Nos. 19-70123, 19-70124, 19-70125, and 19-70326

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Sprint Corporation,

Petitioner,

City of Bowie, Maryland *et al.*,

Intervenors,

v.

Federal Communications Commission and United States of America,

Respondents.

On Petitions for Review of Orders of the
Federal Communications Commission

BRIEF OF LOCAL GOVERNMENT INTERVENORS IN SUPPORT OF RESPONDENTS

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CORPORATE DISCLOSURE STATEMENTS

The Corporate Disclosure Statements are provided separately by each law firm on behalf of their clients.

DISCLOSURE STATEMENT FOR INTERVENORS REPRESENTED BY SPIEGEL & McDIARMID LLP

In No. 19-70123, Spiegel & McDiarmid LLP represents Intervenors City of Eugene, Oregon; City of Huntsville, Alabama; City of Bowie, Maryland; City of Westminster, Maryland; and County of Marin, California.

In No. 19-70326, Spiegel & McDiarmid LLP represents Intervenors City and County of San Francisco, California; County of Marin, California; Contra Costa County, California; Town of Corte Madera, California; and City of Westminster, Maryland.

All Intervenors represented by Spiegel & McDiarmid LLP are governmental agencies and therefore exempt from Rule 26.1.

Date: August 14, 2019

Spiegel & McDiarmid LLP

/s/Tillman L. Lay

Attorneys for Intervenors City of Eugene, Oregon; City of Huntsville, Alabama; City of Bowie, Maryland; City of Westminster, Maryland; and County of Marin, California in No. 19-70123 and Intervenors City and County of San Francisco, California; County of Marin, California; Contra Costa County, California; Town of Corte Madera, California; and City of Westminster, Maryland in No. 19-70326

DISCLOSURE STATEMENT FOR
PETITIONERS AND INTERVENORS REPRESENTED
BY BEST BEST & KRIEGER

In Nos. 19-70123, 19-70124, 19-70125 and 19-70326, Best Best & Krieger represents Intervenors:

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; the City of Yuma, Arizona;

All Best Best & Krieger clients state they are governmental agencies and therefore exempt from Rule 26.1.

Date: August 14, 2019

Best Best & Krieger LLP

s/ Joseph Van Eaton
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DISCLOSURE STATEMENT FOR
INTERVENORS REPRESENTED BY
TELECOM LAW FIRM, P.C.

In No. 19-70326, Telecom Law Firm, P.C. represents as Intervenors: the City of Bakersfield, California; the City of Fresno, California; and the City of Rancho Palos Verdes, California.

All Intervenors represented by Telecom Law Firm, P.C., respectfully state that they are each a governmental agency and therefore exempt from Rule 26.1

Date: August 14, 2019

Telecom Law Firm, P.C.

s/ Robert C. May III
Attorneys for Intervenors City of Bakersfield, California; City of Fresno, California; and City of Rancho Palos Verdes, California in No. 19-70326

DISCLOSURE STATEMENT FOR
INTERVENORS REPRESENTED BY
KISSINGER & FELLMAN, P.C.

In No. 19-70326, Kissinger & Fellman, P.C. represents as Intervenors: the City of Coconut Creek, Florida; the City of Lacey Washington; the City of Olympia, Washington; the City of Tumwater, Washington; the Town of Yarrow Point, Washington; Thurston County, Washington; and the Rainier Communications Commission, respectfully state that they are each a governmental agency and therefore exempt from Rule 26.1.

The Colorado Communications and Utility Alliance is a nonprofit corporation organized under the laws of the State of Colorado, which does not issue stock, which has no parent corporation, and is not owned in any part by any publicly held corporation. Its members are comprised of governmental entities in Colorado.

Date: August 14, 2019

Kissinger & Fellman, P.C.

s/ Kenneth S. Fellman
Attorneys for Certain Intervenors in Case No. 19-70326

DISCLOSURE STATEMENT FOR
INTERVENORS REPRESENTED BY
KELLER AND HECKMAN LLP

In No. 19-70326, Keller and Heckman LLP represents as Intervenors the International Municipal Lawyers Association and the International City/County Management Association. Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), the International Municipal Lawyers Association and International City/County Management Association state that they are nonprofit corporations that have no parent corporation and issue no stock, and therefore no publicly held corporation owns more than 10% or more of their stock.

