No. 18-3678

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CITY OF NORTH LITTLE ROCK, ARKANSAS, and
THE MISSOURI ASSOCIATION OF MUNICIPAL UTILITIES,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

On Petition for Review of an Order of
the Federal Communications Commission

RESPONDENT FEDERAL COMMUNICATIONS COMMISSION'S OPPOSITION TO MOTION FOR STAY PENDING REVIEW

Thomas M. Johnson, Jr.
General Counsel

David M. Gossett
Deputy General Counsel

Jacob M. Lewis
Associate General Counsel

Scott M. Noveck
Counsel

FEDERAL COMMUNICATIONS COMMISSION
445 12th Street SW
Washington, DC 20554
(202) 418-1740
fcclitigation@fcc.gov

TABLE OF CONTENTS

Page

INTRODUCTION

Respondent Federal Communications Commission respectfully opposes the motion for stay of the agency *Order* under review,[1] which reasonably interpreted Sections 253 and 332(c)(7) of the Communications Act. Petitioners have not come close to satisfying the stringent requirements for a stay pending review.

In the *Order*, the Commission considered how to apply Congress's preemption of state and local measures that "prohibit or have the effect of prohibiting" wireless services, 47 U.S.C. §§ 253(a), 332(c)(7)(B)(i)(II), given the changing wireless marketplace and the rise of fifth-generation ("5G") wireless technology, which require the deployment of numerous small facilities, many on existing structures. *See, e.g.*, *Order* ¶¶40, 47-48, 84, 104-112.

Petitioners' stay motion raises a narrow challenge to whether the Commission properly interpreted Sections 253 and 332(c)(7) to apply to municipally-owned utility poles. As we explain, Petitioners have not shown that they are likely to prevail on the merits of their challenge; the Commission reasonably interpreted the Act to apply to all state and local

---

[1] Declaratory Ruling and Third Report & Order, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, --- FCC Rcd ---, 2018 WL 4678555 (2018) (*Order*).

measures that have the effect of prohibiting wireless service, including restrictions on municipally-owned structures. Nor have petitioners shown that they will be irreparably injured by applying the *Order* to municipally-owned poles; the Commission's interpretation simply provides a basis for wireless carriers to seek relief in court, where municipalities remain free to contend that such relief is not warranted. Finally, Petitioners have not shown that a stay would be in the public interest; on the contrary, a stay would serve to block the Commission's efforts to remove unwarranted obstacles to the deployment of modern wireless facilities. Petitioners' motion should therefore be denied.[2]

BACKGROUND

A. Statutory And Regulatory Background

In the Telecommunications Act of 1996, Congress amended the Communications Act of 1934 (the Act), 47 U.S.C. §§ 151 *et seq.*, "to prohibit[] state and local regulation that impedes the provision of" wireless service. *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 491 (2002).

---

[2] The Judicial Panel on Multidistrict Litigation has issued a Consolidation Order designating the Tenth Circuit as the sole forum for any challenges to the *Order*. *See* Consolidation Order, *In re FCC*, MCP No. 155 (J.P.M.L. Nov. 2, 2018). The FCC has accordingly moved to transfer this case to the Tenth Circuit as required by 28 U.S.C. § 2112(a)(5). Resp't FCC's Mot. to Transfer to the Tenth Circuit (filed Dec. 20, 2018). That motion remains pending.

Section 253. In Section 253(a) of the Act, Congress directed that "[n]o state or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any … telecommunications service," 47 U.S.C. § 253(a), subject to limited exceptions found in Section 253(b) and (c). Congress further directed in Section 253(d) that "the Commission shall preempt the enforcement of such statute, regulation, or legal requirement" that the Commission finds to violate Section 253(a). *Id.* § 253(d). A wireless provider that believes a particular state or local measure violates Section 253(a) may ask the Commission to review it. *Id.* § 253(d). The Commission will then collect notice and comment and, if warranted, issue an order of preemption. *Ibid.*

Section 332(c)(7). In Section 332(c)(7) of the Act, Congress likewise directed that state and local governments "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). In addition, localities "shall act on any request for authorization … within a reasonable period of time." *Id.* § 332(c)(7)(B)(ii). If a state or local government violates these limits, any person adversely affected may "commence an action in any court of competent jurisdiction." *Id.* § 332(c)(7)(B)(v).

Section 224. Section 224 of the Act directs the Commission to prescribe specific rates, terms, and conditions for attachments of telecommunications equipment "to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4). Among other things, Section 224 empowers the Commission to ensure that "the rates, terms, and conditions for pole attachments … are just and reasonable." *Id.* § 224(b). Section 224(a) excludes from the definition of "utility" a "person owned by the Federal Government or any State." *Id.* § 224(a)(1).

California Payphone Decision. The Commission initially construed the Act's "prohibit or have the effect of prohibiting" language in its 1997 *California Payphone* decision. *Cal. Payphone Ass'n*, 12 FCC Rcd. 14191 (1997). The Commission reasoned that a state or local measure impermissibly has "the effect of prohibiting" service if it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Id.* at 14206 ¶31; *see Order* ¶¶16, 37-42. This Court has invoked *California Payphone*'s holding that Section 253(a) prohibits "material interference with the ability to compete in a fair and balanced market." *Level 3 Commc'ns, LLC v. City of St. Louis*, 477 F.3d 528, 533 (8th Cir. 2007).

2009 And 2014 Wireless Infrastructure Orders. In 2009 and 2014, the Commission gave effect to Section 332(c)(7)'s requirement that state and local governments act on applications to deploy wireless facilities within a "reasonable period of time," 47 U.S.C. § 332(c)(7)(B)(iii), by establishing "shot clocks"—that is, presumptive timeframes within which localities should act—for two categories of wireless siting applications. Requests to collocate wireless equipment on an existing structure should ordinarily be processed within 90 days. *Declaratory Ruling to Clarify Provisions of Section 332(c)(7)*, 24 FCC Rcd 13994, 14003-15 ¶¶27-53 (2009) (*2009 Shot Clock Order*), *pet. for review denied*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 569 U.S. 290 (2013). For collocation requests that do not substantially change the physical dimensions of an existing structure, the Commission established a 60-day shot clock. *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd 12865, 12955-57 ¶¶211-216 (2014) (*2014 Wireless Infrastructure Order*), *pet. for review denied*, *Montgomery Cnty. v. FCC*, 811 F.3d 121 (4th Cir, 2015). Until the *Order* under review, other siting requests were subject to a shot clock of 150 days. *2009 Shot Clock Order*, 24 FCC Rcd at 14012-12 ¶¶45-48.

B. The *Order* Under Review

In response to considerable record evidence that "legal requirements in [some] state and local jurisdictions are materially impeding [5G wireless] deployment in various ways," *Order* ¶¶25-26, and informed by extensive public comment from a wide array of stakeholders, *id.* ¶¶27-28, the Commission adopted the *Order* under review "to reduce regulatory barriers to the deployment of wireless infrastructure and to ensure that our nation remains the leader in advanced wireless services and wireless technology," *id.* ¶29.

1. The Commission first clarified how the phrase "prohibit or have the effect of prohibiting" in Sections 253(a) and 332(c)(7) applies to the deployment of "small cell" facilities used by 5G wireless networks.[3] *Order* ¶¶34-42. The Commission reaffirmed its ruling in *California Payphone*

---

[3] Unlike traditional cellular networks, which rely on large antennas typically mounted on 200-foot towers each covering a wide geographic area, 5G networks typically rely on small wireless facilities—known as "small cells"—that are "often no larger than a small backpack." *Order* ¶3. Small cells can be unobtrusively attached to traffic lights, street lamps, utility poles, and other structures. *Id.* ¶50. Small cells allow 5G networks to support a greater number of devices at lower lag times and higher speeds, but they require carriers to deploy a large number of relatively small and unobtrusive antennas, "build[ing] out small cells at a faster pace and at a far greater density" than in traditional cellular networks. *Id.* ¶3.

that a state or local measure has the impermissible "effect of prohibiting" wireless service if it "materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Id.* ¶¶35, 37. It then clarified that Sections 253 and 332(c)(7) apply "not only when filling a coverage gap[,] but also when densifying a wireless network, introducing new services[,] or otherwise improving service capabilities." *Id.* ¶37.

