BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20544

In the Matter of	)	
	)	
Petition for Declaratory Ruling that Clark County, Nevada Ordinance No. 4659 Is Unlawful under Section 253 of the Communications Act as Interpreted by the Federal Communications Commission and Is Preempted	)))))))	WT Docket No. 19-230

REPLY COMMENTS OF VERIZON

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I. INTRODUCTION AND SUMMARY

The Commission should grant Verizon's Petition[1] and find that Clark County, Nevada's recurring fees for wireless carriers' use of the public rights-of-way and attachment to public assets within those rights-of-way in the County's Wireless Communications Facility Ordinance ("Ordinance") are unlawful and are preempted.[2] After Verizon filed its petition, Clark County (alternatively, "the County") contacted Verizon and indicated its willingness to mediate in hopes of reaching an agreement on mutually beneficial terms and conditions, including fees. More recently, the County invited Verizon to participate in settlement discussions beginning earlier this week. Verizon appreciates the County's willingness to discuss such an agreement consistent with federal law. The initial meeting with the County was productive, and Verizon looks forward to continuing the discussions.

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[1] Petition for Declaratory Ruling of Verizon, WT Docket No. 19-230 (Aug. 8, 2019) ("the Petition").

[2] *See* Clark County Code, Title 5, Chapter 5.02 (adopted Jan. 7, 2019, effective July 1, 2019).

Absent a settlement, the Commission should find that the recurring fee provisions in the Ordinance violate Section 253(a) of the Act[3] and are preempted. The recurring fees effectively prohibit the provision of wireless telecommunications services in violation of Section 253(a) because they materially inhibit the provision of telecommunications services by wireless providers to whom the fees are charged. Applying the three-part test adopted by the Commission in its *Small Cell Ruling/Order,*[4] the fees violate Section 253(a) because: (i) they do not reasonably approximate the County's costs related to and caused by a provider's use of the public rights-of-way and other assets; (ii) they consequently are not limited to the County's objectively reasonable costs; and (iii) they are inherently discriminatory.

The opposing comments filed by Clark County[5] and the City and County of San Francisco ("San Francisco")[6] provide no basis to reach a different conclusion. These comments fail to provide a cost analysis that can support fees more than ten times higher than the Commission's presumptively reasonable fee level, fail to address whether the County's purported costs are objectively reasonable and related to and caused by the deployment, fail to address the discriminatory nature of the County's fees, and raise legal issues that largely ignore or are contrary to the *Small Cell Ruling/Order*.

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[3] 47 U.S.C. § 253(a). Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any provider to provide any interstate or intrastate telecommunications service." *Id*.

[4] *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment et al.*, 33 FCC Rcd. 9088 (2018) ("*Small Cell Ruling/Order*") at ¶ 50. While the *Small Cell Ruling/Order* is under appeal, it is fully effective and the request for judicial stay of the *Small Cell Ruling/Order* was denied. *See City of San Jose, California, et al., and City of New York v. FCC,* Order, No. 18-9568 (10th Cir., Jan. 10, 2019).

[5] Opposition of Clark County, Nevada, WT Docket No. 19-230 (Sep. 25, 2019) ("Clark County Opposition").

[6] Comments of the City and County of San Francisco, WT Docket No. 19-230 (Sep. 25, 2019) ("San Francisco Comments").

For these reasons, the Commission should use its authority under Section 253(d) of the Act[7] to find that Clark County's recurring fees are unlawful and preempted. The Commission should also declare that Clark County may not charge recurring fees to Verizon that exceed the presumptively reasonable annual rate of $270, as set forth in the *Small Cell Ruling/Order*.

II. THE RECURRING FEES IN THE ORDINANCE ARE UNLAWFUL

In the Petition, Verizon established that the recurring fees in the Ordinance have the effect of prohibiting service under Section 253(a) and the *Small Cell Ruling/Order*.[8] In that ruling, the Commission reaffirmed its interpretation of common language in Section 253 and Section 332(c)(7)[9] of the Communications Act, finding that "a state or local legal requirement will have the effect of prohibiting wireless telecommunications services if it materially inhibits the provision of such services."[10]

The Commission interpreted Section 253 and Section 332(c)(7) to provide that state and local government fees and other charges related to the deployment of facilities used to provide

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[7] 47 U.S.C. § 253(d). Section 253(d) provides that, "[i]f … the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency." *Id*.

[8] The majority of commenters join Verizon in arguing that the recurring fees in the Ordinance are unlawful under Section 253. *See* Comments of the Competitive Carriers Association, WT Docket No. 19-230 (Sep. 25, 2019) at 5-6; Comments of Crown Castle International Corp., WT Docket No. 19-230 (Sep. 25, 2019) ("Crown Castle Comments") at 5-8; Comments of CTIA, WT Docket No. 19-230 (Sep. 25, 2019) ("CTIA Comments") at 5-10; Comments of ExteNet Systems, Inc., WT Docket No. 19-230 (Sep. 25, 2019) ("ExteNet Comments") at 4-5; Comments of T-Mobile, WT Docket No. 19-230 (Sep. 25, 2019) at 6-9; Comments of United States Cellular Corporation, WT Docket No. 19-230 (Sep. 25, 2019) ("USCC Comments") at 2-3; Letter from Steven Keegan, WIA – The Wireless Infrastructure Association, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-230 (Sep. 27, 2019) at 2-3.

[9] 47 U.S.C. § 332(c)(7).

