

**CASE NOS. 18-72689 19-70123, 19-70124, 19-70125, 19-70136, 19-70144,
19-70145, 19-70146, 19-70145, 19-70326, 19-70339, 19-70341, and 19-70344,
19-70490**

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

City Of Portland, Oregon,

Petitioner,

City and County of San Francisco, California,

Intervenor.

v.

Federal Communications Commission and United States Of America,

Respondent,

Spirit Corporation,

Petitioner,

City of Bowie, Maryland, et al.,

Intervenors,

v.

Federal Communications Commission and United States of America,

Respondents.

On Petitions for Review of Orders of the
Federal Communications Commission

**MOTION OF COMMUNICATIONS WORKERS OF AMERICA,
NATIONAL DIGITAL INCLUSION ALLIANCE, AND PUBLIC
KNOWLEDGE TO FILE AN AMICI CURIAE BRIEF IN SUPPORT OF
PETITIONER LOCAL GOVERNMENTS SEEKING REVERSAL;**

**BRIEF OF AMICI CURIAE COMMUNICATIONS WORKERS OF
AMERICA, NATIONAL DIGITAL INCLUSION ALLIANCE, AND
PUBLIC KNOWLEDGE IN SUPPORT OF PETITIONER LOCAL
GOVERNMENTS SEEKING REVERSAL**

David A. Rosenfeld, Bar No. 058163
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
Telephone (510) 337-1001
Fax (510) 337-1023

Attorneys for Proposed Amici Curiae Communications Workers of America,
National Digital Inclusion Alliance, and Public Knowledge

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A Professional Corporation
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Alameda, California 94501
Telephone (510) 337-1001
Fax (510) 337-1023

Proposed Amicus Curiae, Communication Workers of America, National Digital
Inclusion Alliance, and Public Knowledge

CORPORATE DISCLOSURE STATEMENT

Proposed Amicus Curiae, COMMUNICATION WORKERS OF AMERICA is an unincorporated association and a labor organization.

Proposed Amicus Curiae, NATIONAL DIGITAL INCLUSION ALLIANCE is a nonprofit organization that advocates for digital inclusion, with over 370 affiliates including local governments, public libraries, housing authorities, university programs, and community nonprofits.

Proposed Amicus Curiae, PUBLIC KNOWLEDGE is a nonprofit consumer and public interest advocacy organization, and leading advocate for telecommunications policies that increase consumer access to broadband services and promote competitive, affordable, and equitable broadband deployment.

Pursuant to Federal Rule of Appellate Procedure 26.1 and 29(a)(4), Amici state that they have no parent corporations. They have no stock, and therefore, no publicly held company owns 10% or more of their stock.

Date: June 17, 2019

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /s/ David A. Rosenfeld
David A. Rosenfeld

Attorneys for Proposed Amicus Curiae
COMMUNICATION WORKERS OF
AMERICA, NATIONAL DIGITAL
INCLUSION ALLIANCE, and PUBLIC
KNOWLEDGE

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I. INTRODUCTION

Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, Communications Workers of America, National Digital Inclusion Alliance, and Public Knowledge submit this motion for leave to file the amicus curiae brief attached hereto in support of petitioner local governments.

In cases 18-72689, 19-70123, 19-70124, 19-70125, 19-70136, 19-70144, 19-70145, 19-70146, 19-70147, 19-70326, 19-70339, 19-70341, and 19-70344, all parties have consented to this filing. In case 19-70490, the Federal Communication Commission, United States of America, Verizon and Xcel Energy Services have consented. The other parties have not responded.

Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, Communications Workers of America, National Digital Inclusion Alliance, and Public Knowledge (collectively, “Amici”) submit this motion for leave to file the amici curiae brief attached hereto in support of the local government petitioners. This Court may grant leave to file an amici curiae brief pursuant to Rule 29 of the Federal Rules of Appellate Procedure. See Fed. R. App. P. 29(b). Amici must state their interest and the reason why an amicus brief is desirable and relevant to the case. Fed. R. App. P. 29(a)(3)(B).

II. STATEMENT OF PROPOSED AMICI’S IDENTITY, INTEREST, SOURCE OF AUTHORITY TO FILE AND STATEMENT OF COUNSEL’S CONTRIBUTION

Proposed Amicus Curiae, COMMUNICATION WORKERS OF AMERICA is an unincorporated association and a labor organization.

