

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DOCKETING STATEMENT

Case Name: City of Seattle, Washington, et al. v. United States of America and Federal Communications Commission

Appeal No. (if available): Case No. 18-9571 (MCP No. 155)

Court/Agency Appealing From: Federal Communications Commission

Court/Agency Docket No.: WT Docket No. 17-79; WC Docket No. 17-84; FCC 18-133

District Judge: NOT APPLICABLE

Party or Parties Filing Notice of Appeal/Petition: City of Seattle, Washington; City of Tacoma, Washington; King County, Washington; League of Oregon Cities; League of California Cities; and League of Arizona Cities and Towns

I. TIMELINESS OF APPEAL OR PETITION FOR REVIEW

A. APPEAL FROM DISTRICT COURT

1. Date notice of appeal filed: _____

a. Was a motion filed for an extension of time to file the notice of

appeal? If so, give the filing date of the motion, the date of any order disposing of the motion, and the deadline for filing notice of appeal:

b. Is the United States or an officer or an agency of the United States a party to this appeal?

2. Authority fixing time limit for filing notice of appeal:

Fed. R. App. 4 (a)(1)(A) _____ Fed. R. App. 4(a)(6) _____

Fed. R. App. 4 (a)(1)(B) _____ Fed. R. App. 4(b)(1) _____

Fed. R. App. 4 (a)(2) _____ Fed. R. App. 4(b)(3) _____

Fed. R. App. 4 (a)(3) _____ Fed. R. App. 4(b)(4) _____

Fed. R. App. 4 (a)(4) _____ Fed. R. App. 4(c) _____

Fed. R. App. 4 (a)(5) _____

Other: _____

3. Date final judgment or order to be reviewed was **entered** on the district court docket: _____

4. Does the judgment or order to be reviewed dispose of **all** claims by and against **all** parties? *See* Fed. R. Civ. P. 54(b).

(If your answer to Question 4 above is no, please answer the following questions in this section.)

- a. If not, did district court direct entry of judgment in accordance with Fed. R. Civ. P. 54(b)? When was this done?
-

- b. If the judgment or order is not a final disposition, is it appealable under 28 U.S.C. ' 1292(a)? _____

- c. If none of the above applies, what is the **specific** statutory basis for determining that the judgment or order is appealable?
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5. Tolling Motions. *See* Fed. R. App. P. 4(a)(4)(A); 4(b)(3)(A).

- a. Give the filing date of any motion that tolls the time to appeal pursuant to Fed. R. App. P. 4(a)(4)(A) or 4(b)(3)(A):
-

- b. Has an order been entered by the district court disposing of any such motion, and, if so, when? _____

6. Cross Appeals.

a. If this is a cross appeal, what relief do you seek beyond preserving the judgment below? *See United Fire & Cas. Co. v. Boulder Plaza Residential, LLC*, 633 F.3d 951, 958 (10th Cir. 2011)(addressing jurisdictional validity of conditional cross appeals).

b. If you do not seek relief beyond an alternative basis for affirmance, what is the jurisdictional basis for your appeal? *See Breakthrough Mgt. Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1196-98 and n. 18 (10th Cir. 2010) (discussing protective or conditional cross appeals).

B. REVIEW OF AGENCY ORDER (To be completed only in connection with petitions for review or applications for enforcement filed directly with the court of appeals.)

1. Date petition for review was filed: October 24, 2018 (originally filed in the United States Court of Appeals for the Ninth Circuit [Case No. 18-72886]).
2. Date of the order to be reviewed: September 27, 2018 (please note that the order was published in the Federal Register on October 15, 2018) (Declaratory Ruling and Third Report and Order, FCC 18-133, 83 Fed. Reg. 51,867).

3. Specify the statute or other authority granting the court of appeals jurisdiction to review the order: Fed. R. App. P. 15; 5 U.S.C. § 706; 47 U.S.C. § 402(a); 47 U.S.C. § 151 et seq.; 28 U.S.C. §§ 2342(1) and 2344.

4. Specify the time limit for filing the petition (cite specific statutory section or other authority): Within sixty (60) days from publication of a summary of the *Declaratory Ruling and Third Report and Order* in the Federal Register. See 28 U.S.C. § 2344 (establishing the time limit as 60 days after “entry of a final order”); *Declaratory Ruling and Third Report and Order*, FCC 18-133 at ¶ 154 (ordering the commencement of the period for filing petitions for judicial review to coincide with publication in the Federal Register).

C. APPEAL OF TAX COURT DECISION

1. Date notice of appeal was filed: _____

(If notice was filed by mail, attach proof of postmark.)

2. Time limit for filing notice of appeal: _____

3. Date of entry of decision appealed: _____

4. Was a timely motion to vacate or revise a decision made under the Tax Court’s Rules of Practice, and if so, when? *See Fed. R. App. P. 13(a)*

II. LIST ALL RELATED OR PRIOR RELATED APPEALS IN THIS COURT WITH APPROPRIATE CITATION(S). If none, please so state.

On November 2, 2018, the Judicial Panel on Multidistrict Litigation issued a Consolidation Order ordering the following Petitions for Review to be transferred to and consolidated with United States Court of Appeals for the Tenth Circuit Case No. 18-9563, *Sprint Corporation v. United States of America and Federal Communications Commission*:

First Circuit, No. 18-2063	<i>Puerto Rico Tel. Co., Inc. v. FCC</i>
Second Circuit, No. 18-3255	<i>Verizon v. FCC</i>
Ninth Circuit, No. 18-72883	<i>City of San Jose, et al. v. FCC</i>
Ninth Circuit, No. 18-72886	<i>City of Seattle, et al. v. FCC</i>
Ninth Circuit, No. 18-72893	<i>City of Huntington Beach v. FCC</i>
Tenth Circuit, 18-9563	<i>Sprint Corp. v. FCC</i>
DC Circuit, No. 18-1294	<i>AT&T v. FCC</i>

In addition, a related but unconsolidated appeal is currently pending in the United States Court of Appeals for the Ninth Circuit: *Portland v. FCC*, No. 18-72689 (filed Oct. 2, 2018). This petition concerns a separate report and order and declaratory ruling issued in the same rulemaking proceedings conducted by the Federal Communications Commission.