2. The Commission then discussed how Sections 253 and 332(c)(7) apply in three contexts.

State and Local Fees. Consistent with many court decisions, *see Order* ¶¶44-45 & n.122, the Commission first found that unnecessary fees demanded by localities for the deployment of small cells can have the effect of prohibiting wireless services. *See Order* ¶¶43-80. Indeed, the Commission observed, "even fees that might seem small in isolation have material and prohibitive effects on deployment, particularly when considered in the aggregate given the nature and volume of anticipated Small Wireless Facility deployment." *Id.* ¶53 (footnote omitted); *see id.* ¶¶62-65. For this and other reasons, the Commission concluded that state and local fees for the deployment of small-cell facilities have the

impermissible effect of prohibiting wireless services if they exceed a reasonable approximation of the locality's costs. *Id.* ¶¶50, 55-56, 76.

To avoid unnecessary litigation, the Commission established a "safe harbor" that presumes small-cell fees to be reasonable if they do not exceed $500 in application fees and $270 per year for all recurring fees. *Order* ¶¶78-80. The Commission made clear, however, that "localities [may] charge fees above these levels upon [a] showing" that their actual and reasonable costs exceed these amounts. *Id.* ¶80 & n.234; *accord id.* ¶32.

Aesthetic Requirements. The Commission also considered the impact of aesthetic requirements on wireless deployment. The Commission acknowledged that localities have a legitimate interest in ensuring that wireless infrastructure deployments are not unsightly or out of character with the surrounding area. *See Order* ¶¶12, 85-86. It also recognized, however, that overly restrictive or vague and subjective aesthetic standards can prevent carriers from developing deployment plans and have the effect of prohibiting wireless services. *Id.* ¶¶84, 88. Thus, the Commission concluded, if municipalities choose to adopt aesthetic standards, those standards must be reasonable, objective, and published in advance. *Id.* ¶¶86-88.

Shot Clocks. The Commission also adopted two new presumptive timeframes ("shot clocks") for reviewing proposed small-cell deployments, recognizing that localities have become more efficient in reviewing wireless infrastructure applications and that small cells generally pose fewer issues than larger macro cell structures. *Order* ¶¶105-137. Under the new shot clocks, requests to collocate a small cell on an existing structure are ordinarily to be processed within 60 days, and requests to deploy a small cell using a new structure should generally be processed within 90 days. *Id.* ¶¶105-106, 111. As with the existing shot clocks, however, localities may "rebut the presumptive reasonableness of the shot clocks based upon the actual circumstances they face." *Id.* ¶109; *see also id.* ¶115.

3. The Commission also confirmed that the interpretations of Sections 253 and 332(c)(7) adopted in the *Order* "extend to state and local governments' … terms for use of or attachment to government-owned property within [public rights-of-way that they own or control], such as new, existing and replacement light poles, traffic lights, utility poles, and similar property suitable for hosting Small Wireless Facilities." *Order* ¶92; *see id.* ¶¶93-97. "[F]or two alternative and independent reasons,"

the Commission concluded that the conditions municipal entities place on attachments to structures that they own are not immune from federal preemption. *Id.* ¶92.

"First," the Commission explained, commenters' attempts "to differentiate between … governmental entities' 'regulatory' and 'proprietary' capacities … to insulate the latter from preemption" ignored the fact that "both Section[] 253(a) and Section 332(c)(7)(B)(i)(II) expressly address preemption, and neither carves out an exception for proprietary conduct." *Id.* ¶93 & n.258; *see id.* ¶¶94-95. "Second, and in the alternative," the Commission stated, when localities manage public rights-of-way and government structures within the rights-of-way, or when they make "decisions about where facilities that will provide personal wireless service to the public may be sited," a "locality's role seems … indistinguishable from its functions and objectives as a regulator." *Order* ¶96; *see id.* ¶96-97. Activity of that kind, the Commission found, routinely reflects "regulatory" aims—"such as aesthetics or public safety and welfare." *Id.* ¶96.

4. Finally, the Commission made clear that while "[t]he framework reflected in [the *Order*] will provide the courts with substantive guiding principles in adjudicating Section 332(c)(7)(B)(v)

cases," the *Order* "will not dictate the result or the remedy appropriate for any particular case; the determination of those issues will remain within the courts' domain." *Order* ¶124 & n.357.

5. Several local government entities (although neither of the Petitioners here) sought an administrative stay from the Commission, which the agency denied. *See* Order Denying Motion for Stay, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, 2018 WL 6521868 (Wireless Telecomms. Bureau Dec. 10, 2018) (attached as Exhibit 1).[4]

ARGUMENT

To obtain a stay, Petitioners must show that (1) they are likely to prevail on the merits, (2) they will suffer irreparable harm unless a stay is granted, (3) a stay will not harm others, and (4) a stay will serve the public interest. *E.g.*, *Packard Elevator v. ICC*, 782 F.2d 112, 115 (8th Cir. 1986). To merit this "extraordinary remedy," Petitioners must make "a

---

[4] The Federal Rules of Appellate Procedure require those seeking a stay pending review to seek such relief in the first instance from the agency, unless doing so would have been impracticable. Fed. R. App. P. 18(a)(2)(A)(i). The Petitioners here failed to make such a request from the Commission, or to demonstrate that to do so would have been impracticable. We have therefore, in a separate filing, moved to strike their stay request. *See* Resp't FCC's Mot. to Strike (filed Dec. 21, 2018).

clear showing" that they are "entitled to such relief." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008). They have not done so here.[5]

I. PETITIONERS HAVE NOT SHOWN THAT THEY ARE LIKELY TO SUCCEED ON THE MERITS.

1. Petitioners contend that "the Commission lacks the statutory authority under the Communications Act … to regulate attachments to public power utility poles." Mot. 5. They base that argument entirely on Section 224, and in particular on the exclusion of government-owned entities from the definition of "utility" in Section 224(a)(1). *See id.* at 6. By its terms, however, Section 224(a)(1) exempts government-owned utilities only from regulations adopted under "this section"—*i.e.*, Section

---

[5] In addition, neither petitioner appears to be a "party aggrieved," entitled to seek review of the *Order* at all. *See* 28 U.S.C. § 2344; *Packard Elevator v. ICC,* 808 F.2d 654, 655 (8th Cir. 1986) ("party aggrieved" means "that a person seeking judicial review must have participated in the proceedings before the administrative agency"). Petitioner Missouri Association of Municipal Utilities did not participate in the proceeding below. Petitioner City of North Little Rock submitted only a single ex parte letter to the Commission the day before the Order was adopted—during a period when, under the Commission's Sunshine Act rules, 47 C.F.R. § 1.1203(a), further filings are not permitted. *See Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1248-50 (11th Cir. 2006) (ex parte letter "received during the Sunshine Agenda period" in contravention of the agency's rules insufficient to "confer party status"). The apparent flaws in Petitioners' statutory standing constitute an additional consideration weighing against grant of a stay.

224—not from other sections of the Communications Act, like Sections 253 or 332(c)(7). *See Order* n.253.

The Commission did not anywhere in the *Order* prescribe specific rates, terms, or conditions for pole attachments under Section 224. *See, e.g.*, *Order* n.132 ("we are not asserting a 'general ratemaking authority'"); *id.* ¶76 (declining to require "any specific accounting method"). The *Order* likewise does not "compel access to any particular state or local property." *Id.* n.217. Municipal utilities are accordingly free, among other things, to specify their own rates and terms for pole attachments, and to deny siting requests for any legitimate reason. What they cannot do is demand fees so high as to effectively prohibit small cell deployment in violation of Sections 253(a) and 332(c)(7) of the Act. Because the *Order* exercises the Commission's authority to foreclose localities from effectively prohibiting the provision of wireless service pursuant to those sections, it is beside the point that localities are excluded from Section 224.

2. Petitioners' only other merits argument—that "the FCC exceeds its statutory authority by interfering with the proprietary rights of public power utilities" (Mot. 7)—is likewise unfounded.

For one thing, as explained in the *Order*, when localities manage public rights-of-way and government structures within the right-of-way (such as municipal utility poles), they act in a regulatory rather than proprietary capacity. *Order* ¶¶96-97; *see*, *e.g.*, *N.J. Payphone Ass'n Inc. v. Town of West N.Y.*, 130 F. Supp. 2d 631, 638 (D.N.J. 2001), *aff'd*, 299 F.3d 235 (3d Cir. 2002). That is because localities manage rights-of-way "in trust for the public," *Order* ¶96 (quoting *N.J. Payphone*, 130 F. Supp. at 638), they are used "to supply services for the benefit of the public," *id.* ¶97, and the decisions they reach in managing the rights-of-way are routinely "based on … regulatory objectives" such as "aesthetics or public safety and welfare," *id.* ¶96—which are among the animating concerns that Petitioners ascribe to the local ordinance on which they rely in their motion (*e.g.*, at 9).

