UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

CITY OF HUNTINGTON BEACH,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,

Respondents.

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

Intervenors – Respondents.

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

REPLY TO OPPOSITIONS TO MOTION TO STAY

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REPLY TO OPPOSITIONS TO MOTION TO STAY

Six days from this filing, the *Order* appealed will become effective. Although Respondents argue that little significant will occur, that contention is belied by their argument that the Order provides "immediate regulatory relief."[1] Whether that "relief" is consistent with law is the central question on appeal, and the requested Stay is a key means of "ensuring that appellate courts can responsibly fulfill their role in the judicial process."[2] As Movants showed, in determining whether a Stay is appropriate to preserve its jurisdiction, the court considers:

> "(1) whether the stay applicant has made a strong showing that he 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…; and (4) where the public interest lies."[3] "The first two factors …are the most critical."[4]

I. MOVANTS HAVE SHOWN A LIKELIHOOD OF SUCCESS.

There are different formulations as to what satisfies the first factor. Although "more than a mere possibility of relief is required,"[5] Movants "need not

[1] FCC Opp., 25 ("FCC"), Intervenors' Joint Opp., 9-16 ("Intervenors"). The FCC, at 4, suggests placement concerns are minor because small cells are often no larger than a "small backpack." That "backpack" can include a 50 foot tower, 28 cu. ft. equipment cabinets and multiple three cu. ft antennas. *Order*, App. A.
[2] *Nken v. Holder*, 556 U.S. 418, 427 (2009).
[3] *Id.* at 426.
[4] *Id.* at 434.
[5] *Id.* at 435.

show a certainty of winning."[6] The "reasonable probability" of or "fair prospect" of success standard is consistent with that test.[7] Whatever the precise verbal formula applied,[8] that test is met given the *Order's* flaws, which are underlined by the oppositions.

1. *Impermissible Reliance on Section 253.* Respondents sidestep Movants' argument that the *Order* impermissibly relies on 47 U.S.C. §253 to curtail municipal authority over wireless facility placement, even though the Telecommunications Act specifically states that only the provisions in Section 332(c)(7) can "limit or affect" such local authority. Respondents instead argue that Sections 332 and 253 both refer to "prohibition and effective prohibitions" and those terms have the same meaning in both sections.[9] That may be so, but the provisions contain other, different terms, and apply to different services. Similarity in one phrase does not permit the FCC to apply both provisions when plain language prohibits it. Because the FCC has relied on a provision that cannot be

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[6] *DTC Energy Grp., Inc. v. Hirschfeld*, 2018 WL 6816903, at *6 (10th Cir. Dec. 28, 2018) (prima facie showing suffices).
[7] *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012).
[8] In *Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016) this Circuit concluded that the "traditional" standards for stay could not be modified under the rationale of *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008). That begs what is sufficient to satisfy the standards in particular instances. *Nken* suggests that what is sufficient may depend on the circumstances, a position reflected in the Second and other Circuits. *Citigroup Global Markets v. VCG Special Opportunities Master Fund*, 598 F.3d 30 (2d Cir. 2010).
[9] FCC, 7-8; Intervenors, 17.

applied to adopt the *Order*, the *Order* is reversible under *SEC v. Chenery Corp.*, 318 U.S. 80, 93–94 (1943), a point Respondents ignore.

2. *The "Effective Prohibition" Standard.* Respondents argue the *Order* simply adopts the *California Payphone* "effective prohibition" standard.[10] Movants showed the standard in the *Order* is not the *California Payphone* "actual prohibition" standard, and is not consistent with standards adopted in this and other Circuits which accord with the *California Payphone* standard. Respondents' briefs confirm this: FCC states it is a prohibition if a provider is prevented from improving its services by locating facilities where they "best meet[] [the provider's] service needs;" providers may not be required to even consider alternative locations where performance may not be quite as good.[11] But a "not the best" standard cannot be squared with a "prohibition standard" under Supreme Court,[12] or Eighth and Ninth Circuit "plain language" rulings,[13] or under the *California Payphone* standard as articulated by this Court. Respondents offer no authority for the proposition that a statute designed to preserve local authority over wireless facilities can be read to eviscerate that authority based on a provider's preferences. The *Order's* disregard of precedent and conflict with the plain

