

**18-72689, 19-70490**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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City of Portland, Oregon,  
*Petitioner,*

City and County of San Francisco, California,  
*Intervenor,*

vs.

Federal Communications Commission  
and United States of America,  
*Respondents.*

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On Petitions for Review of Orders of the  
Federal Communications Commission

**MOTION FOR EXPEDITED ORAL ARGUMENT  
AND SEPARATION OF ARGUMENTS**

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JOSEPH VAN EATON  
BEST BEST & KRIEGER LLP  
2000 Pennsylvania Ave., NW,  
Suite 5300  
Washington, DC 20006  
(202) 785-0600

[Joseph.Vaneaton@bbklaw.com](mailto:Joseph.Vaneaton@bbklaw.com)

GAIL A. KARISH  
BEST BEST & KRIEGER LLP  
300 South Grand Ave., 25th Fl.  
Los Angeles, CA 90071  
(213) 617-8100

[Gail.Karish@bbklaw.com](mailto:Gail.Karish@bbklaw.com)

KENNETH S. FELLMAN  
GABRIELLE A. DALEY  
KISSINGER & FELLMAN, PC  
3773 Cherry Creek N. Drive, Suite 900  
Denver, Colorado 80209  
(303) 320-6100

[KFellman@kandf.com](mailto:KFellman@kandf.com)

[gabrielle@kandf.com](mailto:gabrielle@kandf.com)

*Attorneys for Petitioners in Case No. 19-70136 and  
Certain Intervenors in Case Nos. 19-70341 and 19-  
70344*

*Petitioners in Case No. 19-72689 and Certain  
Intervenors in Case No. 19-70341 and Intervenors in  
Case Nos. 19-70136 and 19-70146*

MICHAEL J. WATZA  
KITCH DRUTCHAS WAGNER  
VALITUTTI & SHERBROOK  
1 Woodward Ave., 10th Floor  
Detroit, MI 48226-3499  
(313) 965-7983  
[Mike.Watza@kitch.com](mailto:Mike.Watza@kitch.com)  
*Attorney for Petitioners and Certain  
Intervenors*

MICHAEL E. GATES, City Attorney  
MICHAEL J. VIGLIOTTA  
OFFICE OF THE CITY ATTORNEY  
CITY OF HUNTINGTON BEACH  
2000 Main St., Fourth Floor  
Huntington Beach, CA 92648  
(714) 536-5662  
[MVigliotta@surfcity-hb.org](mailto:MVigliotta@surfcity-hb.org)  
[Michael.Gates@surfcity-hb.org](mailto:Michael.Gates@surfcity-hb.org)  
*Attorneys for Petitioners in Case No. 19-  
70146*

GEORGIA M. PESTANA  
*Acting Corporation Counsel  
of the City of New York*  
CLAUDE S. PLATTON  
ELINA DRUKER  
100 Church Street  
New York, New York 10007  
(212) 356-2609 or -2502  
[edruker@law.nyc.gov](mailto:edruker@law.nyc.gov)  
*Attorney for Intervenor the City of New York*

TILLMAN L. LAY  
JEFFREY M. BAYNE  
SPIEGEL & MCDIARMID LLP  
1875 Eye Street, N.W., Suite 700  
Washington DC 20006  
(202) 839-4000  
[Tim.Lay@spiegelmc.com](mailto:Tim.Lay@spiegelmc.com)  
[Jeffrey.Bayne@spiegelmc.com](mailto:Jeffrey.Bayne@spiegelmc.com)  
*Attorneys for Petitioners in Case Nos. 19-  
70145 and 19-70344 and Certain  
Intervenors in Case Nos. 19-70339 and 19-  
70341*

DENNIS J. HERRERA  
City Attorney  
THERESA L. MUELLER  
Chief Energy and Telecommunications  
Deputy  
WILLIAM K. SANDERS  
Deputy City Attorney  
CITY OF SAN FRANCISCO  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102  
(415) 554-4700  
*Attorneys for Petitioner in Case No. 19-  
70145*

