UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THE CITY OF SAN JOSE, CALIFORNIA; et al., Petitioners, v. UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION Respondents. --- CTIA – THE WIRELESS ASSOCIATION, et al., Intervenors – Respondents.	Case No. 18-9568 (MCP No. 155)
CITY OF SEATTLE, WASHINGTON, et al., Petitioners, v. FEDERAL COMMUNICATIONS COMMISSION, et al., Respondents. --- CITY OF BAKERSFIELD, CALIFORNIA, et al., Intervenors – Petitioners.	Case No. 18-9571 (MCP No. 155)

CITY OF HUNTINGTON BEACH,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,

Respondents.

THE CITY OF SAN JOSE, CALIFORNIA, et al.,

Intervenors – Petitioners.

Case No. 18-9572 (MCP No. 155)

MOTION TO STAY FCC ORDER PENDING APPEAL

Petitioners in *San Jose v. FCC*, No. 18-9568; *Seattle v. FCC*, No. 18-9571; and *Huntington Beach v. FCC*, No. 18-9527 jointly request the Court stay the Federal Communications Commission's Declaratory Ruling and Third Report and Order, *In the Matter of Accelerating Wireless Broadband Deployment By Removing Barriers to Infrastructure Investment*, FCC 18-133, WT Docket No. 17-79, WC Docket No. 17-84, 85 FR 51867 (Sept. 27, 2018) (the "Order") (App-1-116), pending review. On October 31, 2018, Petitioners and others requested a stay from the Commission, denied on December 10,

2018.[1] Action is urgently required on this Motion, as the Order will be effective in part on January 14, 2019.

The Order is subject to seven unconsolidated appeals pending before this Court. All participants have been contacted about the motion. [2]

This Court has jurisdiction to review the Commission's actions under 47 U.S.C. §402(a) and 28 U.S.C. §2342(1), and to stay the matter pending appeal pursuant to F.R.A.P. Rules 8 and 18.

STANDARD OF REVIEW

This Court may grant this Motion if it finds (1) a likelihood that the Petitioners will succeed on the merits; (2) that Petitioners will suffer irreparable injury absent a stay; (3) that a stay will not harm other interested parties; and (3) the public interest supports a stay. "The first two factors . . . are the most critical."[3]

[1] The Commission concluded that movants failed to show a stay was warranted, Order Denying Motion for Stay, *In the Matter of Accelerating Wireless Broadband Deployment By Removing Barriers to Infrastructure Investment*, DA 18-140, WT Docket No. 17-79, WC Docket No. 17-84 (Dec. 10, 2018) ("Denial Order") (App-117-126).

[2] The others are: *Puerto Rico Tel. Co., Inc. v. FCC*, No. 18-2063 (1st Cir. Oct. 25, 2018); *Verizon v. FCC*, No. 18-3255 (2nd Cir. Oct. 25, 2018); *Sprint Corp. v. FCC*, No. 18-9563 (10th Cir. Oct. 25, 2018); *Montgomery Cnty. v. FCC*, No. 18-2448 (4th Cir. Dec. 5, 2018). All local government parties and intervenors support the motion. The United States takes no position. All others oppose.

[3] *Nken v. Holder*, 556 U.S. 418, 433-34 (2009).

ARGUMENT

The Order dramatically changes the *status quo* that the Commission concedes works well in many places,[4] conflicts with the plain language in the Communications Act and that raises significant constitutional issues. A stay will allow deployment to proceed while avoiding significant delays and irreversible harms that would result from nationwide regulatory whiplash as the Order takes effect in stages and potentially changes after judicial review.

I. PETITIONERS LIKELY WILL PREVAIL ON THE MERITS

To demonstrate a likelihood that Petitioners will prevail on the merits, it is enough that the appeal "raises serious legal questions, or has a reasonable probability or fair prospect of success."[5]

Review on the merits begins with whether the Congress left a statutory ambiguity for the Commission to interpret and, if so, whether the Commission's interpretation is based on a permissible statutory construction.[6] Furthermore, this Court must set aside agency action that is arbitrary or capricious or contrary to law.[7] "One of the basic procedural requirements of administrative rulemaking is

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[4] Order, ¶5 (App-2).
[5] *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012); *Otero Sav. & Loan Ass'n v. Fed. Reserve Bank*, 665 F.2d 275, 278 (10th Cir. 1981).
[6] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
[7] 5 U.S.C. §706(2)(A); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

that an agency must give adequate reasons for its decisions."[8] The Order fails these standards.

