

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

SPRINT CORPORATION,

Petitioner,

And

CITY OF NEW YORK,

Intervenor - Petitioner,

And

CITY OF BOWIE, MARYLAND; CITY OF
EUGENE, OREGON; CITY OF HUNTSVILLE,
ALABAMA; CITY OF WESTMINSTER,
MARYLAND; COUNTY OF MARIN,
CALIFORNIA; THE CITY OF SAN JOSE,
CALIFORNIA; THE CITY OF ARCADIA,
CALIFORNIA; THE CITY OF BELLEVUE,
WASHINGTON; THE CITY OF BURIEN,
WASHINGTON; THE CITY OF
BURLINGAME, CALIFORNIA; THE CITY OF
CULVER CITY, CALIFORNIA; THE TOWN
OF FAIRFAX, CALIFORNIA; THE CITY OF
ISSAQUAH, WASHINGTON; THE CITY OF
GIG HARBOR, WASHINGTON; THE CITY OF
KIRKLAND, WASHINGTON; THE CITY OF
LAS VEGAS, NEVADA; THE CITY OF LOS
ANGELES, CALIFORNIA; THE COUNTY OF
LOS ANGELES, CALIFORNIA; THE CITY OF
MONTEREY, CALIFORNIA; THE CITY OF
ONTARIO, CALIFORNIA; THE CITY OF
PIEDMONT, CALIFORNIA; THE CITY OF
PORTLAND, OREGON; THE CITY OF SAN
JACINTO, CALIFORNIA; THE CITY OF
SHAFTER, CALIFORNIA; THE CITY OF
YUMA, ARIZONA,

Case No. 19-70123 (MCP No. 155)
(Lead Case)

Intervenors - Respondents.

VERIZON COMMUNICATIONS, INC.,

Petitioner,

And

CITY OF NEW YORK,

Intervenor – Petitioner,

v.

FEDERAL COMMUNICATIONS
COMMISSION; UNITED STATES OF
AMERICA,

Respondents.

And

THE CITY OF SAN JOSE, CALIFORNIA;
THE CITY OF ARCADIA, CALIFORNIA;
THE CITY OF BELLEVUE,
WASHINGTON; THE CITY OF BURIEN,
WASHINGTON; THE CITY OF
BURLINGAME, CALIFORNIA; THE CITY
OF CULVER CITY, CALIFORNIA; THE
TOWN OF FAIRFAX, CALIFORNIA; THE
CITY OF ISSAQUAH, WASHINGTON;
THE CITY OF GIG HARBOR,
WASHINGTON; THE CITY OF
KIRKLAND, WASHINGTON; THE CITY
OF LAS VEGAS, NEVADA; THE CITY OF
LOS ANGELES, CALIFORNIA; THE
COUNTY OF LOS ANGELES,
CALIFORNIA; THE CITY OF MONTEREY,
CALIFORNIA; THE CITY OF ONTARIO,

Case No. 19-70124 (MCP No. 155)

CALIFORNIA; THE CITY OF PIEDMONT,
CALIFORNIA; THE CITY OF PORTLAND,
OREGON; THE CITY OF SAN JACINTO,
CALIFORNIA; THE CITY OF SHAFTER,
CALIFORNIA; THE CITY OF YUMA,
ARIZONA,

Intervenors – Respondents.

PUERTO RICO TELEPHONE
COMPANY, INC.,

Petitioner,

And

CITY OF NEW YORK,

Intervenor - Petitioner,

v.

FEDERAL COMMUNICATIONS
COMMISSION; UNITED STATES OF
AMERICA,

Respondents,

And

THE CITY OF SAN JOSE,
CALIFORNIA; CALIFORNIA; THE CITY
OF ARCADIA, CALIFORNIA; THE CITY
OF BELLEVUE, WASHINGTON; THE
CITY OF BURIEN, WASHINGTON; THE
CITY OF BURLINGAME, CALIFORNIA;
THE CITY OF CULVER CITY,
CALIFORNIA; THE TOWN OF FAIRFAX,
CALIFORNIA; THE CITY OF ISSAQUAH,

Case No. 19-70125 (MCP No. 155)

WASHINGTON; THE CITY OF GIG HARBOR, WASHINGTON; THE CITY OF KIRKLAND, WASHINGTON; THE CITY OF LAS VEGAS, NEVADA; THE CITY OF LOS ANGELES, CALIFORNIA; THE COUNTY OF LOS ANGELES, CALIFORNIA; THE CITY OF MONTEREY, CALIFORNIA; THE CITY OF ONTARIO, CALIFORNIA; THE CITY OF PIEDMONT, CALIFORNIA; THE CITY OF PORTLAND, OREGON; THE CITY OF SAN JACINTO, CALIFORNIA; THE CITY OF SHAFTER, CALIFORNIA; THE CITY OF YUMA, ARIZONA,

Intervenors - Respondents.