The Commission reasonably concluded that "Congress did not intend to permit states and localities to rely on their ownership of property within the [right-of-way] as a pretext to advance regulatory objectives that prohibit or have the effect of prohibiting the provision of covered services, and thus that such conduct is preempted." *Order* ¶97. And "[s]hould factual questions arise about whether a state or locality is

engaged in such behavior," Section 253(d) gives them "an avenue for specific preemption challenges." *Ibid.*

In the alternative, even if local government activity in this area could be characterized as "proprietary" instead of "regulatory," that distinction would not insulate localities from federal preemption. *See Order* ¶¶93-95. Just as Congress can regulate the proprietary activity of private entities, Congress can also choose to regulate the proprietary activity of state and local governments. *Id.* ¶93. Given the "sweeping" preemptive language of Sections 253 and 332(c)(7), *id.* ¶94—"neither [of which] carves out an exception for proprietary conduct," *id.* ¶93—the Commission concluded that these provisions are best read to preempt state and local impediments to wireless service regardless whether they are imposed in a regulatory or proprietary capacity. *Id.* ¶¶94-95.

That conclusion was eminently reasonable. As the Commission observed, an exception for proprietary activity could "have the effect of diluting or completely defeating the purpose of" the statute. *Order* ¶95. The Commission's interpretation is also "'reinforced by the scope of [S]ection 253(d),' which 'directs the Commission to preempt any statute, regulation, or legal requirement *permitted* or imposed by a state or local government if it contravenes [S]ection 253(a) or (b).'" *Id.* ¶94 (quoting

In re Petition of the State of Minnesota, 14 FCC Rcd. 21697, 21707 ¶18 (1999), in which the Commission found that Section 253 applied to preempt an exclusive license from a locality). As the Commission explained, "[a] more restrictive interpretation of the term 'other legal requirements' easily could permit state and local restrictions on competition to escape preemption based solely on the way in which [state] action was structured,'" which would be inconsistent with Congress's intent. *Ibid.* (second alteration in original; internal quotation marks omitted); *see also Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271-72 (10th Cir. 2004) (approving the FCC's view that Section 253 encompasses any state or local measures "that relate to the 'management of rights-of-way" as "appropriate in light of [Congress's] intent to create open competition").

Petitioners assert that the Commission has previously stated "that neither §253 or §332 appl[ies] to the 'non-regulatory decisions of a state or locality acting in its proprietary capacity.'" Mot. 7 n.9 (quoting *2014 Wireless Infrastructure Order*, 29 FCC Rcd. at 12965 ¶239). That is not correct. The Commission's statement in the *2014 Wireless Infrastructure Order* was made in interpreting a different statute, Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, 47 U.S.C. § 1455(a),

and the Commission had no need to elucidate the line dividing a locality's "regulatory" from its "proprietary" activities, as it has done here. 29 FCC Rcd. at 12872 n.27; *see id.* at 12964-65 ¶¶239-240; *see Order* n.265.[6]

II. PETITIONERS HAVE NOT SHOWN THAT THEY WILL SUFFER IRREPARABLE HARM.

Petitioners also fail to meet their burden of showing they will suffer irreparable harm absent a stay—which alone is enough to defeat their motion. *See, e.g.*, *Roudachevski v. All-Am. Care Ctrs., Inc.*, 648 F.3d 701, 706-07 (8th Cir. 2011) ("preliminary injunctive relief is improper absent a showing of a threat of irreparable harm," which is the movant's burden to demonstrate). A threat of harm favoring a stay must be "both certain and great," "actual and not theoretical." *Packard Elevator*, 782 F.2d at 115 (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam)). "Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur." *Id.* (same).

---

[6] Beyond the *Order*'s application to municipally-owned poles, Petitioners have furnished no basis to stay any other aspect of the *Order*. Petitioners ostensibly seek a delay of the entire *Order*, but the arguments in their stay motion address only the *Order*'s application to municipally owned poles. *See* Mot. 6 ("[A]ssuming[] for purposes of argument" that the *Order* "is otherwise within the authority of the Commission"). And the *Order* expressly provides that its various aspects are "to the fullest extent" severable. *See Order* ¶153.

Petitioners' repeated assertions that the FCC's *Order* "creates uncertainty" do not suffice. Mot. 1; *accord id.* at 8, 11; *see also id.* at 10 ("It is *uncertain* if the City [of North Little Rock] will have to renegotiate with all of the other providers to whom it has granted permits. *If* it does, that *could* create a significant administrative burden on the City. Because of the *uncertainty* that the [*Order*] creates, this Court should issue a stay." (emphasis added)). This Court has made clear that such allegations of "possible harm" are "wholly speculative" and "cannot be called irreparable harm." *Local Union No. 884 v. Bridgestone/Firestone, Inc.*, 61 F.3d 1347, 1355 (8th Cir. 1995); *accord Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903, 915 (8th Cir. 2015).

Likewise, Petitioners' contention that "a telecommunications provider is already demanding [that] the City comply with the [FCC's *Order*]" (Mot. 8) does not show irreparable harm. For one thing, in claiming that Verizon is actively "attacking" (Mot. 3) or "challenging" (Mot. 9) the City's pole attachment ordinance, Petitioners overstate their supporting evidence. Verizon's letter to the City merely "provide[s] comment" on the City's ordinance, Mot. Exh. 2.C at 1, asking to "work collaboratively" and "schedule a meeting" at which the parties can discuss aspects of the ordinance that Verizon views as inconsistent with

the *Order*, *id.* at 2. A request to schedule a meeting does not demonstrate harm "of such imminence that there is a clear and present need for equitable relief." *Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 895 (8th Cir. 2013) (internal quotation marks omitted). Petitioners make no showing that Verizon, or any other carrier, has challenged the City's ordinance before the FCC or in court.

And even if the City were currently being required to defend against an "attack[]" on its ordinance (Mot. 3), that would not be enough to show irreparable harm. As the Supreme Court has held, "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980); *accord West v. Bergland*, 611 F.2d 710, 718 (8th Cir. 1979). More generally, "injury resulting from attempted compliance with government regulation ordinarily is not irreparable harm." *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005) (alteration omitted; quoting *Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980)); *accord A.O. Smith Corp. v. FTC*, 530 F.2d 515, 527-28 (3d Cir. 1976). Otherwise, there would always be irreparable harm in cases seeking a stay against a newly adopted government rule.

Finally, Petitioners assert (without elaboration) that the *Order* "negatively impacts" the City's ability to "adequately protect … safety and [City] property." Mot. 11. But the *Order* does not compel the City to authorize the deployment of any particular facility, much less one that might be "dangerous"—"to vehicular traffic" or otherwise. Mot. Exh. 2 at 2; *see Order* n.217 ("There may well be legitimate reasons for states and localities to deny particular placement applications"). There is in any event no basis on which to conclude that rebuttable restrictions on fees or a publication requirement for aesthetic standards are likely to have an adverse impact on public safety. And to the extent Petitioners are concerned that the shot clocks will not afford them adequate time to review a particular deployment, the Commission has made clear that "building and safety officials" will have the same opportunity "as all other siting authorities" to show that "exceptional circumstances" prevented action on an application within the presumptive timeframe. *Order* ¶137; *see id.* ¶¶119, 130. Nor is there any reason to think that a court would order a locality to approve a deployment that would pose a demonstrated danger to public safety.

III. ANY STAY WOULD HARM WIRELESS CONSUMERS AND CARRIERS AND DISSERVE THE PUBLIC INTEREST.

The balance of equities also weighs heavily against a stay. The *Order* will bring immediate regulatory relief to consumers across the country, who increasingly depend on access to modern wireless communications, and to wireless carriers, who must make substantial infrastructure investments to support modern wireless services. *See*, *e.g.*, Letter from CTIA to FCC, WT Dkt. No. 17-79, at 1-2 (filed Sept. 18, 2018) (attached as Exhibit 2) (explaining the importance of the *Order* for consumers and wireless providers alike).

Indeed, Verizon's letter to the City belies Petitioners' claim (Mot. 10) that a stay is needed to encourage carriers to engage cooperatively with municipalities. If anything, postponing the effective date of the *Order* risks diminishing municipalities' incentive to engage with carriers—to the detriment of both carriers and consumers.