A. The Order Rests on A Series of Determinations Inconsistent with Plain Statutory Language and Precedent.

The Order relies heavily on 47 U.S.C. §253[9] notwithstanding the express language of §332(c)(7)(A): "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." The Commission cursorily attempts to justify extending Section 253 to wireless by arguing the Order's requirements do not preempt "decisions."[10] The justification fails as a matter of statutory interpretation and would render the Order nonsensical. Section 332(c)(7) prevents the Commission from using Section 253 from "limiting or affecting" authority over decisions, and restrictions on state and local statutes, regulations and other legal requirements by definition limit or affect authority. And if the Order truly means that site-by-site "decisions" are outside the purview of the Order, then the Order can have no effect.

[8] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).
[9] Cited over 300 times.
[10] Order, n.83 (App-16) The Commission's reference to Section 332(c)(3) is no more helpful, as it is not encompassed by the limitation in subsection (7).

The Order resorts to Section 253 because to limit compensation for occupancy of public property, it needs the "reasonableness" standard in Section 253(c) as a hook (albeit a mistaken one) for Commission authority. Section 332(c)(7) has no reference to compensation comparable to that in Section 253(c) for the obvious reason that Section 332(c)(7) was intended by Congress to preempt only inappropriate use of regulatory authority over land use, and not to affect local or state authority to control siting on their own property.

The Order rests on legal error and cannot stand even if the Commission argues it could reach the same conclusions interpreting only Section 332(c)(7).[11]

Even if Section 253 is applicable to regulations of state and local land use authority, the Order remains riddled with one *ultra vires* determination after another:

1. The Order purports to adopt a definitive test for what constitutes a "prohibition" or "effective prohibition" based upon the standard the Commission adopted in *In re California Payphone Ass'n*, 12 F.C.C. Rcd. 14191, 14206 (1997). Yet, the Order's test cannot be squared with that case, or the statute.

Payphone holds that in reviewing a Section 253(a) claim, the Commission considers whether a regulation "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and

[11] The Commission cannot invent a basis for its Order on judicial review. *See SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

regulatory environment" explains that a regulation "would have to actually prohibit or effectively prohibit the ability of a…service provider to provide services" under that test.[12] The Eighth and Ninth Circuits citing *Payphone,* found the unambiguous "plain language" in Section 253(a) compelled "actual prohibition" test.[13] Under *Nat'l Cable & Telecommc'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005), the Commission must apply that standard.

Instead, the Commission alters *Payphone* to find prohibition whenever an entity is prevented from "improving" service or when regulation imposes costs on deployment (on the theory that providers *might* offer additional services if they were richer).[14] This reinterpretation does not require any meaningful "prohibition" as required by the statute, this Court's precedents or *Payphone*. The disregard for the "actual prohibition" requirement alone justifies reversal.[15] .

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[12] 12 F.C.C. Rcd.14206, ¶31. This Circuit cited *Payphone* in *Qwest v. Santa Fe*, 380 F.3d 1258, 1271 (10th Cir. 2004) finding prohibition where evidence showed that the City's new pricing model would result in a massive cost increases, and there was no countervailing evidence.

[13] *Sprint Tel. PCS, LP v. Cnty. of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008); *Level 3 Commc'ns, LLC v. City of St. Louis*, 477 F.3d 528, 523 (8th Cir. 2007). In the Denial Order, ¶8, the Commission dismisses these cases to the extent that they purport to require a "complete prohibition." They do not, but they do require an "actual" prohibition, and *Brand X* requires application of that standard.

[14] Order, ¶37 (App-17-18).

[15] Even if not resolved by "plain language" the departure from its prior standard means the decision is due less deference under *Chevron. Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993).

2. The disconnect between the Commission's new standard, the statute, and precedent is illustrated by its approach to aesthetics. The Commission finds that compliance with subjective aesthetic standards increases the cost of deployment, and are therefore prohibitory unless they are, *inter alia*, "objective" and equally applied to "other infrastructure."[16] It never explains why a standard that treats wireless different from other infrastructure, such as electrical systems, denies wireless providers a fair playing field. It never explains why the cost associated with compliance of "subjective standards" is actually prohibitory, especially as the decision itself makes clear that providers (while complaining) can and do comply with them. While complying with aesthetic standards may involve costs, courts have noted that consideration of "subjective" aesthetic standards is common in a zoning context.[17] Congress could not have intended to preserve local zoning except in those cases where it did not involve "subjective" choices. The deferential "substantial evidence" standard[18] for local permit denials would be superfluous if Congress envisioned wholly objective zoning standards. The Commission's interpretation is a result Congress manifestly did not intend.[19]

[16] Order, ¶87 (App-45).
[17] *Wireless Towers, LLC v. City of Jacksonville, Fla.*, 712 F. Supp. 2d 1294, 1305 (M.D. Fla. 2010).
[18] 47 U.S.C. §332(c)(7)(B)(iii).
[19] *State Farm*, 463 U.S. at 43.

