

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DOCKETING STATEMENT

Case Name: City of Huntington Beach v. Federal Communications Commission,
and United States of America

Appeal No. (if available) : No. 18-9572 (MCP No. 155)

Court/Agency Appealing From: Federal Communications Commission "FCC"

Court/Agency Docket No.: 17-79, 17-84; FCC 18-133 83 Fed. Reg. 51,867 (Oct. 15, 2018).

District Judge: Not applicable

Party or Parties Filing Notice of Appeal/Petition: City of Huntington Beach, a Charter
City of the State of California

I. TIMELINESS OF APPEAL OR PETITION FOR REVIEW

A. APPEAL FROM DISTRICT COURT:

6. Cross Appeals

- a. If this is a cross appeal, what relief do you seek beyond preserving the judgement below?

See, United Fire & Cas. Co. v. Boulder Plaza Residential, LLC, 633 F.3d 951, (10th Cir. 2011)(addressing jurisdictional validity of conditional cross appeals).

- b. If you do not seek relief beyond an alternative basis for affirmance, what is the jurisdictional basis for your appeal?

See, Breakthrough Mgt. Group, Inc. v. Chukchansi Gold Casino and Resort, 629 F.3d 1173, 1196-98 and n. 18 (10th Cir. 2010)(discussing protective or conditional cross appeals).

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

1. Date petition for review was filed: October 24, 2018
2. Date of the order to be reviewed:

The FCC adopted *Accelerating Wireless and Wireline Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket Nos. 17-79, 17-84; FCC 18-133 on September 26, 2018. (the “Order”).

The summary of the Order was published in the Federal Register at Vol. 83, No. 199, p. 51867 *et seq.*, on October 15, 2018, and this is the date of the Order to be reviewed.

3. Specify the statute or other authority granting the court of appeals jurisdiction to review the order:

5 U.S.C. §706, 47 U.S.C. §402(a), 28 USC §§2342(1), 2343, and 2344, and Federal Rule of Appellate Procedure 15(a).

4. Specify the time limit for filing the petition (cite specific statutory section or other authority):

60 days from date of publication of the Order in Federal Registrar, which date is December 14, 2018. (28 U.S.C. §2344.)

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

As noted in this Court’s Preliminary Order of November 9, 2018, the United States Judicial Panel on Multidistrict Litigation has designated the United States Court of Appeals for the Tenth Circuit as the circuit in which to consolidate the various petitions for review filed in connection with the FCC Order. The time to

file such petitions does not expire until December 14, 2018.

At the time the Judicial Panel on Multidistrict Litigation assigned the petitions for review to the 10th Circuit, there were the following matters:

Puerto Rico Tel. Co., Inc. v. FCC, First Circuit No. 18-2063

Verizon v. FCC, Second Circuit No. 18-3255

City of San Jose, et al. v. FCC, Ninth Circuit No. 18-72883

City of Seattle, et al. v. FCC, Ninth Circuit No. 18-72886

City of Huntington Beach v. FCC, Ninth Circuit No. 18-72893

City of Portland, Oregon v. USA, 9th Circuit, 18-172689 (remains in 9th Cir.)

Sprint v. FCC, 10th Circuit, No. 18-9563

AT&T v. FCC, DC Circuit, No. 18-1294 filed 10/25/2018

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

On September 26, the Federal Communications Commission (“FCC”) issued a Declaratory Order and Report and Order in Docket Nos. WT 17-79 and WT 17-84 that, among other things: reinterprets the key statutory terms in Sec. 253 and 332(c)(7); and establishes new deadlines for action on applications for “small wireless facilities.” Many local governments objected to the FCC’s proposals on both legal and policy grounds, and submitted substantial legal, economic, and policy evidence into the underlying record never addressed by the FCC.

The order significantly limits the rights of state and local governmental entities regarding the installation of small cell antennas in the public rights-of-way (“ROW”) and on publicly-owned infrastructure, such as streetlight poles, utility poles, and traffic signals.

Section 253(a) of the Federal Communications Act specifies that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” Similarly, Section 332(c)(7) states that “[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—(I) shall not unreasonably discriminate among providers

of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.”

The Order adopts a broad interpretation of the “effective prohibition” provisions of Section 253 and 332(c)(7), finding that a state or local government need only “materially inhibit” a small cell antenna deployment to violate the provisions. The Order then concludes that fees and charges assessed by a government entity for small cell antennas, including annual pole attachment fees for government property not open for use by third parties, are only permitted to the extent that they represent a “reasonable approximation” of the locality’s “objectively reasonable costs” related to the deployment. The Order then adopts the presumption that an annual rental charge of no more than \$270 per antenna per year is cost-based, but any higher charge is invalid.

The Order also shortens time for action on wireless applications in a way that is designed to prevent public participation and sets a federal standard for aesthetics without authority.

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

Petitioner disputes the Order on statutory and constitutional grounds, and also argues that it is, inter alia, arbitrary, capricious, and abuse of discretion and otherwise contrary to law.

In part, the federal government cannot deprive a state or cities of their proprietary powers as owners of property. By its terms, Sections 253 and 332(c)(7) apply “only to local zoning and land use decisions and [do] not address a municipality's property rights as a landowner.” (*Omnipoint Communs. v. City of Huntington Beach* (9th Cir. 2013) 738 F.3d 192, 201.) Localities, in their capacity as a property owner, have the “right to decline to lease the property except on agreed conditions.” (*Superior Communs. v. City of Riverview* (6th Cir. 2018) 881 F.3d 432, 445.)

IV. ATTORNEY FILING DOCKETING STATEMENT:

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PLEASE IDENTIFY ON WHOSE BEHALF THE DOCKETING STATEMENT IS FILED:

- A. Petitioner, City of Huntington Beach
- B. The filing counsel is employed by a government entity: City of Huntington Beach

Signature: /s/ Michael J. Vigliotta Date: 11/21/2018

NOTE: A copy of the final judgment or order appealed from, any pertinent findings and conclusions, opinions, or orders, any tolling motion listed in Fed. R. App. P. 4(a)(4)(A) or 4(b)(3)(A) and the dispositive order(s), any motion for extension of time to file notice of appeal and the dispositive order **must be submitted with the Docketing Statement.**

Not applicable by Preliminary Order of Tenth Circuit, dated November 9, 2018.

CERTIFICATE OF SERVICE

I, MICHAEL J. VIGLIOTTA hereby certify that on November 21, 2018, I served a copy of the foregoing **Docketing Statement**, with the Clerk of the United States Court of Appeals for the Tenth Circuit through the CM/ECF system. Participants in case 18-9572 (MCP No. 155) who are registered CM/ECF users will be served by the CM/ECF system. The following were served via U.S. Mail.

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/s/ Michael J. Vigliotta
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November 21, 2018