UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SPRINT CORPORATION, *Petitioner*, CITY OF BOWIE, Maryland; CITY OF EUGENE, Oregon; CITY OF HUNTSVILLE, Alabama; CITY OF WESTMINSTER, Maryland; COUNTY OF MARIN, California; CITY OF ARCADIA, California; CULVER CITY, California; CITY OF BELLEVUE, California; CITY OF BURIEN, Washington; CITY OF BURLINGAME, Washington; CITY OF GIG HARBOR, Washington; CITY OF ISSAQUAH, Washington; CITY OF KIRKLAND, Washington; CITY OF LAS VEGAS, Nevada; CITY OF LOS ANGELES, California; CITY OF MONTEREY, California; CITY OF ONTARIO, California; CITY OF PIEDMONT, California; CITY OF PORTLAND, Oregon; CITY OF SAN JACINTO, California; CITY OF SAN JOSE, California; CITY OF SHAFTER, California; CITY OF YUMA, Arizona; COUNTY OF LOS ANGELES, California; TOWN OF FAIRFAX, California; CITY OF NEW YORK, *Intervenors*, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents*.	No. 19-70123
VERIZON COMMUNICATIONS, INC., *Petitioner*, CITY OF ARCADIA, California; CITY OF BELLEVUE, California; CITY OF BURIEN, Washington; CITY OF BURLINGAME, Washington; CITY OF GIG HARBOR, Washington; CITY OF ISSAQUAH, Washington; CITY OF KIRKLAND, Washington; CITY OF LAS VEGAS, Nevada;	No. 19-70124

CITY OF LOS ANGELES, California; CITY OF MONTEREY, California; CITY OF ONTARIO, California; CITY OF PIEDMONT, California; CITY OF PORTLAND, Oregon; CITY OF SAN JACINTO, California; CITY OF SAN JOSE, California; CITY OF SHAFTER, California; CITY OF YUMA, Arizona; COUNTY OF LOS ANGELES, California; CULVER CITY, California; CITY OF NEW YORK; TOWN OF FAIRFAX, California,

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

PUERTO RICO TELEPHONE COMPANY, INC.,

Petitioner,

CITY OF ARCADIA, California; CITY OF BELLEVUE, California; CITY OF BURIEN, Washington; CITY OF BURLINGAME, Washington; CITY OF GIG HARBOR, Washington; CITY OF ISSAQUAH, Washington; CITY OF KIRKLAND, Washington; CITY OF LAS VEGAS, Nevada; CITY OF LOS ANGELES, California; CITY OF MONTEREY, California; CITY OF ONTARIO, California; CITY OF PIEDMONT, California; CITY OF PORTLAND, Oregon; CITY OF SAN JACINTO, California; CITY OF SAN JOSE, California; CITY OF SHAFTER, California; CITY OF YUMA, Arizona; COUNTY OF LOS ANGELES, California;

No. 19-70125

CULVER CITY, California; TOWN OF FAIRFAX, California; CITY OF NEW YORK,

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION

and UNITED STATES OF AMERICA,

Respondents.

CITY OF SEATTLE, Washington; CITY OF TACOMA, Washington; KING COUNTY, Washington; LEAGUE OF OREGON CITIES; LEAGUE OF CALIFORNIA CITIES; LEAGUE OF ARIZONA CITIES AND TOWNS,

Petitioners,

CITY OF BAKERSFIELD, California; CITY OF COCONUT CREEK, Florida; CITY OF LACEY, Washington; CITY OF OLYMPIA, Washington; CITY OF RANCHO PALOS VERDES, California; CITY OF TUMWATER, Washington; COLORADO COMMUNICATIONS AND UTILITY ALLIANCE; RAINIER COMMUNICATIONS COMMISSION; COUNTY OF THURSTON, Washington; CITY OF ARCADIA, California; CITY OF BELLEVUE, Washington; CITY OF BURIEN, Washington; CITY OF BURLINGAME, California; CITY OF GIG HARBOR, Washington; CITY OF ISSAQUAH, Washington; CITY OF KIRKLAND, Washington; CITY OF LAS VEGAS, Nevada; CITY OF LOS ANGELES, California; CITY OF MONTEREY, California; CITY OF ONTARIO, California; CITY OF PIEDMONT, California; CITY OF PORTLAND, Oregon; CITY OF SAN JACINTO, California; CITY OF SAN JOSE, California; CITY OF SHAFTER, California; CITY OF YUMA, Arizona; COUNTY OF LOS ANGELES, California; CULVER CITY, California; TOWN OF FAIRFAX, California; CITY OF NEW YORK,

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

No. 19-70136

CITY OF SAN JOSE, California; CITY OF ARCADIA, California; CITY OF BELLEVUE, Washington; CITY OF BURIEN, Washington; CITY OF BURLINGAME, California; CULVER CITY, California; TOWN OF FAIRFAX, California; CITY OF GIG HARBOR, Washington; CITY OF ISSAQUAH, Washington; CITY OF KIRKLAND, Washington; CITY OF LAS VEGAS, Nevada; CITY OF LOS ANGELES, California; COUNTY OF LOS ANGELES, California; CITY OF MONTEREY, California; CITY OF ONTARIO, California; CITY OF PIEDMONT, California; CITY OF PORTLAND, Oregon; CITY OF SAN JACINTO, California; CITY OF SHAFTER, California; CITY OF YUMA, Arizona,

Petitioners,

CTIA—THE WIRELESS ASSOCIATION; COMPETITIVE CARRIERS ASSOCIATION; SPRINT CORPORATION; VERIZON COMMUNICATIONS, INC.; CITY OF NEW YORK; WIRELESS INFRASTRUCTURE ASSOCIATION,

Intervenors,

V.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

No. 19-70144

CITY AND COUNTY OF SAN FRANCISCO,

Petitioner,

V.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

No. 19-70145

CITY OF HUNTINGTON BEACH, *Petitioner*, CITY OF ARCADIA, California; CITY OF BELLEVUE, Washington; CITY OF BURIEN, Washington; CITY OF BURLINGAME, California; CITY OF GIG HARBOR, Washington; CITY OF ISSAQUAH, Washington; CITY OF KIRKLAND, Washington; CITY OF LAS VEGAS, Nevada; CITY OF LOS ANGELES, California; CITY OF MONTEREY, California; CITY OF ONTARIO, California; CITY OF PIEDMONT, California; CITY OF PORTLAND, Oregon; CITY OF SAN JACINTO, California; CITY OF SAN JOSE, California; CITY OF SHAFTER, California; CITY OF YUMA, Arizona; COUNTY OF LOS ANGELES, California; CULVER CITY, California; TOWN OF FAIRFAX, California; CITY OF NEW YORK, *Intervenors*, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents*.	No. 19-70146
MONTGOMERY COUNTY, MARYLAND, *Petitioner*, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents*.	No. 19-70147
AT&T SERVICES, INC., *Petitioner*,	No. 19-70326

