

**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, 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,

No. 19-70124

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

Intervenors,

No. 19-70125

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, NEW YORK

No. 19-70136

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

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, NEW YORK; WIRELESS INFRASTRUCTURE ASSOCIATION,

No. 19-70144

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

CITY AND COUNTY OF SAN FRANCISCO,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

No. 19-70145

Respondents.

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, NEW YORK,

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

MONTGOMERY COUNTY, MARYLAND,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

No. 19-70146

No. 19-70147

AT&T SERVICES, INC.,

Petitioner,

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;

No. 19-70326

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;

No. 19-70339

TOWN OF CORTE MADERA, California; CITY OF WESTMINSTER, Maryland,

Intervenors,

v.

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

No. 19-70341

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.

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

No. 19-70344

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.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

**OPPOSITION OF THE CITY OF SEATTLE, ET AL. AND LOCAL
GOVERNMENT INTERVENORS TO THE FEDERAL
COMMUNICATIONS COMMISSION’S MOTION TO HOLD IN
ABEYANCE AND DEFER FILING OF THE RECORD**

City of Seattle, Washington, *et al.*, and Local Government Intervenor¹

(“Opponents”) join in the entirety of the opposition filed by petitioners the City of San Jose, California, *et al.*, the City of Austin, Texas, *et al.*, and local government intervenors² opposing the Federal Communications Commission’s (“Commission”) motion to in so far as the Commission seeks to abate these proceedings and defer filing of the administrative record (“Motion”).³ Opponents write separately to describe the harms that individual petitioners and their constituents are currently experiencing and that would be exacerbated by granting the Motion.

¹ City of Bakersfield, California; City of Rancho Palos Verdes, California; City of Coconut Creek, Florida; City of Lacey Washington; City of Olympia, Washington; City of Seattle, Washington; City of Tacoma, Washington; City of Tumwater, Washington; Town of Yarrow Point, Washington; King County, Washington; Thurston County, Washington; Colorado Communications and Utility Alliance; League of Arizona Cities and Towns; League of California Cities; League of Oregon Cities; Rainier Communications Commission.

² Joint Opposition of the City of San Jose, et al., the City of Austin Texas, et al., and Intervenor Nat’l Ass’n of Telecomms. 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, *Sprint Corp. v. FCC*, No. 19-70123 (9th Cir. Mar. 7, 2019), Doc. ID 11219881.

³ Motion to Consolidate Related Cases, Abate Proceedings Pending Agency Reconsideration, and Defer Filing of the Administrative Record, *Sprint Corp. v. FCC*, No. 19-70123 (9th Cir. Feb. 25, 2019), Doc. ID 11206729.

ARGUMENT

In determining hardship to the parties, the Ninth Circuit “focuses on whether delaying judicial review will impose hardships on *plaintiffs*.” *Acura of Bellevue v. Reich*, 90 F.3d 1403, 1408 (9th Cir. 1996) (emphasis added). “To meet the hardship requirement, a party must show that withholding judicial review would result in direct and immediate hardship and would entail more than possible financial loss.” *Dietary Supplement Coal., Inc. v. Sullivan*, 978 F.2d 560, 562 (9th Cir. 1992).

Here, Opponents will suffer a “direct and immediate hardship” beyond the already significant and unrecoverable expenses incurred in efforts to comply with the Commission’s 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) (the “September Order”). For example:

A. Opponent Colorado Communications and Utility Alliance (“CCUA”) represents numerous local governments in Colorado.⁴ In 2017, the State of

⁴ CCUA was formed as a Colorado non-profit corporation in 2012 and is the successor entity to the Greater Metro Telecommunications Consortium. Its members have been working together since 1992 to protect the interests of their communities in all matters related to local telecommunications issues. The current members of CCUA are Adams 12 Five Star Schools, Adams County, Arapahoe County, Arvada, Aurora, Boulder, Brighton, Broomfield, Burlington, Castle Pines, Castle Rock, CDOT ITS Branch, Centennial, Central City, Cherry Hills Village, City of Colorado Springs, Columbine Valley, Commerce City, Dacono, Delta, Denver, Douglas County, Durango, Eagle County Government, Edgewater, Englewood, Erie, Federal Heights,

Colorado adopted state small cell legislation.⁵ The September Order states that “we reach a decision today that does not preempt nearly any of the provisions passed in recent state-level small cell bills.”⁶ However the September Order never makes clear what precisely is (or is not) preempted in any such state legislation, and Colorado’s state law conflicts with the September Order on a variety of significant issues. Colorado’s law allows either 90 or 150 days to approve or deny applications and does not include the time needed to reach proprietary agreements for access to municipal property,⁷ while the September order slashes those timeframes to 60 or 90 days and expressly encompasses any time to reach such agreements.⁸ Whereas the Colorado small cell law’s definition for a small cell limits non-antenna equipment to 17 cubic feet,⁹ the September Order allows up to 28 cubic feet.¹⁰ The September Order purports to allow local governments to

Fort Collins, Fort Lupton, Frederick, Glendale, Golden, Grand Junction, Greeley, Greenwood Village, Idaho Springs, Jefferson Public Schools, Lafayette, Lakewood, Larimer County, Littleton, Lone Tree, Longmont, Louisville, Loveland, Lyons, Montrose, Northglenn, Paonia, Parker, Pitkin County, Region 10 L.E.A.P., Inc., Sheridan, Southwest Colorado Council of Governments, Thornton, Westminster, Wheat Ridge, Wray. The CCUA undertakes education and advocacy in areas such as telecommunications law and policy, cable franchising and regulation, zoning of wireless communications facilities, broadband network deployment, public safety communications, rights-of-way management, and operation of government access channels. The CCUA is the Colorado chapter of the National Association of Telecommunications Officers and Advisors (“NATOA”) and an affiliate of the Colorado Municipal League.

⁵ H.B. 1193 70th Gen. Assemb., 1st Sess. (Colo. 2017).

⁶ *September Order* at ¶ 6.

⁷ Colo. Rev. Stat. § 29-27-403 (2018).

⁸ *September Order* at ¶¶92; ¶105.

⁹ Colo. Rev. Stat. §29-27-402(4).

¹⁰ 47 C.F.R. 1.6002(1)(2019).

recover their actual costs in connection with use of rights-of-way but creates a legal presumption that any fees in excess of \$100 per application or \$500 per batched application are unreasonable and violate federal law.¹¹ Colorado law has similarly provided for cost recovery in connection with a permit process but creates no cap over which a community's fees are presumed to violate the law.¹²

These conflicting-but-overlapping legal standards create uncertainty in how states like Colorado and their instrumentalities assert their local authority without legal jeopardy. Before the September Order, state and local government processes and fees could be challenged but the challenger bore the evidentiary burdens. The September Order flips this longstanding principle on its head and, especially where a state legislature has provided for processes and/or fees that differ from the September Order, states and their instrumentalities are left to guess as to how local fees are to be assessed and how a court would handle a challenge to a claim that fees may be excessive.

Because of the conflicts between the September Order and Colorado state law, and the Commission's own statements in its Order about not preempting nearly anything (but presumably, preempting something) in state small cell bills, Colorado local jurisdictions are in the unenviable position of attempting to in good

¹¹ *September Order* at ¶¶ 79-80.