[10] *Small Cell Ruling/Order*, ¶ 37.

telecommunications services must satisfy three conditions: (1) the fees are a reasonable approximation of costs,[11] (2) those costs are objectively reasonable, and (3) the fees are non-discriminatory.[12] To aid both providers and state and local governments and minimize disputes, the Commission also adopted a presumption that an annual fee of $270 per small wireless facility for "all recurring fees, including any possible ROW access fee or fee for attachment to municipally-owned structures in the ROW," in combination, would likely not violate Section 253.[13]

The Ordinance, on its face, violates the Commission's rulings. It requires wireless providers to pay a number of recurring fees – totally unrelated to costs – for deploying small wireless facilities in the public rights-of-way.[14] First, a wireless provider must obtain a wireless site license approval and pay a recurring fee for each small wireless facility deployed in the public rights-of-way or on other public assets.[15] These fees range from $700 to $3960 per small wireless facility per year, based on the district in which the facility is located.[16] In addition, beginning July 1, 2020, this fee is subject to an automatic annual increase of two percent (2%) of the prior year's fee.[17]

Second, a wireless provider must obtain a master wireless use license agreement with the County that governs "a licensee's construction, installation, and operation of wireless

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[11] The Commission made clear that costs refer to incremental costs "related to and caused by the deployment." *Id.,* n.131.

[12] *Id.*, ¶ 50.

[13] *Id.*, ¶¶ 78-80.

[14] Clark County Code, Title 5, Chapter 5.02, *et. seq*.

[15] Clark County Code, Title 5, Chapter 5.02.080.

[16] Clark County Code, Title 5, Chapter 5.02.080, 5.02.210(b), and 5.02.210(e).

[17] *See, e.g.*, Clark County Code, Title 5, Chapter 5.02.080(a).

communications facilities in the County's rights-of-way or on municipal facilities."[18] To acquire and maintain the master use license agreement, a wireless provider must pay recurring fees of five percent (5%) of gross revenues collected by the provider.[19] This fee purportedly "compensate[s] the county for a licensee's entry upon and deployment of equipment within the ROW or on any municipal facilities."[20] The Code explains that the gross revenue-based use fee is not required if the provider already pays a business license fee based on gross revenues pursuant to the applicable business licensing provisions of County Code Title 6.[21] Verizon already pays a business license fee of more than $1,000,000 annually to the County. Because the County accepts the wireless business license fee in lieu of the gross revenues-based use fee for right-of-way access, the business license fee is a fee imposed by the County for the wireless provider's use of the public rights-of-way.

Third, the Ordinance requires an additional charge of at least $500 per site for an annual inspection of small wireless facilities installed in public rights-of-way.[22] Although described as an annual inspection, the Ordinance permits inspections to be conducted more frequently should the County believe there is "a reasonable basis for additional inspections," thus creating the possibility that the annual inspection fees will be higher.[23]

These recurring fees, individually and in sum, are wholly unrelated to the County's costs and violate Section 253(a). The recurring fees far exceed the presumptively reasonable fee

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[18] Clark County Code, Title 5, Chapter 5.02.030.230, 5.02.060.

[19] Clark County Code, Title 5, Chapter 5.02.210(a), (d).

[20] Clark County Code, Title 5, Chapter 5.02.210(a). .

[21] Clark County Code, Title 5, Chapter 5.02.210(c).

[22] Clark County Code, Title 5, Chapter 5.02.210(g), 5.02.250.

[23] Clark County Code, Title 5, Chapter 5.02.250.

levels established in the *Small Cell Ruling/Order*, are not cost-based, do not reflect objectively reasonable costs, and are discriminatory.[24] The Clark County Opposition and San Francisco Comments do nothing to alter that conclusion.

III. THE COUNTY FAILED TO DEMONSTRATE THAT ITS RECURRING FEES ARE BASED ON OBJECTIVELY REASONABLE COSTS OR ARE NONDISCRIMINATORY

The County fails to carry its burden of demonstrating that (1) the recurring fees in the Ordinance are a reasonable approximation of costs, (2) those costs s are objectively reasonable, and (3) the fees are non-discriminatory.[25] The County purports to make a cost justification for the site-based fees in the Ordinance, but it is not a serious attempt. The perfunctory cost information submitted by the County falls far short of demonstrating that the site-based fees recover only objectively reasonable costs that are caused by and related to the deployment of wireless facilities in the right-of-way. And the County does not even attempt to provide any cost basis for the right-of-way or inspection fees, and fails altogether to address the discriminatory nature of the right-of-way fees.

A. The Cost Support Information for the Ordinance's Wireless Site License Fees Does Not Justify the Fees.

The Petition demonstrated that the wireless site license fees in the Ordinance, which range from $700 to $3960 per site per year, were derived directly from the "Broadband Master Plan Recommendations" developed by the County's consultant, Smart Works Partners ("Smart Works").[26] Those fee recommendations were developed to maximize revenues to help pay for

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[24] Petition at 18-26.

[25] *See* Section V.E., *infra*, addressing the County's contention that Verizon bears the burden of proving the fees are not cost-based.

[26] Petition at 13-16 (citing CNX, "Broadband Master Plan Recommendations, Clark County, Board of County Commissioners," (December 19, 2017) ("Smart Works Broadband Plan"), available at http://clark.granicus.com/MinutesViewer.php?view_id=18&clip_id=5686 (Item No.

other County policy objectives. The Smart Works Broadband Plan provided no cost support for its wireless site license fee recommendations or its recommendation that the fees escalate periodically.[27] The County now argues (1) that it made many changes to the Ordinance from the time the Smart Works Broadband Plan was submitted until the Ordinance was adopted over a year later;[28] and (2) that on December 18, 2018, a cost justification document was provided to the Board of County Commissioners purporting to justify the wireless site license fees in the Ordinance.[29] Both of these arguments are wrong.

