No. 23-

IN THE

# Supreme Court of the United States

CITY OF PASADENA, TEXAS,

*Petitioner,*

*v.*

CROWN CASTLE FIBER, L.L.C.,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

Respondent Crown Castle Fiber, LLC sued the City of Pasadena, Texas (the City) for a judgment declaring 47 U.S.C. §253 of the Federal Telecommunications Act (the FTA) preempts spacing and undergrounding requirements set forth in the City's Design Manual for the Installation of Network Nodes[1] and Support Poles[2] in the City's public rights-of-way, which the City adopted by a duly enacted ordinance. The district court held Crown Castle's claim is justiciable and entered a judgment declaring §253 preempts the spacing and undergrounding requirements and prospectively enjoining the City from enforcing the spacing and undergrounding requirements. The Fifth Circuit affirmed the judgment. The issues presented are:

I. Whether 47 U.S.C. §253 allows a private party to sue a State or local government in equity to preempt a duly enacted State or local regulation where Congress, as part of its comprehensive enforcement mechanism, entrusted the Federal Communications Commission (FCC) with authority to preempt State or local regulations only "to the extent necessary to correct" any violation of or inconsistency with §253, and to do so only after providing notice and the opportunity for public comment. 47 U.S.C. §253(d).

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1. Network nodes are the equipment that enable communications with a cellular network. TEX. LOCAL GOV'T CODE §284.002(12).

2. Node support poles are the poles—similar to telephone or utility poles–on which a network node is placed. TEX. LOCAL GOV'T CODE §284.002(14).

II. If the Court concludes Crown Castle and others may bring equitable actions to preempt State and local regulations under §253, whether §253 preemption reaches measures taken by State and local governments to manage public rights-of-way where the plain and unambiguous language of 47 U.S.C. §253(c) places State and local management of rights-of-way beyond the reach of preemption under §253, and does not limit State and local governments to measures that are nondiscriminatory and competitively neutral.

## PARTIES TO THE PROCEEDING

The Petitioner, the City of Pasadena, Texas, is a municipality in the State of Texas, and was the Defendant-Appellant below.

The Respondent, Crown Castle Fiber, LLC, formerly known as Crown Castle NG Central, LLC, is a New York limited liability company with its principal place of business in the State of Texas, and was the Plaintiff-Appellee below.

## RELATED PROCEEDINGS

*Crown Castle Fiber, L.L.C. v. City of Pasadena, Texas,* No.H-20-3369, in the U.S. District Court for the Southern District of Texas, Judgment entered August 2, 2022.

*Crown Castle Fiber, L.L.C.,* No. 22-20454, in the U.S. Court of Appeals for the Fifth Circuit, Judgment entered August 4, 2023, petitions for rehearing and rehearing *en banc* denied September 25, 2023.

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## OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Fifth Circuit, filed on August 4, 2023, in *Crown Castle Fiber, LLC v. City of Pasadena, Texas,* 76 F.4th 425 (5th Cir. 2023), is set forth at App. A, pages 1a-28a.

The published opinion of the United States District Court for the Southern District of Texas, Houston Division, filed on August 2, 2022, in *Crown Castle Fiber, L.L.C. v. City of Pasadena, Texas,* 618 F. Supp.3d 567 (S.D. Tex. 2022), is set forth at App. B, pages 29a-67a.

The *per curiam* opinion of the United States Court of Appeals for the Fifth Circuit on Petition for Rehearing and Rehearing En Banc filed on September 25, 2023 in *Crown Castle Fiber, LLC v. City of Pasadena, Texas,* No. 22-20454 (5th Cir. 2023), is set forth at App. C, page 68a.

## JURISDICTION

The Fifth Circuit entered judgment against the Petitioner on August 4, 2023, and denied Petitioner's petitions for panel rehearing and en banc reconsideration on September 25, 2023. This Court has jurisdiction under 28 U.S.C. §1254(1) and Supreme Court Rule 30 because Petitioner filed this petition for a writ of certiorari on the first business day following 90 days after the Fifth Circuit denied Petitioner's petition for rehearing and petition for rehearing *en banc.*

Petitioner seeks the Court's review under Supreme Court Rule 10 because the Fifth Circuit decided important issues of federal law that have not been, but should be, settled by this Court.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Constitutional and statutory provisions involved are reproduced in the Appendix D, pages 69a-73a:

U.S. CONST. ART 6, CL. 2

42 U.S.C. §1983

47 U.S.C. §153(53)

47 U.S.C. §253

47 U.S.C. §332(c)(7)(B)(v)

47 U.S.C. §401

## STATEMENT

### A. The dispute and the proceedings in the district court.

The State of Texas delegates "to each municipality the fiduciary duty, as a trustee, to manage the public right-of-way for the health, safety and welfare of the public, subject to state law." TEX. LOCAL GOV'T CODE §284.0011(a)(2). The Texas Legislature, by statute, has prescribed requirements and limitations that Texas municipalities are to follow in regulating installation of network nodes and node support poles in public rights-of-way. TEX LOCAL GOV'T CODE §284.001(c). To this end, the Legislature authorized each municipality to enact a design manual governing installation of network nodes and node support

poles in public rights-of-way. Tex. Local Gov't Code §284.109.

In 2017, the City of Pasadena enacted an ordinance adopting a Design Manual for the Installation of Network Nodes and Node Support Poles in its public rights of way. (App. 4a). The manual tracks the statute and requires new node support poles to "be spaced apart from existing utility poles or Node Support poles . . . no less than 300 feet from [an existing] utility pole or another Node Support Pole." (App. 4a n.3 (ellipses added)). The City enacted this spacing requirement to "minimize the hazards of poles adjacent to road ways and to minimize [the] effect on property values and aesthetics in the on the area." (App. 4a (alterations by the court)).

Crown Castle contracted to provide T-Mobile with a small cell, distributed antenna systems network in the Houston metropolitan area, which includes the City of Pasadena. (App. 3a). Crown Castle applied to the City for 67 right-of-way permits in nonresidential locations. (App. 5a). Crown Castle divided the applications into three batches. (App.5a). The City rejected 16 of 22 of the applications in Crown Castle's first batch because they violated the spacing requirement. (App. 5a).

Crown Castle sued the City for a declaratory judgment preempting the spacing requirement and an injunction forbidding the City from enforcing the requirement. (App. 6a). The City moved to dismiss Crown Castle's claim under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) asserting, among other grounds, that Crown Castle's claims are nonjusticiable because the FTA does not authorize a private action to enforce §253 and, even if it did, preemption does not reach

State and local management of public rights of way under 47 U.S.C. §253(c). (App. 6a, 36a). The district court denied the City's motion to dismiss.(App. 6a).

In 2021, after Crown Castle filed suit, the City adopted an updated design manual requiring network node equipment to be placed underground, other than "antenna that cannot operate when placed underground." (App. 4a-5a). Although the City had not denied any Crown Castle permit application based on the undergrounding requirement in residential areas, Crown Castle filed an amended complaint seeking a declaratory judgment preempting the undergrounding requirement under §253 and an injunction forbidding the City from enforcing the undergrounding requirement. (App. 6a-7a).

The district court granted summary judgment to Crown Castle. The district court found §253 preempts the spacing and undergrounding requirements and permanently enjoined the City from enforcing these requirements.( App. 58a, 62-63a).

**B. The proceedings in the court of appeals.**

The City appealed and a panel of the Fifth Circuit affirmed the district court's judgment in a unanimous opinion. The City challenges two of two holdings in this Petition.

First, the court of appeals rejected the City's argument that Crown Castle's claims are not justiciable because §253 does not create private rights or a private right of action. Consistent with its own precedent, the court recognized that §253(a) focuses on prohibitions and "does not establish

a private right of action enforceable under 42 U.S.C. §1983." (App. 10a-11a (citing *Southwestern Bell Tel., L.P., v. City of Houston,* 529 F.3d 257, 261 (5th Cir. 2008))). Nevertheless, the court affirmed the district court's judgment, holding that "Crown Castle is not seeking a legal remedy through §1983," but, instead, "brings a claim that the FTA preempts the City's manual," (App. 11a), and the "ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity." (App. 13a (quoting *Armstrong v Exceptional Child Ctr., Inc,,* 575 U.S.320, 327 (2015)).

Second, the court rejected the City's argument that §253(c) excludes from preemption measures taken by State and local governments to manage public rights-of-way. (App. 26a-27a).The panel held the §253(c) limitation excludes State and local regulations managing public rights-of-way only where those regulations are competitively neutral and nondiscriminatory. (App. 27a). The court then concluded the spacing and undergrounding requirements, although universally applicable, somehow discriminate against small cell technology. (App. 27a).

The City moved for panel rehearing and en banc reconsideration. The Fifth Circuit denied both motions on September 25, 2023. (App. 68a).

## REASONS FOR GRANTING THE PETITION

### I. The Court should grant Certiorari to vindicate Congress's intent to entrust the Federal Communications Commission with authority to preempt State and local regulations under §253.

"If Congress wishes to create new rights enforceable under §1983 it must do so in clear and unambiguous terms." *Gonzaga Univ. v. Doe,* 536 U.S. 273, 325 (2002). In the wake of *Gonzaga Univ.,* the court below and other circuits recognized §253 of the FTA does not create a private right enforceable under §1983. Op. at 10; *Southwestern Bell Tel., L.P.,* 529 F.3d at 260-61; *NextG Networks of NY, Inc. v. City of New York,* 513 F.3d 49, 52-54 (2d Cir. 2008); *Qwest Corp. v. City of Santa Fe, N.M.,* 380 F.2d 1258, 1265 (10th Cir. 2004).

Despite the absence of any privately enforceable right under §253, the court of appeals held Crown Castle may sue the City in equity to preempt the spacing and undergrounding requirements in the City ordinance under §253. App. 1a-11a. The Court should grant Certiorari to vindicate Congress's intent. An equitable action, like the one the lower courts authorized here, "substantively change[s] the federal rule established by Congress in the [FTA]" and "effect[s] a complete end run around this Court's implied right of action and 41 U.S.C. §1983 jurisprudence." *Douglas v. Indep. Living Ctr. Of S. Cal., Inc.,* 565 U.S. 606, 619 (2012) (Roberts, C.J., dissenting); *see also, Green Valley Special Util. Dist. v. City of Schertz,* 969 F.3d 460, 499 (5th Cir. 2020) (Oldham, J., concurring).

The equitable action authorized by the courts below has no basis in either the Supremacy Clause or general equity.

The Supremacy Clause does not support an equitable action to preempt State and local regulations under §253(c). The Court put this theory to rest in *Armstrong v Exceptional Child Ctr., Inc.,* 575 U.S. 320, 324 (2015). The "Supremacy Clause is not the source of any federal rights, and certainly does not create a cause of action." *Id.* (citations omitted). Rather than create a privately enforceable right, the Supremacy Clause only establishes a rule of decision that "instructs courts what to do when state and federal law clash." *Id.*

General equity does not support Crown Castle's action because, as the lower courts acknowledged, §253 does not create a private right and, without a private right there should be no equitable remedy. "It is a longstanding maxim that '[e]quity follows the law.'" *Douglas,* 565 U.S. at 620 (Roberts, C.J., dissenting) (quoting J. Pomeroy, Treatise on Equity Jurisprudence §325 (3d ed. 1905)) (modification by the Court). "A court of equity may not 'create a remedy in violation of law, or even without the authority of law.'" *Id.* (quoting *Rees v. Watertown,* 86 U.S. 107, 122 (1874)) (modification added).

*If* a private action in equity to enforce a federal statute that does not create a private right ever exists, it certainly does not arise to enforce §253. Congress created its own clear mechanism for enforcing §253. And Congress's mechanism does not include private equitable actions to preempt and enjoin enforcement of State and local regulations. Rather, Congress vested the FCC alone

with authority to preempt State and local regulations under §253. 47 U.S.C. §253(d). Congress charged the FCC with making a balanced and nuanced determination by preempting State or local regulations only to the extent necessary to resolve any conflict between the State or local regulation and §253.

*Armstrong* demonstrates the reason why there is no equitable action to preempt State and local regulations under §253. In *Armstrong,* this Court held private parties could not sue the State of Idaho in equity to enforce a provision of the Medicaid Act where Congress directed the Secretary of Health and Human Services to enforce the provision by withholding funds from the State. *Armstrong,* at 328. "As we have elsewhere explained, the 'express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others,'" this Court wrote. *Id.* (quoting *Alexander v. Sandoval,* 532 U.S. 275, 290 (2001)). Admittedly, this Court recognized that entrusting enforcement to a federal agency "might not, *by itself,* preclude the availability of equitable relief," but noted "it does so when" the determination Congress directs to a federal agency is "judgment laden" and "judicially unadministrable." *Id.*(emphasis in original).

This is equally true of the §253 preemption determination Congress vested exclusively in the FCC. Congress directed the FCC to decide whether, when and to what extent §253 preempts a State or local regulation. 47 U.S.C. §253(d). The preemption determination Congress directed the FCC to make under §253(d) is indeed judgment laden. The FCC must tailor its decision by "preempt[ing] the enforcement of such statute, regulation, or legal requirement [only] to the extent necessary to

correct such violation or inconsistency." *Id.*[1] And the manner in which Congress directed the FCC to make this determination is judicially unadministrable as Congress requires the FCC to provide "notice and the opportunity for public comment" before preempting any State or local regulation. *Id.*

In short, Congress chose agency expertise and uniformity and rejected the "inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action." *Id.* at 329 (quoting *Gonzaga Univ.,* 536 U.S. at 292 (Breyer, J., concurring in judgment)).

