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

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INTRODUCTION AND SUMMARY OF ARGUMENT

Small wireless facilities or "small cells" are the backbone of next-generation, "5G" wireless service. Wireless providers must install hundreds of thousands of them to provide this transformational technology. WP Br.[1] 6-8; WPER025[2] (*Order*[3] ¶ 47), WPER336-37 (Cmts. of Verizon at 4-5). Federal law prohibits state and local governments from prohibiting or effectively prohibiting the provision of wireless service and requires that applications to site small cells be decided within a reasonable period of time. *See* 47 U.S.C. § 332(c)(7)(B)(i)(II), (ii).

A decade ago, the Federal Communications Commission ("FCC" or "Commission") adopted "shot clocks"—presumptively reasonable periods of time for a state or local government to grant or deny an application—to ensure that state and local authorities timely processed applications to deploy wireless facilities.

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[1] Joint Opening Br. for Pet'rs Sprint Corp.; Verizon Commc'ns Inc.; Puerto Rico Tel. Co., Inc.; & AT&T Servs., Inc., *Sprint Corp. v. FCC*, No. 19-70123, Dkt. 73 (June 10, 2019).

[2] Citations to WPER___ refer to the Joint Excerpts of R. for Pet'rs Sprint Corp.; Verizon Commc'ns Inc.; Puerto Rico Tel. Co., Inc.; & AT&T Servs., Inc., *Sprint Corp. v. FCC*, Dkt. 74-1 & 74-2 (June 10, 2019).

[3] 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), WPER001-116. The *Order* has been referred to as the "*September Order*" or "*Small Cell Order*" by the other parties to these consolidated appeals.

WP Br. 10-11. The FCC, however, found in the *Order* under review that violations of the shot clocks are rampant. "[T]he record in this proceeding demonstrates that many local siting authorities are not complying with [the FCC's] existing Section 332 shot clock rules." WPER010 (*Order* ¶ 26). An established way to provide prompt, sure relief in the case of a shot clock violation is to deem requests granted when siting authorities fail to announce a decision before the expiration of the shot clock time period. Nevertheless, the FCC did not impose a deemed granted remedy.

I. The FCC's failure to impose the deemed granted remedy is arbitrary and capricious because it is "in apparent conflict with [its] finding[s] in this case." *Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1049 (9th Cir. 2010); WP Br. 23-28. The FCC estimated that small cell deployments could reach 800,000 by 2026. WPER065 (*Order* ¶ 126). As the Commission stated, "[i]f, for example, 30 percent . . . of these expected deployments are not acted upon within the applicable shot clock period, that would translate to . . . 240,000 violations." WPER065-66 (*Order* ¶ 126). And the FCC found that the "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." WPER066 (*Order* ¶ 126). The deemed granted remedy would avoid the "prohibitive" costs of filing

the thousands upon thousands of lawsuits to remedy predicted shot clock violations.

The arguments in the FCC's brief do not justify the agency's failure to take that action. The FCC primarily contends that the *Order* will reduce shot clock violations. But, using the same numbers the FCC relied upon, even a 95% compliance rate could lead to 40,000 shot clock violations by 2026—5% of 800,000 deployments—requiring an enormous number of court cases before providers can roll out the facilities needed to provide 5G service. *See* WPER065 (*Order* ¶ 126).

The FCC attempts to discount the additional burden of filing this extraordinary number of lawsuits, asserting that it "contemplate[s] that [a] carrier[] still could need to initiate a declaratory judgment" even under the deemed granted remedy, and that shot clock violations will be easier to prove after the *Order*. FCC Br.[4] 111-12. But the very nature of the deemed granted remedy is that it never *requires* a wireless provider to bring a lawsuit (which is why the FCC says only that a provider "could" still need to file a suit), whereas the current remedy for shot clock violations does. And the fact that shot clock cases may be easier to prove does not make the costs associated with filing them any less a disincentive to deployment.