First, while the County may have made changes to the Ordinance after the Smart Works Broadband Proposal was accepted and may not have adopted every aspect of that proposal, one aspect of the proposal that was adopted without significant change is the wireless site license fee amounts. As documented in the Petition, Smart Works recommended fees ranging from $700 per site per year to $3960 per year for three different geographic area types. It also recommended a 10 percent fee escalation every five years.[30] Ultimately, the Ordinance adopted seven rather than three geographic areas (but only three different fee levels), fees ranging from $700 per site per year up to $3960 per year, and a two percent per year fee escalator (slightly higher than the Smart Works recommendation).[31] These facts make clear that the one aspect of

74, Visited Aug. 6, 2019) (Smart Works previously operated under the business name "Connected Network Exchange" and "CNX"); Clark County Board of Commissioners Agenda Item No. 74 (Dec. 19, 2017), available at http://clark.granicus.com/MinutesViewer.php?view_id=18&clip_id=5686).

[27] *Id.*

[28] Clark County Opposition at 4-8, 14-18.

[29] *Id.* at 16-18.

[30] Petition at 13-15.

[31] *Id.* at 11. The final Ordinance did lower the mid-level fee amount from the $2,500 per pole recommended by Smart Works to $1,900 per pole.

the Smart Works proposal that did not substantially change from the proposal to the Ordinance is the very aspect of the Ordinance at issue in this proceeding – the high recurring fees.

Second, the County's purported cost justification does not represent a serious effort to demonstrate that its excessive fees are tied to its objectively reasonable costs. At the outset, a cost showing submitted at the 11th hour that attempts to support fees developed months earlier smacks of a post hoc effort to justify the fees under the Commission's *Small Cell Ruling/Order*. The primary basis for the cost support appears to be a one-page document containing three tables that list, without any explanation or support, a number of categories and hours necessary for each category.[32] But, even on their face, the number of hours required for each task, averaged over a five-year period, produces an average per year cost estimate ($2,700) that is $230 per year less than the County's expected per site per year revenue estimate ($2,930).[33] So, at best, the County's cost justification acknowledges that each site produces annual revenues well above cost for the first five years.

But there is no reason to accept those numbers on their face. Indeed, the most significant flaw in the cost justification is its lack of detail or explanation. The purported cost justification is just a conclusory set of numbers, lacking enough information to provide a basis on which to understand – much less accept – the numbers provided. Among other things, the cost justification fails to explain the nature of each cost category listed, why it is needed, how it relates to each deployment for which the fee is being assessed, how each number was derived,

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32 Clark County Opposition, Exhibit D. The County also includes in the same exhibit an estimate of the cost of installing a new pole in the Las Vegas Strip District. But at no point does the exhibit, accompanying transcript (at Exhibit G), or opposition explain how the new pole cost relates to the fee levels adopted in the Ordinance.

33 *Id.* And because the annual costs diminish significantly after the first year, assuming the wireless facilities remain in place beyond the five-year period used to determine average costs, the annual revenues above cost produced by the fees will increase over time.

why it is objectively reasonable, and whether each cost is recovered by other fees required under the Ordinance. Without that explanation, neither the Commission nor Verizon can evaluate the cost justification to determine if it satisfies the three-part test.

For example, several of the cost categories listed, such as "Application Services," "Permit Services," "Pre-construction Services," and "Construction Services" appear to be one-time costs more appropriately recovered in the Ordinance's non-recurring fees, rather than through recurring fees.[34] Moreover, the categories appear to overlap. One category in the cost justification for the site based license fee is "Annual Inspection Services." If the County is collecting fees to cover those costs in the wireless site license fee, and charging a separate $500 per inspection per year fee, it appears the County is double recovering those costs.[35] But the cost justification fails to address or provide enough information to determine whether any of the other costs in each category are recovered by other fees collected through the Ordinance.

For all these reasons, the County's proffered cost justification is not close to sufficient to demonstrate that the recurring fees charged under the Ordinance are cost-based and lawful. If the Commission nevertheless is inclined to entertain the County's purported cost justification or if the County later submits more or more detailed cost information or cost support for these recurring fees, Verizon should be allowed to address that cost information in full.

B. The Opposition Provides No Cost Support for the Annual Fee Escalator, Gross Revenue-Based Use Fee, or the Annual Inspection Fee.

The limited cost justification information provided in the Opposition applies only to the wireless site license fee, not the other recurring fees challenged in the Petition. The County

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[34] *Id.*

[35] *Id.;* Petition at 11-13 (explaining the recurring fees in the Ordinance, including a separate $500 per inspection per year fee).

makes no effort to provide cost support for the two percent annual fee escalator, for the gross-revenue based use fee (or where applicable, the personal wireless business license fee), or for the annual inspection fee. The only place where the Opposition addresses costs associated with any of these fees is to argue that "the Petition offers no evidence that the County's cost estimate [for the annual inspection fee] is inaccurate. . . ."[36] But since the County provided no cost estimate for the annual inspections outside of the "Annual Inspection Services" category included as part of the justification for the wireless site license fees, there was no cost estimate to challenge in the Petition. Because the County has not provided any cost support for any of these fees, the County has failed to satisfy its burden of demonstrating they are lawful and conceded this issue.

C. The Opposition Fails to Address the Discriminatory Nature of the Wireless Site License and Gross Revenue-Based Use Fees.

The Opposition also fails to offer any response to evidence in the Petition that the wireless site license fee and the gross revenue-based use fee (or where applicable, the wireless business license fee) are discriminatory under the three-part test.[37] This is because, in both cases, the fees do not vary with the level of costs imposed by the provider. The Petition demonstrated why the discriminatory nature of these fees is yet another reason why the fees are unlawful under Section 253, and the County has not contested that issue.

