

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-1240 (L) (Cons. No. 15-1284)

MONTGOMERY COUNTY, MARYLAND, et al.,
Petitioners and Supporting Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,
Respondents;

CTIA - THE WIRELESS ASSOCIATION, et al.,
Intervenors.

**UNOPPOSED MOTION OF LEAGUE OF CALIFORNIA CITIES,
CALIFORNIA STATE ASSOCIATION OF COUNTIES,
LEAGUE OF OREGON CITIES, AND SCAN NATOA, INC.
FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF
PETITION FOR REHEARING AND REHEARING *EN BANC***

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of Counties, League of Oregon Cities, and SCAN NATOA, Inc.

- 4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
If yes, identify entity and nature of interest:

Corporate entities engaged in building and leasing wireless towers and base stations; providers of commercial mobile radio and similar services; and owners of towers that could support antennas have a direct financial interest in the outcome of the proceedings either as service providers, or as lessors of structures. See lists of entities in Attachment 1.

- 5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

- 6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Javan N. Rad

Date: April 30, 2015

Counsel for: Amici Curiae

CERTIFICATE OF SERVICE

I certify that on April 30, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Javan N. Rad
(signature)

April 30, 2015
(date)

ATTACHMENT 1 TO AMICI CURIAE'S DISCLOSURE STATEMENT

Based on the service list for this matter at the FCC, we believe the following entities would have a direct financial interest in the outcome of this proceeding.

1. AT&T Services, Inc.
2. Cox Communications, Inc.
3. Crown Castle
4. ExteNet Systems, Inc.
5. Fibertech Networks, LLC
6. QUALCOMM Incorporated
7. Rama Communications, Inc.
8. Sprint Corporation
9. Steel in the Air, Inc.
10. T-Mobile USA, Inc.
11. Towerstream Corporation
12. Verizon and Verizon Wireless

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Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, and to assist the Court in resolving the issues in this case, the League of California Cities (the “California League”), California State Association of Counties (“CSAC”), League of Oregon Cities (the “Oregon League”), and SCAN NATOA, Inc. (collectively “*Amici*”) move for leave to participate as *amici curiae* at this stage of the case, and to file the accompanying brief in support of Petitioners’ Petition for Rehearing and Rehearing *En Banc*.

This motion is unopposed. Counsel for *amici* contacted counsel for all parties to request consent to filing an *amicus curiae* brief in support of the Petition for Rehearing and Rehearing *En Banc*. All parties have consented to this request.

The *amicus curiae* brief addresses two issues. First, the Tenth Amendment question discussed in the panel’s opinion presents a question of exceptional importance, as the challenged action by the Federal Communications Commission (“FCC”) substantially undermines states’ rights in the area of land use control. Second, the Court should grant *en banc* review to secure uniformity of this Court’s decisions over whether to apply the APA standard of review in APA challenges to agency action over a statute administered by the agency.

I.**INTEREST OF *AMICI CURIAE***

Amici, who filed an *amicus curiae* brief before the three-judge panel in this case (Dkt. No. 52), have local government members throughout several states who have a direct interest in the outcome of the pending Petition for Rehearing and Rehearing *En Banc*. *En banc* review is necessary to resolve the exceptionally important issues of federal intrusion into local land use control, especially wireless facilities, and to secure uniformity over the Court's decisions involving the appropriate standard to apply over APA challenges to agency interpretations of statutes. Specific interests of *amici* are set forth below.

The California League is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety and welfare of their residents, and to enhance the quality of life for all Californians. The California League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is

administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The Oregon League, originally founded in 1925, is an intergovernmental entity consisting of Oregon's 242 incorporated cities that was formed to be, among other things, the effective and collective voice of Oregon's cities before the legislative assembly and state and federal courts. The Oregon League has identified this case as being of significance to cities statewide.

SCAN NATOA, Inc., which is the States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors, has a history spanning over 20 years representing the interests of over 300 members consisting primarily of local government telecommunications officers and advisors located in California. SCAN NATOA, Inc. has identified this case as matter of significance to its members.

II.

