IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF PORTLAND, *Petitioner*, v. UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents*.	No. 18-72689 (consolidated with No. 19-70490)
SPRINT CORPORATION, *Petitioner*, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents*.	No. 19-70123 (consolidated with Nos. 19-70124, 19-70125, 19-70136, 19-70144, 19-70145, 19-70146, 19-70147, 19-70326, 19-70339, 19-70341, and 19-70344)
AMERICAN ELECTRIC POWER SERVICE CORPORATION, *et al.*, *Petitioners*, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents*.	No. 19-70490 (consolidated with No. 18-72689)

RESPONDENTS' OPPOSITION TO MOTION FOR EXPEDITED ORAL ARGUMENT AND SEPARATION OF ARGUMENTS

Respondents respectfully oppose the local government entities' motion to expedite oral argument in these cases. We do so for two principal reasons. First, these cases do not satisfy this Court's standard under Ninth Circuit Rules 27-12 and 34-3 to expedite oral argument or to prioritize these cases over other pending cases, especially given the Tenth Circuit's earlier order finding that Movants will not suffer irreparable harm during the time these cases are under review.[1] Second, given the number and breadth of issues presented and the extensive briefing before the Court, we believe it best to schedule argument in the ordinary course to ensure that the argument panel has time to review those voluminous materials and ample opportunity to prepare prior to holding argument.

1. Under Ninth Circuit Rule 27-12, motions to expedite will be granted only upon a showing of "good cause," and under Ninth Circuit Rule 34-3 and 28 U.S.C. § 1657, any request to prioritize oral argument

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[1] Order, *City of San Jose v. FCC*, No. 18-9568 (10th Cir. Jan. 10, 2019) (*Stay Denial Order*) (Movants "have failed to meet their burden of showing irreparable harm if a stay is not granted"). The Tenth Circuit panel issued that finding after full briefing on local governments' unsuccessful motion for a stay pending review. The Tenth Circuit subsequently transferred the petitions for review to this Circuit, and the earlier panel's rulings remain law of the case in this proceeding.

in these cases over other pending cases requires the same showing. Of the situations discussed in those rules, the only example of "good cause" that could potentially be invoked here consists of "situations in which . . . in the absence of expedited treatment, irreparable harm may occur or the appeal may become moot." 9th Cir. R. 27-12(3).

These cases do not appear to satisfy that standard. To the extent Movants might argue that they will suffer irreparable harm while they await this Court's review, that issue was already litigated and decided against them earlier in this proceeding, when many of the same local governments unsuccessfully moved for a stay pending review. "After reviewing all the parties' submissions," the Tenth Circuit expressly found that the local governments "have failed to meet their burden of showing [they will suffer] irreparable harm" while these cases are under review. *Stay Denial Order*, *supra* note 1, at 2.

That earlier panel ruling remains law of the case, and given the lack of irreparable harm, Movants have shown no basis now to depart from the Court's ordinary procedures at this late stage. Movants principally argue (Mot. 7–8) that expedition is necessary because there are "other cases progressing through the lower courts" that could be decided while this case is pending. But in denying the motion for a stay

pending review, the earlier panel already considered that disputes over wireless siting requests might arise and be litigated while these cases are pending, and it expressly found that such litigation would not amount to irreparable harm. The wisdom of that determination is confirmed by the fact that Movants identify only two examples of such litigation during the nearly nine months that the *Small Cell Order* has been in effect.[2] And even in those two examples, Movants do not demonstrate that the ultimate outcome in either case would change depending on how this Court rules, and thus have not shown they will be harmed at all—much less irreparably harmed—if those cases proceed in the lower courts while these cases are under review.

Movants' further claim that the Commission has announced plans to "build[] on th[e] Orders [under review]" while these cases are pending (Mot. 9–10) is incorrect. The Commission has not proposed to take action

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[2] In fact, both cases appear to concern wireless siting decisions issued *before* the orders under review here went into effect. Moreover, the docket reveals that one of those two cases has been stayed for nearly a year while the parties discuss possible settlements. *Crown Castle NG West LLC v. Town of Hillsborough*, No. 3:18-cv-02473 (N.D. Cal.). And the other case was recently remanded to the district court after the Third Circuit overturned a previous decision addressing separate issues. *T-Mobile Ne. LLC v. City of Wilmington*, No. 1:16-cv-01108 (D. Del.); *see T-Mobile Ne. LLC v. City of Wilmington*, 913 F.3d 311 (3d Cir. 2019).

