18-72689, 19-70490

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF PORTLAND, Oregon,
Petitioner,

CITY AND COUNTY OF SAN FRANCISCO, California,
Intervenor,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA.,
Respondents.

On Petitions for Review of Orders of
the Federal Communications Commission

BRIEF OF NEBRASKA MUNICIPAL POWER POOL AND LINCOLN ELECTRIC SYSTEM AS *AMICI CURIAE* IN SUPPORT OF LOCAL GOVERNMENT PETITIONERS (CASE NO. 18-72869 AND CONSOLIDATED CASES)

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CORPORATE DISCLOSURE STATEMENT

Amici curiae Nebraska Municipal Power Pool ("NMPP") and Lincoln Electric System ("LES") submit this Corporate Disclosure Statement pursuant to Federal Rules of Appellate Procedure 29(a)(4)(A) and 26.1.

NMPP is the service organization of NMPP Energy, a nonprofit, member-owned coalition of four organizations providing electricity, natural gas, and utility-related services to nearly 200 member communities across six Midwest and Mountain States. No publicly held corporation owns 10% or more of its stock.

LES is a municipally-owned electric utility that serves approximately 200 square miles within Lancaster County, Nebraska, supplying electricity to customers in the cities of Lincoln, Prairie Home, Waverly, Walton, Cheney and Emerald. LES is also NMPP's largest member. As a governmental agency, LES is exempt from the requirements of Rules 29(a)(4)(A) and 26.1.

Date: June 17, 2019

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Nebraska Municipal Power Pool ("NMPP") and Lincoln Electric System ("LES") are pleased to file this *Amici Curiae* brief in support of the Local Government Petitioners (Case No. 18-72689 and consolidated cases) and in support of Petitioner American Public Power Association (Case No. 19-70123 and consolidated cases).

NMPP Energy, which is based in Lincoln, Nebraska, is comprised of nearly 200 member communities which are located in six states. Those states include Colorado, Iowa, Kansas, Nebraska, North Dakota and Wyoming. NMPP Energy serves municipal utilities in communities of 200 to 285,000 people.

NMPP is also comprised of a coalition other organizations. The Municipal Energy Agency of Nebraska ("MEAN") is a not-for-profit wholesale electricity supply organization of NMPP Energy. MEAN provides cost-based power supply, transmission and related services to 69 participating communities in four states (Colorado, Iowa, Nebraska and Wyoming).

Another NMPP coalition member is the National Public Gas Agency ("NPGA"). NPGA provides wholesale natural gas to its member communities and

[1] No counsel of any party to these consolidated proceedings authorized any part of this brief. No party or party's counsel, or person other than *Amici* NMPP and LES, their members or their counsel contributed any money to the preparation or submission of this brief.

other small and medium-sized participating communities that own their own natural gas systems. Economies of scale and increased operational efficiencies result from the pooling of natural gas purchases.

An additional coalition member is the Public Alliance for Community Energy ("ACE"). ACE is the retail natural gas supply organization of NMPP Energy. ACE competes in the Choice Gas program.

LES is a municipally-owned electric utility that serves approximately 200 square miles within Lancaster County, Nebraska, supplying power to customers in the cities of Lincoln, Prairie Home, Waverly, Walton, Cheney and Emerald. The population of Lincoln alone is close to 285,000 people.

For over 50 years, LES has reliably provided power to homes, businesses and governmental properties throughout Lincoln and the surrounding area. LES is committed to providing electricity in a safe and reliable manner. LES is a vertically-integrated, utility-owning generation, transmission, and distribution infrastructure. LES owns or has participation contracts in generation resources in six states. The nameplate capacity of its generation portfolio is comprised of approximately one-third renewable resources (including wind, solar and hydropower), one-third natural gas resources, and one-third coal resources.

LES is a semi-autonomous entity governed by a nine-member administrative board. LES's budget is entirely rate-supported and separate from the City of

Lincoln budget. It receives no general tax funding from the City of Lincoln, but LES makes significant transfers to the City treasury. LES in fact pays the City a "City Dividend for Utility Ownership" and additionally makes a payment in-lieu-of-tax that gets distributed to the City of Lincoln, Lancaster County, Lincoln Public School District, and the City of Waverly which LES serves under franchise.