Date: August 14, 2019

Keller and Heckman LLP

s/ Eric P. Gotting
Attorneys for Certain Intervenors in Case No. 19-70326

DISCLOSURE STATEMENT FOR INTERVENOR NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS

The National Association of Telecommunications Officers and Advisors is a non-profit organization representing the interests of member municipalities, elected officials and their advisors. The organization does not issue stock, have any parent company, or have a 10% or greater ownership interest held by any publicly-traded company.

Date: August 14, 2019

/s/ Nancy L. Werner
General Counsel, Intervenor National Association of Telecommunications Officers in Case No. 19-70326

DISCLOSURE STATEMENT FOR
INTERVENOR CITY OF NEW YORK

The City of New York is a governmental entity exempt from Rule 26.1

Date: August 14, 2019

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ISSUE PRESENTED

Intervenors on this Brief (collectively "Local Government Intervenors") intervened in support of Respondents solely with respect to the Petitions for Review filed by Sprint Corporation (No. 19-70123); Verizon Communications, Inc. (No. 19-70124); Puerto Rico Telephone Company, Inc. (No. 19-70125); and AT&T Services, Inc. (No. 19-70326) (collectively, "Industry Petitioners"). Industry Petitioners filed a joint opening brief (Dkt. Entry 73)[1] on a single question presented: whether the FCC's failure to impose a "deemed granted" remedy for violations of the new so called "shot clocks" it established in the *Small Cell Order*[2] is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

STATEMENT OF THE CASE

Local Government Intervenors adopt the Statement of the Case contained in Petitioner Local Governments' Joint Opening Brief (Dkt. Entry 76) at 6-29.

SUMMARY OF THE ARGUMENT

Nothing in this brief should be read as agreeing with either the FCC or Industry Petitioners position that the Order is lawful. We write only to highlight additional reasons against adopting the "deemed granted" remedy that Industry

[1] All docket entry citations in this brief refer to the docket entry numbers in *Sprint Corp. v. FCC*, No. 19-70123 (9th Cir. filed Jan. 14, 2019).

[2] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, WC Docket No. 17-84, 33 FCC Rcd. 9088 (2018) ("*Small Cell Order*").

Petitioners seek. Industry Petitioners argue the FCC was required to declare that if a locality failed to satisfy an FCC shot clock established under §47 U.S.C. 332(c)(7), the application must be "deemed granted." The FCC correctly states that the order on review did not address the threshold question of whether or not it has the authority to adopt a "deemed granted" remedy in this context. The Commission is also correct that it is not obligated by law to adopt any remedy for failure to satisfy FCC shot clocks much less a "deemed granted" remedy. That is reason enough to reject Industry Petitioners' appeal.

Moreover, the industry petitions should be denied because the FCC lacks authority under the statute to adopt a "deemed granted" remedy here. That is because, inter alia, the statute give the court the sole and exclusive authority to determine what remedy is appropriate if a local or state government fails to satisfy federal requirements governing regulation of the placement of wireless facilities, 47 U.S.C. §332(c)(7)(B)(v), except in cases where an application is denied for failure to satisfy FCC RF standards. A "deemed granted" remedy would be inconsistent with the express statutory provision as it has been interpreted by the Supreme Court; is inconsistent with the legislative history; and is inconsistent with prior Commission determinations, including the determinations made by the Commission when it first established shot clocks.

Further, because the FCC (we believe, improperly) applies the shot clock to

decisions by government as to whether to lease space on proprietary property (such as street lights or traffic signals), or to permit replacement of those structures to accommodate wireless facilities, the effect of a "deemed granted" remedy would be a taking within the meaning of the Fifth Amendment to the Constitution of the United States; and a commandeering of local government property in violation of the Tenth Amendment.

