

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.**

In the Matter of

Accelerating Wireless Broadband	)	
Deployment by Removing Barriers to	)	
Infrastructure Investment	)	WT Docket No. 17-79
	)	
Accelerating Wireline Broadband	)	
Deployment by Removing Barriers to	)	
Infrastructure Investment	)	WC Docket No. 17-84

**MOTION FOR STAY OF THE NATIONAL LEAGUE OF CITIES; THE UNITED STATES CONFERENCE OF MAYORS; THE NATIONAL ASSOCIATION OF COUNTIES; THE NATIONAL ASSOCIATION OF REGIONAL COUNCILS; THE NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS; THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; THE CITY OF ANN ARBOR, MICHIGAN; ANNE ARUNDEL COUNTY, MARYLAND; THE CITY OF ARCADIA, CALIFORNIA; THE CITY OF ATLANTA, GEORGIA; THE CITY OF BELLEVUE, WASHINGTON; BLOOMFIELD TOWNSHIP, MICHIGAN; THE CITY OF BROOKHAVEN, GEORGIA; THE CITY OF BOSTON, MASSACHUSETTS; THE CITY OF BURIEN, WASHINGTON; THE CITY OF BURLINGAME, CALIFORNIA; THE CITY OF CHICAGO, ILLINOIS; THE CITY OF COCONUT CREEK, FLORIDA; THE CITY OF COLLEGE PARK, MARYLAND; THE COLORADO COMMUNICATIONS AND UTILITY ALLIANCE; THE CITY OF CULVER CITY, CALIFORNIA; THE CITY OF DALLAS, TEXAS; THE CITY OF DUBUQUE, IOWA; THE DISTRICT OF COLUMBIA; THE TOWN OF FAIRFAX, CALIFORNIA; THE CITY OF GAITHERSBURG, MARYLAND; THE CITY OF GIG HARBOR, WASHINGTON; THE CITY OF HILLSBOROUGH, FLORIDA; HOWARD COUNTY, MARYLAND; THE CITY OF HUNTINGTON BEACH, CALIFORNIA; KING COUNTY, WASHINGTON; THE CITY OF KIRKLAND, WASHINGTON; THE CITY OF LACEY, WASHINGTON; THE CITY OF LAS VEGAS, NEVADA; THE LEAGUE OF ARIZONA CITIES AND TOWNS; THE LEAGUE OF CALIFORNIA CITIES; THE LEAGUE OF OREGON CITIES; THE CITY OF LOS ANGELES, CALIFORNIA; THE CITY OF LINCOLN, NEBRASKA; THE COUNTY OF LOS ANGELES, CALIFORNIA; MERIDIAN TOWNSHIP, MICHIGAN; THE MICHIGAN COALITION TO PROTECT PUBLIC RIGHTS-OF-WAY; THE MICHIGAN MUNICIPAL LEAGUE; THE MICHIGAN TOWNSHIPS ASSOCIATION; THE CITY OF MONTEREY, CALIFORNIA; MONTGOMERY COUNTY, MARYLAND; THE CITY OF MYRTLE BEACH, SOUTH CAROLINA; THE CITY OF OLYMPIA, WASHINGTON; THE CITY OF ONTARIO, CALIFORNIA; THE CITY OF PHILADELPHIA, PENNSYLVANIA; THE CITY OF PIEDMONT, CALIFORNIA; THE CITY OF PLANO, TEXAS; THE CITY OF PORTLAND, OREGON; THE CITY OF RYE, NEW YORK; THE CITY OF SAN BRUNO, CALIFORNIA; THE CITY OF SAN JACINTO, CALIFORNIA; THE CITY OF SAN JOSE, CALIFORNIA; THE CITY OF SANTA MONICA, CALIFORNIA; THE CITY OF SEATTLE, WASHINGTON; THE CITY OF SHAFTER, CALIFORNIA; THE CITY OF TACOMA, WASHINGTON; THE TEXAS COALITION OF CITIES FOR UTILITY ISSUES; THURSTON COUNTY, WASHINGTON; THE CITY OF TUMWATER, WASHINGTON; WASHINGTON COUNTY, WASHINGTON; AND THE CITY OF YUMA, ARIZONA**

Nancy L. Werner  
NATOA  
3213 Duke Street, #695  
Alexandria, VA 22314

Clarence E. Anthony  
CEO and Executive Director  
National League of Cities

Leslie Wollack  
Executive Director  
National Association of Regional Councils

Robert C. May III  
Michael D. Johnston  
TELECOM LAW FIRM, P.C.  
3570 Camino del Rio N., Suite 102  
San Diego, CA 92108

Michael Watza  
KITCH DRUTCHAS WAGNER  
VALITUTTI & SHERBROOK  
1 Woodward Ave, 10th Floor  
Detroit, MI 48226-3499

Matthew D. Chase  
Executive Director  
National Association of Counties

Tom Cochran  
CEO and Executive Director  
The United States Conference of Mayors

Jennifer Imo  
Executive Director  
National Association of Towns and Townships

Joseph Van Eaton  
Gerard Lavery Lederer  
Gail A. Karish  
John Gasparini  
BEST BEST & KRIEGER, LLP  
2000 Pennsylvania Ave N.W., Suite 5300  
Washington, D.C. 20006

Kenneth S. Fellman  
KISSINGER & FELLMAN, P.C.  
3773 Cherry Creek N. Drive  
Ptarmigan Place, Suite 900  
Denver, CO 80209

October 31, 2018

TABLE OF CONTENTS

I. INTRODUCTION ..... 1

II. LEGAL STANDARD ..... 4

III. THE STANDARDS FOR GRANTING A STAY ARE MET IN THIS CASE ..... 5

    A. Movants Are Likely To Succeed On Their Claims That The Order Violates the U.S. Constitution, the APA, and the RFA. .... 5

        1. Movants’ Constitutional Claims Are Serious and Have a Fair Prospect of Success. .... 5

        2. The Commission’s Interpretations Conflict With The Plain Language of The Communications Act. .... 12

        3. There Is a Substantial Question As To whether the Order Is Arbitrary and Capricious. .... 16

    B. Movants Will Suffer Irreparable Injury Absent a Stay. .... 22

        1. The Order Violates Movants’ Constitutional Rights. .... 22

        2. The Effects of Compliance with the Order will Harm Movants Irreparably. .... 24

        3. The Aesthetic Harms Threatened by Implementation of this Order Cannot be Remedied. .... 26

    C. A Stay Will Not Harm Other Parties and Is in the Public Interest. .... 28

        1. Other Parties Will Not Be Harmed by a Stay Because they are Flourishing Under the Status Quo. .... 29

        2. Granting a Stay is in the Public Interest Because it Reduces Uncertainty 32

IV. CONCLUSION ..... 32

Movants<sup>1</sup> respectfully request that the Commission stay its Order in this proceeding pending the resolution of pending appeals, for reasons stated below. Movants represent almost every local government in America, all of whom are significantly and adversely affected by the Order.

## I. INTRODUCTION

The Order<sup>2</sup> at issue here, scheduled to take effect on January 14, 2019:

---

<sup>1</sup> Movants include the following organizations: The National League of Cities (“NLC”), the oldest and largest organization representing 19,000 cities and towns of all sizes across the country; The United States Conference of Mayors (“USCM”), the official nonpartisan organization of cities with populations of 30,000 or more, which includes 1,192 such cities in the country today; The National Association of Counties (“NACo”), which represents county governments, and provides essential services to the nation’s 3,069 counties; The National Association of Regional Councils (“NARC”), which represents more than 500 councils of government, metropolitan planning organizations, and other regional planning organizations throughout the nation; The National Association of Towns and Townships (“NATaT”), which represents the interests of more than 10,000 towns and townships across the country at the federal level; and The National Association of Telecommunications Officers and Advisors (“NATOA”), whose membership includes local government officials and staff members from across the nation. Movants also include the City of Ann Arbor, Michigan; Anne Arundel County, Maryland; the City of Arcadia, California; the City of Atlanta, Georgia; the City of Bellevue, Washington; Bloomfield Township, Michigan; the City of Brookhaven, Georgia; the City of Boston, Massachusetts; the City of Burien, Washington; the City of Burlingame, California; the City of Chicago, Illinois; the City of Coconut Creek, Florida; the City of College Park, Maryland; the Colorado Communications and Utility Alliance; the City of Culver City, California; the City of Dallas, Texas; the City of Dubuque, Iowa; the District of Columbia; the Town of Fairfax, California; the City of Gaithersburg, Maryland; the City of Gig Harbor, the City of Hillsborough, Florida; Washington; Howard County, Maryland; the City of Huntington Beach, California; King County, Washington; the City of Kirkland, Washington; the City of Lacey, Washington; the City of Las Vegas, Nevada; the League of Arizona Cities and Towns; the League of California Cities; the League of Oregon Cities; the City of Los Angeles, California; the City of Lincoln, Nebraska; the County of Los Angeles, California; Meridian Township, Michigan; the Michigan Coalition To Protect Public Rights-Of-Way; the Michigan Municipal League; the Michigan Townships Association; the City of Monterey, California; Montgomery County, Maryland; the City of Myrtle Beach, South Carolina; the City of Olympia, Washington; the City of Ontario, California; the City of Philadelphia, Pennsylvania; the City of Piedmont, California; the City of Plano, Texas; the City of Portland, Oregon; the City of Rye, New York; the City of San Bruno, California; the City of San Jacinto, California; the City of San Jose, California; the City of Santa Monica, California; the City of Seattle, Washington; the City of Shafter, California; the City of Tacoma, Washington; the Texas Coalition of Cities for Utility Issues; Thurston County, Washington; the City of Tumwater, Washington; Washington County, Washington; and the City of Yuma, Arizona.