While Petitioners emphasize that a stay would maintain "the status quo" (*e.g.*, Mot. 10), "[m]aintaining the status quo is not a talisman," *Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco*, 512 F.3d 1112, 1116 (9th Cir. 2008). Injunctive relief is disfavored, for example, when

maintaining the status quo would prolong public safety risks that the challenged action would alleviate. *Chlorine Inst.*, 792 F.3d at 916.

Here, the record showed that state and local policies in many communities now "materially inhibit[] the buildout of wireless services." *Order* ¶5; *see id.* ¶¶25-26, 40, 48, 53, 84, 106. The FCC found—and Petitioners do not dispute—that those services are "critical" to the public interest. *E.g.*, *id.* ¶2. The *Order* reflects the FCC's expert judgment of how best to remove the barriers now "threaten[ing]" that interest. *Id.* ¶4. A stay in these circumstances would not serve, but instead would disserve, the public interest.

CONCLUSION

The motion for a stay pending review should be denied.

Dated: January 2, 2019

Respectfully submitted,

/s/ *Scott M. Noveck*

Thomas M. Johnson, Jr.
General Counsel

David M. Gossett
Deputy General Counsel

Jacob M. Lewis
Associate General Counsel

Scott M. Noveck
Sarah E. Citrin
Counsel

FEDERAL COMMUNICATIONS COMMISSION
445 12th Street SW
Washington, DC 20554
(202) 418-1740
fcclitigation@fcc.gov

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements and Type Style Requirements

1. This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

   ☒ this document contains 4525 words, *or*

   ☐ this document uses a monospaced typeface and contains ____ lines of text.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   ☒ this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook, *or*

   ☐ this document has been prepared in a monospaced spaced typeface using _____ with _____.

/s/ *Scott M. Noveck*
Scott M. Noveck
Counsel for Respondents

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on January 2, 2019, I caused the foregoing Opposition to Motion for Stay Pending Review to be filed with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit using the electronic CM/ECF system. I further certify that all participants in the case, listed below, are registered CM/ECF users and will be served electronically by the CM/ECF system.

/s/ *Scott M. Noveck*
Scott M. Noveck
Counsel for Respondents

Service List:

Terry M. Jarrett
Penny M. Speake
Peggy A. Whipple
HEALY LAW OFFICE
Suite 22
514 E. High Street
Jefferson City, MO 65101
terry@healylawoffices.com
penny@healylawoffices.com
peggy@healylawoffices.com
Counsel for Petitioners

Robert Nicholson
Adam D. Chandler
U.S. DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
950 Pennsylvania Avenue, NW
Washington, DC 20530
robert.nicholson@usdoj.gov
adam.chandler@usdoj.gov
Counsel for Respondent United States of America

Exhibit 1

Before the
Federal Communications Commission
Washington, D.C. 20554

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

ORDER DENYING MOTION FOR STAY

Adopted: December 10, 2018 **Released: December 10, 2018**

By the Chief, Wireless Telecommunications Bureau:

1. On September 27, 2018, the Commission released its Declaratory Ruling and Third Report & Order (*Order*) in the proceedings listed above.[1] On October 31, 2018, the National League of Cities and a group of local governments and associations (collectively, NLC) filed a Motion for Stay of the Order pending judicial review (Motion).[2] For the reasons discussed below, we deny the Motion.

I. BACKGROUND

2. In the *Order*, the Commission determined that certain state and local legal requirements and related governmental actions may be unlawful because they effectively prohibit the deployment and provision of wireless services. It interpreted the term "effect of prohibiting," as used by Congress in both Sections 253 and 332(c)(7) of the Communications Act.[3] Based on this interpretation, the *Order* articulated specific standards for resolving concrete disputes over whether states' or localities' fees in connection with certain types of wireless facility deployments or their requirements or restrictions relating to wireless facilities' aesthetic impact or related concerns are consistent with Sections 253 and 332(c)(7).[4] It further clarified that states' and localities' rates and terms for deployment of wireless facilities in public rights-of-way (ROW) or on government structures within the ROW are subject to the limits Congress imposed in Sections 253 and 332(c)(7).[5] The Commission also considered and rejected various statutory and constitutional challenges to its interpretive authority.[6]

3. In addition, the *Order* addressed the statutory requirement that state and local governments "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time."[7] Among other things, it codified the existing "shot clocks"

[1] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, *et al.*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79 and WC Docket No. 17-84, FCC 18-133 (released Sept. 27, 2018) (*Order*).

[2] National League of Cities, *et al.* Motion for Stay, WT Docket No. 17-79 and WC Docket No. 17-84 (filed Oct. 31, 2018), https://www.fcc.gov/ecfs/filing/103154366759 (Motion). *See id.* at 1 n.1 (listing parties joining the motion).

[3] *Order* at paras. 34-42 (Part III.A); *see* 47 U.S.C. §§ 253(a), 332(c)(7)(B)(i)(II).

[4] *Order* at paras. 43-80 (Part III.B) (fees), paras. 81-92 (Part III.C) (aesthetic requirements and similar restrictions).

[5] *Id.* at paras. 92-97 (Part III.D).

[6] *Id.* at paras. 98-102 (Part III.E); *see also id.* at paras. 73-77.

[7] 47 U.S.C. § 332(c)(7)(B)(ii).

(*i.e.*, presumptively reasonable periods of time for state and local governments to act on deployment requests) that the Commission adopted in 2009[8] and specified new shot clocks for "small wireless facilities."[9]

4. The full text of the *Order* was released on September 27, 2018; a summary was published in the Federal Register on October 15; and the *Order* is scheduled to take effect on January 14, 2019 (90 days after publication).[10] The *Order* acknowledged that "some localities will require some time to establish and publish aesthetics standards," and therefore the *Order's* aesthetics standards will not take effect until 180 days after Federal Register publication. As a consequence, to the extent localities choose to impose aesthetic requirements on the deployment of covered wireless facilities 180 days after Federal Register publication, the requirements must be "(1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance."[11]

5. Various parties have petitioned for judicial review of the *Order*.[12] Pursuant to 28 U.S.C. § 2112(a), the Judicial Panel on Multidistrict Litigation consolidated the petitions and assigned them to the U.S. Court of Appeals for the Tenth Circuit.[13]

II. DISCUSSION

6. When evaluating a stay request, the Commission considers "(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."[14] "The third and fourth factors merge when the [federal] Government is the opposing party."[15] We conclude that NLC's Motion fails to satisfy these factors.

A. NLC Fails to Show a Likelihood of Success on the Merits

7. NLC contends that aspects of the *Order* conflict with various provisions of the Communications Act,[16] are arbitrary and capricious under the Administrative Procedure Act,[17] and violate local governments' Fifth Amendment and Tenth Amendment rights.[18] None of these arguments is likely to succeed on the merits.[19]

---

[8] *See Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994, 14016, para. 56 (2009) (*2009 Declaratory Ruling*), *pet. for review denied*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 569 U.S. 290 (2013).

[9] *Order* at paras. 104-30. *See id.* at para. 11 n.9, & App. A, 47 CFR § 1.6002(*l*) (defining "small wireless facilities").

[10] 83 FR 51867 (Oct. 15, 2018); *Order* at paras. 152-53.

[11] *Order* at para. 89.

[12] In addition, one petition for reconsideration of the *Order* has been filed. The present order should be not construed as expressing any view on the merits of that petition.

[13] *In re Federal Communications Commission, In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Consolidation Order, MCP No. 155 (U.S. Judicial Panel on Multidistrict Litig., Nov. 2, 2018), https://docs.fcc.gov/public/attachments/DOC-354923A1.pdf.

[14] *Nken v. Holder*, 556 U.S. 416, 425-26 (2009); *see also Winter v. Natural Resources Defense Council*, 555 U.S. 7, 22 (2008).

[15] *Nken*, 556 U.S. at 435.

[16] Motion at 2-3, 12-16.

[17] *Id.* at 16-22.

[18] *Id.* at 5-9 (Tenth Amendment), 9-11 (takings), 11 (due process).

