Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Verizon Petition for Declaratory Ruling	)	WT Docket No. 19-230
Regarding Fees Charged by Clark County,	)	
Nevada for Small Wireless Facilities	)	

REPLY COMMENTS OF CTIA

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October 10, 2019

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I. INTRODUCTION AND SUMMARY

CTIA respectfully submits these reply comments in support of Verizon's Petition and urges the Commission to preempt Clark County's excessive fees because they violate Section 253 of the Communications Act. The record demonstrates that those fees are impeding Verizon and other wireless companies from providing service within and outside of Clark County. Regardless of whether Verizon and the County resolve their dispute, the Commission must address the underlying illegality of the Clark County fees. Ruling that these fees violate Section 253 will help increase the public's access to advanced wireless services by ensuring that deployments by all providers, both in and outside of Clark County, are not adversely affected by the County's unlawful fees.

The County's fees are not a reasonable approximation of the actual and direct costs of overseeing providers' deployments, as federal law requires. Instead, the fees seek to generate revenues to fund the construction of county-owned facilities. The fees are, accordingly, unlawful.

- The per-site fees are not cost-based because they do not incorporate the varying costs to the County depending on whether a site is county-owned or privately-owned.

- The five percent fee on providers' gross revenues is by definition not tied to the County's costs.
- The County's attempt to collect fees to pay for its own infrastructure projects is without merit. Section 253 allows localities to recover only those costs that are attributable to overseeing *providers'* deployments.

The only two localities opposing preemption, Clark County itself and the City and County of San Francisco, mount an untimely and collateral attack on the Commission's 2018 *Small Cell Declaratory Ruling*.[1] They challenge the Commission's legal rationale supporting its interpretation of Section 253 and repeat unsuccessful arguments they previously made. The Commission must reject these efforts. The court initially hearing the appeal of the *Ruling* denied a stay.[2] The *Ruling* is thus the law, and the Commission should enforce it.

II. PREEMPTING CLARK COUNTY'S EXCESSIVE FEES IS ESSENTIAL TO PROMOTING 5G DEPLOYMENT NATIONWIDE.

Although the Petition in this proceeding addresses a dispute with one jurisdiction, the issues it raises affect other providers and other jurisdictions. In Section 253(a) of the Communications Act, Congress declared that state or local requirements that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service" are unlawful.[3] The various excessive fees Clark County charges for wireless infrastructure deployments are impeding Verizon's service, and accordingly, violate

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[1] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088 (2018) *("Small Cell Declaratory Ruling"* or *"Ruling"*); Opposition of Clark, County, Nevada, WT Docket No. 19-230 (filed Sept. 25, 2019) ("Clark County Opposition"); Comments of the City and County of San Francisco, WT Docket No. 19-230 (filed Sept. 25, 2019) ("San Francisco Comments").

[2] *City of San Jose, California, et al. v. FCC*, No. 18-9568, Order (10th Cir., Jan. 10, 2019) *("City of San Jose Order"*).

[3] 47 U.S.C. § 253(a).

Section 253(a) as well as the Commission's *Small Cell Declaratory Ruling* interpreting that provision.[4]

The record demonstrates that Commission action on Verizon's Petition has both local and nationwide importance. Commenters confirm the Commission's own finding that a locality's fees can impede the availability of service both in the locality and in other markets, in violation of Section 253.[5] For example:

- Crown Castle warns that "exorbitant fees – such as those adopted by Clark County – will hinder the deployment of networks in certain localities. . . . Deployment at rates this high will necessarily hinder the number of small cells that Crown Castle will be able to deploy."[6] Crown Castle explains that Clark County is by far the most populous county in Nevada so the impact of the County's fees "is extremely significant for broadband deployment in the entire state of Nevada."[7]

- ExteNet "like Verizon, [] is adversely affected by Clark County's ordinance,"[8] and by other localities' excessive fees throughout the nation. While Verizon's Petition addresses fees in one jurisdiction, ExteNet explains that "blatant disregard for the standards established in the Commission's [*Ruling*] is prevalent throughout the nation and should be addressed by the Commission in a Declaratory Ruling."[9] ExteNet supplies "myriad examples of municipalities charging exorbitant rates for access to the public rights-of-way that constitute economic barriers to entry in violation of 47 U.S.C. § 253(a) and the Commission's [*Ruling*]," including recurring fees ranging from $1,500 to $3,090 charged by many localities, including in California, Florida, Maryland, Oregon, Pennsylvania, and