Proposed Amicus Curiae, NATIONAL DIGITAL INCLUSION ALLIANCE is a nonprofit organization that advocates for digital inclusion, with over 370 affiliates including local governments, public libraries, housing authorities, university programs, and community nonprofits.

Proposed Amicus Curiae, PUBLIC KNOWLEDGE is a nonprofit consumer and public interest advocacy organization, and leading advocate for telecommunications policies that increase consumer access to broadband services and promote competitive, affordable, and equitable broadband deployment.

No party or counsel for any party in this case authored this amicus curiae brief in whole or in part or made any monetary contribution intended to fund the preparation or submission of the amicus curiae brief. No person or entity other than CWA, NDIA and PK and its members made any monetary contribution intended to fund the preparation or submission of the accompanying amicus curiae brief.

A. INTEREST OF PROPOSED AMICI

As stated in their statements of interest, amici are organizations with expertise on digital inclusion, equitable network buildout, and telecommunications policy, and have members directly affected by the Declaratory Ruling and Third Report and Order of the Federal Communications Commission, In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, FCC 18-133, WT No. 17-79, 85 FR 51867 (“Order”). Communications Workers of America (“CWA”) is a labor union whose members are workers who build and service telecommunications networks, and consumers who rely on fair and fast internet and wireless service. The National Digital Inclusion Alliance (“NDIA”) is a nonprofit organization that advocates for digital inclusion, with over 370 affiliates including local governments, public libraries, housing authorities, university programs, and community nonprofits. Public Knowledge (“PK”) is a nonprofit consumer and public interest advocacy organization, and leading advocate for telecommunications policies that increase consumer access to broadband services and promote competitive, affordable, and equitable broadband deployment.

Amici have an interest in ensuring that this Court considers the effect of the Order on the digital divide¹ and public safety. Amici write to describe the role of appropriate fees in fighting the digital divide, the Order's negative effect on digital divide efforts at the local level, and the public safety risks involved in network deployment under the Order. Amici have on the ground experience working with community members and local governments to fight the digital divide, and on the ground experience installing and maintaining telecommunications networks. Amici are well-positioned to provide the Court with relevant policy considerations and factual context.²

B. DESIRABILITY AND RELEVANCE OF AMICUS BRIEF

Permitting a nonparty to submit a brief as amicus curiae is, “with immaterial exceptions, a matter of judicial grace.” *NOW, Inc. v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000). This Court has described the “classic role of amicus curiae” as “assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court’s attention to law that escaped consideration.” *Miller-Wohl Co. v. Comm’r of Labor & Indus. State of Mont.*, 694 F.2d 203, 204 (9th Cir.

¹ “Digital divide” describes the unequal deployment of internet connectivity in low-income and rural communities. See Communications Workers of America, Speed Matters, “Why We Must Act Now On Universal Internet Access and the Digital Divide,” <https://speedmatters.org/pages/why-we-must-act-now>.

² Justice Alito further notes, “The decision whether to grant leave to file must be made at a relatively early stage of the appeal. It is often difficult at that point to tell with any accuracy if a proposed amicus filing will be helpful.... Under these circumstances, it is preferable to err on the side of granting leave. If an amicus brief that turns out to be unhelpful is filed, the merits panel, after studying the case, will often be able to make that determination without much trouble and can then simply disregard the amicus brief. On the other hand, if a good brief is rejected, the merits panel will be deprived of a resource that might have been of assistance.... For all these reasons, I think that our court would be well advised to grant motions for leave to file amicus briefs unless it is obvious that the proposed briefs do not meet Rule 29's criteria as broadly interpreted. I believe that this is consistent with the predominant practice in the courts of appeals.” *Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 133 (3d Cir. 2002).

1982). As stated by now Justice Alito, “[t]he criterion of desirability set out in Rule 29(b)(2) is open-ended, but a broad reading is prudent.” *Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 132 (3d Cir. 2002).

An amicus can provide important assistance to the court “[e]ven when a party is very well represented.” *Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 132 (3d Cir. 2002). Amicus briefs can “collect background or factual references that merit judicial notice,” “argue points deemed too far-reaching for emphasis by a party intent on winning a particular case,” or “explain the impact a potential holding might have on an industry or other group.” *Id.* citing Luther T. Munford, *When Does the Curiae Need An Amicus?*, 1 J.App. Prac. & Process 279 (1999). Amici may be “in a position to provide unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Cnty. Ass’n for Restoration of Env’t (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 976 (E.D. Wash. 1999).

