

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF CTIA

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I. INTRODUCTION AND SUMMARY

CTIA¹ respectfully submits these comments, pursuant to Section 1.2 of the Commission’s Rules and the Public Notice in this proceeding,² supporting Verizon’s Petition for Declaratory Ruling (“Petition”). CTIA asks the Commission to promptly grant the requested relief to preempt the excessive fees that one jurisdiction has imposed on wireless providers in violation of Section 253 of the Communications Act.

The deployment of innovative wireless services is generating tremendous benefits to consumers, businesses, and government entities throughout the nation, all of which are increasingly relying on high-speed wireless technologies. Investment in wireless networks is

¹ CTIA – The Wireless Association® (“CTIA”) (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association’s members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry’s voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry’s leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

² Public Notice, *Wireless Telecommunications Bureau Seeks Comment on Verizon’s Petition for Declaratory Ruling Regarding Fees Charged by Clark County, Nevada, for Small Wireless Facilities*, WT Docket No. 19-230, DA 19-823 (rel. Aug. 26, 2019).

essential to the United States' ability to be the global leader in 5G and reap the economic benefits that will flow from that leadership.³

Both Congress and the Commission have worked hard to promote the deployment of small wireless facilities, and their actions have helped wireless providers make meaningful progress in delivering a 5G future to communities across America. Section 253 implements Congress's cardinal objective to "promote competition and reduce regulation" by declaring that state and local requirements that prohibit or have the effect of prohibiting the ability of any provider to offer service are unlawful.⁴ The Commission's 2018 *Small Cell Declaratory Ruling* made clear that state and local fees and other charges associated with wireless infrastructure deployment are unlawful unless they are a reasonable approximation of costs, those costs are reasonable, and the fees are nondiscriminatory.⁵ State and local fees that materially inhibit the deployment of these next-generation services, such as those that Verizon demonstrates it is being forced to pay under an ordinance enacted by Clark County, Nevada,⁶ not only run afoul of

³ See, e.g., Remarks of Chairman Ajit Pai at the New York State Wireless Association, New York, NY (June 21, 2019 ("When it comes to 5G policy, infrastructure is essential. We need to install hundreds of thousands of small cells – an exponential increase in the number of antenna locations for our current networks."); Remarks of Commissioner Brendan Carr at the Transatlantic Policy Dialogue-Barcelona (Feb. 25, 2019 ("To meet the needs of the people we serve, we need next-gen networks. We need 5G.")).

⁴ Section 253 was enacted as part of the Telecommunications Act of 1996, which amended the Communications Act. The preamble to the 1996 Act declared that its purpose was "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."

⁵ *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order 33 FCC Rcd 9088 (2018) ("*Small Cell Declaratory Ruling*").

⁶ Clark County Code, Title 5, Chapter 5.02 (adopted Jan. 7, 2019, effective July 1, 2019).

Congress's and the Commission's intent, but also can deprive communities of advanced wireless services both in and outside of Clark County.⁷

The excessive fees in Clark County, NV were not set to compensate the county for its costs to oversee the use of its rights-of-way, as Section 253 requires. For example, the ordinance charges recurring fees for small cell facilities that vary by more than 400 percent depending on the facility's location – even though the county's costs do not vary based on location. The ordinance imposes an additional, substantial fee based on wireless providers' gross revenues, which by definition is not tied to Clark County's costs.

The ordinance's fees clearly violate Section 253 of the Communications Act and the Commission's *Small Cell Declaratory Ruling*. The Commission should promptly grant Verizon's petition based on these violations to unleash advanced wireless service deployment in Clark County and prevent downstream effects on deployments across the country.

II. PROMPT GRANT OF VERIZON'S PETITION WILL HELP REMOVE BARRIERS TO THE DEPLOYMENT OF NEXT GENERATION WIRELESS SERVICES.

Wireless providers are working diligently to deploy and densify their networks to deliver the significant benefits of 4G and now 5G to consumers across America. Given the accelerating demand for additional infrastructure to support the innovative services that advanced wireless technologies will enable, the Commission should continue to remove barriers that impair and delay the deployment of that needed infrastructure.

⁷ See *Verizon Petition for Declaratory Ruling Regarding Fees Charged by Clark County Nevada for Small Wireless Facilities*, Order, WT Docket No. 19-230 (CIPD, WTB, Sept. 18, 2019) (“*Clark County Abeyance Order*”).