ARGUMENT

I. THE FCC LACKS AUTHORITY TO IMPOSE A "DEEMED GRANTED" REMEDY FOR VIOLATIONS OF SECTION 332(C)(7) SHOT CLOCKS.

A. A "Deemed Granted" Remedy Would be Contrary to the Plain Language and Legislative History of Section 332(c)(7).

Industry Petitioners argue (Industry Petitioners' Br.at 23-29) that the FCC's decision not to impose a "deemed granted" remedy for violations of the *Small Cell Order*'s new Section 332(c)(7) shot clocks is arbitrary and capricious. Industry Petitioners' argument must fail because the Commission lacks authority for such a remedy.[3]

[3] Even if the FCC had authority to impose a "deemed granted" remedy for violations of Section 332(c)(7) shot clocks - which it does not - it would have discretion to decline to adopt such a remedy based on the record here. The FCC's exercise of that discretion to not impose a "deemed granted" remedy therefore would not be arbitrary and capricious, and Local Government Intervenors agree with the Commission's arguments in Part I.D.3.b - but only Part I.D.3.b - of its Answering Brief.

The plain statutory text does not allow for a one-size-fits-all "deemed granted" remedy. Section 332(c)(7)(B)(ii) provides that:

> A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within *a reasonable period of time* after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

47 U.S.C. § 332(c)(7)(B)(ii) (emphasis added). By its nature, a Commission-imposed "deemed granted" remedy for any failure to act within a Commission-prescribed timeframe would not take into account "the nature and scope" of a particular request.

Moreover, Congress established in Section 332(c)(7)(B)(v) an exclusive mechanism by which persons can seek relief if a locality acts or fails to act in violation of Section 332(c)(7)(B). Section 332(c)(7)(B)(v) specifies that the courts—not the FCC—have jurisdiction to review a state or local government's final action or failure to act consistently with the requirements of Section 332(c)(7)(B). 47 U.S.C. § 332(c)(7)(B)(v) ("Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph [Section 332(c)(7)(B)] may . . . commence an action in any court of competent jurisdiction.").

In contrast to the broad jurisdiction Section 332(c)(7)(B)(v) gives to courts to enforce violations of Section 332(c)(7), it assigns the FCC only a limited role.

The FCC is given authority to review state or local government acts or failures to act only if they are allegedly inconsistent with clause (iv) of Section 332(c)(7)(B). 47 U.S.C. § 332(c)(7)(B)(v). Clause (iv) prohibits state or local regulation "on the basis of the environmental effects of radio frequency emissions to the extent that [personal wireless service] facilities comply with the Commission's regulations concerning such emissions." 47 U.S.C. § 332(c)(7)(B)(iv). Section 332(c)(7)(v) unambiguously gives courts exclusive jurisdiction over disputes relating to all of the other limitations Section 332(c)(7)(B) places on local governments, including clause (i)'s requirement that they not take prohibitory or discriminatory actions, clause (ii)'s requirement that localities act within a reasonable time, taking into account the nature and scope of the particular request, and clause (iii)'s requirement that decisions concerning personal wireless service facilities be "in writing and supported by substantial evidence.

In case there is any doubt, the Conference Report's explanation of Section 332(c)(7), which Industry Petitioners fail to address, confirms that "[i]t is the intent of the conferees that other than under Section 332(c)(7)(B)(iv) . . . the *courts shall have exclusive jurisdiction* over all . . . disputes arising under this section." H.R. Rep. No. 104-458, at 208 (1996) (Conf. Rep.) ("Conference Report") (emphasis added). As the Fifth Circuit explained in affirming the Commission's *2009 Shot*

Clock Ruling,[4] the statute mandates an "*individualized* . . . inquiry into the reasonableness of a state or local government's delay," under which "courts must still determine whether the state or local government acted reasonably under the circumstances surrounding the application at issue." See *City of Arlington v. FCC*, 668 F.3d 229, 258 (5th Cir. 2012) ("*City of Arlington*"), *aff'd*, 569 U.S. 290 (2013) (emphasis added). A Commission-mandated "deemed granted" remedy would be contrary to the individualized, fact-specific nature of the inquiry into whether a locality has complied with Section 332(c)(7)(B)(i)-(iii), as well as Congress's grant of exclusive jurisdiction over such inquiries to the courts.