If more is necessary to demonstrate Congress did not intend to authorize courts to preempt State and local regulations, it is found in the fact that §253(d) is just one part of Congress's enforcement mechanism. Congress created a legal remedy by allowing a party to sue to set aside to denial of or failure to act upon an application for a permit to install cellular equipment. 47 U.S.C.§332(c)(7)(v). Crown Castle did not avail itself of this legal remedy because it did not sue to set aside the City's denial of *any* permit application.[2] Rather, Crown

1. The FCC's guidelines direct parties seeking preemption of a statute or ordinance to "submit information on whether and how the Commission could tailor a decision to preempt the enforcement of an offending legal requirement only 'to the extent necessary to correct such violation or inconsistency' as required by section 253(d)." *Preemption of State or Local Statutes: Suggested Guidelines for Petitions for Ruling Under Section 253 of the Communications Act*, 63 FR 66806 *66807 (FCC) (1998).

2. Additionally, Crown Castle did not sue the City within the thirty-day deadline under §332(c).

Castle sought a different and much broader remedy than the remedy Congress provided: a declaration preempting the spacing and undergrounding requirements and an injunction forbidding the City from enforcing the spacing and undergrouning requirements by denying, based on those requirements, future permit applications yet to be presented, for locations yet to be identified, filed by parties yet to be ascertained, under circumstances yet to be determined.

Clearly, Congress did not authorize courts to grant this sweeping remedy. Far from it, Congress mandated the FCC alone make a tailored determination by preempting State or local regulations only to the extent necessary to comply with §253, and to do so only after providing notice and the opportunity for public comment.[3]

In the context of the Eleventh Amendment, where "the same general principle applies," this Court cautioned lower courts against supplementing an enforcement mechanism Congress specifies in a statute. *Seminole Tribe v. Fla.,* 517 U.S. 44, 74 (1995). The Court articulated this rule: "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex Parte Young.*" *Id.* (citing *Ex Parte Young,* 209 U.S. 123 (1908)).

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3. Other provisions of Chapter 47 further underscore Congress's intent not to authorize a judicially fashioned equitable preemption action. Congress charges the FCC with "execut[ing] and enforc[ing] the provisions of" Chapter 47. 47 U.S.C. §151. Congress provides a mechanism for judicially enforcing Chapter 47 on "application of the Attorney General of the United States at the request of the Commission." 47 U.S.C. §401(a).

Courts have "no warrant to revise Congress's scheme simply because Congress did not 'affirmatively' preclude the availability of a judge-made action at equity." *Armstrong,* 575 U.S. at 329. Revise Congress's enforcement scheme is precisely what the lower courts did in this case. The Court should grant Certiorari to vindicate Congress's intent under the FTA and other statutes where Congress has chosen not to authorize a private action and has, instead, adopted its own enforcement mechanism.

## II. The Court should grant Certiorari because 47 U.S.C. §253(c) plainly states §253 does not preempt actions taken by State and local governments to manage public rights-of-way.

Section 253(c) places State and local measures to manage public rights of way beyond the reach of §253 preemption:

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

47 U.S.C. §253(c) (emphasis added).

The courts below mistakenly read §253(c) to only place State and local authority to manage public rights-of-way

outside the scope of §253 preemption *if* the State or local government exercises that authority in a manner that is nondiscriminatory and competitively neutral manner.

This mistaken reading conflicts with plain language of §253(c). Other circuit courts and the FCC have made the same error. *See infra.* The Court should grant certiorari to provide guidance on applying §253(c) in accordance with its plain meaning.[4] "Where . . . Congress has superseded state legislation by statute, our task is to 'identify the domain expressly preempted.'" *Dan's City Used Cars, Inc. v. Pelkey,* 569 U.S. 251, 259 (2013) (quoting *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 541 (2001)). The preemption inquiry focuses on the words of the statute because that is the best evidence of what Congress intended. *Id.* Clauses like §253(c) limit the scope of express preemption. *Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 868 (2000).[5]

In discerning the meaning of §253(c), the Court's task "begins where all such inquiries must begin: the language of the statute itself." *United States v. Ron Pair Enters.,* 489 U.S. 235, 241 (1989). "In this case it is also where the inquiry should end, for where, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *Id.*

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4. The court of appeals mistakenly characterized §253(c) as a "safe harbor" to be raised as an affirmative defense to preemption. Op. at 21. This is a mistaken description of the statute's limitation on the reach of preemption. On the other hand, a safe harbor is typically "an area of protection" of conduct that a statute otherwise reaches. Garner, *Garner's Dictionary of Legal Usage* (3rd Ed. 2009).

5. There is no claim and no holding of implied preemption.

The error here arises because §253(c) "is quite inartfully drafted and has created a fair amount of confusion." *N.J. Payphone Ass'n v. Town of W. N.Y.,* 299 F.3d 235, 240 (3rd Cir. 2002). The Second Circuit found a syntactical analysis of §253(c) leads to the conclusion that the "nondiscriminatory and competitively neutral requirement" limits the authority of a State or local government to require compensation, but not State or local authority to manage public rights of way. *Cablevision, Inc. v. Public Improvement Comm'n,* 184 F.3d 88, 101 (2nd Cir. 1999). Nevertheless, the FCC has looked beyond the language of §253(c) to the FTA's Legislative history to conclude §253(c) only excludes State and local authority to manage rights of way where the State or local government exercises that authority in a nondiscriminatory and competitively neutral manner. *In re Matter of Classic Telephone, Inc.,* 11 FCC Rcd 13082 *13103 (1996). The Third and Tenth Circuits have also looked beyond the language of the §253(c) to the legislative history. *Qwest Corp. v. City of Santa Fe,* 380 F.3d 1258, 1272 (Legislative intent and "the scant legislative history available on the topic" supports the interpretation); *N.J. Payphone Ass'n,* 299 F.3d at 245 (looking to the "statutory framework" and Legislative debate).

Section 253(c) may be inartfully drafted and confusing, but it is not ambiguous. The plain language of the §253(c) allows only one conclusion: §253 does not impair the authority of State and local governments to manage public rights-of-way, unlike the authority of State and local governments to require compensation for use of public-rights-of-way which, §253(c) specifies, State and local governments may only exercise in a nondiscriminatory and competitively neutral manner. The Fifth Circuit erred by conflating two distinct regulatory authorities.

Section 253(c) identifies two distinct categories of State and local authority separated by the disjunctive "or:" (1) authority to manage public rights of way, or (2) authority to require fair and reasonable compensation for use of public rights-of-way. 47 U.S.C. §253(c)(emphasis added). The phrase "on a competitively neutral and non-discriminatory basis" follows the phrase "require compensation." The last antecedent canon teaches the phrase "on a competitively neutral and non-discriminatory basis" conditions the phrase that precedes it, "require fair and reasonable compensation," but does not condition or limit the more remote phrase, "managing public rights-of-way." *Lockhart v. United States,* 577 U.S. 347, 351 (2015)

The last antecedent "rule provides that 'a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Id.* (quoting *Barnhart v. Thomas,* 540 U.S. 20, 26 (2003)) (modification by the Court)."This Court has applied the rule from our earliest decisions to our more recent." *Id.* (citing *Sims Lessee v. Irvine,* 3 Dall 425, 444 n. (1799); *FTC v. Mandel Brothers, Inc,* 359 U.S. 385, 389 n. 4 (1959); *Barnhart,* 540 U.S. at 26)). "[T]he rule of the last antecedent is not absolute and can be overcome by other indicia of meaning," namely the statutory context. *Id.* at 352. The Court's inquiry into the statutory context of §253(c) "begins with the internal logic of that provision." *Id.*

The internal logic of §253(c) confirms the last antecedent canon controls and the phrase "nondiscriminatory and competitively neutral" does not limit State and local authority to manage public rights-of-way. The phrase "on a competitively neutral and nondiscriminatory

basis" is embedded between "require fair and reasonable compensation from telecommunications providers" and "for use of public rights-of-way on a nondiscriminatory basis," which is itself followed by the phrase "if the compensation is publicly disclosed by such government." 47 U.S.C. §253(c). This "traps the phrase 'on a competitively neutral and nondiscriminatory basis at the same level" as "require compensation for use of the public rights of way." *Cablevision, Inc.* 184 F.3d at 101.

The word "to" appearing before "require compensation" also sets the latter phrase apart from the former and makes clear §253(c) is treating two distinct activities: "the authority of the State or local government to manage the public rights of way or [the authority] to require reasonable compensation." *See,* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 150 (West 2012).

The language of §253(c) is unambiguous. It demonstrates Congress's intent to leave State and local management of public rights-of-way outside the scope of preemption under §253. Courts and commentators have misread §253(c) to limit the authority of State and local governments to manage public rights-of-way. This mistaken reading of §253(c) frustrates Congressional intent. The Court should grant certiorari to provide lower courts and practitioners with guidance that is absent from the Court's precedent.

## CONCLUSION

Congress vested the FCC with exclusive authority to preempt State and local regulations under §253, and Congress clearly directed the FCC to make a tailored

determination by preempting State or local regulations only to the extent necessary to comply with §253. Congress also exempted State and local management of public rights-of-way from the reach of federal preemption under §253. The Fifth Circuit's opinion in this case frustrates Congress's intent in both respects. The City of Pasadena, Texas, therefore, requests the Court to grant certiorari, correct the Fifth Circuit's errors and enter judgment in favor of the City.

Respectfully submitted,

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# APPENDIX

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**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED AUGUST 4, 2023**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-20454

CROWN CASTLE FIBER, L.L.C.,

*Plaintiff—Appellee,*

versus

CITY OF PASADENA, TEXAS,

*Defendant—Appellant.*

August 4, 2023, Filed

Appeal from the United States District Court
for the Southern District of Texas.
USDC No. 4:20-CV-3369.

Before SMITH, HIGGINSON, and WILLETT, *Circuit Judges*.

JERRY E. SMITH, *Circuit Judge*:

This case is part of the battle between telecommunications providers that are attempting to expand next-generation wireless services (commonly called 5G) and municipalities that are resisting that

expansion. Although the usual fights over installation of new technology involved local governments' imposing hefty fees,[1] the City of Pasadena used another method: aesthetic-design standards incorporating spacing and undergrounding requirements. The city invoked those requirements to block Crown Castle's[2] ability to develop a 5G network in the region, and Crown Castle sued for relief.

Congress and the Federal Communications Commission ("FCC") anticipated those strategies and previously had passed the Federal Telecommunications Act ("FTA") and responsive regulations. As a result, the district court decided in favor of Crown Castle, primarily basing its decision on the expansive language of the FTA and an FCC ruling interpreting the Act in light of 5G technology and associated challenges. The court determined that the City of Pasadena's requirements that functionally blocked the build-out of Crown Castle's infrastructure were preempted by the FTA. It entered summary judgment for Crown Castle and imposed a permanent injunction prohibiting the city's use of its Design Manual.

We agree with the district court. The FTA preempts the city's spacing and undergrounding requirements, and the city forfeited its arguments relating to the safe-harbor

1. *See, e.g., City of Portland v. United States*, 969 F.3d 1020, 1035-36 (9th Cir. 2020).

2. Crown Castle Fiber, L.L.C., is referred to as Crown Castle by both parties. This designation also refers to its predecessor-in-interest, Crown Castle NG Central, L.L.C.

provision in the FTA. Nor did the district court abuse its discretion in ordering a permanent injunction. We affirm.

## I.

Telecommunications providers are expanding 5G networks throughout the country. But 5G requires higher radio frequencies than did previous-generation networks, thereby requiring telecommunications and mobile service providers to install new equipment and infrastructure. Previous networks used tall towers spaced far apart to provide service, as the lower-frequency waves they used could travel long distances and through objects.

In contrast, the higher radio frequencies used for 5G communications cannot easily pass through buildings and can only travel short distances. As a result, telecommunications providers have begun using "small cell sites" placed close together to relay signals in an umbrella-esque pattern to provide similar coverage by relaying signals further distances and around obstacles. Unlike the infrastructure required for older networks, the small cell sites can be installed on utility poles, buildings, streetlights, and other structures. Such a buildout of small cells is referred to as "densification."

Crown Castle entered into a contract with T-Mobile whereby Crown Castle agreed to provide T-Mobile with a small cell, distributed antenna systems ("DAS") network in the Houston market, which includes the City of Pasadena. Crown Castle specifically offers telecommunications services by providing network "nodes" and "fiber."

More precisely, Crown Castle uses its infrastructure to transport its customer's (here, T-Mobile's) voice and data signals through these nodes and fiber networks, allowing T-Mobile (or any other wireless service provider it contracts with) to service a particular area with 5G. To build out a small cell network, Crown Castle must install the physical infrastructure, and the company alleged that it must have access to public rights-of-way to accomplish that task, which requires a permit.

The twist is that the city has a small cell ordinance and a Design Manual for the Installation of Network Nodes and Node Support Poles (the "Manual"). The Manual was adopted in 2017, purportedly to comply with state law. It requires that new support poles for a network must be spaced at least 300 feet from existing utility poles or other node support poles.[3] Additionally, in 2021, after Crown Castle had sued, the city updated the Manual to include an additional restriction ("undergrounding"):

> A Network Provider is prohibited from installing above ground on an existing pole a Network Node and related equipment in a public right of way in a residential area. . . .

