Consolidated 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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SPRINT CORPORATION, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

ON PETITIONS FOR REVIEW FROM AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

JOINT OPENING BRIEF FOR PETITIONERS SPRINT CORPORATION; VERIZON COMMUNICATIONS INC.; PUERTO RICO TELEPHONE COMPANY, INC.; AND AT&T SERVICES, INC.

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioners respectfully submit the following corporate disclosure statements:

Sprint Corporation is a publicly traded Delaware corporation that provides telecommunications services. Softbank Group Corp., a publicly traded Japanese corporation, owns approximately 80% of Sprint Corporation's outstanding stock.

The Verizon companies participating in this filing ("Verizon") are the regulated, wholly owned subsidiaries of Verizon Communications Inc. No publicly held company owns 10% or more of its stock. Insofar as relevant to this litigation, Verizon and its subsidiaries' general nature and purpose is to provide communications services.

Puerto Rico Telephone Company, Inc. is a wholly owned subsidiary of Telecomunicaciones de Puerto Rico, Inc. Telecomunicaciones de Puerto Rico, Inc. is wholly owned by Tenedora Telpri, S.A. de C.V., a subsidiary of América Móvil, S.A.B. de C.V., which is a publicly traded company.

AT&T Services, Inc. provides services to its wireless and other affiliates, and is jointly owned by AT&T Inc. and AT&T Teleholdings, Inc. AT&T Teleholdings, Inc. is a wholly owned subsidiary of AT&T Inc. AT&T Inc. is a publicly traded corporation that, through its wholly owned affiliates, is principally engaged in the business of providing communications services and products to the

general public. AT&T Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

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All other parties on whose behalf this filing is submitted concur in its content. *See* Cir. R. 25-5(e).

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INTRODUCTION

As the Federal Communications Commission ("FCC") itself has emphasized, next-generation mobile broadband services have the potential to improve Americans' lives substantially. These services (often called "5G" because they represent the fifth generation of wireless technology) will "support new healthcare and Internet of Things applications, speed the transition to life-saving connected car technologies, and create jobs." ER002 (*Order*[1] ¶ 2). Small wireless facilities, or "small cells," will play an integral role in delivering 5G services. Unlike traditional "macro" antennas, which may be placed on large, freestanding towers, small cells must be sited at lower heights and be closer to the customers using these services. Their small physical size means that they have a limited visual impact.

Some local communities, however, are erecting barriers that impede the deployment of this paradigm-shifting technology. The FCC rightly recognized this problem and has implemented a number of policies aimed at addressing it: new "shot clocks" on the length of time a state or local government may take to decide an application to site these small wireless facilities that are essential to next-generation broadband deployment; limitations on excessive fees for deploying

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[1] Declaratory Ruling and Third Report and Order, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket Nos. 17-79 & 17-84, 33 FCC Rcd 9088 (2018) (FCC 18-133).

wireless facilities; and bars on state and local governments from imposing arbitrary "aesthetic" standards on those wireless facilities.

Despite acknowledging the seriousness of the issue, however, the FCC stopped short of adopting the full remedy necessary to prevent unreasonable delays in acting upon an application: deeming the application to be granted if it is not acted upon by the end of the shot clock period. As the FCC has concluded, it has the power to impose that remedy. Indeed, it enforces a "deemed granted" remedy for violations of shot clocks promulgated under the Spectrum Act.[2] Its failure to do so here—when such action was necessary fully to address what the FCC recognized as a significant obstacle to the massive public-interest benefits of 5G—is arbitrary, capricious, inconsistent with its own precedent, and an abuse of discretion.

JURISDICTIONAL STATEMENT

The FCC had jurisdiction over this proceeding pursuant to §§ 4(i)-(j), 253, 303, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i)-(j), 253, 303, and 332. A summary of the order was published in the Federal Register on October 15, 2018 (83 Fed. Reg. 51,867). These petitions were timely filed in courts of appeals with jurisdiction to hear them on October 25,

[2] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, tit. VI, 126 Stat. 156, 201.

2018. *See* 28 U.S.C. §§ 2343-2344; 47 C.F.R. § 1.4(b)(1); *see also Sprint Corp. v. FCC*, No. 19-70123, Dkt. 2-1, at 15-17; *Verizon Commc'ns, Inc. v. FCC*, No. 19-70124, Dkt. 4-3, at 16-17; *Puerto Rico Tel. Co. v. FCC*, 19-70125, Dkt. 3-5, at 21-23; *AT&T Servs., Inc. v. FCC*, No. 19-70326, Dkt. 1-3, at 18-20. The petitions were ultimately transferred to this Court under 28 U.S.C. § 2112(a). *See Sprint*, No. 19-70123, Dkt. 1-1; *AT&T*, No. 19-70326, Dkt. 1-2.

STATEMENT OF THE ISSUE

The FCC refused to deem a state or local government's failure to act within a reasonable period of time on a request for authorization to place, construct, or modify personal wireless services facilities to be a grant of authorization, despite having done so with respect to similar applications made under the Spectrum Act, 47 U.S.C. § 1455. The question presented is whether the FCC's failure to impose a "deemed granted" remedy is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

STATUTORY AUTHORITIES

Relevant statutory authorities appear in the Addendum to this brief.

STATEMENT OF THE CASE

A. As the FCC concluded, next-generation wireless technology has the potential to transform everyday life.

Next-generation wireless broadband will provide a revolutionary step up in speed and capabilities, enabling consumers to have a more immersive broadband experience and enabling more devices to be Internet-connected. *See* ER002 (*Order* ¶ 1). This "5G" technology will bring countless benefits. Internet-connected devices will expand the use of telemedicine and enhance wearable medical diagnostic devices that alert patients and doctors of important changes.[3] Additionally, using wireless technology, farmers can preserve resources during droughts by using sensors to measure changes in soil moisture and control irrigation systems. *See* ER299-300 (Cmts. of CTIA, Attach. at 6-7).[4] Next-generation broadband services can also assist people with vision-, hearing-, dexterity- and cognition-related conditions with interactive communication systems that allow them to better navigate the world around them. *See* ER299

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[3] *See* Deloitte, *Wireless Connectivity Fuels Industry Growth and Innovation in Energy, Health, Public Safety, and Transportation* 7-8 (Jan. 2017) ("*Deloitte*"), https://api.ctia.org/docs/default-source/default-document-library/deloitte_20170119 87f8479664c467a6bc70ff0000ed09a9.pdf.

