose localities to any lawsuits that could not previously have been brought.

To be sure, the Commission stated that it "expect[s]" and "anticipate[s]" that courts will consider injunctive relief if a locality fails to comply with the shot clocks under ordinary circumstances. *Small Cell*

Order ¶¶ 118–123 (RER 181–84). But the Commission's expectations have no binding legal effect, and the Commission made clear that this discussion does "not dictate the result or the remedy appropriate for any particular case." *Id.* ¶ 124 (RER 184). And in any event, as the Commission recognized, courts already have held that injunctive relief is the ordinary remedy when a locality fails to comply with Section 332(c)(7). *Id.* ¶ 120 & n.342 (RER 182); *see, e.g.*, *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 497 (2d Cir. 1999) (*Oyster Bay*); *Bell Atl. Mobile of Rochester L.P. v. Town of Irondequoit*, 848 F. Supp. 2d 391, 403 (W.D.N.Y. 2012).

b. There is likewise no merit to the Wireless Carrier Petitioners' argument (Br. 23–31) that it was unreasonable for the Commission not to have mandated that applications should be "deemed granted" if the shot clock deadlines are not met.

Contrary to the Wireless Carriers' suggestion (Br. 24–25) that prior shot clocks have been ineffective, the Commission found that "[t]he record here suggests that [the previous] Section 332 shot clocks have increased the efficiency of deploying wireless infrastructure." *Small Cell Order* ¶ 104 (RER 175). The Commission further reasoned that its actions here should "result in localities addressing applications within

the applicable shot clocks in a far greater number of cases," because "the rules and interpretations adopted here will provide substantial relief, effectively avert unnecessary litigation, [and] allow for expeditious resolution of siting applications[.]" *Id.* ¶¶ 128–129 (RER 186–87). Given the substantial relief already provided by its other actions here, the Commission reasonably explained that it "d[id] not find it necessary" to go further and adopt a deemed-granted remedy at this time. *Id.* ¶ 128 (RER 186). And "if the approach . . . in this [*Order*] proves insufficient in addressing the issues it is intended to resolve," the Commission appropriately cautioned that the agency "may again consider adopting a deemed granted remedy in the future." *Id.* ¶ 130 (RER 188).

The Wireless Carrier Petitioners complain (Br. 23–25, 27) that enforcing the shot clocks may require them to file a large number of lawsuits. But even when the Commission has adopted a deemed-granted remedy, it has contemplated that carriers still could need "to initiate a declaratory judgment action to seek 'some form of judicial imprimatur' for an application that has been deemed granted." *Montgomery Cty.*, 811 F.3d at 129 (quoting *2014 Wireless Infrastructure Order*, 29 FCC Rcd. at 12963 ¶ 236). In any event, the clarifications provided in the *Small Cell Order* should vastly reduce the number of disputes where legal action is

required to enforce the shot clocks. *See Small Cell Order* ¶ 129 (RER 187) ("[W]e expect [there will] be only a few cases where litigation commences . . . ."); *see also id.* ¶ 120 (RER 182) (reasoning that notifying the relevant siting authority of a missed shot clock should ordinarily elicit action when the deadlines are clear). And in any cases where litigation is still required, the Commission's actions here will substantially reduce the burdens of litigation by "help[ing] courts to decide failure-to-act cases expeditiously and avoid delays in reaching final dispositions." *Id.* ¶ 129 (RER 187); *see also id.* (the Commission's actions "should address the concerns . . . that filing suit . . . is burdensome and expensive . . . because [the agency's] interpretations should expedite the courts' decision-making process").

Even less meritorious is the Wireless Carrier Petitioners' contention (Br. 31–34) that the Commission's decision not to mandate a deemed-granted remedy here is irreconcilable with the *2014 Wireless Infrastructure Order*'s decision to adopt a deemed-granted remedy for violations of Section 6409 of the Spectrum Act,[26] 47 U.S.C. § 1455.

[26] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, Title VI, 126 Stat. 156, 201–55 (codified in scattered sections of 47 U.S.C.).

Significantly, the text of Section 6409 uses different and unequivocal statutory language—localities "may not deny, and shall approve," certain applications, 47 U.S.C. § 1455(a)(1)—that the Commission understood to call for a deemed-granted remedy. *2014 Wireless Infrastructure Order*, 29 FCC Rcd. at 12961 ¶ 227. By contrast, the text of Section 332(c)(7)(B) does not prescribe any particular remedy.[27]

Moreover, Section 6409 applies to a narrower category of facilities—requests to deploy small cells on existing structures built for the primary purpose of supporting wireless equipment—for which there is little reason to think a longer period of time will ever be required, supporting an unrebuttable 60-day shot clock with a strict deemed-granted remedy. Here, by contrast, the record does not demonstrate that a similar remedy would necessarily be proper for the broader universe of small cell deployments addressed in the *Small Cell Order*, for which the Commission believed the flexibility of a rebuttable shot clock to be more appropriate.

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[27] Contrary to the Wireless Carrier Petitioners' suggestions (Br. 19, 33), the *Small Cell Order* did not decide whether the statutory language in Section 253 or 332(c)(7) could or should be read to authorize a deemed-granted remedy. *See Small Cell Order* ¶ 128 & n.372 (RER 186–87) ("[T]here may be merit in the argument made by some commenters that the FCC has authority to adopt a deemed granted remedy. Nonetheless, *we do not find it necessary to decide that issue today* . . . .") (emphasis added).

II. Petitioners' statutory arguments offer no basis to disturb the Commission's reasonable exercise of delegated authority.

A. The Commission's approach is consistent with Congress's decision to preserve local zoning authority.

The Local Government Petitioners insist that the *Orders* are inconsistent with Congress's decision to preserve limited local zoning authority in Section 332(c)(7)(A) because, they claim, the *Orders* "entitle a provider to construct any and all towers that, in its business judgment, it deems necessary," and thus "effectively nullify a local government's right to deny." Br. 39 (internal quotation marks omitted). Not so.

To be clear, nothing in the *Orders* compels a locality to approve any particular siting request. On the contrary, localities retain the right under Section 332(c)(7)(A) to deny siting requests for any reason, except for those that Congress specifically prohibited in Section 332(c)(7)(B), so long as the reasons for denying the request are supported by substantial evidence, *see* 47 U.S.C. § 332(c)(7)(B)(iii). As the Commission stated, the *Orders* do "not give[] providers any right to compel access to any particular state or local property." *Small Cell Order* ¶ 73 n.217 (RER 159). "There may well be legitimate reasons for states and localities to deny particular placement applications, and adjudication of whether

such decisions amount to an effective prohibition must be resolved on a case-by-case basis." *Id.*; *cf. id.* ¶ 40 n.94 (RER 140) ("[O]ur standard does not preclude all state and local denials of requests for the placement, construction, or modification of personal wireless service facilities . . . .").

Nor is there any merit to the Intervenors' argument (NYC/NATOA Br. 25–28) that some clearer statement is required to preempt state or local obstacles to communications services. Congress already clearly and expressly stated its intent to preempt state law by enacting express preemption provisions in Sections 253(a) and 332(c)(7)(B). Intervenors' reliance on cases considering implied preemption, in the absence of an express preemption clause, is therefore misplaced. And when Congress has enacted an express preemption clause superseding state law, there is no presumption against preemption when interpreting or applying that provision. *See, e.g.*, *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (once Congress has decided to preempt state law, "we do not invoke any presumption against preemption" in disputes over the *scope* of preemption); *Atay v. Cty. of Maui*, 842 F.3d 688, 699 (9th Cir. 2016) (no presumption against preemption applies "[w]here the intent of a statutory provision that speaks expressly to the question of preemption

is at issue").[28] The Intervenors' argument that the Court should put a thumb on the scale in favor of a narrow reading of Sections 253 and 332(c)(7) is squarely foreclosed by these precedents.

B. The Commission's approach is reasonable and consistent with this Court's decisions.

The Local Government Petitioners contend (Br. 16–17, 36–37, 40–43, 86–87) that the Commission's reasonable interpretation of Sections 253 and 332(c)(7) contravenes this Court's decision in *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008) (en banc). In doing so, they erroneously conflate two separate questions about the meaning of those provisions.

