

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SPRINT CORPORATION,

Petitioner,

CITY OF BOWIE, Maryland; CITY OF EUGENE, Oregon;
CITY OF HUNTSVILLE, Alabama; CITY OF WESTMINSTER,
Maryland; COUNTY OF MARIN, California; CITY OF
ARCADIA, California; CULVER CITY, California; CITY OF
BELLEVUE, California; CITY OF BURIEN, Washington;
CITY OF BURLINGAME, Washington; CITY OF GIG
HARBOR, Washington; CITY OF ISSAQUAH, Washington;
CITY OF KIRKLAND, Washington; CITY OF LAS VEGAS,
Nevada; CITY OF LOS ANGELES, California; CITY OF
MONTEREY, California; CITY OF ONTARIO, California;
CITY OF PIEDMONT, California; CITY OF PORTLAND,
Oregon; CITY OF SAN JACINTO, California; CITY OF SAN
JOSE, California; CITY OF SHAFTER, California; CITY OF
YUMA, Arizona; COUNTY OF LOS ANGELES, California;
TOWN OF FAIRFAX, California; CITY OF NEW YORK,

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

VERIZON COMMUNICATIONS, INC.,

Petitioner,

CITY OF ARCADIA, California; CITY OF BELLEVUE,
California; CITY OF BURIEN, Washington; CITY OF
BURLINGAME, Washington; CITY OF GIG HARBOR,
Washington; CITY OF ISSAQUAH, Washington; CITY OF
KIRKLAND, Washington; CITY OF LAS VEGAS, Nevada;

No. 19-70123

No. 19-70124

CITY OF LOS ANGELES, California; CITY OF MONTEREY, California; CITY OF ONTARIO, California; CITY OF PIEDMONT, California; CITY OF PORTLAND, Oregon; CITY OF SAN JACINTO, California; CITY OF SAN JOSE, California; CITY OF SHAFER, California; CITY OF YUMA, Arizona; COUNTY OF LOS ANGELES, California; CULVER CITY, California; CITY OF NEW YORK; TOWN OF FAIRFAX, California,

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

PUERTO RICO TELEPHONE COMPANY, INC.,

Petitioner,

CITY OF ARCADIA, California; CITY OF BELLEVUE, California; CITY OF BURIEN, Washington; CITY OF BURLINGAME, Washington; CITY OF GIG HARBOR, Washington; CITY OF ISSAQUAH, Washington; CITY OF KIRKLAND, Washington; CITY OF LAS VEGAS, Nevada; CITY OF LOS ANGELES, California; CITY OF MONTEREY, California; CITY OF ONTARIO, California; CITY OF PIEDMONT, California; CITY OF PORTLAND, Oregon; CITY OF SAN JACINTO, California; CITY OF SAN JOSE, California; CITY OF SHAFER, California; CITY OF YUMA, Arizona; COUNTY OF LOS ANGELES, California;

CULVER CITY, California; TOWN OF FAIRFAX, California;
CITY OF NEW YORK,

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION

No. 19-70125

and UNITED STATES OF AMERICA,

Respondents.

CITY OF SEATTLE, Washington; CITY OF TACOMA, Washington; KING COUNTY, Washington; LEAGUE OF OREGON CITIES; LEAGUE OF CALIFORNIA CITIES; LEAGUE OF ARIZONA CITIES AND TOWNS,

Petitioners,

CITY OF BAKERSFIELD, California; CITY OF COCONUT CREEK, Florida; CITY OF LACEY, Washington; CITY OF OLYMPIA, Washington; CITY OF RANCHO PALOS VERDES, California; CITY OF TUMWATER, Washington; COLORADO COMMUNICATIONS AND UTILITY ALLIANCE; RAINIER COMMUNICATIONS COMMISSION; COUNTY OF THURSTON, Washington; CITY OF ARCADIA, California; CITY OF BELLEVUE, Washington; CITY OF BURIEN, Washington; CITY OF BURLINGAME, California; CITY OF GIG HARBOR, Washington; CITY OF ISSAQUAH, Washington; CITY OF KIRKLAND, Washington; CITY OF LAS VEGAS, Nevada; CITY OF LOS ANGELES, California; CITY OF MONTEREY, California; CITY OF ONTARIO, California; CITY OF PIEDMONT, California; CITY OF PORTLAND, Oregon; CITY OF SAN JACINTO, California; CITY OF SAN JOSE, California; CITY OF SHAFTER, California; CITY OF YUMA, Arizona; COUNTY OF LOS