CITY OF BALTIMORE, Maryland; CITY AND COUNTY OF SAN FRANCISCO, California; MICHIGAN MUNICIPAL LEAGUE; CITY OF ALBUQUERQUE, New Mexico; NATIONAL LEAGUE OF CITIES; CITY OF BAKERSFIELD, California; TOWN OF OCEAN CITY, Maryland; CITY OF BROOKHAVEN, Georgia; CITY OF COCONUT CREEK, Florida; CITY OF DUBUQUE, Iowa; CITY OF EMERYVILLE, California; CITY OF FRESNO, California; CITY OF LA VISTA, Nebraska; CITY OF LACEY, Washington; CITY OF MEDINA, Washington; CITY OF OLYMPIA, Washington; CITY OF PAPILLION, Nebraska; CITY OF PLANO, Texas; CITY OF RANCHO PALOS VERDES, California; CITY OF ROCKVILLE, Maryland; CITY OF SAN BRUNO, California; CITY OF SANTA MONICA, California; CITY OF SUGARLAND, Texas; CITY OF TUMWATER, Washington; CITY OF WESTMINSTER, Maryland; COLORADO COMMUNICATIONS AND UTILITY ALLIANCE; CONTRA COSTA COUNTY, California; COUNTY OF MARIN, California; INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION; INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION; LEAGUE OF NEBRASKA MUNICIPALITIES; NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; RAINIER COMMUNICATIONS COMMISSION; THURSTON COUNTY, Washington; TOWN OF CORTE MADERA, California; TOWN OF HILLSBOROUGH, California; TOWN OF YARROW POINT, Washington; CITY OF ARCADIA, California; CITY OF BELLEVUE, Washington; CITY OF BURIEN, Washington; CITY OF BURLINGAME, California; CITY OF CULVER CITY, California; CITY OF GIG HARBOR, Washington; CITY OF ISSAQUAH, Washington; CITY OF KIRKLAND, Washington; CITY OF LAS VEGAS, Nevada; CITY OF LOS ANGELES, California; CITY OF MONTEREY, California; CITY OF ONTARIO, California; CITY OF PIEDMONT, California; CITY OF PORTLAND, Oregon; CITY OF SAN JACINTO, California; CITY OF SAN JOSE, California; CITY OF SHAFTER, California; CITY OF YUMA, Arizona; COUNTY OF LOS ANGELES, California; TOWN OF FAIRFAX, California,

Intervenors,

V.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

AMERICAN PUBLIC POWER ASSOCIATION,

Petitioner,

CITY OF ALBUQUERQUE, New Mexico; NATIONAL LEAGUE OF CITIES; CITY OF BROOKHAVEN, Georgia; CITY OF BALTIMORE, Maryland; CITY OF DUBUQUE, Iowa; TOWN OF OCEAN CITY, Maryland; CITY OF EMERYVILLE, California; MICHIGAN MUNICIPAL LEAGUE; TOWN OF HILLSBOROUGH, California; CITY OF LA VISTA, Nebraska; CITY OF MEDINA, Washington; CITY OF PAPILLION, Nebraska; CITY OF PLANO, Texas; CITY OF ROCKVILLE, Maryland; CITY OF SAN BRUNO, California; CITY OF SANTA MONICA, California; CITY OF SUGARLAND, Texas; LEAGUE OF NEBRASKA MUNICIPALITIES; NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; CITY OF BAKERSFIELD, California; CITY OF FRESNO, California; CITY OF RANCHO PALOS VERDES, California; CITY OF COCONUT CREEK, Florida; CITY OF LACEY, Washington; CITY OF OLYMPIA, Washington; CITY OF TUMWATER, Washington; TOWN OF YARROW POINT, Washington; THURSTON COUNTY, Washington; COLORADO COMMUNICATIONS AND UTILITY ALLIANCE; RAINIER COMMUNICATIONS COMMISSION; CITY AND COUNTY OF SAN FRANCISCO, California; COUNTY OF MARIN, California; CONTRA COSTA COUNTY, California; TOWN OF CORTE MADERA, California; CITY OF WESTMINSTER, Maryland,

Intervenors,

V.

No. 19-70339

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

CITY OF AUSTIN, Texas; CITY OF ANN ARBOR, Michigan; COUNTY OF ANNE ARUNDEL, Maryland; CITY OF ATLANTA, Georgia; CITY OF BOSTON, Massachusetts; CITY OF CHICAGO, Illinois; CLARK COUNTY, Nevada; CITY OF COLLEGE PARK, Maryland; CITY OF DALLAS, Texas; DISTRICT OF COLUMBIA; CITY OF GAITHERSBURG, Maryland; HOWARD COUNTY, Maryland; CITY OF LINCOLN, Nebraska; MONTGOMERY COUNTY, Maryland; CITY OF MYRTLE BEACH, South Carolina; CITY OF OMAHA, Nebraska; CITY OF PHILADELPHIA, Pennsylvania; CITY OF RYE, New York; CITY OF SCARSDALE, New York; CITY OF SEAT PLEASANT, Maryland; CITY OF TAKOMA PARK, Maryland; TEXAS COALITION OF CITIES FOR UTILITY ISSUES; MERIDIAN TOWNSHIP, MICHIGAN; BLOOMFIELD TOWNSHIP, MICHIGAN; MICHIGAN TOWNSHIPS ASSOCIATION; MICHIGAN COALITION TO PROTECT PUBLIC RIGHTS-OF-WAY,

Petitioners,

CITY OF ALBUQUERQUE, New Mexico; NATIONAL LEAGUE OF CITIES; CITY OF BROOKHAVEN, Georgia; CITY OF BALTIMORE, Maryland; CITY OF DUBUQUE, Iowa; TOWN OF OCEAN CITY, Maryland; CITY OF EMERYVILLE, California; MICHIGAN MUNICIPAL LEAGUE; TOWN OF HILLSBOROUGH, California; CITY OF LA VISTA, Nebraska; CITY OF MEDINA, Washington; CITY OF PAPILLION, Nebraska; CITY OF PLANO, Texas; CITY OF ROCKVILLE, Maryland; CITY OF SAN BRUNO, California; CITY OF SANTA MONICA, California; CITY OF SUGARLAND, Texas; LEAGUE OF NEBRASKA MUNICIPALITIES; NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; CITY OF BAKERSFIELD, California; CITY OF FRESNO, California; CITY OF RANCHO PALOS VERDES, California;