¹² See Colo. Rev. Stat. § 38-5.5-107(b) (2018); *Bloom v. City of Fort Collins*, 784 P.2d 304 (Colo. 1989) .

faith comply with a state statute and federal order that diverge. The uncertainty that this has generated affects not only local governments but the wireless industry as well as they request that local governments follow the law in acting upon their applications, but what exactly the law is, remains unclear. Prolonging this uncertainty while the Commission contemplates a tangentially related petition for reconsideration will only extend this hardship for all parties.

B. Opponent City of Seattle, Washington is harmed by the implementation of the September Order, which harm will be exacerbated by any delay in this appeal. Affidavit of Jenny A. Durkan, Mayor of the City of Seattle, (Mar. 7, 2019) at 11, attached as Exhibit “A”. Seattle City Light’s (the City’s municipal utility) pole attachment rates are based on fair market value. *Id.* at 12. The City has several long-term agreements with providers based on these fair market rates. *Id.*

However, the *September Order* jeopardizes the ability of the City to enforce these agreements. *Id.* at 13. The Commission extended its fee restrictions to these agreements but allowed the City’s attachers to decide whether or not to honor an existing agreement. *See September Order* at ¶ 66.

Further, should any party wish to enter into a new long-term agreement for a pole attachment, Seattle faces a legal conundrum. If Seattle continues to charge its market-based rates, then it faces the risk that it will be acting in contravention of

federal law under the *September Order*. *Id.* at ¶ 73. Yet, if Seattle lowers its rates for new entrants to comply with the Commission’s edicts, the City risks being accused of violating the Communications Act by treating similarly situated parties differently. *Id.* at ¶ 50. Prompt resolution of the legal issues raised by the *September Order* is necessary to resolve the quandary in which the City of Seattle now finds itself.

C. Legal harms are not just limited to situations where the September Order conflicts with the rights and obligations in a state small-cell statute or pole attachment agreement. The experiences of members of the League of California Cities illustrate how the *September Order* establishes a byzantine regulatory scheme that requires municipalities to do more with less time and fewer resources or face harsher consequences.

Municipalities may review applications for completeness but only within the first 10 calendar days and cannot prohibit document dumps by carriers who submit “batched” applications. *September Order* at ¶¶ 114 and 143. Failure to meet deadlines—no matter how many applications flood across the permit counter—may result in applications deemed complete and legal presumptions that a failure to act was motivated by an intent to effectively prohibit telecommunication services. *Id.* at ¶¶ 117–18.

Municipalities may recover their actual, reasonable and nondiscriminatory costs to review applications but the Commission’s “presumptively reasonable” \$100 application fee would hardly cover more than one or two hours in total time spent by municipal staff.¹³ Fees that exceed more than \$100 per application are presumed to violate the Commission’s cost-based mandate. *September Order* at ¶ 79.

Legal harms from these regulations are not hypothetical. For example, two days after the new restrictions on review processes and fees went into effect, Crown Castle, a communications infrastructure provider, began to dump applications on the City of El Monte, California, a member of the League of California Cities. Affidavit of Tony Bu, Assistant Planner, City of El Monte, Cal. (Mar. 7, 2019) at ¶¶ 11–13 (“El Monte Aff.”), attached as Exhibit “B”. Day after day, Crown Castle would tender batched applications. *Id.* at ¶ 11–13. Within two months, El Monte received more applications *from one single applicant* than it received in the last five years combined. *Id.* at ¶ 14.

Although the city adopted a requirement that all applications be submitted with digital format copies to expedite their completeness review, Crown Castle’s

¹³ The rate for staff time in many large or urban cities exceeds \$100 per hour. Even in a smaller city like Yuma, Arizona, with less than 100,000 residents, the post-construction inspection alone costs \$50 per hour. <https://www.yumaaz.gov/documents/community-development/fee-schedules/PermitFeeSchedules.pdf>.

representatives tendered voluminous paper applications without digital copies and, in one instance, even submitted an empty thumb drive that supposedly contained the missing digital copies. *Id.* at ¶ 13. El Monte also adopted a cost-based review fee calculated by the average staff time per application, *Id.* at ¶ 15. but Crown Castle refused to pay more than \$100 per application (less than one seventh the actual cost to the city) and, on one occasion, *withdrew* applications filed with the correct fee and *resubmitted* the same applications with the \$100 fee. El Monte Aff. at ¶¶ 11 and 13.

El Monte's compliance efforts—digitizing application reviews and establishing fees based on time and material costs—do little to protect the city from the harms inflicted by such bad-faith conduct under the color of the *September Order*. The manifest purpose in the applicant's conduct is to overwhelm city staff with paperwork to avoid the obligation to submit a complete application and/or force the city to reject applications based on fees. *See, e.g.,* El Monte Aff. at ¶ 11. The city bears the burden to review dozens of applications in a matter of days, which necessarily detracts from other municipal functions, services and obligations. *See id.* at ¶ 17. And recalcitrant applicants who intentionally ignore basic requirements designed for compliance with the *September Order* can simply run out the clock or wait for a denial, file a lawsuit and enjoy legal presumptions against the city that will render a defense extremely difficult.

Litigation over these issues is also not hypothetical. For example, one month after the *September Order* became partially effective, Crown Castle Fiber LLC filed a lawsuit against the City of Torrance, California, another member of the League of California Cities. *See* Complaint, Crown Castle Fiber LLC v. City of Torrance, No. 2:19-cv-01205-RSWL-MAA (filed Feb. 15, 2019) (“Crown Castle Complaint”), attached as Exhibit “C”. The city denied certain applications submitted in late 2017 based on its then-current zoning code requirements that applicants demonstrate a need for a facility that fails to meet the basic design criteria. *Id.* at 8. Crown Castle alleges that the *September Order* bars such local aesthetic siting regulations based on a demonstration of need. *See id.* at 5. In addition to costs and attorneys’ fees, Crown Castle asks the district court to permanently enjoin the denials and to order the city to “approve the [applications] and to issue any and all necessary land use approvals” *Id.* at 15.¹⁴

¹⁴ A peculiar feature in the Crown Castle Complaint is that it asks a district court to retroactively apply provisions in the *September Order* that have not yet taken effect. *Id.* at 15. The city denied the applications nearly a year before the Commission released the *September Order*. *See id.* at 8. At the time Crown Castle filed the complaint, only the restrictions on fees and review periods were in effect. The other restrictions in the *September Order*, such as the alleged prohibition on requirements to demonstrate a need, would not go into effect for another two months. *See* Order Denying Motion for Stay, *In the Matter of Accelerating Wireless Broadband Deployment By Removing Barriers to Infrastructure Investment*, WT Docket N. 17-79 and WC Docket No. 17-84, DA 18-1240 at ¶ 4 (Dec. 10, 2018). If one of the largest multinational communications infrastructure providers cannot correctly interpret and apply the provisions in an FCC order that it lobbied for, the chances of fragmented interpretations and decisions among district courts would seem significant.

Experiences by the Opponents and their members in just a few short months since the *September Order*'s effective date illustrate that the direct and immediate legal harms are likely continue and become worse if this Court's proceedings are held in abeyance. Applications, whether complete and paid for or not, will continue to bury local government staff. Municipalities who fail to manage the workload or attempt to assert whatever authority they may still retain will face new liabilities under new legal theories and increased evidentiary burdens. Litigation in the district courts will likely produce interpretations and outcomes as fragmented and inconsistent as the *September Order* itself.

