



C I T Y O F P H I L A D E L P H I A

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October 11, 2019

Re: Correction of City of Philadelphia's Public Comments in FCC Docket WT- 19-230

Ms. Dortch:

Yesterday, the City of Philadelphia filed comments in FCC Docket WT 19-230. After reviewing those comments further this morning, the City recognized that yesterday's comments incorrectly described the City's fee structure and sliding scale in a way that was factually inaccurate. The City wishes to submit this erratum, in order to correct the inaccuracy on page 3. The attached comments are revised to delete the inaccuracy and correct the record.

Respectfully submitted,
CITY OF PHILADELPHIA LAW
DEPARTMENT
Marcel S. Pratt, City Solicitor

/s/ Rachel Castillo Rosser
By: Rachel Castillo Rosser, Senior Attorney
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**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition for Declaratory Ruling Regarding Fees)	WT Docket 19-230
Charged by Clark County, Nevada for Small)	
Wireless Facilities)	

Reply Comments of the City of Philadelphia

I. INTRODUCTION

The City of Philadelphia (“City”) respectfully submits these Reply Comments in response to the initial round of comments filed in the Petition for Declaratory Ruling Regarding Fees Charged by Clark County, Nevada for Small Wireless Facilities, WT Docket 19-230 (“Verizon Petition”). Specifically, the City respectfully responds to the allegations contained in the comments filed by ExteNet Systems, Inc. (“ExteNet”) on September 25, 2019.

In promoting broadband technology and ubiquitous, affordable broadband service for all residents, the City has demonstrated its strong commitment to addressing regulatory barriers that would inhibit deployment of infrastructure to support next generation networks and services. Moreover, the City has worked diligently to regulate and manage the public rights-of-ways (“ROW”) within the parameters of the FCC’s September 26, 2018 Declaratory Ruling and Third Report and Order (“Small Cell Order”)¹ while furthering the City’s goals of promoting broadband deployment throughout the City.

¹ *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT 17-79, WT 17-84. The Small Cell Order has been appealed and the appeal is pending as of the date of these Comments.

ExteNet claims in its comments that municipalities across the country continue to demand “outrageous fees” to access the public rights-of-ways and that such fees are not limited to a reasonable approximation of objectively reasonable costs in contravention of the Small Cell Order. (ExteNet Comments, at 5). The City of Philadelphia is included in ExteNet’s laundry list of alleged bad actor municipalities. But ExteNet’s comments about Philadelphia provide no factual basis for its claims that the City’s fees, or the fees of any of the named municipalities, violate the Small Cell Order. Rather than providing evidence, ExteNet is attempting to use this process to circumvent the framework of the Small Cell Order by creating new burdensome requirements for municipalities, asking cities to spend even more taxpayer money on independent auditors and detailed audit reports. For the reasons which follow, the Commission should reject ExteNet’s comments filed in this proceeding.

II. THE CITY’S ATTACHMENT FEES ARE IN COMPLIANCE WITH THE STANDARD SET FORTH IN THE SMALL CELL ORDER

Pursuant to the Small Cell Order, the Commission has declared that all fees must be cost based. The Commission has interpreted this to mean that all fees must be a reasonable approximation of objectively reasonable costs; otherwise, the fees violate the federal Communications Act’s prohibition on excessive state and local regulation. The Commission further declared that a reoccurring annual fee of \$270 per small cell including ROW access fees or fees for attachment to municipally-owned structures in the ROW, is presumptively reasonable. (Small Cell Order, at 42). The Commission acknowledged that fees may be higher where the municipality has determined that higher fees are necessary in order to recover a “reasonable approximation” of its actual reasonable costs. *Id.* at 42 (“Any party may still charge fees above the levels we identify by demonstrating that the fee is a reasonable approximation of cost that itself is objectively reasonable.”).