LES owns approximately 24,201 distribution poles and 741 streetlight poles. It also has attachments on 8,133 poles owned by Windstream, a landline phone company serving Lincoln. In addition, LES maintains approximately 25,783 streetlight poles owned by the City of Lincoln, so any make-ready work required to install Small Wireless Facilities on those streetlight poles will be the responsibility of LES.

Because of the interests outlined above, the outcome of these consolidated cases has a direct bearing on both LES and NMPP members. Beyond the potential loss of revenue for entities such as LES and NMPP's other members, which revenue the FCC explicitly attempts to restrict, both organizations have significant concerns regarding the FCC's efforts to install itself as a regulatory authority over an area from which it was very clearly and intentionally excluded by Congress. LES and NMPP also have concerns that, should the FCC's attempt be upheld to exert authority through the *Orders*, the efforts of municipal utilities to provide safe

and reliable electric service will be harmed by the resulting unpredictability and regulatory disorder created.

NMPP and LES have endeavored to obtain consent from the parties to file this *Amici Curiae* brief, and have moved this Court for leave to file it as well.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Communication Commission's ("FCC" or "Commission") *Declaratory Ruling and Third Report and Order*, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79 and WC Docket No. 17-84, 33 FCC Rcd. 9088 (2018) ("*Small Cell Order*"), as well as the FCC's *Third Report and Order and Declaratory Ruling, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79 and WC Docket No. 17-84, 33 FCC Rcd. 7705 (2018) ("*Moratorium Order*") (collectively, the "*Orders*"), are both of major concern to NMPP and LES. In addition to the potential loss of revenue which emanates from the *Orders*, both NMPP and LES are very troubled by the FCC's attempted regulatory approach for the placement of small wireless facilities on municipally-owned utility facilities, such as utility poles, and the related restrictions the FCC tries to impose on siting requirements that municipal utilities hosting such small wireless facilities can impose. Safety considerations are paramount for these organizations.

The FCC's attempt to regulate municipal utilities and municipal utility poles pursuant to Section 253 and 332[2] is an overreach of the FCC's statutory authority. The FCC provides no valid legal basis supporting its regulatory efforts in the

[2] 47 U.S.C. §§ 253, 332.

Orders, which renders them arbitrary and capricious and an abuse of discretion. From a less legalistic and a more practical standpoint, the cumulative effect of the *Orders* is to jumble, confuse, complicate and obscure the regulatory framework established by Section 224[3] (and the FCC's own prior application of Section 224), thereby creating serious potential risks to the provision of safe and reliable electric service—all in the name of streamlining the permitting process for small wireless facilities service providers.

By its own terms, Section 224 exempts both municipal utilities and municipal utility poles from FCC regulation. As detailed below, the FCC does not have the authority to regulate municipal utilities or municipal utility poles in the manner it attempts to through the *Orders*. In fact, Congress took measures to protect against such regulatory destabilization.[4]

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[3] 47 U.S.C. § 224.

[4] LES and NMPP concur with the arguments and analysis of Petitioner American Public Power Association and the Local Government Petitioners regarding the applicability of Sections 253 and 332 to the provision of electric service by municipal utilities, and that in so doing they are acting in a proprietary as opposed to a regulatory context. Illustrative of the point made by Petitioners, LES does not regulate the ROW in any of the jurisdictions where it provides service, and so does not have control over (or the authority to issue) all necessary approvals for the siting of small wireless facilities proposed to be located in the right-of-way, and so it cannot unilaterally control the timeline by which applications can be approved or all necessary approvals granted. Indeed, LES itself is largely subject to the same review and approval requirements in the jurisdictions it serves as small wireless facility applicants. See, *e.g.*, *Building and Const. Trades Council of Metropolitan Dist. v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 231-232, 113 S.Ct. 1190 (1993).

ARGUMENT

I. MUNICIPAL UTILITIES AND MUNICIPAL UTILITY POLE ATTACHMENTS ARE EXEMPT FROM FCC REGULATION

A. The FCC Has Not Been Granted Regulatory Authority Over Municipal Utilities or Municipal Utility Pole Attachments

Pole attachments[5] require an evaluation of multiple considerations. Foremost among such considerations is Federal Government regulatory authority pursuant to Section 224. Section 224(b)(1) authorizes the FCC to "regulate the rates, terms, and conditions for *pole attachments* to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions" (emphasis added).