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3. In full, the ordinance requires the following:

> New node support poles shall be spaced apart from existing utility poles or Node Support poles at the same distance as the spacing between utility poles in the immediate proximity, but no less than at a minimum 300 feet from a utility pole or another Node Support Pole to minimize the hazard of poles adjacent to road ways and to minimize [the] effect on property values and aesthetics on the area.

> [A]ll the equipment is required to be installed underground for the safety of the residents and the aesthetics of the area.[4]

Almost all equipment associated with a network node must be stored underground in residential areas.

In 2017, Crown Castle and T-Mobile identified 100 locations in the city's public rights-of-way where Crown Castle wanted to build new utility poles (otherwise known as "nodes"). Of those, 33 were in residential neighborhoods. After discussions with the city,[5] Crown Castle applied for right-of-way permits for the 67 non-residential locations. Crown Castle divided the applications into 3 batches per the city's request. In June 2019, for the first batch, the city rejected 16 of Crown Castle's first 22 applications because they violated the spacing requirement. Crown Castle reviewed its remaining proposed locations and determined that they, too, would violate the spacing requirement.

The parties disagree about whether Crown Castle and T-Mobile explored alternatives, such as placing the new nodes on existing infrastructure. The city maintains that Crown Castle did not attempt to identify new locations or

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4. The only exception is for an "antenna that cannot operate when placed underground."

5. The timeline is unclear, but it appears Crown Castle eventually applied for permits for 3 of the 33 residential locations, and the city permitted one. Although the city rejected those applications before the undergrounding requirement, all 33 are now subject to the undergrounding requirement Crown Castle challenges.

create a network map that would comply with the Manual. Crown Castle represents that it did so and rejected using existing infrastructure because it was not located at the correct height[6] or in feasible areas. Crown Castle alleges that only seven existing poles in Pasadena would have satisfied the city's and Crown Castle's criteria.[7] Crown Castle also avows that placing the required radio equipment underground in Pasadena is technologically impossible because of concerns with overheating and Pasadena's regular flooding.

In September 2020, Crown Castle sued for declaratory and injunctive relief, alleging that the minimum spacing restriction violated, and was thus preempted by, both 47 U.S.C. § 253(a) and Texas state law.

After the district court denied the city's motion to dismiss, the city never filed an answer to the complaint. Even after the city had updated its Manual in 2021 to include the undergrounding requirement, and Crown Castle amended its complaint to allege that that requirement was also preempted, the city still did not answer the complaint. Only after nine months had passed since the deadline to file an answer did the city move for leave to file an answer, averring that the delay

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6. According to Crown Castle, the centerline of the antennas must be located between 31 and 35 feet above ground.

7. These seven poles belonged to AT&T. Crown Castle contends it discussed putting nodes on the poles owned by Centerpoint, an energy and utility provider. But all of Centerpoint's poles were the wrong height and in the wrong locations.

resulted from an "oversight" and "inadvertent mistake" by its counsel. The district court refused to accept that explanation as sufficient, denied the city's motion, and decided that the city had forfeited[8] affirmative defenses.

Both sides sought summary judgment. The district court ruled in Crown Castle's favor and permanently enjoined the city from enforcing the regulations against Crown Castle. First, the court ruled that it had jurisdiction to hear the case because, as a preemption dispute, it involved a federal question, and it was of no consequence that § 253(a) has no private right of action.

On the merits, the district court ruled that its analysis of whether densification effects were protected by § 253(a) was controlled[9] by the FCC's rule stating that densification effects were so protected.[10] Nor did the city properly challenge the FCC's conclusions as arbitrary

8. The district court used the term "waived," but we employ the more precisely accurate word "forfeited."

9. The court stated that "[u]nder the Hobbs Act, the Court does not have jurisdiction to review the merits [of the] FCC Order and thus is bound by the FCC's prior ruling."

10. The FCC rule discussed in the district court's opinion and which played a role in both the preemption and safe harbor decision is the FCC's Declaratory Ruling regarding how § 253 applies to small cell nodes. *See In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment* ("*Small Cell Order*"), 33 FCC Rcd. 9088 (2018); *see also Accelerating Wireless and Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 83 Fed. Reg. 51867 (Oct 15, 2018) (codified at 47 C.F.R. pt. 1).

and capricious. As a result, the district court found that § 253(a) did preempt the city's small cell node regulations, as they violated the FTA by preventing Crown Castle from providing telecommunications services.

The district court also rejected the city's argument that § 253(c), which provides that state and local governments may manage their public rights-of-way in a reasonable and nondiscriminatory manner, acted as a safe harbor. First, the court noted that the city had forfeited the affirmative defense by failing to answer the complaint. Secondly, adjudicating the affirmative defense on the merits, the court concluded that the section still did not allow the city's discriminatory treatment of Crown Castle's applied small cell nodes. Then the court granted Crown Castle a permanent injunction but stayed it pending this appeal.

**II.**

We review issues of Article III standing *de novo*. *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 264 (5th Cir. 2015). "[F]ederal courts are under an independent obligation to examine their own jurisdiction . . . ." *FW/PBS, Inc. v. City of Dall.*, 493 U.S. 215, 231, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990). The district court granted summary judgment on the basis of federal preemption, a question of law reviewed *de novo*. *Friberg v. Kan. City S. Ry. Co.*, 267 F.3d 439, 442 (5th Cir. 2001).

We review a summary judgment *de novo* as well. *Norman v. Apache Corp.*, 19 F.3d 1017, 1021 (5th Cir.

1994). A party is entitled to summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). "As is appropriate at the summary-judgment stage, facts that are subject to genuine dispute are viewed in the light most favorable to [the non-moving party]." *Taylor v. Riojas*, 141 S. Ct. 52, 53 n.1, 208 L. Ed. 2d 164 (2020) (per curiam).

This court reviews a permanent injunction for abuse of discretion. *Thomas v. Hughes*, 27 F.4th 995, 1011 (5th Cir. 2022) (citing *ICEE Distribs., Inc. v. J&J Snack Foods Corp.*, 325 F.3d 586, 594 (5th Cir. 2003)). "An abuse of discretion occurs where the trial court '(1) relies on clearly erroneous factual findings . . . [,] (2) relies on erroneous conclusions of law . . . , or (3) misapplies the factual or legal conclusions when fashioning its injunctive relief.'" *Id.* (alterations and omissions in original) (quoting *Peaches Ent. Corp. v. Ent. Repertoire Assocs., Inc.*, 62 F.3d 690, 693 (5th Cir. 1995)).

## III.

Crown Castle's claims are justiciable. Because its preemption claim presents a federal question, that establishes jurisdiction. Although the city's theory that § 253 of the FTA does not provide a private right of action is correct, that fact does not override Crown Castle's ability to bring a preemption claim. Additionally, Crown Castle has pleaded facts sufficient for Article III standing, and its claims are ripe.

*Appendix A*

**A.**

The city spends most of its briefing alleging that Crown Castle's suit is non-justiciable because § 253 does not provide a private right of action that would enable Crown Castle to sue to enforce the mandate of the FTA. Additionally, the city posits that Crown Castle is not even a telecommunications service provider covered by § 253. The city is incorrect.

Congress enacted the FTA to "reduc[e] . . . the impediments imposed by local governments upon the installation of facilities for wireless communications." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115, 125 S. Ct. 1453, 161 L. Ed. 2d 316 (2005). To that end, § 253(a) provides a comprehensive regulatory scheme that constrains the ability of states and municipalities to regulate telecommunications: "No . . . local statute or regulation, or other . . . local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

Still, as the city notes, § 253(a) focuses on "prohibitions on what the state or local government cannot do, rather than on a right for telecommunications companies." *Sw. Bell Tel., LP v. City of Hous.*, 529 F.3d 257, 261 (5th Cir. 2008). Accordingly, our circuit stated in *Southwestern Bell* that § 253(a) does not establish a private right of action enforceable under 42 U.S.C. § 1983. *Id.* And under 47 U.S.C. § 253(d), the FCC is charged with "preempting the enforcement of laws violating . . . § 253(a)." *Id.* at 262

(internal quotations omitted). As in the present case, our court was asked to determine whether a local regulation was preempted by § 253(a). *Id.*

Nevertheless, the city's reliance on *Southwestern Bell* is misplaced. Even though we acknowledged that the FCC is the primary caretaker and enforcer of the FTA, the actual holding was more constrained than the city believes. "[B]ecause the FTA does not unambiguously establish a private enforceable right, and, in the alternative, because . . . § 253(d) contains a comprehensive enforcement scheme, Congress did *not* intend to create a private right, enforceable under § 1983, for claimed violations of . . . § 253(a)." *Id.*

But Crown Castle is not seeking a legal remedy through § 1983. Instead, it brings a claim that the FTA preempts the City's Manual. In *Southwestern Bell* itself, we made that distinction clear. A "plaintiff's seeking relief from a state regulation on the ground of preemption by a federal statute 'presents a federal question which federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.'" *Id.* (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1983)).

It is worth discussing *Southwestern Bell* further. There, AT&T built various facilities in the public rights-of-way in Houston, which then enacted an ordinance requiring the owners of facilities located in the public rights-of-way to bear the costs of relocating their equipment if the city carried out a public works project in the same location. The ordinance was not targeted at telecommunications

providers but required any facility located in a public right-of-way to be moved at the owner's expense. AT&T spent $420,000 relocating equipment and sued to recover the relocation costs. The company asserted a claim under the FTA through § 1983 and a federal preemption claim.

*Southwestern Bell* first analyzed whether the FTA creates a private right of action. *Id.* at 259-62. The court noted that although the circuits were split, a faithful textual reading of the statute post-*Gonzaga University v. Doe*, 536 U.S. 273, 283, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002),[11] indicated that "§ 253 does not create a private right of action for damages that may be enforced through § 1983." *Sw. Bell*, 529 F.3d at 261 (cleaned up). But Crown Castle is not asking for damages here. The company seeks declaratory and injunctive relief, bringing the suit in equity.

On that note, the panel analyzed AT&T's federal preemption claim *separately* and stated that a "party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action." *Id.* at 262 (quoting *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1266 (10th Cir. 2004)). In *Southwestern Bell*, AT&T's preemption-based arguments failed because of inadequate pleading and the inability to show that the ordinance was

11. *Gonzaga* requires courts to determine whether Congress intended to create a federal right, and "where the text and structure of a statute provide no indication that Congress intend[ed] to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action." 536 U.S. at 286.

not "competitively neutral and nondiscriminatory." *See id.* at 262-64. Houston's ordinance, therefore, was sheltered by the safe harbor provision of § 253(c),[12] and preemption did not apply. *Id.* at 263-64. But, vitally, the court did not dismiss the federal preemption argument for lack of subject matter jurisdiction. The question whether we have jurisdiction is separate from whether there is a cause of action. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998).

The same holds true here. The "ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327, 135 S. Ct. 1378, 191 L. Ed. 2d 471 (2015). Hence, in *Green Valley Special Utility District v. City of Schertz*, we noted that the plaintiff had "a cause of action against [defendants] *at equity*, regardless of whether it can invoke § 1983." 969 F.3d 460, 475 (5th Cir. 2020) (en banc) (citing *Ex parte Young*, 209 U.S. 123, 149, 28 S. Ct. 441, 52 L. Ed. 714 (1908)). Even though § 253 does not confer a private right, a plaintiff is not prevented from gaining equitable relief on preemption grounds. Accordingly, Crown Castle can bring its federal preemption claim.[13]

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12. The subsection provides that "[n]othing in [§ 253] affects the authority of . . . local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."

13. In reply, the city points to Judge Oldham's concurrence in *Green Valley*, where he cast doubt on whether a plaintiff could sue

**B.**

The city maintains that Crown Castle is not a telecommunications provider and is not subject to the protections of § 253(a). To the contrary, Crown Castle is a telecommunications provider under the Act, and thus the city's theory that Crown Castle did not provide services itself, but "merely agreed to install radios and antennae to allow T-Mobile to expand *T-Mobile's* telecommunications service," is untenable.[14]

"[W]e begin where all such inquiries must begin: with the language of the statute itself." *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1056, 203 L. Ed. 2d 433 (2019) (cleaned up). The "judicial inquiry . . . ends there as well

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in equity without belonging to a particular class of citizens with a legislatively conferred cause of action. 969 F.3d at 497 (Oldham, J., concurring) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)). But that is not the law of this circuit.

14. It is possible that Crown Castle could sue under § 253(a) even if it were not a telecommunications provider. As Crown Castle states, we usually look to injury-in-fact when determining standing to sue. Crown Castle likely satisfies the injury prong, and so with that injury, it may be entitled to injunctive relief. As a result, the city's argument that Crown Castle is not protected by § 253(a) is not a jurisdictional issue, and "courts should not treat a statutory provision as jurisdictional unless 'the Legislature *clearly* states that a threshold limitation on a statute's scope shall count as jurisdictional.'" *Biziko v. Van Horne*, 981 F.3d 418, 421 (5th Cir. 2020) (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006)). Because we conclude that Crown Castle is a telecommunications provider, we pretermit discussion of that issue.

if the text is unambiguous." *Tex. Educ. Agency v. U.S. Dep't of Educ.*, 908 F.3d 127, 132 (5th Cir. 2018) (cleaned up). The FTA defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(53).[15]

The district court noted that "providers of 'telecommunications service' are equivalent to 'common carriers,' meaning . . . provider[s] who 'hold[] [themselves] out indiscriminately.'"[16] Applying that definition, the court reasoned that because "Crown Castle's services enable common carriers, like T-Mobile in this case, to provide telecommunications services to the general public, . . . Crown Castle's services are available to 'classes of users as to be effectively available directly to the public.'" We see no error.[17]

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15. "Telecommunications" are "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or the content of the information as sent and received." 47 U.S.C. § 153(50). As discussed *supra*, the voice and data signals that Crown Castle transports through its nodes and fiber infrastructure and DAS network appear to fall readily within that definition.