IV. OPPONENT'S LEGAL ARGUMENTS LARGELY IGNORE OR MISINTERPRET THE *SMALL CELL RULING/ORDER*

A. The Unlawful Recurring Fees Imposed by the Ordinance Have the Effect of Prohibiting Service.

The County and San Francisco are wrong to argue that Verizon's wireless service in Clark County precludes the Commission from finding that the fees in the Ordinance have the

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[36] Opposition at 19-20.

[37] Petition at 25-26.

effect of prohibiting service.[38] This argument ignores many of the fundamental findings of the *Small Cell Ruling/Order* and the facts presented in the Petition. In an effort to modernize its interpretation of Sections 253 and 332(c)(7), the Commission interpreted the phrase "have the effect of prohibiting service" to include actions

> 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 covered service. [footnote omitted] This test is met not only when filling a coverage gap, but also when densifying a wireless network, introducing new services or otherwise improving service capabilities.[39]

Because the Commission ruled that an effective prohibition can occur when a provider is materially inhibited from improving existing services,[40] the provision of some service in a location does not bar a finding of effective prohibition.

The *Small Cell Ruling/Order* also clarified that high fees, such as the recurring fees in the Ordinance, have the effect of prohibiting service outside the area in which the fees are charged and paid: "[w]e conclude that fees imposed by localities, above and beyond the recovery of localities' reasonable costs, materially and improperly inhibit deployment that could have occurred elsewhere."[41] So, even if the high recurring fees do not effectively prohibit service in the County (but they do), the high fees effectively prohibit service elsewhere by exhausting finite capital resources.

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[38] Clark County Opposition at 9-10; San Francisco Comments at 5-7.

[39] *Small Cell Ruling/Order,* ¶ 37; *see also, id.,* ¶ 41 ("Commission precedent . . . makes clear that an insurmountable barrier is not required to find an effective prohibition under Section 253(a) [citation omitted]. The 'effectively prohibit' language must have some meaning independent of the 'prohibit' language. . . .").

[40] *Id.*

[41] *Id.*, ¶ 60.

The record in this proceeding makes clear that the Ordinance's high recurring fees have the effect of prohibiting service. Verizon plans to deploy hundreds of additional small wireless facilities in the County over the next three years.[42] High fees will either force the company not to deploy the number of facilities it needs to enhance its network in the County, or prevent it from deploying facilities elsewhere. Similarly, Crown Castle and ExteNet both do business in the County and explain that the high fees in the Ordinance disrupt their business plans. Crown Castle was forced to sign a new use agreement reflecting the fee provisions in the Ordinance and now must choose between paying the illegal fees and delaying deployment.[43] ExteNet worries that agreeing to high fees in Clark County will lead other municipalities to demand similarly high fees.[44] The record demonstrates that the high recurring fees in the Ordinance have the effect of prohibiting service in the County and elsewhere.

B. A Temporary Agreement to Operate under Terms Different than those Imposed by the Ordinance Does Not Render the Petition Moot.

The matters raised in the Petition are properly before the Commission. The Commission's rules make clear that it, under authority of the Administrative Procedure Act, can issue a declaratory ruling on its own motion to terminate a controversy or remove uncertainty.[45]

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[42] Petition at i, iii, 8, Declaration of Adam McNair at 2.

[43] Crown Castle Comments at 7-8.

[44] ExteNet Comments at 4-5, 8-9. *See also* CTIA Comments at 4-5; USCC Comments at 3-4; *Small Cell Ruling/Order,* ¶ 42 (discussing the effects of high fees outside of the jurisdiction charging those fees).

[45] 47 C.F.R. § 1.2(a). Under Section 1.2 of its rules, "[t]he Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty." Section 5(d) of the Administrative Procedure Act ("APA"), codified at 5 U.S.C. § 554(e), allows agencies, "in [their] sound discretion," to "issue a declaratory order to terminate a controversy or remove uncertainty."

"The Commission has wide discretion within this framework to determine whether the issuance of a declaratory ruling is necessary."[46]

Verizon has sufficiently demonstrated the presence of a controversy or uncertainty. Were Verizon required, for example, to show Article III standing for the Commission to act on the Petition, it has done so. To establish Article III standing, a party must allege (1) an injury in fact that (2) is fairly traceable to the challenged action and (3) would be redressed by a favorable decision.[47] As described in the Petition, the injury exists and is traceable to the recurring fees imposed by the Clark County Ordinance.[48] That Verizon has reached a provisional agreement with Clark County to continue operating for the time being under the existing Master License Agreement ("MLA") at lower fees than set forth in the Ordinance does not negate this injury. The Commission has properly recognized and Clark County has acknowledged that the parties are engaged in ongoing discussions and have not yet reached a negotiated settlement to resolve their dispute.[49] As Clark County stated in its request for abeyance, "[o]peration under this [provisional] agreement will continue until the earlier of: the ordinary expiration of the Master License Agreement; the conclusion of a settlement supplanting the agreement; or Commission action on the Petition."[50] The County thus acknowledges that conditions exist wherein the

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[46] Request for Declaratory Ruling by Harold Furchtgott-Roth, Staff Ruling, 2 F.C.C. Rcd 1656 (MB 1987), (citing Yale Broad. Co. v. F.C.C., 478 F.2d 594, 602 (D.C. Cir. 1973)).

[47] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

[48] As explained by Verizon, these fees are unlawful under the Commission's rules interpreting Section 253. Petition at 1, 19-25.

[49] *Verizon Petition for Declaratory Ruling Regarding Fees Charged by Clark County, Nevada for Small Wireless Facilities*, Order, WT Dkt. 19-230, DA 19-927, (rel. Sept. 18, 2019) ("September 18 Order") at 4; Letter from Gerard Lavery Lederer to Marlene Dortch, Secretary, FCC, WT Dkt. 19-230 at 1 (Sept. 6, 2019) ("Lederer Letter").

