UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE CITY OF PORTLAND, OREGON, Petitioner, **THE CITY OF ARCADIA, et al.** Intervenors, v. **UNITED STATES OF AMERICA,** and **FEDERAL COMMUNICATIONS COMMISSION,** Respondents.	Case No. 18-72689

OPPOSITION OF THE CITY OF PORTLAND AND LOCAL GOVERNMENT INTERVENORS TO FEDERAL COMMUNICATIONS COMMISSION MOTION TO HOLD IN ABEYANCE

Petitioner City of Portland and all Local Government Intervenors[1] (collectively, "Local Governments") respectfully request that the Court deny the

[1] Intervenors the City of Arcadia, California; the City of Bellevue, Washington; the City of Brookhaven, Georgia; the City of Burien, Washington; the City of Burlingame, California; the City of Chicago, Illinois; the City of Culver City, California; the City of Dubuque, Iowa; the Town of Fairfax, California; the City of Gig Harbor, Washington; the Town of Hillsborough, California; Howard County, Maryland; the City of Kirkland, Washington; the City of Las Vegas, Nevada; the City of Lincoln, Nebraska; the County of Los Angeles, California; the Michigan Municipal League; the City of Monterey, California; the City of Philadelphia, Pennsylvania; the City of Piedmont, California; the City of Plano, Texas; the City of San Bruno, California; the City and County of San Francisco, the City of San Jacinto, California; the City of San Jose, California; the City of Santa Monica, California; and the City of Shafter, California join in this Opposition.

Motion of the Federal Communications Commission to hold this matter in further abeyance. Continued delay is not appropriate in this case.

STATEMENT OF FACTS RELEVANT TO MOTION

On August 2, 2018, the FCC issued a declaratory ruling adopting a final rule and order that purports to find that "express" moratoria, and many "de facto" moratoria on accepting and processing any application for any permit when submitted by a person providing telecommunications services or facilities "effectively prohibits" the provision of telecommunications services within the meaning of 47 U.S.C. § 253(a), and generally cannot be saved from preemption by either the "police power" or "right of way management" safe harbors in Sections 253(b) or (c). Third Report and Order and Declaratory Ruling, *In the Matter of Accelerating Wireless Broadband Deployment By Removing Barriers to Infrastructure Investment,* 33 FCC Rcd 7705 (Aug. 3, 2018) ("*August Order*"). The City of Portland timely filed a petition for review of the Declaratory Ruling portion of the *August Order* on October 2, 2018 in this Court. (Dkt. No. 1.)[2] The FCC previously sought an unlimited abeyance, but this Court only held the case in abeyance for sixty (60) days, and required the FCC to move to obtain any further

[2] Portland did not appeal the Third Report and Order because that portion of the decision deals only with what is known as "One Touch Make Ready." The One Touch Make Ready rules amend the Commission's rules implementing the pole attachment provisions of the Communications Act, 47 U.S.C. § 224, but those rules are unrelated to the Declaratory Ruling in substance. That portion of the Order is subject to separate petitions for reconsideration (not mentioned in the Commission motion) and separate appeals.

abeyance.

The FCC argues further abeyance is appropriate in this appeal because it may be able to dispose of overlapping issues through the resolution of certain pending petitions for reconsideration, and based on the recent government shutdown.[3]

The reconsideration petitions were filed in September, but the Commission chose not to provide Public Notice of the petitions for more than a month, waiting until October 18, 2018, and Federal Register publication did not occur until October 25, 2018. The pleading cycle established by that notice concluded November 19th, 2018. In the intervening 98 days, the FCC has taken no action to resolve the petitions for reconsideration, and while it points in part to a government shutdown as grounds for delay, it offers no timetable for resolving the petitions, and instead seeks an indefinite stay in this case, offering only to provide status reports every 60 days.[4] Any further abeyance, much less an indefinite abeyance, is inappropriate.