No. 19-70341

CITY OF COCONUT CREEK, Florida; CITY OF LACEY, Washington; CITY OF OLYMPIA, Washington; CITY OF TUMWATER, Washington; TOWN OF YARROW POINT, Washington; THURSTON COUNTY, Washington; COLORADO COMMUNICATIONS AND UTILITY ALLIANCE; RAINIER COMMUNICATIONS COMMISSION; CITY AND COUNTY OF SAN FRANCISCO, California; COUNTY OF MARIN, California; CONTRA COSTA COUNTY, California; TOWN OF CORTE MADERA, California; CITY OF WESTMINSTER, Maryland,

Intervenors,

V.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

CITY OF EUGENE, Oregon; CITY OF HUNTSVILLE, Alabama; CITY OF BOWIE, Maryland,

Petitioners,

CITY OF ALBUQUERQUE, New Mexico; NATIONAL LEAGUE OF CITIES; CITY OF BROOKHAVEN, Georgia; CITY OF BALTIMORE, Maryland; CITY OF DUBUQUE, Iowa; TOWN OF OCEAN CITY, Maryland; CITY OF EMERYVILLE, California; MICHIGAN MUNICIPAL LEAGUE; TOWN OF HILLSBOROUGH, California; CITY OF LA VISTA, Nebraska; CITY OF MEDINA, Washington; CITY OF PAPILLION, Nebraska; CITY OF PLANO, Texas; CITY OF ROCKVILLE, Maryland; CITY OF SAN BRUNO, California; CITY OF SANTA MONICA, California; CITY OF SUGARLAND, Texas; LEAGUE OF NEBRASKA MUNICIPALITIES; NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; CITY OF BAKERSFIELD, California; CITY OF FRESNO, California; CITY OF RANCHO PALOS VERDES, California; CITY OF COCONUT CREEK, Florida; CITY OF LACEY, Washington; CITY OF OLYMPIA, Washington; CITY OF

No. 19-70344

TUMWATER, Washington; TOWN OF YARROW POINT, Washington; THURSTON COUNTY, Washington; COLORADO COMMUNICATIONS AND UTILITY ALLIANCE; RAINIER COMMUNICATIONS COMMISSION; CITY AND COUNTY OF SAN FRANCISCO, California; COUNTY OF MARIN, California; CONTRA COSTA COUNTY, California; TOWN OF CORTE MADERA, California; CITY OF WESTMINSTER, Maryland,

Intervenors,

V.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

JOINT OPPOSITION OF PETITIONERS CITY OF SAN JOSE, ET AL., CITY OF AUSTIN, TEXAS, ET AL., AND INTERVENORS NATIONAL ASSOCIATION OF TELECOMMUNICATION OFFICERS, CITY OF NEW YORK, AND OTHER LOCAL GOVERNMENTS, TO THE FEDERAL COMMUNICATIONS COMMISSION'S MOTION TO HOLD IN ABEYANCE AND DEFER FILING OF THE RECORD

Petitioners City of San Jose, et al, City of Austin, et al., and Intervenors National Association of Telecommunications Officers and Advisors, City of New York, and Other Local Governments[1] (collectively, "Local Governments") request

[1] 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; City of Albuquerque, New Mexico; National League of Cities; City of Brookhaven, Georgia; City of Baltimore, Maryland; City of Dubuque, Iowa; Town of Ocean City, Maryland; City of Emeryville, California; Michigan Municipal League; Town of Hillsborough, California; City of La Vista, Nebraska; City of Medina, Washington; City of Papillion, Nebraska, City of Plano, Texas; City of Rockville, Maryland; City of San Bruno, California; City of Santa Monica, California; City of Sugarland, Texas; League of Nebraska Municipalities; the City of Austin, Texas; The City of Ann Arbor, Michigan; the County of Anne Arundel, Maryland; The City of Atlanta, Georgia; the City of Boston, Massachusetts; the City of Chicago Illinois; Clark County, Nevada; the City of College Park, Maryland; the City of Dallas, Texas; the District of Columbia; the City of Gaithersburg, Maryland; Howard County, Maryland; the City of Lincoln, Nebraska; Montgomery County, Maryland; the City of Myrtle Beach, South Carolina; the City of Omaha, Nebraska; The City of Philadelphia, Pennsylvania; the City of Rye, New York; The City of Scarsdale, New York; the City of Seat Pleasant, Maryland; the City of Takoma Park, Maryland; the Texas Coalition of Cities for Utility Issues; Meridian Township, Michigan; Bloomfield Township, Michigan; the Michigan Townships Association; The Michigan Coalition to

that the Court deny the Motion of the Federal Communications Commission ("FCC") to hold this matter in abeyance and to delay filing of the record. Delay is not appropriate in this case. The Local Governments do not oppose Movants' request to consolidate these appeals, but believe it appropriate for the Court promptly convene a Case Management Conference to consider the appropriate treatment of this case and related cases for purposes of briefing and further consolidation.

STATEMENT OF FACTS RELEVANT TO MOTION

On September 27, 2018, the FCC adopted a report and order and declaratory ruling purporting to streamline the deployment of wireless facilities by preempting local government authority, overruling the "plain language" interpretations of this Court and other federal appeals courts, and prescribing the terms local governments must offer for use of their proprietary property.[2]

The *September Order* was the second order issued in the same docket addressing local authority to manage placement of wireless facilities. A prior Declaratory Order, adopted in August,[3] was timely appealed to this Circuit by the

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Protect Public Rights-Of-Way are represented by Best Best & Krieger LLP. The National Association of Telecommunication Officers and Advisors and the City of New York are each represented by separate counsel.

[2] 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*").

[3] Third Report and Order and Declaratory Ruling, *In the Matter of Accelerating*

City of Portland, and is now pending.[4] The FCC relied on legal theories adopted in the *August Order* as bases for its actions in the *September Order*.