1. The first question, which was at issue in *Sprint Telephony*, concerns the word "may." An earlier panel decision incorrectly parsed the statute as preempting any state or local measure that "*may* . . . prohibit or have the effect of prohibiting" service, and thus held that Section

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[28] *See also City of Arlington*, 569 U.S. at 305 ("reject[ing] a similar faux-federalism argument" because "'[t]his is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew.'"); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 743–44 (1996) (distinguishing "the question of the substantive (as opposed to pre-emptive) *meaning* of a statute" from "the question of *whether* a statute is pre-emptive," and rejecting the view that a presumption against preemption "in effect trumps *Chevron*").

253(a) preempts any practice that "might possibly" prohibit or have the effect of prohibiting service. *Sprint Telephony*, 543 F.3d at 576–78 (discussing *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001)). In *Sprint Telephony*, however, the Court clarified that because the word "may" is part of the phrase "No State or local statute or regulation[] or other . . . legal requirement[] *may*," it does not modify "prohibit or have the effect of prohibiting." *Id.* at 577–78. The Court thus held that it is not enough to contend that a state or local measure *might possibly* prohibit or have the effect of prohibiting service; instead, preemption under Sections 253 and 332(c)(7) requires a showing that the challenged practice *does* prohibit or have the effect of prohibiting service.

The Commission's rulings here are fully consistent with that decision. The *Orders* do not simply say that the practices at issue "might possibly" have a prohibitive effect. Instead, the Commission made a series of *findings*, based on an extensive review of the comprehensive administrative record compiled in this proceeding, and exercising its expert technical and policy judgment, that the practices at issue *do* prohibit or have the effect of prohibiting service. *See, e.g.*, *Small Cell Order* ¶ 51 (RER 146) (recognizing "the extensive record evidence that shows the actual effects that state and local fees have in deterring

wireless providers from adding to, improving, or densifying their networks and consequently the service offered over them"); *id.* ¶ 61 (RER 153) ("Based on the record, we find that fees charged by states and localities are causing *actual* delays and restrictions on deployments of Small Wireless Facilities in a number of places across the country[,] in violation of Section 253(a)."); *id.* ¶ 84 (RER 164) (the record demonstrates that "use of unduly vague or subjective criteria that may apply inconsistently to different providers or are only fully revealed after application[] mak[e] it impossible for providers to take these requirements into account in their planning and add[s] to the time necessary to deploy facilities"); *Moratoria Order* ¶¶ 147, 149 (RER 75–76) (recognizing that moratoria in fact limit the provision of service). Thus, the *Small Cell Order* explains, *Sprint Telephony*'s "holding is not implicated by [the] interpretations here." *Small Cell Order* ¶ 41 n.99 (RER 141).

2. Petitioners' current challenge, by contrast, concerns the different question of what it means to have the "effect of prohibiting" service. That is a separate question, both textually and conceptually, from the question addressed in *Sprint Telephony*. Indeed, the Court in *Sprint Telephony* had no occasion to consider that question because unlike here—where the Commission made specific factual findings based

on an extensive administrative record—*Sprint Telephony* involved a facial challenge in which there was no evidence at all concerning the practical effect of the ordinance at issue.

On this second question, the Commission reasonably rejected the view that a state or local measure must amount to a complete, absolute, or insurmountable bar to constitute an effective prohibition under Section 253 or 332(c)(7). Though the phrase "effect of prohibiting" is facially ambiguous, the Commission reasonably observed that the statute's use of the disjunctive "or"—"prohibit *or* have the effect of prohibiting"—implies that the phrase "effect of prohibiting" must encompass more than just measures that entirely "prohibit" service. *See Small Cell Order* ¶ 41 (RER 141–42) ("The 'effectively prohibit' language must have some meaning independent of the 'prohibit' language . . . .").[29]

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[29] The Local Government Petitioners therefore err (Br. 41–43) in comparing this case to *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999). In that case, the Supreme Court remarked that the words "necessary" and "impair" in another provision of the Act had an established legal meaning in that context and faulted the Commission for failing to grapple with the statutory language. *Id.* at 387–92. Here, by contrast, the Commission specifically considered the different statutory language at issue and explained why the reach of the phrase "effect of prohibiting" is ambiguous, both on its face and when juxtaposed with the statute's separate reference to measures that entirely "prohibit" service.

Indeed, in the Eighth Circuit decision on which this Court specifically relied in *Sprint Telephony*, the court squarely held that "[t]he plaintiff need not show a complete or insurmountable prohibition" for a measure to be preempted under Section 253(a). *Level 3 Commc'ns, LLC v. City of St. Louis*, 477 F.3d 528, 533 (8th Cir. 2007). And all other circuits to have considered the issue all likewise agree that, contrary to Petitioners' view here, "a prohibition does not need to be complete or insurmountable to run afoul of § 253(a)." *Guayanilla II*, 450 F.3d at 18 (internal quotation marks omitted); *accord White Plains*, 305 F.3d at 76 (same); *Santa Fe*, 380 F.3d at 1269 ("A regulation need not erect an absolute barrier to entry to be found prohibitive."); *RT Commc'ns, Inc. v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000) ("Nowhere does the statute require that a bar to entry be insurmountable before the FCC must preempt it.").

Given the ambiguous statutory language, and considering the relevant statutory goals and purposes as applied to the current wireless marketplace, the Commission reasonably reaffirmed its 20-year-old *California Payphone* standard, which provides that state and local measures impermissibly "have the effect of prohibiting" service—and are therefore preempted under Sections 253(a) and 332(c)(7)(B)(i)(II)—when

those measures "materially inhibit[] or limit[] the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Small Cell Order* ¶¶ 16, 37–42 (RER 125–26, 137–43) (quoting *Cal. Payphone*, 12 FCC Rcd. at 14206 ¶ 31). This Court's decision in *Sprint Telephony* specifically approved of the *California Payphone* standard and opined that "its interpretation is certainly reasonable." 543 F.3d at 578. And every other court of appeals to consider these issues has likewise relied on *California Payphone*. *See*, *e.g.*, *Level 3*, 477 F.3d at 533; *Guayanilla II*, 450 F.3d at 18; *Santa Fe*, 380 F.3d at 1270–71; *White Plains*, 305 F.3d at 76. Nothing in this Court's decisions, or in those of any other court, offers any reason to disturb the Commission's reasonable interpretation of what constitutes an effective prohibition.

3. In a different decision, a panel of this Court adopted a "coverage gap" test for effective prohibition claims under Section 332(c)(7)(B)(i)(II). *MetroPCS, Inc. v. City & Cty. of S.F.*, 400 F.3d 715, 731–35 (9th Cir. 2005). But the Court did not hold that this test was compelled by the statutory text itself; instead, the panel forthrightly explained that "[s]ince there is no controlling legal authority on the issue, our choice of rule must ultimately come down to policy considerations." *Id.* at 734. That decision therefore is not controlling here, because "[a] court's prior

judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Brand X*, 545 U.S. at 982. Instead, "the agency may . . . choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes." *Id.* at 983.

The Commission reasonably explained why it concluded that, in the context of small cells and the current wireless marketplace, requiring the showing of a coverage gap is not the most appropriate way to implement the statute. The coverage gap test "appear[s] to view wireless service as if it were a single monolithic offering provided only via traditional wireless towers," but that approach "reflect[s] both an unduly narrow reading of the statute and an outdated view of the marketplace." *Small Cell Order* ¶ 40 (RER 139–40). In the Commission's view, "coverage gap-based approaches are 'simply incompatible with a world where the vast majority of new wireless builds are going to be designed to add network capacity and take advantage of new technologies, rather than plug gaps in network coverage,'" and they are thus not a good fit for the current wireless marketplace. *Id.* (RER 140–41). Instead, the Commission

reasoned, analysis of whether a state or local measure constitutes an effective prohibition must take into account all relevant "capabilities and performance characteristics"—"including facilities deployment to provide existing services more robustly, or at a better level of quality"—"all to offer a more robust and competitive wireless service for the benefit of the public." *Id.* ¶ 40 n.95 (RER 140).