However, such regulation is limited to "pole[s], duct[s], conduit[s] or right[s]-of-way owned or controlled by *a utility*"[6] (emphasis added). The term "utility" in turn is defined explicitly to "not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government *or any State*"[7] (emphasis added). "State" is defined to include "any State, territory, or possession of the United States, the District of Columbia *or any political*

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[5] "Pole attachments" are defined as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4).
[6] 47 U.S.C. § 224(a)(4).
[7] 47 U.S.C. § 224(a)(1).

subdivision, agency or instrumentality thereof"[8] (emphasis added). Accordingly, as state political subdivisions, Congress has carefully and specifically excluded municipal utilities, such as LES and NMPP's members, as well as attachments to their utility poles, from FCC regulation.

The *Orders* provide scant analysis of the interplay between Section 224, and Sections 253 and 332. The FCC's substantive analysis of Section 224 in the *Small Cell Order* is found in a single footnote, wherein it summarily dismisses the exemption provided by Section 224 for municipal utilities and municipal utility pole attachments.[9] Given the lack of analysis, the FCC's treatment of Section 224 is insufficient.

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[8] 47 U.S.C. § 224(a)(3).

[9] In a single footnote, the FCC states the following:

> Some have argued that Section 224 of the Communications Act's exception of state-owned and cooperative-owned utilities from the definition of "utility," "[a]s used in this section," suggests that Congress did not intend for any other portion of the Act to apply to poles or other facilities owned by such entities. City of Mukilteo, et. al. Ex Parte Comments on the Draft Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, at 1 (filed Sept. 18, 2018); Letter from James Bradford Ramsay, General Counsel, NARUC to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79 at 7 (filed Sept. 19, 2018). We see no basis for such a reading. Nothing in Section 253 suggests such a limited reading, nor does Section 224 indicate that other provisions of the Act do not apply. We conclude that our interpretation of effective prohibition extends to fees for all government-owned property in the ROW, including utility poles. *Compare* 47 U.S.C. § 224 *with* 47 U.S.C. § 253. We are not addressing here how our interpretations apply to access or attachments to government-owned property located outside the public ROW. *Small Cell Order*, fn. 253.

B. Section 253 and Section 332 Do Not Extend Regulatory Authority Over Municipal Utilities or Municipal Utility Pole Attachments to the FCC

Notwithstanding the unambiguous Congressional intent to limit the scope of the FCC's regulatory authority provided in Section 224, the FCC has attempted to sidestep clear limitations placed upon it and assert regulatory authority over municipal utilities—and attachments to the utility poles owned by those municipal utilities—pursuant to Sections 253 and 332 of the Communications Act. As detailed below, the basis for the FCC's assertion of such authority is not valid.

The chief purpose and primary function of municipal utility poles is and will always be to provide for the safe and reliable delivery of electric service to municipal utility customers. Because of that, as recognized by Congress in Section 224, municipal utilities and their utility poles have always been and continue to be heavily regulated at the local and state levels. The FCC's efforts to usurp that regulatory authority reserved by Congress to State and local bodies via Section 224, is improper.

Prior to its adoption of the *Small Cell Order*, the FCC had continuously acknowledged the clear limits of its regulatory authority regarding municipal

utilities and municipal utility pole attachments under Section 224.[10] The FCC nevertheless requested information regarding its ability to reverse course under Sections 253 and 332 and assert authority over municipal utilities and municipal utility pole attachments; this in spite of the fact that in adopting Section 224 Congress had specifically declined to extend such authority to the FCC:

> Could the Commission use its authority under Section 253 to regulate access to municipally-owned poles when the actions of the municipality are deemed to be prohibiting or effectively prohibiting the provisions of telecommunications service? If so, could the Commission use its Section 253 authority in states that regulate pole attachment under Section 224(c)?

Wireline Notice, ¶ 108.

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[10] *See, e.g., In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Notice of Proposed Rulemaking, Notice of Inquiry and Request for Comment*, WC Docket No. 17-84, released April 21, 2017 ("*Wireline Notice*"), ¶ 30:

> We also recognize that some broadband providers encounter difficulties in accessing poles, ducts, conduits, and rights-of-way owned by entities *that are not subject to Section 224 of the Communications Act*, such as municipalities, electric cooperatives, and railroads.[10] We seek comment on actions that the Commission might be able to undertake to speed deployment of next generation networks by facilitating access to infrastructure owned by *entities not subject to Section 224*. (Emphasis added.)

