Case No. 19-70144

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CITY OF SAN JOSE, CALIFORNIA, et al, Petitioners, CTIA – THE WIRELESS ASSOCIATION, et al Intervenors, v. FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA, Respondents.

MOTION FOR LEAVE TO APPEAR ON BEHALF OF THE ASSOCIATION OF WASHINGTON CITIES AS *AMICUS CURIAE* IN CASE NO. 19-70144

Pursuant to Federal Rules of Appellate Procedure 29(a)(6), the Association of Washington Cities ("AWC") is a private non-profit corporation organized pursuant to IRC 501(c)(4) and incorporated under the Washington Non-profit Corporation Act. The AWC represents Washington cities and towns before the State Legislature, the State Executive branch, and regulatory agencies. Membership in the AWC is

voluntary, however the AWC includes 100% participation from Washington's 281 cities and towns which range in population from over 600,000 to 44 persons. AWC's mission is to serve its members through advocacy, education and services. Support for local authority has been a key value of the AWC, and, preserving local government's role as the stewards of the public right-of-way is of significant importance to its members. The AWC's primary interest is assuring that the exercise of FCC authority is in accordance with the rule of law. Cities exercise their authority as creatures of law. Strict compliance with statutory protocols is required in order for cities to exercise their authority. The FCC failed to consider that the regulatory structure it created must be implemented by local government agencies whose powers and authority are structured, pursuant to and limited by the laws under which they are created.

Pursuant to Ninth Circuit Rule 29(3), counsel for AWC sought consent of all parties to the consolidated appeal beginning on May 10, 2019. All parties to Case No. 19-70144 have consented. Four of the parties including the FCC and United States in the companion cases have consented, no response has been received from the remainder.

While all parties in Case No. 19-70144 have consented, the matter in which the AWC wishes to be heard, this motion is filed as a precaution in the event the court determines the consent of the parties in the companion cases is required.

INTEREST OF *AMICUS CURIAE*.

The Association of Washington Cities ("AWC") is an organization whose members include every city in the state of Washington. While several of the AWC's members, most notably the City of Seattle, have joined with the City of San Jose as petitioners, AWC wishes to represent the interests of smaller mid-size and small cities and towns in our state. The resources of these cities as well as the size of their staff provide a perspective different from entities such as the City of New York, Los Angeles, Los Angeles County and other large and sophisticated organizations. While our members' perspectives may differ, their interests are the same and the smaller Washington cities wish to assist the Court by providing the perspective of smaller communities.

Of particular concern to small cities is the failure of the FCC consider the structures under which our members exercise their authority. Also of concern is the shifting of political responsibility for the enactment of often unpopular provisions promulgated by Congress and the FCC from the federal government to local jurisdictions. AWC supports petitioners' claims that the Order is violative of the Administrative Procedures Act and of the Tenth Amendment by providing the Court with the perspective of smaller communities who would otherwise be unable financially to participate in a matter of important to them.

ARGUMENT

The AWC submits the accompanying brief in good faith to ensure that the important legal issues before the Court are thoughtfully presented for the Court's consideration from the perspective of the smaller communities. Accordingly, and pursuant to Rule 29, the *Amicus Curiae* respectfully request permission to file the accompanying brief in support of the Petitioners in Case No. 19-70144 only.

Respectfully submitted this 17th day of June 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF System on June 17, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ W. Scott Snyder
W. Scott Snyder

No. 19-70144
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF SAN JOSE, CALIFORNIA, et al,

Petitioners,

CTIA – THE WIRELESS ASSOCIATION, et al,

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,

Respondents.

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF WASHINGTON CITIES SUPPORTING PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

TREATISES

REGULATIONS

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

MUNICIPAL CODES

INTERESTS OF AMICUS CURIAE

The Association of Washington Cities ("AWC") is a private non-profit corporation organized pursuant to IRC 501(c)(4) and incorporated under the Washington Non-profit Corporation Act. The AWC represents Washington cities and towns before the State Legislature, the State Executive branch, and regulatory agencies. Membership in the AWC is voluntary, however the AWC includes 100% participation from Washington's 281 cities and towns which range in population from over 600,000 to 44 persons. AWC's mission is to serve its members through advocacy, education and services. Support for local authority has been a key value of the AWC, and, preserving local government's role as the stewards of the public right-of-way is of significant importance to its members.