CONCLUSION

Therefore, the movants respectfully request that the Court deny the Commission's request for abeyance, grant the request for consolidation, and further schedule a case management conference to establish a briefing schedule, and compel the Agency to file the record in accordance with their duties under F.R.A.P. 17 so that all parties may begin preparing their arguments to better effectuate a timely resolution of this appeal.

Dated: March 7, 2019

CITY OF SEATTLE, WASHINGTON; CITY OF
TACOMA, WASHINGTON; KING COUNTY,
WASHINGTON; CITY OF COCONUT CREEK,
FLORIDA; CITY OF LACEY WASHINGTON; CITY
OF OLYMPIA, WASHINGTON; CITY OF
TUMWATER, WASHINGTON; THURSTON

COUNTY, WASHINGTON; TOWN OF YARROW
POINT, WASHINGTON; COLORADO
COMMUNICATIONS AND UTILITY ALLIANCE; and
RAINIER COMMUNICATIONS COMMISSION

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LEAGUE OF CALIFORNIA CITIES; LEAGUE OF
OREGON CITIES; LEAGUE OF ARIZONA CITIES
AND TOWNS; CITY OF BAKERSFIELD,
CALIFORNIA; CITY OF FRESNO, CALIFORNIA
AND CITY OF RANCHO PALOS VERDES,
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CERTIFICATE OF COMPLIANCE

Undersigned certifies that this document complies with the word limit of Fed. R. App. P. 26(d)(2)(a) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) this documents contains 4573 words and is under the 20-page limit for motions pursuant to Circuit Rule 27-1(1)(d).

Undersigned further certifies that 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 documents has been prepared using a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman.

Dated March 7, 2019.

By: **s/ Kenneth S. Fellman**
KENNETH S. FELLMAN
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Denver, Colorado 80209
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Email: kfellman@kandf.com

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on March 7, 2019, I caused the foregoing
**OPPOSITION OF THE CITY OF SEATTLE, ET AL. AND LOCAL
GOVERNMENT INTERVENORS TO THE FEDERAL
COMMUNICATIONS COMMISSION'S MOTION TO HOLD IN
ABEYANCE AND DEFER FILING OF THE RECORD** to be filed with the
Clerk of Court for the United States Court of Appeals for the Ninth Circuit using
the electronic CM/ECF system. I further certify that all participants in the case are
registered CM/ECF users and will be served electronically by the CM/ECF system.

By: **s/ Kenneth S. Fellman**
KENNETH S. FELLMAN
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Denver, Colorado 80209
Phone: 303-320-6100; Fax: 303-327-8601
Email: kfellman@kandf.com

**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; CULVER CITY, California; TOWN OF FAIRFAX, California; CITY OF NEW YORK, New York

Intervenors,

v.

No. 19-70125

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 BURIEEN, 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, New York,

No. 19-70136

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

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,

No. 19-70144

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

Intervenors,

V.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

CITY AND COUNTY OF SAN FRANCISCO, California,

Petitioner,

V.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

No. 19-70145

CITY OF HUNTINGTON BEACH, California,

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, 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.,

No. 19-70326

Petitioner,

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;

No. 19-70339

TOWN OF CORTE MADERA, California; CITY OF WESTMINSTER, Maryland,

Intervenors,

v.

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

No. 19-70341

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.

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;

No. 19-70344

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.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

AFFIDAVIT OF JENNY A. DURKAN

Jenny A. Durkan declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Mayor of the City of Seattle.

2. The Commission's Order causes real significant ongoing harm to the City of Seattle and its ability to manage and control its right of way, to further equitable access to technology, and to ensure public safety.
3. In Seattle, the Order has disrupted efforts by the City to plan, manage and impact deployment of small cell facilities, and to ensure a sound financial return to taxpayers. Because the local governments' motions for stay were denied, these negative impacts will continue as long as the appeal is pending.
4. Before the Order, Seattle was working with experts, stakeholders, and industry to modernize the process for small cell deployment, and was continuing to make improvements to enable even faster deployment.
5. When the Order became effective, Seattle was forced to halt that process, and to begin a complete revamp of this process, altering the framework under which carriers for such deployment have worked successfully for more than a decade.
6. Rapid deployment is critical to build out a range of future services and technology needed by the City. Public funds that have been expended, and continue to be spent, in working towards this new framework will ultimately be wasted if the Order is invalidated in

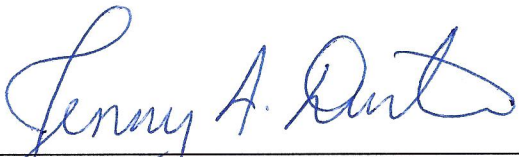
whole or in part. Given the overreach of the Commission's authority throughout the Order, invalidation in some form is a near certainty.

7. It is essential that cities be allowed to maintain control of public property and infrastructure, as well as the application process for utilizing them for public benefit. Cities are not only leaders in innovation, but also have an obligation to the public to ensure safe deployment of new technology.
8. Moreover, 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 will and must be based on fair market value. The current regulation sets an arbitrary price and prevents the use of fair market rates.
9. The assets used to support small cell infrastructure are owned by the residents of the respective city. The Commission continues to support subsidizing the telecommunication industry instead of rightfully using the resources to benefit the public. The Commission's business model takes taxpayer and ratepayer property to benefit private companies.
10. The City has several existing long-term lease agreements in place that set a market value for attachments to the City's electric distribution poles that will be directly impacted by the Order.

11. These critical ratepayer funds are currently at risk because of the Commission's Order, and they will continue to be at risk until the appeal is resolved.
12. The Commission refused to grandfather existing agreements, and it specifically concluded that its interpretation of "effective prohibition" extends to fees for all government-owned property in the right of way, including utility poles.
13. As a result, until the appeal is resolved, the City risks challenge from any lessee as it collects its rightful pole attachment fees under its existing contracts.
14. Furthermore, if the City wishes to enter into new lease agreements and charge cost-based fees, (as the Order appears to require), the City would risk a challenge from its current lessees alleging disparate treatment. This dilemma will continue until the appeal is resolved.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

Executed at Seattle, Washington, on March 7, 2019:



Jenny A. Durkan

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

EXHIBIT B

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

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED

No. 19-70125

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, New York,

No. 19-70136

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

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,

No. 19-70144

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

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

CITY AND COUNTY OF SAN FRANCISCO, California,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

No. 19-70145

EXHIBIT B

CITY OF HUNTINGTON BEACH, California,

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, 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.,

No. 19-70326

Petitioner,

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,

No. 19-70339

Intervenors,

V.

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,

No. 19-70341

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 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

No. 19-70344

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.

FEDERAL COMMUNICATIONS COMMISSION and UNITED
STATES OF AMERICA,

Respondents.

AFFIDAVIT OF TONY BU

Tony Bu declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, as
follows:

1. Since September 2016, I have been employed by the City of El
Monte, California, first as an Assistant Planner and currently as an Associate
Planner. I hold a Bachelor's Degree in Urban and Regional Planning from
California State Polytechnic University-Pomona (2013) and I am currently enrolled

at California State University-Los Angeles pursuing a Master's Degree in Public Administration.

2. My duties as an Associate Planner include the intake and review of applications to install personal wireless service facilities, both on private property and within the City's public rights-of-way.

3. The City requires applications for small wireless facilities to comply with certain processing requirements, which includes a requirement that applicants provide digital format copies of their paper applications. Digital format copies are essential to the City's ability to review applications in a timely manner.