Compounding the problems, the Commission reverses the almost uniform holding of Courts of Appeal that an entity must show it has adopted the "least intrusive alternative" consistent with local standards as part of an effective prohibition claim. The requirement ensures that local standards are adhered to as closely as possible, and logically, where there is a deployment alternative there is no prohibition. The Commission never justifies elimination of this standard.[20]

3. The same disconnect results appears in the discussion of rents for use of government-owned rights-of-way and other property in the right-of-way like street lights and traffic signals. Those are declared prohibitory unless limited to "direct costs."[21]

The problem is not that deployments are prohibited in any localities that charge more than cost. The record showed the reverse.[22] But, according to the Commission, when New York City charges fair-market rents, it "prohibits" deployment in rural North Dakota, because if providers had more money, they

[20] Order, nn. 75, 95 (App-15, 20), (citing Court of Appeals cases and rejecting standard).

[21] In the Denial Order, the Commission suggests localities can recover *any* cost associated with use of public facilities by wireless facilities. The Order states that localities only may recover costs "for their maintenance of ROW and government-owned structures within ROW used to host Small Wireless Facilities." Order, n.217 (App-39).

[22] Comments of the Smart Communities and Special Districts Coalition, WC Docket No. 17-84, Exh. 1, Declaration of Alan Pearce (Jun. 15, 2017) (App-127-30); *Id.* Exh. 2, An Engineering Analysis of Public Rights-of-Way Processes in the Context of Wireline Network Design and Construction (App-131-35).

might (the Commission wishfully concludes) deploy in otherwise unviable markets.[23] The only support for this proposition is a single industry-funded whitepaper submitted after comment periods closed that concludes the industry could (not would) use their windfall in economically viable markets to subsidize operations in communities without a business case to support the capital investment in network facilities.[24] Neither the Commission's prior orders nor economic theory suggests that an entity could or would voluntarily cross-subsidize a non-remunerative market with profits from a competitive market.[25]

4. Going further, the Commission reads the right-of-way compensation savings clause in Section 253(c), out of existence. It finds that only charges that

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[23] Order ¶60-63 (App-31-32).

[24] Letter from Corning Inc., WT Docket No. 17-79, (Sep. 5, 2018) (App-142-47).

[25] The Denial Order suggests that the Commission had economic support for its conclusion. It did not. The study relied upon indicated that if providers had more money they *could* cross-subsidize and deploy in unviable remote areas, and if rents were reduced in marginally viable areas, those areas might become viable. *See* Order, fn.169 (App-31) The first point is not supported by economic theory or practice. *See* Comments of the Smart Communities and Special Districts Coalition, WT Docket No. 17-79, Declaration of Dr. Kevin E. Cahill, Ph.D (Jun. 15, 2017) (App-139-41); Comments of the Smart Communities and Special Districts Coalition, WC Docket No. 17-84, Exh. 3, Effect on Broadband Deployment of Local Government Right-of-way Fees and Practices (App-136-38); *Id.* at fn64 (citing Comments of NATOA, et. al., GN Docket No. 09-51, Report of Ed Whitelaw (Nov. 6, 2009) (App-148-50)); Letter from the Coalition for Local Internet Choice, WT Docket No. 17-79 (Sep. 18, 2018) (App-151-56); Letter from the City of Eugene, Oregon, WT Docket No. 17-79 (Sep. 19, 2018) (App-157-62). The second was unsupported by any showing that in "marginally viable" markets, communities were overcharging. To the extent the record addressed the point, it showed the reverse. *Id.* (App-159-60)

exceed direct costs are prohibitory under 253(a), but then finds that only charges limited to direct costs are protected by the "compensation savings clause in Section 253(c).[26] The legislative history is actually clear that Congress meant for the savings clause to secure state and local rights to charge for property. Congressman Barton, led successful efforts to remove provisions from the law that would have significantly limited state and local rights to charge fees (partially because the transfer of value from localities to private companies would be an unfunded mandate). He explained the clause "explicitly guarantees that cities and local governments have the right to not only control access within their city limits, but also to set the compensation level for the use of that right-of-way.... The Federal Government has absolutely no business telling State and local government how to price access to their local right-of-way." [27] And, contrary to the Commission's claims, court cases do not support a contrary interpretation, or even find that Section 253(c) gives the Commission authority to regulate rates. [28] The broad

[26] Order, ¶55-56 (App-28-29).
[27] 141 Cong. Rec. 22036 (1995).
[28] In *Puerto Rico Tel. Co. v. Mun. of Guayanilla*, 450 F.3d 9 (2006), the court found a particular fee was not saved by Section 253(c) standard because the municipality provided insufficient evidence to support it, but the court noted specifically that it was not saying compensation was limited to direct costs, and its concern about "costs" are discussed in the context of unrebutted arguments that the locality had monopoly pricing power. There is nothing to suggest that localities have monopoly power over poles, buildings or other vertical structures to which small cells are attached. The discussion in these cases about fees being unreasonable if they are not "based on the use of the rights-of-way" derives from

conclusion that any time a locality charges more than cost, it is prohibitory, or an actual prohibition is occur whenever there is a subjective zoning standard is not plausible, and inconsistent with the case-by-case court review of charges envisioned by 47 U.S.C. 253(d) – even assuming Section 253 applies at all.

