

No. 18-72689, 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

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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CITY OF PORTLAND,

Petitioner,

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Intervenors,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

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SPRINT CORPORATION,

Petitioner,

CITY OF BOWIE, MARYLAND, et al.,

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,

Respondents.

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AMICUS BRIEF OF THE STATE OF OREGON, SUPPORTING  
PETITIONER LOCAL GOVERNMENTS' JOINT OPENING BRIEF AND  
SUPPORTING REVERSAL OF THE FCC RULINGS AT ISSUE

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On Petitions for Review of Orders of the  
Federal Communications Commission

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## AMICUS BRIEF OF STATE OF OREGON

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### STATEMENT OF OREGON'S INTEREST IN THE CASE

The State of Oregon submits this brief to support the arguments in Petitioner Local Governments' Joint Opening Brief. *See* Fed. R. App. R. 29(2) (authorizing a State to file an amicus brief without the parties' consent or the court's leave). This brief focuses on the ruling, in the FCC's *Small Cell Order*, that state and local governments—when providing right-of-way access to wireless providers—may recover costs but may not obtain fair-market value.

The ruling eliminates the federal statutory right to “fair and reasonable compensation” and would reduce funding for Oregon roads. Moreover, the ruling places the State in a quandary, as Oregon law and the Federal Highway Administration *require* the State to seek fair-market value.

### SUMMARY OF ARGUMENT

As petitioner Local Governments note, section 253(c) of the Telecommunications Act of 1996 recognizes state and local government authority to require “fair and reasonable compensation” from telecommunications providers who use public rights of way. The Local Governments also correctly observe that a government's interest in its rights of way is more than commercial: When a government develops and maintains a right of way, its primary purpose is to enhance safe and efficient transportation.

Oregon agrees with the Local Governments that obtaining fair-market value from wireless providers who receive and use right-of-way access—for purposes other than enhancing traffic safety or efficiency—qualifies as fair and reasonable compensation.

In light of state and local governmental interests in their rights of way, it is not surprising that Oregon law and Federal Highway Administration regulations (discussed in greater detail below) require Oregon to obtain fair-market value when granting right-of-way access. Those requirements constitute further evidence that the FCC’s *Small Cell Order*, by limiting state and local governments to recovering costs, conflicts with traditional understandings of fair and reasonable compensation.

As this court assesses whether the *Small Cell Order* conflicts with Congressional intent, it also should bear in mind the order’s practical impact. There is a significant difference between (1) a state or local government’s ability to obtain fair-market value for right-of-way access and (2) its “costs” in providing access. The FCC ruling, if upheld, would reduce revenues for road improvements significantly.

## **ARGUMENT**

The Telecommunications Act of 1996 preserved “the authority of a State or local government \* \* \* to require fair and reasonable compensation from

telecommunications providers \* \* \* for use of public rights-of-way.” 47 U.S.C. § 253(c). Yet paragraphs 50 and 79 of the FCC’s *Small Cell Order* construe the Telecommunications Act as prohibiting state and local governments from recovering more than their costs when providing right-of-way access to wireless providers. The State of Oregon supports the Local Governments’ argument that the *Small Cell Order*, by restricting state and local governments to their costs, denies them “fair and reasonable compensation” and thereby conflicts with Congressional intent. (Pet. Br. 56-65).

**A. State and federal law require Oregon to obtain fair-market value when granting right-of-way access.**

The Local Governments correctly note that “the interests served by public rights-of-way”—“ensuring safe and efficient vehicular and pedestrian traffic”—are more than commercial. (Pet. Br. 111). When a government develops and maintains a right of way, its primary purpose is safe and efficient transportation. When a government grants right-of-way access to wireless providers, those providers generally are not going to be using that access to enhance traffic safety or efficiency. Their use may, in fact, conflict with those goals. Accordingly, obtaining fair-market value in exchange for right-of-way access has been traditionally recognized by state and federal law as fair and reasonable compensation for that access.