Amici here seek to assist in a case with major public significance and supplement the efforts of counsel by providing information on how the Order harms local government and community groups’ efforts to close the digital divide. Amici have expertise on telecommunications policy, the impact of the digital divide on members, and existing efforts to promote equitable broadband deployment. The brief provides real world factual context regarding localities’ existing efforts to bridge the digital divide and the effect of the Order on these efforts. Amici also have expertise on the need for localities to properly address public safety risks in the right-of-way. The brief describes real-world risks posed by the Order to workers and the public. Amici provide factual information and policy considerations that do not duplicate arguments provided by the parties.

III. CONCLUSION

For the foregoing reasons, amici respectfully request that the Court grant the Motion of Communications Workers of America, National Digital Inclusion Alliance, and Public Knowledge to File an Amici Curiae Brief in Support of Petitioner Local Governments, and deem the accompanying amicus brief, attached hereto, as filed.

Dated: June 17, 2019

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /s/ David A. Rosefeld
David A. Rosenfeld

Attorneys for Proposed Amicus Curiae
COMMUNICATION WORKERS OF
AMERICA, NATIONAL DIGITAL
INCLUSION ALLIANCE, and PUBLIC
KNOWLEDGE

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29, Amicus Curiae Communication Workers of America certifies that this Motion for Leave to File Amicus Curiae Brief contains 1,283 words of proportionately spaced, 14 point type, and that the work processing system used was Microsoft Word 2010.

Dated: June 17, 2019

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /s/ David A. Rosenfeld
David A. Rosenfeld

Attorneys for Proposed Amicus Curiae
COMMUNICATION WORKERS OF
AMERICA, NATIONAL DIGITAL
INCLUSION ALLIANCE, and PUBLIC
KNOWLEDGE

CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

I hereby certify that on June 17, 2019, I electronically filed the foregoing **MOTION OF COMMUNICATIONS WORKERS OF AMERICA, NATIONAL DIGITAL INCLUSION ALLIANCE, AND PUBLIC KNOWLEDGE TO FILE AN AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER LOCAL GOVERNMENTS SEEKING REVERSAL** with the United States Court of Appeals for the Ninth Circuit, by using the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Notice of Electronic Filing by the Court's CM/ECF system.

I certify under penalty of perjury that the above is true and correct.
Executed at Alameda, California, on June 17, 2019.

/s/ Karen Kempler

Karen Kempler

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David A. Rosenfeld, Bar No. 058163
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
Telephone (510) 337-1001
Fax (510) 337-1023

*Attorneys for Amicus Curiae, Communication Workers of America. National
Digital Inclusion Alliance and Public Knowledge*

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Pursuant to Federal Rule of Appellate Procedure 26.1 and 29(a)(4), Amici state that they have no parent corporations. They have no stock, and therefore, no publicly held company owns 10% or more of their stock.

Date: June 17, 2019

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /s/ David A. Rosenfeld
David A. Rosenfeld

Attorneys for Amicus Curiae
COMMUNICATION WORKERS OF
AMERICA, NATIONAL DIGITAL
INCLUSION ALLIANCE and PUBLIC
KNOWLEDGE

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I. IDENTITY AND INTEREST OF AMICI CURIAE¹

Communications Workers of America (“CWA”) is a labor union representing 700,000 workers in telecommunications, customer service, media, airlines, public service, and manufacturing. CWA members are workers who build and service our telecommunications networks, consumers who rely on fair and fast internet and wireless service, and citizens who demand sensible and equitable telecommunications policy. CWA envisions a universal broadband future where no one is left behind, with robust investment in next-generation networks that create good jobs and connect everyone. CWA regularly participates in proceedings before the Federal Communications Commission, Congress, and state regulatory commissions, and publishes leading reports and resources on telecommunications policy, universal internet access, and the digital divide, with a focus on the importance of labor standards and workers’ rights to a healthy industry and economy.²

The National Digital Inclusion Alliance (“NDIA”) is a nonprofit organization representing practitioners, advocates and supporters of digital inclusion, which NDIA defines as the activities necessary to ensure that all individuals and communities, including the most disadvantaged, have access to and use of Information and Communication Technologies. NDIA’s affiliates include more than 370 nonprofit and public organizations in 44 states, the District of Columbia and the U.S. Virgin Islands – local governments, public libraries,

¹ Amici certify that no party or party’s counsel authored this brief in whole or in part, and that no party, party’s counsel, or other person made a monetary contribution to the preparation or submission of this brief.

