

**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

No. 19-70123

No. 19-70124

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; 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 SHAFTER, California; CITY OF YUMA, Arizona; COUNTY OF LOS ANGELES, California;

No. 19-70125

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

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION
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

No. 19-70136

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

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

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.

No. 19-70144

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

CITY AND COUNTY OF SAN FRANCISCO,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

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.

No. 19-70145

No. 19-70146

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.,

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

No. 19-70147

No. 19-70326

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,

No. 19-70339

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 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 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 PAPIILLION, 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,

No. 19-70341

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 PAPILLION, 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

No. 19-70344

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.

On Petitions for Review of an Order of
the Federal Communications Commission

**RESPONDENT FEDERAL COMMUNICATIONS COMMISSION'S
REPLY IN SUPPORT OF MOTION TO CONSOLIDATE
RELATED CASES, ABATE PROCEEDINGS PENDING
AGENCY RECONSIDERATION, AND DEFER FILING OF THE
ADMINISTRATIVE RECORD**

All parties agree that the Court should consolidate these twelve related cases, which all seek judicial review of the same agency *Order* and which substantially overlap in the issues raised and the relief

sought.¹ The petitioners in Nos. 19-70123, 19-70124, 19-70125, and 19-70326 further agree with respondent Federal Communications Commission that the Court should hold these cases in abeyance pending the Commission's disposition of a petition for agency reconsideration. That petition for reconsideration raises substantially the same issues as the petitions for review here, and the pleading cycle to submit comments on reconsideration closed just last week. The petitioners in Nos. 19-70136, 19-70144, 19-70146, 19-70339, 19-70341, and 19-70344 (collectively, the "objecting petitioners") nevertheless urge the Court to proceed with judicial review now, even though administrative proceedings are still ongoing.

The objecting petitioners have not shown any compelling reason for the Court to take the unusual step of proceeding with judicial review while the underlying *Order* remains under reconsideration. Any such review would be premature, and could even prove unnecessary, because the rulings that petitioners seek to challenge are subject to change on reconsideration. Proceeding with judicial review at this time thus would

¹ The petitioners in a thirteenth case have voluntarily dismissed their petition for review. Order, *City of N. Little Rock v. FCC*, No. 19-70148 (9th Cir. Feb. 26, 2019).

not be an efficient use of the Court's or the parties' time and resources. And to the extent the objecting petitioners complain that even a brief pause could cause them undue hardship, those complaints misstate the *Order's* holdings and effect and are undercut by the Tenth Circuit's prior ruling in this very case (before it was transferred to this Circuit) that in seeking to stay the *Order* petitioners "failed to meet their burden of showing irreparable harm if a stay is not granted." Order, *City of San Jose v. FCC*, No. 18-9568 (10th Cir. Jan. 10, 2019). The Court should therefore adhere to the ordinary practice of holding these petitions for review in abeyance pending the completion of agency proceedings.

1. As we explained in the Motion (at 17-23), when petitions for review of an agency order and petitions for agency reconsideration of the same order are each filed by separate parties, the common practice is for the reviewing court to hold judicial proceedings in abeyance pending resolution of the administrative proceedings. That is the approach this Court recently took under identical circumstances in *City of Portland v. FCC*, in which the Court granted the FCC's request for abeyance for 60 days and invited the agency to thereafter file a status report in which it could request further abeyance—essentially the same relief we propose here. Compare Order, *City of Portland v. FCC*, No. 18-72689 (9th Cir.

Dec. 20, 2018), *with* Mot. 22-23 (“If the Court decides to hold this case in abeyance, the Commission proposes to advise the Court and the parties at 60-day intervals of the status of proceedings concerning the petition for reconsideration, and to notify the Court and all parties promptly when those reconsideration proceedings are concluded.”). The same result should follow here—especially since the petitioners sought and obtained transfer to this Circuit on the ground that the Commission rules challenged in *City of Portland* and the rules under review here constitute “the same order.” *See* Order, *Sprint Corp. v. FCC*, No. 18-9563 (10th Cir. Jan. 10, 2019).

This practice avoids the potential for conflict when both the agency and a court exercise simultaneous jurisdiction over the same administrative proceeding. It conserves the Court’s and the parties’ resources by avoiding any risk that review will be complicated or disrupted by further developments on reconsideration. And it protects against the possibility of piecemeal review that could arise if additional parties file petitions for judicial review once the agency rules on the petition for reconsideration. *See* Mot. 20-21.

In response, the objecting petitioners speculate that the Commission is unlikely to change course on reconsideration. *See* San Jose Opp. 13; San Francisco Opp. 19. The Commission cannot prejudge how it will rule on the petition for reconsideration, however, and it would be equally inappropriate for the Court do so. The Commission solicited public comment on the petition for reconsideration and must now review the comments it received.² And even if the Commission ultimately adheres to its earlier rulings, its order disposing of the petition for reconsideration may still affect this Court's review by providing additional analysis of issues that remain in dispute or additional evidence bearing on those issues.