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[4] *See* Verizon Petition for Declaratory Ruling, WT Docket No. 19-230 (filed Aug. 8, 2019) ("Verizon Petition"), at 6 (fees "will materially inhibit Verizon's ability to provide telecommunications services over its wireless network"); *id.* at Exhibit 6 (Declaration of Nicholas Magnone ¶¶ 4-5); *Small Cell Declaratory Ruling*, 33 FCC Rcd at 9091 ¶¶ 11, 9113 ¶ 50 ("[F]ees are only permitted to the extent that they are nondiscriminatory and represent a reasonable approximation of the locality's reasonable costs.").

[5] *See Verizon Petition for Declaratory Ruling Regarding Fees Charged by Clark County, Nevada for Small Wireless Facilities*, Order, WT Docket No. 19-230, DA 19-927 ¶ 3 (WTB rel. Sept. 18, 2019) (citing *Small Cell Declaratory Ruling*, 33 FCC Rcd at 9091¶ 11, 9118-20 ¶¶ 60-61).

[6] Comments of Crown Castle International Corp., WT Docket No. 19-230 (filed Sept. 25, 2019) ("Crown Castle Comments"), at 3-4.

[7] *Id.* at 4.

[8] Comments of ExteNet Systems, Inc., WT Docket No. 19-230 (filed Sept. 25, 2019), at 4.

[9] *Id.* at 2.

the District of Columbia.[10] ExteNet also documents that Clark County's revenue-based fee parallels revenue-based fees imposed by cities in Massachusetts and Oregon, despite the Commission's decision that such fees are unlawful.[11]

- T-Mobile states that "the County's recurring fees clearly effectively prohibit the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[12]

- The Competitive Carriers Association ("CCA") cites the Commission's record-based finding that excessive fees "were impeding deployment to the detriment of consumer and 5G deployment goals."[13]

Clark County's unlawfully high fees will have broad impact and therefore warrant Commission preemption, regardless of whether Verizon and Clark County settle their dispute. San Francisco incorrectly claims "there is currently no present controversy between Verizon and Clark County for this Commission to consider," pointing to the willingness of Clark County and Verizon to seek to resolve the controversy.[14] However, the parties' willingness to negotiate is not evidence of the lack of a dispute altogether. Clark County's unlawful fees are in no way rendered "moot" by Verizon's effort to try to resolve their dispute, as San Francisco asserts.[15] The County's ordinance applies broadly to other providers seeking to deploy in the County, not just to Verizon, and deters deployment not only in the County but also in communities across the

[10] *Id.* at 5.

[11] *Id.* at 6.

[12] Comments of T-Mobile USA, Inc., WT Docket No. 19-230 (filed Sept. 25, 2019) ("T-Mobile Comments"), at 8.

[13] Comments of Competitive Carriers Ass'n, WT Docket No. 19-230 (filed Sept. 25, 2019) ("CCA Comments"), at 3.

[14] San Francisco Comments at 2.

[15] *Id.*

country. Any settlement of the specific dispute between Verizon and Clark County would not address the underlying illegality of the ordinance, or its broad, harmful impact.[16]

Industry commenters agree that preempting the ordinance's unlawful fees will give force to the *Small Cell Declaratory Ruling* and expedite the deployment of advanced wireless services by deterring other localities from imposing excessive fees. As T-Mobile concludes, "By preempting the County's unlawful recurring fees, the Commission not only will facilitate the provision by all providers of advanced wireless services, including 5G, to customers in the County – it also will set a meaningful precedent for other similarly-situated localities."[17] U.S. Cellular agrees that granting the Petition "will provide the strongest possible impetus to reasonable and fair agreements between wireless carriers and municipalities," and warns that failure to act "will have the opposite effect, encouraging municipal price gouging from coast to coast, egged on by consultants unconcerned with the common good. More important, the effect of a failure to preempt would be to diminish the scale of 5G deployment nationwide, thus doing harm to the present and future economic position of the United States."[18]

As the record shows, prompt Commission action is necessary to prevent Clark County and other localities throughout the country from charging excessive fees that slow or stop deployments within the locality and beyond, undermining the national priority of broadband and 5G deployment.