<sup>2</sup> 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 (“Order”). The Order is one of several flowing out of two FCC inquiries opened in 2017. See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 17-79, ¶ 94 (rel. Apr. 21, 2017); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 at ¶ 104-108 (rel. Apr. 21, 2017).

- Redefines what constitutes an “effective prohibition” under 47 U.S.C. §§ 253(a) and 332(c)(7). The Order explicitly rejects the “significant gap” and “least intrusive alternative” tests that had been adopted and applied (with small variations) by almost every U.S. Circuit Court of Appeals, and incorporated into local ordinances over the last 20 years.<sup>3</sup> The Order, in contravention of a key holding in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*,<sup>4</sup> also rejects the “plain language” interpretations of those sections adopted by the Eighth and Ninth Circuits, both of which found that an effective prohibition requires the litigant to prove that a challenged action *actually* prohibits provision of a protected service. The Commission instead adopted a standard that *presumes* a prohibition where costs of deployment are increased (on the theory that providers *might* offer additional services if they were richer); and that concludes that service is “prohibited” if an entity is prevented from “improving” service.<sup>5</sup>
- Adopts a federal wireless aesthetic standard notwithstanding the fact that Section 332(c)(7) *does not* authorize the Commission to set aesthetic standards. The new Commission standard preempts local authority even where there is no personal wireless service prohibition, if the standards are not “published” or are “more burdensome” than standards applied to other “infrastructure deployment.”<sup>6</sup>

---

<sup>3</sup> See, e.g., *AT&T Mobility Services, LLC v. Village of Corrales*, 642 Fed. Appx. 886, 890–91 (10th Cir. 2016); *T-Mobile Cent., LLC v. Charter Tp. Of West Bloomfield*, 691 F.3d 794, 808 (6th Cir. 2012); *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 996 (9th Cir. 2009); *National Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 20–21 (1st Cir. 2002); *APT Pittsburgh Ltd. Partnership v. Penn Tp. Butler County of Pennsylvania*, 196 F.3d 469, 480–81 (3rd Cir. 1999); *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 643 (2nd Cir. 1999).

<sup>4</sup> 545 U.S. 967 (2005). The Court ruled that the agency *cannot* override a “plain language” determination by a Court of Appeals.

<sup>5</sup> Order at ¶ 37.

<sup>6</sup> Order at ¶ 86.

- Limits the amounts that localities can charge for use of rights of way, and for use of other property that happens to be located in the right of way – even though much of that property (street lights and traffic signals) is not generally open to use by third parties, and other publicly-owned property (utility poles) is specifically exempted from Commission price and term regulation by 47 U.S.C. § 224. The Order goes on to require localities to respond to a request for access to that property within 60 days; makes failure to respond a presumed prohibition; and suggests that the locality may be sued, and the court then prescribe the terms for access. In effect, the Commission is misreading what courts have properly recognized are merely *preemptive* provisions to instead command access to property that currently, if made available at all, is made available on a contract by contract basis, or in accordance with requirements of state law.

In addition to creating a significant legal dispute (discussed in more detail below) the collective effect of these actions is to require a massive rewrite of laws and contracts across the country. The Commission recognizes that complying with just one element of the Order – development of aesthetic requirements – could require at least 180 days.<sup>7</sup> Nonetheless, the Order will go into effect within 90 days, and the first lawsuits challenging the new local requirements can be filed 60 days after that. Meaning: there is no way to implement this Order, even if one assumed that it raised no significant legal issues. Moreover, to the extent the Order creates litigation, or uncertainty, it will ultimately complicate, and not speed deployment. Carriers –

---

<sup>7</sup> Order at ¶ 89. In addition to the aesthetic standards, rules and procedures for access to property, forms for applications, rewrites of ordinances and restructuring of permitting processes (since all permits, not just wireless permits, seem to be subject to the Commission’s new rules) may be required.

several of which are also challenging the Order – have already announced that the adoption of the Order is not changing their investment plans, so a stay will not harm deployment.<sup>8</sup>

We are not here trying to specify every argument that may be raised on appeal, or raise every issue that was raised in the record. The Commission has had ample opportunity to comment on them. What we show below is that there are *enough* issues to more than justify a stay. In these circumstances, a stay is not only required, it is prudent.

## II. LEGAL STANDARD

To qualify for a stay, a movant must show: (1) that it is likely to succeed on the merits; (2) that it will suffer irreparable injury absent a stay; (3) that other interested parties will not be harmed by a stay; and (4) that the public interest supports a stay.<sup>9</sup>

“[A] stronger showing of one element may offset a weaker showing of another.”<sup>10</sup> “The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay. Simply stated, more of one excuses less of the other.”<sup>11</sup>

---

<sup>8</sup> See, e.g. Verizon Communications Inc. Q3 2018 Earnings Call Transcript (Oct. 23, 2018), *available at* <https://seekingalpha.com/article/4213544-verizon-communications-inc-vz-q3-2018-results-earnings-call-transcript?part=single> (“I don’t see it having a material impact to our build out plans.”); Crown Castle International Corp. Q3 2018 Earnings Call Transcript (Oct. 18, 2018), *available at* <https://seekingalpha.com/article/4212546-crown-castle-international-corp-cci-ceo-jay-brown-q3-2018-results-earnings-call-transcript?part=single>. (“I wouldn’t look at that and assume that we’re going to see a material change in our 18 to 24 month deployment cycle. In fact, we don’t believe that will result.”) The FCC is itself taking the position that it may take a significant amount of time to address petitions for reconsideration of its Moratorium Order which have been pending now for nearly 60 days. It is seeking an indefinite delay in an appeal of its orders, which will at a minimum last 90 days. If the Commission cannot itself address questions about its own orders in 150 days, it is hard to imagine how localities can rewrite laws, regulations and codes in a shorter period. *Portland v. F.C.C.*, Resp. Motion for Abeyance, No. 18-72883 (9th Cir. 2018).

<sup>9</sup> *Nken v. Holder*, 556 U.S. 418, 434 (2009); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). The FCC applies the same standard applied by the courts, *Rates for Interstate Inmate Calling Services*, Order Denying stay Petition, 31 FCC Rcd. 10936 ¶ 9 (2016).

<sup>10</sup> *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011); *Mohamed v. Uber Technologies, et al.*, 115 F.Supp.3d 1024, 1028 (N.D. Cal. 2015).

<sup>11</sup> *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

### III. THE STANDARDS FOR GRANTING A STAY ARE MET IN THIS CASE

#### A. Movants Are Likely To Succeed On Their Claims That The Order Violates the U.S. Constitution, the APA, and the RFA.

“The first showing a stay petitioner must make is ‘a strong showing that he is likely to succeed on the merits.’”<sup>12</sup> “The standard does not require the petitioners to show that ‘it is more likely than not that they will win on the merits.’”<sup>13</sup> Rather, “a petitioner must show, at a minimum, that she has a substantial case for relief on the merits.”<sup>14</sup> A substantial case is one that “raises serious legal questions, or has a reasonable probability or fair prospect of success.”<sup>15</sup>

##### 1. Movants’ Constitutional Claims Are Serious and Have a Fair Prospect of Success.

###### a. *The Tenth Amendment Claims are Significant.*

The Constitution sets forth a system of dual sovereignty in which “both the Federal Government and the States wield sovereign powers.”<sup>16</sup> The Constitution “confers upon [the federal government] the power to regulate individuals, not States.”<sup>17</sup> One clear limitation on federal power inherent in these fundamental concepts is the prohibition against “compel[ing] the States to implement, by legislation or executive action, federal regulatory programs.”<sup>18</sup> This rule applies to both affirmative and prohibitive commands.<sup>19</sup> The Order crosses the line preserved by the Constitution.

