

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

COMMENTS OF CROWN CASTLE INTERNATIONAL CORP.

Crown Castle International Corp. and its subsidiaries (“Crown Castle”) submit these comments in response to the Wireless Telecommunications Bureau’s (the “Bureau’s”) Public Notice in the above-captioned proceeding.¹ Crown Castle appreciates this opportunity to submit its comments in support of the Verizon Petition and encourages the Federal Communications Commission (“Commission”) to act quickly to preempt the County’s fees. Clark County’s (the “County’s”) fees for installing Small Wireless Facilities (“SWFs”) are not based on a reasonable approximation of the County’s costs to manage or maintain its rights-of-way. The fees serve to

¹ See *Wireless Telecommunications Bureau Seeks Comment on Verizon’s Petition for Declaratory Ruling Regarding Fees Charged by Clark County, Nevada for Small Wireless Facilities*, Public Notice, DA No. 19-823, WT Docket No. 19-230 (rel. Aug. 26, 2019) (“*Public Notice*”); Verizon, 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) (“*Petition*” or “*Verizon Petition*”).

materially inhibit the provision of telecommunications services, violating both Section 253 of the Communications Act (“the Act”) and the Commission’s *Small Cell Declaratory Order*.²

Introduction & Background

Crown Castle is at the forefront of our country’s broadband revolution, deploying fiber optic and wireless infrastructure that will serve as the backbone for the broadband networks of the future. Over the past seven years alone, Crown Castle alone has invested more than \$11.5 billion on small cell and fiber networks. Crown Castle has worked cooperatively with many jurisdictions and has successfully deployed small cell networks in countless towns, cities, and counties, taking advantage of densification to boost network capacity and throughput and provide millions of Americans with access to networks that are ready to meet the needs of an increasingly wireless future.

Founded in 1994, Crown Castle is the nation’s largest independent owner and operator of shared wireless infrastructure, with more than 40,000 towers, 65,000 small cell installations either on air or under construction, and over 75,000 route miles of fiber. Crown Castle has more than 15 years of experience deploying small cell networks, and currently holds utility certifications in forty-eight states, the District of Columbia and Puerto Rico. Crown Castle’s status as a public utility and its vast experience deploying broadband networks and infrastructure, puts it in a unique position to comment on these fees.

Crown Castle has already made substantial investments developing state-of-the-art networks and is prepared to continue making the investment necessary to deliver the promise of

² 47 U.S.C. § 253; *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 33 FCC Red. 9088 (2018) (“*Small Cell Declaratory Order*”), *recon. pending, appeals pending*.

5G and beyond. These efforts will spur innovation and unleash new technologies that will serve as economic drivers for decades to come. However, exorbitant fees – such as those adopted by Clark County – will hinder the deployment of networks in certain localities.

The Commission has recently taken several steps to streamline deployment of small cell networks and curtail such exorbitant fees.³ Indeed, the Commission has clarified that excessive fees and charges for small wireless deployments can violate Sections 253 and 332 of the Act.⁴ Most relevant to this proceeding, in September the Commission: (1) reaffirmed the *California Payphone* standard⁵; and, (2) defined presumptively reasonable safe harbor maximum fees as “fair and reasonable” compensation likely to comply with the Act.

This proceeding exemplifies a situation where a locality has implemented a fee structure that violates Section 253 by failing to comply with the *California Payphone* standard and the safe harbor maximums. Consequently, Crown Castle’s deployment of essential broadband services in Nevada will be materially inhibited and the Commission should take the action to

³ See, e.g., *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, 32 FCC Rcd. 9760 (2017); *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, 33 FCC Rcd. 3102 (2018), *affirmed in part, vacated and remanded in part sub nom. United Keetoowah Band of Cherokee Indians in Oklahoma et al. v. Fed. Comm’n*, 933 F.3d 728 (D.C. Cir. 2019); *Small Cell Declaratory Order*.

⁴ Sections 253 and 332 of the Communications Act prohibit state and local government actions that “prohibit or have the effect of prohibiting” the ability to provide any telecommunications or personal wireless service. 47 U.S.C. §§ 253(a), 332(c)(7)(B)(i)(II). In addition, Section 253 provides that state or local governments may seek “fair and reasonable compensation” for the use of rights of ways, management of the rights of way, compensation must be “competitively neutral and nondiscriminatory,” and any required compensation must be “publicly disclosed.” 47 U.S.C. § 253(c).