8. *Communications Act*. We find unpersuasive NLC's assertions that the Commission's interpretation of Sections 253 and 332(c)(7) and its application of those provisions to local governments' fees and restrictive requirements unambiguously conflict with the statute.[20] NLC argues that the Commission's *Order* is in tension with and must follow the Eighth and Ninth Circuits' precedents establishing that "evidence of an existing or complete inability to offer a telecommunications service is required" to show that a locality violated Section 253(a).[21] Assuming, *arguendo*, that NLC's characterization of the Eighth Circuit and Ninth Circuit's precedents is correct, NLC nonetheless does not establish likelihood of success on the merits. As the *Order* explains, the Commission's decision is consistent with conclusions endorsed by the First, Second, and Tenth Circuits, as well as longstanding Commission precedent, that the statute's "effect of prohibiting" standard does not "require that a bar to entry be insurmountable before the FCC must preempt it."[22] It is axiomatic that reviewing courts must defer to the Commission's interpretation of "gaps" not clearly resolved by ambiguous terms in the Communications Act.[23] Here, the statutory term at issue—"effect of prohibiting" in Sections 253 and 332(c)(7)—is undeniably ambiguous; indeed, inasmuch as there is a contrast between the Eighth and Ninth Circuits' precedents, upon which NLC relies, and those of the First, Second, and Tenth Circuits, the contrast reinforces this conclusion. The Commission acted well within its authority to "address and reconcile this split" among the courts' potentially "conflicting views."[24]

9. The Commission's interpretation of these provisions also "makes considerable sense in terms of the statute's basic objectives" and is confirmed by its "consisten[cy] with the agency's own longstanding interpretation."[25] The *Order* explains that the narrow "coverage gap"-based interpretation of the term "effect of prohibiting," developed by some courts in the late 1990s,[26] is incompatible with the public's demand for mobile data and technological changes. Wireless providers must not only fill coverage gaps as they did in the 1990s, but now they must exponentially increase their networks' data capacity to maintain service and lay the groundwork for the deployment of 5G.[27] The Commission's rejection of the "coverage gap" interpretation is also driven by its expert policy judgment regarding the urgent need to ensure that "the deployment of wireless infrastructure, particularly Small Wireless

(Continued from previous page)

[19] Notably, while NLC recites the "likely to succeed" element of the stay standard, it does not contend that any of its claims are actually likely to succeed, but only that they are "significant" or "serious and have a fair prospect of success" (*id.* at 5), or that they raise "substantial concerns" or "substantial questions" of statutory or constitutional violations (*id.* at 9, 11, 16).

[20] *Compare* Motion at 2, 13-15 *with Order* at paras. 34-42.

[21] *Order* at para. 41; *cf.* Motion at 13-14 (citing *Level 3 Communications LLC v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007), and *Sprint Telephony PCS, LP v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008)).

[22] *RT Communications v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000). *See Order* at para. 35 & n. 79 and para. 41 & n.100 (citing *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002); and *RT Communications*, *supra*). *See also Order* at para. 41 & n.101 (citing prior Commission rulings reaching consistent conclusion).

[23] *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-45 (1984); *City of Arlington*, 569 U.S. at 290; *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 377-78 (1999).

[24] *Order* at para. 9.

[25] *Barnhart v. Walton*, 535 U.S. 212, 219 (2002); *see Order* at paras. 35-39 (explaining consistency with *California Payphone Ass'n*, 12 FCC Rcd 14191 (1997), and other longstanding Commission precedents).

[26] Under this standard, a locality's denial of a facility siting application was deemed to have the "effect of prohibiting" service only if that decision effectively prevented a carrier from filling a gap in its coverage and precludes the carrier from providing *any* service in a geographic area. *See Order* at para. 34 & notes nn.74-75, para. 40 & n.95, and cases cited therein.

[27] *Order* at para 40 & n.97.

Facilities, not be stymied by unreasonable state and local requirements."[28] That NLC or others might prefer different outcomes or would select alternative interpretations of the statute does not mean that the Commission's choices are impermissible or that NLC's arguments are likely to prevail on the merits.

10. We need not refute in detail each of NLC's other challenges[29] to various other determinations in the *Order* given the Commission's extensive legal analyses in support of its conclusions, which we believe will be sustained on judicial review. And principles of *Chevron* deference fortify our view that NLC's challenges to the Commission's interpretation and application of the Communications Act are likely to fail.[30]

11. *Arbitrary and Capricious.* NLC fails to show that the Commission's decisions are "arbitrary and capricious" in violation of the Administrative Procedure Act.[31] NLC contends that the Commission should have discounted some of the record evidence that it relied on and should have paid greater heed to materials that it claims the Commission ignored;[32] but courts accord the greatest deference to agencies' assessments of the reliability of disparate evidence, factual conclusions, and predictive judgments.[33] NLC fails to show that the Commission's assessments lack any support in the record or that

[28] *Id.* at para. 23; *see generally id.* at paras. 23-28 (discussing policy factors that necessitate Commission action). *See also id.* at para. 11 n.9 (defining "Small Wireless Facilities"); *id.* at App. A, new rule § 1.6002(*l*) (same).

[29] *See, e.g.*, Motion at 13 (challenging the *Order*'s analysis of the relationship between Sections 253 and 332(c)(7)); *but see Order* at paras 35-36 & n.83 (refuting that argument). *See also* Motion at 17 (characterizing as "beyond the bounds of reasonable interpretation" the *Order*'s analysis of the interplay between Section 253(a) and (c), without providing any contrary analysis to refute the Commission's conclusion); *but see Order* at paras. 71-74 (explaining analysis supporting Commission's conclusion). *See also* Motion at 2, 15 (objecting to *Order*'s standards for assessing whether localities' aesthetic requirements and similar restrictions are lawful as unauthorized by statute); *but see Order* at paras. 87-91 (explaining basis for these standards—to prevent state or local requirements that are unreasonably discriminatory or have the "effect of prohibiting" deployment, in violation of Sections 253(a) and 332(c)(7)(B)(i)(I) and (II)). *See also* Motion at 7, 16 (suggesting, in passing, that the *Order* violates Section 224 by requiring municipal utilities to allow access to utility poles at regulated rates); *but see Order* at para. 92 n.253 (explaining that Section 224's exclusion of publicly-owned utilities from the definition of utility, "[a]s used in this section," does not necessarily preclude the application of Section 253 to poles or other facilities owned by such entities). *See also* Motion at 21 (disputing *R&O*'s treatment of "exceptional circumstances" as basis for rebutting shot clocks' presumption of reasonableness); *but see Order* at paras. 115, 119, 121-22 (explaining bases for localities to rebut shot clocks' presumption of reasonableness). *See also* Motion at 21 (characterizing as "too flimsy to pass muster" the *R&O*'s reliance on recently-enacted state laws to justify applying shot clocks to batched applications); *but see Order* at paras. 105-15 (discussing factors, including but not limited to state laws, justifying shot clock rules).

[30] *See, e.g.*, *City of Arlington*, 569 U.S. at 296, 307 (reaffirming that "because Congress has unambiguously vested the FCC with general authority to administer the Communications Act," courts must defer under *Chevron* to the Commission's authoritative interpretations of the Act).

[31] *See* 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (standard of review of claims that agency actions are "arbitrary and capricious").

[32] *See, e.g.,* Motion at 17 (*Order* ignores evidence about size of Small Wireless Facilities); *id.* at 18 (characterizing certain economic assertions as "unsubstantiated" and claiming that evidence supporting contrary conclusion was "completely ignored"); *id.* at 19 (heading) ("The Order Ignored Economic Evidence in the Record Prior to Setting Presumptively Reasonable Rates."); *id.* at 20 (one of the arguments discussed in the *Order* "was rebutted by ample economic evidence the Commission ignored"); *id.* at 20 (challenging conclusion that excessive rates may discourage deployment); *id.* at 21-22 (evidence of state legislation in support new shot clocks as "too flimsy to pass muster").

[33] *See, e.g.*, *FERC v. Electric Supply Ass'n*, 136 S. Ct. 760, 781 (2016) ("The scope of review under the arbitrary and capricious standard is narrow," and a court "must uphold a rule if the agency has examined the relevant considerations and articulated a satisfactory explanation for its action") (internal quotation marks and alterations omitted); *Citizens Telecomms. Co. of Minn., LLC v. FCC*, 901 F.3d 991, 1011 (8th Cir. 2018) ("[T]he FCC may

the Commission failed to articulate a reasoned explanation between the facts found and the choice made, and its disagreements with the Commission's conclusions on these matters cannot justify reversal of the *Order*.