ARGUMENT

It is "not an iron clad rule" that a court must "hold a petition for review in abeyance pending the FCC's further proceedings."[5] A petition for reconsideration

[3] Motion at 4.
[4] *Id.*
[5] *Teledesic LLC v. F.C.C.*, 275 F.3d 75, 83 (D.C. Cir. 2001).

does not result in an automatic abeyance of judicial proceedings.[6] Rather, the grant of an abeyance depends on "prudential considerations."[7]

In the context of administrative orders, "[t]he Ninth Circuit uses two factors to determine whether a controversy is ripe for judicial review: the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[8]

1. The hardship to the parties is significant. The *August Order* is part of a broader set of orders issued by the FCC that are intended to dramatically alter the manner in which states and localities may manage wireless placement. The *August Order* exposes localities to an immediate litigation threat by its terms – it literally invites providers to file complaints at the FCC.[9] It suggests that localities should immediately eliminate what the FCC defines as "de jure" and "de facto" moratoria.

The way in which the FCC defines "de facto" and "de jure" moratoria is sweeping: the FCC finds that "telecommunications providers" are prohibited from providing service if required to comply with any general law that preclude access to roadways at certain times, including, as a specific example, freeze and frost laws (which prevent use of heavy trucks on fragile winter roadways). The *August Order*

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[6] *Id.*; *see also MCI Telecommunications Corp. v. F.C.C.*, 143 F.3d 606, 608 (D.C. Cir. 1998) (holding in favor of "prompt judicial decision" despite pending petitions for reconsideration); *Wrather-Alvarez Broad., Inc. v. F.C.C.*, 248 F.2d 646, 649 (D.C. Cir. 1957).
[7] *MCI Telecommunications Corp.*, 143 F.3d at 608.
[8] *Acura of Bellevue v. Reich*, 90 F.3d 1403, 1408 (9th Cir. 1996).
[9] *August Order* at ¶ 168.

further finds that these laws are generally unrelated to safety or to roadway management.[10] The FCC has chosen not to stay the *August Order*, and general roadway laws are now at risk, and will remain at risk.

2. The issues raised by the *August Order* are fit for judicial review.[11] Despite the petitions for reconsideration, the *August Order* constitutes a final order.[12] In between the time that the reconsideration petitions were filed, and the time that the FCC publicly noticed them, the FCC issued another order on wireless deployment, arising out of the same dockets. Declaratory Ruling and Third Report and Order, *In the Matter of Accelerating Wireless Broadband Deployment By Removing Barriers to Infrastructure Investment*, 33 FCC Rcd 9088 (Sep. 27, 2018) ("*September Order*"). As part of the record in that proceeding, many local governments and local government associations (including most of the Local Governments) submitted filings that raised arguments identical to those raised on reconsideration. In the *September Order*, the Commission had a full opportunity to address those comments; it opted instead to base new regulations in part on a reaffirmation of the key legal theories adopted in the *August Order*.[13] While the *September Order* states, at n. 79, that it was not taking any position on the petitions

[10] *Id*. at ¶¶ 143–152.
[11] *See Acura of Bellevue*, 90 F.3d at 1408 ("Whether an agency action is fit for judicial review depends on whether the agency action represents the final administrative work[.]")
[12] 5 U.S.C. § 704.
[13] *Compare August Order* at ¶¶ 159–60 *with September Order* at ¶¶ 92–97.

for reconsideration of the *August Order*, that assertion is belied by the FCC's actions. There is no reason to suppose that further delay will somehow actually resolve the issues raised by Portland in its petition, or that the *August Order* on appeal here is anything other than the "final administrative work."[14]

Moreover, a central legal issue the Local Governments raise on appeal is particularly appropriate for determination now. It is clear from the FCC's *August Order* that its determination is not based on findings that the sorts of laws it claims are "moratoria" result in *actual* prohibitions, as is required by the *en banc* Chevron Step I determination of this Circuit in *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008).[15] The FCC was not free to ignore the "actual prohibition" requirement. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, the Supreme Court stated a court of appeals' "prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference" where (as was the case in *Sprint*) the court of appeals "holds that its construction follows from the unambiguous terms of the statute . . ."[16] Yet, in the *September Order*, now on appeal before this Court, the FCC makes clear why it is ignoring this Court's "actual prohibition" requirement: the FCC

[14] *See Acura of Bellevue*, 90 F.3d at 1408.
[15] *September Order* at ¶ 41.
[16] *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982 (2005).