2. There is no real question that substantial overlap exists between the petitions for review in these cases and the petition for

² The objecting petitioners' insinuations that the agency somehow dragged its feet in establishing a pleading cycle (San Jose Opp. 4, 15; San Francisco Opp. 19-20) are unfounded. The petition for reconsideration was filed on November 14, shortly before the Thanksgiving holiday, and the agency issued a public notice soliciting comment on December 26, immediately after the Christmas holiday. *See* Mot. Ex. B. Because of the extended government shutdown resulting from a lapse in appropriations, however, the Federal Register did not formally publish that notice—which is required to initiate the pleading cycle in a rulemaking proceeding—until February 7. The pleading cycle concluded just 25 days later.

reconsideration pending before the Commission. The petitions for review challenge the Commission's interpretation of the phrase "prohibit or have the effect of prohibiting" in 47 U.S.C. §§ 253(a) and 332(c)(7) as applied to state and local fees for wireless facility deployments and timelines for state and local review. The petition for reconsideration likewise asks the Commission to reconsider its rulings on state and local fees, *see* Mot. Ex. A at 16-19; timelines for state and local review, *see id.* at 20-22; and the effective prohibition standard generally, *see id.* at 20. There is also no question that the objecting petitioners are similarly situated to the array of local government entities that filed the petition for agency reconsideration.

The objecting petitioners now argue, in essence, that they intend to brief these issues more thoroughly than the parties seeking reconsideration and may raise additional legal arguments bearing on these same issues. *See* San Jose Opp. 5-6; San Francisco Opp. 18-19; APPA Opp. 11-12. But that is simply reason for the objecting petitioners to participate in the agency proceedings on reconsideration to ensure that the relevant arguments are fully presented to the Commission, not reason for them to forgo participating in the administrative process and instead to litigate the very same issues simultaneously in this Court.

That different parties may seek to frame their legal and policy arguments differently does not change the fact that this judicial proceeding and the pending administrative proceeding challenge the same agency rulings, and any Commission decision to modify or expand upon those rulings on reconsideration could substantially affect this litigation.

3. The objecting petitioners' claims that even a brief delay could cause them undue hardship misrepresent the *Order's* holdings and effect. While the substance of the *Order* has not yet been briefed in this Court, these issues were thoroughly considered by the Tenth Circuit on a fully briefed motion for stay pending review, and the Tenth Circuit expressly held that petitioners "failed to meet their burden of showing irreparable harm if a stay is not granted." *Order, City of San Jose v. FCC*, No. 18-9568 (10th Cir. Jan. 10, 2019).

That judicial determination earlier in this proceeding is now law of the case, and it also directly undercuts the objecting petitioners' claims here. To further set the record straight, we briefly summarize the Commission's determinations in the *Order* and the limited effect that the *Order* itself currently has on state and local entities.

a. Under Section 253(a) of the Communications 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 ... telecommunications service,” 47 U.S.C. § 253(a), subject to limited exceptions in Section 253(b) and (c). Similarly, under Section 332(c)(7) of the Act, state and local governments “shall not prohibit or have the effect of prohibiting the provision of personal wireless services.” 47 U.S.C. § 332(c)(7)(B)(i)(II). In addition, localities must “act on any request for authorization ... within a reasonable period of time.” *Id.* § 332(c)(7)(B)(ii). If a state or local government exceeds these limits, any aggrieved party may “commence an action in any court of competent jurisdiction.” *Id.* § 332(c)(7)(B)(v).

In 2009 and 2014, the Commission gave effect to the “reasonable period of time” requirement, 47 U.S.C. § 332(c)(7)(B)(iii), by establishing “shot clocks”—that is, presumptive timeframes within which localities should act—for certain wireless siting applications. Those shot clocks ranged from 60 to 150 days, depending on the type of deployment at issue. *Declaratory Ruling to Clarify Provisions of Section 332(c)(7)*, 24 FCC Rcd. 13994, 14003-15 ¶¶ 27-53 (2009); *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd. 12865,

12955-57 ¶¶ 211-216 (2014). Courts upheld these shot clocks as a reasonable exercise of Commission authority. *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 569 U.S. 290 (2013); *Montgomery Cnty. v. FCC*, 811 F.3d 121 (4th Cir. 2015).

b. In the *Order*, the Commission applied the phrase “prohibit or have the effect of prohibiting” in Sections 253 and 332(c)(7) to new small wireless facilities (“small cells”) used in fifth-generation (5G) wireless networks. *Order* ¶¶ 34-42. In particular, it discussed how Sections 253 and 332(c)(7) apply in three specific contexts.

State and Local Fees. The Commission first recognized that unnecessary fees demanded by localities for the deployment of small cells can have the effect of prohibiting wireless services, especially when considered in the aggregate. *See Order* ¶¶ 43-80. It thus concluded that state and local fees for small-cell facilities have the impermissible effect of prohibiting wireless services when they exceed a reasonable approximation of the locality’s costs. *Id.* ¶¶ 50, 55-56, 76.