The City of San Jose, et al., and several other petitioners filed timely Petitions for Review of the *September Order* in multiple circuits, triggering a judicial lottery under 28 U.S.C. § 2112(a)(1)-(3). The Judicial Panel on Multidistrict Litigation initially assigned the *September Order* appeals to the Tenth Circuit. The Tenth Circuit found, however, that the *August Order* and the *September Order* were the "same order" for purposes of 28 U.S.C. § 2112, and therefore transferred all appeals of the *September Order* to this Court.[5]

The FCC moved to hold the *August Order* appeal in abeyance on October 25, 2018. This Court granted a 60-day abeyance, rather than the unlimited abeyance sought by the FCC; that abeyance has expired. The FCC moved to extend the abeyance, and that extension is opposed. The FCC has now moved to hold these *September Order* appeals in abeyance, and to consolidate all of the *September Order* appeals, but not the appeal of the *August Order*.

The FCC argues abeyance of the *September Order* appeals is appropriate because resolution of one pending Petition for Reconsideration may alter or reduce

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Wireless Broadband Deployment By Removing Barriers to Infrastructure Investment, 33 FCC Rcd 7705 (Aug. 3, 2018) ("*August Order*").

[4] *City of Portland v. United States*, 9th Cir. 18-72689.

[5] Order, *City of San Jose v.* FCC, No. 18-9568 (10th Cir. Jan 10, 2019).

the scope of issues relevant to appeal.[6] That Petition for Reconsideration was filed November 14, 2018.[7] The FCC did not provide public notice of the Petition until January 2, 2019.[8] Federal Register publication of that notice did not occur until February 7, 2019.[9] The pleading cycle established concluded March 4, 2019 – nearly four months after the Petition for Reconsideration was filed. The FCC now seeks indefinite delay of these cases, and of its obligation to file the record.

In the meantime, the *August Order* is fully effective, and the *September Order* became effective in part on January 14, 2019, and will be fully effective on April 15, 2019. The *September Order* is already resulting in litigation in this and other circuits, creating significant hardships for localities and courts seeking to resolve issues regarding wireless applications. Abeyance is inappropriate, and the Court should take steps to move these cases forward, including requiring filing of the record.

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[6] Motion at 18-19.

[7] Petition for Reconsideration of the City of New Orleans, et al., WT Docket No. 17-79 (filed Nov. 14, 2018) ("Petition") (attached to the FCC's Motion as Exhibit A).

[8] Public Notice, *Petition for Reconsideration of Action in Proceeding*, Report No. 3109 (FCC Jan. 2, 2019).

[9] *Petition for Reconsideration of Action in Rulemaking Proceeding*, 84 Fed. Reg. 2485 (Feb. 7, 2019).

ARGUMENT

I. ABEYANCE IS NOT APPROPRIATE.

A. The Pending Reconsideration Does Not Justify Abeyance.

The FCC's argument in favor of abeyance depends on its claim that these appeals significantly overlap with the issues raised by a single, pending Petition for Reconsideration of the *September Order*. It argues that resolution of this Petition may "simplify judicial review"[10] as it "raises substantially the same issues as those raised" in Local Governments' appeals of the *September Order*.[11]

The FCC provides no detail supporting its claim, and the overlap is in fact minimal. The Petition contains approximately 12 pages of substance,[12] of which three are dedicated to arguing that the *September Order* is the wrong approach to encouraging 5G deployment,[13] and is inconsistent with the FCC's deregulatory agenda.[14] The remaining eight pages of substance largely argue that the *September Order* is overly vague – a contention with which the Local Governments agree, but which is hardly the main issue on appeal.[15] The Petition raises no issues of statutory interpretation; Local Governments argue that the FCC's reading of 47 U.S.C. §§ 253 and 332(c)(7) are contrary to the statute and contrary to this Court's

[10] *Id.* at 20.
[11] *Id.* at 18.
[12] Petition at 13-25.
[13] *Id.* at 13-14.
[14] *Id.* at 15-16.
[15] *See, e.g., id.* at 24 ("The Commission also failed to sufficiently articulate procedures for when a shot clock is missed.")

"plain language" reading of those provisions in *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008) (*en banc*), which the FCC decision effectively abrogates. Moreover, Local Governments will argue that abrogation, as explained *infra*, is inconsistent with the Supreme Court's decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.[16] That issue is not raised by the Petition. The Petition raises no Constitutional issues; the appeals before this Court allege violations of the Fifth and Tenth Amendments. The *September Order* eliminates the longstanding distinction between actions taken in a regulatory and a proprietary capacity by local governments; this issue, which Local Government raise in these appeals, is not addressed by the Petition.[17] Nor does the Petition raise concerns relating to pole attachments and 47 U.S.C. § 224, or the *September Order's* failure to address radiofrequency health and safety matters, all of which are before the Court. It is more accurate to suggest that the Petition for Reconsideration is a small tail on a big dog, going at most to a single issue: whether the standards adopted by the FCC are so vague as to be arbitrary and capricious.[18] This issue is covered in two pages in the Petition for Reconsideration. The pending petition does not support abeyance.

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[16] *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982 (2005).
[17] *September Order* at ¶ 92.
[18] *See, e.g.*, Petition at 24.

B. Abeyance Would Be Inappropriate In Any Event.

Even if the issues on appeal did overlap with the Petition for Reconsideration, abeyance would not be justified. It is "not an iron clad rule" that a court must "hold a petition for review in abeyance pending the FCC's further proceedings."[19] Rather, the grant of an abeyance depends on "prudential considerations."[20]

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."[21]

1. In determining hardship to the parties, the 9th Circuit considers "whether delaying judicial review will impose hardships on plaintiffs."[22] In evaluating hardship, courts look for "adverse effects of a strictly legal kind."[23] Factors considered include whether the action "command[s] anyone to do anything or refrain from doing anything; … grant[s], withhold[s], or modif[ies] any formal

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[19] *Teledesic LLC v. F.C.C.*, 275 F.3d 75, 83 (D.C. Cir. 2001); *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).

[20] *MCI Telecommunications Corp.*, 143 F.3d at 608.

[21] *Acura of Bellevue v. Reich*, 90 F.3d 1403, 1408 (9th Cir. 1996).

[22] *Id.* at 1408.