ANGELES, California; CULVER CITY, California; TOWN OF FAIRFAX, California; CITY OF NEW YORK,

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

No. 19-70136

CITY OF SAN JOSE, California; CITY OF ARCADIA, California; CITY OF BELLEVUE, Washington; CITY OF BURIEN, Washington; CITY OF BURLINGAME, California; CULVER CITY, California; TOWN OF FAIRFAX, California; CITY OF GIG HARBOR, Washington; CITY OF ISSAQUAH, Washington; CITY OF KIRKLAND, Washington; CITY OF LAS VEGAS, Nevada; CITY OF LOS ANGELES, California; COUNTY OF LOS ANGELES, California; CITY OF MONTEREY, California; CITY OF ONTARIO, California; CITY OF PIEDMONT, California; CITY OF PORTLAND, Oregon; CITY OF SAN JACINTO, California; CITY OF SHAFTER, California; CITY OF YUMA, Arizona,

Petitioners,

CTIA—THE WIRELESS ASSOCIATION; COMPETITIVE CARRIERS ASSOCIATION; SPRINT CORPORATION; VERIZON COMMUNICATIONS, INC.; CITY OF NEW YORK; WIRELESS INFRASTRUCTURE ASSOCIATION,

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

No. 19-70144

CITY AND COUNTY OF SAN FRANCISCO,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

No. 19-70145

CITY OF HUNTINGTON BEACH,

Petitioner,

CITY OF ARCADIA, California; CITY OF BELLEVUE, Washington; CITY OF BURIEN, Washington; CITY OF BURLINGAME, California; CITY OF GIG HARBOR, Washington; CITY OF ISSAQUAH, Washington; CITY OF KIRKLAND, Washington; CITY OF LAS VEGAS, Nevada; CITY OF LOS ANGELES, California; CITY OF MONTEREY, California; CITY OF ONTARIO, California; CITY OF PIEDMONT, California; CITY OF PORTLAND, Oregon; CITY OF SAN JACINTO, California; CITY OF SAN JOSE, California; CITY OF SHAFTER, California; CITY OF YUMA, Arizona; COUNTY OF LOS ANGELES, California; CULVER CITY, California; TOWN OF FAIRFAX, California; CITY OF NEW YORK,

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

MONTGOMERY COUNTY, MARYLAND,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

AT&T SERVICES, INC.,

No. 19-70146

No. 19-70147

No. 19-70326

Petitioner,

CITY OF BALTIMORE, Maryland; CITY AND COUNTY OF SAN FRANCISCO, California; MICHIGAN MUNICIPAL LEAGUE; CITY OF ALBUQUERQUE, New Mexico; NATIONAL LEAGUE OF CITIES; CITY OF BAKERSFIELD, California; TOWN OF OCEAN CITY, Maryland; CITY OF BROOKHAVEN, Georgia; CITY OF COCONUT CREEK,

Florida; CITY OF DUBUQUE, Iowa; CITY OF EMERYVILLE, California; CITY OF FRESNO, California; CITY OF LA VISTA, Nebraska; CITY OF LACEY, Washington; CITY OF MEDINA, Washington; CITY OF OLYMPIA, Washington; CITY OF PAPILLION, Nebraska; CITY OF PLANO, Texas; CITY OF RANCHO PALOS VERDES, California; CITY OF ROCKVILLE, Maryland; CITY OF SAN BRUNO, California; CITY OF SANTA MONICA, California; CITY OF SUGARLAND, Texas; CITY OF TUMWATER, Washington; CITY OF WESTMINSTER, Maryland; COLORADO COMMUNICATIONS AND UTILITY ALLIANCE; CONTRA COSTA COUNTY, California; COUNTY OF MARIN, California; INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION; INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION; LEAGUE OF NEBRASKA MUNICIPALITIES; NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; RAINIER COMMUNICATIONS COMMISSION; THURSTON COUNTY, Washington; TOWN OF CORTE MADERA, California; TOWN OF HILLSBOROUGH, California; TOWN OF YARROW POINT, Washington; CITY OF ARCADIA, California; CITY OF BELLEVUE, Washington; CITY OF BURIEN, Washington; CITY OF BURLINGAME, California; CITY OF CULVER CITY, California; CITY OF GIG HARBOR, Washington; CITY OF ISSAQUAH, Washington; CITY OF KIRKLAND, Washington; CITY OF LAS VEGAS, Nevada; CITY OF LOS ANGELES, California; CITY OF MONTEREY, California; CITY OF ONTARIO, California; CITY OF PIEDMONT, California; CITY OF PORTLAND, Oregon; CITY OF SAN JACINTO, California; CITY OF SAN JOSE, California; CITY OF SHAFTER, California; CITY OF YUMA, Arizona;