² *See, e.g.*, Communications Workers of America, “Speed Matters: Affordable High Speed Internet Access for All,” available at <http://files.cwa-union.org/speedmatters/SpeedMattersCWAPositionPaper.pdf>; Communications Workers of America, “Affordable High-Speed Internet for America: News, Analysis, Advocacy,” available at <https://speedmatters.org/>.

housing authorities, university programs, and community nonprofits, among others. NDIA is a unified voice for home broadband access, public broadband access, device access, and local technology training and support programs.

Public Knowledge (“PK”) is a nonprofit consumer and public interest advocacy organization. Its mission is to promote freedom of expression, an open internet, and access to affordable communications tools and creative works. PK’s work focuses on the converging fields of telecommunications, media, technology, internet law, and intellectual property. PK frequently advocates at the Federal Communications Commission, on Capitol Hill, and in the courts for telecommunications policies that increase consumer access to broadband services and promote competitive, affordable, and equitable broadband deployment.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Cities and localities across the country have petitioned for review of the Declaratory Ruling and Third Report and Order of the Federal Communications Commission (“FCC” or “Commission”), *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, FCC 18-133, WT No. 17-79, 85 FR 51867 (“Order”). In addition to the sound reasons set forth by the Petitioners, amici write to emphasize the negative effect the Order will have on the digital divide and public safety.

In order to protect public welfare and address the digital divide, states and localities must be able to charge appropriate fees. Millions of Americans do not have access to high quality internet. Those on the wrong side of the digital divide are left out of advantages in areas as diverse as economic development, education, healthcare, and civic participation. As repeatedly acknowledged by the Commission, in geographical areas where there is no business case for deployment, we will not see universal service without policy intervention. Cities like San José and New York are doing the important and innovative work of addressing the

digital divide, and the Order would prevent efforts like those from being implemented.

Localities are also tasked with ensuring public safety in the rights-of-way, from ensuring heavy equipment will not fall on pedestrians, to protecting lines of sight for traffic safety and the integrity of vertical infrastructure. Aggressive shot clock standards and arbitrary interpretations of the “effectively prohibit” standard prevent localities from effectively conducting this long-established role. The prevalence of low-road subcontracting in the wireless industry is one of the many safety hazards that localities must address. Subcontractors have caused gas explosions and utility disruptions, endangering the public and costing localities thousands of dollars. Localities must be able to conduct the full review necessary to ensure public safety, and put forward innovative legislation and license agreements to best address safety issues as they arise.

III. ARGUMENT

A. IN ORDER TO ENSURE UNIVERSAL SERVICE, PROTECT PUBLIC WELFARE, AND ADDRESS THE DIGITAL DIVIDE, STATES AND LOCALITIES MUST BE ABLE TO CHARGE APPROPRIATE FEES

States and localities with authority conferred by states have the right to impose requirements necessary to “advance universal service, protect public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.” 47 U.S.C. § 253(b). The Order’s statement that fees must be limited to objectively reasonable costs conflicts with the rights of states and localities under § 253(b). Furthermore, Congress intended to preserve the broad power of states and localities to set terms and receive reasonable compensation for use of public rights-of-way under § 253(c), including management of the rights-of-way in ways that support universal service. States and localities must be able to charge appropriate fees in order to serve their residents in

the manner described in § 253(b) and § 253(c), and, in particular, to close the digital divide.

“Digital divide” describes the unequal deployment of internet connectivity in low-income and rural communities.³ Twenty-six percent of rural Americans lack high-speed broadband internet access.⁴ Approximately one-in-three rural Americans can’t access mobile LTE broadband with a median speed of 10 Mbps/3 Mbps.⁵ Nationwide, forty-four percent of adults with household incomes below \$30,000 a year don’t have home broadband service.⁶ Many low-income and rural Americans rely on smartphones as their only source of internet. However, these households frequently have to cancel or suspend service due to financial constraints, and are more likely to run up against data-cap limits.⁷ This

³ Communications Workers of America, Speed Matters, “Why We Must Act Now On Universal Internet Access and the Digital Divide,” <https://speedmatters.org/pages/why-we-must-act-now>.

⁴ Federal Communications Commission, *2019 Broadband Deployment Report*, GN Docket No. 18-238 (rel. May 29, 2019), p. 16, available at <https://docs.fcc.gov/public/attachments/FCC-19-44A1.pdf>. See also Public Knowledge, “Rural Broadband Access,” available at <https://www.publicknowledge.org/issues/rural-broadband-access>.