4. The City requires a cost-based fee to be paid at the time an application for a small wireless facility is tendered to the City. The fee is approved by the City Council of the City of El Monte and based on the estimated cost to review each application and was derived by multiplying the estimated hours of staff time by the applicable hourly rate for those staff members. The fee is currently \$753.03 per application.

5. On or about January 17, 2019, Crown Castle, through its representative Mr. Aaron Snyder, tendered eleven applications for "small wireless facilities" within the City's public rights-of-way. All eleven applications were in paper format without the required digital format copies. Each application included a check for \$100.00 rather than the published application fee.

6. On or about January 22, 2019, Crown Castle, through its representative Mr. Aaron Snyder, tendered an additional ten applications for small wireless facilities. Like the eleven applications submitted on or about January 17, 2019, these applications lacked the required digital format copies and included a \$100.00 check rather than the full application fee. The cumulative total applications from Crown Castle at this point in time totaled 21.

7. On or about January 23, 2019, Crown Castle's representative, Mr. Ahmad Smith, tendered nine additional applications for small wireless facilities. Like the eleven applications submitted on or about January 17, 2019, and the ten applications tendered on or about January 22, 2019, these applications lacked the required digital format copies and included a \$100.00 check rather than the full application fee. In addition, although an appointment for this tender has been scheduled in advance for 2:30pm on this date, Mr. Smith arrived at 9:00am and demanded that City staff drop their other work and accommodate him. The cumulative applications from Crown Castle at this point in time totaled 30.

8. After the incident with Mr. Smith on January 23, 2019, I spoke with Mr. Snyder by telephone regarding the need for digital format copies and full application fees in order to process Crown Castle's application in a timely manner. Mr. Snyder told me that he would comply with these publicly stated requirements.

9. On February 25, 2019, Crown Castle, through its representative Mr. Snyder, tendered an additional ten applications for small wireless facilities. These applications each included the appropriate application fee (\$753.03). Although Mr. Snyder did not provide digital format copies, he indicated he would do so at a later date. The cumulative applications from Crown Castle at this point in time totaled 40.

10. On or about February 26, 2019, Crown Castle, through its representative Mr. Snyder, tendered an additional ten applications for small wireless facilities. Like the eleven applications submitted on or about January 17, 2019, and the ten applications tendered on or about January 22, 2019, these applications lacked the required digital format copies and included a \$100.00 check rather than the full application fee. The cumulative applications from Crown Castle at this point in time totaled 50.

11. On or about February 26, 2019, Crown Castle, through its representative Mr. Snyder, withdrew the ten applications for small wireless facilities originally tendered to the City on February 25, 2019. Mr. Snyder stated to me that he paid too much for these applications and intended to resubmit them with checks for \$100.00 rather than the full application fee. Mr. Snyder also stated that Crown Castle was not legally obligated to pay more than \$100.00 per application

for a small wireless facility. The cumulative applications from Crown Castle at this point in time totaled 40.

12. On or about February 27, 2019, Crown Castle, through its representative Mr. Snyder, tendered an additional nine applications for small wireless facilities. Like the eleven applications submitted on or about January 17, 2019, the ten applications tendered on or about January 22, 2019, the nine applications tendered on or about January 23, 2019, the ten applications tendered on February 25, 2019 and the ten applications tendered on February 26, 2019, these applications lacked the required digital format copies and included a \$100.00 check rather than the full application fee. The cumulative applications from Crown Castle at this point in time totaled 49.

13. On or about February 28, 2019, Crown Castle, through its representative Ahmad Smith, tendered the previously withdrawn ten applications for small wireless facilities. Like the eleven applications submitted on or about January 17, 2019, the ten applications tendered on or about January 22, 2019, the nine applications tendered on or about January 23, 2019, the ten applications tendered on February 25, 2019, the ten applications tendered on February 26, 2019, and the nine applications tendered on February 27, 2019, these applications lacked the required digital format copies and included a \$100.00 check rather than the full application fee. Mr. Smith included a thumb drive with his paper applications but

the thumb drive contained no files whatsoever and was returned to Mr. Smith during his submittal. The cumulative applications from Crown Castle at this point in time totaled 59.

14. The City received more applications for personal wireless service facilities between January 1, 2019 and February 28, 2019, than it received in the last 5 years combined.

15. Pursuant to Resolution No. 9904 approved by the El Monte City Council on September 4, 2018, the hourly staff rate established for the Planning Division's review of small cell facility applications is \$104 and is subject to Technology and General Plan fees pursuant to the Master Fee Schedule and changes to employee cost index for State and local government employees, total compensation, as published by the U.S. Bureau of Labor Statistics.

16. On average, the total number of hours staff has spent processing the above mentioned submittals (paragraph nos. 5 thru 13) equates to approximately 5 hours per submittal.

17. Furthermore, because staff is required to be in strict compliance to the 10 day review period of small cell facility applications, this has taken away from other essential day-to-day functions such as: assisting residents/other customers at the public counter, over the phone and emails; plan check reviews, and project entitlement case review/management.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

Executed at El Monte, California, on March 7, 2019:



Tony Bu

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Attorneys for Plaintiff and Petitioner
 Crown Castle Fiber LLC

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA
 WESTERN DIVISION

CROWN CASTLE FIBER LLC, a
 New York limited liability company,

Plaintiff and Petitioner,

vs.

THE CITY OF TORRANCE, a
 California municipality; CITY
 COUNCIL OF THE CITY OF
 TORRANCE, its governing body; and
 DOES 1-10,

Defendants and
 Respondents.

CASE NO.:

**PETITION FOR WRIT OF
 MANDATE AND COMPLAINT
 FOR:**

**(1) Prohibition of Services – 47
 U.S.C. § 332(c)(7)(B)(i)(II)**

**(2) Lack of Substantial Evidence –
 47 U.S.C. § 332(c)(7)(B)(iii)**

**(3) Prohibitory Regulation of
 Rights-of-Way – 47 U.S.C § 253(a)**

**(4) State Preemption – Violations of
 California Public Utilities Code
 sections 7901 & 7901.1**

**Entitled to Expedited Review – 47
 U.S.C. section 332(c)(7)(B)(v)**

FILE DATE:

TRIAL DATE SET: No Date Set

In this action Plaintiff Crown Castle Fiber LLC (“Crown Castle”) seeks a
 declaration of its rights and injunctive relief and/or writ of mandate to direct
 Defendants and Respondents, the City of Torrance (“Torrance”), the City Council

PETITION FOR WRIT OF
 MANDATE AND COMPLAINT

1 of the City of Torrance ("City Council") and DOES 1-10, inclusive, (collectively,
 2 "City"), to set aside the Planning Commission of the City of Torrance's ("Planning
 3 Commission") adoption of resolutions ("Project Denials") denying permit
 4 applications for installation of vital telecommunications infrastructure in Torrance.

5 Torrance is attempting to avoid federal and state laws that apply equally to
 6 all local governments in order to address overriding federal and state concerns,
 7 namely, the provision of a reliable national and statewide telecommunications and
 8 broadband network.

9 The City has instituted de facto prohibition on telecommunication facilities in
 10 the City's public-right-of-ways ("ROW") in violation of federal and state law,
 11 including the federal Telecommunications Act of 1996 and California Public
 12 Utilities Code section 7901.