16. Quoting *Crown Castle NG E. Inc. v. Town of Greenburgh*, No. 12-CV-6157, 2013 U.S. Dist. LEXIS 93699, 2013 WL 3357169, at *15 (S.D.N.Y. July 3, 2012).

17. Numerous other courts have found that Crown Castle or its predecessors are telecommunications providers. *See, e.g., NextG Networks of NY, Inc. v. City of New York*, 513 F.3d 49, 50 (2d Cir. 2008); *Crown Castle NG E. LLC v. City of Rye*, No. 17-CV-3535,

Nevertheless, the city urges us to read the statutory language to indicate that the statute covers only a servicer that provides the product to the end user. That definition reads "effectively available directly to the public" out of the statute. "As a cardinal principle of statutory construction, the presumption against superfluity requires the court to give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section." *Tex. Educ. Agency*, 908 F.3d at 133 (cleaned up) (omission in original).

It is evident that Crown Castle sells its services to the public by establishing the infrastructure to enable T-Mobile to provide wireless service and to transmit T-Mobile's voice and data signals across its network. T-Mobile is undoubtedly a common carrier, and Crown Castle, through its network and infrastructure contract, fits neatly within the protective umbrella of § 253(a).

The city's main cited case suggesting otherwise is not applicable. The city points to *Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921, 930, 339 U.S. App. D.C. 174 (D.C. Cir. 1999), to urge that Crown Castle is a private network operator. That contention is inaccurate. In *Virgin*

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2017 U.S. Dist. LEXIS 202528, 2017 WL 6311693, at *4 (S.D.N.Y. Dec. 8, 2017); *Crown Castle NG Atl. LLC v. City of Newport News*, No. 15-CV-93, 2016 U.S. Dist. LEXIS 104790, 2016 WL 4205355, at *3 (E.D. Va. Aug. 8, 2016); *Crown Castle Fiber LLC v. City of Charleston*, 448 F. Supp. 3d 532, 534 (D.S.C. 2020). Although not all of those opinions go through a textual analysis to determine whether Crown Castle is a telecommunications provider under the statute, they still remain persuasive.

*Islands*, the D.C. Circuit found that the plaintiff was not a common carrier because it made the "bulk capacity in its system" available only to a "significantly restricted class of users," preventing the public from being "able to make use of the cable as a practical matter." *Id.* at 924-30. No such fact has ever been alleged here. Crown Castle's services, through T-Mobile, are available to anyone who wishes to pay. The company is a telecommunications provider under the FTA.

**C.**

Finally, the city asserts that Crown Castle lacks Article III standing because its claims are not ripe. We review two factors to determine ripeness: "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration."[18] A claim is "fit for judicial decision if it presents a pure question of law that needs no further factual development." *Braidwood Mgmt., Inc. v. EEOC*, 70 F.4th 914, 930 (5th Cir. 2023) (cleaned up). An unripe claim is "contingent [on] future events that may not occur as anticipated, or indeed may not occur at all." *Id.* at 930-31 (alteration in original) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81, 105 S. Ct. 3325, 87 L. Ed. 2d 409 (1985)).

The city avers the case is not fit for consideration: The court should wait to evaluate the issues at play because

18. *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 149, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977).

Crown Castle has not sought a permit under the city's new undergrounding requirement and has submitted only about a third of the planned applications, of which the city approved a few. Moreover, Crown Castle did not submit applications for the other sites. Instead, it undertook its own review and "simply decided that all 45 proposed locations to be submitted would violate the Manual's 300-foot spacing requirement." The city also takes umbrage that Crown Castle never requested a variance for the denied applications. The city consequently has not taken a "final, definitive position" about the permits, and the claim is not ripe. For similar reasons, claims based on the other unsubmitted applications are not ripe either.

We go back to first principles to decide ripeness. Crown Castle's claims turn on a pure question of law: Is the Manual preempted by § 253? *See Franks Inv. Co. v. Union Pac. R.R.*, 593 F.3d 404, 407 (5th Cir. 2010) ("The preemptive effect of a federal statute is a question of law . . . ."). There is no factual dispute that the spacing and undergrounding requirements apply to most of Crown Castle's intended pole locations.

As a result, the Manual is the only thing preventing Crown Castle from building out its telecommunications grid. Crown Castle has been harmed and continues to allege injury on account of the Manual, and no further factual development will aid in adjudicating the claim. Moreover, because of those ongoing harms, Crown Castle will experience hardship if we do not consider its claim. *Cf. Braidwood*, 70 F.4th at 931-32.

The city has no persuasive counter-argument. The caselaw it presents primarily invokes the ripeness standard involved in takings cases.[19] And we do not look to its presented ripeness test outside a takings claim. *See Monk v. Huston*, 340 F.3d 279, 282 (5th Cir. 2003). Without that test, the city merely states that Crown Castle was required to ask for a variance for rejected petitions, submit petitions for every other node despite the poor success rate, and change the design of its nodes to comply with the city's requirements. Those theories are divorced from caselaw and resemble exhaustion requirements more than ripeness requirements. As discussed above, Crown Castle met the requirements for ripeness by showing that the case is fit for judicial resolution and that there is ongoing harm. Nothing more is required. Crown Castle's claims are ripe.

**IV.**

Next, the merits. The city failed to challenge the merits adequately in its opening brief and did not correctly raise § 253(c) as an affirmative defense in the district court. But even if we review the merits of the city's arguments, the district court was correct to follow the FCC's order controlling the result.

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19. *See, e.g., Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), *overruled by Knick v. Twp. of Scott*, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019).

*Appendix A*

**A.**

To begin, the district court clearly stated that, per the Hobbs Act,[20] its analysis was bound by the FCC's *Small Cell Order*. In that order, the FCC stated that a local legal requirement constitutes an effective prohibition on the ability of an entity to provide telecommunications service where the legal requirement "materially inhibits" the "critical deployments of Small Wireless Facilities and [the] nation's drive to 5G. *Small Cell Order*, 33 FCC Rcd. at 9102-03. Per the order, a spacing requirement can create a material inhibition of wireless service in violation of § 253(a). *See id.* at 9132. The district court correctly relied on that determination to find material inhibition.

Additionally, the FCC Order indicates that spacing requirements can be unreasonable if they effectively prohibit the construction of nodes through discriminatory application.[21] The FCC Order discusses similar

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20. Unlike the district court, we do have jurisdiction to review the order. *See* 28 U.S.C. § 2342 ("The court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the Federal Communication Commission made reviewable by section 402(a) of title 47.").

21. *See, e.g., Small Cell Order*, 33 FCC Rcd. at 9133 ("For example, under the principle that any such requirements be reasonable and publicly available in advance, it is difficult to envision any circumstances in which a municipality could reasonably promulgate a new minimum spacing requirement that, in effect, prevents a provider from replacing its preexisting facilities or collocating new equipment on a structure already in use."); *see also*

undergrounding requirements, noting that "a requirement that *all* wireless facilities be deployed underground would amount to an effective prohibition given the propagation characteristics of wireless signals." *Id.* at 9133. The court relied on that text to find that the underground requirement was preempted.

Yet, on appeal in its opening brief, the city does not mention the Hobbs Act or the FCC Order once. No attempt is made to contest the notion that the district court was not bound by the ruling of the FCC, or even if it was, that the district court erred in its application of the FCC's ruling.

Although the city attacks the reasoning of the district court's approach indicating that § 253(a) preempts the Manual's requirements, the city fails to grapple with the fact that the district court based its entire preemption decision on the FCC's *Small Cell Order*, through the jurisdictional bounds of the Hobbs Act. The present adjudication cannot be decided without appropriately reviewing the effect of the FCC's 2018 declaratory ruling.

Parties forfeit contentions by inadequately briefing them on appeal. *Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021); *see also* FED. R. APP. P. 28(a)(8)(A).

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*id.* at 9132 ("Analogously, 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 are also permissible."); *cf. City of Portland*, 969 F.3d at 1041 ("[R]easonable regulatory distinctions among functionally equivalent, but physically different services [are allowed].").

Adequate briefing requires a party to raise an issue in its opening brief. *United States v. Bowen*, 818 F.3d 179, 192 n.8 (5th Cir. 2016). "To be adequate, a brief must address the district court's analysis and explain how it erred." *SEC v. Hallam*, 42 F.4th 316, 327 (5th Cir. 2022) (cleaned up). The city's brief is inadequate. Instead of making a substantial argument on the merits, it decided primarily to contest that Crown Castle lacked standing to litigate § 253(a). Having failed there, the city must lie in the bed that it made.

In its reply brief, the city finally mentions that the district court was "bound by the FCC's prior ruling" but that we are not entitled to give the Order *Chevron* deference[22] because § 253(a) is unambiguous. Even if true, the contention needed to be raised in the opening brief.

**B.**

Similarly, the district court did not err in deciding that the city's failure to answer Crown Castle's complaint indicated that it forfeited all affirmative defenses. Federal Rule of Civil Procedure 8(c) indicates that affirmative defenses must be raised in the first responsive pleading, which here would have been the answer (or the motion to dismiss). Instead, the city waited until its summary judgment motion to raise § 253(c). Statutory exemptions such as § 253(c) must be pleaded as affirmative defenses. *See Oden v. Oktibbeha Cnty.*, 246 F.3d 458, 467 n.10 (5th Cir. 2001).

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22. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

Notwithstanding the formal procedures, there is "play in the joints," and "technical failure to comply precisely with Rule 8(c) is not fatal." *Rogers v. McDorman*, 521 F.3d 381, 385-86 (5th Cir. 2008) (cleaned up). The main concern is "unfair surprise," so we do not permit litigants to be able to "lie behind a log" and "ambush a plaintiff." *Id.* at 385 (cleaned up). On the whole, though, unfair surprise is present here.

The city avers that it first raised the § 253(c) safe harbor defense in its motion to dismiss Crown Castle's complaint, which would satisfy Rule 8(c). But the only mention of § 253(c) in the motion to dismiss was in relation to the city's theory that Crown Castle's claim correctly arose under § 332(c)(7) instead of § 253. That is not a proper method to raise an affirmative defense. Nowhere was Crown Castle notified that the city would raise a § 253(c) defense to a § 253(a) preemption claim. As a result, the statements in the motion to dismiss did not put Crown Castle on notice, and Crown Castle remained "prejudiced in its ability to respond." *Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572, 577 (5th Cir. 2009) (quoting *Allied Chem. Corp. v. Mackay*, 695 F.2d 854, 856 (5th Cir. 1983) (per curiam)).

Furthermore, as the district court noted, failure to answer the operative complaint is not excusable. A failure timely to answer or raise an affirmative defense before springing it on plaintiffs at summary judgment almost always constitutes an "unfair surprise." There is no reason to doubt the capable judgment of the district court on this matter.

**C.**

Regardless, even reviewing the merits of the city's arguments, it still loses. Although one might challenge the constitutional validity of the Hobbs Act,[23] the district court was correct to follow the FCC's order controlling the result. Furthermore, no party challenges the constitutionality of the Hobbs Act. As a result, there is no error in the district court's application of the FCC's Order.[24] The district court correctly determined that the city's regulations "effectively prohibit[] Crown Castle

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23. The Hobbs Act essentially strips the jurisdiction of district courts to consider the validity of an agency's legal interpretation of the statutes contained therewithin, including the FTA. Circuit courts have exclusive jurisdiction to determine the validity of final orders, and only if a party seeks judicial review within 60 days of entry of the final order. 28 U.S.C. § 2342. But nowhere in the Hobbs Act does it state that the interpretation of the statutes cannot be challenged in later enforcement proceedings. Under the Administrative Procedure Act, usual administrative law principles permit parties to raise as-applied challenges. *See PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2058, 204 L. Ed. 2d 433 (2019) (Kavanaugh, J., concurring in the judgment).

24. On appeal, the city raises for the first time that as-applied challenges are not permitted under § 253. The city's support is less than persuasive and invokes no controlling precedent. Moreover, it seems likely that the challenge is facial—the district court placed a permanent injunction on enforcement of the Manual and stated that the policies themselves, not just as applied to Crown Castle, were unreasonable under the test outlined in the FCC's *Small Cell Order*. Regardless, given that this issue was not raised at summary judgment, we cannot consider it. *See Keelan v. Majesco Software, Inc.* 407 F.3d 332, 339-40 (5th Cir. 2005).

from providing telecommunications services" and are preempted under § 253(a). Nor is the city protected by § 253(c) because the Manual's restrictions and rules are not "competitively neutral and nondiscriminatory."

The city's primary claim against preemption is that § 253(a) does not apply to densification efforts. But the FCC has clearly stated that it considers the statute's requirement of an effective prohibition to include a material inhibition on the ability of a provider to deploy small wireless facilities, including cells. *See Small Cell Order*, 33 FCC Rcd. at 9102-04.