ROBERT C. MAY III  
MICHAEL D. JOHNSTON  
TELECOM LAW FIRM, PC  
3570 Camino de Rio N., Suite 102  
San Diego, CA 92108  
(619) 272-6200  
[tripp@telecomlawfirm.com](mailto:tripp@telecomlawfirm.com)  
[MJohnston@telecomlawfirm.com](mailto:MJohnston@telecomlawfirm.com)  
*Attorneys for Certain Petitioners in Case No.  
19-70136 and Intervenors in Case Nos. 19-  
70341 and 19-70344*

NANCY L. WERNER  
NATO General Counsel  
3213 Duke Street  
Suite 695  
Alexandria, VA, 22314  
(703) 519-8035  
[nwerner@natoa.org](mailto:nwerner@natoa.org)

*Attorneys for Intervenor in Case Nos. 19-70326, 19-70339, 9-70341, and 19-70344*

JAMES BALLER  
SEAN A. STOKES  
BALLER STOKES & LIDE, PC  
2014 P Street, N.W., Suite 200  
Washington DC 20036  
(202) 833-5300  
Jim@baller.com  
[Sstokes@baller.com](mailto:Sstokes@baller.com)

*Attorneys for Petitioners in Case No. 19-70339*

ARTHUR S. GARRETT, III  
ERIC P. GOTTING  
KELLER AND HECKMAN LLP  
1001 G Street, N.W.  
Suite 500 West  
Washington, D.C. 20001  
(202) 434-4269

*Attorneys for Petitioner in Case No. 19-70147 Montgomery County, GA*

Pursuant to Ninth Circuit Rules 34-3 and 27-12, and Section IV of the Commissioner's April 18, 2019 Order (April 18 Order) (Dkt. Entry 60), Petitioners in Nos. 18-72689 and 19-70490, supported by Petitioners and Intervenors in Nos. 19-70136, 19-70144, 19-70145, 19-70146, 19-70341, and 19-70344 ("Local Government and Public Power Petitioners and Supporting Intervenors"),<sup>1</sup> respectfully request that the

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<sup>1</sup> Local Government Petitioners, Public Power Petitioners, and Supporting Intervenors are all the Petitioners and Intervenors in the appeal of the Small Cell

Court schedule two separate oral arguments, one involving what we describe below as the “Small Cell Order” and the “Moratorium Order,” and the other involving the “One Touch Make Ready Order.” Local Government and Public Power Petitioners and Supporting Intervenors also request that oral argument as to the Small Cell and Moratorium Orders be scheduled at the earliest practicable date.

Electric Utility Petitioners<sup>2</sup> in the One Touch Make-Ready Appeal support the separation of the arguments; the FCC and most Industry Petitioners and Intervenors<sup>3</sup> all oppose. One reason for their opposition is that the cases are to be heard by the same panel,<sup>4</sup> but there is no

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Order and the Moratorium Order, other than Industry Petitioners and Intervenors identified in note 3. Over 60 petitioners and intervenors appeal the FCC Orders, and all are identified in the opening briefs.

<sup>2</sup> ”Electric Utility Petitioners” are American Electric Power Service Corporation, CenterPoint Entergy Houston Electric, LLC, Duke Energy Corporation, Entergy Corporation, Oncor Electric Develier Company LLC, Southern Company, Tampa Electric Company, Virginia Electric and Power Company d/b/a/ Dominion Energy Virginia, Xcel Energy Services, Inc. in *AEP v. FCC*, 9th Circuit Court of Appeal No. 19-70490. In addition to the Electric Utility Petitioners, Intervenor USTelecom-The Broadband Association also opposes the expedite of the One Touch Make Ready Order.

<sup>3</sup> Respondent Petitioners are Sprint Corporation and Verizon Communications and Respondent Intervenors are CTIA – The Wireless Association, Competitive Carriers Association and the Wireless Infrastructure Association and US Telecom – The Broadband Association.

<sup>4</sup> Appellate Commissioner’s Order April 18, 2019 (Dkt. Entry 55 in 18-72689) and Appellate Commissioner’s Order April 18, 2019 (Dkt. Entry 60 in 19-70123).

reason why that end cannot be achieved even with separation. Electric Utility Petitioners in the One Touch Make-Ready Order appeal do not oppose the expedition request. The FCC and Industry Petitioners and Intervenors do.

