BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

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

COMMENTS OF THE CITY AND COUNTY OF SAN FRANCISCO

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I. INTRODUCTION

Verizon is asking the Federal Communications Commission ("Commission") to declare that certain recurring fees charged by Clark County, Nevada for installing and maintaining small wireless facilities in public rights-of-way and on publicly-owned vertical infrastructure in the public rights-of-way are preempted by 47 U.S.C. section 253 of the Communications Act.[1] According to Verizon, these fees "materially inhibit" Verizon from providing telecommunications services in Clark County.

As the City and County of San Francisco ("San Francisco") discusses below, the Commission should not even take up this petition at this time as result of the joint request from Verizon and Clark County that the Commission hold this proceeding in abeyance.

Should the Commission proceed anyway, the Commission should deny the petition because no action by Clark County will "prohibit or have the effect of prohibiting" Verizon from providing "telecommunications services" as those terms are used in section 253(a). Verizon admits that the actions by Clark County that it seeks to preempt concern Verizon's deployment of 5G broadband facilities. This Commission has clearly found broadband is an "information service" not a "telecommunications service."

The Commission should also deny the petition because it relies solely on the Commission's erroneous construction of section 253 in the *Small Cell Ruling*.[2] In the *Small Cell Ruling*, the Commission construed the scope of preemption so broadly that a telecommunications carrier could seek to preempt any local ordinance that even slightly added to the legal requirements or costs to deploy telecommunications facilities. In addition, the Commission erroneously found that section 253 preempted local authority to require telecommunications

[1] See *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* ("Verizon Petition") at 1.
[2] *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd. 9088 (F.C.C. 2018) ("*Small Cell Ruling*").

carriers to enter into arms-length agreements to use publicly-owned vertical infrastructure to install and maintain small cells. Granting Verizon's petition would only perpetuate the Commission's erroneous construction of section 253.

II. COMMENTS

A. The Commission Should Not Consider Verizon's Petition at this Time, Because there Is No Present Controversy for the Commission to Resolve

The Commission's jurisdiction to hear this petition now is unclear. Verizon started this proceeding to obtain a declaratory ruling that Clark County Ordinance No. 4659 is unlawful and preempted by federal law. Under the FCC's Rules of Practice and Procedure, a declaratory ruling must "terminat[e] a controversy or remov[e] uncertainty."[3]

In a letter to the Commission dated September 6, 2019, counsel for Clark County told the Commission that the parties were negotiating a settlement.[4] In the interim, the parties had agreed to "continue to operate under an existing Master License Agreement governing the terms and conditions of Verizon's deploying small wireless facilities in the County." According to the parties, there is currently no controversy between Verizon and Clark County for this Commission to consider.[5]

Nonetheless, the Commission denied the request and is requiring the parties to proceed.[6] In so doing, the Commission clearly ignored its own rule by continuing the proceeding without any controversy between the parties. The Commission noted its concern about the impact its decision in this matter could have on "other providers in the County," even though none of those other providers were seeking any relief.[7] The Commission also noted that these Clark

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[3] 47 C.F.R. § 1.2(a).
[4] Letter dated September 6, 2019 from Best, Best & Krieger LLP to Marlene Dortch, Secretary, Federal Communications Commission.
[5] See *Elizabeth Ryder*, 29 FCC Rcd. 11155, at *1 (F.C.C. 2014) (refusing to exercise discretion to issue a declaratory ruling when the issue was moot).
[6] *See* DA-19-927, *In the Matter of Verizon Petition for Declaratory Ruling Regarding Fees Charged by Clark County, Nevada for Small Wireless* Facilities (WT Docket No. 19-230), Order, p. 2, ¶ 3 (FCC. Sept. 18, 2019).
[7] *Id*.

County fees could "unlawfully prohibit the provision of service even in places other than where the fees are charged. That is, deployments outside the County could also be adversely affected."[8] The Commission found "it would not be in the public interest to suspend indefinitely the consideration of Verizon's Petition" due to "these larger issues."[9]

These types of "larger issues," however, are not appropriately addressed in this matter. Here, the Commission was only called upon to decide a dispute between Verizon and Clark County, which dispute the parties have suspended for the time being. For that reason, the Commission has no authority to act.