This focus on the particular marketplace and technology at issue also explains why the Local Government Petitioners are wrong to object (Br. 10–11, 30, 38) that the Commission's approach to small cells differs from *California Payphone*'s analysis of legacy payphone regulation. In that context, the Commission found based on the record then before it that indoor payphones could substitute for outdoor payphones; a restriction on outdoor payphones in the central business district thus did not materially inhibit the ability of any competitor to provide service. *Cal. Payphone*, 12 FCC Rcd. at 14206–10 ¶¶ 31–42. Given the quite different technological and economic circumstances that govern the current wireless marketplace and next-generation wireless networks, the Commission here reasonably found that even small local obstacles materially inhibit deployment and thereby have the effect of prohibiting service in violation of Sections 253 and 332(c)(7).

C. Localities cannot evade preemption by claiming to manage public rights-of-way in a proprietary capacity.

Petitioners contend that state and local measures concerning public rights-of-way, and government-owned infrastructure within the public rights-of-way, are "proprietary"—no different in kind from measures a private landlord might adopt. *See* Local Gov't Br. 82–83; *see also id.* at 50–52 (arguing that public power utilities operate in a wholly proprietary capacity). But the Commission reasonably concluded that, as a general rule, government entities act in their regulatory capacities when authorizing and setting terms for infrastructure deployment in public rights-of-way (including on property within those rights-of-way that the same government entity also owns or controls). *Small Cell Order* ¶¶ 92, 96, 97 (RER 167, 170–71).

The Commission's interpretations in the *Small Cell Order* rest on the special character of public rights-of-way, which localities hold and operate in trust for the benefit of the public, making them fundamentally different from proprietary property that a landowner manages solely for its own economic interest. The Commission made clear that it did not extend its statutory interpretations "to government-owned property located outside the public [rights-of-way]," which would involve different

considerations. *Small Cell Order* ¶ 92 n.253 (RER 167). Nor did it reach circumstances in which infrastructure within a public right-of-way is owned or controlled by a different government entity from that which owns or controls the right-of-way itself. *See id.* ¶ 92 (RER 167). And as we have already noted, *see supra* Part II.A, nothing in the *Small Cell Order* compels a locality to approve any particular siting request—whether the request seeks access to public rights-of-way or otherwise.

1. States and localities act in a regulatory capacity when authorizing and setting terms for wireless infrastructure in public rights-of-way.

It is well settled that state and local governments may not evade preemption by characterizing as "proprietary" activities that in fact are "tantamount to regulation." *E.g.*, *Wisc. Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 289 (1986); *see also id.* at 287 (whether a state characterizes its practice as "an exercise of the State's spending power" or of "its regulatory power" is "a distinction without a difference"). Petitioners do not contest that principle. *See* Local Gov't Br. 84; Public Power Br. 52; *see also* Public Power Br. 46 ("[I]t is true that Section 253(a) applies to state and local legal requirements [such as the franchise agreement in the *Minnesota Preemption Order*] . . . ."). To guide future cases in which states or localities might seek to mask burdensome

regulatory policies as commercial decisions, the Commission reasonably explained why, as a rule, states and localities act as regulators when setting "terms for access to public [rights-of-way] that they own or control." *Small Cell Order* ¶ 92 (RER 167).

The Commission reached that determination based on the special character of public rights-of-way. As explained in the *Small Cell Order*, public rights-of-way are held "in trust for the public." *Small Cell Order* ¶ 96 (RER 170) (internal quotation marks omitted); *see also* Gardner F. Gillespie, *Rights-of-Way Redux: Municipal Fees on Telecommunications Companies and Cable Operators*, 107 Dickinson L. Rev. 209, 212–15 (2002) (summarizing the history of this principle). They function "to supply services for the benefit of the public," *Small Cell Order* ¶ 97 (RER 171), and governments manage them based on "regulatory objectives, such as aesthetics or public safety or welfare," *id.* ¶ 96 (RER 170). In addition, because they are built to support public infrastructure, public rights-of-way "are often the best-situated locations for the deployment of wireless facilities." *Id.* ¶ 97 (RER 171); *see supra* pp. 82–84.

The special character of public rights-of-way is well supported in the record. *See, e.g.*, Verizon Wireless Comments 26–28 (RER 499–501) (describing the regulatory nature of municipal management of public

rights-of-way); T-Mobile Comments 50 (RER 486) (citing cases supporting the proposition that "municipal [rights-of-way] . . . are property held in trust for the public"). The Local Government Petitioners assert that "'managing and controlling access' to . . . property" within public rights-of-way are "quintessential[ly] proprietary" activities. Br. 83. But their arguments elsewhere belie that claim. *See id.* at 103–04 ("permissible rights-of-way management practices" include "*regulat[ing]* the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts, among other things" (emphasis added; internal quotation marks omitted)); *see also id.* at 91–92 ("local land use authority" merits protection because rights-of-way are "the visual fabric from which neighborhoods are made" (internal quotation marks omitted)).

This Court has previously recognized the special character of public rights-of-way. In *Olympia Pipe Line Co. v. City of Seattle*, 437 F.3d 872 (9th Cir. 2006), the Court concluded that, when seeking to impose safety conditions on the franchisee of an oil pipeline under city streets, Seattle acted as a regulator. Central to that determination was the Court's recognition that Seattle owned the streets not as commercial interests, but in the city's "sovereign capacity," "for the purpose of maintaining a

transportation system." *Id.* at 881. For the same reason, in *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052 (9th Cir. 1987), the Court rejected the argument that Santa Monica acted as a market participant in setting franchise fees for easements under public streets. *See id.* at 1057. And in *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates*, 583 F.3d 716 (9th Cir. 2009), the Court explained that a city's consideration of aesthetics when denying applications to place wireless facilities in public rights-of-way was an exercise of the city's traditional regulatory powers. *See id.* at 722–24.

The cases that Petitioners point to as supporting their view that state and local governments are "akin to . . . private land owner[s]," Local Gov't Br. 83 (internal quotation marks omitted), did not involve public rights-of-way and thus do not apply here. The Second Circuit case, *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404 (2d Cir. 2002), concerned a wireless carrier's request to place an antenna on a school rooftop. In *Superior Communications v. City of Riverview*, 881 F.3d 432 (6th Cir. 2018), the Sixth Circuit analogized the city-owned property at issue to the rooftop in *Mills*. And the dispute in *Omnipoint Communications, Inc. v. City of Huntington Beach*, 738 F.3d 192 (9th Cir. 2013), concerned the construction of telecommunications towers in two city-owned parks.

Those examples bear closer resemblance to private property and raise none of the public policy issues that follow from the special character of public rights-of-way. *See N.J. Payphone*, 130 F. Supp. 2d at 638 ("Distinct from public parks or government buildings, the municipality does not possess ownership rights as a proprietor of the streets and sidewalks. Consequently, the Town's analogies and hypotheticals likening the effect of the Ordinance to the Town's management of public parks and buildings are inapt.").[30]

In sum, none of the cases on which Petitioners rely addressed the special characteristics of public rights-of-way. The Commission limited its statutory interpretations in the *Small Cell Order* to that unique context, and did not extend them to any "government-owned property located outside the public [rights-of-way]" where different considerations might apply. *Small Cell Order* ¶ 92 n.253 (RER 167).

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[30] Indeed, Petitioners' apparent view that rights-of-way management is proprietary activity that falls entirely outside the reach of Section 253 cannot be reconciled with Section 253(c), which reserves to localities only certain qualified authority over rights-of-way management and fees—and thus presumes, contrary to Petitioners' view, that local control over access to and use of public rights-of-way otherwise falls within the ambit of Section 253.

2. The same logic applies when states and localities set terms for access to structures they own or control within their public rights-of-way.

Just as governments act as regulators when they set terms for access to public rights-of-way, the Commission reasonably concluded that those same governments' decisions concerning structures that they operate within the rights-of-way—such as traffic lights or lampposts—are typically regulatory. *See Small Cell Order* ¶¶ 92, 97 (RER 167, 171). These sorts of public structures "are frequently relied upon to supply services for the benefit of the public." *Id.* ¶ 97 (RER 171); *see supra* pp. 82–83.