IMPORTANCE OF AN *AMICUS CURIAE* BRIEF AND ITS RELEVANCE TO THE ISSUE BEFORE THIS COURT

Because of their extensive experience in the area of advocacy on behalf of local government members in policy and legal areas involving wireless facility regulation, including the filing of an *amicus curiae* brief in front of the three-judge panel in this case (Dkt. No. 52), *amici* are able to provide additional local government perspectives to assist the Court in evaluating the consequences and implications of the panel's decision to approve of the FCC's October 17, 2014 Order (the "Order"), which issued rules implementing Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, 47 U.S.C. § 1455(a). Consequently, *amici* believe their participation would be useful to this Court in its consideration of the Petitioners' Petition for Rehearing and Rehearing *En Banc*.

III.**CONCLUSION**

For the reasons stated, *amici* request the Court grant their Unopposed Motion for Leave to File the accompanying *amicus curiae* brief in support of Petitioners.

Respectfully submitted,

Dated: February 8, 2016

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___/s/ Robert C. May III___
Robert C. May III
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Counsel for *Amici Curiae*

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The local government organizations captioned above submit this brief as *amici curiae* pursuant to Rule 29 of the Federal Rules of Appellate Procedure.

Amici's interests are stated in the Motion filed together with this brief.

Additionally, pursuant to Rule 29(c)(5), *Amici* certify that no counsel for a party authored this brief in whole or in part, and no person other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

I.

SUMMARY OF ARGUMENT

The Court should grant *en banc* review of the panel's published opinion (Dkt. No. 87, *Montgomery County v. FCC*, 2015 WL 9261375 (4th Cir. 2015)) for two reasons. First, the opinion presents a Tenth Amendment question of exceptional importance, as the challenged action by the Federal Communications Commission ("FCC") substantially undermines states' rights in the area of land use control. Second, *en banc* review is necessary to secure uniformity of this Court's decisions over whether to apply the APA standard of review in APA challenges to agency action over a statute administered by the agency.

II.

***EN BANC* REVIEW IS NECESSARY TO ADDRESS THE EXCEPTIONALLY IMPORTANT ISSUES OF LOCAL LAND USE CONTROL IN THE TENTH AMENDMENT QUESTION**

The Court should grant *en banc* review to address the anti-commandeering question set forth by Petitioners, because the panel's opinion approves of agency action that severely undermines local land use control. Whether the FCC's Order violates the Tenth Amendment is a critically important question, as the Order limits what would otherwise be quintessential land use regulation. Because of the importance of the Order, which applies to all wireless facility-modification requests covered by Section 6409(a), the Court should grant *en banc* review to review whether the "deemed granted" remedy in the Order violates the Tenth Amendment.

This Court has found that local land use control is a matter of exceptional importance, observing that "federal courts should be extremely reluctant to upset the delicate political balance at play in local land-use disputes." *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63, 68 (4th Cir. 1992). "It is obvious that land use . . . is an area traditionally regulated by the States rather than by Congress, and that land use regulation is one of the historic powers of the States." *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 744 (1995) (citations).

More specific to the issue of local land use control of wireless facilities, one judge of this Court has opined of the importance of the issue as follows:

If a state, county, or town abandoned its local land-use power to regulate the siting of communications facilities, any number of telecommunications towers and other communications facilities could be erected in the midst of residential neighborhoods, next to schools, or in bucolic natural settings such as in the woods or on top of mountains—areas held in high value by most communities. Abandoning land use power in this way would put at risk the property value of every home in the jurisdiction and create the possibility that aesthetic quality of every area in the jurisdiction would be destroyed. The abandonment of land use control for towers is not a viable option for state and local governments.

Petersburg Cellular Partnership v. Board of Supervisors of Nottoway County, 205 F.3d 688, 703 (4th Cir. 2000) (Niemeyer, J.) (“*Petersburg*”).

The panel’s opinion, by approving of an approach where certain wireless facility applications not approved within a 60-day period are “deemed granted” (47 C.F.R. § 1.40001(c)(4)), presents the exact situation feared by Judge Niemeyer in *Petersburg* – forced abandonment of traditionally local land use power, if the 60-day period expires without a decision. For this reason, *en banc* review is necessary to enable this Court to fully address this important anti-commandeering question.

III.