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[16] Comments of CTIA, WT Docket No. 19-230 (filed Sept. 25, 2019) ("CTIA Comments"), at 4-5.

[17] T-Mobile Comments at 3.

[18] Comments of United States Cellular Corp., WT Docket No. 19-230 (filed Sept. 25, 2019) ("U.S. Cellular Comments"), at 3.

III. CLARK COUNTY'S FEES ARE NOT COST-BASED, IN VIOLATION OF SECTION 253 AND THE SMALL CELL DECLARATORY RULING.

Both the recurring fees and gross revenue fee that Clark County imposes for use of its rights-of-way violate Section 253 and the Commission's *Small Cell Declaratory Ruling.* All industry commenters agree. T-Mobile, for example, states that the County's fees "materially inhibit the provision of telecommunications services and represent a clear violation of Section 253."[19] CCA calls the County's high fees "a paradigm example of the problem."[20] Clark County responds that it sought to address industry objections to its draft ordinance by making several modifications to it. But those modifications did not change the gravamen of Verizon's Petition: the County's fees are unlawful, and the Commission should preempt them.

A. The County's Annual Recurring Fees Do Not Reflect That Costs to the County Vary Depending on Whether a Site Is Owned by the County or by Another Party.

First, the County's annual recurring fees are not cost-based. Prior to adoption of the Commission's *Small Cell Declaratory Ruling*, the County's consultant, SmartWorks, recommended that the County "capture fair market value for the use of county assets" to fund other "initiatives," and suggested fees ranging from $700 to $3,960.[21] This proposal plainly sought to maximize revenues and fund the County's own projects, and failed to draw any connection between the proposed fees and the County's costs attributable to reviewing wireless providers' deployments. After the Commission adopted the *Small Cell Declaratory Ruling*, SmartWorks removed from the proposal its suggestion that the County maximize revenue and instead offered purported cost justifications, which happened to match the same revenue

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[19] T-Mobile Comments at 1; *see also id.* at 6-9.

[20] CCA Comments at 2.

[21] Verizon Petition, Exhibit 10 at 2.

maximizing fees the consultant included in its prior report. Indeed, the range of recurring fees the County adopted in the ordinance—from $700 to $3,960 annually per site plus a yearly escalator – remain unchanged from SmartWorks' earlier proposal. This is no coincidence. While Clark County protests that it modified its original draft ordinance to address some industry objections,[22] the fees remained unchanged. Clark County's *post-hoc* justification for its fees undermines the County's claim that it developed the fees to recover its costs.[23]

As further evidence that the County's fees are not based on its actual costs, the fees do not vary depending on whether a site is owned by the County or another party. As CTIA previously noted, the County's costs should be substantially lower for a privately-owned site than for a county-owned site, because the County has no structure to maintain in that instance.[24] Other industry commenters, too, noticed this problem; CCA notes that "such differing installations will necessarily impose significantly different costs on the County."[25]

In any event, the County has the burden to establish that its fees are cost-based. The Commission held that "our review of the record, including the many state small cell bills passed to date, indicate that there should be only very limited circumstances in which localities can charge higher fees" than the amounts the Commission found were presumptively reasonable, and that a locality that wanted to charge more must show that such fees nonetheless are a reasonable approximation of costs.[26] Clark County does not meet this burden.

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[22] Clark County Opposition at 16.

[23] Clark County Opposition at 7.

[24] CTIA Comments at 9.

[25] CCA Comments at 5.

[26] *Small Cell Declaratory Ruling,* 33 FCC Rcd at 9130 ¶ 80.

