

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

18-72689, 19-70123, 19-70124, 19-70125, 19-70136,  
19-70144, 19-70145, 19-70146, 19-70147, 19-70326, 19-70339,  
19-70341, and 19-70344

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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City of Portland, Oregon,  
*Petitioner,*

City and County of San Francisco, California,  
*Intervenor,*

vs.

Federal Communications Commission  
and United States of America,  
*Respondents.*

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Sprint Corporation,  
*Petitioner,*

City of Bowie, Maryland, et al.,  
*Intervenors,*

vs.

Federal Communications Commission  
and United States of America,  
*Respondents.*

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On Petitions for Review of Orders of the  
Federal Communications Commission

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**MOTION TO EXCEED TYPE-VOLUME LIMIT**

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Pursuant to Federal Rule of Appellate Procedure 27, Ninth Circuit Rules 27-1 and 32-2, and the Appellate Commissioner's Order April 18, 2019 (Dkt. Entry 55), Petitioners in Nos. 18-72689, 19-70136, 70144, 19-70145, 19-70146, 19-19-70341, and 19-70344, and the Intervenors joining on their brief, respectfully move for leave to exceed the type-volume limitations set forth in Ninth Circuit Rule 32-1 for their Joint Opening Brief and to file a brief containing 21,288 words. Pursuant to Ninth Circuit Rule 32-2(a), the reasons for this Motion are set forth in the attached declaration. On June 7, 2019, movants requested by email the positions of the other parties to this matter. NATOA and the APPA indicated they support the Motion. No other party had responded.

Respectfully submitted,

June 10, 2019

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*s/ Kenneth S. Fellman*

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*Certain Intervenors in Case Nos. 18-*

*72689, 19 70339 and 19-70341*

*s/ Robert C. May*

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*s/ Michael E. Gates*

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## DECLARATION OF COUNSEL

In support of the Motion to Exceed Type-Volume Limit of Local Government Petitioners (Case Nos. 18-72689, 19-70136, 19-70144, 19-70145, 19-70146, 19-70341, and 19-70344), I declare:

1. I am a partner at Best, Best & Krieger LLP, counsel to petitioners in Case Nos. 18-72689, 19-70144, and 19-70341. I am authorized to file the motion and this declaration on behalf of Petitioners in Case Nos. 18-72689, 19-70136, 19-70144, 19-70145, 19-70146, 19-70341, and 19-70344, joined by petitioner-side intervenors represented by Petitioners' counsel (collectively, "Local Governments").

2. Local Governments' Joint Opening Brief, which is submitted simultaneously with this motion, addresses two Federal Communications Commission ("FCC") Orders. Case No. 18-72689 is an appeal of the Declaratory Ruling portion of *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Third Report and Order and Declaratory Ruling*, WC Docket No. 17-84, WT Docket No. 17-79, 33 FCC Rcd. 7705 (2018) ("*Moratorium Order*"). Case Nos. 19-70123, 19-70124, 19-70125, 19-70136, 19-70144, 19-70145, 19-70146, 19-70147, 19-70326, 19-70339,

19-70341, and 19-70344 are consolidated appeals of *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*”). The appeals of the *Small Cell Order* are not consolidated with the appeal of the Declaratory Ruling portion of the *Moratorium Order*.

3. Local Governments and their supporting intervenors joining this Joint Opening Brief are eighty-seven different local governments and local government associations. They filed six separate petitions for review of the *Small Cell Order* (two sets of Petitioners are now represented by the same law firm), and one petition for review of the *Moratorium Order*. In an effort to avoid duplicative briefing, reduce the total number of briefs, and minimize the total word count, Local Government Petitioners, who otherwise would have been entitled to five separate briefs, have joined on a single brief. If the *Moratorium Order* were briefed separately, it would allow for an additional 14,000-word brief. The Joint Opening Brief, however, contains 21,288 words, which is slightly more than one and one-half briefs. The Joint Opening Brief

also addresses the separate issues raised in the petition for review of the *Moratorium Order*. Thus, the Local Governments' Joint Opening Brief represents a substantial consolidation and shortening of the briefing that would have been filed had Local Governments filed separate briefs, or had the two appeals been briefed separately.

4. Substantial need supports Local Government's request to file a brief that exceeds the type-volume limitations. The brief addresses two lengthy FCC orders. Counting only the Declaratory Ruling portion of the *Moratorium Order*, the two orders on review are over 100 single-spaced pages, which include over 500 footnotes, most of which include substantive legal arguments about decades of FCC and court precedent, as well as scores of citations to the voluminous underlying record with more than 3,650 separate entries exceeding 28,000 pages in the Commission's rulemaking docket.<sup>1</sup> Although the statutory and constitutional issues raised by the two orders overlap, they also contain many separate and specific rulings. The *Small Cell Order*, for instance, not only purports to provide an interpretation of 47 U.S.C. Sections 253 and 332(c)(7), but it also separately applies that interpretation to

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<sup>1</sup> The page count does not include the more than 1,700 "express filings" via the FCC's website.

(1) state and local fees, (2) state and local aesthetic requirements, and (3) state and local governments' actions in their proprietary capacities. Each of these applications raises discrete statutory and constitutional issues. The *Small Cell Order* also includes a Third Report and Order that (1) establishes new "shot clocks" for state and local review of wireless infrastructure deployment applications, (2) adopts a specific remedy for violations of these new shot clocks, and (3) clarifies various issues with respect to shot clocks.

5. Local Governments exercised diligence to reduce repetition of common facts and legal issues. The joint statement of the case sets forth a single set of common facts, and carefully frames the relevant legal issues. The Joint Brief also sets out a common legal standard adopted by Local Governments. Where possible, Local Governments have structured their joint brief to minimize duplication by addressing overarching statutory issues in Part II and constitutional issues in Part IV, whereas Part III addresses specific elements of the two orders.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on June 10, 2019, in Washington, D.C.

*s/ Joseph Van Eaton*

*Attorneys for Petitioners in Case  
Nos. 18-72689 and 19-70144,  
Petitioners and Certain Intervenors  
in Case No. 19-70341 and Intervenors  
in Case Nos. 19-70136, and 19-70146*

## CERTIFICATE OF SERVICE

I hereby certify that on June 10, 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.

Date: June 10, 2019

*s/ Joseph Van Eaton* \_\_\_\_\_

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