---

<sup>12</sup> *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011). (quoting *Nken*, 556 U.S. at 434).

<sup>13</sup> *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012) (quoting *Leiva-Perez*, 640 F.3d at 968).

<sup>14</sup> *Id.* at 968.

<sup>15</sup> *Id.* at 971.

<sup>16</sup> *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1475 (2018).

<sup>17</sup> *New York v. United States*, 505 U.S. 144, 166 (1992).

<sup>18</sup> *Printz v. U.S.*, 521 U.S. 898, 925 (1997).

<sup>19</sup> *See Murphy*, 138 S.Ct. at 1478.

Among other things, the Order requires localities to publish aesthetic standards that meet specified, Commission standards.<sup>20</sup> While the Commission does not specify what it means by “publish,” it is notable that Section 332(c)(7) contains only a single writing requirement – that the final order be in writing (to permit review for compliance with federal standards). Section 253, even if applicable, contains no such requirement. The Commission does not tie the publication requirement to any other provision of Section 332(c)(7) or Section 253. While some form of “publication” is common for local laws and regulations, for Tenth Amendment purposes, the key point is that the Commission may not require it. All that is required under Section 332(c)(7) is the application of existing zoning or land use standards. All that is required under Section 253(c) is that the state or local statute, regulation, or legal requirement be related to the “manage[ment of] the public rights-of-way” that is “competitively neutral and nondiscriminatory” or the “require[ment of] fair and reasonable compensation” that is “publicly disclosed . . . .”<sup>21</sup> Requiring localities to publish standards and specifying their form and contents violates the Tenth Amendment because it regulates states and their instrumentalities rather than individuals. The aesthetic standards cannot be justified as a predicate for local action that could otherwise be preempted, because the conditions for preemption under Section 253 and Section 332(c)(7) are not satisfied by a failure to publish.<sup>22</sup>

Second, the Order also commandeers local officials by requiring them to respond to requests to lease proprietary property within 60 days, or face court action. To be sure, the Order

---

<sup>20</sup> The published standards must be “(1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance.” Order at ¶ 86.

<sup>21</sup> See 47 U.S.C. § 253(c).

<sup>22</sup> The FCC’s “180-day” comment indicates it understands it is compelling action. *New Cingular Wireless PCS, LLC v. City of Cambridge*, 834 F. Supp. 2d 46, 51–52 (D. Mass. 2011), recognizes the distinction between steps a state or locality may be required to take to avoid preemption and an unconstitutional commandeering.

states that its order does not *compel* access to any particular facility.<sup>23</sup> But it does require response, and that response, even if it is to say “no,” requires state and local officials to devote resources to the response. That the Order also contemplates that a locality may be sued, and a court could order access to facilities, under terms the court dictates, merely illustrates the problem: this is not about preempting local or state laws and legal requirements, but requiring entry into leases and agreements, and compelling participation in a process that disposes of basic property rights. While the Order would violate the Tenth Amendment for this reason alone, it is notable that the Order foists responsibilities upon states and local governments that may have no desire to participate in the Commission’s federal program.<sup>24</sup>

Especially with respect to compelled access to municipal utility poles, it is notable that 47 U.S.C. Section 224 denies the FCC any authority to regulate municipal and state utility poles, and the Communications Act does not generally give the Commission authority to command access to property (or require responses to requests to use property) merely because it would be convenient if the property is available to a service provider.<sup>25</sup> Thus, the Commission must find authority for its right to compel access in Section 253(a) or Section 332(c)(7), and no such authority may be found in either section. One court has correctly noted that read as the

---

<sup>23</sup> Order at n. 217. While this Order may not compel access, the Commission’s Declaratory Ruling in these dockets, released August 3, 2018, deems “refusals to issue permits for a category of structures” to be *de facto* moratoria that are prohibited by Section 253(c), raising serious questions about the ability of localities to deny access to their structures.

<sup>24</sup> See *F.E.R.C. v. Mississippi*, 456 U.S. 742, 759–60 (1982).

<sup>25</sup> *In Re California Water and Telephone Co., et al.*, 64 F.C.C. 2d 753, 759 (1977). The FCC purports to find authority for its command in section 253(a), suggesting that it is merely preempting “legal requirements.” It is unclear what legal requirements the FCC thinks it is preempting, but a contract voluntarily entered into would not normally be considered a “legal requirement.” *Superior Communications v. City of Rearview, Michigan*, 881 F.3d 432 (6th Cir. 2018); *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 417–21 (2d Cir. 2002): There may be exceptional cases where a contract is indistinguishable from a legal requirement – as was suggested in *Petition of the State of Minnesota for a Declaratory Ruling regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights of Way*, Memorandum Opinion and Order, 14 FCC Rcd. 21697 (1999), where an exclusive contract effectively cabined the legislative authority of the state with respect to third parties – but in the ordinary case, a contract for use of public property is not itself subject to preemption.

Commission proposes to read it, the requirements are nothing less than “[a] forced transfer of property that is in principle no different from a ‘congressionally compelled subsidy from state governments’” in violation of the Tenth Amendment.<sup>26</sup>

Finally, the federal government cannot deprive a state or its authorized subdivisions, including local governments, of their proprietary powers as owners of property. “The law traditionally recognize[s] a distinction between regulation and actions a state takes in a proprietary capacity . . . .”<sup>27</sup> When a state acts in a proprietary capacity, federal law cannot preempt such actions. It may only regulate to the extent that it may regulate other market participants engaged in the same activity: the prohibition on regulating states qua states precludes any other result.

Prior to the issuance of the Order, both the Commission and multiple courts recognized that local governments acted as market participants when granting lease and license agreements to allow wireless providers to place antennas and other facilities on local government property. However, the Order declares local governments by fiat to be regulators instead of proprietors with respect to all property within a right of way.<sup>28</sup> The departure from prior precedent, and the justification for the decision, is never explained. At most the Commission suggests that some states and localities make property available voluntarily to third parties. But this is exactly what a proprietor often does with property – lease to others where beneficial to the property owner – so this rationale is no rationale at all.

The Commission may be suggesting that as a condition of owning street lights and traffic signals or other structures in state or local rights of way, it can compel a state or locality to grant

---

<sup>26</sup> *Qwest Corp. v. City of Santa Fe, New Mexico*, 224 F.Supp.2d 1305, 1327 (D.N.M. 2002) (quoting *New York*, 505 U.S. at 175).

<sup>27</sup> *Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Tex.*, 180 F.3d 686, 691 (5th Cir. 1999).

<sup>28</sup> Order at ¶ 92.

access to all under federally-specified terms. In other words, it can turn states and localities into common carriers. There is nothing in the Communications Act that grants that authority and the Commission has not made any finding that the mere act of owning street furniture justifies the imposition of common carrier regulations. Requiring a state or locality to act as common carrier as a condition of owning property or leasing it to others would itself raise significant constitutional questions.<sup>29</sup>

b. *The Order's Adoption of the "Actual Cost" Standard for Local Compensation Raises Substantial Fifth Amendment Concerns.*

In addition to the Tenth Amendment concerns, the Orders raise significant Fifth Amendment concerns by limiting local and state governments to collecting, at most, only "actual and direct costs" in return for granting access to rights of way, and "actual and direct costs" in return for granting access to other proprietary property, like street lights and traffic signals.<sup>30</sup> This standard deprives states and local governments of the full fair market value of access to their private property.

Cases distinguish between traditional takings and regulatory takings. It is axiomatic that "when the Federal Government . . . takes for a federal public use the independently held and controlled property of a state or of a local subdivision, the Federal Government recognizes its obligation to pay just compensation for it . . . ."<sup>31</sup> Generally, under Fifth Amendment jurisprudence, just compensation equates to the market value for the property at issue.<sup>32</sup> Market

---

<sup>29</sup> See *Frost v. Railroad Comm. of State of Cal.*, 271 U.S. 583, 592 (1926) ("[A] private carrier cannot be converted against his will into a common carrier by mere legislative command . . . .").

<sup>30</sup> Order at ¶ 55. Because the Order includes the ambiguous requirement that fees be "no higher than the fees charged to similarly-situated competitors in similar circumstances" (Order at ¶ 7), localities may be required to offer below-cost subsidies to match the fees charged to a competitor where, for example, the locality's costs have increased since the competitor entered the market.

<sup>31</sup> *U.S. v. Carmack*, 329 U.S. 230, 242 (1946).