13 JURISDICTION AND VENUE

14 1. This Court has jurisdiction over this matter pursuant to 28 U.S.C.
 15 sections 1331, 1337, 1367, 2201, and 2202, and 47 U.S.C. section 332.

16 2. The Defendants are subject to the personal jurisdiction of this Court
 17 because they are located in this district.

18 3. Venue is proper in this Court under 28 U.S.C. section 1391(b) in that
 19 the Defendants reside in this district and a substantial part of the events or
 20 omissions giving rise to the claims herein occurred in this district.

21 4. Crown Castle properly exhausted all of its administrative remedies
 22 prior to bringing this Action, to the extent it was able or required to do so. The
 23 Action is therefore ripe for review. Additionally, the Action is timely under 47
 24 U.S.C. section 332(c)(7)(B)(v).

25 REQUEST FOR EXPEDITED REVIEW

26 5. Pursuant to 47 U.S.C. section 332(c)(7)(B)(v), Crown Castle seeks
 27 expedited review of this Action.

THE PARTIES

6. Crown Castle is a limited liability company existing under the laws of the State of New York and doing business in the State of California. Crown Castle is a state regulated telephone corporation and a public utility as defined by the California Public Utilities Code section 7901 ("Section 7901").

7. By virtue of the California Public Utilities Code, Crown Castle is vested with a statewide franchise to "erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines" in the ROW without having to obtain a municipal franchise or discretionary fiat. Cal. Pub. Util. Code. § 7901.

8. The California Public Utilities Commission ("PUC") conferred on Crown Castle a "certificate of public convenience and necessity" which certifies Crown Castle as a "competitive local exchange carrier" ("CLEC") and a public utility under the constitutionally granted regulatory authority of the PUC. Because Crown Castle is a telephone corporation, a public utility, and a CLEC, it benefits from Section 7901 statewide franchise right.

9. As a telephone corporation, Crown Castle is the beneficiary of the statutory rights conferred by 47 U.S.C. sections 332(c)(7) and 253.

10. The City is a municipal corporation existing under the laws of the State of California and located within the County of Los Angeles. The City Council is the legislative body that enacts and applies City codes and regulations.

11. Crown Castle is unaware of the true names and capacities of respondents named herein as Does 1 through 10, inclusive, ("Does") whether individual, corporate, associate, or otherwise, and therefore sues those respondents by such fictions names.

12. Crown Castle is informed and believes that the Does, and each of them, inclusive, are and were at all relevant times the agent, servants, employees, successors, predecessors, associates, and/or employees of each other and were

1 acting within the course and scope of such relationships and with the full
2 knowledge and consent of each of the other respondents.

3 THE TELECOM ACT

4 13. Congress enacted the Telecommunications Act of 1996 “to promote
5 competition and reduce regulation in order to secure lower prices and higher quality
6 services for American telecommunications consumers and encourage the rapid
7 deployment of new telecommunications technologies.” Telecommunications Act of
8 1996, Pub. L. 104, 110 Stat. 56 (1996) (codified as amend in scattered sections of
9 U.S.C., Tabs 15, 18, 47) (“Telecom Act”). Congress empowered the Federal
10 Communications Commission (“FCC”) with a broad mandate to interpret
11 provisions of the Telecom Act and to promulgate regulations. Ruing and Third
12 Report and Order in the matter of Accelerating Wireless Broadband Deployment by
13 Removing Barriers to Infrastructure Investment, FCC 18-133, ¶ 21 (2018) (“Small
14 Cell Order”).

15 14. Consistent with the FCC’s broad mandate, courts have consistently
16 recognized the FCC’s authority to interpret 47 U.S.C. sections 253 and 332 to
17 further elucidate what types of state and local legal requirements run afoul of the
18 statutory parameters Congress established. *City of Arlington v. Federal*
19 *Communications Commission*, 668 F. 3d 229, 253 (5th Cir. 2012), *Sprint Telephony*
20 *PCS, L.P. v. County of San Diego*, 543 F. 3d 571, 578 (9th Cir. 2008); *RT*
21 *Communications, Inc. v. Federal Communications Commission*, 201 F. 3d 1264,
22 1268 (10th Cir. 2000).

23 15. In furtherance of its goal of facilitating the rapid deployment of
24 telecommunications technologies, the Telecom Act imposes certain restrictions on
25 the land use and zoning authority of local and state governments. Among those
26 restrictions is 47 U.S.C. section 253 (“Section 253”), which provides, in relevant
27 part, that “[n]o State or local statute or regulation, or other State or local legal
28 requirement, may prohibit or have the effect of prohibiting the ability of any entity

1 to provide any interstate or intrastate telecommunications service.”

2 16. Under the FCC’s¹ definitive interpretation of Section 253, any “state or
3 local legal requirement constitutes an effective prohibition if it ‘materially limits’ or
4 inhibits the ability of any competitor or potential competitor to compete in a fair
5 and balanced legal and regulatory environment.” Small Cell Order ¶ 35.

6 Therefore, “an effective prohibition occurs where a [local regulation] materially
7 inhibits a provider’s ability to engage in any of a variety of activities related to its
8 provision of a covered service.” Small Cell Order ¶ 37.

9 17. For the purposes of Section 253, covered service refers to “a
10 telecommunications service or a personal wireless service.” *Id.* at n. 85.
11 Accordingly, municipalities violate Section 253 when service providers are
12 prevented from: (1) filling a coverage gap; (2) densifying a wireless network; (3)
13 introducing new services; or (4) otherwise improving service. *Id.*

14 **CALIFORNIA PUBLIC UTILITIES CODE SECTIONS 7901 & 7901.1**

15 18. The California Legislature enacted California Public Utilities Code
16 section 7901 (“Section 7901,” as defined above) to confer on telephone
17 corporations a special statewide franchise to “erect poles, posts, piers, or abutments
18 for supporting the insulators, wires, and other necessary fixtures of their lines” in
19 the ROW without having to obtain discretionary planning and zoning processes
20 imposed by local governments. Cal. Pub. Util. Code § 7901.

21 19. For over one-hundred years, the California Supreme Court has
22 repudiated the claims of various local governments that a telephone corporation
23 must obtain a local or municipal franchise, or grant-of-entry, to install its facilities
24 in the ROW, holding that the matter of installing telephone facilities in the ROW is

25
26 ¹ The Small Cell Order is comprised of two parts: (1) a declaratory ruling on the
27 appropriate interpretation of Section 253 and Section 332(c)(7); and (2) a third
28 report and order. The declaratory ruling portion is the definitive interpretation of
the statutory requirements, applying to all pending permit applications, while the
third report and order promulgates new regulatory requirements that took effect on
January 14, 2019.

1 *not* “a municipal affair, but a matter of statewide concern.”

2 20. The California Supreme Court also has repeatedly held that the
3 statewide franchise right conferred by Section 7901 is elevated to the heightened
4 status of a “vested” right, protected by both the United States and California
5 Constitutions. Vested rights cannot be taken away by the state, even though the
6 legislature should repeal the section, or by the people through a constitutional
7 provision.” *See, e.g., Postal Telegraph Cable Co. v. Railroad Comm’n*, 200 Cal.
8 463, 472 (1927) (directly stating that vested rights “cannot be taken away by the
9 state”).