rejects the validity of that standard.[17]

Abeyance here simply acts as a means for the FCC to ignore this Court's "actual prohibition" standard, while requiring states and localities to comply with its own interpretation of the law, contrary to *Brand X*. In this context, the failure of the FCC to provide a timetable or commitment as to the resolution of the petitions for reconsideration is significant and, in the context of other FCC actions, quite troubling. The FCC has a history of taking years to resolve petitions for reconsideration and review.[18] The FCC attempts here to rely on a 25-day lapse in appropriations in January 2019 to justify its inaction on the petitions for reconsideration since comments closed on November 19, 2018.[19] Even during the government shutdown, however, courts rejected federal agency efforts to delay cases.[20] And even accounting for 25 days of work stoppage, the FCC has had 73

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[17] *September Order* at ¶ 41.

[18] *See, e.g. Montgomery County v. F.C.C.*, 863 F.3d 485, 488 (6th Cir. 2017) (describing the FCC "neglect[ing] to respond" to petitions for reconsideration "for nearly seven years"); *Globalstar, Inc. v. F.C.C.*, 564 F.3d 476, 484 (D.C. Cir. 2009) (describing a petition for reconsideration which sat before the FCC for over three years without action); *Prometheus Radio Project v. F.C.C.*, 652 F.3d 431, 455 (3rd Cir. 2011) (describing a petition for review of a license renewal which remained pending "after more than three years.")

[19] Motion at 3.

[20] *See Kornitzky Group LLC v. FAA*, 912 F.3d 637 (D.C. Cir. Jan. 9, 2019) (Srinavasn & Edwards, J., concurring) (listing 16 examples of denials of stays during 2013 shutdown, and 2 additional denials in 2018-19); *see also* Order, *Leader Commc'ns, Inc. v. FAA*, No. 18-1147 (D.C. Cir. Jan. 7, 2019) (denying motion to stay briefing); Order, *Figueroa v. Pompeo*, No. 18-5064 (D.C. Cir. Jan. 3, 2019) (denying motion to stay oral argument); Order, *Mozilla Corp. v. F.C.C., et. al.*, No. 18-1051 (D.C. Cir. Jan. 17, 2019) (denying motion to stay oral

days, as of this filing, to resolve these petitions for reconsideration.

There is no reason to believe that the agency requires more time to act on the petitions for reconsideration. As part of the *September Order*, the FCC declared that within a 60-day window, localities must grant *all* approvals – including property access, zoning approvals, building, electrical, and traffic permits, and conduct any environmental and historic preservation reviews that may be required to act on an application to place a facility that may be the size of a large refrigerator in the public rights-of-way.[21] The FCC gave local governments 90 days – until January 14, 2019 – to comply with most of the *September Order*'s requirements, and an additional 90 days – until April 14, 2019 – to comply with the other elements of the rules.[22] The agency, in other words, views these issues as simple to resolve. Nonetheless, as of the date of this filing the FCC has had the petitions for reconsideration before it for 176 days.

The Local Governments have a significant interest in having the issues raised in this case resolved promptly. The FCC is moving forward with its orders, and placing the burdens on states and localities based on a "commitment to speeding broadband deployment."[23] That "commitment" must carry with it a willingness for the FCC to act so that timely judicial review can proceed.

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argument).

[21] *September Order* at ¶ 133.

[22] *Id.* at ¶ 153.

[23] *August Order* at ¶ 9.

For the reasons stated above, the abeyance should be denied. The Court should direct this case, and related appeals before this Court of the *September Order*, to a case management conference for development of a briefing schedule. The FCC has already had ample time to act on the Petitions for Reconsideration, and will have even more time to act before the first briefs would be filed. Granting the FCC's motion merely invites additional delay.

Dated: February 25, 2019

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February 25, 2019

CERTIFICATE OF SERVICE

I hereby certify that, on February 25,2019, I sent copies of the forgoing Opposition of the City of Portland And Local Government Intervenors to the Federal Communications Commission's Motion to Hold this Matter in Abeyance via the ECF system to the parties:

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February 25, 2019