12. *Tenth Amendment.* NLC's contention that the *Order* contravenes the Tenth Amendment's "prohibition against compelling the states [or their local subdivisions] to implement . . . federal regulatory programs"[34] is, at bottom, a challenge to the Communications Act itself.[35] Through Section 253 and 332(c)(7) of the Act, Congress barred localities from "prohibit[ing] or hav[ing] the effect of prohibiting" service. The *Order* interprets those provisions to bar certain local requirements that effectively prohibit service. While the Commission strongly encourages states and localities to implement "forward-looking policies" that "facilitate the deployment of . . . infrastructure" needed to "bring greater connectivity to their communities,"[36] neither Sections 253 and 332(c)(7) nor the Commission's interpretations of those provisions require states or localities to carry out any specific policies or to approve any particular siting request.[37] These are state and local decisions that are merely conditioned pursuant to the terms Congress specified in Sections 253 and 332(c)(7).[38]

13. *Uncompensated Takings.* We are not persuaded by NLC's mischaracterization of the *Order* as "depriv[ing] . . . local governments of their proprietary powers as owners of property."[39] The *Order* does not implicate local governments' actions in their role as property-owners; rather, it focuses on preventing them from violating federal law when they engage in "managing or controlling access to property within public ROW" for wireless facility deployment and when they make "decisions about where [such] facilities may be sited."[40] These regulatory functions are entirely distinguishable from transactions involving purchases or sales of property or services for a municipal government's own use.[41]

14. Nor are we persuaded by NLC's portrayal of the *Order*'s protections against excessive fees as "takings" of local governments' "private property" without just compensation.[42] First, the *Order* does not give "providers any right to compel access to any particular state or local property."[43] Rather, the *Order* requires that when access is provided, fees charged be a reasonable approximation of the

(Continued from previous page)
rationally choose which evidence to believe among conflicting evidence in its proceedings, especially when predicting what will happen in the markets under its jurisdiction.").

[34] Motion at 5; *see generally id.* at 5-7.

[35] *See Order* at para. 101 & n.290.

[36] *Order* at para. 25.

[37] NLC is incorrect that the *Order* "requires localities to publish aesthetic standards" or "specifies their form or contents." Motion at 6. Nothing in the *Order* requires localities to adopt aesthetic or any other standards, much less dictates their contents. The *Order* simply concludes that if a state or local government chooses to enforce aesthetic requirements, those requirements must be reasonable, non-discriminatory, objective, and published in advance, otherwise they would have the effect of prohibiting the provision of service, in violation of Sections 253 and 332(c)(7). *Order* at paras. 84-89.

[38] *See Montgomery County v. FCC*, 811 F.3d 121, 128 (4th Cir. 2015) (rejecting Tenth Amendment challenge to a related provision of the Communications Act); *see also Order* at para. 101 nn.289, 290 (showing Tenth Amendment cases cited by NLC are inapposite).

[39] Motion at 8. NLC characterizes the Commission's determinations on this issue, *see Order* at para. 92-97, as a "departure from prior precedent [that] is never explained," Motion at 8, but does not cite any prior precedents, much less explain why it thinks the *Order* departs from them.

[40] *Order* at para. 96.

[41] *Id.* at para. 96 & nn.268, 269, 272 and cases cited therein.

[42] Motion at 9-11.

[43] *Order* at n.217.

localities' costs and that they be "no higher than those fees charged to similarly-situated competitors in similar situations."[44] For example, it may be the case that localities that do not offer access to their poles still may comply with Sections 253 and 332(c)(7).[45] Second, localities' obligation not to charge fees that exceed a reasonable approximation of their costs is not analogous to a regulation that deprives a private proprietor of its "investment-backed expectations."[46] Allowing wireless deployments on public ROW and associated structures does not prevent localities from using their ostensible "property" in a manner consistent with their "investment-backed expectations." Moreover, even if requiring localities to allow such access were construed as depriving them of the use of their property, they would not necessarily be entitled to compensation for such purported deprivation in amounts that exceed their reasonable costs.[47]

15. *Due Process.* The *Order* does not deprive local governments of their due process rights. NLC merely argues that "there is no way to implement this Order" within 90 days and that it established "effective dates that *preclude* compliance," but provides no basis for that assertion.[48] Moreover, even assuming *arguendo* that the argument had any merit, it would not justify an indefinite stay on Constitutional due process grounds. We are not persuaded that the drastic remedy of an indefinite stay is warranted for theoretical harm that many or most jurisdictions may never sustain.[49]

B. Local Governments Will Not Suffer Irreparable Harm

16. NLC also fails to justify a stay pending judicial review because it has not shown that local governments are *likely* to suffer irreparable harm absent a stay of the *Order*, and "simply showing some '*possibility* of irreparable injury' fails to satisfy the second factor" of the test for granting a stay pending judicial review.[50] "[T]he 'possibility standard is too lenient."[51] Here, NLC's alleged injuries fall far short of establishing a likelihood of irreparable harm, because none of its purported harms is plausible, legally cognizable, and irreparable.

---

[44] *Order* at para. 50.

[45] *Id.* at para. 73 n.217 ("There may well be legitimate reasons for states and localities to deny particular placement applications, and adjudication of whether such decisions amount to an effective prohibition must be resolved on a case-by-case basis."); *see also id.* at para. 97.

[46] *Id.* at 10 (quoting *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978)).

[47] NLC asserts that "fair market value" must be used to measure just compensation for takings purposes, but there is no "market value" of assets that are not freely bought and sold in a free "market"; and in such cases, use of actual costs or other readily-discernable amounts are not unreasonable proxies for estimating a market value that would be "fair" if a market existed. *See United States v. 564.54 Acres of Land*, 441 U.S. 506, 513 (1979) (recognizing that alternative measure of compensation might be appropriate "with respect to public facilities such as roads or sewers"); *see also Order* at para. 73 n.217 ("cost-based recovery of the type we provide here has been approved as just compensation for takings purposes in the context of such facilities") (citing *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002)). NLC is likewise wrong to assume that the "fair market value" for placing small wireless facilities on government structures in the ROW necessarily exceeds a reasonable approximation of costs associated with that infrastructure. Only monopolists can presume—as NLC apparently does—that the "full . . . market value" will exceed "actual and direct costs," *id.* at 9; and neither private property-owners nor local governments are entitled to recover monopoly profits. *See Order* at para. 73 (finding that "local fees designed to maximize profit are barriers to deployment"). The "actual and reasonable cost" standard in the *Order* does not prescribe any specific accounting method or cost-allocation methodology and does not preclude recovery of any category of costs that the locality reasonably incurred and that are reasonably attributable to the provider's use of the public ROW or other facility. *See Order* at para. 76.

[48] Motion at 3, 11 (emphasis in original). *See also id.* at 23 ("Exposing localities to liability without even a reasonable opportunity to comply violates Due Process.").

[49] As noted below, many localities' requirements may already comply with the *Order*, and they will not need to make any changes to their requirements. *See infra* para. 20.

[50] *Nken*, 556 U.S. at 434-35 (emphasis added).

[51] *Id.* at 435.

17. *Reduced Fee Revenues.* First, NLC contends that irreparable harm will result from the "reduction in the fees that local governments [may] charge . . . to process applications" and asserts that they will not be able to recoup these losses later if the *Order* is overturned on appeal.[52] But as NLC concedes, monetary losses generally do not qualify as "irreparable."[53]

18. Most significantly, the ostensible revenue losses caused by the *Order*'s fee standards are hypothetical and speculative at this point.[54] The *Order*'s determinations about how Sections 253 and 332(c)(7) apply to state or local fees do not resolve the permissibility of any specific local government's fees or other requirements, and any disputes must be adjudicated through future litigation or regulatory proceedings. Moreover, the presumptively reasonable fee levels identified in the *Order* are only safe harbors and do not preclude a given locality from demonstrating that a higher fee is reasonable under the circumstances.[55] Absent a concrete dispute regarding a specific fee, NLC has no basis for speculating that "[t]he presumptively reasonable amount is far less than the record suggested would be required" or "deprives localities of resources that could have been devoted to other projects."[56]

19. Localities' alleged "*risk* of being hauled into court"[57] likewise offers no basis for a stay. Contrary to NLC's claims,[58] the cost of defending against unknown future lawsuits does not justify a stay; it is well established that "mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."[59] And the mere possibility that a locality may need to explain and justify its fees to a court is not the same as an order to lower its fees; no local government will be compelled to reduce any fee unless and until an aggrieved provider challenges the fee and successfully demonstrates to a court or the Commission that the fee violates the *Order's* standards. There is no telling when and whether such a lawsuit or petition will be filed—and no reason to assume local governments will lose such cases. In future cases, "when harm is more imminent and more certain," localities "will have an ample opportunity" to argue that their fees comply with Sections 253 and 337(c)(7).[60]

20. *Administrative Burdens of Overhauling Siting Review Procedures.* NLC's allegations that local governments will be required to overhaul their siting authorization requirements within a short time are overstated and premised on assumed administrative burdens that bear little resemblance to the *Order's* actual requirements. For instance, as to aesthetics, the *Order* simply requires that if a locality chooses to impose aesthetic requirements on covered Small Wireless Facilities applications, such requirements be published in advance and provide sufficient information to enable applicants to understand how their siting applications will be evaluated, without requiring extensive details.[61] Indeed,

---

[52] Motion at 27.