More broadly, a "deemed granted" remedy under Section 332(c)(7) would establish the kind of nationwide, FCC-centered approach to wireless siting decisions that Congress explicitly rejected. As Justice Breyer noted:

> Congress initially considered a single national solution, namely, a Federal Communications Commission wireless tower siting policy that would pre-empt state and local authority. . . . But Congress ultimately rejected the national approach and substituted a system based on cooperative federalism . . . . State and local authorities would remain free to make siting decisions. They would do so, however, *subject to minimum federal standards*—both substantive and procedural—as well as federal *judicial review*.

[4] *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, Declaratory Ruling, WT Docket No. 17-79, 24 FCC Rcd. 13994 (2009) ("*2009 Shot Clock Ruling*").

City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 128 (2005) (Breyer, J., joined by O'Connor, Souter and Ginsburg, JJ., concurring) (citing Conference Report at 207) (emphasis added). The Court went on to find that Section 332(c)(7)(v) provided the *only* remedy for violation of Section 332(c)(7).[5] A "deemed granted" remedy would therefore improperly displace the exclusive remedy provided by Congress in Section 332(c)(7)(B)(v).

Affirming Justice Breyer's reasoning, the Supreme Court more recently held in *City of Roswell* that this "system of 'cooperative federalism,'" coupled with Section 332(c)(7)(A)'s savings clause, means that "the enumerated limitations [on state and local authority in Section 332(c)(7)(B)(i)-(v)] set[s] out an exclusive list," and Section 332(c)(7)(B)(v)'s provision permitting parties to seek court review is on that "exclusive list." *T-Mobile South, LLC v. City of Roswell*, 135 S. Ct. 808, 816 (2015) (citing *Rancho Palos Verdes*, 544 U.S. at 128 (Breyer, J. concurring)). Eliminating or supplanting Section 332(c)(7)(B)(v)'s exclusive court remedy with an FCC "deemed granted" remedy is not on that "exclusive list," and only

[5] *Id.* at 126 ("Construing § 332(c)(7), as we do, to create rights that may be enforced *only through the statute's express remedy*.") (emphasis added). *See also id.* at 129 (Stevens, J. concurring) ("[T]he statute's text, structure, and history all provide convincing evidence that Congress intended the Telecommunications Act of 1996 (TCA) to operate as a comprehensive scheme.").

Congress, not the FCC, can expand that list.[6] Not only would a "deemed granted" remedy improperly intrude on the role of Congress, it would also be a constitutionally inappropriate intrusion by the Executive Branch on the Judiciary's authority to decide *how* a particular dispute is to be resolved and what relief is appropriate, an intrusion completely untethered from the other provisions of Section 332(c)(7). It is not reasonable to interpret the statute to provide for that sort of intrusion upon the separation of powers.

B. The "Deemed Granted" Remedy for Violations of 47 U.S.C. §1455(a) Undermines Industry Petitioners' Arguments.

Industry Petitioners' reliance (Industry Petitioners' Br. at 31-34) on the "deemed granted" remedy adopted by the FCC for violations of the shot clocks established under 47 U.S.C. §1455(a).[7] The obligations on state and local governments imposed by Section 1455(a) are critically different from those under

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[6] The FCC was clear that its approach to shot clocks in the *Small Cell Order* "involves our interpretation of Section 332(c)(7)(B)(ii) and the consequences that flow from that—and *does not rely on Section 253*." *Small Cell Order* ¶ 128 n.372 (emphasis added) (*referring to* 47 U.S.C. § 253). It could not have done so, as in any event, Section 332(c)(7) is the only provision of the Communications Act that can "limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities," 47 U.S.C. § 332(c)(7)(A). *See* Petitioner Local Governments' Joint Opening Br. at 46-49.

[7] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, WT Docket Nos. 13-238 and 13-32, WC Docket No. 11-59, 29 FCC Rcd. 12865 (2014) ("*2014 Shot Clock Order*"), *pet. for rev. denied sub nom. Montgomery Cty. v. FCC*, 811 F.3d 121 (4th Cir. 2015).

Section 332(c)(7). Section 332(c)(7)(B)(ii) prohibits unreasonable delay in approvals or denials whereas Section 1455(a), when applicable, prohibits denials. *Compare* 332(c)(7)(B)(ii), with *id.* § 1455(a)(1) (providing that "a State or local government may not deny, and shall approve, any eligible facilities request…").