The “Small Cell Order” is *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). The “Moratorium Order” is the Declaratory Ruling in *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). The Small Cell Order and the Moratorium Order, both of which involve rulings regarding the authority and control of local and state governments, have been fully briefed by Petitioners, Intervenors, and Respondent. On appeal, the “Small Cell Order” is *Sprint v. F.C.C.*, Nos. 19-70136, 19-70144, 19-70145, 19-70146, 19-70341, and 19-70344, while the Moratorium Order is *Portland v. FCC*, Nos. 18-72689 and 19-70490. While the appeals are technically not consolidated under the April 18 Order, the

appeals of the Small Cell and Moratorium Orders were filed on the same schedule, and briefing is identical, save for cosmetic differences.

The “One Touch Make-Ready Order” is an appeal of the Third Report and Order issued at 33 FCC Rcd. 7705, and involves attachments to privately owned utility poles. Pursuant to the April 18 Order, the case was briefed separately, and briefing has yet to be completed. Local Government and Public Power Petitioners and Intervenors have not filed briefs in that appeal, and likewise, the Electric Utility Petitioners challenging the One Touch Make-Ready Order have not filed in the appeal of the Small Cell Order or the Moratorium Order. The issues raised in the cases are distinct, even though the appeal of the One Touch Make-Ready Order has been consolidated with the appeal of the Moratorium Order.

Local Government and Public Power Petitioners and Supporting Intervenors request that two separate oral arguments be scheduled, one for the Small Cell and Moratorium Orders appeals and another for the One Touch Make-Ready Order appeal. The underlying issues are distinct and independent, and separate briefing took place for that very reason. In addition, briefing on each appeal is sufficiently lengthy to

justify separate oral argument. The issues in the two sets of appeals are sufficiently distinct and complex that separation will allow for more orderly and focused argument in each appeal.

Local Government and Public Power Petitioners and Supporting Intervenors also request that the Court calendar oral argument for their appeals of the Small Cell Order and Moratorium Order at the earliest practicable date. There is good cause for expedition.

First, there are several other cases progressing through the lower courts that will be affected by the outcome of this appeal. For example, in the Third Circuit, a dispute concerning the City of Wilmington, Delaware's right to control the placement of a wireless antenna pursuant to its valid zoning authority was remanded back to the district court earlier this year, and as part of the briefing, the district court must consider whether the FCC's "effective prohibition" standard or the Third Circuit's "actual prohibition" standard will control. *See T Mobile Ne. LLC v. City of Wilmington, Delaware*, 913 F.3d 311 (3d Cir. 2019). District courts in this Circuit are being asked to determine the proper scope of Sections 332(c)(7) and 253(a) of the Telecommunications Act, specifically the proper application of this Court's "effective prohibition"

test in the wake of the FCC's Small Cell Order. *Crown Castle NG W. LLC v. Town of Hillsborough*, No. 18-CV-02473-JSC (N.D. Cal. Aug. 9, 2018). Delay in resolution will simply complicate the work of district courts and Circuit Courts of Appeal throughout the country, as more applications are filed and more disputes arise.

Second, this appeal is a matter of great importance to virtually every locality in the nation. While this appeal is pending, Local Government Petitioners and Supporting Intervenors and similarly situated parties are confronted with uncertainty as to how to develop and apply local standards for small cell deployment, which is rapidly occurring. Small cell deployment also requires localities to contract with service providers for use of municipally owned property, and the compensation they are permitted to receive is an uncertainty until this appeal is final. Expediting oral argument would hasten the resolution of these issues, thereby allowing all parties to proceed on more stable footing with respect to small cell deployment. Conversely, a delayed outcome of this appeal would undermine the expedited resolution of deployment disputes that Congress envisioned. See 47 U.S.C. § 332(c)(7)(B)(v).