[4] *See also* David L. Sunding et al., *The Farmer And The Data: How Wireless Technology Is Transforming Water Use In Agriculture* (Apr. 27, 2016), http://www.mondaq.com/unitedstates/x/487024/Telecommunications+Mobile+Cable+Communications/The+Farmer+And+The+Data+How+Wireless+Technology+Is+Transforming+Water+Use+In+Agriculture.

(Cmts. of CTIA, Attach. at 6). And a "smart" energy grid empowered by 5G technology will better balance constantly changing energy supply and demand and will avoid outages and improve maintenance by using real-time sensor reporting.[5] Smart-grid adoption made possible by expanded and improved wireless broadband service "could add $1.8 trillion in revenue to the economy." ER288-89 (Cmts. of CTIA at 4-5). All told, providers are expecting to invest $275 billion in 5G deployment, *see* ER002 (*Order* ¶ 2), and 5G will lead to three million new jobs and a GDP boost of $500 billion, *see* ER336 (Cmts. of Verizon at 4).

These services cannot be made widely available without deployment of substantial new infrastructure for two reasons. *First*, the capabilities of 5G technology will stimulate a dramatic increase in the use of wireless services, in particular for the most bandwidth-intensive applications. For example, AT&T estimates that its customers' wireless data traffic will grow tenfold between 2017 and 2020. *See* ER277 (Cmts. of AT&T at 1); *see also* ER336 (Cmts. of Verizon at 4) (estimating fourfold growth driven by video traffic). In addition to expanded consumer-driven use, Internet-enabled everyday objects, such as wearable medical devices, will demand their own portion of the available network bandwidth. *See* ER002, ER009 (*Order* ¶¶ 1, 24). As robust as they are, today's networks do not

[5] *See Deloitte* at 5-6.

have the capacity to accommodate this explosion in demand without building new facilities. *See* ER336 (Cmts. of Verizon at 4).

Second, 5G networks will rely in part on spectrum with limited effective range and building-penetration capabilities. Instead of relying on lower-band spectrum with substantial range, as has historically been the case for wireless networks, 5G networks will use higher-band spectrum that can deliver massive amounts of data, but often over shorter distances. *See* ER336-37 (Cmts. of Verizon at 4-5). Thus, in order to provide high-quality service, providers will have to deploy more infrastructure in any given area than current services require.

As the FCC has explained:

> Verizon anticipates that network densification and the upgrade to 5G will require 10 to 100 times more antenna locations than currently exist. AT&T estimates that providers will deploy hundreds of thousands of wireless facilities in the next few years alone—equal to or more than the number providers have deployed in total over the last few decades. Sprint, in turn, has announced plans to build at least 40,000 new small sites over the next few years. A report from Accenture estimates that, overall, during the next three or four years, 300,000 small cells will need to be deployed—a total that it notes is "roughly double the number of macro cells built over the last 30 years."

ER025 (*Order* ¶ 47) (footnotes omitted). "Estimates indicate that deployments of small cells could reach up to 150,000 in 2018 and nearly 800,000 by 2026." ER065 (*Order* ¶ 126); *see also* Public Notice, *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting*

Policies, 31 FCC Rcd 13360, 13364 (WTB 2016) (noting that "deployments are expected to reach 455,000 by 2020").

As the name suggests, however, small cells are in fact quite small: most small cells look no different than the other utility boxes that are already attached to utility poles. *See* ER328 (Cmts. of Sprint at 12); 47 C.F.R. § 1.6002(*l*)(2) (regulation governing small cell size). Examples of AT&T small cells sited on a New York City street sign and a Los Angeles street lamp are below:

New York, NY

Los Angeles, CA

ER367-71 (Feb. 23, 2018 AT&T Ex Parte Ltr., Attach. at 5-9) (providing examples); ER329 (Cmts. of Sprint at 13) (same).

The only practicable way to deploy this massive new infrastructure is to locate antennas in existing rights-of-way. The deployment of small cells does not require major changes to the rights-of-way, however. The new facilities can simply be attached to existing structures. Utility poles, light poles, traffic control poles, and street signs "are ideal locations for 5G antennas." ER337 (Cmts. of Verizon at 5); *see* ER009 (*Order* ¶ 24 n.46) ("Most of this additional infrastructure will likely be built with small cells that use lampposts, utility p[oles], or other structures of similar size able to host smaller, less obtrusive radios required to build a densified network.").

B. Regulatory background.

The Telecommunications Act of 1996 implements Congress's intention "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans." S. Conf. Rep. No. 104-230, at 1 (1996). Congress struck a balance by retaining some state and local authority over decisions about the placement of wireless facilities, while also ensuring that these entities could not unreasonably interfere with the deployment of wireless facilities. To that end, the Act retains state and local governments' authority "over decisions regarding the placement, construction, and modification

of personal wireless service facilities"—a category that includes small cells—but subject to specified limits. 47 U.S.C. § 332(c)(7)(A). At the same time, to prevent state and local governments from thwarting congressional policy by impeding the deployment of wireless networks, Congress barred state and local actions "prohibit[ing] or hav[ing] the effect of prohibiting the provision of personal wireless services." *Id.* § 332(c)(7)(B)(i)(II). Because delay in granting or denying an application could "thwart timely rollout and deployment of wireless services," ER216 (*NPRM*[6] ¶ 5), Congress required state and local governments to "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request." 47 U.S.C. § 332(c)(7)(B)(ii).