<sup>32</sup> *U.S. v. 50 Acres of Land*, 469 U.S. 24, 26 (1984).

value has been described as “what a willing buyer would pay in cash to a willing seller.”<sup>33</sup>

Furthermore, a “permanent physical occupation authorized by government is a taking without regard to the public interests it may serve.”<sup>34</sup>

Here, the record shows that there are many, many voluntary arrangements under which wireless providers are using rights of way and other proprietary property to successfully deploy facilities. What willing buyers pay to willing sellers is readily ascertainable. The fact that the Commission sets a rate far below that level raises significant Fifth Amendment concerns. Of course, states and localities could always seek to recover the difference in value between the Commission-mandated fee and the compensatory fee from the federal government under the Tucker Act. The very fact that the Commission’s Order could expose the Treasury to such claims itself is ground for questioning its validity.<sup>35</sup>

For regulatory takings, a three-part test applies under *Penn Central Transp. Co. v. City of New York*.<sup>36</sup> The three factors are: (1) economic impact on the affected party, (2) the extent of interference with reasonable investment-backed expectations, and (3) the character of the government action.

As an initial matter, Movants note that it seems odd to have to argue that a regulatory taking has occurred when the Commission has no authority to regulate the contractual terms of telecommunications attachments to state and local government infrastructure.<sup>37</sup>

---

<sup>33</sup> *U.S. v. Miller*, 317 U.S. 369, 374 (1943).

<sup>34</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

<sup>35</sup> *Bell Atlantic Telephone Companies v. F.C.C.*, 24 F.3d 1441 (D.C. Cir. 1994).

<sup>36</sup> *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978)

<sup>37</sup> A critical element of a “regulatory taking” is a finding that the entity being regulated is *subject to regulation*, *F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 251–52 (1987). Since Section 253 and Section 332 are preemptive only, and the FCC is denied authority to regulate the terms and conditions of access and occupancy of state and local government infrastructure by telecommunications providers, that finding cannot be made here.

But in any case, the limitation of compensation to costs as described by the Commission does not satisfy the *Penn Central* standard. The record showed that many states and localities stand to lose millions of dollars in leasing revenue as a result of the Order.<sup>38</sup> Even in areas where the lost revenue may be lesser, states and localities nationwide spend millions of dollars undergrounding utilities and beautifying areas with public art, well-designed lighting structures, and so on. The record also showed that the placement of wireless facilities can have a significant and negative effect on those efforts.<sup>39</sup> Those factors were simply ignored by the Commission, which limited recovery essentially to out-of-pocket costs, and ignored other impacts that *must* be considered, and were before it in the record. Embedded constitutional requirements that are designed to prevent governments from leasing or disposing of property to private entities at less-than-fair-value are also ignored. The FCC never considers whether it is even appropriate to grant private companies, some of which have no obligation to serve anyone, access to the property of others for what are essentially private purposes at below-market rates.<sup>40</sup>

c. *The Order Raises Other Substantial Constitutional Concerns.*

The Commission determined that the Order should take effect 90 days after Federal Register publication.<sup>41</sup> Yet in its text, the Order acknowledges that it may take up to 180 days to come into compliance with just one element of the Order. Establishing effective dates that *preclude* compliance raises significant Due Process questions.

---

<sup>38</sup> Comments of the City and County of San Francisco, WT Docket No. 17-79, at 8 (Jun. 15, 2017).

<sup>39</sup> Reply Comments of the City and County of San Francisco, WT Docket No. 17-79, at 13 (Jul. 17, 2017).

<sup>40</sup> Companies like Crown Castle, for example, do not provide licensed wireless services, but build infrastructure and lease it to others at unregulated rates. Effectively, the value of a particular pole or right of way is being transferred to Crown, which is itself free to discriminate as it sees fit.

<sup>41</sup> Order at ¶ 152.

The Commission found that rates should be limited to costs even though it recognized that systems were being deployed at great speed in many communities, where compensation for use of rights of way and for use of other property were above cost. This would of course imply above-cost pricing *is not* prohibitory or effectively prohibitory. The Commission conceded as much but suggested that requiring payment of fair value for use of the rights of way in Portland or New York deprives carriers of money that they *might* otherwise spend in rural areas, and therefore has a *prohibitory effect* in a different state.<sup>42</sup> That is, the Commission is explicitly requiring states like New York to cross-subsidize deployment in another state. Not only is that a Tenth Amendment concern, as *Qwest* suggests,<sup>43</sup> it also raises Commerce Clause questions: under what theory can the federal government require one state to transfer property value to another state?

2. The Commission’s Interpretations Conflict With The Plain Language of The Communications Act.

A reviewing court must invalidate “agency actions, findings and conclusions” from informal rulemaking proceedings when “found to be . . . *not in accordance with law* . . . .”<sup>44</sup> The Order conflicts with the plain language of the Communications Act in several ways.

---

<sup>42</sup> Unrebutted economic analysis demonstrated that this conclusion was, to put it mildly, nonsense. See, e.g. Comments of the Smart Communities and Special Districts Coalition, WT Docket No. 17-79, at Exhibit 2, Declaration of Dr. Kevin E. Cahill, Ph.D (Jun. 15, 2017) (“Cahill Declaration”); Comments of the Smart communities and Special Districts Coalition, WC Docket No. 17-84, at fn. 2 (Jun. 15, 2017) (citing Reply Comments of the City of Portland, Oregon, WC Docket No. 11-59, Attached Report of Alan Pearce, Ph.D. (filed Sep. 30, 2011)); *id.* at fn. 64 (citing Comments of the National Association of Telecommunications Officers and Advisors et al, GN Docket Nos. 19-47, 09-51, 09-137, at Appendix 12, Report of Ed Whitelaw (filed Nov. 6, 2009)); *id.* at fn. 88 (referencing Comments of the National League of Cities, et al, WC Docket No. 11-59, at Exhibit G, Effect on Broadband Deployment of Local Government Right of Way Fees and Practices (Jul. 18, 2011)); Letter from the Coalition for Local Internet Choice, WT Docket No. 17-79 (Sep. 18, 2018) (including letter and remarks from Blair Levin, former FCC Chief of Staff and Executive Director of the National Broadband Plan); Letter from the City of Eugene, Oregon, WT Docket No. 17-79, at 4-9 (Sep. 19, 2018).

<sup>43</sup> *Qwest Corp*, 224 F.Supp.2d at 1327.

<sup>44</sup> 5 U.S.C. § 706(2)(A) (emphasis added).

It conflates Section 253 and Section 332. While those two sections each include an “effective prohibition standard,” nothing in the Communications Act other than Section 332 “limits or affects” local and state authority over “decisions regarding the placement, construction and modification of personal wireless facilities.” The Commission ignores that plain language and finds that local authority over personal wireless facilities that are within the bounds of Section 332 must also comply with Section 253.

Second, the Commission interprets Sections 253(a) and 332(c)(7)’s “prohibit or have the effect of prohibiting” language to find a prohibition, inter alia, where a decision prevents an improvement to an existing service, or where a fee might affect deployment elsewhere. This interpretation directly conflicts with “plain language” holdings issued by the Eighth and Ninth Circuits stating that Sections 253(a) and 332(c)(7)(b)(i)(II) require “actual or effective” prohibition. Under *Brand X*,<sup>45</sup> the Commission may not reverse the plain language holding of a Court of Appeals.

In *Level 3 Communications, L.L.C. v. City of St. Louis, Missouri*, the Eighth Circuit held that “[u]nder a plain reading of the statute, we find that a plaintiff suing a municipality under Section 253(a) must show actual or effective prohibition . . . .”<sup>46</sup> The court reached this conclusion after engaging in the following analysis:

Examination of the entirety of section 253(a) reveals the subject of the sentence, “[n]o State or local statute or regulation, or other state or local legal requirement” is followed by two discrete phrases, one barring any regulation which prohibits telecommunications services, and another barring regulations achieving effective prohibition. However, no reading results in a preemption of regulations which might, or may at some point in the future, actually or effectively prohibit services, as our sister circuits seem to suggest.<sup>47</sup>

---

<sup>45</sup> 545 U.S. at 982.

<sup>46</sup> *Level 3 Communications, L.L.C. v. City of St. Louis, Missouri*, 477 F.3d 528, 532 (8th Cir. 2007).

<sup>47</sup> *Id.* at 533.