B. The County's Gross Revenues Fee for Right-of-Way Use Is Based on Provider Revenue and Not the County's Costs.

Second, the County's five percent gross revenues fee for ROW use is also unlawful. Courts have invalidated such fees because they are by definition not based on a locality's costs. As the Commission concluded, "[W]e agree with courts that have recognized that gross revenue fees generally are not based on the costs associated with an entity's use of the ROW, and where this is the case, are preempted under Section 253(a)."[27]

Clark County's defense of the gross revenues ROW use fee is meritless. The County asserts that because it assesses service providers a separate "Business License Tax as an exercise of its police powers," it must assess a fee "associated with occupation of the rights-of-way" on infrastructure providers who are not wireless service providers in order to comply with the nondiscrimination obligation of Section 253.[28]

The County twists Section 253 beyond recognition to achieve its desired revenue-generating end. While localities may have authority to impose general taxes under state law, what they charge for rights-of-way use access is limited by Section 253.[29] The County cannot claim (as it does) that the Business License Tax is not a ROW use fee (and thus not limited by Section 253), but then argue that Section 253 requires it to charge others the same fee for ROW use. Either the Business License Tax is a general tax or it is a ROW use tax. If the former, then Section 253 does not require a parallel fee to be imposed on others. But if the tax *is* a ROW use tax, it is unlawful under Section 253 because it is not related to the County's costs to manage the ROW; instead it taxes providers based on their revenues. The County cannot have it both ways.

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[27] *Id.* at 9124-25 ¶ 70; *see* CTIA Comments at 9-10.

[28] Clark County Opposition at 18-19.

[29] *Small Cell Declaratory Ruling*, 33 FCC Rcd at 9124-25 ¶ 70.

Moreover, the County fails to tie the gross revenue fee to its costs for ROW management: the County does not reconcile the revenues it projects to receive from this fee to its expenses to manage providers' deployment of wireless infrastructure. The gross revenue fee should be preempted for that reason alone.

C. The County's Fees Factor in Costs Beyond Those Costs Permitted by Section 253 and the 2018 Small Cell Declaratory Ruling.

Third, the County defends its fees by claiming that they will help to defray its expenditures for deploying fiber and smart poles in the Las Vegas Boulevard district.[30] But the County cannot lawfully compel wireless providers to pay for its own unilaterally undertaken infrastructure and public works project as Section 253 and the Commission's *Ruling* make clear.

Section 253(a) provides that state and local requirements may not prohibit or have the effect of prohibiting telecommunications service, and Section 253(c) permits state and local governments to assess "fair and reasonable" charges as compensation. The *Small Cell Declaratory Ruling* interpreted those provisions to require that state and local fees must be a "reasonable approximation" of the local government's costs. In ascertaining whether a fee meets that test, the Commission explained that "only objectively reasonable costs are factored into those fees."[31] The *Ruling* further clarified that by "costs," the Commission means "those costs specifically related to and caused by the deployment."[32]

Clark County's choice to deploy fiber and smart poles was its own unilateral decision. No wireless provider agreed to defray the costs of that decision. Moreover, the project's costs do not result from any wireless provider's ROW use. Imposing fees on wireless providers to

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[30] Clark County Opposition at 16-17.

[31] *Small Cell Declaratory Ruling,* 33 FCC Rcd at 9113 ¶ 50.

[32] *Id.* at 9113 ¶ 50 n. 131.

recover the project's costs thus violates the central tenet of Section 253 and the *Small Cell Ruling*: fees must be limited to "fair and reasonable compensation" for the County's costs in approving and managing wireless providers' deployments. The County's assumption that it can pass on to wireless providers the costs of its own infrastructure[33] finds no basis in Section 253, and the County offers none. To the contrary, the County's position would undermine Section 253's purpose to limit fees to those that are necessary to recoup a locality's reasonable expenses attributable to industry's deployment.

IV. THE 2018 SMALL CELL DECLARATORY RULING IS THE LAW, AND THE COMMISSION HAS AUTHORITY TO ENFORCE IT.

Much of Clark County's and San Francisco's comments amount to an untimely and improper collateral attack on the Commission's *Ruling*, which do not address the issues raised in Verizon's Petition. Localities asked for a judicial stay of the *Ruling*, but it was denied.[34] The *Ruling* is in effect and is the law. The only question the Commission needs to answer is whether Clark County's fees are "a reasonable approximation of actual and direct costs"[35] specifically related to and caused by Verizon's deployment, and the answer is "no."