The AWC's primary interest is assuring that the exercise of the Federal Communication Commission ("FCC") authority is in accordance with the rule of law. Cities exercise their authority as creatures of law. Strict compliance with statutory protocols is required in order for cities to exercise their authority. The FCC failed to consider that the regulatory structure it created must be implemented

by local government agencies whose powers and authority are structured pursuant to and limited by the laws under which they are created.

CORPORATE DISCLOSURE, AUTHORISHIP AND FINANCIAL CONTRIBUTION STATEMENTS

Pursuant to Fed. R. App. P. 29(a)(4)(A) and consistent with Ninth Circuit Rule 26(1) amicus curiae states that the Association of Washington Cities is a non-partisan, non-profit corporation with no parent corporation and no publicly held corporation owning ten percent or more of its stock or other interest in the organization.

Pursuant to Fed. R. App. P. 28(a)(4)(E), amicus curiae states that no counsel to a party in the matter before the court authored this brief in whole or in part; that no party or party's counsel contributed money intended to fund the preparation of submission of this brief; and that no person contributed money to amicus curiae that was intended to fund the preparation or submission of this brief.

STATEMENT REGARDING CONSENT TO FILE IN SEPARATE BREIFING

Pursuant to Fed R. App. P. 29, the AWC sought permission of the parties to participate as Amicus Curiae through the filing of a brief. All parties, Petitioners, Respondents, and Intervenors in Case No. 19-70144 have affirmatively consented.

SUMMARY OF THE CASE

The AWC adopts the Statement of the Case offered by the Petitioners.

SUMMARY OF ARGUMENT

Washington cities and towns ("cities") have been designated as "stewards of the public right-of-way" by Washington courts.[1] Cities exercise this authority pursuant to grants of authority and limitations created pursuant to Titles 35 and 35A of the Revised Code of Washington, the Washington State Constitution and in some cases local charters. The cities of the State of Washington are creatures of law and must act in accordance with governing law.[2]

The AWC believes that the FCC Order[3] fails, in violation of the

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[1] *Winkenwerder v. City of Yakima*, 52 Wn.2d 617, 627 (1958).

[2] *Meadowdale Neighborhood Committee v. City of Edmonds,* 27 Wn. App. 261 (1980).

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

Administrative Procedure Act ("APA")[4], to consider the statutory and other legal structures under which cities must exercise their authority despite comments pointing out the unrealistic time structures imposed for code design, permit issuance and implementation.[5] The FCC Order compels cities to either ignore the state statutory structures such as public notice requirements and state departmental review of zoning revisions or violate the statutes in order to comply with arbitrary time frames. Accordingly, the time periods established by the FCC Order for both the enactment of local ordinances and permit issuance are "arbitrary and capricious" under the APA.[6] While cities are and should remain the primary stewards of the public rights-of-way, the FCC failed to consider the practical impacts of forcing complex technical review on tightly staffed local government officials with little or no expertise in telecommunications.

Wireless Broadband Deployment By Removing Barriers to Infrastructure Investment, FCC 18-133, WT Docket No. 17-79, WC Docket No. 17-84, 85 FCC 51867 (2019) ("FCC Order").

[4] 5 U.S.C. §706(2)(A) (1966).

[5] *See e.g.*, Comment of the City of Mukilteo, City of Bremerton, City of Mountlake Terrace, City of Kirkland, City of Redmond, City of Issaquah, City of Lake Stevens, and City of Richland, WT Docket No. 17-79 (Sept 18, 2018).

[6] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009).

The failure of the FCC to consider the limiting structures under which local government exercise authority is itself arbitrary and capricious under the APA. The FCC failed to investigate the impact on local government of the arbitrary establishment of short periods for compliance and the "presumptively reasonable" time periods for review of permits to deploy small wireless facilities, ignoring the statutory requirements and constraints under which local governments must exercise their powers.[7]

The FCC Order implementing §§332(c)(7) and 253 of the Telecommunications Act of 1996 requires local governments to administer a federal regulatory program without regard to the legal structures under which our cities are created and must exercise their authority. The FCC Order emphasizes its commandeering of local authority by requiring cities to enact local codes and design standards within constrained periods in order to implement a federal system of wireless communications. The FCC Order requires permit issuance with arbitrarily short timeframes, again without regard to statutory structure. This commandeering of local government power and authority violates the Tenth

[7] FCC Order, para. 106-107.