COUNTY OF LOS ANGELES, California; TOWN OF
FAIRFAX, California,

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

AMERICAN PUBLIC POWER ASSOCIATION,

Petitioner,

CITY OF ALBUQUERQUE, New Mexico; NATIONAL
LEAGUE OF CITIES; CITY OF BROOKHAVEN, Georgia;
CITY OF BALTIMORE, Maryland; CITY OF DUBUQUE,
Iowa; TOWN OF OCEAN CITY, Maryland; CITY OF
EMERYVILLE, California; MICHIGAN MUNICIPAL
LEAGUE; TOWN OF HILLSBOROUGH, California; CITY OF
LA VISTA, Nebraska; CITY OF MEDINA, Washington;
CITY OF PAPANILLION, Nebraska; CITY OF PLANO, Texas;
CITY OF ROCKVILLE, Maryland; CITY OF SAN BRUNO,
California; CITY OF SANTA MONICA, California; CITY OF
SUGARLAND, Texas; LEAGUE OF NEBRASKA
MUNICIPALITIES; NATIONAL ASSOCIATION OF
TELECOMMUNICATIONS OFFICERS AND ADVISORS; CITY
OF BAKERSFIELD, California; CITY OF FRESNO,
California; CITY OF RANCHO PALOS VERDES, California;
CITY OF COCONUT CREEK, Florida; CITY OF LACEY,
Washington; CITY OF OLYMPIA, Washington; CITY OF
TUMWATER, Washington; TOWN OF YARROW POINT,
Washington; THURSTON COUNTY, Washington;
COLORADO COMMUNICATIONS AND UTILITY ALLIANCE;
RAINIER COMMUNICATIONS COMMISSION; CITY AND
COUNTY OF SAN FRANCISCO, California; COUNTY OF
MARIN, California; CONTRA COSTA COUNTY, California;

No. 19-70339

TOWN OF CORTE MADERA, California; CITY OF WESTMINSTER, Maryland,

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

CITY OF AUSTIN, Texas; CITY OF ANN ARBOR, Michigan; COUNTY OF ANNE ARUNDEL, Maryland; CITY OF ATLANTA, Georgia; CITY OF BOSTON, Massachusetts; CITY OF CHICAGO, Illinois; CLARK COUNTY, Nevada; CITY OF COLLEGE PARK, Maryland; CITY OF DALLAS, Texas; DISTRICT OF COLUMBIA; CITY OF GAITHERSBURG, Maryland; HOWARD COUNTY, Maryland; CITY OF LINCOLN, Nebraska; MONTGOMERY COUNTY, Maryland; CITY OF MYRTLE BEACH, South Carolina; CITY OF OMAHA, Nebraska; CITY OF PHILADELPHIA, Pennsylvania; CITY OF RYE, New York; CITY OF SCARSDALE, New York; CITY OF SEAT PLEASANT, Maryland; CITY OF TAKOMA PARK, Maryland; TEXAS COALITION OF CITIES FOR UTILITY ISSUES; MERIDIAN TOWNSHIP, MICHIGAN; BLOOMFIELD TOWNSHIP, MICHIGAN; MICHIGAN TOWNSHIPS ASSOCIATION; MICHIGAN COALITION TO PROTECT PUBLIC RIGHTS-OF-WAY,

Petitioners,

CITY OF ALBUQUERQUE, New Mexico; NATIONAL LEAGUE OF CITIES; CITY OF BROOKHAVEN, Georgia; CITY OF BALTIMORE, Maryland; CITY OF DUBUQUE, Iowa; TOWN OF OCEAN CITY, Maryland; CITY OF EMERYVILLE, California; MICHIGAN MUNICIPAL LEAGUE; TOWN OF HILLSBOROUGH, California; CITY OF LA VISTA, Nebraska; CITY OF MEDINA, Washington; CITY OF PAPILLION, Nebraska; CITY OF PLANO, Texas; CITY OF