Interpreting the phrase "prohibit or have the effect of prohibiting," the FCC found more than 20 years ago that a state or local government legal requirement constitutes an effective prohibition if it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." Memorandum Opinion and Order, *California Payphone*

[6] Notice of Proposed Rulemaking and Notice of Inquiry, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, 32 FCC Rcd 3330 (2017).

Ass'n, 12 FCC Rcd 14191, ¶ 31 (1997).[7] As the FCC reiterated in the *Order* under review here, "an effective prohibition occurs where a state or local legal requirement materially inhibits a provider's ability to engage in any of a variety of activities related to its provision of a covered service." ER017 (*Order* ¶ 37).

In 2009, the FCC also addressed § 332's requirement that state and local governments must act on applications to site facilities "within a reasonable period of time," 47 U.S.C. § 332(c)(7)(B)(ii), and imposed on state and local governments "shot clocks" for the siting of wireless facilities. *See generally* Declaratory Ruling, *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review*, 24 FCC Rcd 13994, ¶¶ 32-53 (2009) ("*2009 Declaratory Ruling*"); ER217-18 (*NPRM* ¶ 8). Shot clocks are presumptively reasonable periods of time within which the state or local government must grant or deny an application to site a facility. The FCC imposed a 90-day shot clock for acting on applications to install a wireless facility on an existing structure and a 150-day shot clock for acting on all other applications. *See 2009 Declaratory*

[7] *California Payphone* interpreted the phrase "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service" in § 253(a), 47 U.S.C. § 253(a). *California Payphone* ¶ 31. In the *Order* under review here, the FCC held that, "consistent with the basic canon of statutory interpretation that identical words appearing in neighboring provisions of the same statute generally should be interpreted to have the same meaning," the phrase "prohibit or have the effect of prohibiting" has the same meaning in § 332(c)(7)(B)(i)(II). ER016 (*Order* ¶ 36).

Ruling ¶ 45. Failure to grant or deny an application within those time frames creates a rebuttable presumption that the state or local authority violated the requirement to respond in a reasonable time. *See id.* ¶¶ 42, 44. In that event, the applicant may seek relief from a court, such as an order granting the application, unless the state or local government justifies the delay. *See id.* ¶¶ 37-38.

In 2012, Congress passed the Middle Class Tax Relief and Job Creation Act; Title VI of that Act is known as the Spectrum Act. Section 6409 of the Spectrum Act states that "a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station." 47 U.S.C. § 1455(a). In 2014, the FCC imposed a 60-day shot clock on state and local governments to review applications to modify existing towers and base stations under § 6409 of the Spectrum Act. *See* Report and Order, *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd 12865, ¶¶ 215-221 (2014) ("*2014 Wireless Infrastructure Order*"). Thus, the *2009 Declaratory Ruling* created shot clocks for siting wireless facilities on existing or new structures, and the *2014 Wireless Infrastructure Order* created a special shot clock for modifying existing wireless towers.

The FCC simultaneously imposed a "deemed granted" remedy for violating those § 6409 shot clocks. *See id.* ¶¶ 226-236. The FCC explained that the

"deemed granted" remedy was justified because the Spectrum Act did not permit the local zoning authority to "withhold[] a decision on an application indefinitely." *Id.* ¶ 227. Rather, permitting a state or local government to withhold a decision indefinitely "would be tantamount to denying it" "even if an applicant can seek relief in court or in another tribunal." *Id.* The *2014 Wireless Infrastructure Order* was affirmed on appeal. *See Montgomery Cty. v. FCC*, 811 F.3d 121, 127-29 (4th Cir. 2015) ("[T]he 'deemed granted' procedure provides a remedy to ensure that states do not circumvent statutory requirements by failing to act upon applications.").

C. The Notice of Proposed Rulemaking.

Recognizing the economic importance of small cell deployments, on April 21, 2017, the FCC issued a Notice of Proposed Rulemaking and Notice of Inquiry to consider revising its 2009 rules in light of new developments in technology and the years of experience that had been gained in administering the rules since they were adopted. *See* ER214-73. The FCC noted that, "[b]ecause providers will need to deploy large numbers of wireless cell sites to meet the country's wireless broadband needs and implement next generation technologies, there is an urgent need to remove any unnecessary barriers to such deployment." ER215 (*NPRM* ¶ 2). As relevant here, the FCC sought comment on "potential measures or clarifications intended to expedite" state and local government review under § 332,

and on whether it should adopt a deemed granted remedy for any application a state or local government fails to act on before expiration of the applicable shot clock. ER216, ER218 (*NPRM* ¶¶ 4, 9); *see also* ER217 (*NPRM* ¶ 6) (seeking comments on "whether those measures [proposed] are likely to be effective in further reducing unnecessary and potentially impermissible delays and burdens on wireless infrastructure deployment associated with State and local siting review processes").

The FCC identified three sources of legal authority to impose the deemed granted remedy and invited comment on the benefits and detriments of each option. *See* ER218 (*NPRM* ¶ 9).

First, the FCC proposed ruling that "our determination of the reasonable time frame for action (*i.e.*, the applicable shot clock deadline) would set an absolute limit that—in the event of a failure to act—results in a deemed grant." ER218 (*NPRM* ¶ 10). The FCC "s[aw] no reason to continue adhering to the cautious approach [in the *2009 Declaratory Ruling*] that Section 332(c)(7) indicates Congressional intent that courts should have the sole responsibility to fashion remedies on a case specific basis." ER218-19 (*NPRM* ¶ 11) (alterations omitted). The FCC also agreed with the Fifth Circuit that § 332(c) allows for "dispositive maximum[] [time frames] that may be deemed reasonable as applied to specified categories of applications." ER219 (*NPRM* ¶ 12) (discussing *City of*

Arlington v. FCC, 668 F.3d 229, 255 (5th Cir. 2012), *aff'd*, 569 U.S. 290 (2013)). And it posited that § 332(c)(7) was similar to § 6409 the Spectrum Act, 47 U.S.C. § 1455, which governs modifications to existing facilities on towers and for which the Fourth Circuit had already affirmed a deemed granted remedy for failure to act on an application. *See* ER219 (*NPRM* ¶ 13) (discussing *Montgomery County*); *see also Alliance for Cmty. Media v. FCC*, 529 F.3d 763, 778-80 (6th Cir. 2008) (approving "temporary interim franchises as a remedy for a [cable franchising authority]'s failure to comply with the applicable time frame" to address a franchise application).