⁵ Federal Communications Commission, *2019 Broadband Deployment Report*, GN Docket No. 18-238 (rel. May 29, 2019), pp. 17-18, available at <https://docs.fcc.gov/public/attachments/FCC-19-44A1.pdf>. As noted by Commissioners Rosenworcel and Starks in their dissenting statements, the reliability of this data has been widely criticized as overstating deployment. Among other problems, for example, the FCC’s mapping treats an entire census block as served if a company reports providing service at any location within the block. The figures from this report are almost certainly overstatements, making the numbers even more concerning. *Id.* At pp. 325-331.

⁶ Monica Anderson, Pew Research Center, “Digital Divide Persists Even as Lower Income Americans Make Gains in Tech Adoption,” 2017, available at <http://www.pewresearch.org/facttank/2017/03/22/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/>.

⁷ John Horrigan, Maeve Duncan, Pew Research Center, “Home Broadband 2015,” December 21, 2015, available at <http://www.pewinternet.org/2015/12/21/home-broadband-2015/>.

failure of universal service has serious consequences. Individuals without home broadband service say that lacking service is a major disadvantage in searching for employment, accessing government services, or getting health information.⁸ Additionally, an overwhelming majority of teachers assign homework that requires internet access, and this “homework gap” holds back five million school-aged children who lack regular access to broadband.⁹ Those who “go without” are left out of the advantages of high speed internet in areas as diverse as economic development, education, healthcare, and civic participation.

The Order asserts that preventing localities from seeking appropriate fees will remedy the digital divide, as companies will use resources not spent on deployment in dense urban areas to deploy in rural or underserved areas. Order, ¶¶ 7, 28, 60-65. This conclusion is not supported by logic, federal telecommunications policy, or the experience of states and localities. If a wireless company enjoys savings from reduced costs in dense urban markets, logic dictates these resources will be spent on deployments in lucrative markets or other profitable ventures, rather than deployment in markets where there is no or low likelihood of return on investment. Fee caps do not change the companies’ profit incentives or “the hard economics of rural deployment.”¹⁰ Federal telecommunications policy repeatedly acknowledges this principle. The Order puts forward a theory of rural deployment that lacks any evidentiary support, and severely limits the ability of states and localities to promote universal service and fight the digital divide.

⁸ *Id.*

⁹ Jessica Rosenworcel, The Huffington Post, “Bridging the Homework Gap,” June 15, 2015, available at https://www.huffpost.com/entry/bridging-the-homework-gap_b_7590042.

¹⁰ Order p. 114 (Statement of Commissioner Jessica Rosenworcel, Approving in Part, Dissenting in Part).

1. As Acknowledged By the Commission and Federal Telecommunications Policy, Universal Service Will Not Occur Where There Is No Business Case for Deployment

The Commission itself has found that universal network deployment will not occur where there is no business case. In 2011, when the FCC modernized its High-Cost Universal Service Fund to create the Connect America Fund, the Commission noted that 18 million Americans live in areas where there is no access to robust fixed broadband networks. It further acknowledged that in costly-to-serve communities, “private sector economics” will not provide for Congress’s desire “to ensure that all people of the United States have access to broadband capability.” *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011), ¶ 4, 5 (“CAF Order”).

Today, the Connect America Fund (CAF) helps make broadband available to homes, businesses, and community anchor institutions that do not, or would not otherwise, have broadband. CAF Order, ¶ 20. The CAF’s Mobility Fund is dedicated to “ensuring availability of mobile broadband networks in areas where a private-sector business case is lacking.” CAF Order, ¶ 28. Phase two of the Mobility Fund will make up to \$4.53 billion in support available over 10 years to areas that lack unsubsidized 4G Long Term Evolution (LTE) Services.¹¹ The fund incentivizes the deployment of mobile wireless service through a reverse auction and is “critically important” to ensuring that 4G LTE service is “preserved and advanced in those areas of the country that lack unsubsidized service.”¹² The “universal availability of advanced mobile services is a vital component of the Commission’s universal service mission.” CAF Order, ¶ 118. As the Commission’s

¹¹ Federal Communications Commission, “Mobility Fund Phase II (MF-II),” available at <https://www.fcc.gov/mobility-fund-phase-ii-mf-ii>.

¹² Federal Communications Commission, “Mobility Fund Phase II (MF-II),” available at <https://www.fcc.gov/mobility-fund-phase-ii-mf-ii>.

universal service programs make clear, without policy intervention, universal service will not be a reality in areas where there is no business case for deployment.