See also, *In the Matter of Implementation of Section 224 of the Act*, *A National Broadband Plan for Our Future*, *Report and Order and Order on Reconsideration*, WC Docket No. 07-245, GN Docket 09-51, released April 7, 2011, App. B, ¶ 46:

> Finally, the Commission does not have authority to regulate (and the proposed rules, thus, do not apply to) small utilities that are municipally or cooperatively owned.

In adopting the *Orders*, the FCC relies on Section 253 and on Section 332 to assert authority over municipal utilities and municipal utility poles, citing in particular Section 253(a) and Section 332(c)(7) as the basis for the authority asserted.[11] In other words, the FCC has taken the position that despite the acknowledged lack of FCC oversight authority over municipal utilities and municipal pole attachments pursuant to Section 224, municipal utilities are somehow effectively prohibiting the provision of telecommunications service under Section 253(a) and Section 332(c)(7)(B)(i)(II), and on that basis the FCC asserts regulatory authority over municipal utilities and municipal utility pole

[11] Section 253(a) provides the following:

> No 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 interstate or intrastate telecommunications service.

Section 332(c)(7)(B)(i)(II) provides the following:

> The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—
>
> * * *
>
> shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

attachments.[12] However, there is a fatal flaw in such reliance: Section 253 and Section 332 both only allow for FCC preemption of the regulations of "State or local government[s]" and neither authorize the FCC to preempt acts of Congress, such as the Congressional decision in Section 224 to exclude municipal utilities and municipal utility pole attachments from the scope of regulatory oversight granted to the FCC. Congress determined that the FCC should not have authority to regulate utilities that are municipally owned or operated.

Accordingly, because the FCC is in fact attempting to preempt Section 224 in general, and not any particular "State or local government" regulations, the *Small Cell Order* as applied to municipal utilities and municipal utility pole

[12] In the *Small Cell Order* the FCC explains its identified basis for authority, and its attempt at exercising that authority as pertains to municipal utilities and municipal utility pole attachments as follows:

> We thus clarify the particular standard that governs the fees and charges that violate Sections 253 and 332 when it comes to the Small Wireless Facilities at issue in this decision. Namely, fees are only permitted to the extent that they represent a reasonable approximation of the *local government's* objectively reasonable costs, and are non-discriminatory. *Small Cell Order*, at ¶ 32 (emphasis added).

Further, in a footnote the FCC further elaborates on the intended scope of the Order as pertains to municipal utilities and municipal utility pole attachments:

> Recurring charges for a Small Wireless Facility's use of or attachment to *property inside the ROW owned or controlled by a state or local government, such as a light pole or traffic light*, is the second category of fees addressed here, and is typically paid on a per structure/per year basis. *Id*., fn. 71 (emphasis added).

attachments amounts to nothing more than an effort to execute an end-run around the Congressional limit imposed on the FCC via Section 224. As explained below, the FCC's attempted preemption of municipal utilities and municipal utility pole attachments is *ultra vires*.[13]

II. THE FCC HAS EXCEEDED THE REGULATORY AUTHORITY GRANTED TO IT UNDER SECTIONS 253 AND 332

A. Section 253 Does Not Grant the FCC the Right to Preempt the Entire Field of Regulation of Utilities and Utility Pole Attachments

Although the FCC relies on Section 253 in its effort to displace state and local regulation of utilities and utility poles in a blanket fashion, Section 253(d) authorizes the FCC to preempt state or local regulations only "to the extent

[13] To the extent the argument is framed not as whether the FCC's attempt to regulate municipal utilities and attachments to municipal utility poles is beyond its regulatory authority, but as whether or not the FCC's actual regulatory efforts are themselves erroneous, the Supreme Court has stated the following:

> Both [administrative agencies'] power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is *ultra vires*. Because the question—whether framed as an incorrect application of agency authority or an assertion of authority not conferred—is always whether the agency has gone beyond what Congress has permitted it to do, there is no principled basis for carving out some arbitrary subset of such claims as "jurisdictional." *City of Arlington v. F.C.C.*, 569 U.S. 290, 297, 133 S.Ct. 1863 (2013).

necessary to correct such violation or inconsistency."[14] Such minimally invasive "to the extent necessary" language indicates a clear Congressional intent not to authorize the FCC to undertake wide-spread occupation of the field, but rather to review state and local regulations and preempt only to the extent necessary to correct regulations it determines create an actual or effective prohibition. As the Supreme Court has explained, "Field preemption reflects a congressional decision to foreclose *any state regulation* in the area, even if it is parallel to federal standards." *Arizona v. U.S.*, 567 U.S. 387, 401, 132 S.Ct. 2492 (2012) (emphasis added), *citing Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249, 104 S.Ct. 615 (1984).