The city maintains that T-Mobile already provides 5G and 4G/LTE service through Pasadena, and its rejected nodes would merely "augment" the existing service. That reading is too limited, given the expansive "any" mentioned in the statute. Section 253(a) broadly protects the ability of "any" entity to provide "any" telecommunications service.[25]

Furthermore, the city's favored reading flies in the face of common sense: Just because a provider can provide some limited level of service does not mean that it cannot improve that level, expand its capacity, or otherwise offer an upgraded or additional form of telecommunications

25. *See Chamber of Com. of U.S. v. U.S. Dep't of Lab.*, 885 F.3d 360, 373 (5th Cir. 2018), *judgment entered sub nom. Chamber of Com. of Am. v. U.S. Dep't of Lab.*, No. 17-10238, 2018 U.S. App. LEXIS 27646, 2018 WL 3301737 (5th Cir. June 21, 2018) (stating that the use of "any" in a statute embodies an "expansive interpretation" for an agency).

service. All those boons seem to fall within the scope of the statute's text.

The same is true of the undergrounding requirement. The district court accepted Crown Castle's contention that requiring the burying of all nodes underground in residential areas would essentially destroy their efficacy. Per the FCC Order, a "requirement that *all* wireless facilities be deployed underground would amount to an effective prohibition." *Small Cell Order*, 33 FCC Rcd. at 9133. The district court found that the restrictions on the construction of nodes were unreasonable and made it technically infeasible for Crown Castle to provide a telecommunications service. The city provides no persuasive evidence that the district court's reasoning is incorrect. Under the current regulations, no party disagrees that Crown Castle likely cannot build its network in Pasadena. There is no error here.

Nor is the § 253(c) safe harbor applicable to either requirement. In that section, municipal rules governing rights-of-ways that are "competitively neutral and nondiscriminatory" are permitted. The district court determined that that certainly was not the case, as only small cell technology was subject to the spacing and undergrounding requirements in the Manual.

The city barely offers a response, merely stating that it has almost unlimited authority to manage the public rights-of-way. For example, the city states, "[t]he City's authority to 'manage the public rights-of-way' encompasses its right to deny Crown Castle's applications

based upon *any* applicable requirement contained in the City's design manual, including the City's minimum spacing and undergrounding requirements."

That position does not grapple, however, with the district court's finding that the city's right was limited by the discriminatory targeting of the Manual on small cell nodes. And there is no plausible counterargument: As the court found, the regulations affect only small cell nodes that would permit T-Mobile to offer extensive 5G service in Pasadena. The district court was correct.

**V.**

Finally, the district court did not abuse its discretion in entering a permanent injunction. As the city correctly notes, a party seeking a permanent injunction must establish (1) actual success on the merits; (2) that it is likely to suffer irreparable harm in the absence of injunctive relief; (3) that the balance of equities tips in that party's favor; and (4) that an injunction is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 32, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008).

All those factors weigh in Crown Castle's favor. The above analysis shows that Crown Castle succeeded in its preemption claim. Crown Castle will suffer irreparable harm if it cannot build its network under its contract with T-Mobile. Its harm outweighs whatever disadvantage the city will suffer in response. Finally, the weight of the FCC's Order and the importance of building out our nation's telecommunications network demonstrate that the injunction is in the public interest.

Moreover, we review the district court's determinations on these factors for abuse of discretion. *See Thomas*, 27 F.4th at 1011. That is a demanding standard that the city does not satisfy.

The judgment, including the permanent injunction, is AFFIRMED.

## APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, FILED AUGUST 2, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-20-3369

CROWN CASTLE FIBER LLC,

*Plaintiff,*

v.

CITY OF PASADENA,

*Defendant.*

### ORDER

Pending before the Court are Plaintiff Crown Castle Fiber LLC's Motion for Judgment on the Pleadings (Document No. 123), Plaintiff Crown Castle Fiber LLC's Motion for Summary Judgment (Document No. 124), Defendant City of Pasadena's Motion to Dismiss and for Final Summary Judgment (Document No. 128), Defendant City of Pasadena's Combined Opposition to Plaintiff's Motion for Judgment on the Pleadings and the City's Opposed Motion for Leave to File a Responsive Pleading (Document No. 134). Having considered the motions, submissions, and applicable law, the Court determines Plaintiff's motion for judgment on the pleadings should be denied, Defendant's motion to dismiss should be denied,

*Appendix B*

Defendant's motion for summary judgment should be denied, Defendant's motion for leave should be denied, and Plaintiff's motion for summary judgment should be granted.

## I. BACKGROUND

This case involves the installation of wireless telecommunication services. Plaintiff Crown Castle Fiber LLC ("Crown Castle") provides next-generation telecommunication services through Distributed Antenna Systems ("DAS") that are critical to development of 5G networks. In order to provide these services, Crown Castle must install DAS networks, which consist of nodes, fiber, conversion equipment, and an aggregation point from which the communication signal is transmitted. In order to install parts of the DAS networks, Crown Castle alleges it must have access to the public rights-of-way. In late 2017, Crown Castle alleges it sought to install a DAS network in Defendant City of Pasadena, Texas (the "City"). Around this time, the Texas Legislature enacted Chapter 284 of the Texas Local Government Code which regulates the construction and deployment of wireless network nodes in public rights-of-way across Texas. Tex. Loc. Gov't Code § 284 *et seq.* In response to this legislation, the City adopted ordinances in response to governing the installation of small cell nodes and node support poles in the City's the public rights-of-way (the "Design Manual"). The Design Manual contains: (1) a spacing requirement which significantly limits the locations where it may install the nodes, despite the fact the DAS network requires the nodes to be in specific locations to be functional; and

(2) an underground requirement that forces the nodes and the accompanying radio equipment to be buried in residential areas, which Crown Castle contends is not technically feasible.

Based on the foregoing, on September 30, 2020, Crown Castle filed this lawsuit, asserting preemption claims against the City for violations a provision of the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 253(a) ("Section 253(a)"), and the Texas Local Government Code, Tex. Loc. Gov't Code § 284 *et seq.*, based on Sections 4.C.3, 4.C.4, 4.E.1, and 5.B of the Design Manual. Crown Castle also seeks declaratory and injunctive relief allowing it to install the nodes in the public rights-of-way in the City. On August 19, 2021, the Court granted the motion for leave to amend, and Crown Castle amended its complaint. On April 11, 2022, Crown Castle moved for judgment on the pleadings and for summary judgment. On April 11, 2022, the City moved to dismiss Crown Castle's claims and for summary judgment. On May 2, 2022, the City moved for leave to file its answer to Crown Castle's amended complaint.

## II. STANDARD OF REVIEW

### A. Rule 12(b)(1) Standard

Federal Rule of Civil Procedure 12(b)(1) requires that a court dismiss a claim if the court does not have subject matter jurisdiction over the dispute. Fed. R. Civ. P. 12(b)(1). A motion for lack of subject matter jurisdiction under Rule 12(b)(1) must be considered before any motion

on the merits because subject matter jurisdiction is required to determine the validity of any claim. *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994). "Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (per curiam). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Id.* Unlike a court considering a Rule 12(b)(6) or Rule 56 motion, district courts have a "unique power . . . to make factual findings which are decisive of [subject matter] jurisdiction" when considering a motion under Rule 12(b)(1) that raises questions of fact relevant to subject matter jurisdiction. *Williamson v. Tucker*, 645 F.2d 404, 412-13 (5th Cir. 1981).

**B. Rule 12(c) Standard**

Motions made pursuant to Federal Rule of Civil Procedure 12(c) are "designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts." *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir. 2002) (citations and internal quotation marks omitted). "A motion for judgment on the pleadings under Rule 12(c) is subject to the same standard as a motion to dismiss under Rule 12(b)(6)." *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008). Therefore, like a

motion under Rule 12(b)(6), Rule 12(c) allows dismissal if a plaintiff fails to state a claim upon which relief may be granted. *Id.* Under Rule 8(a)(2), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' it demands more than 'labels and conclusions.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Ad. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "[A] formulaic recitation of the elements of a cause of action will not do." *Id.* (quoting *Twombly*, 550 U.S. at 555).

In deciding a Rule 12(c) motion, "[t]he 'court accepts all well-pleaded facts as true, viewing them in the light most favorable to the [non-movant].'" *Vanderbrook v. Unitrin Preferred Ins. Co. (In re Katrina Canal Breaches Litig.)*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Martin K. Eby Constr. Co. v. Dall. Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). As with a Rule 12(b)(6) motion, the Court is permitted to consider "the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters which a court may take judicial notice." *Wolcott v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011). The motion "should be granted if there is no issue of material fact and if the pleadings show that the moving party is entitled to judgment as a matter of law." *Van Duzer v. U.S. Bank Nat'l Ass'n*, 995 F. Supp. 2d 673, 683 (S.D. Tex. 2014) (Lake, J.) (citing *Greenberg v. Gen. Mills Fun Grp., Inc.*, 478 F.2d 254, 256 (5th Cir. 1973)).

**C. Summary Judgment**

Summary judgment is proper when "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court must view the evidence in a light most favorable to the nonmovant. *Coleman v. Hous. Indep. Sch. Dist.*, 113 F.3d 528, 533 (5th Cir. 1997). Initially, the movant bears the burden of presenting the basis for the motion and the elements of the causes of action upon which the nonmovant will be unable to establish a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The burden then shifts to the nonmovant to come forward with specific facts showing there is a genuine dispute for trial. *See* Fed. R. Civ. P. 56(c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). "A dispute about a material fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 956 (5th Cir. 1993) (citation omitted).

But the nonmoving party's bare allegations, standing alone, are insufficient to create a material dispute of fact and defeat a motion for summary. If a reasonable jury could not return a verdict for the nonmoving party, then summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, at 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202. The nonmovant's burden cannot be satisfied by "conclusory allegations, unsubstantiated assertions, or 'only a scintilla of evidence.'" *Turner v. Baylor Richardson*

*Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007) (quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)). Uncorroborated self-serving testimony cannot prevent summary judgment, especially if the overwhelming documentary evidence supports the opposite scenario. *Vais Arms, Inc. v. Vais*, 383 F.3d 287, 294 (5th Cir. 2004). Furthermore, it is not the function of the Court to search the record on the nonmovant's behalf for evidence which may raise a fact issue. *Topalian v. Ehrman*, 954 F.2d 1125, 1137 n.30 (5th Cir. 1992). Therefore, "[a]lthough we consider the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the nonmovant, the nonmoving party may not rest on the mere allegations or denials of its pleadings, but must respond by setting forth specific facts indicating a genuine issue for trial." *Goodson v. City of Corpus Christi*, 202 F.3d 730, 735 (5th Cir. 2000).

## III. LAW & ANALYSIS

The City contends: (1) the Court should grant its motion to dismiss because Crown Castle lacks standing to assert its claims; (2) the Court should grant its motion for leave to file an answer so that it may assert its affirmative defenses; and (3) the Court should deny Crown Castle's motion for summary judgment as they fail to meet the basic elements of its claims and grant its motion for summary judgment because the Design Manual is protected by the Act's safe harbor provision. Crown Castle contends: (1) the Court should sustain its evidentiary objections to the City's summary judgment evidence; (2) it is entitled to judgment on the pleadings because the City failed to

file an answer, and thus has admitted to the allegations in its amended complaint; and (3) it is entitled to summary judgment on its preemption claims because the Design Manual's spacing and underground requirements materially inhibit its ability to provide telecommunications service. The Court first turns to the City's motion to dismiss, before evaluating the City's motion for leave and the parties' cross-motions for summary judgment.

**A. The City's Motion to Dismiss**

The City contends Crown Castle's claims should be dismissed for lack of subject matter jurisdiction because the Act does not provide a private right of action. Crown Castle contends the precedent in this circuit holds a "plaintiff seeking relief from a state regulation on the ground of preemption by a federal statute 'presents a federal question which federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.'" *Sw. Bell Tel. LP v. City of Houston*, 529 F.3d 257, 262 (5th Cir. 2008) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1983)). Here, Crown Castle seeks declaratory and injunctive relief, in part, on the basis the Design Manual's spacing and underground requirements are preempted by federal law (i.e., the Act). Because the basis of one of Crown Castle's claims is that the Design Manual is preempted by federal, the Court finds federal subject matter jurisdiction exists. Therefore, having considered the motion, submissions, and appliable law, the Court determines the City's motion to dismiss for lack of subject matter jurisdiction should be denied. The Court now turns to the City's motion for leave to file an answer.

## B. The City's Motion for Leave

The City contends it should now be allowed to file an answer to assert affirmative defenses upon which it relies in its pending motion for summary judgment, roughly nine months after the deadline to do so elapsed, arguing good cause exists under both Federal Rules of Civil Procedure 6 and 16 to allow the late filing. Crown Castle contends the City fails to meet the good cause standard under either Rule 6 or 16 and allowing the City to file an answer would be highly prejudicial at this stage of the litigation. The Court first addresses the City's arguments under Rule 6, before turning to its argument under Rule 16.

### 1. Rule 6

Under Rule 6(b), a court may extend a deadline after such deadline has elapsed if the movant establishes good cause and "excusable neglect." Fed. R. Civ. P. 6(b)(1)(B). The factors relevant to determining "excusable neglect" are: (1) "the possibility of prejudice to the other parties;" (2) "the length of the applicant's delay and its impact on the proceeding;" (3) "the reason for the delay and whether it was within the control of the movant;" and (4) "whether the movant has acted in good faith." *Salts v. Epps*, 676 F.3d 468, 474 (5th Cir. 2012) (citing 4B Charles Alan Wright & Arthur R. Miller, Federal Practice And Procedure § 1165 (4th ed. 2022)).