[50] Lederer Letter at 1.

provisions of the Ordinance will apply, *i.e.,* the expiration of the MLA, if there is no settlement or relevant Commission action. Finally, Verizon would have established standing because a Commission decision preempting the Ordinance would redress Verizon's injury caused by the passage of the Ordinance.

But even if Verizon were not an injured party (and it is), the Commission could address the controversy and uncertainty raised in the Petition. "It is well established that the justiciability doctrines of standing and ripeness developed by federal courts do not apply to adjudications by federal administrative agencies such as the Commission."[51] The Commission thus "can and does adjudicate petitions for declaratory rulings – including petitions for declaratory rulings regarding preemption – when the requirements of the standing and ripeness doctrines are not strictly met."[52] In *American Communications Services*, two petitioners sought a declaratory ruling that certain provisions of the Arkansas Telecommunications Regulatory Reform Act of 1997 were preempted by the Communications Act of 1934 (as amended).[53] In that case, without requiring a showing of injury in fact, the Commission issued a declaratory ruling granting in part the

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[51] *Am. Commc'ns Servs., Inc. MCI Telecommunications Corp.*, Memorandum Opinion & Order, 14 FCC Rcd 21579, 21589 (1999) ("Moreover, sections 4(i), 4(j), and 403 of the Communications Act confer upon the Commission broad power to issue orders appropriate for implementing and enforcing the Communications Act.") ("ACSI/MCI Order"); see also *Omnipoint Commc'ns, Inc. New York MTA Frequency Block A*, Memorandum Opinion and Order, 11 F.C.C. Red. 10785, 10788 (1996) (The doctrine of standing "is not directly applicable to administrative agencies such as the Commission," and "there are no statutory or regulatory standing requirements applicable to the Commission in the declaratory ruling context.") ("Omnipoint Order").

[52] ACSI/MCI Order, 14 FCC Rcd at 21589. The Commission also has previously made clear that "the plain language of section 253(d) of the Communications Act empowers the Commission to preempt upon its own motion (after notice and an opportunity for public comment), so the Commission may preempt under section 253(d) in the absence of a directly aggrieved party or even a petition seeking preemption." *Id.* at 21590.

[53] *Id*. at 21581.

preemption requested by the petitioners.[54] The Commission found that the petitioners "have a sufficient interest in removing unlawful barriers to entry into local exchange markets in Arkansas to be appropriate petitioners in this proceeding," in part because they each had "expended substantial effort and resources to enter local exchange markets elsewhere around the country."[55] Verizon, similarly, has expended substantial efforts and resources in its negotiations with Clark County as well as with other municipalities to reach fair and reasonable rights-of-way access agreements or ordinances, leading directly to the Petition and giving it a sufficient interest in removing the barriers established in the Ordinance.

C. The FCC Has Authority to Interpret Section 253(c).

The Commission has authority under Section 253 to determine whether Clark County's fees are fair and reasonable. The County claims that the Commission may preempt violations of Section 253(a), but it lacks authority to judge whether the County's recurring fees for administration and use of its public rights-of-way are fair and reasonable pursuant to Section 253(c). It contends that, because Section 253(d) mentions Commission preemption only of Sections 253(a) and (b), the Commission can neither interpret nor enforce Section 253(c) and that this authority is relegated solely to the courts.[56] The Clark County Opposition

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[54] *Id*. at 21581-82.

[55] *See* id. at 21590 ("[W]e reject the contention of some commenters that we should decline to adjudicate the instant petitions because ACSI and MCI have not identified a specific application of the Arkansas Act that has caused them some concrete, particularized harm. ACSI provides competing local exchange service in Arkansas, and both ACSI and MCI have expended substantial effort and resources to enter local exchange markets elsewhere around the country. Both ACSI and MCI, therefore, have a sufficient interest in removing unlawful barriers to entry into local exchange markets in Arkansas to be appropriate petitioners in this proceeding.") (citations omitted).

[56] *See* Clark County Opposition at 12. Clark County cites select court cases to support its claim, and these are discussed below. The County also attempts to support its position by citing Senator Slade Gorton's amendment excluding Section 253(c) from the Section 253(d) preemption authority. *See id.* at 12-13. There is no need to refer to legislative history when the

mischaracterizes the issues presented to the Commission in the Petition on this point, and its subsequent analysis and conclusions are erroneous and should be rejected.

The Commission has authority to interpret ambiguous terms of the Communications Act.[57] In the *Small Cell Ruling/Order*, the Commission noted it has "issued several rulings interpreting and providing guidance regarding the language Congress used in Section 253" over the past two decades, which have been upheld by the courts,[58] and it expressly rejected claims that it lacks authority to interpret Section 253.[59]

Section 253(d) does not limit the Commission's authority to interpret Section 253, including interpreting when fees for use and administration of the public rights-of-way are fair

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statute is unambiguous about the Commission's authority to interpret and enforce Section 253, and courts have upheld it. In any event, in interpreting the effect of Senator Gorton's amendment, courts have concluded that when a telecommunications provider contends that an economic barrier to its service violates Section 253(a) and is not saved by Section 253(c), the provider may seek a determination from a district court that the barrier is preempted. *See* Qwest Commc'ns Corp. v. City of Greensboro, 440 F. Supp. 2d 480, 491 (M.D.N.C. 2006) ("A reasonable interpretation of Senator Gorton's remarks is that Senator Gorton merely meant to give the federal district courts, rather than the FCC, authority to rule on the issue of preemption."). Simply put, Senator Gorton's statements concerned the forum in which a preemption challenge alleging rights granted under Section 253(c) could be brought. It did not express any opinion as to whether the Commission could interpret Section 253(c) or find that unreasonable recurring fees violate Section 253(a).

