

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF PORTLAND, OREGON,)	
)	
Petitioner,)	
)	
v.)	No. 18-72689
)	
FEDERAL COMMUNICATIONS COMMISSION)	
and UNITED STATES OF AMERICA,)	
)	
Respondents.)	

**REPLY OF THE FCC IN SUPPORT OF THE MOTION FOR FURTHER
STAY**

The City of Portland (City) still does not deny that that there are multiple petitions for agency reconsideration of the *Declaratory Ruling* on review that raise issues identical to those presented here. A further stay of this case is therefore appropriate.

ARGUMENT

1. As when the City unsuccessfully opposed the FCC’s prior abeyance motion, the City again does not dispute that the three pending petitions for agency reconsideration of the *Declaratory Ruling* involve the same issues presented here. *See* Opp. 2–3. And the City also does not deny that, in such circumstances, reviewing courts commonly hold their judicial proceedings in abeyance pending resolution of the agency reconsideration proceedings. *See* Mot. 3–4. Because

action on the agency reconsideration petitions here may limit or modify the needed scope of judicial review, the Court should grant the FCC's motion for a further stay of this case.

2. The City urges the Court to proceed with this case now because the FCC, in an order issued after the *Declaratory Ruling*, had an “opportunity to address” arguments that the City characterizes as “identical” to the theories and arguments pending on reconsideration. Opp. 5 (referencing *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Rcd 9088 (2018) (*September Order*)).¹ But as the City acknowledges (Opp. 5–6), the FCC expressly stated in the *September Order* that it was not there addressing the petitions for reconsideration of the *Declaratory Ruling*, and that the *September Order* “should not be read as impliedly taking a position on those issues.” *September Order*, 33 FCC Rcd at 9102–03 ¶ 35 n.79.

That the City may have some of the same objections to the *September Order* as it does to the *Declaratory Ruling* is irrelevant. As the FCC has explained in a separate motion concerning the cases challenging the *September Order*, there is a pending petition for agency reconsideration concerning that order as well, and the administrative pleading cycle for that petition closes only today (March 4, 2019).

¹ A copy of the *September Order* was attached as Exhibit 1 to the FCC's October 2018 abeyance motion.

See Respondent FCC’s Mot. to Consolidate Related Cases, Abate Proceedings Pending Agency Reconsideration, and Defer Filing of the Administrative Record 18, *Sprint Corp. v. FCC*, No. 19-70123 (9th Cir.).² Accordingly, the real lesson is that abeyance is warranted in the cases challenging the *September Order* as well, *see id.* at 18–22—not that this litigation should be taken out of abeyance.

3. The City’s suggestion that the Commission has dragged its feet on resolving the pending reconsideration petitions, Opp. 7–8, is unfounded. The agency reasonably established a pleading cycle for the petitions concerning the *Declaratory Ruling* that would—“[f]or the convenience of all parties” and “to promote administrative efficiency”—create a “uniform” schedule for pleadings concerning reconsideration of the *Declaratory Ruling* and of amended “pole attachment” rules that the Commission adopted in a different part of the same “order.” *Wireline Competition Bureau Establishes Uniform Deadlines for Oppositions and Replies Regarding Petitions for Reconsideration of [the] Third Wireline Infrastructure Report and Order and Declaratory Ruling*, 33 FCC Rcd 8647, 8647–48 (Wireline Comp. Bur. 2018);³ *see* 28 U.S.C. § 2112(a)(5). After the pleading cycle concluded, appropriated funding for the FCC lapsed, which

² A copy of this motion is attached hereto as Exhibit A.

³ A copy of this public notice is attached hereto as Exhibit B.

prevented work on the pending petitions.⁴ Consideration of the petitions has now resumed. And the timelines that the Commission created in the *September Order* for localities (Opp. 8) are irrelevant to the time that the FCC reasonably needs to act on the pending reconsideration petitions.

4. There is likewise no basis for the claim (Opp. 5–6) that a further stay of this case would cause the City and its supporting intervenors hardship. Neither the City nor any other party sought a stay of the *Declaratory Ruling*—which belies the claim of hardship here. Moreover, both the Eighth and Tenth Circuits rejected motions for a stay pending judicial review of the *September Order*. *See Order, City of San Jose v. FCC*, No. 18-9568 (10th Cir. Jan. 10, 2019) (*Tenth Circuit Stay Denial*); *Order, City of North Little Rock v. FCC*, No. 18-3678 (8th Cir. Jan 3, 2019).⁵ In doing so, the Tenth Circuit expressly found that the movants “[had] failed to meet their burden of showing irreparable harm” absent a stay. *Tenth Circuit Stay Denial 3*.

In opposing the motions for a stay pending judicial review of the *September Order*, the FCC explained that the *September Order* could not plausibly cause

⁴ We recognize that, during the lapse in appropriated funds, courts sometimes required government parties to meet established briefing deadlines. *See Opp. 7 n.20*. But particularly in light of this Court’s December 20, 2018, order staying this case, there was no lawful basis for FCC staff to work on the pending reconsideration petitions during that time.

⁵ Copies of these stay denial orders are attached hereto as Exhibits C and D.

localities imminent harm because that order “does not, on its own, require localities to do anything or compel approval of any particular siting request.” *E.g.*, Respondent FCC’s Opp. to Mot. for Stay Pending Review 23, *City of San Jose v. FCC*, No. 18-9568 (10th Cir.).⁶ The same is true of the *Declaratory Ruling*.

The City’s assertion that the *Declaratory Ruling* “exposes localities to an immediate litigation threat” because it “invites providers to file complaints at the FCC” (Opp. 4) is misleading. The implication is that that the City and aligned localities are subject to a threat of sanctions under the *Declaratory Ruling*. But in fact, the passage in the *Declaratory Ruling* to which the City refers merely states that providers are free—as they always have been—to file petitions with the FCC seeking declarations that “specific legal rules permitted or imposed by specific states or localities” are preempted as inconsistent with federal law. *Declaratory Ruling* ¶ 168. Like the *September Order*, the *Declaratory Ruling* provides the Commission’s authoritative interpretation as to whether the laws of the City and other localities violate Section 253(a) of the Communications Act. 47 U.S.C. § 253(a). Although the Commission “expect[s] states and localities to comply” with that interpretation, it does not compel them to do so unless and until the agency makes a specific determination that a specific state or local law is

⁶ A copy of this pleading is attached hereto as Exhibit E.

preempted under the Act. And such determinations would themselves be subject to judicial review.

CONCLUSION

The FCC's motion for further stay should be granted.

Respectfully submitted,

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March 4, 2019

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