[53] *Id.*

[54] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (purely "conjectural or hypothetical" injuries are not sufficiently "concrete and particularized" to rise to the level of "injury-in-fact" necessary to satisfy the "irreducible constitutional minimum of standing" under Article III of the Constitution).

[55] *Order* at paras. 79-80 & nn.233-34.

[56] Motion at 27.

[57] *Id.* at 25 (emphasis added).

[58] *See* Motion at 24 ("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.").

[59] *Standard Oil Co. of Calif. v. FTC*, 449 U.S. 232, 244 (1980).

[60] *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 734 (1998).

[61] *Order* at para. 88 n.247 ("[T]he aesthetic requirements to be published in advance need not prescribe in detail every specification to be mandated for each type of structure in each individual neighborhood. Localities need only set forth the objective standards and criteria that will be applied in a principled manner at a sufficiently clear level of

as noted above, many localities' existing rules may already comply with the *Order*.[62] Moreover, the Commission already has taken into account concerns about the difficulty some localities might face in establishing and publishing aesthetic standards within a short time frame and, in part to address those concerns, has taken significant steps to alleviate any such difficulties.[63]

21. NLC's protestations about the administrative burdens of complying with the *Order's* new shot clocks for Small Wireless Facility applications[64] are also unfounded. The Commission's 2009 and 2014 orders already require localities to complete their review and act on some types of facility applications within 60 days and others within 90 days.[65] The new 60-day and 90-day shot clocks established for certain types of Small Wireless Facilities should require no major changes to localities' implementation procedures but may simply entail use of existing procedures already in place for review of applications that are already subject to those deadlines. Of course, if local governments have not already established whatever procedures are needed to comply with the existing 60-day and 90-day deadlines, any burdens they now face are caused by their non-compliance with existing rules rather than any new burdens imposed by the present *Order*.

22. *Aesthetics, Property Values, and Traffic Hazards.* Finally, NLC's claim that local governments will suffer immediate harm due to the construction of Small Wireless Facilities that the *Order* will compel them to permit[66] is likewise unfounded. As NLC concedes, the *Order* does not compel any locality to authorize any particular facility.[67] Nothing in the *Order* prevents localities from exercising their authority to deny applications to install facilities that are aesthetically inappropriate,[68] much less facilities that pose *bona fide* traffic hazards or other risks to public safety, so long as they do not wield

(Continued from previous page)
detail as to enable providers to design and propose their deployments in a manner that complies with those standards.").

[62] As the *Order* points out, "[t]he fact that our approach here (including the publication requirement) is consistent with that already enacted in many state-level small cell bills supports the feasibility of our decision." *Id.* This fact also indicates that the Commission's rulings may not cause localities in those states *any* burdens because, pursuant to state law, they may have already implemented any changes needed to comply with the Commission's decisions.

[63] The *Order* provides that it will become effective 90 days after Federal Register publication and localities will have an additional 90 days (i.e., 180 days after Federal Register publication in total) to comply with the *Order's* aesthetics standards. *See Order* at paras. 89, 153. *Cf.* Letter from Clarence E. Anthony, CEO and Executive Director, National League of Cities, *et al.*, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 6-7 (filed Sept. 19, 2018) ("[W]e ask the Commission to delay the effective date for at least six months after publication in the Federal Register to give local governments a sufficient transition period to amend their codes consistent with the Order and new rules. This is especially important given the requirement that, to be applicable, aesthetic requirements must be in place prior to application submission. . . . A delayed effective date is needed to provide sufficient time for local governments to implement thoughtful requirements that balance local processes and concerns with providers' deployment needs, which is best achieved where there is time for input from the public and wireless providers.").

[64] Motion at 21, 25-26.

[65] *See Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report & Order, 29 FCC Rcd 12865, 12957, para. 216 (2014), *aff'd*, *Montgomery County v. FCC*, *supra* (60-day deadline for review of "eligible facility requests" subject to Section 6409 of the Spectrum Act, 47 U.S.C. § 1455(a)); *2009 Declaratory Ruling*, 24 FCC Rcd at 14012, para. 46 (90-day deadline for collocation applications pursuant to Section 332(c)(7)).

[66] Motion at 26. According to the Motion, such compelled construction will cause "immediate aesthetic harm," immediate "effect on property values," and "immediate hazard to traffic and during storms" that could be mitigated or avoided only if the *Order* is stayed or vacated. *Id.*

[67] *Id.* at 7.

[68] The *Order* makes clear that localities retain their authority to enforce objective aesthetic requirements that are "reasonable in that they are technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments." *Order* at para. 87.

such authority in a manner that is arbitrary or that improperly "prohibits or has the effect of prohibiting" the provision of wireless service. Likewise, the new shot clocks for Small Wireless Facilities require local governments to act on siting requests within specified periods of time but do not compel them to approve such requests.[69]

C. A Stay Would Harm Wireless Consumers and Providers, and the Public Interest Requires that the Order Take Effect Promptly

23. The Commission has repeatedly recognized "the urgent need to streamline regulatory requirements to accelerate the deployment of wireless infrastructure for current needs and for the next generation of wireless service in 5G."[70] It is important for the Commission to remove unnecessary regulatory barriers to such deployment to prevent harm to consumers who increasingly depend on access to wireless communications, and whose rapidly growing demand for wireless services and technologies can be met only if providers can rapidly "deploy large numbers of wireless cell sites to meet the country's wireless broadband needs and implement next-generation technologies."[71] For these reasons, the potentially extended delay that would result from NLC's requested stay would harm both consumers and providers of wireless services and would be contrary to public policy.[72]

24. Moreover, we reject NLC's assertion that a stay would benefit wireless industry applicants by reducing uncertainty.[73] To the contrary, allowing the *Order* to take effect as scheduled will give wireless providers, as well as the consumers they seek to serve, greater certainty due to the clear and objective standards that will govern local governments' review of proposed new deployments going forward, as well as the reduction of investment barriers caused by excessive fees or unduly restrictive land-use requirements. Given the weight of the record support for the Commission's determination that the *Order*'s requirements must be implemented promptly to accelerate deployment of the next generation of wireless facilities, we find that a stay of the *Order* would disserve the public interest.[74] We therefore deny NLC's Motion.

---

[69] Motion at 7 & n.23 (citing *Order* at para. 73 n.217).

[70] *Order* at para. 28.

[71] *Id.* at paras. 23-24.

[72] *Cf. FCC v. Radiofone, Inc.*, 516 U.S. 1301, 1301-02 (Stevens, J., in chambers) (because "the harm to the public caused by a nationwide postponement of the auction would outweigh [any] possible harm to" movants, the public interest weighs heavily against granting a stay), *mot. to vacate denied*, 516 U.S. 938 (1995).

[73] Motion at 32.

[74] We do not credit NLC's assertion that statements by Verizon and Crown Castle executives "confirm that a stay of the Order would not harm deployment." Motion at 30 & n.100; *see also id* at 4 & n.8. Both companies submit that NLC mischaracterizes those statements. *See* Letter from William H. Johnson, Senior Vice President, Legal and Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-2 (filed Nov. 16, 2018) (quoting Verizon's Chief Financial Officer's public statements that the *Order* is "hugely important" because requiring municipalities to "get 5G site approvals done within a certain time frame and at a certain cost that's lower than where a lot of them have been" will help with "getting 5G built out as quickly as possible" and "help ensure that more Americans gain access more quickly to 5G services," and explaining that NLC mischaracterized another executive's statement made in a different context); Letter from Kenneth J. Simon, Senior Vice President and General Counsel, Crown Castle Int'l Corp., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-2 (filed Nov. 15, 2018) (explaining that the "18 to 24 month deployment cycle for Crown Castle's facilities is a nationwide average and is driven by a wide variety of factors[;]"emphasizing that some localities' "onerous regulatory requirements and prohibitory fee demands can substantially delay or even prevent wireless buildout, stretching the deployment in [such] jurisdictions well past the nationwide average or, in some cases, keeping facilities from being built at all[;]" and pointing out Crown Castle's Chief Executive Officer's public statement that the *Order* will have an "immediate positive impact on our small cell deployments across the US"). In any event, extensive record evidence outweighs whatever probative value the statements quoted by NLC might have.

III. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1, 4(i), 4(j), 201, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 201, and 303(r) and the authority delegated pursuant to sections 0.131 and 0.331 of the Commission's rules, 47 CFR §§ 0.131 and 0.331, this Order Denying Motion for Stay in WT Docket No. 17-79 and WC Docket No. 17-84 IS ADOPTED.

26. It is FURTHER ORDERED that the Motion for Stay pending judicial review of the Declaratory Ruling and Third Report & Order in this proceeding, filed by the National League of Cities, *et al.*, IS DENIED.

27. It is FURTHER ORDERED that this Order Denying Motion for Stay SHALL BE EFFECTIVE upon its release.

FEDERAL COMMUNICATIONS COMMISSION

Donald K. Stockdale
Chief
Wireless Telecommunications Bureau

Exhibit 2

September 18, 2018

VIA ELECTRONIC FILING

Honorable Chairman Ajit Pai
Honorable Commissioner Michael O'Rielly
Honorable Commissioner Brendan Carr
Honorable Commissioner Jessica Rosenworcel
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: **Ex Parte Letter,** *Accelerating Wireless/Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, WC Docket No. 17-84; *Streamlining Deployment of Small Cell Infrastructure*, WT Docket No. 16-421; *Promoting Investment in the 3550-3700 MHz Band*, GN Docket No. 17-258; *Expanding Flexible Use of the 3.7 GHz to 4.2 GHz Band*, GN Docket No. 18-122; *Use of Spectrum Bands Above 24 GHz for Mobile Radio Services*, GN Docket No. 14-177, WT Docket No. 10-112.

To the Honorable Chairman and Commissioners:

Next week, the Commission will take a critical step to promote job creation and economic growth by setting national guidelines for states and municipalities that reflect and are designed to promote the wireless networks of the 21st century. CTIA and the wireless industry applaud the Commission's commitment to securing U.S. leadership in the wireless marketplace as countries around the globe race to be first to deploy the next generation of wireless networks and services, 5G. In this race, the stakes are high: the nation that leads in 5G will capture millions of new jobs and billions in economic growth. In order to ensure 5G leadership, it is essential that the Commission take steps to modernize siting rules to allow the accelerated deployment of new wireless networks and small cells. The U.S. needs a modernized, national policy framework for small cell deployment that accommodates state and local interests while advancing our national interest in 5G leadership. With the draft Wireless Infrastructure Declaratory Ruling and Third Report and Order that is being considered for the September Open Meeting, the Commission has

the opportunity to establish such a framework and facilitate the roll-out of advanced wireless connectivity to more communities more quickly.[1]

The U.S. led the world in 4G LTE deployment, enabling the wireless industry to add $475 billion to the economy every year and support 4.7 million jobs.[2] The opportunities and economic benefits from 5G are likely to be even greater, with an expected $275 billion in investment leading to three million new jobs and another $500 billion to our economy. Removing regulatory barriers is critical to achieving success in the next generation of wireless, which is why CTIA urges the Commission to adopt the Draft Order and Ruling.

The Commission's recent infrastructure reforms, which removed barriers like state and local moratoria on reviewing siting applications and outdated reviews that impeded wireless infrastructure deployment, have already had a positive impact, expediting siting reviews and getting more facilities built faster to help meet the huge demand for wireless services. The Draft Order and Ruling – which will reduce siting timelines by adopting shorter shot clocks for localities to act on small wireless facilities applications, authorize presumptively reasonable, cost-based fees, and provide guardrails around local aesthetic reviews – will further speed deployment and reduce siting costs. The Commission's approach also builds from valuable lessons learned in the 20 states that have taken forward-thinking steps to modernize their infrastructure siting policies. And importantly, updating the nationwide framework for wireless facility deployment, including for small wireless facilities in particular, will accelerate investment to the benefit of our economy, businesses, and consumers. Indeed, a July 2018 report from Accenture Strategy concluded that reducing regulatory review timelines to accelerate deployment by one year would unleash an additional $100 billion in economic growth over the next three years[3] – a tremendous boost to the

---

[1] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*; *Accelerating Wireline Barriers to Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, WC Docket No. 17-84, FCC-CIRC1809-02 (draft rel. Sept. 5, 2018) ("Draft Order and Ruling").

[2] *See* Letter from Scott K. Bergmann, CTIA, to Marlene H. Dortch, FCC, WT Docket Nos. 17-79 and 16-421, WC Docket No. 17-84 (filed Apr. 17, 2018).

[3] *See Accelerating Future Economic Value from the Wireless Industry*, ACCENTURE STRATEGY (July 2018), *attached to* Letter from Scott K. Bergmann, CTIA, to Marlene H. Dortch, FCC, WT Docket Nos. 17-79 and 16-421, WC Docket No. 17-84 (filed July 19, 2018).

economy and America's global competitiveness that safeguards localities' continued role in the siting review process.

The record establishes that, while some localities charge reasonable, cost-based fees for small wireless facilities, others impose excessive fees, some in the thousands of dollars per site. Given that small cell deployments often require hundreds of antennas across a community, these high fees frustrate investment and, on aggregate, can result in substantial barriers to deployment across the country. Indeed, a recent economic study from CMA Strategy Consulting assessing the harmful impact of high fees on deployment calculated that reducing small cell fees could reduce deployment costs by $2.0 billion over five years. It further concluded that "[t]hese cost savings could lead to an additional $2.4 billion in capital expenditure due to additional neighborhoods moving from being economically unviable to becoming economically viable," with 97 percent going toward investment in rural and suburban areas.[4]

Similarly, while many states and localities process siting applications quickly – including on timelines shorter than the Commission proposes to adopt here – many communities continue to hinder deployment by failing to act on facility requests in a reasonable period of time or neglecting to include all mandatory processes within the shot clock periods. By clarifying reasonable timelines for processing small wireless facility requests, providing guidance for courts for when those timelines are not met, and setting guardrails around practices that could otherwise hinder deployment, the Commission can ensure that localities' role in the siting process is protected while also fostering the rapid deployment of services that will benefit the citizens of those communities. As the Wallowa County, Oregon Board of Commissioners recently told the Commission, "[w]here every dollar matters, reducing regulatory barriers can make a big difference in how fast and how extensively broadband is deployed" to rural communities.[5]

---

[4] *See Assessing the Impact of Removing Regulatory Barriers on Next Generation Wireless and Wireline Broadband Infrastructure Investment: Annex 3*, CMA STRATEGY CONSULTING (Sept. 2018), *attached to* Letter from Thomas J. Navin, Counsel to Corning Inc., to Marlene H. Dortch, FCC, WT Docket No. 17-79 (filed Sept. 5, 2018).

[5] *See* Letter from Chairman Todd Nash, Commissioner Susan Roberts, and Commissioner Paul Castilleja, Wallowa County, Oregon Board of Commissioners, to Commissioner Brendan Carr, FCC, WT Docket Nos. 17-79, 16-421, at 2 (filed Aug. 20, 2018).

In short, the record evidence is clear: outdated, burdensome regulation, wholly inappropriate for small cells, is deterring investment in new infrastructure and slowing deployment of next-generation connectivity to both urban and rural areas across the country. The Draft Order and Ruling, which is well within the Commission's legal authority and amply supported by an extensive factual record, will have a material impact on the economics of broadband deployment, driving expanded and more robust wireless connectivity that will benefit the U.S. in multiple ways. CTIA thus urges the Commission to adopt the Draft Order and Ruling.

Finally, CTIA applauds the Commission for scheduling five high-band auctions in the next year and taking steps to facilitate access to critical mid-band spectrum for next-generation connectivity. These efforts, particularly when coupled with modernizing infrastructure siting policies, will provide a dramatic boost to our nation's 5G-readiness and ensure that wireless providers can rapidly and efficiently put our airwaves to use to foster communications, public safety, telemedicine, education, accessibility, and other benefits across the country.

Pursuant to Section 1.1206(a) of the Commission's rules, a copy of this letter is being electronically submitted into the record of these proceedings. Please do not hesitate to contact the undersigned with any questions.

Sincerely,

Meredith Attwell Baker
President and CEO

cc: Rachael Bender
Erin McGrath
Will Adams
Umair Javed