5. As if this were not enough, the Commission reverses its precedent and court decisions, and finds that Section 253 and Section 332 permit the Commission to preempt and regulate local and state authority over proprietary property. The Commission thus now claims the authority over access to municipal utility poles specifically foreclosed by 47 U.S.C. §224, [29] Its powers (it claims) extends to states where Section 224 "reverse preempts" its authority. It sets presumptively

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an early Telecommunications Act case that was not referring at all to barring revenue-based fees or limiting fees to costs. *AT&T Communications., Inc. v. City of Dallas* 8 F. Supp. 2d 582 (N.D. Tex. 1998). In that case the court was troubled not by a revenue-based fee but by a revenue-based fee to the extent it included in its revenue calculation revenue from sources other than the activities conducted using the infrastructure in the rights-of-way. There was no revenue-based fee at issue *in Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081 (indeed the court indicated it was inclined to approve the fee in question there had the relevant ordinance not been invalidated on other grounds 146 F. Supp. 2d 1081 at 1101). In *N.J. Payphone Ass'n Inc. v. Town of West York,* 130 F. Supp. 2d 631 (D.N.J. 2001), the court specifically stated that it did not need to decide the issue of whether revenue-based fees are valid because it invalidated the local government process on other grounds ("The Court need not choose between these competing views of 'fair and reasonable compensation' in this case." 130 F. Supp. 2d 631at 638).

[29] Order, n.253 (App-47).

reasonable rates based on the pole attachment formula it could not apply under Section 224.[30]

Essentially, the Commission finds that Congress meant *sub silentio* to undo the limits established by Section 224. That is implausible. First, Section 224 was amended when Section 253 was adopted, and if Congress meant to expand Commission authority, it would have said so. It is an impermissible reading in light of the well-established, and constitutionally based rule that "recognize[s] a distinction between regulation and actions a state takes in a proprietary capacity."[31] The latter are not subject to preemption.[32]

Moreover, agreeing with the courts that found Sections 253 and 332 do not extend to proprietary actions,[33] the Commission had previously confirmed that "lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property" are not subject to preemption.[34]

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[30] Order, ¶79 (App-42). The $270 per annum per pole rate is, however, not remotely compensatory, as it includes (as commercial pole fees do not) the right of access to a pole, and the right of access to any other right-of-way required to reach the pole.

[31] *Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Tex.*, 180 F.3d 686, 691 (5th Cir. 1999).

[32] *Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 224 (1993).

[33] *Sprint Spectrum v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002); *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004).

[34] *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 F.C.C. Rcd. 12865 (2014)

There is no reasoned explanation for the departure from prior precedent.[35] The Commission simply declares that a locality's control over any of its property in the right-of-way is regulatory because it involves "managing or controlling access" to that property. If there is one quintessential proprietary activity, it is "managing and controlling access."

B. The Commission's Assertion of Regulatory Authority Raises Significant Tenth and Fifth Amendment Issues.

Even in the unlikely result that none of the numerous statutory limits described above would invalidate the Order, the Order raises serious federal Constitutional concerns, under the Fifth and Tenth Amendments.

The Commission attempts to avoid those issues by arguing that it does not compel localities to grant access to any particular site.[36] But it does: the Order makes clear that denials are subject to a challenge as prohibitions, and courts may require issuance of leases (and presumably, define what terms may be included for access to light poles, traffic signals, conduit, and other proprietary infrastructure).[37] The locality cannot (as a property owner normally could) ignore a request for access. Under the Order, the locality must respond with a full lease within 60 days, or be

[35] The Commission merely noted that its prior decision dealt with 47 U.S.C. Sec. 1455, but the Commission was applying principles to that section because it saw no distinction between it, and Section 253 and 332.
[36] Order, n.217 (App-39); Denial Order, ¶12 (App-121).
[37] Order, n.217 (App-39).

deemed to have prohibited entry, and the Court may order access.[38] That is, governments must respond to requests, and a failure to act results in the courts taking control of property. That is compelled access, and the duty to respond, or lose control, is at least as intrusive as requirements found unconstitutional in *Printz v. United States*, 521 U.S. 898 (1997) and *New York v. United States*, 505 U.S. 144 (1992).