To avoid unnecessary litigation, the Commission established a “safe harbor” that presumes small-cell fees to be reasonable if they do not exceed \$500 in application fees and \$270 per year for all recurring fees. *Order* ¶¶ 78-80. At the same time, however, the Commission made clear

that “localities [may] charge fees above these levels upon [a] showing” that their actual and reasonable costs exceed these amounts. *Id.* ¶ 80 & n.234; *accord id.* ¶ 32.³

Aesthetic Requirements. The Commission acknowledged that localities have a legitimate interest in ensuring that wireless infrastructure deployments are not unsightly or out of character with the surrounding area. *Order* ¶¶ 12, 85-86. It also recognized, however, that vague, subjective, or overly restrictive aesthetic standards prevent carriers from developing deployment plans and have the effect of prohibiting wireless services. *Id.* ¶¶ 84, 88. Thus, the Commission reasoned, any aesthetic standards must be reasonable, objective, and disclosed in advance. *Id.* ¶¶ 86-88.

Shot Clocks. The Commission adopted new shot clocks for small cells, which generally pose fewer issues than larger structures. *Order* ¶¶ 105-137. Requests to collocate a small cell on an existing structure should ordinarily be processed within 60 days, and requests to deploy a small cell using a new structure within 90 days. *Id.* ¶¶ 105-106, 111. As

³ Petitioners thus misrepresent the *Order* in claiming that it places a presumptive cap or ceiling on the fees that localities may charge. *Cf.* San Francisco Opp. 14-15; Seattle Opp. 14, 17. It is a fundamental error to mistake a *safe harbor* for a ceiling. There is no presumption that fees outside the safe harbor are impermissible.

with the existing shot clocks, localities may “rebut the presumptive reasonableness of the shot clocks based upon the actual circumstances they face.” *Id.* ¶ 109; *see also id.* ¶ 115.

c. As the Tenth Circuit recognized, the objecting petitioners’ claims of severe hardship are unfounded. Most fundamentally, there is no new threat of imminent harm because the *Order* does not, on its own, compel localities to do anything or to approve any given siting request. If a locality denies or fails to timely act on a siting request, this simply means that a wireless provider may file suit under 47 U.S.C. § 332(c)(7)(B)(v) and seek judicial relief. *See Order* ¶ 116-131. That was already the case before the *Order*, and while the *Order* clarifies the legal standards that courts should apply, it neither permits nor requires courts to order any relief that they could not already impose, nor does it expose localities to any new lawsuits that could not already have been brought before the *Order* was adopted.⁴

⁴ If anything, the Commission’s efforts to clarify the applicable legal standards under Sections 253 and 332(c)(7) should, by reducing uncertainty, *reduce* the likelihood of litigation, and should simplify and reduce the burdens of any legal proceedings that do arise. In any event, the costs of defending against possible lawsuits generally are not considered a legally cognizable harm. *See, e.g., Standard Oil Co. of Calif. v. FTC*, 449 U.S. 232, 244 (1980).

The *Order* emphasizes, moreover, that determining whether a locality has violated the statute in particular circumstances and determining what (if any) remedy is appropriate “remain within the courts’ domain.” *Order* ¶ 124; *see id.* ¶¶ 116-131. As the Commission explained, “[t]he framework reflected in this Order will provide the courts with substantive guiding principles in adjudicating Section 332(c)(7)(B)(v) cases, but it will not dictate the result or the remedy appropriate for any particular case.” *Id.* ¶ 124 & n.357. The *Order* thus does not compel a locality to take any action unless “a court of competent jurisdiction” independently orders the locality to do so after affording it full legal process and taking into account all relevant facts and circumstances. 47 U.S.C. § 332(c)(7)(B)(v).

Nor is there any reason to assume that, should any disputes arise, localities would necessarily lose such cases. Fees exceeding the *Order*’s safe harbors “may be permissible if the fees are based on a reasonable approximation of costs and the costs themselves are objectively reasonable.” *Order* n.234. Similarly, if particular localities are unable to act within the new shot clocks, they may “rebut the presumptive reasonableness of the shot clocks based upon the actual circumstances they face.” *Id.* ¶109. Localities thus may continue to charge any fees

necessary to cover the full amount of their reasonable and actual costs, and may continue to take as long as reasonably necessary to review new siting applications, simply by explaining why these practices are necessary or appropriate under the particular circumstances they face.

* * *

For the foregoing reasons, the Court should consolidate these twelve related cases and hold them in abeyance pending the Commission's disposition of the petition for administrative reconsideration.

Dated: March 14, 2019

Respectfully submitted,

/s/ Scott M. Noveck

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/s/ Scott M. Noveck _____
Scott M. Noveck
Counsel for Respondent
Federal Communications Commission

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on March 14, 2019, I caused the foregoing Reply in Support of Motion to Consolidate Related Cases, Abate Proceedings Pending Agency Reconsideration, and Defer Filing of the Administrative Record 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/ Scott M. Noveck

Scott M. Noveck
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