Second, the FCC sought comment on whether, "if a locality fails to meet its obligation under Section 332(c)(7)(B)(ii) to 'act on a request for authorization to place, construct, or modify personal wireless facilities within a reasonable period of time,' then its 'authority over decisions concerning' that request lapses," resulting in a deemed grant. ER220 (*NPRM* ¶ 14) (alteration omitted).

Third, the FCC sought comment on whether "Sections 201(b) and 303(r), as well as other statutory provisions, [which] generally authorize the Commission to adopt rules or issue other orders to carry out the substantive provisions of the Communications Act," provide authority for the FCC to "promulgate a 'deemed granted' rule to implement Section 332(c)(7)." ER220 (*NPRM* ¶ 15).

D. The September *Order*.

After receiving extensive comments, including comments stressing the need for a deemed granted remedy to ensure that providers could timely bring the benefits of 5G to consumers around the country,[8] the FCC issued the *Order* on September 27, 2018.[9]

The FCC found that many state and local authorities imposed barriers to the provision of services, including moratoria on placements, excessive fees, arbitrary "aesthetic standards" used to prevent the placement of facilities, and extended delays in reviewing applications. *See* ER009-11 (*Order* ¶¶ 25-26).

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[8] Petitioners Sprint, Verizon, Puerto Rico Telephone Company, and AT&T all provided comments. *See* ER321-32 (Cmts. of Sprint Corp.); ER333-38 (Cmts. of Verizon); ER274-84 (Cmts. of AT&T); ER357-59 (Reply Cmts. of Verizon); ER353-56 (Reply Cmts. of Puerto Rico Telephone Co.); ER351-52 (Reply Cmts. of AT&T).

[9] The *Order* was not the FCC's only effort to address the issues presented by small cell deployment. In March 2018, the FCC issued an order finding that the limited impact of these sites meant that they did not require environmental or historical review under the National Environmental Policy Act of 1969 or the National Historic Preservation Act. *See* Second Report and Order, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, FCC 18-30 (2018), *petition for review pending sub nom. United Keetoowah Band of Cherokee Indians in Okla. v. FCC*, No. 18-1129 (D.C. Cir.) (oral argument held Mar. 15, 2019). In August 2018, the FCC adopted an order dealing primarily with utility poles; the FCC also held that locally imposed moratoria on granting applications constitute a prohibition under § 253(a). *See* Third Report and Order and Declaratory Ruling, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Rcd 7705 (2018) (FCC 18-111) ("*August Order*"). The *August Order* is currently before this Court. *See City of Portland v. United States*, No. 18-72689 (9th Cir.); *American Elec. Power Serv. Corp. v. FCC*, No. 19-70490 (9th Cir.).

The FCC documented many examples of extended and unwarranted delays in reviewing applications. The FCC credited:

- T-Mobile's comments reporting that "roughly 30% of all its recently proposed sites . . . involve cases where the locality failed to act in violation of the shot clocks" and that "a community in Colorado and one in California have lengthy pre-application processes for all small cell installations that include notification to all nearby households, a public meeting, and the preparation of a report, none of which these jurisdictions view as triggering a shot clock," ER010-11 (*Order* ¶ 26 & n.55);

- The comments of the Wireless Infrastructure Association ("WIA") reporting that "70% of [one member's] applications . . . exceeded the 90-day shot clock for installation . . . on an existing utility pole, and 47% exceeded the 150-day shot clock for the construction of new towers," and that a different "member reports that the wireless siting approval process exceeds 90 days in more than 33% of jurisdictions it surveyed and exceeds 150 days in 25% of surveyed jurisdictions," ER010-11 (*Order* ¶ 26 & nn.55-56);

- The WIA members' comments that they "ha[d] experienced delays ranging from one to three years in multiple jurisdictions," ER011 (*Order* ¶ 26 n.56); and

- Lightower Fiber Networks' comments that "average processing timeframes [for its applications] have increased from 300 days in 2016 to approximately 570 days in 2017" and that "forty-six separate jurisdictions in the last two years had taken longer than 150 days to consider applications, with twelve of those jurisdictions—representing 101 small wireless facilities—taking more than a year," ER011 (*Order* ¶ 26 & n.60).

The FCC further cited examples of inordinate delays in processing specific applications. *See* ER010 (*Order* ¶ 26 & n.55). General Communication, Inc. experienced a nine-month delay for one Alaska application; AT&T experienced an

800-day delay for one California application; Crown Castle experienced a three-year delay for one application and approximately two years and 20 meetings for another; and Sprint experienced a *five-year* delay for one application.[10]

Beyond what the FCC specifically noted in the *Order*, the record was replete with other examples: ExteNet Systems, Inc. reported that "nearly half of all [100] surveyed communities failed to act within the longest possible 'reasonable' period of time allowed by the . . . shot clock." ER310-11 (Cmts. of ExteNet Systems at 5-6) (emphasis omitted). Verizon noted that "carriers continue to experience delays in deploying small cells primarily because local zoning processes developed for larger, 'macro' towers have not been updated to account for the smaller profile and limited effects of small cells." ER338 (Cmts. of Verizon at 35). Sprint observed that shot clocks are ineffective when a state or local government imposes a *de facto* moratorium while updating policies, because a lawsuit to enforce the shot clock undermines the provider's ability to negotiate the updated policies. *See* ER330-31 (Cmts. of Sprint at 41-42). And CTIA highlighted that the judicial remedy for some shot clock violations was simply to force the applicant to wait on the locality again. *See* ER293 (Cmts. of CTIA at 9) (citing *NextG Networks of*

[10] *See* ER317-18 (Cmts. of General Communication, Inc. at 5-6); ER345-46 (Cmts. of WIA at 8-9); *Crown Castle NG E., Inc. v. Town of Greenburgh*, No. 12-CV-6157 (CS), 2013 WL 3357169 (S.D.N.Y. July 3, 2013), *aff'd*, 552 F. App'x 47 (2d Cir. 2014); *Sprint Spectrum L.P. v. Zoning Bd. of Adjustment of Borough of Paramus*, 21 F. Supp. 3d 381 (D.N.J. 2014), *aff'd*, 606 F. App'x 669 (3d Cir. 2015).