⁵ *California Payphone Ass’n*, 12 FCC Rcd 14191, 14206, ¶ 31 (1997) (“*California Payphone*”).

preempt the County's Ordinance. Deployment at rates this high will necessarily hinder the number of small cells that Crown Castle will be able to deploy.

Crown Castle's Experience in Clark County

Because Clark County "is by far the most populous county in Nevada, accounting for nearly three-quarters of the state's residents,"⁶ the impact of excessive fees and discriminatory practices within its boundaries is extremely significant for broadband deployment in the entire state of Nevada. Crown Castle has existing network assets in Clark County, including 22 small cells and approximately 16 miles of fiber, and plans to install 6.3 miles of additional fiber within the County.

In 2006, Crown Castle executed a Wireless Use Agreement ("Original Agreement") with the County.⁷ The rates paid to the County in the Original Agreement included both a 5% revenue share for all small cells installed in the County's rights of way and an additional \$500/year for each small cell attached to County-owned infrastructure. The Original Agreement's initial 10-year term expired in 2016. Since that time Clark County revised its form wireless use agreement to include various unlawful terms, including excessive fees and improper aesthetic requirements, which Crown Castle was forced to consider in order to meet contractual commitments to carrier customers.

Instead of renewing Crown Castle's franchise, Clark County agreed only to extend the Original Agreement term by 3 or 6-month increments, stating that since it was contemplating future small cell deployment policies, it would not enter into any agreement term longer than 6 months. To its credit, the County has continued to process Crown Castle's applications for new

⁶ https://en.wikipedia.org/wiki/Clark_County,_Nevada.

⁷ The Original Agreement was entered into by a Crown Castle predecessor entity, NextG Networks of California, Inc.

deployments under the terms of the Original Agreement, however such regulatory uncertainty makes it difficult for Crown Castle and other providers to invest in new network facilities without knowing the financial terms that might apply to such facilities within the next six months.

Clark County initially released a draft copy of its proposed new ordinance on October 4, 2019. Since that time, Crown Castle has been in continuous communication with the County, both alone and along with other members of the industry, encouraging the County to adopt a process and fee schedule that complied with the *Small Cell Declaratory Order*. The County seemingly disregarded input provided by Crown Castle and the rest of the industry explaining that the proposed Ordinance was unlawful and would violate federal law.

Clark County's Ordinance Materially Inhibits the Deployment of Broadband Services

On January 7, 2019, the County adopted Ordinance No. 4659 (the "Ordinance") to be effective July 1, 2019. As Verizon details in its complaint, the Ordinance requires the payment of: (1) one-time application fees in excess of \$550 per site; (2) recurring fees associated with small cell facilities ranging from \$700.00 to \$3,960.00 per site per year (collected quarterly), depending on the location zone, (3) a revenue share fee of 5% of gross revenue (collected quarterly); and (4) an additional \$500 per pole annual inspection fee.

Crown Castle agrees with Verizon that the fees contained in the Ordinance on its face violate Section 253 as detailed in the *Small Cell Declaratory Order*. Based on Crown Castle's engagement with the County, there is no evidence that the fee provisions reasonably approximate the County's actual and direct costs associated with the use of the County's public rights-of-way and other assets. The fees act as an effective prohibition of services and will prohibit the

deployment of essential broadband services. Crown Castle's specific objections to the Ordinance are as follows:

1. The County's one-time per-site permit fees of \$550 per site, comprising of: (1) a \$250 Wireless Site license Approval (SLA) application fee per site; (2) an encroachment permit fee of \$75 minimum per site; and (3) a \$225 inspection fee per site, is excessive, unreasonable, and unrelated to the County's actual and direct costs;⁸
2. The recurring 5% gross revenue share fee is not based on actual and direct costs;⁹
3. The annual Site License Fee per site, ranging from \$700 (lowest cost zone) to \$3,960 annual for the Strip and 2% annual escalator is excessive, unreasonable, and unrelated to the County's actual and direct costs;¹⁰
4. The Annual Inspection Fee of \$500 per site, imposed at the County's discretion is excessive and unreasonable;¹¹
5. The required 300-foot separation distance for new facilities from existing facilities is improper.¹²