In *Sprint Telephony*, the Ninth Circuit, acting en banc, agreed, reversing a prior interpretation of section 253(a) equating “effective prohibition” with “possible prohibition” and replaced it with the “actual prohibition” standard.<sup>48</sup> While reanalyzing the statute, the court stated that “it is clear that Congress’ use of the word ‘may’ works in tandem with the negative modifier ‘[n]o’ to convey the meaning that ‘state and local regulations shall not prohibit or have the effect of prohibiting telecommunications service.’”<sup>49</sup> The court then noted that its previous interpretation of the word “‘may’ as meaning ‘might possibly’ [was] incorrect” and adopted the “actual prohibition” standard.<sup>50</sup> Thus, the Commission is twice foreclosed from issuing a contradictory interpretation of Sections 253(a) and 337(c)(7)(b)(i)(II) that replace the requirement of an actual prohibition with something much less rigorous and far more speculative.

The Commission’s interpretation could not stand even if permitted under *Brand X*. When it reinterprets “prohibition” to mean any installation is permitted if it will “improve” personal wireless services, the agency adopts a definition which “is simply not in accord with the ordinary and fair meaning of th[at] term,” and that also fails “to apply some limiting standard, rationally related to the goals of the Act[.]”<sup>51</sup> As the Second Circuit and other Circuits have recognized, the notion that whenever a provider argues that it is improving service, it is entitled to place facilities undercuts the basic principles underlying Section 332.

The essence of Sprint’s argument is that it has the right under this provision of the TCA to construct any and all towers that, in its business judgment, it deems necessary to compete

---

<sup>48</sup> *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008).

<sup>49</sup> *Id.* at 578.

<sup>50</sup> *Id.*

<sup>51</sup> *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 388, 390 (1999). The FCC’s determinations are also not in accord with the precedent on which it relies for the impairment test.

effectively with other telecommunications providers, wireless or not. Otherwise, Sprint argues in substance, the effect will be to ‘prohibit . . . the provision of personal wireless services.’ This untenable position founders on the statutory language. Since Sprint admits it would never propose to build towers it deems unnecessary to compete successfully, a fact which undoubtedly will hold true for most service providers, such a rule would effectively nullify a local government's right to deny construction of wireless telecommunications facilities, a right explicitly contemplated in 47 U.S.C. § 332(c)(7)(B)(iii).<sup>52</sup>

As suggested above, the aesthetic requirements mandated by the Order also contradict the plain language of 47 U.S.C. § 332(c)(7). The Commission’s only authority with respect to Section 332 is to interpret vague terms – it is a gap filling function. Substantively, the Commission may not add additional burdens to “limit or affect” local decision-making. That is precisely what the aesthetic standard does. Indeed, by requiring zoning agencies to develop regulations that are “no more burdensome than those applied to other types of infrastructure deployments,”<sup>53</sup> the Order improperly rewrites the limitation in Section 332(c)(7)(B)(i)(I), which only prohibits regulations that “discriminate among providers of functionally equivalent services.”<sup>54</sup> By requiring that standards be “objective,” the FCC is establishing a substantive limitation on zoning and land use that has no obvious connection to “discrimination,” “prohibition” or any other requirement of federal law that the FCC has identified.<sup>55</sup>

---

<sup>52</sup> *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 639 (2d Cir. 1999).

<sup>53</sup> Order at ¶ 86. *Inter alia*, the obligation to create “objective” aesthetic standards has no legal foundation.

<sup>54</sup> Functionally equivalent refers “only to personal wireless services . . . that directly compete against one another.” *Sprint Spectrum, L.P. v. Mills*, 65 F. Supp. 2d at 157 (quoting H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 208 (1996)).

<sup>55</sup> The FCC appears to have been responding to a complaint from providers that land use aesthetic standards are vague. It may be that land use standards are not as precise as providers may desire, but the point of Section 332 is to preserve classic land use authority.

The Order also conflicts with the plain language of 47 USC § 224. This section prohibits the Commission from dictating rates or access to state and municipal utility-owned poles, ducts, conduits, and rights-of-way. Nonetheless, the Order undoes this protection by stating that a local government’s refusal to provide access to that property or to set rates for access to such rights-of-way that conform with the Commission’s instructions, violates Section 253(a). As suggested above, nothing in the Communications Act gives the Commission authority to limit the rates charged for placement of wireless facilities on locally-owned infrastructure, and reading Section 253 in a manner that assumes Congress meant to nullify the savings clauses in Section 224 is not a reading that comports with basic rules of statutory interpretation. Congress does not hide elephants in mouseholes.<sup>56</sup>

3. There Is a Substantial Question As To whether the Order Is Arbitrary and Capricious.

“The Administrative Procedure Act . . . permits . . . the setting aside of agency action that is ‘arbitrary’ or ‘capricious.’”<sup>57</sup> “A decision is arbitrary and capricious if 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 the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.’”<sup>58</sup> In this case, the Order is arbitrary and capricious in the extreme. Each of the flaws discussed above would also justify finding that the Order is “arbitrary and capricious.” But there are many other issues raised by the pleadings that demonstrate that this Order, as adopted, may not stand.

---

<sup>56</sup> *Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

<sup>57</sup> *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (citing 5 U.S.C. § 706(2)(A)).

<sup>58</sup> *O’Keeffe’s, Inc. v. U.S. Consumer Product Safety Com’n*, 92 F.3d 940, 942 (9th Cir. 1996) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

a. *The Order Interprets the Statute in a Manner That Creates Internal Contradictions.*

Section 253 can only preempt a local law or regulation where the law “prohibits or effectively prohibits” the *ability of any entity* to provide a telecommunications service. As the Supreme Court has recognized,<sup>59</sup> the odd phrasing indicates that Congress did not guarantee entry into markets to those who could not afford to enter the business, and does not require any particular subsidy for them. The Commission correctly recognizes that this means that it can never be a prohibition within the meaning of the statute to require entities to pay the cost associated with their market entry, since otherwise one would be effectively requiring a subsidy. That means that, by definition, a prohibition may only occur when a fee exceeds cost. Section 253(c) creates a savings clause: even if it is prohibitory, a locality is entitled to “reasonable compensation” for use of the rights of way. The Commission goes on to limit localities to charging only what it had previously found was not a prohibition at all – in other words, it turns the savings clause into a nullity.<sup>60</sup>

The conflation of Sections 253(a) and (c) is just one example of the way in which the Order goes beyond the bounds of reasonable interpretation. The Commission repeatedly finds an “effective prohibition” without actually applying the standard it purports to adopt. Under that standard – “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment”<sup>61</sup> – the focus is on rules that somehow make it virtually impossible for one company to compete with another offering similar

---

<sup>59</sup> *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004).

<sup>60</sup> The record in this proceeding shows that Congress unequivocally intended to leave the form and amount of the charge to states and localities, and contemplated, among other things, gross revenues-based fees. Comments of the Smart Communities and Special Districts Coalition, WT Docket No. 17-84, at 14-15 (Jun. 15, 2017).

<sup>61</sup> Order at ¶ 101.

services. How the Commission’s aesthetic standards, or undergrounding rules, or even cost findings satisfy that standard is unexplained.

b. *The Order Ignores Relevant Evidence In The Record.*

Agency rules are arbitrary and capricious if the agency “entirely failed to consider an important aspect of the problem.”<sup>62</sup> The record contains information regarding the potential compliance burden on local governments and the economic considerations integral to evaluating pricing of property which the Order entirely fails to address.

The Order’s Regulatory Flexibility Act analysis, for example, makes unsubstantiated assertions regarding efficiencies in permitting<sup>63</sup> and focused only on the obligations of complying with shot clocks. But the record reflected evidence of far greater burdens – rewriting local ordinances, developing newly mandated aesthetic standards, retraining staff, hiring new staff, and reworking application forms and processes – all of which will impose costs on all local governments.<sup>64</sup> The Order completely ignored this evidence, and these issues.

The Commission ignored comments that pointed out that the Commission’s definition of “small wireless facilities” would result in very large and very intrusive installations – installations the Commission effectively admits could have a significant impact – unless the Commission altered its regulations governing modifications under Section 6409.<sup>65</sup> It did not do

---

<sup>62</sup> *Motor Vehicles Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43 (1983).

<sup>63</sup> Order at Appendix C paragraph 7.

<sup>64</sup> See, e.g. Letter from Gerard Lavery Lederer, Counsel, Smart Communities and Special Districts Coalition, WT Docket No. 17-79, at 31-33 (Sep. 19, 2018) (“Smart Communities September Letter”); Letter from NATOA, NACo, NLC, USCM, NARC, WT Docket No. 17-79, at 6-7 (Sep. 19, 2018) (“NATOA September Letter”); Letter from the Colorado Communications and Utility Alliance, WT Docket No. 17-79, at 1 (Sep. 18, 2018) (“CCUA September Letter”); Affidavit of Andrew Strong, Interim Asset Management and Large Projects Director, Seattle City Light (Oct. 30, 2018) (“Seattle Aff.”).