2. The Experience of Localities Demonstrates That In Order To Fight The Digital Divide and Promote Public Welfare, Localities Must Be Able To Charge Appropriate Fees

a. San José

Policymakers in the City of San José have recognized that 95,000 San José residents do not have internet access at home. Over 60% of low-income families don't have broadband access at home, disproportionately affecting the Latino population, with over 35% of Hispanic households lacking access.¹³ In order to fight these problems of unequal access and promote the welfare of San José's low-income families and children, San José created innovative agreements with wireless companies that both streamline processing – San José's agreements with Verizon, AT&T and Mobilitie represent the largest small cell deployment in any U.S. city, on approximately 4,000 city-owned light poles – and set up contributions to a Digital Inclusion Fund.¹⁴ Over the ten years of the agreements, the companies will contribute approximately \$24 million in small cell usage fees to the Digital Inclusion Fund.¹⁵ The fund will connect 50,000 San José households with

¹³ San José City Council File # 18-1879. Memorandum from Dolan Beckel, Margaret McCahan re: Approval of the Donor Advised Governance Structure Proposed for the San José Digital Inclusion Fund at 2, January 31, 2019, available at <https://sanjose.legistar.com/LegislationDetail.aspx?ID=3847480&GUID=98722308-E69D-4390-80CD-80115D0EA66B>.

¹⁴ City of San Jose, "City of San José Announces Major Agreements with Verizon, AT&T & Mobilitie to Significantly Enhance Broadband Infrastructure in San Jose," June 15, 2018, available at <http://www.sanjoseca.gov/DocumentCenter/View/78342>.

¹⁵ San José City Council File # 18-1879, Memorandum from Dolan Beckel, Margaret McCahan re: Approval of the Donor Advised Governance Structure Proposed for the San José Digital Inclusion Fund at 7, January 31, 2019, available (continued)

broadband internet and provide lower priced service plans.¹⁶ The fund will also engage in broader digital divide projects, including library connectivity, digital literacy skills programs, and community trainings. FCC Commissioner Rosenworcel held up San José’s agreement as a model for other cities, an agreement in which carriers benefit from streamlined access to thousands of city-owned poles and in turn carriers help fund an effort to close the digital divide.¹⁷ This sort of innovation in promotion of universal service and public welfare would not be possible if states and localities were not permitted to charge appropriate fees.

b. New York City

The efforts of New York City similarly demonstrate that localities must be able to charge appropriate fees in order to promote public welfare. New York City has also recognized the need to address the digital divide. Nearly one third of New York City households do not have a home broadband subscription, and broadband service in New York City is more expensive than both the national average and international standards.¹⁸ In New York City’s recent request for proposals to wireless companies, the city has set up a unique scheme that creates

at
<https://sanjose.legistar.com/LegislationDetail.aspx?ID=3847480&GUID=98722308-E69D-4390-80CD-80115D0EA66B>.

¹⁶ *Id.* at pp. 2-3.

¹⁷ Federal Communications Commission, “Rosenworcel announces availability of small cell model agreements,” June 27, 2018, available at <https://www.fcc.gov/document/rosenworcel-announces-availability-small-cell-model-agreements>.

¹⁸ Comments of the City of New York, Bridging the Digital Divide for Low-Income Consumers, WC 17-287, February 21, 2018, available at https://ecfsapi.fcc.gov/file/10221021835476/City%20of%20New%20York%20Comments_Lifeline%204th%20RO%20NOI%20and%20NPRM_Final.pdf.

incentives for providing service in underserved areas.¹⁹ In Manhattan, the densest part of the city, companies would pay at least \$350 per month to place equipment on city-owned poles, while in certain areas in the Bronx and Brooklyn, the rate begins at \$100. The fee model is designed to promote investment in areas that are underserved, and ensure fair distribution across New York City's neighborhoods. Without incentives like these in the city's pricing schemes, areas where the business case for deployment is less compelling will be left behind as companies limit deployment of next-generation networks to more affluent or densely populated areas. Without the ability to charge appropriate fees, the city would be unable to promote universal service in the deployment of networks and promote public welfare through equitable access.