[57] *See, e.g., National Cable & Telecommc'ns Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 980 (2005) (the Commission has authority to interpret ambiguous terms in the Communications Act*);* *AT&T Corp. v. Iowa Utils. Bd*., 525 U.S. 366, 378 (1999) (under Section 201(b) of the Communications Act, "[t]he FCC has rulemaking authority to carry out the provisions of [the Communications] Act, which include[s provisions]…added by the Telecommunications Act of 1996"). (internal quotation marks omitted)). *See also Alliance for Community Media, et al. v. FCC*, 529 F.3d 763, 776 (6th Cir.. 2008), *cert denied*, 557 U.S. 904 (2009) (although what constitutes "an unreasonable refusal to award a competitive [cable] franchise" in Section 621(a)(1) of the Act, which acts as a predicate to judicial review is ambiguous, the Commission has the authority under this section to construe the language).

[58] *Small Cell Ruling/Order,* ¶ 16 (citing its 1997 *California Payphone* decision, *California Payphone Ass'n*, 12 FCC Rcd 14191, 14206, para. 31 (1997)).

[59] *Small Cell Ruling/Order*, ¶ 98.

and reasonable pursuant to Section 253(c). Rather, Section 253(d) only imposes the affirmative obligation on the Commission to take action if it finds a violation of Sections 253(a) or (b). Simply stated, Section 253(d) does not expressly or implicitly deprive the Commission of its general authority to interpret the provisions of the Communications Act, particularly with respect to Section 253(c).[60]

In the *Small Cell Ruling/Order*, the Commission found that it has the authority to interpret Section 253, including Section 253(c), and it properly exercised that authority. The Commission found that Sections 253(a) and 253(d) require it to preempt state or local legal requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide any…telecommunications service."[61] And it found a state or local government would violate Section 253(a) if it sought to recover fees outside the scope of Section 253(c). Specifically, the Commission determined that, to comply with Section 253(c) – and thereby comply with Section 253(a) – fees must "represent a reasonable approximation of actual and direct costs incurred by the government, where the costs being passed on are themselves objectively reasonable" and must be non-discriminatory.[62] In so doing, the Commission exercised its lawful power to interpret the statute.[63]

[60] Nor is there any limit on the Commission's authority to interpret the scope and meaning of Section 253(d) – *i.e.*, that it does not limit the Commission's ability pursuant to its general authority to interpret the Communications Act – which is implicit in Clark County's argument.

[61] *Small Cell Ruling/Order*, ¶ 52.

[62] *Id.,* ¶ 55. More specifically, the Commission adopted its three-pronged test discussed at length in the Petition at 16-26.

[63] Given the Commission's interpretation in the *Small Cell Ruling/Order* of the interrelationship of Section 253(c) and Section 253(a), the County is effectively contending that there are limits on the Commission's authority under Section 253(d) to preempt violations of Section 253(a). Neither the language of Section 253 nor its legislative history indicates that the Commission is precluded from preempting regulations that impose fees on telecommunications providers that

The two cases cited by Clark County[64] for the proposition that adjudication of whether fees are just and reasonable under Section 253(c) lies exclusively in the courts do not control here.[65] In *TCG Detroit*, the Sixth Circuit concluded that a municipal franchise fee did not violate Section 253(a), but it went on to consider whether the fee was "fair and reasonable" under Section 253(c).[66] Although the Sixth Circuit did not say so explicitly, its analysis indicates that it viewed Section 253(c) as an independent basis for preemption, rather than as a savings clause that can be invoked only after a violation of Sections 253(a) or (b) has been found – a view that is contrary to the Commission's finding in the *Small Cell Ruling/Order*. But the court's suggestion that Section 253(c) might provide an independent basis for preemption was only dicta.[67] No other court of appeals has adopted that approach,[68] and cases in which the courts are asked to apply Section 253(c) independent of Section 253(a) are rare. In any event, the Sixth Circuit did not have before it the question whether the Commission has the authority to preempt Section 253(c), and it did not opine on the issue, for example by stating that the courts alone have the ability to enforce Section 253(c).

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use the public rights-of-way when those fees would prohibit or have the effect of prohibiting the provision of telecommunications service.

[64] *BellSouth Telecomm. Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1187, 1189 (11th Cir. 2001) *("Town of Palm Beach"); TCG Detroit v. City of Dearborn,* 206 F.3d 618, 623 (6th Cir. 2000) ("*TCG Detroit*").

[65] Clark County Opposition at n.65.

[66] *TCG Detroit*, 206 F.3d at 624.

[67] *See id*. at 624-625.

[68] The Eighth Circuit, for example, concluded that Section 253(c) is not an independent basis for preemption, but instead a safe harbor for legal requirements that would otherwise violate Section 253(a). The Eighth Circuit reasoned that that Section 253(c) "derives meaning only through its relationship to [Section 253(a)]" and standing alone, "cannot form the basis of a cause of action against a state or local government." *See Level 3 Commc'ns L.L.C. v. City of St. Louis, Mo.*, 477 F.3d 528, 532 (8th Cir.2007) (quoting *Town of Palm Beach*).

Clark County's reliance on *Town of Palm Beach* is similarly unhelpful to the County. The court did not find that determinations relating to Section 253(c) are reserved to the courts and did not address the extent of the Commission's jurisdiction to interpret Section 253(c). Instead, *Town of Palm Beach* is consistent with the Commission's determination that Section 253(c) illuminates when rights-of-way compensation schemes violate Section 253(a). *Town of Palm Beach* effectively holds that Section 253(c) is not self-sustaining, explaining that the language of Section 253(c) that follows the phrase "Nothing in this section affects" "derives meaning only through its relationship to (a)."[69] Indeed, the Eleventh Circuit found that Section 253(c), standing alone, "cannot form the basis of a cause of action against a state or local government."[70] The case thus stands for the proposition that Sections 253(a) and 253(c) are inextricably intertwined, and that compensation frameworks that comply with Section 253(c) are not preempted as a violation of Section 253(a). It also implies the converse: compensation frameworks that violate Section 253(c) violate Section 253(a) and are subject to preemption.