B. Verizon Cannot Prove that the Clark County Ordinance Would Either Prohibit or Effectively Prohibit Verizon from Providing Telecommunications Services

1. Verizon Has Not Shown that its Facilities Are Needed to Provide Telecommunications Services

Verizon's petition seeks to preempt Clark County Ordinance No. 4659 under 47 U.S.C. § 253, which provides in part: "No 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 entity to provide any interstate or intrastate telecommunications service."[10] Section 253 also has a savings clause, which provides in part: "Nothing in this section affects the authority of a State or local government to . . . require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."[11]

In the Telecommunications Act of 1996, Congress for the first time opened the door for competitive local exchange carriers ("CLECs") to provide local telephone service in

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[8] *Id.*
[9] *Id.*
[10] 47 U.S.C. § 253(a).
[11] 47 U.S.C. § 253(c).

competition with the incumbent local exchange carriers ("ILECs").[12] Congress intended section 253 to prohibit local regulations that would prevent these new CLECs from competing with the ILECs.[13]

The first problem for Verizon is that its petition does not concern the provision of telecommunications services. As Verizon's petition makes clear, it is seeking to deploy hundreds of small cells and 200 miles of fiber-optic cable in order to enhance its 5G capabilities.[14] 5G is a broadband service. As this Commission has found, broadband service is an "information service" [15] under the Communications Act and not a "telecommunications service."[16]

Just two years ago, in *In the Matter of Restoring Internet Freedom*, the Commission reclassified broadband service as an "information service" as that termed is defined in the Communications Act.[17] The Commission expressly rejected its earlier in *In the Matter of Protecting and Promoting the Open Internet* that had classified broadband service as a

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[12] See generally *AT & T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 405 (1999) (Thomas, J., concurring in part, dissenting in part); *Puerto Rico Telephone Co. v. Municipality of Guayanilla*, 450 F.3d 9, 15 (1st Cir. 2006).

[13] *See Cablevision of Boston, Inc. v. Public Improvement Comm'n of City of Boston*, 184 F.3d 88, 97 (1st Cir. 1999).

[14] *See* Verizon Petition at 5-6.

[15] The Communications Act defines the term "information service" to mean "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20).

[16] The Communications Act defines the term "telecommunications" to mean "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received," 47 U.S.C. § 153(50), and the term "telecommunications service" to mean "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used" 47 U.S.C. § 153(54).

[17] *In the Matter of Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 (2017).

"telecommunications service."[18] It would make no sense for the Commission to now find that section 253 applies to broadband services when that provision expressly applies only to telecommunications services.

2. Verizon Cannot Prove that any Clark County Recurring Fees Will Prohibit it from Providing Telecommunications Services in Clark County

Assuming Verizon's provision of telecommunications services is even at issue here, the other problem for Verizon is that Verizon admits that it is providing telecommunications services, including wireless services, in Clark County using some 418 wireless facilities including 99 small wireless facilities.[19] This necessarily raises the question of whether the Clark County ordinance is a "prohibition" of service as the term is used in section 253(a). Both this Commission and the federal courts generally agree that the pertinent question under section 253(a) is "'whether the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'"[20] The Commission has further explained that the local law "would have to actually prohibit or effectively prohibit the ability of a payphone service provider to provide service."[21]

The federal courts have adopted the actual prohibition standard. The Eighth and Ninth Circuit Courts of Appeal have held: "Under a plain reading of the statute, we find that a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition,

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[18] *In the Matter of Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015), aff'd, *United States Telecom Assn. v. F.C.C.*, 825 F.3d 674 (D.C. Cir. 2016).

[19] *See* Verizon Petition at 7.

[20] *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 15 (1st Cir. 2006); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002) [both quoting *In the Matter of California Payphone Association 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, 14206 (F.C.C. 1997).]

[21] *California Payphone Association*, 12 FCC Rcd. at 14209.

rather than the mere possibility of prohibition."[22] The Ninth Circuit found that this conclusion was compelled by the statute's "unambiguous text."[23]

Just last year, however, this Commission chose to ignore both its prior holding in *California Payphone Association* and clear direction from the federal courts concerning the proper construction of section 253(a). Rather than continuing to require an actual prohibition of service, this Commission construed section 253(a) to preempt any local government action that could even remotely impair a telecommunications provider's efforts to improve its service:

> We clarify that an effective prohibition occurs 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 a covered service. 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*. Under the *California Payphone* standard, a state or local legal requirement could materially inhibit service in numerous ways—not only by rendering a service provider unable to provide an existing service in a new geographic area or by restricting the entry of a new provider in providing service in a particular area, but also by materially inhibiting the introduction of new services or the improvement of existing services. Thus, an effective prohibition includes materially inhibiting additional services or improving existing services.[24]

Because no reasonable telecommunications provider would spend money to install new facilities that would not, at the very least, improve its existing services, the Commission has construed section 253(a) to preempt virtually any local government regulation of telecommunications services. Under this approach, the denial of a single application to construct one small cell facility in the public right-of-way—even in a large city that the carrier is already serving—could be construed as a prohibition of service.