[23] *Nat'l Park Hospitality Ass'n v. Dept. of the Interior*, 583 U.S. 803, 809 (2003) (quoting *Ohio Forestry Ass'n,., Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998)).

legal license, power, or authority; … subject[s] anyone to any civil or criminal liability; … or create[s] … legal rights or obligations."[24] The *September Order* does each of these things in turn. It commands local governments to process applications and act within FCC-specified timeframes, and modifies or withholds elements of local governments' authority to manage the aesthetics of their communities and require compensation for the use of public property. Any decision other than granting an application, furthermore, exposes Local Governments to significantly heightened new litigation risks.[25] The *September Order* specifically contemplates new judicial remedies, subjecting localities to strong adverse presumptions in the event of noncompliance and creating a need for local governments to "modify [their] behavior in order to avoid future adverse consequences" – another example of hardship provided by the Supreme Court.[26] As is often the case when "agency regulations [] sometimes force immediate

[24] *Id.*

[25] The FCC eliminated distinctions between acts that are proprietary rather than regulatory. Previously, local governments, like other property owners, had no obligation to respond to a request for access to property controlled in a proprietary capacity. Now, unless they respond within a timeframe specified by the FCC, they are presumed to have effectively prohibited entry in violation of Sections 332(c)(7) or 253(a) and face potential loss of control over the property. Likewise, if access is denied, denial itself gives rise to claims that did not exist under prior FCC precedent. CITE PRIOR FCC PRECEDENT. That change itself gives rise to a hardship.

[26] *Ohio Forestry Ass'n, Inc.*, 523 U.S. at 734.

compliance through fear of future sanctions,"[27] localities have been and continue to be forced to incur substantial expense, and take actions they would not otherwise take,[28] due to the harshness of sanctions and threat of litigation posed by the *September Order*. Its effects, in sum, impose textbook hardship upon the Local Governments.

Further, the *September Order* adopts a test for determining whether a state or local government has violated 47 U.S.C. § 253(a)'s or Section 332(c)(7)'s ban on requirements that "prohibit or have the effect of prohibiting the ability of any entity" to provide telecommunications service[29] that is at odds with this Circuit's plain-language determination in *Sprint* that there must be an "actual prohibition."[30] The *September Order* finds it is enough if a local government action prevents a wireless provider from merely "improving" service. In fact, the *Order* overrules multiple Circuits' prior interpretations of this statute,[31] including the almost universal determination that, before a single denial can be considered a prohibition, it is necessary for the applicant to show that it could not provide services by

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[27] *Id.*

[28] In addition, localities must now process applications under a new legal framework without the FCC having complied with the National Environmental Protection Act and other statutory obligations, which require the agency to consider the health effects of its new regime (including the impact on radiofrequency emissions.)

[29] 47 U.S.C. § 253(a).

[30] *See Sprint Telephony PCS, L.P. v. County of San Diego,* 543 F.3d 571 (9th Cir. 2008).

[31] *September Order* at ¶¶ 41-42.

placing facilities at locations that are less intrusive.

As part of the *September Order*, the FCC also ordered that within a 60-day window, localities must complete processing of *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.[32] This makes it almost impossible to conduct the sort of individualized reviews of wireless facility applications specifically permitted under Section 332(c)(7). And in the event a local government misses the shortened shot clock deadline, the FCC expects that except in exceptional circumstances, courts will direct issuance of permits.[33]

The *September Order* purports to limit and regulate the fees that may be charged for access to proprietary municipal property that happens to be located in the rights-of-way, and to constrain the right to deny access (if access would allow a provider to "improve" service). The *September Order* also reaches property that 47 U.S.C. § 224 forbids the Commission from regulating. The Local Governments described the harms that would follow from implementation of the rules as part of

[32] *Id.* at ¶ 133.

[33] *See, e.g., id.* at ¶ 121 ("…we expect that courts will typically find expedited and preliminary and permanent injunctive relief warranted…"); *id.* at ¶ 123 ("We anticipate that the traditional requirements for awarding preliminary or permanent injunctive relief would likely be satisfied in most cases and in most jurisdictions…").

the record before the FCC,[34] and again in seeking a stay from the Tenth Circuit.[35] The hardships are now increasing, and can be expected to increase as localities receive applications under the new rules. District courts are being told that they must base decisions in pending litigation on the new rules, and must do so on an expedited basis.[36] If the case is delayed, the result will inevitably be the sort of fragmented court review and interpretation of an agency action is exactly what the Hobbs Act was meant to avoid, yet the FCC asks this Court to endorse that fragmentation by seeking indefinite delay pending resolution of a largely unrelated Petition for Reconsideration.

Local governments are thus forced to risk litigation, or approve facilities and accept terms they would otherwise reject. Costly litigation only creates more uncertainty, while approving construction that would not otherwise be permissible but for the *September Order* presents localities with the potential challenge of restoring the *status quo ante* if the *September Order* is overturned.

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[34] Letter from Gerard Lavery Lederer, Counsel, Smart Communities and Special Districts Coalition, WT Docket No. 17-79, at 31-33 (Sep. 19, 2018).

[35] *See* Affidavit of Andrew Strong, Interim Asset Management and Large Projects Director, Seattle City Light (Oct. 30,2018) (attached hereto as "Exhibit A").

[36] In one instance, a wireless carrier has urged a District Court to apply elements of the *September Order* to affect the result of preexisting litigation. T-Mobile Response to D.I. 134, *T-Mobile Northeast LLC v. City of Wilmington, et al.*, D. Del. C.A. No. 16-118-ER (Feb. 18, 2019) (attached hereto as "Exhibit B"). The District Court directed T-Mobile to file a new motion for summary judgment as a result. *See* Order Reopening Case, *T-Mobile Northeast LLC v. City of Wilmington, et al.*, D. Del. C.A. No. 16-1108 (Feb. 25, 2019).

The FCC suggests that the harms are not significant, because the Tenth Circuit found only that movants had failed to show *irreparable* harm (the Tenth Circuit did not find a lack of likelihood of success on the merits).[37] But "hardship" is not the same as "irreparable harm," and the costs and burdens being placed on Local Governments, and the complexity created by uncertainty as to the standards that should apply on review, are significant.[38]

2. The issues raised by the *September Order* are fit for judicial review.[39] Despite the Petition, the *September Order* constitutes a final order.[40] Finality requires that "the action must mark the consummation of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature."[41] Second, "the action must be one from by which rights or obligations have been determined, or from which legal consequences will flow."[42] Both conditions are met here. Courts "consider whether the practical effects of an

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[37] Order, *City of San Jose v.* FCC, No. 18-9568 (10th Cir. Jan 10, 2019).

[38] Moreover, the Tenth Circuit Order simply reflects that Circuit's assessment of the factual showing made at the time the application for Stay was filed, which was before the *September Order* became fully effective, and *before* any litigation might be affected. The Tenth Circuit did not foreclose filing for a Stay when the impacts became more evident, and Local Governments may seek a Stay in this proceeding at an appropriate time.

[39] *See id.* ("Whether an agency action is fit for judicial review depends on whether the agency action represents the final administrative work[.]")