D. Section 253 and the *Small Cell Ruling/Order* Prohibit the Gross Revenue Fee and Wireless Business License Fee Imposed for Access to County Rights-of-Way.

Clark County's gross revenue-based use fee and wireless business license fee are not generally applicable fees and are subject to section 253. As discussed above and in the Petition, to gain access to County rights-of-way under the Ordinance, irrespective of the County's costs, a wireless provider must pay a use fee of five percent (5%) of gross revenues collected by the provider. But if a wireless provider already pays the similar wireless business license fee, it does

[69] *Town of Palm Beach*, 252 F.3d at 1187-88.

[70] *Id*. at 1189.

not have to pay the gross revenues-based use fee.[71] Because in these circumstances both the gross revenue-based use fee and the wireless business license fee are fees that compensate the County "for a licensee's entry upon and deployment of equipment within the ROW or on any municipal facilities,"[72] they are subject to Section 253.

Focusing on the wireless business license use fee (because that is the fee paid by Verizon for access to rights-of-way under the Ordinance), the County argues that the fee is an exercise of the County's police power and akin to a minimum wage law or construction permit requirement.[73] In other words, the County argues, the wireless business license fee rule is a law of general applicability and thus outside the scope of Section 253.[74]

The County's argument fails because the wireless business license fee is not one of general applicability. The fee applies to a limited group of entities that share a single characteristic – use of the County rights-of-way and other public assets. Of all of the many possible business entity categories, only one category of entities is subject to the fee at issue here -- personal wireless service providers.[75] The County cannot credibly assert that the wireless business license use fee applies to all entities within Clark County, and therefore claim that it has exercised its traditional police power in a way that applies to everyone.

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[71] *See* Section II, *infra*; Petition at 11-12.

[72] Clark County Code, Title 5, Chapter 5.02.210(a).

[73] Clark County Opposition at 18. These analogies are beside the point in the current context. There is no claim in the Petition that construction permit requirements or minimum wage laws are recurring charges assessed on telecommunications providers as compensation to the County for use and occupancy of the rights of way.

[74] *Id*.

[75] Clark County Code, Title 6, Chapters 6.13.020, 6.13.030, and 6.13.040.

In any event, courts have consistently ruled that even "generally applicable" state and local government regulations governing rights-of-way fees for telecommunication providers are within the scope of Section 253.[76] In *NextG Networks of Cal., Inc. v. City of San Francisco*, for example, the court rejected San Francisco's assertion that a city permitting requirement, challenged by NextG as prohibiting the installation of telecommunications facilities in the public rights-of-way, was a rule of general applicability and thus outside the purview of Section 253(a):

> If a city could circumvent the requirements of section 253(a) simply by enacting regulations that apply to all utilities, then federal law would fail to provide any meaningful special protection to telecommunications providers. Under the City's proposed construction, it could enact a regulation allowing the City to arbitrarily deny any utility access to public rights-of-way without violating section 253(a). The City's position cannot be reconciled with the plain language of the statute or the deregulatory purpose which it serves.[77]

Like the permitting requirement at issue in the *NextG Networks* case, Clark County's attempt to cast the wireless business license fee as a generally applicable fee, and therefore exempt from Section 253, fails.

It is clear that the wireless business license fee is imposed on wireless providers for use of County rights-of-way and, as such, is subject to the constraints of Section 253. The gross revenue-based use fee compensates the County for a provider's "entry upon and deployment of equipment within" the County rights-of-way and other public assets.[78] But Section 5.02.210 provides that the gross revenue-based use fee must be paid by a wireless provider except where it

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[76] *See, e.g.*, *GTE Mobilnet Ltd. P'ship v. City & County of San Francisco*, 2007 U.S. Dist. LEXIS 8801* (N.D. Cal 2007); *Pacific Bell Tel. Co. v. California Dept. of Trans*., 365 F. Supp. 2d 1085 (N.D. Cal. 2005).

[77] *NextG Networks of Cal., Inc. v. City of San Francisco*, 2006 U.S. Dist. LEXIS 36101, *19 (N.D. Cal. 2006).

[78] Clark County Code, Title 5, Chapter 5.02.210(a).

pays the wireless business license fee.[79] By permitting wireless carriers to pay the wireless business license fee in lieu of the gross revenue-based use fee, the County is accepting the wireless business license fee as compensation for the provider's use of the County rights-of-way and other public assets.

The County effectively concedes that the wireless business license fee is a right-of-way use fee. It contends that it sought to avoid a challenge that it was being discriminatory by imposing the business license fee on personal wireless carriers while not imposing an "equivalent" fee on "other companies [that] provide only wireless infrastructure, and offer no retail services to County residents," which companies, the County explains, "are not subject to the Business License Tax."[80] Consequently, the City adopted "an equivalent fee . . . associated with occupation of the rights-of-way," namely the gross revenue-based use fee,[81] so as "to act in a nondiscriminatory manner (as required by the Commission and the Communications Act) with respect to providers of telecommunications and personal wireless services regardless of whether they have retail customers in the County."[82] By accepting that the Commission and Communications Act require the County not to discriminate between providers in the rights-of-way with retail customers and those providers without retail customers, the County admits that both fees are subject to Section 253.[83] In short, if, as the County correctly surmises, the gross

[79] Clark County Code, Title 5, Chapter 5.02.210(a), (d).