Amendment's separation of powers by shifting accountability from Congress and the FCC to local governments.[8]

Local officials are told to adopt provisions in the ninety-day timeframe without the ability to adequately assess local impacts or address the concerns of their citizens. Compliance with FCC timeframes conflicts with statutory requirements that guarantee the public a role in the legislative and regulatory process and deprive cities of their traditional role in balancing the needs of the varied constituencies that make up each community. The FCC Order accordingly violates the foundations of the Tenth Amendment by passing to local government entities the duty to enforce a federal regulatory program without properly assigning political accountability to its creators, Congress and the FCC.

ARGUMENT

I. CITITES ARE CREATURES OF LAW

A. Cities Operate Pursuant to the Laws of the State in which They Reside

John Adams noted in the Massachusetts Constitution of 1780 that cities are "a government of laws and not of men". This sentiment still holds true today.

[8] U.S. Constitution Amendment Ten.

The 281 cities and towns of the AWC may vary from large and sophisticated cities to small towns, but each operates under the laws of Washington state. Their exercise of authority must be conducted in public. Cities legislate in open public meetings and cities' public records are disclosed pursuant to statute.[9] Land use powers are exercised under the Growth Management Act and reviewed by courts and the Growth Planning Hearings Board.[10]

The statutes that empower local government carry strict procedural requirements and often require public notice periods.[11] These requirements allow close public scrutiny over the exercise of fundamental police powers such as planning and zoning, and control of the public rights-of-way. The state legislature enacted these controls by exercise of their legislative discretion.

II. FCC ORDER VIOLATES THE ADMINSTRATIVE PROCEDURE ACT

A. The FCC's Order is Arbitrary and Capricious

In its rush to promote the interests of wireless industry and Interstate Commerce through the authority vested under and limited by Sections 253 and 332

[9] RCW 42.30; RCW 42.56.
[10] RCW 36.70A.
[11] *See e.g.*, RCW 35.63.200, RCW 35.63.120, RCW 35A.63.070.

of the Telecommunications Act of 1996, the FCC ignored the comments of local government and imposed time frames that ignore the structures under which local governments must operate.[12] Whether its requirement of compliance with procedural requirements in 90 days[13], the adoption of aesthetic standards in 180 days[14], or the imposition of arbitrary "presumptively reasonable" periods for permit review[15], the FCC made no attempt to determine how these fundamental exercises of police powers are considered, enacted or implemented in each state by various types of local government entities.

These arbitrary time restrictions ignore the role of the public in the enactment of laws, the granting of permits, or the approval of a franchise. Under state law, these actions may require public hearings after public notice and final action at a public meeting.[16] These procedural requirements are integral to the exercise of local government's authority. By setting arbitrary periods for compliance with its directive, the FCC failed to consider that local government is

[12] *Supra* note 5.
[13] FCC Order, para 152-153.
[14] FCC Order, para 89.
[15] FCC Order, para. 106-111.
[16] *See e.g.* RCW 35A.47.040.

indeed a government of laws or to inquire into how those laws may impact implementation of the FCC Order.

III. FCC Order Violates the Tenth Amendment

A. The FCC Improperly Commandeered Local Governments

Our cities and towns express their frustration at being required to conform their local planning and zoning regulations and permitting requirements to comply with the requirements of Congress and the FCC. Local officials take the political heat at local public hearings with little or no latitude to, under the FCC Order, address the public's concerns. The United States Supreme Court has identified political accountability as the practical basis for its anti-commandeering principal when considering Tenth Amendment challenges.[17] As the Court stated:

> [W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished…. [W]here the Federal Government directs the States to regulate, *it may be state officials who will bear the brunt of public disapproval,* while the *federal officials* who *devised* the regulatory program may remain *insulated* from the electoral ramifications of their decision. *Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of*

[17] *Petersburg Cellular P'ship v. Bd. of Sup'rs of Nottoway Cty.*, 205 F.3d 688, 703 (4th Cir. 2000) quoting *New York v. United States*, 505 U.S. 144, 166-169 (1992).

> *the local electorate in matters not pre-empted by federal regulation.*[18]

If Congress and the FCC desire to expedite the permitting of small wireless facilities, they may do so under the Commerce Clause but must do so through a federal permitting structure and take political responsibility for their policy choices. Placing local elected officials in the position of being politically responsible for local ordinances that implement federally mandated program requirements is a clear violation of Tenth Amendment.