[10] FCC, 7.
[11] FCC, 14.
[12] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (rejecting FCC standard that effectively found an unlawful impairment where access was denied to property desirable under an entity's business plans).
[13] *Sprint Tel. PCS v. Cnty of San Diego*, 543 F.3d 571, 576 (9th Cir. *en banc* 2008).

language holding of two Circuits, is sufficient to constitute a "strong" showing under *Nken*.[14]

Respondents' reliance on *Brand X* is misplaced. As Movants argued,[15] and Respondents do not rebut, under *Brand X*, the Ninth Circuit's holding in *Sprint Telephony* that Section 253(a) unambiguously requires an actual prohibition forecloses the Commission's authority to require less, and certainly cannot validate that "only the best" standard adopted.[16]

3. *Fee Limitations.* Respondents mistakenly and repeatedly cite to *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004), in an attempt to rebut Movants' arguments that the *Order* impermissibly limits fees and rents for access to municipal property. Respondents grossly misinterpret *Santa Fe* when they claim that this Circuit held "fair and reasonable costs" under 47 U.S.C. § 253(c) are limited to direct costs. In fact, this Court did not hold that fees are limited to costs, merely finding that "rental provisions…[that] create a *massive* increase in cost" are prohibitory.[17] As the briefs suggest, most cases have not adopted a "cost only" approach, including the Sixth Circuit decision on which

[14] The FCC argues that the Ninth and Eighth Circuit incorrectly require a "complete" prohibition. Neither Court said so: what each said is that there must be a meaningful, actual prohibition.
[15] Motion, 7.
[16] *Sprint Telephony* at 576–79; *Encino Motorcars v. Navarro*, 136 S.Ct. 2117, 2125 (2016).
[17] *Qwest Corp* at 1271.

Santa Fe relied. And Movants showed that there is no factual support for concluding that charging more than costs is inherently prohibitory, or unfair or unreasonable. The FCC's claim that higher costs *must* translate to reduced services (and hence prohibitions)[18] is an example of the economic nonsense on which the *Order* rests: the FCC's own spectrum auctions, for example are based on the free market maxim that charging market prices for access actually encourages deployment and efficiencies.[19]

Moreover, Respondents fail to rebut Movants' central point: the *Order* conflates Section 253(a) and (c) by finding that fees that exceed costs are prohibitory and the only fair and reasonable fees are those limited to costs. If Congress intended to preserve fair and reasonable compensation from preemption even when it effectively prohibited an entity's ability to provide service, then it cannot be true that fair and reasonable compensation is limited to only that which is not prohibitory.

Movants also showed that the *Order's* declaration that municipalities have no property rights in either the rights-of-way or their infrastructure was an

[18] FCC, 15.

[19] Neither the FCC or Intervenors rebut Movant's analysis of the economic errors underlying the *Order*. As Movants explained, the record shows that in many communities, providers have agreed to rates above cost, and the FCC conceded those providers are prospering. Intervenor's examples at 9-10 of "overcharges" add nothing. As *Qwest* shows, a cost basis is not required to provide a remedy for unreasonable fees, and the fact AT&T chose not to pay fees does not prove them unreasonable.

unexplained departure from precedent; it remains unexplained.[20] The failure to explain this change is itself reversible error.[21] The FCC's claim that Section 253 and 332 do not directly exclude proprietary activities from their reach is also error because preemption reaches *only* regulatory activities.[22] Courts have consistently recognized that distinction, and that precedent indicate Movants will prevail on this claim.[23]

Similarly, Movants have demonstrated a likelihood of succeeding on their claim that the FCC improperly regulates municipal property it cannot regulate under Section 224. The FCC argues it has not set rates, as it has not set an "accounting system."[24] But the FCC did set the formula for rates municipalities may charge, and specifically referenced the rate regulation standards adopted for private utilities.[25] The notion that Section 253 permits the FCC to accomplish via

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[20] The *Order* relied on *NextG Networks of N.Y., Inc. v. City of New York*, 2004 WL 2884308 (S.D.N.Y. Dec. 10, 2004), which found that regulatory conduct remains subject to preemption when mixed with proprietary functions. The decision does not support the proposition that municipalities have *no* proprietary rights or that proprietary functions take on a regulatory character when the two are mixed together.