N.Y., Inc. v. City of New York, No. 03-cv-9672 (RMB), 2004 WL 2884308 (S.D.N.Y. Dec. 10, 2004)).

Based on T-Mobile's data showing that state and local governments fail to act on 30% of applications and the fact that by 2026 there could be 800,000 small cell deployments, the FCC predicted "240,000 violations [of the shot clocks] in 2026." ER065-66 (*Order* ¶ 126). If WIA's estimate that 70% of applications are not acted upon within the relevant shot clock period is used, that number grows to 560,000 violations. *See* ER066 (*Order* ¶ 126 n.364). The FCC therefore concluded that "[t]hese sheer numbers [of violations] would render it practically impossible to commence Section 332(c)(7)(B)(v) cases for all violations, and litigation costs for such cases likely would be prohibitive and could virtually bar providers from deploying wireless facilities." ER066 (*Order* ¶ 126).

Finding that state and local governments had the capability to approve or deny an application to site a small cell in less time than the shot clocks that were adopted in 2009 for all types of wireless facilities, the *Order* shortened the shot clocks specific to small cell wireless facilities: 60 days for reviewing an application to attach a small cell to an existing structure and 90 days for reviewing an application to attach a small cell using a new structure. *See* ER055 (*Order* ¶¶ 104-105); *see also* 47 C.F.R. § 1.6002(*l*) (defining "Small wireless facilities" or small cells). The *Order* also ruled that failure to meet the shot clocks was not only

a presumptive failure to act within a reasonable period of time in violation of § 332(c)(7)(B)(ii), but also a presumptive prohibition on the provision of personal wireless service in violation of § 332(c)(7)(B)(i)(II). *See* ER005 (*Order* ¶ 13).

However, notwithstanding the evidence that unwarranted delays in approving applications persist under the 2009 shot clocks and the magnitude of judicial actions necessary to remedy them, the FCC did not adopt a deemed granted remedy. Instead, it maintained the status quo of requiring providers to seek judicial relief to compel state and local governments to act on applications after expiration of the shot clocks. The FCC did not deny that it could lawfully impose the deemed granted remedy, as it had indicated it could in the *NPRM*. *See* ER066 (*Order* ¶ 128) ("[T]here may be merit in the argument made by some commenters that the FCC has the authority to adopt a deemed granted remedy."). Rather, the FCC stated that it believed the deemed granted remedy to be unnecessary because it "expect[ed] that [its] decision . . . will result in localities addressing applications within the applicable shot clocks in a far greater number of cases." ER067 (*Order* ¶ 129). The FCC also assumed that, in the "few cases where litigation commences, [its] decision makes clear the burden that localities would need to clear in those circumstances" and that courts can use the *Order* "to decide failure-to-act cases expeditiously and avoid delays in reaching final dispositions." ER067 (*Order* ¶ 129). The FCC further noted that not imposing

the deemed granted remedy "should prevent situations in which a siting authority would feel compelled to summarily deny an application instead of evaluating its merits within the applicable shot clock period" by giving the state and local governments "the opportunity to demonstrate exceptional circumstances." ER068 (*Order* ¶ 130); *see also* ER066 (*Order* ¶ 127) (asserting that requiring judicial action would "temper[]" state and local governments' "concerns about the inflexibility of" the "deemed granted" remedy and "accounts for the breadth of potentially unforeseen circumstances that individual localities may face and the possibility that additional review time may be needed in truly exceptional circumstances").

These timely petitions for review followed.

STANDARD OF REVIEW

An agency's decision shall be set aside if its conclusions are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency must have "examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) ("*EPSA*") (alterations omitted). Additionally, "[a]n 'unexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from

agency practice.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)) (alteration omitted).

SUMMARY OF ARGUMENT

I. The FCC's failure to impose the deemed granted remedy for violations of the small cell shot clocks is arbitrary and capricious because it bears no rational connection to the facts the agency itself found. The record evidence that the FCC credited showed that there could be hundreds of thousands of violations of the shot clocks in the coming years, and the FCC acknowledged that pursuing litigation for each of those violations would be practically impossible and could bar providers from deploying new wireless facilities. ER065-66 (*Order* ¶ 126). Even assuming that the *Order*'s much-needed reforms to small cell shot clocks and other barriers to deployment prevent vast numbers of shot clock violations, there will still be thousands upon thousands of violations of the shot clocks, each potentially requiring judicial intervention.

The FCC's reasons for limiting applicants to a judicial remedy for shot clock violations do not withstand scrutiny. Shot clocks for wireless facility applications have existed in some form since 2009, but state and local governments have failed to comply between 30% and 70% of the time. The fact that the *Order* purports to assist courts in deciding the legal issues surrounding a shot clock violation case

does not offset the burden imposed by the sheer number of cases that will need to be filed to remedy shot clock violations, nor does it account for the fact that state and local governments will seek to demonstrate that their delay was justified on the allegedly extraordinary facts presented to them. *See* ER068 (*Order* ¶ 130).