THE CITY OF SAN JOSE, CALIFORNIA; THE CITY OF ARCADIA, CALIFORNIA; THE CITY OF BELLEVUE, WASHINGTON; THE CITY OF BURIEN, WASHINGTON; THE 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,

Case No. 19-70144 (MCP No. 155)

Petitioners,

And

CITY OF NEW YORK,

Intervenor - Petitioner,

FEDERAL COMMUNICATIONS
COMMISSION; UNITED STATES OF
AMERICA,

Respondents,

And

CTIA-THE WIRELESS ASSOCIATION;
COMPETITIVE CARRIERS
ASSOCIATION; SPRINT
CORPORATION; VERIZON
COMMUNICATIONS, INC.; WIRELESS
INFRASTRUCTURE ASSOCIATION,

Intervenors – 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,

And

CITY OF BAKERSFIELD, CALIFORNIA;
CITY OF COCONUT CREEK, FLORIDA;

Case No. 19-70136 (MCP No. 155)

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; THURSTON COUNTY, WASHINGTON; THE CITY OF SAN JOSE, CALIFORNIA; THE CITY OF ARCADIA, CALIFORNIA; THE CITY OF BELLEVUE, WASHINGTON; THE CITY OF BURIEN, WASHINGTON; THE CITY OF BURLINGAME, CALIFORNIA; THE CITY OF CULVER CITY, CALIFORNIA; THE TOWN OF FAIRFAX, CALIFORNIA; THE CITY OF ISSAQUAH, WASHINGTON; THE CITY OF GIG HARBOR, WASHINGTON; THE CITY OF KIRKLAND, WASHINGTON; THE CITY OF LAS VEGAS, NEVADA; THE CITY OF LOS ANGELES, CALIFORNIA; THE COUNTY OF LOS ANGELES, CALIFORNIA; THE CITY OF MONTEREY, CALIFORNIA; THE CITY OF ONTARIO, CALIFORNIA; THE CITY OF PIEDMONT, CALIFORNIA; THE CITY OF PORTLAND, OREGON; THE CITY OF SAN JACINTO, CALIFORNIA; THE CITY OF SHAFTER, CALIFORNIA; THE CITY OF YUMA, ARIZONA; CITY OF NEW YORK,

Intervenors - Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA,

Respondents.

CITY OF HUNTINGTON BEACH,

Petitioner,

And

THE CITY OF SAN JOSE, CALIFORNIA;
THE CITY OF ARCADIA, CALIFORNIA;
THE CITY OF BELLEVUE,
WASHINGTON; THE CITY OF BURIEN,
WASHINGTON; THE CITY OF
BURLINGAME, CALIFORNIA; THE CITY
OF CULVER CITY, CALIFORNIA; THE
TOWN OF FAIRFAX, CALIFORNIA; THE
CITY OF ISSAQUAH, WASHINGTON;
THE CITY OF GIG HARBOR,
WASHINGTON; THE CITY OF
KIRKLAND, WASHINGTON; THE CITY
OF LAS VEGAS, NEVADA; THE CITY OF
LOS ANGELES, CALIFORNIA; THE
COUNTY OF LOS ANGELES,
CALIFORNIA; THE CITY OF MONTEREY,
CALIFORNIA; THE CITY OF ONTARIO,
CALIFORNIA; THE CITY OF PIEDMONT,
CALIFORNIA; THE CITY OF PORTLAND,
OREGON; THE CITY OF SAN JACINTO,
CALIFORNIA; THE CITY OF SHAFTER,
CALIFORNIA; THE CITY OF YUMA,
ARIZONA; CITY OF NEW YORK,

Intervenors - Petitioners,

v.

FEDERAL COMMUNICATIONS
COMMISSION; UNITED STATES OF
AMERICA,

Case No. 19-70146 (MCP No. 155)

Respondents.

MONTGOMERY COUNTY,
MARYLAND,

Petitioner,

v.

FEDERAL COMMUNICATIONS
COMMISSION; UNITED STATES OF
AMERICA,

Respondents.

Case No. 19-70147 (MCP No. 155)

CITY AND COUNTY OF SAN
FRANCISCO,

Petitioner,

v.

UNITED STATES OF AMERICA;
FEDERAL COMMUNICATIONS
COMMISSION,

Respondents.

Case No. 19-70145 (MCP No. 155)

CITY OF NORTH LITTLE ROCK,
ARKANSAS; THE MISSOURI
ASSOCIATION OF MUNICIPAL
UTILITIES,

Petitioners,

v.

Case No. 19-70148 (MCP No. 155)

FEDERAL COMMUNICATIONS
COMMISSION; UNITED STATES OF
AMERICA,

Respondents.

JOINT MOTION FOR CASE MANAGEMENT CONFERENCE

Movants, representing all the petitioning local governments, and agencies representing local governments¹ request the Court direct that a case management conference be held for purposes including but not limited to developing a briefing plan and schedule in this and other related cases.