[4] Br. for Resp'ts, *Sprint Corp. v. FCC*, Dkt. 134 (Aug. 8, 2019).

II. The FCC also failed to "provide a reasoned explanation" in the *Order* for why it declined to impose the deemed granted remedy for the new small cell shot clocks when it imposed the deemed granted remedy for violations of shot clocks adopted under § 6409 of the Spectrum Act, 47 U.S.C. § 1455. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016); WP Br. 31-34. Both the new small cell shot clocks and the § 6409 shot clocks are designed to prevent governments from "failing to act upon applications," *Montgomery Cty. v. FCC*, 811 F.3d 121, 128 (4th Cir. 2015), and there is "no meaningful difference in processing [§ 6409] applications than processing Section 332 collocation applications," WPER057 (*Order* ¶ 108).

Neither the FCC nor the Local Government Intervenors can justify the departure. They argue that § 6409 of the Spectrum Act and § 332 of the Communications Act are worded differently, and that the types of facilities subject to the two statutes are different. But both statutes include language requiring action by state and local governments, and both are designed to prevent delays in deployments. In any event, this justification does not appear in the *Order*, so the Court should at least remand for the FCC to provide an explanation.

ARGUMENT

I. The FCC's Failure To Impose the Deemed Granted Remedy Runs Counter to the Evidence the FCC Itself Acknowledged.

In defending its failure to impose the deemed granted remedy, the FCC fails to come to terms with its own findings regarding both (1) the predicted number of shot clock violations and (2) the burden of filing lawsuits to address those violations. The Wireless Petitioners agree with the FCC (at 110) that the shot clocks implemented in 2009 have been effective in some cases and that the *Order* will prompt localities to improve their compliance. However, the question here is whether, given the magnitude of small cell deployments, the shot clock remedy will be sufficiently powerful to avoid effectively prohibiting wireless providers from offering service. On that question, the FCC's decision not to impose a deemed granted remedy cannot be squared with its own conclusions.

In particular, the FCC never comes to terms with the scale of the problem its own *Order* identifies. The FCC predicted that there could be as many as 560,000 shot clock violations before the changes. WPER065-66 (*Order* ¶ 126 & n.364), WPER010 (*Order* ¶ 26 n.55) (noting one of WIA's members reports 70% of its applications were not decided within the shot clock periods). Thus, the FCC's primary argument before this Court—that its *Order* will provide "substantial relief" and lead to fewer violations, FCC Br. 111—is not a justification at all:

Even assuming vast improvements in compliance with the shot clocks there will still be tens of thousands of violations requiring court intervention. WP Br. 23-25.

Absent the deemed granted remedy, wireless providers—and federal courts—will still bear an enormous burden of filing and hearing numerous lawsuits to remedy the tens of thousands of violations that will persist notwithstanding the *Order*'s improvements to the shot clocks. The FCC itself found that, without the *Order*'s improvements to the shot clocks, there could be 240,000 violations (or more) by 2026. WPER065-66 (*Order* ¶ 126 & n.364). And it concluded that "[t]h[o]se sheer numbers would render it practically impossible to commence Section 332(c)(7)(B)(v) cases for all violations," and called the corresponding legal costs "likely . . . *prohibitive and* [*a*] *virtual*[ ] *bar* [*to*] *providers . . . deploying wireless facilities.*" WPER066 (*Order* ¶ 126) (emphasis added). Even if compliance with shot clocks rises to 95% (from 30% to 70%), the 40,000 remaining violations requiring litigation to remedy would be an extraordinary burden on wireless providers and the federal courts that the FCC itself has recognized can be a "virtual[ ] bar" to deployment.

To be sure, the FCC suggests to this Court (at 111-12) that filing many thousands of lawsuits will not be a burden because the *Order* clarifies the shot clocks so well that courts will "expeditiously" decide those cases. But, even if courts can decide cases rapidly (which, of course, requires prompt action from

busy federal courts), financial burdens to wireless providers remain. Further, the *Order* acknowledges that state and local governments may attempt to justify their failure to meet the shot clock as reasonable under the circumstances, WPER068 (*Order* ¶ 130), which can and will lead to substantial delay.