[80] *See* Clark County Opposition at 18.

[81] *See id*.

[82] *See id*.

[83] Clark County does not identify which provision of the Communications Act would purportedly be violated if it had not adopted the gross revenue-based use fee in the Ordinance, but no provision other than Section 253 could apply in this context.

revenue-based use fee and wireless business license fee must, taken together, have non-discriminatory effect, then they both must be subject to Section 253.

E. The County Bears the Burden of Demonstrating its Recurring Fees Are Cost-Based.

In a challenge to a locality's fees such as this, once the party challenging the fees establishes that the fees exceed the Commission's presumptively reasonable level, then the burden of demonstrating that the fees meet the three-part test falls to the locality. The County's argument that complainant bears the burden to demonstrate that a locality's fees do not represent costs is contrary to the plain language in the *Small Cell Ruling/Order* and is not practical.[84]

The *Small Cell Ruling/Order* makes clear that the burden falls on the locality to demonstrate that its fees satisfy the three-part test. The presumptively reasonable fee levels, which are based largely on state small cell law fee levels and generally set above those levels,[85] were adopted as a mechanism to avoid cost disputes. The Commission reasoned "that there would be almost no litigation by providers over fees set at or below these levels."[86] The Commission stated that "[i]n those limited circumstances [when a locality can charge fees higher than the presumptively reasonable levels consistent with Section 253] *a locality could prevail in charging fees that are above this level by showing that such fees nonetheless comply with the*

[84] Clark County Opposition at 20-21.

[85] *Small Cell Ruling/Order,* ¶79, n. 233. The County attacks the Commission's decision to establish $270 as the presumptively reasonable fee level for recurring fees, arguing that the Commission did not perform a cost analysis but rather relied on state small cell law fee levels. Clark County Opposition at 22-23. Putting aside that its argument is yet another attack on the merits of the *Small Cell Ruling/Order*, setting presumptively reasonable fee levels generally above the fee levels set forth in state small cells laws is eminently reasonable. The Commission was correct to assume that states would not adopt fee levels that do not allow their local jurisdictions to recover reasonable costs.

[86] *Small Cell Ruling/Order,* ¶ 80.

limits imposed by Section 253 – that is that they [satisfy the three-part test]."[87] This language makes clear it is the locality that bears the burden of making the showing, not the complainant. Requiring the localities to demonstrate the cost basis and non-discriminatory nature of their fees makes sense. Carriers and other applicants generally do not have access to localities cost information or the localities' rationale for determining whether a claimed cost is specifically related to and caused by the deployment.[88]

F. Local Authorities Manage Rights-of-Way and Own Structures within Rights-of-Way in their Regulatory Capacity.

The Commission ruled that Section 253 applies to state and local rights-of-way and to the terms of use of or attachment to government-owned structures within such rights-of-way.[89] San Francisco now asks the Commission to reach a different conclusion in applying the *Small Cell Ruling/Order* to government-owned structures in this case. It argues that the Commission erred in applying Section 253 to government-owned structures because localities operate such structures in a proprietary capacity (i.e., as a market participant) rather than in a regulatory capacity (i.e., when at least some of the government's actions are of a regulatory nature).[90] It contends that the Commission's ruling failed to acknowledge that Congress did not intend to preempt proprietary conduct.[91]

The Commission fully considered San Francisco's arguments in finding that Sections 253 and 332(c)(7) reached local government fees for attaching to government-owned structures. It

[87] *Id.* (emphasis added)

[88] *See id.*, ¶ 50, n.131 ("By costs, we mean those costs specifically related to and caused by the deployment.").

[89] *Small Cell Ruling/*Order*,* ¶¶ 92-97.

[90] San Francisco Comments at 8-10.

[91] *Id.*

found that Congress's intent in preempting proprietary behavior may differ depending on the statute, and that the language in Sections 253 and 332(c)(7) indicated no intent to carve out an exception for proprietary behavior.[92] But even if a carve-out for proprietary actions were justified, it ruled that localities' actions with respect to small cells attached to government-owned property are regulatory in many respects. And that finding justifies its decision to apply Section 253 to the terms for use of or attachment to government-owned structures.[93]

G. Verizon Provides Telecommunications Services.

The *Small Cell Ruling/Order* applies to Verizon's challenge to the recurring fees in the Ordinance. Verizon indicated in the Petition that it currently provides telecommunications services, including personal wireless services, using small cell facilities in the County.[94] It stated it plans to deploy hundreds of new small cell facilities in the County in the next three years, and that the high recurring fees in the Ordinance materially inhibit Verizon from providing telecommunications services.[95] Contrary to the claims of San Francisco, these statements by Verizon are sufficient to demonstrate that Verizon has been and will be affected by the Ordinance and that Section 253 applies to the issues raised in the Petition.

V. CONCLUSION

For the foregoing reasons, the Commission should find that Clark County's recurring fees are not based on a reasonable approximation of the County's costs to manage and maintain its rights-of-way. The recurring fees effectively prohibit the provision of telecommunications services, violating Section 253 and the *Small Cell Ruling/Order*, and they are therefore

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[92] *Small Cell Ruling/Order,* ¶¶ 93-95.

[93] *Id.,* ¶¶ 96-97.

[94] Petition at i, 7, Exhibit 2, Declaration of Adam McNair at 1-2

[95] *Id.* at i, iii, 8, Declaration of Adam McNair at 2.

preempted. The Commission should declare that, because Clark County's recurring fees are not based on a reasonable approximation of its reasonable costs, the County may not charge recurring fees that exceed the presumptively reasonable annual rate of $270, as set forth in the *Small Cell Ruling/Order*.

Respectfully submitted,

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