II. The FCC's failure to explain why it did not impose the same deemed granted remedy for violations of the § 332 small cell shot clocks that it had previously imposed for violations of the Spectrum Act shot clocks was likewise arbitrary and unlawful. When the FCC imposed the deemed granted remedy for violations of the Spectrum Act's shot clocks, both the FCC and the Fourth Circuit noted that the Spectrum Act did not permit state and local governments to prohibit deployment by delay. The same is true of § 332, which requires action in a reasonable time and prohibits failing to act on an application. *See* 47 U.S.C. § 332(c)(7)(B)(ii), (v). Indeed, the FCC noted that there is "no meaningful difference in processing" § 6409 and small cell applications, further demonstrating that there is no reason to have different remedies for shot clocks depending on whether they were issued under § 332 of the Communications Act or § 6409 of the Spectrum Act. ER057-58 (*Order* ¶ 108).

ARGUMENT

I. The FCC's Failure To Impose the Deemed Granted Remedy Is Arbitrary and Capricious Because It Runs Counter to the Evidence the FCC Itself Acknowledged.

A. The FCC's failure to impose the deemed granted remedy cannot be reconciled with its own factual findings and the other facts in the record.

The FCC correctly summarized the scale of the issue before it: "Estimates indicate that deployments of small cells could reach up to 150,000 in 2018 and nearly 800,000 by 2026. If, for example, 30 percent . . . of these expected deployments are not acted upon within the applicable shot clock period, that would translate to 45,000 violations [of the shot clocks] in 2018 and 240,000 violations in 2026." ER065-66 (*Order* ¶ 126). "These numbers would escalate under [the] estimate that 70 percent of small cell deployment applications exceed the applicable shot clock." ER066 (*Order* ¶ 126 n.364). The "sheer numbers" of violations "would render it practically impossible" and "prohibitive[ly]" expensive to bring enough actions against state and local governments "and could virtually bar providers from deploying wireless facilities." ER066 (*Order* ¶ 126).

Indeed, the number of violations potentially leading to litigation could exceed the number of civil cases filed in all federal district courts *combined* in 2018. *See* Admin. Office for U.S. Courts, *U.S. District Courts—Combined Civil*

and Criminal Federal Court Management Statistics 1 (Dec. 2018).[11] The FCC correctly concluded that forcing applicants to litigate that many expected shot clock violations is likely to materially limit the introduction of 5G service. *See* ER066 (*Order* ¶ 126).

The deemed granted remedy proposed in the *NPRM* was the logical solution to the problem correctly identified by the FCC. Shot clocks have existed since the FCC's *2009 Declaratory Ruling*, and (other than for facilities covered by § 6409 of the Spectrum Act) the remedy for exceeding a shot clock during this time has been for a provider to seek judicial relief. As the *Order* acknowledges, that remedy for shot clock violations has not been effective in many cases, even without the greater volume of applications that will come with 5G deployments. *See* ER065-66 (*Order* ¶ 126 & n.364). Even if the new shot clocks will ameliorate some of the problems with the prior shot clocks—and even if they do so substantially—that still leaves thousands upon thousands of violations that could be remedied only through litigation. Those violations will cause further deployment delays, with the attendant loss of the public-interest benefits from 5G that the FCC itself stressed, and will create a substantial burden on the courts. Using the estimates the FCC cited, even if there is 95% compliance with the new shot clocks, the remaining

[11] *See* https://www.uscourts.gov/sites/default/files/fcms_na_distprofile 1231.2018.pdf (reporting 278,721 civil cases filed in 2018).

violations would lead to more than 40,000 violations by 2026 that could require court resolution. And that assumes that it is feasible to address shot clock violations by going to court—something that the record revealed is not always the case. *See* ER330-31 (Cmts. of Sprint at 41-42) (bringing lawsuits undermines a provider's ability to negotiate with governments); ER293 (Cmts. of CTIA at 9) (citing *NextG Networks* as an example of a lawsuit resulting merely in an order for the provider to go back to the government for more process).

A deemed granted remedy would obviate these concerns. There would be no need for litigation if the state or local government fails to comply with its statutory obligations; rather, in that circumstance, the "applications are granted . . . by operation of federal law." *Montgomery Cty.*, 811 F.3d at 129.[12] As the *Order* acknowledges, the deemed granted remedy has a proven track record of eliminating needless litigation both at the state level, *see* ER066 (*Order* ¶ 127 & n.369), and in the context of § 6409 at the federal level, *see* ER007 (*Order* ¶ 20); *see also* ER217-18 (*NPRM* ¶¶ 8-9 & n.14).

Despite this overwhelming record evidence of the need for a deemed granted remedy, the FCC did not impose such a remedy. Instead, the FCC interpreted

[12] Although there is no need to file a lawsuit under a deemed granted remedy, applicants may still elect to "initiate a declaratory judgment action to seek 'some form of judicial imprimatur' for an application that has been deemed granted." *Montgomery Cty.*, 811 F.3d at 129.

§ 332(c)(7)(B)(i)(II)'s "prohibit or have the effect of prohibiting" language to mean that a failure to act within the period specified by the relevant shot clock "presumptively ha[s] the effect of unlawfully prohibiting service." ER062 (*Order* ¶ 119). Put differently, when a state or local government violates the new shot clocks, an applicant may now seek a court order that the government has violated § 332(c)(7)(B)(ii) *and* § 332(c)(7)(B)(i)(II), as opposed to just § 332(c)(7)(B)(ii), but, critically, the fact of a violation and the remedy for it remain unchanged.

The FCC's reasons for declining to impose the deemed granted remedy—thus requiring potentially many thousands of federal court cases for providers to vindicate their rights—do not withstand scrutiny. None provides the required "'satisfactory explanation for its action, including a rational connection between the facts found and the choice made.'" *EPSA*, 136 S. Ct. at 782 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (alteration omitted).