[40] 5 U.S.C. § 704.

[41] *Havasupi Tribe v. Provencio*, 906 F.3d 1155, 1162 (9th Cir. 2018) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)).

[42] *Id.*

agency's decision make it a final agency action." This Circuit "focus[es] on the 'practical and legal effects of the agency action' and define[s] the finally requirement "in a pragmatic and flexible manner."[43]

There is no evidence suggesting the *September Order* is anything other than the final result of its decision-making process. The FCC continues to publicly stand by the *September Order* as adopted. Commissioner Brendan Carr, who has been leading the FCC's infrastructure efforts, recently highlighted the *September Order* in a February 5, 2019 speech, asserting that the agency was "not going to slow down" in its infrastructure efforts, and that the *September Order* (which had at the time been effective for only 22 days, and then only in part) was already impacting local government practices and wireless deployment.[44] There is no reason, therefore, to suppose that further delay will somehow actually resolve the issues raised in these appeals, or that the *September Order* on appeal here is anything other than the "final administrative work."[45]

Moreover, a central issue raised on appeal is particularly appropriate for determination now. It is clear from the FCC's *September Order* that its "material inhibition" standard does not require *actual* prohibitions, as is required by the *en*

[43] *Havasupi Tribe*, 906 F.3d at 1163 (quoting *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1094-95 (9th Cir. 2014)).
[44] Remarks of Commissioner Brendan Carr before the Tower Builders Conference (Feb. 5, 2019), *available at* https://medium.com/@BrendanCarrFCC/5g-jobs-in-the-year-of-5g-3c4ce0b14ace.
[45] *See Acura of Bellevue*, 90 F.3d at 1408.

banc Chevron Step I determination of this Court in *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008).[46] 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 . . . ."[47] Yet, in the *September Order*, the FCC makes clear why it is ignoring this Court's "actual prohibition" requirement: the FCC rejects the validity of that standard.[48]

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 the FCC's, rather than the Court's, interpretation of the law, contrary to *Brand X*. This (along with other elements of the Order discussed above) is a decision from which "legal consequences" will flow.

In this context, the failure of the FCC to provide a timetable or commitment as to the resolution of the Petition for Reconsideration is significant and, in the context of other FCC actions, quite troubling.

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[46] *September Order* at ¶ 41.
[47] *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982 (2005).
[48] *September Order* at ¶ 41.

The FCC has a history of taking years to resolve petitions for reconsideration and review.[49] And in *Portland v. United States,* the appeal before this Court of the *August Order* on which the *September Order* in part relies, the FCC has yet to take action on Petitions for Reconsideration pending before it for more than six months.[50] That delay, combined with the inexplicable two-month delay in noticing the short Petition here, and the request for an indefinite delay in this appeal, suggests that the agency is using reconsideration to delay indefinitely this Court's review of the FCC's actions.[51]

The delay is not justifiable, even accounting for 25 days of work stoppage due to the January 2019 lapse in appropriations. As part of the *September Order*, the FCC declared that within a 60-day window, localities must take final action on *all* approvals – including property access, zoning approvals, building, electrical,

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[49] *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.")

[50] *See* Opposition of Portland, et al to Motion for Further Abeyance, *Portland v. United States*, 9th Cir. 18-72689 (filed Feb. 25, 2019). The Petitions for Reconsideration in that case were filed September 2, 2018; published in the Federal Register October 25, 2018, and comments closed November 19, 2018. These petitions remain pending.

[51] Status Report and Motion for Continued Abeyance, *Portland v. United States*, 9th Cir. 18-72689 (filed Feb. 15, 2019).

and traffic permits, and any environmental and historic preservation reviews[52] – that may be required to place a facility in the public rights-of-way that may be the size of a large refrigerator and 10% taller than adjacent buildings.[53] If the siting issues are indeed as important and as easily resolved as these timeframes suggest, it is hard to imagine why the FCC has itself failed to take necessary steps to resolve the Petition for Reconsideration.

The Local Governments have a significant interest in having the issues raised in this case resolved promptly. The FCC has placed these burdens on states and localities based on a "commitment to speeding broadband deployment."[54] That "commitment" must carry with it a willingness for the FCC to act so that timely judicial review can proceed. No doubt the agency will contend that it is free to take as little or as much time as it desires on reconsideration. But that is precisely the point. Unless the agency has a clear and rapid timetable for resolving pending claims, granting abeyance on a matter of this consequence deprives petitioners of their right to an independent, Art. III review of an Order defying Court of Appeals precedent; and fails to advance the interests that justify abeyance: rapid, efficient and uniform resolution of claims.

[52] *September Order* at ¶ 133.
[53] *Id*. at App. A (new Section 1.6002(l)).
[54] *August Order* at ¶ 9.

II. THERE IS NO REASON TO DELAY FILING THE RECORD

The Local Governments oppose the FCC's request to defer filing of the administrative record. Rule 17 states that the record must be filed "within 40 days of *being served* with a petition for review…"[55] The FCC acknowledges that the record could have been due as early as February 25.[56] In fact, since multiple appeals of the *September Order* had previously been filed in this Circuit, and the Commission had notice of the transfer to the 9th Circuit as early as January 10, 2019, the agency in fact had *more* than 40 days' actual notice of obligation to file the record. The FCC was served with the first Petitions for Review of the *September Order* in late October 2018. The FCC waited until the date the record was due to seek extension.

The FCC argues that, despite ample warning of the obligation to file, it is unclear "whether or how" Rule 17 applies, as the Tenth Circuit vacated an automatically generated deadline for filing the Record.[57] But this Court has issued no such order, and Rule 17 remains applicable. The Court should deny the FCC's request to defer record filing, which would further delay these proceedings.

III. CONSOLIDATION SHOULD BE GRANTED, BUT THE COURT SHOULD TAKE ADDITIONAL ACTIONS AS WELL.

The Local Governments do not oppose consolidation of all appeals of the

[55] Fed R. App. Proc. 17(a).
[56] Motion at 23.
[57] *Id.* at 23.

September Order to facilitate development of a unified briefing schedule. However, the Court now has before it a group of cases arising out of the same docket, one of which (*Portland v. United States*, 9th Cir. 18-72689) appeals the *August Order* relied upon by the *September Order*, while the recently transferred 11th Circuit appeal of the *August Order* raises very different issues, primarily related to placement of wires on privately owned utility poles. The Court has pending before it a motion for a Case Management Conference (CMC), and as part of any consolidation order, a CMC in this and all cases arising out of the same dockets ought to be convened to determine whether further consolidation is appropriate, and what sort of briefing scheduled will provide for effective review of the orders on appeal.