[21] *Supra*, n.16

[22] Motion, 12-13.

[23] *Sprint Spectrum v. Mills*, 283 F.3d 404, 420–21 (2nd Cir. 2002) (Section 332(c)(7) "does not preempt nonregulatory decisions"); *Omnipoint Commc'ns, Inc. v. City of Huntington Beach*, 738 F.3d 192, 194-95 (9th Cir. 2013); *City of Rome, N.Y. v. Verizon Commc'ns Inc.*, 362 F.3d 168, 174 (2nd Cir. 2004); *Omnipoint Holdings, Inc. v. City of Southfield*, 355 F.3d 601, 607 (6th Cir. 2004).

[24] FCC, 14.

[25] *Order*¸ ¶79 (App-42).

preemption what it cannot do via regulation simply underscores that the agency's view of "preemption" is untethered from Constitutional bounds.

4. *Aesthetic Standards.* Respondents defended aesthetic restrictions by misstating them, ignoring that the *Order* does not simply prohibit "secret" or "shifting" standards, but affirmatively requires that the same aesthetic standards be applied to all infrastructure in the right-of-way. Respondents never rebut Movants' showing that such a requirement is unsupportable under Section 332(c)(7), and divorced from the agency's own "effective prohibition" standard (as is the notion that a "subjective" aesthetic standard is prohibitory).

5. *Constitutional Claims.* Movants showed that the *Order* gives rise to a Tenth Amendment violation because it forces municipalities to respond to requests for access to proprietary property; if they fail to do so, they are deemed to have presumptively violated the law, and a court may order access on terms it deems appropriate.[26] Respondents argue that under the Communications Act, federal courts currently have the power to preempt prohibitory regulations and enforce the Act's time limits.[27] But this misses the point. The issue is whether municipalities can be coerced into granting access to their property, which the *Order* attempts to accomplish by relabeling the traditional landlord act of refusing such access as

[26] Motion, 14-15.
[27] FCC, 19.

"prohibitory" regulatory conduct.[28] Respondents rely on this alchemy to bring any publicly-owned structure in the right-of-way within the confines of Section 253(a).[29] It requires municipalities to do more than avoid regulating in a manner that conflicts with federal law.[30] Rather, it requires them to grant *property rights* whenever there is the potential for network improvement. By contrast, *Montgomery County*, on which Respondents rely, found that the FCC's "deemed granted" remedy under 47 U.S.C. §1455 did not violate the Tenth Amendment because the FCC was merely "*preempt[ing] state regulation* of wireless towers."[31] Compelling states to respond or relinquish control of their own property makes this case like *Printz*, and unlike *Montgomery County*.[32]

Respondents argue the *Order* does not violate the Fifth Amendment because municipalities do not have a proprietary interest in their rights-of-way or structures

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[28] *Order*, ¶92 (App-47).

[29] Respondents conflate local regulation of the right-of-way, which may not involve proprietary authority, with control of access to traffic lights, street lights, utility poles, conduit and other structures, which typically do. FCC, 17.

[30] *Nixon v. Missouri Muni. League*, 541 U.S. 125, 140 (2004); *Cablevision of Boston, Inc. v. Pub. Improvement Com'n of City of Boston*, 184 F.3d 88, 105 (1st Cir. 1999).

[31] *Montgomery County v. FCC*, 811 F.3d 121, 129 (4th Cir. 2015).

[32] The Fourth Circuit held that a Tenth Amendment violation did not occur, because the locality could choose not to regulate wireless facilities at all, and hence "no action was required." *Id.* at 128. Here, a locality must grant an affirmative consent to use proprietary property, and cannot simply sit on the sidelines. That a court may issues a final decree directing the grant is of no moment – the question is whether the FCC has authority to use preemptive authority to compel access. It does not.

in the rights-of-way, and because maintenance costs can be recovered.[33] Respondents' first argument is rebutted by *City of St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92 (1893). As to Respondents' second argument, the Fifth Amendment does not permit the FCC to limit localities to recovery of out-of-pocket costs, which is what the agency purports to do. "Decisions concerning compensation are the province of judicial, not legislative determination,"[34] Nor can it be argued that the takings claims are unripe. The *Order* requires response to a request in 60 days; allows for access to be compelled even if alternatives are available; and limits compensation to the costs the locality can prove. That intrusion is clear and immediate, and unlike *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnston City,* 473 U.S. 7 (1985) is a final determination, the validity of which will be decided in this case.