With respect to the first factor dealing with the possibility of prejudice, the City contends: (1) it has responded to Crown Castle's allegations and generally

denied its claims;[1] (2) Crown Castle had the opportunity to conduct discovery on the City's defenses;[2] (3) the City's failure to file an answer could not have prejudiced Crown Castle;[3] and (4) Crown Castle, "despite knowing the City had not answered [Crown Castle's] amended complaint," "cannot in good faith contend the City's admitted oversight was anything more than harmless and nonprejudicial."[4] Conversely, Crown Castle contends it did not conduct discovery on the City's affirmative defenses because it had no way of knowing what those defenses were until the City first raised them in its motion for summary judgment. Crown Castle further contends the defenses the City seeks to plead in its answer "inject[] new issues" and "impose[] new burdens" on Crown Castle after the close of discovery.[5] Indeed, it is unclear how Crown Castle had fair notice of the City's affirmative defenses as required by the Federal Rules of Civil Procedure prior to the City's filing of its motion for summary judgment on April 11, 2022. *See* Fed. R. Civ. P. 8(c). The purpose of Rule 8(c) is to prevent "unfair surprise" with respect to a defendant's affirmative defenses. *Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir.

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1. *City of Pasadena's Combined Opposition to Plaintiff's Motion for Judgment on the Pleadings and the City's Opposed Motion for Leave to File a Responsive Pleading*, Document No. 134 at 3 [hereinafter *Opposition and Motion for Leave].*

2. *Opposition and Motion for Leave, supra* note 1 at 5.

3. *Opposition and Motion for Leave, supra* note 1 at 5.

4. *Opposition and Motion for Leave, supra* note 1 at 5-6.

5. *Plaintiff's Response in Opposition to Defendant's Motion for Leave to File an Answer*, Document No. 145 at 7.

1999). To allow a defendant to raise an affirmative defense for the first time at the summary judgment stage, well after the close of discovery, is both antithetical to the very purpose of Rule 8's fair notice pleading requirements and highly prejudicial to the plaintiff. Thus, the Court finds the possibly of prejudice in allowing the City to file an answer asserting affirmative defenses is high. Therefore, this factor weighs against granting the City's motion for leave.

The second factor addresses the movant's length of delay in seeking leave and the impact on the proceedings. Here, on August 19, 2021, Crown Castle amended its complaint.[6] Therefore, the City had until September 2, 2021 to file its answer to the amended complaint. *See* Fed. R. Civ. P. 15(a)(3). It is undisputed the City failed to do so. The City did not move for leave to file an answer until May 2, 2022, nine months later, and two months before the scheduled trial term. The Court finds the nine months between the City's deadline to file its answer and its motion for leave constitutes a significant delay and, if granted, would greatly impact the proceedings. Thus, this factor also weighs against granting the City's motion for leave.

The third factor relates to the City's reason for its delay and whether that reason was within its control. The City admits the reason for failing to timely answer the amended complaint was an "oversight",[7] and an

6. *See Order*, Document No. 67.

7. *Opposition and Motion for Leave, supra* note 1 at 6.

"inadvertent mistake" on the part of its counse1.[8] However, the City cannot invoke an equitable principle, like excusable neglect, to pardon its own lack of diligence. *See L.A. Pub. Ins. Adjusters, Inc. v. Nelson*, 17 F.4th 521, 527, 860 Fed. Appx. 315 (5th Cir. 2021) (quoting *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 151, 104 S. Ct. 1723, 80 L. Ed. 2d 196 (1984)). Thus, the Court finds the City's lack of diligence is the cause for the delay which was wholly within the City's control. Therefore, the third factor also weighs against granting the City's motion.

The final factor addresses whether the City acted in good faith. The City contends its failure to timely answer was due to a mistake and was not a decision made in bad faith. There is no evidence indicating the City acted in bad faith by failing to timely answer Crown Castle's amended complaint. Thus, the Court finds the City did not act in bad faith by failing to timely answer and waiting nine months to move for leave to file an answer. Therefore, this factor weighs in favor of granting the City's motion for leave.

However, three out of the four factors weight in favor of denying the City's motion for leave. The only factor weighing in favor of granting the motion is the final factor, addressing whether the City acted in good faith. Since the majority of the factors weigh in favor denial, the Court finds the City fails to establish excusable neglect under Rule 6(b). *See Nelson*, 17 F.4th at 527. The Court now turns to whether Rule 16 provides an avenue for the City to file an answer.

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8. *City of Pasadena's Reply in Support of its Motion for Leave to File a Pleading Responsive to Plaintiff's Amended Complaint*, Document No. 146 at 3.

**2. Rule 16**

Additionally, Rule 16 allows a court to amend a scheduling order for good cause. Under Rule 16, four factors determine whether there is good cause: "(1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice." *S&W Enters., L.L.C. v. SouthTrust Bank of Ala., NA*, 315 F.3d 533, 535 (5th Cir. 2003) (quoting *Reliance Ins. Co. v. La. Land & Exploration Co.*, 110 F.3d 253, 257 (5th Cir. 1997)).

As to the first factor, as stated above, the City explains its failure to timely move for leave was based on an oversight by its counsel. However, mere oversight by counsel is an insufficient explanation for its failure to timely seek leave to file an answer. *See S&W Enters., LLC*, 315 F.3d at 535 (stating that "inadvertence" "is tantamount to no explanation at all"). Therefore, the Court finds the City's explanation for its failure to timely move for leave is insufficient. Thus, the first factor weighs against granting leave.

With respect to the second factor, the City contends the amendment allowing it to file an answer is important because without it the City waives the affirmative defense it asserts in its pending motion for summary judgment. Therefore, the Court finds the amendment here is important to the City's ability to raise affirmative defenses. Thus, this factor weighs in favor of granting leave to amend.

The third factor addresses the potential prejudice in allowing the amendment which, as discussed above, in this case is high. The potential for prejudice to Crown Castle is high should the Court grant the City leave to file its answer at this late date, as that answer would contain affirmative defenses heretofore unknown to Crown Castle. Further, the parties have already filed cross-motions for summary judgment—and included in the City's motion for summary judgment are at least some of the affirmative defenses the City wishes to assert if granted leave to answer. However, Crown Castle has been deprived of the opportunity to conduct discovery related to these affirmative defenses due to the City's failure to timely answer and properly assert such defenses. Therefore, the Court finds there is a significant potential for prejudice to Crown Castle should it grant the City's motion for leave to amend. Thus, this factor also weighs against granting leave to amend.

The fourth factor address whether a continuance would cure any prejudice caused by allowing the amendment. This case is currently on the July/August 2022 trial term,[9] and both parties have pending motions for summary judgment. This case has been pending since September 2020 and there have been several continuances granted to date.[10] Given the age of this lawsuit, another continuance

9. *Order*, Document No. 114, at 1.

10. *Order*, Document No. 67 (granting the City's July 27, 2021 motion for continuance); *Order*, Document No. 103 (granting in part the City's November 15, 2021 motion for continuance); *Order*, Document No. 114 (granting the City's February 10, 2022 motion for continuance).

would only serve to amplify, not cure, Crown Castle's prejudice. Therefore, the Court finds a continuance is not available to cure the prejudice caused by granting the City's motion for leave.

Three of the four factors weigh against granting the City's motion to amend the scheduling order. Allowing amendment at this point would cause Crown Castle a high degree of prejudice, and a continuance would not be a practical means to cure this prejudice at this stage of the litigation. Thus, the Court finds the City fails to establish good cause to amend the scheduling order. Accordingly, the City's motion for leave is denied. The Court now turns to Crown Castle's evidentiary objections to the City's summary judgment evidence.

### C. Crown Castle's Evidentiary Objections

Crown Castle objects to the City's Exhibits 3, 16, 17, and 18, contending: (1) Exhibits 3 and 18 are irrelevant; and (2) Exhibits 16 and 17 are inadmissible under *Daubert* and Rule 702 of the Federal Rules of Evidence.

#### 1. Exhibit 3

Crown Castle contends the Court should exclude certain portions of Exhibit 3, a deposition of a T-Mobile representative,[11] because they are irrelevant. Having

11. Crown Castle and T-Mobile, who is not a party in this case, entered into an agreement under which Crown Castle would install a small cell network designed to assist densifying the coverage of T-Mobile's current cellular network. It was this agreement with

reviewed Exhibit 3, the Court finds it could be reduced to an admissible form at trial. Therefore, the Court finds Crown Castle's evidentiary objections to Exhibit 3 should be overruled. Accordingly, Crown Castle's evidentiary objections to Exhibit 3 are overruled.

**2. Exhibits 16 & 17**

Crown Castle contends Exhibit 16, an uncertified deposition, and Exhibit 17, unsworn reports, both from the City's expert Richard Comi are inadmissible under *Daubert* and Federal Rule of Evidence 702. Having reviewed Exhibits 16 and 17, the Court finds Exhibits 16 and 17 could be reduced to a form admissible at trial. Therefore, the Court finds Crown Castle's objections to Exhibits 16 and 17 should be overruled. Accordingly, Crown Castle's evidentiary objections to Exhibits 16 and 17 are overruled.

**3. Exhibit 18**

Crown Castle contends Exhibit 18, the map of T-Mobile's network coverage from T-Mobile's website, is irrelevant. Having reviewed the network map, the Court finds it could be reduced to a form admissible at trial. Therefore, the Court finds Crown Castle's evidentiary objections to Exhibit 18 should be overruled. Accordingly, Crown Castle's evidentiary objections to Exhibit 18 are overruled.

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prompted Crown Castle to attempt to install the small cell nodes and node support poles at issue in this case.

## D. Crown Castle's Motion for Summary Judgment

Crown Castle contends it is entitled to summary judgment because Sections 4.C.3, 4.C.4, 4.E.1, and 5.B of the Design Manual: (1) violate Section 253(a) of the Act as they effectively prohibit Crown Castle from providing telecommunications services through these discriminatory regulations; and (2) violate Section 284 of the Texas Local Government Code as they impede the construction of small cell node support poles which should be allowed as a matter of right and, further, subjects such technology to adverse treatment. The City contends: (1) the contested sections of the Design Manual are protected by the safe harbor provision in Section 253(c) of the Act (the "Safe Harbor Provision"); but even if they are not, (2) Crown Castle fails to establish basic elements of its claims, such as whether it actually provides telecommunications services as defined by the Act.

### 1. 47 U.S.C. § 253

Crown Castle contends the Design Manual is preempted by the Act because the spacing and underground requirements contained in the Design Manual effectively prohibit Crown Castle from providing telecommunications services. The City contends Crown Castle does not offer telecommunications services as defined in the Act, or alternatively, the Design Manual is sheltered by the Safe Harbor Provision—which Crown Castle contends is an affirmative defense that the City has waived. The Court addresses whether the City properly asserted it as an affirmative defense and the Safe Harbor Provision's

applicability below. However, the Court first turns to the threshold question of whether Crown Castle offers telecommunication services as defined by the Act.

**a. Telecommunications Services**

The parties dispute whether Crown Castle provides telecommunications services as defined by the Act. Under the Act, "telecommunications services" are defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(53). "Telecommunications" are defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(50). A "telecommunications carrier" is "any provider of telecommunications services . . . [who] shall be treated as a common carrier." § 153(51). Other courts have held providers of "telecommunications service" are equivalent to "common carriers," meaning a provider who "holds itself out indiscriminately." *Crown Castle NG E. Inc. v. Town of Greenburgh*, No. 12-CV-6157(CS), 2013 U.S. Dist. LEXIS 93699, 2013 WL 3357169, at *15 (S.D.N.Y. July 3, 2013) (Seibel, J.) (citing *V.I. Tel. Corp. v. FCC*, 198 F.3d 921, 926, 339 U.S. App. D.C. 174 (D.C. Cir. 1999)). "A provider may be a common carrier even if its services are not practically available to the entire public; a specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if [it] holds [itself] out to serve indifferently all potential users." *Id.* (quoting

*National Asso. of Regulatory Utility Comm'rs v. Federal Communications Com. (NARUC II)*, 525 F.2d 630, 642 (D.C. Cir. 1976)) (internal quotations omitted).

Crown Castle's services, which include the construction of wireless networks to provide telecommunications services, enable common carriers to provide telecommunications services to the public.[12] Since Crown Castle's services enable common carriers, like T-Mobile in this case, to provide telecommunications services to the general public, the Court finds Crown Castle's services are available to "classes of users as to be effectively available directly to the public." Therefore, the Court finds Crown Castle provides telecommunications services as defined in the Act. Now the Court turns to whether the Safe Harbor Provision shelters the Design Manual from preemption.

**b. The Safe Harbor Provision**

The City contends the Design Manual falls within the protections of the Safe Harbor Provision. Crown Castle contends: (1) the City has waived any argument regarding the safe harbor provision because it is an affirmative defense which the City has not pleaded; and (2) even if the City has properly asserted such an affirmative defense, the Design Manual is not protected by the safe harbor provision. The Court first examines whether the City has waived its affirmative defenses, specifically the Safe Harbor Provision.