CONCLUSION

For the reasons stated above, the requests for abeyance and deferred filing of the record should be denied. The Petition for Reconsideration does not warrant delay, and its resolution will have little to no impact on these proceedings. Moreover, even if the petition were truly central, the comment period on the Petition has closed, so the FCC will have ample time to act before the first briefs would be filed in these appeals. The Court should not allow the FCC to indefinitely delay the review of its orders while local governments and their taxpayers suffer the consequences of increased litigation and uncertainty. The Court should,

however, consolidate all appeals of the *September Order*, and set a Case Management Conference to consider an appropriate schedule for resolution of those cases and other cases arising from the same docket.

Dated: March 7, 2019

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List of Represented Clients:

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; City of Albuquerque, New Mexico; National League of Cities; City of Brookhaven, Georgia; City of Baltimore, Maryland; City of Dubuque, Iowa; Town of Ocean City, Maryland; City of Emeryville, California; Michigan Municipal League; Town of Hillsborough, California; City of La Vista, Nebraska; City of Medina, Washington; City of Papillion, Nebraska, City of Plano, Texas; City of Rockville, Maryland; City of San Bruno, California; City of Santa Monica, California; City of Sugarland, Texas; League of Nebraska Municipalities; the City of Austin, Texas; The City of Ann Arbor, Michigan; the County of Anne Arundel, Maryland; The City of Atlanta, Georgia; the City of Boston, Massachusetts; the City of Chicago Illinois; Clark County, Nevada; the City of College Park, Maryland; the City of Dallas, Texas; the District of Columbia; the City of Gaithersburg, Maryland; Howard County, Maryland; the City of Lincoln, Nebraska; Montgomery County, Maryland; the City of Myrtle Beach, South Carolina; the City of Omaha, Nebraska; The City of Philadelphia, Pennsylvania; the City of Rye, New York; The City of Scarsdale, New York; the City of Seat Pleasant, Maryland; the City of Takoma Park, Maryland; the Texas Coalition of Cities for Utility Issues; Meridian Township, Michigan; Bloomfield Township, Michigan; the Michigan Townships Association; and The Michigan Coalition to Protect Public Rights-Of-Way.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Certificate of Compliance With Type-Volume Limitation,
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1. This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(a) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) this document contains 4,649 words and is under the 20 page limit for motions pursuant to Circuit Rule 17-1(d).

2. This document 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 document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ Joseph Van Eaton
Joseph Van Eaton
Best Best & Krieger LLP

March 7, 2019

CERTIFICATE OF SERVICE

I hereby certify that, on February 25,2019, I sent copies of the forgoing Opposition via the ECF system to the parties:

/s/ Joseph Van Eaton
Joseph Van Eaton
Best Best & Krieger LLP

March 7, 2019

EXHIBIT A

EXHIBIT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79
	)	
and	)	
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-84

CITY OF SEATTLE, WASHINGTON
AFFIDAVIT IN SUPPORT OF MOTION FOR STAY

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

Andrew Strong ("Affiant"), Interim Asset Management and Large Projects Director for Seattle City Light, being of lawful age and being first duly sworn, upon oath, states the following:

1. In Seattle, significant process changes would be necessary to comply with the Commission's Ruling and Order by January 14, 2019.

2. Seattle has been siting small cell facilities since 2005. Over the last two years, Seattle City Light, Seattle's municipal electric utility, has worked extensively to streamline its process to enable faster deployment of small cells. The Commission's Ruling and Order requires a complete revamp of the entire process.

3. Seattle is both a utility pole owner and a regulatory entity. For purposes of this Affidavit, references to utility poles includes both electric distribution poles and street light poles.

4. With strong support in both federal and state law, Seattle currently distinguishes between certain acts it performs in its "proprietary" capacity (e.g., renting space on utility poles) and other acts performed in its "regulatory" capacity (e.g., street use permitting).

5. Seattle City Light has the engineering expertise to evaluate the structural integrity of the proposed small cell facility, whether the pole can withstand the added weight (including wind load and foundational requirements), and compliance with the national electric code standards. The proprietary review and approval process for small cells on Seattle's City Light poles includes preliminary reviews, assistance by the City in finalizing the applicant's scope of work, engineering field work, design and estimates, construction document review and payment, permitting, inspection, and close-out.

6. Because the Commission specifically declined to adopt any distinction between government entities acting in a proprietary capacity as opposed to a regulatory capacity, when providing access to public right of way or authorizing attachments to government-owned property for small cells, Seattle must assume that its proprietary, asset-owner approval is now subject to the shot clocks.

7. Modifying this process to one that can be met in 60 days is already proving to be a tremendous undertaking, and one that most likely cannot be successfully accomplished. Many City departments are meeting several times a week to outline the change in the process, the application of the Commission's Ruling and Order, and the relevant aesthetic standards and application tools necessary to site small cells under the new shot clocks and requirements.

8. For example, because applicants are often unprepared for the permitting process, Seattle City Light's standard practice is to work with applicants through correction cycles until standards are met and a permit can be issued. This applicant-friendly approach has been quite effective in our siting efforts to date,[1] but with only 60 days to process small cell applications, Seattle will not be able to conduct multiple review and correction cycles.

9. Instead, Seattle must develop tools to prepare applicants, including a design catalog, checklist of submittal requirements, design standards, outreach, and training (both internal and external) – activities which themselves cannot be completed by January 14, 2019. The result of a new process that does not allow for collaborative review and correction cycles will likely be more rejections of applications that do not comply with City submittal requirements.

10. Without a stay, each of these process changes would have to be in place before January 14, 2019. And each of these activities involves additional budget for consultants, staff, software, and other related needs to facilitate proper implementation.

11. Furthermore, as a municipal utility that is exempt from federal pole attachment rate regulation under Section 224 of the Communications Act, Seattle City Light's pole attachment fees are based on fair market value. The City has not experienced problems with siting of small cells on utility poles. Clearly, the fair market value rates that are charged in Seattle have not negatively impacted deployment.

12. The Commission's Order requiring all fees to be cost-based means that, without a stay, Seattle would have to perform a financial impact analysis within a matter of weeks to determine costs-incurred by residents and ratepayers. Such an analysis would need to consider how such costs would otherwise be recovered, including the possibility of rate changes for those electricity customers who have been given below market rates for use of the City's proprietary property by a federal agency.

FURTHER AFFIANT SAYETH NOT.