The historical basis for the Tenth Amendment has been analyzed by the Supreme Court utilizing the Federalist Papers and the record of the Constitutional Convention.[19] As adopted in the Constitution, the Commerce Clause "authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state government's regulation of interstate commerce."[20] The Court noted that this separation of powers ensures greater protection of individual liberties.[21]

The Congressional compromise that resulted in the final version of

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[18] *New York,* 505 U.S. at 168-69 (emphasis added).
[19] *Petersburg Cellular P'ship.*, 205 F.3d at 700 quoting *Printz v. United States*, 521 U.S. 898, 919–20 (1997).
[20] *New York*, 505 U.S. at 162.
[21] *Id.* at 163-64; *see also Gregory v. Ashcroft,* 50 U.S. 452, 457-59 (1991).

§332(c)(7) shifted regulation of wireless facilities to the states and local government.[22] While §332(c)(7)'s requirement that a local decision to permit a wireless facility be based on substantial evidence and in writing can be seen as an insubstantial intrusion into local authority, federal case law makes clear that there may be no balancing of interests when addressing separation of powers challenges under the Tenth Amendment:

> Accordingly, whether the standards imposed on the state and local governments by the Telecommunications Act are *relatively modest instructions* cannot become part of the constitutional evaluation. The Tenth Amendment categorically bars the federal government from compelling state and local governments to administer a federal regulatory program.[23]

A debate between the justices on the Fourth Circuit panel in concurring opinions outlines the evolution of the Supreme Court's application of the Tenth Amendment.[24] Adopting a federal standard of "substantial evidence" for local government review ignores the presumption of validity that some states apply in

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[22] *National League of Cities Rising: How the Telecommunications Act of 1996 Could Expand Tenth Amendment Juris Prudence,* 30 B.C. Envtl. Adv. L. Rev 315 (2003) quoting *New York,* 505 U.S. at 188. *See also*, *Printz*, 521 U.S. at 932-33.
[23] *New York*, 505 U.S. at 188; *Printz* 561 U.S. at 923-33 (emphasis added).
[24] *Petersburg Cellular P'ship*, 205 F.3d 688 (2000).

review of local government permitting and land use decisions. In doing so, as the Fourth Circuit debated, §332(c)(7) crosses the bright line applied to separation powers issues. "The deliberate choice that Congress made not to pre-empt, but to use, state legislative processes for siting towers precludes the federal government from instructing the states on how to use their processes for this purpose."[25]

The procedural limitations imposed by the FCC Order and its "shot clocks" for adoption and permit review further highlight this Tenth Amendment violation. "State and local governments are not bureaucratic extensions of Congress and may not be employed as administrative agencies to carry out federal policy."[26]

As Judge Widner noted in his concurring opinion in *Petersburg*:

> While the legislative decision of whether to grant a land use permit might end up in the courts, the doctrine is inescapably a political function … [because] the very essence of elected zoning official's responsibility [is] to mediate between developers, residents, commercial interests, and those who oppose and support development in the community.[27]

[25] *Id.* at 704.
[26] *Id.* quoting *New York,* 505 U.S. at 188.
[27] *Id.* quoting *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 828 (4th Cir.1995).

The FCC Order co-opts local processes in order to facilitate small wireless deployment, thereby ignoring the complex balancing of interests that local government performs in land use permitting.

The FCC's failure to consider the structures under which local governments operate emphasizes that the FCC Order requires local government to enforce a federal program in violation of the Tenth Amendment. The failure is also a violation of the APA as both arbitrary and a violation of the agencies "affirmative obligation" to "consider an important aspect of the problem."[28]

The United States Supreme Court explained the application of the arbitrary and capricious standard under the APA to the context of an agency's failure to consider an important aspect of a problem:

> "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: '[w]e may not supply a reasoned basis for the agency's action that the

[28] *Id.*

agency itself has not given.'"[29]

The FCC's ruling presents just such a failure, in this case, to consider cities' legal ability to comply within its timeframes.

In its response to the National League of Cities ("NLC") request for a stay of its Order, the FCC conflated procedures established to address eligible facilities requests with the comprehensive changes to cities' zoning codes necessary to comply with its order relating to small wireless facilities.

Eligible facilities requests relate to minor expansions of existing facilities, primarily macro facilities. The FCC Order dramatically expands the scope of inquiry regarding small wireless facilities by permitting batching and therefore the size of the administrative task.[30] By expanding the definition of structures suitable for colocation to include existing structures regardless of whether they are used to site wireless facilities, the complexity of review was expanded even further.[31] This need for change is particularly true for jurisdictions which have utilized the Ninth

[29] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 2866 (1983).
[30] 47 C.F.R. § 6409(a).
[31] 47 C.F.R. §1.6002.