No. 19-70341

ROCKVILLE, Maryland; CITY OF SAN BRUNO, California; CITY OF SANTA MONICA, California; CITY OF SUGARLAND, Texas; LEAGUE OF NEBRASKA MUNICIPALITIES; NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; CITY OF BAKERSFIELD, California; CITY OF FRESNO, California; CITY OF RANCHO PALOS VERDES, California; CITY OF COCONUT CREEK, Florida; CITY OF LACEY, Washington; CITY OF OLYMPIA, Washington; CITY OF TUMWATER, Washington; TOWN OF YARROW POINT, Washington; THURSTON COUNTY, Washington; COLORADO COMMUNICATIONS AND UTILITY ALLIANCE; RAINIER COMMUNICATIONS COMMISSION; CITY AND COUNTY OF SAN FRANCISCO, California; COUNTY OF MARIN, California; CONTRA COSTA COUNTY, California; TOWN OF CORTE MADERA, California; CITY OF WESTMINSTER, Maryland,

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

CITY OF EUGENE, Oregon; CITY OF HUNTSVILLE, Alabama; CITY OF BOWIE, Maryland,

Petitioners,

CITY OF ALBUQUERQUE, New Mexico; NATIONAL LEAGUE OF CITIES; CITY OF BROOKHAVEN, Georgia; CITY OF BALTIMORE, Maryland; CITY OF DUBUQUE, Iowa; TOWN OF OCEAN CITY, Maryland; CITY OF EMERYVILLE, California; MICHIGAN MUNICIPAL LEAGUE; TOWN OF HILLSBOROUGH, California; CITY OF LA VISTA, Nebraska; CITY OF MEDINA, Washington; CITY OF PAPIILLION, Nebraska; CITY OF PLANO, Texas; CITY OF ROCKVILLE, Maryland; CITY OF SAN BRUNO, California;

No. 19-70344

CITY OF SANTA MONICA, California; CITY OF SUGARLAND, Texas; LEAGUE OF NEBRASKA MUNICIPALITIES; NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; CITY OF BAKERSFIELD, California; CITY OF FRESNO, California; CITY OF RANCHO PALOS VERDES, California; CITY OF COCONUT CREEK, Florida; CITY OF LACEY, Washington; CITY OF OLYMPIA, Washington; CITY OF TUMWATER, Washington; TOWN OF YARROW POINT, Washington; THURSTON COUNTY, Washington; COLORADO COMMUNICATIONS AND UTILITY ALLIANCE; RAINIER COMMUNICATIONS COMMISSION; CITY AND COUNTY OF SAN FRANCISCO, California; COUNTY OF MARIN, California; CONTRA COSTA COUNTY, California; TOWN OF CORTE MADERA, California; CITY OF WESTMINSTER, Maryland,

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

OPPOSITION OF PETITIONERS CITY AND COUNTY OF SAN FRANCISCO, CA; CITY OF EUGENE, OR; CITY OF HUNTSVILLE, AL; CITY OF BOWIE, MD; AND INTERVENORS COUNTY OF MARIN, CA; CONTRA COSTA COUNTY, CA; TOWN OF CORTE MADERA, CA; AND CITY OF WESTMINSTER, MD, TO THE FEDERAL COMMUNICATIONS COMMISSION'S MOTION TO HOLD IN ABEYANCE

On February 25, 2019, Respondent Federal Communications Commission (“FCC or the “Commission”) moved to (1) consolidate the twelve above-captioned

cases,¹ (2) abate proceedings in this Court pending the Commission's disposition of a petition for administrative reconsideration, and (3) defer filing of the administrative record.² Petitioner City and County of San Francisco, CA (No. 19-70145); Petitioners City of Eugene, OR; City of Huntsville, AL; City of Bowie, MD (No. 19-70344); and Intervenors County of Marin, CA; Contra Costa County, CA; Town of Corte Madera, CA; and City of Westminster, MD (collectively, "Municipal Parties") do not oppose consolidation of the twelve above-captioned cases.