The Commission not only has clear authority to enforce the *Ruling*, but also should do so when localities violate it. Failure to exert its authority here would embolden additional localities to impose excessive fees that impede the public's access to the advanced wireless services Verizon and other providers seek to deliver.

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[33] Clark County Opposition at 21-22.

[34] *City of San Jose Order*.

[35] *Ruling*, 33 FCC Rcd at 9115 ¶ 55.

The Commission specifically addressed and rejected in the *Small Cell Declaratory Ruling* the arguments San Francisco and Clark County attempt to make here. Clark County points to Section 253(c) as a "savings clause" that authorizes localities to charge "fair and reasonable compensation."[36] But the *Ruling* specifically addressed the interaction of Sections 253(a) and (c), and correctly interpreted those provisions to prohibit fees that are not based on cost as exceeding "fair and reasonable compensation." Indeed, the Commission clarified that its interpretations whether fees associated with wireless deployment have the effect of prohibiting wireless telecommunications service and "are subject to preemption under Section 253(a), informed by the savings clause in Section 253(c)."[37]

San Francisco also challenges the *Ruling's* confirmation of the "effective prohibition" standard that the Commission had previously adopted for what regulations and requirements "prohibit or have the effect of prohibiting" service and thus violate Section 253(a).[38] San Francisco contends that the Commission instead should have adopted an "actual prohibition" standard.[39] Again, this is neither the time nor place to challenge the *Ruling.* In any event, the Commission's action was consistent with its *California Payphone* ruling and with court decisions interpreting Section 253(a).

San Francisco also resurrects another unsuccessful argument it made in the proceeding leading up to the *Small Cell Declaratory Ruling*: that Section 253 does not apply to fees charged

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[36] Clark County Opposition at 11.

[37] *Ruling,* 33 FCC Rcd at 9113 ¶¶ 50 & n.132; *see also id.* at 9115-16 ¶¶ 55, 9125-28 ¶¶ 71-76.

[38] *See California Payphone Ass'n Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California, Pursuant to Section 253(d) of the Communications Act of 1934,* Memorandum Opinion and Order, 12 FCC Rcd 14191 (1997).

[39] San Francisco Comments at 5-6

for the use of the muni-owned structures in rights-of-way because localities operate such facilities in their "proprietary" interest.[40] At the outset, this argument is defective because it ignores the fact that Clark County's fees apply to *all* wireless infrastructure—whether privately-owned structures or county-owned structures are used. Further, the Commission squarely rejected this argument and grounded its analysis on court precedent. It correctly held that Section 253 does not draw a distinction between a locality's "regulatory" and "proprietary" actions, and in any event a locality's adoption of fees and other requirements for access to the rights-of-way and structures within the rights-of-way clearly constituted regulatory action.[41] As the Wireless Infrastructure Association ("WIA") observes in supporting Verizon's petition, "Consistent [judicial] guidance has stated that state and local governments operate as stewards of the ROW for the public interest, not landlords."[42]

Although San Francisco and the County disagree with the Commission's analysis, their arguments are an untimely attack on the *Ruling*, and are irrelevant to the Commission's decision on Verizon's Petition. The Commission should exert its authority to enforce both the *Ruling* and Section 253 by expediently granting the Petition to deter other localities from imposing excessive fees that impede next-generation wireless deployment.

V. CONCLUSION

The fee provisions in Clark County's ordinance clearly violate Section 253 and the *Small Cell Declaratory Ruling*, and the Commission should quickly grant Verizon's Petition. As U.S.

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[40] *Id.* at 8-10.

[41] *Ruling*, 33 FCC Rcd at 9135-38 ¶¶ 94-97.

[42] Letter from Stephen Keegan, Law Clerk, WIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-230 (filed Sept. 27, 2019) at 2.

Cellular makes clear, "The stakes are high and the FCC should act now."[43] Preempting Clark County's unlawful fees will enforce the language of Section 253 and advance its underlying purposes, which the Commission properly interpreted in its *Ruling*. Preemption will promote the national priority to deploy the next-generation communications infrastructure needed to meet the nation's accelerating demand for 5G and other advanced wireless services.

Respectfully submitted,

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[43] U.S. Cellular Comments at 4.