In *Silkwood*, The Supreme Court distinguished between the kind of limited preemption authority actually granted to the FCC in Section 253, and the kind of broad preemption the FCC attempts to assert through the *Orders*:

> As we recently observed in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 103

[14] Section 253(d) provides the following:

> (d) Preemption
>
> If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement *to the extent necessary to correct such violation or inconsistency* (emphasis added).

> S.Ct. 1713, 75 L.Ed.2d 752 (1983), state law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Silkwood, at 248 (internal citations omitted).

Given the Supreme Court's analysis, and given the limited authority granted by Congress in Section 253(d), and given the ability of states to elect to regulate via Section 224 "reverse preemption," discussed in further detail below, it is clear that the FCC does not have the authority to exercise such field preemption in the area of utility and utility pole attachment regulation. Further, consistent with the specific grant of authority in Section 253(d), the FCC is authorized only to preempt state and local utility regulations, including regulations pertaining to utility pole attachments, "to the extent necessary to correct [any] violation or inconsistency."

B. The FCC Approach Would Render Section 224(c) Meaningless

Even as pertains to non-municipal utilities and non-municipal utility pole attachments subject to Section 224, the FCC's assertion of regulatory authority is an overreach. Section 224(c)(1) authorizes states to assume regulatory oversight concerning rates, terms, attachments, and management of utility poles, ducts, conduits, and in particular "for pole attachments in any case where such matters

are regulated by a State."[15] Section 224(c) is particularly significant to non-municipal utilities because it provides clear guidance as to which regulations are applicable to those utilities. Where states have elected to regulate utilities and utility pole attachments under Section 224(c), utilities are to first look to the state for regulatory direction, and then to the FCC to the extent any of the state's regulations have been preempted by the FCC.[16] In those scenarios where the state does not provide the entire regulatory framework, either because it has not exercised the right under Section 253(c), or because the FCC has preempted a portion of the state's regulatory framework under Section 253(d), the FCC's regulatory authority may then apply.

However, the FCC has framed its regulations in the *Orders* in a completely different manner than the statutory structure outlined above. According to the

[15] Section 224(c)(1) provides the following:

> (c) State regulatory authority over rates, terms, and conditions; preemption; certification; circumstances constituting State regulation
>
> (1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f), for pole attachments in any case where such matters are regulated by a State.

[16] The FCC periodically publishes a list of the states that have certified that they regulate pole attachments pursuant to Section 224(c). *See Public Notice*, *States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 10-891, released May 19, 2010.

FCC, the authority granted to it by Section 253 is "expansive" in scope[17] and, based on its aggressive reading attempts to stretch its authority under Section 253 to include not only regulation of public right-of-way itself, but to also exert regulatory influence over other publicly owned property located within the ROW.[18]

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[17] In the *Small Cell Order*, the FCC states the following:

> In reviewing this statutory scheme, the Commission previously has construed Section 253(a) as 'broadly limit[ing] the ability of state[s] to regulate,' while the remaining subsections set forth 'defined areas in which states may regulate'. . . . We need not decide today whether Section 253(a) preempts all fees not expressly saved by Section 253(c) with respect to all types of deployments. Rather, we conclude, based on the record before us, that with respect to Small Wireless Facilities, even fees that might seem small in isolation have material and prohibitive effects on deployment, particularly when considered in the aggregate given the nature and volume of anticipated Small Wireless Facility deployment. Against this backdrop, and in light of significant evidence, set forth herein, that Congress intended Section 253 to preempt legal requirements that effectively prohibit service, including wireless infrastructure deployment, we view the substantive standards for fees that Congress sought to insulate from preemption in Section 253(c) as an appropriate ceiling for state and local fees that apply to the deployment of Small Wireless Facilities in public ROWs. *Order*, ¶ 53 (internal footnotes omitted).

[18] As the FCC asserts:

> [N]otwithstanding that Section 253(c) only expressly governs ROW fees, we find it appropriate to look to its substantive standards as a ceiling for other state and local fees addressed by this *Declaratory Ruling*. For one, our evaluation of the material effects of fees on the deployment of Small Wireless Facilities does not differ whether the fees are for ROW access, use of government property within the ROW, or one-time application and review fees or the like—any of which drain limited capital resources that otherwise could be used for deployment—and we see no reason why the Act would tolerate a greater prohibitory effect in the case of application or review fees than for ROW fees. *Small Cell Order*, ¶ 54 (internal footnotes omitted).