In addition, because "a state or local government is often the only entity that controls large numbers of poles within its confines," it is "substantially more powerful than any private parties." Verizon 8/23/18 Letter 4 (RER 629). In that sense, as with rights-of-way, when local governments refuse access to infrastructure within the public rights-of-way, or "impos[e] onerous terms and conditions for such access," *Small Cell Order* ¶ 97 (RER 171), they employ "a coercive mechanism, available to no private party," that "only a government can wield," *Am. Trucking Ass'ns v. City of Los Angeles*, 569 U.S. 641, 651 (2013).

Consistent with this view, the Second Circuit has described as a "regulatory scheme" certain fee demands and related conditions that New York City imposed on a company seeking to install small cells on city-owned poles in public rights-of-way. *NextG Networks of N.Y. v. City of New York*, 513 F.3d 49, 55 (2d Cir. 2008) (*NextG III*). That decision arose from a district court case in which the plaintiff alleged that the city's conditions for prospective franchisees violated Section 253. "Street light poles, like the rest of the public rights-of-way," the plaintiff argued, "are held by the City in trust for the public." *NextG Networks of N.Y., Inc. v. City of New York*, No. 03-Civ-9672, 2004 WL 2884308, at *4 (S.D.N.Y. Dec. 10, 2004). Crediting that theory, the district court denied the city's motion to dismiss. *See id.* at *5.

After the court later granted summary judgment for the city on unrelated grounds, the plaintiff appealed. In the course of that appeal, the city claimed to "act[] in a proprietary capacity with respect to its street poles," "[l]ike any private landlord." Appellees' Br. 33, *available at* 2007 WL 5444621. The plaintiff disputed that claim, arguing that the city cannot "exercise 'proprietary' control" over property "held . . . in trust for the public." Reply Br. 15, *available at* 2007 WL 5444620.

The Second Circuit reversed the award of summary judgment and allowed the case to proceed. *See NextG III*, 513 F.3d at 53–55. And in remanding the case, it explicitly directed the district court to consider "NextG's claims that the City's *regulatory scheme* is in material respects prohibited or preempted by [Section 253]." *Id.* at 55 (emphasis added).

3. Petitioners overstate the scope of the *Small Cell Order*.

In challenging the Commission's determination that governments routinely exercise regulatory authority when setting terms and conditions for access to public rights-of-way, and government-owned structures within them, Petitioners overstate the scope of the *Small Cell Order*.

The Local Government Petitioners argue that the FCC "confuses the identity of the property owner with whether the action is proprietary," ignoring that "aesthetics" and "public safety" can be proprietary concerns. Br. 82. But the Commission recognized that "factual questions [may] arise" as to whether "states and localities [have relied] on their ownership of property within the [right-of-way] as a pretext to advance regulatory objectives" in individual cases. *Small Cell Order* ¶ 97 (RER 171). The Commission 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. *See id.* ¶ 97 & n.277 (RER 171). It concluded only that "the examples" and "situations" presented in the record show that, as a general matter, the terms and conditions that governments impose on access serve regulatory aims. *Id.* ¶ 96 (RER 170). The Commission intended its determination to "guide how preemption should apply in fact-specific scenarios" going forward, *id.* ¶ 97 n.277 (RER 171), mitigating the "temptation" for governments to seek to "insulat[e] conduct from federal preemption" by "blend[ing]" their regulatory and proprietary roles, *id.* ¶ 96 (RER 171).

In arguing that the Commission's determination on this point necessarily extends to public power utilities, Petitioner American Public Power Association likewise overstates the scope of the *Small Cell Order*. *See* Br. 48–51. To be sure, the Commission rejected the notion that public utilities are automatically exempt from the interpretations set forth in the *Small Cell Order* merely by virtue of Section 224 of the Act, 47 U.S.C. § 224. Section 224 directs the FCC to prescribe specific rates, terms, and conditions for attachments of telecommunications equipment "to a pole,

duct, conduit, or right-of-way owned or controlled by a utility." *Id.* § 224(a)(4). And an entity "owned by . . . any State" is excluded from the definition of "utility." *Id.* § 224(a)(1); *see Small Cell Order* ¶ 92 n.253 (RER 167). That determination was correct, as we explain below. *See infra* Part II.D.

But the Commission nowhere sought to extend its statutory interpretations in the *Small Cell Order* to property within public rights-of-way except when the property in question is controlled by the same government entity that controls the rights-of-way. *See Small Cell Order* ¶ 92 (RER 167) ("We confirm that our interpretations today extend to state and local governments' terms for access to public rights-of-way that *they* own or control, . . . as well as *their* terms for use of or attachment to government-owned property within such [rights-of-way] . . . ." (emphasis added)). The Association thus has no basis to complain that the Commission did not address its assertions that public utilities act in their proprietary capacities when controlling access to poles that they own within public rights-of-way. The Association took the position that, "in many instances, public power utilities are separate corporate entities from the local governments that may own the public [rights-of-way]," and they thus "do not have regulatory authority over [those rights-of-way]."

Public Power Comments 14 (RER 475); *accord* Public Power Reply Comments 20 (RER 527). But if public utilities have no regulatory authority over the public rights-of-way in which they own poles, the *Small Cell Order* does not purport to reach that circumstance.

As to the claim that public power utilities are always, necessarily acting in a proprietary capacity, Public Power Comments 14 (RER 475), the *Small Cell Order* permits the Association (or individual public utilities) to raise that claim in future preemption cases, *see Small Call Order* ¶ 97 (RER 171). The Commission was not obliged in the context of the *Order* to address every circumstance in which there might arise "factual questions" concerning whether a government entity is disguising regulatory acts as proprietary ones. *Id.*

D. Section 224 does not exempt public utilities from the Commission's interpretations of Sections 253 and 332(c)(7).

The Commission reasonably concluded that nothing in Section 224 suggests that Section 253 (or "any other portion of the Act") does not "apply to poles or other facilities" owned by public power utilities. *Small Cell Order* ¶ 92 n.253 (RER 167). As the Commission explained, *see id.*, nothing in Section 253 asserts or implies that "State or local legal requirements" cannot include the requirements of public power

utilities—which, as Petitioner American Public Power Association asserted before the Commission, are often "owned by a municipality" or, if not, "are still governmentally owned." Public Power Comments 2 n.5 (RER 474). And although Section 224(a)(1) excludes government-owned entities from the definition of "utility," 47 U.S.C. § 224(a)(1), that limitation by its terms applies only to "this section"—i.e., Section 224—and its implementing regulations, not to other provisions of the Communications Act like Section 253 or 332(c)(7). *See Small Cell Order* ¶ 92 n.253 (RER 167).

The Association asserts that "Congress explicitly stated" in Section 224 "that the Commission has no jurisdiction over poles owned by public power utilities," and that "[t]he Commission does not deny that" view. Br. 39. That is not correct. As the Commission explained, there is no suggestion in Section 224 that Congress sought to foreclose federal oversight of pole attachments except as provided in Section 224. *See Small Cell Order* ¶ 92 n.253 (RER 167). Nothing in Section 224 undermines the authority afforded to the Commission elsewhere in the Act to preempt "State or local legal requirements" that prohibit or effectively prohibit the provision of covered services—even when those requirements concern government-owned poles.

Also unpersuasive is the Association's argument that "Congress clearly understood the distinction between rights-of-way and poles" and "purposely" excluded poles "from the scope of [the] Commission's jurisdiction . . . under Section 253." Br. 40 (internal quotation marks omitted). That argument is founded on a comparison of Sections 224 and 253: Section 253, the Association reasons (Br. 40), only mentions "rights-of-way," 47 U.S.C. § 253(c), whereas Section 224 separately references both "right[s]-of-way" and "pole[s]," *id.* § 224(a)(4). Given that "disparate inclusion" of the reference to poles, the Association contends that Congress must not have intended the Commission's preemptive authority under Section 253 to reach poles. Br. 39–40.