Third, the Commission is not waiting for this Court to decide the validity of the Orders challenged on appeal. In fact, the Commission is currently building on those Orders, which makes possibly unwinding them all the more difficult. The FCC has commenced a proceeding to examine the validity of fees being charged in Clark County, Nevada, and is pursuing that investigation even though Clark County and the entity with which it had the fee dispute committed to settling.<sup>5</sup> The fee issues that are involved in that proceeding *assume* that the FCC can resolve fee disputes, and assume that the FCC can limit fees to an FCC determination of costs only – both issues that may be resolved in the Small Cell Order appeal. The Commission also recently announced a new proceeding in which it will consider extending the definition of “eligible facilities request,” an issue involved in this appeal, to excavations within 30 feet of a tower site. It proposed to further limit local governments’ permitting authority over such matters while also imposing more onerous “shot clocks” than are already in place. The Commission is poised to move forward with full briefing, including

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<sup>5</sup> *In re Verizon Petition for Declaratory Ruling Regarding Fees Charged by Clark County, Nevada for Small Wireless Facilities*, Order, WT Docket No. 19-230 (2019).

economic studies, within 45 days. *See Wireless Telecommunications Bureau and Wireline Competition Bureau Seek Comment on WIA Petition for Rulemaking, WIA Petition for Declaratory Ruling and CTIA Petition for Declaratory Ruling*, WT Docket No, 19-250, WC Docket No. 17-84 (2019). An accelerated decision in the instant appeal will provide guidance to the Commission and to localities which must seek to comply with FCC Orders on very short timeframes.

Finally, the Commission's failure to consider the environmental impacts of the Small Cell and Moratorium Orders, which are intended to promote the rapid placement of thousands of small cells nationwide, has significant, real world consequences. The Commission itself has recognized that mobile and portable transmitting devices may result in harmful radio frequency exposure. *Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields*, OET Bulletin 65 (1997). It is important for the courts to review as quickly as possible the Commission's failure to examine the environmental effects when adopting the Small Cell and Moratorium Orders, as states and localities are not permitted to take those environmental effects into account in reviewing applications.

The significance of the issues justifies expedition even if the argument in the appeals is not separated.

### CONCLUSION

For reasons stated above, Local Government and Public Power Petitioners and Supporting Intervenors ask that this motion be granted.

By: /s/ Joseph Van Eaton  
JOSEPH VAN EATON  
BEST BEST & KRIEGER LLP  
2000 Pennsylvania Ave., NW,  
Suite 5300  
Washington, DC 20006  
Telephone: (202) 785-0600  
[Joseph.Vaneaton@bbklaw.com](mailto:Joseph.Vaneaton@bbklaw.com)

GAIL A. KARISH  
BEST BEST & KRIEGER LLP  
300 South Grand Ave., 25th Fl.  
Los Angeles, CA 90071  
Telephone: (213) 617-8100  
[Gail.Karish@bbklaw.com](mailto:Gail.Karish@bbklaw.com)

*Petitioners in Case No. 19-72689 and  
Certain Intervenors in Case No. 19-70341  
and Intervenors in Case Nos. 19-70136 and  
19-70146*

By: /s/ Kenneth S. Fellman  
KENNETH S. FELLMAN  
GABRIELLE A. DALEY  
KISSINGER & FELLMAN, PC  
3773 Cherry Creek N. Drive, Suite 900  
Denver, Colorado 80209  
(303) 320-6100  
[KFellman@kandf.com](mailto:KFellman@kandf.com)  
[gabrielle@kandf.com](mailto:gabrielle@kandf.com)  
*Attorneys for Petitioners in Case No. 19-  
70136 and Certain Intervenors in Case Nos.  
19-70341 and 19-70344*

By:       /s/ Michael J. Watza        
MICHAEL J. WATZA  
KITCH DRUTCHAS WAGNER  
VALITUTTI & SHERBROOK  
1 Woodward Ave., 10th Floor  
Detroit, MI 48226-3499  
(313) 965-7983  
[Mike.Watza@kitch.com](mailto:Mike.Watza@kitch.com)

*Counsel for Certain Intervenors*

By:       /s/ Michael E. Gates        
MICHAEL E. GATES, City Attorney  
MICHAEL J. VIGLIOTTA  
OFFICE OF THE CITY ATTORNEY  
CITY OF HUNTINGTON BEACH  
2000 Main St., Fourth Floor  
Huntington Beach, CA 92648  
(714) 536-5662  
[MVigliotta@surfcity-hb.org](mailto:MVigliotta@surfcity-hb.org)  
[Michael.Gates@surfcity-hb.org](mailto:Michael.Gates@surfcity-hb.org)  
*Attorneys for Petitioners in Case No. 19-70146*