The scheme created is not prescriptive, not preemptive. Section 253 or 332 cannot be read to countenance a federal scheme for dictating and reviewing contractual terms; such a reading is particularly troubling where, as is the case with traffic signals and street lights, the record shows that there can be highly complex technical issues presenting significant operational and safety risks.[39]

Likewise, the Order creates significant 5th Amendment issues. The Commission recognizes that in the case of a compelled taking, the compensation standard is generally fair market value.[40] It argues, however, that "there is no "market value" of assets that are not freely bought and sold in a free "market"; and

[38] Order, ¶136 (App-70).

[39] Motion for Stay of the National League of Cities et al., WT Docket No. 17-79, Affidavit of Andrew Strong, Interim Asset Management and Large Projects Director, Seattle City Light (Oct. 312018) ("Seattle Aff.") (App-185-87); Comments of the City and County of San Francisco, WT Docket No. 17-79, at 8 (Jun. 15, 2017)("S.F. Comments") (App-165); Reply Comments of the City and County of San Francisco, WT Docket No. 17-79, at 13 (Jul. 17, 2017) ("S.F. Reply Comments") (App-169).

[40] The cases are clear on this point: *U.S. v. Carmack*, 329 U.S. 230, 242 (1946); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

in such cases, use of actual costs or other readily-discernable amounts are not unreasonable proxies for estimating what would be "fair" if a market existed.[41] However, the Commission had no basis for finding that there was not a "market" for access to the sorts of structures to which it compels access. Fair market value is the proper standard here, and in any case, the Commission cannot contend that its limit of compensation to $270 will reliably mimic either cost or fair market value given the rights it purports to grant.[42] The Commission requires the locality, if it wishes more than this nominal amount to prove up "costs" in court (while precluding proving up "fair market value" in court).[43]

The Commission's reliance on *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002)[44] is misplaced. The Eleventh Circuit found a cost-based standard was appropriate where Congress had specifically compelled statutory access, and expressly gave the Commission the right to set rates. In 47 U.S.C. Section 224 (the section at issue in *Alabama Power)*, the Commission was denied the power it now claims. The court suggested compelled access was permissible based on a Congressional determination that utilities had monopoly control over a bottleneck facility. No such determination was or could be made for street lights or traffic

[41] *See United States v. 564.54 Acres of Land*, 441 U.S. 506, 513 (1979).
[42] *See*, n.29, *supra.*
[43] The Commission does not state that the cost of "proving up" costs would be recoverable under its scheme. A utility, of course, may recover its cost of regulation.
[44] Order, n.217(App-39).

signals, or government buildings.[45] The court also concluded that a cost basis was permissible where the attachment of wireline facilities to utility poles did not generally affect the utility of those poles, or create other issues for use. It concluded that in cases where a problem was created, recovery could not be limited to costs. In this case, the only evidence on the record is that attachment to structures owned by localities can be extremely complex, and places at risk millions of dollars in investments made to beautify and secure communities, and can reduce property values.[46] The failure of the Commission to even consider those impacts is fatal under the APA and the Constitution. [47]

C. New Shot Clocks Are Unreasonable.

The Commission makes four significant changes to its existing shot clocks: (1) action on applications for small wireless facilities must be completed in 60 days for attachment to an existing structure, and 90 days otherwise;[48] (2) an unlimited number of applications may be submitted simultaneously;[49] (3) shot clocks apply to "any and all permits necessary for the construction of the proposed wireless

[45] Small cells can be placed on a variety of structures on and off the rights-of-way, so there are literally thousands of alternatives.
[46] S.F. Comments at 8 (App-165); S.F. Reply Comments at 13 (App-169); Letter from the City of Myrtle Beach, South Carolina, WT Docket No. 17-79, at 1 (Mar. 14, 2018) (App-171); Seattle Aff. (App-186).
[47] The fact that the decision may expose the Treasure to Tucker Act claims is reason to question its validity. *Bell Atlantic Telephone Companies v. F.C.C.*, 24 F.3d 1441 (D.C. Cir. 1994).
[48] 47 C.F.R. §1.6003(c).
[49] Order, ¶13 (App-5).

facility…" including permits or leases for use of publicly owned facilities;[50] (4) missing the "presumptively unlawful" shot clock is a prohibition, and absent "exceptional" circumstances a reviewing court should direct issuance of all permits, contracts, licenses, and the like.[51]

There was no basis for concluding that the new 60/90 days is sufficient to complete a discretionary land use process, preserved by Section 332, much less issue all required permits, or respond to dozens of applications. The Commission relies on state laws that replace typical land use hearings with administrative processes. [52] Those times are irrelevant to the time required where a variance or similar process applies, as procedures for appeal and for public participation may make compliance impossible.[53] The Commission cannot set a deadline that requires abandonment of public land use processes. Moreover, the state laws relied upon for support, among other things, limit the number of applications that