6. *Shot clocks.* Respondents' defense of shortened shot clocks never confronts the essential point made by Movants: the clocks are too short to allow for discretionary review of wireless applications (as opposed to administrative review) and cannot reasonably be applied to other permits that may be required before a wireless facility is installed (safety-related traffic permits and the like). Aside from repeating the grounds on which the new shot clocks were set in the *Order,* the

[33] FCC, 17; Intervenors, 19.
[34] *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002); *Wisconsin Cent. Ltd. v. Public Service Com'n of Wisconsin*, 95 F.3d 1359 (7th Cir. 1996).

central response is that the shortening is of little consequence as it is merely a rebuttable presumption.[35] However, *Order* is not consistent with this representation. It emphasizes that the shot clock applies except in "extraordinary" circumstances, [36] and adopts a new remedy under which failure to satisfy the shot clock will ordinarily be deemed "prohibitory" and result in the grant of the application.[37]

II. IRREPARABLE HARMS TO MOVANTS ARE IMMINENT AND REAL

Respondents claim that Movants showed no irreparable harm, primarily based on three contentions. [38]

Respondents claim "the Order does not, on its own, require localities to do anything…"[39] and has no compulsory effect. Actually, the *Order inter alia* requires local governments to respond within 60 days to requests for access to government-owned proprietary property, such as streetlights and traffic signals.[40] A failure to respond presumptively violates federal law, and that presumption is only rebutted by showing that the locality required more time to respond;

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[35] FCC, 22; Intervenors, 20-21.
[36] *Order*, ¶120 (App-62).
[37] *Id.*, ¶123 (App-64).
[38] Contrary to Respondents' claims, Movants did not abandon claims of irreparable harm – we simply summarized and supported those errors throughout the Motion.
[39] FCC, 23; Intervenors, 6-7.
[40] *Order*, ¶132 (App-68-69). The FCC admits a compulsory effect, since it claims the *Order* will immediately result in "streamlining" local processes.

otherwise, the *Order* contemplates the failure to act will be treated as a denial, and access will be granted by a court. Communities that do issue orders face immediate court action, effectively creating a Hobson's choice between violating the law and exposing themselves to liability or "suffer[ing] the injury of obeying the law during the pendency of the proceedings."[41] That injury is particularly important where proprietary rights are abrogated, and localities must either forego their Tenth Amendment rights or face litigation and loss of property rights.[42]

Respondents claim any harms are not "imminent" because it requires, first, an application, a lawsuit by the requestor and, finally, a court to determine whether the local government "violated the statute…and whether relief is warranted ….."[43] But given the FCC shot clocks; and the duty of applicants to challenge any action

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[41] *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 380-81 (1992).

[42] A deprivation of constitutional rights can and does constitute irreparable harm outside the First Amendment, *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *Rodriguez v. Robbins*, 715 F.3d 1127, 1144–45 (9th Cir. 2013), including where the deprivation may be challenged in litigation, *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058–59 (9th Cir. 2009). While some potential constitutional injuries are not irreparable (as in Fifth Amendment cases where later compensation may fully vindicate rights), here the deprivation occurs when the locality if forced to participate in the federal scheme. *Printz* holds that the fact that the intrusion is small is no defense – and it is no defense here to suggest that any Tenth Amendment injury may be stopped by a later order of this Court. *Printz v. United States*, 521 U.S. 898 (1997); *Murphy v. NCAA*, 138 S.Ct. 1461 (2018). *Dombrowski v. Pfister*, 380 U.S. 479 (1965), relied on by the FCC, simply holds that because the state courts can consider constitutional issues, federal courts should not stay pending proceedings to allow claims to be brought in federal court. Here the Stay is sought to prevent constitutional violations resulting from a final FCC *Order*.