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12. *See Plaintiff Crown Castle Fiber LLC's Motion for Summary Judgment*, Document No. 124, Exhibit 5 *(T-Mobile-Crown Castle Small Cell Order Agreement).*

**i. Waiver**

Crown Castle contends the City has waived the right to assert any affirmative defenses, including the Safe Harbor Provision, because it failed to file an answer. The City contends Crown Castle would not be prejudiced by its assertion of the Safe Harbor Provision as an affirmative defense, even though it failed to answer Crown Castle's complaint.

Generally, affirmative defenses must be raised in the first responsive pleading. Fed. R. Civ. P. 8(c). However, "[w]here the matter is raised in the trial court in a manner that does not result in unfair surprise . . . [a] technical failure to comply precisely with Rule 8(c) is not fatal." *Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572, 577 (5th Cir. 2009) (quoting *Allied Chem. v. Mackay*, 695 F.2d 854, 855-56 (5th Cir. 1983)). Thus, "[a]n affirmative defense is not waived if the defendant 'raised the issue at a pragmatically sufficient time, and [the plaintiff] was not prejudiced in its ability to respond.'" *Id.*

Here, the City has not answered the operative complaint and, thus, has failed to assert the Safe Harbor Provision as an affirmative defense. As discussed above, the City's failure to timely answer or otherwise raise the Safe Harbor Provision as an affirmative defense is highly prejudicial and constitutes unfair surprise to Crown Castle at this stage of the litigation. Thus, the Court finds the City did not raise its affirmative defenses at a "pragmatically sufficient" time and therefore has waived the Safe Harbor Provision as an affirmative defense. *See*

*Pasco*, 566 F.3d at 577. But even if the City had timely raised the Safe Harbor Provision, it still would not apply in this instance.

### ii. Applicability of the Safe Harbor Provision

Crown Castle contends the Federal Communications Commission (the "FCC") issued an order that agrees with its reading of the Safe Harbor Provision, stating right-of-way regulations should be "competitively neutral and nondiscriminatory." The City contends: (1) the safe harbor provision clearly reserves the right of state and local governments to "manage the public rights-of-way," which is the purpose of the Design Manual; and (2) the clause "on a competitively neutral basis" only applies to the preceding clause regarding reasonable compensation under the last-antecedent canon.

The Safe Harbor Provision reads as follows:

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

47 U.S.C. § 253(c).

The scope of the Safe Harbor Provision's protection of aesthetic requirements or ordinances presents an issue of first impression in this circuit, as the current case law pertains mainly to the reasonableness of fees imposed for use of public rights-of-ways. *See, e.g., Sw. Bell Tel. LP v. City of Houston*, 529 F.3d 257 (5th Cir. 2008) (finding ordinance imposing relocation costs on telecommunications owners to be "competitively neutral and nondiscriminatory"). However, the FCC recently issued an order offering guidance on the interpretation of the Safe Harbor Provision with respect to aesthetic requirements for small cell technology. There, the FCC concluded "[the Safe Harbor Provision] is properly constructed to suggest that Congress did not intend to permit states and localities to rely on their ownership of property within the [rights-of-way] as a pretext to advance regulatory objectives that prohibit or have the effect of prohibiting the provision of covered services . . . ." *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 F.C.C. Rcd. 9088, 9138 (2018) (the "FCC Order").[13] The FCC Order concludes "that aesthetic requirements are not preempted if they are . . . reasonable, [and] . . . no

13. Under the Hobbs Act, the Court does not have jurisdiction to review the merits FCC Order and thus is bound by the FCC's prior ruling. 28 U.S.C. § 2342(1). However, the United States Court of Appeals for the Ninth Circuit, upon review of the consolidated challenges, affirmed in part and vacated in part the FCC Order. *See City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020). The only relevant portion of the FCC Order that the Ninth Circuit vacated was the conclusion aesthetic requirements must be "objective." *Id.* at 1042. The parties do not argue whether or not the contested sections of the Design Manual are objective. Thus, the Court does not consider this portion of the FCC Order for the purposes of this Order.

more burdensome than those applied to other types of infrastructure deployments . . . ." *Id.* at 9132. The FCC also states "requirements . . . are reasonable [if] they are technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character are also permissible." *Id.* However, the FCC caveats this by reiterating those requirements which are more burdensome on small node networks than other similar technologies would be impermissible as the "discriminatory application evidences [those] requirements are not, in fact, reasonable and directed at remedying the impact of wireless infrastructure deployment." *Id.*

Here, the two different aesthetic requirements at issuer are a spacing requirement and an underground requirement. The spacing requirement at issue prevents small cell node support poles from being constructed within 300 feet of existing utility poles in the public rights-of-way.[14] The underground requirement prevents small cell node equipment from being installed above ground in residential areas.[15] It is undisputed these requirements only apply to the construction of new small cell networks,[16]

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14. *Plaintiff Crown Castle Fiber LLC's Motion for Summary Judgment*, Document No. 124, Exhibit 9 at 18, 21 *(Amended Design Manual).*

15. *Plaintiff Crown Castle Fiber LLC's Motion for Summary Judgment*, Document No. 124, Exhibit 9 at 18 *(Amended Design Manual).*

16. *Plaintiff Crown Castle Fiber LLC's Motion for Summary Judgment*, Document No. 124, Exhibit 9 at 3 ("This [Amended] Design Manual is for sighting and criteria for 'the installation of

and not to either existing small node networks or any other utility that makes use of the public rights-of-ways. While all other telecommunications service providers or other utilities are subject to a less stringent standard, "[a] person may be required to place certain facilities within the public rights-of-way underground according to applicable city requirements . . . unless the person makes a compelling demonstration that . . . this requirement is not reasonable, feasible or equally applicable to other similar users of the public rights-of-way." City of Pasadena, Code of Ordinances § 32-99(b). With "unreasonable or unfeasible" being defined as "whether the requirement would subject the person or persons to . . . any other unreasonable technical or economic burden." *Id.* § 32-99(n).

Based on plain reading of the Design Manual, the spacing requirement for small node networks is clearly more burdensome than the requirements applicable to other users of the rights-of-ways found in the City's Code of Ordinances.[17] Additionally, the underground requirement in the Design Manual is more burdensome because it does not contain the same exceptions for technical infeasibility, and forces small cell network equipment underground even if doing is not feasible or

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Wireless Facilities, including Micro Network Nodes, Network Nodes, Node support poles and related ground equipment being installed pursuant to Loc. Gov. Code, Chapter 284 [which encourages the construction of network nodes and node support poles].").

17. For a full discussion on the spacing requirement, *see infra* D.1.c.i.

reasonable given technological constraints.[18] Further, the fact these requirements are more burdensome and discriminatorily applied indicates these requirements are not a reasonable exercise of the City's power to manage its public rights-of way. *See In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 F.C.C. Rcd. at 9132. Thus, the Court finds the Safe Harbor Provision does not apply here because the spacing and Underground requirements at issue are discriminatory and are not reasonable exercises of the City's power to manage its public rights-of-way. Having decided the question of the applicability of the safe harbor provision, the Court now turns to whether the Design Manual's spacing and underground requirements are preempted by § 253(a) of the Act.

### c. Preemption Under 47 U.S.C. § 253(a)

Crown Castle contends the Design Manual's spacing and underground requirements materially inhibit its ability to provide telecommunications services as the requirements are onerous and discriminatory and are thus preempted by Section 253(a) of the Act. The City contends: (1) Crown Castle cannot establish a violation of Section 253(a) because the spacing and underground requirements do not materially inhibit Crown Castle's ability to provide services; and (2) the Act does not apply to services related to the densification (i.e., increasing the capacity) of existing networks.

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18. For a full discussion on the underground requirement, *see infra* D. 1.c.ii.

*Appendix B*

Congress enacted the Act "to provide for pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services by opening all telecommunications markets to competition." *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 493 (2d Cir. 1999) (alternations and internal quotation marks omitted). Under the Act, "[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 interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). A state or local requirement would constitute an effective prohibition if the requirement "materially inhibits" the "critical deployments of Small Wireless Facilities and [the] nation's drive to deploy 5G." *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 F.C.C. Rcd. at 9102-03. The Court now evaluates the novel issue of whether the Design Manual's spacing and underground requirements materially inhibit Crown Castle's ability to provide telecommunications services, starting with the spacing requirement.

**i. Spacing Requirement**

Crown Castle contends the spacing requirement, found in Sections 4.E.1 and 5.B of the Design Manual, is preempted by Section 253(a) because it materially inhibits Crown Castle's ability to provide telecommunications services: (1) by prohibiting construction of small cell node support poles in roughly 80% of the locations necessary to the network design; (2) because the City's

proposed alternative of forced co-location of the nodes on CenterPoint utility poles would affect the efficacy of the network design and be an improper way for the City to control the means or facilities through with Crown Castle provides its services; and (3) because it discriminates against small node networks in that the requirements are more onerous on small node networks than similar users of public rights-of-way. Conversely, the City contends: (1) Section 253(a) does not apply to municipal regulations impeding the densification of an existing network; and (2) the FCC's interpretation of the Act is "irrational, arbitrary, and capricious,"[19] which should dissuade the Court from applying it to the Design Manual.

Reasonable aesthetic requirements are those that are "technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character are also permissible." *Id.* However, a "discriminatory application [of aesthetic requirements] evidences [those] requirements are not, in fact, reasonable and directed at remedying the impact of wireless infrastructure deployment." *Id.* Further, a minimum spacing requirement may run afoul of the Act when it "has the effect of materially inhibiting wireless service" under Section 253(a). *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 F.C.C. Rcd. at 9132.

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19. While the City argues the FCC Order is arbitrary and capricious, it did not challenge the FCC Order when it was issued and does not challenge it now. Thus, the Court does not consider whether the FCC Order's pronouncement regarding aesthetic requirements is arbitrary and capricious at this time.

*Appendix B*

The contested spacing requirement is found in two places in the Design Manual and both identically state: "New node support poles shall be at a minimum 300 feet from a utility pole or another Node Support Pole to minimize the hazard of poles adjacent to road-ways and minimize effect on property values and aesthetics on the area."[20] Crown Castle contends this spacing requirement is not only discriminatory, as it only applies to new small node networks, but it is also not technically feasible. The purpose of the DAS network Crown Castle wishes to create is to densify, or enhance, T-Mobile's cellular network coverage in the City. The new DAS network Crown Castle seeks to implement requires the nodes to be placed at specific locations to function properly.[21] Further, the small network nodes must be installed at a specific height, between thirty-one and thirty-five feet.[22] Any node installed below or above this height would compromise the functionality and efficacy of the entire DAS network.[23] Crown Castle contends the spacing requirement has

20. *Plaintiff Crown Castle Fiber LLC's Motion for Summary Judgment*, Document No. 124, Exhibit 9 at 18,21 *(Amended Design Manual).*

21. *Plaintiff Crown Castle Fiber LLC's Motion for Summary Judgment*, Document No. 124, Exhibit 4A at 15,35-39 *(Expert Report of Richard Conroy).*

22. *Plaintiff Crown Castle Fiber LLC's Motion for Summary Judgment*, Document No. 124, Exhibit 4A at 16-17 *(Expert Report of Richard Conroy).*

23. *Plaintiff Crown Castle Fiber LLC's Motion for Summary Judgment*, Document No. 124, Exhibit 4A at 16-17 *(Expert Report of Richard Conroy).*

precluded the use of roughly 80% of its intended sites.[24] Meaning, there are only a handful of sites where Crown Castle could possibly install its nodes that would be within 300 feet of an existing utility pole, and this does not take into account whether these locations would be viable in Crown Castle's densification efforts.

In response, the City contends Section 253(a) does not apply to the densification of existing cellular networks, only the construction of new networks. However, the City overlooks the broad language of Section 253(a), which says "[n]o . . . local statute or regulation . . . may prohibit or have the effect of prohibiting the ability of any entity to provide *any* interstate or intrastate telecommunications service." 47 U.S.C. § 253(a) (emphasis added). Therefore, the Court finds Section 253(a) applies to Crown Castle's efforts to densify T-Mobile's network.

As alternatives to Crown Castle's noncomplying DAS network plan, the City proposed Crown Castle could either co-locate its small network nodes on existing CenterPoint utility poles or relocate the node to a conforming location. As to the forced co-location alternative—assuming CenterPoint consents—it would require the small network nodes be installed at roughly forty to fifty-five feet, much higher than the optimal, effective height for this technology.[25] And with respect to the relocation

24. *Plaintiff Crown Castle Fiber LLC's Motion for Summary Judgment*, Document No. 124, Exhibit 4A at 32 *(Expert Report of Richard Conroy).*

25. *Plaintiff Crown Castle Fiber LLC's Motion for Summary Judgment*, Document No. 124, Exhibit 4A at 22-23 *(Expert Report of Richard Conroy).*

alternative, it overlooks the fact these small network nodes must be placed in very specific locations to actually achieve their intended purpose. The fact an alternative exists does not negate the fact the Design Manual specifically targets the construction small cell networks. Notably, all other users of public rights-of-way are *not* subject the same spacing requirements despite the City's insistence the basis for the Design Manual's spacing requirement is to help visibility on rights-of-way as a matter of public safety.[26] All other users of the City's public rights-of-way are subject to the less stringent requirements found in the City's Code of Ordinances—which does not include a spacing requirement. *See* City of Pasadena, Code of Ordinances § 32-99. However, the fact this spacing requirement is discriminatorily applied to only small cell technology indicates the purpose of the requirement is not, in fact, public safety and if unreasonable. *See In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 F.C.C. Rcd. at 9132.