[50] Order, ¶136 (App-70). The record showed it was impossible to act on some of these applications within 60 days of a wireless filing. Letter from Smart Communities and Special Districts Coalition, WT Docket No. 17-79 (Sep. 19, 2018) (App-174-76).
[51] Order, ¶120 (App-62).
[52] MN. Stat. 237.163 (2016); TX. Loc. Gov't Code 284.101; Colo. Rev. Stat. 29-27-404 (3) (2017).
[53] *See*, SC Code Sec. 6-29-800 (B) (setting normal time for appeal from administrative officer to Board established by localities at 30 days from the decision); Letter from the City of Gaithersburg, WT Docket No. 17-79 (Sep. 18, 2018) ("Gaithersburg Letter") (App-179-80).

can be filed at any time;[54] and distinguish between land use permits (the authorization to locate a small cell at a particular location) and the other permits that may be associated with those installations. The Commission ignores those critical distinctions.

The Commission also suggests that because localities now meet a 60-day standard applicable to modifications of existing facilities, under 47 U.S.C. §1455, the new standards are no burden. But the applications are not comparable: the latter typically does not involve application of discretionary considerations, and are not submitted in unlimited batches.

II. MOVANTS WILL SUFFER IRREPARABLE HARM WITHOUT A STAY

Irreparable harm justifies a stay when it is certain, great, imminent and cannot be adequately compensated by money damages.

When an alleged deprivation of a constitutional right is involved no further showing of irreparable injury is necessary.[55] No remedy can correct the immediate harms caused by requiring localities to respond to requests for access to publicly owned assets, or be presumed to have violated the law.

Where consequences from a regulation's continued enforcement during a pending challenge making return to the *status quo ante* difficult there is

[54] *Supra*, n.50.
[55] *See*, 11A Fed. Prac. & Proc. Civ. §2948.1 (3d ed.); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

irreparable harm.[56] If localities are forced to process and issue permits under the Commission's new standards, the harm cannot be remedied – after installation, restoration of the "*status quo*" requires removal, with attendant costs and disruption of public and private infrastructure.[57]

Nor is it clear that a locality could recover costs associated with work required to comply with the Order, which the record showed could total over a hundred thousand dollars a year for smaller communities.[58] The 60-day shot clock and the new aesthetic requirements force those costs to be incurred *prior* to applications being received, and there is no obvious way to recover them. Those unrecoverable costs amount to irreparable harm.

III. The Stay Will Not Harm the Other Parties

This case can be briefed on an expedited schedule within a matter of months. The delay is not likely to cause harm to other parties. Harm necessarily presumes that providers are (a) have substantially changed deployment plans based on the Order; (b) there is a widespread problem with deployment across the nation; and (c) a change in the *status quo* is less disruptive than maintaining the *status quo* while the appeal is heard.

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[56] *Ohio Oil Co. v. Conway*, 279 U.S. 813, 814 (1929).
[57] *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).
[58] Gaithersburg Letter (App-179-80).

Harm to other parties is unlikely when the *status quo* would be preserved by a stay but substantially altered by a denial.[59] Moreover, the equities favor a stay when the respondent "might have exaggerated" the problem the challenged action purports to resolve.[60]

Here, the record shows that the existing regulatory framework does not prohibit personal wireless services, or broadband infrastructure investment.[61] Only the former is relevant for the third and fourth prong, as Section 332 and Section 253 only protect common carriers services, not the sort of data and broadband services on which the Order and Denial Order rely to support the need for immediate action.[62] Nonetheless, there is no reason to fear *any* deployment will suffer materially. Seattle has licensed infrastructure to service providers since 2005 and Verizon named Seattle City Light its 2017 "Partner of the Year."[63] The Commission recognized that "[m]any states and localities have acted to update and

[59] *See O Centro Espirita Beneficiente Uniao De Vegetal v. Ashcroft*, 314 F.3d 463, 467 (10th Cir. 2002).
[60] *Pierce*, 253 F.3d at 1251–52.
[61] *See, e.g.*, Order, Dissenting Statement of Commissioner Rosenworcel, (App-114-15).
[62] Section 332 only protects common carrier services (personal wireless services), not other services. For purposes of the third and fourth prong, only the impact on personal wireless services is relevant; the Commission's Order and Denial Order, which rely on impacts on data services and services other than personal wireless services, are mistaken.
[63] Letter from the City of Seattle, WT Docket No. 17-79 (Sep. 18, 2018) (App-188).

modernize their approaches to…promote deployment . . . ."[64] On calls with investors after the Commission adopted the Order, Verizon confirmed:

> …we were glad to see the FCC rules around the small cell adoption, ... But I don't see [the Order] having a material impact to our build out plans.[65]

IV. The Stay Will Serve the Public Interest

A stay will serve the public's strong interest in "preserving the status quo ante litem until the merits of a serious controversy can be fully considered."[66] Although investments in broadband infrastructure serve the public interest, the Order will necessarily result in large-scale regulatory compliance efforts by local public agencies. These efforts will alter the frameworks under which communications providers have thus far flourished and may be ultimately wasted if this Court invalidates the Order in whole or in part. At least until the Petition is resolved, the public interest is best served by a stay that maintains the *status quo*.