We do, however, oppose the FCC's Motion to hold these matters in abeyance and to delay filing of the record. Municipal Parties support the Opposition to the FCC's Motion filed by the City of San Jose, et al., the City of Austin Texas, et al., and Local Government Intervenors ("Local Governments' Opposition"). In addition to the statement of facts and arguments provided in Local Governments' Opposition, Municipal Parties offer the following additional arguments why the Court should deny the FCC's request to hold these cases in abeyance and delay filing the record.

¹ At the time of the FCC's Motion, there were thirteen related cases. On February 28, 2019, however, this Court granted the motion to voluntarily dismiss the Petition in No. 19-70148.

² FCC Motion to Consolidate Related Cases, Abate Proceedings Pending Agency Reconsideration, and Defer Filing for the Administrative Record at 24, *City of Eugene, Or. v. FCC*, No. 19-70344 (9th Cir. Feb. 25, 2019) ("Motion").

ARGUMENT

Reviewing courts have discretion to hold petitions for review in abeyance pending further Commission proceedings, but “this practice is not an iron-clad rule.” *Teledesic LLC v. FCC*, 275 F.3d 75, 83 (D.C. Cir. 2001) (citing *MCI Telecomms. Corp. v. FCC*, 143 F.3d 606, 608 (D.C. Cir. 1998)).³ Instead, courts look to prudential considerations when determining whether to hold a case in abeyance pending administrative reconsideration. *MCI Telecomms. Corp.*, 143 F.3d at 608. Likewise, “[d]etermining whether an agency’s decision is ripe for review ‘requir[es] us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.’” *Navajo Nation v. U.S. Dep’t. of Interior*, 819 F.3d 1084, 1095 (9th Cir. 2016) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 (1977)). Here, all factors weigh against granting the FCC’s Motion to hold these cases in abeyance.

- A. *Holding these cases in abeyance would result in significant hardship to both local governments and courts, whereas allowing them to proceed would cause minimal hardship to the FCC.***

Holding these cases in abeyance pending Commission action on the petition for reconsideration would impose significant hardships on local governments.

³ Indeed, in *Teledesic LLC*, the D.C. Circuit “decided *not* to hold in abeyance Teledesic’s petition for review . . . even though other parties had petitioned the Commission for reconsideration.” *Id.* (emphasis added).

Grant of the FCC's Motion would allow the new obligations and restrictions imposed on local governments by the order on appeal⁴ to remain in effect, shielding them from judicial review, for an indefinite period of time to be determined by the Commission. That, in turn, would place local governments in an extended, and potentially costly, dilemma.

For instance, the *Order* establishes two new shot clocks defining the presumptively reasonable periods of time for processing applications for (1) collocation of small wireless facilities using a preexisting structure (60 days), and (2) attachment of small wireless facilities using a new structure (90 days). If a local government fails to act within these shot clock deadlines, the *Order* provides that such inaction is a presumptive prohibition on the provision of services in violation of 47 U.S.C. §§ 253(a) & 332(c)(7)(B)(i)(II). As a result, so long as the *Order* remains in effect pending judicial review, local governments will be forced to follow these new shot clocks or risk litigation. Either choice results in hardships to local governments that will only grow larger the longer judicial review of the *Order* remains pending. If local governments opt to comply with the new shot clocks, they will not be able to revisit the decisions they make under those shot clocks for particular deployment applications, even if the shot clocks are

⁴ Declaratory Ruling and Third Report and Order, *Accelerating Wireless & Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, FCC 18-133, 83 Fed. Reg. 51,867 (Oct. 15, 2018) (“*Order*”).

subsequently invalidated by this Court. If local governments instead do not act within the new shot clocks and are sued, they face the costs and other burdens associated with responding to each lawsuit. In addition to any burdens associated with substantive decisions that may be reached in these cases, the sheer number of potential cases means that even relatively minor burdens in individual cases will be substantial in aggregate. This is no small matter. The *Order* (at ¶ 47) cites to comments anticipating the deployment of “hundreds of thousands of wireless facilities in the next few years alone.”