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[1] City of Seattle Ex Parte Letter, WT Docket 17-79, WC Docket 17-84 (Sep. 18, 2018).

Dated this 30 day of October, 2018.

Andrew Strong
Interim Asset Management and Large Projects Director
Seattle City Light

Subscribed and sworn to before me this 30 day of October, 2018 by Andrew Strong, Interim Asset Management and Large Projects Director, Seattle City Light

WITNESS MY HAND AND OFFICIAL SEAL.
My Commission Expires: 11-30-2021

NOTARY PUBLIC
Mary Louise Davis
Residing in Edmonds, WA

EXHIBIT B

EXHIBIT B

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February 18, 2019

By CM/ECF
The Honorable Eduardo C. Robreno
United States District Court
For the District of Delaware
844 N. King Street
Wilmington, DE 19801

Re: ***T-Mobile Northeast LLC v. City of Wilmington, et al.*** **-- C.A. No.: 16-1108-ER (D. Del.), T-Mobile Response To D.I. 134**

Dear Judge Robreno,

Plaintiff T-Mobile Northeast LLC ("T-Mobile") respectfully submits this reply to the Defendant City of Wilmington's February 15, 2019 letter (D.I. 134) ("City Letter"). Because the City Letter introduces extensive argument in response to T-Mobile's minimal Local Rule 7.1.2(b) notice of additional authority (D.I. 133), T-Mobile submits this short response to address the City's new arguments.

Contrary to the City Letter, there is no basis for delaying or restarting this case. Notably, the City's suggestion that the Parties should confer and submit a Rule 26(f) case management plan is misplaced.

First, the case returns to this Court with instructions from the Third Circuit that it has jurisdiction to consider the merits of the Parties' fully-briefed and argued cross-motions for summary judgment. The Federal Communications Commission's ("FCC") September 27, 2019 *Declaratory Ruling* identified in T-Mobile's Rule 7.1.2(b) Notice (D.I. 133-1) raises purely legal issues regarding the appropriate legal standard applicable to T-Mobile's "effective prohibition" claim. At a minimum, there is no reason for the Court to delay ruling on T-Mobile's other claims. Moreover, as the supplemental briefing T-Mobile proposed would have explained, the *Declaratory Ruling* provides additional legal authority, similar to an intervening Third Circuit decision. It does not justify restarting the case with a new case management plan.

Second, there is no basis for re-opening discovery, as the City argues. The *Declaratory Ruling* holds that prior court standards interpreting the effective prohibition clause of Section

332 were improperly weighted toward the local government.[1] *Decl. Ruling* ¶ 40, n.94, n.97. The *Declaratory Ruling* clarifies that the burden T-Mobile must meet is lower than under prior interpretations; it does not open the door to more arguments or discovery by the City.

Notably, the technical issues that were the subject of discovery by the City were addressed by the FCC, and the City's arguments were rejected. T-Mobile in this case has demonstrated that it lacks sufficient network "capacity." (*See, e.g.*, D.I. 73 at 21-22, 24.) The City had discovery on this issue, and the City argued there was no effective prohibition of service because T-Mobile merely sought to "improve service." (D.I. 91 at 22.) Yet, the FCC specifically holds that an unlawful effective prohibition of service occurs if a city materially inhibits or limits T-Mobile from increasing network capacity or even improving service quality. *Decl. Ruling* ¶ 37. The FCC also declared that T-Mobile must be able to achieve the technical service parameters that it desires and defines. *Id.* ¶ 37 n.87. Thus, the *Declaratory Ruling* removes the issues on which the City pursued discovery, and it creates no new issues that would be grounds for additional discovery.

Third, there are no "other issues that would be appropriately discussed by and among counsel prior to briefing," as the City asserts. In particular, there is no ground for discussing "mediation prospects." Although T-Mobile always remains open to cooperative resolution, counsel for the Parties have repeatedly discussed the potential for settlement, including recently, and there has been no meaningful movement toward settlement.

Finally, the City's assertions regarding the applicability of the *Declaratory Ruling* are inaccurate, but at a minimum were precisely why T-Mobile proposed the parties submit limited additional briefing. For example, the City argues that the *Declaratory Ruling* is subject to appeals. Yet, the Court of Appeals denied the appellants' motion to stay the effect of the *Declaratory Ruling* pending appeal. *City of San Jose v. FCC*, Tenth Cir. Case Nos. 18-9568, 18-9571, 18-9572 (10th Cir. Jan. 10, 2019). Accordingly, the *Declaratory Ruling* is now in effect. The City also attacks the validity and merits of the *Declaratory Ruling*. (D.I. 134 at 1). But this Court has no jurisdiction to evaluate the validity of the *Declaratory Ruling*. Under the Hobbs Act, 28 U.S.C. § 2342(1), the Court of Appeals is vested with exclusive jurisdiction to rule on the validity of a challenged FCC declaratory ruling, and, as a result, the *Declaratory Ruling* is binding on this and other courts. *See, e.g.*, *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1120-21 (11th Cir. 2014); *Morse v. Allied Interstate, LLC*, 65 F. Supp. 3d 407, 411-412 (M.D. Pa. 2014).

The City also suggests that the *Declaratory Ruling* should not be applied to this pending case. Again, this is an issue that could be addressed in the suggested briefing, but the City's attempt to sow doubt is inaccurate. *See, e.g. Pope v. Shalala*, 998 F.2d 473, 483 (7th Cir. 1993) ("A rule simply clarifying an unsettled or confusing area of the law . . . does not change the law, but restates what the law according to the agency is and has always been: '***It is no more retroactive in its operation than is a judicial determination construing and applying a statute***

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[1] T-Mobile proposed supplemental briefing to address precisely these issues. T-Mobile provides this summary only to demonstrate there is no basis for the City's arguments for delay or additional discovery.

to a case in hand'") (emphasis added) (quoting *Manhattan General*, 297 U.S. 129, 135 (1936)), *overruled on other grounds, Johnson v. Apfel*, 189 F.3d 561 (7th Cir. 1999).

The City Letter seeks to create the impression of confusion and complexity that does not exist. At most, the legal issues surrounding the *Declaratory Ruling* could be the subject of the limited supplemental briefing proposed by T-Mobile. In the alternative, and at a minimum, however, T-Mobile is confident that the Court can properly apply the *Declaratory Ruling* immediately, without further briefing or delay.

Respectfully submitted,

/s/ Jennifer C. Wasson

Jennifer C. Wasson (#4933)

JCW/mas/6088821
cc: All counsel of record by CM/ECF