CONCLUSION

For the foregoing reasons, the Court should stay the Order.

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[64] Order, ¶5 (App-2).
[65] Verizon Communications Inc. Q3 2018 Earnings Call Transcript (Oct. 23, 2018) (App-182); *see also* Crown Castle International Corp. Q3 2018 Earnings Call Transcript (Oct. 18, 2018) (App-184).
[66] *Valdez v. Applegate*, 616 F.2d 570, 572 (10th Cir. 1980).

Dated: December 17, 2018

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STATUTORY APPENDIX

47 U.S. Code § 402 - Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28.

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide inter LATA services under section 271 of this title whose application is denied by the Commission.

(10) By any person who is aggrieved or whose interests are adversely affected by a determination made by the Commission under section 618(a)(3) of this title.

(c) Filing notice of appeal; contents; jurisdiction; temporary orders

Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

(d) Notice to interested parties; filing of record

Upon the filing of any such notice of appeal the appellant shall, not later than five days after the filing of such notice, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same. The Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28.

(e) Intervention

Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

(f) Records and briefs

The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and shall be prepared within such time and in such manner as the court may by rule prescribe.

(g) Time of hearing; procedure

The court shall hear and determine the appeal upon the record before it in the manner prescribed by section 706 of title 5.

(h) Remand

In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

(i) Judgment for costs

The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

(j) Finality of decision; review by Supreme Court

The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

(June 19, 1934, ch. 652, title IV, § 402, 48 Stat. 1093; May 20, 1937, ch. 229, §§ 11–13, 50 Stat. 197; May 24, 1949, ch. 139, § 132, 63 Stat. 108; July 16, 1952, ch. 879, § 14, 66 Stat. 718; Pub. L. 85–791, § 12, Aug. 28, 1958, 72 Stat. 945; Pub. L. 97–259, title I, §§ 121, 127(b), Sept. 13, 1982, 96 Stat. 1097, 1099; Pub. L. 98–620, title IV, § 402(50), Nov. 8, 1984, 98 Stat. 3361; Pub. L. 104–104, title I, § 151(b), Feb. 8, 1996, 110 Stat. 107; Pub. L. 111–260, title I, § 104(d), Oct. 8, 2010, 124 Stat. 2762.)

28 U.S. Code § 2342 - Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communication Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of—

(A) the Secretary of Transportation issued pursuant to section 50501, 50502, 56101–56104, or 57109 of title 46 or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49; and

(B) the Federal Maritime Commission issued pursuant to section 305, 41304, 41308, or 41309 or chapter 421 or 441 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

(Added Pub. L. 89–554, § 4(e), Sept. 6, 1966, 80 Stat. 622; amended Pub. L. 93–584, § 4, Jan. 2, 1975, 88 Stat. 1917; Pub. L. 95–454, title II, § 206, Oct. 13, 1978, 92 Stat. 1144; Pub. L. 96–454, § 8(b)(2), Oct. 15, 1980, 94 Stat. 2021; Pub. L. 97–164, title I, § 137, Apr. 2, 1982, 96 Stat. 41; Pub. L. 98–554, title II, § 227(a)(4), Oct. 30, 1984, 98 Stat. 2852; Pub. L. 99–336, § 5(a), June 19, 1986, 100 Stat. 638; Pub. L. 100–430, § 11(a), Sept. 13, 1988, 102 Stat. 1635; Pub. L. 102–365, § 5(c)(2), Sept. 3, 1992, 106 Stat. 975; Pub. L. 103–272, § 5(h), July 5, 1994, 108 Stat. 1375; Pub. L. 104–88, title III, § 305(d)(5)–(8), Dec. 29, 1995, 109 Stat. 945; Pub. L. 104–287, § 6(f)(2), Oct. 11, 1996, 110 Stat. 3399; Pub. L. 109–59, title IV, § 4125(a), Aug. 10, 2005, 119 Stat. 1738; Pub. L. 109–304, § 17(f)(3), Oct. 6, 2006, 120 Stat. 1708.)

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

(a) In general

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

(b) State regulatory authority

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

(c) State and local government authority

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

(d) Preemption

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

(e) Commercial mobile service providers

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

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

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

(2) to a provider of commercial mobile services.

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

47 U.S. Code § 332 - Mobile services

(a) Factors which Commission must consider

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will—

(1) promote the safety of life and property;

(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;

(3) encourage competition and provide services to the largest feasible number of users; or

(4) increase interservice sharing opportunities between private mobile services and other services.