Given the discriminatory application of the Design Manual's spacing requirements in Sections 4.E.1 and 5.B to small cell networks, the Court finds the spacing requirement is not reasonable. The Court further finds the spacing requirement effectively prohibits the construction of small node networks by Prohibiting construction of

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26. *Plaintiff Crown Castle Fiber LLC's Motion for Summary Judgment*, Document No. 124, Exhibit 1 at 83:5-16 (Q: "CenterPoint Energy is permitted to locate their poles closer than 300 feet apart in the [City] right-of-way; correct?"; A: "They operate under different rules.") *(Deposition of Zafar Iqbal).*

such nodes in large swaths of the City's public rights-of-ways. Because the Court finds the spacing requirement effectively prohibits the construction of small node networks, the Court further finds the spacing requirement effectively prohibits Crown Castle from providing telecommunications services. Thus, the Court finds the spacing requirement as found in the Design Manual is preempted by Section 253(a) of the Act. Accordingly, the Court grants Crown Castle's motion for summary judgment as to the spacing requirement, found in Sections 4.E.1 and 5.B of the Design Manual. Now the Court turns to whether the underground requirement is preempted by the Act.

### ii. Underground Requirement

Crown Castle contends the underground requirement, found in Sections 4.C.3 and 4.C.4 of the Design Manual, are preempted by Section 253 because it materially inhibits Crown Castle's ability to provide telecommunications services because this requirement is not technologically feasible. The City contends: (1) Section 253(a) does not apply to municipal regulations impeding the densification of an existing network; and (2) the underground requirement is a reasonable exercise of its right to manage public rights-of-ways based on aesthetics and safety concerns.

As with spacing requirements, the FCC Order also discusses whether an Underground requirement would be preempted by the Act. With respect to underground requirements, "a requirement that *all* wireless facilities be deployed underground would amount to an effective

prohibition given the propagation characteristics of wireless signals." *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 F.C.C. Red. at 9133 (emphasis in original).

Here, the underground requirement reads in relevant part: "A Network Provider is prohibited from installing above ground on an existing pole a Network Node and related equipment in a public right-of-way in a residential area," and "all the equipment is required to be installed underground for the safety of the residents and the aesthetics of the area."[27] While all other users of the City's public rights-of-way are "may be required to place certain facilities within the public rights-of-Way underground according to applicable city requirements . . . unless the person makes a compelling demonstration that . . . this requirement is not reasonable, feasible or equally applicable to other similar users of the public rights-of-way." City of Pasadena, Code of Ordinances § 32-99(b).

Crown Castle contends it is not feasible to force its small cell network nodes underground because it would effectively doom those nodes to failure. Crown Castle contends requiring these nodes to be buried underground would drastically reduce their efficacy, effectively prohibiting them from providing telecommunications

27. *Plaintiff Crown Castle Fiber LLC's Motion for Summary Judgment*, Document No. 124, Exhibit 9 at 18, 21 *(Amended Design Manual).*

services.[28] Crown Castle also notes—assuming it is technically feasible to bury the small cell equipment underground—the nodes would have to be sealed in without proper ventilation in a concrete box to prevent water intrusion because the City is prone to flooding. [29] This would cause then the node to overheat and cease to function.[30] Due to the nature of technology and practical considerations, Crown Castle contends it is not technically feasible to place its small network nodes underground. Crown Castle also notes its position is in accord with the FCC Order which states an underground requirement such as the one found in the Design Manual would "amount to an effective prohibition" on the ability to provide telecommunications services. *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 F.C.C. Rcd. at 9133

The City first contends Section 253(a) does not apply here because Crown Castle seeks to densify an

28. *Plaintiff Crown Castle Fiber LLC's Motion for Summary Judgment*, Document No. 124, Exhibit 4A at 33-35 *(Expert Report of Richard Conroy).*

29. *Plaintiff Crown Castle Fiber LLC's Motion for Summary Judgment*, Document No. 124, Exhibit 4A at 33 *(Expert Report of Richard Conroy); Plaintiff Crown Castle Fiber LLC's Motion for Summary Judgment*, Document No. 124, Exhibit 3 at 131:6-132:8 *(Deposition of Richard Conroy).*

30. *Plaintiff Crown Castle Fiber LLC's Motion for Summary Judgment*, Document No. 124, Exhibit 4A at 33 *(Expert Report of Richard Conroy); Plaintiff Crown Castle Fiber LLC's Motion for Summary Judgment*, Document No. 124, Exhibit 3 at 131:6-132 : 8 *(Deposition of Richard Conroy).*

existing cellular network. However, as the Court found above, Section 253(a) applies to the densification of an existing cellular network.[31] The City also contends the underground requirement falls well within its right to manage its public rights-of-ways for safety and aesthetic concerns. However, the City, in both its response to Crown Castle's motion for summary judgment and its own motion for summary judgment, fails to acknowledge the technical impracticality of forcing small cell nodes and their equipment underground. Nor does the City acknowledge the discrepancy between the underground requirement in the Design Manual and the underground requirement in its Code of Ordinances. At least in the Code of Ordinances, if a party can make a showing that the requirement is not technically feasible, the party can be excepted from complying with the underground requirement. *See* City of Pasadena, Code of Ordinances § 32-99(b). There is no such process under the Design Manual. In light of this unexplained discrepancy in treatment, the Court finds the underground requirement found in Sections 4.C.3 and 4.C.4 of the Design Manual is not a reasonable exercise of the City's right to manage its public rights-of-way.

Therefore, the Court finds the underground requirement effectively prohibits the construction of small cell nodes because it is not feasible to place such nodes underground due to both technological and practical considerations. Because the Court finds the underground requirement effectively prohibits the construction of small cell networks, the Court further finds the underground requirement effectively prohibits Crown Castle from

31. *See* discussion *supra* D.1.c.i.

providing telecommunications services. Thus, the Court finds the underground requirement as found in the Design Manual is preempted by § 253(a) of the Act. Therefore, the Court grants Crown Castle's motion for summary judgment as to the underground requirement found in Sections 4.C.3 and 4.C.4 of the Design Manual. Accordingly, Crown Castle's motion for summary judgment as to Crown Castle's preemption claim based on 47 U.S.C. § 253(a) is granted.

**2. Preemption Under Texas Local Government Code § 284**

Crown Castle contends the Design Manual's spacing and underground requirements are also preempted by Chapter 284 of the Texas Local Government Code. The City contends it complied with the requirements set by Chapter 284, thus Crown Castle's claim fails. However, the Court need not reach this issue given the Court's ruling above, finding the Design Manual is preempted by Section 253(a) of the Act.

**3. Injunctive Relief**

Crown Castle contends it is entitled to injunctive relief because: (1) it can show success on the merits; (2) it can show a threat of immediate and irreparable harm; (3) the harm to Crown Castle outweighs the harm to the City if a permanent injunction is issued; and (4) a permanent injunction would serve the public interest in this case, given Crown Castle seeks to increase telecommunications services offered to the public.

*Appendix B*

The elements of a permanent injunction are nearly identical to those of a preliminary injunction, except that a "plaintiff must show actual success on the merits rather than a mere likelihood of success." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987). Thus, to establish it is entitled to a permanent injunction, a plaintiff must demonstrate: (1) an actual success on the merits; (2) a substantial threat of immediate and irreparable harm for which it has no adequate remedy at law; (3) that greater injury will result from denying the [injunction] than from its being granted; and (4) that an injunction will not disserve the public interest. *Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1985); *Amoco Prod*, 480 U.S. at 546 n.12. The decision whether to grant or deny a permanent injunction is within a court's discretion. *See Lemon v. Kurtzman*, 411 U.S. 192, 200-01, 93 S. Ct. 1463, 36 L. Ed. 2d 151 (1973). A permanent injunction "is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion." *Holland Am. Ins. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985). However, even if the movant establishes all the required elements for a permanent injunction, it still remains within the court's discretion to either grant or deny such relief. *Lemon*, 411 U.S. at 200-01.

Here, the first element has been established as Crown Castle succeeded on the merits of its claims that the spacing and underground requirements are preempted by the Act.

As for the second element, Crown Castle contends it will suffer, and has suffered, immediate and irreparable

halm as the spacing and underground requirements preventing it from building the DAS network in the City. The City fails to show Crown Castle would not suffer such harm if an injunction does not issue. Thus, the Court finds Crown Castle would suffer immediate and irreparable harm in the absence of a permanent injunction.

With respect to the third element, Crown Castle contends it would suffer a greater harm from the denial of a permanent injunction than the City would suffer it one were granted in this case. Indeed, Crown Castle would be prevented from implementing the DAS network pursuant to its agreement with T-Mobile, affecting the quality of telecommunications services provided to the public. The City fails to show the harm from its inability to enforce the spacing and underground requirement outweighs the harm to Crown Castle if it is unable to implement the DAS network. Therefore, the Court finds the harm in denying a permanent injunction outweighs the harm in granting one.

Finally, Crown Castle contends a permanent injunction in this case would actually benefit the public, as its goal in building the DAS network with T-Mobile is enhance cellular network coverage *available to the public*. The City does not argue, and consequently fails to show, the public would be disserved by a permanent injunction in this case. Thus, the Court finds the issuance of a permanent injunction in this case would not disserve the public interest. Therefore, the Court finds Crown Castle established it is entitled to the entry of a permanent injunction, enjoining the enforcement of Sections 4.C.3, 4.C.4, 4.E.1, and 5.B of the Design Manual.

### E. The City's Motion for Summary Judgment

The City contends it is entitled to summary judgment because its conduct falls within the Safe Harbor Provision which preserves a municipality's power to manage its rights-of-way. In light of the Court's ruling above, the Court determines the City's motion for summary judgment should be denied for the reasons set forth above. Accordingly, the City's motion for summary judgment is denied.

### F. Crown Castle's Motion for Judgment on the Pleadings

Crown Castle contends judgment on the pleadings is proper because the City has not yet filed an answer, and thus the City has procedurally admitted to all of Crown Castle's allegations in its amended complaint. The City, in response, moved for leave to file an answer.[32] In light of the Court's ruling above, the Court determines the motion for judgment on the pleadings should be denied as moot. Accordingly, Crown Castle's motion for judgment on the pleadings is denied as moot.

## IV. CONCLUSION

Based on the foregoing, the Court hereby

**ORDERS** that Plaintiff Crown Castle Fiber LLC's Motion for Judgment on the Pleadings (Document No. 123) is **DENIED**. The Court further

32. *See* discussion *supra* B.1 and B.2.

**ORDERS** that Defendant City of Pasadena's Motion to Dismiss and for Final Summary Judgment (Document No. 128) is **DENIED**. The Court further

**ORDERS** that Defendant City of Pasadena's Combined Opposition to Plaintiff's Motion for Judgment on the Pleadings and the City's Opposed Motion for Leave to File a Responsive Pleading (Document No. 134) is **DENIED AS MOOT**. The Court further

**ORDERS** that Plaintiff Crown Castle Fiber LLC's evidentiary objections to Defendant City of Pasadena's summary judgment evidence are **OVERRULED**. The Court further

**ORDERS** that Plaintiff Crown Castle Fiber LLC's Motion for Summary Judgment (Document No. 124) is **GRANTED**. The Court further

**ORDERS** that Defendant the City of Pasadena is **PERMANENTLY ENJOINED** from enforcing Sections 4.C.3, 4.C.4, 4.E.1, and 5.B of its Design Manual as to Plaintiff Crown Castle Fiber LLC for the purposes of installing new small nodes and node support poles in public rights-of-ways. The Court will enter a separate final judgment.

SIGNED at Houston, Texas, on this 2 day of August, 2022.

/s/ David Hittner
DAVID HITTNER
United States District Judge

**APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED SEPTEMBER 25, 2023**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-20454

CROWN CASTLE FIBER, L.L.C.,

*Plaintiff -Appellee,*

versus

CITY OF PASADENA, TEXAS,

*Defendant-Appellant.*

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:20-CV-3369

ON PETITION FOR REHEARING
AND REHEARING EN BANC

Before SMITH, HIGGINSON, and WILLETT, *Circuit Judges*.

PER CURIAM:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

# APPENDIX D — RELEVANT STATUTORY PROVISIONS

**U.S. Const. art 6, Cl. 2.**

**Clause 2, Supremacy Clause**

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

**42 USCS §1983**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

*Appendix D*

**47 U.S.C. §153(53)**

(53) Telecommunications service. The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

**47 U.S.C. §253**

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

**(b) State regulatory authority.** Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 [47 USCS § 254], requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

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

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

**(e) Commercial mobile service providers.** Nothing in this section shall affect the application of section 332(c)(3) [47 USCS § 332(c)(3)] to commercial mobile service providers.

**(f) Rural markets.** It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) [47 USCS § 214(e)(1)] for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply—

**(1)** to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) [47 USCS § 251(c)(4)] that effectively prevents a competitor from meeting the requirements of section 214(e)(1) [47 USCS § 214(e)(1)]; and

**(2)** to a provider of commercial mobile services.

*Appendix D*

**47 U.S.C. §332(c)(7)(B)(v)**

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

**47 U.S.C. §401**

**(a) Jurisdiction.** The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this Act by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this Act.

**(b) Orders of Commission.** If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the

same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

**(c) Duty to prosecute.** Upon the request of the Commission it shall be the duty of any district attorney [United States Attorney] of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.