10 21. When it passed the Section 7901 statewide franchise right, the
11 California Legislature withheld from local governments the full slate of zoning
12 powers ordinarily wielded by them. The ROW carries a special status with respect
13 to telephone corporations seeking to deploy their statewide networks. That special
14 status results in the preemption of any attempt by a local government to bar
15 telecommunications facilities from the ROW and bars local attempts to require the
16 equivalent of a local franchise as a precondition to entry into the ROW.

17 22. California Public Utilities Code Section 7901.1 (“Section 7901.1”) provides: “municipalities shall have the right to exercise reasonable control as to
18 the time, place, and manner in which roads, highways, and waterways are
19 accessed.” Control of “time, place, and manner” does not authorize local
20 governments to eject permitted telephone companies facilities from the ROW.
21

22 **FACTS**

23 **The Project**

24 23. The wireless telecommunications facilities (“Node” or “Nodes”) at
25 issue in this Action consist of four small cell antennas mounted on four different
26 utility poles located entirely within the City’s ROW (collectively, the “Project”).
27 Each Node consists of an omni-directional antenna and three remote radio units
28 (“RRUs”). RRUs convert light from fiber optic cables into radio frequencies

1 (“RF”), which is then broadcast from the antenna to provide signal to mobile users.
2 Depending on the individual Node, the RRUs would be located either on pre-
3 existing utility poles or on new replacement wood utility poles. The wood poles
4 range in height from 28 feet to 36.43 feet, including the antennas units.

5 24. Together, the Nodes integrate with one another (and pre-existing
6 infrastructure) to provide critical telecommunications and broadband service within
7 the City. The Nodes also are designed to provide next generation “5G” wireless
8 service to consumers.²

9 The Application Process

10 25. Crown Castle, under its former name, Crown Castle NG West LLC,
11 submitted the Project applications to the City on or around August 28, 2017,
12 pursuant to the City’s codified procedure for processing and approving wireless
13 telecommunication facility applications. Torrance Municipal Code (“TMC”) §§
14 92.39.010-92.39.110.

15 26. In the application and during subsequent communication with City
16 staff, Crown Castle repeatedly demonstrated with expert data and analysis that the
17 Project was necessary to densify and/or add critical capacity to the existing
18 telecommunication network and provide 5G services to consumers.

19 27. On or around October 9, 2018, the Telecommunications Committee of
20 the City of Torrance (“Telecommunications Committee”) denied the Project
21 applications. Pursuant to TMC section 92.39.060(f), Crown Castle filed a timely
22 appeal to the Planning Commission. On or around December 5, 2018, the Planning
23 Commission sustained the denial of the Telecommunications Committee and
24 denied the Project applications.

25
26 ² The FCC has described the development of 5G infrastructure as “critical.” See
27 *generally* Accenture Strategy, *Smart Cities: How 5G Can Help Municipalities*
28 *Become Vibrant Smart Cities*, (2017); attached to Letter from Scott Bergmann,
Vice Pres. Reg. Affairs, CTIA to Marlene H. Dortch, Secretary, FCC, WT Docket
No. 16-421 (filed Jan. 13, 2017).

1 28. The Telecommunications Committee and the Planning Commission
2 purported to base their denials on TMC section 92.39.060(b)(3). Under that
3 provision, a permit will be approved only if the Planning Commission finds: (a) that
4 locations outside the ROW are not available or feasible; (b) that the instillation of
5 the facility at the requested location is necessary to provide service; and (c) that the
6 lack of such a facility would result in a prohibition of service. City staff has
7 acknowledged TMC section 92.39.060(b)(3) only provides the Torrance
8 Telecommunications Committee and Planning Commission a “narrow purview.”
9 Aaron Whitting and Danny Santana, *Planning Division Staff Reports Re Crown*
10 *Castle Applications to City of Torrance Telecommunications Committee*
11 (September 2018). Effectively, TMC section 92.39.060(b)(3) requires that an area
12 completely lack wireless service before a permit application is granted.

13 29. On or around December 20, 2018, Crown Castle filed a timely appeal
14 to the City Council (“City Council Appeal”). Pursuant to its own municipal code,
15 the City Council had thirty (30) days to hear the City Council Appeal. TMC §
16 92.39.060(g) (“The City Council *shall* hear all appeals within thirty (30) days of
17 filing of the appeal.” Emphasis added.).

18 30. Despite repeated inquires and attempts by Crown Castle to obtain a
19 timely hearing on its appeal, the City Council failed to schedule a hearing for the
20 City Council Appeal within the statutorily permitted timeframe. On February 8,
21 2019, Crown Castle informed the City that if a hearing were not scheduled (to occur
22 on or before March 5, 2019) by February 15, 2019, at 5:00 p.m. and if it failed to
23 engage in a tolling agreement to preserve Crown Castle’s Telecom Act claims,
24 Crown Castle would have no choice but to consider the City’s failure to act as a
25 final denial of the project. That February 8, 2019, notice is attached as **Exhibit A**.
26 The City failed to schedule a hearing on the City Council Appeal by February 15,
27 2019, at 5:00 p.m. and otherwise failed to respond to Crown Castle’s requests.
28 Accordingly, Crown Castle exhausted its administrative remedies to the extent it

1 was able to do so.

2 31. Pursuant to its own code, any action on the City Council Appeal by the
3 City Council now is ultra vires, since the deadline to hear the City Council Appeal
4 lapsed. Crown Castle brought this Action within 30 days of the last possible date
5 the City Council could have acted on the City Council Appeal under its own code
6 provisions. This Action therefore is timely under 47 U.S.C. section
7 332(c)(7)(B)(v). Crown Castle has exhausted its administrative remedies by (a)
8 exhausting its administrative appeal rights in the City; and (b) seeking -- but being
9 denied -- relief from the City's own code to hear the City Council Appeal within 30
10 days of the filing of the City Council Appeal. No further avenues lie for exhausting
11 administrative remedies. This Action therefore is ripe for review.

12 **FIRST CLAIM FOR RELIEF**

13 **(Violation of 47 U.S.C. 332(c)(7)(B)(i)(II) – Unlawful Prohibition of Services,** 14 **against all Defendants)**

15 32. Crown Castle incorporates herein by this reference, as though fully set
16 forth, each and every allegation contained above.

17 33. The Telecom Act mandates that “the regulation of the placement,
18 construction, and modification of personal wireless service facilities by any State or
19 local government or instrumentality thereof . . . shall not prohibit or have the effect
20 of prohibiting the provision of personal wireless services.” 47 U.S.C. §
21 332(c)(7)(B)(i)(II).

22 34. A governmental entity violates 47 U.S.C. section 332(c)(7)(B)(i)(II) if
23 it “‘materially inhibits’ the provision of services even if it is not an insurmountable
24 barrier.” Small Cell Order ¶ 35. Moreover, unlawful prohibition of service occurs
25 not only when governmental entities prevent a service provider from “filling a
26 coverage gap but also when densifying a wireless network, introducing new
27 services, or otherwise improving service.” *Id.* at ¶ 37. Accordingly, effective
28 prohibition “includes materially inhibiting additional services or improving existing

1 services.” *Id.*

2 35. Crown Castle established that (a) the Project was necessary to provide
3 telecommunications services, including 5G wireless service, to areas experiencing a
4 significant gap in telecommunications service; and (b) the Project was necessary to
5 provide densification and/or critical capacity to areas where the existing
6 telecommunications service levels were inadequate.

