

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

**REPLY COMMENTS OF THE NATIONAL ASSOCIATION
OF TELECOMMUNICATIONS OFFICERS AND ADVISORS**

I. INTRODUCTION

The National Association of Telecommunications Officers and Advisors (“NATOA”)¹ submits these reply comments in response to the Public Notice released on August 26, 2019, seeking comment on a Petition for Declaratory Ruling filed by Verizon with respect fees imposed by Clark County, Nevada.² NATOA urges the Commission to deny the Petition for the reasons set forth in the County’s opposition to the Petition. NATOA further emphasizes that the Petition must be rejected because (i) the Commission lacks authority to decide whether a local government’s fees fall under the safe harbor found in Section 253(c) of the Telecommunications Act³ and (ii) the Petition and supporting commenters misstate the scope of the Commission’s 2018 Small Cell Order.⁴

¹ NATOA’s membership includes local government officials and staff members from across the nation whose responsibility is to develop and administer communications policy and the provision of such services for the nation’s local governments.

² 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 (filed Aug. 8, 2019) (the “Petition”).

³ 47 U.S.C. § 253(c).

⁴ Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, WC Docket No. 17-84, 33 FCC Rcd. 9088 (2018) (“Small Cell Order”).

II. ARGUMENT

A. *The Commission Lacks Authority to Rule on the Petition*

The Commission does not have authority to rule on the question of whether Clark County's fees are "fair and reasonable compensation" or otherwise "violate" Section 253(c), as requested in the Petition.⁵ Section 253(d) provides the Commission with authority to preempt the enforcement of regulations that violate Sections 253(a) and (b), but not subsection (c). Congress intentionally omitted subsection (c) because it did not wish to provide the Commission with authority to preempt local rights of way fees and obligations. The legislative history on this point could not be clearer:

There is no preemption ... for subsection (c) which is entitled, "Local Government Authority," and which is the subsection which preserves to local governments control over their public rights of way. It accepts the proposition ... that these local powers should be retained locally, that any challenge to them take place in the Federal district court in that locality and that *the Federal Communications Commission not be able to preempt such actions*.⁶

The Petition presents precisely the scenario Congress intended to avoid in omitting subsection (c) from the preemption authority granted the Commission in Section 253(d): "[L]ocal communities ... should not be required to have to come to Washington, DC, in order to defend their local permitting or ordinance-setting actions."⁷

The Small Cell Order recognized that 253(d) would not permit it to preempt alleged violations of Section 253(c), stating that "[a]ny preemption under Section 253 and/or Section 332(c)(7)(B) that subsequently occurs will proceed in accordance with the enforcement mechanisms available in each context."⁸ It expressly stated, in response to concerns in the record about the FCC preempting localities based on Section 253(c), that it was not "usurp[ing] the role

⁵ Petition at 1-2.

⁶ 141 Cong. Rec. S8213 (daily ed. June 13, 1995) (emphasis added).

⁷ *Id.* at S8212.

⁸ Small Cell Order at par. 99.

of the judiciary.”⁹ As the County explained, it is the judiciary’s role to determine whether or not a fee falls within the safe harbor provided in Section 235(c).¹⁰ The Commission may not overstep its authority and usurp that of the judiciary by ruling on the Petition with respect to the application of Section 253(c). Doing so may lead to more litigation over the Small Cell Order currently under review by the Ninth Circuit, which only serves to divert yet more resources to litigation rather than mutually agreed upon resolutions.¹¹

B. The Petition and Supporting Commenters Overstate the Terms of the Small Cell Order

In seeking to preempt the County’s fees, the Petition and supporting commenters significantly and materially overstate the rules set forth in the Small Cell Order in at least two ways, both of which compel the Commission to deny the Petition.

First, the Petition and various commenters suggest that Clark County’s fees should be preempted because they exceed the presumptively reasonable amounts set in the Small Cell Order.¹² The Commission must reject this flawed premise. As the County stated in its opposition to the Petition, “whether one number is bigger than another is not the test—it is whether the fees assessed reasonably approximate objectively reasonable costs.”¹³ The extent to which a fee is higher than the Small Cell Order’s presumptively reasonable rate is entirely irrelevant.

⁹ *Id.* at n. 282.

¹⁰ County Opposition at 12-14.

¹¹ For similar reasons, the Commission should reject the effort by ExteNet to broaden the scope of this inquiry. This Petition cannot be used as a backdoor to address fees that are not the subject of the Petition, nor part the Small Cell Order for that matter. ExteNet’s assertions regarding the charges of other communities, its request to extend the Small Cell Order beyond small cells and its proposal for an already-rejected “deemed granted” remedy are far outside the scope of the Public Notice. We urge the Commission to reject these requests, and any other comments that are outside the scope of the issue raised in the Petition and Public Notice.

¹² *See, e.g.*, Petition at 20; Comments of T-Mobile USA, Inc. at 8; Comments of Competitive Carriers Association at 6.

¹³ Opposition of Clark County, Nevada at 20.

The Commission made this clear in its defense of the Small Cell Order in the Ninth Circuit.¹⁴ The Commission defended its presumptively reasonable fees by arguing that “contrary to the Local Government Petitioners’ repeated statements[,] there is *no* presumption that fee amounts outside the safe harbor are impermissible or preempted. A *safe harbor* is not a *ceiling*.”¹⁵ The Commission went on to state, “that fee levels within the safe harbor are presumed lawful does not logically imply that fees *outside* the safe harbor are presumptively *unlawful*; there is no thumb on the scale against higher fees.”¹⁶ The Commission thus must reject the Petition’s and other commenter’s suggestion that there is, in fact, a presumption that a fee is not cost-based simply because it exceeds the Small Cell Order’s presumptive amounts.

Second, the suggestion that Clark County must prove its fees meet the Small Cell Order’s standard is erroneous.¹⁷ This, too, has been rejected by the Commission:

At most, then, a locality would bear only a nominal burden of production to offer evidence showing that its fees are reasonably related to actual costs it must incur. At that point “the presumption evaporates,” and at all times “[t]he burden of persuasion with respect to the ultimate question at issue remains with the party on whom it originally rested.”¹⁸

Thus, the Commission must reject the suggestion that fees that exceed the amounts in the Small Cell Order must not be, or are presumed not to be, cost-based, and continue to require the Petitioner to bear the burden of proving local fees do not comply with the Small Cell Order.

¹⁴ *Sprint v. FCC*, No. 19-70213 and consolidated cases, Brief for Respondents (filed August 8, 2019) (“FCC Brief”).

¹⁵ FCC Brief at 86 (emphasis in original).

¹⁶ FCC Brief at 88 (emphasis in original).

¹⁷ *See, e.g.*, Petition at 20; Comments of ExteNet Systems, Inc. at 5; Comments of T-Mobile USA, Inc. at 7.

¹⁸ FCC Brief at 88-89 (quoting *City of Arlington v. FCC*, 668 F.3d 229, 256–57 (5th Cir. 2012), *aff’d*, 569 U.S. 290 (2013)).

III. CONCLUSION

NATOA urges the Commission to adhere to the limits of its preemptive authority under Section 253(d) and to the terms of the Small Cell Order, both of which compel the Commission to deny the Petition.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Nancy L. Werner', with a long horizontal flourish extending to the right.

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