B. LOCALITIES MUST BE ABLE TO PROPERLY ADDRESS PUBLIC SAFETY RISKS IN THE RIGHT-OF-WAY, INCLUDING THOSE POSED BY LOW-ROAD SUBCONTRACTING

The Order's arbitrary interpretation of the "effectively prohibit" standard in §253(a) and extreme shot clock standards place unreasonable burdens on local governments and limit the ability of localities to ensure public safety. Local permitting includes review of issues as varied as the potential impact on traffic safety and lines of sight, the effect on public infrastructure, engineering and structural review, and verifications that the applicant has coordinated with existing utilities.²⁰ The Order's aggressive shot clocks do not give localities sufficient time or flexibility to complete necessary reviews to protect public safety. Moreover they

¹⁹ The City of New York Department of Information Technology and Telecommunications. "Request for Proposals for Franchises for the Installation and Use of Telecommunications Equipment and Facilities," at pp. 26-27, June 12, 2018, available at <https://www1.nyc.gov/assets/doitt/downloads/rfp/NYC-Mobile-Telecommunications-RFP-6-12-18.pdf>.

²⁰ Comments of Smart Communities Siting Coalition, WT Docket No. 17-79, June 15, 2017, Exhibit 1, "Report and Declaration of Andrew Afflerbach [of CTC Technology & Energy] For the Smart Communities Siting Coalition" at pp. 12-14.

place an unreasonable expectation on local governments, particularly smaller municipalities with limited resources.²¹ The shot clocks are very broad, applying to “any approval that a siting authority must issue” prior to the deployment of applicable wireless services. Order, p. 78. This could potentially include zoning approvals, building permits, electric permits, and road closure permits, among others. Localities are put in a double bind: pressured to complete often complex safety reviews within a short window with limited resources, or risk expensive litigation for injunctive relief under an unforgiving standard. More broadly, the arbitrary and unpredictable “materially inhibit” standard discourages cities from ensuring robust safety standards in their legislation and franchise or license agreements. Cities are wary of potential litigation risk, and the standard discourages innovative partnership arrangements and creative legislation that would benefit the public.

One of the many safety issues localities are now forced to address is low-road subcontracting. Across industries, subcontracting arrangements are on the

²¹ Many cities, localities, and organizations of cities and localities, commented to this effect in the underlying proceeding. *See, e.g.*, Comments of National Association of Telecommunications Officers and Advisors, National League of Cities, United States Conference of Mayors, National Association of Counties, National Association of Regional Councils, WT 17-79, WC 17-84, September 19, 2018; Comments of Smart Communities Siting Coalition, WT 17-79, June 15, 2017; Comments of County of Sacramento, WT 17-79, WC 17-84, September 19, 2018; Comments of the City of Philadelphia, WC 17-84, September 19, 2018; Comments of Howard County, Maryland, WC 17-84, WT 17-79, September 19, 2018; Comments of Association of Minnesota Counties, WT 17-79, WC 17-84, September 19, 2018; Comments of Waukesha County, WT 17-79, WC 17-84, September 19, 2018; Comments of County of Warren, Virginia, WT 17-79, WC 17-84, September 19, 2018; Comments of Maryland Association of Counties, WT 17-79, WC 17-84, September 19, 2018; Comments of City of Yuma, Arizona, WC 17-84, WT 17-79, September 19, 2018.

rise, raising serious questions about work standards and accountability.²²

Subcontracting arrangements in the wireless industry create a risk that companies performing work in the right-of-way are not properly certified and trained, or cannot be held accountable should an accident occur.

Installation work in the right-of-way requires high levels of technical skill and training. Workers laying fiber to connect small cell sites often must dig under sidewalks and roads and around utility services to access underground conduit, requiring coordination with the city and utility services.²³ In 2018, a Verizon subcontractor in Wisconsin hit a gas main, causing an explosion that leveled half a city block, killing a volunteer firefighter and critically injuring another.²⁴ Similarly, earlier this year in San Francisco, a Verizon subcontractor hit a gas line and caused an explosion. The three-alarm blaze, with over 50 foot flames, burned for hours

²² National Employment Law Project, *Who's the Boss: Restoring Accountability for Labor Standards in Outsourced Work*, May 2014, available at <https://www.nelp.org/wp-content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf>.

²³ The comments of Howard County in the underlying proceeding include a step-by-step illustrated description of the installation and review that can be necessary during installation, from review of structural designs, to drilling, verifying geotechnical recommendations, and navigating underground utility conflicts. Comments of Howard County, WC 17-84, WTB 17-79, September 19, 2018, available at https://ecfsapi.fcc.gov/file/1091967496576/Howard%20County%20MD_COMMENTS.pdf.