<sup>65</sup> See Smart Communities September Letter at 9-10.

so, and as a result, the Commission's Order endorses changes that, under the reasoning of the Order, are substantial and dramatically affect the character of wireless installations.

c. *The Order Ignored Economic Evidence in the Record Prior to Setting Presumptively Reasonable Rates.*

Evidence in the record demonstrated that reasonable rates for use of property must include things other than direct costs, including but not limited to opportunity costs.<sup>66</sup> The Order ignores these arguments, stating simply that “we find no reason not to extend the same reasoning to ROW access fees or fees for the use of government property within the ROW.”<sup>67</sup> No further explanation is proffered, nor is any examination or discussion of the arguments *against* this approach presented in the record.

More importantly, the Commission fails to address significant evidence demonstrating that the economic underpinnings for its “cost” decision were not credible, and inconsistent with the Commission's long-standing understanding: namely, reducing rates to below market for access to facilities in one area simply does not translate to new deployment in rural areas, and other underserved areas.<sup>68</sup>

---

<sup>66</sup> See Cahill Declaration.

<sup>67</sup> Order at n. 221.

<sup>68</sup> As the Order recognizes, providers have generally declined to build out into many rural areas in the years since wireless services have deployed. Order at ¶ 7. However, while the Order seeks to increase rural deployment by implementing new restrictions on traditional local authority, it contains no corresponding requirement for providers to build in rural areas. See Reply Comments of the Colorado Communications and Utility Alliance (CCUA), Rainier Communications Commission (RCC), City of Seattle, Washington, City of Tacoma, Washington, King County, Washington, Jersey Access Group (JAG), Colorado Municipal League (CML), WT Docket 17-79, WC Docket 17-84, at 11, (Jul. 17, 2017) (“CCUA et al Reply Comments”). Without an explicit quid pro quo, the Commission would be doing little more than promoting an expanding digital divide and generating industry profits in high density areas, while rural communities still wonder when they will see robust 2G and 3G technology. *Id.*

d. *The Order Is Inconsistent With Prior Commission Precedent and Other Applicable Law.*

The Order asserts that limiting rates for use of public property only to costs is necessary to promote broadband deployment, and that fees above costs are prohibitory of that deployment *in areas other than the area where the fee is paid*. The assumption is that money saved in one area will be invested in an area where investment is not independently justified. That “cross-subsidy” argument was rebutted by ample economic evidence the Commission ignored. Moreover, the Commission’s conclusion that paying an agreed, market-based rate<sup>69</sup> will discourage deployment is contrary to its own conclusions as to the best way to encourage market deployment. The reliance on voluntary agreements to establish the rate for interconnections is one example. Congress has determined, and Commission analysis shows, auctioning wireless spectrum is a reasonable way to secure a fair return for use government property, and to ensure that infrastructure would be deployed quickly and most efficiently.<sup>70</sup> Yet the Order offers no acknowledgement of these practices or explanation of its departure, despite these issues being raised in the underlying record.

e. *The Commission’s Shot Clock is Arbitrary and Capricious.*

Congress was exceptionally clear when it described what was meant by the term “reasonable period of time” in Section 332c(7)(B)(ii):

decisions are to be rendered in a reasonable period of time, taking into account the nature and scope of each request. If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment

---

<sup>69</sup> Reply Comments of the Smart Communities and Special Districts Coalition, WT Docket No. 17-79, at 59-60 (Jul. 17, 2017) (“Smart Communities Replies”). The Commission does not seriously contend, and nothing in the record supported a conclusion that localities have such significant market power that they are able to charge monopoly rents. In fact, as the record showed, in most large cities, there are often alternatives for placement on privately-owned structures. The absence of a sound economic analysis of markets undercuts any justification for abjuring reliance on market-set rates. Interestingly, the FCC relies on a Congressional bill that did not pass to suggest that its actions are reasonable. It ignored a bill that did pass, governing rates for access to federally-owned property for wireless facilities. Congress required rents at fair market value, which suggests that those rates are not unreasonable. *See* Smart Communities September Letter at 23; *see also* Consolidated Appropriations Act of 2018, Pub. L 115-141, Div. P, Title VI, Sec. 601 *et seq.*

<sup>70</sup> *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd. 6567, fn. 2 (Jun. 2, 2014).

process, the time period for rendering a decision will be the usual period under such circumstances. It is not the intent of this provision to give preferential treatment.<sup>71</sup>

The Order relies on time periods established by state laws that choose to replace typical land use hearing and variance procedures with an administrative process; in some state laws, variances can no longer be required and placement of wireless facilities is generally treated as a permitted use.<sup>72</sup> But those times are inherently not reasonable where a variance or similar process applies, as those procedures include standard times for appeal that basically make compliance impossible.<sup>73</sup> While the shot clock limits may not be as troubling if the Commission presumption of “unreasonableness” or “prohibition” may be overcome by pointing to standard appeal periods, if the Commission truly intends that the presumption will be dispositive except in “exceptional” circumstances,<sup>74</sup> the standard is capricious, and inconsistent with the law.

Indeed, the support for the Commission’s new shot clocks is too flimsy to pass muster even if one simply focused on the state laws the Commission relies on for support. Those state laws, among other things, set time limits for actions on applications that assume that only a limited number of applications will be submitted.<sup>75</sup> Moreover, those codes 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. Without any support, and ignoring

---

<sup>71</sup> S. Rpt. 104-230 (1996) at 208.

<sup>72</sup> MN. Stat. 237.163 (2016); TX. Loc. Gov’t Code 284.101; Colo. Rev. Stat. 29-27-404 (3) (2017).

<sup>73</sup> See, e.g., 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). While that time can be shortened, the error here is that the Commission did not even consider whether its new standards could be complied with in any setting that provides for internal administrative appeals by aggrieved parties.

<sup>74</sup> Order at ¶ 115.

<sup>75</sup> The Texas and Minnesota Codes, cited above, are examples.

evidence before it, the Commission applies its shot clocks to any permit required for placement, including excavation permits, historical districts and environmental reviews, and so on.<sup>76</sup>

**B. Movants Will Suffer Irreparable Injury Absent a Stay.**

The inquiry under the second factor focuses on the likelihood of irreparable injury absent the issuance of the stay.<sup>77</sup> “But, in contrast to the first factor, we have interpreted *Nken* as requiring the applicant to show under the second factor that there is a probability of irreparable injury if the stay is not granted.”<sup>78</sup> Parties must show that irreparable injury is not merely possible but probable.<sup>79</sup> “In analyzing whether there is a probability of irreparable injury, we also focus on the individualized nature of irreparable harm and not whether it is ‘categorically irreparable.’”<sup>80</sup> However, despite this individualized analysis, harms to constitutional rights are assumed to constitute irreparable injury. “It is well established that the deprivation of constitutional rights ‘unquestionably constitutes irreparable injury.’”<sup>81</sup>

**1. The Order Violates Movants’ Constitutional Rights.**

Movants will suffer irreparable injury absent a stay because their constitutional rights will be injured. As discussed in Section A, *supra*, Movants’ Tenth Amendment, Fifth Amendment, and Due Process rights will all be injured by this Order. In the context of preliminary relief, the deprivation of constitutional rights is unquestionably an irreparable injury.<sup>82</sup>

---

<sup>76</sup> See generally Letter from Smart Communities and Special Districts Coalition, WT Docket No. 17-79 (Jul. 16, 2018).

<sup>77</sup> *Nken v. Holder*, 556 U.S. at 434-35.

<sup>78</sup> *Lair v. Bullock* 697 F.3d 1200, 1214 (9th Cir. 2012) (citing *Leiva-Perez*, 640 F.3d 962, 968 (9th Cir. 2011)).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

<sup>82</sup> *Id.*

Movants' Fifth Amendment rights will be injured because the Order's adoption of the "actual cost" standard for local fees constitutes a forced transfer of local government property and is a federal taking of that property without just compensation. The Order violates the Fifth Amendment because the Order grants wireless providers the ability to occupy local government rights-of-way while depriving local governments of the ability to seek full compensation for such an occupation.<sup>83</sup> Particularly with respect to state and local government personal property, such as traffic signals, streetlights and other street furniture, the Order effectively compels owners to grant access to commercial enterprises at below market rates. The Order's cost formula cannot be justified in terms of regulatory takings, inter alia because the Act purports to cap rates for facilities over which the Commission has no authority.