Circuit's "significant gap in coverage" and "least intrusive means" test to evaluate macro facilities within their communities.[32] In response to the NLC's concerns, the Commission responded:

> The Commission's 2009 and 2014 orders already require localities to complete their review and act on certain types of facility applications within sixty (60) days and others within ninety (90). The new sixty-day and ninety-day shot clocks established for certain types of Small Wireless Facilities should require no major change to localities' implement action procedures but simply entail use of existing procedures already in place for review of applications that are already subject to those deadlines. Of course, if local governments have not already established whatever procedures are needed to comply with the existing sixty-day and ninety-day deadlines, any burdens they now face were caused by their noncompliance with existing rules rather than any new burdens imposed by the present *Order*.[33]

The FCC's cavalier rejection of the NLC's concern regarding process assumes that the major expansion of existing public facilities somehow equates to permitting large numbers of entirely new facilities in the right-of-way. The FCC's

[32] *See e.g.*, *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 998 (9th Cir. 2009).

[33] Order Denying Motion for Stay, *In the Matter of Accelerating Wireless Broadband Deployment By Removing Barriers to Infrastructure Investment*, DA 18-1240, WT Docket No. 17-79, WC Docket No. 17-84, (2018) at para 21 ("FCC Denial Order").

failure to evaluate the need for review and adoption of zoning code amendments and their thoughtful application through traditional administrative review of structures proposed for the right-of-way is typical of the FCC's failure or refusal to understand how cities operate. The FCC's blind spot is akin to its bland erasure of the traditional distinction between regulatory and proprietary functions of municipalities.

IV. COMMANDERING THE CITY OF WHOVILLE

A. A Hypothetical Application of the FCC Order

The impact of the structure under which cities operate can best be examined through the lens of the typical small city who is a member of the AWC. The city of Whoville in our hypothetical is a city of approximately 7,000 in population. The Whoville City Council meets twice per month.[34] Many smaller cities meet only once a month.[35] Learning of the FCC's preliminary order in September, the City Council in January moves to comply by adopting an interim zoning approach

[34] *See e.g.,* City of Toppenish Municipal Code Section 2.05.010; City of Lake Stevens Municipal Code Section 2.08.020.
[35] *See e.g.*, City of Medina Municipal Code Section 2.04.010; Town of Yarrow Point Municipal Code Section 2.04.010.

permitted under the Growth Management Act ("GMA").[36] This expedited process permits a city in an emergency to adopt an interim zoning ordinance so long as they then follow the process established in the GMA.[37] The city waited until January because cities in the state of Washington adopt their budgets in October through December.[38] Unpaid elected officials in many smaller communities devote significant amounts of their personal time to their legislative functions and the economic functioning of their city must be their first priority but the FCC Order assumes that cities have no public business other than the implementation of its order.

Having taken the first step toward adopting an interim ordinance, the City Council holds a public hearing within sixty days of the initial publication.[39] Because the city meets twice a month, that public hearing is set for the second meeting in January. The matter is then referred to the city's planning commission for review. Following several meetings and the public hearings that are required

[36] RCW 36.70A.
[37] RCW 36.70A.390.
[38] RCW 35A.33.
[39] RCW 36.70A.390.

by GMA, the planning commission returns the ordinance to the City Council for final adoption. The city at this point, while behind the FCC Order's timeline in the adoption of procedures, has complied with the FCC's direction regarding the adoption of aesthetic standards.

In April, Daddy Warbucks' small wireless company, Warbucks Wireless, files an application for a franchise for a small wireless facility deployment. The city's procedures establish a combined and comprehensive permitting process that includes both a legislative element under Washington law to grant a franchise and an administrative permitting component for use of the public right-of-way. Under Washington law a franchise is a contract.[40] Franchises must be negotiated and either party is required to enter into such an agreement under Washington law.[41] Some negotiation is required. In addition, Washington state law requires that franchise applications be read twice before the legislative body acts.[42] The City Council must examine its legislative agenda and determine whether, in order to meet the sixty or ninety-day timeframe as applicable, a special meeting is required.

[40] *City of Lakewood v. Pierce Cty.*, 106 Wn. App. 63, 74 (2001).
[41] *Id.*; RCW 35A.47.040.
[42] RCW Chapter 35A.11 and RCW 35A.47.040.