Both Oregon law and Federal Highway Administration regulations *require* Oregon to obtain fair-market value when granting right-of-way access. Those requirements implicitly recognize the principle identified above: Because right-of-way access generally will not advance a state or local government’s safety and traffic-efficiency goals, fair-market-value compensation is appropriate, fair, and reasonable.

Under Oregon statutes, highway property is part of the state “highway fund”; the Oregon Department of Transportation may let others use that property only if doing so will “best serve the interests of the state” *and* “most adequately conserve highway funds.” *See* Or. Rev. Stat. § 366.395(1) and (2) (authorizing department to “sell, lease, exchange or otherwise dispose of such real or personal property” in its custody, but only if doing so “will best serve the interests of the state and will most adequately conserve highway funds or the department’s account or fund for the real or personal property”).<sup>1</sup>

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<sup>1</sup> Oregon statutes identify the “State Highway Fund” as a “trust fund.” Or. Rev. Stat. § 366.505(2). The pertinent statutory scheme recognizes the Oregon Department of Transportation as akin to that fund’s trustee. *See Oregon Trucking Associations, Inc. v. Department of Transportation*, 364 Or. 210, 227-29, 432 P.3d 1080 (2019) (“[g]iven that [the Department of Transportation] holds and may dispose of trust property, the parties agree that that [its] role as a trustee may be implied”).

Moreover, Article IX, section 3a, of the Oregon Constitution—whose current text was approved by Oregon voters in 1980—“is intended, in large part, to prevent the highway fund from being raided for non-highway purposes and diminished in the absence of a corresponding benefit to state highways.” *Oregon Trucking Associations*, 364 Or. at 231. The State thus may let others use the highway fund—including real property that the Department of Transportation controls—only if it receives a “corresponding benefit to state highways.” Put differently, the Oregon Constitution allows the State to let others use highway property only in exchange for fair-market value. *See* 2010 WL 3517953 (Or. A.G.) (Oregon Attorney General Opinion concluding that, although “DMV records are assets of the Highway Fund,” “Article IX, section 3a, \* \* \* does not prohibit [the Oregon Department of Transportation] from selling [the Oregon Department of Administrative Services] an exclusive license to provide electronic access to certain driver records, so long as [the Department of Transportation] receives fair value for that license”).<sup>2</sup>

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<sup>2</sup> A claim that the State has failed to fulfill its legal obligation to obtain fair-market value may be enforced in Oregon courts. *See Oregon Trucking Associations*, 364 Or. at 210-31 (in which plaintiffs argued that Oregon Department of Transportation violated Or. Rev. Stat. § 366.395, Or. Rev. Stat. § 366.505, and Article IX, § 3a, of the Oregon Constitution, when granting license to another state agency to use highway fund assets).

Other jurisdictions impose similar restraints. As the Local Governments point out, at least eight other state constitutions can be construed as requiring fair-market-value compensation for highway use or access. (*See* Pet. Br. 107 and n. 48, citing Arizona, California, Michigan, New York, New Mexico, North Dakota, Texas, and Washington Constitutions).

Furthermore, when a state or local government used federal highway funds to benefit their “real property interests,” the Federal Highway Administration requires those governments to charge “fair market value” to others seeking to use such properties. *See* 23 C.F.R. § 710.403(e) (“[c]urrent fair market value must be charged for the use or disposal of all real property interests if those real property interests were obtained with title 23, United States Code funding”). That provision is significant to the State of Oregon, which has used federal highway funds for virtually all its highways. *See also* [www.oregon.gov/ODOT/About/Pages/Transportation-Funding.aspx](http://www.oregon.gov/ODOT/About/Pages/Transportation-Funding.aspx) (noting that 23 percent of the Oregon Department of Transportation’s \$5.3 billion in revenue during the 2017-19 biennium is “from the federal government”).<sup>3</sup>