The new shot clocks are not the only elements of the *Order* that will spawn increased litigation risk absent prompt judicial action in these appeals. For instance, the *Order* (at ¶¶ 78-80) rules that “fair and reasonable compensation” for wireless providers’ commercial use of public property is limited to cost recovery and then establishes threshold limits for certain types of fees, above which fees are presumed inconsistent with Section 253 or Section 332(c)(7)(B), unless they can be proved to be cost-justified. Some Municipal Parties, consistent with state law and with prior court precedent, charge rent-based fees for commercial use of municipal property. San Francisco, for example, has licensed access to hundreds of its streetlight poles and transit poles for small cell facilities at an agreed-upon rate in excess of \$4,000 per year. Demand for access to those poles has continued unabated since the FCC issued the *Order*. Further, many of those licenses have

reached the end of their first year and must be renewed for the agreed-upon license fee. Again, while the *Order* is in effect, a local government must either comply (e.g., charge only cost-based fees at or below the *Order*'s presumptive thresholds) or risk litigation over its actions on every wireless siting application it receives, or at renewal of any existing license agreement. Holding these appeals in abeyance would multiply these hardships.

The FCC claims in its Motion that judicial economy would be better served by holding the appeals in abeyance. That is wrong. Judicial economy would be best served by prompt appellate resolution of the appeals of the *Order*. The longer the *Order* remains in effect (absent a stay), the more district court cases that will be brought against local governments claiming that they have violated the *Order*'s shot clocks, fee thresholds, or other obligations or limitations imposed on them by the *Order*.

This is not an abstract or speculative possibility: Section 332(c)(7)(B)(v) requires a person adversely affected by a state or local government's action or failure to act on a wireless application to commence an action in court within 30 days, and directs the court to decide the matter "on an expedited basis." 47 U.S.C. § 332(c)(7)(B)(v). The district courts handling the individual cases spawned by the *Order* will need to either (1) await this Court's decision on the validity of the underlying *Order* before acting on wireless providers' lawsuits, or (2) issue

decisions based on the *Order's* standards that may subsequently be invalidated if this Court were to overturn the *Order* or significant parts of it. Absent a stay of the *Order* pending the FCC's action on the petition for reconsideration, granting the FCC's Motion would only increase the uncertainty and multiply the number of court actions involving disputes between wireless providers and local governments.

In contrast, wireless providers would face no hardship if this Court denies the FCC's Motion to hold these cases in abeyance. Absent a stay, the elements of the *Order* challenged by local governments, and supported by wireless providers, would remain in effect unless and until this Court issued an order invalidating them. And wireless provider petitioners would also benefit from prompt judicial decision regarding the limited issues raised in their petitions for review.

Denial of the FCC's Motion would impose, at most, minimal administrative burdens on the Commission. The Commission states in its Motion (at 24) that it will "require substantial time and resources for agency staff to compile, review, and prepare the record . . . for filing in this Court." But granting the FCC's Motion would not eliminate its administrative burden. The only aspect of that burden implicated by the Commission's Motion is the timing of when the Commission must file the record, not the amount of work involved.⁵ That is not a valid basis

⁵ It should be noted that the record in the proceeding is already compiled,

for holding these cases in abeyance. There would also be no significant burden on the FCC associated with further supplementation of the record should additional petitions for review be filed after the Commission acts on the pending petition for reconsideration. And whatever incremental administrative burdens the Commission might face associated with the timing of when the record must be filed, they pale in comparison to the substantial additional litigation, risk, and cost burdens facing local governments the longer these appeals remain pending.

Finally, the Commission wrongly suggests (at 22) that the Tenth Circuit's earlier order denying local government petitioners' motion for a stay of the FCC *Order* pending judicial review provides support for abeyance here. It is one thing not to stay an FCC action pending appellate review; it is quite another to place an appeal on hold while the appealed FCC order's consequences continue to multiply. The Tenth Circuit was addressing a different question, subject to a fundamentally different standard of review; a "critical" factor in determining whether to grant a stay is "whether the applicant will be irreparably injured absent a stay." *Nken v.*

continuously updated and available online. FCC Docket No. 17-79, available at [https://www.fcc.gov/ecfs/search/filings?proceedings_name=17-79&q=\(proceedings.name:\(\(17%5C-79*\)\)%20OR%20proceedings.description:\(\(17%5C-79*\)\)\)&sort=date_disseminated,DESC](https://www.fcc.gov/ecfs/search/filings?proceedings_name=17-79&q=(proceedings.name:((17%5C-79*))%20OR%20proceedings.description:((17%5C-79*)))&sort=date_disseminated,DESC); FCC Docket No. 17-84, available at [https://www.fcc.gov/ecfs/search/filings?proceedings_name=17-84&q=\(proceedings.name:\(\(17%5C-84*\)\)%20OR%20proceedings.description:\(\(17%5C-84*\)\)\)&sort=date_disseminated,DESC](https://www.fcc.gov/ecfs/search/filings?proceedings_name=17-84&q=(proceedings.name:((17%5C-84*))%20OR%20proceedings.description:((17%5C-84*)))&sort=date_disseminated,DESC).