The Association's argument overlooks the fact that the scope of the Commission's preemptive authority under Section 253 is established in Section 253(a), not Section 253(c). Section 253(c), which contains the supposedly limiting reference to "public rights-of-way," describes the safe harbor "authority of a State or local government." Accordingly, even if the Association were correct that Congress intentionally distinguished between poles and public rights-of-way, that would only mean that pole attachments are not within *localities' permitted authority* under the safe harbor—not that they are beyond the scope of federal preemption. If

anything, comparing Sections 224 and 253 shows that, when Congress wanted to exclude public utilities, it could do so explicitly—as it did in Section 224, but did not do in Section 253 or 332(c)(7).

There is also no basis for the contention (Public Power Br. 41) that Section 224 is more specific than Section 253. The two provisions address different topics—prohibitions (or effective prohibitions) on the provision of telecommunications services, on the one hand, 47 U.S.C. § 253(a), and "rates, terms, and conditions for pole attachments" on the other, *id.* § 224(b).

Nor is it true that the Commission's understanding of Section 253 "effectively nullif[ies]" the exception for public utilities in Section 224. Public Power Br. 41. Section 224 directs the Commission to implement detailed regulations concerning the specific costs that investor-owned utilities may recover in pole-attachment rates, the accounting methods they must use, and the installation procedures and timeframes that constitute reasonable terms and conditions.[31] The exclusion for

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[31] *See, e.g.*, 47 U.S.C. § 224(d)(1) (specifying formula to calculate maximum "just and reasonable" rates based on "multiplying the percentage of the total usable space [on a pole] . . . occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit or right-of-way"); *id.* § 224(e)(2) ("A utility shall apportion the cost of

municipally owned utilities in Section 224 deprives the Commission of the power to set detailed rates and conditions for poles of that kind. But the *Orders* under review are not fairly characterized as having done that. *See, e.g.*, *Small Cell Order* ¶ 50 n.132 (RER 146) ("[W]e are not asserting a 'general ratemaking authority.'"); *id.* ¶ 73 n.217 (RER 159) ("[T]he Commission has not given providers any right to compel access to any particular state or local property."); *id.* ¶ 76 (RER 161) (declining to require "any specific accounting method"). Municipal utilities remain free to specify their own rates and terms for pole attachments, and to deny siting requests for any legitimate reason. What they cannot do is demand fees so high that they effectively prohibit small cell deployment in violation of Sections 253(a) and 332(c)(7) of the Act.

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providing space on a pole . . . other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities."); *id.* § 224(g) (imputation methodology for utility affiliates that provide telecommunications or cable services); 47 C.F.R. § 1.1409 (formulas to calculate rates and allocation of investments); 47 C.F.R. § 1.1411 (lengthy specifications of terms, conditions, and procedures that investor-owned utilities must implement to facilitate pole attachments).

Finally, there is no reason the Commission should have addressed or distinguished its decision in *California Water and Telephone Co.*, 64 F.C.C.2d 753 (1977), which predated the adoption of Sections 253 and 332(c)(7) in the 1996 Act. In any event, contrary to the Association's contention (Br. 38), the Commission did not "assume[] that all it need do is cite some benefit to communications" to conclude that its jurisdiction may reach government-owned utility poles in appropriate circumstances. It merely concluded that, where requirements imposed by public power utilities prohibit (or effectively prohibit) the provision of covered services, Section 224 does not insulate those requirements from preemption. *See Small Cell Order* ¶ 92 n.253 (RER 167).

E. The Commission reasonably considered the effects of its actions on 5G facilities and mobile broadband.

The Local Government Petitioners contend that, in addressing the effect of state and local restrictions on small cell deployment, the Commission should have ignored the restrictions' effect on "5G and broadband"—because, they assert, neither are "personal wireless services" under Section 332 or "telecommunications services" under Section 253. Local Gov't Br. 45; *see id.* at 46.

But insofar as Petitioners argue that 5G networks and small cells do not provide covered services, they are incorrect. On the contrary, these facilities are used to provide not just mobile broadband and other advanced services, but also traditional covered services like voice calls. As the Commission explained, a "critical feature" of small cell deployments is "ensur[ing] quality service to wireless callers" when they are inside buildings. *Small Cell Order* ¶ 40 (RER 141); *see also id.* ¶ 28 (RER 132) (citing the "urgent need" for accelerated deployment to support "current needs" as well as more advanced services).

That determination is well founded in the record. *See Small Cell Order* ¶ 36 n.84 (RER 137). T-Mobile informed the Commission that it relies on "small wireless facilities to densify [its existing] network to provide better coverage and greater capacity," including to support "voice calls in areas where [its] macro site coverage is insufficient to meet demand." T-Mobile 9/19/18 Letter 1 (RER 664). Verizon likewise explained that it "has deployed Small Wireless Facilities in its network" to "provide telecommunications services." Verizon 9/19/18 Letter 3 (RER 670). And AT&T uses small cells "to operate commercial mobile radio services," AT&T 9/20/18 Letter 1 (RER 671), which are both telecommunications and personal wireless services, *see Moratoria Order*

¶ 142 n.523 (RER 72); *Small Cell Order* ¶ 17 n.20 (RER 126). Petitioners' claim that 5G networks do not provide covered services is therefore unfounded.

It was also proper for the Commission to consider (rather than wholly ignore) effects on broadband as well as on voice services when addressing the prohibitory effect of state and local restrictions on small cell deployment. In today's world, "[i]nfrastructure for wireline and wireless telecommunication services frequently is the same infrastructure used for the provision of broadband Internet access service." *Moratoria Order* ¶ 167 (RER 86). Given the prevalence of "commingled" facilities, the Commission reasonably recognized that alleviating regulatory impediments to the provision of telecommunications and personal wireless facilities would have the important policy benefit of promoting broadband as well. *See id.* ¶ 147 (RER 75); *Small Cell Order* ¶ 36 & n.84 (RER 136–37). In doing so, the agency heeded Congress's directive to "encourage the deployment on a reasonable and timely basis of advanced telecommunications" by "remov[ing] barriers to infrastructure investment." 1996 Act § 706(a), 110 Stat. at 153 (codified at 47 U.S.C. § 1302(a)); *accord id.* pmbl., 110 Stat. at 56. For these reasons, the Tenth Circuit has held in analogous

circumstances that, when the FCC exercises its authority over telecommunications services using commingled facilities, the FCC may expressly take broadband services into account. *See In re FCC 11-161*, 753 F.3d 1015, 1044–48 (10th Cir. 2014) (holding that, although the Act defines "[u]niversal service" as "an evolving level of telecommunications services," 47 U.S.C. § 254(c)(1), the FCC could craft its universal service policies so as to promote the availability of broadband).

F. The Commission reasonably adopted the same approach for both wireline and wireless facilities.

The Local Government Petitioners also briefly object (Br. 46–49) to the Commission's adoption of the same statutory interpretations for both wireline and wireless facilities. The apparent basis for this objection is that, as they read the statute, wireless siting is covered only by Section 332(c)(7), while wireline facilities are covered by Section 253. *See id.* at 46–47.

That objection is misguided. As this Court has recognized, the two provisions use the identical "prohibit or have the effect of prohibiting" language, and there is "nothing suggesting that Congress intended a different meaning of the [same] text . . . in the two statutory provisions, enacted at the same time, in the same statute." *Sprint Telephony*, 543

F.3d at 579. Consistent with that view, the Commission reasoned that "because Sections 332(c)(7)(B)(i)(II) and 253(a) use identical 'effective prohibition' language," its rulings here "appl[y] with equal measure" no matter which provision governs. *Small Cell Order* ¶ 36 & n.83 (RER 136–37). Accordingly, the Commission explained that it "need not resolve here the precise interplay between Sections 253 and 332(c)(7)." *Id.* ¶ 68 (RER 157). This Court has adopted the same approach. *See Sprint Telephony*, 543 F.3d at 579 (the Court "need not decide whether [a dispute] falls under § 253 or § 332" because "the legal standard is the same under either").