7 36. The Telecommunications Committee and the Planning Commission
8 purported to deny the Project applications based on the criteria set forth in TMC
9 section 92.39.040(b)(3), which requires, in relevant part, that “establishment of the
10 facility at the requested location is necessary to provide service; and the lack of
11 such a facility would result in a prohibition of service.” The Planning Commission
12 Staff Reports acknowledged that since “there currently is [] service within the
13 coverage area . . . establishment of the [Node] is not necessary to provide service.”

14 37. The Project denials materially limited Crown Castle from providing
15 necessary service, including, but not limited to densification and 5G service.
16 Accordingly, the City unlawfully prohibited service in violation of 47 U.S.C.
17 section 332(c)(7)(B)(i)(II).

18 38. Crown Castle has been adversely affected by the above-described
19 violations of law and Crown Castle has a clear right to relief. Unless and until
20 enjoined by this Court, Crown Castle’s rights will continue to be adversely affected,
21 and Crown Castle has no adequate remedy at law.

22 **SECOND CLAIM FOR RELIEF**

23 **(Lack of Substantial Evidence – 47 U.S.C. § 332(c)(7)(B)(iii))**

24 39. Crown Castle incorporates herein by this reference, as though fully set
25 forth, each and every allegation contained above.

26 40. 47 U.S.C section 332(c)(7)(B)(iii) provides that “[a]ny decision by a
27 state or local government or instrumentality thereof to deny a request to place,
28 construct, or modify personal wireless service facilities shall be in writing and

1 supported by substantial evidence contained in a written record.”

2 41. The City violated 47 U.S.C. section 332(c)(7)(B)(iii) in at least two
3 ways. By simply failing to act within its codified deadline, the City Council took
4 no action on the City Council Appeal. It allowed a denial of a subordinate
5 decision-making body to stand and refused to act on Crown Castle’s duly filed
6 appeal. The failure of the City Council to take action violates **both** the written
7 denial requirement and the substantial evidence requirement of section
8 332(c)(7)(B)(iii). The City Council’s lack of action was arbitrary, capricious and
9 wholly devoid of the support of any evidence, let alone substantial evidence. The
10 City Council’s action is tantamount to a denial by silence. The City’s record is
11 empty of facts, evidence or reasoning.

12 42. Nor can the findings that form the basis of the Planning Commission
13 denial meet the standards of section 332(c)(7)(B)(iii). Aside from not qualifying as
14 a “final action” under section 332(c)(7)(B)(v), the Planning Commission’s findings
15 are inchoate and conclusory, and do not rise to the level of substantial evidence
16 under federal, state, or local law. The Planning Commission’s denial of the
17 Applications rests on grounds that have been preempted by federal law and
18 therefore cannot possibly qualify as “substantial evidence” as a matter of law.

19 43. Moreover, the Staff Reports failed to identify any evidence, let alone
20 substantial evidence, to ground the Project denials. The Staff Reports clearly
21 acknowledge that that the “proposed small cell facilities [have] been designed to
22 provide increased capacity while simultaneously providing the least visually
23 intrusive structure.” The Staff Reports recommend the Project’s denial solely on
24 the basis that the Nodes are not necessary to provide service and a “lack of such a
25 facility would not result in a prohibition of service.” However, the Staff Reports
26 contain no analysis supporting this assertion. *See* 47 U.S.C. § 332(c)(7)(B)(iii)
27 (requiring “substantial evidence contained in a written record”). Moreover, the
28 Staff Reports are directed to the wrong standard for justifying a denial of

1 telecommunications facilities applications and ignore the appropriate “materially
2 inhibit” standard. Small Cell Order ¶ 35. Accordingly, the Project Denials do not
3 rest on substantial evidence, in violation of the Telecom Act.

4 44. Crown Castle has been adversely affected by the above-described
5 violations of law and Crown Castle has a clear right to relief. The City has an
6 affirmative duty to correct these violations. Unless and until enjoined by this
7 Court, Crown Castle’s rights will continue to be adversely affected, and Crown
8 Castle has no adequate remedy at law.

9 **THIRD CAUSE OF ACTION**

10 **(Violation of 47 U.S.C. § 253 – Prohibitory Regulation of Public Right-of-Way,**
11 **against all Defendants)**

12 45. Crown Castle incorporates herein by this reference, as though fully set
13 forth, each and every allegation contained above.

14 46. 47 U.S.C. section 253(a) provides that “[n]o State or local statute or
15 regulation, or other state or local legal requirement, may prohibit or have the effect
16 of prohibiting the ability of any entity to provide any interstate or intrastate
17 telecommunication service.” Violations of Section 253 are evaluated under the
18 same “materially inhibit” standard as violations of Section 332(c)(7)(B)(iii). Small
19 Cell Order ¶ 38. Accordingly, a governmental entity violates Section 253 if it
20 “‘materially inhibits’ the provision of services even if it is not an insurmountable
21 barrier.” Small Cell Order ¶ 35.

22 47. A municipality engages in unlawful prohibition not only when it
23 prevents a service provider from “filling a coverage gap but also when densifying a
24 wireless network, introducing new services, or otherwise improving service.” *Id.* at
25 ¶ 37. Accordingly, effective prohibition “includes materially inhibiting additional
26 services or improving existing services.” *Id.*

27 48. The City’s ordinances, regulations, and procedures purport to confer
28 more authority on the City and its decision-makers than is allowed by federal and

1 state law. They impose an unreasonably high bar to obtain approvals and therefore
 2 have the effect of prohibiting the provision of telecommunication services in
 3 violation of Section 253(a). Additionally, they are not “competitively neutral,” as
 4 required by Section 253(a), because they impose disparate, onerous approval
 5 criteria on telecommunications facilities and not on other public utilities in the
 6 ROW.

7 49. Crown Castle established that the Project was designed to provide
 8 necessary capacity to areas currently experiencing inadequate service levels.
 9 Crown Castle also demonstrated that the Project was necessary to provide critical
 10 5G wireless service to consumers. The Telecommunications Committee and the
 11 Planning Commission denied the Project applications due to the unlawful
 12 requirements of TMC section 92.39.040(b)(3), which requires, in relevant part, that
 13 “establishment of the facility at the requested location is necessary to provide
 14 service; and the lack of such a facility would result in a prohibition of service.” The
 15 Planning Commission Staff Reports acknowledged that since “there currently is []
 16 service within the coverage area . . . establishment of the [Node] is not necessary to
 17 provide service.” Ultimately, the City’s code materially limits telecommunications
 18 companies, like Crown Castle, from providing service and thereby results in a
 19 prohibition of service.

20 50. Crown Castle has been adversely affected by the above-described
 21 violations of law and Crown Castle has a clear right to relief. Unless and until
 22 enjoined by this Court, Crown Castle’s rights will continue to be adversely affected,
 23 and Crown Castle has no adequate remedy at law.

24 **FOURTH CLAIM FOR RELIEF**

25 **(State Preemption – Public Utilities Code §§ 7901 and 7901.1, against All**
 26 **Defendants)**

27 51. Crown Castle incorporates herein by this reference, as though fully set
 28 forth, each and every allegation contained above.

1 52. Crown Castle's special regulatory status as a CLEC gives rise to a
2 vested right under Section 7901 to use the ROW in Torrance to "construct ...
3 telephone lines along and upon any public road or highway, along or across any of
4 the waters or lands within this State" and to "erect poles, posts, piers, or abutments
5 for supporting the insulators, wires, and other necessary fixtures of their lines, in
6 such manner and at such points as not to incommode the public use of the road or
7 highway[.]" Cal. Pub. Util. Code § 7901.

