October 14, 2020

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Ex Parte Presentation, Petition for Declaratory Ruling on Clark County, Nevada Ordinance No. 4659, WT Docket No. 19-230

Dear Ms. Dortch:

Fourteen months ago, Verizon filed a Petition with the Federal Communications Commission (“Commission”) in which it requested that the Commission rule that the siting fees in Clark County, Nevada’s small cell ordinance are unlawful.\(^1\) The record in the proceeding demonstrates that the County’s recurring fees materially inhibit the provision of telecommunications services by wireless providers, in violation of Section 253 of the Communications Act—as interpreted by the Commission’s September 2018 Small Cell Order and as recently upheld by the Ninth Circuit\(^2\)—because these excessive fees were not cost-based, as the Small Cell Order requires. CTIA urges the Commission to promptly grant the Petition and preempt the excessive fees charged by Clark County to help increase the public’s access to advanced wireless services.

Unlawful local ordinances threaten to impede robust deployment of advanced wireless services across the country, undermining the Commission’s efforts to expedite the public’s

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\(^2\) See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088 (2018) (“Small Cell Order”), aff’d in part, City of Portland v. United States, 969 F.3d 1020 (9th Cir. 2020), petitions for en banc review pending.
access to those services, and suppressing their benefits to consumers and the U.S. economy.\(^3\) As a result, grant of the Petition will have both local and national importance.\(^4\) On a local level, grant will prohibit the excessive and unlawful fees that Clark County enacted—fees that wireless companies demonstrated will harm deployment in that market.\(^5\) The record also includes examples of other localities that are charging high fees well above the safe harbors the Commission adopted.\(^6\) By giving force to Section 253 and the Small Cell Order, preempting Clark County’s fees will send clear guidance to localities nationwide and should help deter localities from imposing excessive fees.\(^7\)

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\(^3\) In the Small Cell Order, the Commission cited information in the record demonstrating that siting fees that exceed a locality’s costs of overseeing deployment impede investment in new infrastructure both in that locality and in other localities. Small Cell Order ¶ 61. The Wireless Telecommunications Bureau stated that “deployments by other providers in the County may also be deterred if Clark County’s practices are not consistent with the Communications Act,” and “deployments outside of the County could be adversely affected” as well. See Verizon Petition for Declaratory Ruling Regarding Fees Charged by Clark County Nevada for Small Wireless Facilities, Order, DA 19-927, WT Docket No. 19-230, ¶ 3 (CIPD, WTB, Sept. 18, 2019).

\(^4\) The Commission previously recognized the national importance of acting on the Petition. In denying Clark County’s request to hold the proceeding in abeyance pending settlement discussions with Verizon, the Commission stated that “this matter raises important issues that potentially affect not only Verizon but also other providers operating both in and outside of Clark County” and that “deployment by other providers in the County may also be deterred if Clark County’s practices are not consistent with the Communications Act.” Id. ¶¶ 1, 3.


\(^6\) ExteNet Comments at 4-5.

\(^7\) See, e.g., Comments of T-Mobile USA, Inc., WT Docket No. 19-230 (filed Sept. 25, 2019) (“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.”); Comments of United States Cellular Corp., WT Docket No. 19-230 (filed Sept. 25, 2019) (stating that grant of the Petition “will provide the strongest possible impetus to reasonable and fair agreements between wireless carriers and municipalities.”).
The facts of this proceeding are straightforward and provide compelling grounds for relief. In 2018, Clark County enacted an ordinance that established new fees for the installation of small wireless facilities along the County’s rights-of-way (“ROW”). The record establishes that those fees are not based on the County’s costs to process applications to install these facilities or manage the ROW. Among other reasons, they vary drastically depending on the location—ranging from $700 to $3,960 per site—even though the mere location of a site would not affect costs. The record also shows that other fees such as an annual fee based on wireless providers’ gross revenues were not cost-based.