***EN BANC* REVIEW IS NECESSARY TO SECURE UNIFORMITY OF THIS COURT'S DECISIONS ON THE APPROPRIATE STANDARD OF REVIEW OF AN AGENCY'S STATUTORY INTERPRETATION**

This Court should grant the petition because the panel's opinion acknowledged that the Administrative Procedures Act (the "APA") governs, but failed to analyze the FCC's Report and Order dated October 17, 2015 (the "Order") under the standards articulated in the text of the APA. Instead, the panel departed from prior decisions, declined to apply the APA standard, and relied exclusively on *Chevron* deference. The Court should grant *en banc* review because the Court's decisions now send a mixed message on the standards of review to apply in judicial review of agency actions.

Under the APA, courts must "set aside" administrative actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency's decision is arbitrary and capricious under the APA standard if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S.*,

Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). As a separate and distinct legal standard, courts should defer an agency's interpretation of a statute that it administers when (1) an ambiguity leaves a gap for the agency to fill; and (2) the agency's interpretation "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute."

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 845 (1984).

Standards under *Chevron* and the APA sometimes "overlap at the margins," but neither one displaces the other. *Arent v. Shalala*, 70 F.3d 610, 615 (D.C. Cir. 1995).

The panel in this case should have applied the challenge to the FCC's Order under both the APA and *Chevron standards*. As courts have found (with several relying on *Arent*),¹ review under *Chevron* concerns whether and to what extent

¹ See, e.g., *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 117 (1st Cir. 2009) (declining to apply *Chevron* in addition to APA because the claim did not involve interpreting the agency's statutory authority); *N.Y. Pub. Interest Research Grp. v. Whitman*, 321 F.3d 316, 324 (2d Cir. 2003) ("When the question is not one of the agency's authority but of the reasonableness of its actions, the 'arbitrary and capricious' standard of the APA governs."); *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 410 (5th Cir. 1999) (finding review under the APA standard "focuses on the reasonability of the agency's decision-making processes rather than on the reasonability of its interpretation"); *Nat'l Truck Equip. Ass'n v. NHTSA*, 711 F.3d 662, 668 (6th Cir. 2013) (concluding judicial review of whether agency "discharged its delegated authority in a justifiable manner" must be reviewed under the APA standard); *Van Hollen, Jr. v. Fed. Election Comm'n*, 2016 WL 278200, *8 (D.C. Cir. Jan. 21, 2016) (reviewing agency action under both the APA and *Chevron*).

Congress authorized the agency to act, while review under the APA concerns whether the agency acted in an appropriate manner. *See Arent*, 70 F.3d at 615–16.

This Court’s decisions reflect inconsistent application of the APA and *Chevron* standards, in determining whether an agency’s interpretation of a statute it administers withstands a challenge under the APA. For example, in *Satellite Broadcasting and Communications Ass’n v. FCC*, 275 F.3d 337 (4th Cir. 2001), this Court applied *Chevron* to determine whether a statutory interpretation was “not in accordance with law,” and the APA to determine whether the same rule was “arbitrary and capricious.” *See id.* at 369–70. However, in *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009), this Court stated that an informal agency rulemaking “must be reviewed” under the APA’s “arbitrary and capricious” standard, but proceeded to review the agency’s statutory interpretation under *Chevron* alone. *See id.* at 192, 211-216.

The panel’s opinion in this case is thus in conflict with *Satellite Broadcasting and Communications Ass’n* and *Ohio Valley Env. Coal*. Although the Petitioners challenged the FCC’s interpretive rules in the Order as a violation of the APA, the panel’s opinion analyzed the Order under *Chevron* only – despite this Court’s prior decisions requiring review under APA’s standard, even where the *Chevron* standard may also apply, as in *Satellite Broadcasting and Communications Ass’n* and *Ohio Valley Env. Coal*. *En banc* review is necessary to

give parties to agency proceedings guidance on whether to expect subsequent judicial review to involve an analysis of the APA, when a court finds the APA standard applies.

IV.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Rehearing or Rehearing *En Banc*.

Respectfully submitted,

Dated: February 8, 2016

___/s/ Javan N. Rad___
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Chief Assistant City Attorney
City of Pasadena

___/s/ Robert C. May III___
Robert C. May III
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 1447 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).
2. The brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: February 8, 2016

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