In *California Payphone*, the Commission stated in determining whether a state or local law has the effect of prohibiting the provision of telecommunications services, it "consider[s] 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," then it violates the "effect of prohibiting" standard in Section 253.¹³ The above fee provisions of the Ordinance violate *California Payphone* since the fees exceed the Commission's presumptively reasonable safe harbor maximums and are not cost-based.¹⁴ In the *Small Cell Declaratory Order*, the

⁸ Clark County Code §§ 5.02.100 (c); 5.02.190 (e) and the County's published fee schedule available at: <https://www.clarkcountynv.gov/public-works/construction-mgmt/Pages/EncroachmentPermits.aspx>.

⁹ *Id.* at § 5.02.190 (a).

¹⁰ *Id.* at § 5.02.190 (b).

¹¹ *Id.* at § 5.02.190 (g).

¹² *Id.* at § 5.02.120 (e).

¹³ *California Payphone*, ¶ 31 and *Small Cell Declaratory Order*, ¶¶ 16-17.

¹⁴ *Small Cell Declaratory Order*, Section III.B.

Commission specifically pointed out several court decisions that held revenue share fees as violating Section 253. Further, the County has not provided any evidence to substantiate why its fees are reasonable and should be allowed to exceed the safe harbors.

Clark County's 300-foot separation requirement violates *California Payphone* as such requirement is not being applied in a competitively neutral manner. In the *Small Cell Declaratory Order*, the Commission stated: "[a] regulatory structure that gives an advantage to particular services or facilities has a prohibitory effect, even if there are no express barriers to entry in the state or local code; the greater the discriminatory effect, the more certain it is that entities providing service using the disfavored facilities will experience prohibition. This conclusion is consistent with both Commission and judicial precedent recognizing the prohibitory effect that results from a competitor being treated materially differently than similarly-situated providers"¹⁵ Indeed, Clark County only requires small cell facilities to maintain a 300-foot separation distance – not other telecommunications equipment nor other "similarly situated providers." Furthermore, the County provides no technology-neutral rationale for this restriction. Consequently, this separation requirement also violates 253 and should be preempted.

Crown Castle's Experience in Clark County After Adoption of the Ordinance.

After the Ordinance was adopted, the County insisted that Crown Castle sign a new Use Agreement to reflect the fee provisions in the Ordinance. Crown Castle resisted doing so while attempting to negotiate with the County to obtain access terms that comply with the safe harbor and non-discriminatory access terms in the *Small Cell Declaratory Order*. Ultimately, the

¹⁵ *Small Cell Declaratory Order*, ¶ 39.

County made clear that it was not amenable to any negotiation on the fees or terms and that it would no longer extend the Original Agreement. This action put Crown Castle in the precarious position of having to sign an unlawful agreement to protect its existing network investment, as the Original Agreement permits forcible removal of existing Crown Castle facilities upon the Original Agreement's expiration.

Consequently, and despite the objectionable provisions of the Ordinance, Crown Castle was forced to sign the new Use Agreement. In a letter to the County dated September 3, 2019, Crown Castle detailed its objections to the provision of the Ordinance and how such provisions are contrary to law but ultimately agreed to accept the new Use Agreement. Subsequent to that communication and in an apparent reaction to the subject Petition, the County rejected countersigning the new Use Agreement and indicated instead that it would again renew the Original Agreement for another 6-month extension.

Despite this recent development, as long as the Ordinance is in effect, Crown Castle's future deployments in Clark County remain in limbo. Crown Castle is faced with the untenable choice – to either refuse to pay and fight the illegal provisions which would inevitably delay the deployment of Crown Castle's network significantly or pay unlawful fees in order to get networks constructed. It appears that the Verizon Petition has already created positive compliance from the County. The Commission should continue that momentum by granting the relief requested.

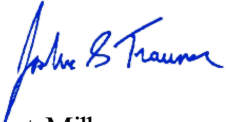
Conclusion

For the reasons stated above, we urge the Commission to act on the Verizon Petition and invalidate the unlawful fee and non-fee provisions in the Ordinance. In addition to resolving a

specific issue with the County, the Commission's actions in this matter will be instructive to other similar jurisdictions that attempt to flaunt the Commission's rules.

Respectfully submitted,

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