Clark County’s ordinance is one example of how unlawful local ordinances threaten to impede robust deployment of advanced wireless services, undermine the Commission’s efforts to expedite the public’s access to those services, and suppress their benefits to consumers and the U.S. economy. Verizon states that it was planning to deploy hundreds of additional small cells in Clark County over the next three years to enhance its 4G network and build out a 5G network, and that this deployment will bring “substantial benefits to the county’s residents, businesses and institutions.”⁸ But Verizon warns that Clark County’s imposition of high individual siting and inspection fees that can exceed \$4000 per site annually, in addition to a revenue-based fee that already obligates it to pay more than \$1 million per year, “will materially inhibit Verizon’s ability to provide telecommunications services over its wireless network.”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. In the *Small Cell Declaratory Ruling*, 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.¹⁰ Consistent with the Commission’s

⁸ Petition at 8.

⁹ *Id.* at 6. Verizon also states that it submitted a business impact statement to the county “detailing how the proposed Ordinance would harm Verizon’s plans to deploy small wireless facilities to improve its network capabilities and service offerings.” Petition Ex. 5, Declaration of Nichols Magnone, ¶ 5.

¹⁰ *Small Cell Declaratory Ruling* ¶ 61 (“AT&T identified jurisdictions in Maryland, California and Massachusetts where high fees have directly resulted in paused or decreased developments.”; *Id.* ¶ 62 (citing other providers’ statements that high fees in one jurisdiction impact deployment elsewhere; “When providers seek to operate on a regional or national basis, they have constrained resources for entering new markets or introducing, expanding or improving existing services, particularly given that a provider’s capital budget of a given period of time is often set in advance. In such case, the resources consumed in serving one geographic area likely to deplete the resources available for serving other areas.”).

findings, 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.¹¹ Commission action to remove those barriers is essential. Preemption of the fee provisions in Clark County’s ordinance will promote deployment of advanced wireless services in that jurisdiction, and Commission enforcement of Section 253 should act as a deterrent to other localities considering imposition of excessive fees that impede investment in communications infrastructure and violate the Act.¹²

III. CLARK COUNTY’S ORDINANCE CLEARLY VIOLATES SECTION 253 AND THE SMALL CELL DECLARATORY RULING.

A. Section 253 of the Act Requires Wireless Siting Fees to Be Cost-Based.

Section 253 implements Congress’s cardinal objective to “promote competition and reduce regulation” in order to benefit consumers, drive communications service deployment, and encourage innovation.¹³ It specifically states, “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 provider to provide any interstate or intrastate telecommunications service.”¹⁴ Section 253 also

¹¹ *Clark County Abeyance Order* ¶ 3.

¹² Despite the FCC’s prohibition on non-cost-based fees, a number of localities, including several in California and Oregon, have recently adopted or proposed annual recurring fees of \$1700, \$2000, or \$3,000, as well as revenue-based fees.

¹³ Preamble, Telecommunications Act of 1996, Pub. L. 104-104, 100 Stat. 56 (1996) (“An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”)

¹⁴ 47 U.S.C. § 253(a).

expressly grants the Commission authority to preempt any such requirements.¹⁵ Verizon’s plan to deploy infrastructure throughout Clark County to enable the company to offer advanced wireless services is precisely the kind of pro-competitive, pro-consumer investment that Congress sought to promote by enacting Section 253.

In the *Small Cell Declaratory Ruling*, the Commission interpreted Section 253 and applied the provision to certain state and local requirements that it determined, based on an extensive record, prohibit or have the effect of prohibiting wireless service.¹⁶ Consistent with prior federal court decisions, the Commission found that excessive fees and other charges imposed on small wireless facilities constitute one type of impermissible regulatory barrier.¹⁷ The record in that proceeding supplied numerous examples of excessive fees that were unrelated to localities’ costs in overseeing wireless deployment, and it also showed that high fees can delay or deter investment in new facilities, undercutting the Act’s objective to promote advanced communications services to benefit the public.¹⁸ The Commission held that: (1) siting fees must be a reasonable approximation of costs, (2) those costs themselves must be reasonable, and (3) the fees must be non-discriminatory.¹⁹ The Commission affirmed localities’ authority to manage the deployment of infrastructure and to recover their costs of doing so, while also ensuring that

¹⁵ “If, after notice and opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.” 47 U.S.C. § 253(d).