Under Washington law, public agencies' business must be conducted in public.[43] Public notice of any special meeting required.[44] At such a special meeting, only the item presented on the agenda may be considered.[45] At this point, it should be obvious that the FCC Order not only fails to recognize how cities operate, but clearly commandeers the cities' legislative process to further the wireless industry in support of federal goals. In this hypothetical, the city's legislative agenda has been commandeered for six months.

On a parallel track, administrative staff is reviewing a small wireless permit application. The FCC Order fails to consider the impact of certain federal and state law obligations and restrictions on the ability of cities to act. For example, public rights-of-way are crowded and as has been noted must accommodate a variety of users. The Americans with Disabilities Act ("ADA") requires the maintenance of regulated passageways for forms of pedestrian traffic.[46] In the event of a problematic design application and in order to avoid a charge of "effective

[43] *See* Open Public Meetings Act, RCW 42.30, and RCW 35.70A.035.
[44] RCW 42.30.080(2).
[45] RCW 42.30.080(3).
[46] 42 U.S.C §126.

prohibition," the city may be required to make changes in its right-of-way design to accommodate a new pole. State law requires uniform standards for major and secondary arterial streets.[47] As the statute provides "no deviation from the design standards as to such streets may be made without the approval of a state aid engineer."[48] The FCC's focused on the industry costs associated with complying with local regulatory measures focuses exclusively on the impact to the small wireless providers while ignoring the impacts on the public and other right-of-way franchisees. If the city of Whoville, in order to accommodate a problematic but necessary design, is required to forward that design change to the state it has no control over the date on which that design approval is provided. Action without that approval is prohibited by state law.

These may be seen as potential defenses in the event of an injunctive relief request. The FCC's point of view is that Whoville should simply to ignore the procedural processes under which cities must act:

> Nothing in the *Order* prevents localities from exercising their authority to deny applications to install facilities that are aesthetically inappropriate, much less facilities that post *bona fide* traffic hazards or other risks to public

[47] RCW 35.78.040.
[48] RCW 35.78.040.

> safety, so long as they do not wield such authority in a manner that is arbitrary or improperly 'prohibits or has the effect of prohibiting' the provision of wireless service.[49]

From the perspective of Whoville's limited staff, Warbucks' wireless application has jumped the que, taking precedent over every other permit application. Cost and speed are substituted for measured judgment. It is obvious that the FCC Order is both arbitrary and capricious under the APA in its failure to consider the other structures under which cities operate as well as the manner in which the FCC Order commandeers both the cities' legislative processes and its administrative priorities.

V. FCC ORDER MISCHARACTERIZES LOCAL GOVERNMENTS' FUNCTIONS AND AUTHORITY

A. Regulatory v. Proprietary Functions

The anti-commandeering injunction is also violated by the FCC Order's arbitrary elimination of the traditional distinction between regulatory and proprietary functions. This distinction is built into Washington law through the state's "fund doctrine." "One fund may not support another" is a fundamental rule

[49] FCC Denial Order, para 22.

of local government budgeting in the state of Washington.[50] The economics of city-owned utilities are controlled in utility accounts separate from a city's "general fund." A utility fund must be self-supporting. Local rate payers funded the purchase of assets from poles to conduit to the very public rights-of-way that the FCC Order purports to offer to wireless carriers without regard to fair market value.[51] The cities' regulatory functions are funded by tax revenues in the cities' general fund. This distinction between regulatory and proprietary functions is firmly grounded in the laws of many states.[52] Courts use this distinction when construing a grant of local authority, applying a different construction to each.[53]

The FCC's elimination of this fundamental principle of local government law is yet another example of how the FCC Order commandeers local governments to promulgate a federal program. This aspect of commandeering is of particular concern in Washington state due to local governments' limited ability to tax[54] as

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[50] RCW 35.33.121 and RCW 35A.33.120.

[51] The AWC supports the takings analysis of the public utility petitioners in *City of Portland v. U.S.A. et. al.*, No. 18-72689.

[52] § 10:27.Governmental and proprietary powers, 2A McQuillin Mun. Corp. § 10:27 (3d ed.)

[53] *Id*.

[54] *See e.g.*, RCW 82.02.020.

well as the fund doctrine. As discussed, this doctrine requires separation of city-owned utility costs and revenue from the general fund and its regulatory function. Washington cities are prohibited by state statute from imposing franchise fees on utilities other than cable television.[55] Federal law already provides for nondiscriminatory access through preemption.[56] Eliminating the traditional distinction regarding local governments' proprietary functions could place city-owned utilities at a distinct disadvantage *vis-à-vis* other public utilities offering identical services in the same public rights-of-way.