Movants' Due Process rights are injured because the Commission has essentially overturned over 20 years of case law, adopted a new substantive standard, and expanded the scope of its shot clocks and requirements to require drafting and preparation of contracts, agreements, and the like within 90 days (the effective date of the Order). This, even though it recognizes that it will take 180 days to comply with one of its regulatory requirements. Exposing localities to liability without even a reasonable opportunity to comply violates Due Process.

The Commission also relied on complaints against unnamed jurisdictions to allegedly substantiate claims that local governments are impeding deployment.<sup>84</sup> The Commission's reliance on anonymous complaints is not only misplaced; it violates fundamental principles of Due Process.<sup>85</sup> Due Process and fundamental fairness require that an entity alleged to be

---

<sup>83</sup> See Section II.A.1.b, *supra*.

<sup>84</sup> See CUA et al Reply Comments at 2.

<sup>85</sup> *Id.*

conducting the “bad acts” that the Order purports to fix be identified and provided an opportunity to respond. Indeed, while the Commission was content to rely on mere allegations against unnamed parties, on those occasions where an entity was named, the entity made subsequent filings in these dockets demonstrating that the claims were false.<sup>86</sup> Yet even in these cases, the Commission ignored the local government responses in order to achieve its intended result.

Movants’ Tenth Amendment rights will be injured because they will be compelled – at significant expense – to undertake activities to satisfy Commission mandates that are not justified as an interpretation of the “effective prohibition” standard, or any other standard that the Commission may be permitted to interpret under Section 332(c)(7). Among other things, as explained in Section A, localities will be forced to develop and negotiate contracts, within a time specified by the Commission, simply to avoid legal actions against them. Moreover, localities will be forced to do so in contravention of state delegations which require that public property be leased at fair value.

Because Movants face deprivation of their constitutional rights including their Fifth Amendment, Tenth Amendment, and Due Process under this Order, a stay is appropriate.

## 2. The Effects of Compliance with the Order will Harm Movants Irreparably.

Compliance with the Order in the time frame required by the Order, is by the very words of the Order, impracticable.<sup>87</sup> It will be a massive undertaking to comply with these rules, and many associated costs with compliance will be unrecoverable. The Order exposes Movants to a Hobson’s choice: they will face a significant risk of litigation or be forced to comply with an Order they are challenging as unlawful in court. Should the court overturn the order, parties who

---

<sup>86</sup> See *e.g.*, claims of Crown Castle against the City of Atlanta draft ordinance. The ordinance was presented to the Commission as an enacted piece of legislation, while it was still only a draft ordinance, and Crown Castle was a part of the public-private partnership reviewing its terms. See Smart Communities Reply Comments at 70-71.

<sup>87</sup> See Order at ¶ 89.

in good faith complied with the Order will have to wrestle with the consequences of deployments that they otherwise would not have granted. However, if the court upholds the rules, a stay would allow all parties the time that the Commission itself has stated is necessary to successfully engage in the complex process of compliance with the Order.

The rules announced by the Commission in this Order, as suggested above, are a sweeping change to a regulatory landscape that has existed for many years. To comply with these rules, Movants must make significant changes to their local codes as well as to their application and permitting processes. This will include, in some cases, retaining and training new personnel to implement the Commission's rules.<sup>88</sup>

Absent a stay, the Order is scheduled to go into effect on January 14, 2019. However, in the Order itself, the Commission found that local governments would need 180 days to comply with the new regulatory landscape: "We appreciate that at least some localities will require some time to establish and publish aesthetics standards that are consistent with this Declaratory Ruling. Based on our review and evaluation of commenters' concerns, we anticipate that such publication should take no longer than 180 days after publication of this decision in the Federal Register."<sup>89</sup>

This means that many communities, especially small localities without readily available legal, planning and public works resources, are required to make major changes in less time than the Commission has found to be reasonable. Failure to do so puts them at risk of being hauled

---

<sup>88</sup> Comments of the Colorado Communications and Utility Alliance (CCUA), Rainier Communications Commission (RCC), City of Seattle, Washington, City of Tacoma, Washington, King County, Washington, Jersey Access Group (JAG), Colorado Municipal League (CML), WT Docket No. 17-79, at 13 (Jun. 14, 2017) ("CCUA et al Comments"); Seattle Aff.

<sup>89</sup> Order at ¶ 89. See also Due Process discussion *supra*.

into court.<sup>90</sup> Movants are not the only parties who must make changes to comply with this Order. Assuming all local governments in the United States could make the changes that the Commission is imposing in their review and approval processes within the time frame dictated by the Commission, industry applicants for small wireless sites will also have to make changes in their processes to comply with the new application and review requirements.

Should the court uphold this Order on appeal, a stay in the interim would benefit the industry applicants who will also have to make significant changes in their application process to conform to the new local requirements.

3. The Aesthetic Harms Threatened by Implementation of this Order Cannot be Remedied.

Small wireless facilities that are permitted under the constraints of the Order, such as 50-foot-tall poles in residential neighborhoods, and constructed during the time the Order is being adjudicated would cause an immediate aesthetic harm. To the extent that the Order will require placement of aboveground utilities in areas where utilities are undergrounded it will cause an immediate harm to the community and present an immediate hazard to traffic and during storms that undergrounding mitigates. Even if one assumes that wireless facilities installed pursuant to the Order could be removed afterward, the harm is immediate, and whether adequate restoration can occur at best is a matter of speculation.<sup>91</sup> The effect on property values will be immediate.<sup>92</sup> If an applicant is forced to take down the small wireless facility or underground ancillary

---

<sup>90</sup> NATOA September Letter at 4-5. Because Section 332(c)(7) contains a “non-discrimination” provision, it is not clear that the failure to “publish” standards can be cured: if one application is granted without being subject to the standards, it may be that the standards cannot be applied to anyone.

<sup>91</sup> It is no solace to someone who is harmed by a falling pole to suggest that at some point, the harm may be eliminated. And whether true restoration is possible may depend on a number of factors, including the effect of installation on surrounding property (are trees, landscaping and other elements affected?).

<sup>92</sup> See Comments of the Smart Communities and Special Districts Coalition, WT Docket No. 17-79, at Exhibit 3, Report and Declaration of David E. Burgoyne (Jun. 15, 2017); see also CCUA et al Reply Comments at 7-10.

equipment after the fact, the harm extends to both local governments and the wireless industry as well.

The Order imposes a reduction in the fees that local governments often charge both to process applications and fees for private use of public property. While some lost fees may be recoverable through claims made should the Order be overturned, the loss of fees are likely to cause other budgetary constraints resulting in local government decisions that cannot be undone and will amount to irreparable harm. The presumptively reasonable amount is far less than the record suggested would be required to comply with the Commission's mandates.<sup>93</sup> Although localities may charge more than the presumptively reasonable amount, doing so puts them at substantial risk of a challenge in which they will bear the burden of proof and requires them to undertake fee studies, audits and other administrative efforts to be prepared to defend themselves. These costs and the lost productivity from staff time, even if recoverable at some point in the future through action against the carriers or against the federal government under the Tucker Act, deprives localities of resources that could have been devoted to other projects and constitute immediate and irreparable harms.

This assumes that costs are recoverable. All localities in the nation must now review codes and determine whether standards in place are likely to satisfy the Commission's new "aesthetic standards," and to develop new or additional standards by the date the Order becomes effective. Setting aside that the Commission admits that this is not a *reasonable* requirement, that effort will be difficult to recover, as no locality can know when or if applications will be submitted under the new Order, and hence when or whether those costs, or the costs of new

---

<sup>93</sup> See Smart Communities September Letter at 32-33.

employees to comply, will be immediately, or ever recoverable.<sup>94</sup> Thus, the economic injury does in fact rise to a level where the financial injury is unrecoverable, thereby amounting to irreparable harm.<sup>95</sup> In other words, there are opportunity costs to both severely limiting local government budgets and then directing them to the administration of the Commission's Order. These are harms that cannot be remedied if the Order is invalidated.

**C. A Stay Will Not Harm Other Parties and Is in the Public Interest.**

The inquiry under the third and fourth factors focuses on the opposing party's interests and the public interest.

Maintaining the status quo pending judicial review of the Order would not harm other parties and would serve the public interest. The public has an interest in allowing their representatives in local government to conduct full inquiries into wireless facilities siting applications and to exercise their traditional police powers to protect the public health and safety. Furthermore, as the Order has identified, the public has an interest in the quick, efficient deployment of wireless services.<sup>96</sup> Staying the implementation of the Order while the court determines its legality would increase this efficient deployment by avoiding chaotic upheaval in local governments nationwide, scrambling to implement a dramatically new siting regime in a very short period of time.<sup>97</sup> Granting the stay will allow time to ensure that the rules that are in effect are legal and will truly aid the deployment of wireless services while allowing local governments to provide the public with the necessary protection and oversight.