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<sup>3</sup> Although a state or local government could try to invoke the “public interest” exception to the fair-market-value requirement, the state or local government bears the burden of showing that the exception applies. *See* 23 C.F.R. § 710.403(e)(1) (“[e]xceptions to the requirement for charging fair market value must be submitted to FHWA in writing and may be approved by FHWA . . . [w]hen the grantee shows that an exception is in the overall public

*Footnote continued...*

The fair-market-value requirements in Oregon law and in 23 C.F.R. § 710.403 implicitly recognize that granting highway or right-of-way access generally will not advance a state or local government's safety and traffic-efficiency goals. Those requirements constitute further evidence that fair-market value for such access is fair and reasonable compensation. The *Small Cell Order*, by limiting state and local governments to recovering their costs when granting right-of-way access to wireless providers, modifies traditional state and federal concepts of fair and reasonable compensation, and conflicts with existing state and federal law.

**B. The *Small Cell Order*'s practical impact is significant, and supports the notion that the order conflicts with traditional notions of fair and reasonable compensation.**

As this court assesses whether the *Small Cell Order* deprives state and local governments of their right to fair and reasonable compensation, it should bear in mind the order's practical impact. There is a significant difference between (1) a state or local government's ability to obtain fair-market value for right-of-way access and (2) its "costs" in providing access.

For example, the Oregon Department of Transportation has informed the Oregon Attorney General that data from 11 Oregon municipalities shows that

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(...continued)

interest based on social, environmental, or economic benefits, or is for a nonproprietary governmental use").

nine of them have been charging “per attachment” fees, for Small Wireless Facilities, that reflect fair-market value. Those per-attachment fees range from \$750 to \$2400—that is, they range from \$490 to \$2,130 *above* the amount that the *Small Cell Order* identifies as the presumptively reasonable costs of permitting each such attachment. *See Small Cell Order*, ¶ 79 (identifying presumptively reasonable costs of \$270 for such attachments). The available data further suggests that those municipalities can expect to receive hundreds of attachment applications over the next twelve months. The significance of that potential revenue loss underscores Oregon’s interest in having this court clarify whether the *Small Cell Order* preempts other state and federal requirements.

And, as the Local Governments note, Oregon is not alone in being subject to a state or local law that requires it to obtain fair-market value when granting right-of-way access. (Pet. Br. 107 and n. 48).

State and local laws that require fair-market-value compensation for right-of-way access reflect their citizens’ perceptions of their common interest in maintaining their transportation infrastructures and promoting traffic safety and efficiency. *See, e.g.*, Or. Rev. Stat. § 184.615(1) and (2)(a) (creating Oregon Department of Transportation and assigning it “duties and responsibilities concerning drivers and motor vehicles \* \* \* and transportation safety”). They thus reflect state and local citizens’ assessments of the value that

should be attached to their roads and rights of way. Those assessments, and the practical impact of the FCC ruling on those roads, are pertinent to whether the ruling—in allowing state and local governments to recover costs alone when giving wireless providers right-of-way access—impairs state and local governments’ ability to obtain fair and reasonable compensation.

### CONCLUSION

Fair-market value for right-of-way access has traditionally qualified as fair and reasonable compensation. The FCC’s *Small Cell Order*, by prohibiting state and local governments from obtaining such compensation, conflicts with 47 U.S.C. § 253(c), and places the State of Oregon and others in a legal quandary.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7), Federal Rules of Appellate Procedure, I certify that the Amicus Brief of the State of Oregon is proportionately spaced, has a typeface of 14 points or more and contains 1,838 words.

DATED: June 17, 2019

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U.S.C.A. No. 18-72689, 19-70123

STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6, Circuit Rules of the United States Court of Appeals for the Ninth Circuit, the undersigned, counsel of record for Amicus, certifies that he has no knowledge of any related cases pending in this court.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that on June 17, 2019, I directed the Amicus Brief of the State of Oregon to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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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