For this same reason, there is no merit to Petitioner City of Portland's argument (Br. 48) that because the *Moratoria Order* is based on Section 253, it cannot apply to wireless siting decisions under Section 332(c)(7). If there was ever any question as to whether the Commission would have reached the conclusions announced in the *Moratoria Order* under Section 332(c)(7), that question was answered when the Commission ruled in the *Small Cell Order* that "the Commission interprets Section 332(c)(7)(B)(i)(II) to have the same substantive meaning as Section 253(a)." *Small Cell Order* ¶ 46 (RER 144).

Finally, given the many separate reasons that the Commission identified as independently supporting its interpretations under either Section 253 or Section 332(c)(7), the Local Government Petitioners' observation that one of those independent reasons is ostensibly "unique to §253" (Br. 48) casts no doubt on the *Orders* here, because the many other considerations discussed by the Commission all still independently support its conclusions.

III. Montgomery County's separate challenges are not properly before the Court and do not support reversal.

Montgomery County contends (Br. 30, 33–57) that the FCC could not lawfully issue the *Small Cell Order* without first reassessing the agency's current exposure limits for radiofrequency radiation and explaining why the *Order* does not trigger environmental assessment requirements under the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321 *et seq.*). The County lacks standing to bring these claims, which in any event fail on the merits.

A. Montgomery County lacks standing to bring these challenges.

"One of the essential elements of a legal case or controversy is that [a] plaintiff have standing to sue." *Trump v. Hawaii*, 138 S. Ct. 2392,

2416 (2018). As to each individual issue, *e.g.*, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006), "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

When "political subdivisions such as cities and counties" bring suit, they "cannot sue as *parens patriae*," because their "power is derivative and not sovereign." *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 131 (9th Cir. 1973). Such plaintiffs therefore must show a direct injury to their "own proprietary interests." *Id.*

The party asserting jurisdiction bears the burden of demonstrating standing. *E.g.*, *Spokeo*, 136 S. Ct. at 1547. In cases involving direct appellate review of an agency's order, "the petitioner's burden . . . is . . . the same as that of a plaintiff moving for summary judgment in the district court: it must support each element of its claim to standing by affidavit or other evidence." *Util. Workers Union v. FERC*, 896 F.3d 573, 577 (D.C. Cir. 2018) (internal quotation marks omitted); *accord Tenn. Republican Party v. SEC*, 863 F.3d 507, 517 (6th Cir. 2017); *Iowa League of Cities v. EPA*, 711 F.3d 844, 869–70 (8th Cir. 2013); *Citizens Against Ruining the Env't v. EPA*, 535 F.3d 670, 675 (7th Cir. 2008).

Here, Montgomery County does not explain the basis on which it asserts standing, let alone offer supporting evidence. Insofar as the County's brief reveals, its interest is in "protect[ing] the health and safety of citizens living and working directly adjacent to 5G small cells." Br. 50; *see, e.g.*, *id.* at 2 ("[Montgomery County] must be assured that its residents will not face any undue health risks."); *id.* at 33 ("[The FCC] did not explain why it ignored potential public health and safety issues . . . and failed to confirm whether the current FCC [radiofrequency] standards still protect citizens from such exposures.").

But as a political subdivision, Montgomery County cannot establish standing based on "particularized injuries to the 'concrete interests' of its citizens on their behalf." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004); *see also Cty. Council of Prince George's Cty. v. Zimmer Dev. Co.*, 120 A.3d 677, 685 (Md. 2015) ("[p]olitical subdivisions of States," including counties, "never were and never have been considered . . . sovereign entities"; they are "subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions" (quoting *Reynolds v. Sims*, 377 U.S. 533,

575 (1964)).[32] Nor can the County rely on a theory that it is safeguarding public health generally: A locality's "interest in the health and well-being . . . of its residents in general" is a "quasi-sovereign interest," distinct from the locality's "proprietary interests." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 602, 607 (1982). Accordingly, as the record now stands, this Court must dismiss Montgomery County's petition for review for lack of jurisdiction.

B. The Commission addressed NEPA's application to small cells in an earlier order, not the *Orders* under review, and Montgomery County cannot challenge that order here.

The County claims that, in issuing the *Small Cell Order*, the Commission unlawfully "[f]ailed [t]o [c]omply with NEPA." Br. 33. As the County frames its argument, because the *Small Cell Order* "removes perceived barriers" to small cell deployment, Br. 38, the *Order* itself is a "major federal action" triggering NEPA review, Br. 36–37.

But the necessary premise of that argument is that small cell deployments themselves are major federal actions. And the Commission already determined, in a March 2018 order, that small cell deployments

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[32] Indeed, even States may not rely on injuries to their citizens in suits against the federal government. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 602, 610 n.16 (1982).

are not major federal actions, because they do not require pre-construction approval from the FCC—meaning that any physical environmental impacts from small cells result from siting and other decisions made by private parties and local governments. *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Rcd. 3102, 3122, 3136–38 ¶¶ 58, 85–86 (2018) (*NEPA Order*). As explained in that earlier order, NEPA thus does not require environmental reviews for small cell deployments. *Id.* at 3104 ¶ 4.

The Commission's determinations in the *NEPA Order* are now under review before the D.C. Circuit. *See United Keetoowah Band of Cherokee Indians v. FCC*, Nos. 18-1129 *et al.* (D.C. Cir. argued March 15, 2019). And although Montgomery County could have participated in that case, it chose not to.[33] Having failed to challenge the *NEPA Order* when it had the chance, the County may not now collaterally attack the Commission's determinations in that earlier order here. Otherwise, the

[33] The County participated in the administrative proceeding underlying the *NEPA Order* as a member of the "Smart Communities and Special Districts Coalition"—an unincorporated, ad hoc group that made joint filings on behalf of a fluctuating list of "individual localities, special districts, and local government associations." Smart Communities Wireless Comments i (RER 477); *see id.* at 1 (RER 478) (identifying Montgomery County as a participating locality); Smart Communities Reply Comments 1 (RER 529) (same).

County "would effectively circumvent" the governing 60-day jurisdictional window for challenges to FCC orders. *United States v. Lowry*, 512 F.3d 1194, 1203 (9th Cir. 2008); *see* 28 U.S.C. § 2344; 47 C.F.R. § 1.4(b)(1); *see also Biggerstaff v. FCC*, 511 F.3d 178, 185 (D.C. Cir. 2007) (unless the administrative record makes clear that the FCC intended to reopen issues decided in an earlier order, a challenge outside the period permitted under the Hobbs Act "is untimely").

In any event, it is well established in this Circuit, consistent with the FCC's position in *United Keetoowah*, that when (as here) a federal order has no environmental impact and proposes no action, the analytical obligations of NEPA are not triggered. *See, e.g.*, *Northcoast Envtl. Ctr. v. Glickman*, 136 F.3d 660, 670 (9th Cir. 1998) (Forest Service disease management plan was not subject to NEPA when it did "not create activities which impact the physical environment"); *see also Ranchers Cattlemen Action Legal Fund United Stockgrowers v. USDA*, 415 F.3d 1078, 1103 (9th Cir. 2005) (NEPA is a "means of protecting the physical environment," not human health without connection to environmental harms (internal quotation marks and emphasis omitted)); *Ka Makani 'O Kohala Ohana Inc. v. Water Supply*, 295 F.3d 955, 962 (9th Cir. 2002)

(NEPA analysis is not required when an agency undertakes activities that will influence future decisionmaking, but which themselves have "no real impact on the physical environment").

The County's argument fails for the additional reason that, just as "the decision of [a] funding or licensing agency is not itself an undertaking" under the federal historic preservation laws, *CTIA—The Wireless Ass'n v. FCC*, 466 F.3d 105, 109 n.2 (D.C. Cir. 2006) (emphasis omitted), an FCC order bearing on wireless deployment is not itself a major federal action under NEPA. This argument, too, is before the D.C. Circuit in *United Keetoowah*. *See* Respondents' Br. 43 n.7, *United Keetoowah Band of Cherokee Indians v. FCC*, Nos. 18-1129 *et al.* (D.C. Cir. Feb. 1, 2019), 2019 WL 415017.

