The FCC has instead determined that a prohibition on all above-cost fees is justified because all above-cost fees, in the aggregate, effectively prohibit 5G deployment. The linchpin of the agency's aggregation theory is a 2018 study by Corning, Inc., which estimates at over $2 billion the cost-savings and reinvestment from reduced fees. *Small Cell Order* ¶¶ 7, 60 & n.169. But the Corning Study is not about fees above costs. And the FCC has not explained how this study tells us about the prevalence of above-cost fees or the burden such fees place on service providers.

Instead, the Corning Study calculated "the cost savings from capping fees at a level in line with the median of recent state regulations," estimating that amount at over $2 billion. Because this is not a measure of fees above costs, the Corning Study does not say whether the caps it used to measure savings approximate costs. Indeed, the Corning Study notes that "[t]here is still significant uncertainty around what 'typical' rates are." The study further states that "attachment and application fees" are "lesser drivers" of 5G deployment economics, raising questions about the extent to which all fees above costs necessarily effectively prohibit service.

At bottom, what the Corning Study conveys is that if fees are reduced, it will produce cost savings to those who pay the fees. *Small Cell Order* ¶¶ 50, 53, 55–56, 60 & n.169, 64–65 & nn.194–95. But that commonsense observation would be true of any fee considered in the aggregate. And it would seemingly mean that any fee in any amount could qualify as an effective prohibition, once aggregated. The same would be true of the aggregate effects of any form of regulation that localities would apply outside the fee context. I am therefore concerned that on the record as it stands, the FCC's approach lacks a limiting principle. At least absent some estimated

quantification of above-cost fees in the aggregate (which the Corning Study does not provide) or some further estimate tied to the rule it adopted, the FCC's logic would appear to justify the preemption of any state or local rule.

The FCC's "reinvestment" theory invites similar concerns. It may be true that every fee imposes some cost that, if avoided, could potentially be reinvested to expand 5G coverage. But it does not follow that every type of fee rises to the level of an "effective prohibition," which is the line Congress drew in the Telecommunications Act. *See Cal. Payphone*, 12 F.C.C. Rcd. at 14209 (stating that, "standing alone," the fact that providers "would generate less revenue . . . does not necessarily mean that [services] are impractical and uneconomic") (quotations omitted); *cf. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 390 n.11 (1999) (disagreeing "that a business can be impaired in its ability to provide services—even impaired in that ability in an ordinary, weak sense of impairment—when the business receives a handsome profit but is denied an even handsomer one"). A provider reinvestment theory, without more, would similarly appear to justify the preemption of any local policy that imposes costs on providers.

On this record, the FCC thus has not shown that above-cost fees effectively prohibit service in many, most, or a plurality of cases. I therefore cannot conclude that the agency has articulated "a rational connection between the facts found and the choice made." *Motor Vehicle Mfgs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotations omitted).

The FCC itself recognizes that "in theory, a sufficiently small departure from actual and reasonable costs might not

have the effect of prohibiting service," but concludes its cost-based standard is still appropriate because "the record does not reveal an alternative, administrable approach to evaluating fees." *Small Cell Order* ¶ 65 n.199. Concerns about administrability, though important as a policy matter, must still be operationalized under the statute's effective prohibition standard. A rule prohibiting fees that exceed cost by $1 would be equally administrable, but that does not mean such fees are invariably effective prohibitions on service, which is the relevant question under §§ 253(a) and 332(c)(7).

The *Order*'s safe harbors underscore my concerns. The FCC concedes that its safe harbors, which are not based on estimated costs, tolerate fee levels "in excess of costs in many cases." *Small Cell Order* ¶ 79 n.233. That makes it more difficult to credit the agency's finding that above-cost fees are *per se* effective prohibitions on service. The safe harbor also allows local governments to charge recurring fees of $270, which is substantially greater than the $150 cap on recurring fees used to calculate cost-savings in the Corning Study. There are also discrepancies between the FCC's safe harbors for application fees and the Corning Study's caps. The FCC does not estimate how much of the over $2 billion in cost-savings from the Corning Study would be left over under its more expansive safe harbors. Nor has the agency explained what portion of that figure can be attributed to above-cost fees.

I would have vacated and remanded the *Small Cell Order*'s prohibition on above-cost fees. *See* 5 U.S.C. § 706(2)(A), (E). While the FCC's objective of advancing 5G service is undoubtedly an important one, Congress set limits on when local actions can be preempted. While a prohibition on all above-cost fees may well be justifiable, I do

not believe the FCC has sufficiently justified it on the present record. With the exception to its references to legislative history, I otherwise join the court's opinion in full.