¹⁶ *Small Cell Declaratory Ruling* ¶¶ 43-65. 81-92.

¹⁷ *Id.* ¶¶ 43-65.

¹⁸ *Id.* ¶ 61 (“The record is replete with evidence that providers have limited capital budgets that are constrained by state and local fees.”).

¹⁹ *Id.* ¶ 50.

state and local requirements do not prohibit or have the effect of prohibiting service in violation of the Act. The *Small Cell Declaratory Ruling* advances the purpose of Section 253 and the Act itself by adopting guideposts that accommodate state and local interests while promoting wireless deployment.

B. Clark County’s Fees Ordinance Violates the Act and the 2018 Infrastructure Order.

At the outset, Clark County’s enactment of the ordinance contradicts assurances it made to the Commission before the Commission adopted the 2018 Order. The county stated at that time that it was committed to “continuing its strong relationship working with small cell providers in our community to establish fair and transparent processes,” and that “many cities have negotiated fair deals with wireless providers.”²⁰ But Clark County did not negotiate any deal with Verizon, let alone a “fair” one. Instead, it acted unilaterally – and over the formal objections of many wireless providers that sought to offer service there²¹ – by enacting an ordinance that imposed unreasonably high fees that are not cost-based. These mandatory fees are precisely the kind of regulatory requirements that Section 253 and the *Small Cell Declaratory Ruling* prohibit.

Each of the ordinance’s recurring fees violate Section 253 and should be preempted, because they do not reasonably approximate the county’s costs associated with wireless providers’ use of rights-of-way. Verizon supports its Petition with documents that reveal that the

²⁰ Letter from Yolanda T. King, Clark County Nevada, to Marlene H. Dortch, FCC, WC Docket No. 17-84, WT Docket No. 17-79 (filed Sept. 18, 2018).

²¹ Petition at 9. At the county’s public hearing to discuss the bill, AT&T testified on behalf of itself, Cox, Crown Castle, Extenet, Mobilitie, T-Mobile and Verizon as to the wireless providers’ objections to the bill, and Cox, T-Mobile and Verizon separately testified. Clark County Board of Commissioners, Public Hearing (Dec. 18, 2018), https://clark.granicus.com/MediaPlayer.php?view_id=17&clip_id=6106.

ordinance's fees were not based on the county's costs at all, but were the result of a bald effort to generate more revenue from wireless providers to pay for unrelated county projects.

Clark County enacted the ordinance following a study by its consultant, Smart Works Partners.²² The consultant conspicuously included no discussion of Clark County's costs to manage wireless providers' use of the public rights-of-way. As Verizon notes, the study "does not identify or even consider costs underlying the management and administration of wireless providers' use and occupation of the public rights-of-way. Instead, it focuses on existing and potential county revenues and, in short, charging the highest amounts that Smart Works thought applicants might pay."²³ This fact is evident from the consultants' report, which recommended that Clark County "capture fair market value for the use of county assets."²⁴

Both the annual wireless site license fees and the revenue-based fees charged by Clark County are unlawful. First, the annual wireless site license fees are not cost-based. These fees, which range from \$700 per year to \$3,960 per year (plus a two percent annual escalator), far exceed the \$270 fee that the Commission determined was presumptively reasonable.²⁵ The county also imposes a charge of at least \$500 annually for "inspections" of each facility. Verizon states that although it asked the county to provide cost-based support for these recurring fees, the county failed to do so.²⁶ While the Commission stated in the *Small Cell Declaratory Ruling* that a locality could charge more than \$270 if it provided a cost justification, it ruled that

²² Petition Ex. 10, Broadband Master Plan Recommendations (Dec. 19, 2017).

²³ *Id.* at 14.

²⁴ *Id.*, Ex. 10 at 8 (recommending that Clark County "use increased revenue to promote service to broadband underserved areas and fund smart community initiatives.").

²⁵ *Small Cell Declaratory Ruling* ¶¶ 78-80.

²⁶ Petition at 10.

“there should be only very limited circumstances in which localities can charge higher fees consistent with the requirements of Section 253.”²⁷ Clark County did not even attempt to justify annual fees that could well exceed \$4,000 per site.