In addition, a related but unconsolidated appeal is currently pending in the United States Court of Appeals for the Eleventh Circuit: *American Electric Power Service Corp. et al. v. Federal Communications Commission and United States of America*, No. 18-14408 (filed Oct. 18, 2018). This petition concerns a separate report and order and declaratory ruling issued in the same rulemaking proceedings conducted by the Federal Communications Commission. On October 30, 2018, the Federal Communications Commission filed a motion with the Eleventh Circuit Court of Appeals to transfer this case to the Ninth Circuit Court of Appeals and consolidate it with the petition for judicial review in *Portland v. FCC*, No. 18-72689 (filed Oct. 2, 2018).

III. GIVE A BRIEF DESCRIPTION OF THE NATURE OF THE UNDERLYING CASE AND RESULT BELOW.

The Commission initiated notice of inquiry and informal rulemaking proceedings in Docket Nos. WT 17-79 and WC 17-84 through which it proposed to identify and eliminate alleged barriers to wireline and wireless broadband deployment. State and local government agencies from around the country, including Petitioners, objected to the Commission's proposals on legal, factual, and policy grounds and submitted substantial evidence into the underlying record to show that the proposals exceeded the Commission's authority under the law, were premised on false or misleading "facts" preferred by communications industry members, and would have deleterious effects on the policies the Commission intended to promote.

The Commission's rules are an unlawful preemption of State and local government authority promulgated without response to the arguments advanced and factual evidence in the record submitted by Petitioners and other commenters opposed to the Commission's rules. Petitioners dispute the Order on statutory and constitutional

grounds, and also assert that it is arbitrary, capricious, an abuse of discretion, and otherwise contrary to law.

IV. IDENTIFY TO THE BEST OF YOUR ABILITY AT THIS STAGE OF THE PROCEEDINGS, THE ISSUES TO BE RAISED IN THIS APPEAL.

The Order violates the U.S. Constitution, the Administrative Procedure Act, the Communications Act, and the Regulatory Flexibility Act. The Order abrogates an en banc plain language decision of the Ninth Circuit interpreting 47 U.S.C. §§ 332(c)(7) and 253. Further, the Commission's interpretations conflict with the plain language of the Communications Act and violate Petitioners' Constitutional rights. There is a substantial question as to whether the Order is arbitrary and capricious, an abuse of discretion, and otherwise contrary to law. The effects of compliance with the Order will harm Petitioners irreparably and the aesthetic harms threatened by implementation of this Order cannot be remedied.

V. ADDITIONAL INFORMATION IN CRIMINAL APPEALS.

- A. Does this appeal involve review under 18 U.S.C. § 3742(a) or (b) of the sentence imposed? NO
- B. If the answer to A (immediately above) is yes, does the defendant also challenge the judgment of conviction? NOT APPLICABLE
- C. Describe the sentence imposed. NOT APPLICABLE
- D. Was the sentence imposed after a plea of guilty? NOT APPLICABLE

E. If the answer to D (immediately above) is yes, did the plea agreement include a waiver of appeal and/or collateral challenges? NOT APPLICABLE

F. Is defendant on probation or at liberty pending appeal? NOT APPLICABLE

G. If the defendant is incarcerated, what is the anticipated release date if the judgment of conviction is fully executed?

NOT APPLICABLE

H. Does this appeal involve the November 1, 2014 retroactive amendments to §§ 2D1.1 and 2D1.11 of the U.S. Sentencing Commission's Guidelines Manual, which reduced offense levels for certain drug trafficking offenses?

NOT APPLICABLE

VI. ATTORNEY FILING DOCKETING STATEMENT:

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PLEASE IDENTIFY ON WHOSE BEHALF THE DOCKETING STATEMENT IS FILED:

A. Appellant

Petitioners

Cross-Appellant

B. PLEASE IDENTIFY WHETHER THE FILING COUNSEL IS

Retained Attorney

Court-Appointed

Employed by a government entity

(please specify _____)

Employed by the Office of the Federal Public Defender.

KENNETH S. FELLMAN

/s Kenneth S. Fellman
Signature

11/20/18
Date

CERTIFICATE OF DIGITAL SUBMISSION

In accordance with the Court's CM/ECF User's Manual (7th Edition; Updated 5/21/18), I, Kenneth S. Fellman, hereby certify, *if applicable*, that:

- a. all required privacy redactions have been made pursuant to CM/ECF User's Manual (Section J), Fed. R. App. P. 25(a)(5) and 10th Cir. R. 25.5;
- b. the hard copies of any pleading required to be submitted to the clerk's office are *exact* copies of the ECF filing;
- c. the ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program (Symantec.Endpoint Protection, Symantec.cloud-Cloud Agent (Version 3.00.20.2796) and Symantec.cloud-Endpoint Protection (Version NIS-22.15.1.8) updated November 20, 2018), and, according to the program is free of viruses; and
- d. the pleading complies with applicable type volume limits pursuant to Fed. R. App. P. 32(g)(1).

Dated: November 20, 2018.

By: s/ Kenneth S. Fellman
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CERTIFICATE OF SERVICE

I, Kenneth S. Fellman, hereby certify that on November 20, 2018, I electronically filed the foregoing Docketing Statement, using the Court's CM/ECF system which will send notification of such filing to the following via email:

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