As discussed below, the FCC's interpretation is inconsistent both with the language of Federal legislation and previous Ninth Circuit precedent.

III. THE SCOPE OF AUTHORITY THE FCC ATTEMPTS TO EXERCISE IN THE ORDERS IS INCONSISTENT WITH BINDING NINTH CIRCUIT PRECEDENT

As outlined above, municipal utilities are expressly excluded from the definition of a "utility" under Section 224(a). Further, in case that exclusion somehow happens to leave any uncertainty, the definition of a "pole attachment" specifically is limited in scope to apply only to a "pole, duct, conduit, or right-of-way *owned or controlled by a utility*," meaning a non-municipal utility (emphasis added). Municipal utilities do not qualify as "utilities" as defined by Section 224, and attachments to municipal utility poles do not qualify as "pole attachments" under Section 224 either.

Further, the *Orders* contravene binding Ninth Circuit precedent regarding Section 253. In *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008), this Court held that in order to establish an actual or effective prohibition under Section 253(a) (which would permit the FCC to exercise preemptive authority under Section 253(c)), the FCC is required to "establish either an outright prohibition or an effective prohibition on the provision of

telecommunications services; a plaintiff's showing that a locality could *potentially* prohibit the provision of telecommunications services is insufficient."[19] *Id*. At 579.

The FCC does not do so in the *Small Cell Order*; in fact, it acknowledges its departure from Ninth Circuit precedent, explicitly rejecting the Ninth Circuit's approach:

> We [the FCC] therefore reject the view of those courts that have concluded that Section 253(a) necessarily requires some additional showing beyond the fact that a particular fee is not cost-based. *See, e.g., Qwest v. City of Berkeley*, 433 F.3d 1253, 1257 (9th Cir. 2006) ("we [the Ninth Circuit] decline to read" prior Ninth Circuit precedent "to mean that all non-cost based fees are automatically preempted, but rather that courts must consider the substance of the particular regulation at issue").

Small Cell Order, fn. 143.

This Court in *County of San Diego* acknowledged that would be required to defer to FCC interpretation if Section 253(a) was ambiguous. However, because it found the provision (as appears both in Sections 253 and 332) unambiguous, the Court found it unnecessary to turn to the second step in the two-step analysis as established by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

[19] To the extent the FCC also relies on Section 332 in its attempt to exercise its regulatory authority over utility poles and pole attachments, the Ninth Circuit's analytical approach after *County of San Diego* is the same: "Our holding today therefore harmonizes our interpretations of the identical relevant text in §§ 253(a) and 332(c)(7)(B)(i)(II)." 543 F.3d at 579.

> Although our conclusion rests on the unambiguous text of § 253(a), we note that our interpretation is consistent with the FCC's. *See In re Cal. Payphone Ass'n,* 12 F.C.C.R. 14191, 14209 (1997) (holding that, to be preempted by § 253(a), a regulation 'would have to actually prohibit or effectively prohibit' the provision of services); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005) (holding that the two-step *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), analysis applies to FCC rulings). Were the statute ambiguous, we would defer to the FCC under *Chevron,* as its interpretation is certainly reasonable. 467 U.S. at 843, 104 S.Ct. 2778. Our narrow interpretation of the preemptive effect of § 253(a) also is consistent with the presumption that 'express preemption statutory provisions should be given a narrow interpretation.'

Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n, 410 F.3d 492, 496 (9th Cir.2005).

Because this Court has already determined Section 253(a) to be unambiguous (and, by extension, the same language in Section 332(c)(7)(B)(i)(II)), the FCC's interpretation of Section 253 and Section 332 prohibiting any above-fee costs is due no deference.

Because the FCC's incorrect determination, that it has authority to regulate municipal utilities and municipal utility poles, underpins the entirety of the FCC's analysis in the *Orders*, and in particular because that analysis contravenes the binding authority of this Court in *County of San Diego*, the regulations the FCC attempts to impose on municipal utilities and their municipal utility poles are invalid.

CONCLUSION

For the foregoing reasons, *Amici* NMPP and LES support Petitioner American Public Power Association and Local Government Petitioners and requests that the Court reverse the FCC's *Orders* in their entirety, and in particular regarding their application to municipal utilities and municipal utility poles.