²⁴ Jessica Arp, Channel 3000 News, "City of Sun Prairie releases construction permits for downtown area near explosion," July 17, 2018, available at <https://www.channel3000.com/news/city-of-sun-prairie-releases-construction-permits-for-downtown-area-near-explosion/769418541>; Bridgit Bowden, WPR, "OSHA cites 2 contractors in Sun Prairie Explosion," January 10, 2019, available at <https://www.wpr.org/osha-cites-2-contractors-sun-prairie-explosion>; City of Sun Prairie, "Downtown Investigation Update," December 20, 2018, available at <https://www.cityofsunprairie.com/1017/Downtown-Investigation-Update-122018>.

and caused substantial property damage.²⁵ In Sacramento, Verizon subcontractors have caused numerous utility disruptions in the last year while deploying small cells, costing the city tens of thousands of dollars in damage to water and sewer pipes, and requiring hundreds of city worker hours to remedy.²⁶ The City of Tampa is similarly suing Verizon for allegedly causing nearly \$100,000 in damages to underground wastewater lines.²⁷

Wireless providers may deploy their networks using subcontracting arrangements that involve many layers of companies. For example, in the San Francisco explosion, Verizon had contracted to a firm, that contracted to another firm, that contracted to yet another firm.²⁸ With these multitier arrangements, it is often not even immediately obvious who is the employer of workers engaged in the right-of-way. This poses clear accountability challenges. In the Wisconsin explosion, the subcontractor company was delinquent in its registrations to work in

²⁵ KTVU, “Contractor identified in massive, fiery San Francisco gas rupture,” February 7, 2019, available at <http://www.ktvu.com/news/contractor-identified-in-massive-fiery-san-francisco-gas-rupture>; Ted Goldberg, KQED, “Contractor Tied to San Francisco Pipeline Explosion Didn’t Have a License,” February 15, 2019, available at <https://www.kqed.org/news/11725622/contractor-tied-to-san-francisco-pipeline-explosion-didnt-have-a-license>; National Transportation Safety Board, “Preliminary Report PLD19MR001”, February 27, 2019, available at <https://ntsb.gov/investigations/AccidentReports/Pages/PLD19MR001-Preliminary.aspx>.

²⁶ Documents provided by the City of Sacramento through public records requests. Available at https://cwa-union.org/sites/default/files/public_records_req_docs_-_sacramento.pdf.

²⁷ Malena Carollo, Tampa Bay Times, “City of Tampa sues Frontier and Verizon for damage to pipes,” February 6, 2019, available at <https://www.tampabay.com/business/city-of-tampa-sues-frontier-and-verizon-for-damage-to-pipes-20190206/>.

²⁸ KTVU, *supra* note 25; Goldberg, *supra* note 25; National Transportation Safety Board, *supra* note 25.

the state.²⁹ In San Francisco, the subcontractor was unlicensed.³⁰ The accidents described above occurred in the last year. As 5G deployment continues, cities must be able to properly address and to proactively mitigate safety issues that arise, whether due to low-road subcontracting or otherwise. Residents and taxpayers deserve no less than for localities to be able to conduct the full review necessary to ensure their public safety, without the burden of untenable shot clocks, and to put forward innovative legislation and franchise or license agreements to best address new issues before and as they arise.

IV. CONCLUSION

The Court should vacate the Order; and grant such other relief as it may deem appropriate.

Dated: June 17, 2019

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /s/ David A. Rosenfeld
David A. Rosenfeld

Attorneys for Amicus Curiae
COMMUNICATION WORKERS OF
AMERICA, NATIONAL DIGITAL
INCLUSION ALLIANCE and PUBLIC
KNOWLEDGE

²⁹ Wisconsin Department of Financial Institutions, Corporate records for VC Technologies, LLC, available at <https://www.wdfi.org/apps/CorpSearch/Details.aspx?entityID=V026292&hash=646382736&searchFunctionID=bcfaece0-316d-4297-82f0-9646dbc3ad9f&type=Simple&q=vc+tech>.

³⁰ Goldberg, *supra* note 25.

UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

I hereby certify that on June 17, 2019, I electronically filed the foregoing **BRIEF OF AMICI CURIAE COMMUNICATIONS WORKERS OF AMERICA, NATIONAL DIGITAL INCLUSION ALLIANCE, AND PUBLIC KNOWLEDGE IN SUPPORT OF PETITIONER LOCAL GOVERNMENTS SEEKING REVERSAL** with the United States Court of Appeals for the Ninth District, by using the Court's CM/ECF system.

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I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on June 17, 2019.

/s/ Karen Kempler
Karen Kempler

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