When the FCC imposed a "deemed granted" remedy for violations of Section 1455(a) shot clocks in its *2014 Shot Clock Order*, it explicitly relied on the unique language of that statute, and especially, its "shall approve" language. *2014 Shot Clock Order* ¶ 227. The Commission explained that Section 1455(a):

> States without equivocation that the reviewing authority "may not deny, and shall approve" any qualifying application . . . [O]nce the application meets [the specified] criteria, the law forbids the State or local government from denying it.

Id. (footnotes omitted). Accordingly, the FCC found that "the text *of Section [1455(a)]* supports adoption of a deemed granted remedy." *Id.* (emphasis added). In upholding the "deemed granted" remedy for Section 1455(a) violations, the Fourth Circuit likewise relied on Section 1455(a)'s unique language, explaining that Section 1455(a) "bars states from denying facility modification applications that meet certain standards" and this remedy "does no more than implement the statute." *Montgomery Cty.*, 811 F.3d at 128.

The FCC's own arguments defending its construction of Section 1455(a) confirms that Section 332(c)(7)—the statute under which the FCC established the shot clocks at issue here—does not authorize a deemed granted remedy. It contains

no mandate that localities "may not deny, and shall approve" all wireless facility applications. As a result, the justification for the "deemed granted" remedy that the FCC adopted for violations of the *2014 Shot Clock Order*'s shot clocks is inapplicable to the FCC's Section 332(c)(7) shot clocks. Section 1455(a)'s plain language demonstrates that, when Congress intended to mandate local government approval of certain types of wireless facility applications, and thereby to authorize a "deemed granted" remedy, it included specific language to that effect.

II. INDUSTRY PETITIONERS ARE WRONG IN ARGUING THE FCC HAS CHANGED POLICY REGARDING "DEEMED GRANTED" .

Industry Petitioners note that, generally, "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change." Industry Petitioners' Br. at 31 (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016)) (internal quotation marks omitted). But they are wrong to suggest that the FCC's refusal to adopt a "deemed granted" remedy for Section 332(c)(7) violations represents any change in existing Commission policy. In fact, it is Industry Petitioners, not the Commission, that are arguing for a change in well-established Commission policy.

A failure to satisfy shot clocks established pursuant to Section 332(c)(7) has

never, previously, given rise to an explicit "deemed granted" remedy.[8] There is no dispute that new shot clocks established in the *Small Cell Order* were established under Section 332(c)(7), just like the original Section 332(c)(7) shot clocks established in the *2009 Shot Clock Ruling*. *Small Cell Order* ¶ 105 n.300 ("Just like the shot clocks originally established in 2009 . . . the shot clocks framework in this Third Report and Order are no more than an interpretation of 'the limits Congress already imposed on State and local governments' through its enactment of Section 332(c)(7)."") (quoting *2009 Shot Clock Ruling* ¶ 25). Industry Petitioners concede, as they must, that at least insofar as their petitions are concerned, the remedy remains the same for both the original 2009 Section 332(c)(7) shot clocks and the *Small Cell Order*'s new Section 332(c)(7) shot clocks: if a locality fails to act within the shot clock, an action must be brought in district court based on that failure to act, and the court, after hearing, determines the appropriate remedy.[9] Because, from the perspective of Industry Petitioners the *Small Cell Order* represents no change in Commission policy from a "deemed granted" to some less

[8] The FCC did not adopt a "deemed grant remedy in the 2009 Shot Clock Ruling, or when it revisited its original shot clock rules in 2014. *See 2014 Shot Clock Order* at ¶284

[9] Industry Petitioners' Br. at 26-27. As Intervenors pointed out in the Local Government Petitioners' Brief (at 94-100), there are important distinctions between the *Small Cell Order*'s shot clocks and the FCC's original § 332(c)(7) shot clocks, but those differences do not relate to, or alter, the inappropriateness of a "deemed granted" remedy.

rigorous remedy, Industry Petitioners' "change in policy" argument fails.[10]

Given the fact that the Commission has consistently (and justifiably) distinguished the remedies under Section 332(c)(7) and Section 1455(a) based on the unique language of that different statute, discussed above, the choice not to adopt a "deemed cannot be viewed as a change in policy with respect to Section 332(c)(7), even assuming the Commission had authority to impose a "deemed granted" remedy pursuant to that section.