Dated: June 17, 2019

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STATEMENT OF RELATED CASES

The *Orders* on appeal have not previously been the subject of review by this Court or any other court. All petitions for review of these *Orders* have been consolidated before this Court under either *City of Portland v. FCC*, No. 18-72689, or *Sprint Corp v. FCC*, No. 19-70123, as appropriate, and are being briefed pursuant to the Briefing Order for the cases. Pursuant to the Order issued on April 18, 2019, by Appellate Commissioner Shaw, Case No. 19-70490 will be briefed separately from No. 18-72689 and 19-70123.

- *City of Portland v. FCC*, Case No. 18-72689. Appealing the *Declaratory Ruling* portion of the FCC's *Third Report and Order and Declaratory Ruling, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, FCC 18-111, WC Docket No. 17-84, WT Docket No. 17-79 (re. Aug. 3, 2018)("*Moratorium Order*").
- *Sprint Corp. v. FCC*, Case No. 19-70123 (lead case). Appealing the FCC's *Declaratory Ruling and Third Report and Order, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79 and WC Docket No. 17-84, FCC 18-133 (re, Sep. 27, 2018)("*Small Cell Order*"). By Order of the Court, the following cases appealing the *Small Cell Order* have been consolidated with the appeal of the *Moratorium Order*.

- *Verizon v. FCC*, Case No. 19-70124
- *Puerto Rico Telephone v. FCC*, Case No. 19-70125
- *City of Seattle et al., v. FCC*, Case No. 19-70136
- *City of San Jose et al., v. FCC*, Case No. 19-70144
- *City and County of San Francisco v. FCC*, Case No. 19-70145
- *City of Huntington Beach v. FCC*, Case No. 19-70146
- *Montgomery County v. FCC*, Case No. 19-70147
- *AT&T Services v. FCC*, Case No. 19-70326
- *American Public Power Association v. FCC*, Case No. 19-70339
- *City of Austin et al., v. FCC*, Case No. 19-70341
- *City of Eugene, et al., v. FCC*, Case No. 19-70344
- *American Electric Power Corp. et al., v. FCC*, Case No 19-70490.

  Appealing the *Report and Order* portion of FCC's *Third Report and Order and Declaratory Ruling, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, FCC 18-111, WC Docket No. 17-84, WT Docket No. 17-79 (re. Aug. 3, 2018)("*Third Report and Order*").

[Signature follows]

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 18-72689, 19-70490

I am the attorney.

This brief contains 4,886 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

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[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature: *s/ Spencer Q. Parsons* **Date:** June 17, 2019

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I hereby certify that on June 17, 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.

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Dated: June 17, 2019

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF PORTLAND, Oregon,
Petitioner,

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA,
Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA.,
Respondents.

On Petitions for Review of Orders of
the Federal Communications Commission

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF OF NEBRASKA MUNICIPAL POWER POOL AND LINCOLN ELECTRIC SYSTEM IN SUPPORT OF PETITIONERS SEEKING REVERSAL OF FEDERAL COMMUNICATIONS COMMISSION ORDERS

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MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF OF NEBRASKA MUNICIPAL POWER POOL AND LINCOLN ELECTRIC SYSTEM IN SUPPORT OF PETITIONERS AND REVERSAL OF FEDERAL COMMUNICATIONS COMMISSION ORDERS

Pursuant to Rule 29, Federal Rules of Appellate Procedure, Nebraska Municipal Power Pool ("NMPP") and Lincoln Electric System ("LES") (hereinafter jointly "*Amici*") hereby submit this Motion for Leave to File a Brief *Amici Curiae* in support of Petitioners.

In support of this motion, *Amici* state:

1. NMPP Energy, which is based in Lincoln, Nebraska, is comprised of nearly 200 member communities which are located in 6 states. Those states include Colorado, Iowa, Kansas, Nebraska, North Dakota and Wyoming. NMPP Energy serves municipal utilities in communities of 200 to 285,000 people.

NMPP is also comprised of a coalition other organizations. The Municipal Energy Agency of Nebraska ("MEAN") is a not-for-profit wholesale electricity supply organization of NMPP Energy. MEAN provides cost-based power supply, transmission and related services to 69 participating communities in four states (Colorado, Iowa, Nebraska and Wyoming).