First, the FCC believes that "the limited instances in which a locality does not issue a decision within that time period will result in an increase in cases where the locality then issues all needed permits" because the *Order* "makes clear the burden that localities would need to clear in those circumstances." ER067 (*Order* ¶ 129). That does not make sense. The FCC imposed two shot clocks in 2009, and the consequences of violating the 2009 shot clocks and the revised rules are the

same: a rebuttable presumption that the state or local government violated § 332(c)(7)(B) that must be confirmed by filing a judicial proceeding. *See 2009 Declaratory Ruling* ¶¶ 42, 44; ER061-62 (*Order* ¶¶ 117-119). Yet, as the *Order* establishes, notwithstanding this rebuttable presumption and the availability of judicial remedies, state and local governments already were failing to comply with the shot clocks between 30% and 70% of the time. *See* ER065-66 (*Order* ¶ 126 & n.364). The FCC offers no reason why its revised shot clocks should be expected to achieve a markedly different result, given that the consequences for state and local governments are the same.

Second, the FCC states that the *Order* would "help courts to decide failure-to-act cases expeditiously and avoid delays in reaching final dispositions." ER067 (*Order* ¶ 129). Even if true, that explanation does not address the sheer number of cases that would have to be filed, which, even if substantially reduced, could be in the tens of thousands. The burden on the courts and parties of so many cases would be extraordinary, even if they are handled promptly. What is more, state and local governments that exceed the shot clock period are bound to seek "the opportunity to demonstrate exceptional circumstances" before the courts that the *Order* cites as a reason not to adopt the deemed granted remedy. ER068 (*Order* ¶ 130). There is no basis to believe that fact development to demonstrate such circumstances, if allowed by the courts, will be handled substantially more

expeditiously because of the FCC's additional guidance as to how courts should weigh the facts.

Third, the FCC stated that continuing the rebuttable presumption of a violation of § 332(c)(7)(B) would avoid the outcome "that siting agencies would be forced to reject applications" to avoid violating shot clocks. ER068 (*Order* ¶ 130). Even putting aside the FCC's assumption that state and local governments would act in bad faith, this reasoning ignores that § 332 requires a rejection to "be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). The absence of such reasoned decisions would be a red flag to any reviewing body that the state or local government had not truly acted on the application as required. Moreover, as the FCC has found, delay *is* a form of prohibition, such that there is little difference between a siting agency improperly rejecting an application to avoid a shot clock violation and continuing to hold the application past the shot clock expiration while waiting for judicial action. *See* ER061 (*Order* ¶ 118) ("State or local inaction by the end of the Small Wireless Facility shot clock will function not only as a Section 332(c)(7)(B)(v) failure to act but also amount to a presumptive prohibition on the provision of personal wireless services within the meaning of Section 332(c)(7)(B)(i)(II).").

B. This Court's and other courts of appeals' decisions demonstrate that the FCC acted arbitrarily and capriciously.

The Court should conclude that the FCC's failure to provide the full measure of relief was arbitrary, as it and other courts of appeals have in prior agency cases. For instance, in *Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d 1015 (9th Cir. 2011), this Court reversed the U.S. Fish and Wildlife Service's decision to remove the grizzly bear from the list of threatened species. *Id.* at 1030. In that case, the agency had concluded that a projected decline in a key food source for the bears would not threaten their population, but the Court noted that the agency itself had also concluded that there was a "well-documented association" between the food source and grizzly bear mortality, such as by forcing bears closer to human interaction in search of food. *Id.* at 1025. The Court thus rejected the agency's bases for discounting the impact of the food source's decline on grizzly bears as, among other things, incompatible with the agency's own findings. *See id.* at 1026-28.

Similarly, in *Humane Society of the United States v. Locke*, 626 F.3d 1040 (9th Cir. 2010), this Court overturned part of a National Marine Fisheries Service order authorizing the killing of sea lions in order to protect salmon fishery stocks. *Id.* at 1044, 1048. The agency had previously found that salmon populations would survive limited commercial fishing without the need to kill sea lions, "in apparent conflict with [the agency's] finding in this case that sea lions responsible

for less or comparable salmonid mortality [as the commercial fishing] have a significant negative impact on the decline or recovery of these same populations." *Id.* at 1049. The agency could not "avoid its duty to confront th[o]se inconsistencies by blinding itself to them." *Id.* at 1051.

And in *Sloan v. Department of Housing & Urban Development*, 231 F.3d 10 (D.C. Cir. 2000), the agency had suspended contractors for improper waste disposal; after a hearing, however, the agency terminated the suspensions on an ongoing basis but declined to grant the full remedy sought by the suspended contractors of retroactively voiding the suspensions. *Id.* at 11. At the hearing, the agency dropped one charge, the administrative law judge ("ALJ") dismissed another charge for lack of evidence, and the third charge did not justify the contractors' suspensions. *Id.* at 16. Thus, the ALJ "rejected the [agency]'s case seeking debarment." *Id.* at 14. The D.C. Circuit held that, because the agency found that the record did not support suspensions, taking only the half-measure of ending the suspensions on an ongoing basis but not voiding them retroactively "fail[ed] to articulate a satisfactory explanation for the agency's action including a rational connection between the facts found and the choice made." *Id.* at 15 (alteration omitted). Accordingly, the court reversed the agency's failure to void the suspensions retroactively. *Id.* at 19.

The principle of these cases—that an agency conclusion must be consistent with its own record and factual findings—applies here. The facts that the FCC itself accepted demonstrate that the absence of the deemed granted remedy will lead to thousands of lawsuits, imposing enormous costs on wireless providers and the judiciary. It was arbitrary and capricious for the FCC not to impose the full remedy that the record and its own findings require.

II. The FCC's Decision Not To Adopt a Deemed Granted Remedy Runs Counter to Its Prior Decision Regarding the Spectrum Act.