B. The Conditional Preemption Doctrine Does Not Save the FCC Order

It may be argued that §332(2)(7) as implemented by the FCC Order falls within the principle of "conditional preemption." Conditional preemption applies only when a state or local government entity has a choice between implementing a judicial program or being preempted. The Supreme Court held in *New York* that a "coercive choice is no choice at all."[57] No better example can be seen then giving a city the choice of ceding control of its right-of-way under a federal regulatory

[55] RCW 35.21.860.
[56] 47 U.S.C. §253(c)-(d).
[57] *New York*, 505 U.S. at 176.

program or ceasing to regulate small wireless operators – only one of many right-of-way users.

The Ninth Circuit applied this principal in an opinion taking into account a similar fiduciary duty of the State of Washington – managing its forest lands.[58] This Court analysis is applicable to cities' dilemma under the FCC Order:

> The government makes two arguments in defense of these provisions. The first is that Washington can avoid the Act altogether by simply halting all sales of time. As the Counties point out, this alternative is a Hobson's choice, because it ignores the State's fiduciary duty to manage the trusts in the best interests of the beneficiaries and ignores the unconditional nature of the commands contained in the Act. It is a choice similar to the one declared unconstitutional in *New York*, as it presents an alternative, halting all timber sales, that Congress has no authority to command.[59]

Congressional and FCC commandeering of cities' management of the public rights-of-way creates a similar Hobson's choice – cities' duties to manage the rights-of-way for a variety of beneficiaries. This is a fiduciary duty which cities must not abandon but which cities may not be able to properly fulfill within

[58] *Bd. of Nat. Res. of State of Wash. v. Brown*, 992 F.2d 937 (9th Cir. 1993).
[59] *Id.* at 947.

arbitrary timeframes.

C. Managing the Public Rights-of-Way is a Fundamental Exercise of Local Authority

Washington's cities have been designated by our courts as the stewards of the public rights-of-way.[60] The primary use of public rights-of-way as defined by the Washington Supreme Court is for travel.[61] The duty of management of the rights-of-way is one of the most significant sources of public liability.[62] In Washington, failure to address conditions on private land adjacent to the right-of-way can carry multi-million-dollar liability for a municipality. Our cities are insurers of the public's traveling safety.[63]

Pedestrian travel is a vital use of the public rights-of-way. Conflicts between utilities within the tight areas adjacent to vehicular traffic areas are common. Cities are required by Title II of the ADA to maintain safe travel paths.[64]

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[60] *Winkenwerder*, 52 Wn.2d at 627.
[61] *State ex rel. York v. Bd. of Comm'rs of Walla Walla Cty.*, 28 Wn.2d 891, 898 (1947).
[62] *See e.g., Keller v. City of Spokane*, 146 Wn.2d 237 (2002) and *Wurthrich v. King County*, 184 Wn.2d 16 (2016).
[63] *Id.*
[64] 28 C.F.R. §35.149.

How can our cities give priority to one right-of-way user while effectively controlling the remaining users for the safety of the traveling public?

Our cities have also made significant investments of public funds to develop their urban streetscapes to reverse the negative impacts to traditional urban commercial centers caused by regional shopping malls. By developing streetscapes that are inviting and aesthetically pleasing, cities are revitalizing their urban shopping cores. Reducing commute times by attracting density to urban centers is a key tool in reducing our carbon footprint.[65] The role of pleasing public spaces in urban life is a well-recognized priority of urban planning and has been since the fora of Greece and Rome.

This long history underscores a traditional and fundamental role of local government: maintaining a sense of place through urban planning. This role has been recognized by the Supreme Court since *Euclid v. Ambler Realty* as a fundamental exercise of the police power.[66]

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[65] *See e.g.*, Dana Flatow, *Density, Carbon Emissions, Transportation and Energy Efficiency* (University of Texas, Austin, School of Architecture *available at* https://soa.utexas.edu/sites/default/disk/.../09_02_su_flatow_dana_paper_ml.pdf.