This could not possibly be what Congress intended in 1996 when it added section 253 to the Communications Act to ensure the new entrants into the telecommunications market had a fair chance to compete with the incumbents. To the extent the *Small Cell Ruling* requires the

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[22] *Level 3 Commc'ns, L.L.C. v. City of St. Louis*, 477 F.3d 528, 532 (8th Cir. 2007); see also *Sprint Telephony PCS, L.P. v. Cnty. of San Diego*, 543 F.3d 571, 577 (9th Cir. 2008) (en banc) (agreeing with the Eighth Circuit).

[23] *Sprint Telephony*, 543 F.3d at 578.

[24] *Small Cell Ruling*, 33 FCC Rcd. at 9104 (emphasis added).

Commission to grant Verizon's petition because the Clark County ordinance is a prohibition of service, the Commission should overrule the *Small Cell Ruling*.

3. Clark County's Fees for Use of Its Vertical Infrastructure Do Not Prohibit or Effectively Prohibit Verizon from Providing Telecommunications Services

In *Small Cell Ruling*, the Commission also found that local government fees, including "fees for the use of government property . . . such as light poles, traffic lights, utility poles, and other similar property suitable for hosting Small Wireless Facilities" violate section 253(a) "unless these 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 those fees, and (3) the fees are no higher than the fees charged to similarly-situated competitors in similar situations."[25] With regard to recurring fees, the Commission established a presumption that a fee of $270 per year would *not* be a prohibition of service.[26]

The Commission's conclusion in the *Small Cell Ruling* that 253(a) preempts all recurring fees that exceed the higher of $270 per year or cost reimbursement ignores the fact that section 253 has a savings clause. The phrase "fair and reasonable compensation" does not appear section 253(a). It only appears in the section 253(c) savings clause, which is intended to protect local government fees that might otherwise be preempted by section 253(a). The Commission's use of the safe harbor to find a prohibition of service is simply erroneous. The purpose of 253(c) is to "preserv[e] certain state and local laws that might otherwise be preempted under § 253(a)."[27]

Because Verizon's only complaint here is that fees are excessive, Verizon relies solely on the Commission's holding in the *Small Cell Ruling* that non-cost based fees violate section 253 as a matter of law.[28] Verizon's petition shows the fallacy in the Commission's ruling. It allows

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[25] *Id*. at 9113.
[26] *Id*. at 9129. This is well below what Verizon has agreed to pay San Francisco for use of its poles.
[27] *Cablevision of Boston*, 184 F.3d at 98.
[28] *See* Verizon Petition at pp. 1-2; *Small Cell Ruling*, 33 FCC Rcd. at 9113-14.

a multi-billion corporation that has been serving a community for many years, and that has over 400 wireless facilities in the community already, to prove a prohibition under section 253 simply because Clark County has asked Verizon to pay recurring fees in excess of $270 for each small cell facility in the public rights-of-way that Verizon admits are only necessary to enhance its 5G service.

To the extent the *Small Cell Ruling* requires the Commission to grant Verizon's petition because the Clark County ordinance imposes non-cost based recurring fees, the Commission should overrule the *Small Cell Ruling*.

C. The Commission May Not Regulate the Fees Charged for Use of Clark County's Vertical Infrastructure

In its petition, Verizon does not distinguish between "recurring fees for wireless telecommunications carriers' use of the public rights-of-way and attachment to public assets within those rights-of-way."[29] According to Verizon, section 253(a) preempts both regulatory right-of-way use fees and proprietary license fees for installing its facilities on publicly-owned streetlight poles and other vertical infrastructure. However, it is clear that Congress in section 253 did not intend to grant the Commission the authority to regulate the fees local governments can charge telecommunications carriers for the use of assets constructed and maintained at taxpayers' expense to serve their communities.