on any of these issues. Instead, Movants point to *petitions filed by private parties* asking the Commission to initiate new proceedings. Under the Commission's rules, any interested person can petition the Commission to act on any matter. *See* 47 C.F.R. § 1.2 (petitions for a declaratory ruling); *id.* § 1.401 (petitions for rulemaking). Whenever such a petition is filed, the Commission's rules provide that the agency will automatically assign a docket number and issue a public notice seeking comment on the petition. *Id.* §§ 1.2(b), 1.403. The fact that the Commission has opened new dockets in response to those petitions and has sought public comment does not mean that the Commission will act on those petitions. The requests for public comment simply reflect the agency's routine information-gathering practices, and Movants suffer no harm—let alone irreparable harm—from the Commission's routine practice of seeking public comment on any petition it receives.[3]

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[3] Movants likewise miss the mark in objecting (Mot. 9) that the agency did not suspend the comment cycle on one of those petitions, involving a fee dispute between Verizon and Clark County, when those parties agreed to discuss possible settlements. The agency explained that while it "encourage[s] Verizon and Clark County to continue settlement efforts," the underlying dispute "potentially affect[s] not only Verizon but also other providers operating both in and outside of Clark County," so "ongoing discussions do not justify postponing the pleading cycle in this proceeding." Order, *Verizon Petition for*

Finally, expedited argument in these cases is not warranted by Movants' ostensible concerns (Mot. 10) about "the environmental impacts of . . . small cells" through "radio frequency exposure." As the government explained in its merits brief, the Commission has been evaluating its radiofrequency exposure limits in a separate proceeding; that issue is not a subject addressed by the orders under review in these cases. *See* Resp. Br. at 151–53, *City of Portland v. United States*, No. 18-72689 (9th Cir. filed Aug. 8, 2019). On August 8, the FCC's Chairman circulated for the Commission's review a draft order that would resolve that proceeding. *Id.* at 152 n.34. Once the Commission issues a final order in that proceeding, any party that is dissatisfied with the agency's treatment of radiofrequency exposure issues can seek judicial review at that time. But the timing of oral argument *in these cases* will have no direct effect on when parties are able to obtain resolution of the radiofrequency exposure issues that are being addressed in that separate proceeding.

Declaratory Ruling Regarding Fees Charged by Clark County, Nevada for Small Wireless Facilities, DA 19-927, WT Docket No. 19-230 (Wireless Telecomms. Bur. Sept. 18, 2019). Movants cannot point to any harm from the agency's practice of soliciting public comment from other interested parties, and the prospect that the dispute might be settled without agency intervention only undercuts Movants' speculation that further agency action could be imminent.

2. Given the voluminous briefing before the Court and the unusual number and breadth of issues raised, there is no reason to risk shortchanging the amount of time for the argument panel and the parties to prepare for oral argument. All told, the argument panel will have before it in these cases at least 28 separate briefs (five opening briefs, two joint answering briefs, five intervenor briefs, eleven amicus briefs, and five reply briefs) comprising roughly 230,000 words, in addition to the underlying agency orders and other record materials. Reviewing all those materials will be a substantial undertaking; it is not a task that the argument panel should have to complete on an expedited schedule. Nor is it in the public interest to rush the oral argument in this case and reduce the amount of time available for the Court and the parties to prepare.

3. Finally, Movants' request that the *Portland* and *Sprint* cases be argued separately from the *American Electric Power* case appears to conflict with the motions panel's order consolidating the *Portland* and *American Electric Power* cases and directing that they "be assigned to the same panel assigned to decide" the *Sprint* case. Order, *City of Portland v. United States*, No. 18-72689 (9th Cir. Mar. 20, 2019). We understand that order to have contemplated that these cases be argued together. The

American Electric Power case was transferred to this Circuit and consolidated with *Portland* (which in turn has been briefed jointly with *Sprint*) because both cases challenge the same agency order, *see* Christopher A. Goelz & Peter K. Batalden, *Rutter Group Practice Guide: Federal Ninth Circuit Civil Appellate Practice* § 6:165, and "[c]onsolidated cases . . . automatically are set for argument together," *id.* § 9:59.

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For the foregoing reasons, Respondents respectfully submit that the motion for expedited argument and for separation of arguments should be denied.

Dated: October 4, 2019

Respectfully submitted,

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I hereby certify that on October 4, 2019, I caused the foregoing Opposition to Motion for Expedited Oral Argument and Separation of Arguments 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.

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