[66] *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

Commissioner Jessica Rosenworcel of the FCC acknowledged this unconstitutional overreach in her statement in the National Proposed Rulemaking on April 12, 2019:

> In large part, this is because small cells are typically deployed in public rights of way or on civic infrastructure. That means you need government approval for their installation. And last year my colleagues determined that the best way to expedite the deployment of these antenna devices was to insert a federal government into the negotiations between cities and private companies. This agency decided it would play the role of small cell rate-maker. Instead of working with our state and local partners to develop incentives to speed the way to 5G deployment, this agency cut them out. It told them that going forward Washington would make choices for them about what could be deployed and at what cost in their own backyard.
>
> I think this is extraordinary federal overreach. I do not believe that the constitution or the Communications Act allows Washington to run roughshod over state and local authority like this. Moreover, I believe the lawsuits that followed in the wake of our decisions will not speed our 5G future, but instead slow it down.[67]

The Supreme Court's application of the Tenth Amendment continues to

[67] Notice of Proposed Rulemaking, *In the Matter of Updating the Commission's Rule for Over-the-Air Reception Devices*, FCC 19-36, WT Docket No. 19-71 (2019), Statement of Commissioner Jessica Rosenworcel.

evolve. The Court's majority has recognized that law enforcement is an exercise of traditional authority that local government neither can nor should be required to abandon. The Court's holding in *Printz* struck down the Brady Act on Tenth Amendment grounds without any suggestion that state or local governments should opt out of their law enforcement role.[68]

Whether the related exercises of police powers in planning and land use, and regulation of the public rights-of-way should receive similar deference under the Tenth Amendment is an open question. For the strong legal and policy reasons stated, the AWC believes it is time to recognize these traditional police power exercises as worthy of Tenth Amendment protection. Similarly, protection of local governments' fiduciary duty to manage the rights-of-way requires that protection. Allow our cities to act in accordance with their statutory mandates and the statutes which create them. Give local government the power that must accompany political responsibility or require the FCC and Congress to administer its own program for the promotion of the small wireless industry and interstate commerce. We firmly believe that local governments are best placed to balance use of public

[68] *Printz,* 521 U.S. at 898.

rights-of-way. The FCC Order is not only a shift from local government's traditional role as steward but a bold transfer of public property for the benefit of one set of business interests.

CONCLUSION

The Telecommunications Act clearly preserves state and local zoning authority:

> (7) **Preservation of Local Zoning Authority**
> (A) **General Authority.** Except as provided in this paragraph nothing in this chapter shall limit or affect the authority of a state or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.[69]

The FCC Order makes the intended narrow exceptions that follow in §332(c)(7) the rule by creating a short, arbitrary and unreasonable timeframe for local governments to enact permitting structures and to act on those permits. This callous and overly clever attempt to circumvent the requirements of the Tenth

[69] 47 U.S.C. §332(c)(7).

Amendment ignores the rule of local government in the administration of the public rights-of-way.

By their nature, public rights-of-way are administered for the use of the community as a whole: all of the public, whether traveling by car, bicycle, on foot or in a wheelchair; all of the utilities that serve the public, below and above the surface of the right-of-way; and all of the business communities through urban revitalization and the community at large by the enhancement and preservation of the public right-of-way utilize the public right-of-way as a public forum.

Balancing the needs of these frequently competing interests is a fundamental and traditional exercise of local government police power. The police power includes planning, zoning and permitting.

The FCC Order requires our cities' elected officials to shut up and act – ignoring both the laws under which those public officials must exercise their authority and the testimony and needs of their citizens. The FCC Order commandeers local authority in clear violation of the Tenth Amendment and is arbitrary under the Administrative Procedure Act by its failure to take into consideration the statutory structures under which local governments exercise their authorities.

If Congress wished to create a parallel federal permitting structure, it could have done so. It did not. Such an act would have been an unnecessary intrusion into local government's administration of the public rights-of-way. §332(c)(7) clearly reflects Congress' intent to preserve the very powers that the FCC Order hijacks.

The AWC respectfully request the Court to reaffirm local government's role as stewards of the public right-of-way and overturn the FCC Order. Local officials appreciate the benefits of wireless communication technology and the need to provide for its ongoing evolution. Allow us to accommodate the 4G and 5G expansion into our communities in a thoughtful and appropriate manner.

RESPECTFULLY SUBMITTED this 17th day of June, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and Ninth Circuit Rule 32-1, the attached brief is proportionally spaced, has a typeface of 14 points and contains 5,842 words exclusive of Table of Contents, Table of Authorities, and Certificates of Service and of Compliance.

Dated this 17th day of June, 2019.

/s/ W. Scott Snyder
W. Scott Snyder

PROOF OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 17, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 17th day of June, 2019.

/s/ *W.Scott Snyder*
W. Scott Snyder, WSBA No. 12835