The county’s focus on maximizing revenue is evident from the fact that a small facility will be subject to dramatically different fees depending on where it is installed. A site built in the Las Vegas Boulevard district will incur an annual recurring fee of at least \$3,960 – more than five times higher than the fee for a site in a “rural” part of the county.²⁸ There can be no plausible cost justification for fees based solely on location, and the county has not attempted to provide one. To the contrary, the county’s location-based fees are transparently based on its perception of what it can demand based on the market value of siting locations in different areas of the county

Second, the revenue-based fees are not based on the county’s costs. Clark County’s requirement that Verizon pay a fee based on its gross revenues is unlawful because revenue-based fees by definition are not based on a jurisdiction’s costs. While the ordinance permits Verizon to continue paying a pre-existing license fee of more than \$1,000,000 annually in lieu of the ordinance’s new five percent gross revenue-based fee, that existing license fee is also calculated based on Verizon’s gross revenues, and thus on its face is not related to Clark County’s costs.²⁹ Numerous courts have struck down similar revenue-based fees as unlawful under Section 253.³⁰ The Commission has similarly concluded that gross revenue fees are not

²⁷ *Small Cell Declaratory Ruling* ¶ 80.

²⁸ Clark County Code, Title 5, Chapter 5.02.210.

²⁹ Petition at 12.

³⁰ See, e.g., *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 21 (1st Cir. 2006); *XO Missouri v. City of Maryland Heights*, 256 F. Supp. 3d 987, 994 (E.D. Mo. 2003) (“the Court adopts the

based on the costs associated with the use of rights-of-way and thus cannot pass muster under Section 253.³¹

IV. THE COMMISSION HAS AMPLE AUTHORITY TO ISSUE THE REQUESTED DECLARATORY RULING.

The FCC has clear authority to declare that the fees imposed by the Clark County ordinance are unlawful. Section 5(d) of the Administrative Procedure Act and Section 1.2 of the Commission's rules specifically empower the Commission to terminate a controversy such as the dispute over the legality of Clark County's fees,³² and the courts have repeatedly affirmed that authority.³³ Moreover, Section 253(d) directs that the Commission "shall preempt the enforcement" of any state or local government action that may prohibit or have the effect of prohibiting service.³⁴

Because Clark County's ordinance clearly violates Section 253 and the *Small Cell Declaratory Ruling* as explained above, the Commission should act quickly to grant the requested relief. There are no disputed facts; the ordinance on its face imposes fees that are not

reasoning supporting other court's decisions that revenue-based fees are impermissible"); *PECO Energy Company v. Town of Haverford*, 1999 U.S. Dist. LEXIS 19409, * 24 (E.D. Pa. 1999) (invalidating a locality's revenue-based fees as unlawful under Section 253).

³¹ *Small Cell Declaratory Ruling* ¶ 70 ("We agree with courts that have recognized that gross revenues fees generally are not based on the costs associated with an entity's use of the ROW, and where that is the case, are preempted under Section 253(a).").

³² 5 U.S.C. § 554(e) ("The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."); 47 C.F.R. § 1.2 ("The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.").

³³ See, e.g., *City of Arlington v. FCC*, 668 F.3d 229, 243 (5th Cir. 2012) (section 554 "empowers agencies to use declaratory rulings to 'remove uncertainty' by issuing statutory interpretations"); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002); (citing precedent supporting FCC authority to issue declaratory ruling to interpret or clarify the Act).

³⁴ 47 U.S.C. § 253(d).

cost-based, and the documents Verizon has placed in the record leave no doubt that Clark County adopted those fees to generate revenue for purposes entirely unrelated to approving and overseeing wireless deployments. There is no need for prolonged consideration of such an abject violation of the Act and a Commission Order. While a reasonable settlement of the issue between the parties would enable Verizon to continue its deployment in Clark County, the Commission should act on the petition to prevent the order from impeding deployment in Clark County and in other localities across the United States. Prompt action here will also deter other localities from imposing excessive fees that impede wireless service deployment in violation of the Act.

V. CONCLUSION

The Commission should promptly grant Verizon's petition and preempt the siting fees set forth in Clark County's ordinance to give force to Section 253, promote the Act's pro-competitive, pro-consumer objectives consistent with Congressional intent, and enable wireless providers to deliver the substantial benefits of 5G to consumers across the country.

Respectfully submitted,

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