In *Sprint Spectrum L.P. v. Mills*, the Second Circuit recognized that local government control over its property is beyond the reach of the Telecommunications Act of 1996.[30] The *Sprint Spectrum* court found that 47 U.S.C. § 332(c)(7)(B)(iv) did not prohibit a school district from enforcing a lease provision imposing more stringent standards on radio frequency emissions from its tenant's facilities than would otherwise be allowed pursuant to federal law: "In sum, we conclude that the Telecommunications Act does not preempt *nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity*; that the School District

[29] Verizon Petition at p. 1.

[30] *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 421 (2d Cir.2002).

acted in a proprietary capacity, not a regulatory capacity, in entering into the Lease agreement with Sprint."[31]

To reach that conclusion, the Second Circuit relied on the Supreme Court's decision in *Boston Harbor*.[32] In that case, the Supreme Court made a distinction between a State acting in a regulatory capacity or in a proprietary capacity when federal preemption is claimed. The Supreme Court held that that "a State may act without offending . . . pre-emption principles . . . when it acts as a proprietor and its acts therefore are not tantamount to regulation or policymaking."[33] The Court concluded that, "[i]n the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction."[34]

When this Commission first considered the regulatory/proprietary distinction, the Commission noted its agreement with *Sprint Spectrum* by rejecting requests from the industry to regulate the use of local government-owned infrastructure:

> As discussed in the record, courts have consistently recognized that in "determining whether government contracts are subject to preemption, the case law distinguishes between actions a State entity takes in a proprietary capacity—actions similar to those a private entity might take—and its attempts to regulate." As the Supreme Court has explained, "[i]n the absence of any express or implied implication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and when analogous private conduct would be permitted, this Court will not infer such a restriction." *Like private property owners, local governments enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property, and we find no basis for applying Section 6409(a) in those circumstances. We find that this conclusion is consistent with judicial decisions holding that Sections 253 and 332(c)(7) of the Communications*

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[31] *Id*. (emphasis added).

[32] *Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I. Inc.*, 507 U.S. 218 (1993) (commonly referred to as "*Boston Harbor*").

[33] *Id*. at 229.

[34] *Id*. at 231-32.

> *Act do not preempt "non regulatory* decisions of a state or locality acting in its proprietary capacity."[35]

However, in the *Small Cell Ruling*, the Commission erroneously took the exact opposite approach.[36] The Commission found that section 253(a) "expressly preempts certain state and local 'legal requirements' and makes no distinction between a state or locality's regulatory and proprietary conduct." In order to come to that conclusion, the Commission misconstrued *Boston Harbor*. Instead of recognizing that in *Boston Harbor* the Supreme Court found that Congress's silence meant Congress did not intend to preempt proprietary local action, the Commission found that Congress intended to preempt proprietary actions because Congress had not "carve[d] out an exception for proprietary conduct."[37]

Rather than relying on its mistake in the *Small Cell Ruling* to preempt the Clark County ordinance, the Commission should find that section 253(a) does not preempt the ordinance to extent that it requires Verizon to pay non-cost based fees for the use of Clark County's vertical infrastructure to install and maintain its wireless facilities. Under well-settled law, Clark County's fees for use of its property are simply beyond the purview of section 253.

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[35] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Report and Order*, 29 FCC Rcd. 12865, 12964 ¶ 239 (F.C.C. Oct. 17, 2014) (the "*2014 Infrastructure Order*") (emphasis added), citing *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1241 (9th Cir. 2004) (recognizing that Section 253(a) preempts only "regulatory schemes"); *Sprint Spectrum*, 283 F.3d at 421; see also *Omnipoint Commc'ns v. City of Huntington Beach*, 738 F.3d 192, 200-01 (9th Cir. 2013) (voter initiative limiting city's ability to lease or sell city-owned property not preempted by 47 U.S.C. § 332(c)(7).)

[36] See *Small Cell Ruling*, 33 FCC Rcd. at 9134-38. In a footnote, the Commission recognized that its holding in the *Small Cell Order* was the inconsistent with its ruling the *2014 Wireless Infrastructure Order*. *Id*. at n. 265. The Commission tried to explain that inconsistency by attempting to "clarify here that the actions and analysis there were limited in scope given the different statutory scheme and record in that proceeding." *Id*. That distinction places differences in statutory language over the Supreme Court's clearly stated principle of statutory construction.

[37] *Id*. at 9135.

III. CONCLUSION

Based on the foregoing, San Francisco asks that the Commission either dismiss the petition or deny the petition in its entirety.

Dated: September 25, 2109

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