8 53. Defendants have violated Section 7901 in at least two ways. First, by
9 attempting to require Crown Castle to adhere with the onerous and prohibitive
10 TMC to obtain a discretionary permit as a precondition to entry into the Row. This
11 violates Crown Castle's existing vested rights to enter the ROW, pursuant to
12 Section 7901. Second, by denying the Project applications, the City exercised
13 authority in excess of the limited time, place, and manner controls ceded to local
14 governments by the People of the State of California through enactment of Section
15 7901.

16 54. A discretionary use permit, like the permit required by the City in this
17 action, constitutes an unlawful precondition for a CLEC's entry into the ROW
18 because, as a matter of law, a discretionary conditional use permit process presumes
19 that the applicant has no pre-existing rights to use that which is being sought by the
20 permit. Here, Crown Castle has a preexisting vested statewide right to enter the
21 ROW for its telecommunications uses. The City's actions wholly ignore this pre-
22 existing right and are the equivalent of a prohibited franchise requirement.

23 55. Moreover, the Project Denials directly violate Section 7901.1, as the
24 City imposed restrictions that exceed the reasonable time, place, and manner
25 restrictions. The City effectively barred Crown Castle from installing any facilities
26 in the ROW of the City's residential areas. The City's controls cannot effectively
27 foreclose the ROW to telecommunications infrastructure, or otherwise prevent
28 Crown Castle from exercising its right under state law to "erect poles" in the ROW.

1 Through its denials, the City is effectively prohibiting all wireless
 2 telecommunication facilities in the ROW, and thereby attempting to wield authority
 3 it does not have, in violation of state law.

4 56. For the above reasons, the City's denials are preempted by state law
 5 under the doctrine of express, field, and/or conflict preemption and therefore are
 6 void as a matter of law. As a result of the City's actions, Crown Castle has no other
 7 adequate relief available. Crown Castle has been adversely affected by the above-
 8 described violations of law. Unless and until enjoined by this Court, Crown
 9 Castle's rights will continue to be adversely affected, and Crown Castle had no
 10 adequate remedy at law.

11 **PRAYER FOR RELIEF**

12 WHEREFORE, Crown Castle prays for judgment against Defendants as
 13 follows:

14 1. As to the First, Second, and Third Claims for Relief:

- 15 (a) For an order declaring the Project denials to be void, unlawful,
 16 invalid, and unenforceable as a matter of law;
- 17 (b) For an order requiring Defendants to approve Crown Castle's
 18 Project applications and to issue any and all necessary land use
 19 approvals for the Project;
- 20 (c) For permanent injunctions and/or writ of mandate compelling
 21 Defendants to rescind, revoke, and set aside the Project denials;
- 22 (d) For permanent injunction/writ of mandate compelling
 23 Defendants to approve the Project applications and to issue any
 24 and all necessary land use approvals for the Project.

25 2. As to the Fourth Claim for Relief:

- 26 (a) For an order declaring the Project denials to be void, unlawful,
 27 invalid, and unenforceable as a matter of law;
- 28 (b) For an order requiring Defendants to approve Crown Castle's

- 1 applications for the Project and to issue any and all necessary
2 land use approvals for the Project;
- 3 (c) For permanent injunctions and/or writ of mandate compelling
4 Defendants to rescind, revoke, and set aside the Project denials;
- 5 (d) For permanent injunction/writ of mandate compelling
6 Defendants to approve the Project applications and to issue any
7 and all necessary land use approvals for the Project.

8 3. As to all claims for relief: For costs of suits incurred herein, including
9 attorneys' fees as may be allowed by law, and for such other and further relief as
10 the Court deems just and proper.

11
12 Dated: February 15, 2019

NEWMEYER & DILLION LLP

13
14 By: /s/ Christopher D. Valentino

15 Michael W. Shonafelt
16 Christopher D. Valentino
17 Attorneys for Plaintiff and Petitioner
18 Crown Castle Fiber LLC
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27
28

EXHIBIT A



NEWMAYER & DILLION LLP
ATTORNEYS AT LAW

MICHAEL W. SHONAFELT
Michael.Shonafelt@ndlf.com

File No.:
2464.153

February 8, 2019

VIA EMAIL AND CERTIFIED MAIL

Jeffery W. Gibson
Director of Community Development
City of Torrance
3031 Torrance Blvd.
Torrance, CA 90503
jgibson@torranceca.gov

Re: Demand Letter: Crown Castle NG West LLC: Pending Appeals of WTC17-00010, WTC17-00015, WTC17-00016, WTC17-00017.

Dear Mr. Gibson,

This office represents Crown Castle Fiber, LLC ("Crown Castle") regarding the above-referenced wireless communication facility applications ("Project"). This letter addresses Crown Castle's appeal of the Planning Commission of the City of Torrance's ("Planning Commission") denial of the Project applications ("Appeal").

On December 5, 2018, the Planning Commission denied the Project applications for an alleged failure to meet the requirements of Torrance Municipal Code ("TMC") section 92.39.060(b)(3). Pursuant to TMC section 92.39.060(g), Crown Castle submitted a timely appeal to the City Council of the City of Torrance ("City Council"). Under TMC section 92.39.060(g), the City Council "*shall* hear all appeals within thirty (30) days of filing of the appeal." (Emphasis added.) Accordingly, the City Council was required, by its own code, to hear the Appeal by January 19, 2019. Despite repeated inquiries by Crown Castle representatives, the Appeal has not yet been scheduled for a hearing.

Not only did the City Council's failure to hear the Appeal violate its own municipal code, it also ignored federal and state law. Federal and state law have repeatedly acknowledged the necessity of timely decisions on wireless telecommunication facility applications. (See, e.g., Petition for Declaratory Ruling (2009) 24 F.C.C. Rcd. 13994, 14004-05 ["Personal wireless service providers have often faced lengthy and unreasonable delays in the consideration of their facility siting applications, and [] the persistence of such delays is impeding the deployment of advanced and emergency services."]; and Gov. Code, § 65964.1.)

Notwithstanding the above, Crown Castle hereby presents this final request that the City Council agendaize a hearing on the Appeal and render a final decision. To accommodate such

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Jeffery W. Gibson
February 8, 2019
Page 2

action, Crown Castle proposes an agreement to toll the statute of limitations for any and all potential claims, including claims made under 47 U.S.C. sections 253 and 332, until after the City Council renders a decision on the Appeal, to occur on or before **March 5, 2019**. To ensure clarity, any statutes of limitations for any applicable claims pertaining to the Appeal, including claims made under either 37 U.S.C. section 253 or 332 shall accrue from the date of the written decision rendered on the City Council's action on the Appeal.

We request that the City Council communicate its response to this letter in writing by no later than **Friday, February 15, 2019, at 5:00 p.m.** If this office does not receive a response from the City Council by the abovementioned date and time, **Crown Castle shall consider the City Council's failure to act as a final denial of the Project.** At that point, Crown Castle will have exhausted its administrative remedies and will immediately be entitled to seek judicial relief against the City for violations of state and federal law, including, but not limited to, 47 U.S.C. sections 332 and 253.

Please do not hesitate to contact me if you have any questions.

Very truly yours,



Michael W. Shonafelt

MWS

cc: Patrick Q. Sullivan, Esq., City Attorney (psullivan@torranceca.gov)
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