(b) Advisory coordinating committees

(1) The Commission, in coordinating the assignment of frequencies to stations in the private mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

(2) The authority of the Commission established in this subsection shall not be subject to or affected by the provisions of part III of title 5 or section 1342 of title 31.

(3) Any person who provides assistance to the Commission under this subsection shall not be considered, by reason of having provided such assistance, a Federal employee.

(4) Any advisory coordinating committee which furnishes assistance to the Commission under this subsection shall not be subject to the provisions of the Federal Advisory Committee Act.

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that—

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public interest.

(B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.

(C) The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition. As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the

extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking required to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to August 10, 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that—

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems

necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications satellite corporation

Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 [47 U.S.C. 741 et seq.] of the corporation authorized by title III of such Act [47 U.S.C. 731 et seq.].

(5) Space segment capacity

Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership

The Commission, upon a petition for waiver filed within 6 months after August 10, 1993, may waive the application of section 310(b) of this title to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:

(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b) of this title.

(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).

(8) Mobile services access

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services unless the Commission finds it to be in the public interest to apply such requirements to such services.

(d) Definitions

For purposes of this section—

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

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

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

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

47 U.S. Code § 1455 - Wireless facilities deployment

(a) Facility modifications

(1) In general

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

(2) Eligible facilities requestFor purposes of this subsection, the term "eligible facilities request" means any request for modification of an existing wireless tower or base station that involves—

(A) collocation of new transmission equipment;

(B) removal of transmission equipment; or

(C) replacement of transmission equipment.

(3) Applicability of environmental laws

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

(b) Federal easements and rights-of-way

(1) Grant

If an executive agency, a State, a political subdivision or agency of a State, or a person, firm, or organization applies for the grant of an easement or right-of-way to, in, over, or on a building or other property owned by the Federal Government for the right to install, construct, and maintain wireless service antenna structures and equipment and backhaul transmission equipment, the executive agency having control of the building or other property may grant to the applicant, on behalf of the Federal Government, an easement or right-of-way to perform such installation, construction, and maintenance.

(2) Application

The Administrator of General Services shall develop a common form for applications for easements and rights-of-way under paragraph (1) for all executive agencies that shall be used by applicants with respect to the buildings or other property of each such agency.

(3) Fee

(A) In general

Notwithstanding any other provision of law, the Administrator of General Services shall establish a fee for the grant of an easement or right-of-way pursuant to paragraph (1) that is based on direct cost recovery.

(B) Exceptions

The Administrator of General Services may establish exceptions to the fee amount required under subparagraph (A)—

(i) in consideration of the public benefit provided by a grant of an easement or right-of-way; and

(ii) in the interest of expanding wireless and broadband coverage.

(4) Use of fees collected

Any fee amounts collected by an executive agency pursuant to paragraph (3) may be made available, as provided in appropriations Acts, to such agency to cover the costs of granting the easement or right-of-way.

(c) Master contracts for wireless facility sitings

(1) In general

Notwithstanding section 704 of the Telecommunications Act of 1996 or any other provision of law, and not later than 60 days after February 22, 2012, the Administrator of General Services shall—

(A) develop 1 or more master contracts that shall govern the placement of wireless service antenna structures on buildings and other property owned by the Federal Government; and

(B) in developing the master contract or contracts, standardize the treatment of the placement of wireless service antenna structures on building rooftops or facades, the placement of wireless service antenna equipment on rooftops or inside buildings, the technology used in connection with wireless service antenna structures or equipment placed on Federal buildings and other property, and any other key issues the Administrator of General Services considers appropriate.

(2) Applicability

The master contract or contracts developed by the Administrator of General Services under paragraph (1) shall apply to all publicly accessible buildings and other property owned by the Federal Government, unless the Administrator of General Services decides that issues with respect to the siting of a wireless service antenna structure on a specific building or other property warrant nonstandard treatment of such building or other property.

(3) Application

The Administrator of General Services shall develop a common form or set of forms for wireless service antenna structure siting applications under this subsection for all executive agencies that shall be used by applicants with respect to the buildings and other property of each such agency.

(d) Executive agency defined

In this section, the term “executive agency” has the meaning given such term in section 102 of title 40.

(Pub. L. 112–96, title VI, § 6409, Feb. 22, 2012, 126 Stat. 232.)

CERTIFICATE OF WORD COUNT AND VIRUS SOFTWARE

Pursuant to Federal Rules of Appellate Procedure 27(d)(2)(A), this motion, produced using a computer, contains 5,183 words.

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December 17, 2018

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2018 I filed the foregoing Motion to Transfer with the Clerk of the United States Court of Appeals for the Tenth Circuit through the CM/ECF system. Participants in the cases are all registered CM/ECF and will be served by the CM/ECF system.

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