The focus of ExteNet’s criticism of the City is based on the City’s attachment fees per

licensed location, effectively acknowledging that all other applicable fees meet the Small Cell Order's standard, and the attachment fees apply only to City-owned infrastructure. The City's attachment fees are on a sliding scale that contemplates the carriers in our ROW will install *networks* of sites, as required by small cell and similar technologies the deployment of which the Commission is attempting to facilitate in the Small Cell Order. The City anticipates that as each provider's network grows, it will be able to leverage its knowledge of the provider's equipment to greatly shorten review time and complexity and thereby reduce its costs and the cost it must pass through to the provider. Consistent with small cell technology and density requirements, the City's program deliberately focuses on facilitating *network* deployments at a reasonable approximation of City costs. This is why the City uses a sliding scale based on the total number of small cell facilities attached to City-owned infrastructure. The intent is to encourage service providers to design and deploy networks of small cell facilities in the ROW and more generally to ensure broadband coverage throughout the city in accordance with the Commission's goals in the Small Cell Order.²

ExteNet's comments deliberately and deceptively ignore the way the City's program actually works by claiming that the City charges \$3090 per site, without qualification (although ExteNet executed a MLA with the City and knows exactly how it works). ExteNet's claim is simply not true for the reasons articulated above and ExteNet's deliberate distortion of our program should be disregarded by the Commission. Nor, as explained below, is the sliding scale the only way in which the City seeks to keep its ROW fees reasonable, cost-based, and at a level that will encourage small cell network development.

1. The City gives service providers the option of paying \$270 per small cell location.

² The City's attachment fee schedule provides for a sliding scale, as described, plus 3% annual escalator which we believe keeps us well within the reasonable cost standard. As noted, the annual attachment fee decreases dramatically the more locations a Service Provider has.

By way of background, in December of 2017, the City of Philadelphia passed an ordinance (“Ordinance”) authorizing the City to establish requirements and fees associated with placement of wireless communication antennas on poles and other structures in the ROW for mobile broadband deployment. Pursuant to the Ordinance, the Department of Streets promulgated rules and regulations governing antenna facilities in the ROW. As for all City regulations, the regulations governing wireless antennas in the ROW involved a notice and comment period prior to final promulgation. In this instance, service providers actively participated in the process by providing the City with multiple rounds of comments. Moreover, several meetings between City representatives and service providers occurred which afforded providers with additional opportunities to raise any concerns with the City. These same regulations are a part of the City’s master license agreement (“MLA”) that the City voluntarily negotiated with a number of service providers including Verizon, Mobilitie, Crown Castle, AT&T and ExteNet, for small cell installations on City-owned infrastructure in the public rights-of-way. The MLA includes the City’s sliding scale annual attachment fee schedule.

When the Small Cell Order became effective in January 2019, numerous service providers had been operating without issue under the terms of the City’s MLA. Notwithstanding the lack of objections from any service providers, and even though the City’s rates are based on a reasonable approximation of actual, reasonable costs, the City, out of an abundance of caution, elected to give service providers the option of paying a fee of \$270 per pole attachment pending the outcome of the Ninth Circuit’s review of the Small Cell Order in order to ensure alignment with the “presumptively reasonable” rate per the Small Cell Order.³ The City believes it is cost effective

³ The City’s annual attachment fee invoice provides as follows: “If Provider chooses to pay a lesser amount to access any right-of-way and attach to City-owned infrastructure, including the annual/per pole fee of \$270 specified in the FCC’s 3rd Report and Order, Declaratory Ruling, FCC 18-11 (“Order”), the City will process Provider’s application(s) without assessing late and/or penalty fees. The City will document all differences owed. Provider will be responsible for full payment of remaining amounts should the Order be

and in the best interest of all providers to plan their networks and opt for our sliding scale, but they are free to proceed site by site on the basis of the \$270 annual fee.⁴ ExteNet ignores this fact as well as the terms of the City’s program described above in order to make a deceptive claim that Philadelphia charges \$3,090 per site for all sites. The Commission should ignore ExteNet’s deceptive rhetoric and consider the facts regarding the City’s small cell program.