Holder, 556 U.S. 418, 434 (2009). The standard for assessing whether these appeals should be held in abeyance is “hardship,” not irreparable injury. *See Navajo Nation*, 819 F.3d at 1095. The Tenth Circuit’s conclusion regarding irreparable injury provides no guidance regarding the weighing of relative hardships to the parties associated with holding these appeals in abeyance pending Commission action on the petition for reconsideration versus allowing them to proceed.

B. The issues raised in these cases are fit for judicial determination.

The focus of the Commission’s Motion is the possibility that its disposition of the pending petition for reconsideration could affect what issues may ultimately remain disputed on judicial review. This mischaracterizes the nature of the issues raised by the petitioners in these appeals compared to those raised in the petition for reconsideration.

The petition for reconsideration does not raise many of the arguments that will be raised by local government petitioners in the above-captioned cases. For instance, the petition for reconsideration does not raise arguments regarding the *Order*’s consistency with statutory text of 47 U.S.C. §§ 253 and 332(c)(7) or with the U.S. Constitution. These legal arguments, which are raised by petitioners in these appeals, will not be resolved by the Commission’s disposition of the pending

petition for reconsideration. These issues are therefore fit for judicial determination now.

The FCC nevertheless asserts that there is “substantial overlap between the local government entities’ petition for reconsideration and the petitions for review filed by other local governments.” Motion at 20. But even if that is so, it does not support abeyance. To the extent that such overlap exists, it is on basic and central aspects of the Commission’s *Order*, such as “the effective prohibition standard generally.” *Id.* at 19. If the Commission genuinely believes that, in acting on the petition for reconsideration, it may change course on the fundamental approach taken in the *Order*, it should be willing to agree to stay the *Order* pending reconsideration. It has not done so, nor has it asked this Court to do so. There has been no indication that the Commission will fundamentally reverse course when it acts on the petition for reconsideration. Thus, the concern about waste of judicial resources expressed in the FCC’s Motion (at 20) is at best theoretical, and at worst disingenuous. It stands in stark contrast to the real, concrete hardships facing local governments while these appeals remain in limbo.

The Court should not permit the FCC to use its inaction on the petition for reconsideration to delay judicial review of its *Order*. That petition was filed with the FCC on November 14, 2018, but because notice of the petition was not published in the *Federal Register* until February 7, 2019, the comment period for

this petition concluded only recently. If the Commission truly believes that the issues raised in the petition for reconsideration “substantial[ly] overlap” with the issues in these appeals, then the Commission should be able to act quickly on the petition for reconsideration. Therefore, if (contrary to Municipal Parties’ position) the Court were to decide to hold these cases in abeyance, it should keep the FCC under a tight leash. The Court should hold the appeals in abeyance for no more than 21 days and require the FCC to renew its motion if it has not acted on the petition for reconsideration by that time.

CONCLUSION

For the reasons stated above, the Court should (1) consolidate the twelve above-captioned cases, and (2) deny the FCC’s Motion to hold these cases in abeyance and defer filing of the record. In the alternative, should the Court be inclined to grant the Motion for abatement, it should limit its duration to 21 days.

Respectfully submitted,

/s/ Tillman L. Lay

Tillman L. Lay
Jeffrey M. Bayne

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Bowie, MD; County of Marin, CA;
Contra Costa County, CA; Town of
Corte Madera, CA; and City of
Westminster, MD*

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March 7, 2019

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/s/ Tillman L. Lay

Tillman L. Lay

March 7, 2019

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2019, I caused the foregoing Opposition to be filed with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the electronic CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served electronically by the CM/ECF system.

/s/ Tillman L. Lay

Tillman L. Lay

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