Moreover, the FCC's decision not to impose a "deemed granted" remedy in the *2009 Shot Clock Ruling* was central to the Fifth Circuit's decision upholding that ruling. In the *Small Cell Order*, the Commission explains (¶ 105) that it is adopting the new Section 332(c)(7) shot clocks "using authority confirmed in *City of Arlington*." In *City of Arlington*, the Fifth Circuit held that the original § 332(c)(7) shot clocks were a permissible interpretation of the statute *precisely "because"*:

[10] Industry Petitioners' heavy reliance on the Commission's statement that it "see[s] no meaningful difference in processing [Section 1455(a)] applications than processing Section 332 collocation applications" is misplaced. Industry Joint Opening Brief at 34. The Commission's comparison was explicitly in reference to how much time the Commission thought it generally should take to render a decision based on work required. *Small Cell Order* at ¶ 107-08. That has nothing to do with the remedy, and as to remedies, prior orders make clear that the Commission did see differences in the statutes. Likewise, reliance on questions raised in the Commission's Notice of Proposed Rulemaking in which the Commission do not support industry's claim that the Commission is moving from a "deemed granted" regime to something less rigorous. Industry Joint Opening Brief at 13-14.

> [T]he 90- and 150-day time frames *do not eliminate the individualized nature* of an inquiry into the reasonableness of a state or local government's delay. The time frames do provide the FCC's guidance on what periods of time will generally be 'reasonable' under the statute, of course, and they might prove dispositive in the rare case in which a state or local government submits no evidence supporting the reasonableness of its actions. *But in a contested case, courts must still determine whether the state or local government acted reasonably under the circumstances surrounding the application at issue*.

City of Arlington at 258 (emphasis added). In summarizing its decision to uphold the *2009 Shot Clock Ruling*, the court again emphasized that:

> We do *not* read the Declaratory Ruling as creating a scheme in which a state or local government's failure to meet the FCC's time frames constitutes a per se violation of § 332(c)(7)(B)(ii). The time frames are *not* hard and fast rules but instead exist to guide courts in their consideration of cases challenging state or local government inaction.

Id. at 259 (emphasis added). Industry Petitioners' argument that § 332(c)(7) authorizes a Commission-imposed "deemed granted" remedy is therefore directly at odds with *City of Arlington*. It would improperly establish a *per se* violation of Section § 332(c)(7)(B)(i) or (ii) for failing to meet a shot clock.

Thus, Industry Petitioners have it exactly backwards: it is their request for a "deemed granted" remedy for Section 332(c)(7) shot clock violations that would require a change in agency policy. If the FCC had adopted a "deemed granted" remedy in the *Small Cell Order*, it would have had to explain its change in policy

not only with respect to remedies, but also with respect to its authority to impose shot clocks under Section 332(c)(7) in the first place. And *City of Arlington* casts substantial doubt on whether the FCC could impose such a hard and fast rule.

Setting aside whether the FCC could adopt a "deemed granted" remedy consistent with the statute, there still would have been no basis for changing course and adopting a "deemed granted" remedy. A "deemed granted" remedy, by its nature, assumes that "small cells" are all basically unobtrusive and small; and that their construction raises so few issues that the Commission could properly decide that every case can be decided within the limits established by the FCC shot clock. The record is clearly to the contrary (see League of Arizona Cities and Towns et al. Reply Comments at pp. 13-16 (July 17, 2017)[LGER 554-557]. If there were any doubt, the matter is resolved by *United Keetoowah Band of Cherokee Indians et al. v. FCC*, No. 18-1129 (D.C. Cir. filed August 9, 2019) slip op. 19-21 (discussing issues and complexities raised by small cell placement, and finding that FCC had failed to consider difficulties presented by densification of cellular networks, and the placement of thousands of small cells).