The FCC's failure to adopt a deemed granted remedy under § 332 of the Communications Act is inconsistent with its prior adoption of that same remedy under § 6409 of the Spectrum Act, which also governs applications to install certain wireless facilities. "Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars*, 136 S. Ct. at 2125; *see also Rapoport v. SEC*, 682 F.3d 98, 104 (D.C. Cir. 2012) ("[A]gencies must apply their rules consistently. They may not depart from their precedent without explaining why."). The FCC, however, has failed to explain why it declined to adopt the same remedy for a violation of the § 332 shot clocks that it previously adopted for a violation of shot clocks imposed under § 6409 of the Spectrum Act. "An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *California Pub. Utils.*

Comm'n v. FERC, 879 F.3d 966, 977 (9th Cir. 2018) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

The FCC has previously recognized the need to enforce shot clocks with a deemed granted remedy. For applications subject to § 6409 of the Spectrum Act—those to "modif[y] an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station," 47 U.S.C. § 1455(a)—the FCC in 2014 concluded that the statute did not permit the local zoning authority to "withhold[] a decision on an application indefinitely." *2014 Wireless Infrastructure Order* ¶ 227. Permitting a state or local government to withhold decision indefinitely—*i.e.*, delay—"would be tantamount to denying" the application, notwithstanding that the applicant could seek judicial relief. *Id.* The Fourth Circuit affirmed the FCC's order and, in so doing, acknowledged that the deemed granted remedy "ensure[s] that states do not circumvent statutory requirements *by failing to act upon applications*." *Montgomery Cty.*, 811 F.3d at 128 (emphasis added).

There is no reason to reach a different result here in the § 332 small cells context. Section 6409 and § 332(c)(7)(B) use similar terminology: § 6409 says that state and local governments "may not deny, and shall approve," applications, 47 U.S.C. § 1455(a)(1), while § 332(c)(7)(B)(ii) states that state and local governments "shall act on any request . . . within a reasonable period of time,"

id. § 332(c)(7)(B)(ii). Both provisions, moreover, are designed to prevent governments from "failing to act upon applications." *Montgomery Cty.*, 811 F.3d at 128; *see also* 47 U.S.C. § 332(c)(7)(B)(v) (permitting an applicant to seek judicial action after a "failure to act"). In all events, the FCC did not suggest that it lacked statutory authority to impose the same result here that it did under § 6409 of the Spectrum Act, and thus it cannot defend its decision on that basis here. *See Louisiana Pac. Corp., W. Div. v. NLRB*, 52 F.3d 255, 259 (9th Cir. 1995) ("[a] reviewing court 'must judge the propriety of agency action solely by the grounds invoked by the agency' ") (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947)) (alteration omitted).

There is also no factual basis on which to reach a different result in the context of § 332. Both small cells and wireless facilities subject to § 6409 have a minimal impact on the surrounding environment. The FCC acknowledged that there is "no meaningful difference in processing these [§ 6409] applications than processing Section 332 collocation applications." ER057 (*Order* ¶ 108). The record likewise supports that conclusion. *See* ER282-84 (Cmts. of AT&T at 25-27); ER292-93 (Cmts. of CTIA at 8-9); ER349 (Cmts. of WIA at 21).

In *Encino Motorcars*, the Supreme Court held that the Department of Labor acted arbitrarily and capriciously in departing from a previously stated position without adequate explanation. *See* 136 S. Ct. at 2126. There, at least, the agency

recognized that it was departing from its prior decision, even if it failed to justify its decision. *See id.* Here, by contrast, the FCC did not even acknowledge that it was departing from its reasoning in the *2014 Wireless Infrastructure Order*, let alone explain its decision. To the contrary, the *Order* suggests that there should be no departure from its prior decision because there is "no meaningful difference in processing" the two types of applications. ER057 (*Order* ¶ 108). Thus, by failing to explain why it took an inconsistent approach for two materially similar statutes, the FCC acted arbitrarily and capriciously. *See Encino Motorcars*, 136 S. Ct. at 2126; *cf. National Ass'n of Cas. & Sur. Agents v. Board of Governors of Fed. Reserve Sys.*, 856 F.2d 282, 287 (D.C. Cir. 1988) (an agency can construe two companion clauses differently provided it gives a reasonable explanation).

CONCLUSION

The Court should find that the FCC acted arbitrarily and capriciously and remand to the FCC with instructions to reconsider the imposition of the deemed granted remedy.

Respectfully submitted,

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All other parties on whose behalf this filing is submitted concur in its content. *See* Cir. R. 25-5(e).

June 10, 2019

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, counsel state that, in addition to the 12 consolidated cases whose case numbers are identified on the cover of this brief challenging the FCC's Declaratory Ruling and Third Report and Order, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Rcd 9088 (2018), there are two cases pending in this Court challenging the FCC's Third Report and Order and Declaratory Ruling, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Rcd 7705 (FCC 18-111) (2018), in the same administrative docket:

- *City of Portland v. FCC*, No. 18-72689 (9th Cir.); and
- *American Elec. Power Serv. Corp. v. FCC*, No. 19-70145 (9th Cir.).

Counsel are not presently aware of any other cases raising the same or closely related issues pending before this Court.

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CERTIFICATE OF COMPLIANCE PURSUANT TO NINTH CIRCUIT RULE 32-1

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned certifies that this brief complies with the applicable type-volume limitation permitted by Ninth Circuit Rule 32-1. This brief was prepared in Times New Roman 14-point font and complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), as well as the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6).

Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 7,992 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Office Word 2013) used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be filed electronically 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 on June 10, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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STATUTORY ADDENDUM

1. 47 U.S.C. § 332 provides in pertinent part:

§ 332. Mobile services

* * *

(c) Regulatory treatment of mobile services

* * *

(7) Preservation of local zoning authority

(A) General Authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The 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.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph—

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

2. 47 U.S.C. § 1455 provides in pertinent part:

§ 1455. Wireless facilities deployment

(a) Facility modifications

(1) In general

Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104-104) or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.

(2) Eligible facilities request

For purposes of this subsection, the term "eligible facilities request" means any request for modification of an existing wireless tower or base station that involves—

(A) collocation of new transmission equipment;

(B) removal of transmission equipment; or

(C) replacement of transmission equipment.

* * *