The deemed granted remedy, in contrast, does not impose the burden of filing lawsuits on wireless providers and the courts. There would be no need for litigation when a state or local government fails to comply with its statutory obligation to decide an application in a reasonable time because the "applications [would be] granted . . . by operation of federal law." *Montgomery Cty.*, 811 F.3d at 129. And the *Order* itself acknowledges that the deemed granted remedy has a proven track record of eliminating needless litigation at the state and federal level. WPER007 (*Order* ¶ 20), WPER066 (*Order* ¶ 127 & n.369).

The FCC notes briefly (at 111) that lawsuits are "contemplated" even under the deemed granted remedy. But the FCC conflates lawsuits that *must* be filed with lawsuits that *may* be filed. Without the deemed granted remedy, wireless providers must file thousands of lawsuits to remedy shot clock violations. With the deemed granted remedy, wireless providers may choose to file a lawsuit to confirm their rights, but they are not forced to incur that cost. *See Montgomery Cty.*, 811 F.3d at 129 ("[T]he Order *permits* applicants to initiate a declaratory judgment action to seek 'some form of judicial imprimatur' for an application that

has been deemed granted," but the "applications are granted only by operation of federal law.") (emphasis added). Because the deemed granted remedy would alleviate the burden on providers and the courts of bringing thousands upon thousands of lawsuits, the FCC acted arbitrarily and capriciously in failing to impose it.

II. Declining To Impose the Deemed Granted Remedy Departs from the FCC's Prior, Analogous Decision.

Although the FCC has previously imposed the deemed granted remedy for violations of shot clocks adopted under § 6409 of the Spectrum Act, it failed do so here for violations of shot clocks for small cells adopted under § 332 of the Communications Act. Its failure to explain why it treated those two types of shot clocks differently was arbitrary and capricious. WP Br. 31-34.

The FCC and Local Government Intervenors attempt before this Court to justify this failure by arguing that § 6409 of the Spectrum Act is worded differently from § 332 of the Communications Act, justifying different treatment, and that the types of facilities to be sited under the two statutory provisions are different, further justifying different treatment. *See* FCC Br. 112-13; LGI Br.[5] 8-10, 14. These justifications appear nowhere in the *Order* and, accordingly, cannot support the FCC's actions here. *See Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015) ("[A]

[5] Br. of Loc. Gov't Intervenors in Supp. of Resp'ts, *Sprint Corp. v. FCC*, Dkt. 136 (Aug. 14, 2019).

court may uphold agency action only on the grounds that the agency invoked when it took the action.") (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("*Chenery I*"); *Louisiana-Pac. Corp., W. Div. v. NLRB*, 52 F.3d 255, 259 (9th Cir. 1995) (similar). The Court should thus, at the least, remand the matter to the FCC for an explanation.[6]

In any event, the argument fails on the merits. *First*, the alleged differences between the texts of § 6409 of the Spectrum Act and § 332 of the Communications

[6] The Court should likewise defer ruling on the Local Government Intervenors' other statutory and constitutional arguments until the Commission has an opportunity to address them for the first time on remand. The Local Government Intervenors argue (at 3-10, 14-17) that neither the text of the Communications Act nor the Constitution permits the FCC to impose the deemed granted remedy for violations of the shot clocks. But the *Order* expressly states that the Commission "d[id] not find it necessary to decide th[e] issue" of its legal authority to impose the deemed granted remedy, although it observed that "there may be merit in the argument" that it has that authority. WPER066 (*Order* ¶ 128).