2. The City’s attachment fees are a reasonable approximation of actual costs.

ExteNet’s apparent contention that the City’s sliding scale “by definition” does not reflect a reasonable approximation of costs, is simply wrong, for the reasons set forth above. Contrary to ExteNet’s assertion, the City’s application fees and attachment fees are based on a reasonable approximation of actual costs that the City incurs in order to accommodate and support the numerous service providers while ensuring public safety and an environment conducive to all uses of the public rights-of-way. The MLA requires the licensee to submit an application for each new installation, pre-existing installation, relocation and/or modification and termination. In addition to the one-time \$400 application fee required per City regulation for wireless antenna attachments to non-City infrastructure in the public ROW, the MLA requires an additional fee of \$400 as reimbursement for the Street Department’s additional time to review applications for installation to City-owned infrastructure. The City’s application fee structure covers such upfront costs to the City such as engineering costs to review and inspect each location; structural analysis review; geographic information system (“GIS”) updating; and design review and approval – all legitimate

stayed or overturned.”

⁴ In no way is the City conceding that \$270 is an accurate representation of its costs (which it is not), nor does the Commission claim in the Small Cell Order that \$270 is an accurate representation of costs. Rather, the Commission presumes that \$270 per Small Wireless Facility per year for all recurring fees, including any possible ROW access fee or fee for attachment to municipally-owned structures in the ROW would not be prohibited by Section 253 or Section 332(c)(7). ExteNet’s expansive reading of the Small Cell Order to equate \$270 with the City’s reasonable approximation of reasonable costs, has no basis and is not supported by the Small Cell Order.

costs of managing the use of the rights-of-way. The City's attachment fees cover additional costs in connection with the City's distributed antenna system ("DAS") program which are essential to dense deployments of wireless antennas and not recouped through the City's ROW management fees. Such costs include administrating the DAS program and costs related to increased employee work hours to review and inspect proposed and completed installation of electric and fiber connection for DAS installations requiring underground conduit. The City does not assess attachment fees for non-City owned infrastructure.

As set forth above, the City's sliding fee scale is based on a reasonable approximation of objectively reasonable costs, and of course, the option to pay \$270 per site fits squarely within the ambit of the Small Cell Order. Any attempt by ExteNet to claim otherwise is simply false.

III. THE FCC HAS ALREADY CONSIDERED, AND RIGHTLY DENIED, A "DEEMED-GRANTED" REMEDY

Despite its threadbare arguments addressing just and reasonable fees, ExteNet argues that the Commission in this proceeding should impose a punitive "deemed granted" remedy for small cell applications wherever a municipality fails to act within the Small Cell Order's "shot clock" timelines. (ExteNet Comments, at 9). It has been less than one year since the Commission thoroughly considered, and denied, a deemed granted remedy for the well-grounded reasons set forth in the Small Cell Order. ExteNet's effort to backdoor that issue here, like its distortion of the City's fee structure for small cell deployments, is another makeweight attempt to create a controversy before the Commission where none exists and circumvent the framework established in the Small Cell Order. There is no basis in law or logic for the Commission to retract its well-grounded finding that siting disputes, including those involving a siting authority's failure to act, must be heard and decided by a court of competent jurisdiction on an expedited basis. The City urges the Commission to reject ExteNet's attempt to revive that issue and to reaffirm its decision against imposing the "deemed granted" remedy in the Small

Cell Order.

IV. CONCLUSION

As set forth above, ExteNet's comments fail to establish that the City of Philadelphia (or given ExteNet's failure to cite supporting facts, any municipality) is charging fees that are not based on a reasonable approximation of actual, reasonable costs. ExteNet's argument attempting to tie its baseless assertions on fees to a punitive deemed granted remedy is without foundation and should be rejected by the Commission here as it did in the Small Cell Order. The City of Philadelphia respectfully requests the Commission to reject ExteNet's comments in their entirety.

Dated: October 11, 2019

Respectfully submitted,
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