¹ This motion is submitted by counsel representing The City Of San Jose, California; The City Of Arcadia, California; The City Of Bellevue, Washington; The City Of Burien, Washington; The City Of Burlingame, California; Culver City, California; The Town Of Fairfax, California; The City Of Gig Harbor, Washington; The City Of Issaquah, Washington; The City Of Kirkland, Washington; The City Of Las Vegas, Nevada; The City Of Los Angeles, California; The County Of Los Angeles, California; The City Of Monterey, California; The City Of Ontario, California; The City Of Piedmont, California; The City Of Portland, Oregon; The City Of San Jacinto, California; The City Of Shafter, California; and The City Of Yuma, Arizona (collectively, City of San Jose, et al.) Joining this motion are the City Of Bakersfield, California; City Of Rancho Palos Verdes, California; City Of Coconut Creek, Florida; King County, Washington; City Of Lacey Washington; City Of Olympia, Washington; City Of Seattle, Washington; City Of Tacoma, Washington; Thurston County, Washington; City Of Tumwater, Washington; Colorado Communications And Utility Alliance; Rainier Communications Commission; League Of California Cities; League Of Oregon Cities; League Of Arizona Cities And Towns; the City and County of San Francisco, California; City of Bowie, Maryland; City of Eugene, Oregon; City of Huntsville, Alabama; City of Westminster, Maryland; County of Marin, California; the City of New York, New York; The City of Huntington Beach, California; The City of North Little Rock; the Missouri Association of Municipal Utilities; and Montgomery County, Maryland.

This Circuit’s Advisory Committee Note to Circuit Rule 33-1 (“Committee Note”) provides that a case management conference may be held for the purpose of managing a complex appeal.² While Movants recognize such conferences “are held only in exceptional circumstances,”³ the cases before the Court in this instance warrant such treatment. The Committee Note specifically contemplates conferences for “complex cases involving numerous separately represented litigants” and extensive agency proceedings.⁴ Both circumstances are true here.

At least nine appeals of one Federal Communications Commission Order,⁵ consolidated under 19-70123, are pending before this Court. These cases include dozens of petitioners, respondents, and intervenors, represented by numerous counsels. These appeals involve complex statutory and constitutional issues affecting virtually every locality in the country, and virtually every provider of wireless service and facilities. Furthermore, an additional four petitions for review of that same FCC order, and interventions therein, have been filed in the D.C. Circuit, and that court has issued an Order directing parties to show cause why they

² 9th Cir. R. 33-1, Note (b).

³ *Id.*

⁴ *Id.*

⁵ *Declaratory Ruling and Third Report and Order*, FCC 18-133, 83 Fed. Reg. 51,867 (Oct. 15, 2018) (“September Order”).

should not be transferred to this Circuit. Movants therefore anticipate the number of parties in this consolidated appeal will increase.

Because this case involves appeals by representatives of industry (which argue that the agency did not go far enough in adopting remedies sought by industry) and representatives of local governments and organizations (which argue the FCC's actions significantly exceeded the agency's authority), there is also likely to be a more complex pattern of briefs filed in support of, and in opposition to the FCC's Order than is reflected in a typical agency appeal.

The appeals were transferred to this Circuit because they arise out of the "same order" as another case pending before this Court, *Portland v. F.C.C.*, No. 18-72689 (9th Cir. filed Oct. 2, 2018).⁶ That case is being held in abeyance until February 18, 2019. The briefing schedules will need to take into account the relationship between that case and these consolidated appeals.

Moreover, Movants conclude an expedited briefing schedule, and possibly other relief, may be necessary and appropriate because: (1) the FCC's rules are now, or will shortly be in full effect; (2) the rules (from the Movant's point of

⁶ Order Granting Motion to Transfer to 9th Circuit, 10th Circuit Court of Appeals Case Nos. 18-9563, 9566, 9567, 9568, 9571, 9572, 9586, 9588, 9501, (Doc 010110109277). In August, the FCC issued *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, FCC 18-111 (rel. Aug. 3, 2018). The Commission issued the September Order in the same dockets on September 26th, which was the subject of the nine appeals transferred from the Tenth Circuit to this Court and captioned above.

view) involve a dramatic change in the status quo; and (3) the rules involve an FCC decision to effectively overturn this Court's en banc "plain language" decision in *Sprint Tel. PCS, LP v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008) (an action Movants believe is in direct conflict with *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)).

Accordingly, Movants request a case management conference be set to consider the following, along with such other issues as the Court may deem appropriate:

1. The number, length and timing of briefs by petitioners, by respondents, and by intervenors in support and opposition;
2. Whether expedition may be appropriate; and
3. The relation of briefing in these cases to briefing in the *Portland* case.

Movants further request that the Court order that such a conference be held during the two-week period from February 4 to February 15, 2019. Movants have contacted other parties to these cases. All industry participants jointly indicated opposition to this motion, as did counsel for Respondent Federal Communications

Commission. Counsel for Respondents United States did not respond, potentially due to the ongoing lapse in appropriations affecting agency operations.

Respectfully submitted,

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January 25, 2019

CERTIFICATE OF SERVICE

I hereby certify that on Friday, January 25, 2019, I filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit through the CM/ECF system. Participants who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Joseph Van Eaton

Joseph Van Eaton

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January 25, 2019