This Court should decline to address an argument expressly not passed on by the FCC and urged only by intervenors. *See GTE Serv. Corp. v. FCC*, 782 F.2d 263, 273 n.11 (D.C. Cir. 1986) (refusing to consider arguments raised by intervenors and not passed on by the agency, including a Fifth Amendment taking argument, on the basis that "[a]ffirmance on any of these grounds would in any event run contrary to the venerable principle of [*Chenery I*] that an agency's decision must be upheld, if at all, on the rationale advanced by the agency"). That the FCC expressly declined to reach the legal issues the Local Government Intervenors press distinguishes this case from *Railway Labor Executives' Ass'n v. ICC*, 784 F.2d 959 (9th Cir. 1986), where the Court considered an argument raised solely by an intervenor regarding the scope of the agency's legal authority. In that case, the agency "ha[d] long interpreted" the statute as granting it that legal authority. *Id.* at 970. Here, however, where the Commission has not previously addressed the issue definitively, the Court should allow the FCC to consider the arguments in the first instance on remand.

Act are not substantive. Section 6409 of the Spectrum Act says that state and local governments "may not deny, and shall approve," covered applications. 47 U.S.C. § 1455(a)(1). Section 332 says that state and local governments "shall act on any request . . . within a reasonable period of time." *Id.* § 332(c)(7)(B)(ii). Each statute contains mandatory language requiring *action* by a state or local government, *Service Emps. Int'l Union v. United States*, 598 F.3d 1110, 1113 (9th Cir. 2010) ("The word 'shall' is ordinarily 'The language of command.'"), and both are designed to prevent governments from "failing to act upon applications." *Montgomery Cty.*, 811 F.3d at 128; 47 U.S.C. § 332(c)(7)(B)(v).

Moreover, the FCC's rationale for implementing shot clocks for § 6409 applications in the *2014 Wireless Infrastructure Order*[7] mirrors its findings in the *Order* regarding delay: Permitting a state or local government to withhold decision indefinitely "would be tantamount to denying" the application. *Id.* ¶ 227. And, in the *Order*, the FCC ruled that unreasonable delays constituted an effective prohibition on the provision of wireless service. WPER005 (*Order* ¶ 13). At the very least, these commonalities required the FCC to explain why it reached a different conclusion here despite the very similar statutory language.

[7] Report and Order, *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd 12865 (2014).

Second, the FCC's and Local Government Intervenors' argument that wireless facilities subject to the new small cell shot clocks are different from wireless facilities subject to the § 6409 shot clocks is inconsistent with the FCC's own findings. The FCC held in the *Order* that there is "no meaningful difference in processing [§ 6409] applications than processing Section 332 collocation applications." WPER057 (*Order* ¶ 108). Similarly, although both the FCC and Local Government Intervenors attempt to justify different shot clock remedies on the basis that the § 6409 shot clocks apply to a narrower class of wireless facilities, FCC Br. 113; LGI Br. 13-14, that justification appears nowhere in the *Order* and is inconsistent with the FCC's focus on the significant public interest in shortening the time periods to act on applications for small-cell facilities in particular. WPER055 (*Order* ¶ 105) ("These new Section 332 shot clocks carefully balance the well-established authority that states and local authorities have over review of wireless siting applications with the requirements of Section 332(c)(7)(ii) to exercise that authority 'within a reasonable period of time . . . taking into account the nature and scope of the request.'") (ellipses in original); WPER056 (*Order* ¶ 106) ("We find compelling reasons to establish a new presumptively reasonable Section 332 shot clock of 60 days for collocations of Small Wireless Facilities on

existing structures. The record demonstrates the need for, and reasonableness of, expediting the siting review of these collocations.").[8]

[8] The Local Government Intervenors also argue that there has been no change in policy because the FCC did not impose the deemed granted remedy in the 2009 Declaratory Ruling, *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review*, 24 FCC Rcd 13994, establishing the first wireless facility shot clocks. But the relevant policy change is the policy articulated more recently in the *2014 Wireless Infrastructure Order*, imposing the deemed granted remedy for § 6409 shot clocks.

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).

September 4, 2019

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 2877 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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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 September 4, 2019.

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