

18-72689, 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,

vs.

Federal Communications Commission
and United States of America,
Respondents.

On Petitions for Review of Orders of the
Federal Communications Commission

MOTION TO EXCEED TYPE-VOLUME LIMIT

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Pursuant to Federal Rule of Appellate Procedure 27, Ninth Circuit Rules 27-1 and 32-2, and the Appellate Commissioner's Order April 18, 2019 (Dkt. Entry 55 in 18-72689),¹ Petitioners in Nos.18-72689, 19-70136, 70144, 19-70145, 19-70146, 19-19-70341, and 19-70344 respectfully move for leave to exceed the type-volume limitations set forth in Ninth Circuit Rule 32-1 for their Joint Reply Brief and to file a brief containing 12,054 words. Pursuant to Ninth Circuit Rule 32-2(a), the reasons for this Motion are set forth in the attached declaration. All parties were asked to consent to the motion. As of the filing date, petitioners American Public Power Association, and intervenor National Association of Telecommunications Officers and Advisors have consented to the motion, and other parties had not responded.

Date: September 4, 2019

[SIGNATURES ON NEXT PAGE]

¹ This Motion should be directed to the attention of the Appellate Commissioner.

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DECLARATION OF COUNSEL

In support of the Motion to Exceed Type-Volume Limit of Local Government Petitioners (Case Nos. 18-72689 19-70136, 19-70144, 19-70145, 19-70146, 19-70341, and 19-70344), I declare:

1. I am a partner at Best, Best & Krieger LLP, counsel to petitioners in Case Nos. 18-72689, 19-70144, and 19-70341. I am authorized to file the motion and this declaration on behalf of Petitioners (collectively, “Local Governments”) in Case Nos. 18-72689, 19-70136, 19-70144, 19-70145, 19-70146, 19-70341, and 19-70344.

2. As was the case with Local Governments’ Joint Opening Brief, the Joint Reply Brief submitted simultaneously with this motion addresses two Federal Communications Commission (“FCC”) Orders. Case No. 18-72689 is an appeal of the Declaratory Ruling portion of *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, WC Docket No. 17-84, WT Docket No. 17-79, 33 FCC Rcd. 7705 (2018) (“*Moratorium Order*”). Case Nos. 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 are consolidated appeals of *Accelerating*

Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, WC Docket No. 17-84, 33 FCC Rcd. 9088 (2018) (“*Small Cell Order*”). The appeal of the Declaratory Ruling portion of the *Moratorium Order* is not consolidated with the appeals of the *Small Cell Order*.

3. Respondents filed a motion to exceed the type volume limitation for their principal brief, which the Appellate Commissioner granted on August 20, 2019. Brief for Respondents, *Portland. FCC*, Case 18-72689, Docket No. 108 (Aug. 8, 2019). Respondents’ principal brief contained 34,345 words (excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)), of which roughly 30,000 dealt with issues addressed by Local Governments in their Opening Brief. Petitioner Local Governments’ Joint Opening Brief, *Portland v. FCC*, Case 19-70123, Docket No. 62 (Jun. 10, 2019). Industry Intervenors filed an additional 15,259 word brief in support of the FCC.

4. Local Governments and their supporting intervenors joining this Joint Reply Brief are the same eighty-seven local governments and local government associations that joined Local Governments’ Joint

Opening Brief. They filed six separate petitions for review of the *Small Cell Order* (two sets of Petitioners are now represented by the same law firm), and one petition for review of the *Moratorium Order*. Consistent with their Joint Opening Brief, in an effort to avoid duplicative briefing, reduce the total number of briefs, and minimize the total word count, Local Government Petitioners have joined a single reply brief, rather than file the five separate reply briefs to which they otherwise would have been entitled.²

5. While the Joint Reply Brief is slightly more than one-half the length of Local Governments' Joint Opening Brief (21,288 words), it is also substantially less than one-half the length of the roughly 30,000-word portion of Respondents' principal brief devoted to Local Governments' issues, without even considering the additional arguments raised by Intervenors supporting Respondents. It represents a substantial consolidation and shortening of the reply briefing that would have occurred had Local Governments filed separate reply briefs.

² If the *Moratorium Order* were briefed separately, it would allow for an additional reply brief.

6. The length is justified given the length of the briefs to which it is responding. Local government have relied upon their Joint Opening Brief where appropriate and focused their Joint Reply Brief on flaws in Respondents' and their supporting Intervenors' arguments on brief, and on inconsistencies between Respondents' and their supporting Intervenors' briefs and the *Orders* under review.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on September 4, 2019, in Washington, D.C.

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2019, 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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: September 4, 2019

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