By:       /s/ Georgia M. Pestana        
GEORGIA M. PESTANA  
*Acting Corporation Counsel  
of the City of New York*  
CLAUDE S. PLATTON  
ELINA DRUKER  
100 Church Street  
New York, New York 10007  
212-356-2609 or -2502  
[edruker@law.nyc.gov](mailto:edruker@law.nyc.gov)  
*Attorney for Intervenor the City of New York*

By:       /s/ Tillman L. Lay        
TILLMAN L. LAY  
JEFFREY M. BAYNE  
SPIEGEL & MCDIARMID LLP  
1875 Eye Street, N.W., Suite 700  
Washington DC 20006  
(202) 839-4000  
[Tim.Lay@spiegelmc.com](mailto:Tim.Lay@spiegelmc.com)  
[Jeffrey.Bayne@spiegelmc.com](mailto:Jeffrey.Bayne@spiegelmc.com)  
*Attorneys for Petitioners in Case Nos. 19-70145 and 19-70344 and Certain Intervenors in Case Nos. 19-70339 and 19-70341*

By:       /s/ Dennis J. Herrera        
DENNIS J. HERRERA  
City Attorney  
THERESA L. MUELLER  
Chief Energy and Telecommunications  
Deputy  
WILLIAM K. SANDERS  
Deputy City Attorney  
CITY OF SAN FRANCISCO  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102  
(415) 554-4700  
*Attorneys for Petitioner in Case No. 19-70145*

By:       /s/ Robert C. May        
ROBERT C. MAY III  
MICHAEL D. JOHNSTON  
TELECOM LAW FIRM, PC  
3570 Camino de Rio N., Suite 102  
San Diego, CA 92108  
(619) 272-6200  
[tripp@telecomlawfirm.com](mailto:tripp@telecomlawfirm.com)  
[MJohnston@telecomlawfirm.com](mailto:MJohnston@telecomlawfirm.com)  
*Attorneys for Certain Petitioners in Case No. 19-70136 and Intervenors in Case Nos. 19-70341 and 19-70344*

By:     /s/ Nancy L. Werner      
NANCY L. WERNER  
NATO General Counsel  
3213 Duke Street  
Suite 695  
Alexandria, VA, 22314  
(703) 519-8035  
[nwerner@natoa.org](mailto:nwerner@natoa.org)

By:     /s/ Eric P. Gotting      
ARTHUR S. GARRETT, III  
ERIC P. GOTTING  
KELLER AND HECKMAN LLP  
1001 G Street, N.W.  
Suite 500 West  
Washington, D.C. 20001  
(202) 434-4269

*Attorneys for Attorneys for Intervenor in Case Nos. 19-70326, 19-70339, 9-70341, and 70147 Montgomery County, GA 19-70344*      *Attorneys for Petitioner in Case No. 19-*

By:     /s/ Sean A. Stokes      
JAMES BALLER  
SEAN A. STOKES  
BALLER STOKES & LIDE, PC  
2014 P Street, N.W., Suite 200  
Washington DC 20036  
(202) 833-5300  
Jim@baller.com  
[Sstokes@baller.com](mailto:Sstokes@baller.com)

*Attorneys for Petitioners in Case No. 19-70339*

Date:           September 24, 2019

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*s/ Joseph Van Eaton*

JOSEPH VAN EATON

BEST BEST & KRIEGER LLP

2000 Pennsylvania Ave, N.W.,

Suite 5300

Washington, DC 20006

(202) 785-0600

[Joseph.vaneaton@bbklaw.com](mailto:Joseph.vaneaton@bbklaw.com)

September 24, 2019

## CERTIFICATE OF SERVICE

I hereby certify that on September 24, 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.

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Date: September 24, 2019

*s/ Joseph Van Eaton*  
\_\_\_\_\_  
JOSEPH VAN EATON  
BEST BEST & KRIEGER LLP  
2000 Pennsylvania Ave, N.W.,  
Suite 5300  
Washington, DC 20006  
(202) 785-0600  
[Joseph.vaneaton@bbklaw.com](mailto:Joseph.vaneaton@bbklaw.com)