Another NMPP coalition member is the National Public Gas Agency ("NPGA"). NPGA provides wholesale natural gas to its member communities and other small and medium-sized participating communities that own their own

natural gas systems. Economies of scale and increased operational efficiencies result from the pooling of natural gas purchases.

An additional coalition member is the Public Alliance for Community Energy ("ACE"). ACE is the retail natural gas supply organization of NMPP Energy. ACE competes in the Choice Gas program.

2. LES is a municipally-owned electric utility that serves approximately 200 square miles within Lancaster County, Nebraska, supplying power to customers in the cities of Lincoln, Prairie Home, Waverly, Walton, Cheney and Emerald. The population of Lincoln alone is close to 285,000 people.

For over 50 years, LES has reliably provided power to homes, businesses and governmental properties throughout Lincoln and the surrounding area. LES is committed to providing electricity in a safe and reliable manner. LES is a vertically-integrated utility owning generation, transmission, and distribution infrastructure. LES owns or has participation contracts in generation resources in six states. The nameplate capacity of its generation portfolio is comprised of approximately one-third renewable resources (including wind, solar and hydropower), one-third natural gas resources, and one-third coal resources.

LES is a semi-autonomous entity governed by a nine-member administrative board. LES's budget is entirely rate-supported and separate from the City of Lincoln's budget. It receives no general tax funding from the City of Lincoln, but

LES makes significant transfers to the City treasury. LES in fact pays the City a "City Dividend for Utility Ownership" and additionally makes a payment in-lieu-of-tax that gets distributed to the City of Lincoln, Lancaster County, Lincoln Public School District, and the City of Waverly which LES serves under franchise.

LES owns approximately 24,201 distribution poles and 741 streetlight poles. It also has attachments on 8,133 poles owned by Windstream, a landline phone company serving Lincoln. In addition, LES maintains approximately 25,783 streetlight poles owned by the City of Lincoln, so any make-ready work required to install Small Wireless Facilities on those streetlight poles will be the responsibility of LES.

However, in contrast to the Federal Communication Commission's ("FCC") apparent understanding, as a municipal utility provider LES does not regulate the right of way itself in any of the jurisdictions where it provides service. LES does not have control over (or the authority to issue) all necessary approvals for the siting of small wireless facilities proposed to be located in the right of way. LES cannot unilaterally control the timeline by which applications can be approved or all necessary approvals granted. Further, it does it have the ability to dictate what fees are charged by right of way authorities for such applications.

3. Because of the interests of *Amici* outlined above, the outcome of the Court's review of the FCC's *Declaratory Ruling and Third Report and Order*,

Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No 17-79 and WC Docket 17-84, 33 FCC Rcd. 9088 (2018) ("*Small Cell Order*") and *Third Report and Order and Declaratory Ruling, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No 17-79 and WC Docket 17-84, 33 FCC Rcd. 7705 (2018) ("*Moratorium Order*") (collectively, the "*Orders*") has a direct bearing on both LES and NMPP's members. An *amici* brief from LES and NMPP is desirable so as to provide the Court context of the potential impact of the FCC actions on municipal utilities and their infrastructure should the *Orders* be upheld. The arguments put forward by *Amici* are dispositive regarding the questions before the Court.

Beyond the potential loss of revenue for entities such as LES and NMPP's other members, which revenue the FCC explicitly attempts to restrict through the *Orders*, both organizations have significant concerns regarding the FCC's efforts to install itself as a regulatory authority over an area from which it was very clearly and intentionally excluded by Congress. *Amici* request leave from the Court to file an *Amici Curiae* brief to outline the fatal legal flaws in the FCC's approach to regulation of municipal utilities and municipal utility poles. In addition, LES and NMPP have concerns that, should the FCC's attempt to exert such authority through the *Orders* be upheld, the efforts of municipal utilities like LES and

NMPP's members to provide safe and reliable electric service will be harmed by the resulting unpredictability and regulatory disorder created.

4. LES and NMPP have endeavored to obtain the consent of all parties to the filing of the brief before moving the Court for leave to file their joint amicus brief. *Amici* have obtained affirmative consent from all but two parties to the consolidated cases, The Wireless Association and Sprint Corporation.

CONCLUSION

For the foregoing reasons, *Amici* hereby request the Court grant leave to file an *Amici Curiae* brief in support of Petitioners.

Dated: June 17, 2019

Respectfully submitted,

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Dated: June 17, 2019

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