C. The Commission was not bound to update its radiofrequency exposure limits before issuing the *Small Cell Order*.

Montgomery County contends that the *Small Cell Order* is arbitrary and capricious because it does not address whether the FCC's "current [radiofrequency exposure] standards"—which the agency is in the process of reassessing in a parallel proceeding, *Reassessment of FCC Radiofrequency Exposure Limits and Policies*, 28 FCC Rcd. 3498 (2013) (*Radiofrequency Proceeding*)—"are protective of human health." Br. 53.

But the FCC is not required to reevaluate its radiofrequency exposure limits whenever it issues an order that might promote the deployment of wireless technologies. As the Supreme Court has recognized, an agency has "significant latitude as to the manner, timing, content, and coordination of its regulations." *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007). Here, the Commission reasonably decided to address effective prohibitions on next-generation networks now, while continuing to study and reassess the governing radiofrequency exposure limits in a separate proceeding already underway for that purpose. *See Small Cell Order* ¶ 33 n.72 (RER 134) (citing *Radiofrequency Proceeding*, 28 FCC Rcd. 3498). If Montgomery County or others are unhappy with the ultimate result of the *Radiofrequency Proceeding*, they will be able to seek judicial review when the agency concludes that proceeding.[34]

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[34] On August 8, 2019—the day we are lodging this brief—the FCC issued a press release announcing that the agency's chairman has circulated for the Commission's review a draft item that would resolve the pending *Radiofrequency Proceeding* by maintaining the existing radiofrequency exposure limits. *See* Fed. Commc'ns Comm'n, Press Release, *Chairman Pai Proposes to Maintain Current Radiofrequency Exposure Safety Standards* (Aug. 8, 2019), https://www.fcc.gov/document/chairman-pai-proposes-maintain-current-rf-exposure-safety-standards.

It is not true that the FCC ignored concerns that "the current [exposure] standards must be updated." Montgomery County Br. 57. The Commission considered commenters' "concerns regarding [radiofrequency] emissions," *Small Cell Order* ¶ 33 n.72 (RER 134), including comments taking the position that the agency should "stop the acceleration of [wireless electromagnetic radiation] until . . . proceedings 13-84 and 03-137 [the *Radiofrequency Proceeding*] are finalized." EMF Safety Network/Ecological Options Network Comments 10 (RER 432); *see Small Cell Order* ¶ 33 n.72 (RER 134). But the Commission reasonably found that those concerns were best addressed in the pending *Radiofrequency Proceeding*.

IV. Petitioners' constitutional arguments lack merit.

Finally, the Local Government Petitioners and their supporting intervenors urge that the *Orders* violate the Fifth and Tenth Amendments. *See* Local Gov't Br. 106–16; NYC/NATOA Br. 14–24. Upon inspection, however, their arguments fail to raise any serious constitutional concerns.

A. The *Orders* do not violate the Fifth Amendment.

The Local Government Petitioners' claim that the *Orders* violate the Fifth Amendment's Takings Clause (Br. 106–13) plainly fails.

"[U]nder traditional Fifth Amendment standards," the Supreme Court has declared, "[i]t is of course settled beyond dispute that regulation of rates chargeable from the employment of private property devoted to public uses is constitutionally permissible." *FCC v. Fla. Power Corp.*, 480 U.S. 245, 253 (1987).[35]

To begin with, the *Orders* do "not give[] providers any right to compel access to any particular state or local property." *Small Cell Order* ¶ 73 n.217 (RER 159); *see also id.* ¶ 40 n.94 (RER 140) ("[O]ur standard does not preclude all state and local denials of requests for the placement, construction, or modification of personal wireless service facilities . . . ."); *see also Moratoria Order* ¶ 164 (RER 85) (the *Moratoria Order* "[does] not specifically preempt any state or local law"). Local governments may still

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[35] The Commission's interpretations here are in fact considerably more modest than what the Supreme Court upheld in *Florida Power*. For one thing, the *Orders* do not require localities to grant any given siting request. For another, the *Small Cell Order* addresses fees and charges only for public rights-of-way, not for ordinary property. (The *Moratoria Order* does not speak to fees or charges, except to clarify that they are not within the scope of that *Order*. *See Moratoria Order* ¶ 159 & n.586 (RER 82).) And the Commission did not engage in prescriptive rate-setting; instead, it adopted only a narrow proscription against state and local governments' demanding right-of-way fees that would amount to an effective prohibition in violation of Sections 253 and 332(c)(7), while preserving localities' right to seek full compensation for any actual costs they must incur.

"deny particular placement applications" for any number of conceivable reasons, *Small Cell Order* ¶ 73 n.217 (RER 159), so long as their reasons for doing so are supported by substantial evidence, *see* 47 U.S.C. § 332(c)(7)(B)(iii); *MetroPCS*, 400 F.3d at 725. The *Small Cell Order* precludes localities from charging unreasonable fees when small cells are deployed in public rights-of-way, but neither *Order* compels localities to grant any particular siting request. Absent the "element of required acquiescence," *Fla. Power*, 480 U.S. at 252, the *Orders* do not amount to a *per se* taking.

Even if the *Orders* were construed to effect a taking, they fulfill the requirement of just compensation by allowing localities to recover all actual costs they must incur. *Small Cell Order* ¶ 73 n.217 (RER 159–60); *see also Moratoria Order* ¶ 159 & n.586 (RER 82) (excluding fees from the scope of the *Moratoria Order*). The Local Government Petitioners' insistence that the Fifth Amendment entitles them to charge "market-based rents" is wrong for two reasons. First, as discussed above, there is no competitive "market" here, because the local governments that control the public rights-of-way exercise a legal monopoly over its use and because there generally are no technologically and economically feasible alternatives for small cell deployment. *See supra* pp. 82–84; *cf. United*

States v. 564.54 Acres of Land, 441 U.S. 506, 512–13 (1979) (recognizing that non-market measures of compensation may be appropriate, "for example, with respect to public facilities such as roads or sewers"). Second, deploying communications infrastructure in the rights-of-way is, "for practical purposes, *nonrivalrous* . . . . mean[ing] that use by one entity does not necessarily diminish the use and enjoyment of others." *Ala. Power Co. v. FCC*, 311 F.3d 1357, 1369 (11th Cir. 2002).

In these circumstances, just compensation can be provided by allowing localities to recover all of their marginal or incremental costs. *See Ala. Power*, 311 F.3d at 1369–71. As a leading treatise explains, "When the telegraph company (or any utility company for that matter) acquires the right to maintain its lines along a" right-of-way, the right-of-way holder "is not entitled to recover the market value of that portion," but instead "its compensation is limited to the decrease in the value of the use of the right-of-way . . . by reason of its being concurrently used for telegraph purposes." 4A Julius L. Sackman, *Nichols on Eminent Domain* § 15.15, at 15-75 to -76 (3d ed. rev. July 2013) (discussing compensation owed for use of railroad rights-of-way).

For relatively unobtrusive equipment like small cells, which cause little interference with other uses of the right-of-way, any decrease in useful value is likely nominal and fully compensated by allowing localities to recover all of their actual costs. *Cf. Chicago, Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226, 241–42, 247–48 (1897) (*Chicago Railroad*) (holding that, when the city built a street that crossed the defendant's railroad tracks, a nominal award of one dollar provided just compensation because "the opening of the street across the railroad tracks did not unduly interfere with the company's use of the right of way," and "its use for all the purposes for which it was held by the railroad company was interfered with only so far as [it] was diminished in value by subjecting the land within the crossing to use as a public street"); 4A *Nichols on Eminent Domain* § 15.15, at 15-78 & n.12 (when the right-of-way holder "is unable to show any actual damage, it is entitled to recover only nominal damages" under *Chicago Railroad*). Thus, in the absence of any showing that rights-of-way are already at "full capacity" and that allowing telecommunications equipment prevents "higher valued use," "marginal cost meets th[e] test." *Ala. Power*, 311 F.3d at 1372; *see id.* at 1370–71.