The ordinance’s fees violate Section 253 of the Communications Act and the Small Cell Order. In 2018, the Commission ruled that siting fees for small wireless facilities violate Section 253 “unless three conditions are met: (1) the fees are a reasonable approximation of the state or local government’s costs; (2) only objectively reasonable costs are factored into these fees, and (3) the fees are no higher than the fees charged to similarly-situated competitors in similar situations.” The U.S. Court of Appeals for the Ninth Circuit affirmed the Commission’s interpretation of Section 253, and upheld its conclusion that the “cost-based standard would prevent excessive fees and the effective prohibition of 5G services in many areas of the country.” The Commission adopted guidance for fees that it determined were presumptively reasonable, and held that a locality could charge more than those fees if it demonstrated the fees were cost-based. The Ninth Circuit also upheld these provisions.

The Small Cell Order and the Ninth Circuit’s decision both interpreted Section 253 but did not address the legality of any specific locality’s fee. Thus, when a particular locality acts inconsistently with the Small Cell Order, the Commission must give these rulings teeth and ensure that localities are complying with the law. Indeed, the Commission expressly invited

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8 Petition at 20-25.
9 Small Cell Order ¶ 4.
10 City of Portland, 969 F.3d at 1038.
11 Small Cell Order ¶ 79.
12 City of Portland, 969 F.3d at 1038 (“[T]he presumptive levels are not arbitrary and capricious.”).
wireless providers to invoke that remedy to bring non-compliant local practices to its attention so it can address them—the precise action Verizon took here in seeking relief from Clark County’s unlawful fees:

Our interpretations here are intended to facilitate the implementation of the scheme Congress intended and to provide greater regulatory certainty to states, municipalities, and regulated parties about what conduct is preempted under Section 253(a). Should factual questions arise about whether a state or locality is engaged in such behavior, Section 253(d) affords state and local governments and private parties an avenue for specific preemption challenges.\(^\text{14}\)

The record here is clear: Clark County’s excessive and widely disparate fees do not fall within the presumptively reasonable safe harbors the Commission created, nor has the County demonstrated that its fees are cost-based.\(^\text{15}\) Preemption is thus the correct remedy.

The fact that Clark County agreed not to charge Verizon the fees it enacted in the 2018 ordinance and that the parties are seeking to negotiate a private agreement setting lower fees does not preclude the Commission from acting, because those fees are generally applicable to all wireless providers who would not benefit from any such agreement. Whether or not the specific parties to a dispute are negotiating a private agreement is irrelevant; this case involves an ordinance that is generally applicable to wireless providers seeking to deploy advanced wireless service to the public, in jurisdictions across the country. Moreover, even if Verizon and the County were to reach an agreement as to the fees Verizon must pay, it would not alter the fact that the ordinance violates Section 253. Even if Clark County never charges the excessive fees in its ordinance, insulating them from review under Section 253 for that reason presents Commission licensees and tower companies with the choice of accepting the ordinance-based fees or lower, but still not cost-based or lawful, negotiated fees.

\(^{14}\) Small Cell Order ¶ 97.

\(^{15}\) See, e.g., Reply Comments of Verizon, WT Docket No. 19-230, at 6-10 (filed Oct. 10, 2019); CTIA Reply Comments at 6-9.
While many local governments are excellent partners in wireless deployment efforts, Clark County’s ordinance is a case study on how regulatory barriers can impede deployment of advanced wireless services and suppress the economic and other benefits they can deliver. CTIA accordingly urges the Commission to grant the Petition and declare that the siting fees in the 2018 ordinance are unlawful and preempted.

Pursuant to Section 1.1206(b) of the Commission’s rules, a copy of this letter is being electronically submitted into the record of this proceeding. Please do not hesitate to contact the undersigned with any questions.

Sincerely,

/s/ Kara Graves
Kara Graves
Assistant Vice President, Regulatory Affairs