[43] FCC, 23.

or failure to act within 30 days,[44] there is not merely a likelihood but a certainty that litigation will result. Courts reviewing a failure to act are not free to decide communities may ignore requests; the FCC rule is to the contrary. Further, given that localities may only enforce requirements that are in place, the *Order* also creates an imminent problem for localities that wish to exercise the rights preserved by Section 332 versus adopting and complying with an FCC standard that exceeds the agency's authority. An example are the aesthetic standards: unless the locality applies the same standards to all infrastructure, its wireless standards violate FCC rules.

Movants contended that there would be a significant, and non-compensable cost associated with complying with the *Order*, and the risks and costs associated with defending against claims. Respondents argue that those claims are not supported by the record, and in any case, economic harms are not irreparable harm. In fact, Petitioners pointed to declarations that showed a significant noncompensable cost associated with bringing local requirements into compliance with the *Order*.[45] While Respondents argue that these costs are simply anecdotal, as the FCC estimated it would require at least 180 days of work to bring local ordinances into compliance with aesthetic standards, the examples clearly support the conclusion that the compliance effort involves significant noncompensable

[44] 47 U.S.C. §332(c)(7)(B)(v).
[45] Motion, n.39 (App-185-87).

costs, which amount to irreparable injury.[46]

Finally, this Court only need find that the *Order's* enforcement would make such a return to the "status quo" difficult.[47] Respondents never explain how the *status quo ante* can be restored; their assumption is that it will never *be* restored.

III. RESPONDENTS OVERSTATE THEIR ANTICIPATED HARM

Movants showed that the industry's forward-looking statements to their investors on earnings calls indicated that the *Order's* effect does not change their immediate plans[48] and the *Order* concedes that capital expenditure plans are "often set in advance."[49] While Respondents downplay the import of these points, statements on earnings calls cannot simply be dismissed. And even if one assumes massive long-term benefits, that does not foreclose a finding that the short-term impacts of a Stay on industry will not be significant. Further, Respondents rely on harms to broadband and other services which are not personal wireless services[50] protected by Section 332. The effect on these services cannot support upholding or implementing the *Order*.

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[46] *DTC Energy Grp., Inc.* 2018 WL 6816903, at *3–4; *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011). *Schrier v. Univ. of Colo.*, 427 F.3d 1253 (10th Cir. 2005), relied upon by Respondents, simply recognizes an injunction is not appropriate to remedy *past* economic injury.
[47] *Ohio Oil Co. v. Conway*, 279 U.S. 813, 814 (1929).
[48] Motion, 21-22.
[49] *Order*, ¶62 (App-33).
[50] FCC, 25-26; Intervenors, 13-14.

Whatever benefits may accrue if the *Order* becomes effective may be temporary in nature; if the *Order* is overturned, pending cases and applications must be reviewed, and new records developed. That is not mere speculation, as Respondents argue;[51] it is a statutory requirement. Because Section 332 requires decisions be based on substantial evidence on a written record, if the standards change, the record and process are affected. It is important that the public, providers, and localities have certainty as to the standards that will apply. That certainty is best secured by a short Stay.

IV. THE PUBLIC INTEREST FAVORS A TEMPORARY STAY

Respondents offer no legal arguments against this Circuit's longstanding preference to preserve the status quo while serious issues are examined.[52] The FCC simply argues that, based on its record of past technology deployments, the status quo must be changed, even as Intervenors argues that past deployment "says little or nothing" about future needs.[53] Neither argument compels disregarding this Court's preference for preservation of the *status quo*.

The Court should stay the Order.

[51] FCC, 23-24; Intervenors, 6.
[52] Motion, 22.
[53] Intervenors, 15.

Dated: January 8, 2018

Respectfully submitted:

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CERTIFICATE OF WORD COUNT AND VIRUS PROTECTION

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January 8, 2019

CERTIFICATE OF SERVICE

I hereby certify that, on January 8, 2019, I caused the foregoing to be electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users. All participants in the case are registered CM/ECF users, and service will be accomplished through the CM/ECF system.

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