The Commission's cost-based approach comports with more than a century of precedent holding that, when telegraph and telephone companies have been given the right to deploy infrastructure along railroad rights-of-way, "consideration need be given . . . only insofar as the value of the right of way, as a unit, is affected thereby" and "need not be given either to fee value or rental value." 4A *Nichols on Eminent Domain* § 15.15, at 15-77 (footnotes omitted). Thus, for example, in one case "a railroad company was entitled to recover what it originally cost the company to clear the space covered by poles and wires, as well as the capitalized annual cost of keeping the space clear"; in another case "[i]t was held . . . that the railroad company might recover the increased expense of keeping the location free of inflammable materials"; and other cases have likewise held "that the communications company must make compensation proportionately for the cost and expense of the railroad company in putting the right of way in condition." *Id.* at 15-78 to -79. All of these cases hold that the right-of-way holder is entitled to compensation only insofar as the infrastructure actually interferes with its use of the right-of-way and requires it to incur actual costs, not (as the Local Government Petitioners would have it) to whatever price carriers with little alternative can be made to pay.

B. The *Orders* do not violate the Tenth Amendment.

The *Orders* also do not raise any substantial Tenth Amendment concerns. Indeed, the Tenth Amendment by its own terms does not apply here. The text of the Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Thus, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York v. United States*, 505 U.S. 144, 156 (1992). Because Congress enacted the 1996 Act pursuant to its delegated authority under the Commerce Clause, *MCI Telecomms. Corp. v. Bell Atl.*, 271 F.3d 491, 503 (3d Cir. 2001), no Tenth Amendment issue arises here. *See New York*, 505 U.S. at 157–58; *Qwest Broadband Servs., Inc. v. City of Boulder*, 151 F. Supp. 2d 1236, 1245–46 (D. Colo. 2001).

Unlike in *New York*—in which the Supreme Court ruled that Congress had exceeded its authority by seeking to make states regulate the disposal of radioactive waste (or, if a state failed to regulate, to make it take title to and assume direct liability for the waste), *see* 505 U.S. at 159–60—Sections 253 and 332(c)(7) do not commandeer the state legislative process or conscript local officials to administer a federal

regulatory scheme.[36] Indeed, nothing in these provisions or in the Commission's *Orders* interpreting them requires local governments to regulate the deployment of telecommunications infrastructure at all; they instead *forbid* localities from regulating or interfering with deployment in certain impermissible ways.[37]

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[36] Contrary to the intervenors' assertions (NYC/NATOA Br. 22), the provisions at issue do not "forc[e] local governments to administer federal regulatory programs" or "set priorities for local decisionmakers." *See Small Cell Order* ¶ 101 & n.289 (RER 174). As this Court and others have held, "the substantial evidence inquiry [under Section 332(c)(7)] does not require incorporation of [any] substantive federal standards . . . but instead requires a determination whether the zoning decision at issue is supported by substantial evidence in the context of applicable *state and local law*," and thus it "'does not affect or encroach upon the *substantive* standards to be applied under established principles of state and local law.'" *MetroPCS*, 400 F.3d at 723–24 (quoting *Oyster Bay*, 166 F.3d at 494). The statute does not conscript local officials to apply federal standards, but instead preserves state and local standards for reviewing siting applications, subject to only a few discrete limits to preempt localities from impeding wireless deployment.

[37] To be sure, *if* a locality decides to regulate the siting of telecommunications equipment, Sections 253 and 332(c)(7) provide that it may not "interfere with the expansion of [telecommunications] networks" by adopting practices that have the effect of prohibiting service, but that does not pose any Tenth Amendment problem. *Montgomery Cty.*, 811 F.3d at 128. Nothing in Sections 253 or 332(c)(7), or in the Commission's orders interpreting those provisions, requires localities to regulate the placement or appearance of telecommunications infrastructure at all, or to approve any given siting request. *Small Cell Order* ¶ 73 n.217 (RER 159); *id.* ¶ 101 (RER 174).

Nor is this a situation in which "there is simply no way to understand the provision[s] . . . as anything other than a direct command to the States." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1481 (2018). Although their "language might appear to operate directly on the States," in substance these provisions "confer[] on private entities (i.e., covered carriers) a federal right to engage in certain conduct subject only to certain [limited] constraints." *Id.* at 1480. Sections 253 and 332(c)(7) therefore operate as "valid preemption provision[s]," *id.* at 1479, and such preemption provisions are entirely constitutional, *see id.* at 1479–81; *New York*, 505 U.S. at 160.

Moreover, in the event a court does issue "an injunction to force access," Local Gov't Br. 114, the necessary approvals are "granted only by operation of federal law," so "the imprimatur of any [such order] is federal, and not local." *Montgomery Cty.*, 811 F.3d at 129. Nor would granting Petitioners' request to vacate the *Orders* prevent courts from issuing any injunctions, because any authority to order injunctive relief arises from "'the limits Congress already imposed' . . . through its enactment of Section 332(c)(7)," not the *Orders* under review here. *Small Cell Order* ¶ 101 (RER 174); *see id.* ¶¶ 120 & n.342, 136 (RER 182, 190–91); *see also*

Montgomery Cty., 811 F.3d at 128 ("The FCC's Order does no more than implement the statute."). Because any Tenth Amendment challenge thus goes to the underlying statute itself, not to the *Orders* challenged here, vacating the *Orders* would not redress any Tenth Amendment injury. In any event, this Court and others have repeatedly upheld the application of Sections 253 and 332(c)(7) without ever suggesting that those provisions could be constitutionally infirm; there is no basis to reach a different result here.

CONCLUSION

The petitions for review should be denied.

Dated: August 8, 2019

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to the Appellate Commissioner's Order issued on April 18, 2019, the foregoing Brief for Respondents addresses both the petition for review filed in *City of Portland v. USA & FCC*, No. 18-72689, and the consolidated petitions for review filed in *Sprint Corp. v. FCC & USA*, Nos. 19-70123 *et al.*

The following cases in this Court have been consolidated with Case No. 19-70123 and arise out of the same underlying agency order:

- *Verizon Communications, Inc. v. FCC & USA*, No. 19-70124
- *Puerto Rico Telephone Co. v. FCC & USA*, No. 19-70125
- *City of Seattle, et al. v. FCC & USA*, No. 19-70136
- *City of San Jose, et al. v. FCC & USA*, No. 19-70144
- *City & County of San Francisco v. FCC & USA*, No. 19-70145
- *City of Huntington Beach v. FCC & USA*, No. 19-70146
- *Montgomery County v. FCC & USA*, No. 19-70147
- *AT&T Services, Inc. v. FCC & USA*, No. 19-70326
- *American Public Power Ass'n v. FCC & USA*, No. 19-70339
- *City of Austin, et al. v. FCC & USA*, No. 19-70341
- *City of Eugene, et al. v. FCC & USA*, No, 19-70344

A separate petition for review filed in *American Electric Power Service Corp., et al. v. FCC & USA*, No. 19-70490, arises out of the same underlying agency order at issue in Case No. 18-72689 and has been consolidated with that case. Pursuant to the Appellate Commissioner's Order, the parties are briefing the *American Electric Power* case separately from the other related cases in this Court.

In addition, an earlier order issued in one of the same agency dockets as the underlying order in No. 19-70123 is currently under review in the D.C. Circuit. *See United Keetoowah Band of Cherokee Indians v. FCC*, Nos. 18-1129 *et al.* (D.C. Cir. argued March 15, 2019). Certain issues in that case are the same as (or closely related to) issues that Petitioner Montgomery County raises here.

CERTIFICATE OF COMPLIANCE FOR BRIEFS

I certify that this brief contains 34,345 words, excluding the items exempted by Fed. R. App. P. 32(f), and that the 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). I further certify that the brief is accompanied by a motion to exceed the ordinary type-volume limits pursuant to 9th Cir. R. 32-2(a).

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CERTIFICATE OF FILING AND SERVICE

I, Scott M. Noveck, hereby certify that on August 8, 2019, I filed the foregoing Brief for Respondents with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the electronic CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served electronically by the CM/ECF system.

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STATUTORY ADDENDUM

STATUTORY ADDENDUM CONTENTS

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47 U.S.C. § 253 ..... Add. 2

47 U.S.C. § 332(c)(7) ..... Add. 3

47 U.S.C. § 253 provides in pertinent part:

§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.

* * *

47 U.S.C. § 332(c)(7) provides:

§332. Mobile services

* * *

(c) Regulatory treatment of mobile services

* * *

(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).

* * *