III. THE IMPOSITION OF A "DEEMED GRANTED" REMEDY WOULD VIOLATE THE FIFTH AND TENTH AMENDMENTS OF THE U.S. CONSTITUTION.

The problems with a "deemed granted remedy" are compounded by the *Small Cell Order*'s elimination of distinctions between state and local

governments' activities as regulators, and activities as owners of property, a topic discussed at length in Local Government Petitioners' Brief (at 76-85, 106-116). Under the *Small Cell Order*, a locality has 60 days to act on a provider's request to place a small wireless facility on a street light or on a traffic signal that is owned by the locality, and 90 days to act on a provider's request to *remove* an existing traffic signal or street light and replace it with a new structure capable of supporting a wireless facility. The Commission made clear that these shot clocks apply to all authorizations necessary for the deployment of small cells, including the licensing and leasing of public infrastructure. *See Small Cell Order* at ¶132.

Under the industry's "deemed granted" remedy, if a locality has not approved a contract for lease of the street light or traffic signal pole, or even elects not to respond to the initial request for lease within the shot clock, the locality will be deemed to have granted the provider's request.

If it happens that, a locality requires more than 60 or 90 days to draft, review and approve a license or lease to use a street light (because of the approval process required for public contracts), a "deemed granted," remedy would give a provider the right to use or replace the local government's property; the provider therefore would be free to remove facilities owned by a locality, and replace them with facilities of its choosing. Under a "deemed granted" remedy, there would be no conditions on the provider's use of local government facilities: what the provider

requested would be simply be granted. Technically, the provider would not even be under any obligation to replace a traffic signal or a street light with a traffic signal or street light that worked in concert with the City's street light and traffic light systems.

Here, a "deemed granted" remedy would not be limited to preempting local regulatory authority – a limitation that the FCC has acknowledged applies in the context of Section 1455(a)'s "deemed granted" remedy.[11] Thus, it would effect a taking or effective condemnation of local government property, and under the *Small Cell Order*'s rules for compensation, there is no avenue for fully recovering the damage caused by the taking. *See* Local Government Petitioners' Brief at 106-113

The "deemed granted" remedy could also require an affirmative action by the affected state or local government to convey the property rights "deemed granted" (i.e. the right to occupy street lights and traffic signals) by the operation of law. A federally compelled lease of publicly-owned property is not equivalent to issuing a permit for Tenth amendment purposes. Whereas local governments could decline to regulate small cells and have no need to issue permits, declining to respond to requests for access to publicly owned street lights results in a

[11] *2014 Shot Clock Order*, ¶239 (providing that Section 1455(a) and the "deemed granted" remedy do not apply to states or localities acting in their proprietary capacity).

conveyance of property interests, and requires local governments to dedicate their own property to small cell use. This is a commandeering government assets and resources in furtherance of a federal program, and violates the Tenth Amendment. *See id*. at 114-116.

At bottom, a "deemed granted" remedy here would either involve the federal government (1) taking away property rights from states and localities and transferring those rights to wireless service and infrastructure providers, for their private commercial purposes—an effective condemnation of state and local property for private purposes; or (2) commandeering the property and assets of state and local governments to serve the FCC's goal of promoting broadband and 5G deployment—a clear violation of the Tenth Amendment. *Printz v. U.S.*, 521 U.S. 898, 925 (1997); *New York v. U.S.*, 505 U.S. 144, 161 (1992); *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018). And, even setting aside the serious constitutional issues raised by a "deemed granted" remedy, it is notable that Industry Petitioners do not point to any statutory authority that would authorize the FCC to create such a drastic remedy, much less *compel* the FCC to adopt that remedy.[12]

[12] Of course, one could argue that communities can avoid the compelled transfer by developing templates under which their facilities would be made available to all wireless and infrastructure comers, effectively requiring localities to assume the obligations of a common carrier with respect to their own vertical infrastructure in the right-of-way, or by denying all applications, and facing litigation under Section

CONCLUSION

For the reasons set forth above, the Court should deny Industry Petitioners' Petitions for Review.

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332(c)(7). Either way, however, states and localities are forced to either act as common carriers, or participate in a federal program (by issuing decision and acting on requests). Under the Constitution, neither action can be compelled. *Id.*

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STATEMENT OF RELATED CASES

The *Order* on appeal here has not previously been the subject of review by this Court or any other court. All petitions for review of this *Order* have been consolidated before this Court under *Sprint Corp. v. FCC*, No. 19-70123, and are being briefed pursuant to the Briefing Order for the cases.

Date: August 14, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,275 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word, Version 2010, Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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