---

<sup>94</sup> The record showed that small communities assumed that the additional costs of employees could amount to over \$100,000 per year.

<sup>95</sup> See *Nat'l Lifeline Ass'n v. F.C.C.*, No. 18-1026 (D.C. Cir. Aug. 10, 2018) (order granting stay); see also *Colo. River Indian Tribes v. Town of Parker*, 776 F.2d 846, 850 (9th Cir. 1985).

<sup>96</sup> Order at ¶ 1.

<sup>97</sup> *Seattle Aff.*, *supra*.

For example, it has been the practice of many local governments to work with industry to develop the standards and aesthetic requirements for small wireless facilities siting. These standards will be different in a single-family residential neighborhood than they will be in an industrial development. Developing standards, sharing them with up to eight industry entities, scheduling meetings to discuss feedback and develop consensus, takes considerably longer than 90 and often longer than 180 days. If the Order is to be followed, this collaboration will end, which would be a disservice to the public interest.

1. Other Parties Will Not Be Harmed by a Stay Because they are Flourishing Under the Status Quo.

Granting a stay will maintain the current regulatory framework pending judicial review of the Order and would not harm either the Commission or other parties. A stay will maintain the status quo, allowing all parties – including the wireless industry – to avoid expending significant and potentially unnecessary costs to conform to a fundamentally different regulatory regime that is fraught with uncertainty.

Wireless industry parties deploying small wireless facilities have worked in partnership with local governments and have flourished under the existing framework, as demonstrated plainly in the record – so a stay that simply maintains the status quo will not harm them.<sup>98</sup> The Commission’s Order acknowledges that “[m]any states and localities have acted to update and modernize their approaches to small cell deployments. They are working to promote deployment

---

<sup>98</sup> See, e.g. Letter from the Smart Communities and Special Districts Coalition, WT Docket No. 17-79 (Jul. 18, 2018) (highlighting Sprint celebrating its unprecedented success in deploying small cells prior to this FCC action).

and balance the needs of their communities.”<sup>99</sup> Further the wireless industry’s quarterly statements to investors confirm that a stay of the Order would not harm deployment.<sup>100</sup>

Local governments are, for the most part, working well with industry to promote deployment. For example, the City of Seattle demonstrated persuasively in the record that it actively supports the deployment of broadband and wireless facilities.<sup>101</sup> The City has been working with industry to site small wireless facilities since 2005 and has several pole attachment agreements in place with wireless industry members.<sup>102</sup> Verizon even named Seattle City Light as its Partner of the Year in 2017.<sup>103</sup> The record contains numerous accounts detailing this kind of positive partnership between the wireless industry and local governments across the nation.<sup>104</sup> Indeed, the record shows that contracts for deployment often result in more rapid deployment to areas that are not served. As an example, both the City of Los Angeles and the City of San Jose entered into contracts for use of proprietary property that should result in more rapid deployment and service available in areas that have long been ignored by wireless providers. As the Commission recognizes that such arrangements may not in fact be prohibitory, delay will simply

---

<sup>99</sup> Order at ¶ 5.

<sup>100</sup> See, e.g. Verizon Communications Inc. Q3 2018 Earnings Call Transcript (Oct. 23, 2018), *available at* <https://seekingalpha.com/article/4213544-verizon-communications-inc-vz-q3-2018-results-earnings-call-transcript?part=single> (“I don’t see it having a material impact to our build out plans.”); Crown Castle International Corp. Q3 2018 Earnings Call Transcript (Oct. 18, 2018), *available at* <https://seekingalpha.com/article/4212546-crown-castle-international-corp-cci-ceo-jay-brown-q3-2018-results-earnings-call-transcript?part=single>. (“I wouldn’t look at that and assume that we’re going to see a material change in our 18 to 24 month deployment cycle. In fact, we don’t believe that will result.”)

<sup>101</sup> Letter from the City of Seattle, WT Docket No. 17-79 (Sep. 18, 2018).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> See, e.g. Dissenting Statement of Commissioner Jessica Rosenworcel, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order (Sep. 26, 2018); see also Comments of the Smart Communities and Special Districts Coalition, WT Docket No. 17-79, at 33-37 (Jun. 15, 2017).

allow parties to move forward, and develop mutually acceptable solutions for deployment.<sup>105</sup> There is no risk – none – that there will be widespread stoppage of deployment.

Problematically, the requirements adopted by the Commission will not actually speed deployment. The shorter shot clock adopted by the Commission’s rules will likely have the unintended consequence of both delaying deployment and increasing costs, counter to the Order’s purpose.<sup>106</sup> In the record, the City and County of Denver pointed out that an application may appear to be complete in that each document listed on the application form has been submitted.<sup>107</sup> However, once staff begins a substantive review of the documents submitted, it is not uncommon to find (particularly with respect to wireless companies that contract out their application responsibilities to consulting firms) that the documents were not prepared properly and/or do not comply with relevant regulations that would apply to a given site.<sup>108</sup> In this situation, the City has been able to work with applicants to update documentation through resubmittals, and complete a second substantive review process in compliance with Colorado’s statutory shot clock.<sup>109</sup> With a shorter shot clock, these applications which appear complete on their face, but subsequently are found to be deficient in one or more respects, will not have sufficient time to submit new drawings and undertake new reviews of resubmittals.<sup>110</sup> In order to comply with the Commission’s shorter shot clock, there will be more denials of applications, resulting in the need to file new applications, together with new application fees.<sup>111</sup> Granting a

---

<sup>105</sup> Order at ¶ 66.

<sup>106</sup> See CCUA September Letter at 3. See also, Seattle Aff., *supra*.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

stay would maintain the status quo and avoid the unintended unfavorable consequences of the Order.

2. Granting a Stay is in the Public Interest Because it Reduces Uncertainty

If a stay is not granted, the Commission's stated objectives will be harmed because the Order creates uncertainty in the marketplace which will not encourage, and may discourage investment. When there is uncertainty because wireless industry applicants will be wary of approvals of their applications conditioned upon a requirement to remove the site are if these rules are struck down (stranded investment), as well as conditions to pay increased costs to compensate any local governments who have been harmed by the application of unlawful rules, investment decreases and the very goals of the Order are impaired.

The public interest favors the stay by ensuring that deployment of small wireless facilities proceed with the right framework which works for everyone, not a framework resting on unsettled legal theories and the unsubstantiated belief that dollars saved in one market will somehow affect the business case for investment in another, otherwise non-viable market.

#### **IV. CONCLUSION**

For the foregoing reasons established herein, it is respectfully requested that the Commission stay the effective date of the Order -until after the decision on appeal of the Order. As parties to that appeal, we fully expect that an expedited briefing schedule can be established that will protect the interest of all the participants, avoid unnecessary and misdirected compliance costs, and avoid uncertainty in the market. A stay should also provide time to permit local governments to come into compliance after the date of a final decision.

Respectfully submitted,

/s/ Nancy L. Werner

Nancy L. Werner  
NATOA  
3213 Duke Street, #695  
Alexandria, VA 22314

/s/ Clarence E. Anthony

Clarence E. Anthony  
CEO and Executive Director  
National League of Cities

/s/ Leslie Wollack

Leslie Wollack  
Executive Director  
National Association of Regional Councils

/s/ Robert May III

Robert C. May III  
Michael D. Johnston  
TELECOM LAW FIRM, P.C.  
3570 Camino del Rio N., Suite 102  
San Diego, CA 92108

/s/ Michael Watza

Michael Watza  
KITCH DRUTCHAS WAGNER  
VALITUTTI & SHERBROOK  
1 Woodward Ave, 10th Floor  
Detroit, MI 48226-3499

/s/ Matthew D. Chase

Matthew D. Chase  
Executive Director  
National Association of Counties

/s/ Tom Cochran

Tom Cochran  
CEO and Executive Director  
The United States Conference of Mayors

/s/ Jennifer Imo

Jennifer Imo  
Executive Director  
National Association of Towns and Townships

/s/ Joseph Van Eaton

Joseph Van Eaton  
Gerard Lavery Lederer  
Gail A. Karish  
John Gasparini  
BEST BEST & KRIEGER, LLP  
2000 Pennsylvania Ave N.W., Suite 5300  
Washington, D.C. 20006

/s/ Kenneth S. Fellman

Kenneth S. Fellman  
KISSINGER & FELLMAN, P.C.  
3773 Cherry Creek N. Drive  
Ptarmigan Place, Suite 900  
Denver, CO 80209